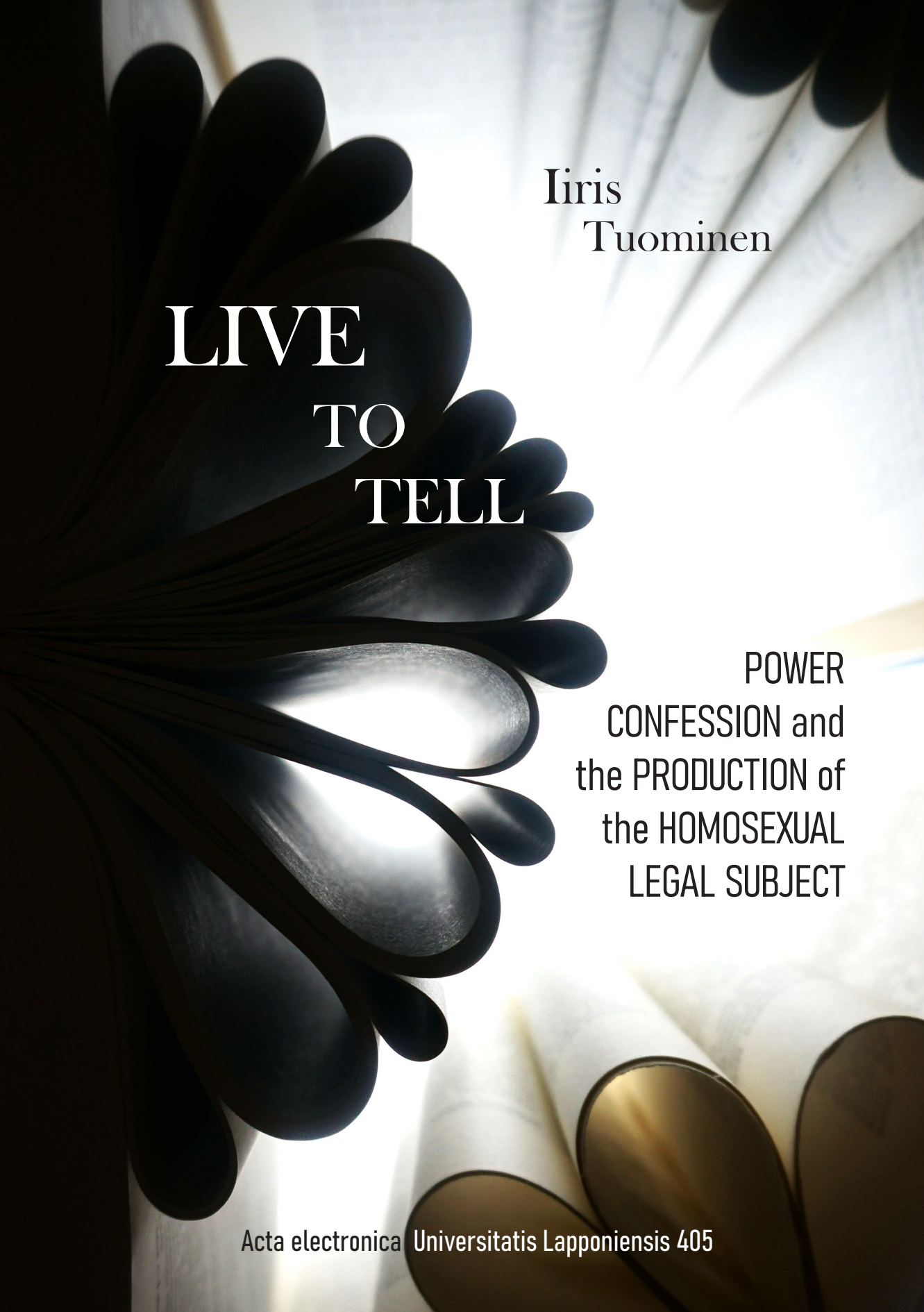


Iiris Tuominen

LIVE TO TELL

POWER CONFESSION and the PRODUCTION of the HOMOSEXUAL LEGAL SUBJECT

Acta electronica Universitatis Lapponiensis 405

Acta electronica Universitatis Lapponiensis, 405

IIRIS TUOMINEN

Live to Tell: Power, Confession and the Production of the Homosexual Legal Subject

Academic dissertation
to be publicly defended with the permission
of the Faculty of Law at the University of Lapland
in Lecture Room B 127 on 25 April 2025 at 12 noon.

LAPIN YLIOPISTO
UNIVERSITY OF LAPLAND

Rovaniemi 2025

University of Lapland
Faculty of Law

Supervised by

Professor (emerita) Mirva Lohiniva-Kerkelä, University of Lapland

Professor Julian Reid, University of Lapland

Reviewed by

Professor Panu Minkkinen, University of Helsinki

Associate Professor Bal Sokhi-Bulley, University of Sussex

Opponent

Associate Professor Bal Sokhi-Bulley, University of Sussex

Layout: Minna Komppa, Taittotalo PrintOne
Cover: Joonas Vola

Acta electronica Universitatis Lapponiensis, 405

ISBN 978-952-337-478-2
ISSN 1796-6310

The permanent address of the publication:
https://urn.fi/URN:ISBN:978-952-337-478-2

In writing, every narrative and linguistic choice you make forecloses others, directs the story a certain way, focuses on a particular image, extends a metaphor that on another day, you might have chosen very differently. Form has everything to do with content in this sense. So what is "true" in non-fiction writing is also always "crafted" – given shape and composition and emotional intensity – through our narrative choices as writers. And that's in addition to the science of memory. So the true story is always a fiction. This is why I have come to believe that non-fiction and fiction are as inextricably linked as memory and imagination – which, as it turns out, also use the same brain circuits when they are active.

Lidia Yuknavitch, *The Chronology of Water*

Abstract

Iiris Tuominen
Live to Tell: Power, Confession and the Production of the Homosexual Legal Subject
University of Lapland, 2025
Acta electronica Universitatis Lapponiensis, 405
ISBN 978-952-337-478-2
ISSN 1796-6310

This thesis is a study of power exercised through and with legal proceedings over individuals belonging to sexual minorities – power that intersects not only with questions of sexuality but also with questions of knowledge, space, and even death. The thesis provides a close reading of certain cases from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) concerning the rights of sexual minorities but, as argued throughout this thesis, even more than that they concern *the truth about sexuality*. In other words, the legal issue in the cases was not the sexual orientation in itself, but what procedures are appropriate in investigating the claimed sexual orientation. Therefore, what is located in the background is the relationship between sexuality, truth, and institutional and judicial power. From this premise, the thesis seeks answers to the questions of how legal proceedings constitute what is conceptualised as the "homosexual legal subject," what the elements of such subjectivity are, and what purposes the constitution of the subject serves in the context of law as well as politics. This general interest is explored in the four articles of this thesis, each addressing individual research questions.

In this study of subjectification, one form of practice emerges as especially significant: *confession*. However, in the articles that the thesis consists of, the thematic of confession also intersects with other concepts that nevertheless contribute to the constitution of the homosexual legal subject. The discussion related to these concepts can be categorised under the notions of *spatiality* and *death*. In the thesis, the concepts of confession, spatiality, and death are interwoven and brought together by the theoretical framework and methodology derived from the work of Michel Foucault.

In this thesis, altogether seven judgments are analysed, all of which are related to the right to respect for private and family life, enshrined both in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Three cases from the ECtHR concern the dismissal of employees belonging to sexual minorities from the British Armed Forces based on

homosexuality being banned in the Armed Forces during that period. The cases from the CJEU concern asylum applications on the grounds of belonging to a sexual minority. In these cases, in addition to the general issue of asylum applications based on the applicant's sexual orientation, the relevant feature is the so-called assessment of credibility, that is, assessment of whether the applicant is telling the truth about their sexuality.

The cases are analysed through a method of *critical close reading*. This approach entails that legal cases are analysed neither from the perspective of the internal coherence of the legal system, nor by focusing on their material consequences in society, nor mainly philosophically. In this thesis, the legal cases are analysed by reading them against the Foucauldian theoretical framework. The method of close reading aids in illuminating the so-called subtext of the legal cases; it is a manner of interrogating what the text does but what it appears to be unaware of. This methodological premise is combined and contextualised with the Foucauldian notion of *problematisation*. Similarly, as Foucault would eventually describe his project as one focused not on what issues arise from certain problems, but rather on why those societal issues have become problems in the first place, the thesis examines the ways in which sexual orientation becomes a legal problem and how boundary conditions for this problem are being developed through the process.

The thesis argues that the homosexual legal subject is formed by different intersecting powers through and with legal proceedings for the effective operation of disciplinary and governmental networks. These networks have been in place before the cases analysed in this thesis, and they continue to function today. In addition to broader philosophical questions of subjectification and power, the thesis also addresses the role of law in the context of the analysed cases. In this regard, the thesis demonstrates how law is irrevocably bound to power but also to the production of knowledge and vice versa.

Confession is identified as a central technology that produces the relevant legal knowledge, a "truth" about sexual orientation. However, the "truth" so manufactured has specific criteria and functions for the operation of different regimes of power. Such operation is addressed in the thesis through a discussion of *the confessional dispositive* that arranges these different powers and technologies on a particular field of practice by structuring and re-structuring itself. The significant elements of such dispositive that emerge from the analysed materials can be further conceptualised as a triad of *truth, confession, and death*, grounded on the notion of suspicion. While suspicion is a significant part of the confessional practice in its sacramental form, it also finds a fertile soil in the "culture of disbelief," well researched and documented in asylum and refugee studies.

The thesis concludes that although law is a form through which certain acts are defined as transgressing or permitted, it is also a way to adjust relationships between groups and individuals in a manner that is productive more than repressive while

adjusting the individuals. In this regard, introducing the confessional mechanism to the juridical apparatus is a significant element; the confessional practices that were made visible through the analysis of the legal cases of this study allow quantifying, categorising, and describing the subjects in detail while allowing law to regulate its own development. In this thesis, the confessional dispositive appears as a framework through which it provides solutions to the problems of its own creation, such as what the truth about sexuality is and how such truth can be revealed. Law, then, is an important instrument both in the constitution of such truth and in the strategic re-arrangement of the dispositive.

Tiivistelmä

Iiris Tuominen
Live to Tell: Power, Confession and the Production of the Homosexual Legal Subject
Lapin yliopisto, 2025
Acta electronica Universitatis Lapponiensis, 405
ISBN 978-952-337-478-2
ISSN 1796-6310

Väitöstutkimuksessa tarkastellaan vallankäyttöä, jonka kohteina ovat seksuaalivähemmistöihin kuuluvat yksilöt. Tutkimus osoittaa, kuinka tällainen vallankäyttö ei kuitenkaan kohdistu vain seksuaalisuuteen, vaan limittyy myös tietoon, tilallisuuteen ja kuolemaan. Vallankäytön keskeinen kanava ja ilmenemismuoto on oikeus. Tutkimusaineisto koostuu Euroopan ihmisoikeustuomioistuimen (EIT) ja Euroopan unionin tuomioistuimen (EUT) oikeustapauksista, joiden keskiössä on seksuaalivähemmistöjen oikeuksien lisäksi ennen kaikkea *totuus* seksuaalisuudesta. Toisin sanoen analysoiduissa tapauksissa oikeudellinen harkinta ei kohdistu niinkään seksuaaliseen suuntautumiseen itsessään, vaan pikemminkin siihen, minkälaiset menettelyt ovat sallittuja seksuaalisuuteen liittyvän totuuden selvittämiseksi. Samalla tutkimuksessa rekonstruoidaan kuva siitä seksuaalisuuden, totuuden sekä institutionaalisen ja oikeudellisen vallankäytön suhteesta, joka on käytännön juridiikan taustalla. Näistä lähtökohdista tutkimuksessa etsitään vastauksia kysymyksiin: 1) Miten oikeuskäytännössä tuotetaan subjektipositio, jota voidaan kuvata ”homoseksuaaliksi oikeussubjektiksi”? 2) Mitkä ovat tällaisen subjektiviteetin elementit? 3) Mitä tarkoitusta näin tuotettu subjekti palvelee, sekä oikeudellisesti että poliittisesti? Väitöskirjan neljä osajulkaisua käsittelevät näitä kysymyksiä kukin oman tarkemman tutkimuskysymyksensä kautta.

Tunnustus on keskeinen väitöstutkimuksessa kuvattu subjektifikaation muoto. Väitöskirjan osajulkaisuissa tunnustus kuitenkin risteää muiden teemojen ja käsitteiden kanssa, jotka kaikki osallistuvat yhdessä homoseksuaalin oikeussubjektin muotoamiseen. Nämä eri teemat ovat *tilallisuus* ja *kuolema*. Tunnustus, tilallisuus ja kuolema yhdistyvät Michel Foucault’n työstä ammentavassa teoreettis-metodologisessa viitekehyksessä.

Väitöskirjassa analysoidaan yhteensä seitsemää tuomiota, jotka liittyvät kaikki sekä Euroopan ihmissokeussopimuksessa että Euroopan unionin perusoikeuskirjassa turvattuun oikeuteen nauttia yksityis- ja perhe-elämää koskevaa kunnioitusta.

Kolme EIT:n ratkaisemaa tapausta koskevat seksuaalivähemmistöön kuuluvien työntekijöiden irtisanomisia Yhdistyneen kuningaskunnan asevoimista sillä perusteella, että homoseksuaalisuus oli kiellettyä asepalveluksessa. EUT:n käsittelemät asiat puolestaan koskevat turvapaikkahakemuksia, joiden perusteena on seksuaalivähemmistöön kuuluminen ja siitä johtuva vaino. Näissä tapauksissa seksuaaliseen suuntautumiseen liittyvien yleisempien oikeudellisten kysymysten lisäksi merkityksellinen on niin kutsuttu uskottavuusarviointi eli viranomaisen arvio siitä, onko hakijan kertomus seksuaalisesta suuntautumisestaan totta.

Tuomioita analysoidaan *kriittisen lähiluvun* menetelmin. Näin ollen oikeustapauksia ei analysoida ensisijaisesti oikeusjärjestelmän sisäisen koherenssin näkökulmasta, eikä siitä näkökulmasta, minkälaisia yhteiskunnallisia seurauksia tuomioilla on, eikä myöskään yksinomaan filosofisesti. Oikeustapauksia luetaan foucault'laista teoreettista viitekehystä vasten. Menetelmällä pyritään tuomaan esiin oikeustapausten niin kutsuttu subteksti. Näin päästään tarkastelemaan tekstin ”tiedostamatonta” osaa. Tämä metodologinen lähtökohta yhdistyy Foucault'n problematisaation käsitteeseen. Foucault kuvasi työnsä keskittyvän vähemmän siihen, millaisia ongelmia yhteiskunnassa voidaan havaita ja enemmänkin siihen, miksi nämä ongelmat olivat ylipäätään muodostuneet ongelmiksi. Tässä väitöskirjassa tarkastellaan niitä tapoja, joilla seksuaalisesta suuntautumisesta tulee oikeudellinen ongelma ja kuinka ongelman reunaehdot muodostuvat samalla.

Väitöskirjassa väitetään, että homoseksuaali oikeussubjekti muodostuu oikeuskäytännössä erilaisten voimien leikkauspisteessä ja oikeuden kautta kurinalaistavien ja hallinnallisten verkostojen tehokkaan toiminnan varmistamiseksi. Tällaiset verkostot ovat olleet olemassa jo ennen väitöskirjassa analysoituja tapauksia, ja ne jatkavat toimintaansa edelleen. Laajempien subjektifikaatioon ja valtaan liittyvien kysymysten ohella väitöskirjassa käsitellään oikeuden roolia suhteessa näihin teemoihin. Tältä osin väitöskirjassa väitetään, että oikeus ja valta ovat erottamattomasti kytköksissä paitsi toisiinsa, myös tiedon tuotantoon.

Tunnustus on keskeinen teknologia, jonka kautta tuotetaan tapausten ratkaisun kannalta relevanttia juridista tietoa: ”totuutta” seksuaalisesta suuntautumisesta. Näin tuotettu ”totuus” vastaa kuitenkin ennalta asetettua kriteeristöä ja palvelee siten tiettyä tehtävää erilaisissa vallankäytön järjestelmissä. Tällaista ”järjestelmien järjestämistä” käsitellään väitöskirjassa tunnustuksellisen dispositiivin kautta. Tunnustuksellinen dispositiivi järjestää erilaisia voimia ja teknologioita tietyllä käytäntöjen kentällä purkamalla ja uudelleen kokoamalla itseään. Dispositiivin toiminnan keskeiseksi elementiksi tunnistetaan totuuden, tunnustuksen ja kuoleman kolminaisuus, jonka perustana on epäily ja epäluulo. Epäily on paitsi olennainen osa tunnustuksen sakramentaalista versiota, mutta epäily liittyy myös läheisesti turvapaikkalainsäädännön ja pakolaisoikeuden tutkimuksessa laajalti dokumentoituun ”epäilyksen kulttuuriin”.

Väitöskirjan johtopäätös on, että oikeus on paitsi väline sen määrittämiseen, mitkä teot ovat kiellettyjä ja mitkä sallittuja, myös väline järjestää ja säädellä ihmisten ja ryhmien välisiä suhteita. Näin oikeuden toiminta asettuu pikemminkin osaksi tuottavia kuin repressiivisiä vallan muotoja. Tunnustuksellisen mekanismin ottaminen osaksi juridista koneistoa on tältä osin merkittävä muutos: tapauksissa ilmenevä tunnustuksellisuus mahdollistaa subjektien tarkan määrällistämisen, luokittelun ja kuvailun. Samalla se tarjoaa oikeudelle olennaisen keinon säädellä omaa toimintaansa ja kehitystään. Tunnustuksellinen dispositiivi ilmenee kehikkona, joka tarjoaa ratkaisuja itse kehittämiinsä ongelmiin, kuten mikä on totuus seksuaalisesta suuntautumisesta ja millä tavoin tällainen totuus voidaan selvittää. Oikeudella puolestaan on merkittävä rooli sekä totuuden tuottamisessa että dispositiivin strategisessa järjestämisessä ja uudelleen järjestämisessä.

Acknowledgements

In her memoir *Girl, Interrupted*, author Susanna Kaysen (1994: 41) notes how early on she noticed being overtaken by patterns:

> all patterns seemed to contain potential representations, which in a dizzying array would flicker to life. That could be ... a forest, a flock of birds, my second grade class picture. Well, it wasn't – it was a rug, or whatever it was, but my glimpses of other things it might be were exhausting. Reality was getting too dense.

Bonnie Honig (2013: x) comments on Kaysen's narration in many ways in the monograph *Antigone, Interrupted*. In relation to patterns, she notes that "finding meaning in the right place and in the right amount is as good a definition of sanity as any." In a way, I suppose this thesis has come into being as a result of my inability to let go of certain problems that have continued to preoccupy me. And more than once, I have been told that these are not problems at all: it is just a rug, nothing more. At times, I myself have found it difficult to discern from the flickering representations the ones that would be connected and form a whole, or a network, and the ones that are, indeed, just a rug.

My supervisors, Professor Mirva Lohiniva-Kerkelä and Professor Julian Reid, have been a great help in this task. Julian has commented on all my work in depth, pointing out potential avenues for elaboration and directing my attention to what could be left for further research. Based on these valuable comments, the first draft of the third article would eventually be divided into articles III, IV, and one that is currently in progress. That is perhaps quite descriptive of how I sometimes tend to get carried away with representations. Mirva has been there to guide the process and offer guidance whenever I have needed them, bringing in a welcomed portion of realism as well. For example, initiating the pre-examination of the thesis when I was 37 weeks pregnant would not have been a viable option after all. Thank you, Mirva, for saving me from a bunch of grey hair.

Thank you also to my preliminary examiners, Associate Professor Bal Sokhi-Bulley and Professor Panu Minkkinen, for valuable and encouraging comments, especially on improving the synthesis. Bal Sokhi-Bulley also kindly agreed to be my opponent, and I am very grateful for the opportunity to continue the discussion with her.

Professor Susanna Lindroos-Hovinheimo acted as the opponent in my halfway defence, providing insightful and crucial comments on the thesis. Her academic work has also greatly influenced the approaches taken in the thesis, as evident from the description of methods in the synthesis. Thank you, Susanna.

The Problematisations research group has also provided valuable comments during our monthly gatherings in 2019–2020. Even more, the group provided the first academic community I knew. I cannot imagine a better or warmer setting to start the PhD journey. Thank you to everyone who came to the seminars and shared their ideas and support. The Faculty of Law gave us the necessary infrastructure and resources to make the research group the welcoming community it was. I also thank the Faculty of Law for accepting me as a doctoral student and the administration and my colleagues there.

The Problematisations research group cannot be mentioned without Samuli Hurri. Formulating my gratitude in words is a difficult task, as sometimes one person plays such a significant role in who and where you are today that words will never do justice. Samuli, I believe you will nevertheless find yourself written between these pages time and again. Later Samuli also kindly invited me to join the Moral Struggles research group with Sanna Mustasaari, Kati Nieminen, and Ukri Soirila. Thank you all for your unwavering support and gentle guidance through "the bushes of academia," as Paul B. Preciado has formulated the issue.

Professor Rosa Ballardini has had the most significant role in my academic journey, supervising my Master's Thesis as an undergraduate student and later employing me in various research projects, "keeping me in bread" during the years of drafting the PhD. Your warm support (and kick-ass jokes) have meant the world to me, ever since 2017 when I presented my student work for a large conference audience. Through the presentation, you kept nodding approvingly, and I suppose you never stopped during the years to come.

Thank you also to Jonna Häkkilä and the Digital Access to Sámi Heritage Archives project team. I came to the project while writing my Master's Thesis, and I believe I grew with it, both academically and personally. Special thanks to Maija Mäkikalli, from whom I learned many things, not least importantly that sometimes the best way forward with research is to go walk in a forest.

Thank you, fellow PhD students, some of you having already reached the end of this journey, and some still walking. Either way, all of you have walked with me and provided great companions along the way. Jenna Päläs and Kaisa-Maria Kimmel have included me in their entertaining and wisest discussions in the Faculty coffee room. Juho Aalto has, on many occasions, shared with me the unbearable lightness of writing a PhD, shifting his role easily between co-organizer, co-writer, and a friend. Jenni Hakkarainen was the first to show me that law can be done differently. I am not sure if I have taken this too to the extreme, as I tend to do. Thank you, Jenni, for being present through these years.

Staying loyal to my philosophical commitment that all boundaries are artificial, differentiating between "academic friends" and "just friends" is, at best, a matter of clearly structured presentation. In reality, many of my friends from the university are important to me in all fields of life. Similarly, none of my academic contributions would have happened without my important people outside the university. Taru Riskilä, Emmi Pesola, Elina Uutela, Anja-Kaisa Ylimommo, Johan-Eerik Kukko, Sanna Pettersson, Joonas Vola, and Sari Nisula: Thank you, first and foremost, for staying with me when reality was getting too dense, which, to be honest, it has often been.

Although my name will be on this thesis, which I suppose means that "I" have written it, such "I" is not an unequivocal or precise idea for me. This work has been carried out by me, connected to the networks and groups of people larger than myself. Many people have supported me, and a list of names would perhaps not do justice to the collective nature of writing. Nevertheless, I want to express my specific gratitude to Sari Kokkola, who has reviewed the language of the thesis, including its individual articles. When I haven't been able to express my train of thought in any known language, Sari has been able to decipher the meaning beneath. Miia Mäkinen has provided me with the tools that have allowed me to climb up from the bottom of the ocean and to stay on the surface. Thank you.

The grants trusted to me by the Finnish Cultural Foundation's regional fund of Lapland and Eemil Aaltosen Säätiö have also enabled my work. Thank you for your contributions.

While it might be in the end impossible to write about anything *but oneself*, I have tried to acknowledge the nature of writing as "action in concert" rather than a "solitary, heroic performance", as Honig (2013: xiii) describes Antigone's actions in *Antigone, Interrupted*. I (who is not one but many) write on behalf of collective life that is agonistic, in becoming, imbued with counter-sovereignties and shifting meanings. This is both where my words come from and where they are headed.

Finally, Tomi and Seppo, my relentless and loving support group, accomplices in my conspiracy with language, my family. Once again, words fail me (capricious as they are), but perhaps what is most important in life will always escape language. Perhaps some things just need to be felt with our hearts. Thank you.

Rovaniemi, 6 March 2025
Iiris Tuominen

List of Original Articles

The dissertation is based on the following original articles, which will be referred to in the text by their Roman numerals I–IV.

I Kestilä, Iiris. "Confession as a Form of Knowledge-Power in the Problem of Sexuality." *Law and Critique* 32, no. 2 (2021): 195–216.

II Kestilä, Iiris. "Law, Space and Power: Spatiality in the European Court of Human Rights Judgments on Homosexuality." *Gender, Place & Culture* 30, no. 11 (2023): 1509–1528.

III Kestilä, Iiris. "'The Truth of Oneself': Governing Homosexual Asylum Seekers Through Confession." *Law, Culture and the Humanities*. Accepted for publication.

IV Tuominen, Iiris. "Confession, Death and Disbelief: Interrogating the Asylum Cases of the Court of Justice of the European Union." Revised version submitted to *Social Identities*.

Articles I-IV are reproduced with the kind permission of their copyright holders.

Contents

1 Openings

Very often a doctoral candidate faces the question: why did you choose this specific topic? This seemingly simple question is one that is often difficult to answer. I, like so many others, have struggled with it many times. So, what was it that brought me to the questions this thesis eventually came to consist of? These questions relate to the position of sexual minorities in the contexts of the military, criminal proceedings, and the asylum system. At first glance one might wonder what actually combines these contexts, except the fact that sexual minorities were involved. The answer is both simple and complex. A simple answer would be that all these contexts are bound together by exercise of power over individuals belonging to sexual minorities. A complex answer would be that when I started to look at the materials of this research, cases from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), I began to notice that exercise of power appeared to intertwine with other issues. Power intersected not only with questions of sexuality, but also with questions of knowledge, law, space – and even death. Surprisingly, the fundamental question arising from this entanglement was something I could recognise from my own life.

At the time of embarking on the project of writing this thesis, me and my partner back then were constantly facing awkward social situations. It appeared that not only other people but also state institutions were endlessly curious about the nature of our relationship. We were asked whether we were sisters, whether we were friends, whether my partner was my mother and so on. I was left wondering what all that was about. It was only later, when I started to familiarise myself with the case materials from the ECtHR and the CJEU, that I noticed a similar pattern in them. This pattern seemed to be centered around the notion of *truth*. For some reason, the question of truth seemed essential especially in the context of sexuality, and especially what was perceived as homosexuality. There appeared to be some "fundamental secret sexuality harbors"[1] and about which the truth needed to be found out. In this thesis, I wanted to ask: why?

The question about homosexuality has been discussed for centuries.[2] While this issue is, to a great extent, social and political, it has also become a legal problem. In

1 Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge*, trans. Robert Hurley (London: Penguin, 1988).

2 See, e.g., Kenneth James Dover, *Greek Homosexuality* (Cambridge & Massachusetts: Harvard University Press, 1989).

this legal context questions such as how is sexual citizenship constituted,[3] how do legal subjectivities affect the reasoning of the court in terms of sexual rights[4] and how does the legal praxis of the CJEU differ from the ECtHR in terms of sexual minorities[5] have been discussed. This research does not address doctrinal issues as such. Neither does it aim to solve legal problems concerning sexual minorities. Rather, I examine the ways in which homosexuality becomes a legal problem and the reasons behind its formation into a problem. This approach has its roots in the work of Michel Foucault, who referred to this type of inquiry as research of "problematisations". Foucault did not, for example, ask what is sexuality about but why and how has sexuality turned into a problem.[6] In a similar vein, when writing about the history of madness, Foucault focused on historical processes and practices through which madness became to be conceived of and treated as a problem.[7] Then how does homosexuality become a legal problem in the mentioned legal cases? Let us take a couple of examples.

In 1999, the ECtHR ruled on the case *Smith and Grady* v. *The United Kingdom*.[8] The case concerned the discrimination of applicants who had been "found" to be homosexuals in the British Armed Forces, homosexuality being banned at the time. In case of both applicants, suspicions had been raised concerning their sexual orientation, i.e. whether they were homosexual. The British Armed Forces therefore launched investigations in order to confirm that the applicants were not just seeking an administrative discharge based on false pretences. Thus, the question came down to whether the applicants were *truly* homosexuals. Then, in 2018, the CJEU ruled on the case of *F v. Bevándorlási* és Állampolgársági *Hivatal*,[9] where the Hungarian migration officials had aimed to substantiate an asylum seeker's claim of

3 Carl F. Stychin, "Sexual Citizenship in the European Union," *Citizenship Studies* 5, no. 3 (2001): 285-301.

4 Michele Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject," *European Journal of International Law* 14, no. 5 (2003): 1023–1044.

5 Andrea Mrazova, "Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law," in *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective*, eds. Arzu Güler, Maryna Shevtsova and Denise Venturi (Springer, 2018); Anna Van der Vleuten, "Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe," in *LGBT Activism and the Making of Europe: A Rainbow Europe?*, eds. Phillip M. Ayoub and David Paternotte (Hampshire & New York: Palgrave Macmillan, 2014); Pasquale Annicchino, "Persecution of Religious and LGBTI Minorities and Asylum Law: Recent Trends in the Adjudication of European Supranational Courts," *European Public Law* 21, no. 3 (2015): 571-590.

6 Michel Foucault, "Polemics, Politics, and Problematizations: An Interview with Michel Foucault," in *The Foucault Reader*, ed. Paul Rabinow, trans. Robert Hurley and others (New York: Pantheon Books, 1984).

7 Michel Foucault, *The History of Madness*, trans. Jonathan Murphy and Jean Khalfa (London: Routledge, 2006).

8 *Smith and Grady v. The United Kingdom* (applications nos. 33985/96 and 33986/96), 27.9.1999.

9 C-473/16 *F v. Bevándorlási és Állampolgársági Hivatal* (ECLI:EU:C:2018:36).

being homosexual by psychological tests. Similarly to the case of *Smith and Grady*, the issue was whether the applicant was *truly* homosexual and thus entitled to be granted asylum.

Both cases were eventually taken to a supranational court in order to find out, not whether banning sexual minorities from armed forces was against the European Convention on Human Rights (ECHR),[10] or whether homosexuality qualifies as grounds for applying asylum in the European Union (EU), but whether the attempts to unearth this fundamental "truth" about the individual's sexuality violated the applicants' rights. Therefore, the legal problem was not so much homosexuality in itself, but the relationship between sexuality, truth and institutional and judicial power. This connection between sexuality, truth and power is clearly visible in some of the cases addressed in the thesis, while in some others it is less clear. The cases are not only far apart in time but they concern different situations and individual circumstances, although common nominators obviously exist as well. However, seeing the same general mechanism recur across cases – regardless of their differences – indicated that somehow it derived from the same origin.

In his work, Andrew Hewitt urges us to ask "what was homosexuality for" when viewed politically and at any given historical moment. Hewitt notes that whereas the Foucauldian formulation of the question would be "when and how was homosexuality", what needs to be understood is "what homosexuality was (and is) *for*." [11] In other words, Hewitt was interested in understanding the function of homosexuality in the contemporary political and philosophical framework and the ways out of an aporetic heterosexism it could provide. However, I believe that the "what for" formulation is also compatible with the Foucauldian framework. During the research process, my initial question of "why" transformed into a quest for understanding how the homosexual as a subject is constituted, what the elements of such subjectivity are and what purposes it serves in the context of law as well as politically. This general interest is explored in the four articles of this thesis, each addressing individual research questions.

While homosexuality can obviously be an important element of identity for many people, and I am aware of its significance in this regard, this thesis does not delve into questions of identity at an individual level. Here, some terminological clarification is in order. When this thesis discusses the "homosexual legal subject", the use of this term aims to designate a specific subject position which can be referred to as "homosexual". Acknowledging that this term carries considerable historical

10 Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms," *Council of Europe Treaty Series 005* (Strasbourg: Council of Europe, 1950).

11 Andrew Hewitt, *Political Inversions: Homosexuality, Fascism & The Modernist Imagination* (Stanford: Stanford University Press, 1966), 81.

baggage related to pathologisation and medicalisation of sexual orientation,[12] and today other terms are preferred, this term is used for two reasons. First, it is precisely the pathologisation that is a crucial element of producing the homosexual legal subject as the Other or "deviant", and thus the use of the concept aims to illustrate this practice. Second, both the ECtHR and the CJEU concisely use the term "homosexual" in their judgments. Therefore, when discussing the cases, I have retained the terminology of the courts for the sake of clarity.

The work of Foucault largely serves as the compass guiding my quest for solving this puzzle. Study of power is a central element in Foucault's work. However, to an even greater extent, Foucault studied the modes of history by which human beings are made subjects.[13] In this thesis, I trace the ways in which power is exercised over individuals belonging to sexual minorities through legal proceedings, thus constituting them as homosexual legal subjects. The focus is especially on one form of subjectification, that of *confession*. However, in the articles that the thesis consists of, the thematic of confession also intersects with other, perhaps somewhat less obvious, concepts that nevertheless affect the practices that constitute the homosexual legal subject to be governed over. The discussion related to these concepts can be categorised under notions of *spatiality* and *death*. In this thesis, the concepts of confession, spatiality and death are interwoven and brought together by the theoretical framework and method deriving from Foucault's work. I argue that the homosexual legal subject is formed by different intersecting powers through and with legal proceedings for the effective operation of disciplinary and governmental networks.

These networks have, of course, been in place already before the cases analysed in this thesis and they continue to function even today. While the thesis addresses broader philosophical questions of subjectification, power, and so on, it also suggests an understanding of the role of law based on the analysed legal cases. The cases analysed in this thesis demonstrate how the law is irrevocably bound to power, but also how the relation between law and power is not straightforward or stable. Indeed, Foucauldian understanding of power refers not so much to a single form of power covering everything, but the ubiquity of power arises from the way in which power is created at every moment, in every relationship. Power is therefore unstable and local.[14] Moreover, different local centres of power often have conflicting goals and operational logics.[15] Similarly, while law sometimes plays the part of an accomplice

12 For example, both The Diagnostic and Statistical Manual of Mental Disorders (DSM) and International Classification of Diseases (ICD) categorised homosexuality as a mental disorder until the beginning of 90's.

13 Michel Foucault, "Afterword," in *Michel Foucault: Beyond Structuralism and Hermeneutics*, eds. Hubert Dreyfus and Paul Rabinow (Chicago: University of Chicago Press, 1983), 208.

14 Foucault, *The Will to Knowledge*, 93.

15 Foucault, *The Will to Knowledge*, 96.

to other forms of power, sometimes law appears to work against these very same powers. This observation opens a way to explore the possibilities of resistance through law.

A generally held view is that the purpose of research is to produce answers. However, the strength of my work – which often tends to produce more problems and more questions – lies elsewhere. As Gilles Deleuze writes, "it is the school teacher who 'poses' the problems; the pupil's task is to discover the solutions. In this way we are kept in a kind of slavery. True freedom lies in a power to decide, *to constitute problems themselves*".[16] Although this thesis does not offer practical solutions, it could nevertheless be considered to offer more than problems. Maybe we could say that it offers *openings*. As Foucault explained in an interview:

> My work takes place between unfinished abutments and anticipatory strings of dots. I like to open up a space of research, try it out, and if it doesn't work, try again somewhere else. ... What I say ought to be taken as "propositions", "game openings" where those who may be interested are invited to join in ...[17]

I have accepted this invitation and extend it to the reader of this thesis: you are most welcome to join in on this journey. This work is yours to build on, to critique, even to dismiss if considered necessary.

The thesis comprises four articles (Articles I to IV), each approaching the questions introduced above from different angles. This synthesis summarises the findings, as well as introduces the theoretical and methodological framework in more detail. The synthesis is divided into six chapters. The present chapter functions as an introduction. The second chapter establishes the theoretical framework and offers discussion on each key element used in the analysis. The third chapter introduces the methodological framework overarching the four articles of the thesis. The fourth chapter addresses the research questions of each article as well as research materials, providing also an overview of the articles and contextualising the case materials from a legal point of view. The fifth chapter presents the findings made in the thesis relating, first, to the Foucauldian notion of confession as a crucial technology in the formation of a subject, second, to the role of law in such formation, and third, to the possibility to rearticulate rights as a means of resistance. The sixth chapter concludes the synthesis.

16 Gilles Deleuze, *Bergsonism*, trans. Hugh Tomlinson and Barbara Habberjam (New York: Zone Books, 1991), 15. Emphasis added.

17 Michel Foucault, "Questions of Method," in *Michel Foucault: Power. Essential works of Foucault 1954–1984, Vol. 3*, ed. James D. Faubion, trans. Robert Hurley and others (New York: The New Press, 2000), 223-4.

2 Theoretical Framework

2.1 Power, subject and confession

The questions relating to exercise of power and formation of subjects, both central to Foucault's project, are at the centre of this thesis. As mentioned in the beginning, for Foucault, power is present in every relationship.[18] Understanding power in this way means that power is not taken as something that is always exercised knowingly or in a certain specific context, nor that power is self-generating or something hanging above everyday relationships.[19] As Foucault notes, "mechanisms of power are an intrinsic part of all ... relations and, in a circular way, are both their effect and cause".[20] This means, for example, that power does not generate only from the state or state institutions. In this thesis, power is analysed from the perspective of "where and how, between whom, between what points, according to what processes, and with what effects, power is applied."[21]

The question of power is closely connected to the formation of the subject. But what is a "subject" for Foucault, and in this thesis? In the "Afterword" to Hubert Dreyfus' and Paul Rabinow's book *Michel Foucault: Beyond Structuralism and Hermeneutics*, Foucault describes his work:

> I would like to say, first of all, what has been the goal of my work during the past twenty years. It has not been to analyse the phenomena of power, nor to elaborate the foundations of such an analysis. My objective, instead, has been to create a history of the different modes by which, in our culture, human beings are made subjects.[22]

18 Foucault, *The Will to Knowledge*, 93.
19 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, eds. Michel Senellart et al., trans. Graham Burchell (New York: Palgrave Macmillan, 2007), 17.
20 ibid.
21 Foucault, *Security, Territory, Population*, 16.
22 Foucault, "Afterword," 208.

It is quite possible to interpret Foucault's work from other perspectives as well.[23] For example, in *The Order of Things*[24] and *The Archaeology of Knowledge*,[25] the question of the subject is easy to bypass. However, the way Foucault emphasises the meaning of the subject in his work in the "Afterword" nevertheless indicates its significance and opens Foucault's work to that specific interpretation.

In the "Afterword", Foucault explains that "there are two meanings of the word subject: subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to".[26] The term "subjectification" includes a double reference. On one hand, it becomes understandable when considering how philosophical education and scholarly interest in France were during that time very much centred around phenomenological thought. In this philosophical tradition, the subject as a centre of experience is an essential element. Foucault intentionally works against this notion by not aiming to recapture "the meaning of everyday experience in order to rediscover the sense in which the subject that I am is indeed responsible ... for founding that experience together with its meaning".[27] Instead, Foucault's commitment is rather *desubjectivation*: "... however boring, however erudite my books may be, I've always conceived of them as direct experiences aimed at pulling myself free of myself, at preventing me from being the same".[28] On the other hand, Foucault refers to political subjection as a mode of having power exercised over oneself. The term subjectification is then coined from these two different elements: being subjected to power and Foucault's interest in relocating his analysis towards the ways in which focusing on the inner experience of oneself comes to function as a form of subjection as well. However, as Foucault's description of the issue in the "Afterword" underlines, these both forms are two aspects of the same process. We are subjected to and governed by power through practices that constitute us as subjects of self-knowledge.

In this formulation of subjectification, Foucault describes the operation of modern power, an essential element of which is to suggest that we govern and police ourselves. Moreover, the subject so constituted is established and re-established by history, and is thus not a stable or immutable mode.[29] And while subjectification is

23 At the time of making this statement, Foucault was developing what is usually referred to as his ethical period, which may well have affected the way he saw the entirety of his work.

24 Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences*, trans. Alan Sheridan (New York: Vintage, 1994).

25 Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, trans. Alan Sheridan (New York: Pantheon Books, 1971).

26 Foucault, "Afterword," 212.

27 Foucault, "Polemics, Politics, and Problematizations," 241.

28 Foucault, "Polemics, Politics, and Problematizations," 241-242.

29 Arnold I. Davidson, "From Subjection to Subjectivation: Michel Foucault and the History of Sexuality," in *Foucault and the Making of Subjects*, eds. Laura Cremonesi, Orazio Irrera, Daniele Lorenzini and

also a way to group certain individuals under one denominator (such as homosexual, abnormal, hysterical woman, and so forth), a particular person should not be reduced to a specific type of subjectification. Even though we can identify practices such as "hystericisation of women's bodies" or "pathologisation of homosexuals", there is nobody who is solely a hysterical woman or homosexual, and nothing else.[30] Also in this thesis, the concept of the homosexual legal subject does not describe the applicants of the cases as individuals, but rather the subject position they are called into, a logic behind a certain model of operation.

It has also been suggested that subjectification could rather refer to something becoming subjective, and therefore also possessing an emancipatory element.[31] This could be seen in line with Foucault's conceptualisation of the notion. In addition to examining the ways in which we become subjects to be governed, Foucault addressed the possibility of resistance in various instances. For example, in *Discipline and Punish*,[32] Foucault considers forms of resistance to disciplinary power. In the second and third volumes of *The History of Sexuality*, Foucault addresses the ways people conduct their "aesthetics of existence".[33] Mobilising Foucault's terminology in English poses certain challenges in this regard and sometimes the terms "subjection", "subjectivation" and "subjectification" are used interchangeably, while sometimes they refer to different concepts. Nevertheless, the understanding of a "subject" and "subjectification" presented here informs the treatment of the themes discussed in the articles of this thesis.

The thesis concentrates especially on one specific form of subjectification: *confession*. According to Arnold I. Davidson

> The history of confession is a constitutive element of the history of subjectivity precisely because the confession of sexual desire has been inscribed at the heart of the procedures of subjection enacted by power. Truth, subject, confession, desire are a set of notions which shape our experience of ourselves; they are the form of our subjection.[34]

Martina Tazzioli (London: Rowman & Littlefield International, 2016), 57.

30 Todd May, "Subjectification," in *The Cambridge Foucault Lexicon*, eds. Leonard Lawlor and John Nale (New York: Cambridge University Press, 2014), 499.

31 See e.g., Päivi Johanna Neuvonen, "Retrieving the 'Subject' of European Integration," *European Law Journal* 25 (2018), 6–20. However, similar interpretations have been presented also by Davidson, "From Subjection to Subjectivation," as well as Daniele Lorenzini and Martina Tazzioli, "Confessional Subjects and Conducts of Non-Truth: Foucault, Fanon, and the Making of the Subject," *Theory, Culture & Society* 35, no. 1 (2018): 71-90.

32 Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vintage, 1995).

33 Michel Foucault, *The History of Sexuality, Volume 2: The Use of Pleasure*, trans. Robert Hurley (New York: Random House, 1985); Michel Foucault, *The History of Sexuality, Volume 3: The Care of the Self*, trans. Robert Hurley (New York: Vintage, 1988).

34 Davidson, "From Subjection to Subjectivation," 58.

As Chloë Taylor notes, for Foucault, confession had become *the* manner in which subjectivity is produced in the modern West.[35] Taylor further notes that confession can be seen to have replaced early modern forms of identity based in, for example, family or bloodline and, referring to Foucault, points out that "the truthful confession was inscribed at the heart of the procedures of individuation by power".[36] Indeed, such process is always a relation of power. According to Foucault, "truth is not by nature free – nor error servile – ... its production is thoroughly imbued with relations of power. The confession is an example of this".[37]

In his lectures and articles written in the 1980s, Foucault traces forms of confessional discourse through Antiquity and into the first centuries of Christianity. In this regard, Foucault notes that "in all the ancient philosophical practices, the obligation to tell the truth about oneself occupies a rather limited place".[38] Indeed, confessional discourses, as present later in Christian practices and in the eighteenth and nineteenth century, were nearly absent in antiquity. In Taylor's interpretation of Foucault, "ancient techniques of self-examination pursued the goals of self-transformation and self-mastery rather than self-discovery and interpretation".[39] These forms became more visible in the Christian practices of the second and fifth centuries. Foucault discusses some of these forms in his lectures *About the Beginning of the Hermeneutics of the Self*,[40] for example.

In the eighteenth century, the influence of the Church was diminishing and the technique of confession was taken up by other domains. According to Taylor, "what really interests Foucault in the first volume of *The History of Sexuality* is not sexuality in auricular confession, however, but rather the multiplication of forms of sexual confession in secular discourses and the internalisation of the coercion to confess ...".[41] This development marks also a shift to biopower, when "population" became a wider concern and with it, new objects of inquiry and control.[42] And as Foucault writes: "At the heart of this economic and political problem of population was sex".[43] While sexuality was a central interest in the previous, religious forms of confession, this discourse also traveled to other forms of confessional practices, which proliferated in the modern era. According to Foucault: "From the Christian penance to the present day, sex was a privileged theme of confession. A thing that

35 Chloë Taylor, *The Culture of Confession from Augustine to Foucault: A Genealogy of the "Confessing Animal"* (Oxon & New York: Routledge 2010), 77.

36 Taylor, *The Culture of Confession*, 77; Foucault, *The Will to Knowledge*, 58-59.

37 Foucault, *The Will to Knowledge*, 60.

38 Foucault, *The Will to Knowledge*, 2.

39 Taylor, *The Culture of Confession*, 13.

40 Michel Foucault, "About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth," *Political Theory* 21, no. 2 (1993): 198–227.

41 Taylor, *The Culture of Confession*, 67.

42 ibid.

43 Foucault, *The Will to Knowledge*, 4.

was hidden, we are told".[44] In this modern era (more specifically, in the eighteenth and nineteenth centuries), the interrogators had changed from priests to scientists, doctors and psychologists. As Taylor notes, "once a belief in the therapeutic need to confess had been implanted in modern subjects, an external form of surveillance, the extraction of confessions, had been internalised into self-surveillance".[45]

Thus, we see that a certain kind of suspicion is in the heart of confession: There might be something in ourselves that we are not aware of. However, this suspicion inhabits the confessional form from the beginning. While Tertullian, in the Early Church, first theorises the "original sin", what also comes to function as an important element of the confession is precisely the "suspicion of the self by the self."[46] In *The Confessions of the Flesh*,[47] fourth volume of *The History of Sexuality*, Foucault discusses the reciprocal roles of the shepherd and the sheep in the context of pastoral power: a shepherd is supposed to protect and care for the flock, but also constantly examine their conduct in order to discover what the sheep might hide even from themselves.[48] Thus, the notions of producing knowledge, producing "truth", and confession as a technique of achieving these can be seen as part of the same specific network of power relations.

Confessional practices play a central role in the legal cases analysed in this thesis. All the articles of this thesis focus, in one way or another, on the production of knowledge, and more specifically, on the production of "truth". The main apparatus for this "truth"-production is precisely the confession. These practices take place in the military, where the crucial question is whether a person should be dismissed due to their homosexuality, which again requires finding out the "truth" about an individual's sexuality (as discussed in article I). They also take place through what can be called a spatial schema, relating especially to Foucault's work on the concept of panopticism. Through panoptic practices, the individuals turn into objects of knowledge, instead of being participants in communication.[49] Panopticism makes the individuals visible, instead of repressing them into shadows. This way, behaviour is not repressed or excluded but made visible and the "deviant" individual is moulded into an obedient subject. Moreover, the issue is not so much with what one does, but what one is. Therefore, what needs correction is not an individual act but the individual as such (as discussed in article II).[50] This notion is also related to

44 Foucault, *The Will to Knowledge*, 5.

45 Taylor, *The Culture of Confession*, 71.

46 Andrea Teti, "Rethinking Confession," in *The Late Foucault: Ethical and Political Questions*, eds. M. Faustino, & G. Ferrero (Bloomsbury Academic: 2020), 225.

47 Michel Foucault, *Confessions of the Flesh*, ed. Frédéric Gros, trans. Robert Hurley (Knopf Doubleday Publishing Group, 2021).

48 Foucault, *Confessions of the Flesh*, 394.

49 Foucault, *Discipline and Punish*, 199-200.

50 Michel Foucault, "Truth and Juridical Forms," in *Michel Foucault: Power. Essential works of Foucault 1954–1984, Vol. 3*, ed. James D. Faubion, trans. Robert Hurley and others (New York: The New Press, 2000).

the context of the EU asylum system. In this context, when asylum can be granted based on persecution of an applicant due to belonging to a sexual minority, a need has emerged to know the "truth" about sexuality of these applicants. In the practices of migrant administration, "homosexuality" is perceived as the essential and innate character of one's identity, and thus as something that can be found out if only using the right methods (as discussed in articles III and IV).

Throughout our Western history, sexuality has been the central object of interest in the context of confession. Moreover, while confessing can be taken to mean subjecting oneself to exercise of power from the "outside", it is also a form of governing oneself for the interests of different forms of power. This becomes visible in the ways in which the homosexual legal subject is often produced as somehow "deviant", and thus in need of control and governance. However, by discussing the position of asylum applicants belonging to sexual minorities, as well as through conceptualising the EU's asylum legislation and policy as a confessional technology, especially articles III and IV demonstrate how the technology of confession becomes a general technology of governing. Indeed, while some of the cases discussed in the thesis originate in the seemingly distant past, the confessional practices are by no means a thing of the past. They take place here and now, absorbing new ways of producing subjects that can be governed, and moreover, subjects that can govern themselves.

2.2 Spatiality

In addition to Foucault's work on power, the subject and forms of confession, my thesis draws from Foucault's conceptualisation of space. The relationship between space and power has been considered as one of the most central forms of technologies of discipline and population control in Foucault's studies.[51] Even though Foucault did not write primary texts that foreground spatial concerns, spatiality was nevertheless more than just a passing interest.[52] According to Foucault, "it is somewhat arbitrary to try to dissociate the effective practice of freedom by people, the practice of social relations, and the spatial distributions in which they find themselves. If they are separated, they become impossible to understand".[53] Indeed,

51 See, e.g., Robert J. Topinka, "Foucault, Borges, Heterotopia: Producing Knowledge in Other Spaces," *Foucault Studies* 9, no. 9 (2010): 54–70; Stuart Elden, *Mapping the Present: Heidegger, Foucault and the Project of a Spatial History* (London & New York: Continuum, 2001) and David Wood, "Foucault and Panopticism Revisited (Editorial)," *Surveillance & Society* 1, no. 3 (2003): 234–239.

