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BETTER LATE THAN NEVER?
SOGI ASYLUM CLAIMS AND ‘LATE DISCLOSURE’
THROUGH A FOUCAULDIAN LENS

Nuno Ferreira

ABSTRACT

Members of sexual orientation and gender identity (SOGI) minorities escaping persecution may apply for asylum or bring up their SOGI in asylum procedures later than expected by authorities for a variety of reasons, including fear, shame, and ignorance. Using a Foucauldian lens—in particular the notions of power and confession—this Article assesses how such instances of so-called late disclosure are regulated and treated by statutes, policy guidance, and case law, with a focus on the European context. The Article also considers in detail claimants’ experiences with late disclosures, and the views of both claimants and several other actors in the asylum system on this matter. The analysis concentrates on an extensive body of secondary data (including international, European, and domestic case law, policy documents, NGO reports, case files, etc.) as well as of primary data collected in Germany, Italy, and the United Kingdom (UK) at European Union (EU) and Council of Europe levels. The primary data was collected through semi-structured interviews and online surveys with a range of stakeholders, focus groups with SOGI asylum claimants and refugees, observations of asylum appeals, and Freedom of Information requests. The Article thus offers an empirically and theoretically informed critique of late disclosures in SOGI asylum claims in Europe and puts forward recommendations to ameliorate the fear and injustice experienced by SOGI refugees while navigating an asylum system that is stacked against them in so many respects.

Keywords: asylum, refugees, sexual orientation, gender identity, SOGI, LGBTIQ+, late disclosure, Foucault, power, confession

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I. SEEKING ASYLUM ON SOGI GROUNDS . . . A BIT TOO LATE?

A. Establishing the Credibility of SOGI Asylum Claims

Amongst the 82.4 million forcibly displaced people in the world,¹ an undetermined but significant number of people seeking asylum on grounds of sexual orientation or gender identity (SOGI) find themselves trying to navigate a system of international protection that was not designed with their needs in mind and often fails to do justice to their claims.² Like all other asylum claimants, SOGI claimants need

1. *Figures at a Glance*, UN HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/figures-at-a-glance.html>[<https://perma.cc/KC8C-N2NC>].

2. Nuno Ferreira & Carmelo Danisi, *Queering International Refugee Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 78–96 (Cathryn Costello, Michelle

to fulfill a range of requirements to be recognized as refugees. Claimants must show that due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, they are outside the country of their nationality and are unable or, because of such fear, are unwilling to avail themselves of the protection of that country.³ Asylum claims are regulated and adjudicated by a multi-level governance regime that involves international, regional, and domestic actors.⁴ While assessing asylum claims, decision makers consider whether claims are credible. Credibility determination requires different elements of claimants' testimonies be consistent with each other (internal credibility) and with information gathered by the asylum authorities (external credibility).⁵

SOGI claimants see the credibility of their claims undermined on various and spurious grounds. These grounds include the stereotype that members of SOGI minorities do not marry or have children, the expectation that SOGI minorities engage with social groups and events in host countries immediately on arrival according to a Western "out and proud" narrative, and the manipulation of minor inaccuracies or inconsistencies to the detriment of claimants' overall testimonies.⁶ Additionally, authorities may use the late disclosure of one's SOGI to undermine the credibility of SOGI claims. Late disclosure—that is, not disclosing one's SOGI in an asylum claim or not submitting one's SOGI-based claim at the earliest opportunity—plays a significant role in the outcome of these claims, often harming the claimant's credibility. Such delays may be for a variety of reasons including internalized homophobia and shame (in their relationships with friends, family, and diasporas), fear (of family, community, and authorities), not knowing SOGI can be the base for an asylum claim, not being familiar with the asylum system at all, not feeling at ease during the asylum interview (owing to the gender, religion, ethnicity, attitude, etc., of the

Foster & Jane McAdam eds., 2021).

3. *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137, art. 1.2(a).

4. NUNO FERREIRA ET AL., *Governing Protracted Displacement: An Analysis Across Global, Regional and Domestic Contexts* (TRAFIG, Working Paper No. 3, 2020).

5. GÁBOR GYULAI ET AL., CREDIBILITY ASSESSMENT IN ASYLUM PROCEDURES: A MULTIDISCIPLINARY TRAINING MANUAL, Volume 1, 31 (2013); UN HIGH COMM'R FOR REFUGEES, *Beyond Proof, Credibility Assessment in EU Asylum Systems* (May 2013).

6. CARMELO DANISI ET AL., QUEERING ASYLUM IN EUROPE: LEGAL AND SOCIAL EXPERIENCES OF SEEKING INTERNATIONAL PROTECTION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY, ch. 7 (2021).

interviewer, interpreter, or other people present), medical conditions such as post-traumatic stress disorder (PTSD), and so on.⁷

One instance of late disclosure affecting negatively the credibility of a SOGI claimant involved the highly publicized case of Aderonke Apata, who arrived in the UK in 2004. She applied for asylum for the first time that same year on grounds unrelated to her sexuality, and saw her claim refused. She then submitted a fresh asylum claim on grounds of her sexual orientation in 2012 and saw her claim repeatedly refused—due in part to her late disclosure—until she finally secured refugee status 13 years after arriving in the UK.⁸

Cases of late disclosure are very much connected to the issue of *sur place* claims. *Sur place* international protection claims are claims based on fear of persecution that arises from events that take place after claimants have left their country of origin.⁹ This may be the case of SOGI claimants, who may only require international protection if the conditions for SOGI minorities in their country of origin deteriorate or if public authorities, members of the community, or relatives find out about their SOGI after they have left the country.¹⁰ This can happen, for example, in the case of international students who become more conscious or outspoken about their SOGI during their time abroad, may be active on social media about their participation in LGBTIQ+ (lesbian,

7. SABINE JANSEN & THOMAS SPIJKERBOER, *FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE* 65–69 (Sept. 2011); U.N. HIGH COMM’R FOR REFUGEES, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶¶ 3 and 59, U.N. Doc.HCR/GIP/12/09 (Oct. 23 2012) [hereinafter *Guidelines*]; Nicholas Hersh, *Challenges to Assessing Same-Sex Relationships Under Refugee Law in Canada*, 60 MCGILL L.J. 527, 543, 544 (2015). See generally Diana Bögner, Chris Brewin & Jane Herlihy, *Refugees’ Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information*, 36 JOURNAL OF ETHNIC AND MIGRATION STUDIES 519–35 (2010) (on factors behind late disclosure in asylum claims).

8. Diane Taylor, *Nigerian gay rights activist wins UK asylum claim after 13-year battle*, THE GUARDIAN, (August 14, 2017), <https://www.theguardian.com/world/2017/aug/14/nigerian-gay-rights-activist-aderonke-apata-wins-uk-asylum-claim-13-year-battle> [<https://perma.cc/M5LV-4M27>]. The Home Office granted Aderonke Apata refugee status after a long campaign in her support, including several prominent witnesses.

9. U.N. HIGH COMM’R FOR REFUGEES, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶¶ 83, 94–96 (2d ed. 1992, reissued 2019), <https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [<https://perma.cc/3K2V-8DD3>] [hereinafter *Refugee Handbook*].

10. Hemme Battjes, *Accommodation: Sur place claims and the accommodation requirement*, in *FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM* 82–97 (Thomas Spijkerboer ed., 2013).

gay, bisexual, trans, intersex, queer, and others) events, or may have a same-sex partner and are then unable to return to their home country due to homophobia or transphobia.¹¹ Although conceptually and technically late disclosure and sur place claims are distinct matters, in practice they often become intertwined, and whether a given set of facts falls under one or the other legal notion is unclear. It is thus important to consider sur place claims when discussing late disclosure.

B. Methodological Framework

This Article questions the role late disclosure—along with sur place claims—plays in SOGI asylum claims and whether measures are required to improve the asylum system in this regard. The Article's focus is on Europe, using Germany, Italy, and the UK as case studies. The analysis adopts a mixed-methods approach, including documentary analysis of publicly available materials (including international, European, and domestic case law, policy documents, NGO reports, case files, etc.) and extensive fieldwork carried out in Germany, Italy, and the UK at EU and Council of Europe levels, between 2017 and 2019, as part of the four-year socio-legal research project SOGICA.¹² The fieldwork reached almost 500 participants including 143 semi-structured interviews with policy makers, decision makers, members of the judiciary, legal representatives, NGO activists, and SOGI asylum claimants and refugees; 16 focus groups with SOGI asylum claimants and refugees; 24 observations of asylum appeals; two online surveys of SOGI asylum claimants and refugees as well as professionals and other individuals supporting them (239 respondents); and Freedom of Information requests in the three country case studies, with responses to these requests received in the case of Germany and the UK.¹³ The broad range of quantitative and qualitative data collected has been crucial to complement the legal and documentary analysis, thus ensuring a broad and in-depth understanding of the role of late disclosure in SOGI claims. The empirical data is referenced throughout this Article by using participants' real names or a pseudonym, depending on their personal choice.¹⁴

11. *Guidelines*, *supra* note 7, ¶ 57.

12. SOGICA stands for 'Sexual Orientation and Gender Identity Claims of Asylum: A European Human Rights Challenge.' See www.sogica.org for full details of the project.

13. For full details of the SOGICA project methodology, see DANISI ET AL., *supra* note 6, at ch. 2 and *Fieldwork*, SOGICA, <https://www.sogica.org/en/fieldwork> [<https://perma.cc/N2ZG-ZQ8K>]. The survey findings are available in VÍTOR LOPES ANDRADE ET AL., *QUEERING ASYLUM IN EUROPE: A SURVEY REPORT (2020)*, https://www.sogica.org/wp-content/uploads/2020/07/The-SOGICA-surveys-report_1-July-2020-1.pdf [<https://perma.cc/M2PV-5ZFZ>].

