

THE CONCEALMENT CONTROVERSY

Sexual Orientation, 'Discretion' Reasoning and the Scope of Refugee Protection

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as part of the collaborative doctoral degree and/or fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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This thesis is the result of a research candidature conducted jointly with another University as part of a collaborative Doctoral degree.

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Abstract

The study explores the concealment controversy in refugee law. Though repeatedly discarded both by courts and refugee law scholars, the idea that a claim for international protection can be rejected on the basis that the claimant behave 'discreetly' ('discretion' reasoning) in their country of origin, has been haunting asylum claims based on sexual orientation, and to a lesser extent other grounds of claim, for a long time. The central puzzle that the study addresses is the resilience of this phenomenon.

Employing a mixed methods approach, the study critically examines the phenomenon of 'discretion reasoning' on different levels and from different angles. The theoretical framework is drawn from queer theory and discourse analysis. Building on Michel Foucault, Eve Kosofsky Sedgwick and Janet Halley, an act/identity dichotomy serves as the lens through which the doctrinal construction of 'discretion' reasoning is scrutinised. This approach is capable of reaching beyond sexuality-based claims to encompass claims based on religion and political opinion, because the persecutory environment is understood to create a situation analogous to the closet, in which 'discretion' and disclosure become highly sensitive.

Based on these theoretical underpinnings, the thesis proceeds in two parts. Part I is dedicated to a detailed analysis of sexuality-based asylum claims from the European civil law jurisdictions Germany, France and Spain, both before and after three European high-level judgments rejected the 'discretion' requirement. Part II turns the analysis around: Rather than looking for instances of 'discretion' reasoning, it undertakes a doctrinal analysis of the ways in which 'discretion' logics emerge from the different approaches to conceptualising the Convention grounds, both in the jurisdictions under review and in the common law jurisdictions, as well as in international refugee law doctrine more broadly.

The thesis reveals that 'discretion' reasoning is not limited to any particular jurisdictions or doctrinal framework, but emerges in all jurisdictions under study, hidden in all types of reasoning that operate on the assumption that the claimant is able to manage and avoid persecution by refraining from expressing the protected characteristic. The thesis concludes that 'discretion' reasoning is the site where the scope of refugee protection is negotiated. This scope is caught in the paradox that is created by two widely held but competing principles of refugee law: Firstly the notion that claimants cannot be required to hide the characteristic they are persecuted for, and secondly the principle that the purpose of refugee protection is to protect from serious harm, not to provide full human rights protection. 'Discretion' is the response to this tension – it simultaneously stabilises and destabilises refugee protection.