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

Confession, Death and Disbelief: Interrogating the Asylum Cases of the Court of Justice of the European Union

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Abstract: This article addresses the connections between confession, truth and death that materialise in asylum processes and the European Union's asylum system more generally. Through close-reading of two asylum cases from the Court of Justice of the European Union (EU), on the one hand, and an analysis of Michel Foucault's works related to confession, on the other hand, I demonstrate how asylum processes follow a logic that can be described as confessional in light of Foucault's work. At the same time, this analysis illustrates how not only are the notions of confession and death interlinked in Foucault's work, but also how these notions share the same root in suspicion toward the self and others. This theoretical contribution is then used to further elaborate how the workings of the EU's asylum procedures can be analysed through a truth–confession–death triad that is rooted in suspicion and disbelief. Finally, I suggest that the operation of the EU's asylum procedures can be understood as a confessional dispositive, an economy of power that follows a confessional logic.

Key words: asylum, Michel Foucault, confession, credibility assessment, sexuality, sexual minorities, dispositive

1 Introduction

This article addresses the connections between confession, truth and death that materialise in asylum processes and the European Union's (EU) asylum system more generally. Through close-reading of two asylum cases from the Court of Justice of the European Union (CJEU), I demonstrate how such processes follow a logic that can be described as confessional in light of the work of Michel Foucault. Moreover, these notions share the same root in suspicion toward the self and others.

The Foucauldian notions of confession and truth have been previously discussed conceptually, theoretically and historically (Lorenzini & Tazzioli, 2018; Tadros, 1998; Taylor, 2009; Teti, 2020) as well as by applying the concepts to several practical contexts (Beard & Noll, 2009; Ferreira, 2023; Kestilä, 2021; May & Bohman, 1997; Salter, 2007). However, the connection between confession and death has received less scholarly attention, now

elaborated in *The Confessions of the Flesh*, the fourth volume of Foucault's *The History of Sexuality*. On a theoretical level, I discuss the meaning of confession as a spiritual and symbolic death in light of Foucault's work. On a practical level, the context for this discussion is EU asylum legislation and cases decided by the CJEU where the application for asylum was based on the sexual orientation of the applicant. A key element in these types of cases is the assessment of credibility of the applicant's statements. In other words, it is a question of establishing whether the applicants *truly* belong to a sexual minority. Failure to pass this assessment will result in rejecting the application and finally deportation to the applicant's country of origin, where they might face even life-threatening circumstances.

The analysis of these two layers is carried out through readings of two landmark cases by the CJEU that concern the different legal measures pertaining to the Common European Asylum System (CEAS), a legal and policy framework developed to guarantee harmonised standards for people seeking asylum in the EU. The first case, *Joined Cases C-199/12–C-201/12 Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel* (ECLI:EU:C:2013:720) (*X and others*), was decided by the CJEU in 2013. In the second case, *Joined Cases C-148/13–C-150/13 A and others v. Staatssecretaris van Veiligheid en Justitie* (ECLI:EU:C:2014:2406) (*A and others*), the CJEU ruled in 2014. In both cases, the applicants had based their applications on fear of persecution in their countries of origin for reasons of membership of a sexual minority. In order to decide whether the applicants fulfil the legal criteria for being granted asylum, the question in the national migrant administration came down, first, to whether belonging to a sexual minority qualified as a basis for the application, second, whether the applicants were telling the truth about their sexuality, and third, how serious is the risk the applicants would face should they be deported. This way, the question of 'speaking the truth' comes to essentially define who will be granted asylum in the EU. Procedures to reveal this 'truth' appear to follow the logic of confession. However, the cases discussed in this article also demonstrate how these procedures aid in negotiating the risks and consequences that follow from rejecting the application, in other words the likelihood of the applicant facing serious harm or even death in their country of origin. By discussing these cases, we can approach the intertwinement of the notions of confession, truth and death.

Moreover, the analysis illustrates how confessional practices, intertwined as they are with the notions of truth and death, are essentially mobilised through the notion of 'disbelief' or 'suspicion', something well researched and documented in the field of asylum and refugee

studies.¹ A ‘culture of disbelief’ refers to a persistent idea that applicants ‘really’ belonging to a sexual or gender minority are rare while the rest are mainly ‘bogus asylum seekers’, pretending to belong to these minorities in order to exploit the receiving state’s goodwill. However, as Bohmer and Shuman (2018) note, suspicion is not generated first and foremost by what asylum applicants say or by the evidence they are able to provide, but ‘also by larger institutional frameworks, each with its own history, culture, and politics’ (Bohmer & Shuman, 2018, p. 159). In the (political) asylum process suspicion towards the claims made by applicants is a central part of its dynamic. In addition, suspicion can be considered as an important element for the genealogy of distinct confessional modes that Foucault traces in his work.

The article is structured as follows: First, in Section 2, the legal framework for seeking asylum in the EU is explained in detail. This sets the stage for the discussion about confession and the praxis of the CJEU in asylum cases. In Section 3, the concept of confession as well as its connection to death and suspicion in Foucault’s work is discussed. Section 4 presents an analysis of the two cases decided by the CJEU. The cases are analysed through the concept of confession with the objective of demonstrating how not only are the national asylum processes confessional, but also how the CJEU has in its argumentation laid the foundation for the types of asylum practices that have governance of truth as their main rationale. Moreover, it is observed how the driving force for such governance, practically and theoretically, is suspicion. Section 5 synthesises and further theoretically contextualises the previous readings of the cases, suggesting an understanding of this operation as the confessional dispositive. Section 6 concludes the article.

2 Seeking Asylum in the EU

The framework of EU asylum legislation essentially operates through the CEAS and its five primary legislative instruments. This article concentrates on the Qualification Directive (2011/95/EU). The Qualification Directive sets out the definition and the standards of treatment for refugees and beneficiaries of subsidiary protection and its application was the main issue in both cases that will be discussed.