14. References include the capacity in which participants were interviewed and in

The country case studies were chosen on the basis of three factors: the volume of asylum claims, the different adjudication procedures adopted, and the socio-cultural-legal context, particularly in relation to SOGI.¹⁵ While the findings are not generalizable to all of Europe, Germany, Italy, and the UK were all Member States of the EU when the fieldwork was carried out, and are still all parties to the European Convention on Human Rights (ECHR).¹⁶ This allows for the contextualization of the country-level findings within cross-national frameworks and European trends.¹⁷ Furthermore, despite the legal, procedural, and substantive differences between the selected jurisdictions, asylum decision-making broadly entails the same three key steps: an initial interview where claimants are asked to provide key information about their identity, their journey to the host country, and their risk of persecution; a main, lengthy interview where a different interviewer gathers a broad body of evidence to determine whether the criteria for granting international protection has been met; and, where the initial decision is negative, the possibility of an appeal where a judicial authority considers possible grounds to reconsider the initial decision.¹⁸ Moreover, although each national asylum system has its own specificities and presents its own challenges, the analysis below—in particular the empirical data analyzed in Part IV—points to strong common themes across all three country case studies. The empirical data has thus been analyzed along thematic lines, rather than from the perspective of each jurisdiction, which more effectively unearths pervasive issues across the asylum systems analyzed.

which country they were based; when no capacity is specified, the participant was an asylum claimant or legally recognized refugee. Focus groups are identified by number and location; court hearings are identified by level of the court, its broad geographical location and the year the hearing took place. Survey respondents are referred to by a letter (C for claimant and S for supporter) and numerical identifier. More specific information is not offered to preserve the anonymity and confidentiality of the participants.

15. DANISI ET AL., *supra* note 6, at ch. 2.

16. Council of Europe, European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, Nov. 4, 1950 (amended Aug. 1, 2021). For an introductory discussion about the ECHR system, see JANNEKE GERARDS, *GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2019).

17. Although the UK is no longer an EU Member State, EU law has for the most part been retained and is still valid in the UK. See GRAEME COWIE, *THE STATUS OF “RETAINED EU LAW”* (2019), <https://commonslibrary.parliament.uk/research-briefings/cbp-8375> [<https://perma.cc/AQC3-UEV7>].

18. For an exploration of the differences and commonalities of the asylum processes between Germany, Italy, and the UK, see DANISI ET AL., *supra* note 6, at ch. 6.

The data analysis will be carried out through a Foucauldian lens, contributing to a growing scholarship that uses Foucault's work to study the securitization and governance of borders and migration.¹⁹ This Article will address the role of late disclosure in SOGI asylum claims through a Foucauldian lens and determine whether any measures are required to improve the asylum system in this regard. Part II will start by discussing how Foucault's work is of relevance to SOGI asylum and which Foucauldian conceptual tools are of particular importance to analyze the topic of late disclosure. Part III will explore the relevant legislative and policy context (Part III.A) as well as how courts have interpreted and applied the relevant law and guidance (Part III.B). Against this background, Part IV will analyze the participants' lived experiences of asylum systems in relation to late disclosure issues from the claimants' perspective (Part IV.A) and then from the authorities' perspective (Part IV.B). Finally, Part V will consider possible avenues to improve asylum systems for SOGI minorities in relation to late disclosure matters.

II. ADOPTING A FOUCAULDIAN LENS TO SOGI ASYLUM

Foucault produced an extensive body of work that has influenced a range of disciplines, including law, and questioned the way we see human rights.²⁰ His work explored numerous key notions—most notably power, knowledge, and the subject—and has helped scholars and activists better understand the dynamics of domination and resistance thereto.²¹ Foucault has also played a crucial role in exploring the historical nature of sexuality and how discourses on sexuality are constructed.²² Besides having been used to frame the analysis of different

19. For a discussion of this growing body of work and its limitations, see, e.g., William Walters, *Foucault and Frontiers: Notes on the Birth of the Humanitarian Border*, in *GOVERNMENTALITY* 138–64, 141 (Ulrich Bröckling, Susanne Krasmann, & Thomas Lemke eds., 2010) and Martina Tazzioli, *Discordant migrants' freedom and the bordering of migrants' lives. Three snapshots on revolutionized spaces in the aftermath of the Arab Springs*, in *BIOPOWER: FOUCAULT AND BEYOND* 123 (Vernon W. Cisney & Nicolae Morar, eds., 2015).

20. See, e.g., JOSÉ GUILHERME MERQUIOR, *FOUCAULT* (1987); JEREMY MOSS, *THE LATER FOUCAULT: POLITICS AND PHILOSOPHY* (1998); MICHEL FOUCAULT (David Owen ed., 1st ed. 2014); BAL SOKHI-BULLEY, *GOVERNING (THROUGH) RIGHTS* (1st ed. 2016).

21. See generally Brent L. Pickett, *Foucault and the Politics of Resistance*, 28 *POLITY* 445 (tracing the evolution of the notion of resistance throughout Foucault's work) (1996); Mark Bevir, *Foucault, Power, and Institutions*, 47 *POL. STUD.* 345 (1999) (exploring in particular the role of power and resistance in political institutions); ERIC PARAS, *FOUCAULT 2.0: BEYOND POWER AND KNOWLEDGE* (2020) (revisiting our understanding of the notions of power and knowledge in Foucault's work).

22. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY. VOLUME 1: AN INTRODUCTION* (Robert Hurley trans., 1978).

migration topics,²³ Foucault's work has also helped more effectively analyze certain aspects of refugee law and practice, including in relation to SOGI claimants.²⁴ Foucault's work on the productive nature of power, in particular, has helped shed light on how asylum interviews and decisions categorize and produce LGBTIQ+ identities.²⁵

Foucault's work can usefully underpin the analysis of late disclosure in SOGI asylum scholarship. From Foucault's toolbox of concepts, we can choose not only the notion of power but also that of confession, which has yet to inform SOGI asylum scholarship in any meaningful way. In Parts III and IV, the Article will explore the way power and confession dynamics are embedded in the law, policy, and practice of SOGI asylum applications, drawing from primary and secondary data. As for the former notion, Foucault explored different forms of power, namely sovereign, disciplinary, and bio-power. (Another form of power—pastoral power—was also developed by Foucault and holds relevance for our analysis, as we will see below.)²⁶ Sovereign power refers to more orthodox forms of hierarchical power; disciplinary power relates to the effective control of bodies' skills (including through self-control) to maximize production and prevent revolt against power; bio-power refers to the control and organization of populations.²⁷ Foucault, however, did not see power—in particular disciplinary power—as a hierarchical or oppressive assertion, but rather as a polyvalent scheme of forces and resistances.²⁸ It is through these networks of power that sexuality is constructed and developed into a discourse—not to oppress sex, but to regulate it.²⁹ Power thus reaches, penetrates, and controls

23. See, e.g., Bal Sokhi-Bulley, *Countering the Changing Genealogies of Migration in the EU*, in *GOVERNMENTALITY AFTER NEOLIBERALISM* (Mark Bevir ed., 2016); Yara Mamdouh Ahmed, *On Dream Making and Aspired Migration of Queer Bodies*, 3 *KOHL* 93 (2017).

24. See generally Sonia Katyal, *Exporting Identity*, 14 *YALE J.L. & FEMINISM* 98 (2002); Lorenzo Bernini, *The Ordeal for Humanity: LGBTI Asylum Seekers in Europe Facing the Limits of Human Rights*, 4 *ABOUT GENDER: INT'L J. OF GENDER STUD.* 177 (2015); David K. Seitz, *Limbo Life in Canada's Waiting Room: Asylum-Seeker as Queer Subject*, 35 *ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE* 438 (2017); Alex Powell, "Sexuality" through the Kaleidoscope: *Sexual Orientation, Identity, and Behaviour in Asylum Claims in the United Kingdom*, 10 *LAWS* 90 (2021).

25. See Eithne Luibhéid, *Afterword: Troubling identities and identifications*, 17 *SEXUALITIES* 1035, 1036 (2014).

26. See, e.g., Richard A. Lynch, *Foucault's Theory of Power*, in *MICHEL FOUCAULT: KEY CONCEPTS* 13, 13–14 (Dianna Taylor ed., 2010).

27. See Richard A. Hoffman, *Disciplinary Power*, in *MICHEL FOUCAULT: KEY CONCEPTS* 27–39 (Dianna Taylor ed., 2010); Lemke Thomas, *BIO-POLITICS: AN ADVANCED INTRODUCTION* 33–52 (2011).

28. LISA DOWNING, *Works: The History of Sexuality*, in *THE CAMBRIDGE INTRODUCTION TO MICHEL FOUCAULT* 86, 90 (Lisa Downing, 1st ed. 2008).

29. FOUCAULT, *supra* note 22, at 25–26.

individuals' "most private pleasures" not only through prohibitions but also by intensification and excitation.³⁰ Although there is no sexuality outside power relationships (or the law), we can resist certain power dynamics and discourses, and navigate power networks with certain purposes. In the particular case of asylum, as discussed below, power is exercised to various degrees not only by authorities and claimants, but also by relatives, friends, lawyers, and NGO volunteers, amongst others. Power relations produce the claimant who is so-called "bogus" because—amongst other reasons—they confessed their SOGI too late. Claimants navigate the asylum system and challenge the production of the "bogus" claimant to the best of their ability by learning about the expectations of the various asylum system actors and trying to meet them.³¹

The notion of confession becomes relevant in this context through Foucault's discussions of the "link between the obligation to tell the truth and the prohibitions weighing on sexuality."³² While confession originated in the context of religions and then became a central tool in psychoanalysis,³³ it has also increasingly played a key role in several other spheres of life, including justice. Confession is now central in turning the asylum system into a chamber of truth, reflecting the ways in which confession has been "loosened and diversified" and made "peripheral sexualities" more visible.³⁴ As Foucault puts it, "it is in the confession that truth and sex are joined, through the obligatory and exhaustive expression of an individual secret,"³⁵ bringing together truth, knowledge, and power, as well as highlighting the "fundamental historical and political importance of the confessional technology of truth and power."³⁶ Sexuality—as understood today—is thus the product of "specific techniques for eliciting confession about individual

30. Alan Sheridan, *Sexuality, Power, and Knowledge*, in MICHEL FOUCAULT: THE WILL TO TRUTH 162, 168 (1st ed. 1980).

31. Nuno Ferreira, *Utterly unbelievable: The discourse of 'fake' SOGI asylum claims as a form of epistemic injustice*, INT'L J. REFUG. L. (2022) (forthcoming).