52 Stuart Elden and Jeremy W. Crampton, "Introduction," in *Space, Knowledge and Power: Foucault and Geography*, eds. Stuart Elden and Jeremy W. Crampton (Aldershot: Ashgate, 2007), 8.

53 Michel Foucault, "Space, Knowledge, and Power," in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon, 1984), 246.

as Stuart Elden notes, in Foucault's work "spatiality occurs as an integral part of a larger concern, and ... a tool of analysis rather than merely an object of it".[54]

In 1976, Foucault took part in an interview with the geographers of the French journal *Hérodote*. It appeared in English translation in the 1980 collection *Power/Knowledge* as "Questions on Geography",[55] and has since become one of the most cited pieces concerning Foucault's relation to questions of space and power.[56] However, what is much less well-known is that Foucault sent some questions back to the journal for a subsequent issue. There Foucault asks four related questions: 1) What are the relations between knowledge (*savoir*), war and power?; 2) What does it mean to call spatial knowledge a science?; 3) What do geographers understand by power?; and 4) What would the geographies of medical establishments (implantations) understood as "interventions" look like?[57] As Elden and Crampton note, Foucault posed these questions at the time of the lectures titled *Society Must be Defended*[58] and the first volume of *The History of Sexuality*. According to Elden and Crampton, they are coterminous with his concern with biopower and slightly predate his work on governmentality. They further note that in 1976, two of Foucault's projects can be seen to have coincided: the analysis of discipline that he had been working on in a concentrated form from the beginning of the decade and the genealogy of the subject that occupied him until the end of his life.[59]

From the perspective of this thesis, too, Foucault's questions highlight important connections between different topics and concepts. While they reflect Foucault's continuous interest in the production of knowledge as precisely that – a product that needs to be manufactured – they also indicate the conceptualisation of knowledge and power as deeply interlinked. Indeed, knowledge is manufactured in the networks of power, and knowledge that comes into being in this way continues to circulate in these networks, generating power itself. Moreover, these questions suggest that Foucault considered spatial arrangements as important sites and apparatuses not only for the exercise of power, but also for the production of knowledge.

In this thesis, the discussion of spatiality focuses especially on two concepts Foucault used: *heterotopia* and *panopticon*. When Foucault spoke about heterotopias, he referred to spaces that are different from all other spaces within a certain culture but which, unlike utopias, are nevertheless real.[60] Due to being different, and yet in

54 Elden and Crampton, "Introduction," 9.

55 Michel Foucault, "Questions on Geography" in *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. Colin Gordon, trans. Colin Gordon and others (New York: Pantheon, 1980).

56 Elden and Crampton, "Introduction," 1-2.

57 Elden and Crampton, "Introduction," 2-3.

58 Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975–1976*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003).

59 Elden and Crampton, "Introduction," 4.

60 Michel Foucault, "Of Other Spaces," *Diacritics* 16, no. 1 (1986): 22–27, 24.

relation with all other sites, heterotopic spaces can reflect or mirror the features of these other sites.[61] Panopticon, for its part, is a certain kind of utopia. For Foucault, the panopticon was the utopia of absolute power over individuals: generalised surveillance and normative judgements that discipline individuals.[62] In the legal cases analysed in the thesis, the concepts of both heterotopia and panopticon play an important role. In article II, the concept of heterotopia is analysed in relation to law, as a certain kind of mirror which shows a connection between law and (disciplinary) power as each other's reflections, somewhat alike to Foucauldian heterotopias. Through the concept of panopticon it is illustrated how "deviancy" produced in these cases takes place through practices built on both external and internal supervision. While individuals are classified and hierarchised within space on a spectrum of normal–deviant through panopticism, it is also an internalised practice of a confessional form. In this way, article II demonstrates how analysis of both the concept of confession, disciplinary forms of power and their relation to law can be elaborated if understood through a spatial schema. And as noted above, the discussion of space draws together certain important elements of Foucault's work, deepening our understanding of the ways in which concepts such as subjectification and functioning of different powers in relation to each other were developed in Foucault's texts.

2.3 Death

Finally, the third element of the theoretical framework the thesis builds on is the concept of death. Although the notion of death is more or less visible in the body of Foucault's work as a whole, death is not a concept most often associated with Foucault's terminological register. Nevertheless, the thematic of death can be found in all periods of Foucault's work: archaeology, genealogy and ethics. Despite the significance this notion has in Foucault's *oeuvre*, the perspectives he takes appear almost mutually exclusive. However, none of the concepts Foucault develops and mobilises are very precisely defined and many of them evolve throughout his work. That being said, it can nevertheless be observed from Foucault's texts that the question of death appeared to preoccupy him throughout his career.

The significance of death for Foucault is evident already in his work on archaeology of discourse-knowledge. During this period, the question of death is most thoroughly discussed in *The Birth of the Clinic*, at the beginning of

61 ibid.

62 Deborah Davis and Kim Walker, "Towards an 'Optics of Power': Technologies of Surveillance and Discipline and Case-Loading Midwifery Practice in New Zealand," *Gender, Place & Culture* 20, no. 5 (2013): 597–612, 601.

which Foucault explicitly notes that "the book is about space, about language, and about death".[63] In this book, Foucault shows how from the Renaissance onwards, death is seen to erase all individuality, reducing everyone equally to dust. From the end of the eighteenth century, however, death no longer has this status of the final leveller but rather becomes an individuating mechanism which transforms faceless masses to particulars, unique medical cases. Foucault describes the issue:

> But the perception of death in life does not have the same function in the nineteenth century as at the Renaissance. Then it carried with it reductive significations: differences of fate, fortune, conditions were effaced by its universal gesture; it drew each irrevocably to all; the dances of skeletons depicted, on the underside of life, a sort of egalitarian saturnalia; death unfailingly compensated for fortune. Now, on the contrary, it is constitutive of singularity; it is in that perception of death that the individual finds himself, escaping from a monotonous, average life; in the slow, half-subterranean, but already visible approach of death, the dull, common life becomes an individuality at last; a black border isolates it and gives it the style of its own truth.[64]

These ideas are also discussed in *Death and the Labyrinth*[65] and "Language to Infinity"[66] as well as *The Order of Things.* Then, in the first volume of *History of Sexuality*, Foucault approaches the issue of death from a different perspective, focusing on power relations that shape individuals in society. A shift from sovereignty to modernity introduces more subtle ways of exercising power over populations. Among these new ways of governing, death is reserved a place not as a final legitimisation of sovereign power, as a demand for death by dying in a war for the sovereign, but as a demand for certain kind of life. Death is brushed to the sphere of privacy and becomes the only thing that is really an individual's own. Finally, death, in the Foucauldian sense, can be understood as a condition for a certain mode of subjectivity, essentially how does the subject relate to its own death. An example of this is a Stoic exercise of death meditation (*meletē thanatou*), the purpose of which is to "test" oneself as being at the point of dying which allows to look back at one's life as a whole. This exercise does not mean imagining future scenarios of dying, but

63 Michel Foucault*, The Birth of the Clinic: An Archaeology of Medical Perception*, trans. A. M. Sheridan Smith. (London: Routledge, 2003), ix.

64 Foucault, *The Birth of the Clinic*, 171.

65 Michel Foucault, *Death and the Labyrinth: The World of Raymond Roussel*, trans. Charles Ruas (New York: Continuum, 2007).

66 Michel Foucault, "Language to Infinity," in *Language, Counter-memory, Practice: Selected Essays and Interviews by Michel Foucault*, ed. Donald F. Bouchard, trans. Donald F. Bouchard and Sherry Simon (New York: Cornell University Press, 1977).

it aims to grasp the value of the present and furthermore, memorise life in order to reveal it as it is.[67]

Finally, Foucault explored the topic of death in relation to forms of resistance, namely through the notion of suicide. In *The Will to Knowledge*, Foucault refers to Aristotle's idea of the human being as an animal with the additional capacity of political existence. However, according to Foucault, modern man is rather an animal, not only capable of political existence, but also of political death.[68] As sovereign power takes upon itself the right to kill, the biopolitical regime takes the effective preservation of life as its object. From this premise, Foucault formulates an idea of suicide as resistance against the biopolitical form of power.[69] However, as Ben Golder notes, Foucault's mobilisation of such rhetoric is also an attempt to "harness rights discourse in order to help construct everyday and very personal resistances to biopolitical rule."[70] Instead of staying with the liberal formulation of the issue, such as debating the right to euthanasia on the state–individual axis, Foucault attempts "to play the game of rights" by using "the game of rights to inaugurate a different game, with a different mode of relation to life."[71]

This interpretation of playing the game against the game itself opens an important topic from the perspective of this thesis: deploying rights tactically and deploying rights strategically. When Foucault poses his provocative claim for a "right to suicide", this rights claim functions as "a vehicle for a contrary imagining of death ... which, in turn, asks us to think about the value of the life which precedes it."[72] His mobilisation of "a right to death" is tactical, in the sense that it is instrumental and aims to achieve something else than being concretely granted such a legal right by the state. However, claiming such a right can also be seen as strategical, in the sense of engaging and contesting wider formations of power: contemporary biopolitics. As Golder notes, in this context, "rights are the tactic called in aid of the strategy of an aesthetics of existence."[73]

In this thesis, my discussion of death in Foucault's texts is mostly narrowed down to the specific issue of confession. The relation between death and confession has also been less discussed within Foucauldian theory and it is, admittedly, easy to bypass,

---

67 Michel Foucault, *The Hermeneutics of the Subject: Lectures at the Collège de France 1981–1982*, ed. Frédéric Gros, trans. Graham Burchell (New York: Palgrave Macmillan, 2005), 479-480.

68 Foucault, *The Will to Knowledge*, 143.

69 For a detailed discussion on the suicide as resistance, see Julian Reid, "Biopolitics," in *Critical Studies of the Arctic: Unravelling the North*, eds. Marjo Lindroth et al. (Springer International Publishing AG, 2022).

70 Ben Golder, *Foucault and the Politics of Rights* (Stanford: Stanford University Press, 2015), 129.

71 Golder, *Foucault and the Politics of Rights*, 129-130.

72 Golder, *Foucault and the Politics of Rights*, 137. See also Michel Foucault, "The Simplest of Pleasures," in *Foucault Live: Collected Interviews, 1961–1984,* trans. Lysa Hochroth and John Johnston, ed. Sylvère Lotringer (New York: Semiotext(e), 1996).

73 Golder, *Foucault and the Politics of Rights*, 138.

because Foucault, too, seems to have dealt with it only as if in passing. However, *The Confessions of the Flesh* elaborates on these connections. The analysis presented there opens a way to form an understanding of confession that is fundamentally intertwined with the notion of death and also a form of practice that can be deadly. This connection between confession and death is discussed especially in article IV from symbolic and theoretical as well as practical perspectives that relate to these concepts. The symbolic connection between confession and death is touched upon already in articles I and III, where confession is discussed essentially as representation of death in the context of Christianity. However, these articles mainly focus on confessional practices that have become detached from their original point of reference and transformed into a technology that can be found in society at large.[74] This symbolic element is then elaborated by analysing it together with discussion presented in *The Confessions of the Flesh* in article IV, contributing to Foucauldian theoretical discussions. The practical connection between confession and death is introduced in article IV for the first time. While this connection relates to the symbolic and theoretical dimensions introduced before, it also illustrates how the issue is not only of theoretical importance. On the contrary, confessional practices result in concrete consequences in the field of EU asylum law, analysed in article IV.

Andrea Teti's analysis of the conflation between the concepts of avowal (*aveau*) and confession is significant here. According to Teti, the concepts are distinct, avowal being more closely associated with judicial procedures while confession usually refers to a sacramental practice.[75] However, from Foucault's use of these concepts, as well as their different reference points, emerges "a specific configuration of power relations rooted in a particular articulation of confession with the avowal in which the avowing subject's normalization is undermined"[76] *by a subjectivity already and necessarily marked by deviant, stained nature*. From this premise, two subject positions essential to the confessional technology can be distinguished: the Self that is pure and normal, and the deviant Other that is pathological and in need of being emancipated. In the sacramental form of confession, this division can be described as one between the sinner and the one who turns toward God and away from the world of sin. However, the concept of "original sin" turns the position of a sinner into an ontological *a priori*. Such *a priori* deviancy is fundamental to the operation of a confessional economy of power because it sets in motion a mechanism where such economy will inevitably fail in emancipating the Other, and this failure will

74 A signature method for Foucault was to take an institution, such as the prison, and detach its methods of operation from their institutional context. By taking this kind of external perspective on institutions it was possible to apply these findings to other contexts, in order to see where else in society do these institutions have history and how these methods are used in these other contexts. See Foucault, *Security, Territory, Population*, 122-124.

75 Teti, "Rethinking Confession," 228.

76 Teti, "Rethinking Confession," 216. Emphasis added.

continually reproduce the system itself. This economy of power, or system, will be later addressed in more detail in reference to the concept dispositive.

In the context of the asylum process, the division between the Self and the Other takes essentially the form of claims being true or false. From this premise, responsibility is assigned to the emancipating Other, the "fraudulent" applicants. In other words, asylum seekers must "tell the truth" in order to be granted asylum, and their "failure", which in fact is the failure of the confessional dispositive, results in their deportation. The failure reinstates the dispositive: asylum applications should be rejected, because most of the applicants are "bogus asylum seekers", and the high rejection rates further validate this conclusion.[77] Moreover, a failure to comply with the truth demands of the process will result in deportation to conditions that can be deadly.

77 Carol Bohmer and Amy Shuman, *Political Asylum Deceptions: The Culture of Suspicion* (Cham: Palgrave Macmillan, 2018).

3 Methodology

3.1 Critical close reading

The method of this research could be termed as *critical close reading of legal cases*. Close reading is a method used traditionally in literature research, and it also comes close to discourse analysis. In the literature context, a method of close reading sometimes refers to the study of individual words, the syntax, the order in which the sentences unfold ideas, as well as formal structures. In discourse analysis, for its part, the "analyst is interested in the ways in which (legal) texts (and practices) produce ... 'facts' and 'norms' as well as the ways in which they construct reality in general".[78] The method applied in the articles of the thesis is somewhat different from these notions. This method is essentially an approach that aids to illuminate the *subtext* of the legal cases. The study of subtexts is not unfamiliar to legal research either. As Gareth Davies notes in relation to significance of doctrinal legal research: "the legal researcher can unpack the meaning of words and reveal their subtexts and the interests they represent, without needing to quantify their consequences".[79]

However, the method applied in this thesis presents a branch of legal theory where legal cases are not analysed from a purely "internal" point of view (from the perspective of internal coherence of legal system, for example), from the point of view of their consequences in society (as could be the case in sociological or empirical study of law) or mainly from the point of view of legal philosophy. In this thesis, the legal cases are analysed by reading them against certain works of Foucault. In this vein, Samuli Hurri notes how "Foucault explains what the cases do not explain, but what nonetheless is present in the cases".[80] In order to highlight how such method can be used in ways that share a similar premise, but are nonetheless different, I will introduce two texts more thoroughly: *Birth of the European Individual*: *Law,*

78 Kati Nieminen, "The Law, the Subject and Disobedience: Inquiries into Legal Meaning-Making" (PhD diss., University of Helsinki, 2017), 8.

79 Gareth Davies, "Taming Law: The Risks of Making Doctrinal Analysis the Servant of Empirical Research" in *The Politics of European Legal Research: Behind the Method*, eds. Marija Bartl and Jessica C. Lawrence (Cheltenham: Edward Elgar, 2022). See also Cass Robert Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review* 144, (1996): 2021-2053; Wibren van der Burg, "The Expressive and Communicative Functions of Law, especially with Regard to Moral Issues", *Law and Philosophy* 20, (2001): 31–59.

80 Samuli Hurri, *Birth of the European Individual: Law, Security, Economy* (Oxon & New York: Routledge, 2014), 16.

Security, Economy by Hurri and *Private Selves: Legal Personhood in European Privacy Protection*[81] by Susanna Lindroos-Hovinheimo.

Hurri's book *Birth of the European Individual* is committed to Foucauldian philosophy, both in terms of method and theoretical discussion. There Hurri notes, however, how the method of close reading does not mean that some theories taken from Foucault are read into the cases. On the contrary. The method of close reading consists of reading the cases over and over again, looking for "signs passing by relatively quickly".[82] What happens is that "in a meticulous close-reading of the cases ... the pull of these hardly perceptible signs grows with every reading. These signs start to work as references to the *subtexts* of the cases".[83] But why are there these kinds of subtexts to legal cases? Hurri explains that while the practice of law is an exercise of power over individuals, it is also an exercise of power in relation to the other members of the general field of power. While these other members, regimes and apparatuses are connected to the juridical structures, they do not always work together. Rather, they often work against each other. The powers present in the legal cases are, by nature, *antijuridical*. For this reason, the signs of these other powers remain subtextual.[84] By searching for these signs, it is possible to form an understanding of the workings not only of juridical power, but also of other forms of societal powers and their encounters with the legal system. Moreover, it is possible not only to examine the ways in which law operates or how legal agents understand their own actions, but also to assess the self-understanding and operation of other societal powers. After all, it is the legal context where these issues have become problematic.[85]

Then, in *Private Selves*, Lindroos-Hovinheimo shows through analysis of case law and applied theoretical framework the underlying assumptions and expectations of European privacy protection as deeply individualistic and embedded in liberal thought. In the beginning of the book, Lindroos-Hovinheimo explains how "the philosophical roots of the study lie in the deconstruction of the subject in late-modern philosophy".[86] More specifically, this refers to the ways in which Foucault questioned subjectivity in his hermeneutics of the subject and in deconstruction of prevailing patterns of thought as developed by Jacques Derrida. In this way, subjects, ideas and practices can be understood and analysed as historically constructed and

81 Susanna Lindroos-Hovinheimo, *Private Selves: Legal Personhood in European Privacy Protection* (Cambridge: Cambridge University Press, 2021).

82 Hurri, *Birth of the European Individual*, 17.

83 ibid.

84 Hurri, *Birth of the European Individual*, 18.

85 See, e.g., Samuli Hurri, "Cosmology and the Practices of the European Union," *No Foundations – An Interdisciplinary Journal of Law and Justice* 17, (2019): 118-138.

86 Lindroos-Hovinheimo, *Private Selves*, 34.

produced,[87] and moreover, the ideological underpinnings of such production can be laid bare. In *Private Selves*, an understanding of the ways in which European courts (the ECtHR and the CJEU) appear to conceptualise the legal subject of privacy is formulated, and moreover "how the individualising practices of the self are becoming normalised by various aspects of privacy law".[88] However, this understanding does not stem only from what could be termed as a methodological approach of the book (namely work of Foucault and Derrida), but also its theoretical framework comprising the readings of authors such as Jacques Rancière, Roberto Esposito and Jean-Luc Nancy.

In *Private Selves*, Lindroos-Hovinheimo also raises the question of psychoanalysis, referring to Derrida's diagnosis of the situation: psychoanalytic thinking has not found its way into law.[89] What Derrida specifically refers to is the unconscious, something that "legal thinking has not been able – or willing – to acknowledge ... nor to think through the consequences".[90] Whereas *Private Selves* mostly focuses on the consequences of understanding human experience as always affected, at least to some extent, by the unconscious instead of treating individuals as autonomous and always in control of themselves, the idea of the unconscious could be extended to the analysis of legal cases as well. Perhaps there is a kind of unconsciousness to the cases. For example, Kent D. Palmer has noted that the text's unconsciousness rises from its artefactual characteristics and thus "the text itself becomes a general economy of contexts, situations, milieus, and in general metasystems of signification and meaning *beyond the intent*".[91] Understood this way, close reading of legal cases is necessarily more than analysis of the will of the legislator and how this will is being realised in legal praxis. It is precisely a manner of interrogating what the text does, but what it appears to be unaware of.

Both Hurri and Lindroos-Hovinheimo adopt a similar approach to analysing legal cases through certain philosophical notions and frameworks. In both texts, the authors describe the cases in more detail than what is perhaps usual in legal analysis other than specific case commentaries. Whereas a "common" way of discussing case law is to present the established principle or otherwise, quite concisely, refer to the relevant elements of the case, the method of close reading opens up what ordinarily stays hidden in the cases. Whereas argumentation presented by the parties and the courts, how this argumentation could have looked different, and the consequences and implications of the cases are discussed, these elements are

87 ibid.

88 Lindroos-Hovinheimo, *Private Selves*, 5.

89 Jacques Derrida and Bernard Stiegler, *Echographies of Television: Filmed Interviews*, trans. Jennifer Bajorek (Cambridge: Polity Press, 2002), 98.

90 Lindroos-Hovinheimo, *Private Selves*, 30.

91 Kent D. Palmer, "Intratextuality: Exploring the Unconscious of the Text" (working paper, Archonic.net, 2002), http://archonic.net/Lx01a14.pdf. Emphasis added.

not interpreted primarily from the internal perspective of law but they are read through different philosophical accounts. Although the contributions of Hurri's and Lindroos-Hovinheimo's books are obvious in terms of legal scholarship, this philosophically inspired close reading of legal cases also discusses and develops further the philosophical and theoretical traditions they are connected to.

Mobilisation of political theories or philosophical thinking is indeed a central element of close reading. While the application of theories aids to illuminate the subtextual elements of the cases, the hidden underside of law as in *Birth of the European Individual*, such application also makes visible the ideological structures behind law, as in *Private Selves*. However, the methods and theories applied affect the researcher as well. Reading cases through Foucault's writings produces different outcomes than reading cases through Karen Barad's work, for example.[92] Ontological and epistemological commitments of certain philosophical works set their limitations on the ways in which said work can be mobilised, although attempts to bring together the work of authors who represent different philosophical positions is not uncommon. A good example is Elizabeth Grosz's work, where the fundamental basis is a combination of Luce Irigaray's and Gilles Deleuze's philosophies.[93] However, Grosz's work combining these very different ontological premises for the purpose of reading Darwin and evolution theory is also a good example of the ways in which such method can at times appear quite confusing. It can be reasonably argued that Irigaray's consciousness-based dual-ontology is not compatible with Deleuze's conceptualisation of ontology as continuous individuation and de-individuation of substance.[94] This contradiction leads to a situation where Grosz is often explaining biological "facts" through philosophical concepts, namely "irreducibility of gender" as presented by Irigaray, and these "facts" are also taken as a confirmation of the idea of gender difference. In many ways, such application of theories easily seems deliberate. This notion relates closely to the danger of reading Foucauldian theories into cases that Hurri warns against.

So far, I have described the method on a general level, comparing it to other accounts. While my approach is very similar to the ones applied in *Birth of the European Individual* and *Private Selves*, it is also somewhat different. First of all, all articles of the thesis have essentially the same structure. In the articles, the discussed cases are first described in detail, focusing not only on the decision of the court but also, and to an even greater extent, on the facts. In other words, whereas the main

92 On analysis of legal cases through new materialist theoretical framework, see Juho Aalto, "BinaryTech in Motion: The Sexgender in the European Court of Human Rights Jurisprudence," *Leiden Journal of International Law* (2024). Advance online publication. https://doi.org/10.1017/S0922156524000141.

93 See, e.g., Elizabeth Grosz, *Becoming Undone. Darwinian Reflections on Life, Politics, and Art* (Durham & London: Duke University Press, 2011).

94 See Tuija Pulkkinen, "The Role of Darwin in Elizabeth Grosz's Deleuzian Feminist Theory: Sexual Difference, Ontology, and Intervention," *Hypatia* 32, no. 2 (2017): 279-295.

interest in working with cases is often to concentrate on the *ratio decidendi,* here the focus is on *obiter dicta*. As described above, this makes it possible to illuminate what underlies the cases, but what is less obvious and usually bypassed quite quickly or even goes unnoticed. In all four articles, the description of the cases is followed by analysis where the cases are read through Foucauldian notions. Philosophical and legal analyses thus inform our understanding of why certain powers and technologies operate the way they do in the legal cases analysed in this thesis.

Against the backdrop of the method of close reading described above, one might still wonder: what is the critical element to it? Isn't all research at the doctoral level expected to be "critical"?[95] As the critical approach is central to this work, some words of elaboration are in order here. Kaarlo Tuori writes about the position of legal researcher as follows: "a critical legal scholar herself belongs to the law, how dangerous a supplement she might ever be, and her critique is inevitably critique in the law".[96] When one writes about law, they at the same time contribute to the law, affirm it and recreate it. Similarly, when one writes about law, they acknowledge its significance and power, at least to some extent. If one did not believe in law, they would not write about it in the first place. Therefore, a critical approach to law is always critique from within. However, critique and criticism are not necessarily the same thing.

Panu Minkkinen notes that, in common usage, the expression "critical" often refers to a practice of "criticism",[97] something that Theodor Adorno would describe as "judging intellectual phenomena in a subsumptive, uninformed and administrative manner and assimilating them into the prevailing constellations of power which the intellect ought to expose".[98] This type of criticism can thus appear simplistic, deliberate or "subjective". However, the point of critique, according to Joan Scott, "is not to tear down or destroy but, by bringing to light the limits and inconsistencies that have been studiously avoided, to open up new possibilities, new ways of thinking about what might be done to make things better". [99] Understood in this way, the point of criticism – unlike that of critique – would be to destroy the opponent's argument. Contrasting these two notions, Bal Sokhi-Bulley notes that

> Critique re-reads and re-considers the claims of a discourse, searching for what is authentic in it. Before uncovering the power relations within the discourses

95 Panu Minkkinen, "Critical Legal 'Method' as Attitude," in *Research Methods in Law*, eds. Dawn Watkins and Mandy Burton (Oxon: Routledge, 2017), 119.

96 Kaarlo Tuori, "Law, Power and Critique," in *Law and Power. Critical and Socio-Legal Essays*, eds. Kaarlo Tuori, Zenon Bankowski and Jyrki Uusitalo (Liverpool: Deborah Charles Publications, 1997). See also Kaarlo Tuori, *Critical Legal Positivism* (Aldershot: Ashgate, 2002), 285-286.

97 Minkkinen, "Critical Legal 'Method' as Attitude," 120.

98 Theodor W. Adorno, "Cultural Criticism and Society," in *Prisms*, trans. Shierry Weber Nicholsen and Samuel Weber (Cambridge, MA: MIT Press, 1984), 30.

99 Joan Wallach Scott, "Introduction: Feminism's Critical Edge" in *Women's Studies on the Edge*, ed. Joan Wallach Scott (Durham, NC: Duke University Press, 2008), 7.

> that regulate and govern us, critique re-asserts the importance of the said discourses. Critique is, therefore, far from negating. It does not dismiss, reject or refute its object. It cannot, since by re-reading it must affirm the object.[100]

We thus return to Tuori's conceptualisation of the legal scholar as inevitably intertwined with law. My relation to law is, and has been for a long time, quite volatile. The approach I have taken in this thesis does not emanate from a place of constructive feedback or ideas for improvement. Instead, my approach has most often emanated from the feelings of injustice, and frankly, anger. And still, already these words give away my commitment to the very thing they aim to critique: law and justice.

Perhaps it could be said that while criticism aims to destroy the opponent's argument, critique rather curiously inquires. However, we need a more precise definition of "curiosity". Curiosity as a central critical element does not mean distancing oneself artificially from the research but rather is a characteristic that evokes "care", as Sokhi-Bulley explains, citing Foucault:

> Curiosity is a vice that has been stigmatised in turn by Christianity, by philosophy, and even by a certain conception of science. Curiosity is seen as futility. However, I like the word; it suggests something quite different to me. It evokes the care one takes of what exists and what might exist; a sharpened sense of reality, but one that is never immobilised before it; a readiness to find what surrounds us strange and odd; a certain determination to throw off familiar ways of thought and to look at the same things in a different way; a passion for seizing what is happening now and what is disappearing; a lack of respect for the traditional hierarchies of what is important and fundamental.[101]

To this, Sokhi-Bulley adds that the critical attitude allows us essentially to think differently; to be curious about the claims that rights make and ask what else do rights do.[102]

Different levels of critique can be found in my approach. First, my engagement with the topics and theoretical frameworks of this thesis is a form of critique in the sense that my aim is to contribute to those discussions by thinking with them and putting these concepts and systems of thought into action. It is "labour of love",

100 Bal Sokhi-Bulley, *Governing (Through) Rights* (Oxford & London: Hart Publishing, 2016), 7.
101 Michel Foucault, "The Masked Philosopher," in *Ethics: Subjectivity and Truth*. *Essential Works of Foucault, 1954-1984, Vol. 1*, ed. Paul Rabinow, trans. Robert Hurley (London: Penguin, 2000), 325.
102 Sokhi-Bulley, *Governing (Through) Rights*, 7.

as Sara Ahmed would put it.[103] Second, the approach of the thesis does not claim neutrality or objectivity, certainly it does not just describe the state of the world as it is. As noted by Marija Bartl, Pola Cebulak and Jessica C. Lawrence,

> Legal scholars have arrived at the question of method at a point in human history when the concept of the "objectivity" of academic research, from the humanities to the hard sciences, has already suffered many blows. They have discovered that there is no neutral, objective ground from which the researcher can operate. Instead, facts seem to be always socially constructed, and researchers always the products of their professional and personal environments.[104]

Moreover, "methods not only reflect, filter and naturalise the social order, but actively construct that order as they invite us to perceive and interpret the world in line with their in-built conceptual frameworks".[105] Mobilising theoretical and methodological frameworks is necessarily an intervention and thus partakes in the creation of the world as well. In this thesis, I have tried to be open about my commitments, on a theoretical and methodological level, acknowledging that "choosing" a certain methodological framework necessarily means the exclusion of others. Adopting a methodology is itself claiming a correct way of looking at whatever is the topic of research, imposing its own kind of machinery in place of the object of critique and in relation to previous scholarly work.[106]

Bartl, Cebulak and Lawrence have identified four axes of methodological struggle, one of them being the "politics of questions". This kind of methodological approach is to "ultimately ask whose problems, concerns and voices matter and should matter, challenging some of the deep structural asymmetries that have come to dominate academic discourse".[107] This type of approach perhaps seems familiar to scholars identifying with critical legal research. Sometimes this kind of critical approach is understood as having some kind of an activist interest; critical approach does not only describe but rather, reveals, exposes, intervenes and perhaps changes something in the world, often raising certain suspicions in the eyes of the legal orthodoxy due to this personal and "subjective" commitment.[108] Perhaps this thesis could be described

103 Sara Ahmed, "Open Forum Imaginary Prohibitions: Some Preliminary Remarks on the Founding Gestures of the 'New Materialism'," *European Journal of Women's Studies* 15, no. 1 (2008): 23–39, 30.
104 Marija Bartl, Pola Cebulak and Jessica C. Lawrence, "Introduction to The Politics of European Legal Research," in *The Politics of European Legal Research: Behind the Method*, eds. Marija Bartl and Jessica C. Lawrence (Cheltenham: Edward Elgar, 2022), 3.
105 Bartl, Cebulak and Lawrence, "Introduction," 4.
106 Sokhi-Bulley, *Governing (Through) Rights*, 143.
107 Sokhi-Bulley, *Governing (Through) Rights*, 7.
108 Minkkinen, "Critical Legal 'Method' as Attitude," 120.

like that as well. More than that, I would suggest understanding this work as a form of *problematisation*. As Foucault notes in an interview

> It is true that my attitude isn't a result of the form of critique that claims to be a methodical examination in order to reject all possible solutions except for the one valid one. It is more on the order of "problematisation" – which is to say, the development of a domain of acts, practices, and thoughts that seem to me to pose problem for politics.[109]

My central interest in this thesis has been to interrogate the problem sexuality poses not only to politics, but also to law. Therefore, let us still address the element of problematisation in my methodological framework.

3.2 Problematisation

Methodologically, Foucault's work is often associated with discourse analysis. However, discourse analysis as a method, at least the way it is usually described and practiced, is not necessarily very close to the methods Foucault applied in his work. Foucault's conceptualisation of a discourse varies throughout his *oeuvre*. In fact, Foucault's consideration of the concept of discourse is especially illuminating in showing how the focus of his work shifted through the periods of his work. These periods are usually considered to consist of the "archaeological" period (in the 1960s), the "genealogical" period (in the 1970s) and the "ethical" period (in the 1980s). Especially in *The Archaeology of Knowledge*, which in a way summarises Foucault's work of the 1960s, discourse appears to hold a central position in itself. In volume 1 of *The History of Sexuality*, also a certain kind of culmination point of Foucault's work in the 1970s, discourse is rather considered as one element of a broader framework that is now centred around the question of power relations. However, it should be noted that, already in *The Archaeology of Knowledge*, discourse does not presuppose a subject nor is it necessarily a practice through which "reality" is constructed in general. Foucault's work on the concept can be seen essentially as a way to interrogate the production of knowledge. Understood this way, discursive regularities rather give *statements* their status, in other words, what is considered coherent and credible.[110]

As noted above, Foucault would eventually describe his project as one focused not on what issues arise from certain problems, but rather on why have those societal issues become problems in the first place. This way, we could think that during a

109 Foucault, "Polemics, Politics, and Problematizations," 384.
110 Foucault, *The Archaeology of Knowledge*, 98–99 and 182–183.

certain period of time, in a certain societal context, some phenomenon becomes a problem. It might not have been a problem before, but then something happens and this phenomenon is problematised. Often various solutions to the discovered problem are proposed, and some of them are contradictory. Is this the method of problematisation then? Revealing how something in the society becomes a problem and starts to be treated with different solutions? Foucault explains that the purpose of his work is "to rediscover at the root of these diverse solutions the general form of problematisation that has made them possible – even in their very opposition".[111] In other words, problematisation is not so much about expressing certain difficulties, but problematisation "develops the conditions in which possible responses can be given; it defines the elements that will constitute what the different solutions attempt to respond to".[112] Therefore, problematisation, in Foucault's register, is not pointing out historical problems, and it is neither something done explicitly by the researcher. Study of problematisations is studying the ways in which something becomes a problem and how boundary conditions for this problem are being developed through this process.

However, later, problematisation has taken on another meaning. In this vein, problematisation can be considered precisely as something that the researcher does; it is the researcher who problematises something that was not previously considered problematic. For example, when asked about problematisation in the Foucauldian sense in an interview, Thomas Lemke sees it as a possibility to go further, "not only to start with something that is already visible as a problem, but to begin with something that doesn't seem to be a problem at all".[113] Problematisation, in this sense, is rather inquiring into what appears rational or self-evident and illustrating the effects of power in that taken-for-granted phenomenon. In this vein, Bröckling et al. note how problematisation is "an angle of view, a manner of looking, a specific orientation".[114] Or, as Marjo Lindroth and Heidi Sinevaara-Niskanen put it: "Problematisation is a matter of interrogating the familiar and making it strange".[115]

Problematisation, in the context of this thesis, has elements from both approaches. It is a way of interrogating a certain formation into a problem from the perspective of what (legal and political) purposes that specific formulation of a problem serves,

111 Foucault, "Polemics, Politics, and Problematizations," 388-389.

112 ibid.

113 Thomas Lemke, "Foucault Today: An Interview with Thomas Lemke," interview by Stéphane Baele, *Emulations* 1 (2008): 46-51, 50.

114 Ulrich Bröckling, Susanne Krasmann and Thomas Lemke, "From Foucault's Lectures at the Collège de France to Studies of Governmentality: An Introduction," in *Governmentality: Current Issues and Future Challenges*, eds. Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (New York: Routledge, 2010), 15.

115 Marjo Lindroth and Heidi Sinevaara-Niskanen, "Introduction: Alternative Lenses on the Arctic," in *Critical Studies of the Arctic: Unravelling the North*, eds. Marjo Lindroth, Heidi Sinevaara-Niskanen and Monica Tennberg (Cham: Palgrave Macmillan & Springer Nature Switzerland AG, 2022), 5.

with what powers it appears to be compatible and what powers it works against. This would, I think, come close to the way in which Foucault describes his project as a study of historical forms of problematisations. However, just as the critical legal scholar is not an outsider to the law, neither is the Foucauldian scholar an outsider to the forms of problematisations. The researcher necessarily participates in the problematisation of a certain phenomenon by researching it, even though the aim could be the opposite (such as "normalising" certain issues). And finally, perhaps a new problem appears in the form of a thesis.

Therefore, one must proceed with caution. Interrogating the familiar and illuminating its inconsistencies, strangeness and exclusiveness, problematising the cases, brings with it a dark underside. The legal cases I discuss are often ones where the sexual minorities "won", so to say. Moreover, these cases are often considered landmark cases, where the evolution of the rights of sexual minorities took leaps forward, even though such an understanding has been critiqued as well.[116] In this thesis, I have analysed the cases from an angle that shows how in return for certain rights, be they small or more significant, the individuals necessarily participate in their own subjectification.[117] An interesting example, which well illustrates this practice, is described by Mark Fisher in *Capitalist Realism*.[118] Fisher describes the proliferation of auditing culture in post-Fordism, definitely not uncommon in academia. Every individual worker is required to participate in constant self-auditing, which consequently produces an endless flow of "data": how are the exams graded, how many publications does everyone produce during a certain time period, how many grants, how many projects, how many working hours, and so forth. The thing is, as Fisher notes, "much of the so-called information has little meaning or application outside the parameters of the audit".[119] Somewhat similar analysis has been presented by Sokhi-Bulley, who describes an act of measurement as a central element of rights becoming governmental. According to Sokhi-Bulley, "the implementation and enjoyment of human rights depends on being able to identify how good governance, good practice and progress in rights can be calculated".[120] Similarly to auditing of a worker's performance, also the "proper functioning" of human rights is audited constantly through a set of tools, such as surveys, reports, statistics, pictures, numbers, guidelines and charts, and the collected "data" is then being analysed and disseminated by experts. Indeed, "rights become governmental

116 See, e.g., Paul Johnson, *Homosexuality and the European Court of Human Rights* (London: Routledge, 2012). However, in addition to highlighting the gradual development of sexual rights, Johnson notes how argumentation of the ECtHR has also contributed to practices that are not very beneficial for sexual minorities.

117 Similar observations have been made by Sokhi-Bulley, *Governing (Through) Rights*.

118 Mark Fisher, *Capitalist Realism* (Winchester: Zero Books, 2009).

119 Fisher, *Capitalist Realism*, 53.

120 Sokhi-Bulley, *Governing (Through) Rights*, 15-16.

by becoming technical – they must be able to be measured and implemented into good governance strategies through a rights-based approach because this is how to do good governance".[121]

However, in addition to rendering rights technical and thus governmental, the practice of measurement appears to do something to the governed individuals as well. The "data" moulds the subjectivities to be better suited to the purposes of different technologies of power. The same could be argued regarding the subjectification that takes place in the legal proceedings discussed in the thesis. In return for certain rights, the applicants shape themselves and their experiences to be a better fit to the system that can only recognise certain types of subjects.

This view of rights as a sort of "double-edged sword" has been a topic of debate for decades. One example are the so-called rights debates (the debate on whether rights are inherently progressive or rather the opposite). Opposing the traditional legal faith in rights, it has been argued that rights struggles tend to produce politically conservative, classic liberal outcomes, and that this provides the ideological underpinning of many rights "victories".[122] More recently, critical legal scholarship has provided detailed analyses of the often counter-productive nature of rights, especially human rights, as well as envisioned ways of rearticulating and strategically mobilising the rights claims.[123] For example, in the field of human rights of sexual minorities, Anthony J. Langlois elaborately analyses the rhetoric of "universal" human rights. Such universality immediately becomes questionable – and temporally displaced – when human rights are declared to now cover even more people than before. This is especially visible in the context of queer people, when "universality" transforms into "progression"; the outcome of the "history" is already decided (we must stay on the "right side" of the history) and it is largely a question of how fast and efficiently this inevitable victory of human rights will be achieved.[124] While some states (Nordic and Western) are represented as "naturally" further ahead on the road of "progression," the liberal articulations of queer human rights come to function as yet another instrument of distinguishing the "civilised global North" from the "primitive global South." Moreover, it is also worth asking what truly alternative futures human rights

121 Sokhi-Bulley, *Governing (Through) Rights*, 16.

122 See, e.g., Carl Stychin, "*Grant*-ing Rights: The Politics of Rights, Sexuality and EU," *Northern Ireland Legal Quarterly* 51, no. 2 (2000): 281-300 and Didi Herman, "Beyond the Rights Debate," *Social & Legal Studies* 2, no. 1 (1993): 25-43.

123 Some accounts in this vein are Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing, 2018); Sumi Madhok, *Vernacular Rights Cultures* (Cambridge: Cambridge University Press, 2021); Louiza Odysseos and Bal Sokhi-Bulley, "After Rights? Politics, Ethics, Aesthetics: An Introduction," *The International Journal of Human Rights* 28, no. 8–9 (2024): 1209–1220; Kathryn McNeilly and Ben Warwick (eds), *The Times and Temporalities of International Human Rights Law* (Hart Publishing, 2022).

124 Anthony J. Langlois, "Queer Temporalities and Human Rights," in *The Times and Temporalities of International Human Rights Law*, eds. K. McNeilly, & B. Warwick (Hart Publishing, 2022).

claims can offer. According to Langlois, "the common experience of human rights is as a reporting regime for their absence, an eternal return of broken promises, as power (state and capital) routinely goes about its business, claims of justice notwithstanding."[125] Viewed this way, the human rights regime appears as a sort of hauntological entity: it exists through designation of locations where it is absent.[126]

In that vein, the formulation by Wendy Brown from the 1990s still bears repeating:

> None of this is to suggest that those without rights in a rights-governed universe should abandon the effort to acquire and use them. [Patricia] Williams and others make clear enough that such counsel, especially from white middle-class academics, is at once strategically naive and a disavowal of cultural prerogatives. But to argue for the importance of having rights where rights are currency is not yet an assessment of how they operate politically nor of the political culture they create. Rather, that argument underscores both the foolishness of walking into a pitched battle unarmed and the crippling force of being deemed unworthy of whatever a given culture uses to designate humanity.[127]

Similarly, in an interview on architecture and liberty, Foucault explains how exercise of liberty and resistance is a constant practice, instead of something that can be achieved once and for all. And while liberty and resistance can be exercised anywhere, from this does not follow that "one may as well leave people in slums, thinking that they can simply exercise their rights there".[128]

In addition to the accounts and approaches introduced above, this thesis aims for a reading of legal cases that could well be described as a dramaturgical reading. According to Bonnie Honig, "a dramaturgical approach treats the text as a performance that may succeed or fail rather than as an argument that may be true or false, right or wrong."[129] Dramaturgical reading attends to shifting contexts, circulation of information, double entendres, puns, and jokes. Moreover, "such an approach is attentive to the asymmetrical powers of different speakers, the errancy of utterance which may end up in the wrong place, the pace and trajectory of textual and historical events, the possibility of conspiracy, coded communication."[130]

---

125 Langlois, "Queer Temporalities and Human Rights," 166.

126 Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (New York: Routledge, 2006).

127 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995), 24.

128 Foucault, "Space, Knowledge, and Power," 245–6.

129 Bonnie Honig, *Antigone, Interrupted* (Cambridge; New York: Cambridge University Press, 2013), 7-8.

130 ibid.

4 Research Questions and Research Materials

4.1 Research questions and overview of the articles

As mentioned in the beginning, this thesis is a study of legal practices and power relations through which the homosexual legal subject is constituted. More specifically, it examines how the homosexual as a subject is constituted, what the elements of such subjectivity are and what purposes the constitution of the subject serves in the context of law as well as politically. This general interest is explored in the four articles of the thesis, each addressing individual research questions. The questions are the following:

- RQ1: How is knowledge about the homosexual subject produced in the context of security and what happens when this knowledge comes into contact with law, namely in the praxis of the ECtHR?

The RQ1 is answered in article I ("Confession as a Form of Knowledge-Power in the Problem of Sexuality," *Law and Critique* 32, no. 2 (2021): 195-216) and it opens the discussion on knowledge-production as intertwined with questions of power through the technology of confession. Article I addresses the discrimination of sexual minorities in the British Armed Forces as illustrated by the judgments of the ECtHR in the cases *Smith and Grady v. the United Kingdom* and *Beck, Copp and Bazeley v. the United Kingdom*.[131]

In both cases, suspicions had been raised concerning the applicants' sexual orientation, i.e. whether the applicants were homosexual. Therefore, the British Armed Forces, namely the Royal Air Force, launched investigations to find out whether the applicants were indeed homosexual. Once their homosexuality was confirmed in the investigations, the applicants were discharged from the Royal Air Force. According to the law that was in force at that time, homosexuality was no longer a criminal offence but it left the Armed Forces the possibility to classify homosexuality as a reason for discharge. According to the policy, homosexuality was considered incompatible with service in the Armed Forces. When dealing with cases of suspected homosexuality, a Commanding Officer was to make "a balanced

131 *Beck, Copp and Bazeley v. The United Kingdom* (applications nos. 48535/99, 48536/99 and 48537/99), 22.10.2002.

judgment taking into account all the relevant factors".[132] The applicants complained to the ECtHR that the investigations into their homosexuality and their subsequent discharge on the sole ground that they were homosexual, constituted a violation of their right to respect for their private lives protected by Article 8 of the ECHR.[133]

The first part of the research question is approached by analysing the techniques of knowledge-production exercised within the military context described above over service personnel through reading the facts of the cases against Foucault's texts on the thematic of confession. This is done by deploying two conceptual pairs, which I have likewise borrowed from Foucault. The analysis is carried out, on one hand, through the concepts of *ars erotica* and *scientia sexualis* as presented in *The Will to Knowledge* and, on the other hand, *exomologesis* and *exagoreusis* from the lectures *About the Beginning of the Hermeneutics of the Self*. The concepts of *ars erotica* and *scientia sexualis* aid in addressing the mechanisms of knowledge-production within the Armed Forces. The concepts of *exomologesis* and *exagoreusis* contribute to understanding of the ways in which individuals produce knowledge of themselves and thus participate in their own subjectification.

The second part of the sub-question is approached by discussing the functioning of the law as an exercise of power and its relation to other forms of power in society, namely disciplinary power as conceptualised by Foucault. This discussion is carried out by analysing the reasoning of the ECtHR in the cases mentioned above. This analysis connects to the broader theoretical discussion on the position of law in Foucault's work.[134] In this article, I argue, along the lines of Ben Golder and Peter Fitzpatrick, that law and legal rules are elastic and open, always capable of being turned around. This argument leads to a conclusion about the law's strategic reversibility, which would mean that law cannot be understood as completely subordinated by, for example, disciplinary forms of power, or, at least such an understanding would be somewhat imprecise. While law can be mobilised to discipline and govern, it could also be mobilised for resistance and emancipation. Furthermore, these effects may take place within the same judgment.

In article I, certain core concepts around which the thesis is built are introduced and tested for the first time. These include confession in its different forms, knowledge-power, disciplinary power and law's strategic features. The discussion presented sets the stage for the further development and application of these concepts in articles II, III and IV and also opens the venue towards addressing the overall research interest

132 *Smith and Grady v. the United Kingdom*, para 49.

133 *Smith and Grady v. the United Kingdom,* para 69.

134 See, e.g., Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Oxon & New York: Routledge, 2009); Paul Q. Hirst, *Law, Socialism and Democracy* (London/Boston: Allen & Unwin, 1986); Alan Hunt, "Foucault's Expulsion of Law: Toward a Retrieval," *Law and Social Inquiry* 17, no. 1 (1992): 1–38; Vanessa E. Munro, "Legal Feminism and Foucault: A Critique of the Expulsion of Law," *Journal of Law and Society* 28, no. 4 (2001): 546–567.

regarding the production of the homosexual legal subject, reasons behind such extensive practices and technologies, and the significance of these in terms of law.

– RQ2: How is the homosexual subject constituted through spatial arrangements in the praxis of the ECtHR and what are the implications of such practices for law?

The RQ2 is answered in article II ("Law, Space and Power: Spatiality in European Court of Human Rights Judgments on Homosexuality," *Gender, Place & Culture* 30, no. 11 (2023): 1509–1528). Article II continues the discussion opened in article I on the production of the homosexual legal subject as well as functioning of the law and its relation to power, especially disciplinary power. This article continues the examination of technologies of power, but the perspective shifts to their operation in and through spaces. The central interest of the article is the production of the homosexual legal subject in terms of "deviancy" in the case-law of ECtHR. Moreover, the article asks: what do these practices tell us about law?

The analysis presented in article II follows the same method applied in article I, where cases decided by the ECtHR are read against Foucault's texts. The article focuses on the formerly analysed case of *Smith and Grady* and, in addition, the cases of *Lustig-Prean and Becket v. the United Kingdom*[135] and *Laskey, Jaggard and Brown v. the United Kingdom*. The case of *Lustig-Prean and Becket* is part of the British military cases, similarly as *Smith and Grady* and *Beck, Copp and Bazeley*, discussed in article I. The case of *Laskey, Jaggard and Brown* concerned sadomasochistic acts between forty-four men in total.[136] The police had found film material of said acts. As a result, the applicants were charged with a series of offences, including assault and wounding, relating to the sadomasochistic activities that had taken place over a period of ten years. These activities were consensual and were conducted in private. Video cameras were used to record the events and the tapes were copied and distributed amongst members of the group.[137] The applicants claimed that their prosecution and convictions for assault and wounding was in breach of Article 8 of the ECHR, right to respect for private life.[138] According to the applicants, the sadomasochistic acts were all done willingly between adults, were carefully restricted and controlled, and the acts were not witnessed by the public. Neither did the acts cause any serious or permanent injury.[139]

135 *Lustig-Prean and Becket v. the United Kingdom (*applications nos. 31417/96 and 32377/96), 27.9.1999.
136 *Laskey, Jaggard and Brown v. the United Kingdom* (applications nos. 21627/93, 21628/93 and 21974/93), 19.2.1997, para 8.
137 *Laskey, Jaggard and Brown v. the United Kingdom*, para 9.
138 *Laskey, Jaggard and Brown v. the United Kingdom*, para 35.
139 *Laskey, Jaggard and Brown v. the United Kingdom*, para 38.