The Qualification Directive lays down the criteria for refugee status and the assessment of credibility relating to the grounds for applying for asylum. Article 2 (d) states that a ‘refugee’

¹ For example, the ‘culture of disbelief’ has been discussed in detail in (Danisi et al., 2021, pp. 312–316).

is a third-country national, who is unable to stay in their country due to well-founded fear of being persecuted there. Article 9(1) defines persecution as, essentially, a severe violation of basic human rights. Paragraph 2 gives a non-exhaustive enumeration of examples of such violations, including sexual violence and various forms of discrimination (Spijkerboer, 2022). Article 4(5) sets the conditions for the assessment of credibility regarding the application, in case where the application is not supported by documentary or other evidence. According to the Article 4(5), the applicant has to make a genuine effort to substantiate the application, submit all relevant elements at the applicant's disposal, the applicant's statements must be coherent and plausible and not contradict available specific and general information relevant to the applicant's case, international protection has to be applied at the earliest possible time and finally, the application must be generally credible.

Selim et al. (2023, pp. 1002–1003) note that asylum seekers are rarely able to provide external evidence (such as documentation) to support their claims, and therefore evaluating the credibility of their statements is a significant step of the asylum decision-making process. According to Danisi et al. (2021, p. 300) while credibility is the basis of all asylum applications, it is particularly difficult to ascertain in the cases of applicants belonging to minorities based on their sexual orientation or gender identity as the persecution they face is rarely documented and has usually taken place in private. In the cases discussed in this article, sexual orientation was the basis of the applications. Thus, a couple more words about the special nature of credibility assessment in these cases is needed.

In *A and others*, the CJEU held that the national authorities are to assess the statement of the applicant and related evidence. It rejected the proposition that the declared sexual orientation of an applicant must be held to be an established fact (*A and others*, para 49). Furthermore, authorities are not to accept evidence such as the performance by the applicant of homosexual acts, apply 'tests' with a view to establishing their sexual orientation, or require the production of films of such acts (*A and others*, paras 65-66). As Spijkerboer (2022, p. 204) notes, this places the applicants in front of a difficult dilemma as

Asylum applicants are required to show the 'genuine nature' of their sexual orientation. However, the Court of Justice denies them the two forms of evidence which they can provide: their own statement as to their sexual orientation, and evidence of the fact that they have performed same sex sexual activities through, for example, visual material.

While allowing evidence such as films of sexual acts would easily constitute a violation of the Charter of Fundamental Rights of the European Union (the Charter), especially the right to respect for human dignity as prescribed in Article 3 and the right to respect for private and family life prescribed in Article 7, excessive control given to authorities in determining what kind of statements can be considered credible is equally problematic.

In this situation, where applicants can rarely provide external evidence and yet their own statement is not sufficient, credibility assessment has become a complex art. As a guiding principle, the applicants' statements are often assessed based on the so-called credibility indicators, which usually include (with some variations in wording): detail and specificity, internal consistency (ie within the applicants' statements), external consistency (ie with other people's statements and country information), and plausibility (UNCHR, 2013; Selim et al., 2023: 1015). As Bohmer and Shuman (2018, p. 15) note,

to be successful in the political asylum process, applicants need to be able to tell a coherent, credible narrative about their experiences of persecution in their home country. This is rarely an easy task, not only because their experiences are often so complex, leading to a noncoherent narrative, but also because the immigration officials, who assess the narratives, make many assumptions about what is credible and what seems deceptive.

Indeed, the procedure leaves substantial discretion to the national authorities, thus making it easier for the individual prejudices of the decision-makers to affect the outcomes of the process (see, e.g, Hertoghs, 2024). For example, applicants belonging to sexual minorities are often expected to have lived their life according to Western standards. These include, for example, the 'out and proud' narrative (Danisi et al., 2021, p. 307) the idea that if the applicant has not 'come out' in their country of origin, they are expected to do so immediately upon arrival to Europe.

However, not only personal considerations but also the broader institutional environment and culture within which the applications are assessed can be seen to affect individual decision-making. Bohmer and Shuman (2018, p. 93) argue that at least in the UK, the perception that LGBTI cases are less credible than other bases for asylum claims is based in part on the high rates of denial. According to a report from the NGO UKGLIG, 98–99% of LGBT applicants brought to their attention were denied their claims. While the authors acknowledge that obtaining reliable data on the topic is difficult, a number of applicants

aiming to obtain a refugee status fraudulently is unlikely to be as high as this denial rate would lead one to believe (Bohmer & Shuman, 2018, p. 93). The data begins to act as a self-fulfilling prophecy: As most LGBTI applications are rejected, applicants claiming to belong to a sexual minority must be unreliable or fraudulent, and therefore this individual application should be rejected too.

As noted by Fassin already in 2013, the question of asylum was subsumed under the logics of immigration control. Moreover,

This evolution is accompanied by a profound loss of credibility of asylum seekers within the institutions in charge of assessing their applications. There was a time, not so long ago, when the relationship between the administration and the claimants was one of trust. It has reversed into mistrust. (Fassin, 2013, p. 10)

Danisi et al. (2021) have documented the decision-making culture across Europe where disbelief appears to be the starting point in asylum claims. While this ‘culture of disbelief’ has been analysed from various perspectives, in this article I aim to connect the question to a broader, although likely no less complex question of truth and the practices through which such truth is constructed.

