The Politics of Knowledge

Edited by Samuli Hurri and Iiris Kestilä

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Editorial

This special issue of *No Foundations* is dedicated to the politics of knowledge. The politics of knowledge is a recurring theme in all societal critique – not least because of the Foucauldian power/knowledge nexus. We started addressing this theme in a small research community, aptly named as Problematizations. At first our intention was to approach the issue through the 'hard' and objective stem sciences as compared to the 'soft' and subjective social sciences. Such a distinction between different types of knowledges, however, seemed to contain within itself already a problem, although that problem was not that clear to us in the beginning. However, that problem seemed to be closely intertwined with politics as exercise of power. Our discussions around this question grew into a seminar series, where the issue of politics and knowledge was looked upon from several different perspectives. We were lucky to receive contributions from many excellent academics from a number of disciplines, so that the special issue gathers together a nice variety of approaches to the theme. We express our gratitude towards everyone who contributed to this special issue.

What is knowledge or what do we mean by knowledge? During the seminars it became clear that knowledge as a concept covers several possible approaches, theoretical and methodological. The perspectives from which we approach the politics of knowledge in this issue highlights this point well: subjugated knowledges, knowledge as a phenomenological problem, politics of knowing other cultures, and finally the critique of knowledge-based societies. This is in no way an exhaustive list of the ways in which the topic of the politics of knowledge can be approached, but we feel it offers an up-to-date exposition on the theme.

After our foray into the politics of knowledge we are next going to focus on an adjoining theme: the role of language in the production of knowledge and politics. Many of the issues that were brought up during our seminars seemed to somehow associate with language. Therefore, we decided to take language as our next problematization. What problems indeed does language include and why do we perceive language as problematic in the first place? The work we started in a small group of scholars will continue in a community that has since grown larger. We look forward to the upcoming discussions in our seminar series.

Problematizations Team

The Politics of Knowledge: Introduction

Samuli Hurri & Iiris Kestilä*

1. Introduction

The politics of knowledge is an open-ended notion that releases a whole variety of critical research possibilities. What we introduce in this volume is collective work by researchers who have come together for one academic year to explore those possibilities.[1] The question for us was how different types of knowledge and exercise of power mingle in the governing of societies. At the beginning, we had in mind a number of rather traditional dichotomies whose 'hybridization' or 'deconstruction' the notion of politics of knowledge seemed to suggest: science and politics, theoretical and practical reasoning, facts and norms, description and prescription, and so forth. How we proceeded from there will be explained shortly. Before that, however, we feel we should say a word on the topicality of our theme. The politics of knowledge is not a new notion and even less a new thing, yet we think that it opens a view on to what is going on in the world at the present time.

A couple of years ago, public ridicule of statements by a certain White House press secretary about how many people attended Donald Trump's inauguration ceremony seemed entirely unimportant.[2] Ridicule was not so much about that statement as about its subsequent defence by someone else. That defence appeared somewhat obtuse at the time, but also comical and amusing: the Counsellor to the President publicly on television termed the number of attendees as offered by the press secretary not as plain falsehood but as an 'alternative fact'. As we now know, the waters quickly became more muddied and nothing is amusing about alternative facts any longer. On the one side, there is the rise of cultural, socio-economic and anti-establishment populism that distrusts all knowledge as mere official dogma

* Adjunct Professor and Researcher, Universities of Lapland and Helsinki.

1 This was the academic year 2018–2019. The work was organized within the framework of what we have come to call the 'problematizations seminar'. For its current themes and problems, see <http://ulapland.fi/Problematizations>.

2 He said it was the 'largest audience to ever witness an inauguration'. It was quickly established that more people attended Obama's inauguration in 2009.

whose function is to constrain the will of the true people.[3] On the other side, there is the uncanny figure of the furious teenager Greta Thunberg speaking before the U.S. Congress and the UN General Assembly and urging everybody to 'listen to the scientists' in the face of imminent destruction.

The politics of knowledge apparently stands in the midst of these types of development that may sometimes appear very dramatic. They surface in our awareness as broadcast events like any other matter does, but are they perhaps generated by more intricate, less visible contradictions of our Zeitgeist? Should we try to find out whether a steadier current of politics of knowledge exists beneath the headlines, the task first involves capturing its nature, then corroborating its existence, and finally measuring its size and trend. For that task, one would need rigorous analytical tools and fruitful research materials. Each of the articles in this volume will provide their own vision with precisely those ends in mind. Before introducing this more elaborate work, we will provide a brief illustration of the idea by way of a couple of examples from newspapers.

2. Illustration of the idea

The following are from the specific field of the politics of *economic* knowledge and it is not clear whether any other or even all knowledge works in the same way, but it is not impossible that they do.

The Wall Street Journal reported in September 2019 about the findings of NYU economics professor Thomas Philippon.[4] Having compared the development of prices and wages in the European Union and the United States, Philippon had found as a fact that on both counts Europe has done considerably better than the USA over the last decade. Philippon's explanation for that was that the USA had given up on the free market by letting business concentrate and competition dry out, whereas the EU had been more careful in upholding and enhancing the functioning of the free market. This may of course very well be true.

The Financial Times reported one month later about the changing of the guard at the European Central Bank.[5] The story was really about Christine Lagarde, but the Bank's outgoing president Mario Draghi was also considered. He had frequently defended the Central Bank's so-called bail-out and austerity policies that were often criticized as interventions in the functioning of the market. According to Draghi, the eleven million new jobs created in Europe during the previous ten years prove that the policies of the European Central Bank were the right thing to do. Like Philippon's theory, Draghi's may also be true. We will return to both of these shortly.

The New York Review of Books published one month later a book review[6] by

3 According to the study by Jordan Kyle and Limor Gultchin (2018, 20) the number of countries with populism in power increased fivefold between 1990–2018.

4 'What France – Yes, France – Can Teach the U.S. About Free Markets'. *Wall Street Journal*, 6 September 2019.

5 'What will Christine Lagarde's ECB look like'. *Financial Times,* 27 October 2019.

6 'Against Economics'. *The New York Review of Books*, 5 December 2019. The book reviewed was Robert Skidelsky's *Money and Government: The Past and Future of Economics*. Baron Skidelsky is an emeritus

David Graeber opening as follows: 'There is a growing feeling, among those who have the responsibility of managing large economies, that the discipline of economics is no longer fit for purpose. It is beginning to look like a science designed to solve problems that no longer exist.' The paragon for all such futile economic sciences is the microeconomic theory of rational choice. According to Graeber, what was at first simply 'a technique for understanding how those operating on the market make decisions' transformed into 'a general philosophy of human life'. This philosophy, in turn, posits 'purely rational actors motivated exclusively by self-interest, who know exactly what they want and never change their minds'. The point that for us illustrates the implicated notion of politics of knowledge comes immediately next:

> Surely there's nothing wrong with creating simplified models. Arguably, this is how any science of human affairs has to proceed. But an empirical science then goes on to test those models against what people actually do, and adjust them accordingly. This is precisely what economists did *not* do. Instead, they discovered that, if one encased those models in mathematical formulae completely impenetrable to the noninitiate, it would be possible to create a universe in which those premises could never be refuted.[7]

What do we get out of these three pieces of economic news? As to the first two, we do not know in fact whether Philippon and Draghi are right about the causes of the current state of Europe's economy. For that matter, we are not even sure whether such an upbeat assessment of the situation is correct at all. Perhaps someone competent in economics could establish all this. What even we as a couple of simple lawyers can point out and problematize, however, is that the scientist Philippon and the central banker Draghi here seem to explain more or less the same facts with rather different wisdoms. Apparently, one of them explains the current state of Europe by its vigilant free market policy, whereas the other says it is because of its cautious interventionist policy.

It is no news of course that different theories exist and that the choice between them depends at least partly on one's political views. This is not the problem that emerges from the newspaper articles. The problem is whether proponents of economic knowledge, such as Philippon and Draghi, ever really are honest interpreters of facts. Prices, wages and employment rates are facts, but the theories explaining them clearly are not. We all know that economic theory is both empirical and normative at once (it informs us not only about facts, but also about norms, about what should be done) but this is not the point. The point is that economic theory not only informs and regulates action, but also *constitutes* the domain of those facts which it then goes on to describe and explain.

This constitutive effect and function of theory brings us to Graeber's review,

professor of political economy at the University of Warwick; Graeber is professor of anthropology at the London School of Economics.

7 This is what Thomas Piketty also lamented about his experience of American academic economics in his *Capital in the Twenty-First Century* (2013).

where the critique was not only of the microeconomic theory of rational choice, but of all mainstream (neoclassical) economic theory. What matters to us is that in Graeber's view this type of economic theory is not really knowledge because it is too hermetic to be tested or criticised adequately. However, the result has not been rejection of economic theory as not a good basis for knowledge, but only that no theoretical alternatives exist. Another question is whether this type of theory is political by nature as it ascribes a normative model of behaviour to human beings (self-interested, knowing what one wants, unwavering). Not really, because this normative model is not posited as debatable opinion, but indeed as something like the ideal or truth itself. The result has not been rejection of economic theory as not a good basis for policy but only that no political alternatives exist.

Here it seems we have one ideal-typical version of the politics of knowledge, that of economics: whatever view this mongrel comes up with, it has no alternatives. It has no theoretical alternatives, because it is fundamentally a matter of politics. But it also has no political alternatives, because it is fundamentally a matter of knowledge. Elements of the compound exclude each other, so that the politics of knowledge grows into something entirely different.

Leaving economics aside, we can think about science and knowledge production more generally. To what extent can any thoughtful knowledge ultimately avoid the element of politics of knowledge? Is avoidance possible, or even preferable? Some of us would respond straight away that at this very moment and in this global situation, one should indeed turn back from whatever politically naïve post-modern constructivism, as Jürgen Habermas (1989) suggested many years ago. But if and when we 'turn back' this way, are we then to reclaim exactly the same old values of science: objectivity and truth as the very opposites of politics?

Some of us would perhaps be ready to recognize that only objectivity and truth may provide the ultimate meaning and purpose of research. Only objectivity and truth may function as the ultimate standards of criticism for the results of research. Perhaps so. But if objectivity and truth are indeed given this way as *values*, and if moreover the alternative would be *politically naïve* (as it opens gates for denialist villains who are 'sceptical' about a whole range of things from climate change to concentration camps) then are we not somehow led back again to the sphere of politics of knowledge?

Very well, this much should be enough of journalism. We should next explain what kind of entrée to the problem of politics of knowledge we have started to develop and present an overview of what our work has resulted in so far. Our initial idea was to approach the problem from both sides separately, first from the side of science and then from the side of politics. Yet it quickly became clear that this was not a feasible arrangement. Each of the articles is in one way or another about the hybridization or deconstruction of the whole distinction, not about analysing politics and knowledge separately.

While it was our starting point that science should be defined as 'production of knowledge' and politics as 'production of common will', these were only working

definitions, something to begin with. The real problem and objective was to establish the role played by will in production of knowledge, on the one hand, and the role played by knowledge in production of common will, on the other. Therefore, neither the articles nor the following sections of this introduction will attempt an analysis of politics first and then knowledge, as it were, so as to maintain a clear difference between these two things. Instead, we will present some sort of four-point guided tour in the politics of knowledge, which is all about intersections and mixings between the two.

3. Cultural pluralism: politics of dominant and subjugated knowledge

One way to start discussing the politics of knowledge is to question the idea of unity that seems to underlie certain views of both politics and knowledge. Politics has since ancient times been constitutive of the unity of a nation, a *demos*. Politics in this sense is based on the idea of a group of people that is unified in its need to form a common will on public matters. Knowledge, in turn, is by and large defined precisely by its unity as universal validity for everyone equally. This type of unity is indispensable, at least in the Western scientific sense of the term 'knowledge'.[8] In this regard, the politics of knowledge suggests a completely different perspective. Politics is not based on the idea of a unified nation, but on struggles between different groups of people that coexist in the same political space. Moreover, knowledge is not unified but diversified from the outset because it is always understood as something inherent to a culture, that is, the particular ways of thinking of particular groups of people.

In this context, the politics of knowledge materialises in relations of dominance and resistance between different socio-cultural groups and their knowledges. Of special concern here are the struggles of marginalized, subjugated or underdog cultural knowledges against a dominant culture.[9] For our purposes, 'dominant' culture knowledge is one which cannot really understand how the whole notion of knowledge could be expressed in the plural: 'knowledges'. Against the type of knowledge that can hardly imagine anything else but itself as knowledge, a whole variety of 'other' knowledges exist: knowledge of oppressed social classes; knowledge of ethnic, racial, cultural sexual and religious minorities; knowledge of children and the elderly, and so on.[10]

One of the fields of politics between dominant and subjugated knowledges consists in the struggles by indigenous peoples against the culture of the 'settler West'. It is common to consider this as a struggle by indigenous people to secure their peculiar mode of living and being as something inscribed in their traditional knowledge. Traditional knowledge, in turn, is something to which an outsider, typically someone trained in universalist scientific culture, cannot really gain genuine

8 One expression of the unity of knowledge consists in the so-called laws of thought in logic: the law of contradiction, the law of excluded middle and the principle of identity.

9 The notion of 'subjugated knowledges' was coined by Michel Foucault; 2003, 7.

10 More recently, the 'forgotten knowledge' of the male, middle-class, heterosexual white has entered the field of politics of knowledge.

access. Moreover, any intrusion by a member of the universalist scientific culture will be considered as an existential threat to traditional knowledge and to the mode of being inscribed in this knowledge. Hence, the need to protect indigenous cultures from colonisation and appropriation by the hegemonic majority population.

In his article *'Ensnare the Language': Imagination and Resilience in Indigenous Arts*, Julian Reid discusses the notion of resilience as a colonial image of indigenous peoples. 'Settler West' for Reid is more or less identical to its neoliberal regime of governing. Reid maintains that resilience is used as an element of neoliberalism's strategy of interpellation that operates through the self-imagination of its subjects. Presenting them with a resilient image of the human, neoliberal power means seeking to convince the people it subjugates of their capacity to bear all the difficulties on their own. The strategic objective is to trap people into accepting harshness of life as a kind of natural necessity, so that it would no longer cross their minds to consider this harshness as something generated by oppressive social structures. Resilience is perfect for that type of power, because it does not have to be taught to people as some kind of doctrine, but by way of putting their own imagination to work. As an idea of oneself, a resilient person is in fact rather pleasant and therefore easy to endorse.

Reid's analysis does not stop there, however. He goes on to look for positive imageries that would open up possibilities for indigenous peoples to develop counter-strategies of resistance. In view of those possibilities, Reid discusses certain alternative images from contemporary indigenous activist art. Characteristic of these is that people are not presented as resilient victims who will suffer their destiny eternally, but as a political people who are capable of action. Artistic work itself is political action that manages to conduct the rather surprising operation of double appropriation. What does this mean? What these artists are doing in their radically alternative images is in fact cultural appropriation of political modernity(!) In other words, they borrow the imagery of the West and 'counter-colonize', as it were. This is returning the favour, so to say, so that indigenous artists are in fact appropriating not only the settler imagery, but the settler's very own mechanism of appropriation itself.

In her article *Enhancing Resilience Through Indigenous Traditional Knowledge in Ecological Restoration*, Punam Noor adopts a notion of resilience very much opposite to that of Reid's. One might say that Noor's discourse itself proves 'resilient' against Reid's, in that it is capable of resisting the critical lore of his analysis of the notion of resilience as a subtle ideological trap. For Noor, gaining resilience means becoming stronger, not weaker. Not abandoning the normative stance that resilience is after all something good and worth striving for, Noor too is still – like Reid – critical of what she calls the 'epistemological authority of Western thought processes'. However, unlike Reid, who focuses on these processes in the Western political regime of governing, Noor focuses on how they are implicated in natural science and ecological knowledge.

In her article, Noor substantiates her critique anthropologically, that is, by way of researching ecological restoration projects conducted in the lands of indigenous peoples. These peoples have much at stake in such projects, as their livelihood is

often dependent on nature. This is also evident in the particular case study that Noor provides in her article, namely, focusing on a river restoration project that was important for the indigenous people living on its banks because of its fisheries. Noor observes especially the ways in which the traditional knowledge of indigenous people was consulted in the restoration project. Noor's argument is not only that this knowledge was quintessential for the success for the project, but also that its inclusion in an otherwise rather technical and pragmatic project also had significant societal effects. Through the use made of their knowledge, the restoration project enhanced indigenous people's sense of belonging and resilience.

4. Critical traditions of human sciences: phenomenology

A second and rather different perspective on the problem of the politics of knowledge would be to consider what human and social sciences already have to offer. In that direction, one would be reminded of the rich variety of critical traditions pertaining to our problem. For instance, members of the Frankfurt School, from Horkheimer and Adorno (1997) to Habermas (1971), were very much concerned with the dispersion of the natural sciences type of experimental methods and technical reasoning to the field of human and social research. The Frankfurt School's state of the art today is Axel Honneth's (2011) theory of justice as analysis of society, the aim of which is to cross the boundary between normative political theory and empirical social science.

Another example would be so-called Science and Technology Studies, spearheaded by the French anthropologist Bruno Latour. This stands for a more radical intervention of the human and social sciences into the heart of hard natural sciences. This school has developed a way of looking at scientific practices of knowledge production from the constructivist perspective of human and social sciences, asserting for instance that facts are produced in science laboratories comparably to the way in which judgments are produced in law courts (Latour & Woolgar 1989; Latour 2009). This may very well be seen as an offspring of the French tradition of the history of science, from Canguilhem to Foucault, that for a long time now has studied the hidden normative effects pertaining to empirical sciences, something that Foucault (2008, 34) called 'intersections between jurisdiction and veridiction'.

One could go even further back in the history of modern thinking to find out that at the root of these and other European traditions critical of knowledge probably stands the effort by Kant to draw limits to purely theoretical, empirical and objective reason, together with the effort by Hume to show that norms cannot be derived from facts. One interesting response to precisely these two postulates is the phenomenological tradition that began with Husserl's critique of what he called the 'natural attitude' of the objectifying empirical perspective and went on to redirect attention to the domain of human thinking instead of knowing. At present, with Luce Irigaray especially, the phenomenological tradition has moved on to consider perception as an ethical relationship between two embodied subjects rather than between subject and object.

In his article *Justice as a Matter of Thinking: A Phenomenological Approach,* Juha Himanka offers a close reading of Husserl's lectures on *The Idea of Phenomenology* to track down the way in which Husserl's method of reduction or *epoché* was born and put to work. This meant, first, staying within the limits of immanence of thoughts, but second, from there to find out about the ways in which a correlation forms between an appearance and that which appears. What matters is that this correlation varies in different cases (e.g., 'counting a number, seeing a thing, remembering something, or considering something as beautiful or just') and in Himanka's reading it is exactly the explication of these differences that phenomenology is about.

In addition to close reading of Husserl, Himanka offers an example of the way in which phenomenology might work out in the case of considering something as just. Here he draws on Alexandre Kojevè and his example of distributing food in a situation where one is hungrier than the other. Two different notions of justice might be applied, the one requiring that each should get the same and the other that the hungrier should get more. What seems to be phenomenological about this is that considering these options is a matter of thinking, including the thinking of others in an intersubjective process, rather than making observations in nature. Concepts of justice belong to that realm, not to the external world.

In her article *Towards a New Ethics of Sexual Self-determination: Finnish Rape Law through the Speculum of Feminist Philosophy*, Minni Leskinen works out a novel phenomenological perspective on law. In the background stands Luce Irigaray's phenomenology emphasising the human body as a site of ethical communication. Quite like in Himanka's justice concepts, in Leskinen's discussion two different *thought*s are also foregrounded. These thoughts are the alternative ways in which the definition of rape may be construed: either as a violation against sexual self-determination or against sexual integrity. The first creates two distinct fields of freedom and reduces sexuality to penetration, whereas the second is more sensitive to dependencies and asymmetries that define real-life human relations.

While this perhaps is not Leskinen's main objective, her analyses of legal cases involving rape provide a highly convincing demonstration of the feasibility of the phenomenological approach in law, also in the sense Himanka advocated. One might say that as far as justice is concerned, rape is a *thought*, a definition through which the thing itself appears. Yet Leskinen's article goes even further and moves to the Irigarayan phenomenology of the body, to consider the way in which sexual intercourse 'is not a space that can be divided into two', but 'a space where two persons not only coexist but communicate, relate, intertwine'. For Leskinen this raises the need of a new ethics, but not only that: sexual intercourse is also an indispensable way of gaining knowledge and wisdom. Perhaps we might add 'an indispensable bodily way of experiencing the truth'. Leskinen's discourse implies that this phenomenological aspect is also a worthy concern when thinking about the object of protection in the criminal law on rape.

5. Politics of knowing other cultures: China and Europe

The third perspective on the politics of knowledge would be to consider the relationship between the effect of social, cultural and historical reality on knowledge. Starting from the view that knowledge is bound to a certain place and time, one could revisit the old project common to early anthropology (Durkheim & Mauss 1963) as well as Marxist sociology of knowledge (Mannheim 1948) to start from the hypothesis that not only certain ways of thinking but also the mind's cognitive structure is in fact the product of social structure. Explorations of the 'primitive' or 'savage' mind were meant to examine the depth of formative and constitutive power that culture exerts on human knowledge.

One of the most influential perspectives on that sort of orientation is the type of cultural studies which Edward Said (2003) conducted in his critique of orientalism. This is based on the awareness that anything one says about 'other' cultures may often be an illusory construct that has the function of clarifying one's own culture. This type of exploration of remote cultures is made use of as the inner other whose real function is to constitute the self. Said was exploring the orientalism of nineteenth century European literature, but the concept of critique he was articulating there could very well be developed into a general method of researching the politics of knowledge.

Saidian awareness should not lead to an impasse, however. It would be foolish to simply block off all interest in other cultures because of the postulate that latent in that interest is always an interest in one's own culture. Insofar as that is a necessity, we should perhaps make a virtue of it. Why not openly confess that research into other cultures implies research of one's own culture? Not of course in the orientalist manner that would consider everyone else a barbarian, but as an honest learning process, where one could see new things about one's self in the image of the other.

In his article *Dao: Cosmological Thinking and Social Practice*, Matti Nojonen discusses the ancient Chinese philosophical notion of *Dao*, proposing it as the foundation of Chinese thinking even today – not only in philosophy, but also in Chinese policy making and in the everyday life of ordinary people. Interesting from the point of view of the politics of knowledge is Nojonen's observation that the notion of *Dao* seems to undo the distinction between politics and knowledge. *Dao*, and therewith Chinese thinking in general, does not seem to distinguish between verb and noun: *Dao* is both the action of traversing and the path itself. Likewise, Chinese *Dao* thinking does not operate on the distinction between practical and theoretical that is fundamental in Western philosophy.

Hence, what we learn is that the distinction between 'politics' and 'knowledge' – without which our notion of 'politics of knowledge' could hardly be perceived as a problem – appears to be curiously non-existent in Chinese culture. Is it then the case that we can learn precisely nothing about the politics of knowledge from Chinese culture? On the contrary, we learn pretty much everything. Insofar as Chinese culture provides a holistic view that has not decomposed into politics and knowledge, we are in fact witnessing the politics of knowledge. Inserted into politics, every piece

of knowledge is always already an element of a strategic game, where the value of any knowledge depends on the following type of questions: whether only you know; whether your opponent knows the same; whether you know that your opponent knows; whether your opponent knows that you know what they know; and so on.

In his article *Cosmology and Practices of the European Union*, Samuli Hurri draws inspiration from Nojonen's text on Chinese culture and tries to make something similar work in the context of the European Union. Having the European Union as a playground, Hurri's text is a theoretical experiment with certain notions that derive from the work of Michel Foucault: 'regimes of practices', 'the logic of strategy' and 'subjectivation'. Hurri's idea is to take seriously Nojonen's Daoist dialectic (between the so-called *yin* and *yang* properties) as something materialising in the interaction between the European Union's different governing dispositions – political, juridical, economic and security. Operative as concrete regimes of practices, these four connect to each other through the logic of strategy, so generating an unending process of transformation of the European Union as a field of power relations.

Drawing again on Nojonen's ideas, Hurri envisions the governing of the European Union as a sort of Chinese political cosmology. One cannot control, let alone freeze, the process of continuously changing constellations, the process of *dao* that is 'autogenerative' as Nojonen puts it. The interaction between regimes of practices is something like the *dao*-path, whose generative mechanisms one can learn by way of internalising its 'mode of spontaneity', according to Nojonen. Central in Hurri's article are the different types of subjectivation pertaining to the governing dispositions of the political, juridical, economic and security regimes. The purpose of subjectivation seems to be again comparable to that of the political *dao*, which is to 'cause people to be in complete accord with their ruler [and] follow him to death or survival undismayed by any danger', says Nojonen quoting the strategic thinker Sunzi.

6. Critique of the knowledge-based society: economic and psychological knowledge

As the fourth and final perspective on the politics of knowledge, we would consider the prospect of developing a critique of the so-called knowledge-based society, meaning by that a society that aspires to govern itself through proven and indubitable science. Undoubtedly, sciences play a huge role everywhere in modern society. The problem is, however, whether science is only the provider of helpful information that may be fed in the processes of collective will formation, or whether it has in many places replaced democratic politics. Consider for example technology, medicine and ecology that are all very much involved in the governing of today's society. The attraction of these very 'hard' sciences is probably due to their promise of objectivity. But does objectivity mean, in this context, neutrality towards politics as choices between values?

When one thinks about the actual practices of governing in concrete situations, then technology, medicine and the ecology may quickly lose their virtue of scientific

objectivity, insofar as by that is meant purity from value choices. Let us think, for instance, that in the context of extraction of minerals some practical solution stands out as the most efficient from a technological perspective. It is easy to imagine that this will not necessarily appear as a good choice from the perspective of health or the natural environment. Assuming that these sciences are not just objective but *equally objective*, their confrontation departs from the domain of neutral knowledge and will have to enter the open field of political deliberation. No value-free level of uncontaminated objectivity exists to make conflicts between equals disappear. This is where the sorry business of the politics of knowledge probably belongs: preferences, opinions, struggles over hegemony, suspicion of hidden agendas, and so on.

In his article *Governing the Rural Family in Australia from a Distance; The Family Provision Act and the Role of 'Expert Knowledges'*, Malcolm Voyce conducts a critique of the Australian Family Provision law from the perspective of Foucauldian governmentality studies. Voyce's idea is to study the way in which rules of inheritance might be penetrated by what Michel Foucault termed 'examination' and 'normalisation'.[11] From the perspective of the politics of knowledge, examination and normalisation are important as elements of Foucault's genealogy of social and human sciences in the practices of power and control. Foucault himself considered 'examination' as associated with the new panoptic techniques of social control that were developed in the context of 18th and 19th century urbanization and capitalism. Voyce's question is whether mechanisms of examination have found new employment, but this time in the rural context that is not defined by capitalism.[12] Foucault's normalisation, in turn, stands for the tendency of the capillary power of society's immanent normality to replace the externally given legal norms. On this count, Voyce's observation is that in inheritance cases a kind of normalisation is at work, which may be detected in the legal rhetoric that draws on common knowledge about family farming.

In his article on *The Financial Stability of the Euro Area as a Whole: Between Jurisdiction and Veridiction,* Tomi Tuominen addresses the problem of the politics of economic knowledge. Employing Michel Foucault's concepts of jurisdiction and veridiction, Tuominen investigates the European Court of Justice's judgment in the famous case of *Gauweiler* concerning the European Central Bank's government bond purchasing programme. In Tuominen's discussion, this case grows into a display of a set of problems at the very heart of modern governance: conflation of means and ends, exercise of political power behind the veil of technocracy, the growing power of the market, and so on. Hovering in the background of Tuominen's discussion is the problem of how much legal analysis still has independent leeway with respect to the

11 *Examination*: 'A constant supervision of individuals by someone who exercised a power over them – schoolteacher, foreman, physician, psychiatrist, prison warden – and who, so long as he exercised power, had the possibility of both supervising and constituting a knowledge of concerning those he supervised.' This new knowledge 'was organized around the norm, in terms of what was normal or not, correct or not, in terms of what one must do or not do'; Foucault 2000, 59. *Normalisation*: 'The normal comes first and the norm is deduced from it'; Foucault 2007, 63.

12 Farmers both work and own their means of production.

requirements of a functioning market. The result of Tuominen's critical analysis is that modern society, characterized by financial capitalism, is not so much governed through the economy, but rather *for* the economy.

In her article *Embodied and Embedded Vulnerable Subject: Asylum Seekers and Vulnerability Theory,* Laura Tarvainen addresses the problems arising from what may be seen as insertion of psychological knowledge in a system of the toughest type of state power: the system of immigration administration. The object of her analysis consists in cases concerning asylum seekers whose psychic system suffers from exertion of the most extreme type of violence: torture. In Tarvainen's work, the tortured subject is not so much the marginal and extraordinary case that one would perhaps expect it to be. Instead, torture victims unveil the ways in which politics and law work on what she calls the 'vulnerable subject'. Vulnerability, in turn, should be seen as something that defines all human beings, every one of us. Insofar as psychological knowledge considers human beings as fundamentally vulnerable, fragile and dependent beings, this would probably create the sharpest possible contrast with what is often considered to be the ideal subject of economic knowledge: the rational and radically independent master of one's own will and desire.

7. Where does all this leave us?

At the beginning we said that research on the politics of knowledge involves three tasks: capturing its nature, corroborating its existence, and measuring its size and trend. We also said that rigorous analytical tools and fruitful research materials would be needed, with respect to which the articles in this volume prove of the progress made on both counts. Trusting that on that point the articles will speak for themselves, we would like to end this introduction by returning to the first of our tasks, the one concerning the nature of the politics of knowledge. Let us first sum up the above discussion as stages of development of a singular idea and then conclude with something that hopefully explains the rationale of our research.

What has our team gained to capture the nature of the politics of knowledge? We would like to point at the stages we have just gone through and make some points on their basis. At the first stage, we were considering economic theories. In that context it seemed that sometimes when politics and knowledge come together to form a compound, all *alternatives will be eliminated* in both directions. Economic theory provided itself as a basis of both knowledge and policy in such a way that nothing else was seriously thinkable any longer. At the second stage, however, an entirely different and even opposite view was produced. The politics of knowledge appeared to constitute both politics and knowledge, not as unified wholes, but as *diversified pluralities*. This time, the politics of knowledge is about struggles and confrontations between groups that think and know differently. An apparent discrepancy exists between the first and the second stage: how can the politics of knowledge be elimination of alternatives and affirmation of plurality at once? A *contradiction* exists, but maybe this belongs to the nature of the politics of knowledge.

At the third stage, the perspective of phenomenology brought in light that at the foundation of knowing there should be an intersubjective and ethical element. We would go a bit further and ask whether a political element may also exist in the same way. Should it be so, the politics of knowledge provides us with a view of the stream of 'appearing' and 'experience' as something fundamentally political. Let us say, it would consider this as a *stream of onto-epistemological interventions*: interventions of thought in the reality and interventions of reality in the thought. At the fourth stage, an intercultural learning experiment between China and the European Union transposed the stream-view of the politics of knowledge in *a strategic field of structures of governing*. Interacting in that field, different knowledges and policies were implicated in a process that may be best seen as a struggle for survival. Autogenerative and spontaneous, this process stages the competition between functionally differentiated regimes of power.

At the fifth and last stage, we were finally asking what way the politics of knowledge considers science. The articles in this volume will not discuss the field of academic knowledge production as a social institution that has its particular normative structures and organisational arrangements.[13] These structures and arrangements undoubtedly constitute an interesting domain of very peculiar politics. What we do discuss instead of that, however, is the way in which different types power draw on sciences in their practices of governing the society. Perhaps we can call this dimension of the politics of knowledge *the uses and abuses of science*. Having said that, one should avoid mistaking science as something that was originally pure and only afterwards contaminated by political uses and abuses. Scientific methods are meant to justify the characterization of knowledge as something universal, objective and disinterested, but in the light of their history, they may be found as first developed for the practical purposes of monitoring society (Foucault 2000). We think that insofar as this so-called 'genealogical' view of science captures something essential of the nature of the politics of knowledge, a pertinent question emerges: is science ultimately allowed to exist only to the extent that it makes the society more productive and less dangerous?

Let us conclude by turning at last to the question of the rationale: what are the perspective, mode of operation and objectives of research on the politics of knowledge? Like any critical research, it may very well start from some set of statements given as knowledge. We did something alike at the beginning of this introduction when discussing the statements of professor Philippon and president Draghi. The normal way of proceeding would be to test the validity of the statements, find out whether they are true or false. This is where the way to the domain of the politics of knowledge departs from the normal way: research is not interested in testing the validity of statements. If not that, what then?

Indeed, *what is the question* in which the type of research that considers

13 The normative structure involves something that may be called a 'scientific ethos': the ethos of universalism, scepticism and disinterestedness, for instance. The organisational arrangement is university that has it own kind of compartments, reward systems, processes of evaluation, and so on. See Merton 1973.

knowledge as always already associated with politics is interested? We think that a certain passage in Sigmund Freud's *New Introductory Lectures on Psycho-Analysis* fittingly illuminates this problem of research interest. In that passage, Freud first invites the reader to imagine that someone would have just maintained that *the centre of earth is made of jam*. Then he (Freud) says:

> The result of our intellectual objection will be a diversion of interests; instead of their being directed on to the investigation itself, as to whether the interior of the earth is really made of jam or not, we shall wonder what kind of man it must be who can get such an idea into his head. (Freud 1933, 49.)

In somewhat similar way, research on the politics of knowledge is not interested in the truth of what is given as knowledge. Borrowing Freud's expression, there is a *diversion of interests* towards the political motivations, political employment and political effects of any given knowledge. This type of diversion is where the study of the politics of knowledge begins, the way it operates, and the way it defines its objectives.

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‘Ensnare the Language’: Imagination and Resilience in Indigenous Arts of the Self

Julian Reid*

Abstract

The subjugation of the indigenous imagination has been central to the settler colonial project historically. Indigenous peoples have had to deploy their own arts of imagination in order to fight back against processes of dispossession and denigration. Today, however, the politics of conflicts over the image of indigeneity are in some ways quite different to what they have been historically. Indigenous artists are encouraged and supported to present images of themselves by settler colonial states in search of ‘reconciliation’. In diverse artistic and political contexts an image of indigenous peoples as ‘resilient’, capable of bouncing back from and coping with adversities, is growing in force and power. In this article I discuss this particular way of imagining indigeneity, in terms of ‘resilience’, and argue that it is deeply problematic. Contrary to the popular assertion that resilience is inherent to indigenous ways of being, I argue that it is a colonial concept, projected onto indigenous peoples as a means to sustaining settler colonial relations of power. The article does so by connecting and problematizing various images of indigenous resilience, in North America especially, and contrasts them to images of indigenous resistance deployed by Suohpanterror, an ‘artivist’ group active in Finnish Lapland, which offer an entirely different and radically hostile imaginary to that of settler colonialism.

1. Introduction

The subjugation of the indigenous imagination has been central to the colonial project ever since the first encounters of indigenous peoples with their colonizers. Images of indigenous peoples as primitive and under-developed were prevalent historically, and helped legitimate the processes of dispossession by which the

* Professor of International Relations, University of Lapland.

settler colonial project grew. Indigenous peoples have had to deploy their own arts of imagination in order to fight back. Today, however, the politics of conflicts over the image of indigeneity are in some ways quite different to what they have been historically. Indigenous artists are encouraged and supported to present images of themselves, their communities and indigenous ways of life that celebrate core elements of indigenous cultures and knowledge. In diverse artistic and political contexts an image of indigenous peoples as 'resilient', capable of bouncing back from and coping with adversities, is growing in force and power. In this article I discuss this particular way of imagining indigeneity, in terms of 'resilience', and argue that it is deeply problematic. Contrary to the popular assertion that resilience is inherent to indigenous ways of being, I argue that it is a colonial concept, projected onto indigenous peoples by their colonizers, today as much as in the past. Artists and arts communities, wherever they participate in the projection of the image of indigenous resilience, are themselves therefore complicit with the contemporary colonization of indigenous peoples. I make this argument in this article by connecting indigenous arts projects in Canada, the United States, and in Finland where I live. I also make the argument that when we look more closely at indigenous arts we can encounter ideas and concepts that are fundamentally hostile to the neoliberal and colonial ideology of resilience.

The article opens in the following section with a brief account of the development of the discourse on indigenous resilience on the Canadian arts scene, via the Resilience Billboard Exhibition, as a means towards the reconciliation of indigenous peoples with the Canadian state. In this opening section I articulate my concerns as to why this concept of resilience is problematic, and discuss how it can be seen as an element within a neoliberal strategy for the capture and subjugation of the indigenous imagination. In the second section I discuss the wider importance of imagination and images for indigenous struggles against colonialism historically and again today, and argue that we need to approach indigenous imaginaries with a view to how they conflict with the basic assumptions of resilience ideology. In the third section I do precisely that by analyzing the works and ideas of two Sámi poets, Paulus Utsi and Nils-Aslak Valkeapää, and show exactly how their poetics and aesthetics contest the image of indigeneity projected by proponents of indigenous resilience. In the fourth section I detail the ways in which the image of indigenous resilience is itself depicted and situated as an expression of resistance to neoliberal colonialism, especially in the United States in the wake of the election of Donald Trump as President, and the problems which that mobilization of the figure of indigenous resilience poses for my critique of it. Is the image of indigenous resilience universally subjugating, I will ask, or does it leave itself open to multiple and different kinds of usage? While recognizing the complexity of resilience discourse, and the fact that it can and does refer to different things, I detail how and why it remains captured within neoliberal power relations. In the fifth section I consider where and how today indigenous art and image making might be seen to express a politics which is no longer neoliberal, in which context I make an argument for the importance of Suohpanterror, whose

propaganda art not only draws attention to the continued colonization of Sámi territories, but also defaces iconic images drawn from the colonial west in ways that assert a self-empowering, violent and militant opposition to colonialism. These are images, I argue, which do much more than picture indigenous peoples proffering mere resilience to colonialism. What these images do is to appropriate elements of modernity to imagine indigenous emancipation from colonialism, by way of any means necessary.

2. Resilience and reconciliation

From the first day of June until the first day of August, 2018, billboards appeared across Canada as part of the Resilience Billboard Exhibition, a response to Call to Action 79 of the Truth and Reconciliation Commission Report, aiming at the integration of 'Indigenous history, heritage values, and memory practices into Canada's national heritage and history' (Martin 2018). Call to Action 79 of the Report, titled *Honouring the Truth, Reconciling for the Future*, the writing of which dates back to 2008, directly called upon 'the arts community' to develop such a 'reconciliation framework' (TRCR 2015, 340–341) for Canada and the indigenous peoples living there, whom Canada had for over a century, the report concluded, sought the elimination of (TRCR 2015, 1). The Resilience billboard exhibition was situated as a 'creative act of reconciliation, and a public celebration and commemoration of the work of Indigenous women artists' in particular (Martin 2018). For those two months, images made by 50 First Nations, Inuit and Métis women artists were displayed on billboards in inner cities and on highways across Canada, 'sites from which too many women have disappeared' as a 'physicalized reminder' of the excluded histories of indigenous peoples in Canada (Martin 2018). The project was described by its curator, Lee-Ann Martin, as an attempt to give indigenous women artists the power to 'present their ideas, their visions, themselves' (Martin 2018). The contribution, for example, of Anishinaabekwe artist, Rebecca Belmore, is a photograph of the naked back of a reclining female body, which bears what appears at first to be simply a long scar upon its surface. On closer inspection, however, the image suggests, as Martin describes in her introductory essay to the exhibition, 'both beauty and trauma' (Martin 2018). Beads hang upon the scar, which appears to be a braid, suggesting the craftwork with which the body has both repaired and ornamented itself. As Belmore herself describes, it is a body that has turned its back on the atrocities inflicted upon it, in order 'to find resilience in the future. The Indigenous female body is the politicized body, the historical body. It's the body that doesn't disappear.' (Martin 2018).

Image 1: *Fringe* by Rebecca Belmore 2008.

Resilience, as Martin also tells, is defined in dictionaries as the ability to not just withstand but bounce back from adversities. In the context of the lives of indigenous peoples the central adversity in question is that of colonialism itself (Martin 2018). Yet even before the first encounters with colonizers, Martin argues, resilience was central to indigenous knowledge and ways of being. 'It defines the long-term adaptability of Indigenous cultures to changing environmental and social landscapes', she argues (Martin 2018).

Assertions such as Martin's as to the inherent resilience of indigenous peoples, the deep rootedness of resilience as a way of life for the indigenous, and its centrality to indigenous knowledge, are ubiquitous today (Reid 2018). Indigenous peoples are celebrated as exemplars of resilience, not simply by art curators, but by the very colonial states and international organizations that continue to govern them. The global discourse on indigenous resilience is part of what scholars now name critically, 'the resilience machine' (Bohland, Davoudi & Lawrence 2019). The argument that indigenous peoples are in any sense resilient is deeply questionable, and troubling, given the argument, now widely shared by critical theorists across the social sciences, that resilience is a neoliberal discourse and project designed to convince peoples worldwide of their capacities to bear the brunt of adversities by themselves (Chandler & Reid 2019).[1] Labeling indigenous peoples 'resilient', arguing that resilience is a central tenet of indigenous knowledge and practices, is an expression of a strategy for the subjectification of indigenous peoples in an era in which neoliberal power seeks to mask itself as a regime for the liberation and emancipation of peoples from colonial conditions of existence. Understanding the resonance of art projects such as the Resilience Billboard Exhibition, their power to attract funding and support, and position themselves as enablers of 'reconciliation', requires understanding the power which neoliberalism holds over the images of indigenous modes of being, the governance of images of indigeneity, and the vast scope today of the neoliberal imaginary, which constructs both indigenous and non-indigenous people alike, as resilient to crisis, perseverant in the face of present and future suffering, and accepting of their ongoing experiences of dispossession. To be

1 This paper draws broadly on the book which I and David Chandler have coauthored on this topic (Chandler and Reid 2019) and which was published in Autumn 2019.

fully understood, neoliberalism has to be grasped as a form of power which works through the imaginations of its subjects, convincing us of the naturalness of the image of the human with which it presents us, and which it presents itself as merely enabling and seeking to protect (Fisher 2018).

How is it, that images of indigenous peoples have become so closely linked to images of resilience? How did the vast plurality and powers of indigenous ways of being come to be so defined by this one concept that works discursively to trap people into accepting the necessity of a life of endless survival, against the odds, in a world defined by continuous adversity. Why would indigenous artists accept that their work be reduced to such a degrading ideal?

For anybody concerned with resistance to neoliberalism today, one central task is to find a way out of the discursive traps laid by neoliberal regimes of power. The image of the indigenous subject as the resilient, perseverant, endlessly adaptive being, capable of coping with serial disasters, and bouncing back is, I argue, precisely such a trap. Images are traps into which we sometimes fall, and often are led to in order that we may do so (Reid 2017). Which is why we need to be wary of how our imaginations can deceive us, as well as invest in the powers of our imaginations to create better images, capable of leading us onto different and more promising paths. Imagination, I believe, is of much greater importance for the possible emancipation of peoples from colonial regimes of power than resilience.

3. Ensnare the language!

Intriguingly, in the language of the Sámi, one indigenous people of the Arctic region, the word for trap (*giela*) is the same as the word for language (*giela*) itself (Gaski 1997, 11). Perhaps there are things in the cultures of indigenous peoples that might, by their very own natures, lend themselves to this problematic of discursive interpellation? Perhaps indigenous modes of being are not simply those of resilient, willfully dispossessed, perseverant subjects of neoliberal lore, but also those of power savvy hunters of power, who know both how to trap and hunt power, as well as the risks of being trapped and hunted by power themselves. Indeed the language of the Sámi would indicate as much. The Sámi writer, Harald Gaski, has already detailed how the history of Sámi resistance to colonization has been defined by the basic idea of the need to hide messages of resistance in imaginative forms such as the *yoik*, the original song and music of the Sámi (Gaski 2011, 36). Colonization of the Sámi, like every other indigenous people, took the form of cultural suppression, and thus Sámi people have had to struggle not only to maintain these cultural traditions, but also to use their traditions in imaginative ways, to hide and convey resistance through a clever deployment of images. How might indigenous peoples today deploy their imaginations in ways that contest and subvert the colonization of indigenous imaginaries? How indeed does the indigenous imagination look, when we attempt to take a look, in disregard of the framing of indigenous imaginaries by the curators of colonialism today as reducible to resilience?

Engaging with indigenous imaginations and images strategically is important

today because the representation of indigenous imaginaries remains so heavily policed by colonial powers. Of course there are plenty of settler states and powers only too happy to talk about the need to revive and protect indigenous cultures today, as Canada is doing right now, and promote the indigenous imagination, so long as the images it produces and the work which indigenous cultures perform remains complicit with a neoliberal agenda. 'Language, cultural expression, and even spirituality don't pose an unmanageable threat to settler colonialism, because cultural resurgence can rather effortlessly be co-opted by liberal recognition', as Leanne Betasamosake Simpson, herself of the Nishinaabeg people, which has long suffered the colonization of the Canadian state, argues (Simpson 2017, 50). Colonizing the imaginations of indigenous peoples was a direct strategy of the Jesuits who, as the anthropologist Hans Belting recounts, 'set out to colonize the imaginary world of the natives…not only by placing pictures before their eyes, but also by attempting actually to imprint the pictures bodily, so that they would take possession of their viewers' imaginations and dreams' (Belting 2011, 40). Today this strategy is still in place, as indigenous peoples across the world are asserting. The National Indigenous Corporation of Chile (CONACIN), in protest at the appropriation and manipulation of a photographic image of a Mapuche woman by a Congress on mental health, alcohol and drugs in Santiago in 1998, described the situation well:

> We were stripped of our land. We were deprived of our gods and language. We were brought alcohol and venereal diseases. And after all the plunder, now they want to appropriate our images, and treat us like drunks, criminals, and drug addicts. Our faces and ways of seeing have been taken away. Besides negating our images and usurping our archives of dreams, they have colonized our imagination through the mass media. (Quoted in Salazar and Cordova 2008, 39).

The colonization of the indigenous imagination and the policing of indigenous imaginaries take many forms. Projects arising out of well-intended desires to heal indigenous peoples, by engaging their arts of imaginations, to reduce their suffering, to enable and empower them, or develop indigenous knowledge systems, are often equally as problematic (Rathwell & Armitage, 2016). The Anthropologist, Kim Tallbear, has already well exposed how deeply engrained discourses around the need to protect indigenous peoples and help them survive the threat of extinction have been to settler colonialism, both historically and in the present (Tallbear 2013, 149-150). Contemporary projects, like that of the Resilience Billboard Exhibition, which aim on the surface to give the power to indigenous peoples to 'reimagine' themselves, by making and circulating their own images, as if doing this would validate the results as authentic and free from the dangers of repeating colonialism, fall into the same kind of category. 'Stewardship of the land, respect for the natural world and adaptation to change are values that have always characterized the resilience of Indigenous cultures', agues Lea-Ann Martin, the exhibition curator (2018). These values are epitomized in *We are the Land* by Lianne Marie Leda Charlie, which according to Martin, depicts 'the timeless connections between Indigenous people and the land,

past, present and into the future' (Martin 2018). The problem is that these ways of representing indigeneity as existing 'outside of time' and irreducibly connected to land have become integral to colonial and clichéd imaginaries (Chandler & Reid 2019).

Image 2: *We are the Land* by Lianne Marie Leda Charlie, 2015.

In this article I am not only interested in the ways indigeneity is represented, politically, in images, to underscore the 'resilience' of indigenous peoples. In contrast with the circulation of images of indigenous resilience, and as a way of cracking open that one particular and dominant image, I will excavate the alternatives which indigenous imaginations avail for us, of themselves, their cultures, and ways of being. There are vast differences between indigenous imaginaries, when we take the trouble to open them up and examine their potentials, and the ways the indigenous imagination is represented by the curators of images of indigenous resilience. Indigenous imaginaries and the imaginations from which they derive are always political, but as I will explore, in radically different, and indeed, contradictory ways.

4. Indigenous poetics

One of the most well known Sámi poets of all time was a man called Paulus Utsi (1918-1975). Hailing from Jokkmokk, a small town in Swedish Lapland, Utsi became well known in the Sámi community in the 1960s and early 1970s as a pioneer of the poem as a form of political expression (Svensson 1978, 229-230). Before his death, Utsi penned a collection titled *Giela giela*, which translates into English as 'Ensnare the Language' (Gaski 1997). In other words, it was language itself that Utsi urged his fellow Sámi to hunt and trap. Never, I believe, was that injunction of Utsi's more urgent than it is today. Once we open them up to proper investigation, indigenous imaginaries can be seen to be far in excess of the compliant and accepting modes of being engendered in dominant Western discourses. They can also be seen as challenging these strategies, in which indigeneity is made into an homogenous mode

of being, through Western discourses which prey on their lives, practices, and ways of being, rendering them functional to the aims and ambitions of the West.

Utsi's poetry still remains, in spite of the global attention commanded by elements of Sámi culture today, largely obscure to Western readers. His work was always written in Sámi, and sometimes translated into Swedish. English language translations of his poems are still hard to find and access, and where they do appear have often been translated from the Swedish rather than directly from Sámi. Their translation and the wider interest in Sámi poetry that developed in the 1970s and 1980s occurred in the context of the development of ecopolitical and ecopoetic movements, which often took inspiration from indigenous voices. Utsi's poems often contain descriptions of non-human nature. For example, 'Snowstorm', and 'The Hut's Smoke', which were translated into English for the Canadian ecophilosophical journal, *The Trumpeter*, in the 1980s, contain descriptions of reindeer, animals the herding of which is integral to Sámi ways of life, and birch trees, which are poetic emblems of the landscapes of the homelands of the Sámi people (Utsi 1987). Yet other poems, for example, 'Thought Work', describe the distinctively human world of thinking and doing.

> Tool in, tool your thoughts
> in silver, wood and bone

The poem begins by inciting the reader (Utsi 1987, 18). Clearly Utsi is referencing the traditional materials from which Sámi handicrafts are made, but in a way that is celebrative of the distinctly human capacity to work nature into tools and through which humans are enabled to shape their worlds. The poem continues:

> Spin, spin your reflections
> into rope and threads of skin.
> Weave, weave fast your fate
> in shoe-laces and wagon straps.

Art itself, in Sámi culture, as Gaski tells us, has a distinctly functional value (Gaski 2011, 33). *Duodji*, as it is called, is a tradition in which value derives from utility, and the arts of which depend on the abilities of the maker to subject non-human nature to instrumentalization. When Western theorists, like Timothy Morton reduce 'indigenous people' to a subject-position of alliance with non-human nature (2017, x) they do so by ignoring these foundations of many indigenous cultures and practices, which, in many senses are yet more instrumentalizing of non-human nature than the Western cultures, supposedly defined and made ill by that propensity.