32. 1 MICHEL FOUCAULT, THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1988, ETHICS: SUBJECTIVITY AND TRUTH, 224 (Paul Rabinow ed., Robert Hurley & et al. trans., 1997).

33. Downing, *supra* note 28 at 89.

34. FOUCAULT, *supra* note 22, at 33–34, 39. For a discussion on how 'confession', as a technology of truth, permeates many sectors in our society—including education and entertainment—see, for example, SUZANNE DIAMOND ET AL., COMPELLING CONFESSIONS: THE POLITICS OF PERSONAL DISCLOSURE (2010).

35. FOUCAULT, *supra* note 22, at 61.

36. Lauri Siisiäinen, *Confession, Voice and the Sensualization of Power: The Significance of Michel Foucault's 1962 Encounter with Jean-Jacques Rousseau*, 14 FOUCAULT STUDIES 138, 142 (2012).

desires and classifying and interpreting what was discussed.”³⁷ Confessions about the “truth of sex” have been developed as a form of “knowledge-power” and are “at the heart of the procedures of individualization by power.”³⁸ The “confession of the flesh” is now not only crucial in self-examination and penance but also in migration and border control; indeed, as empirical data will illustrate throughout this Article, the “nearly infinite task of telling” and “transforming sex into discourse” are at the core of adjudicating claims by SOGI refugees.³⁹

Confession and power are intrinsically interconnected by virtue of confession being embedded in networks of power relations.⁴⁰ It is through confession that power leads the unique self to “exteriorize” itself, then grasps it by “judging and punishing practices.”⁴¹ Power and confession are further entangled through the notion of pastoral power—the power states have inherited from the Catholic Church’s confessional tool to determine what individuals do, think, and feel, accumulating knowledge about them and being in a better position to regulate them.⁴² In Foucault’s thought, the interest of secular powers in regulating and policing sex, as well as producing knowledge about it, has led to a perverse society that conceals its real powers over sex in order to render such powers effective.⁴³ Furthermore, the intensity of confessions renews the curiosity of questioners, gives power pleasure, and offers it further impetus.⁴⁴ The expectation of disclosing one’s SOGI in the asylum system can, from a Foucauldian perspective, be translated into the imposition of a confession of one’s SOGI at the earliest opportunity; as queer scholarship has frequently pointed out, this is problematic because it forces individuals into pre-delineated sexual and gender categories that can then be regulated.⁴⁵ Western notions of coming out,

37. Downing, *supra* note 28 at 86.

38. FOUCAULT, *supra* note 22, at 58–59.

39. *Id.* at 20–21.

40. *Id.* at 61–62.

41. Siisiäinen, *supra* note 36, at 146.

42. MICHEL FOUCAULT, *The Subject and Power* (1982) 8(4) CRITICAL INQUIRY 777, 782–5; Ben Golder, *Foucault and the Genealogy of Pastoral Power* (2007) 10(2) RADIC. PHILOS. REV. 157, 169–75; Jeremy Carrette, *Foucault, Religion, and Pastoral Power*, in A COMPANION TO FOUCAULT (Christopher Falzon, et al., eds., 2013), at 372–77.

43. Sheridan, *supra* note 30 at 180.

44. FOUCAULT, *supra* note 22, at 44–45.

45. See, e.g., Tracey Lee McCormick, *Queering Discourses of Coming Out in South Africa*, 42 STELLENBOSCH PAPERS LINGUISTICS PLUS 127 (2013), at 329–32; Shuzhen Huang & Daniel C. Brouwer, *Coming Out, Coming Home, Coming With: Models of Queer Sexuality in Contemporary China*, 11 J. INT'L L. & INTERCULTURAL COMM'N 97, 100–3 (2018); Brian A. Horton, *What's so 'Queer' About Coming Out? Silent Queers and Theorizing Kinship Agonistically in Mumbai*, 21 SEXUALITIES 1059, 1066–68 (2018); John Wei, *Out on YouTube*:

however, can be particularly inappropriate and prescriptive for racialized SOGI minorities.⁴⁶

While such power and confession mechanisms go much beyond law, the Article will focus on the use of these tools in the context of SOGI asylum law and practice. This will allow the Article to more clearly unearth the ways in which late disclosure is constructed and constrained by power relationships and authorities' imposition of a confession. In this process, we should bear in mind that the sexual orientation or gender identity one may confess is itself socially constructed, culturally heterogeneous, fluid, complex, performed, and negotiated, rather than a permanent or inherent identity in any way.⁴⁷ So, while authorities and other actors in the asylum system may have the expectation that claimants confess their true—that is, stable and fixed—SOGI, the reality is much more complex than that, as according to Foucault there is no true subject and subjects are always in the state of becoming.⁴⁸ As Butler reminds us:

[T]o hold a person accountable for his or her life in narrative form is to require a falsification of that life in the name of a certain conception of ethics [and law, I add]. Indeed, if we require that someone be able to tell in story form the reasons why his or her life has taken the path it has, that is, to be a coherent autobiographer, it may be that we prefer the seamlessness of the story to something we might tentatively call the truth of the person⁴⁹

In fact, the late disclosure of one's SOGI is embedded in complex and constructed discourses around the truth of one's sexuality and gender in the fields of migration and asylum.⁵⁰ Such discourses are to a large extent constructed by legislatures, governments, and courts, as the Article will now consider.

III. LATE DISCLOSURE IN LAW, POLICY, AND COURTS

Asylum decisions are taken against a statutory, policy, and judicial background. The authorities involved in developing such background—parliaments, governments, governmental agencies, courts, and

Queer Youths and Coming Out Videos in Asia and America, FEMINIST MEDIA STUD. 1, 2–3 (2021).

46. Alessandro Boussalem, *In, Out, or Somewhere Else Entirely: Going Beyond Binary Constructions of the Closet in the Lives of LGBTQ People from a Muslim Background Living in Brussels*, 46 TRANSACTIONS INST. BRIT. GEOGRAPHERS 435, 443–45 (2021).

47. Eric Fassin & Manuela Salcedo, *Becoming Gay? Immigration Policies and the Truth of Sexual Identity*, 44 ARCHIVES SEXUAL BEHAV. 1117, 1121–24 (2015).

48. Foucault, *supra* note 32, at 163–173.

49. Judith Butler, *Giving an Account of Oneself*, 31 DIACRITICS 22, 34 (2001).

50. Ferreira, *supra* note 31.

tribunals—contribute to producing the reality of SOGI refugees, including who they are, how they are understood, the rituals of truth they need to go through to obtain international protection, and—most important for our purposes—how late disclosures should be dealt with by authorities.

A. The Statutory and Policy Context

The United Nations High Commissioner for Refugees (UNHCR)—the highest global authority in relation to asylum and refugee matters—has produced guidelines specifically on asylum claims based on one's SOGI. In those SOGI Guidelines, the matter of late disclosure is acknowledged, namely in terms of recognizing that discrimination, hate, and violence directed at claimants may lead to feelings of shame, internalized homophobia, and trauma, which in their turn affects claimants' capacity to present their case or openly express their SOGI. Crucially, UNHCR asserts that “adverse judgments should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview.”⁵¹

At a regional level, the EU also has legal tools that touch upon the matter of late disclosure. From a substantive perspective, EU law establishes that “Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection.”⁵² From a procedural perspective, when an asylum claimant makes further representations during or after the examination of an asylum application, Member States are free to examine those representations but are also entitled to not examine them if they consider that the claimant was at fault for not presenting the new elements in question earlier on in the procedure.⁵³

Although the expectation of a prompt confession of one's SOGI is understandable from the point of view of effectiveness, SOGI asylum claimants often do not share their SOGI because they do not know it can be relevant to obtaining international protection. Even if claimants are aware that their SOGI is relevant, many do not know how to

51. UNHCR - UN HIGH COMMISSIONER FOR REFUGEES, *supra* note 7, par 59.

52. Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2011 OJ (L 337) 9, 14.

53. Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, 2013 OJ (L 180) 60, 81.

structure their narratives to include all elements that may be considered relevant by European decision makers. In a likely attempt to compensate for such legal framework, the gender and SOGI training provided by the European Asylum Support Office (EASO) alerts decision makers to “[b]e careful when you deal with the late disclosure of claimed facts, look for reasonable explanations and remember that you should not let late disclosure negatively affect the credibility of an application ‘per se.’”⁵⁴ EASO also reminds asylum decision makers of the fact that some claimants are entitled to special procedural guarantees, including having enough time to prepare and put forward their claims.⁵⁵

At a domestic level, some national authorities also possess express rules on the matter of late disclosure. In Germany, asylum instructions acknowledge that—given the sensitive nature of SOGI issues—the mere fact that claimants are reluctant to disclose intimate aspects of their lives does not mean that their claims are implausible, and late disclosures do not warrant findings of untrustworthiness.⁵⁶ Several other European countries, such as Italy,⁵⁷ possess explicit norms prohibiting authorities from reaching a negative credibility assessment merely on the basis of a late disclosure.⁵⁸ Yet, the application of such norms is often patently deficient and illustrative of authorities’ coercive expectation of a confession, as explored in Part IV.