3 Confession, Death and Disbelief in Foucault’s work

Before we proceed to the analysis of the cases, let me introduce the theoretical framework for this discussion in detail, namely, confession and its relation to death and disbelief. While Foucault discussed the theme of confession in many of his works (1995; 1993; 2003a, 2014a; 2000), I will limit my analysis to two forms of confession: *exomologesis* and *exagoreusis*. These confessional practices are addressed especially in Foucault’s Dartmouth lectures in 1980, *About the Beginning of the Hermeneutics of the Self*, but also in *The Confessions of the Flesh*, published posthumously. Whereas *The Will to Knowledge*, the first volume of *History of Sexuality*, is often the reference point for discussions concerning Foucault’s work on confession (see e.g. Ferreira, 2023), the texts mentioned above elaborate the turn from Antiquity’s techniques of self-mastery towards examination and interpretation of the self. This relation between self and truth is of central interest to this article, together with the thematic of self-destruction and renunciation of the self. The latter element is discussed

especially in *The Confessions of the Flesh* which provides a more detailed analysis of the relation between confessional practices and death.

Let us begin with Foucault's lectures *About the Hermeneutics of the Self*, consisting of two parts entitled 'Subjectivity and Truth' and 'Christianity and Confession'. In 'Subjectivity and Truth', Foucault (1993, p. 201) notes that to confess is essentially to tell the truth of oneself to other people. While the word 'confession' might immediately bring to mind the confessional, the place where the priest sits when hearing confessions of penitents, this form of confession was hardly the first one. In 'Christianity and Confession', Foucault (1993, p. 213) refers to Tertullian's description of the practice of *exomologesis*, a penitential rite:

The penitent wears a hair shirt and ashes. He is wretchedly dressed. He is taken by the hand and led into the church. He prostrates himself before the widows and the priest. He hangs on the skirts of their garments. He kisses their knees.

Tertullian described *exomologesis* as *publicatio sui*: one had to 'publish oneself' – to show oneself as a sinner. This act was understood as a representation of death, showing the sinner as dead or as dying. The second element of *exomologesis* was precisely to show one's will to be freed from earthly life, 'to get rid of his own body, to destroy his own flesh, and get access to a new spiritual life'. In *exomologesis*, the sinner is willing to embrace their own death as a sinner and thus enacts a self-renunciation. Indeed, the most important reference for *exomologesis* is martyrdom (Foucault, 1993: 214–215). By reproducing the martyrdom this way, the penitent places themselves at the threshold of death, which is a promise of a genuine life where death is reversed (Foucault et al., 2021, p. 77).

However, the renunciation – and thus publication – of the self also takes another form: that of *exagoreusis*. This form of confession refers to organized practices of confession in monasteries, and they were developed during the time these institutions were formed. Two principles are crucial: the principle of obedience and the principle of contemplation (Foucault, 1993: 215–216). As Foucault (2021, p. 101) notes, the strict system of obedience implies that nothing should be undertaken without the order or permission from the director. The contemplation, then, grants access to God due to one's purity of heart. The monk must at all times contemplate his own thoughts, observe 'the nearly imperceptible movements of the thoughts, the permanent mobility of soul' (Foucault, 1993: 217). Why is this constant contemplation needed? Essentially, to be able to tell good thoughts from bad ones. We can

thus see how a fundamental suspicion is instilled into this mode of confession: There might be something in ourselves that we are not aware of, a terrible secret.

Verbalisation of thoughts is a way to test their origin: If the thoughts resist verbalisation, in other words, if one feels ashamed to confess them, the thoughts refer to sin. The one who hears the confession represents God. When the monk speaks his thoughts to his superior, he puts those thoughts before the eyes of God where they will ‘necessarily show what they are’. Moreover, in Satan, the human is considered to be attached to himself. When moving from Satan towards God through the act of verbalisation, the human renounces not just Satan but also himself. As Foucault notes, ‘one’s search for the truth about oneself [constitutes] a certain way of dying to oneself’ (Foucault, 1993: 220). The rule of constant verbalisation finds its parallel in the model of martyrdom familiar to *exomologesis*. To summarise, in both forms of confession, a common origin can be found: We must sacrifice ourselves in order to find the truth about ourselves (Foucault, 1993: 221). Moreover, this connection between confession, truth and death, but also their connection to suspicion, has marked the development of confessional practices from the beginning.

This becomes clearer when in *The Confessions of the Flesh* Foucault addresses the first forms of penitence in Early Church. Foucault discusses especially the concept of *metanoia*, the word meaning essentially ‘conversion’ in Ancient Greek (Konstan, 2015), which establishes a link between received teaching (access to truth) and rebirth, but also repentance. While Foucault usually addresses the practice of confession as centred around the truth that is somehow hidden in the self and must therefore be brought to light, *metanoia* appears to involve recognition rather than knowledge: ‘recognising the evil one has done and giving signs showing that one is no longer the person one was, that one has indeed changed one’s life [...]’ (Foucault et al., 2021, pp. 39–40). This type of conversion and penitential practices that followed typically took place before baptism: they could be performed as sort of a precondition. In this way, ‘true’ believers could be separated from the people who aimed to receive baptism for wrongful intentions. According to Tertullian:

a sinner must weep for his faults before the moment of pardon, because the time of penitence is also a time of danger and dread. I do not deny to those who will enter the water the assurance of divine benediction; but to get there, one must do the work (Foucault et al., 2021, p. 45).

Here we can see that suspicion as a central element of confessional practices is much older than the form of suspicion we observed from *exagoreusis*. Indeed, as Teti (2020, p. 225) interprets Foucault, not only does ‘Tertullian first theorise “original sin,” but it is he who first folds such suspicion of the self by the self into practices of direction of conscience.’ The ones seeking salvation through baptism must fear both God and themselves: ‘namely one’s own weakness ... the mistakes one is capable of, of the insinuation of the enemy within the soul, of the blindness or the complacency which will make it possible for him to surprise us’ (Foucault et al., 2021, p. 61). This marks the birth of what Tertullian calls the *discipline of penitence*. At the time of Tertullian’s writings, it was precisely the institutionalisation of ecclesial practices that was taking place. This institutionalisation constituted a long period of preparation in which the catechesis and teaching of truths was combined with other rituals and obligations. Foucault groups the period of preparation into three major forms: the interrogatory investigation, the tests of exorcism, and the confession of sins.