Another widely regarded Sámi poet, Nils-Aslak Valkeapää, himself a relative of Utsi, once condemned 'the self-righteous grandeur' of the colonizers of the Arctic tundra, and sought to give counter-representation to 'indigenous peoples' values and philosophy', including those of the Sámi, but also of all other indigenous peoples with whom Valkeapää identified (Gaski 2010, 301–305). What would Valkeapää say today, were he still alive, in observation of the importance now given to indigenous

knowledge, by the Arctic Council that governs his own land, Sápmi, as well as by so many other states and powers? Would he simply affirm the embrace of indigenous knowledge, welcome the interests of anthropologists and other Western thinkers and scientists in indigenous ways of being, as steps forward in the advancement of indigenous freedoms, or would he display the same cynicism with which he condemned the colonialisms of his own time?

Poetry itself can be a powerful resource for equipping peoples with the intelligence and necessary cynicism with which to avoid discursive traps and make language and concepts work for and not against peoples. Not least because poetry incites the imaginations of peoples by deploying images in ways that open up the possibility of new worlds, rather than simply governing worlds in the ways that states and international institutions seek to (Chandler & Reid, 2016). The poetry of Valkeapää contains many different ideas, images and thoughts but, like that of Utsi before him, is well known for the importance and beauty it attaches to the image of reindeer. The reindeer herd is a central motif in many of Valkeapää's works (Gaski 2010, 312).

On the one hand this motif might seem simply to embody the poet's defence of Sámi traditions as yet another example of their appreciation of non-human nature and life forms over and against the hubristic humanism of the coloniser (Gaski 2010, 306–307). Reindeer are revered in Sámi culture, it is said, because as 'perfectly adapted Arctic survivors' they provide meat, milk, hides for clothing, shoes, and tents, bones and antlers for tools, handicrafts and weapons, and their sinews are used for clothing (Wall 2019). This is also attested to in the language of the Sámi, which is said to have over 1000 words for describing reindeer (Magga 2006, 31). The reasons for this are not necessarily poetic nor owing to any sense of reverence, but due to the basic need of reindeer herders to be able to describe individual reindeer as exactly as possible, as a means of identification. It is a highly advanced taxonomic system that works to classify reindeer on the basis of age, size, color and appearance (Magga 2006, 25). The fact that indigenous peoples like the Sámi invent and employ taxonomic systems to know and make sense of their worlds and resources may come as an surprise to western thinkers who would otherwise have us believe that indigeneity is defined by an opposition to such ways of knowing (see Spriner & Turpin 2017, xiii-xiv). Taxonomic methods of identification and classification are necessary for Sámi reindeer herders in order to determine which reindeer belongs to whom, because reindeer from one herd are liable to get mixed up with another (Magga 2006, 25). In other words, it owes to the insistence of property - that institution and practice which so many contemporary theorists of indigeneity have claimed has no place in indigenous cultures. It owes also to the needs of the Sámi to decide which of the reindeer are ready for slaughter (Magga 2006, 25). In other words, the complexities and refinements of Sámi language, when it comes to reindeer, owes much not to any simple love, care and interests in non-human nature, but to their objectification and instrumentalization of it for their own peculiarly human ends; ends which they have in common with many other non-indigenous peoples, and which conveniently

get left out of the ethnographic descriptions of indigenous peoples by their colonial observers.

The Sámi poet Valkeapää had no interest himself in continuing the tradition of herding reindeer (Gaski 2010, 316). The reindeer he owned were of a distinctly 'private' nature, existing in his head, the property of his imagination, shared with others by way of his poetry (Gaski 2010, 316). Within the poetics through which Valkeapää constructs his images of reindeer, through the deployment of Sámi language, the reader can encounter ideas that conjoin also with the interests of indigenous peoples, including the Sámi, in maintaining their autonomy from Western powers. Here the reader, whether indigenous or non-indigenous, can encounter anthropomorphized images of reindeer, through the redeployment of the taxonomic vocabulary by which the Sámi propertify reindeer into a poetic language and aestheticized form that also evokes a political sensibility of a distinctly human kind. Property too, has its own aesthetics, and it is not simply a liberal western one.

In a poem published in his book *The Sun, My Father,* for example, the words of the poem, which themselves are drawn from the taxonomic vocabulary of reindeer, spread out, gradually, across the pages in a manner that, to the eye of the reader, directly evokes the image of a herd of reindeer moving from right to left in the opposite direction of the reader. The first reindeer the reader encounters is that of *Menodahkes* (Gaski 2010, 320). *Menodahkes* represents not just any reindeer but the reindeer who 'thrives best by itself', and which 'is in the habit of trying to avoid being taken hold of' and 'prefers to keep to itself' (*ibid.*). It relates to the verb, *eaidat*, 'to become a stranger to something or someone, to keep apart by itself, without having anything to do with others' (*ibid.*).

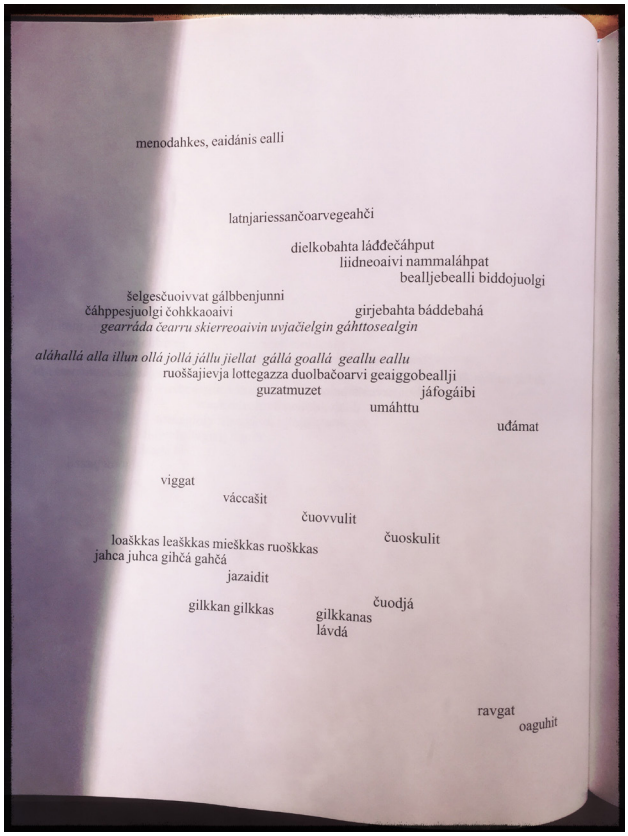

Image 3: *The Sun, My Father* by Nils-Aslak Valkeapää.

While, in ordinary Sámi language, *Menodahkes* might be used to designate a reindeer of that nature for purposes merely of distinguishing ownership, in the poetry of Valkeapää this feature of the behavior of the animal takes on an aesthetic form. The resistance of the reindeer to its indigenous master becomes itself a poetic substance. Becoming a stranger, maintaining distance, avoiding being taken hold of; these are fundamentally political practices, the poetics of which are integral to Valkeapää's work and ethics, and to Sámi poetics and practices as a whole. These indigenous poetics of autonomy recall the Yaqui shaman, Don Juan, whose life and teachings were detailed in the anthropology of Carlos Castaneda and which described a set of practices that come close to *eaidat*, and a way of being *Menodahkes* as it were. Like Valkeapää, Don Juan taught respect for the earth and for species of life other than humans, while at the same time being immensely concerned with the arts by which we humans can best live. He taught the arts by which the indigenous subject can 'build a fog' around itself and cultivate the 'ultimate freedom of being unknown' (Castaneda 1972, 31). Don Juan emphasised the importance of disconnection as life practice and as the basis of ethics. 'Your friends, those who have known you for a long time, you must leave them quickly,' he advised Castaneda (*id*., 42). Of course, it is often said that Castaneda's study of Don Juan was a fiction, and lacking any 'scientific' grounding, but others, including the great anthropologist, Rodney Needham, have argued that it is among the best works that anthropology has

ever produced, precisely on account of its deployment of imagination as method (Needham 1978, 76). If the disciplinary knowledge of the western academy is to do justice to indigenous cultures of shamanism, which are themselves based on 'immoderate capacities' for imaginative fantasy, then it would do well to lose its belief in 'science' and actively embrace the powers of the imagination as method, which Castaneda no doubt did; indeed with a 'literary artistry' unrivalled by any other anthropologist since (Needham 1978, 51-76).

In her analysis, Kathleen Osgood Dana has argued that Valkeapää, also, is best understood as a 'shaman-poet' whose vision penetrates time itself, employing poetry as a power to look into the past, future and reality itself (Dana 2004, 9). *The Sun, My Father* is itself, she argues, a kind of shamanic drum, 'capable of seeing into other worlds, into the past, and into the future' (*id*., 9). Like Don Juan, what Valkeapää is really concerned with is truth: the search for it, and the ability of the subject to align itself with its own truths, to act without doubt or remorse. 'I have no doubts or remorse,' as Don Juan said, 'everything I do is my decision and my responsibility,' because in this world 'there is no time for regrets or doubts. There is only time for decisions' (Castaneda 1972, 56). Like Don Juan, Valkeapää's shamanism seeks to free the self from doubt and attain the power of decision that is the hallmark of sovereign subjectivity.

In much of the literature on indigeneity today we encounter the claim that indigenous subjectivity is defined by a sense of the interconnectedness of the self to others. The life histories of indigenous peoples are said to show a moral ordering of sociality that emphasises mutual support and concern' (Moreton-Robinson 2015, 15). Doubtless these are important aspects of many indigenous cultures and life practices as they are probably, of most cultures. Indigenous cultures, however, are also rich in ideas about how the self cannot just support but achieve power over others, hunt and trap, deceive, and outwit the other. The recent case of the attempts of a Christian missionary, John Allen Chau, to connect with an indigenous people known as the Sentinelese who inhabit an island in the Indian Ocean quite well illustrates the point. Chau is believed to have been speared to death by the Sentinelese, a people with deft archery skills, who have been killing anyone who attempts to land on their island and make contact since records of their existence began (Wallace 2018). These are not cultures defined, simply, if at all, by 'mutual support and concern' but by a will to defend their autonomy, to the death. Which is every bit as admirable, and possibly even more so, than the moral capacities for care and concern by which scholars today package indigenous peoples to make them more appetizing to liberal sensibilities.

Imagination is perhaps the greatest weapon that the human has. In the West, the power to deceive, hunt and trap the other has, since Plato at least, been understood to owe to the power which some humans hold over the imaginations of other humans: the ability to deploy images, and make the illusory appear true (Plato 1993). In the Western tradition it has been seen to be at the root of many human problems, from madness to political fanaticism to illegitimate government. In Indigenous cultures too, though, writers state that we can encounter the same ideas, involving power

and imagination, perhaps even in a more affirmative way. Valkeapää writes, in *The Sun, My Father*, much of images, employing the Sámi words *govva*, to evoke a world which, in Osgood Dana's descriptions of it, is itself *govvás máilbmi*, a 'world full of images', or world-as-image (Dana 2004, 9). The word *govva* evokes, in Northern Sámi language as much as in its Finnish language equivalent *kuva* (picture/image), Osgood Dana also argues, the particular image of a drum, and the drum of the shaman himself especially, an instrument for the making of images (*ibid.*). At the same time, it also evokes the power of the hunter, for both *govva* in Northern Sámi and *kuva* in Finnish were originally terms for decoys used by hunters to lure birds (Dana 2004, 9). The image in Valkeapää's poetry is unambiguously powerful, as a means with which to hunt and trap, empower the self, and live more. As Dana expresses it, images are, for Valkeapää, 'potent emblems of life itself, written both on the drum and on the land' (Dana 2004, 13). It is not incidental to Valkeapää's work that he also made a lot of music (Lehtola 2003, 186). Contemporarily his influence is testified to strongly in the field of Sámi rap, in the work of rappers such as Ailu Valle, who cite him directly (Nykänen 2015).

The suppression of Sámi culture in the Arctic proceeded through the confiscation and destruction of Sámi drums; the *govadasat*, with which they conjured images (*id.*, 19). The war on indigenous peoples in the Arctic, as conducted more or less worldwide by Western colonial regimes, was a war upon their image-making powers, a war to either extinguish or control their imaginations. As it was for those indigenous peoples unfortunate enough to have encountered the Jesuits who colonised their imaginations, not just by placing pictures before their eyes but by imprinting pictures upon the bodies of natives, 'so that they would take possession of their viewers' imaginations and dreams' (Belting 2011, 40). The struggle against the imposition of a particular imaginary of an indigenous mode of being, can only happen through the restitution of the powers of imagination. Today however indigenous peoples are facing a new and different, more subtle and clever regime of power relations, which seeks to imagine for them what their imaginations can do. Colonial images of indigenous peoples as exemplars of resilience are more difficult to reject and destroy because, as we will see in the next section, they claim legitimacy as icons of indigenous resistance to western colonialism.

5. The image of indigenous resilience

How does the production of the image of indigenous resilience work? Today the colonization of indigenous imaginaries takes more subtle forms when compared with the past.[2] One example, which I want to draw attention to here, is that of one of the most iconic recent images of indigenous resilience: Ernesto Yerena Montejano's portrait of Lakota elder, Helen 'Granny' Redfeather at Standing Rock, which was developed for the 'We the People' mobilization of indigenous peoples and their

2 This section of the paper draws from my earlier essay '"We The Resilient": Colonizing Indigeneity in the Era of Trump' in *Resilience* (Reid 2019).

settler allies against the election of Donald Trump as President of the United States in 2016. Following Trump's racist and xenophobic electoral campaign, and in the wake of his election to become the 45th President of the United States, in November of 2016, Montejano teamed up with fellow artists Jessica Sabogal and Shepard Fairey, and the non-profit Amplifier Foundation, a self-described 'art machine for social change', to produce works for the Foundation's campaign. The campaign's objective was, as described to its Kickstarter funders, to resist Trump, by flooding Washington D.C. with symbols of hope on January 20th of 2017, the date of Trump's inauguration. And indeed, pictures and video footage of the marches and demonstrations that took place that day, in Washington, as well as throughout much of America, indicate the efficacy of the campaign. To look at those pictures is to see people marching in their numbers carrying the images created by Fairey, one of an African-American woman, another of a Muslim woman, and one of a Latino woman, each titled, 'We the People'. We can also see Sabogal's image being displayed, depicting two women, looking at each other tenderly, one above the other, whose neck she cradles, and whose hat reads 'Women are perfect'. The image itself is titled underneath, 'We the Indivisible'.

Image 4: *We the Resilient*, by Ernesto Yerena, 2017.

Yerena's contribution was a stenciled image, featuring Lakota elder Helen 'Granny' Redfeather, a frontline warrior fighting against the Dakota Access Pipeline at

Standing Rock, where Yerena himself also spent time in the November of Trump's election. Yerena's work situates the Lakota elder underneath its title 'We the Resilient: Have Been Here Before'. Giving background to his work, reasons for making it, and thinking behind it, Yerena explained:

> My relationship with the U.S. is very complicated…I was born here, I live here, but the government is like an occupying force on this land. The colonization process was so violent. It outlawed people from being able to practice Indigenous traditions and languages. How, through all that, have people been able to survive? Considering how hostile the attempted erasure was toward everything to do with our people, Indigenous people, it's incredible. That's resilience. (Gursoz 2017.)

The image Yerena created soon became ubiquitous, a symbol of hope and defiance for peoples protesting the xenophobia and white supremacist racism which Trump's election represented. On January 21, 2017, Yerena could be seen distributing 4000 of his 'We the Resilient' posters within 15 minutes at the Women's March in Los Angeles. Yerena himself was born in California, close to the Mexican border, and identifies as a 'straight cis-gender Mexican-American Chicano male'. Although identifying as Chicano, he also strongly identifies as indigenous. As such his work is dedicated to exposing 'the weight of colonization and the effects of Westernization of Indigenous cultures'. 'Trump is the Chernobyl of colonialism', he explains, 'but I don't want to make artwork that's against him; it gets too dark. I want to make artwork that's for something. I'm for dignity. I'm for resilience. I'm for Mother Earth. I'm for honoring elders. I'm for working with my friends. I'm for making positive messages' (Gursoz 2017).

The power of Yerena's image of the resilient indigenous grandmother, Helen Redfeather, to have not only made the protests at Standing Rock of indigenous peoples fighting against the construction of the Dakota Access Pipeline more visible and known, but to connect indigenous struggles and subjectivities to the wider struggles and protests against Trump, 'the Chernobyl of colonialism' as well as global resistances to continuing forms of colonialism worldwide, is significant. Yet at the same time the underscoring of the image of this indigenous warrior as a figure defined by her and their collective resilience is problematic for all the reasons already stated.

What then to make of that particular image of indigenous resilience? And what to make of the many people carrying the 'We are Resilient' banners on the marches and protests against Trump? Is that image, and the people spreading it, on the streets of American cities, as well as virtually by dissemination on websites and via social media accounts, also to be condemned, along with the discourse and concept of resilience itself as part of the problem of colonialism today? Is resilience universally subjugating, or does it leave itself open to different usages when it comes to the indigenous? Are there different ways of imagining indigenous resilience? And how do indigenous imaginaries avail themselves of such differences?

I recognize the salience of critiques of the critique of resilience that have appeared in recent years. I read with interest the work of colleagues, such as Peter Rogers, who have argued that we must avoid the cynicism of a blanket dismissal of resilience and seek to distinguish between its positive and negative aspects, and recognize instead its potential; a potential for more open and inclusive democratic political orders, as he has claimed (Rogers 2015, 66). The geographer Ben Anderson has made similar kinds of points when asking 'what kind of thing is resilience?' and by imploring that we make the connections between resilience and neoliberalism, 'into a question to be explored rather than a presumption from which analysis begins' (Anderson 2015, 60). These are useful interventions, the basis for which echoes throughout this phenomenon of the power of indigenous resilience to mobilize and symbolize popular resistances of indigenous peoples and their allies to extractive industries and the states supporting them. The resilience at stake in strategy documents of states and international organizations is not simply the same as that which was enunciated on the streets of Washington, Los Angeles and other American cities as indigenous peoples and their allies took to those streets to fight the election of Donald Trump.

There is a difference likewise between indigenous peoples imagining themselves as resilient and intergovernmental forums made up of the representative of colonial states, such as the Arctic Council, saying that indigenous peoples are resilient. For one thing, the resilience which indigenous peoples claim for themselves refers fundamentally to their having survived a centuries old project of colonial extermination, while the resilience which colonial states now identify with indigenous peoples more often refers to their abilities to cope with environmental disasters and pays little heed to their own history of colonial violence against indigenous peoples. Perhaps we need more imagination when it comes to the political theorization of resilience, and recognition of the multiplicity of possible worlds which indigenous resilience makes possible.

Nevertheless, there is a surface of contact between these different usages of resilience, and while their points of articulation are indeed different and to some extent opposed, they are nevertheless related by the concept itself. In each case, the indigenous subject which resilience refers to is defined by its capacity to survive. But is there anything problematic in that? Ernesto Yerena Montejano, like everybody else, and every other entity with a stake in the future, has also to survive. An artist has to make a living, and art, for the most part and for the majority of artists pays badly. In Yerena's case, survival requires once in a while taking a job that entails a relative sacrifice of principle. Which is why Yerena has sold his images to the manufacturer of the energy drink, Red Bull. Some of their cans are decorated with his signature rose symbolizing dignity and a *calavera* (Mexican sugar skull). As he candidly explains, 'sometimes corporations will hire me because they want to tap into the "Latino" market. I take some of the jobs because I need to keep paying rent, but it's a fine line. What I really want is to make critical, challenging work. A lot of times I have to self-fund [these pieces] or work with a small stipend. Unfortunately, the people with the best ideas don't have a lot of money' (Gursoz 2017).

Many of us know this conflict between good intention and its sacrifice to political and economic power. Images, ideas, concepts and arguments are all eminently open to manipulation, appropriation and commodification by agencies whose intentions and effects are malign, or simply self-interested, as is the case with the profit-maximizing Red Bull, an Austrian company with the highest market share of any energy drink in the world, selling five billion cans a year; a market share that owes in no small part to the distinctiveness and recognizability of the blue silver design of the cans in which its drink is sold and on which Yerena's designs appear.

There is no direct connection between Yerena's work for Red Bull and the 'We The Resilient' poster that he made for the campaign against Trump and in defense of indigenous rights. In effect, the former served the latter. Selling to Red Bull meant Yerena could pay the rent and paying the rent meant Yerena could design for the non-profit Amplifier Foundation and its political campaign against the particular formation of white racist neoliberal capital that Trump's presidency exists to defend. There is no reason to believe Red Bull saw any capital in hiring an artist with his politics or with his links to indigenous peoples and political struggles. As Yerena is aware and states clearly, Red Bull were interested in tapping into the Latino market and it is the resonance of his designs with Chicano culture that attracted them. But there is some sense of a connection, vague and difficult to see, but there somewhere nevertheless, in this collaboration, between Yerena and Red Bull on the one hand, and the 'collaborations' taking place between resilience and neoliberalism on the other.

Red Bull, as the most iconic energy drink of its generation epitomizes resilience culture. It is what you drink when you are struggling to cope, stay awake, or persevere amid stress, physical or psychic. If you need resilience in a liquid form you need Red Bull. It is also the drink that, besides giving you resilience, gives you stereotypes. On the website, Native Appropriations, a forum for discussing representations of native peoples, including stereotypes and cultural appropriation, a commercial campaign of Red Bull beginning in 2009 is described as reading like a 'check list of native stereotypes' (Adrienne K 2010). Amid tipis, smoke signals, war whoops, and 'tom-tom' drumming, two natives, Brown Bear and White Dove, express in third person broken English their frustrated sexual desire for each other.

'Greetings White Dove, my heart is heavy', says Brown Bear. 'Mine too, Brown Bear', replies White Dove. 'The end of the year is near, and we still can't get together. Brown bear can't jump that far!' complains Brown Bear. 'And White Dove can't fly! We are only united in mind' concludes White Dove. 'Yes, but my body longs for you too', confirms Brown Bear. White Dove sighs. 'No Red Bull, no happy ending', warns the narrator. Yes Red Bull is not only the drink that gives you resilience. It's the drink that gets you laid. Or it's the drink that gives you the necessary resilience to get laid. And, which in sexualizing resilience, also sexualizes indigeneity, making a commercial stereotype out of indigenous perseverance, and stoking colonial myths.

Red Bull is responsible for mythic representations of indigenous peoples, but what about resilience itself? In March of 2017 the *Journal of Multidisciplinary*

Healthcare published an article titled 'Mental Resilience, Perceived Immune Functioning, and Health'. The article is a generic representative of its kind, describing resilience as the 'trait that enables an individual to recover from stress and to face the next stressor with optimism' (Lantman *et al*. 2017, 107). People with resilience, it argues, 'have a better mental and physical health' (Lantman *et al*. 2017, 107). People with reduced immune functioning tend to be those who are less resilient, while people with resilience tend to have better functioning immune systems, is the conclusion it draws on the basis of a large empirical study (Lantman *et al*. 2017, 112). Like a lot of medical research, the article had as many as eight authors, among who is named a Dr Joris Verster from the University of Utrecht in the Netherlands. In the Disclosure section of the article the authors list the sources of financial support that have funded their research. Verster, an advocate of resilience, lists among the different funders he is in the patronage of, Red Bull. Which is interesting. In fact Verster is also the author of a another study, published 2016, in the *Journal of Human Psychopharmacology*, titled 'Mixing Alcohol With Energy Drink: A Systematic Review and Meta-Analysis' (2016).

The article addresses the popular social belief that people who mix energy drinks such as Red Bull with alcohol end up drinking more alcohol than they ordinarily would. Reassuringly, Verster and his colleagues conclude that their research proves that mixing energy drinks with alcohol does not increase the total amount of alcohol consumed. Which is also interesting. What to make of these connections between the science of resilience, so assured in its conclusions concerning the reality of resilience as a property of healthy people everywhere, and an energy drink manufacturer which funds the science of resilience, and which employs the same science to defend itself from mythic representations of the properties of the product as a source of alcoholism and ill health? A corporation, and icon of the neoliberal economy, furthermore, which sells its products on the basis of colonial representations of indigenous people, as well as by decorating its cans with the designs of an artist who, unwittingly no doubt, is himself a proponent of indigenous resilience, and the creator of what is one of the most iconic images of indigenous resilience, the picture of Lakota elder Helen 'Granny' Redfeather, carried on banners by the many people who showed up to protest the election of Donald Trump, in Washington DC and other American cities in January of 2017.

6. Reimagining indigeneity

Given the complexity of these power relations, how, if at all, might indigenous images of resilience be reclaimed? When and where does indigenous art and image making become political and how to recognize when it expresses a politics which is no longer neoliberal? How might we all 'create networks of reciprocal resurgent movements with humans and other humans' and radically imagine our way 'out of domination', as Leanne Simpson urges us (Simpson 2017, 10)? Which among us is 'not afraid to let those imaginings destroy the pillars of settler colonialism' (Simpson 2017, 10)?

Regardless of the many, complex as well as unwitting, ways in which images of indigeneity serve a neoliberal imaginary, indigenous peoples and indigenous art does no doubt offer alternatives to the stultifying image of indigenous resilience generated by this nexus of relations between science, art and corporate capital that, in turn, governs indigenous resistance. Judith Bessant and Rob Watts have usefully detailed the ways in which community development projects aimed at the neoliberal governance of indigenous youth, in Western Australia, and operating through the making of video art and digital media, contain the basis for politicization, because they entail the possibility for indigenous peoples to reclaim images of indigenous peoples for themselves (Bessant & Watts 2016, 1). Are there ways in which indigenous propaganda art, of which Yerena's 'We the Resilient' poster is an obvious example, breaks with a neoliberal strategy of interpellation?

In the Arctic an interesting and potentially political example exists in the form of Suohpanterror, a largely anonymous group of Sámi 'artivists', whose propaganda art made in the form of posters has achieved wide popularity in Finnish Lapland and beyond. All of the images which I discuss here are available to see on their website (2019). What they do is to appropriate iconic images drawn often from Western traditions of art and image-making and subject them to their own defacement such that they function to politicize the governance of Sámi identity and draw attention to the continued colonization of their homelands in Finnish Lapland and the wider Arctic region (Junka-Aikio 2018).

Image 5: *The Scream* by Suohpanterror.

Rather than attempt to 'stay true' to Sámi aesthetic traditions, Suohpanterror have deliberately embraced and subverted Western techniques, symbols and images (Hautala-Hirvioja 2015). For example, Edvard Munch's *The Scream* is repurposed such that the figure is dressed in traditional clothing of the Sámi people and screaming in horror at the exploitation of the land. Wind turbines appear in the background of the defaced image of the painting and a sign warns in Finnish language, 'Mining Area: Trespassing Forbidden'. Their use of *The Scream* is interesting not least in so far as it is an iconic image of Western expressionism in art, a movement which drew deliberately on insights derived from medical and psychological sciences to depict the human unconscious, deconstruct and explore human emotions, moods and psychiatric disorders of depression and anxiety of which Munch himself was a victim (Kandel 2012). The image has been claimed to depict the distortion of the human by the subjectivizing force and flows of nature.

In its appropriation by Suohpanterror, the figure suffers the distortions of the natural landscape marked by an industrialization, which it feels itself powerless to do anything about. In that sense, it appropriates an image that aestheticizes the human/nature divide and depicts the fear and anxiety, which flows from modern man's encounter with its sublimity and reverses the power relations involved, such that it is nature which is threatened by human encroachment. But the image does more than that, for it also appropriates the aesthetics of neurosis, which underpin modern psychiatric discourses and images of selfhood. In so much of the Western anthropological literature on indigeneity we encounter the claim that indigenous peoples are above and beyond any sense of self, that they do not possess a self, and that their concept of otherness is ontologically inaccessible for self-minded cultures such as those that define the West. Here, in the iconography of Suohpanterror, by way of contrast, the indigenous self is asserted, and in every bit as neurotic a modality as the psychiatrized versions of the self, which Munch's art depicted.

Indeed, while drawing attention to the kinds of land-related issues which indigenous politics is well known for, the images Suohpanterror make tend mostly to leave nature to the background while foregrounding, like Munch and other modernists, distinctly human figures. Nature figures as backdrop in the political aesthetics of Suohpanterror while the human is foregrounded. Often the images celebrate a violent militancy. For example, an image of a Sámi offering a handshake to a businessman carrying a briefcase is juxtaposed with an image of the same Sámi delivering a karate style kick to his head. Again, we are a far cry from the image of the indigenous suffering the instrumental and structural violence of the colonial state and not being equipped to fight back other than through strategies of queering and performativity.

Reindeer, that motif of the Sámi poets who came before Suohpanterror, also appear in the images, but in radically different ways. In one image a military checkpoint on a road into Lapland is depicted. The politics of the checkpoint depicted is ambiguous. Is it a checkpoint manned by the State and an expression of colonial power? The combat fatigues and guns of the soldiers in the image manning it would

indicate as much. Or is it a Sámi checkpoint designed to keep the colonizers out from their lands? 'Area of reindeer husbandry' reads the text in the familiar language that does indeed appear in signs around Lapland. A smaller sign appears in the foreground of the image in which a drawing of a reindeer is depicted as is the case of many signs around Lapland. 'Stop! Halt!' the sign in the foreground of the image reads. 'Checkpoint Sapmi No. 169'.

Image 6: *Checkpoint* by Suohpanterror.

The reference is to ILO Convention 169, which binds states to consult with indigenous peoples about the uses of natural resources on their lands, and which Finland has so far refused to ratify; a refusal which is denounced in the Sámi Manifesto, endorsed by the principal artist behind Suohpanterror, Jenni Laiti, and her collaborators (Holmberg & Laiti 2015). In another image, a group of Sámi and their reindeer are depicted standing before a wall, in evocation of the walls erected in Israel, which functions to divide Palestinians from each other and which for many symbolizes colonial occupation. The wall, in the image of Suohpanterror, likewise divides one group of Sámi from another, depicted on the other side, as well as from the fells that appear in the distance on the other side of the wall. In another image reindeer are depicted crossing the fells marked in text as *Gallok*, the Sámi name for Kallak, an area close to Jokkmokk, the town where the poet Paulus Utsi was born, and where

the Sámi are now mobilizing to prevent the proposals of the British mining company Beowulf to build an iron ore mine.

All of these images express a very different imaginary of indigeneity to that which enables the image of indigenous resilience. Indeed what we see happening here is an indigenous people doing a cultural appropriation of a political modernity denied to them by the Western guardians of the image of indigenous peoples as existing outside of and in antagonism to that of modernity. An appropriation that shifts the image of indigeneity out of its colonial grounding in the capacities that the colonizer has sought to pin indigenous people down to, and asserts the radical equality of indigenous people to the access of distinctly political capacities for emancipation from the imagination of the other. The image of the resilient indigenous subject is precisely that, a product of the imagination of the colonizer, projected onto indigenous peoples, including the Sámi, who as Tuija Hautala-Hirvioja has told, have long since had to struggle to maintain their own identities and senses of self-worth against colonial regimes which have forced them to adapt to majority cultures and values (2017, 99). It is absurd that today the indigenous capacity for 'adaptation' is celebrated as a feature of their cultures and ways of being, when it is a capacity forced upon them by colonialism. Likewise twee images of indigenous peoples 'existing as and being part of nature' are elements of such 'mental colonisation' which Sámi and other indigenous peoples must still reckon with when confronting regimes of power and discourse which claim to be supportive of decolonization when, actually, they are not (Hautala-Hirvioja 2017, 99).

7. Conclusion

Imagination is integral to the political strategies by which colonial powers have sought control over indigenous populations and the image of their indigeneity, as well as to the strategies of radical resistance of indigenous peoples to colonialism historically as much as today. The policing of the indigenous imagination and the image of indigeneity it avails to us permeates Western discourses on indigenous peoples as much as it does the reception of the political aesthetics of indigeneity. When we examine, more closely, the actuality of indigenous aesthetics, and the development of indigenous poetics, we get a very different picture, literally, to that told and represented to us of how indigenous peoples see themselves in art and political aesthetics. Far from the image of indigenous peoples celebrating their subjugation to a natural world that is beyond their control, the analysis of indigenous poetics made here reveals all the tropes of the political modernity which indigenous peoples are represented as existing outside of and against. Corporate sponsored artists, as well as corporate capital itself, may still possess the power to control some of the images of indigeneity that circulate, as resilient, but there are plenty of other images available which project alternative and more empowering visions of what indigeneity entails and can, in the future, become. Of course, for indigenous peoples to reject the discourse of resilience, as it is applied to them by the international order, will entail certain risks; the risk of not meeting the colonial expectations of their

would-be masters. However, like my colleagues, Lindroth and Sinevaara-Niskanen, I believe it is a risk worth taking (2018, 127-144). Whatever is lost in the process, in terms of rights and recognitions, will in turn allow for a more complex and varied understanding of the nature of indigeneity (Lindroth & Sinevaara-Niskanen 2018, 144). Without such complexity and variation indigenous peoples will remain hostages to the colonial imagination of the West, possessive of rights which afford them no real autonomy, recognized not for what they are but what the West wants them to be, and forever subject to the whims of the colonial order.

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Enhancing Resilience Through Indigenous Traditional Knowledge in Ecological Restoration

Noor Jahan Punam*

Abstract

Although indigenous peoples – especially the Skolt Sami – are deemed to be inherently resilient, they are facing the limits of their resilience due to the unprecedented rate at which climate change is altering the ecosystems in the European High Arctic of which the Finnish Lapland is a part. Ecological restoration is often used as a tool to reverse this alteration and it has been recognised that ecological restoration should consider indigenous traditional knowledge beside ecological processes. A successful case which has attracted worldwide praise in this respect is the Näätämö River project where co-production of knowledge assisted in the restoration task. This case is used to highlight the conclusion that the resilience of the Skolt Sami can be enhanced by such collaboration of knowledge against climate change and changing ecological processes.

1. Introduction

Indigenous traditional knowledge (ITK) is derived from an array of sources and is inclusive of a vibrant collection of past tradition and present improvement gathered through trial and error over decades (Berkes 2008, 3-9). The knowledge is geographically specific and largely reliant on local and social mechanisms. Thus, it differs within and also between societies (See Berkes, et al. 2000). ITK has been increasingly respected as a significant source which can be utilised in favour of the growing interest in ecological restoration. It has been recognised that ecological restoration should consider cultural practices besides ecological processes. The use of ITK along with science in adaptation planning has been emphasised by the Paris Agreement. The importance of ecological restoration has been brought to the

* Researcher, University of Lapland.

forefront by the Aichi Targets under the Convention on Biological Diversity (CBD). In various parts of the Paris Agreement, emphasis has been put on ecosystem-based approaches and the importance of indigenous peoples' protection and value has been put on ITK. A recent international study conducted by Britta L. Timpane-Padgham (See Timpane-Padgham et al. 2017) and her team has given recognition to the crucial role of Arctic indigenous people in the efforts made towards ecological restoration. This contribution assists in building resilience to major climate change-driven changes in the distribution of land, marine and freshwater species. In this study, a case where ITK held by the Skolt Sami, who live in the Sevettijärvi area, has been used in the ecological restoration of the Näätämö watershed will be considered. Consideration will also be given to how accommodating ITK within ecological restoration plans can assist in upholding international obligations under the Convention on Biological Diversity and the Paris Agreement along with enhancing socio-ecological resilience.

In this article, I aim to look at whether using ITK in ecological restoration can enhance the resilience of indigenous people in Finnish Lapland against climate change. To attain this aim, it would be relevant to look at the key legislation in force tackling ecological restoration and resilience at international, supra-national and national levels. In this context, another sub-question becomes relevant, namely, do ecological restoration and resilience go hand in hand or do they contradict one another? Prima facie, it appears to be so in general, but in the context of this paper, it will be argued that in certain circumstances it might be possible to enhance the resilience of indigenous communities by using traditional knowledge in ecological restoration. I am aware of the alternative arguments with regard to use of the term 'resilience' in respect of indigenous communities but wish to argue that enhancing the resilience of indigenous communities is possible through collaboration between ITK and scientific knowledge.

Resilience, in the context of this paper, refers to the capacity of a system to self-organise following a disturbance and the degree to which the system can build the capacity to learn, adapt, share and make use of its knowledge of social and ecological interactions (Carpenter et al. 2000; Gunderson & Holling 2002; Arctic Resilience Report 2016). Gaps in previous literature remain as to promotion of resilience through appropriate use and implementation of ITK in regulatory and policy measures in terms of climate change. There has also been ignorance as to ITK collaborating with scientific knowledge. ITK has often been overlooked or 'disapproved' of by scientists and policy makers due to their disregard for non-Western knowledge systems (Whyte 2013, 2). In an era of climate change, when the resilience of indigenous communities such as the Skolt Sami is facing its limits, considering ITK in different restoration projects which are scientific in nature would enhance resilience at different levels. Using the example of the Skolt Sami in the Näätämö River area of Finnish Lapland, I intend to prove the argument that the resilience of indigenous people against climate change at psychological and community levels can be enhanced by collaboration between ITK and other ecologically-specific knowledge.

2. Ecological restoration

Ecological restoration is an interdisciplinary process of undertaking restoration tasks, which must be inclusive of the experiences, political ideals and cultural practices held or pursued by people as well as their communities (Telesetsky et al. 2017, 24). In this part of the article, the definition of ecological restoration will be considered first and then consideration will be given to whether ecological restoration can be complemented by the use of ITK. In the later part of the section, I reflect upon the legal basis for ecological restoration using ITK followed by a discussion on what kind of resilience can be achieved through such collaboration of knowledge.

2.1 Relevance and definition

Activities by human beings are causing depletion to ecosystems at an unprecedented rate (Telesetsky et al. 2017, i). Despite efforts made globally in favour of nature conservation, many ecosystems involving those critical for human well-being have been either damaged or destroyed (Telesetsky et al. 2017, i). It has been realised that human beings are not capable of conserving the earth's biological diversity exclusively by protecting critical areas (IUCN, Ecosystem Restoration). It is understood that ecosystem restoration should be a significant element of conservation programmes so that the livelihoods of people relying on these degraded ecosystems can be sustained (IUCN, Ecosystem Restoration). Ecological restoration has been receiving an increased amount of attention from both scientists and policy-makers due to its focus on the 'long-term holistic recovery of ecosystems' (Telesetsky et al. 2017, i). Ecological restoration is commonly used as a tool of reversal against environmental degradation caused by human actions such as deforestation, pollution and land use practices which cause soil erosion, although variant ecosystems will recover at different rates (See ReyBenayas et al. 2009).

Ecological restoration as a concept was defined initially from the context of natural science. One of the early definitions was proposed by Bradshaw and Chadwick as a 'blanket term to describe all those activities which seek to upgrade damaged land or to re-create land that has been destroyed and to bring it back into beneficial use, in a form in which the biological potential is restored' (Bradshaw & Chadwick 1980, 2). A similar and related definition was offered by Berger, who defined it as a 'process in which a damaged resource or region is renewed' (Berger 1987). Diamond was the first academic to shed light on the social dimensions of restoration and he did so by posing a question: 'First, no community on Earth has escaped the direct or indirect effects of man, so which is the "natural community" that one would seek to restore?' (Diamond 1985, 629). This question led to a shift in looking at ecological restoration from a social perspective. In 1997, Higgs stated that, 'Ecological restoration is the total set of ideas and practices (social, scientific, economic, political) involved in the restoration of ecosystems' (Higgs 1997, 81). He laid emphasis on the fact that ecological restoration is a process in which the goals cannot be separated from the end results of the restored ecosystem. Furthermore, the

United Nations Convention on Biological Diversity defined ecological restoration in its publication of 2016 as 'the process of managing or assisting the recovery of an ecosystem that has been degraded, damaged or destroyed as a means of sustaining ecosystem resilience and conserving biodiversity' (CBD 2016, 4).

Several other definitions of ecological restoration exist but among these, the most widely used definition is provided by the Society for Ecological Restoration (SER) in its Primer as the 'process of assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed' (SER 2002, 3). For the purpose of this article, we will be using this definition.

Reference to the terms 'assist' and 'recovery' have importance and they were meant to be general enough to accommodate diverse activities designed to make ecosystems regain their health, integrity or other ecological functions (Allison 2012, 6). The SER Primer further elaborates that 'Ecological restoration is an intentional activity that initiates or accelerates the recovery of an ecosystem with respect to its health, integrity and sustainability […] Restoration attempts to return an ecosystem to its historic trajectory' (SER 2002, 1). What is termed as ecological restoration or ecosystem restoration is not to be confused with 'restoration ecology' as per the SER Primer (SER 2002, 11). The fact that ecological restoration is a combination of the restoration task alongside the experiences and cultural practices of communities is specifically inspiring. Thus, it is not astounding that interest in ecological restoration is growing at a fast pace all over the world and that, in most cases, cultural beliefs and practices are drawn upon to assist in determining and shaping what should be conducted under the umbrella of restoration (SER 2002, 2).

However, the idea asserted in the SER Primer that ecological restoration should 'return an ecosystem to its historic trajectory' is not free from controversy. Ecologists have commonly noted that returning to past ecosystems is generally not possible per se, in the sense that history cannot be repeated (Andel & Aronson 2012, 7). What is meant by ecological trajectory has been described by SER as the 'developmental pathway of an ecosystem through time […] The trajectory embraces all ecological parameters. Any given trajectory is not narrow and specific. Instead, a trajectory embraces a broad yet confined range of potential ecological expressions through time' (SER 2002, 6). Trajectory refers to an all-inclusive approach to the task that has to be undertaken in ecological restoration. It is the notion that the reference point used for restoration needs to consider a variety of factors and affects the restoration of the habitat (Telesetsky 2017, 26). Therefore, the requirement to restore an ecological trajectory is integral to the SER definition. When restoration practitioners are given the task of deciding on a historical point of reference to use for the purposes of restarting an ecosystem based on its historical trajectory – that is when the challenges arise. A reference site for an ecosystem is particularly distinctive from the current state that an ecosystem is in (Telesetsky 2017, 26). This is so because the logic behind restoration is generally that an ecosystem will be taken past its degraded state, which is presumed to be the current state it is in. According to Newbold, a reference system would not inevitably be the natural state of the

ecosystem, as the natural state of an ecosystem might be different from what the ecosystem was like prior to its degradation in some way by anthropogenic influences (Newbold 2015, 45-50).

It is not an easy task to point out the historical trajectory of an ecosystem because one needs to ask which indigenous form of the ecosystem they are interested in and what are the possible features of that system which would allow it to be self-perpetuating. It has been argued by Rackham that the best approach for considering the historical trajectory of an ecosystem is to identify the losses which complement degradation (Rackham 1986). Significant losses involve the loss of historical vegetation and wildlife (Rackham 1986). The problem with this perspective is that restoration needs to be about ecological recovery by concentrating on loss. In doing so, we tend to make the decision-making process more complex. This is because emphasis is put on what humans value in the ecosystem (Telesetsky 2017, 27). A significant problem with reinstating an ecosystem to its historical trajectory lies with the fact that ecosystems are dynamic in the sense that they react to both internal and external influences (Telesetsky 2017, 27). It needs to be agreed that it is impossible to return nature to a state where it was untouched by the influence of human beings. For example, present temperatures, levels of pollution, and soil conditions might prevent the achievement of a natural state or a pre-degradation state. Due to the huge amount of uncertainty with regard to ecological histories, identifying a reference point or natural baseline might be too complex and impractical to be included in projects (Normander 2008, 25).

Nevertheless, a number of arguments can be made for the return of an ecosystem to its historical trajectory as contrasted to forming a new trajectory. First, restoration managers are not required to select from alternatives as to what to leave in and out of the management of the restoration process (Telesetsky 2017, 28). No space is left for creatively interpreting the potential or capacity of an ecosystem to endure, so long as the aim of the project is to return an ecosystem to a certain natural state baseline (Jordan 2003, 23-24). One of the problems with picking what to restore in an ecosystem is the chance of overlooking the effects that minor species or inconspicuous processes exert (Jordan 2003, 23). It has been argued by Gross on these lines that restoration has to assist with the recovery of the ecosystem in ways which are not under the control of human beings (Gross 2006, 172-179). Another point is that returning to a historical trajectory might overlook the homogenisation of landscapes presently triggered by increasing climate change besides invasive species (Kareiva 2007, 1866-1869). Use of historical trajectories might promote recovery efforts which are not always influenced by what is immediately beneficial for human beings. And, finally, historical authenticity is implied in the idea of historical trajectories and it assists restorationists to avoid any criticism that they are substituting natural value with technologically and economically influenced priorities and possibilities.

These apparent issues raised as to the definition of ecological restoration under the SER Primer and the wide-ranging definitions available for the process

led to a proposition by Martin to amend the definition provided by the SER Primer (Martin 2017, 668-673). According to Martin, 'Ecological restoration is the process of assisting the recovery of a degraded, damaged or destroyed ecosystem to reflect values regarded as inherent in the ecosystem and to provide goods and services that people value' (Martin 2017, 670).

In summation, for the purpose of this article and the example case to be considered and in light of the challenges faced by ecological restoration process, the most appropriate definition appears to be the one proposed by Martin as it does not separate people from the ecological restoration process whilst staying focused on the ecosystem itself.

2.2 ITK for ecological restoration

Extensive knowledge is held by the traditional people of the world regarding the natural resources they use (Gadgil et al. 1993, 151). The Convention on Biological Diversity asserts that it can be used as a source of information for conservation, management and sustainable use of natural resources. Traditional knowledge has also been regarded as significant in informing scientific approaches to the management of natural resources (Gadgil et al. 1993, 155-156). Collaboration between ITK and science can contribute to adaptive management (Berkes et al 2000, 1260). There are various similarities between adaptive management and many traditional knowledge systems as it is an 'integrated method for resource and ecosystem management' (Berkes et al 2000, 1260). Besides this, such collaboration contributes to self-determination of indigenous communities. Science, at present, with limited effectiveness with respect to environmental issues of increasing magnitude and complexity, has also made room for the acknowledgement of substitute sources of knowledge (Stevenson 2005, 4). There are many examples showing where ITK has complemented ecological data collected previously by contributing concordant and additional information on a more specific geographic scale compared to scientific data (see, Moller et al. 2004). The current interest in ecological restoration is on an upward trend and it is increasingly recognised that ecological restoration must consider cultural practices in the same way as ecological processes (Higgs 2003, 163). It has also been suggested that traditional knowledge has co-evolved with ecosystems and thus provides a solid base for ecological restoration (see, Long et al. 2003).

Nevertheless a number of scholars have been sceptical about the scientific legitimacy of traditional knowledge and its effectiveness beyond the local level, whereas others are concerned about the ethical issues of exploiting traditional knowledge for the purpose of academic or policy matters (see, Chalmers & Fabricius 2007). As such, integrating traditional knowledge within top-down approaches to ecological restoration still appears to be a great challenge (Zhou et al. 2009, 2010). However, community participation is very important throughout the restoration process, specifically when it concerns societies with important traditional knowledge that is inherently connected to biodiversity and natural resources management (Ramakrishnan 2007, 138). In those landscapes where the influence of traditional

people has been given recognition, the cultural and social features of ecological restoration become particularly significant (see, Garibaldi & Turner 2004). The role of ITK for the purpose of ecological restoration has been acknowledged in recent years (See Anderson 2001) but its probable contribution has not been studied properly (Perrow & Davy 2002, xiv). Moreover, some authors working with ITK and restoration have indicated that ITK has been disregarded in ecological restoration programmes due to what is referred to as the 'epistemological authority' of the Western, objectivist thought process amongst restoration and conservation ecologists (Reyes-Garcia, et al. 2019, 4). An example illustrating where ITK has complemented the restoration process can be found in the biocultural landscape restoration in northern Veracruz, Mexico (see, Velazques-Rosas et al. 2018).

2.3 Legal basis for ecological restoration: International, supranational and national

Article 8(f) of the Convention on Biological Diversity provides that: 'Each Contracting Party shall, as far as possible and as appropriate…rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies'. In addition, Article 10(d) of the Convention provides that each contracting party should so far as possible 'support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced'. Gardner has explained that, when speaking of remedial action to degraded wetlands, this should be inclusive of restoring the site to its previous condition (Gardner 2003, 582). The same would clearly apply to other kinds of ecosystem.

A specifically significant development with regard to restoration has been noticed in the Conference of the Parties (COP) to the CBD[1] where it has been recognised as a crucial component. The vision of the plan is a world of living in coherence with nature where biodiversity will be valued, conserved, restored and used whilst ecosystem services are maintained, by 2050. This in turn is deemed to sustain a healthy planet whilst providing benefits important for all human beings.[2] As can be seen, restoration is a part of this mission and the central topic of two separate targets within the Aichi Biodiversity Targets. Under these targets it is expected that, by 2020, 'ecosystem resilience and the contribution of biodiversity to carbon stocks' will be enhanced by way of conservation and restoration along with restoring at least 15% of degraded ecosystems. This is estimated to contribute to mitigation and adaptation of climate change and to fighting desertification (Target 15, Aichi Targets). Along these lines, the Aichi targets also lay out that by 2020 ecosystems providing essential services, such as those relating to water, are restored and protected, accounting for the needs of women, indigenous and local communities and the poor and vulnerable.

1 CBD Decision X/2.
2 *Ibid*.

The COP decision very clearly highlights the significance of restoration in terms of equivalence to the prevention approach and states that, 'while longer-term actions to reduce the underlying causes of biodiversity are taking effect, immediate action can help conserve biodiversity, including critical ecosystems, by means of protected areas, habitat restoration, species recovery programmes and other targeted conservation interventions'.[3] The significant role that restoration can play was even more expressly emphasised at the COP in 2012, where contracting parties adopted Decision XI/16 and noted that, 'ecosystem restoration will play a critical role in achieving the Strategies Plan for Biodiversity 2011-2020, including conservation of habitats and species' (CBD 2016, 1).

Apart from this, the Paris Agreement has focused on including perspectives according to ecosystems when adaptation actions are considered. These actions are to be guided by best available science and, where appropriate, knowledge of indigenous people and traditional knowledge. This is contained in Article 7(5) as:

> […] parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.

It needs to be pointed out that the European Commission has expressly adopted ecological restoration in their policy targets which are set out in the Biodiversity Strategy to 2020 (EU Biodiversity Strategy 2020). Legal obligations towards ecological restoration in the EU are a matter of consideration under biodiversity protection directives, where conservation is defined as 'maintain or *restore* the natural habitats and the populations of species of wild fauna and flora at a favourable status' under the 1992 Habitat Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora). Express reference to restoration is also made for the mentioned purpose under several substantive obligations of the Directive.

As this article takes into consideration a case example from Finnish Lapland, it is important to consider the national legal measures in place as to ecological restoration. It should be acknowledged that Finland has been a party to the CBD since 1994 and the country is also committed to the Aichi Targets. In its 'Related Aichi Targets', targets 14, 15 and 18 focus on ecological restoration committing to restoring and safeguarding ecosystems providing services related to water, health, livelihoods and well-being of the indigenous Sami Community (Finland, Related Aichi Targets). Moreover, Finland is a party to the Paris Agreement, and as such the obligations under the Paris Agreement can be deemed to be binding on Finland.

3 *Ibid.*

Besides these, Finland became a member of the European Union in 1995 pursuant to which EU policy measures relating to ecological restoration along with all legal measures are applicable to Finnish national policy and legal measures as to any efforts relating to ecological restoration.