The elements of these cases are elaborated and analysed through Foucauldian concepts related to space: *panopticon*, mostly discussed in *Discipline and Punish*, and *heterotopia*, described by Foucault in his lecture "Of Other Spaces". The discussion is carried out against the backdrop of theorisation on the public/private dichotomy, the concept of "deviancy" and related feminist and queer accounts.[140] By discussing these spatial concepts in the context of legal cases and with the public/private dichotomy as a reference point, the article illustrates how production of the homosexual legal subject is rooted in the idea of the "deviant", which one must not become and which one must be wary of. In order to protect society and individuals belonging to sexual minority themselves from this deviancy, extensive methods of discipline, governing and exclusion are mobilised. In other words, production of the homosexual as "deviant" is an essential element of producing the homosexual legal subject to be governed.

Moreover, the article demonstrates the artificiality, or rather obfuscation and intertwinement, of the public/private dichotomy that has nevertheless been a crucial part of the ECtHR's approach to cases concerning rights of sexual minorities. In this process, also law's relation to disciplinary power can be seen as diffuse. Spatial analysis allows to conceptualise discipline and law as reflections of one another, specifying how law and discipline often work together in certain historical, societal and strategic contexts.

– RQ3: How is the "truth" about homosexuality constituted through legal proceedings, what kinds of subjectivities are produced in the process, and what can these issues tell us about the law itself?

The RQ3 is answered in article III ("'The Truth of Oneself': Governing Homosexual Asylum Seekers Through Confession," *Law, Culture and the Humanities*, accepted for publication). Whereas article I addressed operation of confessional practices in the context of security while observing what happens when the "truth" produced through such practices comes into contact with law, now the focus is on law specifically and the ways in which law itself participates in these practices. Article III again discusses the formation of the homosexual legal subject, demonstrating how this subjectification is essentially a practice based on and carried out by truth-acts. In this article, too, it is further shown that confession appears to be the central technology to mediate these practices.

140 See, e.g., Gillian Rose, *Feminism and Geography: The Limits of Geographical Knowledge* (Minneapolis: University of Minnesota Press, 1993); Gill Valentine, "Queer Bodies and the Production of Space," in *Handbook of Lesbian and Gay Studies*, eds. Diane Richardson and Steven Seidman (London: SAGE Publications, 2002); Michael P. Brown, *Closet Space: Geographies of Metaphor from the Body to the Globe* (London: Routledge, 2000); Diana Fuss, *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991).

However, in article III, the context changes. From now on, the analysed cases come from the CJEU. These judgements concern asylum seekers who belong to sexual minorities, i.e. persons who are seeking asylum on grounds of sexual orientation and claim to have been persecuted on grounds of their homosexuality in their country of origin. In article III, two cases are analysed: *F v. Bevándorlási* és Állampolgársági *Hivatal* and *A and others v. Staatssecretaris van Veiligheid en Justitie*.[141] Both cases concern especially the assessment of credibility and therefore the interpretation of Article 4 of the Qualification Directive 2011/95/EU.[142] The essential question in these types of proceedings is to determine whether the applicant's declared sexual orientation is credible, i.e., whether the applicant is "truly" homosexual.

In case of *F*, the applicant had submitted an application for asylum to the Hungarian authorities. The basis for the application was their fear of being persecuted in their country of origin due to their homosexuality. F's application was rejected. The rejection was based on a psychologist's expert report commissioned by the Hungarian authorities, which concluded that it was not possible to substantiate F's claims of being homosexual. F then brought an action against the Hungarian migrant administration. According to F, the psychological tests seriously prejudiced their fundamental rights and were not suitable for assessing the credibility of their sexual orientation.[143] In the case *A and others*, the applicants had lodged applications for asylum in the Netherlands. They had stated that they feared persecution in their countries of origin because of their homosexuality.[144] Their applications were rejected by the Staatssecretaris as not being credible. In its judgment, the CJEU famously stated that the claim of being a homosexual constitutes "merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4".[145]

Similarly to articles I and II, also here the cases are analysed through certain works by Foucault that address the thematic of confession. While the Foucauldian theoretical framework has already been mobilised in the previous articles, and well-known reference points for confession such as *The Will to Knowledge* and *About the Hermeneutics of the Self* have been addressed, this body of work is now supplemented with notions from the *Abnormal* lectures as well as queer and post-colonial accounts relating to asylum. In article III, these texts are also analysed from a somewhat different perspective than was the case in article I. The interest in article

141 Joined Cases C-148/13–C-150/13 *A and others v. Staatssecretaris van Veiligheid en Justitie* (ECLI:EU:C:2014:2406).

142 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (the Qualification Directive).

143 *F*, paras 20-23.

144 *A and others,* para 22.

145 *A and others,* para 49.

I lies in the division between *exomologesis* and *exagoreusis* as well as *ars erotica* and *scientia sexualis* as practices that are an elemental part of confession but also explain its functioning. In article III, the issue is approached by outlining the ways in which sexuality and "truth" about sexuality become the first and foremost explanatory feature of the individual's life. Moreover, confessional practices through which such "truths" are produced can be analysed based on another division: subjection and objectivation. Whereas subjection here refers to the internalised pressure to confess, objectivation is essentially a practice to extract "truth" from the individual through a clinical examination. In this regard, article III picks up the discussion started in article I about two characters that come to serve as archetypes that represent different types of confessional practices: the priest and the doctor.[146]

Article III thus continues the discussion of the homosexual legal subject but also law's relation to other powers. Indeed, production of a homosexual "truthful" subject is production of a governable subject and, in that subject, law intersects with other forms of power. This way, the "culture of disbelief",[147] the persistent idea that applicants "really" belonging to sexual minorities are rare while the rest are mainly "bogus asylum seekers",[148] forms a basis for endless interventions into the applicant's privacy. These interventions are then justified in the decisions of the CJEU, where the understanding that asylum seekers claiming to be part of a sexual minority are unreliable as a premise is accepted. Thus, the verification of their claims is not only recommended but mandatory. The method of extracting the "truth" is a task for an expert, whose instruments are forms of observation and interrogation. As was already acknowledged in article I, "truth" about sexuality is not something an individual could produce themselves but it needs to be verified by an outside interpreter. A "truth" that is considered credible, as well as methods of extracting it, originate from different medical, administrative and judicial powers that participate in the production of a "truth"-telling homosexual subject while producing the boundary conditions for such "truth".

However, one question still remains unanswered: if the homosexual legal subject is a subject to be governed, what is it governed for? Why are all these complex games of truth necessary? This issue is addressed in article IV.

– RQ4: What purpose does the constitution of the homosexual legal subject through confessional practices serve when such constitution is considered as part of larger networks of power?

146 Foucault, *The Will to Knowledge*, 66–67.

147 See, e.g., Carmelo Danisi et al., *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity* (Cham: Springer, 2021), 312-316.

148 Magdalena Kmak, "Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through the Technology of Morality," *Social Identities* 21, no. 4 (2015): 395-409.

The RQ4 is answered in article IV ("Confession, Death and Disbelief: Interrogating the Asylum Cases of the Court of Justice of the European Union," revised version submitted to *Social Identities*, which concludes the analysis of the thesis. This article, too, discusses confessional practices, their visibility in legal and administrative practices and their position in Foucault's work. However, in article IV, the main interest is to illuminate specifically *why* these practices are visible and what their purpose is. In the focus are the ways in which the connection between truth and death materialises in asylum processes and the EU's asylum system in general. It is then argued that when the EU's asylum procedures are analysed through a truth–confession–death triad, which is rooted in suspicion and disbelief, the broader operation of the EU's asylum law and policy can be understood as a confessional dispositive.

The legal cases analysed in this article also come from the CJEU. Analysed cases are *A and others v. Staatssecretaris van Veiligheid en Justitie* and *X and others v. Minister voor Immigratie en Asiel*[149] concerning assessment of asylum applications on grounds of persecution based on sexual orientation. As mentioned above, the central question in *A and others* was the assessment of credibility and interpretation of Article 4 of the Qualification Directive. In the case of *X and others*, the applicants had applied for asylum in the Netherlands on the ground of fear of persecution because of their sexual orientation. According to the applicants, they had been subject to violent reactions by their families and entourage, or to acts of repression by the authorities in their countries of origin. In all of these countries, homosexuality was a criminal offence. However, the applications were rejected.[150]

Case of *X and others* has become a landmark case in terms of the CJEU's jurisprudence for reasons of elaborating and defining the criteria for belonging to a "particular social group", one of the elements that can lead to persecution as defined in the Qualification Directive. In *X and others*, the CJEU also concluded that the fact that homosexual acts are criminalised in the applicant's country of origin does not by itself constitute persecution and is therefore not a reason to grant asylum. This observation opens a way to look at the methods used by the migrant administration to assess the credibility of the applicant's sexual orientation in line with confessional practices. In this article, it is also illustrated how confessional practices aid in negotiating the risks and consequences that follow from rejecting the application. In other words, how likely is it that the applicant will face serious harm or death in their country of origin.

Indeed, the Foucauldian framework mobilised in article IV concentrates especially on confession and its relation to death. Here we return to the notions of *exomologesis*

149 Joined Cases C-199/12–C-201/12 *Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel* (ECLI:EU:C:2013:720).
150 *X and others,* paras 23-27.

and *exagoreusis*, addressed especially in Foucault's *About the Beginning of the Hermeneutics of the Self* lectures, but also in the *Confessions of the Flesh*, the fourth volume of *History of Sexuality* series, published posthumously. The *Confessions of the Flesh* provides a more detailed analysis of the relation between confessional practices and death. On a theoretical level, article IV contributes to understanding confession as a spiritual and symbolic death in light of Foucault's work. On a practical level, the article contributes to the discussions on EU asylum legislation by demonstrating how the connection between confession and death reaches beyond individual cases and functions as an essential element of EU asylum policy. Moreover, the analysis in article IV illustrates how confessional practices, intertwined as they are with the notions of truth and death, are essentially mobilised through the notion of "suspicion" and within the institutional and cultural setting of "disbelief."

In a way, article IV returns to the thematic of law and security, discussed in article I. Analysis of the CJEU's legal praxis shows how in the core of EU asylum policies is not so much sovereign right to kill, but how death is nevertheless regulated and allocated in a subtler way by means of policies and legal instruments. It is argued that confession is a moralising technology which not only justifies harsh border policies, but also the ways in which people concretely die migrating. Article IV concludes by noting that while death is a symbolic element of confession when the person confessing destroys their own flesh in order to rid themselves of sin (as in *exomologesis*), or when they verbalise their thoughts to the external authority (as in *exagoreusis*), death is also a practical concern within the EU asylum framework. People are constantly dying when trying to reach Europe, and deporting them includes a risk of death as well. The confessional dispositive connects the poles of truth, confession and death, or in other words, the poles of knowledge, power and techniques of subjectification, into a network that functions by producing solutions to the problems of its own creation.

4.2 Research materials and legal context

The research questions presented above are approached through legal cases from the ECtHR and the CJEU. Altogether seven judgments are analysed, all of which are related to the right to respect for private and family life, enshrined both in the ECHR and the Charter of Fundamental Rights of the European Union (the Charter).[151] These seven cases were selected based on searches on both courts' open databases. In the beginning of the research process, I searched for cases that related to the application of Article 8 of the ECHR and moreover, to sexual minorities. However, this initial search was performed for another project with a quite different

151 European Union, "Charter of Fundamental Rights of the European Union," *Official Journal of the European Union C83* 53 (Brussels: European Union, 2010).

objective. Nevertheless, when going through the list of cases, something else started to emerge. As explained in the first chapter of this synthesis, this something – the surprising similarities between the cases – would continue to preoccupy me.

When the time came to draft a research plan for the thesis, I returned to these cases and moved to search also the CJEU's database with the same references, wondering whether something even remotely alike would be present there. As discussed in the articles and this synthesis, the cases seemed so similar to the ones I found first that it was striking. After the initial hypothesis had been settled, the actual selection of cases took place. Obviously, the ECtHR has many other cases relating to the application of Article 8 and sexual minorities. First three cases, all concerning dismissals of employees "found" to be homosexuals from the British Armed Forces, were eventually selected for further analysis as the operation of what would become conceptualised as confession appeared to be most clearly present there. In addition, the context of security was fitting to the original research plan, according to which I wanted to say something specifically about the relation between law and security. Although the research plan has lived and evolved throughout the process, and the topic of security turned out not to have such a privileged position in the end, selecting cases from the military context has proved a good choice. Through the cases' immediate connection to security, which nevertheless is visible in them, it became possible to develop the argument about the role of law.

Later these cases would be supplemented by the analysis of *Laskey, Jaggard and Brown*. This case was first added as an exercise of sorts. I wanted to test the possibilities of spatial analysis that would go beyond analysis of concrete places and environments, in other words, to work with space as a theoretical concept.[152] The overall objective was to study the operation of law and power through a spatial schema by applying Foucauldian concepts. *Laskey, Jaggard and Brown* is an especially fruitful case that can be meaningfully analysed from many different perspectives.[153] In article II, it is analysed together with *Smith and Grady* and *Lustig-Prean and Beckett*, which had been chosen for further analysis before. However, for quite some time, it was not very clear to me what position this experiment would eventually have in the context of the thesis. I even considered dropping it altogether. But very rarely something ends up being completely futile and "stray paths" hardly exist when it comes to research. The analysis of *Laskey, Jaggard and Brown* eventually became a crucial element in forming the argument for this thesis.

---

152 This type of approach would perhaps come close to what is presented by Andreas Philippopoulos-Mihalopoulos. However, due to quite different philosophical premises and frameworks, this branch of law and space research is not discussed at length here or in the articles. See, e.g., Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Oxon & New York: Routledge, 2015).

153 See, e.g., Jarna Petman, "Egoism or Altruism? The Politics of the Great Balancing Act," *No Foundations: Journal of Extreme Legal Positivism* 5, (2008): 113-133 and Leslie J. Moran, "Laskey v. the United Kingdom: Learning the Limits of Privacy," *The Modern Law Review* 61, no. 1 (2003): 77–84.

As mentioned above, the first three cases from the ECtHR concern dismissal of employees belonging to sexual minorities from the British Armed Forces on the basis of homosexuality being banned in the Armed Forces during that period. The applicants responded to the dismissal by starting legal proceedings on the grounds of having been discriminated based on their sexual orientation. Case of *Laskey, Jaggard and Brown* concerns sadomasochistic same-sex acts from the criminal law's perspective. In the end, the analysed cases from the ECtHR are

- *Laskey, Jaggard and Brown v. the United Kingdom* (applications nos. 21627/93, 21628/93 and 21974/93), 19.2.1997,
- *Lustig-Prean and Becket v. the United Kingdom* (applications nos. 31417/96 and 32377/96), 27.9.1999,
- *Smith and Grady v. the United Kingdom* (applications nos. 33985/96 and 33986/96), 27.9.1999 and
- *Beck, Copp and Bazeley v. The United Kingdom* (applications nos. 48535/99, 48536/99 and 48537/99), 22.10.2002.

Selection of the cases decided by the CJEU was easier. First, the CJEU does not have as extensive jurisprudence on sexual minorities to begin with. Second, when I started to go through the cases found from the database, I already had an idea of what I was looking for. From this premise, three cases were selected and, at that time, those were the only cases from the CJEU that concerned asylum applications on grounds of belonging to a sexual minority. As the confessional practices again seemed to be clearly visible in all of these cases, and the amount was quite reasonable, they all were included in this study. The analysed cases from the CJEU are

- Joined Cases C-199/12–C-201/12 *Minister voor Immigratie en Asiel v. X* and *Y* and *Z v. Minister voor Immigratie en Asiel* (ECLI:EU:C:2013:720),
- Joined Cases C-148/13–C-150/13 *A and others v. Staatssecretaris van Veiligheid en Justitie* (ECLI:EU:C:2014:2406) and
- C-473/16 *F v. Bevándorlási* és Állampolgársági *Hivatal* (ECLI:EU:C:2018:36).

In these cases, in addition to the general issue of asylum applications based on the applicant's sexual orientation, the relevant feature is the so-called assessment of credibility, in other words, assessing whether the applicant's account of their sexual orientation should be accepted as such or whether such claim can be assessed as any other kind of evidence. Moreover, it is a question of what methods are considered acceptable in the assessment of credibility of asylum applications.

In terms of relevant legal frameworks, the issue in both groups of cases relates to the abovementioned right to respect for private and family life, enshrined in Article 8 of the ECHR and Article 7 of the Charter. According to Article 8 of the ECHR:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The corresponding Article 7 of the Charter differs very slightly in formulation. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR. Indeed, Article 7 of the Charter is meant to have the same meaning and scope as Article 8 of the ECHR.[154] Obligations imposed on contracting parties under Article 8 can be negative or positive. In both the ECHR and the EU fundamental rights law, the concept of private life has a separate meaning as an autonomous concept. Based on the ECtHR's interpretation of Article 8, the concept of private life can be characterised as encompassing the physical, psychological and moral aspects of the personal integrity, identity and autonomy of individuals.[155] In terms of its scope, Article 8 is a particularly content-rich element of the ECHR. In the praxis of the ECtHR, Article 8 has come to cover issues from communication technologies to living premises (namely through the concept of "home"), various relationship arrangements and personal autonomy.[156]

Perhaps due to its capability to absorb new areas of life under its scope, Article 8 has been in frequent use in terms of contesting and developing the rights of sexual minorities under the ECHR. Paul Johnson notes that a common story told about the evolution of these rights under the ECHR is that they are the outcome of a progressive series of applications to ECtHR beginning in the 1950s with the

---

154 William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), 359.

155 David Mangan, "Article 7 (Private Life, Home and Communications) – Respect for Private and Family Life," in *The EU Charter of Fundamental Rights: A Commentary*, eds. Steeve Peers et al. (Oxford & New York: Hart Publishing, 2021), 154.

156 Maris Burbergs, "How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in which New Rights are Born," in *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, eds. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2014), 315.

demand for the recognition of "sex rights" under Article 8.[157] A landmark case in this regard is *Dudgeon v. the United Kingdom*.[158] In the case of *Dudgeon*, the ECtHR not only decided that consensual homosexual acts between adults should be free from interference by the state but also that engaging in such acts constituted a human right.[159] In the CJEU, most of the cases relating to sexual minorities have been framed in terms of a violation of Article 157 of the Treaty on the Functioning of the European Union (TFEU)[160] concerning equal pay for men and women or through directives on equal treatment.[161] However, the cases concerning asylum seekers belonging to sexual minorities have been approached precisely through Article 7 of the Charter.

In addition to Article 7 of the Charter, the thesis addresses the application of the Qualification Directive, especially its Article 4, concerning the assessment of facts and circumstances. Article 4 of the Directive provides that although it is the duty of the applicant to substantiate their claim, Member States have the duty to assess the relevant elements of the application, including reasons for applying for international protection. This assessment has to be carried out on an individual basis and should take into account, inter alia, all relevant facts as they relate to the applicant's country of origin and their statements and documentation. However, EU legislation includes no specific instructions on the methods by which the credibility assessment should be carried out.[162] In 2016, a new legislative package was proposed by the European Commission to reform the Common European Asylum System (CEAS), according to which the Qualification Directive would take the form of a Regulation. Still, no clarification regarding methods of credibility assessment was introduced. It nevertheless remains a clear legal obligation that, in all the asylum procedures, authorities must respect human rights. When assessing the applicant's credibility, decision makers are implementing EU law and are bound by the provisions of the Charter, including Article 7.[163]

Due to the lack of guidance from the EU legislation, the legal praxis of the CJEU has assumed a significant role in determining what methods are acceptable in assessing the applicant's credibility. In its case law, the CJEU has rejected the proposition that the declared sexual orientation of an applicant must be held to be an established fact.[164] However, in its *Van Kück* judgment, the ECtHR

157 Johnson, *Homosexuality and the European Court of Human Rights*, 96.
158 *Dudgeon v. the United Kingdom* (application no. 7525/76), 22.10.1981.
159 Johnson, *Homosexuality and the European Court of Human Rights*, 100.
160 "Consolidated Version of the Treaty on the Functioning of the European Union," OJ C 326 (26.10.2012): 47–390.
161 Van der Vleuten, "Transnational LGBTI Activism," 125.
162 Mrazova, "Legal Requirements," 188.
163 ibid.
164 *A and others*, para 49.

considered that gender identity touches upon "one of the most basic essentials of self-determination".[165] In this regard, Thomas Spijkerboer notes that there is no reason to find these considerations not equally applicable to sexual orientation,[166] as the CJEU otherwise often follows the ECtHR's guidance when interpreting the Charter. Moreover, the CJEU's stance leads to the applicants being required to provide external evidence, yet as the persecution they face is rarely documented and has usually taken place in private they are unable to do so.[167] Thus, the assessment of credibility leaves substantial discretion to the national authorities. In this regard, Carol Bohmer and Amy Shuman point out, how in order to be successful in the (political) asylum process, "applicants need to be able to tell a coherent, credible narrative about their experiences of persecution in their home country."[168] This being a difficult task as it is,[169] the immigration officials also tend to make many assumptions about what is credible and what seems deceptive.[170]

An extensive amount of literature exists on the differences and similarities between the ECtHR and the CJEU as well as rationales behind their judicial actions, including from the perspective of sexual minorities. However, these elements are not in the focus of the thesis, although it is necessary to address them to some extent. In general, although these two courts have very different jurisdictions, legitimacy and they operate through a different logic, this thesis demonstrates that the confessional practices at work in the praxis of both are surprisingly similar.

165 *Van Kück v. Germany* (app no. 35968/97), 12.9.2003, para 73.

166 Thomas Spijkerboer, "Asylum Decision-Making, Gender and Sexuality," in *Research Handbook on EU Migration and Asylum Law,* eds. Evangelia Lilian Tsourdi and Philippe De Bruycker (Cheltenham: Edward Elgar Publishing, 2022), 204.

167 Danisi et al., *Queering Asylum in Europe*, 300.

168 Bohmer and Shuman, *Political Asylum Deceptions*, 15.

169 Many factors, such as possible traumatic events, cultural and societal differences and knowledge about the contents of the asylum law and procedures can lead to the statements of the applicant to appear "noncoherent." See, e.g., Bohmer and Shuman, *Political Asylum Deceptions*. It has also been noted that the way human memory functions, according to the empirical evidence, is not easily compatible with the demands of the asylum procedure, see Hedayat Selim et al., "Asylum Claims Based on Sexual Orientation: A Review of Psycho-Legal Issues in Credibility Assessments," *Psychology, Crime & Law* 29, no. 10 (2023): 1001–1030.

170 Bohmer and Shuman, *Political Asylum Deceptions*, 15.

5 An Object Appears, An Object that Appears as a Problem...

5.1 Confession

In the beginning of this synthesis, I presented a set of questions that have guided the research. I started with the general problematisation of the ways in which homosexuality becomes a legal problem and the reasons behind its formation into a problem. Then, I proceeded to address more specific questions of how the homosexual as a subject is constituted, what the elements of such subjectivity are and what purposes the constitution of the subject serves in the context of law as well as politically. These questions were explored through the individual research questions in the four articles of this thesis. Now I would like to draw together certain topics and themes that have been, in one way or another, present in all four articles. For the sake of clarity, the discussion is divided into three sections. Let us begin with the thematic of confession.

First of all, it is important to note that quite early into the research, it became clear that the problem was perhaps not so much homosexuality in itself but rather knowledge about homosexuality and the homosexual individual. In the cases analysed in the articles, both the ECtHR and the CJEU were concerned about methods of obtaining knowledge about homosexuality. To some extent this follows from approaching the cases from the perspective of private life. Concentrating the argumentation around Article 8 in the ECtHR has, of course, been a conscious strategy used by the applicants, although other articles, such as Article 3 (prohibition of torture), were often raised in the applications as well. However, the ECtHR repeatedly ends up considering articles other than Article 8 inadmissible in the field of sexual rights. Assessing the cases in light of Article 8 consequently structures the assessment of the ECtHR around the question of method: what questions were posed about the sexuality of the applicants, how specific they were, what topics they dealt with, and under what circumstances they were asked. At the same time, the need to know is left unquestioned. The CJEU even appears to consider it an irreplaceable element of the asylum process, a guarantee for the functioning of the system. In all of the cases analysed in this thesis, the legal question comes back to the question of "truth". Confession, then, is the essential technology that can provide such "truth".

The confessional technology appears to have certain key features already outlined by Foucault. First of all, confession has an internal and external dimension. While pressure to confess might originate from the surrounding society or circumstances at hand, confession can operate as an effective instrument of governance only when

individuals internalise its functioning. Confessional practices are centred around an interest directed precisely to the internal world of an individual. These observations have been present in all articles of the thesis. By looking at confessional practices we can identify the need to know, to categorise and to assess an individual's thoughts and feelings as specifically as possible. However, what is being assessed and categorised is not so much the individual's actions, i.e. what the individual has done, but the individual themselves: what and who they are, and moreover, what they *should* be. The idea underlying confessional practices is that by verbalising and deciphering the constant flow of thoughts, the "truth", the most fundamental and immutable essence of a person, can be revealed. This verbalisation is needed because such "truth" is unknown to the individual who speaks. Knowledge produced in this way comes into being only in a relation between the one confessing and the one receiving the confession, the latter being also tasked with the interpretation of what is being said.

The technology of confession is a relation of power. In the light of the cases discussed in this thesis, it appears as part of the technologies through which individuals can be moulded into obedient and adjusting subjects needed for the effortless functioning of the societal, political and legal machines. This element was discussed in article III, where it was noted that artificial narratives of "out and proud" and other Western stereotypes contribute to forming the subjects that they aim to describe.[171] If the human rights law under the ECHR only recognises "good homosexuals", i.e. the homosexual as "a law-abiding, disease-free, self-closeting homosexual figure who knew her or his proper place on the secret fringes of mainstream society",[172] as subjects of rights, this interpretation is bound to affect the content of different rights struggles.[173] Moreover, it affects what is considered worth wanting on an individual level. Do we prioritise rights to equal marriage over right to sexual activities that are marginalised even within the minority itself? In the case of asylum seekers, when the applicants are unable to fulfil their expected roles as being active in queer social spaces, being knowledgeable about queer culture, not having children and especially having "come out",[174] they are not only rejected by the migrant administration but often also their peers might consider them as "fake" following their rejected applications.[175] As has been discussed above, the

171 On this thematic, see also Ali Ali, "Reframing the Subject: Affective Knowledge in the Urgency of Refuge," in *Refugees and Knowledge Production: Europe's Past and Present*, eds. Magdalena Kmak and Heta Björklund (London: Routledge, 2022) and Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

172 Anna-Marie Smith, *New Right Discourses on Race and Sexuality: Britain, 1968–1990* (Cambridge: Cambridge University Press, 1994), 18.

173 See Langlois, "Queer Temporalities and Human Rights."

174 Bina Fernandez, "Queer Border Crossers: Pragmatic Complicities, Indiscretions and Subversions," in *Queering International Law: Possibilities, Alliances, Complicities, Risks*, ed. Dianne Otto (Oxon & New York: Routledge, 2018), 202.

175 Ali, "Reframing the Subject," 182.

confessional practices build as much on the suspicion towards the self as they do on the suspicion toward others. In the context of asylum, through the axis of true and false, "genuine asylum seekers" and the "bogus asylum seekers", a moral element is instilled into the operation of the system.[176] In this way, categorisation of individuals according to this division is also a practice of hierarchisation and exclusion. This element has been discussed especially in articles II, III and IV.

Sexuality is the privileged theme of the confession, its central interest. However, if we understand confession as a relation of power, we can observe how this interest is specifically directed to "abnormal" and "deviant" sexualities. An example of this is the analysis in article II on the "dangerous" sadomasochistic homosexuals who need to be brought back to the order of "normal" society. This governing and disciplining of "deviant" sexualities is a central theme in Foucault's work as well. Indeed, the interventions and techniques visible in the analysed cases have been possible in their extent because homosexuality has already been considered a form of "deviancy" and thus the disciplinary network and governmental technologies already exist around it. However, such exercise of power appears to go further than that. Especially the asylum cases from the CJEU indicate that the applicants are not necessarily excluded so much due to their homosexuality, but due to their status as migrants. Thus, individual applicants try to become what the faceless bureaucracy of migrant administration wants them to be in order to be granted asylum.[177] However, the purpose of this performance is not to prevent "bogus asylum seekers" from entering the EU. Often the purpose seems to be preventing entering in general. The applicants are caught in a game they cannot win.

In article IV, the discussion on the confessional dispositive aims to address this issue. Such dispositive operates through a triad of truth, confession and death, but the element of suspicion is equally important. While suspicion is a significant part of the confessional practice in its sacramental form, it also finds a fertile soil in the "culture of disbelief," well researched and documented in the field of asylum and refugee studies. In this regard, Bohmer and Shuman note that the in-built suspicion towards the claims made by applicants is a central part of the asylum procedure's dynamic. Thus, suspicion towards the applicants is not generated first and foremost by what asylum applicants say or by the evidence they are able to provide, but rather is the product of the workings of larger institutional frameworks, as well as histories, cultures and politics behind these.[178]

176 Kmak, "Between Citizen and Bogus Asylum Seeker."

177 In *Capitalist Realism*, Fisher notes that the rationale of bureaucracy, auditing and self-reporting is not so much to produce useful information but to satisfy the big Other, as Jacques Lacan would conceptualise the issue. However, nobody really knows what the big Other wants exactly, and thus the production of "data" is based on trying to guess what is needed. Fisher, *Capitalist Realism*, 49.

178 Bohmer and Shuman, *Political Asylum Deceptions*, 159.

In the context of the asylum process, the notion of "truth" is a crucial element, as only the "truth" can separate "deserving applicants" from "bogus asylum seekers."[179] The conceptualisation of "bogus asylum seekers" as immoral justifies state actions and creates moral panic.[180] Confession is a technology that produces the kind of "truth" needed for the operation of different regimes of power. The confessional dispositive, then, arranges these different powers and technologies on a certain field of practice by structuring and re-structuring itself. As noted above, the dispositive is a framework through which it provides solutions to its own problems.

5.2 Law

In addition to analysing confession and its operation in legal praxis, the role of law as well as its relation to the surrounding society have been addressed in the thesis. In this regard, it is demonstrated in the articles how law often operates together with other societal powers but also against them. This connection, and at times volatile relation, between law and other powers has emerged as especially important in this thesis. It is sometimes argued that Foucault failed to acknowledge the importance of law in modernity.[181] This claimed omission by Foucault is generally referred to as the expulsion thesis.[182] At the core of the expulsion thesis is the identification of law as a pre-modern, negative and repressive form of power. This form of power then became overtaken by a new form of power, namely disciplinary power.[183] According to this view, law was completely subordinated by disciplinary power.[184] However, the analysis of the legal cases in this thesis indicates that law's relation to power is more complicated than that. Let us consider this observation by discussing one text from Foucault that I have not yet addressed, despite its obvious connections to the issue.

The text is titled "Truth and Juridical Forms", originally a title of Foucault's 1973 Brazil lectures delivered at the Pontifical Catholic University of Rio de Janeiro. In fact, these lectures were my first attempt to grasp the concept of confession in Foucault's writing, in other words, the first text that I started to analyse after I started working on this thesis. At the time, I did not understand the text at all, and although I returned to it several times during the years to come, I still felt I did not understand it very well. I had persistent difficulties in grasping the relation between that text and the conceptualisation of confession that Foucault appeared to develop in *The*

179 Kmak, "Between Citizen and Bogus Asylum Seeker," 396.
180 Kmak, "Between Citizen and Bogus Asylum Seeker," 406.
181 Golder and Fitzpatrick, *Foucault's Law*, 23.
182 See, e.g., Munro, "Legal Feminism and Foucault".
183 Golder and Fitzpatrick, *Foucault's Law*, 24.
184 Bob Fine, *Democracy and the Rule of Law: Liberal Ideas and Marxist* Critiques (London: Pluto Press, 1984), 200.

Will to Knowledge and the texts to follow. To put it briefly, I did not like "Truth and Juridical Forms" that much.

I have now returned to this text once again. And fittingly, perhaps, as I have at times had difficulties explicating my argument about law, I will now try articulate this argument by discussing "Truth and Juridical Forms," hoping that both have gained clarity by now. Approaching the conclusions in this way, as a serpent continually devouring itself and being reborn from itself, seems quite appropriate. However, there is also a strictly practical reason to now engage with the lectures. Foucault addressed the relation between subjectivity and juridical power in other instances as well (e.g., in his "On the Government of the Living" lectures and the subsequent Louvain lectures),[185] and even through the same character, Oedipus. In his 1973 Rio de Janeiro lectures he nevertheless takes a somewhat distinct position on the topic. Therefore, I will present these conclusions through a reading of the lectures "Truth and Juridical Forms" and similarly to Foucault, through Sophocles's play *Oedipus Tyrannos*.

These lectures, similarly to Foucault's other lectures on the topic, are in many ways indebted to Nietzsche.[186] Foucault opens by discussing a famous quotation from Nietzsche:

> In some remote corner of the universe, bathed in the fires of innumerable solar systems, there once was a planet where clever animals invented knowledge. That was the grandest and most mendacious minute of "universal history".[187]

Foucault pays attention specifically to the way Nietzsche uses the word "invented" (*Erfindung*) which occurs in a polemical relation to the word "origin" (*Ursprung*). Similarly to religion, also knowledge was *made*; it did not exist before.[188] To investigate this further, Foucault addresses another text from Nietzsche, more specifically, a passage in *The Gay Science* titled "The Meaning of Knowing." In this text, Nietzsche argues against Spinoza, according to whom, if we wish to understand things in their nature, their essence, and hence their truth, we must take care not to laugh at them (*ridere*), lament them (*lugere*), or detest them (*detestari*). Only when those passions are calmed can we finally understand.[189]

---

185 Michel Foucault, *On the Government of the Living: Lectures at the Collège de France, 1979–1980*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador 2016); Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*, ed. Fabienne Brion and Bernard E. Harcourt, trans. Stephen W. Sawyer (Chicago: University of Chicago Press 2014).

186 See Alberto Toscano, "Tragedy and Juridical Forms," *South Atlantic Quarterly* 121, no. 4 (2022): 777–794, 787-788.

187 Foucault, "Truth and Juridical Forms," 6. Citing Nietzsche.

188 Foucault, "Truth and Juridical Forms," 7.

189 Foucault, "Truth and Juridical Forms," 11. Citing Spinoza.

Nietzsche says that the case is completely the opposite. To understand is nothing more than a compromise or settlement, that is an outcome of an interplay between *ridere*, *lugere* and *detestari*.

From this premise, Foucault argues that to know is not getting close to the object or identifying with it, but keeping the object at a distance, differentiating oneself from it and possibly destroying it through hatred. And if these three drives produce knowledge, it is not because they have attained unity but because they have tried to harm one another; "they're in a state of war."[190] And in a momentary stabilisation of this state of war, "they reach a kind of state, a kind of hiatus, in which knowledge will finally appear as the 'spark between two swords'".[191] From this it follows that knowing is a violent practice, and therefore, the philosopher is most likely to be wrong about the nature of knowledge since they are always looking for the form of love, unity and pacification. Instead, Foucault suggests, if we truly wish to know knowledge in its manufacture, we must look not to philosophers but to politicians, to examine the relations of struggle and power.[192]

After this introduction, Foucault moves on to discuss *Oepidus Tyrannos,* and indeed, his reading of the play in these lectures takes as its starting point the disavowal of the relation between power and knowledge. As Alberto Toscano notes, the Rio de Janeiro lectures are distinctive in that Foucault reads the play as the ultimate condemnation of the conjunction of power and knowledge in the figure of the tyrant. According to Toscano:

> This is the other Oedipus complex that Foucault wants to grasp, clinically and critically, through the "anarchaeology" of the juridical history of our subjectivity. This other complex is about power and knowledge, not desire and the unconscious, and it can also be approached, epochally, as "a great Western myth: that there is an antinomy between knowledge and power. If there is knowledge, it must renounce power. Where knowledge and science are found in their pure truth, there can no longer be any political power". Against this, Foucault reiterates the Nietzschean lesson, to wit that "behind all knowledge [*savoir*], behind all attainment of knowledge [*connaissance*], what is involved is a struggle for power …".[193]

To contextualise the discussion briefly, in the beginning of *Oedipus Tyrannos* the city of Thebes suffers from a plague. The ruler of the city, Oedipus, seeks to know why the city is plagued; identifying the cause may lead to solving the problem.

190 ibid.
191 ibid.
192 Foucault, "Truth and Juridical Forms," 12.
193 Toscano, "Tragedy and Juridical Forms," 788. Citing Foucault.

From this premise, a complex game of truths unfolds, eventually leading to a horrific observation that Oedipus himself has brought the plague upon Thebes by unknowingly killing his father and marrying his mother.

Foucault approaches the events through the Greek technique of *sumbolon*, an instrument of power, where a person breaks a ceramic object in half, keeping one part and entrusting the other to an individual who is to carry the message or to certify its authenticity. Such authentication is carried out by fitting the two halves together. And indeed, a complex, geometric game of veridictions ensues:

> In terms of divine or oracular speech, the truth of Apollo will be completed by that of Tiresias; at a second level, that of the wielders of power, Jocasta's and Oedipus's utterances will complement one another; finally, two slaves or servants, a Corinthian and a Theban, will reaffirm the oracular truth established at the divine level and seal the fate of Oedipus, who will finally be revealed as himself a monstrous *sumbolon*, "perpetually double."[194]

Foucault notes that the play is often analysed by saying that Oedipus is the one who did not know anything and whose memory was blocked, "the man of the unconscious" in Freudian terms. However, through the mechanism of the *sumbolon*, Oedipus is not the one who did not know but the one *who knew too much*, the one who joined his knowledge and his power in a way that should not be possible.[195] Thus, what Foucault appears to read as the grand teaching of the play in his Rio de Janeiro lectures, is the prohibition of combining knowledge and power.

We will return to this, but let us take a moment to consider what Foucault might mean by using the word "juridical". Victor Tadros notes that Foucault seems to use the term both to describe a discursive understanding of power and a real set of power relations connected together in a particular form.[196] However, Tadros argues that the juridical is not primarily a discourse to Foucault, but should rather be understood as referring "both to a code which is used to describe power (a juridical discourse) *and* as a real network of power relations that was once in place."[197] First, what is important here, is the understanding that not all law is necessarily "juridical" nor that the only way in which juridical power manifests itself is legal. Second, the juridical is to be understood as a certain conception that defines power in relation to a series of acts; which acts transgress and which are permitted. It is a manner in

194 Toscano, "Tragedy and Juridical Forms," 780.
195 Foucault, "Truth and Juridical Forms," 24.
196 Victor Tadros, "Between Governance and Discipline: The Law and Michel Foucault," *Oxford Journal of Legal Studies* 18, no. 1, (1998): 75-103, 81. Emphasis added.
197 Tadros, "Between Governance and Discipline," 81-82.

which power describes itself.[198] Third, how power describes itself has little relation to the actual operations of power in modern society.[199]

Foucault traces the emergence of the juridical into the Middle Ages, where the field of power is somewhat disorganised and this disorganisation gives rise to certain conflicts which could only be resolved through the sword. The principle of hierarchy, essentially the state, was introduced as a solution to the problem. However, the power relations through which this hierarchy was constructed were already more or less in place. What was done was a codification of these existing power relations, and in that, the law succeeded not by exerting violence but by unifying through coordinating and organising these relations.[200] It must be noted, however, that this was not the way law was described. Instead, law was described through a symbolic representation, a Sovereign, who had the right to use violence where the laws that constituted his sovereignty were violated. As argued by Tadros, this does not adequately represent the way in which law actually operated: "law operated as much through co-ordination as it did through violence."[201]

According to Tadros, this symbolic manifestation of law nevertheless resulted in a juridical mechanism which had two parts. Together, these parts, on the one hand, produce truth and, on the other hand, help to legitimise the operations of law. The first part is the investigation, through which the court attempts to establish the truth about the act. The mechanism of power through which this investigation functions is the confession. In *The Will to Knowledge*, Foucault notes how, through confession, the individual introduces into the law the truth about themselves.[202] Previously, the ordeals and ties of alliance had established the truth, an issue Foucault addresses in many of his works. In the confession, the discourse of truth that the individual is able to pronounce about themselves authenticates for them. Moreover, introducing the confessional mechanism into the juridical apparatus made it possible to distinguish precisely one crime from another both in terms of its gravity and its type, something that was not possible with the ordeals. According to Tadros: "The more the law required offences to be articulated by the defendant, the more it could respond to its own language and thus reproduce and regulate its own development."[203]

Here we have several important elements from the perspective of this thesis: namely, how do confession, establishment of truth and law relate to one another? Returning to Foucault's reading of *Oedipus Tyrannos*, Oedipus seeks the truth but detached from the previous and more common ways of establishing the (legal)

198 Tadros, "Between Governance and Discipline," 76-79.
199 Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977,* ed. Colin Gordon, trans. Colin Gordon and others (New York: Pantheon, 1980).
200 Tadros, "Between Governance and Discipline," 86-87.
201 ibid.
202 Foucault, *The Will to Knowledge*, 58.
203 Tadros, "Between Governance and Discipline," 87-88.

truth in Ancient Greece. Instead of an oath (although there is also an oath taken), or duel, Oedipus' search for truth is a form of modern juridical investigation. He collects evidence and by combining all relevant factors, joining the halves of the *sumbolon*, he is able to form the whole picture. While Foucault examines such form of investigation in *Oedipus Tyrannos*, the argument he makes is more about a rupture in Western scientific and political thinking: the ways in which power and knowledge are supposed to be separate from one another.

When we consider this observation from *Oedipus Tyrannos* and compare it with what Tadros, in his interpretation of Foucault, claims to be the difference between how law is described and how law operates, we can see that not only are power and knowledge irrevocably bound to each other, but also that power and knowledge are deeply interlinked with law, and vice versa. The confessional mechanism visible in the legal cases analysed in this thesis allows to quantify, categorise and describe the subjects in detail, thus connecting the juridical form to the disciplinary network, but it also allows law to regulate its own development. And when this juridical form, already connected to the disciplinary network, develops to adjust relations between individuals and groups, instead of adjusting the individual, it also becomes connected to the pole of governmentality.

This new connection to governmentality, which Foucault locates in the eighteenth century, marks a transformation from the governing of family units to the governing of populations.[204] In terms of legislation, this meant that although the quantity of legislation increased, legislation was no longer used only to describe a threshold of transgression. Rather, it became a tactic amongst other governmental tactics for what Foucault terms "disposal,"[205] referring to an arrangement of things through which one can achieve certain ends. Such "disposal" refers to "a ... complex composed of men and things," in other words, human beings in relation to objects and events in the world.[206] As Foucault writes,

> with government it is a question not of imposing laws on men, but of disposing of things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics – to arrange things in such a way that, through a certain number of means, such and such ends may be achieved.[207]

Then, if the juridical power is a way to define power in relation to a series of acts inside the parameters of which acts transgress and which are permitted,

204 Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 94.
205 ibid.
206 Tadros, "Between Governance and Discipline," 91.
207 Foucault, "Governmentality," 95.

once the governmental technology is put in place, the law begins to be exercised in order to adjust relationships between individuals.[208] And this "positive" law is part of a broader apparatus of governmental control which intervenes in the lives of individuals and groups in response to knowledge collected about those lives.[209] Indeed, as Ratna Kapur notes: "[human] rights do not simply intervene to ensure 'bare survival' or attend only to address situations of 'human suffering'" but rather, "rights today are active conduits for structures and relations of power, for avid as well as insidious policing and for increased regulation and governance of both the entitled and the disenfranchised."[210]

Article II discusses the concept of panopticon in Foucault's work, which can be considered as one of the mechanisms that produces knowledge of its subjects in order to discipline and govern. What makes the panopticon such an effective technology of power in the particular context of article II – the British Armed Forces – is that supervision is not exercised only by the central authority but by one's peers and investigating officers. Individuals become the police of each other and themselves.[211] In the cases discussed in article II, production of knowledge about the applicants is part of a broader technology of confession, which again is part of a broader network of discipline and governmental control. In article II, we can also observe how discipline operates between three poles: the homosexual subject, the homosexual subject as deviant and the need to emancipate from that deviancy, which is articulated through protection of public morals by deterring homosexual behaviour through criminal law.

We thus return to the concept of dispositive. While Foucault most famously addresses the question of dispositive in *The Will to Knowledge*, his conceptualisation of the prison in *Discipline and Punish* is equally illustrative. Dispositive comes to form and homogenise the techniques used by different institutions and regimes of power, thus enabling the circulation of subjects between them. In the case of prison, Foucault argues that prison forms a community of delinquents; delinquents produced in prison are soon returned to it by the police. These "three terms (police–prison–delinquency) support one another and form a circuit that is never interrupted."[212] This way, dispositive also begins to treat a problem that it itself has created and to which it is the only solution. And regarding the notion of panopticon, Wood notes how "for Foucault the panopticon represented a key spatial figure in the modern project and also a key dispositif in the creation of modern subjectivity."[213]

208 Tadros, "Between Governance and Discipline," 93.
209 ibid.
210 Kapur, *Gender, Alterity and Human Rights*, 228.
211 Catherine A. Lugg, "Thinking about Sodomy: Public Schools, Legal Panopticons, and Queers," *Educational Policy* 20, no. 1 (2006): 35–58, 42.
212 Foucault, *Discipline and Punish*, 282.
213 Wood, "Foucault and Panopticism Revisited," 235.

In the context of article II, the homosexual subject needs disciplinary intervention because such subject is deviant, deviancy being a fundamental part of its subjectivity. However, deviancy in these cases is rather an element which needs to exist in order to organise, control and circulate the individuals within the parameters of the dispositive. In article II, it is stated that law's relation to disciplinary power can be seen as diffuse: discipline and law are reflections of one another. And as discussed above, law is one of the tactics to adjust and arrange individuals in relation to one another.

This thematic also intersects with articles III and IV. In article III, the "culture of disbelief" is identified as one of the key factors forming a basis for endless interventions in the applicant's privacy, justified by the CJEU in its decisions, where the verification of an asylum seeker's claim to be part of a sexual minority is not only recommended but mandatory. In the extraction of "truth", we return to the confessional technology and its methods. However, in article III it is also discussed how "truth", and the ways in which it can be uncovered, originate from different medical, administrative and judicial powers while producing the boundary conditions for such "truth". Article IV continues from this notion by suggesting an understanding of the asylum process as the confessional dispositive. In this regard, article IV relies on Teti's conceptualisation of such confessional economy of power:

> The following characteristics can be identified: first, a discursive framework which distinguishes between two subject positions, the Self (pure, normal) and the Other (stained, pathological); second, an imperative placed on the latter to emancipate, normalize; third, the failure of that emancipatory effort – a double failure, of both shepherd and flock – made inevitable precisely by the emancipating Other's stained, impure alterity; and finally, fourth, the responsibilization of that Other for these failures, thus allowing the failure generated by this dispositive to paradoxically reproduce the dispositive itself, rather than undermine it.[214]

Similarly, Tadros notes how the disciplinary dispositive constructs observations of its own functions to which it can respond; by responding to this information, discipline begins to discipline itself.[215] In article IV, it is argued that the asylum decision-making operates essentially by distinguishing two subject positions: "the bogus asylum seeker" and "the genuine asylum seeker", not so unlike distinguishing "the pathological homosexual" from the figure of "the good homosexual." Essentially, such division into the pathological and the normal, the fraudulent and the genuine, more generally reflects the positions of the Self and the Other. Similarly to the cases

214 Teti, "Rethinking Confession," 229.

215 Tadros, "Between Governance and Discipline," 95.

discussed in article II, in article IV law also appears as an instrument that aids in connecting the poles of the dispositive through the EU asylum legislation and policy.

Article I also discusses the functioning of the law as an exercise of power and its relation to other forms of power in society, namely disciplinary power. However, it is also suggested that while law can be mobilised to discipline and govern, it can also be mobilised for resistance and emancipation. Finally, I wish to return to this thematic: the complexity and difficulty of resisting through law and reclaiming rights. Let us return to the figure of Oedipus.

5.3 Reclaiming rights?

Honig points out that "it is now a mainstay of political and cultural theory to diagnose certain political problems as 'Oedipal' and to recommend a solution that is, somehow, 'Antigonean'".[216] In *Antigone*, another play by Sophocles, Oedipus's daughter Antigone defies the order of Creon, who is now the ruler of Thebes, to leave one of her deceased brothers, Polynices, to be devoured by vultures, against the backdrop that he has engaged in a civil war for the Theban throne, which has resulted in Antigone's both brothers dying while fighting each other. In the aftermath, Creon orders the public honouring of Antigone's other brother, Eteocles, and declares Polynices as a traitor to Thebes, therefore denying him an honourable burial. According to Honig:

> Those who turn to Antigone now do so in the hope she might break the spell of the father's legacy of rationalism (Oedipus, the puzzle solver), rule, or governmentality (Oedipus, the king), or hierarchical, naturalized patriarchal power (Oedipus, the incest and parricide). Against these, political and feminist theorists have variously embraced Antigone as a bearer of true feeling possessed of a true ethical compass, powerful disobedient to tyrannical, tone-deaf, or impositional law, anti-patriarchal devotee of the natal over conjugal family form, or great lamenter and lover of the equal brother whom she grieves and buries at no small risk to herself.[217]

Honig revisits several theorists who have invoked Antigone. For example, while Judith Butler seeks to open up an alternative future by re-reading Antigone, Lee Edelman sees instead in Antigone an invitation to reject the future altogether.[218] Whereas Butler re-reads and rearticulates Antigone for the "new humanism",

216 Honig, *Antigone, Interrupted*, 36.
217 ibid.
218 Honig, *Antigone, Interrupted*, 50.

Edelman insists on the limits of resignification, noting that resignifying a term like "human" does not efface or transcend the "prior uses to which it was put: no historical category of abjection is ever simply obsolete. It abides, instead, in its latency, affecting subsequent signification, always available, always waiting to be mobilized again."[219]

The same concern can be raised regarding resignification of rights or emancipatory projects advanced through human rights advocacy. The question is: is resignification ever possible? Can we find our way to freedom from "the Western liberal fishbowl" of rights and liberty, as formulated by Kapur in her analysis of the problems of the liberal human rights project and alternative figurations of freedom?[220] As Kapur notes, while we cannot abandon human rights advocacy, we must recognise its inability to procure freedom, and from this notion, proceed to explore truly mindful, equitable and inclusive strategies of rights deployment.[221]

Several solutions have been suggested. Butler, as discussed above, has in some of their work proposed the politics of grievability and practices of grieving as a sort of counter-conduct to the violence of the state.[222] In a similar vein, Langlois concludes his sharp analysis on the counter-productivity of human rights in terms of queer people by suggesting that "remembering – especially for those of us now in rights respecting jurisdictions – the absence of rights, may be what is critical to preventing the future of rights from being taken from us."[223] In a way, both Butler's politics of grievability and Langlois's politics of remembering emphasise the meaning of the past, of being connected to what was before, and from this premise, being able to imagine alternative futures. While I agree that staying connected to the past is essential, and we have many examples of the shortcomings in our theoretical and political practices where the mistake of forgetting the past has been made (such as dismissing the work of the feminists and activists representing Indigenous peoples, Black resistance, decolonial struggles and so on), we can neither live in the past, nor in the future. As Frantz Fanon states:

> Every human problem must be considered from the standpoint of time. Ideally, the present will always contribute to the building of the future. And this future is not the future of the cosmos but rather the future of my century, my country, my existence. In no fashion should I undertake to prepare the world that will come later. I belong irreducibly to my time. And it is for my own time that I should live. The future should be an edifice supported by living

219 Lee Edelman, *No Future: Queer Theory and the Death Drive* (Duke University Press, 2004), 115; Honig, *Antigone, Interrupted*, 52-53.