While the interrogation preceded and concluded the preparatory phase before baptism, it was quite different from the confession. The interrogation concerned the past life and conduct of a candidate, mainly external particulars. Confession was not something inquired from the candidate, but an act that one performed themselves (Foucault et al., 2021, p. 51). It was an act where one recognised being a sinner in a general sense. Nevertheless, also this form bears similarity to the later forms of confession: it is in any case a truth act, where telling the truth of oneself is an essential element. Moreover, also this form of confession is intertwined with the notion of death. Indeed, baptism is the ‘death of death’, where one dies as a sinner and is reborn into Christian life and thus death is eventually reversed. Thus, baptism does not mark only entering the life as a Christian, but it becomes a permanent matrix for one’s life (Foucault et al., 2021, p. 55).

Teti (2020) analyses elaborately the conflation of the concepts avowal (*aveau*) and confession, resulting from Foucault’s own, at times ambiguous, usage. According to Teti (2020, p. 228), these concepts appear as distinct in Foucault’s *oeuvre*, avowal being more closely associated with judicial procedures while confession appears mostly in the context of sacramental practice. However, it is nevertheless possible to discern

a specific configuration of power relations rooted in a particular articulation of confession with the avowal in which the avowing subject’s normalization is

undermined by a subjectivity already and necessarily marked by deviant, stained nature ... (Teti, 2020, p. 216).

This way, avowal is also treated as part of confessional practice. Such ‘sacramental confession’ is centred around a subject, which must ‘tell the truth’ not because the truth will redeem the one confessing but because the subject is ontologically distinct, the deviant Other. Teti points specifically to a paragraph from the *Confessions of the Flesh*, where Foucault discusses the reciprocal roles of the shepherd and the sheep in the context of pastoral power:

once attacked by temptation, the weak must seek asylum in their shepherd, ‘as children in the breast of their mothers.’ But the shepherd must also discover — even despite themselves — that which they hide or hide from themselves ... that is to say ‘examine external conduct’ of sinners with the aim of ‘discovering through this that which they hide in their heart which is most criminal and detestable.’ (Foucault et al., 2021, p. 394).

Thus, while this excerpt demonstrates the link between avowal and pastoral power, we can also view it as illustrating how, in addition to the notions of truth and death, the confessional practices are built upon doubt and suspicion. Suspicion towards the self, but also suspicion toward others. And such external suspicion is accompanied by the responsibility of the shepherd to bring the frauds and deceptions of the flock to light.

4 Asylum Process as a Confessional Practice

4.1 A and Others

The practical workings of confession can be illustrated by discussing two cases decided by the CJEU. Let us begin by introducing the case *A and others*. The applicants had lodged applications for asylum in the Netherlands. They had stated that they feared persecution in their countries of origin because of their homosexuality. Applicant A’s application was rejected by the Staatssecretaris as not being credible. Instead of challenging the refusal, A submitted a second application where it was stated that ‘he was prepared to take part in a “test” that would prove his homosexuality or to perform a homosexual act to demonstrate the truth of his declared sexual orientation’. Also this second application was rejected on the grounds that the credibility of A’s homosexuality had still not been established. The Staatssecretaris considered that ‘it was not appropriate to rely only on the declared sexual

orientation of the applicant for asylum without making any assessment of the credibility of that orientation' (*A and others*, paras 22-25).

In a similar manner as in the case of A, applicant B's application was also rejected. This was because the Staatssecretaris considered that the statements concerning B's homosexuality were 'vague, perfunctory and implausible'. The Staatssecretaris considered that although B's country of origin was intolerant against homosexuality, B should have been able to 'give more details about his emotions and his internal awareness of his sexual orientation' (*A and others*, para 26).

Also applicant C's application, based on other grounds than his homosexuality, was rejected. C did not challenge the first rejection but lodged a new application, based on the fear of persecution in his country of origin on account of his homosexuality. C stated that he had not been able to tell about his homosexuality sooner but only after he had left his country of origin. To prove his claim, C gave the authorities a video recording of intimate acts with a person of the same sex. The Staatssecretaris did not consider C's claim as credible, noting that

'C ought to have mentioned his declared sexual orientation in the first application for asylum, that he had not clearly explained how he became aware of his homosexuality and had not been able to reply to questions about Netherlands organisations for the protection of rights of homosexuals' (*A and others*, paras 27-29).

Thus, the Staatssecretaris rejected the application.

The applicants appealed before the Raad van State, the highest general administrative court in the Netherlands. The Raad van State decided to ask the CJEU for clarification on what limits do Article 4 of the Qualification Directive and the Charter impose on the method of assessing the credibility of a declared sexual orientation (*A and others*, para 43). The CJEU thus considered whether Article 4 imposes restrictions on national authorities when assessing the facts and circumstances concerning the declared sexual orientation of the applicant (*A and others*, para 48). In its assessment, the CJEU gave its approval to national authorities to verify the applicant's declared sexual orientation, for example, by interviews (*A and others*, para 64). The CJEU noted that, contrary to what the applicants had argued in the main proceedings, the claim of being a homosexual constitutes 'merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4' (*A and*

others, para 49). However, the assessment must be in accordance with the fundamental rights guaranteed by the Charter (*A and others*, para 53), therefore, the questions may not concern details of sexual practices. Similarly, the CJEU considered that performing a ‘test’ in order to prove one’s homosexuality, or to produce film material of homosexual acts, would as well be contrary to the fundamental rights. Allowing such practices would also incite others to act in a similar manner, thus de facto requiring the applicants to provide such material (*A and others*, paras 64-66).