In the UK, the Home Office asylum policy instruction on assessing credibility also states that decision makers should consider personal factors that may contribute or account for the late disclosure of evidence, including but not limited to age, gender, memory capacity, physical and mental health, emotional trauma, level of education, social status, cultural background, feelings of shame, and painful memories, particularly those of a sexual nature.⁵⁹ The 2011 Gender Identity guidance recognizes that claimants may not feel able to disclose their gender identity when

54. EASO - European Asylum Support Office, *EASO training: Gender, Gender Identity and Sexual Orientation* (2015), Unit 5.1 (not publicly accessible; access kindly provided by EASO). Since 2022, EASO has become the European Union Agency for Asylum (EUAA).

55. Directive 2013/32, *supra* note 53, at 74. See also *id.* at 62–63, which makes explicit reference to sexual orientation and gender identity in the context of special procedural arrangements and includes “sufficient time” amongst the scope of “adequate support” in these cases.

56. Dienstanweisung Asylverfahren [Service Instruction for Asylum Procedures], Bundesamt für Migration und Flüchtlinge, (2017), <https://www.proasyl.de/wp-content/uploads/2015/12/DA-Asyl-April-2017.pdf> [<https://perma.cc/XJH7-9NR8>] (Ger.).

57. D. Lgs. 28 gennaio 2008, n. 25, G.U. Feb. 16, 2008, n. 40, at Art. 8(1) (It.).

58. JANSEN AND SPIJKERBOER, *supra* note 7, at 65–69.

59. HOME OFFICE, ASYLUM POLICY INSTRUCTION: ASSESSING CREDIBILITY AND REFUGEE STATUS (VERSION 9.0.), at 14–15 (2015) (UK).

they take part in the screening interview.⁶⁰ The 2016 Sexual Orientation guidance states as well that caseworkers must not reject a claim because of the late declaration of one's sexual orientation, even if failure to disclose at the main asylum interview without a very good reason may call the claimant's credibility into question.⁶¹ Although credibility should be "globally assessed,"⁶² these Home Office instructions exist against the background of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,⁶³ which—combined with Paragraphs 339L and 339N of the Immigration Rules⁶⁴—provides that asylum claimants risk being denied "the benefit of the doubt" if they fail to make a claim at the earliest opportunity and that "any behaviour that appears to have been designed or likely to conceal information, mislead, or obstruct the resolution of their claim" may undermine their credibility.⁶⁵ To reinforce the obligation of an immediate and full confession, the Nationality and Borders Act 2022 states that "[u]nless there are good reasons why the evidence was provided late, the deciding authority must, in considering it, have regard to the principle that minimal weight should be given to the evidence."⁶⁶ NGOs are understandably concerned that this will "unreasonably and potentially disproportionately penalise LGBT+ people for a 'late' asylum claim."⁶⁷

Sur place claims at the EU level are regulated in Article 5 of the Qualification Directive, which includes a fear of persecution based on "activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin."⁶⁸ This is relevant for SOGI claimants, as their SOGI-related "activities" in the host country will

60. HOME OFFICE, GENDER IDENTITY ISSUES IN THE ASYLUM CLAIM: TRANSGENDER 12 (2011).

61. HOME OFFICE, ASYLUM POLICY INSTRUCTION: SEXUAL ORIENTATION IN ASYLUM CLAIMS 31, 35 (6th ed. 2016).

62. R v. SOS for the Home Dep't, Ex parte Sivakumar (FC) [2003] UKHL 14; JT (Cameroon) v. SOS for the Home Dep't [2008] EWCA (Civ) 878 (Eng.).

63. Asylum and Immigration Act 2004, c. 19 (UK), <https://www.legislation.gov.uk/ukpga/2004/19/contents> [<https://perma.cc/8KNW-E29G>].

64. Home Office, *Immigration Rules*, Gov.UK (2016) ¶ 339L, 339N, <https://www.gov.uk/guidance/immigration-rules>.

65. HOME OFFICE, ASSESSING CREDIBILITY AND REFUGEE STATUS IN ASYLUM CLAIMS LODGED ON OR AFTER 28 JUNE 2022, at 54.

66. Nationality and Borders Act 2022 c. 36, § 26 (UK).

67. RAINBOW MIGRATION ET AL., NATIONALITY AND BORDERS BILL 2021 POLICY BRIEF: ENSURING LGBT+ PROTECTION IS NOT LOST 5 (2021), <https://www.sogica.org/wp-content/uploads/2021/07/Briefing-for-second-reading-FINAL.pdf> [<https://perma.cc/VSF6-TCV2>].

68. Directive 2011/95/EU, *supra* note 52, at 15.

often be the result of a sexual orientation or gender identity of which the claimant was—at least to some extent—already aware in their country of origin but may have felt more free to explore or express in the host country. However, Article 5(3) of the Qualification Directive states that “Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.”⁶⁹ This may have detrimental effects for SOGI claimants because decision makers may interpret SOGI claimants’ involvement with initiatives, events, groups, press, or social media of an LGBTIQ+ nature to be an attempt by the claimant to publicize their circumstances, increase the risk of persecution upon return, and thus fulfill the requirements to obtain refugee status. Crucially, the lack of SOGI claimants’ involvement with such initiatives, events, groups, and social media is also used by public authorities to undermine those claimants’ credibility,⁷⁰ which effectively throws claimants into a no-win situation. Fundamentally, this reflects the pernicious use of asylum authorities’ power to shape confession as a practice of extraction of the “truth” and undermine claimants’ credibility, as an illustration of Foucault’s pastoral power.

For the time being, Article 5(3) simply offers EU Member States the *possibility* (thus no obligation involved) of denying refugee status to applicants who file a subsequent application on the basis on circumstances which authorities may believe were created by applicants by their own decision since leaving the country of origin, and only refers to refugee status (thus leaving the status of subsidiary protection unaffected in this regard).⁷¹ Nonetheless, the 2016 Proposed Qualification Regulation—still on the table and awaiting political agreement—amends Article 5(3) as to render it practically mandatory and apply it to subsidiary protection as well.⁷² Conversely, the European Parliament

69. *Id.*

70. Rikke Andreassen, *Social Media Surveillance, LGBTQ Refugees and Asylum: How Migration Authorities Use Social Media Profiles to Determine Refugees as ‘Genuine’ or ‘Fraudulent’*, 26(1) *FIRST MONDAY* (2020); DANISI ET AL., *supra* note 6, at ch. 5.

71. This possibility has not been taken up by several EU Member States, such as Italy. *E.g.*, D.Lgs. [Legislative Decree] 19 Nov. 2007, n. 251 Art. 4.

72. *Proposal for a Regulation of the European Parliament and of the 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 and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents*, COM (2016) 466 final (July 13, 2016).

favors retaining the facultative nature of this norm and not applying it to those cases—such as those described above—of claimants who have had to conceal their sexuality and are then able to in the host country.⁷³

This analysis of the statutory and policy context in which late disclosure claims are assessed underscores the authorities' power to force a confession from SOGI claimants. In particular, EU law offers considerable scope for Member States to impose on asylum claimants the obligation to immediately and fully confess their SOGI—something that the UK legislation also prompts authorities to do. It is apposite to now analyze how courts have interpreted and applied this statutory and policy framework.

B. The Judicial Guidance and Application

1. Late Disclosure in SOGI Asylum Cases in Strasbourg

Judges across Europe have had several opportunities to deal with instances of late disclosure in asylum claims, including at the highest judicial levels. The European Court of Human Rights (ECtHR)—responsible for dealing with applications related to the violation of obligations imposed by the ECHR—had such an opportunity in *M.K.N. v. Sweden*, a case involving an Iraqi man who had claimed asylum in Sweden based on his religious belief.⁷⁴ His sexual orientation—reflected in a same-sex relationship against the background of an opposite-sex marriage—was only brought up late in the asylum process, as the claimant had not been aware until then that same-sex relationships were accepted in Sweden.⁷⁵ The Swedish authorities noted that “the applicant must have understood the importance of stating all the important facts at once,” and neither the Migration Board nor the Migration Court considered this new element of the claim to be credible.⁷⁶ When lodging his application with the ECtHR, the claimant highlighted the need for the Swedish authorities to apply the principle of the benefit of the doubt in relation to late disclosure of his sexuality,⁷⁷ to which the Swedish

73. *Report on the Proposal for a Regulation of the European Parliament and of the 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 and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents*, amend. 68, EUR. PARL. DOC. A8-0245/2017 (2017).

74. *M.K.N. v. Sweden*, Eur. Ct. H.R. (2013).

75. *Id.* ¶ 9.

76. *Id.* ¶¶ 10, 11.

77. *Id.* ¶ 18.

authorities replied that the claimant would have no intention to “publicly demonstrate” his sexuality upon return, thus there being no danger in that regard.⁷⁸ Since the ECtHR decides on violations of the ECHR rather than on asylum claims themselves,⁷⁹ in this instance the Court decided on whether the claimant’s deportation to Iraq would violate Article 3 of ECHR, which prohibits torture and inhuman or degrading treatment or punishment.⁸⁰ The Court sided with the Swedish authorities and, on the precise point of the late disclosure of the claimant’s sexuality, it agreed that his submission lacked credibility on account of the amount of time he had taken to bring up that matter in the asylum process and the insufficient justification he offered for that delay.⁸¹

Although this judgment significantly marked the first time the Court recognized that sexual orientation asylum claims can fall within the scope of protection of the ECHR, the Court did not set an appropriate standard for dealing with instances of late disclosure. Instead, it applied the principle of the benefit of the doubt in an insufficient manner to the facts and deferred excessively to the domestic authorities’ credibility assessment, thus favoring their power despite the claimant’s confession.⁸² A confession is thus not enough: one’s confession of their SOGI needs to be offered in the terms and moment imposed by authorities, independently of the claimant’s individual circumstances and framing of their SOGI, consequently reinforcing the regulatory and oppressive dynamics underlying how late disclosures are treated in SOGI asylum.