220 Kapur, *Gender, Alterity and Human Rights*.

221 Kapur, *Gender, Alterity and Human Rights*, 235.

222 Judith Butler, *Precarious Life* (London: Verso, 2004).

223 Langlois, "Queer Temporalities and Human Rights," 174.

men. This structure is connected to the present to the extent that I consider the present in terms of something to be exceeded.[224]

Therefore, I want to explore the politics of rights that take the present as their target, as their battlefield. But the problem of resignification remains. As Emilios Christodoulidis formulates the question: "What registers as resistant, neither reducible to nor co-optable by the order it seeks to resist?"[225] What form of resistance through rights can be found that would not be co-opted by the state and the human rights framework, which is flawed in many ways? For this project, use of rights that is rooted in strategical analysis and tactics might be helpful.

Ben Golder analyses Foucault's work on the topic of relation between strategic and tactics, noting that from this work, two distinct positions in relation to rights claims can be distinguished: on the one hand, a dialogical use of rights that remains within the limits of "the game" and thus reproduces the game, and on the other hand, the polemical refusal of the game and its rights.[226] However, as Golder asks, is there not some other way of playing the game that consists neither of acquiescence and reproduction nor of utter refusal? A way of using rights to play a different game entirely?[227] Here inspiration comes from the communist and anti-colonialist lawyer Jacques Vergès and his theorisation of the "strategy of rupture", articulated in his 1968 book *De la stratégie judiciaire*.[228] Golder explains how Vergès distinguishes two strategies: a "strategy of connivance" and a "strategy of rupture." In the former, the defendant is counselled within the limits of the game, so to say, accepting the law's authority and its formal rules, while in the latter the trial is approached politically as an opportunity to contest the law's legitimacy and its self-presentation, and thus creating a rupture in the system itself.[229] As summarised by Golder, the rules of the game are deployed to maximum effect in order to interrupt the game itself.[230]

We should nevertheless keep in mind, considering the Foucauldian framework visited in this thesis and the analysis carried out in the articles, that much in the same way as everything that is "juridical" (in the Foucauldian sense) is not necessarily "legal"; legal obligations are not equivalent to the various mechanisms and networks of discipline and governing that inhabit the "liberal free space" that supposedly exists within the limits of the law,[231] nor are legal rights equivalent to what should

224 Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1952), 14-15.
225 Emilios Christodoulidis, "Strategies of Rupture," *Law and Critique* 20, no. 1 (2009): 3-26, 9.
226 Golder, *Foucault and the Politics of Rights*, 116.
227 ibid.
228 Jacques Vergès, *De la stratégie judiciaire* (Éditions de Minuit, 1968).
229 Golder, *Foucault and the Politics of Rights*, 125.
230 ibid.
231 John Stuart Mill, "On Liberty," in *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991).

be our social obligation towards each other. Sokhi-Bulley's conceptualisation of the issue in the case of Shamima Begum, who came to be known as the face of the '"ISIS-brides",[232] is rather illustrative of this problematic.

Begum left her home in the United Kingdom in 2015 to join ISIS in Syria. In February 2019, Begum's citizenship was revoked based on the Home Secretary's policy of "stripping dangerous dual nationals of their British citizenship" under the new laws provided for by the 2019 Counter-Terrorism and Border Security Act.[233] The legal question came down to the scope and exercise of the Home Secretary's powers. As Sokhi-Bulley explains, in this reality, Begum is a terrorist and even more, a traitor who chose to abandon her liberal homeland in the UK. In an alternative reality, Begum is a child who was groomed online to join a cult, a child who made a mistake and wants to come home.[234] Sokhi-Bulley asks: "Does she deserve mercy, generosity, forgiveness? There is no 'right' to these things – just as there is no right to make mistakes, no right to come home, and no right to right treatment. These are not juridical rights but they are relational rights ... ".[235] From this it follows that, on the one hand, there cannot be *a rights claim to mercy*, and, on the other hand, that nothing is stopping us from performing these rights *even though they do not exist in legal documents*. These are rights that rely on one's coexistence within a community.[236]

Here I would like to return to Honig's reading of *Antigone*, and different politics informed by the character of Antigone. Honig revisits the theorisation and activism of Douglas Crimp and ACT UP, a grassroots movement seeking to end the AIDS pandemic, and contrasts them with Butler's Antigonean politics. Honig finds similarities between the latter and the "post-political ethical universalism against the state" while, in her view, the aim of Crimp and ACT UP was to force the state to act on behalf of a sexual health politics different from the governmental response to crisis.[237] Crimp's goal is to force the state to step up to its responsibilities, whereas Butler wants to tell it to step back.[238] And certainly, the ACT UP coalition's relationship with the state was not so much oppositional as it was ambivalent. As Honig describes the issue:

> The aim of ACT UP in the 1980s was not just to oppose the state and expose the irresponsibility of government but to enlist the state's resources. Like the

232 Bal Sokhi-Bulley, "'After Rights' is Friendship: On Abandonment, Obligation and the Stranger," *The International Journal of Human Rights* 28, no. 8-9 (2024): 1459-1477.
233 Bal Sokhi-Bulley, "Rights as Friendship," in *The Critical Legal Pocketbook*, eds. Illan rua Wall et al. (Oxford: Counterpress, 2021).
234 ibid.
235 ibid.
236 ibid.
237 Honig, *Antigone, Interrupted*, 59.
238 ibid.

> Antigone of Butler's *Antigone's Claim*, but in far more statist fashion, AIDS activists like Crimp wanted sovereignty, and they tried to claim it. They did not want just to lament sovereignty's excesses.[239]

Tadros notes that, in political theory, "the privileged locus of political criticism was cast in juridical terms; it was always a question of the overextension of political power. The actual points at which power was exercised were invisible to this theory even as they dominated the social field."[240] Instead of analysing what law as a form of power concretely does in society and to its subjects, the theorisation of sovereignty has pondered the scope and exercise of sovereign's powers, much alike to what legally happened in Begum's case. This results, first, in a situation where legal and political theory does not effectively represent the mode of operation that law or politics takes. Second, it is precisely this ineffectiveness that legitimises the exercise of power by covering up its own paradoxes.[241]

What could perhaps be learned from Crimp and ACT UP, and what has also been taken up in recent critical legal scholarship, is to emphasise "obligation" over "rights."[242] In essence, a focus on the obligation allows to consider wellbeing of individuals and communities in addition to legislation and what they are strictly entitled to.[243] In this regard, Sokhi-Bulley adds that "not only does 'obligations-talk' precede and exceed rights-talk but that obligation, when understood as hukam, is a way of life that comes 'after rights'".[244] The concept of *hukam*, derived from the Sikh scriptures, is mobilised "to argue for 'after rights' as an 'obligation' towards the 'stranger'".[245] Sokhi-Bulley adds that, in this formulation, the 'after' does not designate temporality but is rather "a reconfiguring of social life as a 'counter-society' that struggles alongside and in parallel with the society that exists."[246] In my interpretation, such conceptualisation is one of ethics of care and resistance, tactical and strategical thinking that, similarly to the view held by Crimp, does not aim to make certain deaths grievable but rather, aims to make all lives acceptable and livable.

Returning to Foucault's "Truth and Juridical Forms" lectures, and his discussion on Nietzsche and Spinoza in the first lecture, what was posited as the prerequisite for knowledge was the battle between three drives: to laugh (*ridere*), to lament (*lugere*), and to detest (*detestari*). I believe it is not far-fetched to suggest that these three drives could well inform our political resistance as well as our critical legal

239 Honig, *Antigone, Interrupted*, 59-60.
240 Tadros, "Between Governance and Discipline," 101.
241 ibid.
242 Scott Veitch, *Obligations: New Trajectories in Law* (Abingdon: Routledge, 2021).
243 Sokhi-Bulley, "'After Rights' is Friendship," 1465.
244 ibid. Emphasis added.
245 Sokhi-Bulley, "'After Rights' is Friendship," 1460.
246 Sokhi-Bulley, "'After Rights' is Friendship," 1465.

scholarship. As Honig writes: "ACT UP did not lament power, nor just rage against it, nor just seek inclusion. They did all of these. But they also sought power."[247] And as argued by Crimp, in the wake of the AIDS epidemic, it was important to mourn loss, while not mistaking funeral gatherings for activist political action.[248] According to Honig, Crimp's understanding is one of a militant combination of lamentation and festival: "to grant mourning its place while also interrupting it with the pleasures of natality, luring activists out of mourning and back to life."[249]

Antigone seems to teach the same lesson as Crimp and the AIDS activists. In Honig's reading of the play, the character of Antigone is "pointedly political," rather than "transcendently universal." Antigone laments, but in a way that is also partisan and vengeful, not just mournful or humanist. She dies for her *atê*, her deceased family, but she also dies for her living sister. Antigone "acts politically in conditions of impossibility"; she does not only resist sovereign power and martyr herself to an impossible cause, "she makes a claim for sovereignty, both for herself and the form of life to which she belongs." [250] Antigone enters into political conspiracy against Creon, "she conspires with language, and it with her, to solicit a public that may see things her way." And most importantly, Antigone does not act alone, but "her actions are embedded in and enacted on behalf of forces, structures, and networks larger than the autonomous individual" of liberal humanist thought. [251]

247 Honig, *Antigone, Interrupted*, 60.
248 Douglas Crimp, *Melancholia and Moralism: Essays on AIDS and Queer Politics* (Cambridge, Mass.: MIT Press, 2002), 131–132.
249 Honig, *Antigone, Interrupted*, 58.
250 Honig, *Antigone, Interrupted*, 8.
251 ibid.

6 Conclusion: Distrusting Rights, Towards Practices of Resistance

Throughout the process of writing this thesis I have been asked about practical implications and societal impact of this research. I have always struggled to answer these questions. Although I had already come to terms with the understanding that this particular research probably does not have many practical implications, and its impact on society is obscure, to say the least, I now want to provide some thoughts on the issue after all.

It is true that this thesis does not suggest any legal reforms or provide instructions on how to interpret the existing rules. Perhaps the same critique that is sometimes pointed at Foucauldian theory in general could be presented about this thesis. According to this critique, Foucauldian (critical) theory mainly aims to point out oppression, existence of power relations or the role of structures as dominating over every individual action. Such critique has been famously put forward by Norman Fairclough, for example, who argues that "in the totality of [Foucault's] work and in the major analyses, the dominant impression is one of people being helplessly subjected to immovable systems of power".[252] Moreover, Foucault is accused of not offering any alternatives or tools for resistance. The critique of this approach also concerns its alleged effect of rendering people passive. Indeed, Foucault's approach was debated already during his lifetime, and he himself responded to this critique.[253]

In an interview, Foucault was asked what he had to say about the ways his analysis of prisons can seem paralysing or anaesthetic for the social workers working in prisons, for example. Foucault begins his answer by noting that "it's true that certain people, such as those who work in the institutional setting of the prison – which is not quite the same as being in prison – are not likely to find advice or instructions in my books that tell them 'what is to be done'". Rather, the purpose of his work is precisely the opposite. The purpose is to make these workers unsure of what to do, so that what they have been doing until now begins to seem dangerous and problematic.[254] Foucault adds:

> And then I have some news for you: for me, the problem of the prisons isn't one for the "social workers" but one for the prisoners. And on that side, I'm

252 Norman Fairclough, *Discourse and Social Change* (Cambridge: Polity Press, 1992), 57.
253 Foucault, "Questions of Method," 234.
254 Foucault, "Questions of Method," 235.

> not so sure what's been said over the last fifteen years has been quite so – how shall put it? [*sic*] – demobilising.[255]

Moreover, Foucault does not consider the newly found confusion of the social workers as a negative issue: "If the social workers you are talking about don't know which way to turn, this just goes to show that they're looking and, hence, are not anesthetised or sterilised at all – on the contrary".[256] In this regard, it would rather be the very act of telling them from above "what is to be done" that would truly render them passive. As Foucault states, critique does not have to end up with a conclusion of what reform exactly needs to be carried out. Rather, "it should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It isn't a stage in a programming. It is a challenge directed to what is."[257]

While Foucault does not offer any blueprint of the humane and positive prison for example, Foucault's politics is hardly one of defeatism.[258] According to Elden and Crampton, "while liberation and freedom are both desirable and achievable, they will not come about with the mere passing of certain laws or by the guarantee of rights. Rather, freedom is a practice or a process that has to be constantly undertaken".[259] This theme can be seen in Foucault's work on both populations and practices of the self. As Foucault noted: "the liberty of men is never assured by the institutions and laws that are intended to guarantee them. That is why almost all of these laws and institutions are quite capable of being turned around".[260] In a similar vein, this thesis does not function as a manual on how to make the asylum process or other similar practices slightly less horrible. As such, it is perhaps not a thesis written primarily for the decision-makers or politicians. This thesis is dedicated to those who do not have the power to make decisions and whose plain existence is politicised. As I find myself highly distrustful of the idea that the situation could change only through legislative improvements, can we find other ways to act?

If we consider the central theme of this thesis – confession – what kind of counter-conduct could we imagine? First, it is necessary to note that in the legal cases discussed here, the applicants probably had very little possibility to act otherwise. For an asylum seeker, the options are playing the game, returning to the country of origin, or staying as an irregular migrant. None of these options are such that "white middle-class academics" could provide any useful guidance on choosing one over the other for the sake of resistance. But if we consider confession as a broader

255 ibid.
256 Foucault, "Questions of Method," 236.
257 ibid.
258 Elden and Crampton, "Introduction," 9.
259 ibid.
260 Foucault, "Space, Knowledge, and Power," 245–6.

technology in our lives, how could *we* resist? If governing through confession is essentially governing through "truth", and its *sine qua non* is our willingness to speak the truth of ourselves, perhaps a route opens up.

In *The Animal That Therefore I Am*, Derrida notes that confession is anchored in the logic of debt: we owe the truth (to whom?). Following this statement, Derrida asks: "Is there ... an ancient form of autobiography immune to confession, an account of the self, free from any sense of confession?"[261] How can we tell our story while resisting the technologies that suggest we tell the "truth" of ourselves? Perhaps by "writing of the self as living, the trace of the living for itself, being for itself,"[262] as Derrida explores Jean-Paul Sartre's idea. This position of "being for itself", being capable of affecting itself, should not be mistaken for neoliberal responsibilisation and individualisation strategies. It is an ethical position, which nevertheless involves taking responsibility: responsibility over one's own story. I would add that it should involve taking responsibility for one another, to acknowledge the obligation towards the Other, and in this way, we could begin to dismantle the mechanism of othering that is based on the conception of the virtuous "Self" and the devalued "Other".

Such autobiographical responsibility also entails that we do not place our fate only in rights, law, justice or other institutions and technologies of governance. As Françoise Vergès notes,

> One must use the laws of the state against the state itself, but without illusion or idealism, as understood by the enslaved women who fought to win free status, which they passed on to their children, or by the colonised people who used the colonial state's own laws against it (demanding freedom of the press, freedom of association, the right to vote, etc.). This strategy was always accompanied by a critique of the racial colonial state and its institutions.[263]

To work within the law must similarly be accompanied by a critique of the law itself as well as its institutions, while paying attention to every location where it has effects. Perhaps this would enable us to free ourselves from the unfulfilled promise of rights, their assignment of identities from above and from the demand for "truth".

261 Jacques Derrida, *The Animal That Therefore I Am*, ed. Marie-Louise Mallet, trans. David Wills (New York: Fordham University Press, 2008), 21.

262 Derrida, *The Animal That Therefore I Am*, 47.

263 Françoise Vergès, *A Decolonial Feminism*, trans. Ashley J. Bohrer (London: Pluto Press, 2019), 8.

Bibliography

Aalto, Juho. "BinaryTech in Motion: The Sexgender in the European Court of Human Rights Jurisprudence". *Leiden Journal of International Law* (2024). Advance online publication. https://doi.org/10.1017/S0922156524000141.

Adorno, Theodor W. "Cultural Criticism and Society." In *Prisms*, translated by Shierry Weber Nicholsen and Samuel Weber. Cambridge, MA: MIT Press, 1984.

Ahmed, Sara. "Imaginary Prohibitions: Some Preliminary Remarks on the Founding Gestures of the 'New Materialism.'" *European Journal of Women's Studies* 15, no. 1 (2008): 23–39.

Ali, Ali. "Reframing the Subject: Affective Knowledge in the Urgency of Refuge." In *Refugees and Knowledge Production: Europe's Past and Present*, edited by Magdalena Kmak and Heta Björklund. London: Routledge, 2022.

Annicchino, Pasquale. "Persecution of Religious and LGBTI Minorities and Asylum Law: Recent Trends in the Adjudication of European Supranational Courts." *European Public Law* 21, no. 3 (2015): 571–590.

Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Penguin Books, 1994.

Bartl, Marija, Pola Cebulak, and Jessica C. Lawrence. "Introduction to The Politics of European Legal Research." In *The Politics of European Legal Research: Behind the Method*, edited by Marija Bartl and Jessica C. Lawrence. Cheltenham: Edward Elgar, 2022.

Bohmer, Carol, and Amy Shuman. *Political Asylum Deceptions: The Culture of Suspicion*. Cham: Palgrave Macmillan, 2018.

Bröckling, Ulrich, Susanne Krasmann, and Thomas Lemke. "From Foucault's Lectures at the Collège de France to Studies of Governmentality: An Introduction." In *Governmentality: Current Issues and Future Challenges*, edited by Ulrich Bröckling, Susanne Krasmann, and Thomas Lemke. New York: Routledge, 2010.

Brown, Michael P. *Closet Space: Geographies of Metaphor from the Body to the Globe*. London: Routledge, 2000.

Brown, Wendy. *States of Injury*. Princeton: Princeton University Press, 1995.

Burbergs, Maris. "How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in which New Rights are Born." In *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, edited by Eva Brems and Janneke Gerards. Cambridge: Cambridge University Press, 2014.

Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge, 1990.

Butler, Judith. *Precarious Life*. London: Verso, 2004.

Christodoulidis, Emilios. "Strategies of Rupture." *Law and Critique* 20, no. 1 (2009): 3–26.

Crimp, Douglas. *Melancholia and Moralism: Essays on AIDS and Queer Politics*. Cambridge, Mass.: MIT Press, 2002.

Danisi, Carmelo, et al. *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity*. Cham: Springer, 2021.

Davidson, Arnold I. "From Subjection to Subjectivation: Michel Foucault and the History of Sexuality." In *Foucault and the Making of Subjects*, edited by Laura Cremonesi, Orazio Irrera, Daniele Lorenzini, and Martina Tazzioli. London: Rowman & Littlefield International, 2016.

Davies, Gareth. "Taming Law: The Risks of Making Doctrinal Analysis the Servant of Empirical Research." In *The Politics of European Legal Research: Behind the Method*, edited by Marija Bartl and Jessica C. Lawrence. Cheltenham: Edward Elgar, 2022.

Davis, Deborah, and Kim Walker. "Towards an 'Optics of Power': Technologies of Surveillance and Discipline and Case-Loading Midwifery Practice in New Zealand." *Gender, Place & Culture* 20, no. 5 (2013): 597–612.

Deleuze, Gilles. *Bergsonism*, translated by Hugh Tomlinson and Barbara Habberjam. New York: Zone Books, 1991.

Derrida, Jacques, and Bernard Stiegler. *Echographies of Television: Filmed Interviews*, translated by Jennifer Bajorek. Cambridge: Polity Press, 2002.

Derrida, Jacques. *The Animal That Therefore I Am*. Edited by Marie-Louise Mallet, translated by David Wills. New York: Fordham University Press, 2008.

Derrida, Jacques. *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*. New York: Routledge, 2006.

Dover, Kenneth James. *Greek Homosexuality*. Cambridge & Massachusetts: Harvard University Press, 1989.

Edelman, Lee. *No Future: Queer Theory and the Death Drive*. Duke University Press, 2004.

Elden, Stuart, and Jeremy W. Crampton. "Introduction." In *Space, Knowledge and Power: Foucault and Geography*, edited by Stuart Elden and Jeremy W. Crampton. Aldershot: Ashgate, 2007.

Elden, Stuart. *Mapping the Present: Heidegger, Foucault and the Project of a Spatial History*. London & New York: Continuum, 2001.

Fairclough, Norman. *Discourse and Social Change*. Cambridge: Polity Press, 1992.

Fanon, Frantz. *Black Skin, White Masks*. New York: Grove Press, 1952.

Fernandez, Bina. "Queer Border Crossers: Pragmatic Complicities, Indiscretions and Subversions." In *Queering International Law: Possibilities, Alliances, Complicities, Risks*, edited by Dianne Otto. Oxon & New York: Routledge, 2018.

Fine, Bob. *Democracy and the Rule of Law: Liberal Ideas and Marxist Critiques*. London: Pluto Press, 1984.

Fisher, Mark. *Capitalist Realism*. Winchester: Zero Books, 2009.

Foucault, Michel. *The Archaeology of Knowledge and the Discourse on Language*, translated by Alan Sheridan. New York: Pantheon Books, 1971.

Foucault, Michel. "Language to Infinity." In *Language, Counter-memory, Practice: Selected Essays and Interviews by Michel Foucault*, edited by Donald F. Bouchard, translated by Donald F. Bouchard and Sherry Simon. New York: Cornell University Press, 1977.

Foucault, Michel. "Questions on Geography." In *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, edited by Colin Gordon, translated by Colin Gordon and others. New York: Pantheon, 1980.

Foucault, Michel. "*Two Lectures.*" In *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977,* edited by Colin Gordon, translated by Colin Gordon and others. New York: Pantheon, 1980.

Foucault, Michel. "Afterword." In *Michel Foucault: Beyond Structuralism and Hermeneutics*, edited by Hubert Dreyfus and Paul Rabinow. Chicago: University of Chicago Press, 1983.

Foucault, Michel. "Polemics, Politics, and Problematizations: An Interview with Michel Foucault." In *The Foucault Reader*, edited by Paul Rabinow, translated by Robert Hurley and others. New York: Pantheon Books, 1984.

Foucault, Michel. "Space, Knowledge, and Power." In *The Foucault Reader*, edited by Paul Rabinow. New York: Pantheon, 1984.
Foucault, Michel. *The History of Sexuality, Volume 2: The Use of Pleasure*, translated by Robert Hurley. New York: Random House, 1985.
Foucault, Michel. "Of Other Spaces." *Diacritics* 16, no. 1 (1986): 22–27.
Foucault, Michel. *The History of Sexuality, Volume 1: The Will to Knowledge*, translated by Robert Hurley. London: Penguin, 1988.
Foucault, Michel. *The History of Sexuality, Volume 3: The Care of the Self*, translated by Robert Hurley. New York: Vintage, 1988.
Foucault, Michel. "Governmentality." In *The Foucault Effect: Studies in Governmentality*, edited by Graham Burchell, Colin Gordon, and Peter Miller. Chicago: University of Chicago Press, 1991.
Foucault, Michel. "About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth." *Political Theory* 21, no. 2 (1993): 198–227.
Foucault, Michel. *The Order of Things: An Archaeology of the Human Sciences*, translated by Alan Sheridan. New York: Vintage, 1994.
Foucault, Michel. *Discipline and Punish*, translated by Alan Sheridan. New York: Vintage, 1995.
Foucault, Michel. "The Simplest of Pleasures." In *Foucault Live: Collected Interviews, 1961–1984*, translated by Lysa Hochroth and John Johnston, edited by Sylvère Lotringer. New York: Semiotext(e), 1996.
Foucault, Michel. "Nietzsche, Genealogy, History." In *Michel Foucault: Aesthetics, Method and Epistemology. Essential Works of Foucault 1954–1984*, edited by James D. Faubion, translated by Robert Hurley and others. New York: The New Press, 2000.
Foucault, Michel. "Questions of Method." In *Michel Foucault: Power. Essential Works of Foucault 1954–1984*, Vol. 3, edited by James D. Faubion, translated by Robert Hurley and others. New York: The New Press, 2000.
Foucault, Michel. "The Masked Philosopher." In *Ethics: Subjectivity and Truth. Essential Works of Foucault, 1954-1984*, Vol. 1, edited by Paul Rabinow, translated by Robert Hurley. London: Penguin, 2000.
Foucault, Michel. "Truth and Juridical Forms." In *Michel Foucault: Power. Essential Works of Foucault 1954–1984*, Vol. 3, edited by James D. Faubion, translated by Robert Hurley and others. New York: The New Press, 2000.
Foucault, Michel. *Birth of the Clinic: An Archaeology of Medical Perception*. Translated by A. M. Sheridan Smith. London: Routledge, 2003.
Foucault, Michel. *Society Must Be Defended: Lectures at the Collège de France 1975–1976*, edited by Mauro Bertani and Alessandro Fontana, translated by David Macey. New York: Picador, 2003.
Foucault, Michel. *The Hermeneutics of the Subject: Lectures at the Collège de France 1981–1982*, edited by Frédéric Gros, translated by Graham Burchell. New York: Palgrave Macmillan, 2005.
Foucault, Michel. *The History of Madness*, translated by Jonathan Murphy and Jean Khalfa. London: Routledge, 2006.
Foucault, Michel. *Death and the Labyrinth: The World of Raymond Roussel*. Translated by Charles Ruas. New York: Continuum, 2007.
Foucault, Michel. *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, edited by Michel Senellart et al., translated by Graham Burchell. New York: Palgrave Macmillan, 2007.

Foucault, Michel. *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*. Edited by Fabienne Brion and Bernard E. Harcourt, translated by Stephen W. Sawyer. Chicago: University of Chicago Press, 2014.
Foucault, Michel. *On the Government of the Living: Lectures at the Collège de France, 1979–1980*. Edited by Michel Senellart, translated by Graham Burchell. New York: Picador, 2016.
Foucault, Michel. *Confessions of the Flesh*. Edited by Frédéric Gros, translated by Robert Hurley. Knopf Doubleday Publishing Group, 2021.
Fuss, Diana. *Inside/Out: Lesbian Theories, Gay Theories*. New York: Routledge, 1991.
Golder, Ben. *Foucault and the Politics of Rights*. Stanford: Stanford University Press, 2015.
Golder, Ben, and Peter Fitzpatrick. *Foucault's Law*. Oxon & New York: Routledge, 2009.
Goldstein, Jan. "Framing Discipline with Law: Problems and Promises of the Liberal State." *American Historical Review* 98, no. 2 (1993): 364–375.
Grigolo, Michele. "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject." *European Journal of International Law* 14, no. 5 (2003): 1023–1044.
Grosz, Elizabeth. *Becoming Undone: Darwinian Reflections on Life, Politics, and Art*. Durham & London: Duke University Press, 2011.
Herman, Didi. "Beyond the Rights Debate." *Social & Legal Studies* 2, no. 1 (1993): 25-43.
Hewitt, Andrew. *Political Inversions: Homosexuality, Fascism & The Modernist Imagination*. Stanford: Stanford University Press, 1966.
Hirst, Paul Q. *Law, Socialism and Democracy*. London/Boston: Allen & Unwin, 1986.
Honig, Bonnie. *Antigone, Interrupted*. Cambridge; New York: Cambridge University Press, 2013.
Hunt, Alan. "Foucault's Expulsion of Law: Toward a Retrieval." *Law and Social Inquiry* 17, no. 1 (1992): 1–38.
Hurri, Samuli. "Cosmology and the Practices of the European Union." *No Foundations – An Interdisciplinary Journal of Law and Justice* 17 (2019): 118-138.
Hurri, Samuli. *Birth of the European Individual: Law, Security, Economy*. Oxon & New York: Routledge, 2014.
Johnson, Paul. *Homosexuality and the European Court of Human Rights*. London: Routledge, 2012.
Kapur, Ratna. *Gender, Alterity and Human Rights: Freedom in a Fishbowl*. Edward Elgar Publishing, 2018.
Kaysen, Susanna. *Girl, Interrupted*. New York: Vintage Books, 1994.
Kmak, Magdalena. "Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through the Technology of Morality." *Social Identities* 21, no. 4 (2015): 395–409.
Langlois, Anthony J. "Queer Temporalities and Human Rights." In *The Times and Temporalities of International Human Rights Law*, edited by Kathryn McNeilly and Ben Warwick, 159–177. Hart Publishing, 2022.
Lemke, Thomas. "Foucault Today: An Interview with Thomas Lemke." Interview by Stéphane Baele. *Emulations* 1 (2008): 46–51.
Lindroos-Hovinheimo, Susanna. *Private Selves: Legal Personhood in European Privacy Protection*. Cambridge: Cambridge University Press, 2021.
Lindroth, Marjo, and Heidi Sinevaara-Niskanen. "Introduction: Alternative Lenses on the Arctic." In *Critical Studies of the Arctic: Unravelling the North*, edited by Marjo Lindroth, Heidi Sinevaara-Niskanen, and Monica Tennberg. Cham: Palgrave Macmillan & Springer Nature Switzerland AG, 2022.
Lorenzini, Daniele, and Martina Tazzioli. "Confessional Subjects and Conducts of Non-Truth: Foucault, Fanon, and the Making of the Subject." *Theory, Culture & Society* 35, no. 1 (2018): 71–90.

Lugg, Catherine A. "Thinking about Sodomy: Public Schools, Legal Panopticons, and Queers." *Educational Policy* 20, no. 1 (2006): 35–55.
Madhok, Sumi. *Vernacular Rights Cultures*. Cambridge: Cambridge University Press, 2021.
Mangan, David. "Article 7 (Private Life, Home and Communications) – Respect for Private and Family Life." In *The EU Charter of Fundamental Rights: A Commentary*, edited by Steeve Peers et al. Oxford & New York: Hart Publishing, 2021.
May, Todd. "Subjectification." In *The Cambridge Foucault Lexicon*, edited by Leonard Lawlor and John Nale. New York: Cambridge University Press, 2014.
Mill, John Stuart. "On Liberty." In *On Liberty and Other Essays*, Oxford: Oxford University Press, 1991.
McNeilly, Kathryn, and Ben Warwick, eds. *The Times and Temporalities of International Human Rights Law*. Hart Publishing, 2022.
Minkkinen, Panu. "Critical Legal 'Method' as Attitude." In *Research Methods in Law*, edited by Dawn Watkins and Mandy Burton. Oxon: Routledge, 2017.
Moran, Leslie J. "Laskey v. the United Kingdom: Learning the Limits of Privacy." *The Modern Law Review* 61, no. 1 (2003): 77–84.
Mrazova, Andrea. "Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law." In *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective*, edited by Arzu Güler, Maryna Shevtsova, and Denise Venturi. Springer, 2018.
Munro, Vanessa E. "Legal Feminism and Foucault: A Critique of the Expulsion of Law." *Journal of Law and Society* 28, no. 4 (2001): 546–567.
Neuvonen, Päivi Johanna. "Retrieving the 'Subject' of European Integration." *European Law Journal* 25 (2018): 6–20.
Nieminen, Kati. "The Law, the Subject and Disobedience: Inquiries into Legal Meaning-Making." PhD dissertation, University of Helsinki, 2017.
Odysseos, Louiza, and Bal Sokhi-Bulley. "After Rights? Politics, Ethics, Aesthetics: An Introduction." *The International Journal of Human Rights* 28, no. 8–9 (2024): 1209–1220.
Palmer, Kent D. "Intratextuality: Exploring the Unconscious of the Text." Working paper. Archonic.net, 2002. http://archonic.net/Lx01a14.pdf.
Petman, Jarna. "Egoism or Altruism? The Politics of the Great Balancing Act." *No Foundations: Journal of Extreme Legal Positivism* 5 (2008): 113-133.
Philippopoulos-Mihalopoulos, Andreas. *Spatial Justice: Body, Lawscape, Atmosphere*. Oxon & New York: Routledge, 2015.
Pulkkinen, Tuija. "The Role of Darwin in Elizabeth Grosz's Deleuzian Feminist Theory: Sexual Difference, Ontology, and Intervention." *Hypatia* 32, no. 2 (2017): 279-295.
Reid, Julian. "Biopolitics," in *Critical Studies of the Arctic: Unravelling the North*, eds. Marjo Lindroth et al. Springer International Publishing AG, 2022.
Rose, Gillian. *Feminism and Geography: The Limits of Geographical Knowledge*. Minneapolis: University of Minnesota Press, 1993.
Schabas, William A. *The European Convention on Human Rights: A Commentary*. Oxford: Oxford University Press, 2015.
Scott, Joan Wallach. "Introduction: Feminism's Critical Edge." In *Women's Studies on the Edge*, ed. Joan Wallach Scott. Durham, NC: Duke University Press, 2008.
Selim, Hedayat, et al. "Asylum Claims Based on Sexual Orientation: A Review of Psycho-Legal Issues in Credibility Assessments." *Psychology, Crime & Law* 29, no. 10 (2023): 1001–1030.
Smith, Anna-Marie. *New Right Discourses on Race and Sexuality: Britain, 1968–1990*. Cambridge: Cambridge University Press, 1994.

Sokhi-Bulley, Bal. *Governing (Through) Rights*. Oxford & London: Hart Publishing, 2016.
Sokhi-Bulley, Bal. "Rights as Friendship." In *The Critical Legal Pocketbook*, edited by Illan Rua Wall et al., Oxford: Counterpress, 2021.
Sokhi-Bulley, Bal. "'After Rights' is Friendship: On Abandonment, Obligation and the Stranger." *The International Journal of Human Rights* 28, no. 8–9 (2024): 1459–1477.
Spijkerboer, Thomas. "Asylum Decision-Making, Gender and Sexuality". In *Research Handbook on EU Migration and Asylum Law*, eds. Evangelia Lilian Tsourdi and Philippe De Bruycker. Cheltenham: Edward Elgar Publishing, 2022.
Stychin, Carl F. "Sexual Citizenship in the European Union". *Citizenship Studies* 5, no. 3 (2001): 285-301.
Stychin, Carl. "Grant-ing Rights: The Politics of Rights, Sexuality and EU". *Northern Ireland Legal Quarterly* 51, no. 2 (2000): 281-300.
Sunstein, Cass Robert. "On the Expressive Function of Law". *University of Pennsylvania Law Review* 144, (1996): 2021-2053.
Tadros, Victor. "Between Governance and Discipline: The Law and Michel Foucault." *Oxford Journal of Legal Studies* 18, no. 1 (1998): 75–103.
Taylor, Chloë. *The Culture of Confession from Augustine to Foucault: A Genealogy of the "Confessing Animal"*. Oxon & New York: Routledge, 2010.
Teti, Andrea. "Rethinking Confession," in *The Late Foucault: Ethical and Political Questions*, eds. M. Faustino & G. Ferrero. Bloomsbury Academic, 2020.
Topinka, Robert J. "Foucault, Borges, Heterotopia: Producing Knowledge in Other Spaces". *Foucault Studies* 9, no. 9 (2010): 54–70.
Toscano, Alberto. "Tragedy and Juridical Forms." *South Atlantic Quarterly* 121, no. 4 (2022): 777–794.
Tuori, Kaarlo. "Law, Power and Critique". In *Law and Power. Critical and Socio-Legal Essays*, eds. Kaarlo Tuori, Zenon Bankowski, and Jyrki Uusitalo. Liverpool: Deborah Charles Publications, 1997.
Tuori, Kaarlo. *Critical Legal Positivism*. Aldershot: Ashgate, 2002.
Valentine, Gill. "Queer Bodies and the Production of Space". In *Handbook of Lesbian and Gay Studies*, eds. Diane Richardson and Steven Seidman. London: SAGE Publications, 2002.
Van der Burg, Wibren. "The Expressive and Communicative Functions of Law, especially with Regard to Moral Issues". *Law and Philosophy* 20, (2001): 31–59.
Van der Vleuten, Anna. "Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe". In *LGBT Activism and the Making of Europe: A Rainbow Europe?*, eds. Phillip M. Ayoub and David Paternotte. Hampshire & New York: Palgrave Macmillan, 2014.
Veitch, Scott. *Law and Irresponsibility: On the Legitimation of Human Suffering*. Abingdon: Routledge, 2007.
Vergès, Jacques. *De la stratégie judiciaire*. Éditions de Minuit, 1968.
Vergès, Françoise. *A Decolonial Feminism*. Translated by Ashley J. Bohrer. London: Pluto Press, 2019.
Wood, David. "Foucault and Panopticism Revisited (Editorial)," *Surveillance & Society* 1, no. 3 (2003): 234–239.

I

Kestilä, Iiris. "Confession as a Form of Knowledge-Power in the Problem of Sexuality." *Law and Critique* 32, no. 2 (2021): 195–216.

Creative Commons CC BY

Reproduced as a part of a doctoral dissertation with the kind permission of the copyright holder.

Law and Critique (2021) 32:195–216
https://doi.org/10.1007/s10978-021-09287-x

Confession as a Form of Knowledge-Power in the Problem of Sexuality

Iiris Kestilä[1]

Accepted: 12 February 2021
© The Author(s) 2021, corrected publication 2021

Abstract
This article addresses two questions related to the discrimination of homosexuals in the British Armed Forces as illuminated in the judgments of the European Court of Human Rights in the cases *Smith and Grady v. the United Kingdom* and *Beck, Copp and Bazeley v. the United Kingdom*. First, how does the military organization obtain knowledge about its subjects? Two works by Michel Foucault concerning the thematic of confession—*The Will to Knowledge* and *About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth*—provide a foundation for answering this question. Second, what happens when this knowledge obtained by the military organization comes into contact with the legal system? In relation to this question, Foucauldian theories of law are discussed, namely the so-called 'expulsion thesis' and 'polyvalence theory'. It is argued that the production of knowledge in the context of these cases is intertwined with the technique of confession. However, the confession does not only operate at the level of the military organization but also as an internal practice of the individual. When this knowledge then encounters the legal system, it appears that the law puts up a certain resistance towards other forms of power, e.g. disciplinary power. It is argued that this resistance is due to the law's 'strategic openness', i.e. the possibility to harness the law to different strategic purposes, due to which law can never be fully subordinated by external powers.

Keywords Confession · European Court of Human Rights · Expulsion thesis · Homosexuality · Knowledge-based power · Michel Foucault · Polyvalence

✉ Iiris Kestilä
iiris.kestila@ulapland.fi

[1] Faculty of Law, University of Lapland, Rovaniemi, Finland

Introduction

> It seems that nobody in Alexina's feminine milieu consented to play […] the difficult game of truth which the doctors later imposed on his indeterminate anatomy, until a discovery that everybody delayed for as long as possible was finally precipitated by two men, a priest and a doctor. (Foucault 1980, p. xii)

The above quotation by Michel Foucault is a passage from the memoirs of Herculine Barbin, known as Alexina by her/his familiars but subsequently renamed as Abel Barbin. Alexina, who had lived as a female, was later on recognized to be 'truly' a young man (Foucault 1980), and was officially reclassified as male. S/he lived in France in the mid-nineteenth century, and went to a Catholic school. S/he later worked as a teacher in a nearby town, and became the lover of a fellow schoolmistress. Later Alexina confided in a priest about her ambivalence, and was sent to a medical examination. Due to certain anatomic features, s/he was 'discovered' to 'belong' to the male sex and was obliged to make the legal change of sex after judicial proceedings (ibid.). Alexina's life was not a happy one and neither was the way it ended: s/he eventually committed suicide at a young age. I will not further discuss Alexina's case here, but the life s/he lived and the quotation by Foucault serve to illustrate some of the central themes of this paper.

Moving to more recent times, let us take a couple of more examples. In 2017 the European Court of Human Rights (later on 'the Court') ruled on the case *AP, Garcon and Nicot v. France* which concerned the possibility for transgender persons to change their gender marker on official documents as well as their forenames on their birth certificates to match their gender identity. The applicants complained that the fact that they had to substantiate this request by proving that they actually suffered from a gender identity disorder, and that the change in their appearance was irreversible, amounted to a violation of Article 8 of the European Convention on Human Rights (later on 'the Convention')—the right to private and family life (*AP, Garcon and Nicot*, para 3). We might thus say that the essential question in the case came down to whether the applicants were truly transgender. Then, in 2018, the Court of Justice of the European Union dealt with the case of *F v. Bevándorlási és Állampolgársági Hivatal*, where the Hungarian migration officials had aimed to substantiate an asylum seeker's claim of being homosexual by psychological tests. Somewhat similarly to the case of *AP, Garcon and Nicot*, the issue was whether the applicant was truly homosexual.

It would seem that there is something fundamentally problematic about the *truth* in relation to these matters, let us say gender and sexuality. In *The Will to Knowledge*, part one of *The History of Sexuality*, Foucault introduces the idea that the Western society has, for some time now, been obsessed by the need to know the *truth* about sexuality. Foucault questions sexuality as repressed and, instead, notes that, if anything, discourse on sexuality has exploded. In order to unearth the *truth* about sex, extensive technologies have been developed around the subject. Building on Foucault's work, my interest is not in the problematic of gender

and sexuality in a strictly juridical sense, although my laboratory in this article consists of cases from the Court and especially the application of Article 8 of the Convention. Rather, my focus will be on the ways in which these technologies of knowledge-based power come to light in legal cases and what happens when the knowledge generated by this power comes into contact with law.

My aim is to explore the techniques of knowledge-based power in the context of the military organization. The paper addresses two questions in this context. What kind of techniques to produce knowledge about individuals can be detected in the context of military? To answer this question, I will look at the facts of the cases and read them against certain texts by Foucault that deal with the thematic of confession. What happens when this obtained knowledge encounters the legal system? To answer this question, I will move from the facts to the reasoning and the judgment of the Court. It has sometimes been argued that Foucault did not think too much of the legal system but rather ignored it or saw it as subordinate to other societal powers. However, are there other ways to see the role of law?

Returning to the opening quotation, two characters come to mind: a priest and a doctor. Still building on a Foucauldian framework, these two characters appear to intertwine with a certain practice of knowledge-production—confession. An individual is invited to confess every little detail about their sexuality in the vein of Christian tradition and yet this information does not constitute *truth* without an outside interpreter, the doctor who can decipher the peculiar symptoms of the patient (Foucault 1976, pp. 66–67).

To my understanding, these mechanisms of knowledge-production are particularly well illuminated in the line of cases from the Court concerning discrimination of homosexuals in the British Armed Forces. Out of the total of four such cases, two will be examined here in detail: *Smith and Grady v. The United Kingdom* and *Beck, Copp and Bazeley v. The United Kingdom*, from the years 1999 and 2002, respectively. The key issue in these cases was the application of the guidelines drafted by the British Ministry of Defence, banning homosexuals from serving in the army. Because homosexuality was a ground for discharge from the Armed Forces, whenever such suspicions arose, it was considered necessary to substantiate the truthfulness of the claims. In both cases examined here, the applicants considered that the investigation into their sexuality violated their rights under Article 8 of the Convention.

The article is constructed as follows. I will first introduce the thematic of confession more generally. Then I will discuss certain ideas by Foucault concerning the thematic of confession by way of explaining the facts of the two cases and how they illustrate the points made by Foucault. The purpose of this exercise is to learn about the ways in which confession operates in this context and thus the ways in which the military organization produces knowledge about its subjects. After this, I will then analyse the two judgments of the Court to reveal what happens when this knowledge obtained by the military organization comes into contact with the legal system. Whilst doing this, I will utilise the Foucauldian concept of polyvalence to explain the features that come to light in the context of the cases. The final section concludes the discussion.

Confession

Let us start with the thematic of confession. Following Foucault, and bearing the two characters—the priest and the doctor – in mind, we might think that the *truth* about sexuality is produced, on the one hand, through the practices that derive from the Christian tradition of confession (see e.g. Peters 2003, p. 365; May and Bohman 1997) and, on the other hand through practices that could be referred to as judicial-medical (see e.g. Salter 2007, p. 58). What combines these two branches is the way they make the subject reveal the most intimate details of their sexuality, and yet, this information does not constitute *truth* without interpretation by an outsider (see e.g. Posel 2008, p. 134; Rose 1999, p. 240). What is needed is a priest to hear the confession of a sinner or a doctor to decipher the peculiar symptoms of a patient. As Foucault notes:

> The truth did not reside solely in the subject who, by confessing, would reveal it wholly formed. It was constituted in two stages: present but incomplete, blind to itself, in the one who spoke, it could only reach completion in the one who assimilated and recorded it. (Foucault 1976, p. 66)

The sexuality of a subject is a secret, not only to everyone else, but it is also hidden from the subject themselves. In order to find out the *truth* about this fundamental secret, technologies of power[1] have been developed around the subject. For Foucault, the technique of confession, together with the thematic of truth, was central to many of his works (see e.g. Foucault 2000a; Foucault 2005, 2017, 2014a, b).[2] This article largely relies on two texts dealing with the concept of confession: The *Will to Knowledge* and *About the Beginning of the Hermeneutics of the Self*: *Two lectures at Dartmouth.*

The theme of confession was outlined as clearly important in *the will to knowledge*, although Foucault later on changed his course to some extent (Elden 2005 pp. 24–26). In *The Will to Knowledge*, as mentioned above, he questions the so-called 'repression hypothesis': the idea that sexuality is somehow repressed as presented e.g. by Sigmund Freud (Foucault 1976, p. 10; Freud 1952[1910]). Instead, we speak about sexuality like never before and, indeed, must confess everything and anything related to it. In this way, verbalization of sexuality becomes intrinsically intertwined with the practices of power, but not in the negative sense, via restrictions. Instead, Foucault rather wishes to discuss the proliferating effects of power, those effects that generate behaviour. These practices of power then lead to the situation where

[1] The reader might wonder what the difference between the terms 'technique' and 'technology' is. Although Foucault often used these terms interchangeably, Behrent argues that there was also a difference between them (2013, pp. 58–59). In this article, I use the term 'technique' to refer to certain kind of methods and 'technology' to refer to power relations and the ways they operate.

[2] However, the thematic of confession is to some extent visible also in Foucault's writings about Antiquity, such as *History of Sexuality Vol.2: The Use of Pleasure* (1985). See also Taylor: in Ancient Greece, individuals would also examine one's actions, however, less to tell the truth and rather to direct oneself towards the philosophical idea of the good life (2009, pp. 13–14).

individuals will subjugate themselves to power via self-monitoring and reporting those observations about themselves.

As noted by David Tell (2010, p. 97), *The Will to Knowledge* often constitutes the reference point for research concerning Foucault's ideas on confession. The concept of confession, as outlined in *The Will to Knowledge*, has been discussed e.g. from the point of view of media studies (Mandziuk 2001), Catholic confessional practices (May and Bohman 1997), operation of Truth and Reconciliation Commissions (Posel 2008) and social media (Matabane 2017), to mention a few. However, the thematic of confession is discussed more thoroughly in Foucault's lectures entitled *About the Beginning of the Hermeneutics of the Self*, delivered at the Dartmouth College on 17 and 24 November in 1980.[3] The lectures consist of two parts entitled 'Subjectivity and Truth' and 'Christianity and Confession'. These lectures address the thematic of confession and especially its interpretative function. One of the main arguments of these lectures is that while individuals start extensively monitoring their own thoughts and behaviour as presented in *The Will to Knowledge*, this activity simultaneously requires interpretation and deciphering of those thoughts to find out their origin and especially whether they are good or bad, so to say (see e.g. May and Bohman 1997, p. 139).[4] Foucault traces the ways in which speaking the truth functions as 'a technique of power', which then produces the subject's relation to the self (Coe 2016).

On the one hand, my interest lies especially in the ways these mechanisms of confession and interpretation operate at the level of the military organization and, on the other hand, at that of the subject. As stated above, although Foucault's ideas of confession have been discussed from numerous perspectives, confession in the context of security has only rarely been addressed,[5] although we can observe a clear link between confession and the operation of the disciplinary power in Foucault's work. Indeed, according to e.g. Chloë Taylor, the 'techniques of domination and techniques of the self are always interwoven' (2009, p. 9). This connection is also noted by Arnold Davidson in the introductory part of Foucault's *Abnormal* lectures. As Davidson points out, 'Foucault's work from the early 1970s, his courses, lectures, interviews, and books, provides a wealth of material from which one could begin to write a genealogy of the examination, a genealogy that would intersect with the history of confession' (2003, p. xxiv). The concept of examination,[6] a normalizing practice of power that operates in schools, hospitals as well as the military, is then

[3] In 1980 Foucault gave a series of lectures of which the Dartmouth lectures form a part. He also gave lectures in the University of California at Berkeley, Princeton University and New York University. Foucault had given more or less the same lectures as Howison Lectures in Berkeley on 20 and 21 October (Blasius 1993).

[4] Foucault brings up this aspect also in Volume 2 of *History of Sexuality: The Use of Pleasure*, where he describes technologies of the self as 'models proposed for setting up and developing relationships with the self, for self-reflection, self-knowledge, self-examination, for the decipherment of the self by oneself, for the transformations that one seeks to accomplish with oneself as object' (1990, p. 29).

[5] However, this does not mean that the link between security and confession would not have been discussed at all, see e.g. Salter (2007).