If we now return to the discussion about confession, we can observe certain common elements. First, applicant A’s willingness to take part in a ‘test’ to prove his homosexuality can be analysed through the lens of *exomologesis*. *Exomologesis* is a practice of publication of the self. In *exomologesis* one does not say anything. Rather, the truth is being demonstrated by one’s body, wearing a hair shirt and ashes, kneeling, sometimes even flogging oneself. Confession in this form is a corporeal practice. Applicant A’s suggestion also finds common ground with *metanoia*. It should be noted that while the transformation from *metanoia* through *exomologesis* to *exagoreusis* might appear as a linear evolution where one form replaced another, and Foucault’s own work sometimes gives the same impression, all these modes of confession include some common elements. In *metanoia*, one demonstrates the conversion mostly by other means than verbalisation. However, practices attached to *metanoia* also include verbal elements, such as interrogation concerning the past life and conduct of a candidate. And similarly, *exagoreusis* includes an obligation to improve oneself in order to become worthy, similarly as true conversion needed proof before baptism. All these elements find their parallels in the asylum process, where proving one’s claim through verbalisation essentially becomes an exercise of proving one’s worthiness.

Then, in the *Confessions of the Flesh*, Foucault again addresses in more detail the coupling of ‘truth-telling’ and ‘truth-doing’, especially the performative and ‘non-discursive’ aspects of the process of truth-production (Teti, 2020, p. 224). In the context of asylum procedures, the asylum applicant’s body is itself a source of evidence, as noted by Bohmer and Shuman (2018, p. 78). Asylum courts sometimes rely on medical examiners and certificates to validate the narratives of the applicants. Such evidence can be sought in support of the claims related to, for example, torture, sexual identification, rape and forced contraception. According to Fassin and Halluin (2005), new technologies of inspecting the body have resulted in the expectation that the applicant provides documentation and evidence of their

body. They note how ‘the body has become the place of production of truth on the asylum seeker’ (Fassin & D’Halluin, 2005, p. 599).

If we consider A’s suggestion of a ‘test’ together with the video recording provided by applicant C, we again see more clearly how different modes of confession are interlinked. As was discussed above, a fundamental element of all confessional practices shares a common root in suspicion. The tests before baptism were arranged precisely in order to separate ‘true believers’ from the fraudulent ones. In the case of *A and others*, while the CJEU prohibited this kind of evidence because it constitutes a violation of human rights, this was also partly because ‘such evidence does not necessarily have probative value’ (para 65). The opinion of Advocate General Sharpston elaborates on this stance: ‘the probative value of such evidence is doubtful because it can be fabricated if needed and cannot distinguish the genuine applicant from the bogus’ (para 66). And while the CJEU eventually confirmed that the application should not be rejected solely based on the use of stereotyped notions because such notions do not allow the authorities to take account of the individual situation and personal circumstances of the applicant (para 62), the Advocate General noted that such notions are also unlikely to be able to distinguish genuine applicants from bogus claimants who have schooled themselves in preparing their application (para 65). These statements reflect well the suspicion that is elementary both to modes of confession and the ‘culture of disbelief’ in the field of asylum procedures.

We can also see the workings of *exagoreusis* in the case, namely in relation to applicant B. In applicant B’s case, it was considered that his statements were ‘vague, perfunctory and implausible’. Instead, B should have been able to ‘give more details about his emotions and his internal awareness of his sexual orientation’ (*A and others*, para 26). In *exagoreusis*, the fundamental basis is the ability and willingness to verbalise one’s thoughts and feelings to an external listener and this requires tracking them in detail. However, the listener is not merely a passive recipient but a supervisor and authority, who will assess what is being said. The one who listens to the confession has the power to judge and punish but also to forgive and console (Foucault, 1993: 62). In monasteries, the assessment focused on whether thoughts included sin. In the asylum process, the assessment is focused on whether the statement is credible. This dynamic is also discussed in *The Will to Knowledge*. As the subject cannot explicate the truth as wholly constituted, an outsider is needed to interpret what is being said. ‘Truth’ is construed in a two-stage process: between the one who speaks and the one who deciphers what is being said (Foucault, 1998, p. 66).

Finally, in relation to applicant C, we can observe both forms of confession. C had given the authorities a video recording of intimate acts with a person of the same sex (*A and others*, paras 27-28), similarly to the way applicant A was willing to take part in a ‘test’, and the Staatssecretaris had considered that also C should have been able to give more details about becoming aware of his homosexuality, similarly as B’s statements were considered vague.

4.2 X and Others

Let us then move to the case of *X and others*, decided by the CJEU in 2013. The applicants X, Y and Z had applied for asylum in the Netherlands on the ground of fear of persecution because of their homosexuality. According to the applicants, they had been subject to violent reactions by their families and entourage and acts of repression by the authorities in their countries of origin. In all of these countries, homosexuality was a criminal offence. However, the applications were rejected (*X and others*, paras 23-27).

All three applicants then appealed to the Rechtbank’s-Gravenhage, a local court, from which the dispute later proceeded to The Raad van State, the same court that dealt with the case *A and others*. The Raad van State decided to stay the proceedings and referred the issue to the CJEU. In its referral, the Raad van State asked, first, whether foreign nationals belonging to a sexual minority form a particular social group as referred to in Article 10(1)(d) of the Qualification Directive. The second question concerned the kinds of homosexual activities that fall within the scope of the Qualification Directive, namely, can applicants belonging to a sexual minority be expected to conceal their orientation in order to avoid persecution or can they at least be expected to exercise restraint in expressing that orientation. The third question related to whether criminalisation of homosexual acts constitutes an act of persecution (*X and others*, para 37).

Regarding the first question, the CJEU considered Article 10(1) of the Qualification Directive to mean that a group is regarded as a ‘particular social group’ when essentially two conditions are met. First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society. The CJEU then noted that a person’s sexual orientation is an element so fundamental to the person that they cannot be expected to renounce it. In addition, the existence of criminal laws in the applicants’ countries of origin support the finding that

homosexual persons form a separate group which is perceived by the surrounding society as being different. Therefore, homosexuals in the described circumstances can be considered as a social group (*X and others*, paras 44-49).