Whilst there is no direct reference to ecological restoration in the Finnish Constitution, inferences can be drawn from Section 20, which stipulates 'responsibility for the environment'. Further, it states that, 'the public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment'. Besides this, the Water Act (587/2011) contains a provision which is specifically relevant for the case study in this article. Section 14(3) of the Act states that the party responsible for a water resources management project has a fisheries obligation. This is the case if such a project has a detrimental impact on waterways comprising a fish passage. The provision imposes an obligation on the responsible party to undertake a 'restoration' measure relating to fisheries. The problem with this obligation is that it is obligatory only for the party responsible for a water resources management project.

Since this paper argues for the use of ITK in restorative measures, it is worth noting Section 51a of the Constitution of Finland, which guarantees the cultural autonomy of the Sami people concerning their language and culture within the Sami homelands. Besides this, Finnish policy measures show a commitment towards restoration of forests and waterways amongst other natural ecosystem services. For example, the Forest Biodiversity Programme METSO has elaborate conservation and restoration plans for Southern Finland's forest ecosystems (See Ministry of Environment, 2015). The only missing link in the policy measures as well as legal provisions appears to be ignorance towards including traditional knowledge in ecological restoration processes.

Nevertheless, it should be noted that Finland has adopted the Akwé : Kon Voluntary Guidelines (adopted at the seventh meeting of the Conference of the Parties in 2004) under the CBD (See Juntunen and Stolt 2013). Essentially, the Akwé : Kon Guidelines should be applied to any evaluation of cultural, environmental and social impact of projects and plans concerning the Sami (Sami Homeland) which might have any impact on Sami culture, their livelihood and cultural heritage (Juntunen and Stolt 2013, 21). The Ministry of Environment in Finland appointed a national group of experts on Article 8(j) of the CBD (See Markkula et al. 2019). Article 8(j) sets out a requirement for respecting, preserving and maintaining knowledge of indigenous and local communities, comprising traditional lifestyles relevant for conservation and sustainable use of biological diversity and promotion of their 'wider application with the approval and involvement of the holders of such knowledge'. In summary, it requires participation by indigenous people throughout any conservation plans which will have an impact on indigenous peoples' traditional lifestyle. The Akwé : Kon Guidelines have been adopted for management and land

use planning and also adopted as the permanent protocol of Metsähallitus[4] for wilderness and conservation area planning (See Markkula et al. 2019). This kind of effort as to use of the Akwé : Kon Guidelines is yet to be established for waterways restoration or management plans.

2.4 Relevance of ecological restoration in enhancing resilience

Resilience has been defined abundant times from different dimensions and perspectives. It is thus important to specify a standard definition which can be appropriately used for this article. The most widely used definition of resilience is provided by Gunderson and Holling. They define resilience as 'the capacity of a system to undergo disturbance and maintain its functions and controls' (Gunderson & Holling 2002, 51). In line with this definition, a broader perspective is favoured by Carpenter et al whereby they state that resilience should have three properties: i) the amount of transformation the system can undergo and still have similar controls on the function and structure; ii) the extent to which the system can self-organise; and iii) the extent to which it can build its capacity to learn and adapt (Carpenter et al. 2001, 766). Adaptive capacity is said to be a feature of resilience which suggests the learning aspect of system behaviour in responding to disturbance (Gunderson 2000, 428). Adaptation to climate change emerges from the reduction of vulnerability to climate change (Schmidt-Thome 2017, 55).

The Arctic Resilience Report (Arctic Resilience Report 2016, 8) defines socio-ecological resilience as 'the capacity of people to learn, share and make use of their knowledge of social and ecological interactions and feedbacks, to deliberately and effectively engage in shaping adaptive or transformative social-ecological change'. For the purpose of this article, resilience refers to the capacity of a system to self-organise following a disturbance and the degree to which the system can build the capacity to learn and adapt and share and make use of indigenous peoples' knowledge of social and ecological interactions. This might appear to contradict the idea of ecological restoration as resilience favours the idea of a system or people to self-organise. I argue that along with the unprecedented rate at which climate change is altering the ecosystem, it is becoming more difficult for a system and the people within the system to self-organise and as such the process of becoming resilient requires external inputs. Ecological restoration in this context can thus be considered as a tool to enhance resilience. Ecological restoration of ecosystems or the natural environment reduces the vulnerability of the ecosystem. As a result, restoration is arguably an adaptation measure triggering enhanced resilience at a socio-ecological level. As discussed elsewhere in the article, traditional knowledge has often been disregarded by Western scientists in the context of restoration. It is argued that collaboration of traditional knowledge with scientific knowledge, whilst contributing to self-determination, also promotes community resilience. It

4 Metsähallitus is a Finnish state-owned enterprise, responsible for the management of one third of Finland's surface area (editors' note).

has been argued that community resilience can ensue from socio-ecological and psychological resilience. From the perspective of psychology, the general definition of resilience lays emphasis on the capability of individuals to recover from adversity (Buikstra et al. 2010, 982). The resilience of a community is commonly deemed to be the capacity of its social system to work together to achieve a communal objective, which often includes intentional actions to bring about objectives (Berkes & Ross 2013, 6).

3. Case study: Knowledge co-production and the ecological restoration of Näätämö river, Finland

In a broader sense, co-production of knowledge is a collaboration of knowledge production instituting numerous research disciplines and stakeholders who belong to other sectors of society (Harvey 2019, 1). In the context of climate change, co-production of knowledge is deemed to be inherently crucial as it is deemed to have the ability to draw in knowledge from different disciplines and promotes shared learning on the basis of combined experience. In particular, it increases the apparent legitimacy and relevance as well as use of the knowledge held by non-academic stakeholders (Harvey 2019, 2). In the case study, I consider such a collaboration of knowledges in practice.

The Näätämö watershed is located in the Finnish-Norwegian borderlands and is a major Atlantic salmon stream (Mustonen & Feodoroff 2013, 84). It has a wide diversity of fish species (Apgar et al. 2016, 59). It is the home of the Skolt Sami people who live in the Sevettijärvi area of Finland. Currently, the management of the Näätämö salmon fishery is governed by the Atlantic Salmon Management Bilateral Agreement between Norway and Finland. The Skolt Act of Finland (253/1995) implies responsibilities on the state towards recognition of Sami rights. The Act provides for user rights as to the traditional lifeway of hunting, herding and fisheries but it has been poorly executed (Apgar et al. 2016, 60). The Eastern Sami people have expressed that their cyclical and non-linear view of the world has not been sufficiently accounted for in the management of natural resources by the state.[5] They claim that, partly for this reason, the ecosystems have faced their demise and this in turn is threatening their way of life.[6] As a response, the Skolt Sami got involved in a community-based initiative supported by the Snowchange Cooperative to comprehend the status – and to undertake ecological restoration – of the damaged parts of the Näätämö basin.

The process began in 2011 and was the first attempt at a formal process of co-management by combining ITK and science in Finland. It focused on responding to negative impacts of climate change and the need to tackle previous ecological damage (See Mustonen & Mustonen 2015). Co-construction of the process was expedited by combining ITK and science in a joint process of comprehending the changes in

5 Skolt Sámi Nation and Snowchange Cooperative (2011) Sevettijärvi Declaration.
6 *Ibid*.

the ecosystem and by relating them to livelihood strategies. It began with thorough baseline work, which involved preparation of the Eastern Sami Atlas (See Mustonen & Mustonen 2015). The Atlas included information on indigenous governance of water bodies, which was in practice before a large-scale colonial presence (Mustonen & Mustonen 2011, 211). Interviews conducted by the Snowchange Co-operative with local fisherfolk in the Skolt language contributed to the process by providing information about salmon, names of places and past environmental change, which assisted in documentation of traditional knowledge (See Mustonen & Feodoroff 2013). Based on the historical baseline, local fisherfolk from the area were leading the environmental monitoring of the watershed between 2013 and 2014.

Throughout the summer field season, local fisherfolk were recording what they observed with digital cameras and continuously shared the results with the science team. This developed a new field method, which was termed visual-optic histories (Mustonen 2015, 776), which usually refers to histories which are recorded, painted, and documented, and includes expressions ranging from recorded oral histories and rock art to digital photography. This approach gives way to a new approach of monitoring and documenting changes an ecosystem is undergoing and it can inform as to species distribution enabling decision-makers of Arctic change to take into account significant details which might not be found by use of Western science alone (Mustonen 2015, 766). The approach amounted to detection of new species entering the ecosystem. For instance, they documented for the first time the presence of the southern *Potosiacuprascarabaeid* beetle, which was recorded through oral communication. Observations and photographs from the field by Skolts were put together with species identification by a specialist on insects, which confirmed the new geographical discovery. Furthermore, observations of water level and temperature fluctuations which are connected to salmon movement patterns and changes in the quality of water-like algae blooms and foam were co-constructed by sharing the monitoring data with limnological data available publicly for the basin (Apgar et al. 2016, 61).

Throughout the Atlantic salmon fishing season, records were kept of catches by the Skolts. These statistics were compared with scientific surveys of the quantities and qualities of salmon coming upriver (See Mustonen & Mustonen 2015). For instance, the Skolt records noticed an increase in the number of northern pike to stream sections of the river proximate to Opukasjärvi. No observation science records have yet been detected but it could assist in understanding the warming of waters. The Skolts also recorded on maps what were thought to be lost salmon spawning areas (See Mustonen & Mustonen 2015). These sites were lost because of state-sponsored management actions, in particular forestry experiments which were conducted in the 1960s and 1970s, as well as the development of new boating routes. The recording of sites of erosion on lake and river banks, which are signs of possible climate change impact, were vital for facilitating ecological restoration activities (Apgar et al. 2016, 61).

This process amounted to revitalisation of Sami knowledge by creating a

community-based traditional knowledge archive to assist the community and research work in future. Moreover, using ITK in monitoring has resulted in new management options and actions for the watershed. Although co-management is yet to be made formal, national institutes such as Metsähallitus and the local Centre for Economic Development, Transport and the Environment – have shown an interest in learning about novel management alternatives through a Skolt research agreement (Apgar et al. 2016, 61).

4. Conclusion

Based on the discussion above, it appears to be the case that combining ecological restoration and ITK can assist in reversing a number of ecosystem degradations caused by human activities. This is indeed a recommended way of using ITK with science to overcome damage to ecosystems. Nevertheless, in order to achieve results which are effective, it is worth observing ITK in combination with science at a local level. Besides giving recognition to ITK of the Skolt Sami and forming a participatory and inclusive environment, this practice can also enable Finland to uphold its obligation under the Aichi targets and to a certain extent the obligations under the Paris Agreement. This further leads to building trust between indigenous communities and projects taking place in their locality.

Whilst agreeing that resilience is a self-organising process, it is concluded that at the current rate at which ecosystems are being altered, resilience cannot be achieved by self-organisation. It rather requires external factors or inputs like 'ecological restoration' to activate a self-organised process of resilience. Ecological restoration projects such as the Näätämö River example can be the external factor to enhance resilience of ecosystems, psychological resilience of indigenous people and resilience of the community when indigenous people participate by their input of traditional knowledge. Besides increasing the resilience of the Skolt Sami, the Näätämö River project also brought results to benefit the Skolt Sami by restoring the salmon spawning area.

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Justice as a Matter of Thinking
A Phenomenological Approach

Juha Himanka*

Abstract

In order to make wise political decisions, we need knowledge. In this study, however, I argue that instead of taking knowledge as our starting point, we should do something different: think. In the Continental philosophical tradition, thinking is understood to differ essentially from knowing, and some topics such as time, friendship, truth, justice and ethics are understood as matters of thinking. Thus, my aim is to discuss how we could think about justice from the point of view of Edmund Husserl's phenomenology as I understand it. This means that we should take as our starting point for thinking the phenomenological act called reduction.

1. Introduction

We live in the age of information and knowledge. It seems obvious that in order to understand something we need to collect all the relevant information about it. In philosophy, this seemingly obvious choice is, however, questioned. In Plato's dialogues, Socrates did not teach people to know but, rather, he used *not* knowing and being aware of it as an example. In our time, this tradition is alive in the philosophical movement called phenomenology. It was founded by Edmund Husserl who saw *epoché* – an act whereby we distance ourselves from knowledge – as the starting point of philosophy. In this study, I will explicate how we could reach such a starting point and lay out the main characteristics of this kind of an approach. Critique of knowledge will first take us to the difference between knowing and thinking and then to the difference between objectivity and intersubjectivity. As phenomenology claims to be a concrete approach, I will conclude with an example in order to show how this method could be used in thinking about justice.

According to Husserl, phenomenology should be a *strenge Wissenschaft*, a

* Senior Lecturer in Philosophy, University of Lapland.

rigorous method which can be used universally and which covers all topics, but it has been used relatively little in legal studies (Pallard and Hudson 1999). According to Pallard and Hudson, in the rare cases where it has been used as a method, it has been understood in many different ways. They write about phenomenological law studies:

> Each [way] latched onto a particular aspect of phenomenology while leaving its other methodological concerns aside. There is neither methodological nor doctrinal similarity in the views that phenomenologists of law have espoused. (Pallard & Hudson 1999, 645.)

I will soon come back to this view of different approaches to phenomenology, but I will first question the view according to which the phenomenological method is that rare within law studies.

Although I agree with Pallard & Hudson in that the phenomenological method has not been a mainstream approach in legal studies, some phenomenological research endeavours have, nevertheless, been undertaken within this field. To take one example, in the German-speaking world, Arthur Kaufmann, Werner Maihofer, Walter Heinemann, Marc Blessing, Alessandro Baratta, Eric Fechner and René Marcic have considered justice from the phenomenological perspective (Hirvonen 2001). And if we consider the situation from the wider perspective of what is generally referred to as Continental philosophy and include philosophers such as Michel Foucault and Jacques Derrida, there has been quite a lot of interest within the discipline of legal studies. Here I will, however, concentrate on the influence of the founder of the phenomenological movement, Edmund Husserl.

In legal studies, Husserl's phenomenological method was, at the first phase, used by Adolf Reinach and Gerhard Husserl. They both understood Husserl's method mainly as a search for essences. Husserl's writings certainly back up this kind of an approach, but we can argue that *Wesensschau*, or searching for essences, is not the most original part of Husserl's method. From this perspective, the phenomenological method can be seen as just a new form of idealism (Ricœur 1974, 9). In this study, I understand Husserl's method from the perspective of the principles that Husserl set for the phenomenological method: the principle of principles (Husserl 1950b, §24) and the first methodological principle (Husserl 1950a, §5). I will not enter into an in-depth discussion of the principles here, but the basic claim behind them is that phenomenological inquiry should be grounded in evidence that Husserl calls *adequate*. Husserl also writes about another kind of evidence: *apodictic* evidence. Apodictic evidence means that we cannot question a claim which is evident in this way, in other words, we are certain of it. The approach of Reinach and Gerhard Husserl is mainly based on this kind of evidence. Husserl himself tried for a long time to establish a link between adequate and apodictic evidence, but had to finally admit that they do not need to go hand in hand (Himanka 2005). From this follows that we can choose to concentrate either on apodictic or on adequate evidence. Reinach and Gerhard Husserl chose to follow the apodictic line whereas, in the present article, I

follow the line of adequate evidence. This is also the direction into which Heidegger took the phenomenological method: away from searching for certainty or essences and towards what he called *unconcealment*, a more openly understood truth.

As was discussed above, Pallard and Hudson mention diverse ways in which the phenomenological method is used in the field of jurisprudence. The focus of the present article, however, will be on some recent work in which the method, in my interpretation of it, has been used adequately and in accordance with the methodological guides set by Edmund Husserl. From the Husserlian point of view of adequacy, the most important research within the field of jurisprudence has been done by Hans Lindahl. In order to explicate what Husserl calls adequate evidence he uses the phrase 'something as something' (*etwas als etwas*). Something is given adequately when it is given as something, as it itself. I, however, write instead about correlation between appearance and that which appears. As we will see, both formulations are used to describe Husserl's view on truth and do fulfil that function. There is, however, a reason why I have chosen to use the correlation between appearance and that which appears. According to Husserl, his method, in the final sense, is not grounded in the view on truth or principles describing it, but on the deed he calls reduction (Husserl 1962, 192; Husserl 1971, 76; Husserl 1989; Husserl 1993, 332). The advantage of writing about correlation instead of the something-as-something structure comes from its relation to reduction. As I will explicate, Husserl's lectures on the *Idea of Phenomenology* show how the correlation between appearance and that which appears actually emerges from the act of reduction. This critique of knowledge is the first step on the way from knowledge to thinking.

2. Critique of knowledge

Our age esteems knowledge highly. We understand that knowing is a basis for reasonable decisions and wise politics. Without knowledge our actions would not be justified. In general, we human beings have achieved our position among other living beings on earth largely by creating and passing on knowledge. But what is this very usable something that we call knowledge? This is one of the major philosophical questions and it is addressed by the domain of philosophy called epistemology.

Historisches Wörterbuch der Philosophie defines epistemology (*Erkenntnislehre*) first in a wider sense that has to do with knowing in different disciplines and, secondly, in a more specific, properly philosophical sense, which deals with essences, principles, origins and limits of knowing (Gethmann, 1972). Although we can trace both themes back to Antiquity, epistemology as a specific area of study is a particularly modern phenomenon (Gethmann, 1972). At the turn of the 19th century, a concern of circularity of knowledge emerged and problems of the fundamental concepts that determine knowing – that is, subject and object – were taken up. This approach was called *Erkenntniskritik*, critique of knowledge. I will now concentrate on how Edmund Husserl treated these problems in his lecture series *The Idea of Phenomenology* held in 1907.

In the first of the five lectures, Husserl starts by clearing the difference between

natural sciences and philosophy: 'The former originates from the natural [and] the latter from the philosophical attitude of mind' (Husserl 1999, 15). In the *natural attitude*, we simply take knowledge for granted and do not pay attention to the ways in which objects are given to us. Surely, we distinguish between objects seen and heard, for example, but in both cases, we basically first receive data and then the mind and the brain process this data in order to give it status as knowledge. In Husserl's language, we relate to the world which consist of objects. We can then make judgements of these things and consider logical relations between these statements. 'Thus the various positive sciences come into being and grow.' (Husserl 1999, 16) Husserl includes also mathematics and other sciences that deal with ideal objects in these sciences. Sciences are '[c]onstanly engaged in productive activity, advancing from discovery to discovery in newly developed sciences.' (Husserl 1999, 16). In so doing, the natural attitude 'finds no occasion to raise the question of the possibility of knowledge as such.' (Husserl 1999, 16) Knowledge appears as a problem in a certain manner, but it is understood as a fact: It is a fact that there is knowledge. Knowledge is a 'natural state of affairs; it is the experience of some knowing organic being.' (Husserl 1999, 16) Taken in this manner, it is a psychological fact that can be studied, and these studies will give us results about the reliability of knowledge, for example. Husserl then turns to the *philosophical attitude* and the situation changes radically.

When Husserl turns to the philosophical attitude, 'abysmal difficulties' (Husserl 1999, 16) ensue. That which was taken for granted – knowledge – suddenly emerges as a mystery. When the natural attitude supposes that there is knowledge, it can consider what kind of knowledge we have but it does not raise the more radical question of whether we have knowledge at all. As knowledge is knowledge of objectivity and we claim to know this objectively, the approach falls into circular thinking – the *petitio principii* fallacy. To know about the objectivity of knowledge in an objective way is a problem. According to Husserl, we should ask more radical questions such as: 'How … can knowledge be sure of its agreement with the known object?' (Husserl 1999, 17) Instead of taking the possibility of knowledge for granted we should turn to transcendental attitude and ask for the conditions of possibility of knowledge.

At the end of the first lecture, Husserl strongly declares that philosophy should be kept clear of the influence of the natural attitude of the sciences. The natural attitude does not only mean our everyday understanding of the world, but it also covers the exact sciences and even mathematical or logical calculations. Husserl writes:

> If the very sense and value of positive knowledge *as such*, with *all* its methodological arrangements, with all its exact groundings, has become problematic, then this effects every principle drawn from the sphere of positive knowledge that might be taken as a point of departure as well as every ostensibly exact method of grounding. The most rigorous forms of mathematics nor mathematical natural science here have not the slightest advantage over any actual

> or alleged knowledge belonging to common experience. (Husserl 1999, 21.)

Philosophy is thus critique of knowledge and as such it should not model itself following the methods of science and it should not take scientific results as its starting point. When this radical breakaway covers not only sciences but also methods of mathematics and formal logic it is difficult to see what is left. Where could one begin the investigation when these starting points that are usually seen as well-established should now be set aside? If, however, we consider Husserl's collected works, *Husserliana*, from the point of view presented in these works, we notice that these writings actually are astonishingly free from the influence of scientific results and methods. This sets Husserl's work apart from that of other thinkers. The question, then, is: How can he start from a situation which seems like an impasse?

As discussed above, the *Historisches Wörterbuch der Philosophie* points out two characteristics of the critique of knowledge. The first one is the problem of circularity of knowing that one knows. That was pointed out by Husserl in the first lecture described above. The second characteristic is the concept pair subject and object. Husserl takes this theme up in the second lecture. We will now try to see whether Husserl can live up to his tall order to do without sciences and logic.

Husserl surely understood the problems involved in an attempt to start without the aid of sciences and asks at the beginning of the second lecture: 'How can the *critique of knowledge establish* itself?' (Husserl 1999, 23.) He calls for an *epoché* – a radical rejection of existing knowledge that he described in the first lecture. He now repeats that this starting point means that we doubt all our knowledge, acknowledging that research cannot stay at such a situation of doubt. Husserl continues by describing the way forward: The method should not presuppose anything as pregiven, but it can 'begin with some knowledge that it does not take unexamined from other sources, but rather provides for itself and posits as primary.' (Husserl 1999, 23)

Husserl's view of the starting point resembles the Cartesian method of doubt and he certainly is aware of that as he soon tells us that his method is a modification of the Cartesian method. Descartes used his method of doubt for other purposes, but with the appropriate modifications the same type of method is used by Husserl as well. Husserl then introduces two concepts, *immanence* and *transcendence*. Immanence refers to the sphere of my immanent thought that I cannot meaningfully doubt. Transcendence, in turn, is the sphere of the outer world that is not immediately given and that I can doubt. When I, for example, see a tree out there (transcendent) it might be that I am only dreaming of it. My thought of that tree, however, is beyond any doubt. I have that thought of the tree whether that tree is real or not.

Husserl now elucidates his method of *epoché* further by stating that *epoché* means staying within the limits of immanence. In order to map the situation, we need to introduce three further concepts of Husserl. He uses the word '*reell*' (actual) to refer to the sphere of inner thoughts. My thoughts are now actual and they appear in inner time-consciousness but do not have place or space. In contrast to actual there is '*real*', real. The things that appear in outer time and space are real. Husserl calls the third dimension '*ideal*', ideal. Objects that appear in all time but in no place,

numbers for example, are ideal. The problem, then, is to consider how these spheres relate to each other. In this case, the main issue is to consider the relationship between my actual (*reell*) thought and the real things in the world. From the point of view of the critique of knowledge, we need to see how this relationship works in order to have knowledge at all.

Husserl first states that immanence means actual immanence (Husserl 1999, 27) and that transcendence stands against actual immanence. The situation is an impasse. In order to reach knowledge, we need to see the relationship between immanence and transcendence. There are two ways of attempting this. The first one is the philosophical approach that follows Descartes' line of thought. We limit ourselves within the immanence of our thoughts, but the problem, then, is to reach out to the object of those thoughts in the outside world. The other approach is the one used in objective sciences. In this approach, we rule out our subjective thoughts and limit ourselves to the objective world. These approaches bring out the two ends of the immanence-transcendence relationship, but, at the same time, they rule out one another. Does Husserl find his way out of this cul-de-sac?

In the next phase, which a bit later turns out to be a decisive step, Husserl separates two meanings of immanence and transcendence. He writes:

> But there is *another sense of transcendence,* whose counterpart is entirely different immanence, namely, *absolute* and *clear givenness, self-givenness in the absolute sense*. This givenness, which excludes any meaningful doubt, consists of an immediate act of seeing and apprehending the meant objectivity itself as it is. It constitutes the precise concept of evidence, understood as immediate evidence. (Husserl 1999, 27-28.)

After this analysis of the concept of immanence, Husserl again explicates the main problem of science. A scientist could claim that he or she knows *that* the world really is and that there really is no sense to doubt it. From Husserl's point of view, however, this *that* does now give us a view on *how* we reach the transcendent world. He compares this situation to a man born deaf, who tries to explain sounds (*id.* 30). The deaf person can, for example, read about and explicate music, but the person would still be lacking the 'how' of the music. In a way similar to this deaf man who cannot reach the 'how' of sounds, the scientist cannot reach the 'how' of the world.

Husserl then introduces the main methodological step of phenomenology, now calling for a 'reduction', a phenomenological act closely related to the notion of *epoché* he had spoken of previously. As well as *epoché,* reduction means that we stay within the limits of immanence. Yet, the main question remains: 'But how is phenomenology to proceed? How is it possible?' (*id.* 36) Husserl asks whether all science leads to 'establishing an objectivity existing in itself, thus to what is transcendent.' (*id.* 36) When Husserl uses the method of *epoché*, or reduction, he should stay within the limits of immanence, and within those limits, there is no objective validity, only subjective truths (*id.* 36). There seems to be no way out of this impasse.

In the next phase, Husserl gives the solution. He writes: 'What we need here is a further step that will roll out this spurious circle for us. But we have already taken this step in principle by distinguishing the two senses of transcendence and immanence.' (*id.* 37) The solution is actually rather simple. If reduction keeps us within the limits of immanence-in-the-sense-of-'that', transcendence cannot be reached, but when we turn to Husserl's analysis of the concept of immanence earlier, there opens a new possibility that covers all that can be reached in an immanent way. This happens if we understand immanence-in-the-sense-of-'how'. Husserl now seems to think he has opened the scope of immanence enough for knowledge to be possible.

There are, however, substantial difficulties in Husserl's solution. First, reduction, or *epoché*, is supposed to be the main methodological tool in phenomenology. Here, however, it plays only a secondary role whereas the decisive step was the analysis of concepts. Second, it is not at all clear how this immanence from the point of view of 'how' is to be comprehended. Husserl continues on the grounds of this solution until the last lecture, but there the problems of the solution surface and the lecture ends up in a mess. (Himanka 1999.)

Husserl had mentioned in the first lecture that the critique of knowledge will lead to abysmal difficulties. Thereafter, it first seems that Husserl managed to deal with these difficulties although he used analysis of concepts instead of phenomenological reduction. In the last lecture, however, it turns out that the solution does not work and that Husserl himself faces these abysmal difficulties.

In the middle of the last lecture, Husserl seems to be about to declare that the aim is reached: 'Only if we construct general judgements of essence, can we attain the secure objectivity which science demands.' (*id.* 55) The next sentence, however, comes so suddenly that a softening sentence – 'But that does not matter here' – has been added to the manuscript afterwards: 'Hence we seem to get into a maelstrom.' (Himanka 1999) This maelstrom is the abysmal difficulty Husserl anticipated but thought he could pull through the lectures. But he did not manage to do that. The rest of the last lecture is a search for a way to manage the maelstrom, but the solution was not found during the lectures. What actually happened is an *epoché,* losing one's knowledge base, and in this case, Husserl lost his very starting point. In order to reach the full reduction (Husserl 1950a, 57; Husserl 1959, 165), he still needed to find a new way to start again. (Himanka 2011.)

On the same day when the last lecture was held, Husserl wrote a *train of thought* of the lectures. The text is not a summary of the actual lectures, but a reflection on how the lectures ran and, what is more important, what happened during and right after them. In the lectures, Husserl had spoken in a customary way about the differences between his own views and other points of view. In the *train of thought,* the distinction between what should be accepted and what not were set differently. Now the text can be read as if he speaks of his own earlier points of view. He writes about his earlier, naïve point of view that it has to be overcome, and he uses phrases like 'one is inclined to interpret'; 'on a closer view, however,' ; 'at first it seemed'.

In the last of the four steps of the *train of thought*, Husserl writes about his

original solution to the problem of knowledge:

> At first everything seemed quite straightforward, scarcely requiring hard work on our part. One might cast aside the prejudice of immanence as actual *[reeller]* immanence, as if it all came down to that, yet, at least in a certain sense, one remains attached to actual [*reellen*] immanence. Initially it appears that the examination of essence only has to grasp what is actually [*reell*] immanent in the *cogitationes* in their generality and to establish the relations that are grounded in essences – an apparently easy matter. (Husserl 1999, 67.)[1]

This reflects on the situation just before the maelstrom where Husserl had explained how to construct general judgements of essences, as quoted above.

Now he knows what the problem is and states that we must look closer, and this closer look gives a surprising view: 'If we look closer … the *appearance and that which appears stand over against each other*, and do so *in the midst of pure givenness*, that is, within genuine immanence, then we begin to wonder' (Husserl 1999, 67). Husserl mentions this correlation between appearance and that which appears a couple of times in the next few pages and writes about it as a new point. And indeed, it is new in comparison with the lectures where this point of view does not come up. Husserl has overcome the problem of knowledge and achieved a new point of view: the correlation between an appearance and that which appears. I will call this correlation simply truth. (Himanka 2019.)

Husserl's phenomenology is often explained by starting with the concept of 'intentionality'. In his exposition of Lindahl's phenomenology of legality, Emilios Christodoulidis (2014) sees this approach as problematic in this context and follows Jean-Luc Marion's reading of the *Idea of Phenomenology* instead. In this reading, too, the correlation between appearing and that which appears is the key, and the whole of phenomenology is to be opened up from this correlation. Marion, however, does not focus on the act of reduction but, instead, emphasises the role of givenness. In the wider context, outside of the *Idea of Phenomenology* lectures, the correlation is described by using different concepts. Karl Mertens writes about 'the inseparable relation of *constituens* and *constitutum*' (Mertens, 2018, 485) and Dermot Moran, in turn, uses the terms *cogitationes* and *cogitata* to refer to the acts of the ego and its correlates (Moran 2000, 150). By using Husserl's later terminology, we could also speak about *noesis* (appearance) and *noema* (that which appears). What separates the interpretation presented in this study is that, following Husserl's own methodological considerations, it is the act of reduction that opens up phenomenological research and transforms us from knowing to thinking. In this case, reduction takes place in the train of thought of the *Idea of Phenomenology* lectures (Himanka 2011, 2019.).

3. Thinking and knowing

We moderns tend to consider truth as a property of knowledge. We use the word

1 Translation modified: using actual to translate 'reell' instead of real.

'thinking' both in everyday usage and in its philosophical sense. In the tradition of Continental philosophy from Hegel to Heidegger, thinking is understood as a philosophical activity, as the activity that sets philosophy apart from the disciplines of knowing. This understanding of thinking has been strongly influenced by Kant. In Kantian thought, thinking has wider possibilities than knowing and is reflective (Bormann & al. 1972). I will use an example from Lindahl (2013, 100) to illustrate this.[2] The situation is the following: hikers out in the wilderness are lost, and they have a piece of paper with lines and other cartographic symbols. After having stared blankly at the piece of paper, one of the hikers understands that it is a map and that 'we are here!' Now they can orient themselves following compass directions.

Likewise, in his 'What Does it Mean to Orient Oneself in Thinking?' Kant uses the metaphor of orienteering to explain what thinking is (Kant 1786). His point, however, is to show that, in addition to using a map and a compass, I also need 'to feel the difference in my own subject, namely the right and the left hand.' Kant calls this feeling [*Gefühl*], because this difference cannot be explained purely objectively. In *Prolegomena,* Kant challenges the reader to try to objectify the difference between right and left and continues:

> When they have in vain attempted its solution, and are free from prejudices at least for a few moments, they will suspect that the degradation of space and of time to mere forms of our sensuous intuition may perhaps be well founded. (Kant 1912, §13)

Kant claims that if we cannot solve the problem of right and left, we should also reject our normal understanding of space and time and accept his transcendental line of argumentation. Although it is generally thought that Kant's problem of right and left has been solved, in his monograph on the topic, Chris McManus had to confess that Kant's problem 'remains as alive and as confusing today as in 1768' (McManus 2004, 57). My aim here, however, is not to defend Kant's philosophical position but to explicate how we need a subjective element when we orient in the wilderness or in thinking. According to my interpretation, for Husserl, the compass to orient in thinking is the correlation between appearance and that which appears.

Truth means correlation between appearance and that which appears and in different cases of appearance the constitution is different. The correlation itself – truth – stays the very same, but it takes different forms when we deal with different kinds of activities. Husserl's basic example of truth is a number (Miller 1982). When we consider the evidence or truth of numbers, we compare them in presence and absence. There are some things on the table (number is absent) and we count them and number becomes now present. In other words, there is a correlation between appearance (counting) and that which appears (number). Husserl used this method already before the lectures, but there he managed to actually show how this point of view is achieved by accomplishing reduction. We have now left the perspective

2 Lindahl's example derives from John Perry.

of knowing behind and achieved the level considering what appears from the point of view of truth instead of knowledge. We will call this the perspective of thinking instead of knowing.

The task of phenomenology is then to explicate these differences: how correlation differs in the cases of counting a number, seeing a thing, remembering something, or considering something as beautiful or just.

When we turn from knowing to thinking, we start our consideration of truth as unconcealment (to use Heidegger's expression) instead of seeing it as a property of knowledge. Instead of considering whether different statements are really knowledge or not, whether they are right or wrong, we start from the correlation between appearance and that which appears.

4. Objectivity and intersubjectivity

There is a problem in Husserl's approach in the *Idea of Phenomenology*. Although he managed to overcome the problem with knowledge and found thinking in the manner of searching correlations between appearance and that which appears, we could still ask on what grounds this is something more than Husserl's own point of view without objective validity. Husserl was certainly aware of this problem and he actually took it very seriously. He struggled with the problem of intersubjectivity at the same time when he held the lectures on the idea of phenomenology. He did not publish anything for a decade (1901–1911) when he was trying to solve the problem, but finally he at least believed to have solved it. He had managed to find a way from mere subjectivity to intersubjectivity.

In the *Husserliana,* Husserl's work on the problem of intersubjectivity covers three thick volumes and it is not my purpose to try to cover this struggle here. Instead, I will highlight some manuscripts from the 1930s that deal with the relationship between objectivity and intersubjectivity. In those days, Husserl was preparing the work entitled *The Crisis of European Sciences and Transcendental Phenomenology* and was concerned with how sciences were losing contact with people's lives. In that context, he tried to understand how sciences first come about. In the *Crisis*, he deals with this by considering Galileo Galilei's work, but here we are not that much interested in how sciences come about but in how research in general comes about.

In the *Crisis,* Husserl saw that the spirit of Europe was sick and he called that disease objectivism. Although science is an intellectual (*geistige*) activity and it is undertaken by subjects, its main goal is precisely the opposite: objectivity. This diagnosis cannot be reached through objective methods because objectivism is the problem. In order to understand the position of science we need to take a wider perspective and turn from knowledge to thinking. In this case it means that we need to concentrate on intersubjectivity instead of objectivity. Husserl does this by considering the origin of research in general, not only science.

In Husserl's view, research was born in ancient Greece. Before this happened, different tribes and nations had their own understanding of the world and that was not seen as a problem. One tribe can have its own kind of myth about the Sun and

the Earth, and others can have theirs. In Husserl's terms there were different home-worlds (*Heimwelte*) (cf. Lindahl 2013, 93). Then some philosophers came up with the idea that this seemed strange to begin with. Husserl even calls the one who had this idea a *Sonderling*, an eccentric man, and he obviously had Plato in mind. The idea was that there is only one world, *cosmos,* instead of the different home-worlds. In a working manuscript from the time period of the *Crisis,* Husserl writes: 'those actually are the same Sun, the same Moon, the same Earth, and the same sea that are seen by different nations and traditions in the light of different mythologies' (Husserl 1993, 388). Research was born and the culture was transferred from mere belief (*doksa*) into knowledge (*episteme*). (Cf. Miettinen 2013.)

This transition from different home-worlds to a world that is essentially the same for different cultures and traditions did not mean a transition into objectivity, which in its ideal form means that reality is not only the same for everybody but it can be thought also without anybody. Let us consider this by taking a certain exchange of views about the Sun as an example.

In the early fifties, there was a philosophical conference in Paris. In one presentation, one of the participants, Georges Bataille, told how he had entered into discussion with some other participants the night before. The discussion dealt with a simple proposition: 'There was a sun before humans.' One of the participants, A. J. Ayer, saw that sentence as unproblematic. According to Ayer, philosophy is closely connected with sciences and from that point of view it makes sense to see the sentence about the sun as reasonable. Two of the other participants, Maurice Merleau-Ponty and Bataille himself, were close to the phenomenological tradition, and the fourth one, Ambrossino, was a physicist. All others disagreed with Ayer. According to Ambrossino, there certainly was no world before humans, and, according to Bataille, the whole sentence did not make sense. According to Vrahimis, this discussion was the first public mention of a difference, or even a gulf, between two philosophical traditions: Continental and Analytic philosophy. (Vrahimis 2013). The discussion about the ontology of things before there was any consciousness still continues, but from the perspective of this article, it is important to see that the sun before human beings does not make sense from the phenomenological point of view. In doing research we try to find positions that are valid for everyone (intersubjectivity), but that does not mean they are valid for no-one (objectivism). (Vrahimis 2013; Himanka 2000)

Lindahl's phenomenological approach follows here the Continental insight: 'In contrast to science, which seeks to factor out subject-relative aspects of knowledge in its quest for objectivity, phenomenology has pointed out that the scientific endeavour presupposes and takes place on the ground of an experience of the world that is subject-relative' (263-4; cf. Christodoulidis, 945). From Lindahl's phenomenological point of view, the world is subject-relative as we 'always refer to how it appears to *us*' (Schaap 2015, 2). Miettinen articulates Husserl's point of view: '[A]ll objectivity is necessarily grounded in intersubjectivity' (Miettinen 2003, 157-158). The sun before we existed does not make sense.

In the foregoing, I have summarized the main elements of phenomenological inquiry. Instead of knowledge, a phenomenologist searches for truth and understands it as a correlation between appearance and that which appears, or, unconcealment. A phenomenologist searches for truth by thinking, not by means of science, and this is nonetheless research. As research it is not restricted to the thoughts of an individual but is intersubjective. It is thinking rather than knowing. In order to see how we can study justice following these guidelines, I add one more consideration. According to Husserl, phenomenology does not engage in theory but is concrete research (Husserl 1999, 43). In order to proceed in a concrete way, we need to have concrete cases. In what follows next, I will take up one concrete example in order to exemplify how phenomenological research could proceed in jurisprudence. The example comes from Alexandre Kojève (Kojève 2000).

5. Equitable dinner

In the background of Kojève's example, as it is given in his *Outline of a Phenomenology of Right*, is the way he describes a plan of a universal and homogenous state. This state would cover all of humanity and it would be achieved through legal integration between states. In order to reach this goal, Kojève thinks that it is necessary to understand what justice means. He writes: 'Unfortunately, the phenomenon of *Droit* has still not found universally accepted and truly satisfying definition.' (Kojève 2000, 29, cf. G. Husserl 1937) This is a philosophical way to start a study: to admit that we do not know what something is. This also resembles Husserl's method of *epoché*.

Kojève continues by pointing out that he will not try to give a complete definition of justice and he then explains further what kind of a definition he would be satisfied with:

> But I will limit myself here to describing the 'superficial' aspect of *Droit*, to analysing it as 'phenomenon' given to the immediate consciousness of man, who 'knows' what *Droit* is and distinguishes it from other things, while not being able to describe correctly this 'immediate knowledge' – that is, to give a phenomenological definition of *Droit*. (Kojève 2000, 33.)

Kojève gives the definition in the first chapter and it is introduced by explaining the relations between A, B and C.[3] A and B are human beings engaged in interaction, and C is an impartial and disinterested third who intervenes in this interaction. The study does not begin from, for example, an analysis of rights and duties of A and B. Instead, it concentrates on the actual happening of justice, on how it appears when the third, the C, intervenes. I will not enter into Kojève's actual definition here, but, from our point of view, it is important to notice that he does not start by analysing what we know about justice but concentrates on the actual appearance of that which appears phenomenologically.

3 Gerhard Husserl, Edmund Husserl's son and a professor of law, uses a rather similar approach in his 'Justice' (Husserl G., 1937) when he also uses A, B and C in order to explain basic elements of justice. He also understood equality to be the basic factor in this but does not separate equivalence from equality.

In the second part of the book, Kojève gives an example (*id.* 254). There are two people sharing food for dinner.[4] These two people have a different situation: A has eaten lunch and B has not. The question for the impartial and disinterested C is: how should the food be apportioned? Should B get more food than A? Justice can appear in two ways in this occasion. C could say that all are equal and both parties should have an equal portion. Or C could base his judgement on equivalence. We need to consider that B has not eaten lunch and therefore he should get more. Thus, we have two ways of understanding justice. Kojève calls the first one aristocratic (equality) concept and the second one bourgeois (equivalence) concept of justice. Kojève finds the origins of these two concepts in Hegel's dialectics of Master and Slave, but I will now continue to phenomenological perspectives of truth.

Is Kojève's view true from the phenomenological point of view? Is there a correlation between appearance and that which appears in Kojève's argument? When asking whether it is right to give this or that amount of food to a person, we are dealing with justice. Justice appears when something is judged to be just. In some cases, justice is absent and, in some others, it is present. The problem in this case, however, is that the result is arbitrary, it depends on whether C happens to be bourgeois or aristocratic. As justice should not be arbitrary, it is not present but absent in this case.

From the point of view of intersubjectivity we have now two views on the same thing, just like the tribes having different mythologies about the Sun. How could we solve the situation? We are tempted to search for a scientific or an objective solution. We might, for example, take a utilitarian point of view and try to calculate which will be the most beneficial from the point of view of society. When we take an intersubjective possibility, we try to find a common feature behind these two concepts of justice. This is indeed what Kojève did.

Kojève's aim is to acknowledge both principles at the same time without contradicting himself (*id.* 263-264). He returns to the example of a dinner:

> The principle of equality will require a share of equal portions between those having *droit*, and it will no longer be concerned about anything else. But the principle of equivalence will ask if the equal portions are really equivalent. If one observes that some are hungrier than others, one will see [to it] that this is not so. One will then share the food differently, making the portions proportional to the hunger of each one. The principle thus being satisfied, one will leave matters there. (*Id.* 269.)

The problem here is that the first principle of equality will be offended as the portions now are not equal. There is, however, a possibility to eliminate this difference:

> One will … ask why some are hungrier than others. And if one observes that this difference results from the fact that some have had lunch and others not, one will see to it such that from now on all might have lunch. (*Id.* 269.)

4 Kojève wrote the book in Marseille in summer 1943 where there was a shortage of food at that time.

Now, when all have had a chance to have lunch, equality and equivalence coincide with each other, equivalence is equality. This is not always as easy to turn into practice as it was in the example of the dinner. Only women can give birth, for example, and the situation is impossible to change, but in principle the idea is clear: 'the justice of equity will only be satisfied when the greatest possible *equality* reigns.' (*id.* 270). In the case of women and men, Kojève writes about equivalence between 'maternity and military service' (*id.* 270) which now may not seem to be the best way to increase equity, but it is clear that equity can be improved also in the cases where inequality cannot be abolished.

In the case of sharing food when there is a shortage of it and people are not equally hungry, there are, at the outset, two possible ways to see how justice is fulfilled: equity and equivalence. By searching for an intersubjective view of the situation, we can see how these two views could be merged together to one concept of justice. Kojève's idea is then to remove differences between justice systems so that all humans would be judged by the same idea of justice.

The way in which Kojève overcomes the conflict between the different concepts of justice in his dinner example brings us back to Husserl's introduction of the notion of intersubjectivity in his *Crisis of the European Sciences*. From Husserl's perspective, a good European is not someone who has achieved a superior understanding of reality, i.e. objectivity, but instead, someone who aims at the intersubjective perspective that is valid for everyone. The difference between objectivity and intersubjectivity is crucial. From this perspective, the other is an essential element of justice. It follows that justice should not be studied objectively but intersubjectively. Justice will never appear in a study of the outside world, but in an intersubjective exchange of views. In other words, by way of thinking about others' thoughts, and thus finding out what is perhaps not right in one's own thinking.

6. Conclusion

Let us conclude by first giving a brief summary of the foregoing. Phenomenological inquiry in the Husserlian sense starts from the critique of knowledge. It begins from the act he called *epoché* or reduction. The radicality of this approach lies in that it does not take some forms of knowledge – for example formal logic or exact sciences – for granted and then starts to consider how far does knowledge extend and how certain it is. This does not cover only scientific results but also the method by which these results are reached. The question in this study was: On what grounds can we do research when the way in which science is grounded needs to be abandoned?

In his lectures on *The Idea of Phenomenology,* Husserl accomplished what he called reduction, and ended up with the correlation between appearance and that which appears. However, when we start from this instead of knowledge, we face an obvious problem. The correlation between appearance and that which appears is not an objective standpoint and it seems that by following it I will only explicate my own subjective views. That might be a good method when writing a novel, but it does not seem to fulfil the expectations of research. The phenomenological approach,

however, does not aim at objectivity but intersubjectivity. It aims at thinking instead of knowing. It is grounded in the idea that thinking and truth are more than my subjective notions in contrast to objective facts. The question, then, is: How is this done in practice?

Turning to Kojève, we may consider that one way to do phenomenology in practice may be seen in his attempt to find one and unified concept of justice. In order to achieve this, he did not start studying empirically what kind of concepts are to be found. Instead, he turned to Hegel's *Phenomenology of Spirit* and its dialectics of Master and Slave. The two main ways to understand justice – the aristocratic and bourgeois ideal of justice – were found from there. In order to see how these can be unified, he considered the example of sharing food at dinner. From the Husserlian point of view, we may say that considering the just way of food-sharing, we are also considering the correlation between that which appears (justice) and how it takes place in the particular case, its appearing. Indeed, Kojève's approach did not aim at giving us objective certainty: he did not measure, calculate or rely on scientific results. Instead, the aim was to achieve intersubjective validity.

In this study, I have laid out some elements that characterize the phenomenological method in comparison to the scientific method and showed, by way of example, how this could operate in practice. Let me conclude the discussion by referring to another phenomenological dinner-example, one by Hans Lindahl. At the beginning of his *Fault Line of Globalization,* Lindahl tells us a story about him and his partner having dinner in a restaurant, where a vagrant suddenly came in and demanded a dinner. It was clear that he would not pay for the meal. In Kojève's terms, the waiter chose to follow the bourgeois understanding of justice and showed him to a table next to Lindahl's. The crucial turn in Lindahl's story, however, came when the vagrant asked the waiter to join him. Panu Minkkinen ends his review of Hans Lindahl's *Fault Lines of Globalization* by pointing at the example of a vagrant disturbing a dinner in a restaurant (Minkkinen 2016). Minkkinen compares this episode to Heidegger's views on how we are interrupted when something unexpected happens. Husserl's reduction is also something that interrupts our normal order and makes us think instead of knowing. In that sense, Lindahl's unexpected intrusion is akin to Husserl's reduction, they both open up the possibilities of thinking.

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Towards a New Ethics of Sexual Self-determination: Finnish Rape Law through the Speculum of Feminist Philosophy

Minni Leskinen*

Abstract

Taking the perspective of feminist philosophy and feminist legal scholarship, this article discusses the idea of sexual self-determination on which the Finnish rape law is currently built. A transition from coercion-based model of criminalization to consent-based model of criminalization of rape is expected to take place also in Finland. Such a transition from one model to another calls for a discussion of the discourses of freedom and moral autonomy inherent in these models. Responding to that call, the article draws on a variety of sources, from travaux préparatoires and case law to influential philosophers, in order to elucidate current understandings of sexual self-determination. With the view of a possible redefinition of the foundations of rape law, the article introduces and discusses Luce Irigaray's notions of sexual difference, love and wonder. Finally, the article develops an Irigarayan inspired three A's approach – prohibition of assimilation, assumption and appropriation – in order to open a way towards new ethics of sexual self-determination.

1. Returning to feminist philosophy

In 1998, more than twenty years ago, British professor of criminal law and gender studies Nicola Lacey asked in her inaugural lecture *Sexuality, Integrity, and Criminal Law*, why the law on sexual offences says so little about what is valuable for us in sexual relationships (Lacey 1998, 103). Her lecture has been read and cited by feminist criminal law scholars in the Nordics, and one could state it is a classic in its own field of study. In Finland it has been referred to by at least Johanna Niemi and

* Researcher, University of Turku. This article has been written in the research project ASLA: Actors, Structures and Law, funded by the Academy of Finland, decision 312497.

Helena Jokila, and in Sweden by Ulrika Andersson and Linnea Wegerstad.[1] Why is her text still inspirational? Why do we – and why should we – go back to it, even after so many years?

One of the reasons for her resonance in Finland seems to be that her criticism on sexual autonomy as the starting point of British law was exactly spot on with what has been seen to be one of the core problems in Finnish law on sexual offences in recent decades. In Finland, sexual self-determination was defined to be the core value of the law on sexual offences in the 1990s. The Finnish Criminal Code Chapter 20 on Sexual Offences was basically fully renewed and came into force on the 1st of January 1999. The chosen emphasis on sexual self-determination has raised strong criticism among Finnish feminist criminal scholars ever since.[2] As Lacey puts it, the liberal discourse of autonomy and sexual self-determination closes off the possibility for developing a sophisticated conception of sexual harms, reducing the body to property (Lacey 1998, 113; see also Nousiainen 1997, 232). The discourse does not recognize the relationality of sexuality or the importance of relations to solid development of personal autonomy and finally, reduces sexuality to penetration.

Since 1999 Chapter 20 has been amended five times. The first amendments in 2004 and 2006 relate to the international framework for human trafficking (see Kimpimäki 2009, 211-226; Roth 2010). In 2011 significant changes were made in relation to implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS 201) (see Ojala 2012, 12-28). The provisions concerning rape and sexual abuse of persons of 16 years and above were revised in 2011 and 2014 (see Ojala 2014, 17-26; Leskinen 2017). The last two revisions relate to powerful lobbying by NGOs on women's rights and the state's obligation to protect women and girls from sexual violence (see e.g. Amnesty International 2008). Even though the law has gradually changed, sexual self-determination as its core value has not been discussed. The question is even more topical now when the new Finnish government has announced that it will amend the law on sexual offences to be based on consent (Osallistava ja osaava Suomi, 89).

NGOs have been keeping up the discussion on consent and sexual self-determination (see e.g. Amnesty International 2019, 6). Last year in the aftermath of #metoo, several Finnish NGOs gathered their forces and produced a draft law on sexual offences based on consent (Suostumus2018). Their groundings start by stating that self-determination is a human right that belongs to everybody. The concept of self-determination is not discussed, but an important question is raised here. What would it mean that self-determination belongs to *everybody*, even to children and to those in various ways impaired or disabled? Is there a need to reassess the law's philosophical presuppositions?

1 See Jokila & Niemi 2019; Wegerstad 2015; Jokila 2010; Niemi-Kiesiläinen 2004; Andersson 2004. Non-feminist writers have also referred to the text, see e.g. Asp 2010.