[6] In *Discipline and Punish* Foucault describes examination as a 'mechanism that links a certain type of formation of knowledge to a certain form of exercise of power' (1995, p. 239).

more thoroughly discussed in *Discipline and Punish* (Foucault 1995). In this regard, Davidson also notes the similarities between the *Abnormal* lectures and *Discipline and Punish* (2003, p. xxii).

To illustrate the joint functioning of the mechanisms of confession and interpretation, I will deploy two conceptual pairs, which I have likewise borrowed from the abovementioned texts by Foucault. These concepts are *ars erotica* and *scientia sexualis* as presented in *Will to Knowledge;* and *exomologesis* and *exagoreusis* from *About the Beginning of the Hermeneutics of the Self*. The concepts of *ars erotica* and *scientia sexualis* aid me to address the mechanisms of knowledge production that operate at the level of the military organization. The concepts of *exomologesis* and *exagoreusis*, then, contribute to the ways in which the subject produces knowledge of themselves, that is, the ways in which these mechanisms of knowledge production become internalized. These mechanisms become visible in the cases of *Smith and Grady v. the United Kingdom* and *Beck, Copp and Bazeley v. the United Kingdom*.

Facts of *Smith and Grady*

Let us begin by addressing the case of *Smith and Grady v. the United Kingdom*. The case originated in two applications against the United Kingdom of Great Britain and Northern Ireland and the judgment was delivered in 1999. The applicants, Ms Smith and Mr Grady, both served in the Royal Air Force. In both cases, suspicions had been raised concerning their sexual orientation, i.e. whether the applicants were homosexual. The Royal Air Force therefore launched investigations to find out whether the applicants were indeed homosexual. Once their homosexuality was confirmed in the investigations, the applicants were discharged from the Royal Air Force.

The legal context for these two cases was provided by certain legislative changes in the laws regarding homosexuality as a criminal offence as well as Armed Forces' policy regarding the issue.[7] According to this new law, homosexuality was no longer a criminal offence but it left the Armed Forces the possibility to classify homosexuality as a reason for discharge. According to the policy, homosexuality was considered incompatible with service in the armed forces. When dealing with cases of suspected homosexuality, a Commanding Officer was to make 'a balanced judgment taking into account all the relevant factors' (*Smith and Grady v. the United Kingdom,* para 49.) It was recommended that in these cases a formal investigation would be opened (ibid.).

The cases of Ms Smith and Mr Grady originated in these circumstances. In both cases, the Armed Forces' authorities had gained information that suggested that Ms

[7] In the background of it was also affected by the so-called Wolfenden report (Home Office, *Report of the Committee on Homosexual Offences and Prostitution*), the purpose of which was to provide information on the criminalization of homosexual acts. Although the report eventually advocated for decriminalization of homosexual acts between consenting adults, it has been argued that it nevertheless established an idea that homosexuality was in essence immoral. See e.g. Johnson (2014, p. 100).

Smith and Mr Grady might be homosexuals, following which investigations were initiated.

In Ms Smith's case, noteworthy is the fact that investigations took place after Ms Smith had already admitted her homosexuality. In its submission, the British Government noted that the investigation took place if homosexuality was denied but also if it was admitted. This was to substantiate the truthfulness of the allegations. The aim of the investigations was to 'verify the homosexuality of the person suspected in order to detect those seeking an administrative discharge based on false pretences' (*Smith and Grady v. The United Kingdom*, para 80).

Therefore, the service police interviewed Ms Smith. The interview lasted approximately thirty-five minutes. She was asked how she came to realise that she was lesbian, the names of her previous partners and numerous times whether her previous partners were in the service. She was questioned about how she had met her current partner and the extent of their relationship. When she refused to respond, the interviewer asked how else he was to substantiate her homosexuality. She then confirmed that she and her partner had a full sexual relationship. She was also asked whether she and her partner had a sexual relationship with their foster daughter who was 16 years old. She was also asked 'whether she had thought about HIV, whether she was being "careful", what she did in her spare time and whether she was into "girlie games" like hockey and netball' (*Smith and Grady v. The United Kingdom*, para 14–15).

In Mr Grady's case, the central themes of the interviews consisted of Mr Grady's marriage difficulties, the sleeping arrangements with his wife and his cycling holiday with a male colleague. Mr Grady denied being homosexual. He was asked numerous questions about his work, his relationship with the head of the unit he worked at, his cycling holidays with a male colleague and about his female colleague. He was asked to tell the interviewers about the break-up of his marriage, whether he had extra-marital affairs, about his and his wife's sex life including their having protected sex and about their financial situation. He was further questioned about the cycling holiday, about a male colleague and the latter's sexual orientation (*Smith and Grady v. The United Kingdom*, para 25). After the first interview, Mr Grady sought legal advice, after which he refused to answer the questions in the second interview. However, he finally admitted his homosexuality adding that the reason he denied it at first was that he was uncertain about certain accumulated benefits on discharge and that he was therefore concerned about his family's financial situation.

Mr Grady was then further questioned about a person called 'Randy', whether his wife knew he was homosexual, whether a male colleague was homosexual and when he had 'come out'. He was asked whether he was 'a practising homosexual'. After Mr Grady refused to give the name of his current partner, it was then explained to him that his admission of homosexuality would have to be substantiated in order to avoid fraudulent attempts at early discharge. He was then questioned about his first homosexual relationship, his homosexual partners (past and present), who they were, where they worked, how old they were, how he had met them and about the nature of his relationship with them, including the type of sex they had. Lastly, he was also questioned about when he first realized he was homosexual, who knew about his sexual orientation, his relationship with his wife (including their sexual

relationship), what his wife thought about his homosexuality, his HIV status and again about the nature of his sexual relationships with his homosexual partners (*Smith and Grady v. The United Kingdom*, para 27.).

Confession and Interpretation

What does the case discussed above tell us about the practice of confession? Returning to Foucault and *The Will to Knowledge*, could we say that the ways of producing the truth about sexuality as exemplified by this case are somehow grounded in the act of confession? According to Foucault, historically there have existed two great procedures for producing the *truth* about sex: *ars erotica*, on the one hand, and *scientia sexualis*, on the other (Foucault 1976, pp. 57–58). Perhaps we could say that *ars erotica*—erotic art—is based on the *secret*: it is the master of this art who holds the secret and only they can transmit it to the disciple. This kind of knowledge must remain a secret, as 'according to the tradition, it would lose its effectiveness and virtue by being divulged' (Foucault 1976, p. 57).

Foucault then continues that our Western civilization does not possess *ars erotica*. Instead, our civilization is a certain kind of rarity, the only one which practices *scientia sexualis*. As Foucault notes, it is:

> […] the only civilization to have developed over the centuries procedures for telling the truth of sex which are geared to a form of knowledge-power strictly opposed to the art of initiations and masterful secret: I have in mind the confession. (Foucault 1976, p. 58)

The foundation for *scientia sexualis* could be considered to reside in the two characters introduced in the beginning: the priest and the doctor. It is through the institutions these characters represent—the Church and Science—that truth about sex came to be produced via an act of confession that operated through the norms of scientific regularity. The juridico-religious model of confession became intertwined with scientific methods of extorting evidence.

Let us take a closer look at the technique of confession. The confession operates in a way of dual relationship between the one who confesses and the one who hears the confession. This relationship is also one of power as the person who hears the confession 'is not simply an interlocutor but the authority who requires the confession […]' (Foucault 1976, p. 61). The subject who speaks is also the subject of the statement (ibid.). The one who listens to the confession has the power to judge and punish but also to forgive and console. The one who confesses is, conversely, unburdened of his wrongs, liberated (Foucault 1976, p. 62). And yet, almost nothing could be further from freedom, as the act of confession is obligatory and exhaustive. As Foucault notes, we assume that it is the power that holds sexuality within the domain of silence and represses it. Instead, it is the power that constantly generates the discourse on sexuality and makes us confess every little, secret detail about it. But how to confess that which is a secret?

As discussed before, the thing about sexuality is that it is not only something that the subject wishes to hide but what hides from the subject himself (Foucault 1976,

p. 66). This leads us to the integration of confession into the scientific discourse, which modifies the scope of confession:

> If one had to confess, this was not merely because the person to whom one confessed had the power to forgive, console and direct, but because the work of producing the truth was obliged to pass through this relationship if it was to be scientifically validated. (Foucault 1976, p. 66)

As the subject cannot explicate the truth as wholly constituted, an outsider is needed to *interpret* what is being said. Truth is construed in a two-stage process: between the one who speaks and the one who deciphers what is being said (ibid.). The one who listens to the confession is not merely a forgiving master but now becomes 'the master of truth with a hermeneutic function' (ibid.). Making sexuality into something that has to be interpreted is precisely the way sexuality was brought to scientific discourse.

Now, in the case that I have discussed here, the elements of confession and extorting evidence via scientific methods appear to be present. The starting point with both applicants was the suspicion of their homosexuality. However, the suspicion persisted despite the applicants' admission of their homosexuality, which was especially visible in the case of Ms Smith where the investigation was launched only after her confession. As the British Government submitted, there was a need to know the *truth* about her sexuality. Foucault also notes this sort of suspicion towards sexuality, as if there were indeed some fundamental secret that sexuality harbours (Foucault 1976, p. 69). This suspicion causes the emergence of two processes: we demand that sex speaks the truth but also that it speaks us *our* truth: 'the deeply buried truth of that truth about ourselves which we think we possess in our immediate consciousness' (ibid.) By deciphering what sexuality says about itself we are given back what is our own, yet unknown to us. What Foucault calls a knowledge of the subject is constructed by delivering us this very part that escapes us. That is, not the knowledge of the subject's form but that which divides him, and most of all, that which makes him ignorant of himself (ibid.).

In case of both applicants, this truth was then sought via methods that Foucault would describe as interrogation, the exacting questionnaire and the recollection of memories (Foucault 1976, p. 65). Both applicants were asked detailed questions about the nature of their sexual relationships but also about how they first came to realize that they were homosexual as well as about the development of their sexuality. Noteworthy in the case is also the way sexuality appears to reach every corner of the subject's experience. The questions that the applicants were asked did not relate 'only' to sex but also to their relationships to co-workers, financial status and relationship to their family, especially children. Perhaps this practice reveals something about what Foucault refers to as general and diffuse causality of sexuality (ibid.). Justification for the obligation to tell everything was found from the all-powerful causal power of sex. Confession has to be thorough and constant as sex is a cause of anything and everything (Foucault 1976, pp. 65–66). As Foucault notes:

> The confession has spread its effects far and wide. It plays part in justice, medicine, education, family relationships, and love relations […]. One goes about

> telling, with the greatest precision, whatever is most difficult to tell. (Foucault 1976, p. 59)

But why is all this information about sexuality needed? Who needs it? What Foucault seems to suggest is that not only the one who receives the confession but also the one confessing (Foucault 1976, p. 71). There is a certain pleasure in the act of unearthing our deepest secrets. However, to claim such a thing in the context of the case discussed here would be nothing short of grotesque. Might we instead ask whether this kind of desire is embedded in the *system* that requires the confession? Is there pleasure in this extensive, multiplying and intense truth-production about sex? Have we, instead of abandoning *ars erotica*, merely invented new forms of pleasure in finding the truth about pleasure and having those new forms of eroticism integrated into technologies that penetrate our privacy? As Foucault notes, must we conclude that *scientia sexualis* is rather an extraordinarily subtle form of *ars erotica*? (ibid.). Perhaps we should, instead of the sexuality of the subject, consider the sexuality of the army, the church, medicine or law.

Next, we will take a look at the feature of difficulty in confessing one's thoughts. Why is it that certain thoughts appear to be more difficult to say out loud and almost resist verbalization? And why is it that, nevertheless, it is precisely the same thoughts that we feel the need to talk about? Whereas in the case of *Smith and Grady* it appears that the will to confess derived rather from the security system than from the applicants themselves, in the next case, we will take a look at how the technique of confession operates in the inner world of the subject.

Facts of *Beck*

The subject's inner urge to confess is illustrated in the case of *Beck, Copp and Bazeley v. the United Kingdom* and especially in the case of Mr Beck. In 1976, Mr Beck had joined the Royal Air Force. By 1993 he had reached the rank of sergeant and was employed as a communications systems analyst. He had divorced in 1988. His conduct had been evaluated as exemplary and his evaluation was also otherwise very good. By 1993 he had been studying theology and was considering ordination; that is, becoming a priest. In May 1993 he took a course meant to aid participants to assess their suitability for ordination. He claimed that, during the course, he had 'realised that he could no longer deny his homosexuality and that he felt morally bound to reveal his sexual orientation as he was aware of the policy against homosexuals in the armed forces'. On the next day after the course he told the security officer that he was homosexual, although a celibate one. Later that day he also admitted his homosexuality to his superior. Similarly to the case of *Smith and Grady v. the United Kingdom*, an investigation was opened by the service police (*Beck, Copp and Bazeley v. the United Kingdom*, para 12–16).

The security officer to whom Mr Beck had spoken after the course described the visit during which Mr Beck had admitted his homosexuality to the service police. He reported on the information that Mr Beck had provided on his family and 'how he had lived his homosexuality in armed forces'. The security officer

also emphasized the view that Mr Beck was indeed a homosexual and not trying to get an early release from the armed forces. The officer also described Mr Beck's visit to a medical officer and a referral to a visiting psychiatrist. According to the psychiatrist, Mr Beck did not suffer from a clinical disorder (*Beck, Copp and Bazeley v. the United Kingdom*, para 17).

The other officer who had interviewed Mr Beck after the investigation had been opened also stated that Mr Beck was a genuine homosexual and not attempting to get an early release. Mr Beck's superior described Mr Beck's character and interest in theology, noting that he was not surprised that Mr Beck was homosexual, although his homosexuality had never showed. While he believed Mr Beck, he added that he had never seen or heard anything that would substantiate Mr Beck's story (*Beck, Copp and Bazeley v. the United Kingdom*, para 18).

Statements were obtained also from two of Mr Beck's colleagues. The first had been a close friend to Mr Beck and knew about his homosexuality already before the armed forces' authorities. This colleague described his relationship to Mr Beck, including his wish to be ordained. Both colleagues interviewed described Mr Beck as a '"man's man" who gave no indication of his homosexuality'. In addition to the statements of the colleagues, the Station Padre's evidence was recorded. Mr Beck's religious studies as well as his aspirations towards priesthood were outlined. According to the Station Padre, Mr Beck was 'a clever individual who would attempt to get what he wanted, the way he wanted'. Mr Beck's ex-wife was also interviewed on their marital difficulties, their financial difficulties, their separation and their divorce (*Beck, Copp and Bazeley v. the United Kingdom*, para 19–21).

The report finally concluded that:

> no signs of homosexual tendencies were identified by the first applicant's ex-wife, colleagues or friends, that the only evidence was the first applicant's own admission and that the enquiry had not revealed anything to rebut the first applicant's submissions that he had not had a homosexual physical relationship. (*Beck, Copp and Bazeley v. the United Kingdom*, para 22)

The Unit Commander's recommendation for administrative disposal of the matter later on recorded that:

> despite the devious and deliberate concealment of his homosexual tendencies, [Mr. Beck's] honesty and character have caused him finally to admit to the truth. […] [Mr. Beck] has nowhere to live outside the Sergeant's Mess … As such this lonely and solitary individual, who has had to face up to a situation not of his own making, deserves to be treated in a compassionate and dignified manner. … [Mr. Beck] has had to cope with extreme personal difficulties which have not previously impacted on the Service. These difficulties, which have been beyond his control, have caused him to become a lonely and solitary man, and finally to admit to his true personality. (*Beck, Copp and Bazeley v. the United Kingdom*, para 23)

On 10 August 1993, two of the members of a Board of Royal Air Force described Mr Beck's case as 'a murder inquiry without a body' as he had confessed his

homosexuality 'without any evidence to confirm or deny his claim'. However, on 27 November 1993 Mr Beck was nevertheless discharged from the Royal Air Force on the basis of his homosexuality (*Beck, Copp and Bazeley v. the United Kingdom*, para 25–26).

Interpretive Analysis of the Self

As Foucault notes, the examination of conscience and confession are among the most important of the procedures of producing the truth about oneself (Foucault 1993, p. 204). Perhaps the most striking feature of the case of Mr Beck is the way he found himself morally obliged to admit his homosexuality although he knew it would cost him his job. The fact that he came to this conclusion after the course, the purpose of which was to evaluate whether a person was fit to become a priest, is also worth noting. Unlike in the case *Smith and Grady*, Mr. Beck voluntarily felt the need to confess his homosexuality to the armed forces' authorities. Based on this setting, let us again take a closer look at the act of confession.

Foucault begins his lecture entitled 'Christianity and Confession' by returning to the formation of what he calls *the interpretive analysis of the self* (Foucault 1993, p. 210). According to Foucault, Christianity in itself is a confession which imposes on those who practice it the obligation of truth (Foucault 1993, p. 211). Examples of this kind of obligation are the obligation to hold true certain propositions that constitute a dogma, hold certain books as a source of truth or accept decisions from authorities in matters of truth (ibid.). And yet, a Christian is subjugated to other kind of obligation as well. According to Foucault:

> Everyone, every Christian, has the duty to know who he is, what is happening in him. He has to know the faults he may have committed: he has to know the temptations to which he is exposed. And, moreover, everyone in Christianity is obliged to say these things to other people, to tell these things to other people, and hence, to bear witness against himself. (Foucault 1993, p. 211)

Following Foucault, I will concentrate on the obligation to manifest the truth about oneself (Foucault 1993, p. 212). This manifestation in the Christian institutions of the first centuries takes two forms: *exomologesis* and *exagoreusis*. *Exomologesis* refers to an act related to penance, where, in short, the person doing the penance showed himself as a sinner with somatic and symbolic expressions, such as ash, wretched clothes and fasting (Foucault 1993, pp. 213–214). Foucault refers to Tertullian, according to whom what *exomologesis* means is *publication sui*, 'the Christian had to publish himself' (Foucault 1993, p. 214). This publication of the self included two features. First, showing oneself as a sinner, 'as somebody who preferred spiritual death to earthen life' (ibid.). *Exomologesis* was a kind of representation of death, renunciation of oneself to get access to spiritual life (ibid.). Second, *exomologesis* was also the model of martyrdom: 'The martyr is he who prefers to face death rather than to abandon his faith' (Foucault 1993, p. 215).

Exagoreusis is quite different from *exomologesis*. It is rooted in verbal confession whereas *exomologesis*, as described, rather relates to the public, and bodily,

manifestation of the truth. The deeper roots of *exagoreusis* go into self-examination practiced in the monastery. This self-examination was grounded in two principles: the principle of obedience and the principle of contemplation. In this relation, obedience takes essentially the form of a permanent sacrifice of one's own will (Foucault 1993, p. 216). Contemplation, then, refers to contemplation of God. As Foucault notes, 'the obligation of the monk is continuously to turn his thought to that single point which is God […]' (ibid.). The effect of contemplation, where the monk has to direct his thoughts towards God, is that he must take in hand not only his actions but also his thoughts in order to make certain that they really are constantly directed towards God (Foucault 1993, pp. 216–217). This requires not only constant examination of one's thoughts, but also deciphering their origin. After all, it is quite possible that the idea comes, not from God, but from Satan (Foucault 1993, p. 218). To find out whether an idea is rooted in bad sentiments, 'we have to decipher our thoughts as subjective data which have to be interpreted, which have to be scrutinized, in their roots and in their origins' (ibid.).

But how does one interpret one's thoughts? According to Cassian,[8] to whom Foucault also refers, this is precisely by telling them to the master or your spiritual father. Verbalization of thoughts makes it possible to sort out bad thoughts from good ones. This is because one cannot easily talk about things that are inhabited by evil. But would it then be sufficient for the monk to verbalize his thoughts by himself? According to Foucault, no. The presence of someone is needed as that presence is the image of God. Verbalization of thoughts is a way of putting them before the eyes of God where they necessarily show their nature (Foucault 1993, pp. 219–220). From this it follows that verbalization itself has an interpretive function. Verbalization must go as deep as possible, because thoughts have obscure roots which need to be brought to light. As verbalization brings thoughts to light, it also leads to the movement of the human soul away from the reign of Satan and towards God. 'Since under the reign of Satan the human being was attached to himself, verbalization as a movement toward God is a renunciation of Satan, and a renunciation to oneself.' Therefore, verbalization is a form of self-sacrifice (Foucault 1993, p. 220).

In this peculiar way, a common root can be found for *exomologesis* and *exagoreusis*. As Foucault notes, they are in fact deeply and closely related (Foucault 1993, p. 221). Obligation to renounce oneself finds parallel in the martyrdom discussed in relation to *exomologesis*. According to Foucault:

> the revelation of the truth about oneself cannot be dissociated from the obligation to renounce oneself. We have to sacrifice the self in order to discover the truth about ourself, and we have to discover the truth about ourself in order to sacrifice ourself. (Ibid.)

Therefore, there is no truth about the self without the sacrifice of the self (Foucault 1993, p. 222). This practice appears to become visible in Mr Beck's case: verbalization of his inner thoughts led, quite literally, to the sacrifice of his career. In his case, also the other aspect of these self-technologies is present: truth is not produced

[8] John Cassian (c. AD 360 – c. 435) was a Christian monk and theologian.

via coercion but inner motivation to speak out the deepest secrets of oneself. In the beginning of this article, two archetypes—the priest and the doctor—were introduced. Now what seems to be emerging is the idea of entanglement of these two characters. In case of Mr Beck, a priest and a doctor appear in *himself*. The requirement to examine and scrutinize one's thoughts includes an interpretive function as one has to keep up with the contemporaneous flow of thoughts in order to separate good thoughts from the bad ones.

However, as described, verbalization alone is not sufficient. Confession has to be made to someone and, in and through that act, the thoughts are brought to light. What was remotely present in the case of Smith and Grady, becomes more clearly visible with the case of Mr Beck. While the military organization, as it were, requires the confession, it also fosters a fundamental suspicion towards the individual, asking: is what Mr Beck is saying really the truth about himself? This suspicion is then channelled via the medical system when a statement from a psychiatrist is obtained. Also, this way the characters of the priest and the doctor make yet another appearance.

The Court's Judgments

On the basis of the preceding analysis, the answer to the first question of this article is that there is indeed a technique of confession at play in the cases. This technique operates, on the one hand, at the level of the military organization and, on the other hand, at the level of the individual. The military organization requires the confession and yet the confession does not form into *truth* without an outside interpreter representing the military. However, the way in which this technology operates does not merely take place within the military as such but can be understood as internalized practices of the individual as well. These are essentially the ways in which, based on the cases discussed here, the military organization produces knowledge about its subjects.

I will next move to answer the second question: what happens when this knowledge concerning the individual encounters the legal system? To answer this question, the Court's judgments in the two cases are analysed.

In both *Beck, Copp and Bazeley* and *Smith and Grady* the Court found a violation of Article 8 of the Convention. In *Beck, Copp and Bazeley* (para 53), the Court concluded that there was no difference between this case and the case of *Smith and Grady*. For this reason, it is sufficient to analyse the reasoning of the Court only in *Smith and Grady*.

As was explained above, the applicants complained that the investigations into their homosexuality and their subsequent discharge from the armed forces on the sole ground that they were homosexual, in pursuance of the Ministry of Defence's absolute policy against homosexuals in the British armed forces, constituted a violation of their right to respect for their private lives protected by Article 8 of the Convention (*Smith and Grady v. The United Kingdom*, para 69).

In such cases the Court's ruling always proceeds through certain standard questions. These include whether the issue falls within the scope of one of the substantive

articles of the Convention, whether there was an *interference* with the right, whether the interference was based on *law* and whether the interference pursued *a legitimate aim*. Finally, the Court considers whether the interference was *necessary in a democratic society* in order to achieve the legitimate aim in question, whether it was *proportionate* to that aim and taking into account *the margin of appreciation* accorded to the States by the Convention. The answer to this fourth question is usually referred to as the 'democratic necessity test'. What this essentially means is that there must always be a proportionate relationship between the aims pursued by the interference and the Convention right at stake (Gerards 2013, p. 467).

In the case of *Smith and Grady*, the British Government accepted that there had been an interference with the applicants' right to private life; however, they were of the opinion that this interference was 'in accordance with the law' and had an aim which was legitimate and 'necessary in a democratic society' (*Smith and Grady v. The United Kingdom*, para 72).

The core argument of the British Government in support of the policy was that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on the morale and, consequently, on the fighting power and operational effectiveness of the armed forces (*Smith and Grady v. The United Kingdom*, para 95). Conversely, the applicants submitted that the interferences with their private lives, given the subject matter, nature and extent of the intrusions at issue, were serious and grave, and required particularly serious reasons by way of justification. According to the applicants, the subject matter of the interferences concerned the most intimate part of their private lives, which was made public by the Ministry of Defence's policy itself (*Smith and Grady v. The United Kingdom*, para 81). Although the applicants acknowledged the unique circumstances of military life, i.e. certain restrictions regarding the sphere of an individual's private life, the applicants also noted that 'the armed forces of a country exist to protect the liberties valued by a democratic society, and so the armed forces should not be allowed themselves to march over, and cause substantial damage to, such principles' (*Smith and Grady v. The United Kingdom*, para 83).

The Court held that both the discharges and the investigations done after the admissions of homosexuality violated the applicants' right to respect for private and family life. The Court found that while both were in accordance with the national law and had a legitimate aim, neither was 'necessary in a democratic society' as required by Article 8. As the intrusions concerned one of the most intimate parts of an individual's private life, the Court noted that 'particularly serious reasons' are required to justify them (*Smith and Grady v. The United Kingdom*, para 89). In the context of armed forces, this meant that there must have been a 'real threat' to their operational effectiveness (ibid.).

The Court noted that the evidence provided by the British Government, on the basis of which the military supported its policy to exclude homosexuals, was solely based on negative attitudes towards homosexuals by current soldiers (*Smith and Grady v. The United Kingdom*, para 96–97). The Court found that this, especially when considered against the backdrop of the successes of integrating women and racial minorities into the military, was not 'convincing and weighty' evidence to support the exclusionary policy (*Smith and Grady v. The United Kingdom*, para

102–105). Likewise, the continued investigations after the applicants had already confessed to being homosexuals was a violation of Article 8 as the government's rationale of seeking to detect false claims of homosexuality was not sufficiently convincing and weighty (*Smith and Grady v. The United Kingdom*, para 106–110).

Polyvalent Law?

It is often argued that Foucault failed to acknowledge the importance of law in modernity and that in his analyses he did not sufficiently consider the role of law (Golder and Fitzpatrick 2009, p. 23). This stance is generally referred to as the 'expulsion thesis' (see e.g. Hirst 1986; Hunt 1992; Munro 2001). At the core of the expulsion thesis is the identification of law as a pre-modern, negative and repressive, form of power. This form of power then became overtaken by a new form of power, namely disciplinary power (Golder and Fitzpatrick 2009, p. 24). This change would also mark a transition from the pre-modern to the modern, in which law and sovereignty became less important as sites of power (ibid.). As Bob Fine notes, according to this view, law was completely subordinated by disciplinary power (1984, p. 200). Law, which was considered essentially as a negative mode of power by Foucault, was then overtaken by more productive modes of power; modes, that rendered law as an instrument to their own operation (Golder and Fitzpatrick 2009, pp. 25–26).

However, other accounts have also been introduced, the most famous perhaps being the one by Ben Golder and Peter Fitzpatrick. They argue that, to the contrary, Foucault's law could not be subordinated by disciplinary or other forms of power as power in Foucault's register exists 'in a relational dynamic of mutual constitution with disciplinary power' (Golder and Fitzpatrick 2009, pp. 150–151). Golder and Fitzpatrick argue that Foucault's law is a vacuous concept, open to different kinds of inputs from other social systems and functions. It is precisely this openness that makes sure that law cannot be completely occupied by external powers. Although law can be made to serve other powers, it is this quality of being able to be subordinated in a given situation that prevents the law from being definitively encompassed by these other powers (Golder and Fitzpatrick 2009, pp. 152–153).

From these notions we move to discuss law's polyvalent nature. This type of approach would deal with law as an empty shell, in a sense (cf. Ewald 1988, p. 36).[9] Because of this, law cannot be tied to any singular and determinate form (Golder and Fitzpatrick 2009, pp. 125–126). As Foucault himself writes in *Nietzsche, Genealogy, History*: 'rules are empty in themselves' (Foucault 2000b, p. 378). Rules can be occupied by powers external to them but it is indeed this vacuity due to which law cannot be contained by other powers. As Golder and Fitzpatrick note, 'the vacuity of Foucault's law is polyvalent vacuity, an insubordinate openness, for the "strategic reversibility"' (Golder and Fitzpatrick 2009, p. 127). While some commentators have aimed to place law in contrast to disciplinary power, as restraining it (see

[9] Ewald notes that 'it is a fact that there is no (positive) law without a law of law; no law without a principle, an instance of reflexion, whereby the law thinks about itself.'.

e.g. Goldstein 1993), the idea of polyvalent law would rather acknowledge that law can operate as a form of resistance; however this is not because of some righteous essence of law but because of its capability to be harnessed for different strategic purposes. This way we might conclude that law can be instrumentalized for the purposes of, for example, disciplinary techniques but it can also be used by individuals for the articulation of rights.

However, is it really so that the 'rules are empty in themselves?' This takes us to the old discussion about the responsiveness and reflexivity of the law. The introductions to the thematic have been famously made by Philippe Nonet and Philip Selznick (2009 [1978]) as well as Gunther Teubner (1983). Responsivity of the law can be shortly described as the law's capability to consider and react to inputs from other social functions and regimes whereas reflexivity refers to the idea of law as 'a system for the coordination of action within and between semi-autonomous social subsystems' (Teubner 1983, p. 242). As Peer Zumbansen notes,

> although the law was placed at a unique place from which it would constantly receive manifold communications, influences and pressures from different parts of society, its evolution depended on its ability to maintain this intricate relationship to its environment. Its self-reproduction depended on its constant exposure to the forces of society, while reconstructing these signals in its own language or code. (Zumbansen 2008, p. 792)

To my understanding, this would mean that the law is not completely subordinated by other social forces but rather retains a certain fundamental structure of its own. In the context of the two cases being addressed in this article, could we think that this fundamental structure is precisely the functioning of the human rights system? As presented by Kaarlo Tuori, human rights belong to deep structure of the legal system (2002, pp. 192–193). According to Tuori, 'the deep structure of modem law is defined by basic categories such as "legal subjectivity" and "subjective right" and by fundamental principles such as human rights as general normative ideas' (2002, p. 192). These categories construct the framework within which we can think in legal terms at the surface level of the law; the level where everyday legal actions take place.

Could there be a way to combine these approaches? Let us consider some of the features of these cases. First, both parties rely on previous cases, claiming that these are either analogous to the case at hand or different from it, meaning that the case at hand should be resolved either by following the previous cases or differently from the ones with a less desirable outcome. The Court will then decide which cases are relevant regarding the case at hand. This is an important part since due to these strategic choices of the parties the other one's interpretation of the case is often taken as the basis of the judgment. Second, the parties need to translate their problem into the legal grammar. In these cases this meant that, on the one hand, the applicants translated their sense of injustice into a question of whether there had been a violation of Article 8 of the Convention. This is essentially a question of an individual right. The British Government, on the other hand, relied on the legitimate aim of securing the functioning of the armed forces. These elements, the individual right

and the legitimate aim, could be considered as belonging to the fundamental functioning logic of the human rights system established by the Convention.

Would this mean, then, that the polyvalence thesis is not an accurate description of these cases? The answer is not that straightforward. First of all, my interpretation of the polyvalence thesis is that the essential feature of it is indeed the strategic elements it brings to fore. By considering the praxis of the Court as consisting of strategic relationships, we can detect that both parties in the case have their own strategy in order to win the case. But is there a strategic element in the judgment as well? Some accounts would definitely argue so. For example, Paul Johnson notes that the applicants also appealed on Article 3, which prohibits degrading treatment or punishment. The Court then concluded that while the investigations were undoubtedly distressing and humiliating for the applicants, the treatment did not reach the minimum level of severity to bring it within the scope of Article 3 of the Convention (*Smith and Grady v. The United Kingdom*, 122). According to Johnson, this is precisely a manifestation of the tendency to treat issues of homosexuality as essentially private issues (2014, pp. 101 and 103–104). Indeed, the Court has been criticized for its supposedly moralistic judgments (Johnson 2014, p. 103; Moran 1998; see also Grigolo 2003).

However, the contending interpretation would be that while the functioning logic of the Court is not strategic in itself in this moment of history, it is nevertheless a product of historical power struggles. This would bring us back to the polyvalence theory. Also the fundamental operation of the legal system is a product of strategic moves: powers that operate in the society also shape the legal system, some faster and some slower. While law is not devoid of power or value-free, the values embedded in law as a result of strategic power-struggles can change over time.

This brings us the answer to the second question of this article, namely what happens when knowledge about sexuality obtained through the technique of confession encounters the legal system. First, we can see how both parties aim to use the law for their own purposes: the military to sustain its techniques of governing and the applicants to resist this power. Based on these cases, it would indeed seem that law does not that easily lend itself to attempts of occupation by other forms of power. Instead, it could be said that law present a certain kind of resistance to other forms of power. But is this resistance due to the successful strategic movements of the applicants or the functioning of the law as such? To conclude, I would argue that both these accounts can be true at the same time. Indeed, the strategic movements of the parties shape the judgment but at the same time there is a historically situated and contingent 'core' of the law which also guides what kind of claims can be posed before the Court in the first place. This is a two-way movement between what Tuori calls the surface level and deep structure of the law. As Tuori also notes, this is necessarily an analytical division. In practice, the levels and different functions of the law form an organic whole (2002, p. 192). Perhaps we could say that this whole is polyvalent by its nature.

Conclusions

The purpose of this paper was to illustrate, first, how the military organization produces knowledge about its subjects and, second, what happens when this knowledge encounters the legal system. Let me now draw together some conclusions.

On the one hand, it seemed that the military organization demanded confession and it had indeed developed extensive technologies to produce that kind of information. This became visible in the case of *Smith and Grady*, where the confession was extended to all corners of the individual's sphere of life, from economic affairs to hobbies and sexual practices. On the other hand, the way in which these technologies operate does not merely take place within the system as such but can be understood as internalized practices of the individuals as well. An example of this was the case of *Beck*, where the applicant felt the moral obligation to confess his homosexuality although this was not required of him. What then ties these two cases together is what became especially visible in the case of *Beck*, from the way his confession was received. Indeed, there was a need to make sure that he was telling *the truth*. In both *Smith and Grady* and *Beck*, a fundamental suspicion regarding what these individuals had to say manifests itself. This takes us back to the priest and the doctor. Confession alone is not sufficient but an outside interpreter is needed for the confession to be seen as constituting the *truth*.

However, these archetypes do not appear in isolation but, as was observed in the case of *Beck,* they also intertwine. The interpreter—the doctor—is neither explicitly an outsider, but confession includes a kind of hermeneutic aspect which leads to a situation where individuals start to observe their own thoughts in order to decipher their meaning and origin. In this regard it also becomes visible how the technologies of knowledge production are not merely something external to the individual but also operate from within the subject.

What also seemed to be present in both of these cases was the way in which the representatives of the military organization were needed as the interpreters of the applicants' homosexuality. The military is, thus, the condition for the production of knowledge about the individual's inner world in that the system can, as it were, tell the truth about the individual—something that is unknown to the individual themselves. This operation of truth-production is necessarily also a manifestation of a power relationship, an exercise of power directed to the individual's sphere of privacy. This became visible when these issues were observed together with Article 8 of the Convention on the right to private and family life.

Then, what happened when this knowledge obtained for the purposes of the military came into contact with law? In this regard, we moved to discuss the judgment and the Court's reasoning as well as Foucauldian theories of law, namely the expulsion thesis and the polyvalence theory. However, saying that law would be completely occupied by e.g. disciplinary power seemed a bit of an exaggeration. Instead, both cases were decided in favour of the applicants: the Court balanced individual rights higher in the discussed cases in comparison to the societal aims that the British Government had chosen as its strategy. Foucauldian legal theories were then discussed in comparison with the old theories about the responsiveness

and reflexivity of the law; the question being, are rules empty or is there some kind of a fundamental functioning logic or 'core' of the legal system, so to say. It was then concluded that it is precisely the strategic openness of the polyvalence theory that could be considered to reside in the 'core' of law. This feature would also be the one to resist occupation from other forms of power. Because law, by nature, can be mobilized for different strategic moves it can never be completely overtaken by other forms of power.

To sum, there is a technique of confession at play within the military organization, which operates on the one hand at the level of organization itself and on the other hand, at the level of the subject. The military organization requires the confession and this input from the system causes the individuals to confess, seemingly out of their own initiative but when we take a closer look, it rather appears that this is precisely the technique of confession at work in the inner world of the subject. When this knowledge about the individual encounters the legal system, what appears to happen is that it runs into certain trouble. However, this is not necessarily because law is 'good' and disciplinary power is 'bad' but is rather caused by the fundamental logic of law at play. This is the 'strategic reversibility' of the law.

It is clear that this article only provides a brief outlook into these matters. One purpose of this article can indeed be described as opening more questions rather than providing definitive answers. Some issues that will be left for further analysis are, for example, whether these results are generalisable? Does confession operate only in the military context or can we detect ways in which confession operates also in other societal contexts? How does law function and should we understand its operation as a vacuous concept, empty shell, just sitting there and waiting to be possessed by external powers? Or are there some fundamental values beneath the surface of the legal system, guiding its operation and this way aiding to resist these external powers?

Acknowledgements I am grateful to the two anonymous reviewers for *Law and Critique* whose comments greatly improved the article. I would also like to thank Samuli Hurri and Julian Reid for their unwavering support and constructive comments throughout the process; Joonas Vola for commenting on the early drafts; and Tomi Tuominen for his comments and assistance in several phases of preparing this article.

Funding Open access funding provided by University of Lapland.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/.

References

Behrent, Michael C. 2013. Foucault and technology. *History and Technology* 29 (1): 54–104.

Blasius, Mark. 1993. Introductory note. In About the beginning of the hermeneutics of the self. Two lectures at Dartmouth, Michel Foucault. *Political Theory* 21 (2): 198–227.

Coe, Cynthia D. 2016. Review: About the beginning of the hermeneutics of the self: Lectures at Dartmouth College. *Notre Dame: Philosophical Reviews*. https://ndpr.nd.edu/news/about-the-beginning-of-the-hermeneutics-of-the-self-lectures-at-dartmouth-college/. Accessed 4 July 2020

Davidson, Arnold I. 2003. Introduction. In *Abnormal Lectures at the College de France 1974–1975, Michel Foucault*. London: Verso.

Elden, Stuart. 2005. The problem of confession: The productive failure of Foucault's history of sexuality. *Journal for Cultural Research* 9 (1): 23–41.

Ewald, Francois. 1988. The law of law. In *Autopoietic law: A new approach to law and society*, ed. Gunther Teubner. Berlin: Walter de Gruyter.

Fine, Bob. 1984. *Democracy and the rule of law: Liberal ideas and Marxist critiques*. London: Pluto Press.

Foucault, Michel. 1976. *The will to knowledge: The history of sexuality*, vol. 1. London: Penguin Books.

Foucault, Michel. 1980. Introduction. In *Herculine Barbin: Being the recently discovered memoirs of a nineteenth-century French hermaphrodite*. New York: Pantheon Books.

Foucault, Michel. 1990. *The use of pleasure*. New York: Vintage Books.

Foucault, Michel. 1993. About the beginning of the hermeneutics of the self: Two lectures at Dartmouth. *Political Theory* 21 (2): 198–227.

Foucault, Michel. 1995. *Discipline and punish: The birth of the prison*. New York: Vintage Books.

Foucault, Michel. 2000a. Truth and juridical forms. In *Michel Foucault: Power. Essential works of Foucault 1954–1984*, Vol. 3, ed. James D. Faubion, 1–89. New York: The New Press.

Foucault Michel, 2000b. Nietzsche, Genealogy, History. In *Michel Foucault: Aesthetics, method and epistemology. Essential works of Foucault 1954–1984*, Vol. 2, ed. James D. Faubion, 369–391. New York: The New Press.

Foucault, Michel. 2005. *The hermeneutics of the subject: Lectures at the College de France 1981–1982*. New York: St Martin's Press.

Foucault, Michel. 2014a. *Wrong-doing, truth-telling. The function of avowal in justice*. Chicago: University of Chicago Press.

Foucault, Michel. 2014b. *On the government of the living; Lectures at the Collège de France 1979–1980*. New York: Palgrave MacMillan.

Foucault, Michel. 2017. *Subjectivity and truth: Lectures at the Collège de France 1980–1981*. Basingstoke & New York: Palgrave MacMillan.

Freud, Sigmund. 1952 [1910]. *Five lectures on psychoanalysis.* New York: WW Norton.

Gerards, Janneke. 2013. How to improve the necessity test of the European Court of Human Rights. *International Journal of Constitutional Law* 11 (2): 466–490.

Golder, Ben, and Peter Fitzpatrick. 2009. *Foucault's law*. Oxon, New York: Routledge.

Goldstein, Jan. 1993. Framing discipline with law: Problems and promises of the liberal state. *American Historical Review* 98 (2): 364–375.

Grigolo, Michele. 2003. Sexualities and the ECHR: Introducing the universal sexual legal subject. *European Journal of International Law* 14 (5): 1023–1044.

Hirst, Paul Q. 1986. *Law, socialism and democracy*. London, Boston: Allen & Unwin.

Home Office. 1957. *Report of the Committee on Homosexual Offences and Prostitution.*

Hunt, Alan. 1992. Foucault's expulsion of law: Toward a retrieval. *Law and Social Inquiry* 17 (1): 1–38.

Johnson, Paul. 2014. *Homosexuality and the European Court of Human Rights*. Oxon, New York: Routledge.

Mandziuk, Roseann M. 2001. Confessional discourse and modern desires: Power and please in true story magazine. *Critical Studies in Media Communication* 18 (2): 174–193.

Matabane, Palesa Flory. 2017. *I confess therefore I am: How can online confession be used in a social media cyber performance.* University of Pretoria.

Larry, May, and Bohman James. 1997. Sexuality, masculinity, and confession. *Hypatia* 12 (1): 138–154.

Moran, Leslie J. 1998. Laskey v. the United Kingdom: Learning the limits of privacy. *The Modern Law Review* 61 (1): 77–84.

Munro, Vanessa E. 2001. Legal feminism and Foucault—A critique of the expulsion of law. *Journal of Law and Society* 28 (4): 546–567.
Nonet, Philippe, and Philip Selznick. 2009. *Toward responsive law: Law and society in transition*. New Brunswick, London: Transaction Publishers.
Peters, Michael. 2003. Writing the self: Wittgenstein, confession and pedagogy. *Journal of the Philosophy of Education* 34 (2): 353–368.
Posel, Deborah. 2008. History as confession: The case of the South African Truth and Reconciliation Commission. *Public Culture* 20 (1): 119–141.
Rose, Nikolas. 1990. *Governing the soul: The shaping of the private self*. London: Routledge.
Salter, Mark B. 2007. Governmentalities of an airport: Heterotopia and confession. *International Political Sociology* 1: 49–66.
Taylor, Chloë. 2009. *The culture of confession from Augustine to Foucault: A genealogy of the 'confessing animal.'* New York: Routledge.
Tell, Dave. 2010. Rhetoric and power: An inquiry into Foucault's critique of confession. *Philosophy and Rhetoric* 43 (2): 95–117.
Teubner, Gunther. 1983. Substantive and reflexive elements in modern law. *Law and Society Review* 17: 239–285.
Tuori, Kaarlo. 2002. *Critical legal positivism*. London, New York: Routledge.
Zumbansen, Peer. 2008. Law after the welfare state: Formalism, functionalism, and the ironic turn of reflexive law. *The American Journal of Comparative Law* 56 (3): 769–808.

Cases: European Court of Human Rights

Case of A.P., Garcon and Nicot v. France. (Applications nos. 79885/12, 52471/13 and 52596/13), 6.4.2017.
Case of Beck, Copp and Bazeley v. The United Kingdom (Applications nos. 48535/99, 48536/99 and 48537/99), 22.10.2002.
Case of Smith and Grady v. The United Kingdom (Applications nos. 33985/96 and 33986/96), 27.9.1999.

Court of Justice of the European Union

C-473/16 F v. Bevándorlási és Állampolgársági Hivatal, ECLI:EU:C:2018:36.

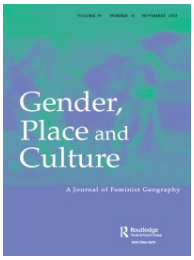
Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

II

Kestilä, Iiris. "Law, Space and Power: Spatiality in the European Court of Human Rights Judgments on Homosexuality." *Gender, Place & Culture* 30, no. 11 (2023): 1509–1528.

Creative Commons CC BY

Reproduced as a part of a doctoral dissertation with the kind permission of the copyright holder.



Gender, Place & Culture
A Journal of Feminist Geography

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/cgpc20

Law, space and power: spatiality in the European Court of Human Rights judgments on homosexuality

Iiris Kestilä

To cite this article: Iiris Kestilä (2023) Law, space and power: spatiality in the European Court of Human Rights judgments on homosexuality, Gender, Place & Culture, 30:11, 1509-1528, DOI: 10.1080/0966369X.2022.2072815

To link to this article: https://doi.org/10.1080/0966369X.2022.2072815

© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

Published online: 11 May 2022.

Submit your article to this journal

Article views: 1191

View related articles

View Crossmark data

Full Terms & Conditions of access and use can be found at
https://www.tandfonline.com/action/journalInformation?journalCode=cgpc20

GENDER, PLACE & CULTURE
2023, VOL. 30, NO. 11, 1509–1528
https://doi.org/10.1080/0966369X.2022.2072815

Routledge
Taylor & Francis Group

OPEN ACCESS Check for updates

Law, space and power: spatiality in the European Court of Human Rights judgments on homosexuality

Iiris Kestilä

Faculty of Law, University of Lapland, Rovaniemi, Finland

ABSTRACT

This article examines the ways in which technologies of power, and their operation in and through spaces, constitute 'deviance' in central cases on homosexuality of the European Court of Human Rights. To do this, the article deploys two concepts from Michel Foucault: heterotopia and panopticon. The European Court of Human Rights has sometimes been accused of dealing with cases relating to homosexuality in terms of the public/private dichotomy. Both heterotopia and panopticon question this division and show that this division is not as clear as is sometimes portrayed. While spatial arrangements affect the ways in which an individual is defined as 'deviant', the spatial analysis also illustrates the ways in which legal cases can be considered heterotopic themselves, this way contributing also to the discussions about the relationship between law and disciplinary power.

ARTICLE HISTORY
Received 8 April 2021
Accepted 11 April 2022

KEYWORDS
Heterotopia; homosexuality; law; Michel Foucault; panopticon

Introduction

In this article, I address the ways in which homosexuality becomes a 'problem' in certain cases of the European Court of Human Rights (later on 'the Court'). These landmark cases form a body of legal praxis that has often been discussed from the perspectives of, for example, queer and feminist studies. This is also a central element in the selection of cases. The article introduces a new perspective to these discussions by deploying two concepts from Michel Foucault, those of heterotopia and panopticon. In this article, I will analyse how do technologies of power, and their operation in and through spaces, constitute 'deviancy' in the Court's central cases on homosexuality. In other words, how does a homosexual become a 'deviant' subject depending on the spatial arrangement at hand.

CONTACT Iiris Kestilä iiris.kestila@ulapland.fi Faculty of Law, University of Lapland, Rovaniemi, Finland.

© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group
This is an Open Access article distributed under the terms of the Creative Commons Attribution License (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

In the core of such becoming, from the perspective of this article, is the division between public and private space. This division has been extensively discussed in the field of feminist studies (see, e.g. Rose 1993; Valentine 2002; Munt 2000), and also law (see, e.g. Stychin 2000, 2001, 2009; Johnson 2014). In his book Homosexuality and the European Court of Human Rights, Johnson (2014) has argued that the public/private dichotomy has a central role in the way in which the Court establishes homosexuals as eligible for legal protection. However, the division between public and private is perhaps not as clear as portrayed by Johnson.

This article elaborates on Johnson's work by discussing the public/private dichotomy with the aid of Foucauldian concepts related to space. The article contributes primarily to the legal theoretical discussion about the Court's jurisprudence: while these approaches have to great extent drawn from Foucault in terms of governing and sanctioning the homosexual subjects, so far Foucauldian theories of space have been mostly absent from these discussions. The Foucauldian concepts of heterotopia and panopticon aid to illustrate how the public/private division is in fact vague, affecting also the Court's argumentation in the legal judgments studied in this article.

While discussing the public/private dichotomy, the article also contributes to feminist discussions about law and space, and the growing body of scholarship on Foucauldian geography. On the one hand, the feminist approaches are often grounded in practice; they analyse concrete spaces and the ways in which these spaces affect the homosexual subjects, whereas this article engages in theoretical conceptualization on the law's heterotopic qualities. On the other hand, Foucauldian geography has not yet engaged with the praxis of the Court, and doing this enables to examine the relationship between legal identities and legal spaces.

The aim of the article is to scrutinize the public/private dichotomy, and to problematize its role in constructing homosexual 'deviancy'. Instead of only asking whether there is a public/private dichotomy at play in the cases, the article also shows how this division makes the Court's argumentation problematic from a legal perspective, and finally, how does this problem affect the construction of 'deviant' subjects.

In practice, the judgments are analysed via the method of critical close reading, which has been developed especially by Hurri (2014). This method not only analyses how law operates in practice and how legal actors understand their own actions, but also investigates how judgments can be used to analyse the functioning and self-understanding of other institutions and societal powers, as they are the ones that have become problematic in legal proceedings. In practice, this research looks for and analyses passages in judgments that reveal techniques of power directed at the subject. Thus, the practical method of analysis is embedded in a Foucauldian theoretical framework.

The Foucauldian theoretical framework consists namely of power analytics, especially in the way in which they relate to space. In this regard, the focus is on two concepts: heterotopia and panopticon. By speaking about heterotopias, Foucault (1986, 3) referred to spaces that are different from all other spaces within a certain culture but which are nevertheless real, unlike utopias. Due to being different, and yet in relation with all other sites, heterotopic spaces can reflect or mirror the features of these other sites (Foucault 1986, 3). Panopticon, then, is a certain kind of utopia. For Foucault, the panopticon was the utopia of absolute power over individuals: generalised surveillance and normative judgements that discipline individuals (Davis and Walker 2013, 601).