Regarding the second question, the CJEU noted that the Qualification Directive does not specify what kind of an attitude or behaviour the applicant should adopt in relation to their sexual orientation. Neither can it be derived from the Qualification Directive that the person should limit the expressions of their sexuality to private life. Therefore, a person applying for asylum cannot be expected to conceal their homosexuality in their country of origin in order to avoid persecution (*X and others*, paras 69-71).

Regarding the third question, the CJEU noted that the acts of persecution must be sufficiently serious and constitute a serious violation of human rights. In the case at hand, the violation of human rights relates to the right to private and family life as enshrined in Article 8 of the European Convention of Human Rights and the corresponding Article 7 of the Charter. However, these rights are not among the fundamental human rights from which derogation is not possible (*X and others*, paras 52-54). The CJEU therefore noted that the criminalisation of homosexual acts alone does not constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution (*X and others*, para 61).

How does this case relate to confession and truth, and moreover, to death? Here, the CJEU significantly shaped the ways in which credibility assessment should take place by affirming that homosexuality is essentially an innate characteristic that cannot be changed, following the lead of the European Court of Human Rights (ECtHR), which had previously stated how homosexual activities constitute ‘a most intimate aspect of private life’ and ‘an essentially private manifestation of the human personality’ (*Dudgeon v. the United Kingdom*, application no. 7525/76, 22.10.1981). This principle, although progressive in many ways, has become counterproductive from the perspective of asylum seekers. In practice, it has led to a framework where sexual orientation is considered as a fundamental part of an individual, reinforcing the idea that all individuals have an essential identity or nature, despite such idea having been contested over and over again. For example, it has been argued that the self and identity are rather ongoing processes (see, e.g., Soirila, 2015). Nevertheless, understanding of identity as fixed, but sometimes concealed even from the subject, has led to practices that aim

to access this ‘truth’ about identity through external interpretation and specific methods. Returning to the extract from *The Confessions of the Flesh* discussed above, the shepherd must discover what it is that each individual sheep hides from others or from themselves; the shepherd must examine their external conduct and this way, discover what is most criminal and detestable in their heart (Foucault et al., 2021, p. 394).

As has been argued above, this type of process is confessional. Through confession the applicant subjects themselves to assessment and is granted salvation, assigned more exercises or rejected. In confession, truth is precisely a fundamental part of the individual and when that truth is subjected under the supervision of another, the individual also subjects themselves. Therefore, what is eventually evaluated is not the quality of the statement but the individual. And affected by the suspicion and disbelief that both the asylum process and confession share, the ‘truth’ to be revealed may well indicate that the intentions of the applicant were wrongful.

If we take a step further, such assessment of ‘truth’, that takes as its object not the individual’s actions but the individual themselves, is easily expanded beyond a certain individual to all individuals representing the group that is understood as ontologically different, the Other. This also results in moral judgment: the Other is different because it is in essence already stained and pathological. On a practical level, the question of separating applicants who are ‘truly’ in danger from the opportunist ‘bogus asylum seekers’ (Kmak, 2015, p. 396) has become a central issue of EU asylum policy and it is also visible in the praxis of the CJEU. This way, the ‘wrongful intentions’ of the ‘bogus applicants’, notions based on the fundamental suspicion that grounds the system, come to serve as justification for border policies focusing on restriction, control and effective deportations as well as high rejection rates for the applications.

In addition, the case of *X and others* illustrates how the asylum process is not only a way of regulating migration, but similarly to sacramental confession, one for regulating truth and also death. If the applicants are credible in claiming their sexual orientation, are they also credible when it comes to the gravity of danger they might face if the applications are rejected? How likely is it that they are actually in danger? This way, what is accepted as ‘truth’ is entangled with the applicant’s ability to express it correctly it. And such correct representation of ‘truth’ is entangled with the question of death, in the form of negotiating what happens to the applicant if they are deported. But as has been noted above, ‘truth’ is

something that the applicant cannot produce on their own terms. Instead, the ‘truth’ is regulated by Article 4 of the Qualification Directive as well as by the multiple instructions and guidelines that the officials apply, the procedures of the courts, and the broader institutional settings and cultures.

5 The EU Asylum System and the Confessional Dispositive

Based on the analyses above, we can now identify a triad of truth, confession and death operating at the core of the asylum procedures presented in the cases. However, equally important is the element of suspicion. Let us still discuss these elements in more detail.

While the act of conversion in the Early Church, as was discussed in relation to *metanoia*, was not primarily about seeking individual faults or wrong-doings, it was nevertheless an act that was needed precisely due to each person’s fundamental status as a sinner. In conversion and the following baptism, one leaves their past life behind and is reborn into Christian life and, thus, eventually salvaged. Baptism was not necessary only for individuals who had committed serious crimes, as it is not today either, but for everyone who wished to follow the guidance of the Christ. Every individual had to be baptised because every individual is a sinner by default. As mentioned, in baptism one dies as a sinner, is reborn as a Christian and thus death is reversed. In this context, while the notion of death bears practical implications (dying concretely and through baptism gaining eternal life), more significantly it refers to *the world of sin as death*. This conceptualisation of sin as death is visible in all modes of confession discussed here: *exomologesis*, *exagoreusis* and *metanoia*. While sin is obviously connected to and originates from the Devil, it is even more about being attached to oneself; a self that is irrevocably bound to sin. As was discussed in the context of *exomologesis*, *exagoreusis* and martyrdom, the only way to escape such sin is to sacrifice oneself, dying to self.

If we look at the asylum process more concretely, the notion of ‘truth’ is a crucial element, as only the ‘truth’ can separate ‘deserving applicants’ from ‘bogus asylum seekers’ (Kmak, 2015, p. 396). Kmak (2015) observes how the latter term has become firmly embedded into European migration discourse already since the 1990s. Through the division between ‘genuine asylum seekers’ and ‘bogus asylum seekers’ a moral dimension is built into the asylum process. The conceptualisation of ‘bogus asylum seekers’ as immoral justifies state actions and creates moral panic (Kmak, 2015, p. 406). This moralising element eventually justifies the deaths of irregular migrants in the Mediterranean, for example.