2 See e.g. Niemi-Kiesiläinen 1998, 2000, 2004; Nousiainen 1999; Karma & Pohjonen 2006; Jokila 2010; Leskinen 2017.

In her lecture from 1998, Lacey suggests two different ways to approach the issue. Either the concept of sexual self-determination should be redefined or there should be an entirely new framework for sexual offences. Her suggestion is to shift the emphasis from sexual autonomy to sexual/bodily/human integrity, following the ideas of feminist legal theorists Drucilla Cornell and Jennifer Nedelsky (Lacey 1998, 117). How to understand integrity in this specific setting clearly depends on the chosen theorists. The Oxford dictionary's formal definition of integrity is a state of being whole and undivided. The dictionary definition itself resonates somewhat too much with old-fashioned moralistic views on feminine sexuality emphasizing virginity and chastity, which used to be a leading principle for rape law (see e. g. Utriainen 2010; Jokila 2010; Lidman 2017). We need to understand how integrity has been understood by feminist legal theory in order to understand what Lacey is aiming at.

For Lacey, Drucilla Cornell's theory on the imaginary domain seems to reflect best what she also means by integrity. Integrity includes bodily integrity, access to symbolic forms as the capability to differentiate ourselves from others and protection of the imaginary. The space to pursue personhood is not only mental but embodied and sexed, including our sexual desire (Lacey 1998, 117). As Cornell herself puts it, her theory of the imaginary domain is a theory on the minimum conditions of individuation, giving us the chance of freedom (Cornell 1995, 5). Jennifer Nedelsky's project, Lacey's other point of reference, is also about encompassing the body (Lacey 1998, 119). But Nedelsky is not giving up the idea of autonomy. She wants to redefine it as relational, building in a corporeal aspect of dependency as its precondition. The ability to become governed by our own laws is given us by others whom we are in relation to and depending on. (Nedelsky 1989, 25.) In her much later book, *Law's Relations* (2011), Nedelsky goes on to argue that gaining this relational autonomy is something that the liberal state should protect.

In Finland, Johanna Niemi-Kiesiläinen, in her article in 2004, advocated a shift from the concept of sexual self-determination to sexual integrity. She creates a linear narrative, in which sexual self-determination belongs to the era of modern law of the liberal state whereas sexual integrity marks a shift to feminism, postmodernism and an understanding of the legal subject as relational instead of individual and atomistic. The concept of sexual self-determination could hold its place as part of the concept of sexual integrity. However, emphasizing integrity would, according to Niemi-Kiesiläinen, allow us to recognize that the subject is always in a relation with others. What Niemi-Kiesiläinen has in mind is not only the safety of women from physical violence but structural and contextual abuse of power as an equally important context for sexual offences. (Niemi-Kiesiläinen 2004, 182-184.)

In her dissertation on rape law in 2010, Helena Jokila also suggested that sexual integrity and trust should replace sexual self-determination. Her point of view seems to be more psychological than philosophical, emphasizing the meaning of trustful and safe emotional relations as a prerequisite for developing individual autonomy in the first place (Jokila 2010, 296). In conclusion, feminist scholarly criticism in

Finland has quite clearly framed sexual self-determination and its contemporary understanding as the primary suspect for the unsatisfying and 'blind' outcome of the legislative and judicial process. In their recent article, Jokila and Niemi have argued for further inclusion of trust, relationality and contextuality into the formulation of rape law. Their legal solution would be inclusion in domestic law of the coercive circumstances doctrine developed in international criminal law (Jokila & Niemi 2019).

In Finland, Sweden is quite often used for benchmarking when looking critically at the law on sexual offences. In Sweden, the two concepts of integrity and autonomy have been used side by side in *travaux préparatoires* for the past twenty years. The Swedish rape law was fully renewed in 2018 and is now based on lack of free will on the part of the victim, also referred to as consent-based criminalisation. The link between enhanced protection of sexual integrity and more victim-oriented, even feminist, criminal law seems to be reinforced. Nevertheless, the view on the progressivity of Swedish law is to some extent challenged by Linnea Wegerstad's dissertation on sexual harassment from 2015. According to her analysis, the Swedish *travaux préparatoires* involve a built-in 'success story'. With each and every amendment the view on sexual crime is 'sharpened' and protection of sexual integrity is made 'as covering as possible'. Sexual integrity, on the other hand, is always self-evident and never explained. (Wegerstad 2015, 74-78.) This seems to be very similar to the situation in Finland, where sexual self-determination is repeatedly used as a basis for revising the law on sexual offences but the content of the concept itself is not open to discussion.

According to Wegerstad's analysis, sexual self-determination in the Swedish *travaux préparatoires* is seen as freedom from another's sexual desire, not as freedom from being sexualised as a woman (Wegerstad 2015, 189). Wegerstad's analysis of the case law shows that desire usually needs to take a physical form before it is recognized by the courts. Acts which are seen as 'worthy of punishment' are physical attacks with a sexual motive and purpose. This means that the counterpart to 'worthy of protection' is physical integrity. Her analysis also shows that even in Sweden emphasis is sometimes placed on the will of the victim in order to get protection for her integrity. (Wegerstad 2015, 308-309.) This means that the victim needs to express her objection and thus actively exercise her sexual self-determination. Wegerstad's analysis shows that it would be too simplified to think that concepts themselves would lead to certain laws or interpretations. It seems though, that different concepts lead to different emphasis: if we look at sexual integrity, the question seems to be what counts as a 'sexual' act and what does not, whereas if we look at sexual self-determination, the question is: who is using sexual self-determination and how is it used in relation to others?

Reading Lacey's lecture could also open up other paths yet unexplored. Before advocating the turn from autonomy to integrity using Cornell and Nedelsky, Lacey discusses corporeality and embodiment in feminist philosophy, naming some key works of the 1990s such as Judith Butler's *Bodies that Matter* (1993) and Elizabeth

Grosz's *Volatile Bodies* (1994). Lacey emphasizes the need to affirm the corporeal frame, the body, through which affective and intellectual life is lived – including in terms of sexuality. In addition to Butler and Grosz, she uses Irigaray as a 'striking example […] on the role of feminine embodiment in the generation of distinctive sensibilities and knowledges'. Lacey notes how Irigaray uses 'the image of lips as a way of expressing a form of feminine and relational human subjectivity different from that of the unitary and rational individual of modern thought'. (Lacey 1998, 110.)

After this statement, Lacey does not return to Irigaray but continues to discuss legal theory with Cornell and Nedelsky. This is a point where an opening is available – but she does not use it. I agree with Lacey that reading Irigaray opens the possibility to think about human subjectivity very differently from that of modern thought – and modern law. Going back to what seems more familiar to lawyers, namely legal theory, takes her back to exactly what she tried to escape here, to modern subjectivity and its relations to freedom, state and law. I demonstrate this shortly by looking at how Jennifer Nedelsky and Drucilla Cornell understand the legal subject.

The subject for Nedelsky is definitely a corporeal and relational being. However, her approach is rather psychological and pragmatic than philosophical. This becomes even more clear in her recent work *Law's Relations* (2011), in which she rejects law's individualistic and boundary-focused approach to the (legal) subject and claims that the liberal state should include in its tasks a transformation of the relation between men and women (Nedelsky 2011, 228). By this she means the end of domination and fear (Nedelsky 2011, 216), and rejection of control and independence as core components of autonomy (Nedelsky 2011, 303). For her, freedom seems not to be freedom from state-bound restrictions but constituted by the state through law. As she writes on the widely-praised Canadian law on rape, it imposes more responsibilities on both parties: 'It commands that men offer women a respectful attention to their wishes about sexual contact, and it requires women to be more forthright about their sexual desires (Nedelsky 2011, 226)'.

Cornell's view, on the other hand, is more philosophical. At the beginning of her book *The Imaginary Domain,* Cornell discusses her view of the human subject. The subject for Cornell is the *Perso-na*, in Latin, which literally means a shining-through. To be able to shine through, says Cornell, a person must be able to imagine themselves as a whole even though they can never reach this wholeness. Freedom for Cornell is the chance to struggle to become a person, and the (liberal) state needs to protect this chance as a legal matter of equality. (Cornell 1995, 4-5.) This approach seems to be even more liberal than Nedelsky's, recalling the capabilities approach of Amartya Sen and Martha Nussbaum. For Nussbaum, imagination is one of the core capabilities that all democracies should support. Her approach is Aristotelian, picturing humanity and human dignity as nobility shining through even in the middle of difficulties (Nussbaum 2008, 73).

One could claim this is also a question of a humanistic world view. Is the subject of law and legal theory actually humanist? Is it one that chooses courses of

action, cultivates itself, seeks happiness? One needs only to read the preface to Judith Butler's *Bodies that Matter* to understand that Butler's question is totally different from e.g. Cornell's. This is not about individuation but politics, and our possibility to gain critical agency in a world where we do not decide on gender, but gender is part of what defines us as a subject. Butler emphasizes that 'the materiality of sex is constructed through a ritualized repetition of norms', trying to find a way out of the dualism between humanism and determinism. (Butler 1993, x.) Similarly, Elizabeth Grosz theorizes on the body and sexual difference. The body is an *open materiality* which cannot be reduced to biology understood as an equation: 'subject minus culture'. It is a lived reality, an ontological structure with (infinite) tendencies the development of which is not consciously chosen. Also for Grosz, sexual difference demands sexual ethics. (Grosz 1994, 190-192.) What both Butler and Grosz are pointing out is that any theory based on dualisms of biology and culture, body and language, or choice and determinism is too simplified.

I claim that thinking with Irigaray offers even deeper possibilities to question modern (legal) ideas of subjectivity. But what can we say about the Irigarayan subject and its relation to the state or power or law? In the works of the 1970s, *Speculum of the Other Woman (1974)* and *The Sex That is Not One (1977),* both translated into English in 1985, she demonstrates – by using the technique of philosophical inversion – how 'the whole of Western philosophy is the mastery of the *direction* of will and thought by the subject, historically man'.[3] The Irigarayan female subject is no doubt a political actor. However, her possibilities to define herself are limited by the existing symbolic, phallocentric order. Irigaray's background in psychoanalysis is clear when she evokes *mimesis* as the thinking, writing and speaking process through which the female subject can try to challenge and alter this order, the 'Father's Law'. For Irigaray, though, it is not the subject, or even the gendered subject as such but the *sexual difference* she wants to make the centre of her philosophic exploration. At the same time, she is insisting that this difference is placed between men and women (and no one else), and treats other questions of difference as secondary (Irigaray 1996, 47), a statement that has evoked a critique of essentialism by thinkers such as Judith Butler.

Even though the Finnish law on sexual offences has been gender-neutral since the reform in 1999, rape still remains a crime that is committed mainly by men and the victims of which are mainly women. In a world in which we would like to think that gender does not matter but we are forced to admit it does, Irigarayan thinking might prove its persuasive power. As the American philosopher Debra Bergoffen states on the essentialist dangers recognized in Irigaray's thinking:

> This dangerous ambiguity is part of the power of Irigaray's thinking. […] I think that it comes from Irigaray's refusal to accept the nature-culture divide; that it is embedded in the way she grounds her understanding of the sexual difference

3 This is an explanation she gives herself much later on, in *I love to you: Sketch of a Possible Felicity in History* (Irigaray 1996, 45).

> in the materialities of our desire; in the way she looks to these materialities for ethical directives; and in the way she calls on these ethical directives to structure our political commitments. (Bergoffen 2007, 152.)

According to Bergoffen, we need to understand Irigaray's use of different couple relations in order to exactly understand why the man-woman relationship is for Irigaray the origin of ethics. Bergoffen claims that Irigaray's other couples such as the pregnant woman-foetus and the mother-daughter (both contesting the social order based on the contract between men) are only almost-ethical, whereas the man-woman-relationship is the only situation in which the phallocentric symbolic order can be challenged and changed. I will come back to the symbolic order in the third section, but for now it suffices for my argument to point out that it is the unity of the rational, imaginarily-neutral but in-reality-male human being, and the singularity of the ethical subject that Irigaray is contesting. For her, it is not the subject that is universal but the sexual difference (Irigaray 1996, 47).

Is this so very different from what Nedelsky means by relational autonomy, i.e., that we are never truly alone-standing but always dependent on others? The answer seems to be both yes and no. In an ethical sense, both Irigaray and Nedelsky are emphasizing the being in relations. So, in that sense there is a connection to be drawn here. But Nedelsky does not cast doubt on the ability of the liberal state (in its current form) and its (criminal) laws also to accommodate the relational subject and protect women as its citizens. Quite the contrary: Irigaray argues that citizenship does not include women. In many of her works published in the 1990s and after, Irigaray speaks more directly of law and the need to incorporate specific women's rights into law (see e.g. Joy 2011). She is sceptical of the sufficiency of criminal law alone and sees the right to physical and moral inviolability as a question of (women's) civil identity to be guaranteed by civil law (Irigaray 1996, 132; Joy 2011, 231). Since the emphasis in this article is on the development of criminal law whereas she is turning more towards the discourse of rights, our paths part here.

Even though Irigaray herself does not divide her works into different phases, the problematics of her later works has been well analysed by Morny Joy. As Joy notes, in 'Irigaray's program for the liberation of women' there are two intertwining projects: (1) attainment of self-determination and respect (autonomy) by means of a sexually-marked civil law and (2) reaching a personal state of integrity and self-possession in 'divinity' (Joy 2011, 221). Both of these projects seem to include a claim, firstly as to what being feminine means and, secondly, how this femininity should come to expression both in law and in the self-realization of real-life women. Irigaray's – convincing – argument that there is an ontological-ethical sexual difference would also appear to imply how we should deal with sexual violence and criminal law. But her idea of a 'natural identity' (woman or man) as a basis for civil identity (Irigaray 1996, 53; Joy 2011, 234) is, arguably, nothing worth pursuing by means of law: we do not need sex-specific rules but universal rules which can accommodate sexual difference.

Irigaray's turn towards prescribing how women should pursue their autonomy

and integrity is also interesting from the point of view of her psychoanalytical interest. As Rachel Jones notes, it is Irigaray who shows us how psychoanalytic theory 'continues to perpetuate a sexual indifference driven by an underlying desire for the same'. The desires and sexuate specificity of women remain unacknowledged. (Jones 2011, 139-140.) In that light, it seems plausible enough that Irigaray claims that it is now time for women to consciously find 'genuine modes of expression for their own desires' (Joy 2011, 227). But there is a very small step from the generative power of the sexuate difference to the paralyzing effect of forced femininity, whatever content that may have. This is crucial from the point of view of sexual violence, since the idealized meanings given to concepts such as sexual self-determination and sexual integrity can easily turn into tools that divide victims of sexual violence into those who deserve and those who do not deserve state protection.

Nevertheless, I think that it is possible to use Irigaray's philosophy as a starting point for a different understanding of sexual violence even though one would not agree with her later ideas as to how autonomy and integrity should be developed in concrete legal terms. In this article, I will attempt to show where following Irigaray (the philosopher) might lead us. I am also interested in the psychoanalytical traits in Irigaray's philosophy since they enable us to think about the role of sexuality in subjectivation and who exactly are the subjects thinking and speaking in the fields of law. I attempt to start a discussion about the content of freedom, autonomy, self-determination, sexual difference and ethics in the framework of Finnish law on sexual offences. As a starting point I will use the Finnish *travaux préparatoires* and also include some recent cases by the Finnish Supreme Court where sexual self-determination has been discussed. Inspired by feminist philosophy, I ask the question how sexual self-determination could be redefined and how the legal order in which it came to be could be altered. As Nicola Lacey suggested more than twenty years ago, feminist philosophy has a lot to offer for this discussion. In this article, I try to dig deeper into the question what that something could be.

2. Origins of sexual self-determination

When the Finnish Criminal Code Section 20 on Sexual Offences was renewed in 1998, sexual self-determination was the idea that was chosen to symbolize the 'good' that law on sexual offences ought to protect (Niemi-Kiesiläinen 2004, 176). The first time the notion appeared was in a working group draft law in 1993. It is not clear or self-evident where the idea came from or why it was chosen in the first place. Neither the memorandum of the working group from 1993 nor the Government Bill from 1998 give any explanation. Johanna Niemi-Kiesiläinen has linked this comparably sudden change from strict sexual morals and double standards to freedom and respect for privacy to the sexual liberation of the 1960s and 1970s (Niemi-Kiesiläinen 2004, 189). But in Finnish official documents, neither is the history of the idea discussed, nor are its possible options. Nevertheless, the Finnish *travaux préparatoires* give a one-sentence definition of sexual self-determination. As the working group memorandum from 1993 states and as is repeated in the Government Bill five years

later, *everyone should be allowed to exercise their sexual self-determination freely except when they violate someone else's sexual self-determination.*[4]

When the Government Bill was published in 1998, there was direct criticism of the chosen perspective. Johanna Niemi-Kiesiläinen pointed out that the focus on sexual self-determination assumes a woman who is independent and capable of taking care of her rights herself. If other perspectives, such as the safety of women or respect for integrity, had been chosen, the outcome of the law might have been different. (Niemi-Kiesiläinen 1998, 19.) On the other hand, Minna Kimpimäki (whose critique is not exactly feminist at this point) accused the *travaux préparatoires* of conceptual confusion. Whereas the working group used sexual self-determination as a restricting principle against too many limitations on sexual freedom, in the Government bill the notion of self-determination was used mainly for purposes of systematisation. In Kimpimäki's opinion, the concept as such was clear enough, though, and in line with Finnish liberal (and restrictive) criminalization theory. (Kimpimäki 1998, 21-22.) What is striking, though, is that the formulation of the definition is not further discussed in these critiques.

In Nicola Lacey's lecture, the idea of autonomy is traced back to John Stuart Mill's essay *On Freedom* from 1859 (Lacey 1998, 105). For John Stuart Mill, the boundary of one's autonomy is the prohibition on inflicting *harm* to others:

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. […] Over himself, over his own body and mind, the individual is sovereign. (Mill 1977, 223-224.)

It is to be noted that Mill was not an advocate of social contract theory. His approach is rather practical, claiming that 'living in a society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest' (Mill 1977, 276). What he is specifically talking about is the state's right to intervene in individual conduct and the legitimate use of force such as penalties. According to Mill, any case of conduct is taken out of the 'province of liberty' and placed in that of morality or law, whenever there is damage or risk of damage to an individual or the public (Mill 1977, 282). What Mill is trying to do is to find a balance between an individual's freedom to pursue a good life of their own definition and responsibilities of the individual towards society, which are seen as antagonists. Mill's definition of liberty is thus a version of negative freedom.

If we read more closely the definition given to sexual self-determination in the Finnish *travaux préparatoires*, the question arises whether we really can trace it back to Mill or whether we should look for other references in order to better understand its origin and problematics. As stated above, for Mill an individual is sovereign only

4 Oikeusministeriön lainvalmisteluosaston julkaisu 8/1993: Seksuaalirikokset. Rikoslakiprojektin ehdotus, 3-4; HE 6/1997 vp, 161.

when their actions concern solely themselves, and in all other cases society has the right to intervene if there is a risk of harming others. In the Finnish formulation, *the boundary of freedom is the violation of someone else's freedom,* not inflicting harm or risk of damage. Is there then a difference between violating someone else's freedom and causing harm? It does appear that there is, and it is important to highlight it. The different definitions regulate the relations between perpetrator, victim and state power differently and call for state intervention differently. If the harm principle is left out, the responsibility to set the boundaries between human beings shifts from the state to individuals. If the responsibility of the state is *only* to protect freedom, it is up to individuals to articulate violation of their freedom. What happens is that moral freedom is emphasized over protection of the vulnerable.

Since the Finnish definition of sexual self-determination as individual freedom seemed not to fully correspond to the British liberal-utilitarian line of thinking, I turned my gaze towards German philosophy, where one of the outstanding and highly influential thinkers in terms of legal philosophy can be found – namely, Immanuel Kant. Philosophically seen, the most equivalent version of freedom is provided by Kant in *The Metaphysics of Morals*:

> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity (Kant 2006, 393, translation Mary J. Gregor; in original Kant 1966, 345).

At first, the formulation seems not too different from that of Mill's. They both seem to agree that freedom is a sphere that is not created by the state but where the state lets the individual act without intervention (also known as *negative freedom*). This is what Kant refers to as 'originality' of freedom. But the difference between Kant and Mill becomes evident in how important the relationship between the state and the individual is in the analysis. For Kant, freedom is not solely freedom from state intervention but – as Panu Minkkinen formulates it – a 'transcendental idea' that explains human faculties such as morality and ethics (*Sittlichkeit*) (Minkkinen 2002, 43). Or as Luce Irigaray would put it, what Kant creates here is a 'sublime dynamic which predestines man to be (only) a moral being' (Irigaray 1987, 209). It is an economy of moral self-recognition that, according to Irigaray, has its cost, to which I shall return later.

In *The Groundwork of the Metaphysics of Morals* Kant elaborates further how freedom is linked to will, reason and morality. He comes to the conclusion that freedom is a part of the will, and will belongs to all reasonable beings (Kant 1966, 82-83). Thus, it would not be meaningful to speak of freedom without first establishing the human being as a *rational and willing* being. Further, without a will that is autonomous, choosing according to reason and thus law-creatively, no morality would be possible (Kant 1966, 41). Through our free will we choose the 'good' that becomes our own law, and that which is recognized by the individual as their own law has the potential to become state law. State law cannot pre-exist individual

morality.[5] Only through our freedom that is bound by the categorical imperative do we develop the capability to make laws that have the ability to be binding for others (Kant 1966, 347). However, Irigaray suspects that the universality which the Kantian subject claims to recognize is only their own picture in the mirror.

Why is this idea of a Kantian moral subject so well-fitted to criminal law? Several reasons can be suggested for it. As Minkkinen explains, the transcendental idea of freedom shows that freedom and nature are not necessarily an unsolvable paradox. There is physical causality and there are natural laws, but also the possibility to act and choose freely. (Minkkinen 2002, 40-43.) Criminal responsibility assumes a subject who could have acted otherwise but chose to act against the law. In order to punish, the state must symbolically equip its citizens equally with reason, freedom and a will of their own. The Kantian subject has all these capabilities. The ability to be a moral being and recognize moral actions clearly does not include a natural causality to always act morally, which in turn explains the need for criminal law. The purpose of criminal law can be limited to punishing actual wrongdoers, and purely symbolic messages should be omitted (see Melander 2008, 364). Kantian morality also creates an idea of unity and universality. Thus reason, if listened to, leads to actions which claim universal acceptability and lay the ground for positive law. (Nousiainen 1997, 228-229.) For Irigaray, this is the old story of Adam and Eve retold: 'Since he freely consented to sin, it follows that he equally has the native capacity to rise up to the good (Irigaray 1987, 210).'

The problematics become evident when the other party to sexual intercourse is brought into the picture. In the Kantian formulation of morality there is only one party, the individual himself. This does not mean that Kant would completely forget others and one's responsibilities towards them but the other is reduced to a part of moral self-referentiality. The other is visible in the acknowledgement that each and every reasonable being has intrinsic value (*Zweck an sich selbst*) (Kant 1966, 59-60). But even in here, it is the individual that is in focus: only in morality that is based on freedom can this intrinsic value actualize (Kant 1966, 68-69). Acknowledging the intrinsic value of others could be seen as a way to reveal the intrinsic value of oneself. The dignity of humankind is in the simultaneous ability (or paradox) to be autonomous, that is law-creating, and yet bound by these laws (Kant 1966, 74) – a circular movement towards oneself.

What I am pointing out here is that freedom in this sense includes only one relation and it is the perpetrator's relation to themselves. Even though the Finnish *travaux préparatoires* seem to state that both the perpetrator and the victim have equal shares of self-determination that ought to be protected by law, is this type of understanding theoretically possible? If freedom is seen as a movement

5 Since Kant, the idea of maximal and equal freedom has been repeated by several thinkers, of which John Rawls and Jürgen Habermas would probably be the most widely read in Finnish legal scholarship. For Rawls e.g., the equal right to the most extensive basic liberty, compatible with a similar liberty for others, is the first principle of justice (Rawls 1988, 60). Even though he later admits that the worth of this liberty might not be the same for everyone because of their ability to use it, the liberty itself is still the same (Rawls 1988, 204).

towards universal moral law, how could conflicting interests or even difference be conceptualised? What Irigaray is stating in her essay on Kant, *Paradox a Priori*, is that this moral economy in its claim to sovereign discretion includes an inevitable forgetting of the original relation to nature (*materia*), suppressing the sensual and weakening of the imaginary, which in psychoanalytical terms is expressed as incest taboo:

> The principle 'noli tangere matrem' locates its economy of reason and desire in the categorical imperative. Fear and awe of an all-powerful nature forbid man to touch his/the mother and reward his courage in resisting her attractions by granting him the right to judge himself independent, while at the same time encouraging him to prepare himself to continue resisting dangers in the future by developing (his) culture. (Irigaray 1987, 210.)

Thus, for Irigaray this move towards sovereignty and culture (that in my opinion entails law), is a move away from the feminine (understood as matter, nature or maternal) and an obstacle for recognition of difference. According to her, 'the desire for reason to reunite the in-finite of the sensual world into one whole' (Irigaray 1987, 209) leads to imaginative blindness. As Rachel Jones notes, it is a self-constitutive move that is motivated by the threatening instability of nature/matter (Jones 2011, 123-124; Jones 2013, 274-276). This is very interesting to put into contrast with Drucilla Cornell's idea of the imaginary. For Cornell, Kant's definition of freedom is a foundation for individual pursuit of happiness (Cornell 1995, 11-12). Cornell sees no problem in adding her concept of the imaginary domain, which includes bodily integrity, as a prerequisite for this pursuit (Cornell 1995, 5). To be able to imagine oneself as a whole, it is essential 'that no one is forced to have another's imaginary imposed upon herself or himself in such a way as to rob him or her of respect for his or her sexuate being' (Cornell 1995, 8). The question that raises is whether Cornell's imaginary is truly inclusive of the bodily aspect or is the imaginary, the ability to recognize wholeness in oneself, inherently bound to the idea of the subject which Irigaray is trying to expose as suppressive.

The value of Irigaray lies exactly in her ability to problematize the very foundations of the production of universal truths. Like philosophy, legal science also has a tendency – or should we say, the task – to produce universal truths, which then become difficult to question. As Irigaray writes later on in *Speculum of the Other Woman* in an essay on Plato, reason, truth and law are inherently bound in the production of knowledge:

> For the optics of Truth in its credibility no doubt, its unconditional certainty, its passion for Reason, has veiled or else destroyed the gaze that remained mortal. With the result that it can no longer see anything of what had been before its conversion to the Father's Law. (Irigaray 1987, 362.)

As stated before, Irigaray is both philosopher and psychoanalyst, and *Speculum* is a work in which she constantly, be it Kant or Plato or other Western philosophers she

comments on, is demonstrating how philosophy is the discipline of the man striving to become the Father of the Oedipus complex through claiming to be the holder of the certainty of his knowledge. Especially, the mixing of truth and law in authority is a question of losing sight of the female other. As Irigaray writes on:

> Alone, then, in the closed circle of his 'soul', that theatre for the re-presentation of likeness, that vertigo of a god that recognizes nothing but himself now. (Ibid.)

The concept of soul brings us back to Irigaray's reading of Kant. In the creation of the moral being the soul is the solution to the disagreement between imagination and reason. But as Irigaray emphasizes, the soul cannot exist without culture and the abstraction of the sensible world (Irigaray 1987, 209). As Margaret Whitford puts it, Irigaray's reading of Kant's philosophy involves a 'ruthless refusal to recognize its debt to the sensible, by seizing the imaginary (which is bodily in form) and reallocating it to the intelligible, the understanding' (Whitford 1991, 157). The self-referentiality of the Kantian moral subject is, in my reading, the Irigarayan 'closed circle of his soul' that sees and hears no one else any more, that has abstracted everything into his own reason. The subject that believes and desires to be autonomous in the sense of law-making is the one losing sight. As Whitford reads the desire of truth, there is also a question of exchange that would not be possible without a standard against which everything else can be measured (Whitford 1991, 187).

The desire for universal truth has its counterpart in legal philosophy as the desire for justice and understanding what justice is (see Hirvonen 2000, 22). The subject who is all about reason, is in their hubris mixing what is and what should be (*Sein und Sollen*) the universal (law) and the singular (event) – a distinction that should be the very foundation of law. The (moral) law imposed by the subject becomes the truth. In this circular economy of the truth as the Greek *aletheia*, nothing else but sameness is revealed:

> The economy of this optical jiggery-pokery now demands that the aletheia be named. We will have to wait only for the next trick of deduction, or the next paragraph. But this particular paragraph is really worth its weight in gold, for it under-lies the whole Socratic dialectic: nothing can be named as 'beings' except those same things which all the same men see in the same way in a setup that does not allow them to see other things and which they will designate by the same names, on the basis of the conversation between them. Whichever way up you turn these premises, you always come back to *sameness.* (Irigaray 1987, 263).

Irigaray's understanding of female sexuality, as seen in the metaphors she uses, is also profoundly illuminating of the blindness described above. The concept of sexual self-determination that creates two distinct fields of freedom and a clear border between them leaves out the two different *bodies* meeting and intertwining in this encounter, and especially that of the female. Irigaray's description of female sexuality as plurality highlights the phallocentric truth of the rape law. In her well-

known essay *This Sex Which Is Not One* she writes:

> But *woman has sex organs more or less everywhere*. She finds pleasure almost anywhere. Even if we refrain from invoking the hystericization of her entire body, the geography of her pleasure is far more diversified, more multiple in its differences, more complex, more subtle, than is commonly imagined – in an imaginary rather too narrowly focused on sameness. (Irigaray 1985, 28.)

Regardless of whether we try to pin down a universal definition of sexual self-determination, sexual integrity or female sexuality, the problem arises, as I read Irigaray, in this gesture of universal fixing and quest for unity as one truth. But in law, would it be possible *not* to have a law that claims universality? Is it not what we are aiming at with all laws and their application? That they are binding to all and applied equally? Would it be possible to reason otherwise, to do law otherwise? Is there a possibility of self-referential moral contemplation that would not be listening to one's own justice but to justice that is communicated by the Other?[6] For Irigaray that would mean not to go out from our own needs but from love towards the other who is not me and never will be mine (Irigaray 1996). And this is what raises the question and need for a new ethics of sexual self-determination.

3. Redefining sexual self-determination

In this section, I first want to present two recent cases of the Finnish Supreme Court to exemplify how the concept of sexual self-determination has lately been used in court practice and how the understanding of it has changed in the last twenty years. Historically, the criticism has been that women have had to put up a fight to be seen as deserving victims (see e.g. Utriainen 2010; Jokila 2010). Sexual self-determination has been something women needed to protect themselves to the utmost in order to receive protection from the state. Another point of feminist criticism has been that the point of view taken by the court has been that of the male perpetrator and what he has been allowed to subsume from the behaviour of the victim. My argument is that even though the emphasis on violence has diminished, self-determination remains something that is looked at from the outside (male) perspective. This is problematic since if we define sexual self-determination as freedom from outside definitions, how can we define the truth about the use of it instead of the person themselves? After discussing the cases, I will turn back to Irigaray to discuss the grounds for further redefinition of sexual self-determination.

Despite the emphasis on sexual self-determination discussed in the last chapter, in the Government Bill from 1997 rape is mainly seen as a violation of the *physical* integrity of the victim in the form of violently executed forced penetration. This violation of physical integrity is, according to the Bill, the most serious violation of

6 Susanna Lindroos-Hovinheimo has used Emmanuel Levinas' philosophy of the Other in her ethics of legal interpretation. In this article I am not able to discuss the differences and similarities of the Levinasian Other and feminist philosophy. For that discussion see e.g. Chanter 1995.

sexual self-determination one could possibly think of (HE 6/1997 vp, 174). It is self-evident that the use of force negates the ability of the victim to avail themselves of self-determination and free action. The only setting comparable to violence, recognized in the *travaux préparatoires*, was if the perpetrator had drugged the victim before the act or otherwise caused the victim to be in 'a helpless state'. One of the key themes of feminist critique in the 2000s was that there should be no difference in law regarding the reason for the helpless state. If the helpless state was caused by the victim herself e.g. as a result of excessive use of alcohol, the act used to qualify only as sexual abuse, which was not as severe a crime as rape. The fact that the rape law was changed in 2011 to accommodate cases of self-inhibited helplessness as well was to a large extent a result of a campaign for women's rights (see e.g. Amnesty International 2008).

But what is interesting, is that in the *travaux préparatoires* from 2011 the concept of sexual self-determination is made even more private. The Government Bill, which is a rather short document, first states that the starting point of the law on sexual offences is sexual self-determination, which needs to be protected by the state. But then the tone changes, and self-determination is 'privatized' and 'psychologized': it becomes a subjective feeling of the victim. It is not said that sexual self-determination is equally violated in all cases of abuse of a helpless state. Instead, the Government Bill states that the victim *might feel* that her self-determination is equally violated by non-consensual intercourse even when she has caused her original helpless state herself (HE 283/2010 vp, 7). From the point of view of state protection of sexual self-determination this seems quite ambiguous. Was the amendment a statement that there is something deserving of punishment here, or is it again left to the victim to state that their equal right to sexual self-determination was indeed violated in the particular case?

The Supreme Court has taken up this question in a recent precedent.[7] The background to the case is that a group of friends was spending time on a boat and during that time alcohol was consumed. In the course of the evening, the victim decided to go to bed and became unconscious partly because of the alcohol and partly because of tiredness. The perpetrator, who had made unsuccessful advances to the victim during the evening, penetrated her while she was asleep. Because she was unconscious there was no need for violence. He also stopped immediately when she woke up and told him to stop. The Court takes a clear stance, stating that the act severely violates the victim's right to sexual self-determination. She was clearly not able to make a choice herself since she was sleeping. *Sexual self-determination needs to be acted out and thus realized in sexual intercourse*. Even though violent coercion is mentioned in the first paragraph of the section on rape and abuse of a helpless state in the second paragraph, there are no grounds to think that abuse would be only 'second class rape', reasons the Court.

The core question in the case is whether the perpetrator should be sentenced to unconditional imprisonment. Indeed, that is the conclusion the Supreme

7 KKO:2018:91. The precedents are available in Finnish at: https://www.finlex.fi/fi/oikeus/kko/ (visited on 18th of October 2019).

Court reaches in light of the reasoning above. In this setting of the victim's full unconsciousness and total lack of any communication between the parties, the concept of sexual self-determination seems to work quite well and reflects equality and mutuality as a starting point. The result would probably not have been any different if sexual integrity had been the protectable good. The judgment also takes up issues, such as breaking the trust of the victim, that have been on the agenda of feminist legal scholarship for years (see Jokila 2010). To conclude, the precedent seems to mark the climax of a success story in terms of changing the basic understanding of rape. On the other hand, the concept of sexual self-determination is not challenged. The victim is clearly a person who is fully able to use her self-determination, but at the moment of the crime she is severely hindered from doing so because of her unconscious state. One could also ask: what was the importance of the fact that the victim had turned the perpetrator down during the evening, thus taking active steps as a holder of sexual self-determination and setting up her boundaries.

I take up a second case to further emphasize the meaning of setting the boundaries. The case is about sexual abuse of children and the restriction of criminal liability. In Finland, sexual intercourse with a child under 16 years is statutory rape (in legal terms, aggravated sexual abuse of a child). But according to the restriction, an act that *does not violate the sexual self-determination of the victim* and where there is no great difference in the mental and physical maturity of the parties will not be deemed sexual abuse of a child. In a recent Supreme Court precedent[8] a perpetrator aged 17 had sexual intercourse two to three times with two victims, one aged 14-15 and the other 15. The victims, two girls, had spent time with the perpetrator and his friends smoking cannabis and drinking alcohol. The perpetrator had offered them cannabis at least once, but none of the witnesses remembered clearly who from the party offered the girls alcohol. The sexual intercourse took place in the flat of the perpetrator or one of his friends. It was not a question of a relationship between any of the parties and the motivation of the girls to spend time with these older males seemed to be access to cannabis and alcohol. The sexual acts themselves were committed voluntarily, as stated by the Court. The main question in this case came to be whether the acts in these circumstances violated the sexual self-determination of the girls.

The Court stated that the circumstances described above did not automatically mean that the girls would not have been able to equally and independently use their sexual self-determination when making a choice whether or not to become involved in sexual intercourse with the perpetrator. One of the arguments was that it was not shown that the perpetrator would have offered the girls cannabis and alcohol in order to impair their self-determination, nor was it shown that sex was demanded as payment for these goods. The sexual self-determination of the girls had thus not been hindered in an unacceptable manner and the perpetrator was not guilty of a crime.[9]

8 KKO:2018:74.

9 The situation would have been different if the perpetrator had been older as in case KKO:2018:35 where a 23-year-old perpetrator was sentenced to 2 years imprisonment without parole for having sex with a drunken

The judgment was not unanimous, though. Two of the judges were of the opinion that it mattered not who offered the girls cannabis and alcohol. The meetings took place only because of the drugs offered to the girls. According to the two dissenting judges, in that kind of circumstances there could not have been equal or free choice.

What this case shows clearly is that the liberal idea of the 'equal and maximal amount of self-determination' does not work in circumstances where unequal power structures are at play. It is clear that the victims in this case were influenced by the circumstances and that their ability to use their self-determination was weakened. Despite the uneasiness this clearly caused in the judges' contemplation, the majority settled with the end result that the girls had 'enough' of their freedom left still to be considered self-determined. The question was clearly not whether all the persons involved were as autonomous and equally as free as the others. In comparison to the previous case, this precedent makes it evident just how difficult a concept sexual self-determination is, if it is made into an ability of the victim. If there is no ability at all to exercise one's sexual self-determination, as in the first of these cases,[10] then the concept works. However, as soon as the victim is able to some extent, the perpetrator's responsibility to respect the equal freedom of the other turns into the victim's responsibility to actively set boundaries for the perpetrator's free action.

Bringing ability into the discussion also turns the question of sexual self-determination into an inquiry as to the cognitive capacities of the victim(s). Even if the question risks being patronizing, can we assume that all the parties in these cases are Kantian reasonable beings striving towards their moral autonomy, or even pursuing their happiness provided by freedom as their 'most original right'? Whereas in the 1990's sexual self-determination was introduced to clear the law on sexual offences from all morals and emphasize the free will of the parties in determining their sexual behaviour, these cases show that the state cannot exclude itself from the deeply moral question as to how we relate to each other in sexual relations. Sexual intercourse is not a space that can be divided into two, where both parties would have their equal shares of freedom to do what they want. It is always a space where two persons not only coexist but communicate, relate, intertwine. The use of sexual freedom is in its core a deeply moral and ethical question. What is needed is also a much deeper understanding of the difference between sexual morals guiding 'acceptable sexual behaviour' and ethicality as a relation to or attitude towards other human beings.

This question brings us back to Luce Irigaray. In her later work *The Ethics of Sexual Difference* it becomes evident that her philosophical project is not about destroying the foundations of Western philosophy. She returns to classical continental philosophy with a very different approach, not with critique but with love. Her earlier works such as *Speculum* and *The Sex That Is Not One* demonstrate

13-year-old-girl at a home party. In that case sexual self-determination did not need to be discussed since the restrictive provision only applies to situations where there is no big difference between the ages of victim and perpetrator.

10 KKO:2018:91.

how the sexual difference is the forgotten question of philosophy, whereas in *The Ethics of Sexual Difference* she uses the same heritage to formulate a new ethics of sexual difference. What I am claiming is that Irigaray's ethics of sexual difference could also provide a basis for a different (legal) understanding of freedom, sexual autonomy and integrity. In Sara Heinämaa's reading of Irigaray's ethics of sexual difference, two concepts are emphasized over others – wonder and love (Heinämaa 2000). For Irigaray, love is an utterly political concept. It relates not only to sexuality but also to questions of uneven division of work, property and discourses (Irigaray 1993, 66-67). On the other hand, her new ethics mark the need for a new economy of desire changing the relations between human and god(s), human and human, human and the world, and man and woman (Irigaray 1993, 8). Bringing divinity and the transcendental into connection with the material, sensible, maternal and carnal, is a reaction to Western philosophy that has not acknowledged their meaning in the making of subjectivity (see Joy 2006, 40; Jones 2013, 94-95; Lehtinen 2014, 139).

I start with wonder. Heinämaa emphasizes that it is *Cartesian* wonder that Irigaray wants to return between the sexes. For Descartes, wonder is a sentiment that precedes all other sentiments and has no counterpart. Thus, wonder is beyond e.g. respect or generosity, joy or pleasure. Wonder is an interruption in both theoretical thinking and conventional perceiving. (Heinämaa 2000, 65.) This interruption is essential for the sexual difference and ethics to emerge (Irigaray 1993, 74). In order to wonder we need to stop measuring the other with our own values and goals (Heinämaa 2000, 65). As Irigaray herself writes, we need to resist what we consider comfortable or suitable for us. If we evaluate the other as suitable, we have already reduced them into ourselves. For Irigaray, approaching the other in questioning mode is a way to be and become. (Irigaray 1993, 74.) Thus, wonder can be seen as a space for freedom between the subject and the world, freedom *from* being the master of the world, objects and the other. Even desire is secondary to wonder (Irigaray 1993, 77), and love comes only after it: 'It is the passion of that which is already born and not yet re-enveloped in love (Irigaray 1993, 82)'. Intriguingly, what Irigaray does is that she turns the Cartesian idea of wonder as a reflex into a generative power that can free the Cartesian thinking subject from its desire for self-sufficiency (see Jones 2011, 115-117).

Both wonder and love are 'intermediate terrains' but in her reading of Diotima's speech in Plato's Symposium, Irigaray emphasizes love not only as a terrain between man and a woman but as a 'space-time of permanent *passage* between mortal and immortal', as demonic (Irigaray 1989, 39). Love is a way to knowledge, both practical and metaphysical, but as a mediator it should never be abolished in this knowledge (Irigaray 1989, 33). This is, though, exactly what happens when love is turned into a method of production during Diotima's speech. But, as Tina Chanter points out, Irigaray is very much aware that Diotima is not speaking directly. Her words are reported by Plato, who might not have understood or remembered them correctly. (Chanter 1995, 162.) In the course of the speech, the wisdom of love is reduced to governance, rationality and teleology of will (Irigaray 1993, 29). For Irigaray, this is

a 'miscarriage', but is it the fault of Diotima or the 'midwife' Socrates, who is the one speaking? Is this not again an example of women not speaking, not having a voice (see, Braidotti 1991, 256)?

Quoting Tina Chanter, 'the problem of philosophy only being able to talk in the name of universality is a problem that Irigaray addresses in several contexts' For Irigaray, women are different in a way that will have positive political significance. (Chanter 1995, 167-168). This is what brings together her earlier works, critique, and later works, offering solutions such as wonder and love. According to Rosi Braidotti, 'Irigaray's work can be read as a "positive" reaction to the crisis of modernity', thus maintaining the link between rationality and the divine (Braidotti 1991, 248). Her ethics of sexual difference demands the recognition of the equal *worth* of the two sexes, a redefinition of heterosexual ethics on the symbolic plane (Braidotti 1991, 261). In the context of sexuality, Irigaray's idea of love could mean an ethics of not consuming the other for one's own needs (be it symbolical, theoretical or factual), and secondly, production of knowledge that would not be satisfied in being mere mortal wisdom of governance: *raison d'état* (Irigaray 1993, 30).

The question is, of course, how could these ideas of wonder and love enter the legal field that seems to be quite closed, almost self-evidently reflecting the masculine *logos*? It is not entirely clear, either, how Irigaray tackles the fact that psychoanalysis itself is committed to a theory of a symbolic order that is based on suppressing the feminine. In her article *The Question of the Subject and The Matter of Violence*, philosopher Debra Bergoffen discusses ‑ in the light of psychoanalytic theory ‑ why women are seen as legitimate targets of heterosexual violence. She gives a reading of the symbolic order through Sigmund Freud's *Totem and Taboo*. The social contract as described by Freud is based on the murder of the tyrant father and the following 'solidarity' of the brothers, who limit their autonomy in the fear of one of them becoming a new tyrant. The contract based on the politics of fraternity leaves women explicitly out of its sphere. The lack of freedom of these men in the public sphere is compensated by their absolute freedom in the private sphere. As Bergoffen writes, domestic and wartime violence against women are real-life examples of how women's bodies belong to men. She credits Freud for his analysis of how the social contract is very far from being a rational arrangement, leading to women's alienation from their sexual pleasure (Bergoffen 2017, 205-208). On the other hand, Freud's contract theory is very similar to Rousseau, who also denied the authenticity of women's expression of will (Nousiainen 1990, 20).

According to Bergoffen, for Irigaray 'the hope of the feminist project lies in the vision of the emergence of a symbolic order in which the death drives will not be fed by women's blood' and 'a radically different history in which rape […] would be seen not only as a foreclosure of the two lips of women's desire, but an assault on the possibility of a democratic politics' (Bergoffen 2017, 214). In the Irigarayan project, the way to do feminist critique is mimicry, *mimesis* as she calls it. In *Speculum of the Other Woman* Irigaray introduces the concept of 'good' mimesis as an attempt to join the Father (God). Anyone who speaks 'in truth' becomes a 'subject' of his

logos alone. (Irigaray 1987, 337.) As Rosi Braidotti points out, Irigarayan *mimesis* as a feminist method is on the contrary not striving for any rightfulness or unity. It is essentially anti-Hegelian, opposing the synthesis dissolving differences. The metaphor of lips kissing each other, caressing each other, breaks the union of desire and death (Braidotti 1991, 258). It is a play with the philosophical tradition that aims to overturn the goal of the philosophical thinking process. For Braidotti, the Irigarayan method of practicing difference is a political act. The woman who is *not yet,* will gain her self-determination by her *mimesis* (Braidotti 1991, 259). She will not be satisfied in her 'sovereignty' that is given her only by excluding the feminine *jouissance* from the political.[11]

In conclusion, mimesis brings us back to the question of subjectification. On the individual (psychoanalytical) and political level, there seems to be space for re-negotiating the terms of being. In Irigaray's terms the space depends on the mimetic positions which a woman can take in order to question old – and create new – truths without losing herself in the process (Lehtinen 2014, 147). In his theory of legal practice, Samuli Hurri argues that court cases offer a possibility to resist domination and normalisation in return for legal subjectification (Hurri 2011, 359). I am sceptical though, to what extent this could be done in the frame of Finnish criminal law practice with dogmas such as literal interpretation of the law (the legality principle) and quite strong interpretative value given to *travaux préparatoires* in resolving any ambivalence. The term *secondary victimization* used in victimology to describe how (rape) victims experience the legal process in which they are not heard, met or believed, describes the limits of any re-negotiation of the understanding of sexual self-determination during the investigation of the crime or the criminal process. Thus, in order to meet the standards of legality and the realities of praxis, discussion on sexual self-determination and the legal subject needs to take place in the law-making process. Since the Finnish government has announced the need to amend the Finnish rape law to be based on consent, the time for that discussion is now.

4. Epilogue

> This wondrous, non-reductive encounter with difference, which does not assimilate to an existing frame of reference, becomes for Irigaray the prototype for all sexual relationships (Joy 2006, 48).

The aim of my article has been to challenge the current understandings of what the law on sexual offences could, and should, protect. At the beginning of the article I took up the question posed by Nicola Lacey, namely, why does criminal law say so little about what is valuable in sexual relationships? Following the path opened by Lacey, I have evoked Luce Irigaray's philosophy of sexual difference in order to ask the question

11 Quite intriguingly, legal philosopher Panu Minkkinen offers us a completely different reading of *Totem and Taboo*, and the Freudian-Lacanian concept of feminine *jouissance*. Whereas men are left prisoners of their fear and desire, never reaching full autonomy, women in the realm of their jouissance are the only true sovereigns (Minkkinen 2009).

whether criminal law could protect love and wonder as a new ethical orientation in all sexual encounters. I have also analysed how our ideas on subjectivity affect our possibilities to grasp the meanings of human relations, the state, morals and laws. In doing so, my aim has been to exemplify how love and wonder as an ethical gesture intertwine with challenging ontological and epistemological presumptions. The way Luce Irigaray is able to move on all of these three philosophical domains, with her concepts of difference, wonder and love, is both remarkable and inspirational.

Depending on the author and perhaps the time of reading, either the ontological or epistemological dimensions of the Irigarayan project have been emphasized. For Irigaray, sexual difference, a difference that is ontologically inassimilable, is not only material but potentially transcendental. If we let sensations guide us, as Rachel Jones notes, they can open us up beyond ourselves, into a transcendence that is both sensible and spiritual (Jones 2013, 296). Wonder and love, as well as desire, are mediatory in many senses: between man and woman, between the subject and the world, and between the carnal and the divine (Joy 2006, 48). In Joy's reading, 'the two' as a basis for the new ontology and new ethics is 'the sole agent of disruption of the monopoly of the one' (Joy 2006, 148). The more epistemologically oriented readings emphasize the 'other' side of the two, the feminine, and its possibilities to think, speak and write. As Margaret Whitford puts it, 'the only way in which the status of women could be fundamentally altered is by the creation of a powerful female symbolic to represent the other term of sexual difference against the omnipresent effects of the male imaginary' (Whitford 1991, 92). In doing so, love should not be limited to how we relate to the sexually other but expanded to production of knowledge. In Virpi Lehtinen's words, 'loving wisdom means striving for wisdom in all of these sensual-transcendental relations', meaning sensible relations to ourselves, to the (sexually) other, and to the world (Lehtinen 2014, 208). I would like to suggest that this call on philosophers as lovers of wisdom could be directed at legal scholars as well.

As a legal scholar, I have to admit that using the word 'love' in the context of law is far from easy. This might have to do with the Cartesian idea of sensations as something that cannot be trusted and need to be 'domesticated' (Joy 2006, 49–50), or with the Kantian need to go beyond what we can sense by our ability to reason morally (Jones 2013, 282-283). In these traditions, the sensible has rather been a problem than a solution in the quest for a 'good life'. It belongs to the infinite maternal matter that needs to be forgotten in the process of becoming an autonomous, self-contained subject (Jones 2013, 293). This morally self-contained subject is such a prevalent figure that it is hard to see other ways to build subjectivities. As Morny Joy notes, Irigaray has also been considered utopian because of her ethics of sexual difference as a 'new form of relations between man and woman' based on mutual recognition that 'will foster the emergence of a culture where love can flourish' (Joy 2006, 1). Irigaray herself denies this label, stating that she considers herself rather a 'political militant for the impossible' (Irigaray 1996, 10).