I will discuss these concepts in more detail below, however, for now it should be noted that especially heterotopia is a contested and, to some extent, elusive concept (see, e.g. Saldanha 2008). Foucault himself hardly used the term after having invented it. Indeed, Foucault's concept of heterotopia is far from clear or systematic. However, for the purposes of this article, I believe it is sufficient to use the concepts of heterotopia and panopticon as instruments, sources of inspiration, rather than aiming for an in-depth analysis of their meaning in Foucault's register. I believe that if these concepts, in the context of law, are to be understood as analytical tools, they can indeed contribute to our understanding of the relationship between law and spatiality in the Court's legal praxis. In practice, how the concepts of heterotopia and panopticon aid in further specifying the nature of the public/private division.

In the core of this article is the construction of 'deviant' subject, by which I refer to Foucault's conceptualisation of 'deviancy', especially sexual deviancy (Foucault 1976). In Discipline and Punish, and also in History of Sexuality Vol. 1: Will to Knowledge, Foucault notes that discipline operates in the following manner: instead of repressing or excluding the unwanted behaviour, this behaviour is made visible and the 'deviant' individual is moulded into an obedient subject. Moreover, the issue is not so much with what one does, but what one is. Therefore, what needs correction is not an individual act but the individual as such (see, e.g. Foucault 2003). This way, certain bodies are rendered 'normal' while others 'deviant' (Valentine 2002, 149). A central aspect of Foucault's work relating to sexuality was precisely the production of the homosexual as a 'deviant' subject (see, e.g. Foucault 1980, 101).

Such a mechanism is often in the background of legislation and even the legal praxis of the Court. Furthermore, this type of formation of 'deviancy' in the context of law is significantly related to space. Indeed, geography has come a long way from the times when it was considered merely as the description and identification of the Earth's surface (Valentine 2002). Nowadays 'space is understood to play an active role in the constitution and

reproduction of social identities, and vice versa, social identities, meanings and relations are recognised as producing material and symbolic or metaphorical spaces' (Valentine 2002, 145–146). In a similar manner, the relation between space and power was central to Foucault's work (see, e.g. Harni and Lohtaja 2016; Topinka 2010; Elden 1998; Rabinow 1984). In this article, I examine the ways in which space produces legal identities, namely 'deviancy', and at the same time, how identities pushed to margins produce legal spaces.

This article is divided into four parts. In Sec. 1, I will address the so-called public/private dichotomy—a theme often discussed in the field of queer studies and other research related to sexual minorities—and the ways in which it is present in the Court's case law, as well as the problematic nature of such a division. The purpose of this inquiry is to set the stage for the subsequent discussion of the spatial dimensions in the Court's jurisprudence. In Sec. 2, I will address the theme of heterotopia and the ways in which heterotopic sites challenge the public/private division. This section explores the concept of heterotopia in greater depth and applies it to practice via the Court's landmark cases on homosexuality. In Sec. 3, I will discuss the concept of panopticon in a similar manner. I will address the ways in which this spatial notion can be understood in more abstract terms as a technology of power. In the practice of panopticism, the production of knowledge, which so often underlies issues concerning sexual minorities, intertwines with space and power. Finally, In Sec. 4, I will shortly address the implications of the preceding analysis for the law in general: what is the relationship between law and space?

The article concludes that spatial arrangements affect the ways in which an individual is defined as 'deviant' and that the Court is not immune to these effects. However, the way Court relies on the public/private dichotomy is problematic because, as the analysed judgments show, this division is far from clear. Indeed, this division is rather a continuum, comparable even to the famous Möbius strip. This leads the Court into argumentation that not only leaves sexual minorities vulnerable but is also unconvincing from a legal perspective. Moreover, the obfuscation of this division shows how these peculiar spaces that are present in the cases come to function as a sort of a mirror: on the one hand, the legal system sees a reflection of disciplinary power in and over itself, and, on the other hand, discipline sees its own transient and elusive form in the image of the law. In this sense, the cases are heterotopic themselves.

Public/private and the epistemology of the closet

Let us begin by addressing the so-called public/private dichotomy of the Court's jurisprudence. For example, Johnson (2014, 101) has argued that the

Court has constantly aimed to maintain a strict division between private and public manifestations of homosexuality, which has led to the reinforcement of 'the social relations of the closet' (Johnson 2014, 103–104). What this essentially means is that homosexuals gain access to rights when they keep their sexuality hidden and out of the public sphere. This, according to Sedgwick (1990, 71), provides the 'defining structure for gay oppression' as well as the 'the contemporary legal space of gay being' (70; see also M. Brown 2000; Fuss 1991). Stychin (2000, 2001, 2009) has analysed the public/private dichotomy extensively in terms of trans-national law, i.e. the human rights law and the law of European Union. For example, Stychin (2000, 612–613) mentions the concept of a 'good homosexual', derived from work of Smith (1994). This concept relates to the homosexual as 'a law-abiding, disease-free, self-closeting homosexual figure who knew her or his proper place on the secret fringes of mainstream society' (Smith 1994, 18). According to Stychin (2000, 612), this is 'an imaginary figure who, because completely discrete and closeted, has no public identity at all'. In a similar vein, W. Brown (1995, 161) argues that the public sphere is characterized within citizenship discourse as the realm of rights: as long as homosexuals stay within the sphere of privacy, they do not have access to rights that belong to the public sphere. Indeed, the scope for social, and legal, acceptance of homosexuality has been limited to those who completely respect the public/private dichotomy (Stychin 2000, 612).

However, feminist theorists have acknowledged that this dichotomy is not that clear in practice. Rose (1993), for example, notes that, in a way, gay men and lesbians can occupy places of public and private at the same time. For instance, homosexuals who work in finance, or indeed law, can be very close to the centres of power and the public sphere, and yet feel that they do not belong. They are both present and absent within the workplace (Valentine 2002, 157). Similarly, Butler (1993, 21) writes about the 'constitutive outside', the space outside the subject which nevertheless serves as a foundation for the subject. In practice, that the 'outside' only exists because of the context 'inside' (Munt 2000, 535).

If we continue with public spaces, according to Butler (2004, xvii):

> The public sphere is constituted in part by what cannot be said and what cannot be shown. The limits of the sayable, the limits of what can appear, circumscribe the domain in which political speech operates and certain kinds of subjects appear as viable actors.

Although Butler in this context refers more to political speech regarding terrorism than sexual minorities, her analysis can be considered also in the context of homosexuality and the construction of public/private dichotomy, as well as its effects. In the quotation, we can see how the boundaries of public and private already start to obfuscate. First, how public and private

are co-constitutive. The private leaks into the public: we are aware of what lurks behind the curtains although we do not speak about it. Second, this co-constitution contributes to the formation of the subjects that are considered as viable actors, politically, or in this case, in terms of law. As we will see, the arrangement of public and private at hand determines who is a criminal, who is a law-abiding citizen and what actions can be taken within the sphere of public.

Referring to Foucault, Butler (1990, 2) writes that 'juridical systems of power produce the subjects they subsequently come to represent'. That is to say, that the law is performative; it names the things it at the same time calls into being. This is also why Butler is fairly critical towards the law as means of emancipation (ibid.). While Butler is perhaps most known for her theory of performativity relating to gender as repeated acts that over time produce what comes to seem as a natural state of things (Butler 1990, 33), performativity has also been applied to questions of space. According to this approach, space, too, can be brought into being through performances and as performative articulations of power (Gregson and Rose 2000, 434). Spaces considered, for example, heterosexual, do not precede their performance but come into being through these performances while being themselves performative of particular power relations (Gregson and Rose 2000, 434; Valentine 2002, 154–155). As Massey (1999, 283) notes, 'because [space] is the product of relations, relations which are active practices, material and embedded, practices which have to be carried out, space is always in a process of becoming. It is always being made'. This is also the case with the formation of the subject as considered by Foucault and Butler.

Although this short introduction to the thematic may sound like homosexuality being repressed into silence and privacy, Foucault (1976) notes, that in fact there exist massive technologies around the subject to *reveal* the secret of sexuality, namely through the technology of confession (Kestilä 2021). This way, the homosexual individual, through this process of knowledge-production, becomes a homosexual subject whose 'deviancy' is controlled and corrected. Sexuality and knowledge are thus always interwoven. These aspects—a need to stay within the sphere of privacy and a need to confess—are well illustrated in the cases of *Dudgeon v. the United Kingdom* (application no. 7525/76, 22.10.1981) and *Smith and Grady v. the United Kingdom* (applications nos. 33985/96 and 33986/96, 27.9.1999). The latter case will be discussed more thoroughly later on. However, before beginning the analysis of *Dudgeon*, first it is necessary to say a few words about the operation of the Court.

The European Court of Human Rights, established in 1959, is a supranational court that interprets the European Convention on Human Rights (later on the 'Convention'), the central international fundamental rights treaty in Europe. Under Article 1 of the Convention, the countries that have joined

the Convention have an obligation to ensure the rights and freedoms defined in the Convention to everyone within their jurisdiction. Therefore, it is under the jurisdiction of the Court to oversee this obligation, which it does through the applications submitted to it (Hirvelä and Heikkilä 2017, 17). The ultimate guarantee of the functioning of the Convention is the systematic monitoring of the execution of judgments. The Court's judgments are, in principle, declaratory, enforced by the Committee of Ministers of the Council of Europe. The competence of the Committee of Ministers is based on Article 46, which commits State Parties to comply with the final judgment of the Court in a case to which they are parties. Accordingly, the State must implement the judgment (Hirvelä and Heikkilä, 55).

The Court always addresses cases through the following standard questions. The Court considers whether the issue falls within the scope of one of the substantive articles of the Convention; whether there was an interference with the right; whether the interference was based on law; and whether the interference pursued a legitimate aim. Finally, the Court considers whether the interference was necessary in a democratic society in order to achieve the legitimate aim in question, and whether, taking into account the margin of appreciation accorded to the States by the Convention, it was proportionate to that aim. What the last-mentioned question essentially means is that there must always be a proportionate relationship between the aims pursued by the interference and the Convention right at stake (Gerards 2013, 467). Indeed, the rights protected by the Convention are not absolute but interferences with them can be accepted if reasonable justification is provided. For example, the rights enshrined in Articles 8–11 can be breached if this is 'necessary in a democratic society'. The case at hand, *Dudgeon*, concerned Article 8 (right to private and family life), and thus the democratic necessity test applied.

Now to the case. In the case of *Dudgeon*, the Court not only decided that consensual homosexual acts between adults should be free from interference by the state but also that engaging in such acts constituted a human right (Johnson 2014, 100). The applicant in the case, Mr. Dudgeon, was a homosexual but also an LGBT rights activist in Northern Ireland. In January 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act. During the search, also Mr. Dudgeon's personal documents, such as correspondence and diaries, were found and seized. A review of these documents revealed that Mr. Dudgeon was indeed a homosexual; something that was criminalized at the time. Mr. Dudgeon complained to the Court that his treatment together with the existence of the law criminalizing homosexual conduct constituted an unjustified interference with his right to respect for his private life, which is protected by Article 8 of the Convention (right for private and family life) (*Dudgeon*, paras 33–34).

The British government argued that while the criminalization of homosexual acts did interfere with private life, it was necessary in a democratic society and within the state's margin of appreciation. The British government claimed that the criminalization pursued two legitimate aims: protecting rights and freedoms of others and protection of morals (*Dudgeon,* paras 40 and 42). Mr. Dudgeon disputed these arguments. The Court eventually found a violation of Article 8 and famously stated that homosexual activities constitute 'a most intimate aspect of private life' (*Dudgeon*, para 52) and 'an essentially private manifestation of the human personality' (*Dudgeon*, para 60). While this has been considered a great victory in the context of gay rights, the judgement and the Court's argumentation in the case has since proven to be problematic. Although the Court can be seen as having taken a significant step away from the previous views regarding homosexuality, it nevertheless acknowledged the 'legitimate necessity in a democratic society for some degree of control over homosexual conduct' (*Dudgeon*, para 62).

This, read together with the Court's view that penal sanctions could not be justified 'when it is consenting adults alone who are involved' (*Dudgeon,* para 60), contributes to the understanding that the Court implicitly legitimized the view that maintaining homosexuality in private was necessary in order to 'protect the vulnerable' and thus protect the overall moral climate of the state (Johnson 2014, 101). While the Court established the view that homosexuals can gain access to privacy rights, access to rights is only gained when sexual practices are kept hidden from the public.

It can be argued, that the case reinforces the idea that keeping homosexuality hidden is desirable. But what exactly is 'hidden' homosexuality? This point is well illustrated by the case of *Laskey, Jaggard and Brown v. the United Kingdom* (applications nos. 21627/93, 21628/93 and 21974/93, 19.2.1997).

Heterotopia and the obfuscation of boundaries of public and private

The case of *Laskey, Jaggard and Brown v. the United Kingdom* concerned sado-masochistic homosexual acts between forty-four men in total (*Laskey, Jaggard and Brown*, para 8). During a routine investigation into other matters, the police found film material of said acts. As a result, the applicants were charged with a series of offences, including assault and wounding, relating to the sado-masochistic activities that had taken place over a period of ten years. The acts included, for example, maltreatment of the genitalia and ritualistic beatings. These activities were consensual and were conducted in private (ibid.). The activities took place at a number of locations, including rooms equipped as torture chambers. Video cameras were used to record the events and the tapes were copied and distributed amongst members

of the group (*Laskey, Jaggard and Brown*, para 9). The applicants claimed that their prosecution and convictions for assault and wounding was in breach of Article 8 of the Convention (*Laskey, Jaggard and Brown,* para 35).

According to the applicants, the sado-masochistic acts were all done willingly between adults, were carefully restricted and controlled, and the acts were not witnessed by the public. Neither did the acts cause any serious or permanent injury (*Laskey, Jaggard and Brown*, para 38). The British Government submitted that behind criminal law there were also moral concerns: criminal law should seek to deter certain forms of behaviour (*Laskey, Jaggard and Brown*, para 40).

The Court began its evaluation by noting that 'necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued' (*Laskey, Jaggard and Brown,* para 42). According to the Court, the State was entitled to consider not only the actual seriousness of the harm caused but also the potential for harm inherent in the acts in question (*Laskey, Jaggard and Brown*, para 43–46). As to whether the measures taken against the applicants were proportionate to the legitimate aim or aims pursued, the Court noted that the charges of assault were numerous and referred to illegal activities which had taken place over more than ten years. The sentences could also be appealed. Based on these factors, the Court considered that the measures taken against the applicants were not disproportionate (*Laskey, Jaggard and Brown*, para 49).

The case as a whole is very interesting. However, one particularly noteworthy aspect is the way the Court at first questioned whether the acts fell within the scope of Article 8, that is whether they are protected by privacy:

> The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life […] However, a considerable number of people were involved in the activities in question which included, inter alia, the recruitment of new 'members', the provision of several specially equipped 'chambers', and the shooting of many videotapes which were distributed among the 'members'. It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of 'private life' in the particular circumstances of the case. (*Laskey, Jaggard and Brown*, para 36)

Whilst the Court eventually found that the acts in question did fall within the scope of Article 8, its decision has been criticised for being based mainly on a moralizing view of the sexual activities which can gain protection as private (see, e.g. Moran 2003). As explained by Johnson (2014, 103), 'the Strasbourg organs [i.e. the Court] have consistently maintained a particular moral view about what types of activities can be regarded as private'. However, it would also seem that there is something about the space where

the activities took place. Although these happened behind closed doors, there was something that would seem to connect them to society in general. This becomes visible in the Court's moral concerns. I will now address this relationality with the aid of the concept of heterotopia.

The concept of heterotopia is perhaps most closely associated with the lecture Foucault gave to architects in 1967, and that was later published under the name of '*Des espaces autres*' ('Of Other Spaces'). Indeed, in the lecture, Foucault describes heterotopias as 'other spaces', present but always on the outside. In Foucault's analysis, heterotopia comes to represent a certain kind of counterpart for utopia, which is only imagination and does not exist concretely (see, e.g. Lee 2009, 649). As noted by Lee (2009), 'heterotopia emerge when utopian ideals are expressed in forms of relational difference that offer an alternative ordering of space and society'. Similarly, heterotopia differs from the panopticon—another important Foucauldian concept in terms of spaces. Whereas the panopticon in Foucault's work is an apparatus of constant surveillance and control, both internalised and dispersed, heterotopias have also been interpreted as places of resistance (Topinka 2010; Lefebvre 1991, 39). According to Tennberg (2020, 12), heterotopias are 'commonplace, concrete and real places unlike utopias or dystopias'.

In the lecture, Foucault (1986, 4) uses the mirror as an example of heterotopia: the image in the mirror is real, unlike for example the utopian image of the self, but it is nevertheless a 'placeless place'. The mirror reflects the image of a person gazing into it somewhere where the person is not and yet the gaze returns to a concrete place, to the person (ibid.). As Foucault explains:

> The mirror functions as a heterotopia in this respect: it makes this place that I occupy at the moment when I look at myself in the glass at once absolutely real, connected with all the space that surrounds it, and absolutely unreal, since in order to be perceived it has to pass through this virtual point which is over there. (ibid.)

The reflection in the mirror is both real and unreal at the same time. Indeed, heterotopias possess potential to challenge also other conventional uses and meanings of space, such as the dichotomic division of the public and the private. For Foucault (1986, 3), heterotopias are essentially sites that are 'in relation with all the other sites, but in such a way as to suspect, neutralize, or invent the set of relations that they happen to designate, mirror, or reflect'.

Moreover, in the *Order of Things*, another occasion when Foucault used the concept of heterotopia, it is mentioned that

> Heterotopias are disturbing, probably because they secretly undermine language, because they make it impossible to name this and that, because they destroy 'syntax' in advance, and not only the syntax with which we construct sentences but also that less apparent syntax which causes words and things (next to and also opposite to one another) to 'hold together'. (Foucault 1994, xvii–xviii)

As Steyaert (2010, 52) notes, 'heterotopia is a discursive modality that contradicts or contests ordinary experience and how we frame it, by unfolding a non-place within language. It points at the unthinkable "other" of our own familiar discourses and the discursive order of things'. Perhaps it could be said that heterotopias mirror, or reflect, but they do not necessarily show us what we expect to see. It shows us something that almost comes to resemble the concept of *uncheimlich* from Freud ([1919] 2003, 148; see also Kristeva 1991, 183): something that we once knew, which was anchored outside of ourselves due to fear and which returns in a frightening and unknown form, but which in fact is our own sub-conscious. However, this sub-conscious is not truly ours and the *unheimlich*, or heterotopia, shows this to us.

Could we understand the chambers in which the sado-masochistic activities of the case *Laskey, Brown and Jaggard* took place as heterotopic spaces: ones that fall within the private, while remaining connected to the public? Other elements of heterotopias that Foucault mentions would also seem to resonate with these closed spaces. First, as was explained in the previous section, homosexuality in society is preferred to be kept hidden and the places reserved for such sexual acts are expected to be kept private as homosexual individuals have, historically, been considered as deviant sexual predators subject to social exclusion (Johnson 2014, 101; Wolfenden Report, 1957). In this regard, Foucault (1986, 5) describes heterotopias of deviation. Foucault (1986, 7) also mentions the linkage between time and heterotopias. In *Laskey, Brown and Jaggard*, the sexual acts that took place in the chambers were recorded on film, freezing them in time. This also contributed to the Court's understanding of whether the space was really private. Moreover, according to Foucault (ibid.), either entering the heterotopia is compulsory, as would be the case in the context of a prison, or entering requires certain rites. In the case of *Laskey, Brown and Jaggard*, it is mentioned that everyone who took part in the activities conformed to certain rules, including the provision of a code word to be used by any 'victim' to stop an 'assault' (*Laskey, Jaggard and Brown*, para 8).

From this we could deduct that heterotopia is first, to some extent, a contradictory space, 'capable of juxtaposing in a single real place several spaces, several sites that are in themselves incompatible' (Foucault 1986, 25). Second, 'place is heterotopic not simply because of internal heterogeneity, but because of its external difference from all the rest of a society's spaces' (Saldanha 2008, 2083). It is precisely a counter-site, indeed a mirror, in some sense. Perhaps it is easy to recognize the 'torture-chambers' as heterotopic sites in themselves. However, could we also see them in a more abstract way, as a mirror for the legal system of international human rights? Law, speaking in a very general sense, is ultimately a system of language. As was mentioned above, heterotopias are disturbing because *they secretly undermine*

language. Heterotopia shows us what escapes language, and thus, what escapes law. What could be more difficult to bring into symbolic order than sexuality?

However, there is more to this. The case of *Laskey, Brown and Jaggard* shows us exactly how different homosexual acts, and in Foucauldian vein, different individuals, come to be defined as 'deviant' depending on the spatial arrangement. What takes place in the 'privacy' of home, can more easily gain protection through Article 8, as was the case in *Dudgeon*. In *Dudgeon*, it was only the possibility that the individual might be prosecuted for homosexuality that was considered to be in conflict with the Convention's privacy rights. This way, the Court subtly signalled that homosexuality in itself does not constitute deviancy. Instead, if homosexuality takes place in a context that is against public morality (sado-masochistic acts) or leaks into the public space (videotapes), it is acceptable that the individuals in question become subjected to criminal procedure. However, heterotopic sites, and heterotopic *concepts* such as sexuality, obfuscate the boundaries of private and public, thus leading also the Court to argue in a peculiar manner about what in fact constitutes private space. And yet, the artificial division between public and private, on which the Court has built an extensive body of legal praxis, was perhaps not the only problem. As was mentioned, heterotopia reflects the surrounding society, rendering visible its peculiarities and inconsistencies. What did the Court see in the mirror? This will be discussed next.

The panopticon and the utopia of absolute control

In *Discipline and Punish*, Foucault describes the utopia of the city that is subjugated to absolute control (Foucault 1995, 198). The foundation for this kind of working of power is in the prison building, designed and theorized by Jeremy Bentham. The panopticon, unlike medieval dungeons, is a prison that is full of light and is architecturally efficient. From the tower in the midst of the building, the inmates are supervised, although they do not know whether or not they are being watched and by whom. In this way, the inmates turn into objects of knowledge, instead of being participants in communication (Foucault 1995, 199–200). The all-seeing eye of panopticism observes and classifies people within the space, and thereby becomes a central mechanism of governing society at large. Thus, Bentham's idea of the perfect prison is not only an architectonic design but a utopia of absolute control. The panopticon is both a concrete way of organizing space and a certain kind of abstract machine. As Wood (2003, 235) notes, 'for Foucault the panopticon represented a key spatial figure in the modern project and also a key dispositif in the creation of modern subjectivity'.

As Foucault (1995, 202–203) described the issue, whoever is surveyed 'inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection'. Indeed, panopticon is, perhaps even more than a concrete place, a technology of power. Therefore, in this article I refer to panopticon as a practice of panopticism, by which I mean to draw a difference between panopticon as something that concretely exists (see, e.g. Bender-Baird 2016) and panopticon as a tool of analysis.

The practice of panopticism becomes particularly visible in two cases that concern the discrimination of homosexuals in the British armed forces: *Smith and Grady v. the United Kingdom* and *Lustig-Prean and Becket v. the United Kingdom* (applications nos. 31417/96 and 32377/96, 27.9.1999). In the former, both applicants served in the British Royal Air Force. Suspicions had been raised concerning their sexual orientation, i.e. whether Ms Smith and Mr Grady were homosexuals. Due to these speculations, the Royal Air Force launched investigations to find out whether the applicants were indeed homosexuals. In the background of the issue was the policy of the Ministry of Defence, which forbade homosexuals to serve in the military.

The other applicant, Ms Smith, had received an anonymous message in her answering machine a couple of months before she was to take her final exam to allow her promotion to proceed. The caller stated that she had informed the Air Force authorities of Ms Smith's homosexuality. Soon after this, Ms Smith admitted her homosexuality. After that, the assistance of the service police was requested (*Smith and Grady*, para 11–13). As a result of these investigations, Ms Smith was eventually discharged from the Royal Air Force. The events relating to Mr Grady's application were similar in that he too was subject to similar investigations and was eventually discharged.

The same policy was in the background of the case *Lustig-Prean and Becket*. In 1994 Mr Lustig-Prean was informed that his name had been given to the Royal Navy Special Investigations Branch in connection with an allegation of homosexuality. Mr Lustig-Prean admitted to his commanding officer that he was homosexual. He was then interviewed about his sexual orientation for about twenty minutes (*Lustig-Prean and Becket*, para 12–13). He was told that the interview took place because of the anonymous letter sent to his commanding officer claiming that Mr Lustig-Prean had had a relationship with a serviceman. Mr Lustig-Prean was asked to follow up on these claims. On 16 December 1994, the Admiralty Board informed Mr Lustig-Prean that his commission would be terminated and he would be discharged. The ground for discharge was his sexual orientation (*Lustig-Prean and Becket*, para 14–16).

In 'Truth and Juridical Forms', Foucault describes the idea of panopticism as one of the characteristic traits of our society (Foucault 2000, 70). According to Foucault, panopticism is founded on

> the type of power that is applied to individuals in the form of constant supervision, in the form of control, punishment and compensation, and in the form of correction, that is, the moulding and transformation of individuals in terms of certain norms. (ibid.)

Foucault refers to Cesare Beccaria and the legalistic theory, which means that criminal liability is based on individual guilt and punishments derived from the law, noting that panopticism serves as a sort of antithesis to the legalistic theory. In panopticism, supervision is not carried out at the level of what one *does* but what one *is*. The above extracts from the discussed cases show that, as Foucault argues, the panopticon is not only a concrete space such as military barracks; it is

> a type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organization […]. Whenever one is dealing with a multiplicity of individuals on whom a task or a particular form of behaviour must be imposed, the panoptic schema may be used. (Foucault 1995, 205)

The panopticon is a technology of power which operates through a spatial schema. In the armed forces, supervision is not exercised only by the central authority but by one's peers and investigating officers. This relates to what Foucault calls a 'pyramid of gazes' (Foucault 2000, 73). Information about individuals is passed on from the lower levels of surveillance all the way to the highest point of the pyramid. Individuals become the police of each other and themselves (Lugg 2006, 42). This was the case when the anonymous caller made the phone call regarding the case of Ms Smith and when someone had tipped off Mr Lustig-Prean. This was also the case in the whole formation of the service police, an organ designed to exercise power over one's peers. After these incidents, interviews were carried out, prying into the privacy of the applicants. An important element of the panoptic organization is indeed the production of knowledge, and moreover, the production of truth. As MacMillan (2009, 157) notes, panopticism creates new targets of power and, at the same time, 'a new economy of power mechanisms where the exercise of power is inseparable from the production of knowledge'. As Foucault (1980, 93) notes,

> there can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.

For example, in the cases discussed here, the inquiries into the applicants' sexuality continued after the people in question had already admitted their homosexuality. Such production of knowledge about sexuality relates to what Foucault describes in *The Will to Knowledge* (1976, 65): producing truth about sexuality takes place via scientific methods, namely, interrogation, the

exacting questionnaire and the recollection of memories. These are all part of a broader technology of confession. This *need* to know the truth about sexuality emerges as a central theme in Foucault's work on sexuality. The way in which deviancy is constructed in these cases takes place through panoptic practices, both external and internal supervision. While panopticism creates a pyramid of gazes that pry into the privacy of the individual—classifying them as normal and suitable for service, or as a deviant and therefore subject to discharge—it is also an internalised practice that takes place through the technology of confession (Foucault 1976; Foucault 1993; see also Kestilä 2021). The individuals subject themselves and partake in the process of becoming 'deviant'.

Finally, it is necessary to note that the operations of the military were legal, in terms of the national legislation then in force, although the Court eventually found a breach of Article 8. The panopticism of the armed forces is not invented by the individual soldiers but it is a technology which is supported by and which derives from other societal powers and institutions. It was the national law of United Kingdom which made it possible to have the said operations and procedures. Law is not immune to disciplinary power and it can be instrumentalised to serve such power. Perhaps this was what the Court saw in the mirror when addressing the case: the reflection of disciplinary power that lurks below the surface of the outspoken values of the legal system.

The law's spatiality

So far, the case law of the Court has been discussed by using the concepts of heterotopia and panopticon. I next discuss one last question: how should we understand the relation between the law itself and space?

One option would be to understand the law as a technology of power and control, as a certain kind of panopticon. Nieminen (2017, 43), for example, has noted that 'the ways of legal thinking […] shape our subjectivities, and in some cases, allow and even justify violent practices'. To my understanding, while it is clear that the workings of power are present everywhere, the same holds true for the law. This brings us to the so-called 'expulsion thesis', namely the argument according to which Foucault did not sufficiently consider the role of law in his analyses but rather saw it as completely subordinated by other powers (Fine 1984, 200; Golder and Fitzpatrick 2009, 25–26). However, this does not seem to be entirely true, as has been argued e.g. by Golder and Fitzpatrick (2009). Indeed, in *Discipline and Punish*, Foucault appears to conceptualize the law in contrast with the operation of disciplinary power. In Foucault's work, the discipline comes to form a certain kind of underside of the law: something that operates beneath the law's surface (Foucault 1995, 222; see also Hurri 2014). According to Foucault (1995, 222),

> The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines.

Foucault (ibid.) continues that 'the disciplines should be regarded as a sort of counter-law. They have the precise role of introducing insuperable asymmetries and excluding reciprocities'. Whereas law unifies, discipline separates, categorizes and classifies as well as hierarchizes individuals in relation to one another and, if necessary, disqualifies and invalidates (Foucault 1995, 223).

Understood in this way, we could say that there is a connection between law and disciplinary power; that they are each other's reflections in the mirror, somewhat alike to heterotopias as described by Foucault. For example, the military can be understood as heterotopic in relation to the law: the military as a place is distinct from the law, but it nevertheless shows us the image of the law, being a place that the law needs in order to secure its own existence, yet where the law does not seem to be in force, so to say (see, e.g. Agamben 2003). In other words, the military as a system, for its part, aims to secure the continued existence of the state, which, conversely, is the ultimate source of the law; yet, as a system the military seems to be beyond the confines of the normal operation of the law. Agamben explains this with a reference to the Möbius strip, the geometrical figure whose inside turns into an outside and back again, by noting that it, in a sense, comes to represent precisely the state of exception. According to Agamben (1998, 28), 'the state of exception is thus not so much a spatiotemporal suspension as a complex topological figure in which not only the exception and the rule but also the state of nature and law, outside and inside, pass through one another'. The cases I have discussed show the impossibility of separating between inside and outside. However, these cases also lead to another type of identity crisis in terms of legal system. They show that beneath the law's surface, which is supposed to be equal, objective and fair, lurks the disciplinary power.

Conclusions

It is now time to draw the conclusions. I started with the question, how do technologies of power, and their operation in and through spaces, constitute 'deviancy' in certain legal cases from the Court. I argued that the division between public and private is indeed one the most fundamental spatial arrangements in the Court's legal reasoning, determining whether the individual is constructed as 'deviant' in the context of human rights and homosexuality. However, this division is not as straightforward as has sometimes been portrayed. Instead, the inside and outside, private and public, are

co-constitutive and cannot be clearly separated from each other. This leads to faltering argumentation by the Court, as it tries to apply the public/private dichotomy, which in reality does not exists. Cases such as *Laskey, Jaggard and Brown* demonstrate this. This obfuscation of boundaries was further illustrated by deploying Foucault's concept of heterotopia. Foucault himself used the mirror as an example of heterotopia. Indeed, it would seem that the case of *Laskey, Jaggard and Brown* came to function as a certain kind of a mirror, which not only showed the artificiality of the public/private dichotomy but also something about the law.

This question was then addressed through the cases of *Smith and Grady* and *Lustig-Prean and Becket*. Here, I used another Foucauldian concept of space, that of panopticon. Whereas heterotopias in Foucault's register are concrete places, the panopticon is ultimately a utopia of absolute control over subjects. However, this control is not only external but also internalised. It is an inner urge to comply and supervise one's own actions although also one's peers are mobilised to this endeavour. The individual is not only shown the image of a deviant (which one must not become and which one must be wary of) but during the confessional processes of interrogation, the individuals themselves contribute into becoming 'deviant'. It was also noted that these processes are not invented by any individual person but that they derive from institutions and societal powers that surround such organisations as for example the military.

Building on this, I asked, what was it that the Court supposedly saw in the heterotopic mirror of *Laskey, Brown and Jaggard*? I have suggested that perhaps we could see discipline and law as reflections of one another. Law needs discipline, such as the military organization, in order to stay in force, while the military needs the law in order to enact its subjectivating practices. However, just as the inside and outside are indistinguishable in the Möbius strip, or how the public and private are obfuscated in the discussed cases on homosexuality, law and discipline are not strictly separate either. They already include one another.

My argument is that beneath the surface of the law live forms of discipline in parallel with the outspoken values of the law, such as justice and equality. Perhaps it is so that these forms of discipline have a certain fundamental suspicion towards sexuality that escapes governing and symbolization and therefore poses a threat to their unity. In heterotopic cases regarding homosexual subjects these disciplines see a reflection of their *unconscious*; an unconscious that separates and fragments, and thus shows that there is no such thing as unity, for everyone and everything has more than what can be rationalised and understood. While trying to exclude this ambiguous threat to their existence, the disciplinary powers exclude the suspicious subjects (see, e.g. Kristeva 1991), the homosexuals.

Acknowledgement

I would like to thank three anonymous reviewers whose thoughtful comments greatly improved the text.

Disclosure statement

No potential conflict of interest was reported by the authors.

Funding

Eemil Aaltosen Säätiö.

Notes on contributor

Iiris Kestilä is a PhD candidate at the Faculty of Law, University of Lapland. Her PhD work concentrates on the encounters between law and knowledge-based power in the problem of sexuality, especially from the perspective of LGBTQIA+minorities. She has previously been working on the Foucauldian concept of confession in the context of sexual minorities as well as politics of knowledge.

ORCID

Iiris Kestilä http://orcid.org/0000-0002-1557-0335

References

Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. California: Stanford University Press.

Agamben, Giorgio. 2003. *State of Exception*. Chicago: University of Chicago Press.

Bender-Baird, Kyla. 2016. "Peeing under Surveillance: Bathrooms, Gender Policing, and Hate Violence." *Gender, Place & Culture* 23 (7): 983–988. doi:10.1080/0966369X.2015.1073699.

Brown, Michael P. 2000. *Closet Space: Geographies of Metaphor from the Body to the Glober*. London: Routledge.

Brown, Wendy. 1995. *States of Injury: Power and Freedom in Late Modernity*. Princeton: Princeton University Press.

Butler, Judith. 1990. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge.

Butler, Judith. 1993. *Bodies That Matter. On the Discursive Limits of "Sex"*. London: Routledge.

Butler, Judith. 2004. *Precarious Life: The Powers of Mourning and Violence*. London: Verso.

Davis, Deborah, and Kim Walker. 2013. "Towards an 'Optics of Power': Technologies of Surveillance and Discipline and Case-Loading Midwifery Practice in New Zealand." *Gender, Place & Culture* 20 (5): 597–612. doi:10.1080/0966369X.2012.701199.

Elden, Stuart. 1998. "Mapping the Present - Space and History in the Work of Friedrich Nietzsche, Martin Heidegger and Michel Foucault." PhD diss., Brunel University.

Fine, Bob. 1984. *Democracy and the Rule of Law: Liberal Ideas and Marxist Critiques*. London: Pluto Press.

Foucault, Michel. 1976. *The Will to Knowledge: The History of Sexuality*. Vol. 1. London: Penguin Books.
Foucault, Michel. 1980. *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*. New York: Pantheon Books.
Foucault, Michel. 1993; "About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth." *Political Theory* 21 (2): 198–227.
Foucault, Michel. 1994. *The Order of Things: An Archaeology of the Human Sciences*. New York: Vintage Books.
Foucault, Michel. 1995. *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books.
Foucault, Michel. 2000. "Truth and Juridical Forms." In *Power: Essential Works of Foucault 1954–1984*, edited by James D. Faubion, vol. 3, 1–89. New York: The New Press.
Foucault, Michel. 2003. *Abnormal: Lectures at Collège de France 1974–1975*. London: Verso.
Foucault, Michel, and Jay Miskowiec. 1986. "Of Other Spaces." *Diacritics* 16 (1): 22–27. doi:10.2307/464648.
Foucault, Michel. 1986. "Of Other Spaces." *Diacritics* 16 (1): 22–27. (Translated from French by Jay Miskowiec).
Freud, Sigmund. [1919] 2003. *The Uncanny*. New York: Penguin Books.
Fuss, Diana. 1991. *Inside/Out: Lesbian Theories, Gay Theories*. New York: Routledge.
Gerards, Janneke. 2013. "How to Improve the Necessity Test of the European Court of Human Rights." *International Journal of Constitutional Law* 11 (2): 466–490. doi:10.1093/icon/mot004.
Golder, Ben, and Peter Fitzpatrick. 2009. *Foucault's Law*. Oxon: Routledge.
Gregson, Nicky, and Gillian Rose. 2000. "Taking Butler Elsewhere: Performativities, Spatialities and Subjectivities." *Environment and Planning D: Society and Space* 18 (4): 433–452. doi:10.1068/d232.
Harni, Esko, and Aleksi Lohtaja. 2016. "Heterotopia ja Profanaatio: Michel Foucault ja Giorgio Agamben Tilan Poliittisuuden Uudelleen Muotoilijoina." *Tiede & Edistys* 41 (1): 44–56. doi:10.51809/te.105212.
Home Office. 1957. "Report of the Committee on Homosexual Offences and Prostitution ('Wolfenden Report')."
Hurri, Samuli. 2014. *Birth of the European Individual: Law, Security, Economy*. Oxon: Routledge.
Johnson, Paul. 2014. *Homosexuality and the European Court of Human Rights*. Oxon: Routledge.
Kestilä, Iiris. 2021. "Confession as a Form of Knowledge-Power in the Problem of Sexuality." *Law and Critique* 32 (2): 195–216. doi:10.1007/s10978-021-09287-x.
Kristeva, Julia. 1991. *Strangers to Ourselves*. New York: Columbia University Press.
Lee, Janet. 2009. "FANY (First Aid Nursing Yeomanry) 'Other Spaces': Toward an Application of Foucault's Heterotopias as Alternate Spaces of Social Ordering." *Gender, Place and Culture* 16 (6): 647–664. doi:10.1080/09663690903279120.
Lefebvre, Henri. 1991. *The Production of Space*. Oxford: Blackwell.
Lugg, Catherine A. 2006. "Thinking about Sodomy: Public Schools, Legal Panopticons, and Queers." *Educational Policy* 20 (1): 35–58. doi:10.1177/0895904805285374.
MacMillan, Alexander. 2009. "Foucault and the Examination: A Reading of 'Truth and Judicial Forms." *Journal of Power* 2 (1): 155–172. doi:10.1080/17540290902760923.
Massey, Doreen. 1999. "Spaces of Politics." In *Human Geography Today*, edited by Doreen Massey, John Allen, and Phil Sarre, 279–295. Cambridge: Polity Press.
Moran, Leslie J. 2003. "*Laskey v. the United Kingdom*: Learning the Limits of Privacy." *The Modern Law Review* 61 (1): 77–84. doi:10.1111/1468-2230.00129.

Munt, Sally R. 2000. "Shame/Pride Dichotomies in Queer as Folk." *Textual Practice* 14 (3): 531–546. doi:10.1080/095023600750040694.

Nieminen, Kati. 2017. "The Law, the Subject and Disobedience: Inquiries into Legal Meaning-Making." PhD diss., University of Helsinki.

Hirvelä, Päivi, and Satu Heikkilä. 2017. *Ihmisoikeudet: Käsikirja EIT:n Oikeuskäytäntöön*. Helsinki: Alma Talent.

Rabinow, Paul. 1984. *The Foucault Reader*. New York: Pantheon.

Rose, Gillian. 1993. *Feminism and Geography: The Limits of Geographical Knowledge*. Minneapolis: University of Minnesota Press.

Saldanha, Arun. 2008. "Heterotopia and Structuralism." *Environment and Planning A: Economy and Space* 40 (9): 2080–2096. doi:10.1068/a39336.

Sedgwick, Eve. 1990. *Epistemology of the Closet*. Berkeley: University of California Press.

Smith, Anna Marie. 1994. *New Right Discourses on Race and Sexuality: Britain, 1968–1990.* Cambridge: Cambridge University Press.

Steyaert, Chris. 2010. "Queering Space: Heterotopic Life in Derek Jarman's Garden." *Gender, Work & Organization* 17 (1): 45–68. doi:10.1111/j.1468-0432.2008.00404.x.

Stychin, Carl F. 2000. "A Stranger to Its Laws': Sovereign Bodies, Global Sexualities, and Transnational Citizens." *Journal of Law and Society* 27 (4): 601–625. doi:10.1111/1467-6478.00169.

Stychin, Carl F. 2001. "Sexual Citizenship in the European Union." *Citizenship Studies* 5 (3): 285–301. doi:10.1080/13621020120085252.

Stychin, Carl F. 2009. "Faith in the Future: Sexuality, Religion and the Public Sphere." *Oxford Journal of Legal Studies* 29 (4): 729–755. doi:10.1093/ojls/gqp016.

Tennberg, Monica. 2020. *Arktinen Heterotopia: Neljä Tarinaa Rovaniemeltä*. Rovaniemi: Arktinen keskus/Lapin yliopisto.

Topinka, Robert J. 2010. "Foucault, Borges, Heterotopia: Producing Knowledge in Other Spaces." *Foucault Studies* 9 (9): 54–70. doi:10.22439/fs.v0i9.3059.

Valentine, Gill. 2002. "Queer Bodies and the Production of Space." In *Handbook of Lesbian and Gay Studies*, edited by Diane Richardson and Steven Seidman, 145–160. London: SAGE Publications.

Wood, David. 2003. "Foucault and Panopticism Revisited (Editorial)." *Surveillance & Society* 1 (3): 234–239. doi:10.24908/ss.v1i3.3338.

III

Kestilä, Iiris. "'The Truth of Oneself': Governing Homosexual Asylum Seekers Through Confession." *Law, Culture and the Humanities.* Accepted for publication.

Used with permission of SAGE Publications Ltd. Journals, permission conveyed through Copyright Clearance Center, Inc.

‘The Truth of Oneself’: Governing Homosexual Asylum Seekers Through Confession

Iiris Kestilä

Abstract: This article addresses the question of how the ‘truth’ about homosexual asylum seekers is constituted through legal proceedings, what kinds of *subjectivities* are produced in the asylum process, and how these issues reflect the EU law as it relates to questions of asylum. The analysis is carried out through the Foucauldian concept of *confession* and case analysis of the CJEU’s legal praxis. The article concludes that the credibility assessment of homosexual asylum seekers can be understood as a confessional practice where ‘truth-telling’ subjects are produced and linked to relationships of power and domination.

Key words: EU asylum law, sexual minorities, Michel Foucault, confession, the Qualification Directive

I Introduction

In *The Will to Knowledge*, part one of *The History of Sexuality*, Michel Foucault argues that the Western society has, for some time now, been obsessed with the need to know the ‘truth’ about sexuality. In this article, I discuss the ways in which this ‘truth’ is constituted through legal proceedings, what kinds of subjectivities are produced in the process, and what can these issues tell us about the law itself. This examination is carried out by analyzing judgements by the Court of Justice of European Union (CJEU) on asylum seekers who belong to sexual minorities, ie homosexual persons who are seeking asylum on grounds of sexual orientation and claim to have been persecuted on those grounds in their country of origin. The essential question during the proceedings, then, is to find the ‘truth’ about the applicant’s sexuality, ie to determine whether their declared sexual orientation is credible.

The cases analyzed concerned the interpretation of the Qualification Directive 2011/95/EU where,[1] first, Article 2(d) defines who is a refugee. According to this definition, a refugee is 'a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group' is 'unable or, owing to such fear, unwilling to return to their country of origin'. Article 4 then stipulates the conditions for the assessment of facts and circumstances in the application process. The cases discussed here, *F v. Bevándorlási és Állampolgársági Hivatal*[2] and *A and others v. Staatssecretaris van Veiligheid en Justitie*,[3] concern especially the assessment of credibility and therefore the interpretation of Article 4.

In the European Union (EU) legal framework on asylum, sexual orientation and gender identity (SOGI) are currently taken to constitute membership in a particular social group that is in threat of being persecuted. Nevertheless, SOGI applicants still face many obstacles in applying for asylum. Many of these problems relate to credibility assessment specifically, ie, whether the applicants are considered as 'truly' homosexuals. This essentialist assumption of an immutable nature of sexual orientation not only creates many practical difficulties in relation to the credibility assessment but it has also been heavily critiqued for example from the perspective of queer theory. Deniz Akin has noted that 'a queer critique is heavily informed by the poststructuralist understandings of human subject as discursively constructed' and therefore a queer 'approach is particularly suspicious of any natural or core identity claim.'[4]

---

[1] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). OJ L 337, 20.12.2011, p. 9–26. One of the analysed cases concerns the interpretation of the earlier directive (Council Directive 2004/83/EC), however the content of the mentioned Article is the same in both directives.

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

[3] *Joined Cases C-148/13–C-150/13 A and others v. Staatssecretaris van Veiligheid en Justitie* (ECLI:EU:C:2014:2406) (*A and others*).

[4] Deniz Akin, 'Discursive Construction of Genuine LGBT Refugees' *lambda nordica* 3-4 (2018), pp. 21-46, p. 26.

The role of subjects and subjectivities has emerged as a topical issue in EU law as well. As noted by Susanna Lindroos-Hovinheimo, 'the European harmonization project began with an emphasis on trade and free movement, but has gradually become attentive to the human beings who are its subjects, both as actors and as those acted upon.'[5] However, as noted by Samo Bardutzky and Elaine Fahey, not only are the citizens of the Member States subjects of EU law, but EU law subjectifies also other individuals such as, for example, asylum seekers.[6] The authors further note that individuals/citizens are indeed subjectified, meaning 'that they are exposed to regulatory expectations, strategies and pressures that are exerted by government power.'[7]

The terms *subjection* and *subjectification* are sometimes used interchangeably. However, as explained, eg, by Päivi Neuvonen, often *subjection* refers to becoming a subject, someone governed over, whereas *subjectification* (or subjectivation) refers to something becoming subjective.[8] Subjectification has been seen as something that can also have an emancipatory element. This division is somewhat in accordance with the Foucauldian register, where the word 'subject' has a double-meaning: 'subject to someone else by control and dependence; and tied to his own identity by a conscience or self-knowledge'.[9] As Daniele Lorenzini and Martina Tazzioli note, mainly starting from 1980s, Foucault becomes interested in the concept of 'counter-conduct', where, in order to refer to more autonomous ways of constituting oneself as a subject through a certain set of practices or techniques of the self, he speaks of 'subjectivation'.[10] In this article, I use the term *subjection* in the mentioned meaning.

---

[5] Susanna Lindroos-Hovinheimo, 'There Is No Europe - On Subjectivity and Community in the EU', *German Law Journal* 18 (2017) pp. 1229-1246, p. 1230.

[6] Samo Bardutzky and Elaine Fahey, 'The Subjects and Objects of EU Law: Exploring a Research Platform' in Samo Bardutzky and Elaine Fahey, eds., *Framing the Subjects and Objects of Contemporary EU Law* (Cheltenham, UK & Northampton, MA, USA: Edward Elgar 2017), pp. 1-31, pp. 6-7.

[7] Bardutzky and Fahey, 'The Subjects and Objects', p. 11.

[8] See eg Päivi Johanna Neuvonen, 'Retrieving the "Subject" of European Integration', *European Law Journal* 25 (2018), pp. 6–20.

[9] Michel Foucault, 'The Subject and Power', *Critical Inquiry* 8 (1982), pp. 777-795, p. 781.

[10] Daniele Lorenzini and Martina Tazzioli, 'Confessional Subjects and Conducts of Non-Truth: Foucault, Fanon, and the Making of the Subject' *Theory, Culture and Society* 35 (2018), pp. 71-90, pp. 75-76.

In the context of EU law, too, subjection of the individuals/citizens is a power relationship. Moreover, subjects of EU law are legal subjects, although perhaps in a broader sense than has been traditionally understood. Thus, the definition of a subject is not limited to, for example, acts of voting, putting forward initiatives or litigation but, rather, subjects are constituted in multiple social settings. When we purchase something from a store or, indeed, migrate to another country, we are 'constantly deciding and creating our social and legal life':[11] our acts are foreseen by the law and the law ascribes consequences to them.[12]

The discussion regarding the subjects of EU law has been addressed from critical perspectives as well.[13] As Lindroos-Hovinheimo points out, 'there is a strong tendency of law to treat humans as autonomous self-same subjects. Accordingly, the protection of individuals' dignity, freedom, and subjective personhood are considered important aims in the EU.'[14] According to Lindroos-Hovinheimo, 'judgments from the European courts refer repeatedly to individual autonomy and the need to respect personal identity,' whereas approaches that view the individual and community as co-constitutive should rather be explored.[15] Gareth Davies has argued that while Union Citizenship is intended to bring Europeans together, it is often commented that it can, on the contrary, even have exclusionary and anti-egalitarian effects.[16] While Union Citizenship is granted to all citizens of the Member States, only some actively exercise the rights that come along with it. One of those rights is the right 'to live a transnational life within the EU', in other words, 'to become a mobile Citizen.'[17] Freedom of movement, one of the fundamental freedoms of the EU, is particularly problematic from the perspective of asylum seekers. According to Magdalena Kmak, migration of EU citizens

[11] Damjan Kukovec, 'Subject-Object Dialectics and Social Change' in Samo Bardutzky and Elaine Fahey, eds., *Framing the Subjects and Objects of Contemporary EU Law* (Cheltenham, UK & Northampton, MA, USA: Edward Elgar 2017), pp. 45-64, p. 57.

[12] Bardutzky & Fahey, 'The Subjects and Objects', p. 8.

[13] For an overview, see Editorial Comments, 'The Critical Turn in EU Legal Studies', *Common Market Law Review* 52 (2015), pp. 881-888.