However, the ‘truth’ of the asylum process is even more tightly connected to death when we look at the issue through what can be described as *the confessional dispositive*. I am here using the concept of dispositive as pertaining to a certain economy of power, a strategic arrangement of different powers in a specific situation and during a specific time.² Although the emergence of a dispositive is highly contextual, from this does not follow that the dispositive’s engagement in its context unequivocally delimits a specific field. The dispositive is in constant move, forever being displaced due to its interaction with its surroundings (see Raffnsøe et al., 2016).

Teti (2020, p. 229) suggests an outline for such a confessional economy of power:

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

In the context of asylum, the truth–death axis of the confessional dispositive produces the notion of ‘original sin’; an individual who is a sinner as an ontological *a priori*. However, from this premise precisely two subject positions become distinguishable: those who will receive baptism and salvation – and those who will face damnation.

While I have in this article addressed mostly the modes of confession that Foucault traces from the Antiquity, in *The Will to Knowledge* Foucault analyses the development of these modes in more detail, especially from the perspective of how such modalities will contribute to the governing of populations and resulting finally in biopolitical governance. During this transformation, the position of sin is replaced by deviancy, which is by its nature pathological rather than sacramental (see, e.g., Foucault, 1995, 1998, 2003; see also Kestilä, 2023). This

² Within the limitations of this article, it is not possible to engage in depth with the discussions regarding the position of dispositive in Foucault’s *oeuvre*. For example, (Raffnsøe et al., 2016) provide an elaborate discussion on this notion and its mobilisation within Foucauldian theory more generally.

division, when it becomes detached from its original context, can be mobilised to mark any division between general positions of the Self and the Other. In asylum procedures and policies, when considered through a confessional dispositive, such division is essentially one between true and false. And similarly as Teti suggests, fraudulent applicants, the ‘bogus asylum seekers’, are held responsible for their immoral actions. However, within the confessional dispositive, this immorality of actions is perceived as the immorality of *being*. The application procedure is built to emancipate the applicants from this deviancy, which it cannot do, and for which the applicants will be held responsible within the parameters of the dispositive. Indeed, ‘such a “failure” actively supports the confessional dispositive itself by attributing responsibility for that failure precisely to a deviant alterity’ (Teti, 2020, p. 229). Shortly, asylum seekers must ‘tell the truth’ in order to be granted asylum, which they cannot do because most, if not all, asylum seekers are ‘bogus asylum seekers’ and deserve to be deported. Access to Europe is managed and justified through the notion of ‘truth’. Within the confessional dispositive, the requirement of ‘telling the truth’ shifts the responsibility for being able to enter to the applicant, even though ‘telling the truth’ is not a straightforward or simple practice. Nevertheless, failure to comply with the demands of the process will result to deportation to potentially fatal conditions.

6 Conclusion

In the beginning of this article I noted that my aim was to address the connections between confession, truth and death that materialise in asylum processes, as well as the fundamental significance of suspicion that grounds these notions. I have argued that this dynamic can be understood as confessional dispositive.

The intertwinement of these notions is reflected, first, in the ways in which the connection between confession and death appears as significant in Foucault’s work. Death is symbolically present in confession when the person confessing destroys their own flesh in order to rid themselves of sin, or when they verbalise their sins to the external authority, renouncing their subjectivity and thus becoming subjects to be governed. Second, death is a practical concern within the asylum framework. People are constantly dying when trying to reach Europe, and deporting them includes a risk of death as well. Moreover, different symbolic representations of death that are part of confessional modes, as well as concrete practices of asylum procedures, can be traced to suspicion and doubt that are instilled in the heart of the confessional dispositive.

Many authors have pointed out the contradictions between the outspoken values and policy goals of the EU and its allies and concrete actions. As Mayblin et al. (2020), for example, argue, ‘while human rights law is meant to ensure the equality of all human beings, it is clear that there is a practical regime of differential humanity operating here.’ Within such regime, conditions of impoverishment and endangerment are more tolerable for asylum seekers, if fewer make applications for asylum in the UK. In other words, the life of an asylum seeker is meant to be hard so that more asylum seekers are not ‘pulled’ to the Europe. We thus have, on the one hand, the statements and declarations about respecting human rights, and on the other hand, the everyday life of the asylum seeker. Tadros (1998) has previously argued that while the privileged locus of political criticism has been cast in juridical terms, concentrating on the overextensions of political power, the actual points at which power is exercised have been invisible to this theoretical framework. Similarly, the analyses of the asylum cannot take legislation and declarations at face value.

While accurately describing the workings of the law and its many connections to different apparatuses and modes of power is a challenge, there might be a broader societal challenge emerging from the double-standard of asylum system. While politicians may view restrictions of mobility and economic rights of asylum seekers as favourable due to the perceived view of these making Europe less appealing,³ and no matter what the majority of citizens want from European asylum policy, the discrepancies between what is said and what is done in this field will not go unnoticed. There are people who in general support these democratic institutions and who might wonder whether they should be trusted after all. But there are also people who will use these contradictions against the democratic institutions precisely because their degradation will give way for authoritarian regimes and politics.

References

Beard, J., & Noll, G. (2009). “Parrhēsia and Credibility: The Sovereign of Refugee Status Determination.” *Social & Legal Studies*, 18(4), 455–477.
<https://doi.org/10.1177/0964663909345094>

³ Such view has been heavily questioned in previous research. See, e.g., (James & Mayblin, 2016) who demonstrate how restricting the economic rights of asylum seekers has not had any impact on the numbers of asylum applications received.