To defend the impossible in the discipline of legal philosophy is made difficult by both of the faculties, law and philosophy. As another French philosopher, Michèle

Le Dœuff, writes, there is an in-built pressure in philosophical practice to 'remain always on the outside and to challenge from any point of view anything that states a content', a strand she calls 'a dogmatism of the impasse, doubt or void' (*aporia*) (Le Dœuff 1991, 18). Le Dœuff continues that this type of philosophical negativity is 'harder to root out than dogmatic conviction'. As a legal scholar I might disagree with the latter statement. Our dogmatic convictions on criminal law are the boundaries to what we as legal scholars consider possible (or impossible) to implement. To challenge these convictions (both dogmatic and aporetic), one could involve Irigaray's mimetic method. What would then be the mimetic positions available? The feminist point of view is typically that of the victim's, but at least Virpi Lehtinen is sceptical as to whether 'the desired woman' could ever occupy the position of speaking and writing, for she has no authority (Lehtinen 2014, 140). The more powerful position would be 'the teacher of love' that occurs in Irigaray's philosophy in the figure of the goddess Diotima. But, as Irigaray herself emphasizes, even Diotima was talking from absence in Plato's *Symposium* (Lehtinen 2014, 148). And this is what might happen to a feminist legal scholar speaking of love and wonder, as well. She might not be invited to speak before the 'ideal audience' consisting of her fellow scholars.[12] And even if she was, could she ever persuade a majority of its 'rational members' to let love enter the legal discourse?

Why, then, should love and wonder enter legal discourse? Why are we in need of new concepts? Are we not well served with the concept of sexual self-determination? And if not, would it not suffice to replace or supplement it with sexual integrity? In this article, my aim has firstly been to show that sexual self-determination as a basis for Finnish rape law is an empty shell that can be used for any type of amendment. Secondly, in practice it has been used against women as victims of sexual violence. In court, protecting sexual self-determination has turned into a question, namely, what the victim could or should have done to resist. In jurisdictions in which rape law is based on consent, the prerequisite for mutual voluntariness turns easily into the question of whether and how the victim has expressed her will.[13] Even Irigaray herself seems to fall into this trap in her later works when she demands civil rights for women. Each woman 'receives the right to be a woman' by birth, and she has the duty to 'respect, cultivate, and historically develop this right' (Irigaray 1996, 51).

With statements of this kind, Irigaray contributes herself to the controversy on her claimed essentialism. I, too, have a problem with the idea of the right to be a woman and a duty to cultivate this womanhood protected by the state. My understanding of what it means to be a woman is about recognition: either one belongs to the same sex as the mother, or one does not. This recognition features a

12 'The ideal audience' refers to Aulis Aarnio's theory of legal justification according to which 'Legal dogmatics ought to attempt to reach such legal interpretations that could secure the support of the majority in a rationally reasoning legal community' (Aarnio 1987, 227-228).

13 This can be seen even in Sweden, which implemented a consent-based rape law in 2018. See, Högsta Domstolen, B 1200-19, 11.7.2019. Available on <http://www.hogstadomstolen.se/Avgoranden/Vagledande-domar-och-beslut-prejudikat/2019/> (visited on 9th of August 2019); Leskinen 2019.

corporeal aspect: the capacity to give birth. (Jones 2013, 275-276.) Thus, female sex brings with it a different type of (inter)subjectivity characterized as lack of spatial distance to the other. As Sara Heinämaa points out, it can best be described in the self-other-relationship of the unborn child and its mother (Heinämaa 2007, 252-256). Still, as Virpi Lehtinen emphasizes, for Irigaray 'woman, both as a potential mother and as a beloved woman in the sexual act, represents the place for man from which to desire and to which to desire', both concretely and symbolically (Lehtinen 2014, 92). This is what I see as the core of the Irigarayan, psychoanalytically inspired, idea of female subjectification. Becoming autonomous happens in the recognition of the fact that being a woman means potentially becoming a place for others. If sexual integrity is seen as wholeness, it is always already being shared. If sexual self-determination is seen as setting up your boundaries, those boundaries are always already shifting. And, according to Debra Bergoffen, this means that women are not equal with men: they are trapped in a social contract that involves a risk of becoming a victim of sexual violence (Bergoffen 2017).

Inspired by Irigaray's notions of sexual difference, wonder and love, I will conclude this article with an outline of a three A's approach for further development of the law on sexual violence. The three points relate to the ontological, epistemological and ethical dimensions of Irigaray's philosophy. I have named them prohibitions of (1) assimilation, (2) assumption, and (3) appropriation. The first – prohibition of assimilation – should serve as a basis for law on sexual offences. Even though Chapter 20 on Sexual Offences in the Finnish Criminal Code has been formulated gender-neutrally since the 1998 amendment, sexual crimes are in reality gendered (Niemi-Kiesiläinen 1998). The prohibition of assimilation would mean that even though the rules remained universal, the phenomena are not, a factor that needs to be taken into account when assessing the need for further amendments.

The prohibition of assimilation intertwines with the prohibition of assumption. It is directed not only at the parties to a sexual encounter, it is an ethical claim directed at legislator and judiciary, as well. The behaviour of a woman is not a reason to assume anything about the behaviour of another woman. The previous behaviour of a woman is not a reason to assume anything about her future behaviour. Wonder as a basis of a new ethics between the sexes means that no assumptions can be made as to the willingness of a particular woman to participate in a sexual encounter. In relation to desire, wonder seems to form the total opposite of Kantian moral law. Based on what I desire, no assumption can be made on what the other desires. Thus, moral action based on reason alone does not suffice. We need to encounter and sense the other according to Irigaray's imperative: 'always as if for the first time' (Irigaray 1991, 171).

Thirdly, we return to love. In the tradition of Western philosophy, carnal love has been seen as a failure of subjectivity (Lehtinen 2014, 139). Therefore, in Irigaray's philosophy, love becomes a bridge between the sensible and the transcendental. Love is thus a generative power constitutive of subjectivity, seen as a way leading to personal integrity and genuineness in 'divinity' (Joy 2011, 230). The sensible takes its

form in the gesture of the caress of two lips, whereas the transcendental is best grasped in the notion of fecundity without production, preached by Diotima (Lehtinen, 109-110 and 155-156). If, in the ideal sexual encounter, the other is not only left the other but constituted as the other, the least it demands in the 'real world' is reciprocity and respect for the other (see Nieminen 2019, 411). This respect should not only cover what the other wants or has expressed as his or her will but the entire being of the other and their potentiality as a being. This – as I claim – could be expressed as a prohibition of appropriation. No one should be turned into a commodity only serving the (sexual) needs of the other.

An example of legislation that moves in this direction can be found in Sweden, which in July 2018 implemented a new law on sexual offences based on mutual voluntariness.[14] This is not to say that the new law is perfect, but it provides a good starting point for a similar amendment in Finland. One of the greatest challenges is how to define the responsibilities of the parties. Based on what I have said above about wonder as a prohibition of assumption, it follows that there should be a responsibility to know what the other desires rather than a responsibility to express what one oneself desires. We should also consider criminalizing negligent rape, which would apply if the perpetrator makes no effort to know their counterpart. In addition, mutual voluntariness should be understood as a process that lasts during the entire sexual encounter. Consent should not be conceptualised as an act of reason prior to the sexual encounter but as an immanent part of the sexual act. These might become steps towards a law that would protect love as a principle of not claiming ownership over the other, that at least for Irigaray is not a utopia but 'the only possibility of a future' (Irigaray 1996, 10).

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14 For further analysis in Finnish see Leskinen 2019.

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Dao: Cosmological Thinking and Social Practice

Matti Nojonen*

Abstract

This article analyses the Chinese concept of dao (道) in the classical era of Chinese philosophy. The concept had a fundamental role in shaping all Chinese schools of thought. Dao is not only the key to Chinese cosmological and transcendental thinking, but moreover occupies a central role in how Chinese philosophers, legalist scholars and strategists understood knowledge and coordinated and regulated social and political behaviour. This article illustrates how the concept provides a specific, dynamic and practice-related approach to politics, governance and strategic thinking, fusing conceptions of knowledge and practice into one notion – dao.

1. Introduction

This exploratory article analyses the Chinese concept of *dao* (道). *Dao* is the most central and widely shared concepts of various Chinese schools of thought. It possesses the same philosophical status as 'truth', 'reality' and 'knowledge' in Western philosophy. Instead of these Western concepts, it is the notion *dao* that is foundational in the Chinese world of philosophy. Therefore, *dao* is a key to Chinese thinking, although not an easy one to understand. The polymorphic connotations and functions of *dao* both fascinate and trouble Western educated minds. *Dao* extends its central influence over a whole variety of modes of cosmological thinking and other philosophical discourses in the Chinese tradition. However, more importantly, this article will illustrate how the concept forms the key element in societal, political and strategic practices of agents in China – a process in which the concept conventionally translated as 'Way' can take the forms of an abstract noun or verb becoming a political practice aiming at generating societal efficacy.

Adopting a traditional Sinological approach combining philological and

* Professor of Chinese Society and Culture, University of Lapland.

philosophical explanations, this article shows how Chinese classical era schools of thought utilised and understood the concept of *dao*. This approach is necessary as the traditional Chinese thought understood the role and function of concepts, and more broadly even language on the whole, differently from that of Western thought. Namely, all classical era (and a great majority of later) Chinese philosophers viewed language as an important way to coordinate and regulate social and political behaviour, rather than developing a classical Western kind of theoretical approach to understanding the function of language as depicting facts and grasping the truth or reality. In this sense, an endogenous understanding of the role of language and particularly the function of concepts in early Chinese schools of thought can bring some food for thought to our endeavour to understand the exciting relationship between knowledge and power, or the politics of knowledge.

This article analyses sources that belong to the classical era of Chinese philosophy, also known as the Hundred Schools of Thought era (from the 6th century to 221 B.C.), that witnessed the birth and flourishing of dozens of schools of thought. More specifically, the focus is on the main contending schools of thought: Confucianism, Legalism, Mohism, Daoism, and the strategy theorist Sunzi. *Confucianism* is humanistic state philosophy that emphasises intra-family relations and the relationship between the subject and the ruler. Confucianism underscores the importance of self-cultivation that should materialise in certain fundamental values, such as filial piety, propriety, humanness, loyalty, benevolence, and righteousness. The practice of these values formed the foundation of functioning social relations and governance. *Legalism* believed that humans are inherently selfish and therefore did not believe that a society could be governed by benevolent Confucian values, but rather an efficient governance system that relies on strict laws and harsh punishments. *Mohism* is famous for its advocacy of unified ethical and political order based on impartial concern for all, also known as 'universal love', and opposition to military aggression. *Daoism* can be best described as an umbrella concept covering a whole range of esoteric, metaphysical, mystic, religious, political, and naturally philosophical paths that all build their understanding of the world and cosmos on mutually opposing and generative dialectic forces of *yin* and *yang*. Lastly, Sunzi's *Art of War* laid the foundation of Chinese strategic thinking that emphasises the usage of indirect, surprising manoeuvres that are based on dialectic understanding of the strategic configurations. It is notable that the concept of *dao* and its underlying philosophy were shared by all of these schools of thought.

The discussion will proceed as follows: The first section will consider the etymology of the notion *dao* and explicate its specificity philologically. In the second, *dao* will be discussed as the fundamental force of Chinese cosmological thinking. The third section will elaborate how various schools of thought understood the *dao* of heaven (*tiandao*) as a basis of the divine and/or force of nature. The fourth part will elucidate how various schools of thought comprehended and utilised the *dao* of human beings (*rendao*) as a source of societal efficacy. The final part will contain some concluding remarks.

2. Etymological roots

A good starting point is *dao* as a word in the Chinese language. The conventional translations of *dao* usually interpret the concept as a concrete or abstract 'path', 'road' or 'way'. However, the concept has a number of other connotations as well. It can for example have the meaning of 'method', 'skill', 'principle, or 'to speak'. Naturally, it can refer to the philosophical school of Daoism. Furthermore, the classical Chinese language does not differentiate between singular and plural. Consequently, when the textual context permits, the concept can refer to 'one particular Way' or 'several Ways', leaving it open for interpretation how many *dao*s the text is referring to.

Etymologically, the written character of *dao* (道) is also interesting. It consists of pictograms of a head (首) on a foot (辶). Before the written character was standardised into its current form more than 2 500 years ago, the character appeared in earlier bronze inscriptions, showing a head covered by cloth while the person was traversing. This early image of the *dao* character reminds us that the path should be advanced with caution as the head is covered by a cloth. (Wang 2012, 44.)

Figure 1. Early bronze inscription of the character *dao*

This earliest form of the character *dao* provides an important etymological explanation and imaginative illustration of the basis of the different connotations of the concept. The pictogram encourages us to expand our conventional understanding of *dao* as a noun, as 'a path', or as a more abstract 'the Way'. The pictogram suggests that *dao* is, at an abstract level, a process, an undertaking of 'traversing a chosen path'. This idea integrates *dao* both as a noun and as a verb, which was the commonly shared pattern of the usage of concepts in traditional China. Concepts could be at the same time nouns and verbs, a tradition that stands in stark contrast with Western philosophical tradition, where concepts are always nouns (Li 1994, 94-97).

All in all, the goal or guidance of the traversing man stands in the background of *dao*. It is noteworthy, however, that the goal or guidance is not received from spirits or deities, nor are the goals and means of the undertaking to be determined 'rationally', as Westerners would have it, say, through careful logical-deductive processes. Rather, in the *Dao*ist philosophy the Way of *dao*, traversing or practising *dao* should be seen as an autogenerative process. In Chinese, this is known as 'self-so-ing' (*ziran*,自然), as an internalised mode of spontaneity that stems from and binds the agent to the context of specific configuration that is particular and universal at the same time. As a form of internalised being and doing, it spins together two

important things: First, the vital energy (*qi*, 气) that is inherent in all things and in all forms of life; and second, the dynamism of the *yin* and *yang* (阴阳), that is, of the two correlatives that oppose and yet mutually complement each other, as elements generating a harmonious process of perpetual transformation. This transformation is not externally generated, but resides within the process itself. (Coutinho 2014, Moeller 2006.)

3. Dao as force of cosmology

For the Chinese, forces of *dao* were present everywhere, which brings us to the cosmological dimension of the notion. Early Daoist philosophers believed that *dao* was the source of everything, including the cosmos, heaven, earth, and everything in between. Chinese philosophers were not interested in pondering over ontological questions or divulging the 'reality' behind the appearance. Instead, they strove to understand how the world hangs together.[1]

Laozi (ca 6th century B.C.) illustrates this central approach in *Daodejing* as follows:

> *Dao* gives birth to one,
> One to two,
> Two to three,
> Three to myriad things.
> Myriad things shoulder yin (阴) and embrace yang (阳),
> Infusing with the vital energy (qi, 气) in achieving harmony (he, 和).[2]

Consequently, the questions of what gives birth to *dao* or what structure resides behind that concept remained irrelevant for the Chinese thinkers. Instead, they simply took the presence of *dao* as granted.

In the Chinese mindset, *dao* is a cosmic force providing the existence of everything. It is a constantly moving process that takes place in and between all things and all forms of life. It generates both the tangible and the metaphysical world. It contains the vital energy *qi* (present even in dead objects such as stones). Yet it cannot be named in the sense that we would be able to gain control over it. In a way, the early understanding of *dao* resembles the way in which the current astrophysics focuses on studying how energy and material behaved after the big-bang. Accordingly, a process exists that is still shaping our universe and life, and one studies that process instead of pondering over what 'the reality' or 'ontological structures' were before the big bang, as we have no theoretical tools to divulge these properties.

In this sense, Laozi's *Daodejing* crystallises the Chinese observation on how *dao* not only produces all things of the universe, but eventually illustrates how the process of *dao,* together with other generative and fundamental forces of cosmos

1 See Ames and Hall 1995, 195-197; Qian 2011, 17.
2 Laozi: *Daodejing*. Translation by the author.

and life, creates a balanced and natural ongoing process of being – harmony. This metaphysical process definition of *dao* guided the Chinese to ask questions such as 'how things work', 'how to deal with this or that', or when applied to society, 'how to be efficient', instead of asking 'what is the (ontological) structure behind the appearance', 'what structures produce the appearances', or 'why things work', as accustomed in the Western tradition (Qian 2011, 110-112).

Importantly, the above quotation from *Daodejing* not only clarifies the fundamental cosmological thinking of Chinese philosophers, but also provides, on the one hand, the framework for the Chinese-style transcendental discussions, and on the other hand, the grounding inspiration for exploring the ways of generating societal efficacy, that is by good governance and how to act strategically in society and politics. Consequently, in the so-called Spring and Autumn Period (771-476 BC), this processual thinking of *dao* grew out of its cosmological context, became more systematic and gained the dominant role in the overall Chinese mindset. Two different spheres of discussions emerged: '*dao* of human beings' (*rendao*, 人道) and '*dao* of heaven' (*tiandao*, 天道).

4. Dao of heaven

The first of these discussions is the *dao* of 'heaven', the so called *tiandao*. Heaven is a semantically complex and philosophically important concept in the Chinese worldview. It can refer to 'sky', 'nature' or 'cosmos', but it also has a strong religious connotation of 'Heaven as a supreme deity' having a will of its own. The written character of heaven (*tian*, 天) most likely derives from a pictogram of a 'big man', and this might explain why the 'human element' became part of the Chinese conception of heaven as God. Nevertheless, it is notable that *tian* as 'a sky' and as a 'transcendent God' was never so much understood as polysemy in the Chinese tradition as it would be in the Judeo-Christian world, maybe because China lacks a human kind of anthropomorphic God. (Fung 1994, 30-31; Coutinho 2014.)

While *tiandao* may be considered to some degree to be reminiscent of our conception of a god and it certainly gives guidance to human life, the genesis of life in the Chinese tradition is not a creation carried out by an all-powerful God who would moreover possess the monopoly over knowledge and the ultimate reason. Instead of an omnipresent God observing, guiding, testing, forgiving, and judging people, in the Chinese tradition it was the Goddess Nüwa who created life: the nobility out of yellow earth and clay and the vast masses of people out of darker clay. Importantly, after this life-giving act Nüwa disappears, without determining the criteria for a morally good man or providing the fundamental commandments of socially acceptable conduct. Instead of Nüwa, the notion of *tiandao*, the way of heaven, took prominence on the ethical stage.

The concept *tian* as 'nature', in turn, refers to the empirically observable natural world: sky, cosmos, nature, and all phenomena of nature, such as the cycles of seasons and of day and night. In this sense, the Way of Heaven (*tiandao*) is responsible for the cyclic processes of life, seasons, blooming and withering of life, shifts between cold

and warm, aridness and rain. *Tiandao* conducts all forces of nature that constantly shift beneath the sky or even above the sky in the constellations of stars (Coutinho 2014, 27-32). In *Art of War*, Sunzi elaborates on the properties of *tian* as an element of successful strategy: '*Tian* is the changes of weather, winter and summer and constellations of seasons' (Li 2012, 62).

Different schools of thought had different understandings of the cosmic and natural world. For the Daoist like Laozi, *dao* was generated before heaven or earth, and it was the ultimate source of life and energy that was 'turning around and round without tiring; it may be the mother of all under heaven',[3] which points out that *dao* was probably the source of everything. In turn, the early Confucians and the Legalist scholars thought the opposite – *dao* was the source of material and metaphysical world, but it did not produce the heaven as such. Furthermore, Daoists saw nature as a wild, but not hostile environment, having its own natural regularities. For the Confucian scholar Xunzi (c. 310-235 B.C.), in turn, nature was an untamed surrounding that had to be harnessed for the benefit of social prosperity. The military strategy school adopted both the Daoist and Xunzi's ideas; one should, on the one hand, adapt to the regularities of nature, and on the other hand, try to turn the forces of nature into one's own benefit. (Graham 2003.)

Furthermore, the concept of *tian* had a religious function in the Chinese mindset. For the Chinese, however, the divinity of the heaven (*tian*) was not so much a source of religious illumination, but rather a force that was in constant motion. Having the heaven following its way (*tiandao*), this force also affected human behaviour. It was common in ancient China that people believed that heaven had a divine will that determined the fate of peace, war and natural disasters. Mozi (470-391 B.C.), the founding father of Mohism that was a competitor of Confucianism, believed strongly that the heaven had a will. Mozi wrote:

> People who conform to the will of heaven (*tian*), love without discrimination, help others, will certainly receive rewards; those who counter the will of heaven by discriminating other people, being inauspicious and by doing wrong to others, will certainly be punished.[4]

Even the early grounding fathers of Confucian philosophy, like Confucius (551-479 B.C.) and Mencius (372-289 B.C.), believed that heaven was the supreme lord. Confucius states:

> If heaven (*tian*) let this culture where I live to be perished, it would not have given this culture to a person who will eventually die like me. Since heaven has not demolished this culture, what can the people of Kuang do to me?[5]

3 Laozi: *Daodejing*. Translation by the author.
4 *Mozi*, at Will of Heaven. Translation by the author.
5 Confucius: *Analects*, at Zi Han. Translation by the author.

5. Dao of human beings, source of societal efficacy

The second discussion turns to the *dao* of human beings, *rendao*. With the Chinese at the time of the Hundred Schools, the concept of *rendao* became the inspirational source for generating societal efficacy. The conception of *dao* is perhaps the most important among the concepts in Chinese philosophy that have shaped the Chinese societal world view and political practices for the last two millennia. The concept provides a specific, dynamic and practice-related approach to politics, governance and strategic behaviour. This approach was shared by all schools of philosophy, but also by political actors and strategists in their endeavours to create societal efficacy.

The original etymological meaning of the written character of *dao*, 'traversing a path with head covered with cloth', provides us with an important image that illustrates the strategic-societal connotation of *dao*. It is not about blind and aimless wandering, but rather about a process where the traversing man should have internalised an understanding of the path ahead. It is about the grasp of the dialectic between the various *yin* and *yang* properties – more precisely, between their correlatives as governing dispositions – that condition the chosen path and the direction of one's undertaking. This understanding was not received from gods or spirits, but stemmed from actual circumstances and concrete practices. (Wang 2012, 44-45.)

Despite the fact that heaven had an important transcendent role in the early Chinese mindset, sages including Confucius himself did not lay their own or their society's fate in the merciful hands of the heaven, but rather emphasised the responsibility of men to rely on their own capacities. This is the core of the famous '*dao* of human beings' (*rendao*). As noted in Confucius's *Analects*, 'When Master talks of human nature, talk on the Way of Heaven (*tiandao*) cannot be heard'.[6] Human nature and the fate of society was based on the character of individuals: 'Let the will be on the Way (*dao*), rely in your conduct on virtue, trust in benevolence and find relaxation in the arts'.[7] One of the founding fathers of Confucianism, Xunzi, took the argument even further by stating that 'The Way is not the way of heaven nor the way of earth, but rather the way of human beings'.[8] Xunzi understood that the creation of societal order is exclusively a human endeavour and that humans should neither seek any help from the heaven, nor have much or any gratitude toward heaven for their fortunes or tragedies.

This idea of Xunzi expands the meaning of *dao* to politics and to the unavoidable element of all political practice: strategic analysis and strategic work. As Li Ling (2012, 61) illustrates, the concept of *dao* can also have the connotation in the field of politics, where it may constitute the most important concept for successful strategy work. This political connotation of *dao* becomes obvious in reading Sunzi's *Art of War* (Sunzi presumably lived and compiled the book in the 6th century), according

6 Confucius: *Analects*, at Gong Yechang. Translation by the author.
7 Confucius: *Analects*, at Shu Er. Translation by the author.
8 *Xunzi*, at Ru Xiao. Translation by the author.

to which, correct 'politics (*dao*) will be supported by many people' and incorrect 'politics (*dao*) will be supported by few people' (Li 2012, 61). In his opening chapter, Sunzi nominates five comparative criteria for successful strategy, the first criterion being *dao*. Sunzi states: 'Politics (*dao*) is to cause people to be in complete accord with their ruler, then they follow him to death or survival undismayed by any danger' (Li 2012, 61-62).

This idea reflects the active meaning of the concept of *dao:* it is man's proper conduct of political practices that wins the hearts and souls of his subordinates. Correct political practices stem from the process where the political leader or commander has internalised the underlying intrinsic properties of *dao* – the subtle and particular political dispositions that reside behind all appearances and phenomena – and is able to communicate his policies to people. Furthermore, as *dao* has also the connotation of 'to speak', the process of *dao*-as-politics brings us back to the basic practical political work, that is, convincing of people by way of speaking (Li 2012, 61-62).

Hence, it is not a surprise that in early Chinese politico-philosophical thinking *dao* could refer to politics or practising of politics, famously captured in the Confucian dichotomic conceptualisation: the correct and morally sound politics of 'the Kingly Way' (*wangdao*, 王道)[9] juxtaposed against the amoral politics of 'the Tyrannical Way' (*badao*, 霸道)[10]. Henceforth, *dao* as politics does not mean merely the internalisation of a body of the fundamental knowledge of underlying properties, means and set goals of action, speech and act that are all activated in one concept. Besides that, the concept is itself a practice – *dao*-as-politics – that enlivens the underlying knowledge, morality, rituals, and norms. This is the political context where there is always a competition going on, and where it is necessary to be resourceful in order to get the upper hand over one's political rivals. (Moeller 2006, 55-74.)

The theoretical illustration of this *dao*-as-political-practice approach can once again be traced back to the earlier quotation of the Daoist Laozi's *Daodejing* and its definition of *dao*:

> *Dao* gives birth to one,
> One to two,
> Two to three,
> Three to myriad things.
> Myriad things shoulder yin (阴) and embrace yang (阳),
> Infusing with the vital energy (qi, 气) in achieving harmony (he, 和).[11]

Daodejing was not only widely regarded as the source of Daoist philosophy, but

9 On the notion of *wangdao*, see databank Ctext.org, available on <https://ctext.org/pre-qin-and-han> (visited 19 June 2019) and enter "wangdao" in the search engine.
10 On the notion of *badao*, see databank Ctext.org, available on <https://ctext.org/pre-qin-and-han> (visited 19 June 2019) and enter "badao" in the search engine.
11 Laozi: *Daodejing*. Translation by the author.

also read as a strategy manual: it provided the dialectic approach so fundamental to Chinese strategic thinking. The question of formulating a successful strategy is a question of the ability to identify the dialectical dispositions and forces involved. These dispositions and forces are understood not only as interrelated, but also as dynamically and constantly changing in '*dao* processes'. In these processes, the counterparts of the dialectic produce each other as 'one gives birth to two, two to three and three to myriad things'. Importantly, all entities are dialectic by nature; they consist of correlating and opposing *yin-yang* elements that 'shoulder' and 'embrace' each other. The list of these *yin-yang* elements is endless, comprising both tangible and non-tangible elements, such as direct-indirect, honest-dishonest, rich-poor, and powerful-weak. A resourceful strategist understood the Daoist sense in which the interaction of the properties with their counterparts was always beyond his complete control, so that no one could ever be in full control of the situation. Rather, the correct identification of dispositions and properties enables him to lead the development in the intended direction by 'infusing energy' into one or several of the identified properties. It is only in this manner that the strategist could achieve the 'political harmony' he would prefer to build, be it a society based on the Confucian benevolence, on the Mohist universal love and pacifism, or on the Legalist positive law.

Chinese Legalist scholars were also utilising the concept of *dao* in their thinking. For the early Legalist scholars, *dao* is not a transcendental concept, but a universal force that standardises the principles that condition justice. As Guanzi (720-645 B.C.) states: 'Rites arise from justice, justice from principles, and principles accommodate to the Way (*dao*)'[12]. However, Guanzi does not define *dao*, but provides a metaphorical and conventionally 'Daoist' explanation of *dao* as invisible, formless and soundless: 'The Way cannot be spoken of, eye cannot see, the ear cannot hear'[13] and yet it is producing the myriad things of our existence. This Daoist definition of *dao* provides an intriguing opening to the discussion of the basis of law in the relationship between generally valid norms and particular facts of each case. On the one hand, based on the Daoist thinking to which Guanzi refers, *dao* is a cosmic and universal force that shapes the properties of our existence; on the other hand, *dao* is always particular and cannot be repeated as it always manifests site-specific properties. Unfortunately, Guanzi does not elaborate further on the relationship between the law as legal principles and the law as legal practices, which could have been envisaged against the background of the universal and particular forces of *dao*.

The later Legalist scholar Hanfeizi (280-233 B.C.) elaborated on *Daodejing* in order to relate his otherwise practical Machiavellian and positivist-law based political philosophy to a more general metaphysical world picture. His work, named after him as *Hanfeizi*, contains two separate chapters on Laozi, 'Interpreting Laozi' (ch. 20) and 'Illustrating Laozi' (ch. 21). However, both chapters contain very little Legalist thinking to the effect of amalgamating Legalism and Daoism or providing

12 *Guanzi*, at Xin Shu I. Translation by the author.
13 *Guanzi*, at Nei Ye. Translation by the author.

a Daoist interpretation of the Law. Later, it has even been questioned whether these chapters have been written by Hanfeizi at all. However, in interpreting the concept of *dao* in Laozi, Hanfeizi argues that *dao* is not above heaven and earth, as Laozi claimed, and coupled the idea of affair-guiding principles with *dao*. 'If thinking is methodical you grasp the principles of affairs … If you grasp principles in affairs you are certain to achieve results'[14], said Hanfeizi and continued later: 'Therefore observe principles, but if you engage in too many tasks you will change things around you achieving little … This is why a ruler who has the Way values stillness and does not keep on altering laws'.[15]

Consequently, for the individual, irrespective of their other philosophical inclinations, *dao* represents an important source of knowledge and force that brings into life subjectively chosen morals and conceptions of practices and principles that guide and manifest man's cause of speech and action, i.e. politics. As *dao* is an active undertaking, it should be seen as a self-generating process in which political practices are inseparable from what it produces as concrete and definite policies.

Dao is also the ultimate object of knowledge – once the agent has internalised the underlying properties of *dao* (that produce particular phenomena or even the universe) and is able to reflect and radiate these internalised properties in his words and deeds, he/she will reach the status of a Sage. Subsequently, *dao* can also refer to 'mastery' of something that combines the internalisation of an approach of knowing 'how the world hangs together' with 'how it can be led in a desired direction'. These two are reflected in the masterful practice, or even art, of doing something. However, *dao* cannot be thought, learned, memorised, or emulated, but it should be internalised by being one with world. (Moeller 2004; Coutinho 2014.)

6. Some concluding remarks

The concept of *dao* is maybe the most fundamental concept, not only in Chinese theoretical thought, but in conditioning the Chinese people's everyday and political practices. As a noun, *dao* most commonly refers to a concrete or abstract way or path. It can refer to the 'reality' as we see it. However, the observable reality is a manifestation of the underlying abstract and/or metaphysical, unique eternal substance, origin and order of things – also named *dao*. Hence, all phenomena or existing things, living or dead, always reflect a particular *dao*. This is the underlying, ultimate intrinsic subsistence that dwells behind and produces all appearances and phenomena, all the existing realities and the universe. However, as *dao* always constitutes a dialectic between opposing and correlative elements that are in constant flux, *dao* is never static, but in constant movement.

The concept of *dao* provides us with an important and culturally specific view on how the Chinese philosophers, policy makers and strategists have related to the fundamental transcendental questions, as well as to the societal questions of how to

14 *Hanfeizi*, at Jie Lao. Translation by author.
15 *Hanfeizi*, at Jie Lao. Translation by author.

generate societal efficacy. Chinese schools of philosophy provided the fertile ground for the Daoist conception of a practical *dao* to flourish, as all schools of thought focused on solving the question of how to generate societal efficacy, rather than staying with ontological questions or transcendental debates on, say, the role of God in human life. Despite the fact that Chinese philosophers were interested, and also to various degrees believed, in the transcendental, cosmic or metaphysical forces of the '*dao* of Heaven' (*tiandao*), the overwhelmingly dominating and politico-socially most influential discussion took place around the '*dao* of human beings' (*rendao*). *Rendao* is based on an idea of detaching man from the transcendental Heaven and understands human beings anthropocentrically: as active, more or less secularised agents.

The polymorphic connotations of the concept *dao* can at the same time take the form of a noun and a verb. On the one hand, it refers to the abstraction of cosmic forces and life. On the other hand, it provides the basis for rational and resourceful strategy analysis and practice. This dispersion of meaning and use over different fields requires a fair amount of sensitivity and imagination from the Western educated mind. This brief overview of the particular role and function that the concept of *dao* has in the Chinese worldview can also raise further questions on the relationship between concepts (as clearly defined nouns) and practices (that are always separated from the conceptualisation process) from the vantage point of the Western tradition.

The concept of *dao* is loosely and yet intimately paired with other concepts, such as the *yin-yang* and the vital energy *qi* discussed above. This conceptual edifice, and the role that concepts in general had in metaphysical theorising, evolved and formed complex discussions in the hands of later Neo-Confucian scholars during and after the Song dynasty (960-1276). Due to the complexity of the Neo-Confucian discussion on *dao*, it has been left out of this analysis. So much can be said, however, that given its theoretical complexity that discussion did not gain wider influence outside theory-oriented thinkers. By contrast, the early Daoist discussion analysed in this short paper has remained popular among policy makers and even ordinary people. For that reason, the classical *Dao* reaches to the contemporary China.

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Cosmology and Practices of the European Union

Samuli Hurri*

Abstract

This article experiments with a small number of theoretical notions deriving from Michel Foucault's analytic of power. The European Union is presented as a strategic field of power relations between a number of regimes of practices. Interacting in that field will be the political regime, juridical regime, economic regime and security regime. Interaction is constituted by what Foucault calls the logic of strategy. The idea is to present the ongoing structural rearranging of the relations between the regimes as a process of perpetual transformation, something reminiscent of the Classical Chinese notion of the Dao. The article suggests that the type of knowledge implied by this notion amounts to a sort of political cosmology.

1. Introduction

This small tract presents an experiment with a small number of theoretical notions. These notions derive mostly from the work of Michel Foucault, and the context of the experiment is the European Union (EU). I will shortly say more about the experiment, but I will first tell what provided me with the inspiration for it. To begin with, a rather simple problem exists in the background: how much of the activity of a big governance apparatus such as the EU may be considered as *proactive* and how much as *reactive*? How much is just responding to events, shocks, situations and crises? How much is acting first, planning and controlling the course of developments?

Believing that a careful theoretical analysis of the problem prepares the way for a successful analysis of reality, this article stays on the side of theory. What will have to suffice as the reference to reality is just a very quick and impressionistic glimpse

* Senior Lecturer, University of Lapland; Adjunct Professor, University of Helsinki.

of some events in the recent history of the EU.

In retrospect, it is not entirely impossible to imagine 2000 as a watershed year. Earlier, the European Communities (EC) had been piecemeal and pragmatic, but nevertheless resolute in the project of lifting restrictions on trade and competition. Later on, the goal of establishing the European Single Market, launched in 1986, was already more ambitious. The European Union itself was created in Maastricht (1993), and further powers were transferred to it a bit later in Amsterdam (1997).

Then things changed. After the turn of the millennium, the EU seems to have been running from one crisis to another: the global crisis of the liberal world order and its rule of law ensued from the war on terrorism that started with 9/11; political crisis followed with the rise of anti-establishment populism and led to the failure of the European Constitution in 2005; the global financial crisis that led to the European debt crisis was set off by the bankruptcy of Lehman Brothers in 2008; the refugee crisis in 2015; Brexit; and so on.

Upon closer investigation, however, it is apparent that both proactive and reactive actions were taken all the time, and no sharp watershed moment existed. The point of this story is to illustrate what these different modes of political action might be. But what is it that really makes the two different? Think, for instance, of the failed project of the European Constitution. On the one hand, the plan itself was certainly as *proactive* as possible: the goal was to make Europe not just economically but also politically integrated. On the other hand, the project on the whole, in a broader context, may be perceived as a *reaction* to the fall of the Berlin Wall.

Should unclarities of this nature emerge, the definitional problem itself seems to require some thought before more individual cases are analysed. How to enter into this problem? It seems to me that a possible key was afforded by Matti Nojonen's article, published in this volume, on the classical Chinese notion of the *Dao*.[1] What struck me the most about Nojonen's text was its emphasis on all-encompassing change as a 'process of perpetual transformation'. The ancient Chinese seemed to suggest that only by accepting in the first place that change never ends can one have an idea of what may come next and how to intervene.

That said, traversing or practising the *Dao* (the 'Way') is apparently not so much about interventions, but about taking part in a process of unfolding that is 'autogenerative'. On this basis, the search for external causes of change is a mistake and an attempt to trace changes back to their origins is pointless. What matters is the way through which things continue to be rearranged every moment and internally. Knowledge of the *Dao* leads to mastery, but this does not happen through realising some kind of metaphysical freedom. Instead, the *Dao* occurs through the internalisation of a 'mode of spontaneity' that characterises the process of perpetual transformation. Apparently, internalising spontaneity means submerging in the process of change, rather than escaping or being liberated from it.

In Nojonen's text, there are two aspects of the *Dao* that I find especially

1 *Dao: Cosmological Thinking and Social Practice*.

interesting from the point of view of the governing of society. First, as Nojonen says, the *Dao* affords 'a specific, dynamic and practice-related approach to politics, governance and strategic behaviour'. A little later, Nojonen goes on to define what this approach involves:

> It is about the grasp of the dialectic between the various yin and yang properties – more precisely, between their correlatives as *governing dispositions* – that condition the chosen path and the direction of one's undertaking. (Nojonen 2019, italics added)

Hence, one will choose a path, but the undertaking from that time on depends on the interaction between 'governing dispositions' that one cannot command or even fully predict. I will briefly say more about how I transpose the notion of interaction between governing dispositions in the context of the EU and its 'perpetual process of transformation'. What is important at this point is to observe that what happens in this interaction is *internal to the process*, not external events or exogenous shocks like 9/11 or the insolvency of Lehman Brothers.

Finally, I want to point out another aspect of the *Dao* that relates to the governing of society. According to Nojonen, with respect to its societal effectivity, the *Dao* as 'politics' owes critically to the ruler's power to involve their subjects, not by force, but by bringing them into a state of willing participation and self-government. From such a perspective of subjectivation, the *Dao* is 'to cause people to be in complete accord with their ruler [and] follow him to death or survival undismayed by any danger', as Nojonen puts it, quoting the strategic thinker Sunzi.

In what follows, I will try to proceed on the basis of the Chinese inspiration noted above and consider the EU as a perpetual process of transformation. The process involves interaction between impersonal governing dispositions as well as interaction of these dispositions with individual human beings. First I would like to further develop a rigorous analytical apparatus. For this purpose, I will need to translate the problem of reactive and proactive governing into the language of Foucault's analytic of power.

2. Europe as a strategic field of power relations

As mentioned in the beginning, the European Union is not the ultimate concern of this experiment; it is merely a theoretical sandbox. Consequently, the European Union will be represented rather freely for the purposes of staging a thought experiment. Having said that, the prospect exists that this type of theoretico-dramatical fiction, so to speak, could make it possible someday to conduct rigorous analyses of the real European Union, or for that matter, any similar giant power structure. That would be a distant future prospect, not something to be realised here.

For the purposes of the experiment, the European Union will be understood in a specific and rather limited way. First of all, the European Union will be imagined

as a *strategic field of power relations*.[2] This field is one of perpetual transformation. Secondly, the power relations are imagined as established through the interaction of a selection of heterogeneous *regimes of practices*.[3] Regimes of practices stand for the governing dispositions in the Chinese model of the Dao. Thirdly, the field and the interaction are imagined as constituted by *the logic of strategy*.[4] This is the logic that explains the 'autogeneration' of the EU's perpetual transformation. An illustration of how that logic might work is the ultimate purpose of this whole experiment.

For our purpose, therefore, the EU is a *strategic field of power relations* established in the interaction between *regimes of practices* informed by the *logic of strategy*. Let us consider the regimes of practices first and then the logic of strategy. Before explaining what a regime of practice is, let us point out which individual regimes will be considered in the experiment that follows:

a) Political regime
b) Juridical regime
c) Economic regime
d) Security regime

These are the four regimes that will play the role of the main protagonists of our experiment. Now, what is a regime of practice? First of all, a regime of practice is a *methodological viewpoint* that places techniques and mechanisms of governing before everything else. This means that practices are *not* subordinated to the institutions that would house them, nor to the ideologies that would inform them, nor to the actions that would materialise them in specific circumstances.[5] Practices constitute a reality of their own which is relatively independent from ideologies, institutions and actions.

Focus on practices and their regimes means *abandoning* the internal point of view of institutions and their societal functions. Instead, practices are viewed in the external context of what Foucault calls the 'general economy of power': regimes of practices develop their techniques independently and merely find support in institutions and their societal functions.[6] Furthermore, the subject matter of regimes of practices – the techniques employed in the governing of society – are 'mobile' in two senses: they develop all the time and move freely across the institutional boundaries established, according to the division of their societal tasks.[7]

Especially important among the techniques pertaining to all regimes of practices is their peculiar mechanism of 'subjectivation'. What does Foucault mean

2 The 'strategic field of power relations' is a general notion of Foucault; see, for instance, his *Will to Knowledge* (1998b, 96).
3 Focus on 'regimes of practices' defines Foucault's method generally; see, e.g., Foucault 2000a, 225.
4 The notion of 'the logic of strategy' was introduced by Foucault in his *Birth of Biopolitics* lectures; 2008, 42.
5 In Foucault's words (2000b, 225), practices 'are not just governed by institutions, prescribed by ideologies, guided by pragmatic circumstances […] but, up to a point, possess their own specific regularities, logic, strategy, self-evidence and "reason"'.
6 For a more elaborate explanation, see Foucault 2007, 116-119.
7 *Ibid.* See also Foucault 1998, 98-102.

by subjectivation? The French word *assujettissement* means *submission*, *state of dependence*, or *action of subjugation*. In Foucault's theoretical use of the notion, all those aspects are involved, but they combine with an idea of conversion or transformation. Subjectivation involves a process of metamorphosis, the shaping of individuals, casting them in the mould of a subject.

Subjectivation may very well be seen as impersonal social structures acting on human individuals, as the formative power of society over its members.[8] Yet with Foucault, one also finds that subjectivation is not simply the work of an impersonal society but somehow very much the work of the individuals themselves as well. The effect of subjectivation is a self-subjecting individual. Subjectivation allows practices of power an access to the inner constitution of individuals, affecting what people do through what they are or have come to be. The subject of this type of power will ultimately be someone who 'is subject to his own identity by conscience or self-knowledge' (Foucault 2000a, 331).

Preparing the experiment, I will at this point establish three elements of an analytic, designed on the basis of Foucault's theoretical notions explained above. For our purposes, the following elements will constitute a regime:

1. Function
2. Technique
3. Subjectivation

The experiment proceeds by way of first reconstructing political, juridical, economic and security regimes. For each of these in turn, there are the societal function, the technique of governing and the mechanism of subjectivation. After that, I will go on to consider the way in which the regimes of practices interact. As that interaction is constituted by what will be called, following Foucault, 'the logic of strategy' (Foucault 2008, 42), I will still have to say a word on that before moving to the experiment itself.

The logic of strategy is usually understood as the logic that characterises games and warfare. More generally, one might say that strategic logic prevails in any field of action that is conditioned by the following four elements: (1) different actors exist and they pursue different goals; (2) everyone has to plan their actions with the view of the possible actions of others; (3) others may either assist or resist one's attempts to achieve their goal; and (4) strategy is just as much about trying to influence others' actions as it is about planning one's own moves.

Foucault transposes this type of strategic logic from the sphere of human actors to the sphere of the interactions and relations between regimes of practices that are 'heterogeneous'. No overall perspective exists that would allow 'homogenisation' of the regimes. They pursue fundamentally and irreversibly different goals, and they work on the basis of equally different rationalities. While the logic of strategy

8 At one point Foucault would say that a historically evolving network of practices exists, in which 'power passes through individuals' and makes them subjects'; Foucault 2003.

establishes the possibility of coexistence and connections between the coexisting regimes, it does so in such a way that the regimes nevertheless remain heterogeneous (Foucault 2008, 42).

Characteristic of the strategic relations in which regimes coexist is ceaseless structural rearrangement. Sometimes regimes find support and make use of each other, but at other times they need to block others in order to secure their own success. What enables this game are the techniques that move across the functionally established boundaries. One regime may be able to make use of the other regime's techniques and include it in its own repertory of means, where it might be refined to better suit its own purposes. Strategic logic explains the way in which regimes couple and decouple techniques from all sides, borrowing and lending them back and forth.

I believe this is enough abstract conceptual clarification. Let me just summarise. Two things are important for the understanding of a strategic field of power relations: regimes of practices and the logic of strategy. Regimes of practices may be analysed through their societal functions, techniques of governing and mechanisms of subjectivation. The logic of strategy explains the way in which regimes of practices interact without forming a unity. Each regime has its own separate existence, and regimes continue to be separate. Despite their disparity, which cannot be overcome, the regimes nevertheless coexist in strategic relations.

Let us begin with the experiment.

3. Regimes of practices

3.1 Political regime

For a long time, it was considered a major problem for the European Union that it has not been able to enact a political regime that would be capable of uniting individuals into a European people. The so-called democratic deficit (which means a variety of things, but in the first place held that democratically elected politicians cannot control the executive branch) was blamed for the fact that Europeans did not believe that they belonged to the EU in the way they believed that they belonged to their nation states. During the last couple of years, the trend in this respect seems to have changed. Not only the considerable rise in parliamentary election turnout (42.2% in 2014, 50.6% in 2019) but also the most recent Eurobarometer tells that the EU is currently seen by the public in a much more positive light than before: more people trust in the EU, more people think their voice counts in the EU, and more people are satisfied with the way democracy works in the EU.[9] This is somewhat surprising, considering the fact that the EU has not done so much lately to repair its democratic deficit.

Be that as it may, today's trends will not really affect our modest theoretical experiment. Let us now consider what pertains to the political regime in terms

9 Eurobarometer is available on <https://ec.europa.eu/commfrontoffice/publicopinionmobile/>.

of its societal function, technique of governing and mechanism of subjectivation. Beginning with the societal function, let us agree that the political regime is based on the idea of *common cause*. Common cause is not only the task of politics but necessary for the mobilisation of any particular collective action, as well as its legitimacy. It explains why people should unite into a polity in the first place. The political function must take care of the reproduction of the common cause, because the existence of common cause is the ultimate *raison d'être* of the political regime.

Let us move next to the political technique of governing. The way in which a democratic political regime reproduces the common cause is through mechanisms of *collective will-formation*. Employing these, people are able to debate, negotiate and determine their collective will in regard to common affairs. Voting in elections, discussions in the public sphere, participation in political associations and demonstrations, all of these are political mechanisms of collective will-formation. Their purpose is to unite individuals into a political body, a sovereign *demos*. Each and every individual is to contribute their willpower to this political sovereign, which then turns this willpower back to the subjects, in the form of legislation, as an expression of their own so-called general will.

Thirdly, let us consider the political mechanism of subjectivation. What kind of individual self-understanding underlies the political practice of power? Let us say that the political subject, a citizen generated by the political mechanism, is two things at once: someone in whose name political power is exercised and someone who is *therefore* subjected to that very same power. In this way, democracy purports to arrange a system for state power that is essentially self-government: people are in command of themselves. Belonging to a people, a *demos*, every citizen is at once both the master and the servant, and each one is equal to everyone else.

Democratic polity may be questioned from a realist point of view. What if the truth is that the polity tells its citizens what their will is, and not the other way around, as it should be? This type of polity may first tolerate, then ignore and eventually declare incompetent all those who disagree and resist, such that the 'general will' is determined top-down, not bottom-up. The infamous Carl Schmitt called this the 'logic of Jacobinism', which justifies 'the rule of a minority over the majority, even while appealing to democracy' (Schmitt 1988, 26). As to the mechanism of collective will formation, important for Schmitt is the following:

> […] the question of who has control over the means with which the will of the people is to be constructed: military and political force, propaganda, control of public opinion through the press, party organizations, assemblies, popular education, and schools. (Schmitt 1988, 29.)

Schmitt's view is that 'only political power, which should come from the people's will, can form the people's will in the first place' (1988, 29). This type of critique – democracy as a polity of blind crowds led by propaganda – is an ineradicable European legacy. Without doubt it played a role in the early political design of the EU as well. At the time, one of the concerns of European leaders and thinkers must

have been the need for the European states to reconceive themselves in such a way that would prevent the possibility of the rebirth of National Socialism. Democracy understood in the plain sense of majority rule appeared as a rather dangerous game.

To conclude, it is fair to say that even if the EU has by now been able to create a fair amount of trust and sense of belonging among people, historically speaking this is not an achievement for a well-functioning democratic political regime. Much more important for the EU's success has been the fact that it has been able to install other mechanisms and functions, which are housed by other regimes than the political one. These other regimes were very efficient at compensating for the EU's lack of political regime. Let us have a look at these next.

3.2 Juridical regime

The juridical regime has been one of the resources through which the EU has historically compensated for its lack of political regime. In the 1960s, the constitutionalisation of the EU (the EC at the time) was carried out by its Court of Justice through the adjudication of cases rather than through political channels. In their so-called landmark decisions,[10] forward-looking judges started to interpret the Treaty of Rome in a progressive way. The court said that this treaty affords individuals certain rights, even though these are not explicitly given in the text of the treaty. Moreover, individuals could invoke these rights against Member States directly in their national courts, without the mediation of national laws. EU law was understood to be a *sui generis* legal order, having a life of its own, and even today EU law continues to be relatively independent from the democratic political regime.

Let us now consider how this European legal experience reflects the functioning of the juridical regime in general. Like with the political regime above, the following will offer a sketch of the juridical regime's societal function, its technique of governing and its mechanism of subjectivation. To begin with, the societal function of the juridical regime is undoubtedly to deliver justice. Justice plays the same role in the juridical regime as common cause plays in the political regime. Justice is its *raison d'être*, the ultimate reason why any juridical regime normally exists. Another way of saying this is that, on the whole, the legitimacy of the regime rests upon justice. Important here is that justice is not a mere idea, or even a standard of criticism, but something infused in the structure and functioning of the regime.

The delivery of justice is normally done by a very specific juridical technique, which is employed in all modern juridical regimes: the technique of subjective rights. In the first place, rights protect the individual against injustice in its primordially juridical sense: abuse of political power by state authorities. How does the technique of subjective rights work? A comparison with the technique of the political regime illuminates this question: through collective will-formation, citizens give their willpower to the political sovereign and the political sovereign returns it back in

10 Among which the most important are *Van Gend en Loos*, Case 26/62, Judgement of the Court of 5 February 1963; and *Costa v. ENEL*, Case 6/64, Judgement of the Court of 15 July 1964.

the form of legislation. Quite similarly, through subjective rights every individual abandons their so-called natural freedom (to do as they please) and in return they get civil and political rights. This mechanism of give-and-take is what Foucault (2008, 43) calls 'the fundamental axiomatic of the rights of man', the bartering of freedom for rights. This technique is probably the best candidate for the true constitution of the law as a regime of practices.

From the point of view of subjectivation, subjective rights also comprise the mechanism by which the legal regime recruits individuals to work for the system. Inviting them to practice their rights, the regime calls the individuals 'in their place' as its subjects (Althusser 2008). In the same way that the citizen is the subject of the political regime, the rights-holder is the subject of the juridical regime. For the maintenance of the legal order, more important than legislators and police are the individuals invoking their rights before legal courts. Outsourcing the upkeep of the system to individual rights-holders is generally an efficient arrangement, but it has been an especially smart solution for the EU, since it lacks both democratic legitimacy and a law-enforcement apparatus. All the EU's juridical regime needs is subjective rights: questions of legitimacy do not arise, because the system seems to be on the side of the individual from the start; questions of enforcement do not arise, because rights-holders take care of this by themselves.