2. Late Disclosure in SOGI Asylum Cases in Luxembourg

The Court of the Justice of the EU (CJEU) has also had the opportunity to deal with a late disclosure in a SOGI claim. In cases *A, B, and C*, the Court stated that the late disclosure of one’s sexual orientation or gender identity should not lead to a negative credibility finding of the overall claim: The “sensitive nature of questions relating to a person’s personal identity and, in particular, his sexuality” may justify a claimant’s “reticence in revealing intimate aspects of his life” and not sharing their sexuality with the authorities from the outset of the

78. On the matter of ‘discretion reasoning’ in SOGI asylum claims, see JANNA WESSELS, *THE CONCEALMENT CONTROVERSY: SEXUAL ORIENTATION, DISCRETION REASONING AND THE SCOPE OF REFUGEE PROTECTION* (2021).

79. Nuno Ferreira, *An Exercise in Detachment: The Strasbourg Court and Sexual Minority Asylum Claims*, in *QUEER MIGRATION AND ASYLUM IN EUROPE* 78, 81 (Richard Mole ed., 2021).

80. Article 3 of the European Convention on Human Rights (*supra* note 16).

81. *M.K.N. v. Sweden*, Eur. Ct. H.R., ¶ 43 (2013).

82. This is a pattern in the Strasbourg jurisprudence on sexual orientation asylum claims. Ferreira, *supra* note 79, at 98.

asylum procedures.⁸³ Although under EU law, Member States are entitled to expect asylum claimants to “submit as soon as possible all the elements needed to substantiate the application for international protection,”⁸⁴ the Court also pointed out in *A, B, and C* that domestic asylum authorities are under the obligation to carry out interviews and individual assessments of asylum claims in a way that is sensitive to the claimant’s circumstances (including their vulnerability).⁸⁵

More recently, in *XY*, the Court dealt with another case of late disclosure in a SOGI claim where the gay Iraqi Muslim claimant’s sexuality was raised after the initial asylum procedure in Austria concluded.⁸⁶ The claimant had feared mentioning his sexual orientation and only felt comfortable doing so after being reassured by an NGO that he would not be exposing himself to danger in Austria by mentioning his sexuality to the asylum authorities.⁸⁷ The Court asserted that asylum decision makers should interpret the notion of “new elements or findings” in EU asylum law as to include both those that have arisen after the conclusion of an asylum procedure and those that already existed but that the applicant may have only brought up afterwards.⁸⁸ Member States also have the obligation to examine the merits of subsequent applications even if the late submission of the new elements of findings is attributable to the applicant’s fault.⁸⁹ This means that there should be no time limits to re-opening asylum procedures on SOGI grounds even if the applicant was already aware of their SOGI at the time of the first procedure.⁹⁰ Nonetheless, the Court also concluded that EU law allows Member States to reject subsequent applications based on new elements that have not been brought up in the initial asylum process on account of the applicant’s fault, provided Member States make explicit use of that possibility in their statutory framework (which had not been the case in Austrian legislation).⁹¹ This has potentially

83. Joined Cases C-148/13–C-150/13, *A, B, and C v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2014:2406, ¶ 69 (Dec. 2, 2014).

84. Directive 2011/95/EU, *supra* note 52, at 14.

85. Joined Cases C-148/13–C-150/13, *supra* note 83, ¶ 70.

86. Case C-18/20, *XY v. Bundesamt für Fremdenwesen und Asyl*, ECLI:EU:C:2021:710 (Sept. 9, 2021).

87. *Id.* ¶ 15.

88. *Id.* ¶¶ 36–44.

89. The EU law norm in question was Article 40 of Directive 2013/32/EU, *supra* note 53.

90. Case C-18/20, ECLI:EU:C:2021:710 at ¶ 61.

91. *See id.* ¶ 65 (specifically referencing Article 40(4) of Directive 2013/32/EU, *supra* note 53).

negative consequences for SOGI claimants and has been criticized by the European Parliament.⁹²

This strong steer from the CJEU towards not unduly using late disclosure as grounds to reach negative credibility findings in SOGI claims or refusing to assess those new elements altogether seems to have been noticed by national courts. For example, soon after the judgment in *A, B, and C*, the Italian Supreme Court affirmed that a claimant fleeing homophobia may be unable, for psychological reasons, to disclose the real reason to fear persecution in the home country, which places a duty on asylum authorities to consider any relevant element put forward by the claimant independently of the moment the process has reached.⁹³ The claimant in the case only revealed that his sexual orientation was the reason for fearing persecution during a fresh application. The administrative decision makers (territorial commission) disbelieved the claimant because the claimant knew his sexual orientation at the time of the first application. In light of the authorities' duty to collect information on the conditions in the country of origin, the Supreme Court determined that the Court of Appeal of Naples should re-examine the case in a more proactive fashion and without pre-empting its outcome.⁹⁴ This is consistent with the fact that, when dealing with late disclosure in SOGI claims, Italian decision makers both at administrative and judicial levels already tended to recognize refugee status to claimants.⁹⁵ This has also been reinforced by subsequent decisions of the Italian Supreme Court asserting that claimants can be held credible even if they have not disclosed the real reason for fearing persecution at the first possible opportunity.⁹⁶ Conversely, in the UK, lower courts

92. COMM. ON CIV. LIBERTIES, JUST. AND HOME AFFS., REPORT OF 24 MARCH 2011 ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON MINIMUM STANDARDS ON PROCEDURES IN MEMBER STATES FOR GRANTING AND WITHDRAWING INTERNATIONAL PROTECTION (RECAST), amend. 88, A7-0085/2011 (Mar. 24, 2011).

93. Cass. civ., sez. sesta, 5 March 2015, n. 4522 (It.).

94. *Id.*

95. *See, e.g.*, Territorial Commission of Gorizia, branch of Verona, 26 June 2012; Tribunal of Trieste, 18 October 2013.

96. Cass., 21 July 2017, n. 18128 (It.); Cass., 29 December 2016, n. 27437 (It.). Similarly, the Finnish Supreme Administrative Court has found that a lower court's decision on an asylum claim by a gay Iraqi man had unfairly dismissed the claim for lack of credibility simply because the claimant had only revealed his sexuality at the appeal stage. Supreme Admin. Ct., KHO:2017:14, (Sept. 22, 2017) (Fin.). The Court considered the claimant's justifications for the late disclosure—namely the presence of an interpreter wearing a headscarf during the interview and fear of abuse in the reception center where he lived—were sufficient and warranted that the lower court give the claimant the opportunity to establish the credibility of the claim at an oral hearing. Moreover, in a case involving a gay Syrian man, the Swiss Federal Administrative Court found that the claimant should be granted refugee status on account of the conditions for gay men in the country of origin, even though he had

still use statutory norms on late disclosure to the detriment of SOGI claimants, as recent decisions indicate.⁹⁷ In Germany, participants' experiences also point towards an inappropriate dealing with 'late disclosures' in SOGI claims.⁹⁸

Overall, the case law in this Part reflects some willingness—even desire—to re-balance the power dynamics that exist in asylum procedures and somewhat protect SOGI claimants' position against the clearly more powerful asylum authority. Most decisions discussed also tend to construct the claimant's confession of their SOGI as an act, the timing of which the claimant should be able to choose to some extent. This may be particularly the case when claimants—exercising the power (even if limited) they possess in such contexts—are able to articulate in a cogent way why the timing and framing of their confession should be accommodated by the asylum system, even if the decision on whether to accommodate such late disclosure ultimately lies with the authorities. Yet, examples from the ECtHR as well as UK courts suggest that the power balance in the adjudicatory relationship still clearly leans towards the authority, who has the prerogative to derive negative consequences from late confessions and enforce certain sexual and gender discourses.

Against this policy and case law background, we can now consider the lived experiences of SOGI claimants who—for a range of reasons—may not be able or willing to submit their claims at the earliest opportunity. A mismatch between policy and case law, on the one hand, and claimants' experiences, on the other, will emerge. The discussion below will thus confirm—as Foucault asserted—how sexuality is “endowed with the greatest instrumentality: useful for the greatest number of maneuvers and capable of serving as a point of support, as a linchpin, for the most varied strategies”—in this case, the regulation of borders and refugee movements.⁹⁹

not mentioned his sexuality in his initial application. Bundesverwaltungsgericht (BVGE) (Federal Administrative Court) Aug. 12, 2020, D-6722/2017 (Switz.).

97. On the use of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 in the case of a Bangladeshi gay claimant, *see* MAR v. SOS for the Home Dep't, First-tier Tribunal (Immigration and Asylum Chamber) PA/06976/2019, 23 December 2020, ¶¶ 39–45 (UK). In the Netherlands, as well, there is some evidence of lower instance courts still not having fully grasped the very limited significance that the timing of disclosure of the claimant's SOGI should have in the credibility assessment. *See* SABINE JANSEN, PRIDE OR SHAME? ASSESSING LGBTI ASYLUM APPLICATIONS IN THE NETHERLANDS FOLLOWING THE XYZ AND ABC JUDGMENTS 118–20 (2019).

98. *See infra* Part IV.

