

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-Hovineimo 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-Hovineimo, ‘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-Hovineimo, ‘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: Brill 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 I. 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 intertwining 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 or 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 intertwining 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 were 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.