It is possible to say that it was through the fundamental axiomatic of rights that the European Court of Justice, in its 1960s cases on direct effect and supremacy, established the juridical regime of European law. Direct effect made it possible that rights were invoked by individuals, and every time this happened it contributed to the reproduction of that system overall. Every time someone draws on rights, they materialise the law in real life. The more there are individuals making use of their rights deriving from the EU system, the more there are subjects of the juridical regime of the EU. This became a way for the EU to compensate for its democratic deficit, such that it could exist as a legal polity even without exercising a democratic political function.

People are generally used to associating the invocation of rights with struggles for justice. The famous 19th-century German scholar Rudolf Jhering suggested that subjective rights are the juridical mechanism that upholds not only the legal system but 'objective justice' as well (Jhering 2003). Looking at the contemporary topography of politics one finds that many civil society movements pursue their social goals in the tangible form of rights: the rights of women, the coloured, the indigenous, the unborn and so on. Also for lawyers, rights comprise the language in which jurists articulate justice: justice is built into the system of law through rights, and justice is materialised in society through rights. This is what makes rights such an indispensable element for the overall juridical technology of power; its effectiveness is partly due to the idea that justice is associated with rights.

In this respect, the EU law's notion of rights stands as a peculiar exception. In EU law, concern for justice does not seem to play the pivotal role described above. This is not to say that the EU's judges have not had occasions to hoist the banner

of justice. For example, a little more than a decade ago there was the great battle between the EU Court of Justice and the UN Security Council over the rights of those whom the latter had listed as terrorists.[11] More recently, the Court has disciplined multinational companies such as Google and Facebook regarding individuals' so-called right to be forgotten, thereby limiting the collection of personal data. One way or another, no governing regime that claims to be juridical can entirely bypass justice.

Nonetheless, the more one explores the EU legal system, the less one can say that this system is genuinely concerned with justice. Neither social nor individual justice seems to have ever constituted the final frame of reference for the understanding of the EU's notion of rights. Rights in EU law ultimately appear to be instrumental for something else entirely. I will say more about that in a moment, but to conclude this part, one further problem should be noted here. That is the question of whether subjects invoking their EU rights would genuinely consider themselves as individuals struggling for justice. Invoking their EU rights, are they not somewhat aware that something completely different than justice lies behind those rights?

3.3 Economic regime

It is very difficult, if not impossible, to say whether the EU as a whole exists today for one sole purpose or another. As a many-headed beast, does it know its goals? Maybe they are all negotiable. It might be a sober choice to explore the EU's workings purely as an apparatus, as a machine that is not in itself capable of meaning and purpose. What remains if one does not assume any final objectives, but only looks at it as a technology that produces real effects and then induces from these effects what seems to be encoded to it as commitment? If presumed as a mindless thing, what niche can this technology nonetheless carve out for itself in the realm of virtues? This type of analysis would probably confirm rather quickly that the EU has been historically driven by economic virtue. This puts the economic regime at the centre of the strategic field of this experiment, as will be seen later.

At this point, however, let us proceed in the same manner as above and try to outline the economic regime's societal function, its technique of governing and its mechanism of subjectivation. To begin with, the basic function of economic regimes at all times has been the production of sustenance and wealth for society. What we are concerned with here is the way in which the modern liberal economic regime represents this function. For the purposes of the experiment, let us propose the following: economic liberalism says that society's prosperity depends on the economic vitality of its own people. There is no other way to create wealth than to have the people produce it. They do it for themselves and for the society, which after all are the same thing in terms of economic liberalism: the society is composed of its individuals, it is not anything more or anything different. In this way, the *vitality of*

11 The most famous of these cases is *Kadi and Al Barakaat*, joined cases C-402/05 P and C-415/05 P, judgment of the Court of 3 September 2008.

each individual plays the same role in the liberal economic regime as common cause plays in the political regime and justice in the juridical regime. Since vitality comes first and only then does prosperity follow as its consequence, the former is the real *raison d'être* of the economic regime.

The technique that the economic regime has developed for generating vitality in individuals is circulation. Not only the EU's economic regime, but economic thinking more broadly has come to rely on the approbation of circulation as something that truly animates societies, whereas immobility evokes an impression of a moribund society.[12] Insofar as circulation is essentially motion, it is also life. The great wheel that vivifies societies by putting things in motion is the market where everything circulates. In an almost magical way, circulation is capable of producing more value, more activity, more consumption, and indeed more *production*. Commerce produces more commerce, movement produces more movement, and circulation produces more circulation. Movement nourishes life, creates surplus energy and spreads it around.

Let us next view the economic regime from the point of view of subjectivation. What lies under the liberal generation of economic vitality and its technique of circulation as its specific economic subject? We can suggest the following: the liberal economic regime tells people that what motivates them (what can make them move) is always ultimately their own interest. Even when we pretend or believe it to be something nobler, it is really our own individual interests that keep us active and alive. The technique of circulation cannot work if individuals cannot focus all their attention on their own interests. Doing this makes them more mobile and the society more vital. Thus, corresponding to the citizen and the rights-holder of the two other regimes, the third figure pertaining to the economic regime starts to appear in the form of the self-seeker.

As far as noting less than life itself is at stake, underlying the self-seeker subject cannot be merely the rational calculation of preferences usually associated with the economic mind. It seems that something much more powerful than this must reside in the psychic structure of a true self-seeker. Maybe the true source of economic vitality is not individual interest, but individual *desire*. It is the desire that needs to be set free if one wishes to generate economic vitality and activity. Moreover, it will probably have to be the type of desire that is never fully satisfied, because satisfaction represents relief, suggesting immobility. Curiously enough, at this point a clandestine (but probably more real) occupation of the economic regime turns out to be not satisfaction of needs, but *generation of dissatisfaction*. Insofar as the sense that something is lacking is what makes us get up and move, the economic regime has to arrange things so that a state of continuous dissatisfaction is secured, and desire will never be completely relaxed in the individual. That kind of figure, a perpetually unsatisfied self-seeker, appears to be the final product of the liberal economic mechanism of subjectivation.

12 For a historical perspective, see Fernand Braudel (1992) and Antionio Serra, *Breve trattato*,.

There is no doubt that the EU was originally an economic regime and still is fundamentally attached to mechanisms of circulation. In the context of the EU, the perspectives of the market, competition and economic freedoms are always relevant. It boils down to a very simple rule: what accelerates circulation is beneficial, good and right; what slows it down is detrimental, bad and wrong. The EU's vehicle of circulation – the Common Market and the free movement of goods, workers, services and capital – should carry out the function of generating economic vitality. For it to work properly, however, is it somehow not only possible, but also necessary to not only set desire free, but also *excite* desire and disseminate dissatisfaction in individuals?

3.4 Security regime

Like the political function, the security function in the traditional sense was effectively also lacking in the EU before the Treaty of Maastricht, whose new pillar system provided a framework for closer intergovernmental collaboration in law enforcement matters, as well as in foreign and military affairs. While the EU still has no police force or army of its own, it now provides a variety of frameworks for Member States to co-operate in security sectors, such as, for example, the administration of external borders. As for its law-enforcement and executive functions more generally, the EU will probably in the future rely too greatly on Member States, whose administrative apparatuses are not always extremely responsive to the needs of the EU. However, because of some fairly recent developments, including third-country migration and terrorist attacks, various security mechanisms rapidly started to move towards the centre of the EU's strategic field of power[13] as a response to the increasing sense of a potentially dangerous element growing in the European population.

Let us now consider the security regime with a view towards its societal function, its technique of governing and its mechanism of subjectivation. To begin with, a security regime's function is obviously to maintain stability in society. Hence, its *raison d´être* is what may be called the state's *basal order*.[14] As a function, this involves not so much reacting to disturbances that have already happened as elimination of them in advance. The security regime's function is fulfilled when it is one step ahead of developments and capable of intervention at the stage where disturbances are still at the level of a threat. That is why the security regime needs to

13 This has occurred by way developing the European border control regime on the whole, and especially through such partial initiatives as 'EU travel intelligence architecture' and the reform of the Common European Asylum System (CEAS), which involves the Dublin Regulation; the Reception Conditions Directive; the Qualification Regulation; the Asylum Procedure Regulation; Eurodac Regulation; the EU Asylum Agency Regulation; and the Resettlement Framework Regulation. Noteworthy are also the enhancement of surveillance technologies by artificial intelligence; various extensions of police powers, including undercover policing; cross-border data gathering and exchange; 'criminalization of solidarity' targeted at NGOs and individuals who help migrants; and finally the EU's agreements on migration with third countries, which can effectively mean externalisation of refoulment practices.

14 Following Carl Schmitt, one might also speak of the 'concrete order' of the community (*Gemeinshaft*). Schmitt 2004, 51.

continuously investigate what is secretly mushrooming as a potential threat to the society. This aspect of secrecy reflects the regime's own style of working as well, as transparency is not one of its cardinal virtues. On the contrary, the security regime can govern disturbances only to the extent that antisocial elements do not know how and what surveillance has found out about them.

Turning to the technique of the security regime, it is a natural starting point to say that it must be *exclusion* – exclusion of whatever poses a threat to order. Such phenomena as criminality and terrorism are examples of clearly destructive elements that need to be excluded, eliminated or at least kept under control and surveillance. The migration of people reveals another type of threat. Whereas terrorism is a threat because one knows that its aim is to destroy order, immigration is a threat exactly because *one does not know* who the incomers are and what they may have in mind. What foregrounds that abstract aspect of threat is not so much some concrete and identified destructive elements, but the much more vague anxiety that derives from circumstances which one is not familiar with. In other words, everything that is strange, other than what one knows, potentially disturbs order, whereas everything familiar is secure. At that more profound level, what underlies the technique of the security regime is a more general exclusion of 'otherness'.

Coming now to the security regime's mechanism of subjectivation, it is important to make a distinction between the target groups that may be involved. The more obvious group would be, of course, dangerous and potentially antisocial elements of society. In terms of these, one could think that the rehabilitation of delinquents and the integration of immigrants in society have something to do with subjectivation. It is clear, however, that the technique of exclusion is not helpful there; policies of rehabilitation and integration are about inclusion. To consider the way in which exclusion works as a mechanism of subjectivation, one needs to turn to something else.

The question is whether underlying the security regime a mechanism of subjectivation is at work, not among delinquents but among the *normal* people. Going down to that more profound level, one might consider the effects of exclusion of otherness in the constitution of the self, so to say. Insofar as the other and its exclusion are constitutive of the self at the level of formation of individual identity, then it is logical to think that at the level of society this type of constitutive effect is at work in the security regime, for which everything strange poses a threat. Perhaps the technique of exclusion implicates a mechanism of subjectivation that produces docility in the normal members of society by way of maintaining hostility towards whoever is strange and unknown.

Let us return for a moment to migration and terrorism as concrete phenomena that the EU security regime has had to deal with more intensively in recent years. We could say that we have *plain otherness* in the case of migration of non-Europeans and *radical otherness* in the case of terrorists. The terrorist represents radical otherness because their desire is to destroy. In the language of psychoanalysis, in the terrorist the so-called 'death drive' or Thanatos dominates. Repression and control of this are

absolutely necessary. The plain otherness of the third-country migrant is different. In the first place, migrants are individuals on the move. Apart from those who are pushed by war or fear of persecution, why are migrants in general on the move? It is probably because of a want and need of something that cannot be satisfied in the place where they are coming from. Against the destructiveness of a terrorist, the migrant mind is governed by exactly the opposite impetus, the so-called 'life-drive' or Eros.

What seems to be important for our purposes is that both of these figures represent desire and dissatisfaction. One notices straightaway how this evokes our earlier discussion of the mechanism of subjectivation pertaining to the economic regime, namely, the generation of dissatisfaction. We will return to the possible link between these two mechanisms in the next section, but let us now prepare some ground for identifying this connection by way of making a general methodological remark. Two basic procedures seem to ensue from encountering otherness. The first procedure is based on a simple model that can be explained very quickly. An encounter with otherness presents the self as a problem: *I am not like that stranger. Who am I then?* A process of generating self-awareness sets off an affirmation of identity, and a rejection of difference results from it. The problem of the self is the same as in the previous procedure, but entry to it is crucially different: *I am like that stranger. Who am I then?* In the mirror of the other, one realises something about oneself that one previously did not know. Encountering strangeness leads into the zone of our own inner secrets.

Finally, where does this methodological remark leave us? I believe it raises the question of how much the economic regime may recognize itself in the mirror of the security regime. That will be one of the questions dealt with in the next part.

4. The logic of strategy

Let me sum up the elaborations that I have made above. I have sketched out four regimes of practices: political, juridical, economic and security, and expounded on them in terms of societal functions, techniques of governing and mechanisms of subjectivation. The basic blueprint of what this resulted in may be presented in the form of a table:

Regime	**Function**	**Mechanism**	**Subjectivation**
Political	Common cause	Collective will-formation	Citizen
Economic	Vitality	Circulation	Self-seeker
Juridical	Justice	Subjective rights	Rights-bearer
Security	Order	Exclusion	Docile subject

The function of the political regime is reproduction of common cause, to which end it employs techniques of collective will-formation, the effect of which is the citizen subject. The function of the juridical regime is delivery of justice, for which it employs the technique of subjective rights, the effect of which is the rights-bearer subject. The function of the economic regime is the generation of economic vitality, for which it employs the technique of circulation, the effect of which is the dissatisfied self-seeker subject. The function of security is maintaining order, for which it enacts the technique of exclusion, the effect of which is the docile subject, who is hostile towards everything that is strange.

After all this groundwork, let us finally move on to the more exciting part of our experiment and consider all this from the perspective of the logic of strategy. As one will recall, this logic should explain the way in which different governing regimes coexist and interact between each other in the strategic field of power relations. Presuming that the economic regime still dominates in the EU, I will be looking at the process of perpetual transformation and structural rearrangements from the strategic point of view of the economic regime.

4.1 Economic and political

Let us first have a look at the strategic relationship between the economic regime and the political regime. The economic regime compensates for the lack of democratic political function in the EU. Even though the EU lacks democratic legitimacy, its existence is nevertheless justified insofar as it is capable of producing prosperity. However, this relationship of compensation is not all there is to it. In fact, the above structural analysis of the functions and mechanisms at work in both regimes should make perceptible something that may be called an *intrinsically antagonist relation* between them. Due to this antagonism, the economic regime may be imagined as if it was carrying out strategic manoeuvres against the political regime, aiming at a partial decoupling of the political regime from the governing system of the EU.

The antagonism seems to be inscribed in the *functions* of the two regimes. Whereas the political function is based on the belief that a *common cause* mobilises action and reinvigorates societies on the whole, the economic function considers this as a serious hazard. Insofar as the best way to generate economic vitality is to make individuals concerned about their own interest, the idea of a common cause only serves as a distraction. Common cause makes people attend to something that merely causes harm to the proper functioning of the market mechanisms. Therefore, from the point of view of the economic regime, mechanisms of collective will-formation should be removed, or at least blocked, to secure the market mechanisms' best possible functioning. To the extent that the economic function is as dominant in the EU as one is accustomed to thinking, it may in fact be found the structural background of the EU's democratic deficit.

Be that as it may, in our experiment two structural rearrangements appear to take place in the strategic game played by the economic regime with respect to the political regime. To begin with, it is in the interest of the economic regime to try to

block or *decouple from* the mechanism of collective will-formation of the political function. At the same time, however, it is in the interest of the economic regime to *couple* with the political notion of common good, or more accurately, to appropriate this notion by way of identifying it with economic vitality. In other words, the economic regime should try to *redefine* the common good as economic prosperity and nothing else. Along these lines, one could say that insomuch as the economic function is installed in full force in the EU, this will not only make the political function superfluous but moreover downplay –and even eradicate – the crucial political mechanism of collective will-formation, in order to make the economic mechanism as efficient as possible.

4.2 Economic and juridical

Let us next consider the strategic connection between the economic and the juridical regime. The critical question asked above was, what in the EU legal system stands behind rights instead of objective justice? We may recall that in the normal arrangement of the juridical regime, subjective rights are associated with the idea of objective justice; justice enters the juridical function and its mechanism of rights at the point where individuals are required to abandon their natural freedom, which is 'to live as they please', governed by self-interest. Instead of letting people realise their desires and allowing them to live freely, the juridical rights-bearer is asked to recognise the authority of the law as well as each other's legal rights. This is the price to be paid for the protection of the legal system and for civil and political rights; one may no longer live as one pleases, being subject to rules of justice.

Like with the political function, here too the economic function may be seen as carrying out a remarkable strategic rearrangement of structures. To begin with, the juridical rights afforded to individuals are extremely useful for the economic regime, because this mechanism is an efficient way of materialising economic freedoms and enhancing the circulation of assets in the market. In other words, articulating free movement of goods, persons, services and capital as *legal rights* of individuals is a way to create a supporting relationship between the market system and the legal system. Therefore, from the point of view of the economic regime, the mechanism of rights should be preserved.

However, the justice aspect involved in the mechanism of rights turns out to be problematic for the economic regime. That is because justice implies a renunciation of the element that is absolutely indispensable for the economic regime, namely, desire. Abandoning desire is what 'the fundament axiomatic of the rights of man' (the social contract, in other words) requires from the individual. Thus, suppression of desire is always involved in the juridical mechanism of rights. Insofar as desire is something without which the economic regime cannot breathe, it should try to reconstruct the mechanism of rights so that desire is preserved. Insofar as economic vitality is really best produced by way of liberating and perhaps even exciting desire in individuals, the juridical abandonment of natural freedom should be cancelled. Inciting desire is crucial for the economy, just as compromising desire is crucial for

the law.

Imagined as a strategic game of rearranging structures between regimes, the strategy of the economic regime with respect to the juridical regime can be fleshed out in the following manner. The economic regime has an interest in borrowing the mechanism of rights from the juridical regime, but it needs to break that down and have it reassembled so that it fits better for its own purpose. The first thing to do is to try to decouple the element of justice from this mechanism, just as it had to decouple the element of common cause pertaining to the political regime.

However, we may imagine that the decoupling of justice is only the first step in the economic regime's overall strategy in the game of structural rearrangements. Something probably needs to be replaced instead of justice; rights should be associated with something other than justice in order to give them new meaning and purpose. The new arrangement should support the function of generating economic vitality without repressing the free play of desire in individuals, because the more everyone desires, the more efficient and powerful the economy is. Insofar as the EU were to commit itself exclusively to the generation of economic vitality, the structural arrangement of its functions and mechanisms would not appease desire, but rather excite it. On this basis, might it be possible for the economic regime to couple rights precisely with desire, so that it would replace justice?

Let us imagine that this type of strategic manoeuvre conducted by the economic regime, this structural rearrangement, would fully succeed in the EU. What might its consequences be for the juridical regime? First of all, every individual right in EU law would manifest in the broader context of governing economic vitality. Every right would have to be reconstructed in such a way that the element of desire is incited. The final purpose of rights in the EU would be to secure everyone's access to the market as economic agents and competitors. Rights would exist to make it possible for everyone to put their products, skills and other assets in economic circulation. Moreover, this is something that people would be expected to do out of economic gain, not because of civic virtue, which mobilises action in politics, or out of some sort of duty, as in the case of the law. In this way, it would not be very difficult to consider liberation of the individual's self-interested desire as the novel meaning and purpose of rights. Desire would indeed substitute for justice in that structural position.

4.3 Economic and security

Let us finally turn to the coexistence and connection between the economic regime and the security regime. The way in which this question might be approached is to consider it against the background of the economic regime's previous manoeuvres with respect to the juridical and political regimes. Could it be exactly these that bring the economic regime into contact with the security regime?

With respect to the political regime, the question can be framed this way: can the political system of democracy ascertain that its essential technique of collective will-formation has a security function of its own? Collective will-formation imposes

on people the requirement to think in terms of common interest, not merely their own. Consequently, general will takes the place of free desire, as the individual *qua* citizen is persuaded to conduct their life guided by the light of common interest, not self-interest. Conceived thus, democracy indeed seems to have a security function. Insofar as the economic regime manages to remove common cause from the strategic field of power relations, it creates a situation that is potentially dangerous.

The next question is whether the same happens in the case of the juridical regime in its subjectivation of individuals as bearers of rights. Is security involved here as well? Important from the perspective of security is that rights require us to abandon the natural freedom to do as we please – that is, desire – and replace it with justice. With that comes the whole package of rules and requirements that the legal system basically is. More crucially, in the guise of justice another idea arrives and takes hold of our thoughts without notice. This idea insists that *rules* should govern our lives; we should live in a regulated fashion rather than freely and dangerously. Through justice, we will be afforded an area of freedom defined by rights but also *confined* by rights. From the point of view of security, these limits are indeed essential. Beyond these limits, freedom is genuine but all too dangerous. Here again, the economic regime's meddling with juridical rights produces a situation in the strategic field of power relations that is potentially dangerous.

How about the economic regime's connection with the security regime as such. On the face of it, one might think that a well-functioning economic system contributes to security in that it gratifies people's material needs. As long as there is food, shelter and so on, everyone is safe. As long as the economic regime is about satisfying needs, it would be easy to consider a security function operating there. As seen above, however, the kind of economic system we have depends on dissatisfaction rather than satisfaction. Insofar as economic vitality requires that people continuously feel want and need of something, it cannot risk producing safety and comfort. Were those to be achieved, the economic system would quickly collapse. One must continue to desire more and more, because this is the sign of life; one must be ready to take the risk and live dangerously.

What about the methodological remark about the different procedures of encountering otherness that ended with the question of how much the economic regime may perhaps recognise itself in the mirror of the security regime? This question may also be posed in more concrete terms with the help of our concrete images of the migrant and the terrorist. Insofar as desire must exist as a force that *makes people move*, it is not that the economic regime ultimately wishes to instil in individuals the same type of feeling that exists in migrants – let us say, a wish for life. However, in that this feeling is essentially *based on dissatisfaction*, it may on occasion turn dangerous. Perhaps it can take a more destructive form, such as that represented by the terrorist, the drive for death.

Now, how should one assess the situation in the strategic field of power relations where the economic regime's strategy has been to liberate self-interest and desire from the shackles of common cause and juridical justice? Might it not be the

case that the economic regime finds itself at a crossroads where it has produced a situation in which one can no longer be sure if life or death wins? Whether the desire and dissatisfaction it has been so carefully nurturing will develop into a destructive or productive form?

5. Cosmology?

Let me conclude by way of returning to the beginning. Inspired by the classical Chinese notion of the *Dao*, I wanted to experiment with certain theoretical notions of Michel Foucault: the strategic field of power relations, regimes of practices, and the logic of strategy. My question was, could the rearrangement of structures between the regimes of governing be seen as something similar to the perpetual and autogenerative process of transformation that characterises the *Dao*-informed idea of politics as a competition between different governing dispositions? While I do think that Foucault tried to make something like this perceptible by his notion of a strategic logic, I can only hope that my disposition of it is as clear.

Strategic logic characterises the constant confrontation and interaction between regimes of power. This interaction between regimes is at once a struggle for the souls of individuals, because regimes need subjects. Different regimes try to conquer the strategic field of power relations by way of trying to impose their own concepts of humanity on the living bodies that we humans are. Although the above experiment does not mean to put forward anything like the final result of thorough and rigorous research, what it does suggest is that in the background of the governing apparatus of the EU there stands a very problematic element the subject of desire.

Let us assume that the reality of the present state in the EU would in reality be something like the one described in the above experiment. The economic regime still has the upper hand with respect to the other regimes, leading to people being subjectivated as economic agents concerned with their own self-interest, enabled as subjects of desire. Yet, this condition need not stay that way forever.

The present arrangement, I believe, has its future transformation already potentially present within it. Perhaps the flip side of the economic excitement of desire, the dissemination of dissatisfaction, will at some point bring the economic regime's hegemony to an end. Growing dissatisfaction often leads to fundamental changes, even revolutions, but the future revolution may be a rather strange one: it may happen that people get tired of being dissatisfied and decide to stop. It is hard to know what would be born out of that.

And knowledge of that sort, what would that be? I would suggest we call it *cosmology*, the logic that resides behind the movements of the universe, like the *Dao*. In the world of politics and power, this logic is the logic of strategy.

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Governing the Rural Family in Australia from a Distance: The Family Provision Act and the Role of 'Expert Knowledges'

Malcolm Voyce*

Abstract

This article examines the governance of rural families in Australia and the legal treatment of inheritance disputes. It makes this analysis through an examination of Family Provision legislation, which imposes the legal obligation on every testator or testatrix to make proper provision for the support and maintenance of certain defined dependants. This form of law has been seen as an intervention into the private sphere to curtail the notion of individual freedom as regards property and to protect the position of women who were not properly provided for. This article makes a critique of Family Provision law as regards the composition of such law and its operation in rural Australia.

To make this critique the article, firstly, outlines forms of rhetoric which justify farming sons' inheriting family property. Secondly, the article describes how court judgments are involved in what Foucault called the 'examination' and in a process of 'normalisation'. Thirdly, the article demonstrates how such cases are involved in the governance of rural society and how these cases incorporate 'expert knowledges'. This analysis achieves the aim of the article to describe the forms of cases that reflect how law was imbricated with expert forms of knowledges that enable the state to 'rule from a distance'.

1. Introduction

This article began as part of a project on rural inheritance[1] that found that many farmers were not able to complete successful transfers of family farms to the next

* Law Professor, Macquarie University.

1 See Voyce, 2019, this article draws on this work, with permission of the publisher.

generation. A common sentiment among families was the desire 'to keep their farm in family hands' and to continue with a line of male succession. Underlying property division were implicit evaluations concerning the contributions of each respective family member. As Jack Goody has argued, splitting up family property splits up people (Goody 1976, 9).

As the project developed, several research questions were formulated. Firstly, what was the role of law in assisting families seeking to complete an intergenerational transfer of the farm? This was important, as family conflicts were often resolved through an interpretation of legal decisions or what has been called 'bargaining in the shadow of the law' (Mnookin & Kornhauser 1979).

A common approach when helping people with legal disputes is to provide them with an analysis of the law. Rather, this work seeks not only to provide legal analysis on family law matters but also to examine how the law incorporates different forms of argument about rural society. My objective is to ask 'how does law accept or reject rhetorical forms of argument about rural values and family work?' Here reference is made to arguments by litigants about the value of looking after parents, the importance of ancestral property, the sacrifice of farming sons' working on farms for many years with minimal rewards and the rightful expectations of off-farm children.

Secondly, given the great distances in the Australian landscape and the isolation of rural farms from each other, the issue arises as to how successive governments (imperial, federal and state) encouraged economic activity and regulated a rural society based on family farming. In other words, 'how did the centralized state rule from a distance, where proximity between state officials and subjects was not possible?' I later argue how local forms of authority (solicitors, welfare agencies), merged with notions implicit in legal institutions.

To achieve its goals the article, firstly, describes the social background of family farming as regards property disputes. Secondly, the article details the operation and role of Family Provision law. Thirdly, the article develops the theoretical approach of this work, namely Foucault's governmentality approach and the use of the concepts of 'normalisation' and 'examination'. Fourthly, a critique is made of the current approaches to Family Provision law. Fifthly, the article examines the form of property narratives claimants deploy in property disputes. The article then examines specific types of claimants such as farming sons', farming widows and daughters. The article concludes with reflections on the role of rhetoric found in these cases and how different forms of expertise have enabled the state to rule rural Australia from a distance.

2. The social background to family property disputes

Farming communities adhere to an ideology that prioritises the passing of farm property to someone in the next generation of the family.[2] The intergenerational

2 Lehrs 2017, 47; Barclay, Foskey & Reeve 2007.

exchange of transferring the farm on to someone in the next generation may be seen as a 'script'. Vanclay and Silvasti say 'this script represents an ideology of patrilineal succession embodying the continuity of the family farm' to keep the farm in the family (Vanclay & Silvasti 2009, 155).

These authors recognise that a strong ideology in family farming is based on the notion that supports male dominance in agriculture that results in the differential treatment of children along gender lines. Rural patriarchy 'does not operate in a vacuum' but has a material base, resting on, in part, men's control over women's access to the means of livelihood and through a form of control through economic dependence on males (Lehrs 2017, 49).

The distribution of assets in inheritances often meets bitter divisions and acrimony amongst family members when one child receives a larger than expected share. This may especially be the case with farms as there is a tendency of farming sons to receive the largest share. This pattern of inheritance goes against the notion of equality usually favoured in modern forms of inheritance. This tension is often exacerbated by the fact that farms have escalated in value, a fact that breeds ground for acrimony and rancour within families.[3]

Each member of a family may have their own expectations about who should inherit farm property. I call these expectations 'property narratives'. I describe these narratives as forms of rhetoric[4] as they often resonate with historical sentiments and the different justifications about the significance of owning property. These stories about property often express in popular form ideas that philosophers such as Locke make in their justifications for property rights (Rose, Saunders, Newby & Bell 1978).

An examination is made of the various narratives deployed in Family Provision cases as regards the labour of a farming son and the foundation events surrounding the development of the farm. It is suggested these accounts exhibit a rhetorical form in that they represent coherent arguments that contain autobiographical events and a version of community history.

Firstly, ideas of property imbricate narratives of kinship and significant personal relationships. At the same time, they are connected to notions of personhood and identity.[5] Families may be regarded as being based on the bonds that structure and

3 Conway 2016, 36-37. A number of recent studies have dealt with modern views on inheritance, see for instance Douglas, Woodward, Humphry, Mills and Morell 2011; White, Tilse, Wilson, Rosenman, Purser, Roseman and Coe 2015. Also see recent ethnographical work by Lehrs 2017; Williams 2010.

4 To analyse property claims as rhetorical the term 'rhetoric' needs some explanation. Scholars have in the last century expanded on the notion of rhetoric to include popular forms of thinking which have creditability. The meaning of the term rhetoric has thus shifted from the time of Aristotle, where it is generally seen as pervasive forms of argument (Aristotle 1909). Here I take rhetoric to mean statements that have or contain the logic of reasonableness or common belief which is adopted in a form which constructs an authoritative discourse which shapes subjects and makes calibrations about what is acceptable and what is illicit. I expand on the notion of rhetoric later. On property narratives see Rose 1990.

5 As Radin wrote there is a relationship between personhood and property. She wrote that 'most people possess certain objects they feel are almost part of themselves'. In Radin's view such objects are 'bound up with the holder' and essential to the self. The loss of these objects harms the individual and interferes with their ability to flourish and develop. Radin 1982, 959.

give meaning to their lives (Spencer & Pahl 2006, 45). Recent studies show contrary to notions of individualism, that there is a concern to take responsibility and obligation towards dependants and a concern to preserve the blood line and one's heritage (Douglas et al. 2011, 247).

Secondly, 'property' is connected to a process of location and place as property dwellers experience 'place attachment'. The expression 'attachment' describes the emotional bond which develops between a person and a place which may arise out of memories and feelings evoked by the landscape. Such an approach emphasises the lived experience and everyday experience of belonging to a place (Graham 2011, 14).[6]

Thirdly, land has been associated with the idea of improvement, that those who work on the property should be able to receive its reward[7] and that such work improves their moral character. This argument about the value of property paid less attention to the value of the land itself but more on the moral claims or entitlements of those who worked it (Ashcroft 1995, 51).[8]

Fourthly, there is the idea of custodianship or trusteeship. These ideas come in various forms. For instance, the central goal of medieval families from an aristocratic family was the protection of their landed estates intact for the male (Davidoff and Hall 1987, 205-206). In Australia in recent times farmers have often expressed the idea that farming land was a form of trust property that should be kept for successors.[9] For instance, some farmers have a 'longitudinal approach' to property that three generations may be currently involved in one property. As Carrington writes the land transfer process 'is in a continuous state of transition between generations' (Carrington 1997, 121).

3. Family Provision law

Family Provision legislation[10] imposes a legal obligation on every testator or testatrix to make proper provision for the support and maintenance of certain defined

6 Along these lines, Carter argues that property ownership represents the struggle to control or repress nature and that the cultural preoccupation with property is symptomatic of a desire to be placed or grounded. See Carter 1996, 2; Graham 2011, 14.

7 This idea has been associated with John Locke. See Arneil 1994.

8 In the context of squatting it was argued that land was made valuable through the application of squatter's labour. This argument was used to justify their occupation over extensive areas of vacant land. Ironically it was recognised later in the late nineteenth century that wool was of more value than the land. See Buck 1994, 128.

9 For sentiments along these lines see Submission of the Family Law Council to the *Joint Select Committee on Certain Aspects of the Operation of the Interpretation of the Family Law Act 1975*. 1992. 30:76–77.

10 Standard works include Englefield 2011; De Groot and Nickel 2012; Atherton and Vines 2013; Mackie 2013. On family farms and Family Provision, see Voyce 1993 and 1994. As regards the legislation in this area see the various Acts and ordinances: Family Provision Act 1969 (ACT); Succession Act 2006 (NSW); Family Provision Act (NT); Succession Act 1981 (Qld); Inheritance (Family Provision) Act 1972 (SA); Testator's Family Maintenance Act 1912 (Tas); Administration and Probate Act 1958 (Vic); Inheritance (Family) and Dependents Provision Act (WA) 1972.

dependants.[11] Should a testator or testatrix fail to make such provision in his/her will or should intestacy provisions fail to provide for such a dependant, the aggrieved dependant may obtain such an order, varying the terms of the will or varying the statutory rules on intestacy. The Act, however, does not empower the court to make a new will for the testator. Courts will only alter a will (or intestacy provisions) so far as it is necessary to provide for the proper maintenance and support of dependants where adequate provision has not been made for this purpose.[12]

Those conversant with distributions under the Family Law Act 1975 (Cth) will recognise that in property settlements following divorce, that 'contributions' are assessed as regards financial and non-financial contributions. In the Family Provision context what is assessed are the *needs* of the parties. In a nutshell, the applicant must demonstrate to the Court that 'adequate provision' has not been made from the estate for their 'proper maintenance and support'.[13] In coming to a decision, a court must act from the perspective of 'a just and wise testator' and from a perspective that reflect community standards (Dal Pont & Mackie 2013, 573).

In New South Wales, Family Provision legislation lays down that character or conduct is relevant.[14] However, a broad consideration of conduct has been relevant in case law given that the focus of the legislation has generally been defined in terms of the moral obligation of the deceased (Atherton 1993, 363). This is the case despite the fact that from time to time judges have attempted to repudiate the notion that there is a connection between good conduct and an order being made.[15]

As regards the claim for further provision from an estate the applicant must clearly prove need and provide all the financial information necessary. Applicants must provide in affidavits full details of the assets and liabilities, and the extent of their

11 Eligible dependants are defined by the respective state and territory laws and ordinances. As regards NSW, see section 57 of the Succession Act 2006 (NSW). Note in NSW the list of eligible claimants has been expanded.
12 Stout CJ in *Re Allardice* (1910) 29 NZLR 959, 969. Although the range of applicants has been enlarged since Stout made this comment, the thrust of the comment is still true as to the overall limit of the discretion.
13 The term 'adequate provision for proper maintenance and support' is an intentionally ambiguous statement, which is considered relative to each individual's circumstance. In order to determine whether adequate provision has been made, the court will consider the terms 'adequate' and 'proper' in relation to the applicant's situation. As such, the terms 'adequate' and 'proper' must be considered in the context of: The age, sex, condition, lifestyle and situation of the applicant. The applicant's needs and the resources they require for meeting those needs. The nature, extent and character of the estate and other claims upon it. What the will-maker regarded as superior claims or preferable dispositions. *Vigolo v Bostin* (2005) 221 CLR 191, 231 [122] (Callinan and Heydon JJ). *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ), cited in *Draskovic v Bogisevic* [2007] VSC 36 (1 March 2007) [24], *Collicoat v McMillan* [1999] 3 VR 803, 820 [47].
14 In NSW the court is now authorised expressly to take into account contributions whether of a financial character or not. This includes contributions directly or indirectly (i) to the acquisition, conservation or improvement of the property of the deceased, or (ii) the welfare of the deceased person including a contribution as homemaker. As regards a wife's claim there is an implicit assumption that a wife has been dutiful and that her claim has not been disqualified by disentitling conduct (Atherton 1993, p. 361). Thus, a person who has behaved badly in a consistent fashion towards the deceased may get less than otherwise might have been the case. For instance, the courts have taken into account conduct such as a good and loving wife, a deeply affectionate mistress, a close and loving daughter. Certoma 1997, 228-235; De Groot & Nickel 2012, 37.
15 *Blore v Lang* (1960) 104 CLR 124, 134 (Fullagar and Menzies JJ).

needs, such as housing, living costs and so on. In regard to the value of property expert evaluators are required (Englefield 2011, 176-177).

4. Foucault and governance, normalisation and the 'examination'

Foucault's ideas of 'governmentality' regarded government not as a form of representation but as a matter of intervention. To comprehend government, he suggested we should see it as a form of technology which sought to translate thought into reality to establish a world of persons and things for acting on subjects (Rose & Miller 1990, 8).

This use of the term 'technology' suggests an approach which shows that attention should be given to the form of mechanisms through which governments seek to shape subjects and to normalise them in their conduct and thought. Thus, to understand modern forms of rule we should examine humble and ordinary mechanisms like techniques of accountancy and other forms of evaluation (Rose & Miller 1990, 8).

Should we see the family and the family farm as a technical device we may conceive that the family become a key field of intervention for the state as families represented a bridge to larger reactions of power. Kinship, procreation and inheritances were the domain of state power as the family worked as a 'hinge' or 'switch point' between localised forms of power and state power (Foucault 2003, 81-82; Martin 2012, 866-869).

Foucault regarded the family as having a degree of local sovereignty as it could be relied upon to police its members and to offer them up to state authorities for education or therapy (Foucault 1978). However, the family at the same time was subject to professional disciplines of individualisation, categorization and spatial segregation. In Donzelot's words there was a 'transition from a *government of families* to a *government through the family*' (Donzelot 1979, 92, my emphasis).

Foucault showed how disciplinary power has several components, namely hierarchical observation, normalisation and the examination. Normalisation establishes a corrective function which determines whether one is a good soldier, teacher or worker. Its purposes are to establish the gaps that exist between expectations and practice. Foucault says of the 'examination':

> The examination combines the techniques of an observing hierarchy and those of a normalizing judgment. It is a normalizing gaze, a surveillance that makes it possible to qualify, to classify and to punish. It establishes over individuals a visibility through which one differentiates and judges them. That is why, in all the mechanisms of discipline, the examination is highly ritualized. In it are combined the ceremony of power and the form of the experiment, the deployment of force and the establishment of truth (Foucault 1978, 184).

While I have mentioned the nature of the examination it is necessary to give a further analysis of this idea and relate it to how a legal judgment incorporates different forms of knowledges. Foucault's purpose in outlining the different forms of legal processes was to show how the examination incorporates 'normalisation' and forms of expert

knowledges. Foucault does this in two ways.

Firstly, Foucault outlines the form of truth finding in early Greek legal processes. He regarded the dispute between Antilochus and Menelaus in the *Iliad* as illustrative of a previous method for obtaining truth.[16]

Foucault saw the way truth was reached in this context was by way of a testing game. He extrapolates that the modern form of trial differs in that it draws on the observation of power holders and a criterion of normality. In other words, the trial process draws on a contextually specific power-knowledge complex that constructs normality or what Foucault called normalisation (Foucault 2000; Pavlich 2010, 215).

Secondly, the reader may recall the description in *Discipline and Punish* of the dramatic physical punishment of Damien through the progressive destruction of his body. This mutilation represented to Foucault the end of an era with the consequent development through the introduction of the 'examination' as a forum for a whole series of assessments, diagnoses, prognoses and corrective suggestions. By focusing on the trial rather than the criminal act we may see how all kinds of expert opinions from the sciences were incorporated into the trial. Foucault links this development with the birth of a 'new epistemological-juridical formation' (Foucault 1978, 23; Suntrup 2017, 317). This new event brought about 'epistemic competition' between legal and scientific discourse (Suntrup 2017, 318). I outline in my conclusion how this way of approaching texts throws light on Family Provision law.

5. Critical approaches to family provision law

Commentators on Family Provision law have observed how the state at the turn of last century intervened in family life to override individual action and curtail free will. This approach was at odds with then current view of *laissez-faire* as expressed in the idea of 'freedom of property' (Atherton 1990a, 1993, 131; Voyce 2001). This move by the state was reflected in the introduction of Family Provision law as a form of legislation which was seen to intervene into the family realm to restore imbalances of power and improve the inequalities between men and women. As has been well shown by Atherton, Family Provision legislation developed as a response to men who neglected to make testamentary provision for their wives and children following the abolition of dower (Atherton 1988).

This form of critique of Family Provision legislation was based on the liberal assumption of a division between the public and the private realm, where the state was seen as the main source of governance and the progressive idea that reform measures will restructure social life. This approach assumed that the domestic sphere was primarily governed by centralised measures and the assumption that

16 In the chariot race of the games Antilochus crossed the line first, but an indignant Menelaus accused him of a foul at the post, challenging him to swear an oath by Zeus that he did not cheat. Antilochus refuses to take this challenge, and thereby invites the judgment that he did commit a foul and so must forfeit the race. As Foucault observed, this is a peculiar way to produce truth, to establish juridical truth – not through the testimony of a witness but through a sort of testing game, a challenge hurled by one adversary at another. Foucault 2000, 18.

disciplinary technologies had little sway on people's lives.

The 'liberal approach' approach to Family Provision law has ignored other forms of power and technologies, such as the disciplinary role of economics, which operated upon family life and how such disciplines interlocked with each other at a local level (Voyce 2008). It is therefore suggested a new approach to Family Provision law is needed to understand how it operates as part of rural governance.

The only other critique of Family Provision law was provided by Cownie and Bradley who make an analysis of Family Provision legislation in the United Kingdom.[17] Cownie and Bradley argued that the most common form of legal reasoning may be called 'deductive reasoning'. However, they argue Family Provision law does not utilise this form of logic.[18]

By contrast they argue that Family Provision law uses a different form of rhetoric allied to a different set of concerns. Cownie and Bradley take as an example the type of rhetoric reasoning found by Bonaventura de Sousa Santos, in cases of disputes as regards resident's association in shantytowns in Brazil.

De Sousa Santos found that while shantytown occupiers had no legal title to the property they occupied, they nevertheless developed an informal and unofficial legal system to deal with the occupation of their houses and property disputes. He found that these people had an informal system of augmentative rhetoric that was deployed in such disputes.

De Sousa Santos's as well as Cownie and Bradley's work is of help in the Family Provision context as it indicates how there may be a transplant of rhetorical forms from a social arena into a legal forum**.** These authors usefully indicate that Family Provision cases deploy a different form of analysis, based on a different form of logic. Hence, I refer to how rhetoric as a form of persuasion by argumentation and as a decision-making strategy was transposed into family property decisions.[19] At the same time such decisions were subject to the process of normalisation.

6. The narratives of specific claimants about property

I now examine aspects of the cases involving family property disputes. My analysis of cases involves typical 'actors' in the 'drama' of these cases (sons, widows, daughters). This form of analysis examines the personal narratives of family disputants and the

17 Inheritance (Provision for Family and Dependants) Act 1975 (UK).

18 Cownie and Bradley see the reasoning in Anglo-American jurisprudence as being based on the elaboration of general principles of an axiomatic nature from which necessary solutions can be deduced logically within the premises of a closed system. See Cownie & Bradley 2003, 580. On the role of discretion in family law see the comments by Parkinson and Dewar. Parkinson says that in the family law area that judgments are 'often intuitive rather than reasoned, subjective rather than principled' (Parkinson 1999, 122-123). Dewar says that family law has no explicit normative and justificatory framework (Dewar 1997). Note these authors are writing about family law but the same may be said of Family Provision law. See also Ingleby & Johnstone 1995 and Glendon 1986.

19 It is acknowledged that Foucault avoids talking of rhetoric as he adopted the term discourse. However, according to some writers his approach parallel ideas on modern forms of rhetoric. See Bizzell & Herzberg 1990, 1127.

form of rhetoric incorporated (or excluded) in these cases.

6.1 The Farming son's cases

Many family members feel a special connection with the property as a farm may have been in the family for several generations. This is especially the case with 'farming sons' who regard that they are 'special' for a variety of reasons. Such sons may feel they are charged with carrying the family legacy of the farm tradition and bear a personal responsibility to continue the farm in the family.

They also feel their labour is not recognised as it should be given a greater family significance. Frequently a son will leave school early and join his father after an agricultural or trade course. Sons are subsequently trained by their fathers to be farmers. In many cases an applicant may have helped build up the assets of the farm, frequently doing much of the heavy work long hours for a low wage, while their father continues to hold the purse strings.

In *Vigilo v Boston*[20] the son whose claim was not recognised said:

> I've put up with hell since I was 16, and trying to bring a family up with $40 a week at that stage, my wife working, you know, we were working basically 15 hours a day 7 day a week to survive on promises of 'Great, beauty, one day it's going to be mine.' We were looking for this bit of dirt, and at the end of the day told to leave with the shirt on my back. It's a bit hard. And also like Subarian [his lawyer] pointed out, that what are you going to do at 16 or 18, was I going to go out and get a solicitor and say 'Pop, let's go and see the solicitor and put it all down in writing'. You know what he would have said? Just imagine you doing that to your father, what would he say? [21]

In *Dawson v Joyner*[22] there were two sons claiming the land. The judge said about their situation:

> Until about age 23 Garry had precisely the same relationship with the testator as did Ross. Both were raised on the family property. Both worked on the property as children being paid very modest sums. Garry was sent off to Agricultural College with the intent that he return and work on the property. Ross stayed on the property. As adults they were paid an award wage together with benefits such as fuel, free meat and milk, accommodation, and groceries to be charged to the testators' account up to $30 per week. While there may be some dispute about the detail of the payments made it seems clear that both worked hard for fairly modest financial returns.

The testator made it plain to his two sons that the intention was that the aggregation

20 *Vigilo v Bostin* (2005) 221 CLR 191; Voyce 2005.
21ABC program 'Farms, Families and Fights over Wills', 12 April 2015 available at <http://www.abc.net.au/radionational/programs/lawreport/2005-04-12/3453104>.
22 [2011] QSC 385 (12 December 2011).

would be built up by their joint efforts to enable their two families to live off the properties and that they would one day inherit the family properties.

In *Daniels v Hall* [23] the judge described the plaintiffs as:

> the plaintiff continued to live on the family farm and was persuaded, he would say compelled, by his father to leave school early and to devote the whole of his time and efforts to working the family farm and, in the process, to take up additional land in the plaintiff's own name and to work that in conjunction with the home farm. According to the plaintiff, he did this out of respect for his father's demands and worked hard for small financial reward.

The judge commented:

> There is no doubt that Robert Daniels was an attentive and assiduous worker on the farm and in the partnership right from the inception, that is, before the formalisation of the partnership in 1974. Indeed, he claims that he was constantly working on the farm from the age of 10 and that he had abandoned an ambition to have a working career as a pilot because of his father's insistence that he should stay and work on the farm. It is also clear that Robert was attentive to the needs of his mother and his father, the deceased, particularly when they were in declining health. As already mentioned, he helped build the house on the block at 28 Gibson Way, Hopetoun and he used to visit his mother at regularly intervals when she was in care at the Ravensthorpe Hospital. He continued to see his father regularly after the dissolution of the partnership in 1997 with his father visiting the farm almost every day until his cancer diagnosis. Robert assisted with the care and treatment of Arnold by driving him to Perth and back on occasions when chemotherapy was administered and in bringing Arnold to his own home at the farm during intervals between treatment when he needed care and attention.

6.2 Farming widows

Widows are often seen as objects of pity and sympathy as their husbands had often left them in a financially precarious position. By contrast there was the 'merry widow' often created by men as a consequence of their fears of female sexuality and their own mortality (Hart 2009, 11). Despite the patriarchal nature of the law a study of nineteenth century widow's wills has shown that many men attempted to provide for their families.[24] However, they were also worried that their property could come under the protection of another man (Hart 2009, 69).

Typically, such widows had spent their life on the farm and were dependent on the surviving family for support in old age. Such a widow may well have borne the testator's children, lived on the farm with him for many years and helped him in his declining health. We must remember in this context that women outlive men (De

23 [2014] WASC 152, [12].

24 For English evidence see Goody, Thirsk & Thompson 1976, 350 and 353.

Groot & Nickel 2012, 90).[25]

Widows were often thought to be taken care of should the property of the estate be placed in a life estate.[26] The pattern of life estates for widows is still found in rural Australia and is especially used in the cases of remarriage to protect members of blended families.

Implicit in such settlements was the typical of the eighteenth-century view, which regarded women as mere objects of protection being conduits or vessels, in the sense that the property was to be protected for the ultimate male heirs, while the widow was to be maintained and protected as the bearer of heirs (Atherton 1993, 106). As Atherton argues:

> Judges echoed loudly the eighteenth-century framework […] in which women generally and married women in particular were seen as objects of protection – but only in a 'conduit pipe' sense. She was protected in so far as her need for maintenance was concerned, but not to the extent of any real notion of independent mind. The concept is dynastic: it is the property itself which is to be protected for the ultimate heirs, her children, while she is to be maintained and protected as the bearer of the heirs.

Life estates are time honoured devices usually created in a will or through an *inter vivos* trust set up by a solicitor to be administered by an accountant. The device allows the life tenant (usually the widow) to enjoy the benefits of the estate while the son farms the property with the expectation he will inherit the property on the death of the life tenant. The device is created in a way that the life tenant receives the profits of the estate while the remainderman will receive a salary and on the death of the widow, the farming son will inherit the property.

Historical evidences have shown that rural accountants used technical accounting formulations that operated to minimise the proportion a widow may receive from an estate. The case of *McBride v Hudson*[27] allowed a trustee the option of utilising a form of apportionment which is deemed peculiar to station properties. This case indicated that trustees in farming estates may hold that the increase in sheep in any one year belonged to capital (that is, the remainder farmer) and should not be seen as a profit for the life tenant (that is, the widow).

Implicit in this apportionment principle is the notion that the life tenant's share should be minimised to help smooth the transition of the estate between different generations of males.

Life estates are technical creations that split ownership over time between two successive owners. While we may suppose these devices are neutral it is suggested these

25 Early Family Provision decisions formulate the claim of the surviving widow as having a 'paramount claim' (Englefield 2011, 112-116). Recently it has been stated that there is no rule that 'the widow takes all' as each case depends on the circumstance. *Bladwell v Davis* [2004] NSWCA 170, [12]. See De Groot & Nickel 2012, 90. See also *Burke* [1940] QLR 45.

26 Analogous methods are a provision for a widow that is terminable upon marriage and the provision of an annuity rather than a capital sum, see Dickey 1992, 120.

27 (1963) 107 CLR 604.

devices are implicated in local power networks which operate to discriminate against farming widows (Voyce 2001).

The legal and accounting administration of life estates and the carriage of the legal affairs of the family was usually a local solicitor and accountant acting in concert for a male representative of the family. This relationship operated over time to reinforce the interests of life tenant as against the interest of the widow.