99. FOUCAULT, *supra* note 22, at 103.

IV. THE REALITY OF LATE DISCLOSURES

The SOGICA online survey unearthed that while 63 percent of the respondents who had claimed asylum on SOGI grounds did so immediately after they arrived in the host country, 18 percent did so within three months and 19 percent did so after three months.¹⁰⁰ This amounts to 37 percent of claimant respondents whose credibility may be undermined by asylum authorities on account of the claim not having been submitted at the earliest opportunity. While filing an asylum claim at a later stage has the advantage of potentially affording claimants more time to collect evidence and prepare the asylum claim with the benefit of legal advice, authorities can use such lateness against these claimants.

Part IV.A will explore the reasons behind the lateness of SOGI claimants' confessions and how the authorities use their power to react to such late confessions. In particular, Part IV.A will analyze how power is inherent to all the relationships in which SOGI claimants are embedded, as a reflection of divisions, inequalities, and imbalances within these relationships. This allows power to be "exercised from innumerable points, in a set of unequal, shifting relations,"¹⁰¹ in the process of extracting a confession from SOGI claimants.

A. Understanding the Claimants

Authorities demand immediate disclosure by SOGI claimants, and delaying such disclosure renders those claimants not legible, thus leading to their exclusion, incarceration, surveillance, and control.¹⁰² Many reasons and different sets of circumstances account for SOGI claimants not submitting their claims as soon as they arrive to the host country or—in the case of sur place claims—when the risk of persecution begins. The main one amongst these seems to be the lack of awareness of the asylum process (in general) and of the possibility of lodging an asylum claim on SOGI grounds (in particular). Thirty-one percent of the claimant respondents to the SOGICA survey did not know they could claim asylum on SOGI grounds and seven percent were unsure.¹⁰³ In other words, more than a third of the surveyed claimants were unaware or unsure about being able to file a SOGI-based asylum claim in their host country, which challenges the popular narrative that SOGI asylum claimants—like all other claimants—plan ahead and choose their destinations.¹⁰⁴

100. ANDRADE ET AL., *supra* note 13, at 11–12.

101. Sheridan, *supra* note 30 at 182.

102. Judith Butler, *Mal Faire, Dire Vrai: Le Cas de l'Aveu Sexuel*, in FOUCAULT(S) 224–243 (Jean-François et al. eds., 2017).

103. ANDRADE ET AL., *supra* note 13, at 13.

104. Carmelo Danisi, *What 'Safe Harbours' Are There for Sexual Orientation and*

For example, Janina, a lawyer in Germany, told us that “there are many refugees who do not dare to state that [their SOGI] in the first interview . . . because they say, ‘I do not know the situation in Germany. It could be that it is also punishable here.’” The same happens in the UK, where a gay Ugandan refugee stated that:

I claimed asylum within a month as I didn't know before the entry. But after failing to get a job because I didn't have the national insurance number, I went to [the] Home Office and I was arrested and from there I was asked why I left my country. I didn't have any idea about the asylum process I didn't know whether you could even say it [sexual orientation] to anyone. I didn't know that you could seek asylum on [grounds of] sexual orientation. After what happened to me in Uganda, couldn't think that anyone or any government supports LGBTQI people.¹⁰⁵

A gay Pakistani asylum claimant—in the UK as well—had a more extreme experience. He shared that “I claim[ed] after several years of [being] part of [the] LGBT community because I didn't know about this [asylum] law.”¹⁰⁶ These situations were corroborated by professionals supporting SOGI claimants:

[T]he reasons [for late claims] are, one, that you wouldn't know. Most people don't know before coming that you can claim asylum on that basis. Most people will tell you: “all I had heard of was political asylum.” They just associate asylum with someone who is persecuted for their political opinion back home and who claim[s] asylum. So most people don't even know.¹⁰⁷

Yet, even if they possess some knowledge about the asylum process and the possibility of filing a SOGI-based claim, claimants contend with another significant challenge: coming to terms with their own SOGI. Being able to deal with one's own identity and feelings was a recurrent topic in our participants' experiences:

[W]e Africans, because of our past experience, we don't . . . before we open up, it is really hard for us to say that we are gays or anything, homosexual, even though we are still in this kind of free world. There is still that stigma inside us to keep [inside] our real identity.¹⁰⁸

Gender Identity Asylum Claims? A Human Rights Reading of International Law of the Sea and Refugee Law, 5 GENIUS 9–24 (2018); DANISI ET AL., *supra* note 6, at 162–66.

105. Reply from respondent C59, based in the UK, to online survey (on file with author).

106. Reply from respondent C67, based in the UK, to online survey (on file with author).

107. Interview with Nath, lawyer, in the UK (on file with author).

108. Interview with Just Me, focus group no. 4, in Northern Italy (on file with author).

But I think I was homophobic myself when I first discovered myself. I hated all gays and everything related to gay and I hated even myself, but it is kind of . . . it is a period that takes a bit of time where you come to a conclusion [and] I think you say “[it] is alright.”¹⁰⁹

Internalized homo/trans-phobia was also of concern to those professionals supporting SOGI claimants, leading them to reflect upon possible implications for the asylum process, the balance of powers in asylum adjudication, and the timing of the confession of one's SOGI. One such professional, a UNHCR officer named Cristina, asserted:

[T]here is a cultural issue, so, in some languages there are no words to say it [one's SOGI], or that do not correspond to a negative term, and on the other side there is the fear of showing outside something that often has not become conscious inside. . . . [S]o, this is a fundamental thing, in my opinion, in other words, you should not leave the burden of having to open up oneself only to the person claiming asylum.¹¹⁰

Cristina thus points to a sharing of the burden of proof, simultaneously replacing the imposition of immediate and full confession with a dialogic and more balanced power relationship between authorities and SOGI claimants.

Homo/trans-phobia also manifests itself through the fear SOGI claimants have of facing violence and discrimination in the host countries—fear being a feeling that permeates many social and legal experiences of SOGI refugees.¹¹¹ This is undoubtedly the case when claimants first arrive to a European country:

When I entered Italy, they asked me if am a lesbian, I said “no.” Why I said “no” is that I thought they [would] lock me up because I ran out of [the] country because they want[ed] to kill me.¹¹²

[T]he situation they [claimants] have just come from, you know, if they have literally just got off a plane in some cases. Because of, as we say, the cultural reticence, and fear that there is around disclosing their sexuality, so some people just don't disclose at that point, at that first interview. They will give other reasons for claiming [asylum].¹¹³

Fear of disclosure remains prevalent for many claimants and continues long after their arrival in Europe. It may be a long time before they feel secure enough to discuss their SOGI with anyone, let alone presenting it as the basis for their asylum claim:

109. Interview with Ali, in the UK (on file with author).

110. Interview with Cristina, UNHCR officer, in Italy (on file with author).

111. Senthoran Sunil Raj, *Fighting Fear: Queer Claims and Asylum*, in *FEELING QUEER JURISPRUDENCE* 94–115 (2020).

112. Reply from respondent C73, based in Italy, to online survey (on file with author).

113. Interview with Debbie, NGO Volunteer, in the UK (on file with author).

I made my claim . . . after a year . . . [W]hy? Because [I] am afraid of bring[ing] myself out to the people [I] am living with and with the Italian people I found myself around with, so I have to study them and know the kind of people [I] am going out with, why because I don't want to face the pains I pass[ed through] . . . when I arrived, I have a fear in me to show myself out because I was put in a place with people that is against my [sexual] orientation¹¹⁴

Such fears often lead to the denial of the first asylum claim, based on a non-SOGI-related ground:

When I came [to Germany] I was a little bit . . . I was scared, you know, this thing from Africa, you cannot say it out that you are a lesbian. So I think I had that in me, so I could not open up to anybody that I'm a lesbian until I went for the interview. So when I was rejected, I still didn't tell anyone. So it was when my social [worker] read my paper and she knew, and she said 'oh, you are a lesbian, ok, you have to go to this organization'.¹¹⁵

This fear is heightened in relation to one's relatives and compounded by the way the asylum process is conducted by authorities. Relatives, friends, lawyers, and NGO volunteers form power networks that contribute to discourses on sexuality. This case exemplifies how close relatives and decision-makers can control the disclosure of one's SOGI by delaying it, even if not clearly intentionally:

[W]hat has to improve is that often the argument arises that, if people did not come up immediately with being LGBTI, but later: "Yes, why later?" Always like that, with little empathy, that—for example, the case this morning, he had his hearing with his sister. Something like that should not happen.¹¹⁶

Such fears often translate into living in hiding in host countries for many years for complex socio-cultural-ethnic reasons. As reported by professionals supporting SOGI claimants in the UK, many claimants are successful in leaving their countries of origin and reaching the UK but:

[They] continue in a way to be hiding their sexual identity or a lot of them will have like a double-life, kind of. And that doesn't, doesn't really affect the asylum process itself, but it definitely affects how they are able to express their sexual identity and then, and then how the decision, like how much evidence they can provide, and therefore¹¹⁷

[T]hey have never told anybody, or they have come out to their parents and they are frightened and they have come here as a student, as a way of escaping They are able to live fairly freely as a student,

114. Reply from respondent C62, based in Italy, to online survey (on file with author).

115. Interview with Tina, in Germany (on file with author).

116. Interview with Kadir, NGO Worker, in Germany (on file with author).

117. Interview with Nath, Lawyer, in the UK (on file with author).

they have, if they have got family here, they have kind of two lives, or they have got family back there that they just keep a distant relationship [with] . . . [T]hen they graduate and then they start to get scared about what is going to happen.¹¹⁸

Similar dynamics present themselves in Germany, where even legal representatives and interpreters unwittingly play a role in the power networks that underpin late disclosures, contributing to what is said about a claimant's SOGI and when:

We have now had an asylum claimant who came out to us, but said: "In the interview, I did not come out, because the lawyer representing me is also friends with my family; I haven't come out to my family. And there are a lot of people living like this here in Germany, and I'm also likely to go on living without coming out."¹¹⁹