[14] Lindroos-Hovinheimo, 'There Is No Europe', p. 1235.

[15] ibid.

[16] Gareth Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans' *European Papers* 4 (2019) pp. 675-694, p. 675.

[17] Davies, 'Citizenship', p. 677.

exercising their right to freedom of movement is encouraged and protected, while attempts by asylum seekers to enter the EU are discouraged and restricted. Moreover, those who cross the EU borders in an irregular manner are condemned as immoral and perceived as 'bogus asylum seekers.'[18] In a similar vein, Saila Heinikoski has argued that 'the current policy of free movement as part of the area of freedom, security and justice puts emphasis on the exclusion of others, reflecting the view that people crossing the borders of the Union are a source of threat.'[19]

Nadine El-Enany has noted that matters of migration and asylum are often presented as 'challenges' to nation states, whereas the refugee situation is referred to as a 'crisis'.[20] El-Enany argues that migration in itself is not problematic, but rather that it has been problematized.[21] Indeed, 'the migrant has been vilified, considered to be a deviation from the norm'. The norm is a system of nation states where each 'native' is considered to be entitled to their land and therefore should have no reason to migrate. However, as El-Enany demonstrates, such an argument is usually made without any historical context. People have always migrated, and the problematization of this migration is embedded in racism and historical injustices.[22] El-Enany argues that 'both the movement of people and responses to migration must be rooted in an understanding of and resistance against imperialist, capitalist and racialized structures of domination'.[23] Similarly, as these structures affect the ways in which narratives about migration are constructed, they also affect the ways in which the subjects of asylum law are produced: from a Western, racialized and heteronormative perspective. In this regard, the critique of post-structuralist, queer and feminist authors seems

[18] Magdalena Kmak, 'Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through the Technology of Morality' *Social Identities* 21 (2015), pp. 395-409, p. 396. See also Carmelo Danisi et al., *Queering asylum in Europe: Legal and social experiences of seeking international protection on grounds of sexual orientation and gender identity* (Springer 2021), pp. 3-4; René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Leiden & Boston: Bill 2012), p. 105.

[19] Saila Heinikoski, 'Morals and the Right to Free Movement: Insiders, Outsiders and Europe's Migration Crisis' *Nordic Journal of Migration Research* 7 (2017), pp. 47-75, p. 47.

[20] Nadine El-Enany, 'On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the Refugee' *International Journal on Minority and Group Rights* 22 (2015), pp. 7-38, p. 7-8.

[21] El-Enany, 'On Pragmatism and Legal Idolatry', p. 8.

[22] ibid.

[23] El-Enany, 'On Pragmatism and Legal Idolatry', p. 38.

to be on point. The truth was never absolute, but rather always constructed contingently in a particular social setting.

In this article, the topic of the 'truth' about sexuality and the related production of subjectivities is approached through a theoretical framework deriving from the work of Michel Foucault, with a particular focus on the theme of *confession*. While the notion of confession – a central mechanism of production of subjects in Foucault's register – has been widely discussed from multiple perspectives, the discussion of confession from the perspective of legal procedures has been mostly missing,[24] despite their clear connection. Indeed, confession, which takes the form of subjection and objectivation, can be considered as the central technology governing the SOGI asylum seeker within the framework of EU law. Confession is not only an internalized practice of the individual that produces the subject but also a form of external knowledge-production that produces the SOGI asylum seeker as an object of knowledge. Both subjection and objectivation are forms of power and domination, stemming from the Western history of colonialism and heteronormativity.

This article contributes to Foucauldian discussions on confession through the perspective of EU asylum law, with a particular focus on subjection and objectivation as forms of subject-formation. This division within the technology of confession is illuminated through an analysis of asylum cases – an aspect which has so far been mostly missing from the discussions concerning confession. The article also contributes to discussions about subject-formation in EU law by enriching them with the Foucauldian concept of confession. It shows that confessional technologies are not only present in practices of migrant administration or courts, but they are also embedded into EU legislation, thus contributing to the formation of a 'true homosexual subject' on a fundamental level.

The article is constructed in the following manner: first, in Section 2, I present the legal framework of credibility assessment in the asylum process in detail as well as specific issues related to SOGI applicants. Then, in Section 3, I discuss the concept of confession in detail. The purpose of this section is to set the stage for the analysis of the CJEU's judgements

[24] However, see eg Nancy J Holland, '"Truth as Force": Michel Foucault on Religion, State Power, and the Law' *Journal of Law and Religion* 18 (2003), pp. 79-97 and to some extent Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Oxon & New York: Routledge 2009).

concerning SOGI asylum seekers. In Sections 4 and 5 I analyze two cases from the CJEU from the perspective of confessional practices. The analysis shows that, first, there are confessional practices at play in the cases, and second, the practices of confession take the form of both subjection and objectivation. In Section 6, I discuss the ways in which the subject of 'truth' is produced in and through confessional practices present in the asylum process, what kinds of subjects are produced and, in particular, how indicators related to credibility assessment deriving from the EU legislation contribute to the formation of subjects. Section 7 concludes the discussion.

This article argues that the credibility assessment of SOGI asylum seekers can be understood as a confessional practice in the Foucauldian sense and, as such, as a relationship of power and domination – and eventually exclusion, when 'bogus asylum seekers' are excluded from entering the European society. The powers that produce the 'truth-telling' subject, and the 'truth' in the first place, are the same powers that determine whether the 'truth' the applicants tell is credible. The 'truth-telling' homosexual subject thus becomes a medium for different intersecting powers. Moreover, this process is supported by the legal praxis of the CJEU and relevant EU legislation.

II The Legal Framework of Credibility Assessment

Let me first shortly introduce the said legal framework and issues related to it from the perspective of SOGI claimants. The cases I have discussed above relate to the Qualification Directive, and therefore, this will be the focus of my analysis.

In 2015, Europe faced the so-called 'refugee crisis.' During that time, the increase in people leaving their homes especially in Syria due to a civil-war was witnessed. In the first nine months of 2015, more than 487,000 people arrived on Europe's Mediterranean shores, twice the number for all of 2014.[25] In response to these events, the European Commission launched in 2015 the European Agenda on Migration. As a consequence, in 2016 the European Commission put forward a series of legislative drafts relating to all aspects of the Common

[25] Seth M Holmes and Seide Castañeda, 'Representing the "European Refugee Crisis" in Germany and Beyond: Deservingness and Difference, Life and Death' *American Ethnologist* 43 (2016), pp. 12-24, p. 12.

European Asylum System (CEAS), which are still being negotiated. According to the plans, for example the Qualification Directive would take the shape of Regulation. In Fall 2020, the European Commission supplemented these drafts with a suggestion for a New Pact on Asylum and Migration. The processing of the package is still ongoing.

The Qualification Directive, in light of the cases discussed above, lays down the criteria for refugee status and the assessment of credibility relating to the grounds for applying for asylum. Article 2 (d) states that a 'refugee' is a third-country national, who is unable to stay in their country of origin due to well-founded fear of being persecuted there, for reasons listed under the Article and one of them being 'membership of a particular social group'. Article 10 (d) elaborates on when a person can be considered as belonging to a 'particular social group'. According to the Article, a particular social group might include a group based on a common characteristic of sexual orientation. However, from the perspective of the cases discussed here, Article 4 is perhaps most interesting. Article 4 (5) sets the conditions for the assessment of credibility. The Article lists the conditions which have to be met in order to credibility to be established, in case where the application is not supported by documentary or other evidence. The criteria includes that

> (a) the applicant has made a genuine effort to substantiate his application;
>
> (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
>
> (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
>
> (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
>
> (e) the general credibility of the applicant has been established.

In a similar manner, for example the UNHCR recommends using four indicators to evaluate applicants' statements: detail and specificity, internal consistency (ie within the applicants' statements), external consistency (ie with other people's statements and country information),

and plausibility.[26] These indicators have also been noted by a UNCHR research project CREDO, which identified five, rather similar, credibility indicators. While the indicators may have some differences in wording, they are often substantially very similar. Amanda Weston has often been credited with identifying these indicators.[27]

As Carmelo Danisi et al. note, credibility is the basis of all asylum applications, but at the same time, it is particularly difficult to ascertain in the cases of SOGI claimants as the persecution they face is likely to be undocumented and has taken place in private.[28] In addition, 'individual prejudices and Eurocentric understandings of SOGI still plague asylum adjudication systems'.[29] SOGI claimants are often expected to have lived their life according to Western standards. These include, for example, the 'out and proud' narrative, relating to both how claimants live their daily and personal lives and whether they take part in community initiatives and events,[30] as well as stereotyped notions of sexual orientation. According to Bina Fernandez, some of these stereotypes include that

> all lesbians and gays engage in cross-gender identification, are active in queer social spaces, are knowledgeable about queer culture, are sexually active but always only with persons of the same gender, don't have children, and if they have not 'come out', they will (or should) when they arrive in the country of immigration.[31]

---

[26] Hedayat Selim et al., 'Asylum Claims Based on Sexual Orientation: A Review of Psycho-Legal Issues in Credibility Assessments' *Psychology, Crime and Law* (2022); UNHCR, 'Beyond proof. Credibility assessment in EU asylum systems' (2013) <https://www.unhcr.org/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html> accessed 28 July 2022.

[27] Amanda Weston, '"A Witness of Truth" – Credibility Findings in Asylum Appeals' *Immigration and Nationality Law and Practice* 12 (1998), pp. 87-89.

[28] Danisi et al., *Queering Asylum in Europe*, p. 300.

[29] Op. cit., p. 303.

[30] Op. cit., p. 307.

[31] Bina Fernandez, 'Queer Border Crossers: Pragmatic Complicities, Indiscretions and Subversions' in *Queering International Law: Possibilities, Alliances, Complicities, Risks*, ed. Dianne Otto (Oxon & New York: Routledge 2018) pp. 193-213, p. 202.

As Fernandez points out, these assumptions, and indeed, stereotypes, are based on gendered, racialized and classed understandings of the Western white gay male norm.[32] These stereotypes work to concretely exclude the claimants who are considered as not fitting to the narrative produced by the Western immigration administration.

Hedayat Selim et al. note, that asylum-seekers are rarely able to provide external evidence (eg documentation) to support their claims, and therefore evaluating the credibility of their statements is a significant step of the asylum decision-making process.[33] As matters of sexual orientation are in general internal by nature, SOGI applicant are even less likely than other groups to support their claim of group membership through external evidence.[34] Selim et al. critique the existing credibility indicators as not supported by empirical evidence on how human memory operates, noting also that 'vague testimonies do not diagnostically indicate deceit, because the limits of memory retention, cultural differences in communication, and the presence of an interpreter can all influence the amount of information applicants provide'.[35] Nevertheless, officials continue to rely on these inadequate guidelines, and therefore, any unfounded assumptions officials hold about sexual minorities might undermine the accuracy of their decisions.[36] This way, the credibility indicators intertwine with stereotyped notions as well as a 'culture of disbelief',[37] the persistent idea that 'real' SOGI applicants are rare while the rest are mainly 'bogus asylum seekers', pretending to belong to SOGI minorities in order to exploit the receiving state's goodwill. It is therefore a task of the migrant administration to find out the 'truth' about these claims.

In this article, I approach the question of 'truth' in relation to credibility assessment based on Foucault's notion of confession, aiming to find out what does this theoretical framework tell us of the ways in which 'truth', and its subjects, are constructed in the asylum proceedings. Let us move forward with this idea.

---

[32] ibid.

[33] Selim et al. 'Asylum Claims', p. 3.

[34] Op. cit., p. 4.

[35] Op. cit., p. 3.

[36] Op. cit., p. 4.

[37] The 'culture of disbelief' has been discussed in detail in Danisi et al., *Queering Asylum in Europe*, p. 312-316.

III Confessing the Intimate

In *The Will to Knowledge*, Foucault traces the formation of the Western subject through one technology of power: that of *confession*. As Chloë Taylor notes, for Foucault, confession had become *the* manner in which subjectivity is produced in the modern West.[38] Taylor describes Foucault's famous examples relating precisely to homosexuality, noting that by confessing their homosexuality, the individuals 'affirm who they are by means of this speech' and thus the homosexual act 'becomes the defining trait of their being.'[39] Taylor further notes that confession replaced early modern forms of identity based in, for example, family or bloodline and, referring to Foucault, that 'the truthful confession was inscribed at the heart of the procedures of individuation by power.'[40] Our society is obsessed with identity and identity is produced through confession.[41] This process is always a relation of power. Foucault writes: 'truth is not by nature free — nor error servile — … its production is thoroughly imbued with relations of power. The confession is an example of this.'[42]

The technique of confession, together with the theme of truth, was central to many of Foucault's works. Foucault discussed the theme of confession in *The Will to Knowledge*, the first part of his four-volume study *The History of Sexuality*, but also more succinctly in such works as *About the Beginning of the Hermeneutics of the Self*,[43] *Abnormal: Lectures at the Collège de France, 1974*-1975,[44] 'Truth and Juridical Forms,'[45] *Wrong-Doing, Truth-Telling:*

[38] Chloë Taylor, *The Culture of Confession from Augustine to Foucault: A Genealogy of the 'Confessing Animal'* (Oxon & New York: Routledge 2010), p. 77.

[39] ibid.

[40] ibid.; Michel Foucault, *History of Sexuality, Vol 1. The Will to Knowledge* (London: Penguin 1976), pp. 58-59.

[41] Taylor, *The Culture of Confession*, p. 77.

[42] Foucault, *The Will to Knowledge*, p. 60.

[43] Michel Foucault, 'About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth' *Political Theory* 21 (1993), pp. 198-227.

[44] Michel Foucault, *Abnormal: Lectures at the Collège de France, 1974-1975* (New York: Verso 2003).

[45] Michel Foucault, 'Truth and Juridical Forms' in James D. Faubion, ed., *Michel Foucault: Power* (New York: The New Press 2000), pp. 1-90.

The Function of Avowal in Justice[46] and *Discipline and Punish*.[47] Indeed, as Dave Tell has noted, the fundamental aspects of Foucault's critique of confession had been formed already before writing the *The Will to Knowledge*.[48] I will not discuss all of these texts in detail, but concentrate especially on the two lectures, *About the Hermeneutics of the Self* and *Abnormal*, and the monograph *The Will to Knowledge.*

The *About the Hermeneutics of the Self* lectures consist of two parts entitled 'Subjectivity and Truth' and 'Christianity and Confession.' Foucault notes in 'Subjectivity and Truth' that to confess is 'to declare aloud and intelligibly the truth of oneself.'[49] Foucault further points out that, in Western society, 'one needs for his own salvation to know as exactly as possible who he is'.[50] However, this is not enough, but the individual must also be able to tell this as explicitly as possible to other people.[51] Then, in *The Will the Knowledge*, Foucault explains that

> [t]he truth did not reside solely in the subject who, by confessing, would reveal it wholly formed. It was constituted in two stages: present but incomplete, blind to itself, in the one who spoke, it could only reach completion in the one who assimilated and recorded it.[52]

The sexuality of a subject is a secret, not only to everyone else, but it is also hidden from the subject themselves. By confessing to someone, the 'completion' of the confession can be reached. In this way, while confession is often made due to outside pressure, it is also a practice internal to the subject: the subject feels the need to confess.

---

[46] Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice* (Chicago: The University of Chicago Press 2014).

[47] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books 1995).

[48] Dave Tell, 'Rhetoric and Power: An Inquiry into Foucault's Critique of Confession' *Philosophy & Rhetoric* 43 (2010) pp. 95-117, p. 107.

[49] Foucault, 'Hermeneutics of the Self', p. 201.

[50] ibid.

[51] ibid.

[52] Foucault, *The Will to Knowledge*, p. 66.

The theme of reporting and analyzing the observations about oneself is discussed in more detail in part two of About the Hermeneutics of the Self lectures, 'Christianity and Confession', where Foucault notes that:

> [e]veryone, every Christian, has the duty to know who he is, what is happening in him. He has to know the faults he may have committed: he has to know the temptations to which he is exposed. And, moreover, everyone in Christianity is obliged to say these things to other people, to tell these things to other people, and hence, to bear witness against himself.[53]

One of the main arguments of these lectures is that while individuals start monitoring their own thoughts and behavior extensively, this activity simultaneously requires interpretation and deciphering of those thoughts not only in order to identify their origin but also, and especially, to find out whether they are good or bad.[54] As stated by Lorenzini and Tazzioli, 'the individual is constituted as a subject who bonds himself or herself to the truth he or she verbalizes',[55] thus producing the subject's relation to the self.

This obligation to know oneself is further discussed in the *Abnormal* lectures, especially in lecture seven. In *Abnormal*, Foucault traces the history of psychiatry and its intertwinement with the medico-legal procedures as well as the ways in which sexuality came to run through the emergence of Christian confessional practices. The latter is especially visible in relation to the figure of a masturbating child. The figure embodies the way in which catholic confessional practices, administrative institutions and medicine, especially psychiatry, merge in a common reference point: sexuality and the sexual body. As it was, the only way to know the 'truth' about a child's masturbation was through confession by the child. However, it was not sufficient that the child confessed to their parents, or even to the family doctor, but the confession was to be received by an outside doctor.[56] This is how the Christian practice of confession came together with medical procedures but also involved power exerted over

[53] Foucault, 'Hermeneutics of the Self', p. 211.

[54] See eg May Larry and James Bohman, 'Sexuality, Masculinity, and Confession' *Hypatia* 12 (1997), pp. 138-154, p. 139.

[55] Lorenzini & Tazzioli, 'Confessional Subjects', p. 74.

[56] Foucault, *Abnormal*, pp. 250-251.

children by their parents.[57] Masturbation was not just bad behavior but an illness – and not only that, but the origin of all illnesses.[58] Thus, psychiatry became the first and foremost technology of the self and, ultimately, the explanation for everything. According to Taylor, 'this link [between Christian confession and psychoanalysis] is one of developing and unpredictable disciplinary power.'[59]

This essentialist conception of the individual is also reflected in what Foucault wrote about homosexuality in *The Will to Knowledge*. Foucault notes that the ancient civil or canonical codes dealt with homosexuality as a category of forbidden acts: 'the perpetrator was nothing more than a judicial subject.'[60] However, 'the nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology.'[61] Similarly to masturbation as described in the *Abnormal* lectures, now homosexuality became an explanatory feature of an individual's whole life: it was 'at the root of all his actions because it was their insidious and indefinitely active principle.'[62] And yet, this essential feature of an individual did not function only as the guiding principle of one's own conduct but it became, again similarly to medical power described in relation to the *Abnormal* lectures, the principle of classification and intelligibility. Indeed, instead of being excluded, these marginalized sexualities were specified and analyzed.[63]

In summary, confession has certain fundamental features that are relevant from the perspective of this article. First, confession needs to be made and this is due to both external pressure and an internalized need to confess. Second, the reference point for confession is sexuality, ie what needs to be confessed is essentially one's sexual thoughts and some kind of fundamental secret that sexuality harbors.[64] Third, confession of sexuality becomes the

[57] Op. cit., p. 254.

[58] Op. cit., pp. 237-238.

[59] Taylor, *The Culture of Confession*, p. 2.

[60] Foucault, *The Will to Knowledge*, p. 43.

[61] ibid.

[62] ibid.

[63] Foucault, *The Will to Knowledge*, p. 44.

[64] Op. cit., p. 69.

foremost technology of the self, one that comes to function as a tool of discipline for several societal institutions. As Tell notes, 'confession is a sine qua non of modern power – it is an essential component without which modern power could not be exercised.'[65] Fourth, sexuality, especially its marginalized forms, becomes an explanatory element for an individual's whole life, also related to the ways in which the focus was no longer so much on what had been done as on what could be done and how the individual's personal history could explain the act.

Within this power relation, there is an external pressure to confess, which is then internalized, and 'in the process we create … truths, and create selves as products of power.'[66] This is an essential mode of subjection. However, as noted by Lorenzini and Tazzioli, this process can take different forms. First, it takes the form of 'a "subjection" when the individual is required to tell the truth about himself or herself in order for a certain mechanism of power to govern him or her.'[67] Second, this process can take the form of an '"objectivation" when the truth of the individual is extracted from him or her through a clinical examination.'[68] Within this form, ie, the doctor has to interpret the observations of the patient through techniques of interrogation, questionnaire, and hypnosis in order to translate them into scientifically acceptable observations.[69]

I will now present an analysis of selected cases from the CJEU with the aim of pointing out the emergence of confessional practices in them. The particular focus will be on how the forms of confession can be taken to represent practices of subjection and objectivation.

IV A and others v. Staatssecretaris van Veiligheid en Justitie

In 2014, the CJEU decided on the case of *A, B and C v. Staatssecretaris van Veiligheid en Justitie* (*'A and others'*). The applicants had lodged asylum applications in the Netherlands. They had stated that they feared persecution in their respective countries of origin on grounds

[65] Tell, 'Rhetoric and Power', p. 98.

[66] Taylor, *The Culture of Confession*, p. 78.

[67] Lorenzini & Tazzioli, 'Confessional Subjects', p. 75.

[68] ibid.

[69] ibid.; Foucault, *The Will to Knowledge*, p. 65.

of their homosexuality. A's application was rejected by the Staatssecretaris because it was not found credible. Instead of challenging the refusal, A submitted a second application stating that they were 'prepared to take part in a 'test' that would prove [their] homosexuality or to perform a homosexual act to demonstrate the 'truth' of [their] declared sexual orientation'. Also A's second application was rejected by the Staatssecretaris on the grounds that the credibility of A's declared homosexuality had still not been established. The Staatssecretaris considered that 'it was not appropriate to rely only on the declared sexual orientation of the applicant for asylum without making any assessment of the credibility of that orientation'.[70]

In a similar manner as in the case of A, B's application was also rejected. B's application was rejected on grounds that the Staatssecretaris considered that the statements concerning B's homosexuality were 'vague, perfunctory and implausible'. The Staatssecretaris considered that although homosexuality is not accepted in B's country of origin, B should have been able to 'give more details about his emotions and his internal awareness of his sexual orientation'.

Also C's application, which was based on grounds other than their homosexuality, was rejected. C did not challenge the first rejection but lodged a second application, based on the fear of persecution in their country of origin on account of their homosexuality. In their second application, C stated that they had not been able to disclose their homosexuality until after they had left their country of origin. In support of their claim of being homosexual, C gave the authorities a video recording of intimate acts with a person of the same sex. The Staatssecretaris rejected C's application, stating that their claim of being homosexual was not credible. The Staatssecretaris considered that 'C ought to have mentioned [their] declared sexual orientation in the first application for asylum, that [they] had not clearly explained how [they] became aware of [their] homosexuality and had not been able to reply to questions about Netherlands organizations for the protection of rights of homosexuals'.[71] Eventually, the applicants appealed before the Raad van State, the highest general administrative court in the Netherlands. In these circumstances, this national court decided to refer to the CJEU the question of what limits do Article 4 of Qualification Directive and the

[70] *A and others*, paras 22-25

[71] *A and others*, paras 26-29.

Charter of Fundamental Rights of the European Union ('the Charter') impose on the method of assessing the credibility of declared sexual orientation.[72]

The CJEU began its assessment by noting that, contrary to what the applicants had argued in the main proceedings, the claim of being homosexual constitutes 'merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4'. The CJEU also noted that the Member States may consider it to be the applicant's duty to submit as soon as possible all necessary information in order to assess the application. All in all, the CJEU concluded that it follows from Article 4 that the applicant's statements might require further confirmation. However, this assessment must be conducted in accordance with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity as prescribed in Article 3 and the right to respect for private and family life prescribed in Article 7.[73]

The CJEU also paid attention to the interviews conducted in order to verify the credibility of the applicants' claims. According to the CJEU, while the national authorities are entitled to carry out interviews 'in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum', the questions may not concern details of sexual practices. This would be against the fundamental rights guaranteed by the Charter, namely the right to private and family life. Similarly, the CJEU considered that submitting oneself to a 'test' in order to prove one's homosexuality, or producing evidence, eg film material, of homosexual acts, would be contrary to the fundamental rights, namely the right to the respect of human dignity. Authorizing such practices or evidence would also incite others to act in a similar manner, thus de facto requiring the applicants to provide such material.[74]

What can we then gather from this judgement? To summarize, the CJEU appears to draw the line between acceptable interview methods and those that are contrary to fundamental rights as enshrined in the Charter. It is the act of prying into details of the sexual practices of the applicant during an interview that is methodologically unacceptable in this context. Similarly,

[72] *A and others*, para 43.

[73] *A and others*, paras 48-53.

[74] *A and others*, paras 64-66.

the use of 'tests' or other evidence of homosexual acts is prohibited. However, in general, the interview as a method is acceptable, and, indeed, the CJEU appears to acknowledge that some manner of verification of the applicant's claims is nevertheless necessary. As the CJEU noted, the applicant's initial declaration of their sexual orientation constitutes merely a starting point for the assessment process.

As was noted before, according to Foucault, one needs to know as exactly as possible who he is and also be able to tell this as explicitly as possible to other people.[75] Especially in the case of *A and others*, the applicants' ability to disclose such information about themselves became a fundamental factor in determining whether their stated sexual orientation was credible: indeed, it is up to the applicant to make their sexual orientation credible. As stated above, applicant B should have been able to 'give more details about [their] emotions and [their] internal awareness of [their] sexual orientation'.[76] Also applicant C 'had not clearly explained how [they] became aware of [their] homosexuality'.[77] As Foucault noted in the lecture 'Christianity and Confession': 'everyone, every Christian, has the duty to know who he is, what is happening in him' as well as tell these things to other people.[78] By agreeing to self-monitor their thoughts and behavior and report their observations to others, individuals subjugate themselves to power in a general sense. Moreover, by confessing the individual not only subjugates themselves to power, but the act of confession also produces the subject's relation to the self. Confession is constitutive of the subject that then becomes governed.

It is also worth noting that, according to Foucault, the nature of confession was such that those receiving a confession were not supposed to ask whether the confessing individual had done something, because this might lead the individual to think what they should say or do. Instead, the confessional techniques were developed to the direction where the individual was rather asked about the *thoughts* they had had and the feelings they had experienced.[79] Perhaps this is reflected in the cases examined here as well; specifically in the way in which the focus is placed on each applicant's narrative about the development of their internal awareness of

[75] Foucault, 'Hermeneutics of the Self', p. 201.

[76] *A and others*, para 26.

[77] *A and others*, para 29.

[78] Foucault, 'Hermeneutics of the Self', p. 211.

[79] Foucault, *Abnormal*, p. 186

their sexual orientation and the descriptions about their emotions. Indeed, as Foucault pointed out in *The Will to Knowledge,* 'the nineteenth-century homosexual became a personage, a past, a case history, and a childhood'.[80]

Furthermore, in *The Will to Knowledge*, Foucault also questioned the 'repression hypothesis' and instead focused on the proliferating effects of power, namely those that *generate behavior*. This relates to the internal functioning of confession as a technology of the self, an apparatus that makes it possible to govern individuals through their own acts of self-monitoring and reporting their observations about themselves to others. This, I believe, is reflected in the cases of A and C in that A, on their own initiative, declared their willingness to submit to a 'test' to prove their sexual orientation, whereas C, without being prompted, provided the authorities with a video recording of themselves engaging in sexual acts. These examples reflect the idea that there is not only an external pressure to confess, but the individual wishes to confess. Moreover, in the cases of both A and C, the technology of confession resulted in concrete sexual acts as A was willing to prove their sexual orientation by demonstrating it and C engaged in homosexual acts in order to produce video evidence of their sexual orientation.

I will return to these elements of confession later, but for now, let us move on to the second case.

V F v. Bevándorlási és Állampolgársági Hivatal

In April 2015, F had submitted an application for asylum to the Hungarian authorities. The basis for the application was their fear of being persecuted in their country of origin due to their homosexuality. F's application was rejected. Although there was no fundamental contradiction in F's statements, the rejection was based on a psychologist's expert report commissioned by the Hungarian authorities. The report included an exploratory examination, an examination of personality and several personality tests, namely the 'Draw-A-Person-In-the-Rain' test, the Rorschach test and Szondi tests, and concluded that it

[80] Foucault, *The Will to Knowledge*, p. 43.

was not possible to substantiate F's claims of being a homosexual. F then brought an action against the Hungarian immigration authority before the referring court. According to F, the psychological tests seriously prejudiced their fundamental rights and were not suitable for assessing the credibility of their sexual orientation.[81]

In the case of *F*, the Administrative and Labour Court of Szeged decided to stay the proceedings and refer two questions to the CJEU. The first question, as reformulated by the CJEU, concerned whether Article 4 of the Qualification Directive should, in light of the Charter, be interpreted as precluding the preparation and use of an expert's report and the use of projective personality tests in order to substantiate the credibility of the applicant's declared sexual orientation.[82] The second question concerned whether Article 4 must be interpreted as precluding the authorities from using an expert's report in order to examine the applicant's sexual orientation in the first place.[83]

The CJEU decided to answer the second question first and acknowledged that it might sometimes be necessary for the courts or authorities to obtain expert opinions in order to assess the credibility of the applicant's claims.[84] However, the CJEU also addressed the evaluation process described in Article 4, noting that when assessing an application for asylum, the factors listed in Article 4 should be considered. These include that the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the case, as well as the fact that the applicant's general credibility has been established. Therefore, the relevant provisions do not preclude the authorities from using expert's reports, provided that the procedures for preparing such a report are consistent with the fundamental rights guaranteed by the Charter.[85] Finally, the CJEU noted that the determining authority cannot base its decision solely on the conclusions of an expert's report or be bound by those conclusions.[86]

---

[81] *F,* paras 20-23.

[82] *F,* para 47.

[83] *F,* para 27.

[84] *F,* para 37.

[85] *F,* paras 33-35.

[86] *F,* para 42.

Then the CJEU answered the first question. As it followed from the answer to the second question, obtaining an expert report was not considered to be precluded as long as the procedures for recourse to such a report are consistent with the Charter.[87] The CJEU identified Article 7 of the Charter, concerning the right to respect for private and family life, as having a particular relevance in the context of the case. In this regard, the CJEU referred to Advocate General Wahl's opinion. The Advocate General considered that psychological examinations are admissible only when the applicant has given their consent.[88] The Advocate General further stated that in circumstances such as the asylum process, it might in reality be difficult for the applicant to withdraw consent.[89] The CJEU leaned in the same direction, noting that although the psychological examinations undergone were formally based on the consent of the applicant, such consent was, considering the circumstances, not necessarily given freely. Therefore, the preparation and use of a psychological expert report constituted an interference with the applicant's right to respect for their private life.[90]

After concluding that there had been an interference with the applicant's fundamental rights, the CJEU moved on to discuss whether the limitation of such rights had been proportionate. The CJEU noted that while the interference could be justified by the need to find out whether the applicant really was in need of international protection, it should be assessed whether an expert report the authority wishes to obtain is appropriate and necessary in order to achieve that objective.[91] The CJEU continued that it found that the seriousness of the interference could not be regarded as proportionate to the benefit it might represent.[92] In this respect, the CJEU emphasized the fact that the methods and principles of such examination should be recognized by the international scientific community, ie they should be sufficiently reliable.[93] Also the Advocate General raised this point, noting that 'a cursory look at scientific literature

[87] *F,* para 48.

[88] Opinion of Advocate General Wahl C-473/16 *F v Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2017:739, para 39.

[89] Opinion of Advocate General Wahl C-473/16 *F*, paras 43 and 45.

[90] *F*, paras 52-54.

[91] *F,* para 57.

[92] *F,* para 59.

[93] *F,* para 58.

shows that, according to a number of studies in psychology, homosexual men and women are not distinguishable, from a psychological viewpoint, from heterosexual men and women.'[94]

The CJEU also considered that the interference with the applicant's private life was particularly serious in that it concerned 'an essential element of [their] identity' within the personal sphere that relates to intimate aspects of their life. It also drew attention to Principle 18 of the Yogyakarta Principles, which states that 'no person may be forced to undergo any form of psychological test on account of his sexual orientation of gender identity'.[95] Looking at these factors together, the CJEU concluded that the seriousness of the interference exceeded the possible benefits that such an examination might entail. Finally, the CJEU noted that the applicant's statements not substantiated by the documentary or other kind of evidence do not need confirmation should the other conditions set out in Article 4 of the Qualification Directive be fulfilled. An expert's report was considered to provide only an indication of the applicant's sexual orientation.[96]

Therefore, the CJEU decided that while for the national courts, obtaining an expert's report for the purpose of assessing the facts and circumstances of an asylum application was not precluded, those procedures must be consistent with the fundamental rights provided by the Charter and the decision must not be based solely on the report. However, the preparation and use of a psychologist's expert report, in order to assess the applicant's sexual orientation, would be precluded in light of Article 4 of the Directive. To summarize, the CJEU considered that certain procedures to verify the applicant's claim might be necessary, also those of obtaining an expert's report. However, a psychologist's evaluation was prohibited based on the seriousness of such interference with the applicant's privacy, as well as the Yogyakarta Principles and the consensus of the scientific community.

Now, similarly to the case of *A and others* discussed in the previous section, the CJEU saw that the credibility of the applicant needs to be somehow verified, ie the applicant's statements must be reviewed for coherence and plausibility and they must not contradict the

[94] Opinion of Advocate General Wahl C-473/16 *F,* para 36.

[95] *F,* paras 61-62.

[96] *F,* para 69.

available information.[97] Moreover, the CJEU retained its essentialist stance, which now became more clear, by noting that the sexual orientation of the applicant constitutes 'an essential element of [their] identity'.[98] According to Foucault, a division between what one *does* and what one *is* becomes established through confessional practices. While the essentialist approach to sexual minorities has, at times, proven as useful in legal proceedings, [99] what happens in the context of these cases can also be described from the perspective of disciplinary interventions. Homosexuality becomes a medium for the exercise of such power: The assumption that homosexuality is a feature that an individual essentially has, lies at the very core of confessional technologies which require the individual to tell as explicitly as possible, not what they have done, but who they *are*. The apparatus of confession thus subjugates the individual to administrative and judicial interventions, where the confession needs to be verified by an outside interpreter.

As noted by Lorenzini and Tazzioli, the process of producing subjectivity takes different forms. Above I have discussed this process as 'subjection', where the individual is obliged to produce the 'truth' about themselves and thus themselves as governable subjects. However, this process can also take the form of 'objectivation', when 'the truth of the individual is extracted from him or her through a clinical examination.'[100] It is

> a question of determining under what conditions something can become an object for a possible knowledge [*connaissance*], how it may have been problematized as an object to be known, to what selective procedure [*procedure de decoupage*] it may have been subjected, the part of it that is regarded as pertinent. [101]

As Foucault explains in *the Will to Knowledge*, objectivation is a process through which confession came to function within the norms of scientific regularity and was constituted in

---

[97] *F,* para 33.

[98] *F,* para 61.

[99] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Oxon & New York: Routledge 2014).

[100] Lorenzini & Tazzioli, 'Confessional Subjects', p. 75.

[101] Michel Foucault, 'Foucault' in James D. Faubion, ed., *Aesthetics, Method, And Epistemology: Essential Works of Foucault, 1954-1984* (New York: The New Press 1998), pp. 459-465, p. 460.

scientific terms.[102] The methods used in this process were 'the interrogation, the exacting questionnaire and hypnosis, with the recollection of memories and free association.'[103] The production of 'truth' had to pass through this relationship if it was to be scientifically validated.[104] As Foucault notes, 'by making sexuality something to be interpreted, the nineteenth century gave itself the possibility of causing the procedures of confession to operate within the regular formation of scientific discourse.'[105] The process that took place in the case of *F* thus resembles the process of objectivation.

Another reference point for *F* can be found from the *Abnormal* lectures. Foucault describes the expert psychiatric opinion, as used in court proceedings. Foucault notes that where these institutions of justice and science – ie the court and the expert – encounter each other, statements, which have the status of true discourses with judicial effects, are formulated. However, 'these statements also have the curious property of being foreign to all, even the most elementary, rules for the formation of scientific discourse, as well as being foreign to the rules of law and of being'.[106] They are grotesque, or, as Foucault refers to them, 'Ubu-esque'. Whereas 'Ubu-esque' practices are closely related to arbitrary sovereignty, they are also related to assiduous bureaucracy.[107] Foucault adds that what is said about modern bureaucracy could also be said about many other mechanical forms of power, such as Nazism or Fascism.[108]

It seems that in the case of *F*, these powers that are governed by the judicial system, scientific methods and bureaucracy intertwine in the figure of the homosexual asylum seeker. Moreover, as was noted above in relation to the figure of the masturbating child, it is in the common reference point of sexuality and the sexual body that Catholic confessional practices, administrative institutions and medicine – especially psychiatry – merge. The figure of a doctor replaced, to some extent, that of a priest, and sexuality became an issue of

[102] Foucault, *The Will to Knowledge*, p. 65.

[103] ibid.

[104] Foucault, *The Will to Knowledge*, p. 66.

[105] Op. cit., p. 67.

[106] Foucault, *Abnormal*, p. 11.

[107] Op. cit., p. 12.

[108] Op. cit., p. 13.

medicine rather than religion. When the migrant administration in the case of *F* aimed to substantiate the applicant's sexual orientation by means of psychological tests and by ordering a psychologist's report, that is precisely where the way in which psychology as the first and foremost technology of the self and a central channel for the exercise of 'Ubu-esque' power over subjects manifests itself. Now confession is not made to a priest, but to a psychologist –in the role of an interpreter reminiscent of Foucault's figure of the doctor – and it is governed not by the church, but by the bureaucratic migrant administration.

However, the CJEU did not accept the use of a psychologist's expert opinion in the case. Still, it acknowledged that this was partly because the methods and principles of such examination should be recognized by the international scientific community, ie they should be sufficiently reliable.[109] Perhaps it could be said that the CJEU did not so much reject the use of scientific discourses in court proceedings, as saw the methods used as outdated and thus no longer as part of the scientific consensus. Also, the CJEU noted that the expert's opinion cannot be the sole basis for the national court's decision, however, similarly to the case of *A and others*, some form of verification of the claims is necessary.

VI The Subject of 'Truth'

As has been discussed above through the Foucauldian framework, the production of 'truth' in migrant administration and in the CJEU appear to have certain elements which resonate with Foucault's concept of confession. Through the confessional practices, a subject of 'truth' is produced. This production, based on the cases discussed in this article, takes two forms: those of subjection and objectivation. In the case of subjection, the asylum seeker is encouraged to observe their inner world and past in order to form a coherent narrative about their homosexuality and becoming aware of their sexual orientation. Thus, subjection is namely an inner practice, focused on the thoughts and feelings of the asylum seeker. This, as noted by Sima Shakshari, leads to 'essentialist juridical discourses of asylum [that] produce the

[109] *F,* para 58.

refugee as one with a fixed, timeless, and universally homogenous identity'.[110] Objectivation then is a practice that is directed at the asylum seeker from the outside. It is extraction of knowledge through scientific methods in order to produce the subject as an object of knowledge. Whilst these practices became especially visible in the process in migrant administration, and the CJEU appeared to set certain limits to these practices, the CJEU is not immune to these either.

The CJEU appears to be committed to the abovementioned credibility indicators, which can be considered to derive from Article 4 of the Qualification Directive, ie external credibility, internal credibility, plausibility and general information. This was especially visible in the case of *F*, where the CJEU noted that when assessing an application for asylum, the factors listed in Article 4 should be considered. These include that the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the case, as well as the fact that the applicant's general credibility has been established.[111] However, the CJEU also addressed the methods of assessing the facts and circumstances. In this regard, it was not ruled out that for example questioning based on the indicators of Article 4 could determine the credibility of an asylum seeker. In a similar manner, the use of an expert's report was not ruled out altogether.

Taken together, the indicators and the methods of interviews form a confessional technology, the workings of which are reflected in the cases studied. It is a technology that aims to find out the 'truth' about the applicant and thus produces the applicant as a subject of that 'truth'. This subject is willing to explore their sexuality in detail and become aware of it in order to tell as explicitly as possible about it to the migrant administration and the court. As Shakshari notes, 'the recognition of the refugee in the human rights regimes relies on essentialist notions of identity, which are fixed in time'.[112] This narrative is underpinned by a grammar which is considered plausible within the judicial system, ie the narrative that is coherent, based on evidence and produced 'as soon as possible'.

---

[110] Sima Shakhsari, 'The Queer Time of Death: Temporality, Geopolitics, and Refugee Rights' *Sexualities* 17 (2014), pp. 998-1015, p. 1002.

[111] *F,* para 33.

[112] Shakshari, 'The Queer Time', p. 1004.

Above it was discussed how this narrative is based on a Western understanding of belonging to a sexual minority. What are the consequences of this? First, the idea of a universal and immutable experience of sexuality, that is performed in accordance with the Western narrative of 'out and proud', leads to practical difficulties in the migrant administration when deciding the case: since the guidelines that the administration follows are inadequate and vague, this leaves the individual officials with subjective discretion.

Second, and perhaps more importantly, this practice, that I consider as a confessional technology, may transform the applicant's own experience of their subjectivity. This perspective has been discussed in depth by Ali Ali, who, based on their fieldwork, analyzed the subject's sense of grief and grievability of their embodied/affective knowledge and how that informs the terms of making claims in the field of queer refugeehood.[113] Ali makes an important observation: the policing of authentic identities expands also to the communities of asylum seekers, in that applicants who have received a rejection are considered as 'fake' applicants by their peers.[114] A similar observation has been made by Shakshari, according to whom the policing of identities in the interactions between asylum seekers demonstrates how particular forms of modern sexual identities are produced and regulated according to normative notions of race, class and gender; and it is precisely these identities that are recognized legitimate by the human rights regimes. This way the narratives and technologies of producing a 'credible SOGI claimant' utilized by the migrant administration begin to transform the individual applicant's experience as well. In other words, the strategic 'out and proud' narrative begins to operate also on the level of the individual applicant, thus producing them as subjects who can conform to the narratives expected by the authorities.

Shakshari notes that it is inevitable that SOGI applicants repeat these essentialist notions of identity in order to fit to the idea of an 'immutable sexual orientation', and to thus qualify for protection. Through the technologies of 'truth' applicants are reduced to rational and linear definitions of their identity. At the same time, the regulatory practices of human rights regimes conceal the processes through which the asylum seekers are constructed as normative

[113] Ali Ali, 'Reframing the Subject: Affective Knowledge in the Urgency of Refuge' in Magdalena Kmak and Heta Björklund, eds., *Refugees and Knowledge Production: Europe's Past and Present* (London: Routledge 2022), pp. 182-198, p. 182.

[114] See also Shakshari, 'The Queer Time', p. 1003.

subjects of the refugee system, rather than having already existed prior to entering this discourse.[115] The same is true also within EU asylum law, where a 'truth'-telling subject is produced and for whom a place can then be found within the legal framework. The subject not only produces the 'truth' about themselves, but indeed, produces themselves as the subject of that 'truth' and relation to it.

As was previously mentioned in relation to the 'repression hypothesis', the CJEU's praxis seems somewhat contradictory in that regard. The CJEU has stated in both cases discussed here that explicit narratives about eg sexual practices should not be obtained. However, as the cases illustrate, in practice, the confessional technology at play may lead to precisely this kind of behavior. Confessional practices proliferate the discourse of sexuality, causing the applicants to engage in sexual activities, for example, in order to 'prove' their sexual orientation. Moreover, production of a 'truth'-telling subject is essentially production of a governable subject. The 'truth' about homosexuality – and sexuality in a broader sense – becomes a medium for exercising administrative, judicial and medical powers, which intersect in the figure of the homosexual asylum seeker. Suspicion towards an asylum seeker claiming to be homosexual leads to justification of endless interventions in the applicant's privacy, which take, for example, the form of questioning and examination carried out by an expert. This way, the powers at play in the cases also form a minimum requirement for the 'verification' of the 'truth'. The 'truth' about the applicant's sexuality cannot be produced by the applicants themselves, but indeed it needs to be verified by an outside interpreter. The intertwinement of medical, administrative and judicial powers not only produces the 'truth'-telling subject but also the 'truth' the subject needs to tell.

As was noted in the beginning, the tendency of law to treat humans as 'autonomous self-same subjects' has been considered problematic.[116] As Lindroos-Hovinheimo has noted, protection of individuals' dignity, freedom, and subjective personhood is considered an important aim in the EU,[117] relating also to respect for personal identity. Indeed, as the analysis presented in this article has shown, the question of protecting personal identity is far from unproblematic.

[115] Op. cit., p. 1002.

[116] Lindroos-Hovinheimo, 'There is No Europe'.

[117] Op. cit., p. 1235.

In the context of asylum seekers belonging to SOGI minorities, it rather leads to essentializing discourses and intrusive processes where the essence of 'true identity' is constructed. It is precisely the focus on individuals' life stories and their development to become aware of their homosexuality that leave the asylum seekers highly vulnerable in the process, in case they cannot respond to the expectations of the migrant administration that are underpinned by particular assumptions and beliefs. Following the argumentation of Davies as it relates to Union law dividing people into groups, the personal identity in the EU law appears to be a double-edged sword. While in other contexts, especially insofar as relating to EU citizens, it can be used to protect the privacy of an individual, in other contexts it rather operates as a justification to intrude into that privacy.

Thus, the asylum seeker is not only subjected to a lengthy, and at times humiliating, process of determining whether they are entitled to asylum, but, due to this very process, the asylum seeker may not be granted asylum based on the difficult games of 'truth' the rules of which are often very far removed from the lived reality of SOGI applicants in their countries of origin. As Kati Nieminen has noted, the violence of law is not only something 'external' to law, but always part of law to begin with.[118] Similarly, while law creates subjects, it at the same time destroys others. While it might be easy to acknowledge that the applicants 'won' the cases, the analysis presented here illustrates how EU law is not immune to violence either. The violence works discreetly by subjecting the applicants into conforming to the expected roles of 'good homosexuals' but it can also work much more concretely, by deporting those applicants who do are not able or do not want to conform.

In a similar vein, El-Enany has critiqued the refugee law by noting that 'despite the law's claim to neutrality, legal categories are artificial and historically contingent in that they do not represent natural or predefined groups of persons, but instead construct them.'[119] As has been noted also in this article, the 'truth' about 'sexual identity' is more than anything else constructed by the institutions and in the processes that deem the applicant as credible or not credible. El-Enany further points out that 'refugee law and in particular its making and

[118] Kati Nieminen, 'The Detainee, the Prisoner, and the Refugee: The Dynamics of Violent Subject Production' *Law, Culture and the Humanities* 15 (2016), pp. 1-24.

[119] El-Enany, 'On Pragmatism and Legal Idolatry', p. 11.

re-making is a practice embedded in the process of nation-building in its creating a point of reference for the rearticulation of state sovereignty'.[120] The way the SOGI asylum applicant becomes constructed as a homosexual subject is essentially a matter of power and the applicant comes to exist in the cross-section of different powers.[121] What can be gathered from El-Enany's account is that cosmetic changes to asylum and migration laws are not enough to repair the structural and historical injustices embedded in them. The migration debate needs to be re-politicized across disciplines, including law.[122]

VII Conclusion

The aim of this article was to examine whether the notion of confession can provide insight into how the 'truth' about the declared sexual orientation of an asylum applicant is produced in national immigration administration and how this is reflected in the argumentation of the CJEU. Let me now present the conclusions.

First, there appeared to be confessional practices at play in the cases, which took the forms of subjection and objectivation. These two different forms of confession operate according to a similar logic but through different means. Whereas subjection is essentially an internal practice of the individual, subjecting them through contemplation of their inner world and recollection of personal histories, objectivation is a form of external knowledge-production through which the subject as an object of that knowledge is produced. The two discussed cases demonstrate how these forms of confession operate in practice. The 'truth' about an asylum seeker was produced not only through external interrogation (objectivation) but also through an internalized practice of the individual (subjection). Although the two confessional practices where here analyzed separately (objectivation in *F* and subjection in *A and others*), mainly to highlight them as separate practices, in reality they often intertwine. Through these

[120] ibid.

[121] Nevzat Soguk, *States and Strangers: Refugees and Displacements of* Statecraft (Minneapolis & London: University of Minnesota Press 1999), p. 20.

[122] El-Enany, 'On Pragmatism and Legal Idolatry', p. 38.

methods the 'truth' can be produced. However, this 'truth' will only have that status if it is verified by the powers that came to produce it in the first place.

Second, while these practices were clearly visible in the migrant administration as described in the cases, the CJEU was not immune to them either. The confessional practices became especially visible in relation to the credibility indicators, which are to some extent derived from Article 4 of the Qualification Directive. Thus, it can be argued that the technology of confession is not only present in the praxis of the migrant administration or the praxis of the CJEU, but it is embedded in the provisions of the Qualification Directive.

Third, the article has demonstrated how sexual identity is indeed constructed in legal proceedings, such as the praxis of the CJEU and the national migrant administration. However, the essentialist idea of an immutable sexual orientation, which is part of the applicant's identity, is persistent in the CJEU and the national migrant administration. This essentialist idea, acting together with the confessional technologies, produces legal subjects that conform to Western understandings of sexuality in the context of SOGI. Furthermore, not only are these understandings rooted in the gendered, racialized and classed understandings of the Western white gay male norm, they also appear to be rooted in the confessional practices. Confession invites its subject to produce certain content, but it also matters *how* confession takes place. To sum up, and returning to the previous point, the narrative about a 'fixed, timeless, and universally homogenous identity' first needs to be explicated in detail by the applicant – emphasizing the ways in which they became aware of their sexual orientation, and this story needs to be produced on time and coherently – after which it then still needs to be verified by an outside interpreter.

It seems that while the credibility assessment can indeed be understood as a confessional practice, excluding many of the applicants not deemed 'credible' from entering the European society, it also appears that the production of credibility, and thus the 'truth', is a highly contingent practice; the 'truth' is constructed rather than discovered.[123] The powers that produce that 'truth' produce also the 'truth-telling' subject, and this way determine which 'truth' is acceptable. It is indeed a relation of power, which operates to justify intrusions into

[123] On the matter of 'truth' as a historical construct, see eg Didier Fassin, 'The Precarious Truth of Asylum' *Public Culture* 25 (2013), pp. 39-63 and Akin, 'LGBT Refugees', pp. 27-28.

the applicants' privacy – and thus subjects them as governable within the EU legal framework on asylum. Following El-Enany's argumentation, the way forward is not by changing individual Articles and not even through more comprehensive reforms if this is done within the paradigm of preventing migration due to it being a 'security threat'.[124] Furthering the fundamental critique of the asylum system, as well as the nation state upon which the system is based, is needed. Instead of asking, what is the 'truth' about an individual asylum seeker's sexual orientation, perhaps we should ask, what is the truth about the asylum system and who does it protect.