6.3 Daughters

Daughters on family farms are usually expected to participate in farm work and they usually develop skills comparable to their brothers. However, this work is not usually recognised and daughters who wish to take up farming as a career are normally discouraged because the prevailing attitude favours sons as successors (Lehrs 2017, 40). As Riley reports girls see their place on the farm as 'transitory' while boy's engagements through farm tasks are seen as 'rites of passage' (Riley 2009, 252). It is instructive that in some cases judgments refer to the life story of the daughter, with no mention of her efforts on the farm in her youth.[28]

At the same time Family Provision cases show a lack of recognition for girls who looked after aging parents.[29] For instance, in *Salmond v Osmond* the judge commented:

> the daughter, like her siblings, grew up on the farm. It had been her wish to stay on the farm and help her father, but he considered that that was inappropriate and he found her a job in a pharmacy in Wagga Wagga.
>
> [although she] lived away from Wagga from about the time she commenced her relationship with Mr Long, she maintained contact with her parents, visiting two to three times a year. During those visits, she always assisted around the farm. [30]

While cases usually consider the needs of individual applicants there have been cases where judges consider the wellbeing of the family as a whole. For instance, in one case a judge minimised the contribution a daughter might have received to help support the rest of the family. In this case an applicant daughter was entitled to a significant portion of her father's estate to purchase a house in town. The trial judge said that the bulk of the farm should not be sold as the farm was being used to support other family members and they intended to leave the farm to other family members.[31] The judge said:

> Disrupting the arrangements would disrupt the pattern of family relationships upon which their lives and happiness are formed, and would also disrupt the

28 *Roberts v Roberts* [1999] SCWA (4 September 1999) 8568.
29 These features of rural life have been well reported by Alston 1988, 2004; Gray and Lawrence 2001. An important study on the socialization into gender roles is Scharz 2004.
30 [2015] NSWCA 42 (10 March 2015), [29]–[30] (Beazley J).
31 *Lloyd-Williams v Mayfield* (2005) 63 NSWSC 631.

> interests, expectations and life plans of close relatives with whom they feel a sense of identity.

6.4 'Marrying-off the daughters'

A feature of many cases in Family Provision cases is that married daughters who made applications under family Provision legislation have been considered as sufficiently well maintained and not in need of support if their husbands were doing well in life (De Groot & Nickel 2012, 74). This view reflects the idea of women as 'dependent' on the husband who could be relied on as the primary earner of the relationship. The result, in effect, is by not providing for a daughter the rest of the estate is released to help establish the male farmer.

For instance, in *Re Hodgson*[32] the daughter was regarded as 'taken care of' as she had married well. In deciding whether or not the testator was guilty of a breach of moral duty towards the daughter, one of the relevant factors was the income and prospects of the husband the daughter had married. As she had married a prosperous husband, Herring J considered she had 'transferred into another household' where her husband consequently was responsible for her.[33] Martin J held that as the property was small and probably was not susceptible to division, that in the circumstances he concluded that the elder son had 'at all events a strong moral claim to be entitled to carry it (the farm) on as a dairy farm'.[34]

The judges concluded that she was well provided for as she was married to a healthy husband with adequate means and good prospects. As regards the daughter Sholl J said:

> When he came to the situation of the daughter, he was aware that she had recently married a young farmer in the vicinity who appeared to be in quite comfortable circumstances, and well able to support her and the child she then had. In those circumstances the problem is whether she had some need and some moral claim. So far as need is concerned she has given no evidence as to her husband's assets other than that the husband was making a modest living and was not affluent. It appears from her cross-examination that he owns two farms and has an interest in the partnership in the lease of another. I don't know what he earns, but I see no reason to doubt the statement that he is in comfortable circumstances. She was at the death of the testator married to a young farmer who is well off financially and well able to look after her. He could be reasonably assured that their married life would be a success. Should any misfortune overtake him, she has the benefit of his will or of the statute. Her financial future was perfectly assured or appears to be so. I see great difficulty in seeing how the daughter has a claim on his bounty.[35]

32 [1955] VLR 481.
33 Ibid, see 484 per Herring J, the other two judges agreed with this approach.
34 Ibid, 487.
35 Ibid, 24.

In effect the judges were saying that having left one family for the security of her husband's family she had therefore lost her claim on her father's estate.[36]

7. Conclusion one: the role of rhetoric in family provision cases

I now examine how the type of cases I have examined adopt forms of rhetoric. I also refer to the significance of Foucault's insights as regards the importance of expert knowledges.

I have argued disputes for family property enshrine forms of rhetoric. I take rhetoric to mean statements that contain a logic of reasonableness or common way of thinking that is adopted by judges as part of the presentation of their judgment. This approach sees law as a cultural description[37] as well as a form of reasoning. These forms of presentations also enshrine calibration about what is acceptable and what is illicit. As I will later argue such rhetoric incorporates forms of normalisation.

I have examined forms of rhetoric active in Family Provision cases as regards family farms. They were claims firstly based on the history of the farming son on the farm and the work he had done on the farm. Secondly, I examined cases where the long-term viability of the farm was the factor that underpinned the decision. In these later cases widows and daughters received minimal amounts on the basis that intergenerational continuity for a son should be maintained.

The first group of cases discussed described the claims of farming sons who had been brought up to work on the land.

Milner suggests that such 'property narratives' show stories of identity pertaining to the sons' history, property and place.[38] These farming sons' stories in general reflect the values of intergenerational exchange of family ownership as seamless flow between generations as each contribute to the property to pass it on to the next generation. In these cases, the land was 'family land' in the sense that it was intergenerational property as a result of a reciprocal exchange of property title for labour.

This is implicit in the founding stories of the family on the land and the recognition given to the son for his work. Part of the family story is how sons leave their previous existence as off-farm workers and become stake holders as 'farmers'.

These accounts emphasise what Milner calls the 'rites of settlement'. These accounts represent rites of struggle and of hard work, and the taming of nature. These struggles also emphasise a son's status as a farmer and the supposed right to keep the fruits of their struggle.

Secondly, I referred to a group of cases which marginalised women's contributions. These happened in two sorts of cases. The first group dealt with the case of widows who received life estates and a second group of cases dealt with 'farming daughters'.

36 The Full Court per Herring CJ, Martin and Sholl JJ.

37 See my earlier comments on rhetoric. I acknowledge here the work of James Boyd White. He importantly draws a distinction between 'law as a machine' and law as a social and cultural endeavour. While he concedes law is a method of social control, he argues it is a culture of argument, see White 1984 and 1985.

38 I acknowledge my debt here to Neil Milner and his study of leaseholder's land disputes in Hawaii, see Milner 1993.

Cownie and Bradley have argued that Family Provision cases are a form of *topoi,* or forms of argument which operate from different forms of dialectical and rhetorical proofs as found in other areas of law. Cownie and Bradley argue that these forms of argument adopt arguments from generally accepted opinions and arguments. Such arguments they argue are fragmentary insights, points of view, that orientate the discussion and problem and open a different set of solutions (Cownie & Bradley 2003, 580; De Sousa Santos 1977, 14, 17).

The deployment of this form of rhetoric is consistent with the critique generally advanced on the role of discretion found in Family Provision law.[39] It is suggested also that this form of approach utilises a particular form of discretion that is not a form of 'inquiry' but an 'examination' based on the notion of normalisation.

As indicated normalisation involves the construction of an idealised norm of conduct. Normalisation is one of the assemblage of tactics used for social control with the minimum expenditure of force through forms of what Foucault calls 'disciplinary power'. I develop the significance of this later.

8. Conclusion two: the imbrication of 'expertise' into family provision judgments and governance of family farms

The settlement of rural Australia was facilitated by a variety of 'expert forms of knowledges' which allowed the state to govern the family situation from a distance. By the term expert 'forms of knowledges', it is meant those forms of knowledges based on surveying, cartography, and demography which allowed the family to be 'governed from a distance' where direct control was not possible (Voyce 2007; Rose & Miller 1990; Latour 1987, 219-232).

While these devices were crucial in creating a form of internal government for the family, such as its form of property holding, the institution of marriage itself and the various programs of governmental support, attention is directed now to how decisions in Family Provision cases were composed through the imbrication of different forms of expert knowledges. I turn here to what Foucault regarded as 'economics' as a prime instance of an expert knowledge.

Foucault regarded professional forms of expertise, such as economics[40] as a form of knowledge that constructed a technology for evaluating certain types of subjects and practices (Mitchell 2002, 80-119). Foucault regarded economics, for example, not as an autonomous realm of exchange, but rather as a form of technology or as a mode of inquiry to be conducted through examination, measurement and objectification of the productive subject.

At the same time these economic forms of measurement, as part of a complex 'assemblage' of practices and technologies, were connected to 'knowledge formations'

39 See former discussion and critique of Dewar 1997 and Parkinson 1999.

40 This approach builds on the notion that the 'economy' was essential to the emergence of a new form of political rationality which Foucault called 'governmentality', which linked the management of the self, the family and the state (Barry, Osborne & Rose 1996).

(formal and informal) which were united in the role of governance. Through this linkage at a local and state level the rudiments of the pioneer settler state were established.

This way of proceeding toward 'economics' as outlined instructs us to think of expert knowledges (widely conceived) as 'dividing practices'[41] that operate in judgments, in the case of farms, as a device which separates those who are in need and those who are not.

Within this approach there is implicit in judgments an 'examination' of the 'needs' of the applicant and the family in general. Seen as an *examination* each farming dispute adopts one of the types of rhetoric outlined. These as indicated were 'as the son had worked on the farm he should inherit the farm', and that an economic perspective dictated that women should receive minimal amounts to preserve the farm in the long term.

I will conclude how Foucault's methodical approach to law texts and to forms of governance underpins six insights into Family Provision law.

Firstly, should we conceive of the farm as a vehicle for family governance we may see that the idea of property enables the state to govern from a distance as regards what may be called as a 'family's internal property relations'. This approach is in line with some property theorists who argue that we should examine the relationship between the stakeholders of property owners through how law governs their relationship with each other (Alexander 2012, 1860). The techniques of governance I suggest are not neutral but contain social implications.

For instance, 'accountancy technology' utilised in life estates enabled substantial farm wealth to be directed to farming sons. The deployment of the capital income distinction, utilised in a special way for farming properties constructed women as conduits for the continuation of male farming. Likewise, daughters' efforts on farms were downgraded in the interests of intergenerational continuity. Underpinning these decisions were economic evaluations that male labour was more productive and women's labour a hindrance on male continuity of farming.

Secondly, I take Foucault's method to reveal that we should focus on the notion that the Family Provision hearing is a form of 'examination' rather than an 'inquiry'. As I have indicted an *inquiry* is the knowing of events according to witnesses, according to criteria of observation. By contrast an *examination* is knowing individuals according to the observation of power holders and a criterion of normality or what Foucault called 'normalisation' (Elden 2017). This process involves the creation of standards to separate out undesirable subjects. An analysis of the cases presented show that productive labour was rewarded, and long-term commitment endorsed, by way of an allocation of property that supported male continuity of family farming.

Thirdly, the result in each case should not be seen as creating a 'precedent' in the traditional legal sense of deciding cases according to consistent principled rules so that similar facts will yield similar and predictable outcomes. Practitioners in the

41 Examples are the mad from the sane, the sick from the healthy, and the criminals from the 'good boys' (see Foucault 1982, 208).

area of Family Provision often complain about the lack of consistency in decisions.[42] Perhaps the best view is from Gillian Douglas who writes:

> that the only way one can 'articulate' how that judgment is made, is by understanding that what the judges are doing is using their own experience of family practices and norms to assess the family tie between deceased and applicant, taking due account of how that family itself 'operated' and what norms it shared. In so doing, the law can be used dynamically to determine which kinds of relationship, and what qualities of emotional or supportive bonds, should be recognized as giving rise to a 'sense of obligation', as Janet Finch would put it, to provide some financial provision for the applicant. (Douglas 2014, 240.)

It is suggested then that seeing the cases as an 'examination' rather than as a form of inquiry goes further than doctrinal analysis as usually conceived. This is the case as this way of proceeding draws on forms of power-knowledge as expressed in judgments. As George Pavlich writes the modern form of examination 'can only claim legitimacy by drawing on contextually specific power-knowledge complexes that define how to discover and investigate legal truths' (Pavlich 2010, 215).

In the context of family farm judgments, we may observe the role of local power networks. Thus, in the case of farming sons the preeminent local solicitors in towns as regards Family Provision matters and divorce cases act for male litigants exclusively. At the same time women who desert their husbands may not receive credit facilities in local stores. Alternatively, women are entrenched in male dependence on account of the social welfare rule on cohabitation rule (Voyce 2008). Finally, a woman might be excluded from rural society as she may be seen not to have a proper mental capacity consistent of those required to support rural masculine values.[43] In short, solicitors, police and welfare agencies worked and supported patriarchal views of farming communities (Voyce 2008, 342).

Fourthly, I have shown that family narratives about family property reflect various values as to ideas on property. The Family Provision cases I have discussed coincide with a rural view that property should be inherited by those who worked on the land, that land should be preserved to support family cohesion. In this form of rhetoric ideas as to rural forms of identity or sense of 'place attachment' underpin these decisions although they are not referred to as such. Other ideas excluded such as the laudable merit of helping aging parents, assisting widows or married daughters.

Fifthly, Foucault scholars have interpreted Foucault's approach to law in various ways. One school of thought is that in the light of expert disciplines law has withered away as it has been colonised by other forms of discourses. The argument by Hunt and Wickham was that law acts as a norm which has been shaped by scientific

42 See earlier comments on the role of discretion in Family Provision cases.
43 See the story of Catherine Currie in McLeary and Dingle 1998, 106-108. On the colonial construction of madness, note Colebourne 1997.

disciplines such as criminology, economics and psychiatry. In this view law has been 'emptied' out or even dismantled and is entering into a terminal process of decline (Hunt & Wickham 1994; O'Malley & Valverde 2014, 326).

However, I suggest it is unproductive to generalise about the relationship between law and the disciplines as each area of law should be considered separately. I consider that the Family Provision cases bring about a system of normalisation as a result 'epistemic competition' (Teubner 1989, 749).

As indicated by 'normalisation' I mean that in the 'farming cases' inheritance by sons of farmers tended to be supported with only moderate amounts for other members of the family. In line with this approach family solicitors supported this approach in the affirmation of male power in local communities. It is acknowledged that more recent cases have ended the special consideration given to farming sons and the idea that the farm must be kept in the family (Voyce 1993).

As regards what Teubner called 'epistemic competition' I would argue that what is brought about through the result of human sciences being imbedded in law, represents what Foucault called as a 'grotesque cog in the mechanism of power' (Foucault 1999, 11; Suntrup 2017, 318). In other words, we have what Teubner called as 'a new reality that is neither a purely judicial construction nor a purely scientific construction' (Teubner 1989, 750; Suntrup 2017, 319). For instance, in the case of life estates there are rules where forms of accounting have excluded other interpretations of law to in effect deny support for meritorious widows and daughters to ensure the long-term viability of the farm for the son.

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The 'Financial Stability of the Euro Area as a Whole': Between Jurisdiction and Veridiction

Tomi Tuominen*

Abstract

Through the concepts of jurisdiction and veridiction, Foucault conceptualised the different relations that markets and law have had throughout times. During the pre-modern era, the market was heavily regulated. Legal-locution through politics (jurisdiction) defined, for example, what was the just price for a given product. During the modern era the role of markets changed. Now, markets function as a site of truth-locution (veridiction). The markets, through formation of market prices, define what is good government. This article takes the European Court of Justice's judgement in C-62/14 Gauweiler as an example of the interplay between the forces of legal-locution and market-veridiction. The case concerned the European Central Bank's government bond purchasing programme. A central element of this programme, and also the condition for its legality, was that it does not interfere with the logic of the markets and retains the Member States' impetus to follow sound budgetary policy. The analysis reveals how the European Central Bank had to use legal-locution to make market-veridiction work because the markets were acting irrationally. The case is thus a paramount example of Foucault's maxim: 'One must govern for the market, rather than because of the market.'

> In clear terms this means first of all that the main objective of regulatory action will necessarily be price stability, understood not as fixed prices but as control of inflation. Consequently all other objectives apart from price stability can only be secondary and, so to speak, adjuncts. At any rate, they can never be the primary objective. In particular, the primary objectives must not be the maintenance [sic] purchasing power, the maintenance of full employment, or even balancing the balance of payments.

* University Lecturer in Law, Faculty of Law, University of Lapland.

1. Introduction

When you read this quotation in 2019 – in the post-Eurozone crisis era – you would likely assume that it comes from a technocrat such as Mario Draghi, the President of the European Central Bank (the Bank) from 2011 to 2019. Or perhaps you had in mind a politician such as Herman Van Rompuy, who served as President of the European Council from 2009 to 2014. Both men were in office during the height of the Eurozone crisis and participated in crafting the European Union's responses to the crisis. However, the quotation is from Michel Foucault's 1978-1979 lectures at the Collège de France, later published as the seminal volume *The Birth of Biopolitics* (Foucault 2008, 138-139).

These lectures varied from Foucault's previous ones in that here he engaged with contemporary issues for the first time. Although Foucault commenced his analysis from the middle ages, he approached very close to the era of Thatcher and Reagan, a time that is usually taken as the starting point of modern neoliberalism. One of Foucault's points in these lectures was to show how the role of the markets has changed, and how, along with that, also the role of law and government changed. In fact, this change is central for his conceptualisation of *gouvernementalité*, as this transformation also affects the way in which power operates.

Foucault described the following shift: During the pre-modern era, the market was heavily regulated. There were rules on what could be sold, what the just price was, and the consequences of fraudulent action by the market participants. According to Foucault, this meant that the market functioned as a site of justice, 'a place where what had to appear in exchange and be formulated in the price was justice'. The market was therefore a site of *jurisdiction* (Foucault 2008, 31). This changed, however, in the modern era. The role of government within the markets changed. Central in this shift was a 'form of rationality' that made possible the self-limitation of governing. According to Foucault, it was political economy. The objective of political economy was the enrichment of states, and central to it was competition between states (Foucault 2008, 13-15), but now the value of governmental practices was determined at the markets – and thus by the markets – through the formation of market prices. The mechanism of price formation is therefore a form of truth-locution and thus 'good government' functions according to the truth that the market produces. The market is therefore now a site of *veridiction* (Foucault 2008, 32).[1] Thus, in practice, 'market principles frame every sphere and activity, from mothering to mating, from learning to criminality, from planning one's family to planning one's death' (Brown 2015, 67).

Regarding sovereignty, this signalled simultaneously an ontological, epistemological, and political reformulation, if not a complete revolution (Brown 2015, 57). The markets took over the role of law. It was not the law that legitimised the state anymore but rather the markets. But unlike liberal economic theorists of

1 The terms 'truth-locution' and 'legal-locution' as expressions of Foucault's idea on the relation between the market-system and political power are from Hurri 2014, 167-168.

the modern era had argued, the role of the state was not to leave the markets alone; rather, government must 'intervene on society so that competitive mechanisms can play a regulatory role at every moment and every point in society and by intervening in this way its objective will become possible, that is to say, a general regulation of society by the market' (Foucault 2008, 145). This means an activation of the state on behalf of the economy in order to facilitate economic growth and to economise the society as a whole (Brown 2015, 61-62).

Nevertheless, the contemporary relevance of these lectures stems from that which was missing from Foucault's analysis: the very fact that they were delivered at the dawn of modern neoliberalism. While Foucault was able to map out the fundamental ways in which neoliberal governance works, his analysis lacked two important features from a contemporary, European perspective: Foucault's neoliberalism was state-centric, and at the time, the economy was not as financialised as it is today (Brown 2015, 70-72). Thus, the 'markets' that Foucault described are very different to the 'markets' that are at the centre of this article. Foucault's conception was that markets are a domain in which goods are exchanged for a price that is based on supply and demand. The financial markets are different though. Financial markets are not about commodities as such, but specifically about money. Thus, the 'irrationality' of the markets, discussed later in this article, needs to be understood specifically from this perspective; we are talking about governing the market itself, not about governing some other aspect of society through the markets.

The opening quotation of this article describes what role monetary policy played in German ordoliberalism, in the form as it was conceived in the 1930s. The Eurozone crisis inspired ordoliberalism's return to academic debates, as many have claimed that the reactions that the European Union conducted to combat the crisis and to prevent new crises were clear expressions of ordoliberal thinking (see Blyth 2013).[2] As is widely known, the law has a specific function in ordoliberalism (see Tuori & Tuori 2014, 13-60), much like in its cousin neoliberalism too (see Gill & Cutler 21014). This is also clearly visible in the quotation from Foucault.

The purpose of this article is to analyse one specific contemporary instance in which the problematisation conceptualised by Foucault four decades ago, and recently updated by Wendy Brown (2015), is manifested in a very concrete and politically important way. On 16 June 2015, the Court of Justice of the European Union (the Court) delivered its judgement in the case of *Gauweiler*.[3] This was a paramount judgement for several reasons (see Tuominen 2018), but for our current purposes, its primary relevance lies in the fact that, together with the Court's earlier judgment in *Pringle*,[4] it condoned the approach that the European Union had adopted to solving the Eurozone financial and debt crisis: austerity induced from the outside as a precondition for financial assistance. States at the brink of bankruptcy, Greece

2 However, it has been seriously questioned whether German ordoliberalism has anything to do with current neoliberalism or what Germany itself has been doing. See Young 2014.
3 C-62/14 *Gauweiler* ECLI:EU:C:2015:400.
4 C-370/12 *Pringle* ECLI:EU:C:2012:756.

being the best example, had to introduce massive cuts to their government budgets and implement a host of 'reforms' regarding various policy fields, most notably to social security, education, employment and pension systems.

From its very inception, the logic of the Economic and Monetary Union had been to subject the participating states to the logic of the markets. This is due to the 'asymmetrical' structure of the currency union: monetary policy (the setting of interest rates) is centralised to the Bank, but economic policy (government taxing and spending, and policy issues related to the economy) remains a national issue. Crudely simplified, economic policy is about social welfare, whereas monetary policy is about the price of government financing; the latter is needed in order to secure the former. As each state was to remain responsible for their own economic policies, the currency union included mechanisms for making sure that states do not incur too much debt and become bankrupt, in which case the other states would need to come to their rescue. The purpose of these rules – the ban on central bank financing (Article 123 TFEU) and the no bail-out clause (Article 125 TFEU) – was to subject the Member States' economic policies to market-veridiction; the formation of government interest rate levels was to act as an incentive for states not to have budget deficits nor to incur more debt (see Lastra & Louis 2013). As we know now, these rules did not work. The adopted crisis response mechanisms aim to make market-veridiction work. States are subjected to the markets; states need to apply austerity in order to receive money from the markets.

Gauweiler brings into relief Foucault's main point about the role of the markets and also two related issues. The Court addressed each of them as a separate legal point. First, the Weberian rationality of modern law is central to the way in which the economy becomes the guiding force of society. One would assume that the individual legal mechanisms that the European Union enacted as a reaction to the Eurozone crisis would be the means to an economic situation that is seen as a desirable end. However, the means as such seem to contain policy choices and values. In other words, the ends are already inscribed into the means. Such means-ends rationality is visible in the first legal question that the case addressed: how do we delineate between 'economic' and 'monetary' policy, and what significance do we give to the stated objectives and the actual effects of such measures?

Second, within the realm of formally rational modern law, the legality of governmental actions is reviewed through their proportionality. Specifically, the proportionality review in *Gauweiler* hinged on the role of expert knowledge within economic governance, an issue that is central to many Foucauldian analyses and which is at the very core of *gouvernementalité*. Here, the point is that although expert knowledge is often purported to be objective and neutral – that politicians set the ends and then experts devise the means to reach them – with regards to the economy, this is definitely not the case. In fact, the role of economic expert knowledge remains highly disputed and it often makes it possible to masquerade policy choices behind a veil of technocracy.

Third, the case also concerned the operation of market-veridiction – how

markets tell the truth ('*dire le vrai*'; Foucault 2008, 32) about government policies. But as the markets were not functioning as market fundamentalists supposed they should, legal-locution needed to intervene in order to reinstate the possibility of market-veridiction. Market-veridiction is a form of knowledge production, which is then supposed to guide the actions of states; market-veridiction is thus a basis of power.

This article schematises *Gauweiler* as an example of Foucault's maxim: 'One must govern for the market, rather than because of the market' (Foucault 2008, 121). This article's contribution is in showing how the move to the post-state world and the large-scale financialisation of the economy affects our society – a point that was still missing from Foucault's analysis, as these changes had not yet occurred forty years ago. Although there is an abundance of doctrinal analysis on *Gauweiler*, its significance from a Foucauldian perspective has not been analysed to date.[5] I show how the markets truly are at the 'intersections between jurisdiction and veridiction' (Foucault 2008, 34). As explained above, all three discussed issues relate to the Foucauldian power/knowledge nexus. This is because 'the goals of power and the goals of knowledge cannot be separated: in knowing we control and in controlling we know' (Gutting & Oksala 2019).

This article proceeds in the following manner: Sections 2 and 3 explain the background of the case and contextualise the subsequent analysis; Sections 4, 5 and 6 address the three legal questions that the case concerned, each containing a sub-section that explains the theoretical starting point for analysing the specific legal issues, and another sub-section that then analyses the specific part of the Court's judgement; Section 7 concludes the article.

2. The crisis

The Eurozone crisis was a crisis in several respects (see Menéndez 2017). Of most concern to us here is the political crisis, or what Jürgen Habermas (2012) has called the crisis of European democracy. I will just briefly mention three instances that depict well the political sentiments that were prevalent during the height of the crisis. All three of these can be viewed as instances wherein experts produce knowledge about crises, which is then operationalised as a tool for purporting certain political ends. In other words, how crises are thus a technique of *gouvernementalité* (see Lawrence 2012).

First, the Heads of State or Government of the European Union issued a statement in which they pledged their allegiance towards the common currency and adopted 'safeguarding the financial stability of the euro area as a whole' as the new paramount policy objective.[6] This statement has been credited with having signalled

5 Cf. a Foucauldian analysis of the Eurozone crisis through the concepts of 'pastorship' and 'discipline', De Lucia 2016. The argument by Schepel 2017 is rather similar as to the one presented here, however he does not utilise a Foucauldian framework.

6 See Statement by the Heads of State or Government of the European Union, Brussels, 11 February 2010, <https://www.consilium.europa.eu/media/20485/112856.pdf> (accessed 31 May 2019): 'All euro area

a transformation in the political contract between the Member States (see Borger 2018), and the aim is clearly visible in all of the different crisis response measures adopted in the wake of the crisis (see Tuominen 2017). To clarify, it is pertinent to mention that price stability is related to the broader conception of 'financial stability'. However, while we do have a clear definition for price stability (inflation), there is no clear definition of financial stability (Tuori & Tuori 2014, 131-133).

Second, Angela Merkel, then-Chancellor of Germany, expressed the political maxim: '*Scheitert der Euro, dann scheitert Europa*.'[7] Whether this was a notion that the European leaders actually believed in or it was merely a ploy to sell the rescue mechanisms and austerity politics to the public is questionable. Nevertheless, it is a clear expression of the sentiment that drove European politicians ahead – and when the stakes are this high, something as petty as the law should not be in the way of making important decisions!

Third, and this brings us to *Gauweiler* and to our actual case study, the then-President of the Bank Draghi announced that the Bank was serious about the crisis and the way it intended to combat it: 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.'[8] What became known as 'Draghi's bazooka' was the announcement of the ECB's Outright Monetary Transactions Programme (the Programme), a measure closely linked to the aim of safeguarding financial stability and the other crisis response measures. Next, we turn to our case study and the litigation that ensued from this announcement.

3. He who must not be named

The Programme was intended to be the Bank's tool for safeguarding the functioning of its monetary policy transmission mechanism and the singleness of its monetary policy. Under the Programme, the Bank would have purchased Member States' sovereign bonds from the secondary markets but not directly from the issuing state, that is, from the primary markets. In practice, through the Programme, the Bank pledged to purchase government bonds from the markets, with the intention that this pledge would result in private banks' purchasing them directly from the states (which the Bank is prohibited from doing). The Bank would then later purchase these bonds from the private banks. As this would result in an increased interest for private banks to purchase government bonds, the interest rates of these bonds would decrease, which in turn would reduce the loan refinancing costs of these states.

Since such purchases are not specifically regulated by the EU Treaties, the

members must conduct sound national policies in line with the agreed rules. They have a shared responsibility for the economic and financial stability in the area.'; 'Euro area Member states will take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole.'

7 Speech by Angela Merkel before the *Bundestag* on 19 May 2010, <https://www.bundestag.de/dokumente/textarchiv/2010/29826227_kw20_de_stabilisierungsmechanismus-201760> (accessed 31 May 2019).

8 Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> (accessed 31 May 2019).

conditions for the use of the Programme were drawn up by the Bank itself. According to the Bank, the necessity of the Programme stemmed from the magnitude that the Eurozone crisis had reached in 2012: the normal monetary policy tools of the Bank were not functioning; hence, in order to conduct its primary task of maintaining price stability, it had to resort to such unconventional monetary policy measures. No purchases were ever made through the Programme, as its mere announcement by Draghi was enough to calm the markets. Since then, the Bank has initiated several other programmes for conducting secondary market operations.[9]

Gauweiler[10] concerned the competences of the Bank: could the Bank adopt the Programme? The judgement of the Court addressed three legal issues. First, it addressed the delineation between economic and monetary policy (Articles 119 and 127 TFEU). As the Bank's mandate covers only monetary policy, if the Programme were about economic policy, then adopting it would breach the powers conferred onto the Bank. Second, the Court addressed whether the Programme was proportionate. Third, the Court questioned whether the Programme breached the ban on central bank financing (Article 123 TFEU) (see Borger 2016).

Each of the three legal questions relates to a central concern of neoliberal governance. First, when tackling the delineation between economic and monetary policy, we come face-to-face with the formal rationality of modern law and the distinction between means and ends. Second, the proportionality analysis conducted by the Court displays how political power is used behind a veil of technocracy. Third, the answer to whether the Programme is a form of banned central bank financing hinges on how it relates to the markets – specifically, whether it interferes with the logic of the markets, i.e., whether the markets retain their position as a site of veridiction. Next, we discuss each of these issues in turn.

4. Financial stability as a means or an end?

> The fact that [the Programme] might also be capable of contributing to the stability of the euro area, which is a matter of economic policy …, does not call … into question [the conclusion that it is a monetary policy measure].[11]

4.1 The formal rationality of modern law

Max Weber's ideas on rationality are closely linked to the main theme of this article: knowledge. Rational action as such presupposes knowledge. Modern Western civilisation is a culmination of a gradual process of disenchantment and intellectualisation. Religion, theology and metaphysics are no longer sources of

9 See <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html> (accessed 31 May 2019).
10 *Peter Gauweiler* was a Member of Parliament in the German *Bundestag*. He was one of the people who initiated the case before the German Federal Constitutional Court, and he has done so also on other occasions. See <https://en.wikipedia.org/wiki/Peter_Gauweiler> (accessed 31 May 2019). Being an avid euro-sceptic, some circles of EU scholars see him as a *persona non grata*, a person whose name shall not be mentioned.
11 C-62/14 *Gauweiler*, para 51.

knowledge; instead we build on means-end relationships, and systematic and logical reasoning (Kim 2017).

This led Weber to distinguish between two forms of rational action: value rational and instrumentally rational. *Value rational action* is based on a belief in the value that the chosen course of action has regardless of its consequences. What matters is the behaviour itself, not the consequences. Here, ethical or aesthetic value is attached to the behaviour itself, not the consequences. Central is the idea that the actors choose the value themselves, and that it is not imposed or derived from authority, tradition or affect. *Instrumentally rational action*, conversely, is based on an assessment of the mutual relationship between ends and means. Everything is viewed as a precondition, means or obstacle to action. Action is directed towards ends, the consequences of the action. Instrumentally rational action may serve a purpose chosen through value rationality, but 'instrumentally rational action itself does not carry the value, and in this important respect, the means are distinct from the end'. Furthermore, from an instrumentally rational perspective, value-rationality is always irrational (Brown 2015, 115-121).

According to Kaarlo Tuori's reading of Weber's schemes of rationality, societal structures (as opposed to culture, action and personality) are *formally rational* when they represent instrumental rationality or create preconditions for it, whereas they can be said to represent *substantive rationality* if they further the realisation of some value(s). Whether something is formally rational – that is, effective in pursuing a given end – can be ascertained on the basis of *objective factual criteria*, while the assessment of substantive rationality is always done from the perspective of the adopted *value* (see Tuori 2002, 32-50).

As a result of disenchantment and intellectualisation, formal rationality is now embedded into social structures. This is perhaps most clearly visible in the capitalist economy and the bureaucratic state. Such formal rationality works in a highly intrusive manner: in addition to making it possible for us to act rationally from a means-ends perspective, formal rationality also imposes limits on whose ends our chosen means can be made to serve, most notably so in that the economic interests prevailing in the marketplace also condition our thinking in other realms. When our thinking becomes dominated by a market logic (and the underlying market values), this inevitably affects all of our actions. Because of this, we are forced into formally instrumental rational action, which rules out substantive instrumental rationality, as it presupposes conscientious value choices (Tuori 2002, 35-36). Or, in Foucauldian terms, the normalising power of market rationality affects our decisions, both the ends and means, without our even noticing it.

To sum up, pre-modern law was attached to such extra-legal values as ethics, utilitarian rules or political maxims, whereas modern law is detached from them and is thus autonomous and formally rational (Tuori 2002, 38-39). In light of our current theme, Tuori postulates the fundamentals in the following manner: 'In modern society, the formal rationality of the law is presupposed by, first of all, the *capitalist economy* and *bureaucratic administration*, both based on purposive-rational

[instrumentally rational] action' (Tuori 2002, 43). Through formally rational law, governments make individuals act purpose-rationally, whereas here markets impose formal rationality onto governments.

4.2 A necessity for the maintenance of price stability

In answering the first question, the Court needs to return to the delineation between economic and monetary policy, which it had already previously addressed in *Pringle*. This time, however, the Court's predicament is to find the measure at hand to fall under monetary policy and not economic policy, which is the opposite of the case with the European Stability Mechanism (the Mechanism) in *Pringle* (see Borger 2013).

According to the Court, the starting point for defining whether the Programme is an economic or monetary policy measure must be the stated objectives of the Programme itself.[12] Here, the Court cites its earlier judgment in *Pringle*, so let us recount the logic the Court adopted there.

In *Pringle*, the Court's argumentation for delineating between economic and monetary policy was the following: First, that in the EU Treaties themselves, monetary policy is defined through its objectives, rather than through the instruments via which it is operated (Articles 3(1)(c) and 127 TFEU).[13] Second, the objective of the Mechanism is to safeguard the financial stability of the euro area as a whole, whereas the objective of monetary policy (as defined in the EU Treaties), is to safeguard price stability. From this, the Court draws the following conclusion: 'Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro'.[14] The Court does not, however, further specify this finding. Only later in the judgement, when discussing the possibility that the Mechanism would be a monetary policy measure, since its use might have effects on inflation (i.e. price stability), the Court opines that '[e]ven if the activities of the [Mechanism] might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted'.[15]

So, according to the Court, if the objective of a measure is economic policy, it is not turned into a monetary policy measure even if it affects price stability, as long as these effects are only indirect. I shall call this the *indirect effects doctrine*.

Coming back to *Gauweiler*, the Court then cites the objective of the Programme from the Bank's press release ('an appropriate monetary policy transmission and the singleness of the monetary policy'), and distinguishes two aims from it: safeguarding the singleness of monetary policy and safeguarding the monetary policy transmission

12 C-62/14 *Gauweiler*, para 46.
13 C-370/12 *Pringle*, para 53-54.
14 *Id.*, para 56.
15 *Id.*, para 97.

mechanism.[16] According to the Court, the first aim is legitimate as is stated in Article 119(2) TFEU ('a single currency, the euro, and the definition and conduct of a single monetary policy'). Regarding the second aim, the Court reasons that safeguarding the monetary policy transmission mechanisms is both 'likely' to contribute to the primary aim (a single monetary policy) and that it also contributes to the overarching objective of the Bank's monetary policy (price stability).[17] Here, the conflation of means and ends, to which the Court must revert in order to find the Programme to be a monetary policy measure, is starting to appear.

After having thus found that the Programme is about monetary policy, the Court then still needs to assess whether it is perhaps also about economic policy. If the Programme also contributes to 'the stability of the euro area', does this turn it into an economic policy measure?[18] Here, the Court returns to the indirect effects doctrine, established in *Pringle*: the fact that a measure might also have indirect effects within the realm of economic policy does not mean that it should be classified as an economic policy measure.[19]

After this conceptualisation, the Court then addresses the Programme in light of the facts of the case. In essence, here the Court must define how buying sovereign bonds (from secondary markets, so as not to breach Article 123 TFEU, which will be discussed below in section 6) is not an economic policy measure – although the reason why sovereigns issue bonds is to finance their government expenditures. Simply put, issuing sovereign bonds is about economic policy when viewed from the perspective of the issuing state.

The Court begins to unwind this issue by stating that '[i]t is clear' from Article 18(1) ESCB Statute that the Bank may deal with sovereign bonds on the financial markets.[20] Next, the Court tackles the problem of selectivity, raised by the German Federal Constitutional Court in its referral: if the Programme is used to purchase the bonds of specific states (i.e. crisis states), how can it be about a 'single' i.e. unitary monetary policy? First, the Court states that selectivity does not 'imply, of itself,' that the Programme would not be a monetary policy measure. Second, the Court states that the EU Treaties do not even necessitate non-selectivity.[21] From this follows the conclusion that 'it is apparent' that the Programme is a monetary policy measure.[22]

A second hurdle that the Court faces is the fact that the Programme is intricately linked with the Mechanism – a measure that the Court had itself judged to belong within the realm of economic policy in *Pringle*. As purchases through the Programme are conditional on the state's having accepted a bail-out from the Mechanism, and therefore also being subject to a macro-economic adjustment programme (i.e. austerity measures), does this mean that the Programme too is an

16 C-62/14 *Gauweiler*, para 47.
17 *Id.*, para 48-49.
18 *Id.*, para 51.
19 *Id.*, para 52, citing C-370/12 *Pringle*, para 56.
20 C-62/14 *Gauweiler*, para 54.
21 *Id.*, para 55.
22 *Id.*, para 56.

economic policy measure? Again, the Court reverts to its indirect effects doctrine: 'It is, of course, possible that' the Programme 'may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes'.[23] According to the Court, this does not, however, question the Programme's nature as a monetary policy instrument. The Court makes six arguments to back up this conclusion[24], only one of which I will highlight here. According to the Court, conditionality between buying bonds and following the imposed austerity measures ensures that Member States targeted with possible Programme purchases follow their macro-economic adjustment programmes, and from this follows the fact that the Bank 'thus ensures that the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States'.[25]

So, succinctly: the Programme's indirect effects on economic policy support the austerity politics imposed onto the crisis states. Next, the Court needed to assess whether this was proportionate, and whether the Bank had used its economic expert knowledge correctly when deciding on the Programme and assessing the market situation that it was a reaction to.

5. Disproportionate proportionality?

> [I]n view of the [Bank's] broad discretion, nothing more can be required of the [Bank] apart from that it use its economic expertise and the necessary technical means at its disposal to carry out [its proportionality] analysis with all care and accuracy…[26]

5.1 The modern ephorate and proportionality review

In the modern state, various governmental agencies operate without direct input from electorally legitimised sources of authority. Central banks are an example par excellence, as a central aspect in designing how they function is to make them independent and to insulate them from political influence (see Smits 2008). The crucial point, however, is that such bodies often have more impact on the society than decisions by elected politicians.

Martin Loughlin has characterised such unaccountable institutions as 'the new ephorate'. Ephor (*ephoros*) was the title given to magistrates in ancient Sparta. Together with the king, the ephors formed the main governing body. According to Loughlin, central in the role and power of the modern ephorate is, first, the fact that their position is based upon a supposed expert knowledge, and second, that their decisions circumscribe the actions of elected officials (Loughlin 2010, 450). To this, we should also add the fact that the ephors were not subject to control and

23 C-62/14 *Gauweiler*, para 58.
24 See *id*., para 59-65.
25 *Id*., para 60.
26 C-62/14 *Gauweiler*, para 75.

accountability (see Nipple 1994, 10), which is contrary to what we nowadays expect from governmental institutions that use public power. Ultimately, then, the new ephorate poses a democratic concern.

In the ideal situation, the ephorate would contribute towards the quality of the decisions that our political system produces. The expert knowledge that the ephors possess would be first used to map out the alternative decisions and weigh out their pros and cons, whereas in the second phase the elected politicians would make the actual decision. Only if the ephorate are independent will they be able to use their expert knowledge objectively and without political influence (Loughlin 2010, 451). This is clearly the rationale behind making central banks independent – behind making them beyond the reach of political pressure and influence (see Smits 2008). However, it is this very same reason that creates the problem that is associated with their position from the perspective democratic accountability.

What the modern ephorate does and the types of policies they pursue are also central to the Foucauldian idea of *gouvernementalité*. As Loughlin explains, their actions result in 'the extension of the disciplinary mechanisms of police to the central questions of government: fiscal rules devised in the regulatory network discipline ministers, monetary policies laid down by central banks constrain governments…' (Loughlin 2010, 452). This quotation encapsulates the problem that the modern ephorate poses from the perspective of the critique of neoliberalism.

Yet modern law, although permeated by formal rationality and *gouvernementalité* through political economy, is not blind to the problems posed by the modern ephorate. In fact, modern law has devised a specific legal mechanism for controlling the powers used this way: proportionality. From a legal perspective, the shift from the pre-modern to the modern blurred the line between justice (law) and police (government): 'the juridical logic of legal/illegal blends into, and with respect to issues of administrative government tends to be supplanted by, the disciplinary logic of proportionate/disproportionate' (Loughlin 2010, 459-460). In the modern administrative state, the legality of all governmental action is reviewable on the basis of a 'means-ends rationality', whereas the criteria for this analysis are based on the position and competence of that particular agency. Thus, the basic type of law is a 'disciplinary law'; a law that determines whether the government could pursue the given action (Loughlin 2010, 460).

Joana Mendes (2016) has instigated a debate within EU legal scholarship on the issue of technical discretion left to administrative agencies. Whereas policy discretion concerns which policies the legislator can adopt and how to pursue them, technical discretion is about the actions that administrative agencies take on the basis of their technical expert knowledge. Simply put, the agency has been tasked with a certain duty and whilst pursuing its tasks, it needs to make technical assessments on which course of action is best suited for the situation at hand. Depending on the situation and the norm giving competence to the agency in an individual instance, the use of discretion can lead to two outcomes: either the expert knowledge can dictate one alternative that the agency must pursue, or the expert knowledge can

map out several alternatives, from which the agency can then choose its preferred option.

With regards to policy discretion, it is easy to fathom why courts should exercise only a light proportionality review. If the review is stringent, then the courts will supplant the legislator's policy choice with their own. This is problematic from the perspective of the division of powers. To counter this, courts sometimes show deference towards the legislative branch; they respect decisions made by the democratically legitimate decision-maker and do not intrude by reviewing such decisions (see Henckels 2017). The situation is different, though, when it comes to technical discretion. Indeed in some situations, agencies make decisions based on 'objective' knowledge on the issue at hand, and courts do not have the capacity to understand these decisions and should therefore not replace them with their own (see Paloniitty & Kangasmaa 2018). However, there are also instances in which agencies make decisions with grave consequences and the nature of the knowledge on which they base these decisions is far from objective, perhaps even disputed. It is in these types of cases that we face the problem of the modern ephorate most directly.

The basic dilemma associated with government agencies' being given broad discretion is this: law grants powers to public administration, but it should also limit them. But how should law define these limits when oftentimes the 'best' decision for the administration to make cannot be defined through legal means (see Mendes 2016, 422)?

With regards to policy discretion, it is easy to understand why courts should not enforce a stringent level of review, as the purpose of policy discretion is to leave the decision-making body the room to balance out different public interests, and therefore courts should not replace these policy considerations with their own judgements. With respect to technical discretion, though, the argument is different, since technical discretion is based on the use of expert knowledge and should not entail policy choices as such. The use of technical expert knowledge either dictates the one right answer or the group of answers from which the administrative will then choose, but the latter is not an instance of proper discretion. In this case, questions on the legitimacy of judicial review do not arise, as here courts are simply ensuring that the decision complies with the criteria set by law, but there is no weighing of competing public interests (Mendes 2016, 423-424).

However, as explained by Mendes, the distinction between discretion proper (policy discretion) and technical discretion is often futile, since the two are entangled in a way that prevents us from realising the true stakes: 'whether discretion emerges from policy judgments or from choices that technical expertise does not preclude (in the sense that such expertise does not provide only one reasonable solution) may be a very thin line' (Mendes 2016, 425-426). In other words, focusing on the technical nature of a decision masks the truly political nature of such decisions. Let us next analyse the proportionality analysis of the Court in *Gauweiler* with this in mind.

5.2 The technical expertise of the bank

The Court frames its proportionality analysis of the Programme by stating that the assessment must be made in light of the objectives of the Bank's monetary policy.[27] The Court then repeats its standard phrase on proportionality: 'the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives'.[28] This leads the Court to conclude that since the use of the Programme requires the Bank 'to make choices of a technical nature and to undertake forecasts and complex assessments', the Bank must be allowed broad discretion when implementing the Programme.[29]

The Court thus reveals how it situates itself in relation to reviewing administrative decisions of a technical nature. This does not mean, however, that the Court would adopt a completely deferential attitude, since despite such broad discretion, certain procedural guarantees must be in place. This requires the Bank to give 'an adequate statement of the reasons' why it adopted the Programme, although the Bank is not 'required to go into every relevant point of fact and law'. Conversely, when the Court conducts its analysis in these types of cases, it must take into consideration the 'context and the whole body of legal rules governing the matter in question'.[30]

In the first part of its proportionality, concerning the appropriateness (suitability) of the Programme, the Court recounts how the Bank's view of the prevailing economic situation in the Eurozone during the adoption of the Programme was the following: there was high fluctuation and extreme spreads in the interest rates on government bonds of various euro area states. These spreads were 'not accounted for solely by macroeconomic differences' between these states, but rather were a result of 'the demand for excessive risk premia for the bonds issued by certain Member States, such premia being intended to guard against the risk of a break-up of the euro area'.[31] After having read this passage, it is important to remember that one of the original elements of the Economic and Monetary Union was that Eurozone Member States are responsible for their own economies and that the market mechanism of pricing government bonds exists to ensure that Member States have incentives to pursue sound public finances (see Lastra & Louis 2013). According to the Bank, these spreads in the bond yields were not caused by this market mechanism, but rather were due to speculation that the euro area might break up.[32] This condition of the markets was such that the functioning of the Bank's monetary policy transmission mechanism was 'severely undermined'. The Bank was no longer able to transmit impulses into parts of the economy of the euro area (through its normal monetary

27 C-62/14 *Gauweiler*, para 66.
28 *Id.*, para 67.
29 *Id.*, para 68.
30 *Id.*, para 69-70.
31 *Id.*, para 72.
32 For an analysis of such 'irrationality' of the markets, see Schepel 2017.

policy measures).[33]

Next, we come to the Bank's technical expert knowledge. According to the Court, this estimation of the economic situation by the Bank was not 'vitiated by a manifest error of assessment'.[34] This analysis by the Bank was questioned in the proceedings before the referring German court. However, the Court did not give much weight to such claims, but instead retreated behind the veil of technocracy: 'given that questions of monetary policy are usually of a controversial nature and in view of the [Bank]'s broad discretion, nothing more can be required of the [Bank] apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy'.[35] The nature of this statement is brought into relief when contrasted with the previous finding on the Bank's reading of the market situation: on one hand, the Bank's views on economic policy cannot be questioned, but on the other hand, the Bank itself states that the markets were functioning irrationally and that therefore it needed to take action. Here, the Court acknowledges the contested nature of economic knowledge and simultaneously concedes that courts of law should not intrude into such issues.

After having established this, the Court then explains why the Bank was correct in adopting the Programme. In essence, the Court is saying that the markets were acting irrationally, that there were 'unjustified fears about the break-up of the euro area'. To 'dispel' these irrational assumptions by the markets, the Bank had to 'play a part in bringing about a fall in — or even the elimination of — excessive risk premia', which it did by way of adopting the Programme, and that the Programme is 'likely' to help in fixing this problem.[36]

But what is this problem actually about? It is the taboo of the death of the markets. This leads us to the third issue, namely that of market-veridiction and how the markets are supposed to function.

6. Subjectivation to the veridiction of the markets?

> [The Programme] is accompanied by a series of guarantees that are intended to limit [its] impact on the impetus [of the Member States] to follow a sound budgetary policy.[37]

6.1 Formalisation of the state on the basis of the markets

In the introduction, Foucault's conceptualisation about the role of market power (veridiction) and political power (jurisdiction) was explained. The third legal issue of the case revolves around this juxtaposition. More specifically, we are concerned about the way in which the Court purports truth-locution by the markets to operate,

33 C-62/14 *Gauweiler*, para 73.
34 *Id.*, para 74.
35 *Id.*, para 75.
36 *Id.*, para 76-77.
37 *Id.*, para 115.

and what is actually at stake.

Foucault posed the question of whether neoliberalism will be able to bring about 'a general formalization of the powers of the state and the organization of society on the basis of the market economy' (Foucault 2008, 117). The purpose of such a shift is not to facilitate markets as a site of exchange, but rather to make markets a site of competition (Foucault 2008, 118). This would signal the superimposition of government to market mechanisms and competition. 'Government must accompany the market economy from start to finish' (Foucault 2008, 121). In the case of the Eurozone, this means that states are made to compete against one another; 'the markets' are the government bond markets. The formation of bond yields (the amount of interest that governments must pay for their debts) is thus both a constant judgement on governments' actions as well as a place of competition between them.

With this in mind, it will be intriguing to see how the Court argued why the Member States should have an impetus to follow 'sound budgetary policy',[38] and furthermore, why the Programme is not to bring about the harmonisation of government bond interest rates. By way of clarification, it is necessary to mention that the term 'budgetary policy' can here be understood as a synonym for economic policy – the Member State's overall economic policy affects the balance sheet of their government budget.