So, the problem is that they [claimants] did not dare to say that [their SOGI] in the first proceedings, because they were afraid of the interpreter, because they were afraid of stigmatization by the community, they feared it would come out. So, a pretty big mix of factors.¹²⁰

While not explicitly prohibited from disclosing their SOGI, claimants self-censor any discussion of their SOGI out of fear of negative consequences, in a clear example of how Foucault's disciplinary power works in practice in the context of asylum—often with tragic consequences for claimants. The same happens for religious reasons, particularly when claimants remain closely associated with religious peers or communities throughout the asylum application process. This is often also associated with one's livelihood:

The other thing is because of the nature of the people I was living with, I couldn't disclose my sexuality to them because they were people I knew from maybe church. So, I was still in that bubble whereby I don't want to be known as a lesbian, because from what they were discussing and what they were talking, I could tell that these are homophobic people and I cannot go there, then I will risk having nowhere to stay.¹²¹

Dependence on others for one's livelihood and shelter thus shapes SOGI claimants' experiences and willingness to disclose their SOGI. Specifically, difficult housing circumstances and precarious legal statuses can dictate one's decision about when and if to claim asylum and confess one's SOGI:

[I didn't claim asylum when I arrived] mainly because the lady that I was living with did not have her status, so it meant if I went and applied

118. Interview with Debbie, *supra* note 113.

119. Interview with Matthias, Social Worker, in Germany (on file with author).

120. Interview with Elias, Lawyer, in Germany (on file with author).

121. Interview with Jayne, in the UK (on file with author).

for asylum, I am putting her at risk and I had to consider the fact that I had shelter, comparing to not having shelter and putting her in danger.¹²²

The combination of lack of knowledge, coming to terms with one's own SOGI, fear of violence and discrimination, and practical and survival reasons thus indelibly shapes the power networks SOGI claimants navigate and delays the confession authorities require at the earliest possible occasion.

Once members of a SOGI minority become aware of the possibility to claim asylum on grounds of their SOGI and overcome fears related to disclosing it, they are able to make a conscious decision about claiming asylum or not, as it happened to Lutfor and Jayne, in the UK:

[T]hen one day he [boyfriend] asked me what is my status, I explained the situation, and he told [me about asylum]. I mean, I read paper, in paper there was something about asylum, but I [didn't] know what is asylum and I didn't have the, like, you know, computer or anything that I can see what is asylum. I thought asylum may be something like visa or something, I had no idea what it is. So, he explained [to] me that if you are from a conservative country, and if you are gay, you could apply for asylum.¹²³

I overstayed like nearly a decade. Now, at this point I have known about asylum, I know I can claim asylum based on my sexuality, but still the fear of what is going to happen I sat down with my son, just like talking to him when he turned 16, just to explain to him why I haven't been home, why I left him for so long, and I had to gather some courage to tell him about my sexuality [W]ell, if now my son knows about all this, maybe it is time I go and give myself in.¹²⁴

Confessing one's SOGI to the authorities is here combined with literally "giving oneself in" in Jayne's words, thus entailing surrendering one's body and soul to the asylum system. Indeed, as Foucault's work reveals, by adhering to one single sexual identity, one is completely submitting oneself to another, falling into a trap, or even entering a prison.¹²⁵ The likely brutal reactions of the system—further explored in the next Subpart—often do not inspire trust in potential claimants, as Lutfor also experienced:

I mean, I was stupid, I know. You know, when you are true, you feel like that confident, so I was confident that I am gay, so it will be easy for me. So, I made an appointment, I went there, they put me in detention straight away.¹²⁶

122. Interview with Stephina, in the UK (on file with author).

123. Interview with Lutfor, in the UK (on file with author).

124. Interview with Jayne, *supra* note 121.

125. Butler, *supra* note 102, ¶ 13.

126. Interview with Lutfor, *supra* note 123.

While acknowledging that the “truth” about one’s SOGI is considerably more complex than it may seem at first and constitutes a discursive construction,¹²⁷ Lutfor’s experience and other similar ones are often reflected in the advice offered to potential claimants:

[V]ery few people were telling me good things about [claiming asylum], everyone was like “if I were you, I would advise you just to stay as you are, because it is not easy if you don’t have family support, you don’t have friends who can support you, it is not an easy process.”¹²⁸

Such experiences can only prompt other potential claimants to fear the asylum system and delay the confession of their SOGI to authorities, rather than encourage them to disclose their SOGI in an asylum claim right from the start. As claimants become aware of how pastoral power operates and the consequences of disclosing personal information to the authorities, they resist that power by making a conscious decision about when and how to confess their SOGI.

From the perspective of sur place claims, SOGI claimants’ experiences may also prompt fear of persecution once one is already living in the host country. In Germany, for example, Marlen mentioned that after a first asylum claim is lodged, claimants may start exploring their gender identity, which then becomes a new element that can justify a subsequent, fresh asylum claim.¹²⁹ Similarly, in Italy, Roberto told us of claimants who lodged their initial asylum claims on a ground not related to their SOGI but, subsequently, became conscious of their SOGI (often upon meeting a new same-sex partner) and decided to lodge a subsequent, fresh claim on SOGI grounds.¹³⁰ Although establishing the credibility of the claim may be more difficult under these circumstances, Roberto underlined the importance of dealing fairly with such sur place claims, as it is realistic that the individual circumstances of the claimant or the conditions in the country of origin may have changed and justify a fresh claim.¹³¹ In the UK, SOGI is also important in sur place claims: during an appeal hearing, a claimant was challenged by the Home Office for having entered the country on a tourist visa, then applying for a student visa, and only later on claiming asylum on the basis of his sexual orientation.¹³² Common to all these examples is the fact that the claimant’s SOGI only became a clear ground for an asylum

127. *See supra* Part II.

128. Interview with Jayne, *supra* note 121.

129. Interview with Marlen, Lawyer, in Germany (on file with author).

130. Interview with Roberto, Decision-Maker, in Italy (on file with author).

131. *Id.*

132. Judicial hearing observation of Upper Tier Tribunal, in London (2018) (on file with author).

claim some time after entering the host country, which offers a plausible explanation for the delay in confessing one's SOGI to the authorities.

A clear underlying theme in the discussion above is that all SOGI claimants find themselves in complex networks of power that include relatives, partners, friends, religious authorities, legal authorities, members of their diasporas, cohabitants, etc. It is these matrices of power-knowledge that to a large extent shape when and how SOGI refugees wish, feel comfortable and are able to confess their SOGI, both to the asylum authorities and any other individual or entity. What all the claimants quoted above must contend with is that—in true Foucauldian fashion—the asylum system actors rely on their power to expect claimants to go:

[A]bout telling, with the greatest precision, whatever is most difficult to tell One confesses—or is forced to confess. When it is not spontaneous or dictated by some internal imperative, the confession is wrung from a person by violence or threat; it is driven from its hiding place in the soul, or extracted from the body.¹³³

While SOGI claimants are not powerless, their power is disciplinary in nature, meaning that it is largely dominated by the need for self-control—including by silencing any mention or expression of their SOGI. Simultaneously, the confession being imposed on them needs to be done in terms of the expected “truth,” which reinforces the need to conform to precise sexual and gender discourses. Although Foucault asserts that one should not even have to pose the question to oneself of what one *is* sexually and, instead, should invest in creating new types of (political) subjectivity and individuality, he understands the strategic need in certain moments to self-identify according to a certain sexual identity.¹³⁴ The threat SOGI claimants face if they do not confess is clear: return to countries of origin. Yet, how much do authorities understand the claimants' reasons explored in this Subpart for not having confessed their SOGI earlier on? The next Subpart addresses this question.

B. The Authorities' Reactions

When adjudicating SOGI claims, asylum authorities play a key role in the process of ritualistic confession of the “truth” on sex. The confession here takes place in the shape of a relationship between the claimant as “the speaking subject” and asylum authorities as “the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console and reconcile.”¹³⁵

133. FOUCAULT, *supra* note 22, at 59.

134. Butler, *supra* note 102.

135. FOUCAULT, *supra* note 22, at 61–62.

Similarly to the fear many claimants feel about confessing their SOGI to authorities and lodging a SOGI-based claim, asylum authorities' practices and decisions are also permeated by fear—in this case of imaginary floodgates and bogus claimants. Such fear reduces the space afforded to the variety of queer intimacies and identities of refugees.¹³⁶

Despite the policy guidance and case law discussed in Part III, which overall points towards the need not to equate late disclosure with lack of credibility, domestic authorities still attach negative consequences to delays in confessing one's SOGI. Specifically, authorities impose an often insurmountable standard of proof on claimants and even an implicit presumption of lack of credibility in such cases. In Germany, for example, decision-makers tend to count late disclosures against claimants' credibility, even when they are explainable on a range of accounts, including fear of disclosing one's SOGI and the role of interpreters. As German lawyer Janina explains:

[M]aybe there is an interpreter who somehow looks [at the claimant] in a funny way, or the young Iraqi [claimant] that I have, who says that in the interview there was an interpreter with a headscarf that looked so strictly Islamic and she was also Iraqi and he simply did not dare to say that [he was gay]. But he then brought it up and now he's waiting—but of course, he received a rejection from the Federal Office, now we appeal and hope that everything goes well.¹³⁷

Even those decision-makers who support claimants' right to SOGI self-identification are skeptical of claimants who only mention their SOGI at the appeal stage. Oscar reported an appeal hearing involving a late disclosure and suggested that denying the appeal was the logical consequence: "if that [sexuality] is such a big part of her life, then she could have mentioned it before. Apart from that, I looked her in the eyes and then asked a few questions, and then it was over."¹³⁸ The flip-pant tone adopted here reflects a clear disregard for the power networks in which the claimant may have been embedded throughout her asylum journey and how the confession of her "true" sexuality may have been considerably more complex than it seemed. Even abandoning oneself to the authority's discourse on "true" sexuality, adopting a certain identity and setting aside the complexity of one's experiences—with all the humiliation it may entail—may be insufficient to be legible before authorities.¹³⁹