[124] One example of the securitization of the asylum seekers is the New Pact on Migration and Asylum, proposed in September 2020. The goal of this agreement is comprehensive management of migration, with particular emphasis on effective deportations and border control. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum. COM/2020/609 final.

IV

Tuominen, Iiris. "Confession, Death and Disbelief: Interrogating the Asylum Cases of the Court of Justice of the European Union." Revised version submitted to *Social Identities*.

Confession, Death and Disbelief: Interrogating the Asylum Cases of the Court of Justice of the European Union

Iiris Tuominen

Abstract: This article addresses the connections between confession, truth and death that materialise in asylum processes and the European Union's asylum system more generally. Through close-reading of two asylum cases from the Court of Justice of the European Union (EU), on the one hand, and an analysis of Michel Foucault's works related to confession, on the other hand, I demonstrate how asylum processes follow a logic that can be described as confessional in light of Foucault's work. At the same time, this analysis illustrates how not only are the notions of confession and death interlinked in Foucault's work, but also how these notions share the same root in suspicion toward the self and others. This theoretical contribution is then used to further elaborate how the workings of the EU's asylum procedures can be analysed through a truth–confession–death triad that is rooted in suspicion and disbelief. Finally, I suggest that the operation of the EU's asylum procedures can be understood as a confessional dispositive, an economy of power that follows a confessional logic.

Key words: asylum, Michel Foucault, confession, credibility assessment, sexuality, sexual minorities, dispositive

1 Introduction

This article addresses the connections between confession, truth and death that materialise in asylum processes and the European Union's (EU) asylum system more generally. Through close-reading of two asylum cases from the Court of Justice of the European Union (CJEU), I demonstrate how such processes follow a logic that can be described as confessional in light of the work of Michel Foucault. Moreover, these notions share the same root in suspicion toward the self and others.

The Foucauldian notions of confession and truth have been previously discussed conceptually, theoretically and historically (Lorenzini & Tazzioli, 2018; Tadros, 1998; Taylor, 2009; Teti, 2020) as well as by applying the concepts to several practical contexts (Beard & Noll, 2009; Ferreira, 2023; Kestilä, 2021; May & Bohman, 1997; Salter, 2007). However, the connection between confession and death has received less scholarly attention, now

elaborated in *The Confessions of the Flesh,* the fourth volume of Foucault's *The History of Sexuality*. On a theoretical level, I discuss the meaning of confession as a spiritual and symbolic death in light of Foucault's work. On a practical level, the context for this discussion is EU asylum legislation and cases decided by the CJEU where the application for asylum was based on the sexual orientation of the applicant. A key element in these types of cases is the assessment of credibility of the applicant's statements. In other words, it is a question of establishing whether the applicants *truly* belong to a sexual minority. Failure to pass this assessment will result in rejecting the application and finally deportation to the applicant's country of origin, where they might face even life-threatening circumstances.

The analysis of these two layers is carried out through readings of two landmark cases by the CJEU that concern the different legal measures pertaining to the Common European Asylum System (CEAS), a legal and policy framework developed to guarantee harmonised standards for people seeking asylum in the EU. The first case, Joined Cases C-199/12–C-201/12 *Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel* (ECLI:EU:C:2013:720) (*X and others*), was decided by the CJEU in 2013. In the second case, Joined Cases C-148/13–C-150/13 *A and others v. Staatssecretaris van Veiligheid en Justitie* (ECLI:EU:C:2014:2406) (*A and others*), the CJEU ruled in 2014. In both cases, the applicants had based their applications on fear of persecution in their countries of origin for reasons of membership of a sexual minority. In order to decide whether the applicants fulfil the legal criteria for being granted asylum, the question in the national migrant administration came down, first, to whether belonging to a sexual minority qualified as a basis for the application, second, whether the applicants were telling the truth about their sexuality, and third, how serious is the risk the applicants would face should they be deported. This way, the question of 'speaking the truth' comes to essentially define who will be granted asylum in the EU. Procedures to reveal this 'truth' appear to follow the logic of confession. However, the cases discussed in this article also demonstrate how these procedures aid in negotiating the risks and consequences that follow from rejecting the application, in other words the likelihood of the applicant facing serious harm or even death in their country of origin. By discussing these cases, we can approach the intertwinement of the notions of confession, truth and death.

Moreover, the analysis illustrates how confessional practices, intertwined as they are with the notions of truth and death, are essentially mobilised through the notion of 'disbelief' or 'suspicion', something well researched and documented in the field of asylum and refugee

studies.[1] A 'culture of disbelief' refers to a persistent idea that applicants 'really' belonging to a sexual or gender minority are rare while the rest are mainly 'bogus asylum seekers', pretending to belong to these minorities in order to exploit the receiving state's goodwill. However, as Bohmer and Shuman (2018) note, suspicion is not generated first and foremost by what asylum applicants say or by the evidence they are able to provide, but 'also by larger institutional frameworks, each with its own history, culture, and politics' (Bohmer & Shuman, 2018, p. 159). In the (political) asylum process suspicion towards the claims made by applicants is a central part of its dynamic. In addition, suspicion can be considered as an important element for the genealogy of distinct confessional modes that Foucault traces in his work.

The article is structured as follows: First, in Section 2, the legal framework for seeking asylum in the EU is explained in detail. This sets the stage for the discussion about confession and the praxis of the CJEU in asylum cases. In Section 3, the concept of confession as well as its connection to death and suspicion in Foucault's work is discussed. Section 4 presents an analysis of the two cases decided by the CJEU. The cases are analysed through the concept of confession with the objective of demonstrating how not only are the national asylum processes confessional, but also how the CJEU has in its argumentation laid the foundation for the types of asylum practices that have governance of truth as their main rationale. Moreover, it is observed how the driving force for such governance, practically and theoretically, is suspicion. Section 5 synthetises and further theoretically contextualises the previous readings of the cases, suggesting an understanding of this operation as the confessional dispositive. Section 6 concludes the article.

2 Seeking Asylum in the EU

The framework of EU asylum legislation essentially operates through the CEAS and its five primary legislative instruments. This article concentrates on the Qualification Directive (2011/95/EU). The Qualification Directive sets out the definition and the standards of treatment for refugees and beneficiaries of subsidiary protection and its application was the main issue in both cases that will be discussed.

The Qualification Directive lays down the criteria for refugee status and the assessment of credibility relating to the grounds for applying for asylum. Article 2 (d) states that a 'refugee'

[1] For example, the 'culture of disbelief' has been discussed in detail in (Danisi et al., 2021, pp. 312–316).

is a third-country national, who is unable to stay in their country due to well-founded fear of being persecuted there. Article 9(1) defines persecution as, essentially, a severe violation of basic human rights. Paragraph 2 gives a non-exhaustive enumeration of examples of such violations, including sexual violence and various forms of discrimination (Spijkerboer, 2022). Article 4(5) sets the conditions for the assessment of credibility regarding the application, in case where the application is not supported by documentary or other evidence. According to the Article 4(5), the applicant has to make a genuine effort to substantiate the application, submit all relevant elements at the applicant's disposal, the applicant's statements must be coherent and plausible and not contradict available specific and general information relevant to the applicant's case, international protection has to be applied at the earliest possible time and finally, the application must be generally credible.

Selim et al. (2023, pp. 1002–1003) note that asylum seekers are rarely able to provide external evidence (such as documentation) to support their claims, and therefore evaluating the credibility of their statements is a significant step of the asylum decision-making process. According to Danisi et al. (2021, p. 300) while credibility is the basis of all asylum applications, it is particularly difficult to ascertain in the cases of applicants belonging to minorities based on their sexual orientation or gender identity as the persecution they face is rarely documented and has usually taken place in private. In the cases discussed in this article, sexual orientation was the basis of the applications. Thus, a couple more words about the special nature of credibility assessment in these cases is needed.

In *A and others*, the CJEU held that the national authorities are to assess the statement of the applicant and related evidence. It rejected the proposition that the declared sexual orientation of an applicant must be held to be an established fact (*A and others*, para 49). Furthermore, authorities are not to accept evidence such as the performance by the applicant of homosexual acts, apply 'tests' with a view to establishing their sexual orientation, or require the production of films of such acts (*A and others*, paras 65-66). As Spijkerboer (2022, p. 204) notes, this places the applicants in front of a difficult dilemma as

> Asylum applicants are required to show the 'genuine nature' of their sexual orientation. However, the Court of Justice denies them the two forms of evidence which they can provide: their own statement as to their sexual orientation, and evidence of the fact that they have performed same sex sexual activities through, for example, visual material.

While allowing evidence such as films of sexual acts would easily constitute a violation of the Charter of Fundamental Rights of the European Union (the Charter), especially the right to respect for human dignity as prescribed in Article 3 and the right to respect for private and family life prescribed in Article 7, excessive control given to authorities in determining what kind of statements can be considered credible is equally problematic.

In this situation, where applicants can rarely provide external evidence and yet their own statement is not sufficient, credibility assessment has become a complex art. As a guiding principle, the applicants' statements are often assessed based on the so-called credibility indicators, which usually include (with some variations in wording): detail and specificity, internal consistency (ie within the applicants' statements), external consistency (ie with other people's statements and country information), and plausibility (UNCHR, 2013; Selim et al., 2023: 1015). As Bohmer and Shuman (2018, p. 15) note,

> to be successful in the political asylum process, applicants need to be able to tell a coherent, credible narrative about their experiences of persecution in their home country. This is rarely an easy task, not only because their experiences are often so complex, leading to a noncoherent narrative, but also because the immigration officials, who assess the narratives, make many assumptions about what is credible and what seems deceptive.

Indeed, the procedure leaves substantial discretion to the national authorities, thus making it easier for the individual prejudices of the decision-makers to affect the outcomes of the process (see, e.g, Hertoghs, 2024). For example, applicants belonging to sexual minorities are often expected to have lived their life according to Western standards. These include, for example, the 'out and proud' narrative (Danisi et al., 2021, p. 307) the idea that if the applicant has not 'come out' in their country of origin, they are expected to do so immediately upon arrival to Europe.

However, not only personal considerations but also the broader institutional environment and culture within which the applications are assessed can be seen to affect individual decision-making. Bohmer and Shuman (2018, p. 93) argue that at least in the UK, the perception that LGBTI cases are less credible than other bases for asylum claims is based in part on the high rates of denial. According to a report from the NGO UKGLIG, 98–99% of LGBT applicants brought to their attention were denied their claims. While the authors acknowledge that obtaining reliable data on the topic is difficult, a number of applicants

aiming to obtain a refugee status fraudulently is unlikely to be as high as this denial rate would lead one to believe (Bohmer & Shuman, 2018, p. 93). The data begins to act as a self-fulfilling prophecy: As most LGBTI applications are rejected, applicants claiming to belong to a sexual minority must be unreliable or fraudulent, and therefore this individual application should be rejected too.

As noted by Fassin already in 2013, the question of asylum was subsumed under the logics of immigration control. Moreover,

> This evolution is accompanied by a profound loss of credibility of asylum seekers within the institutions in charge of assessing their applications. There was a time, not so long ago, when the relationship between the administration and the claimants was one of trust. It has reversed into mistrust. (Fassin, 2013, p. 10)

Danisi et al. (2021) have documented the decision-making culture across Europe where disbelief appears to be the starting point in asylum claims. While this 'culture of disbelief' has been analysed from various perspectives, in this article I aim to connect the question to a broader, although likely no less complex question of truth and the practices through which such truth is constructed.

3 Confession, Death and Disbelief in Foucault's work

Before we proceed to the analysis of the cases, let me introduce the theoretical framework for this discussion in detail, namely, confession and its relation to death and disbelief. While Foucault discussed the theme of confession in many of his works (1995; 1993; 2003a, 2014a; 2000), I will limit my analysis to two forms of confession: *exomologesis* and *exagoreusis*. These confessional practices are addressed especially in Foucault's Dartmouth lectures in 1980, *About the Beginning of the Hermeneutics of the Self*, but also in *The Confessions of the Flesh*, published posthumously. Whereas *The Will to Knowledge*, the first volume of *History of Sexuality*, is often the reference point for discussions concerning Foucault's work on confession (see e.g. Ferreira, 2023), the texts mentioned above elaborate the turn from Antiquity's techniques of self-mastery towards examination and interpretation of the self. This relation between self and truth is of central interest to this article, together with the thematic of self-destruction and renunciation of the self. The latter element is discussed

especially in *The Confessions of the Flesh* which provides a more detailed analysis of the relation between confessional practices and death.

Let us begin with Foucault's lectures *About the Hermeneutics of the Self*, consisting of two parts entitled 'Subjectivity and Truth' and 'Christianity and Confession'. In 'Subjectivity and Truth', Foucault (1993, p. 201) notes that to confess is essentially to tell the truth of oneself to other people. While the word 'confession' might immediately bring to mind the confessional, the place where the priest sits when hearing confessions of penitents, this form of confession was hardly the first one. In 'Christianity and Confession', Foucault (1993, p. 213) refers to Tertullian's description of the practice of *exomologesis*, a penitential rite:

> The penitent wears a hair shirt and ashes. He is wretchedly dressed. He is taken by the hand and led into the church. He prostrates himself before the widows and the priest. He hangs on the skirts of their garments. He kisses their knees.

Tertullian described *exomologesi*s as *publicatio sui*: one had to 'publish oneself' – to show oneself as a sinner. This act was understood as a representation of death, showing the sinner as dead or as dying. The second element of *exomologesis* was precisely to show one's will to be freed from earthly life, 'to get rid of his own body, to destroy his own flesh, and get access to a new spiritual life'. In *exomologesis*, the sinner is willing to embrace their own death as a sinner and thus enacts a self-renunciation. Indeed, the most important reference for *exomologesis* is martyrdom (Foucault, 1993: 214–215). By reproducing the martyrdom this way, the penitent places themselves at the threshold of death, which is a promise of a genuine life where death is reversed (Foucault et al., 2021, p. 77).

However, the renunciation – and thus publication – of the self also takes another form: that of *exagoreusis*. This form of confession refers to organized practices of confession in monasteries, and they were developed during the time these institutions were formed. Two principles are crucial: the principle of obedience and the principle of contemplation (Foucault, 1993: 215–216). As Foucault (2021, p. 101) notes, the strict system of obedience implies that nothing should be undertaken without the order or permission from the director. The contemplation, then, grants access to God due to one's purity of heart. The monk must at all times contemplate his own thoughts, observe 'the nearly imperceptible movements of the thoughts, the permanent mobility of soul' (Foucault, 1993: 217). Why is this constant contemplation needed? Essentially, to be able to tell good thoughts from bad ones. We can

thus see how a fundamental suspicion is instilled into this mode of confession: There might be something in ourselves that we are not aware of, a terrible secret.

Verbalisation of thoughts is a way to test their origin: If the thoughts resist verbalisation, in other words, if one feels ashamed to confess them, the thoughts refer to sin. The one who hears the confession represents God. When the monk speaks his thoughts to his superior, he puts those thoughts before the eyes of God where they will 'necessarily show what they are'. Moreover, in Satan, the human is considered to be attached to himself. When moving from Satan towards God through the act of verbalisation, the human renounces not just Satan but also himself. As Foucault notes, 'one's search for the truth about oneself [constitutes] a certain way of dying to oneself' (Foucault, 1993: 220). The rule of constant verbalisation finds its parallel in the model of martyrdom familiar to *exomologesis*. To summarise, in both forms of confession, a common origin can be found: We must sacrifice ourselves in order to find the truth about ourselves (Foucault, 1993: 221). Moreover, this connection between confession, truth and death, but also their connection to suspicion, has marked the development of confessional practices from the beginning.

This becomes clearer when in *The Confessions of the Flesh* Foucault addresses the first forms of penitence in Early Church. Foucault discusses especially the concept of *metanoia*, the word meaning essentially 'conversion' in Ancient Greek (Konstan, 2015), which establishes a link between received teaching (access to truth) and rebirth, but also repentance. While Foucault usually addresses the practice of confession as centred around the truth that is somehow hidden in the self and must therefore be brought to light, *metanoia* appears to involve recognition rather than knowledge: 'recognising the evil one has done and giving signs showing that one is no longer the person one was, that one has indeed changed one's life […]' (Foucault et al., 2021, pp. 39–40). This type of conversion and penitential practices that followed typically took place before baptism: they could be performed as sort of a precondition. In this way, 'true' believers could be separated from the people who aimed to receive baptism for wrongful intentions. According to Tertullian:

> a sinner must weep for his faults before the moment of pardon, because the time of penitence is also a time of danger and dread. I do not deny to those who will enter the water the assurance of divine benediction; but to get there, one must do the work (Foucault et al., 2021, p. 45).

Here we can see that suspicion as a central element of confessional practices is much older than the form of suspicion we observed from *exagoreusis*. Indeed, as Teti (2020, p. 225) interprets Foucault, not only does 'Tertullian first theorise "original sin," but it is he who first folds such suspicion of the self by the self into practices of direction of conscience.' The ones seeking salvation through baptism must fear both God and themselves: 'namely one's own weakness … the mistakes one is capable of, of the insinuation of the enemy within the soul, of the blindness or the complacency which will make it possible for him to surprise us' (Foucault et al., 2021, p. 61). This marks the birth of what Tertullian calls the *discipline of penitence*. At the time of Tertullian's writings, it was precisely the institutionalisation of ecclesial practices that was taking place. This institutionalisation constituted a long period of preparation in which the catechesis and teaching of truths was combined with other rituals and obligations. Foucault groups the period of preparation into three major forms: the interrogatory investigation, the tests of exorcism, and the confession of sins.

While the interrogation preceded and concluded the preparatory phase before baptism, it was quite different from the confession. The interrogation concerned the past life and conduct of a candidate, mainly external particulars. Confession was not something inquired from the candidate, but an act that one performed themselves (Foucault et al., 2021, p. 51). It was an act where one recognised being a sinner in a general sense. Nevertheless, also this form bears similarity to the later forms of confession: it is in any case a truth act, where telling the truth of oneself is an essential element. Moreover, also this form of confession is intertwined with the notion of death. Indeed, baptism is the 'death of death', where one dies as a sinner and is reborn into Christian life and thus death is eventually reversed. Thus, baptism does not mark only entering the life as a Christian, but it becomes a permanent matrix for one's life (Foucault et al., 2021, p. 55).

Teti (2020) analyses elaborately the conflation of the concepts avowal (*aveau*) and confession, resulting from Foucault's own, at times ambiguous, usage. According to Teti (2020, p. 228), these concepts appear as distinct in Foucault's *ouvre*, avowal being more closely associated with judicial procedures while confession appears mostly in the context of sacramental practice. However, it is nevertheless possible to discern

> a specific configuration of power relations rooted in a particular articulation of confession with the avowal in which the avowing subject's normalization is

> undermined by a subjectivity already and necessarily marked by deviant, stained nature … (Teti, 2020, p. 216).

This way, avowal is also treated as part of confessional practice. Such 'sacramental confession' is centred around a subject, which must 'tell the truth' not because the truth will redeem the one confessing but because the subject is ontologically distinct, the deviant Other. Teti points specifically to a paragraph from the *Confessions of the Flesh*, where Foucault discusses the reciprocal roles of the shepherd and the sheep in the context of pastoral power:

> once attacked by temptation, the weak must seek asylum in their shepherd, 'as children in the breast of their mothers.' But the shepherd must also discover — even despite themselves — that which they hide or hide from themselves … that is to say 'examine external conduct' of sinners with the aim of 'discovering through this that which they hide in their heart which is most criminal and detestable.' (Foucault et al., 2021, p. 394).

Thus, while this excerpt demonstrates the link between avowal and pastoral power, we can also view it as illustrating how, in addition to the notions of truth and death, the confessional practices are built upon doubt and suspicion. Suspicion towards the self, but also suspicion toward others. And such external suspicion is accompanied by the responsibility of the shepherd to bring the frauds and deceptions of the flock to light.

4 Asylum Process as a Confessional Practice

4.1 A and Others

The practical workings of confession can be illustrated by discussing two cases decided by the CJEU. Let us begin by introducing the case *A and others*. The applicants had lodged applications for asylum in the Netherlands. They had stated that they feared persecution in their countries of origin because of their homosexuality. Applicant A's application was rejected by the Staatssecretaris as not being credible. Instead of challenging the refusal, A submitted a second application where it was stated that 'he was prepared to take part in a "test" that would prove his homosexuality or to perform a homosexual act to demonstrate the truth of his declared sexual orientation'. Also this second application was rejected on the grounds that the credibility of A's homosexuality had still not been established. The Staatssecretaris considered that 'it was not appropriate to rely only on the declared sexual

orientation of the applicant for asylum without making any assessment of the credibility of that orientation' (*A and others,* paras 22-25*)*.

In a similar manner as in the case of A, applicant B's application was also rejected. This was because the Staatssecretaris considered that the statements concerning B's homosexuality were 'vague, perfunctory and implausible'. The Staatssecretaris considered that although B's country of origin was intolerant against homosexuality, B should have been able to 'give more details about his emotions and his internal awareness of his sexual orientation' (*A and others,* para 26).

Also applicant C's application, based on other grounds than his homosexuality, was rejected. C did not challenge the first rejection but lodged a new application, based on the fear of persecution in his country of origin on account of his homosexuality. C stated that he had not been able to tell about his homosexuality sooner but only after he had left his country of origin. To prove his claim, C gave the authorities a video recording of intimate acts with a person of the same sex. The Staatssecretaris did not consider C's claim as credible, noting that

> 'C ought to have mentioned his declared sexual orientation in the first application for asylum, that he had not clearly explained how he became aware of his homosexuality and had not been able to reply to questions about Netherlands organisations for the protection of rights of homosexuals' (*A and others,* paras 27-29).

Thus, the Staatssecretaris rejected the application.

The applicants appealed before the Raad van State, the highest general administrative court in the Netherlands. The Raad van State decided to ask the CJEU for clarification on what limits do Article 4 of the Qualification Directive and the Charter impose on the method of assessing the credibility of a declared sexual orientation (*A and others,* para 43). The CJEU thus considered whether Article 4 imposes restrictions on national authorities when assessing the facts and circumstances concerning the declared sexual orientation of the applicant (*A and others,* para 48). In its assessment, the CJEU gave its approval to national authorities to verify the applicant's declared sexual orientation, for example, by interviews (*A and others,* para 64). The CJEU noted that, contrary to what the applicants had argued in the main proceedings, the claim of being a homosexual constitutes 'merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4' (*A and*

others, para 49). However, the assessment must be in accordance with the fundamental rights guaranteed by the Charter (*A and others,* para 53), therefore, the questions may not concern details of sexual practices. Similarly, the CJEU considered that performing a 'test' in order to prove one's homosexuality, or to produce film material of homosexual acts, would as well be contrary to the fundamental rights. Allowing such practices would also incite others to act in a similar manner, thus de facto requiring the applicants to provide such material (*A and others,* paras 64-66).

If we now return to the discussion about confession, we can observe certain common elements. First, applicant A's willingness to take part in a 'test' to prove his homosexuality can be analysed through the lens of *exomologesis*. *Exomologesis* is a practice of publication of the self. In *exomologesis* one does not say anything. Rather, the truth is being demonstrated by one's body, wearing a hair shirt and ashes, kneeling, sometimes even flogging oneself. Confession in this form is a corporeal practice. Applicant A's suggestion also finds common ground with *metanoia*. It should be noted that while the transformation from *metanoia* through *exomologesis* to *exagoreusis* might appear as a linear evolution where one form replaced another, and Foucault's own work sometimes gives the same impression, all these modes of confession include some common elements. In *metanoia*, one demonstrates the conversion mostly by other means than verbalisation. However, practices attached to *metanoia* also include verbal elements, such as interrogation concerning the past life and conduct of a candidate. And similarly, *exagoreusis* includes an obligation to improve oneself in order to become worthy, similarly as true conversion needed proof before baptism. All these elements find their parallels in the asylum process, where proving one's claim through verbalisation essentially becomes an exercise of proving one's worthiness.

Then, in the *Confessions of the Flesh*, Foucault again addresses in more detail the coupling of 'truth-telling' and 'truth-doing', especially the performative and 'non-discursive' aspects of the process of truth-production (Teti, 2020, p. 224). In the context of asylum procedures, the asylum applicant's body is itself a source of evidence, as noted by Bohmer and Shuman (2018, p. 78). Asylum courts sometimes rely on medical examiners and certificates to validate the narratives of the applicants. Such evidence can be sought in support of the claims related to, for example, torture, sexual identification, rape and forced contraception. According to Fassin and Halluin (2005), new technologies of inspecting the body have resulted in the expectation that the applicant provides documentation and evidence of their

body. They note how 'the body has become the place of production of truth on the asylum seeker' (Fassin & D'Halluin, 2005, p. 599).

If we consider A's suggestion of a 'test' together with the video recording provided by applicant C, we again see more clearly how different modes of confession are interlinked. As was discussed above, a fundamental element of all confessional practices shares a common root in suspicion. The tests before baptism were arranged precisely in order to separate 'true believers' from the fraudulent ones. In the case of *A and others*, while the CJEU prohibited this kind of evidence because it constitutes a violation of human rights, this was also partly because 'such evidence does not necessarily have probative value' (para 65). The opinion of Advocate General Sharpston elaborates on this stance: 'the probative value of such evidence is doubtful because it can be fabricated if needed and cannot distinguish the genuine applicant from the bogus' (para 66). And while the CJEU eventually confirmed that the application should not be rejected solely based on the use of stereotyped notions because such notions do not allow the authorities to take account of the individual situation and personal circumstances of the applicant (para 62), the Advocate General noted that such notions are also unlikely to be able to distinguish genuine applicants from bogus claimants who have schooled themselves in preparing their application (para 65). These statements reflect well the suspicion that is elementary both to modes of confession and the 'culture of disbelief' in the field of asylum procedures.

We can also see the workings of *exagoreusis* in the case, namely in relation to applicant B. In applicant B's case, it was considered that his statements were 'vague, perfunctory and implausible'. Instead, B should have been able to 'give more details about his emotions and his internal awareness of his sexual orientation' (*A and others,* para 26). In *exagoreusis*, the fundamental basis is the ability and willingness to verbalise one's thoughts and feelings to an external listener and this requires tracking them in detail. However, the listener is not merely a passive recipient but a supervisor and authority, who will assess what is being said. The one who listens to the confession has the power to judge and punish but also to forgive and console (Foucault, 1993: 62). In monasteries, the assessment focused on whether thoughts included sin. In the asylum process, the assessment is focused on whether the statement is credible. This dynamic is also discussed in *The Will to Knowledge*. As the subject cannot explicate the truth as wholly constituted, an outsider is needed to interpret what is being said. 'Truth' is construed in a two-stage process: between the one who speaks and the one who deciphers what is being said (Foucault, 1998, p. 66).

Finally, in relation to applicant C, we can observe both forms of confession. C had given the authorities a video recording of intimate acts with a person of the same sex (*A and others,* paras 27-28), similarly to the way applicant A was willing to take part in a 'test', and the Staatssecretaris had considered that also C should have been able to give more details about becoming aware of his homosexuality, similarly as B's statements were considered vague.

4.2 X and Others

Let us then move to the case of *X and others*, decided by the CJEU in 2013. The applicants X, Y and Z had applied for asylum in the Netherlands on the ground of fear of persecution because of their homosexuality. According to the applicants, they had been subject to violent reactions by their families and entourage and acts of repression by the authorities in their countries of origin. In all of these countries, homosexuality was a criminal offence. However, the applications were rejected (*X and others,* paras 23-27).

All three applicants then appealed to the Rechtbank's-Gravenhage, a local court, from which the dispute later proceeded to The Raad van State, the same court that dealt with the case *A and others*. The Raad van State decided to stay the proceedings and referred the issue to the CJEU. In its referral, the Raad van State asked, first, whether foreign nationals belonging to a sexual minority form a particular social group as referred to in Article 10(1)(d) of the Qualification Directive. The second question concerned the kinds of homosexual activities that fall within the scope of the Qualification Directive, namely, can applicants belonging to a sexual minority be expected to conceal their orientation in order to avoid persecution or can they at least be expected to exercise restraint in expressing that orientation. The third question related to whether criminalisation of homosexual acts constitutes an act of persecution (*X and others,* para 37).

Regarding the first question, the CJEU considered Article 10(1) of the Qualification Directive to mean that a group is regarded as a 'particular social group' when essentially two conditions are met. First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society. The CJEU then noted that a person's sexual orientation is an element so fundamental to the person that they cannot be expected to renounce it. In addition, the existence of criminal laws in the applicants' countries of origin support the finding that

homosexual persons form a separate group which is perceived by the surrounding society as being different. Therefore, homosexuals in the described circumstances can be considered as a social group (*X and others,* paras 44-49).

Regarding the second question, the CJEU noted that the Qualification Directive does not specify what kind of an attitude or behaviour the applicant should adopt in relation to their sexual orientation. Neither can it be derived from the Qualification Directive that the person should limit the expressions of their sexuality to private life. Therefore, a person applying for asylum cannot be expected to conceal their homosexuality in their country of origin in order to avoid persecution (*X and others,* paras 69-71).

Regarding the third question, the CJEU noted that the acts of persecution must be sufficiently serious and constitute a serious violation of human rights. In the case at hand, the violation of human rights relates to the right to private and family life as enshrined in Article 8 of the European Convention of Human Rights and the corresponding Article 7 of the Charter. However, these rights are not among the fundamental human rights from which derogation is not possible (*X and others,* paras 52-54). The CJEU therefore noted that the criminalisation of homosexual acts alone does not constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution (*X and others,* para 61).

How does this case relate to confession and truth, and moreover, to death? Here, the CJEU significantly shaped the ways in which credibility assessment should take place by affirming that homosexuality is essentially an innate characteristic that cannot be changed, following the lead of the European Court of Human Rights (ECtHR), which had previously stated how homosexual activities constitute 'a most intimate aspect of private life' and 'an essentially private manifestation of the human personality' (*Dudgeon v. the United* Kingdom, application no. 7525/76, 22.10.1981). This principle, although progressive in many ways, has become counterproductive from the perspective of asylum seekers. In practice, it has led to a framework where sexual orientation is considered as a fundamental part of an individual, reinforcing the idea that all individuals have an essential identity or nature, despite such idea having been contested over and over again. For example, it has been argued that the self and identity are rather ongoing processes (see, e.g., Soirila, 2015). Nevertheless, understanding of identity as fixed, but sometimes concealed even from the subject, has led to practices that aim

to access this 'truth' about identity through external interpretation and specific methods. Returning to the extract from *The Confessions of the Flesh* discussed above, the shepherd must discover what it is that each individual sheep hides from others or from themselves; the shepherd must examine their external conduct and this way, discover what is most criminal and detestable in their heart (Foucault et al., 2021, p. 394).

As has been argued above, this type of process is confessional. Through confession the applicant subjects themselves to assessment and is granted salvation, assigned more exercises or rejected. In confession, truth is precisely a fundamental part of the individual and when that truth is subjected under the supervision of another, the individual also subjects themselves. Therefore, what is eventually evaluated is not the quality of the statement but the individual. And affected by the suspicion and disbelief that both the asylum process and confession share, the 'truth' to be revealed may well indicate that the intentions of the applicant were wrongful.

If we take a step further, such assessment of 'truth', that takes as its object not the individual's actions but the individual themselves, is easily expanded beyond a certain individual to all individuals representing the group that is understood as ontologically different, the Other. This also results in moral judgment: the Other is different because it is in essence already stained and pathological. On a practical level, the question of separating applicants who are 'truly' in danger from the opportunist 'bogus asylum seekers' (Kmak, 2015, p. 396) has become a central issue of EU asylum policy and it is also visible in the praxis of the CJEU. This way, the 'wrongful intentions' of the 'bogus applicants', notions based on the fundamental suspicion that grounds the system, come to serve as justification for border policies focusing on restriction, control and effective deportations as well as high rejection rates for the applications.

In addition, the case of *X and others* illustrates how the asylum process is not only a way of regulating migration, but similarly to sacramental confession, one for regulating truth and also death. If the applicants are credible in claiming their sexual orientation, are they also credible when it comes to the gravity of danger they might face if the applications are rejected? How likely is it that they are actually in danger? This way, what is accepted as 'truth' is entangled with the applicant's ability to express it correctly it. And such correct representation of 'truth' is entangled with the question of death, in the form of negotiating what happens to the applicant if they are deported. But as has been noted above, 'truth' is

something that the applicant cannot produce on their own terms. Instead, the 'truth' is regulated by Article 4 of the Qualification Directive as well as by the multiple instructions and guidelines that the officials apply, the procedures of the courts, and the broader institutional settings and cultures.

5 The EU Asylum System and the Confessional Dispositive

Based on the analyses above, we can now identify a triad of truth, confession and death operating at the core of the asylum procedures presented in the cases. However, equally important is the element of suspicion. Let us still discuss these elements in more detail.

While the act of conversion in the Early Church, as was discussed in relation to *metanoia*, was not primarily about seeking individual faults or wrong-doings, it was nevertheless an act that was needed precisely due to each person's fundamental status as a sinner. In conversion and the following baptism, one leaves their past life behind and is reborn into Christian life and, thus, eventually salvaged. Baptism was not necessary only for individuals who had committed serious crimes, as it is not today either, but for everyone who wished to follow the guidance of the Christ. Every individual had to be baptised because every individual is a sinner by default. As mentioned, in baptism one dies as a sinner, is reborn as a Christian and thus death is reversed. In this context, while the notion of death bears practical implications (dying concretely and through baptism gaining eternal life), more significantly it refers to *the world of sin as death*. This conceptualisation of sin as death is visible in all modes of confession discussed here: *exomologesis*, *exagoreusis* and *metanoia*. While sin is obviously connected to and originates from the Devil, it is even more about being attached to oneself; a self that is irrevocably bound to sin. As was discussed in the context of *exomologesis*, *exagoreusis* and martyrdom, the only way to escape such sin is to sacrifice oneself, dying to self.

If we look at the asylum process more concretely, the notion of 'truth' is a crucial element, as only the 'truth' can separate 'deserving applicants' from 'bogus asylum seekers' (Kmak, 2015, p. 396). Kmak (2015) observes how the latter term has become firmly embedded into European migration discourse already since the 1990s. Through the division between 'genuine asylum seekers' and 'bogus asylum seekers' a moral dimension is built into the asylum process. The conceptualisation of 'bogus asylum seekers' as immoral justifies state actions and creates moral panic (Kmak, 2015, p. 406). This moralising element eventually justifies the deaths of irregular migrants in the Mediterranean, for example.

However, the 'truth' of the asylum process is even more tightly connected to death when we look at the issue through what can be described as *the confessional dispositive*. I am here using the concept of dispositive as pertaining to a certain economy of power, a strategic arrangement of different powers in a specific situation and during a specific time.[2] Although the emergence of a dispositive is highly contextual, from this does not follow that the dispositive's engagement in its context unequivocally delimits a specific field. The dispositive is in constant move, forever being displaced due to its interaction with its surroundings (see Raffnsøe et al., 2016).

Teti (2020, p. 229) suggests an outline for such a confessional economy of power:

> The following characteristics can be identified: first, a discursive framework which distinguishes between two subject positions, the Self (pure, normal) and the Other (stained, pathological); second, an imperative placed on the latter to emancipate, normalize; third, the failure of that emancipatory effort – a double failure, of both shepherd and flock – made inevitable precisely by the emancipating Other's stained, impure alterity; and finally, fourth, the responsibilization of that Other for these failures, thus allowing the failure generated by this dispositive to paradoxically reproduce the dispositive itself, rather than undermine it.

In the context of asylum, the truth–death axis of the confessional dispositive produces the notion of 'original sin'; an individual who is a sinner as an ontological *a priori*. However, from this premise precisely two subject positions become distinguishable: those who will receive baptism and salvation – and those who will face damnation.

While I have in this article addressed mostly the modes of confession that Foucault traces from the Antiquity, in *The Will to Knowledge* Foucault analyses the development of these modes in more detail, especially from the perspective of how such modalities will contribute to the governing of populations and resulting finally in biopolitical governance. During this transformation, the position of sin is replaced by deviancy, which is by its nature pathological rather than sacramental (see, e.g., Foucault, 1995, 1998, 2003; see also Kestilä, 2023). This

[2] Within the limitations of this article, it is not possible to engage in depth with the discussions regarding the position of dispositive in Foucault's *ouvre*. For example, (Raffnsøe et al., 2016) provide an elaborate discussion on this notion and its mobilisation within Foucauldian theory more generally.

division, when it becomes detached from its original context, can be mobilised to mark any division between general positions of the Self and the Other. In asylum procedures and policies, when considered through a confessional dispositive, such division is essentially one between true and false. And similarly as Teti suggests, fraudulent applicants, the 'bogus asylum seekers', are held responsible for their immoral actions. However, within the confessional dispositive, this immorality of actions is perceived as the immorality of *being*. The application procedure is built to emancipate the applicants from this deviancy, which it cannot do, and for which the applicants will be held responsible within the parameters of the dispositive. Indeed, 'such a "failure" actively supports the confessional dispositive itself by attributing responsibility for that failure precisely to a deviant alterity' (Teti, 2020, p. 229). Shortly, asylum seekers must 'tell the truth' in order to be granted asylum, which they cannot due because most, if not all, asylum seekers are 'bogus asylum seekers' and deserve to be deported. Access to Europe is managed and justified through the notion of 'truth'. Within the confessional dispositive, the requirement of 'telling the truth' shifts the responsibility for being able to enter to the applicant, even though 'telling the truth' is not a straightforward or simple practice. Nevertheless, failure to comply with the demands of the process will result to deportation to potentially fatal conditions.

6 Conclusion

In the beginning of this article I noted that my aim was to address the connections between confession, truth and death that materialise in asylum processes, as well as the fundamental significance of suspicion that grounds these notions. I have argued that this dynamic can be understood as confessional dispositive.

The intertwinement of these notions is reflected, first, in the ways in which the connection between confession and death appears as significant in Foucault's work. Death is symbolically present in confession when the person confessing destroys their own flesh in order to rid themselves of sin, or when they verbalise their sins to the external authority, renouncing their subjectivity and thus becoming subjects to be governed. Second, death is a practical concern within the asylum framework. People are constantly dying when trying to reach Europe, and deporting them includes a risk of death as well. Moreover, different symbolic representations of death that are part of confessional modes, as well as concrete practices of asylum procedures, can be traced to suspicion and doubt that are instilled in the heart of the confessional dispositive.

Many authors have pointed out the contradictions between the outspoken values and policy goals of the EU and its allies and concrete actions. As Mayblin et al. (2020), for example, argue, 'while human rights law is meant to ensure the equality of all human beings, it is clear that there is a practical regime of differential humanity operating here.' Within such regime, conditions of impoverishment and endangerment are more tolerable for asylum seekers, if fewer make applications for asylum in the UK. In other words, the life of an asylum seeker is meant to be hard so that more asylum seekers are not 'pulled' to the Europe. We thus have, on the one hand, the statements and declarations about respecting human rights, and on the other hand, the everyday life of the asylum seeker. Tadros (1998) has previously argued that while the privileged locus of political criticism has been cast in juridical terms, concentrating on the overextensions of political power, the actual points at which power is exercised have been invisible to this theoretical framework. Similarly, the analyses of the asylum cannot take legislation and declarations at face value.

While accurately describing the workings of the law and its many connections to different apparatuses and modes of power is a challenge, there might be a broader societal challenge emerging from the double-standard of asylum system. While politicians may view restrictions of mobility and economic rights of asylum seekers as favourable due to the perceived view of these making Europe less appealing,[3] and no matter what the majority of citizens want from European asylum policy, the discrepancies between what is said and what is done in this field will not go unnoticed. There are people who in general support these democratic institutions and who might wonder whether they should be trusted after all. But there are also people who will use these contradictions against the democratic institutions precisely because their degradation will give way for authoritarian regimes and politics.

References

Beard, J., & Noll, G. (2009). "Parrhēsia and Credibility: The Sovereign of Refugee Status Determination." *Social & Legal Studies*, 18(4), 455–477. https://doi.org/10.1177/0964663909345094

[3] Such view has been heavily questioned in previous research. See, e.g., (James & Mayblin, 2016) who demonstrate how restricting the economic rights of asylum seekers has not had any impact on the numbers of asylum applications received.

Bohmer, C., & Shuman, A. (2018). *Political Asylum Deceptions*. Springer International Publishing. https://doi.org/10.1007/978-3-319-67404-9

Danisi, C., Dustin, M., Ferreira, N., & Held, N. (2021). *Queering Asylum in Europe*. Springer International Publishing. https://doi.org/10.1007/978-3-030-69441-8

Fassin, D. (2013). "The Precarious Truth of Asylum." *Public Culture,* 25(1), 39–63. https://doi.org/10.1215/08992363-1890459

Fassin, D., & D'Halluin, E. (2005). "The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers." *American Anthropologist*, 107(4), 597–608. https://doi.org/10.1525/aa.2005.107.4.597

Ferreira, N. (2023). "Better Late Than Never? SOGI Asylum Claims and 'Late Disclosure' Through a Foucauldian Lens." *UCLA Journal of International Law and Foreign Affairs*, 27(1). https://escholarship.org/uc/item/3kd5b8p7

Foucault M (1993) "About the Beginning of the Hermeneutics of the Self." *Political Theory* 21(2): 198–227.

Foucault, M. (1995). *Discipline and punish: The birth of the prison* (A. Sheridan, Trans.; Second Vintage Books edition). Vintage Books.

Foucault, M. (1998). *The will to knowledge*. Penguin books.

Foucault M (2000) "Truth and juridical forms." In: Faubion JD (ed.) *Michel Foucault: Power. Essential works of Foucault 1954-1984*, New York: New Press, pp. 31-45.

Foucault, M. (2003). *Abnormal: Lectures at the Collège de France, 1974-1975* (V. Marchetti, A. Salomoni, & A. I. Davidson, Eds.; G. Burchell, Trans.). Picador.

Foucault M (2014) *Wrong-Doing, Truth-Telling. The Function of Avowal in Justice*. Chicago: University of Chicago Press.

M Hertoghs (2024). "Affects of Objectivity: Decision-Making Practices in the Dutch Asylum Procedure." *Social & Legal Studies*. https://doi.org/10.1177/09646639241260727

Foucault, M., Hurley, R., & Gros, F. (2021). *Confessions of the flesh*. Pantheon Books.

James, P., & Mayblin, L. (n.d.). "Factors influencing asylum destination choice: A review of the evidence."

Kestilä, I. (2021). “Confession as a Form of Knowledge-Power in the Problem of Sexuality.” *Law and Critique*, 32(2), 195–216. https://doi.org/10.1007/s10978-021-09287-x

Kestilä, I. (2023). “Law, space and power: Spatiality in the European Court of Human Rights judgments on homosexuality.” *Gender, Place & Culture*, 30(11), 1509–1528. https://doi.org/10.1080/0966369X.2022.2072815

Kmak, M. (2015). “Between citizen and bogus asylum seeker: Management of migration in the EU through the technology of morality.” *Social Identities*, 21(4), 395–409. https://doi.org/10.1080/13504630.2015.1071703

Konstan, D. (2015). “Foucault’s On the Government of the Living.” *Foucault Studies*, 266–276. https://doi.org/10.22439/fs.v0i0.4941

Lorenzini, D., & Tazzioli, M. (2018). “Confessional Subjects and Conducts of Non-Truth: Foucault, Fanon, and the Making of the Subject.” *Theory, Culture & Society*, 35(1), 71–90. https://doi.org/10.1177/0263276416678291

May, L., & Bohman, J. (1997). “Sexuality, Masculinity, and Confession.” *Hypatia*, 12(1), 138–154. https://doi.org/10.1111/j.1527-2001.1997.tb00175.x

Mayblin, L., Wake, M., & Kazemi, M. (2020). “Necropolitics and the Slow Violence of the Everyday: Asylum Seeker Welfare in the Postcolonial Present.” *Sociology*, 54(1), 107–123. https://doi.org/10.1177/0038038519862124

Raffnsøe, S., Gudmand-Høyer, M., & Thaning, M. S. (2016). “Foucault’s dispositive: The perspicacity of dispositive analytics in organizational research.” *Organization*, 23(2), 272–298. https://doi.org/10.1177/1350508414549885

Salter, M. B. (2007). “Governmentalities of an Airport: Heterotopia and Confession: Governmentalities of an Airport.” *International Political Sociology*, 1(1), 49–66. https://doi.org/10.1111/j.1749-5687.2007.00004.x

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

Soirila, U. (2015). “Smothered to (un)death: On identity and the European court of human rights as an administrator of human life.” *Social Identities*, 21(4), 345–358. https://doi.org/10.1080/13504630.2015.1071698

Spijkerboer, T. (2022). “Asylum decision-making, gender and sexuality.” In *Research Handbook on EU Migration and Asylum Law* (pp. 194–203). Edward Elgar Publishing. https://doi.org/10.4337/9781786439635.00016

Tadros, V. (1998). “Between Governance and Discipline: The Law and Michel Foucault.” *Oxford Journal of Legal Studies*, 18(1), 75–103.

Taylor, C. (2009). *The culture of confession from Augustine to Foucault: A genealogy of the “confessing animal.”* Routledge.

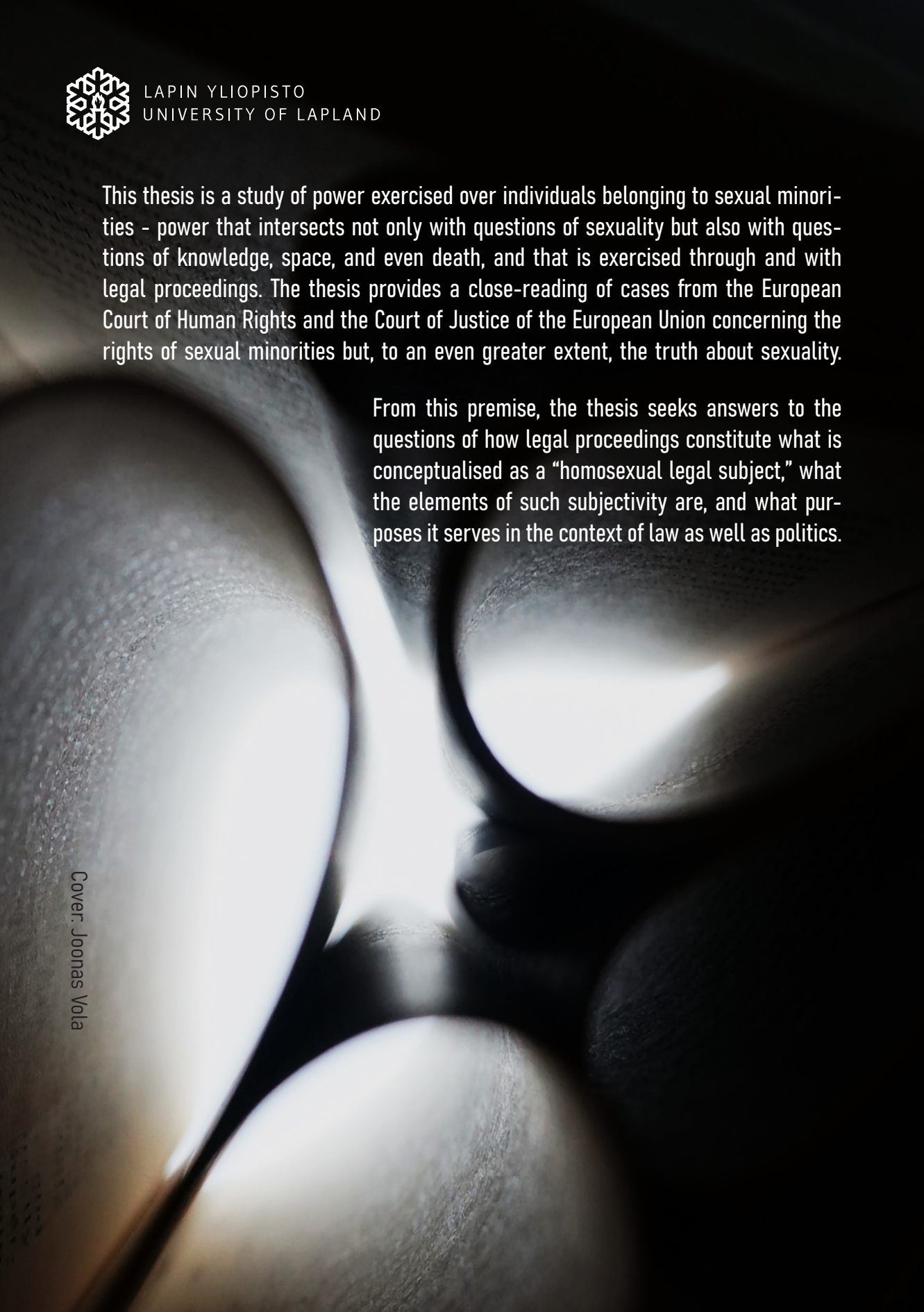
Teti, A. (2020). “Rethinking Confession.” In *The Late Foucault: Ethical and Political Questions* (pp. 214–231). Bloomsbury Academic. https://abdn.elsevierpure.com/en/publications/rethinking-confession

UNCHR (2013) Beyond proof. Credibility assessment in EU asylum systems. Available at: https://www.unhcr.org/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html (accessed 3 July 2024).

LAPIN YLIOPISTO
UNIVERSITY OF LAPLAND

This thesis is a study of power exercised over individuals belonging to sexual minorities - power that intersects not only with questions of sexuality but also with questions of knowledge, space, and even death, and that is exercised through and with legal proceedings. The thesis provides a close-reading of cases from the European Court of Human Rights and the Court of Justice of the European Union concerning the rights of sexual minorities but, to an even greater extent, the truth about sexuality.

From this premise, the thesis seeks answers to the questions of how legal proceedings constitute what is conceptualised as a "homosexual legal subject," what the elements of such subjectivity are, and what purposes it serves in the context of law as well as politics.



Cover: Joonas Vola