6.2 An impetus to follow sound budgetary policy

After having concluded that the Programme is proportionate, the Court then still had to address one legal concern, namely, whether the Programme breaches the ban on central bank financing stipulated in Article 123 TFEU. The Court begins its analysis by reading Articles 123 TFEU and 18(1) ESCB Statute together, and concludes from them that the Bank is not prohibited from taking action on secondary bond markets.[39] However, actions on the secondary markets are prohibited if they have 'an effect equivalent to that of a direct purchase', which would undermine the effectiveness of the ban in Article 123 TFEU.[40] Again, to determine what this means more specifically, recourse must be sought to the objectives of a measure.[41]

In *Pringle*, the Court was obliged to define what type of assistance (i.e. bail-out) is allowed under Article 125 TFEU. Adopting a 'two-order telos' argument (see Tuori & Tuori 2014, 120-136), the Court opined that the no bail-out clause of Article 125 TFEU 'ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline'.[42] The rationale of this rule is to safeguard the financial stability of the euro area – the same goal as that of the Mechanism. Therefore, although by literal interpretation, the Mechanism might seem to breach the no bail-out clause, under

38 *Id.*, para 100.
39 *Id.*, para 93-96.
40 *Id.*, para 97.
41 *Id.*, para 98, citing C-370/12 *Pringle*, para 133.
42 C-370/12 *Pringle*, para 135.

such reasoning it is nevertheless permitted.[43]

In *Gauweiler*, the Court conducts a similar analysis of Article 123 TFEU. According to the Court, 'the aim of Article 123 TFEU is to encourage the Member States to follow a sound budgetary policy'.[44] This means that the Programme should function in a way that does not compromise this objective. Specific safeguards are needed so that such endangerment does not occur. The Court identifies the following safeguards: First, the Programme operates only on secondary markets.[45] Second, there are enough measures in place that prohibit private actors, operating on the primary markets, from acting as intermediaries to the Bank: the blackout period between the issuing of bonds on the primary markets and when they are purchased on the secondary markets by the Bank, and the fact that the total amount of Programme purchases is not specified in advance.[46] Third, and most importantly, if the Programme nevertheless 'lessen[ed] the impetus of the Member States concerned to follow a sound budgetary policy', then it would be in breach of Article 123 TFEU.[47]

This third point is of most concern for us since here the Court is again faced with the effects that monetary policy measures have on economic policy. The Court concedes the following: 'the conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States'.[48] With this in mind, the Court proffered three reasons why the Programme nevertheless does not lessen the Member States' impetus to follow a sound budgetary policy. First, purchases through the Programme cease when its objectives have been achieved.[49] For this reason, Member States cannot 'rely on the certainty' that the Bank will purchase their bonds in the future. Furthermore, the Programme does not 'bring about a harmonisation of the interest rates applied to the government bonds of the Member States of the euro area regardless of the differences arising from their macroeconomic or budgetary situation'.[50] Second, the technical features of the Programme de facto limit its use, for which reason it does not lessen the Member States' impetus to follow sound budgetary policy.[51] Third, the link between the Programme and the Mechanism – 'the structural adjustment programmes to which the Member States concerned are subject' – also prevents the Programme from having adverse effects on the Member States' impetus to follow sound budgetary policy.[52] In other words, the austerity measures ensure that in return for the aid received

43 *Id.*, para 133-147.
44 C-62/14 *Gauweiler*, para 100.
45 *Id.*, para 103.
46 *Id.*, para 104-106.
47 *Id.*, para 109.
48 *Id.*, para 110.
49 *Id.*, para 112.
50 *Id.*, para 113.
51 *Id.*, para 115-119.
52 *Id.*, para 120.

through the Mechanism and the Programme, a Member State adopts measures that market participants such as the international rating agencies would want them to take. This is perhaps a good example of how, during the euro crisis, institutions 'tended to internalise the interests of creditors' (Losada 2016, 837), i.e., institutions in charge of legal-locution start acting on the basis of market-veridiction.

So, what does it mean that there is no harmonisation of interest rates and that the Member States' impetus to follow sound budgetary policy is not lessened? According to the market mechanism that is embedded into Articles 123 and 125 TFEU, there are supposed to be differences in bond spreads – differences that reflect the states' chosen economic policies. But as these differences were irrational – as the Court argued in the first part of the judgement, following the Bank – the Bank had to adopt the Programme in order to fix the situation. Is the Court thus saying that the way in which the Programme would be used would return bond spreads to normal but would not harmonise them? In other words, the Programme would bring back the functioning of the market mechanism in the formation of government bond yields? Again, market-veridiction is not functioning, so therefore we need to intrude by way of jurisdiction – ordering by law for the sake of the markets. However, it is worth mentioning that such unconventional monetary policy measures as the Programme can actually impair the functioning of the markets as opposed to normalising them, which was the goal following the turmoil of the crisis years. If banks obtain their funding at a zero interest rate from the Bank, then there is no room for market determination (see Tuori 2016, 867).

7. Conclusion

With regards to the first legal questions, we can conclude that the Court delineates between economic and monetary policy, and it situates the Programme in relation to this line in the following manner: the objective (the end) of the Programme is to safeguard price stability (to make the monetary policy tool functional), but the effects that pursuing this causes (safeguarding financial stability through acting as a lender of last resort; see Borger 2016, 148-152) appear within the realm of economic policy. The Court's indirect effects doctrine is cognisant only of the ends of a given measure, whereas it seems to overlook the means through which the ends are pursued. Such *conflation of means and ends* obfuscates the delineation between economic and monetary policy. The objective of price stability, which falls under the EU's exclusive competence over monetary policy, is pursued through the means of austerity measures, which in fact are a form of economic policy.

As to the second legal questions, it seems somewhat paradoxical that the Court at the same time regards the Bank as an expert institution and therefore does not want to review its actions whilst still acknowledging that *the nature of the expert knowledge* that this position is essentially built upon is contested. Does this conclusion on the nature of economic knowledge not lead to the outcome that, in the end, it is all just politics? Remember, the answer to the first question hinged on the 'irrationality' of the markets, whereas the answer to the second question assumes that the Bank

has some form of economic expert knowledge that cannot be questioned. Perhaps 'this is market fundamentalism loyal not to actual market behavior, but to some mysterious equilibrium reached by hypothetical markets that we have never actually witnessed in real life' (Schepel 2017, 96). In other words, governing for the market, not because of the market (see Foucault 2008, 121).

Finally, regarding to the third legal question, which was perhaps most intimately associated with Foucault's main point, we observed that the views adopted by the Bank and accepted by the Court appear to oscillate somewhere *between legal-locution through politics (jurisdiction) and truth-locution by the markets (veridiction)*. Is the role accorded to law during the neoliberal hour of the 21st century only that of substituting for the markets in case they do not work? Harm Schepel has argued that the 'Court's fundamental move, then, is to sanction the substitution of political decisions on austerity for the "logic of the market" and to force assisted states to behave as *if* they were headed for insolvency' (Schepel 2017, 88).[53] In other words, that through its judgments in *Pringle* and *Gauweiler,* the Court authorised the use of political power (jurisdiction) in disguise of what was required by market logic (veridiction). This reveals how the EU actually has an economic policy, although according to the asymmetrical structure of the Economic and Monetary Union, the EU (the Bank) should only have competence within monetary policy. However, the EU's economic policy is exactly the policy of no economic policy – the policy of the 'least state' (Foucault 2008, 54).

For a doctrinal legal scholar, it might seem that my analysis has been superficial and that many of the intricacies of the case have been brushed off lightly. For example, with regards to the second legal question on the nature of economic knowledge and the Court's proportionality review, I have disregarded the issue of central bank independence, which partly explains why the Bank has the power to define the content of its monetary policy measures and why the Court adopts a lenient attitude towards reviewing them (see Borger 2019). However, as doctrinal analysis has pointed out (Borger 2019, 130-131), there are no easy, clear-cut answers to what the Court should do in such situations, or how the economy should be governed legally. Therefore, the point of such scholarship as this article is to show how the economy is governed or how the society is governed through the economy and for the economy. As neoliberalism 'has pervasive effects on ways of thought to the point where it has become incorporated into the common-sense way many of us interpret, live in, and understand the world' (Harvey 2005, 3), we need constant reminders of the various ways in which it functions and affects the society. Only by making it visible can we understand it; only by understanding it will we be able to better the society.

53 In this passage Schepel is talking about *Pringle*, but his overall argument is the same with regards to *Gauweiler*.

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Embodied and Embedded Vulnerable Subject: Asylum Seekers and Vulnerability Theory

Laura Tarvainen*

Abstract

The article discusses vulnerability of victims of torture in asylum process. Based on case study materials, recognizing and addressing vulnerability seems random in asylum process. Vulnerabilities of torture victims are systematically ignored in the process and expert medical certificates are not taken into account. In the background exists an assumption of a logical subject, who is able to make rational decisions and produce a coherent account of events, even when individuals are suffering from medical conditions making them unable to manifest such behaviour. This article searches for explanations relying on Martha Fineman´s vulnerability theory. It will be argued that the difficulties of taking the vulnerability of the tortured asylum seeker into account in the asylum process reflect different understandings and uses of the concept of vulnerability. Moreover, it seems that the asylum process tends to confuse the question 'who is entitled to international protection?' with the question 'who is vulnerable?'. The globalized context is briefly discussed, which offers yet another way to explain the difficulties that the asylum system has with vulnerability. The article argues that a paradigm change is needed – a change where we would look at the concept of vulnerability in a dynamic and contextual way. Vulnerability should be understood as socially embedded notion and relational to the institutional and societal contexts in which it is produced. Vulnerability should be seen as primary human condition that does not exclude agency, but is rather qualified by different levels of resilience. These, in turn, are produced within and through institutions and relationships which confer privilege and power.

* Researcher, University of Lapland.

1. Introduction

The starting point for this paper was a disturbing finding arising from my PhD project[1] case study material of 99 cases involving asylum seekers who are victim of torture; who according to the Common European Asylum System (CEAS) legislation should be entitled to special protection but whose asylum process in terms of outcome and recognition and addressing vulnerability seems random. Their vulnerabilities are systematically ignored in the process. Expert medical certificates are not taken into account and the background assumption of a logical subject who is able to make rational decisions and produce a coherent account is expected even when applicants are suffering from medical conditions making them unable to manifest such behaviour. In search of an explanation(s), I rely on Fineman´s vulnerability theory.[2]

An asylum seeker is the most judicially naked of all human beings and in need of protection. However, as Arendt laments, human rights fail those who are at their most human; those who do not have the protection of citizenship status and whose world has been intrinsically politically ruptured by torture. I claim, following Martha Fineman´s vulnerability theory, that this failure can be traced back to Western liberal thought and its fundamental split between the mind and the body, where autonomy forms a foundation of legal and political subjectivity – rather than vulnerability as a universal condition. The law, however, regulates, orders and controls bodies, but when it does, it has a certain kind of body in mind: it categorizes, forms groups and sets boundaries of inclusion and exclusion. When the term vulnerability is used in law, it is attributed only to some individuals or groups who are vulnerable populations or it is used in the asylum determination process as a basis for comparison to share scarce resources / special services among those most vulnerable, thus ignoring the universality and constancy of vulnerability as described by Fineman. Her thesis also recognises the radical particularity of vulnerability in our embodiment and embeddedness. Asylum seekers, like all human beings, are embedded in institutions and societal structures, which confer power and privilege through the operation of the system and by creating societal identities. Law´s stagnant categories are at odds with constantly changing human vulnerability, which the asylum process seeks to identify and respond to. In this paper, I will focus on the embodied and embedded vulnerable subject, who is at the interface with the structural and institutional mediation of power and vulnerability. I try to analyse, through Fineman´s vulnerability thesis, the tortured subject as an inherent representation of the ways in which politics and law work on an embodied vulnerable subject.

1 My ongoing PhD project working title is 'Construction of vulnerability. Victims of torture in the asylum process'.

2 I express my gratitude to Professor Fineman for making me think of this question. For the purpose of this paper and my PhD project in general, the following articles among others are central for my understanding of vulnerability: Fineman 2008, 8-40; Fineman 2010, 10-130; Fineman 2017, 133-149; Fineman 2000, 13-29; Fineman 2012, 12-224; Fineman 2015, 15-348; Fineman 2014, 14-292; Fineman 2013, 13-28 and Fineman & Grear 2013, 1-12.

In the asylum process, asylum interviews hold the central position in terms of gaining knowledge of an applicant´s grounds for protection.[3] Evaluation of the credibility of the applicant is in the central position in the protection determination process. The assumption is that the asylum seeker has to tell his/her grounds for asylum in a logical and consistent manner. However, a tortured asylum seeker may offer fragmented or contradictory testimony which is attributed to fabrication rather than underlying memory disturbances and dissociation caused by torture trauma. It is estimated that up to 35% of refugees are torture victims, who are particularly susceptible to mental health problems, such as PTSD, anxiety, suicidal thoughts and depression (Heeren & Mueller et al. 2012, 1-8).[4] A Swedish study found that the staff conducting interviews do not always take into account how human memory functions when formulating the interview questions. This may result in grave injustices (van Veldhuizen et al. 2017, 3-12). To assess the credibility of the account, with or without trauma, the assessment should not focus on the applicant's answers in isolation but on the basis of coproduction of questions and answers by the interviewer and the applicant. What is being asked is crucial when evaluating credibility (Vrij & Granhag 2012, 110-117).

The process has been criticized for producing epistemologies of ignorance (Bohmer & Shuman 2007, 603-629), suffering from a culture of disbelief (Jubany 2011, 74-94); indicating that problems arise from the organization and conduct of asylum interviews, creating a gap in how knowledge about cases is produced.[5] The asylum process is a power-knowledge regime which produces truths: the power producing knowledge and those in power defining the truth**.** During the asylum procedure, a particular truth about the applicant is produced and only the authorities have the power to decide whose truth is accepted.

2. The concept of vulnerability: Vulnerability in and of the asylum process

Although the concept of vulnerability is nowadays frequently used in legal and political language (see e.g. Abrisketa, et al. 2015, 16; Churruca Muguruza et al. 2014, 129-166) it is a relatively recent development in policy discourses and frameworks, now carrying a normative undertone of constrained human agency as to who requires or deserves support (Brown 2017, 11-12). The concept of vulnerability carries a negative connotation in everyday discourses. It is often used when defining stigmatized or otherwise disadvantaged groups and populations. Some vulnerable

3 I will describe and discuss the challenges of asylum interviews in more detail in my PhD project.

4 In a study carried out in 2005 on the mental health of Cambodian refugees who had resettled in the USA, 54% of the respondents reported torture. See Marshall, Schell et al. 2005, 571-579, cited in Carswell, Blackburn & Barker 2011, 107-119. See also a recent TERTTU (2019) study revealing high percentages of injuries stemming from experiences of violence among asylum seekers, which should also have practical implications regarding asylum processes.

5 Herlihy & Turner 2009, 171; Jubany 2011, 74-94; Määttä 2015, 21-35; Puumala 2017; Puumala & Kynsilehto 2015, 352-368.

groups are seen as perhaps more sympathetic than others – for example, children – but vulnerability as a concept is generally associated with victimhood, deprivation, dependency and pathology (Fineman 2011, 166). However, as a legal concept vulnerability remains ambiguous and even contested (Peroni Manzoni & Timmer 2013, 1056-1058; 1061).[6]

International human rights law is based on the premise that all persons, by virtue of their humanity, should enjoy equal human rights (Weissbrodt 2008, 35). Specific human rights instruments have been created to ensure that specific protection is guaranteed to those individuals who are in need of enhanced protection due to their particular vulnerability or due to structural inequality (Mustaniemi-Laakso et al. 2016, 2, fn 5), such as women, children, migrant workers, trafficked persons and persons with disabilities (Grant 2011, 29). While these instruments do not directly refer to the groups they are designed to protect and empower as vulnerable, their inherent rationale is to counteract and mitigate vulnerability through special safeguards and measures to enable such groups to enjoy all their human rights to the full (Mustaniemi-Laakso et al. 2016, 2, fn 6). According to many authors, embodied vulnerability is foundational to human rights, but also complex and contested and the individual that human rights law seeks to protect is not always the vulnerable subject (Turner 2006; Grear 2010).

In the asylum system vulnerability bears different meanings. It defines either the precarious position of all people seeking asylum, not least due to their legal status,[7] or classifies individuals with different needs due to their particular physical, mental or social circumstances. Vulnerability can also be understood and occupied as a tool for categorising the asylum-seeking population. Vulnerability as a gradual position leads to a situation where decision makers, consciously or not, are demanding a higher level of violence experienced and a higher level of vulnerability expressed. The threshold for granting protection gets higher and higher and the practice of granting protection moves further and further away from the criterion of international protection as defined in international law. It can also be understood as not a relevant factor when assessing international protection. As voiced by some of those operating the system:

- 'It is possible that the ground for international protection is found without having to think of vulnerability […]'[8]
- 'That person has anyway already been granted international protection, whether or not she/ he is vulnerable or not […]'[9]
- 'Mostly those actual asylum seekers who are granted protection are not

6 On the conceptualisation of vulnerability and the usage of the term, see, e.g., Fineman & Grear (eds.) 2013. See also Churruca Muguruza et al. 2014, 130-131 and Abrisketa, et al. 2015.

7 *M.S.S. v Belgium and Greece*, app no 30696/09, judgment on 21 January 2011, at paras 232-233. See also Peroni & Timmer 2013, 1056, 1068-1070; for an analysis of whether the Court's finding points to recognition of the vulnerability of asylum-seekers as a group.

8 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge A.

9 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge B.

vulnerable but active political fighters.'[10]

In the asylum determination process, a person´s rightful presence and access to rights in the receiving society are determined (Mountz 2010). While the right to asylum is written into international human rights law, it is still the state´s right to decide to whom protection is granted. This situates asylum between law and politics, institutional practice and migration governance (Puumala, Ylikomi & Ristimäki 2018, 197-215). The purpose of the asylum process is to recognize those in need of international protection, such as those fleeing persecution or serious harm. To that end, the authorities are interested in only a fraction of the issues that affect asylum seekers' vulnerable position.[11] The eligibility criteria are defined by the Geneva Convention on the Status of Refugees, and in the Finnish context also by the Qualification Directive (2011/95/EU) and national policy guidelines on admissibility. According to CEAS legislation, the state has the duty to recognize and address vulnerability, which in the asylum process works as another criterion of inclusion / exclusion. 'Once identified as vulnerable, applicants enjoy specific rights and safeguards in the asylum process under EU law. Vulnerability should therefore trigger additional or tailored support to ensure that people have the necessary conditions to bring forward a claim for protection' (AIDA Report 2017, 7).

The asylum system, when focusing only on the individual in separation, deems inability to act according to expectations in the asylum process as a sign of failure, which in the context of international protection has potentially very dramatic consequences when failed asylum seekers are sent back to their country of origin. A sign of failing can be an inconsistent, not detailed and illogical story; the criteria the authorities use when assessing the credibility of the application and which according to psychological knowledge are not able to tell anything about credibility (Deeb 2017). Designating only some (vulnerable asylum seekers) as vulnerable entails that some would not be vulnerable – a construction which is ultimately impossible.

Under the Common European Asylum System there are legal standards that refer to vulnerability placing the duty on states to take vulnerability into account. The legislation is based on group-based logic that connects the concept to the characteristics of the person thus reinforcing the idea that vulnerability describes an identity or characteristic of certain groups rather than the general human condition. The individual who is labelled vulnerable under the CEAS is an able and liberal subject while the vulnerable subject is seen as something different from the standard subject of law, thus requiring special measures / protection.[12] However, the legislation

10 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge A.

11 Not only does the legal definition of refugee set the limit of what is relevant and what is not but the protocol itself at the Finnish Immigration Service hearing also sets those limits. The report is a kind of standardized report where certain things are always asked in a certain order and certain information is always provided. The asylum interview begins with an opening statement from the interviewer. This statement sets the limits and the aim of the hearing. The one asking the questions defines what can be said, in what order and what is considered relevant and what is not. Applicants have no power to negotiate these limits but have to adapt themselves and their story to the frame set by the authority.

12 For example, The Qualification Directive recognizes the specific situation of vulnerable persons and the

on vulnerability leads to situations where the authorities should first recognise vulnerability in order to grant the special protection that vulnerable applicants are entitled to, but vulnerability will pass unrecognized until the benefits of vulnerability are conferred on the applicant.

The concept is thus not one and static as the law´s internal logic aims to represent but many different understandings and background assumptions that operate in many different ways and to many different ends. In short, the logic of exception and the background assumption of autonomous and logical subject operate in law in such a manner that they do not manage to protect those in need of protection. So, the question is: what shall we do with vulnerability?

3. Vulnerability thesis and embodied and embedded vulnerability

Martha Fineman has developed 'a legal paradigm that brings vulnerability and dependency, as well as social institutions and relationships, together into an analysis of state responsibility' (Fineman 2017, 1). Vulnerability theory challenges the dominant conception of the universal legal subject as an autonomous, independent and fully functioning adult, who is able to negotiate the terms of a contract, assess their options and make rational choices (Fineman, Andersson & Mattsson 2017, 3; Fineman 2008, 10). Vulnerability theory challenges the stagnant categories and group-based understanding of vulnerability in law. 'Vulnerability is – and should be understood to be ‑ universal and constant, inherent in the human condition' (Fineman 2008, 1). Vulnerability is also particular as 'each embodiment performs a unique set of circumstances which renders vulnerability particular' (Truscan 2013, 66).

Vulnerability is thus universal in its nature but particular in terms of how it manifests itself. It is complex and can manifest itself in multiple forms (Fineman 2013b, 22). Two forms of differences are relevant. The first consists of variations in human embodiment: we are physically, mentally and intellectually different. The second difference is social and constructed as we are situated within and dependent upon overlapping and complex webs of economic and institutional relationships.

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duty to take that into account in connection to the issues regulated in Chapter VII of the Directive, but only after individual evaluation of their situation. Vulnerability is seen as something different from the standard subject of the Directive; that of an able applicant with the capacity to state the facts of their case in a logical and consistent manner. Article 4 of the Directive is a good example of that. The evaluation of credibility plays a central role in identifying international protection needs. According to article 4(1) it is the duty of the applicant to submit as soon as possible all the elements needed to substantiate their application for international protection and it is duty of the State to assess the relevant elements of the application in cooperation with the applicant. The assumption is that the asylum seeker has to tell their grounds for asylum in a logical and consistent manner. Only in exceptional situations listed in article 4(5) is the applicant exempted from presenting evidence supporting their story and those exceptions are also based on the ability to produce a logical and coherent story. However, a tortured asylum seeker can offer fragmented or contradictory testimony which is attributed to fabrication rather than underlying memory disturbances and dissociation caused by torture trauma. See Wilson & Droždek (eds.) 2004, 19. The Directive fails to recognize the possibility that the applicant´s vulnerability may have a bearing on their capacity to act according the requirements of article 4 for reasons beyond their control.

We are constantly dependent on institutions and relationships throughout our lives while that reliance varies over time and in response to changes in embodiment and social context. Fineman argues that the state must be responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions (Fineman 2017, 2).

In my PhD project I started searching for an explanation for inconsistent practice in Scarry´s analysis on pain, according to which pain and torture happen because of the body and 'embodied vulnerability is directly and focally at stake in the case of right to life […]the rights to protection against torture' (Grear 2010, 160). Scarry´s analysis on bodily pain links speech, pain and the body intimately together. 'World, self and voice are lost, or nearly lost, through the intense pain of torture' (Scarry 1985, 35). Pain, according to Scarry, is unsharable through its resistance to language because of its exceptional character to other interior states.[13] However, my case material seemed not to support this claim totally. For example, an unaccompanied minor was able to tell his experience of torture, captivity and being forced to watch and hear other people being tortured from the first interview with the police. However, at the Finnish Immigration Service interview no clarifying questions were asked about the violence, even though apart from the Finnish immigration service personnel, the lawyer and the legal guardian were also present. His vulnerability, although well explained by him, was ignored in the process that followed.[14] Focusing only on embodiment does not explain the initial problem I started this paper with: how does the vulnerability of those defined in law as vulnerable still pass unrecognised even when they have medical certificates as evidence to prove their embodied vulnerability? How is it that psychological and medical knowledge about the effects of trauma are not enough to revoke the basic assumption and point of comparison of the autonomous and logical subject in law?

Vulnerability is a primary human condition, not merely openness to physical or emotional harm (Fineman 2017, 11). Vulnerability is not just the capacity to suffer but also a source and expression of dynamic inter-relationality with other human beings and with the world; an aspect which I claim the asylum process tends to ignore as it focuses only on the asylum seeker and her particular abilities and inabilities. The vulnerability thesis not only replaces the autonomous, liberal subject with the vulnerable subject, but also looks at the societal institutions and structures that can produce or reduce vulnerability (Fineman 2008).[15] 'Therefore, the appropriate comparison is *not* that of relative *vulnerability*, but of relative *resilience* (in the form of access to and opportunity within society and its institutions) […] Important, in

13 '[…] physical pain – unlike any other state of consciousness - has no referential content. It is not *of* or *for* anything.
It is precisely because it takes no object that it, more than any other phenomenon, resists objectification in language.' Scarry, 1985, 5.
14 Case study, case 1/99: Finnish Immigration Service asylum protocol.
15 The vulnerability thesis offers a good theoretical framework for analyzing the role of institutions and their effect on the asylum process.

this regard is the realization that resilience is not an innate characteristic for anyone, but it is socially produced over time and within structures and institutions' (Fineman 2013, 85-86). 'The individual experience of vulnerability varies depending on quality and quantity or resources we possess and can command' (Fineman 2013b, 21). Thus, while vulnerability theory begins with the idea of human vulnerability, the emphasis is not there but on the inequality of resilience which turns the attention to societal institutions, processes and legislation that can confer power and privilege (Fineman 2015, 1). Importantly, human beings are not rendered more or less vulnerable due to certain characteristics or membership in a group; rather, we should focus on 'different spaces, places, situations or relationships as indicators of the proximity of, exposure to, or probability for vulnerability to be manifested or realized in the form of dependency'(Fineman 2015, 2). We experience the world with different levels of resilience which is produced in those same places, situations and sites; those being the sites of state responsibility. Thus, focusing on resilience brings societal institutions and state responsibility to the fore and into the conversation with the vulnerable subject. A responsive state provides assets and removes obstacles for the enjoyment of rights and then contributes to the resilience of the individual (see e.g. Fineman 2008; Fineman 2013b, 24-26).

Fineman rightly claims that the institutional and structural approach allows for greater recognition of individual differences than identity-based analysis grouping individuals according to their characteristics (victims of torture, unaccompanied minors, women etc.) even those characteristics are nuanced and multiple (an asylum seeker who is a victim of torture, who has against her will left her country including her own family there, who is now in strange cultural, social and societal surroundings, does not speak the language…). The focus being on institutions producing distinguishing characteristics and 'identities' allows the observer to notice that those identities are neither individual nor static, but social and reflecting allocation of power and privilege (Fineman 2013a, 85-86). Suppose, for example, that the resilience and vulnerabilities of the system itself were to be taken into account: would the situation look different?

4. Resilience in the asylum process

According to Fineman, 'differences are produced as a result of an individual´s experiences within societal institutions and relationships over the life course. These differences structure options and create or impede opportunities' (Fineman 2013, 22). Fineman lists physical, human, social, ecological / environmental and existential assets that societal institutions and organizations can provide, creating and fostering resilience (Fineman 2013, 22). 'Although nothing can completely mitigate our vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect our lives' (Fineman 2017, 133-149).

In the asylum process resilience is truncated to the ability / capability of the individual in question and is interpreted rather as a sign of invulnerability, making

the individual able to return to her country of origin. 'You are a young man with a history of employment and able to work in the future': the factors that the Finnish Immigration Service considered as proofs of invulnerability in a negative decision on asylum.[16] Meanwhile the lawyer in the appeal described his client as a trustworthy person, able to navigate well in Finnish society, being able to study with good grades and having learned Finnish.[17] In the appeal phase, the Finnish Immigration Service described the appellant as an able 16-year old, who in the cultural context in his country of origin would already be responsible for taking care of his family; being the man of the house and if he had a family of his own, he would already be responsible for offering protection to them. Based on this cultural interpretation of the appellant´s age, the Finnish Immigration Service referred to a general policy according to which 'returning an adult man, who is able to work, to country X, a lack of existing safety networks does not complicate his adjustment to society.'[18] In the asylum process resilience – if even indirectly described – involves either proof of invulnerability with unrealistic and false expectations of individual ability and capacity to overcome any obstacles or a description of individual capacities to overcome all inherent difficulties of being an asylum seeker in a strange country and heroically adapting oneself and proving worthiness to stay.

The asylum process has been criticized for being too focused on trauma stories, neglecting the strengths of applicants and pathologizing them as traumatized victims, running the risk that medical diagnosis is just another way of categorizing and labelling persons. Elsewhere I have also analysed national legal development through the vulnerability lens and found the same pattern of seeing resilience as the capability of the individual only dependent on her personal abilities in a system built around a highly capable subject who needs to overcome almost impossible barriers in order to be able to enjoy state protection (see more Tarvainen, 2017).

How could resilience be built into the asylum process? Fineman claims that 'experiences with institutions are often concurrent and interactive, but also can be sequential' (Hutchinson & Dorsett 2012, 55-78). Instead of focusing only on the individual and her ability in the asylum-seeking context to communicate her vulnerability, we instead focus on the system and its role of producing, creating and alleviating vulnerability. We start to ask very different questions if the counterpoint of vulnerability is not invulnerability but resilience-building institutions and processes, limiting or enhancing our ability to exercise autonomy, thus defining the scope and nature of our agency. The critical focus is shifted to the operation of societal institutions and their ability to mitigate vulnerability. The role of law in structuring societal relationships and institutions means that the state should bear responsibility for ensuring that they are justly structured and fairly functioning (Fineman, Andersson & Mattsson 2017, 4).

16 Case study, case 1/99: *Migri* decision.
17 Case study, Case 1/99: appeal to the Helsinki Administrative Court.
18 Case study, Case 1/99: Migri´s request for appeal before the Supreme Administrative Court.

5. Vulnerability of the system

Even the Preamble to the Refugee Convention (RC)[19] is ambiguous. On the one hand it is about protecting the human rights of refugees, on the other hand stating that 'the grant of asylum may place an unduly heavy burden on certain countries' (Walker 2003, 596). There is thus an inbuilt tension between protecting the human rights of refugees and recognizing its limitations (Hathaway 1990, 113; Walker 2003).[20] Or, as Noll has expressed, 'while the universalist perspective focuses on the existential threat facing the individual, the particularist perspective is eager to avoid existential threats facing communities' (Noll 2000, 80). Noll and Vested-Hansen phrase the tension in the following way: 'by its very nature, migration and asylum law is situated in the conflict zone between particularism and universalism. In ultimate questions, participants in this discourse have a choice between two foundational paradigms – one striving for the global realization of human rights and another giving preference to the interests of a certain state population' (Noll &Vested-Hansen 1999, 360).

The asylum seeker is per definition dependent on the protection of the host state and dependent on its support,[21] and if those support systems fail or are inadequate, the system actually increases the vulnerability of those already in a vulnerable position. What is the justification behind the current system, which is unable to distinguish those who are vulnerable (as the system understands the concept) resulting in a system that harms those it seeks to protect?[22] The state (here Finland, but the same applies to the EU as a whole) has played favourites and chosen vulnerable institutions over the vulnerable applicant.

In 2015 1.2 million human beings submitted an asylum claim in the EU. Of these, 32 476 came to Finland. The mass media and political leaders described the refugee situation in the EU as a major 'refugee crisis' or 'migrant crisis'.[23] In 2017, 650 000 new applications for asylum were filed in the EU and 2139 in Finland. However, the decrease in the number of applications is clearly a consequence not only of

19 According to Nykänen: 'The UN Refugee Convention constitutes the unequivocal foundation of the legal framework for the international framework for international protection of forced migrants. With 147 states formally adhering to the Convention and/or its 1967 Protocol, among them all the Member States of the EU, this instrument has nearly global coverage.' Nykänen 2011, 14-15. As of 5 March 2014, the total number of states parties to the RC was 145 and to the 1967 Protocol 146, available on <http://www.unhcr.org/pages/49da0e466.html> (accessed 5 May 2014).

20 However, Foster argues that the reference to the 'heavy burden' emphasizes the need for co-operation in dealing with the refugee problem, rather than undermining the 'humanitarian and human rights purpose of the Refugee Convention.' Foster 2007, 44-45; Beard & Noll 2009, 460.

21 For example, in the form of access to reception services including accommodation, reception allowance or spending allowance, any necessary social and health services, interpretation and translation services as well as work and training activities.

22 The mental health consequences of prolonged asylum processes are well-documented. See for more, for example: Jakobsen Meyer DeMott, Wentzel-Larsen et al. 2017; Lindert, Ehrenstein, Priebe et al. 2009, 246-257; Carta, Moro & Bass 2015, 33-38; Lambert & Alhassoon 2015, 28-37; Patel, Kellezi & Williams 2014; Mollica, Ekblad & McDonald 2015, 341-378.

23 In January 2016 Donald Tusk, President of the European Council, described 'the migration and refugee crisis' as 'an existential challenge for the EU'. *Report by President Donald Tusk to the European Parliament on the outcome of the December European Council*, Statement 16/17 of 19 January 2016, § 2.

national legislative decisions but also of EU policy in general towards asylum seekers. Individual EU Member States have built fences, have decided to detain all asylum seekers, and have established Schengen border controls, among other restrictive policy measures.[24] However, in a longer time span, it is clear that these restrictive policies will not stop people seeking asylum but only forces them to switch to more dangerous routes in order to reach Europe.[25]

Vulnerability can serve as a legitimation of resources to be deployed. In public debate during and in the aftermath of the 2015 'refugee crisis', women and children deemed vulnerable were described as entitled to seek asylum while others (i.e. young men) were categorically seen as exploiting the system when they actually should have been defending their countries and vulnerable women and children there. However, the debate over those deserving protection and safe routes to the EU quickly turned into an agreement between the EU and Turkey, thus making it impossible for anyone to reach Europe through that route. In summer 2018, EU leaders started to discuss outsourcing asylum altogether by establishing regional disembarkation platforms to provide rapid processing to distinguish between economic migrants and those in need of international protection.[26] In similar vein, on 4 May 2016 the European Commission proposed reforming the CEAS 'by creating a fairer, more efficient and more sustainable system for allocating asylum applications among Member States' (EC press release 2016). The aim continues to be 'to ensure quick identification of persons in genuine need of international protection and return of those who do not have protection needs.'

The press release also claims that it is 'generous to the most vulnerable and strict towards potential abuse, while always respecting fundamental rights' (COM[2016] 467). On 13 July 2016 the Commission gave its second set of legislative proposals on 'Managing the refugee crisis', which included reforming the Procedures Directive and Qualification Directive as regulations[27] and reforming

24 In summer 2018 the Hungarian government passed a law that made helping asylum seekers a crime. See: <https://www.helsinki.hu/en/hungarian-government-marks-world-refugee-day-by-passing-law-to-jail-helpers/>.

25 'The EU's migration and border control policies aim to adhere to a *human rights-based* logic, but at the same time the policy field is very *security-oriented*. As the case studies in this report indicate, security considerations often take the upper hand in designing and implementing policies at the operational and policy level at the expense of the protection of human rights and the consideration of vulnerabilities of individuals' (Mustaniemi-Laakso et al. 2016, 122 and 126). States are now trying to shut the doors to the welfare state as well as to work, housing, education and other institutions of society. Access to public services has become an instrument of migration policy. Broeders 2009, 14-15.

26 EU summit, 28-29 June 2018, where EU leaders discussed taking all necessary internal legislative and administrative measures to prevent asylum seekers from freely travelling across the EU. The probability of reaching agreement on reform of Dublin is so unlikely, that individual Member States have been reaching individual solutions to stop asylum seekers from moving and reaching Europe. This summit proposed a common EU solution, namely outsourcing asylum altogether outside of the union.

27 Proposal for a Regulation of the European Parliament and the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. Brussels 13.7.2016, COM(2016) 467 final; Proposal for a Regulation of the European Parliament and Council 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

the Reception Conditions Directive[28] for further harmonization.[29] It has, however, been argued that the Commission proposals do not address the persistent failure of EU asylum policy but are more likely to worsen the current crisis of solidarity by reproducing and intensifying the structural flaws of the CEAS by continuing to further externalisation of refugee protection, continuing to save the Dublin system at any cost and controlling asylum seekers through harmonisation (Chetail 2016, 584-587).[30] While it has been acknowledged that some modifications improve protection of asylum seekers across the Union,[31] 'the most numerous and substantial changes proposed by the Commission are in fact fuelled by three primary objectives: those of accelerated asylum procedures, fighting secondary movements and limiting access to international protection' (Chetail 2016, 600). As the structural flaws of the CEAS are not addressed, the bearer of the cost of the broken system is the asylum seeker who in human rights logic requires special protection does not in the CEAS even have the chance to enter that logic of being deserving and requiring support. In this regard, one must ask: is CEAS legislation on vulnerability really about protecting those in vulnerable situations or protecting the system itself?

Finland responded in December 2015 to an increase in asylum applications with its asylum policy operational plan, according to which it promised to restrain immigration and cut off the uncontrolled stream of asylum seekers to Finland, better control the economic expense of the asylum system and effectively integrate those who receive international protection in Finland.[32] The plan does not mention protection of those in a vulnerable situation. As a reaction to the increase in applications, the Finnish government applied restrictive immigration and asylum policies and many separate restrictions to legislation were approved.[33]

In early 2018 research by Åbo akademi, the University of Turku and the Non-discrimination Ombudsman showed that the legal position of people applying for international protection seemed to have become significantly weaker, a fact that cannot be explained by the amendments to the preconditions for granting international protection under the Aliens Act. Indeed, in many ways the principles of data interpretation have become visibly stricter. The research claimed that the source of the change could be found in the general interpretation policies of the authorities

and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Brussels 13.7.2016, COM(2016)466 final

28 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), Brussels 13.7.2016, COM(2016)465 final.

29 The first set of legislative proposals include: reforming the Dublin System, reinforcing the Eurodac system and Establishing a European Union Agency for Asylum.

30 More on this issue also in Tarvainen 2007.

31 They notably concern an extended notion of family members, early access of asylum seekers to the labour market, and an explicit time-limit for appointment of unaccompanied minors' guardians. Chetail 2016, 599.

32 Hallituksen turvapaikkapoliittinen toimenpideohjelma, 8.12.2015.

33 These amendments and policies had been criticized by many notable legal scholars, such as the President of the Supreme Administrative Court and the Finnish Non-discrimination ombudsman, demanding that the effect and their accordance with the Finnish Constitution should be investigated. More on national development in Tarvainen, 34-42.

and in possible political and administrative steering influencing these policies.[34] At the request of the Finnish Interior Minister to respond to worries both for fulfilment of basic and human rights as well as for the Finnish constitutional state, the Finnish Immigration Service conducted and published its own investigation regarding its own decision-making practice, concluding that 'its decisions are principally made according to the law´s criteria'. As to documented quality problems in interpreting and handling claims, the Finnish Immigration Service concluded that they were probably more likely after the dramatic 2015 increase in applications and the need for multiplying the personnel responsible for those applications in a short time span. However, it considered that quality was better already as 'the processes are amplified, the trainings are intensified and the experience of the personnel has accrued'.[35] According to the Finnish Interior Minister, this investigation by the Finnish Immigration Service does not exclude the possibility of independent assessment in the future of which to date there is no new information.[36]

Based on initial analysis of the interviews conducted for my PhD research, it seems that there is a general phenomenon of passing the responsibility for recognizing vulnerability to some other actor / institution than one's own. The Finnish Immigration Service took the view that health care professionals or social workers at reception centres are better positioned to recognize vulnerability during their health screenings, even though at the same time recognizing the practical difficulty of accomplishing that. A reception centre worker might be responsible for 150 clients and their health screening.[37] At the same time, the administrative court saw that its role as appeal court prevented it from taking an active part and asking about vulnerability.[38] Instead the judges considered themselves as tied to decisions by the Finnish Immigration Service, to the claims made in an appeal and finally it was in any case the responsibility of lawyers to raise the issue. The judges, however, did accept that there might be situations where it is impossible for an asylum seeker to tell about his / her vulnerability even to their lawyer, and then 'it stays

34 To support this claim, the research referred to a reprimand by the Chancellor of Justice to the Finnish Immigration Office on 3.2.2017 (Dnro OKV/8/50/2016) and to the fact that administrative courts have returned many Finnish Immigration Service decisions to be re-assessed (some 32% in 2017) either because of new information in the appellate stage or because of a procedural mistake or mistake in application of the law (4 %). Also the COI assessment of security situations has had a significant role in the legal position of those seeking asylum in Finland. The possibility of being granted international protection was significantly lower for Iraqi asylum applicants after the Finnish Immigration Service updated its view on the security situation in Iraq in 2015. This pilot study supports my claim that states are confused and vulnerable themselves in their attempt to solve the allocation problem with stricter decision-making practice.

35 Maahanmuuttoviraston selvitys Sisäministerille turvapaikkapäätöksentekoon ja -menettelyyn liittyen, 13.6.2018.

36 See webpage in Finnish: <https://intermin.fi/artikkeli/-/asset_publisher/selvitys-turvapaikkamenettelysta-loytyi-kehitettavaa-mutta-ei-systemaattisia-virheita>.

37 Semi-structured Interview with Finnish Immigration Service designated personnel, 13.12.2017.

38 Under the Administrative Procedure Act 31 § An authority shall ensure that a matter is sufficiently and appropriately examined, by acquiring the information and evidence necessary for a decision to be made on the matter.

in the dark. It stays there and we cannot really do anything about that'.[39] However, the judge recognized that the system is vulnerable itself as '[t]here are all kinds of lawyers. There are differences in quality. The whole process is quite appalling right now: there are differences in quality before Finnish Immigration Service interviews, quality is different among lawyers, our quality is different and I guess the Supreme Administrative court struggles with the same issue…They have also hired a lot of new people. The situation taken as a whole is very special; with bad luck someone might be on the bad side of the whole process…'[40] Finnish Immigration Service personnel recognized personal attitudes of the personnel as potential vulnerabilities of the system,[41] also the time allocated for interview during which 'it´s not possible to recognize vulnerability' and the risk of re-traumatization.

Personal attitudes were apparent when interviewing Finnish Immigration Service designated personnel, who was very optimistic of the ability of social workers to recognize possible special needs even in a situation of scarce resources: 'If the social worker does not handle the pressure, she / he is not fit for that profession'. According to him 'everyone knows in the psychiatric health sector that not everything is what it appears to be. I, for example, had a client who claimed he was going to kill himself if he didn´t receive more money'. He also expressed his skepticism of any tools for identifying vulnerable asylum seekers, including PROTECT[42] as one of them 'as it is guaranteed that with those tools, you will get fake positive cases'.

As Fineman states, 'those who are not seen as sufficiently autonomous and independent actors are herded together in designated "vulnerable populations" and are susceptible to monitoring, discipline, and supervision' (Fineman 2012, 114). Monitoring is definitely needed, but instead of monitoring those designated as vulnerable, states and their institutions should be monitored, evaluated, updated and reformed when necessary (Fineman 2010, 38). As Fineman notes, '[t]he state and its institutions are thus vulnerable themselves. Because they are so important both to individuals and to society, the flaws, barriers, gaps, and potential pitfalls that such institutions contain must be monitored and adjusted when they are functioning in ways harmful to society. This is what I mean by calls for a responsive state – a state responsive to the vulnerability of both individuals and institutions, one that takes seriously its responsibility to monitor even itself to ensure equality of access and opportunity' (Fineman 2013a, 84-89).

39 Semi-structured Interview with Oulu Administrative Court Judge, 8.12.2017, Judge B.

40 Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge A.

41 The designated person stated that background attitudes towards, for example, sexual minorities could be so strong that the effect of any training is limited. According to her, those attitudes affect, for example, how questions are phrased etc. If she has noticed such attitudes, she has strongly recommended to that person's boss to exclude them from interviewing persons belonging to that particular category. Semi-structured Interview with Finnish Immigration Service designated personnel, 13.12.2017.

42 The PROTECT-ABLE project aims at disseminating, through training, lobbying, networking and communication a process of early screening and orientation for asylum seekers suffering from consequences of traumatic experiences (torture, rape, serious forms of physical, psychological or sexual violence), in order to encourage the Member States to comply with European directives on asylum. It also aims at developing good practice in the registration process for asylum seekers by implementing an evaluation tool for vulnerable asylum seekers.

6. A vulnerability analysis in globalized context: some initial thoughts

> While vulnerability, uncertainty and insecurity are not new in the life of people, what is new that their causes and manifestations have multiplied and changed profoundly over the last decade. Examples include civil strife and the proliferation of conflicts, growing inequalities within and among the countries further accentuated by globalization, mixed outcomes of poverty, reduction efforts, increased mobility of populations and changes in family structure (UN 2003:2, 1 at para. 3).

Vulnerability analysis, placed in a globalized context, makes us aware of the high human cost of selective forms of state responsiveness. Kirby, for example, has identified causal networks between neoliberal globalisation and deepening human vulnerability in a globalized context where the power has shifted from states to market forces (Kirby 2006). Beck has argued that the nature of power itself has changed under the conditions of neoliberal globalisation (Beck 2005). In this context, the state could be argued to be one element in an extensive system of capitalist interactions, as Grear phrases it. Grear questions the theoretical freedom of the state from the market and the adequate ability of the state to be responsive to the violent unevenness characterising the ethico-material urgencies of our age (Grear 2013, 55).

One criterion for triggering protection under the 1951 Convention is that a person 'is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country' (189 UNTS 150; SopS 77/1968, art. 1 A [2]). Territorial sovereignty reigns supreme and an asylum seeker needs to first cross an international border to be able to trigger the protection of another country than her own. However, the securitisation trend of EU asylum and migration policies with an increasing array of non-entrée policies is states' reaction to their loss of control of the global forces behind movements of people. Are migration laws and their enforcement in an attempt to control migration the last bastion of state sovereignty (Dauvergne 2008)?

I claim that states are actually vulnerable themselves when trying to solve global challenges on a local level and confusing two different issues: 1) the duty stemming from international law to take responsibility over asylum seekers and design a suitable process for them to decide who is entitled to protection and who is not; and then 2) the allocation problem: it is not states that really decide where the applicants end up applying for asylum but it is asylum seekers themselves and/or smugglers, whose decisions are shaped by the securitisation trend of EU policies aiming to control irregular migration flows at the expense of protecting vulnerabilities. This illustrates the state's vulnerability and their attempt to actually solve this second question by addressing the first one. States within a globalized context are seeking to preserve national sovereignty for the state at the expense of the individual.

The reason why I started to ponder the roles and possibilities of the state alone to be responsive, was protest movements in asylum and deportation, where political protest is articulated by movements, activists, grassroots organizations, ordinary

citizens and asylum seekers themselves; where resistance and power within civil society, its citizens and non-citizens is built and the liberal state's coercive capacity to control its borders is challenged. Fineman defines the state as 'a cluster of relationships, entities, and agencies reflecting and shaping public norms and values, through law and policy. Those relationships include the relationship between the citizen and state, as well as between state and institutions' (Fineman 2013b, 26). Even though the state does not mean a monolith, nor is it limited to the definition of 'state' under international law,[43] are states able in this context not to tolerate a system that unduly privileges any group of citizens over another as Fineman states (Fineman 2010, 41)? Or do we need to add civil society, which is distinct from the state and the market, to shape policies, norms and social structures to be able to achieve the paradigm change[44] proposed by Fineman?

7. Conclusions

The problem I started this paper with was a finding arising from my case study material where the vulnerability of victims of torture was taken into account randomly or even systematically ignored in the asylum process. The background assumption – namely, of a logical and rational subject who is able to produce a coherent account – is expected even when the asylum seeker is suffering from medical conditions proved by medical certificate making him/her unable to manifest such expected behaviour. My aim in this paper was to seek explanations for this finding relying on vulnerability theory. I have analysed – through Fineman´s theory – the tortured subject as an inherent representation of the ways in which politics and law work on the vulnerable subject.

The challenges in the asylum process of taking the vulnerability of the tortured asylum seeker into account reflect the different understandings and uses of the concept of vulnerability. The concept is thus not unique, uniform or static as the law´s internal logic would aim to represent but, rather, many different understandings and background assumptions that operate in many different ways and to many different ends. Additionally, it seems that the asylum process tends to confuse the question 'who is entitled to international protection?' with the question 'who is vulnerable?' by granting protection to the most vulnerable: a construction which is ultimately impossible. Moreover, I have briefly discussed the vulnerability of the system in a globalized context, which offers yet another way to explain the difficulty of the asylum system in terms of taking the vulnerability of the individual asylum seeker

43 Montevideo Convention, art 1 'the state as a person of international law should possess the following qualifications: Permanent population, Defined territory, Government, Capacity to enter into relations with the other states.'

44 A paradigm change is needed, where we would look at the concept of vulnerability in a dynamic and contextual way, as socially embedded and as relational to the institutional and societal contexts where it is produced. Vulnerability is a primary human condition that does not exclude agency and qualifies itself by different levels of resilience, which are produced within and through institutions and relationships which confer privilege and power.

into account.

To conclude, a paradigm change is needed – a change where we would look at the concept of vulnerability in a dynamic and contextual way, as socially embedded and as relational to the institutional and societal contexts where it is produced. Vulnerability is a primary human condition that does not exclude agency and qualifies itself by different levels of resilience, which in turn is produced within and through institutions and relationships which confer privilege and power.

What if, instead of a logical subject to which the exception is a person with personality disorders we would take human vulnerability as a starting point? The clinical attributions of disorders rely on a set of shared assumptions on what is normal and that in turn is determined by the myth of the autonomous, logical and rational subject. Vulnerability theory offers a lens to reconceptualize and recast different behaviours operating within a relational system where everyone is recast as vulnerable. The logic of exception and the background assumption of an autonomous and logical subject operate in law so that they fail to protect those in need of protection. It would need a paradigm shift from the logical and autonomous subject to the vulnerable subject. It would need vulnerability to be seen as both universal and particular, resilience seen as socially produced and the state being the entity responsible for building resilience to vulnerability; thus it would need a change of the entire system if protection of vulnerability were to be taken seriously. That would among other things mean a system which depends on individual evaluation of vulnerability, which is not based on any categories but on different situations that can render someone vulnerable. This evaluation would have to take into account the idea of resilience being socially produced. Thus even though the evaluation as such would be individual, it would focus on the institutions and social and societal settings producing or alleviating vulnerability.[45] The legislator would take situational vulnerability into account when addressing vulnerability by providing appropriate measures and remedies. It would do away with the othering effect of choosing who is vulnerable and who is not, which, if following Fineman´s approach, is theoretically impossible as there is no such thing as invulnerability. The starting point in the process would hence be that of the vulnerable subject in Fineman´s sense and the procedure would be design-based on that starting point. It would be an asylum process of universal design that takes the universality and particularity of human vulnerability into account. My assumption is that an asylum process based on the vulnerability approach would then be better prepared to recognize, assess and address human vulnerability.

45 One argument for the need to change the system being not only inconsistent practice but the fact that the system as it is, harms the asylum seekers it seeks to protect. The present findings underline the stressful impact of asylum interviews on traumatized refugees. They indicate that the asylum interview might decrease posttraumatic avoidance and trigger posttraumatic intrusions, thus highlighting the importance of ensuring that an already vulnerable group of traumatized refugees needs to be treated with empathy during their asylum interview. See, Schock, Rosner & Knaevelsrud 2015.

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Case study, case 1/99: Finnish Immigration Service asylum protocol.

Case study, Case 1/99: Migri decision.

Case study, Case 1/99: appeal to the Helsinki Administrative Court.

Case study, Case 1/99: Migri´s request for appeal before the Supreme Administrative Court.

Interviews conducted by the author

Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge A.

Semi-structured Interview with Helsinki Administrative Court Judge, 2.2.2014, Judge B.

Semi-structured Interview with Finnish Immigration Service designated personnel, 13.12.2017.

Semi-structured Interview with Oulu Administrative Court Judge, 8.12.2017, Judge B.