- Bohmer, C., & Shuman, A. (2018). *Political Asylum Deceptions*. Springer International Publishing. <https://doi.org/10.1007/978-3-319-67404-9>
- Danisi, C., Dustin, M., Ferreira, N., & Held, N. (2021). *Queering Asylum in Europe*. Springer International Publishing. <https://doi.org/10.1007/978-3-030-69441-8>
- Fassin, D. (2013). "The Precarious Truth of Asylum." *Public Culture*, 25(1), 39–63. <https://doi.org/10.1215/08992363-1890459>
- Fassin, D., & D'Halluin, E. (2005). "The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers." *American Anthropologist*, 107(4), 597–608. <https://doi.org/10.1525/aa.2005.107.4.597>
- Ferreira, N. (2023). "Better Late Than Never? SOGI Asylum Claims and 'Late Disclosure' Through a Foucauldian Lens." *UCLA Journal of International Law and Foreign Affairs*, 27(1). <https://escholarship.org/uc/item/3kd5b8p7>
- Foucault M (1993) "About the Beginning of the Hermeneutics of the Self." *Political Theory* 21(2): 198–227.
- Foucault, M. (1995). *Discipline and punish: The birth of the prison* (A. Sheridan, Trans.; Second Vintage Books edition). Vintage Books.
- Foucault, M. (1998). *The will to knowledge*. Penguin books.
- Foucault M (2000) "Truth and juridical forms." In: Faubion JD (ed.) *Michel Foucault: Power. Essential works of Foucault 1954-1984*, New York: New Press, pp. 31-45.
- Foucault, M. (2003). *Abnormal: Lectures at the Collège de France, 1974-1975* (V. Marchetti, A. Salomoni, & A. I. Davidson, Eds.; G. Burchell, Trans.). Picador.
- Foucault M (2014) *Wrong-Doing, Truth-Telling. The Function of Avowal in Justice*. Chicago: University of Chicago Press.
- M Hertoghs (2024). "Affects of Objectivity: Decision-Making Practices in the Dutch Asylum Procedure." *Social & Legal Studies*. <https://doi.org/10.1177/09646639241260727>
- Foucault, M., Hurley, R., & Gros, F. (2021). *Confessions of the flesh*. Pantheon Books.
- James, P., & Mayblin, L. (n.d.). "Factors influencing asylum destination choice: A review of the evidence."

- Kestilä, I. (2021). "Confession as a Form of Knowledge-Power in the Problem of Sexuality." *Law and Critique*, 32(2), 195–216. <https://doi.org/10.1007/s10978-021-09287-x>
- Kestilä, I. (2023). "Law, space and power: Spatiality in the European Court of Human Rights judgments on homosexuality." *Gender, Place & Culture*, 30(11), 1509–1528. <https://doi.org/10.1080/0966369X.2022.2072815>
- Kmak, M. (2015). "Between citizen and bogus asylum seeker: Management of migration in the EU through the technology of morality." *Social Identities*, 21(4), 395–409. <https://doi.org/10.1080/13504630.2015.1071703>
- Konstan, D. (2015). "Foucault's On the Government of the Living." *Foucault Studies*, 266–276. <https://doi.org/10.22439/fs.v0i0.4941>
- Lorenzini, D., & Tazzioli, M. (2018). "Confessional Subjects and Conducts of Non-Truth: Foucault, Fanon, and the Making of the Subject." *Theory, Culture & Society*, 35(1), 71–90. <https://doi.org/10.1177/0263276416678291>
- May, L., & Bohman, J. (1997). "Sexuality, Masculinity, and Confession." *Hypatia*, 12(1), 138–154. <https://doi.org/10.1111/j.1527-2001.1997.tb00175.x>
- Mayblin, L., Wake, M., & Kazemi, M. (2020). "Necropolitics and the Slow Violence of the Everyday: Asylum Seeker Welfare in the Postcolonial Present." *Sociology*, 54(1), 107–123. <https://doi.org/10.1177/0038038519862124>
- Raffnsøe, S., Gudmand-Høyer, M., & Thaning, M. S. (2016). "Foucault's dispositive: The perspicacity of dispositive analytics in organizational research." *Organization*, 23(2), 272–298. <https://doi.org/10.1177/1350508414549885>
- Salter, M. B. (2007). "Governmentalities of an Airport: Heterotopia and Confession: Governmentalities of an Airport." *International Political Sociology*, 1(1), 49–66. <https://doi.org/10.1111/j.1749-5687.2007.00004.x>
- Selim, H., Korkman, J., Pirjatanniemi, E., & Antfolk, J. (2023). "Asylum claims based on sexual orientation: A review of psycho-legal issues in credibility assessments." *Psychology, Crime & Law*, 29(10), 1001–1030. <https://doi.org/10.1080/1068316X.2022.2044038>
- Soirila, U. (2015). "Smothered to (un)death: On identity and the European court of human rights as an administrator of human life." *Social Identities*, 21(4), 345–358. <https://doi.org/10.1080/13504630.2015.1071698>

- Spijkerboer, T. (2022). "Asylum decision-making, gender and sexuality." In *Research Handbook on EU Migration and Asylum Law* (pp. 194–203). Edward Elgar Publishing. <https://doi.org/10.4337/9781786439635.00016>
- Tadros, V. (1998). "Between Governance and Discipline: The Law and Michel Foucault." *Oxford Journal of Legal Studies*, 18(1), 75–103.
- Taylor, C. (2009). *The culture of confession from Augustine to Foucault: A genealogy of the "confessing animal."* Routledge.
- Teti, A. (2020). "Rethinking Confession." In *The Late Foucault: Ethical and Political Questions* (pp. 214–231). Bloomsbury Academic. <https://abdn.elsevierpure.com/en/publications/rethinking-confession>
- UNCHR (2013) Beyond proof. Credibility assessment in EU asylum systems. Available at: <https://www.unhcr.org/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html> (accessed 3 July 2024).