136. Raj, *supra* note 111.

137. Interview with Janina, Lawyer, in Germany (on file with author).

138. Interview with Oscar, Judge, in Germany (on file with author).

139. See Butler, *supra* note 102.

In Italy, as well, the late disclosure of one's SOGI may be detrimental to a claimant, especially because of the stereotype that SOGI claimants would inevitably be out and proud about their SOGI.¹⁴⁰ If claimants have declared in the initial written form a ground that is different from the real reason for claiming international protection, they might be deemed "not credible" by administrative decision-makers in the belief that they changed their story in order to be granted asylum.¹⁴¹ According to our participants, Italian courts are also at times skeptical of claimants who bring up their sexuality after their initial asylum claim has been denied.¹⁴² This was illustrated by Maurizio, who told us that he finds it suspicious when SOGI claimants do not mention their (non-hetero) sexuality immediately upon arrival to "a free country"—such as Italy, it is implied:

Then, check if, upon arrival in Italy, at the first contact with the Italian authorities, he expressed his homosexuality; although this is not the only element to consider him credible or not, I believe that this can complement other elements to evaluate one's credibility, because in the vast majority of African countries that have perhaps embraced and applied Sharia [law], and therefore legislation that is openly discriminatory towards homosexuals, I believe that the first moment you arrive in a free country, when you know that you escape from homosexual persecution, the first thing that one tries to say is "I am homosexual, I escaped because I am persecuted."¹⁴³

Considering the traumatic and violent experiences most SOGI claimants have undergone in their countries of origin and on the way to Europe,¹⁴⁴ the expectation of an immediate and full confession of one's SOGI is clearly unrealistic and inappropriate. Furthermore, this is in clear tension with the decisions of the higher judicial instances in Italy.¹⁴⁵ Other decision-makers seem better aware of more appropriate approaches to late disclosure, to the point of empathizing with claimants. For example, Titti believed that late disclosure can occur because: (1) sometimes certain facts do not even come to claimants' minds, (2) claimants' cultural background may prevent them from interpreting their experiences as traumatic or exceptional, (3) social shame may impede claimants from speaking about certain aspects of their lives, and (4) claimants may not have the skills or inclination to articulate

140. DANISI ET AL., *supra* note 6, at 307–12.

141. Interview with Roberto, Decision-Maker, in Italy (on file with author).

142. Interview with Nicola & Giulio, LGBT Group Volunteers, in Italy (on file with author).

143. Interview with Maurizio, Judge, in Italy (on file with author).

144. DANISI ET AL., *supra* note 6, at 145–50.

145. *See supra* Part III.

their SOGI as a personal characteristic or identity.¹⁴⁶ In the same vein, legal representatives are overall positive about the way Italian decision-makers deal with late disclosures. Nazarena told us, for example, of a claimant who had lived in Italy for several years, had abandoned an asylum claim, returned to the country of origin on account of a strong attachment to his mother, and then returned to Italy.¹⁴⁷ Instead of using these elements to discredit the claimant, the judge of appeal considered these were, in fact, an indication of the difficulties the claimant had in disclosing and dealing with his sexuality, which justified the way he had handled the asylum process.

Turning to the UK, SOGI claims do not seem more affected by late disclosures and delays in submission than other categories of claims.¹⁴⁸ Nonetheless, domestic authorities still clearly use their power to infer negative consequences to claimants from any delays in confessing their SOGI. Particularly in terms of credibility assessment, the Home Office often uses the trope: "If this was really true, why didn't you disclose it then?"¹⁴⁹ The ultimate result can be the denial of asylum to SOGI claimants, as it happened to our participant Irma. With this, according to the UK Lesbian and Gay Immigration Group (UKLIG), the Home Office routinely uses the late submission of SOGI claims to harm the credibility of claimants.¹⁵⁰ This is a problem that has been highlighted in the UK for more than a decade: the 2010 report *No Going Back* revealed a serious lack of understanding of the experiences of SOGI claimants in terms of late disclosure, which is particularly clear when juxtaposing the decision-makers' comments with the claimants' testimonies in the same report.¹⁵¹ Despite current policy duly limiting the negative relevance late disclosures and late submissions may have in the outcome of an asylum claim, there does not seem to have been

146. Interview with Titti, Decision-Maker, in Italy (on file with author).

147. Interview with Nazarena, Lawyer, in Italy (on file with author).

148. John Vine, *An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation: March–June 2014*, INDEPENDENT CHIEF INSPECTOR OF BORDERS AND IMMIGRATION, at 35 ¶ 5.21 (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547330/Investigation-into-the-Handling-of-Asylum-Claims_Oct_2014.pdf [<https://perma.cc/6YEX-TRPR>].

149. Interview with Ashley, Psychotherapist, in the UK (on file with author).

150. *Still Falling Short: The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity*, UK LESBIAN & GAY IMMIGRATION GROUP 21–22 (2018), <https://www.rainbowmigration.org.uk/publications/still-falling-short> [<https://perma.cc/65QD-LZFD>]. UKLIG was renamed Rainbow Migration in 2021.

151. Nathanael Miles, *No Going Back: Lesbian and Gay People and the Asylum System*, STONEWALL at 16 (2010).

sufficient progress on this front over the last decade, as asserted by this survey respondent supporting SOGI claimants in the UK:

A major issue is if people do not know that their sexual orientation is a reason to claim asylum, they may not often reveal this at their screening or substantive interview. It can then later bring their credibility into question, as they may be deemed by the Home Office to have “lied” or “omitted” details that are relevant to their claim. They are also sometimes viewed as trying to say they are LGBT+ just to claim asylum.¹⁵²

In a clear form of pastoral power, authorities thus collect information from SOGI claimants to then draconianly regulate their lives. The Home Office decision-makers have a strong expectation that, when claimants arrive to the UK, they are familiar with the asylum system and aware that they can claim asylum on SOGI grounds, blatantly disregarding the trauma most claimants have suffered. There are even instances of decision-makers using claimants’ academic qualifications against them:

The Home Office always use it as a credibility issue and say, “Did you not see the notices about asylum in the arrivals hall at Heathrow?” Well, I can think of international airports that I have gone through as a tourist in my right mind, and I probably haven’t seen half the notices that are there. So, the Home Office take a really stupid approach to this and say, “You have had every opportunity to find out.” They even say, “You are an educated person, you have arrived with a degree in business studies, why did you not find out about this?”¹⁵³

Although claimants’ cultural, social, and personal background often stands in the way of an immediate and full confession, the Home Office uses its share of power in the asylum system to unreasonably penalize claimants when they do not offer a prompt, articulate, and clear disclosure of their SOGI:

I said I was sleeping with my partner [when the Home Office asked me what I was doing when the police arrived]. [Interviewer] said, “Oh, you were sleeping with your partner?” I said, “Yes, I was sleeping with my partner, naked, you know.” I couldn’t say we were having sexual intercourse, I was still holding back on that thing, that, you know. So, on my refusal they said, “She said they were just sleeping.” So, as girl child or they can just sleep as friends . . . So, most of the times, the most important information you just withhold out of respect, out of cultural beliefs, out of the way you have been raised, but not intentionally.¹⁵⁴

152. Reply from respondent S83, Religious minister, in the UK, online survey (on file with author).

153. Interview with Oliver, NGO worker, in the UK (on file with author).

154. Interview with Meggs, focus group no. 1, Manchester, in the UK (on file with

The Home Office's evidentiary expectations in relation to the confession of one's SOGI can thus be seen as an arbitrary use of their power. It has become apparent that SOGI asylum claimants cannot possess the range of evidence usually expected by the Home Office unless they have lived in the UK for a while and have had time to associate with the LGBTIQ+ community. However, doing that entails delaying one's confession—to be able to lodge a well-prepared SOGI claim—which will count against one's credibility assessment:

The issue with sexuality is, if you fled, you have not brought with you things that before you fled for your life you thought, "There may very well be asylum opportunities with the country I am going to and I will need this range of documents, so I will put together a legal bundle, that will stand me in good stead when I get there." You just run. So when you run, you arrive with nothing. If you immediately apply for asylum, you will never have any evidence about your sexuality. If you can get six months integration into an LGBT community somewhere, you will start to get evidence. So, the process that they require you [to follow, i.e., submit SOGI claim at earliest opportunity] and try to punish you if you don't follow, means that you will end up in court in terms of evidence about your sexuality completely naked.¹⁵⁵

Being "naked" before the authorities in evidentiary terms despite having confessed one's SOGI, and then being disbelieved as well, reflects how confession reinforces the power of authorities' reductive discourses and their detachment from those who confess their sexual identities.¹⁵⁶

SOGICA researchers witnessed on several occasions that late disclosure—often in the form of late submission of a SOGI claim—is also used by the Home Office against claimants during appeal hearings.¹⁵⁷ Judges, however, seem to possess a better understanding of the difficulties faced by claimants who need to confess their SOGI to obtain asylum:

The courts are not saying that anytime someone is delayed in claiming asylum, your credibility is weakened. It is, "Let's have a look at the context of . . . ," because they are lawyers ultimately, and they are saying, "Let's have a look at it, in the round, once we have taken everything into account" So the courts have effectively got it right.¹⁵⁸

author).

155. Interview with Oliver, NGO worker, in the UK (on file with author).

156. See Butler, *supra* note 102.

157. Three separate judicial hearing observations of Upper Tier Tribunal, in London (2018) (on file with author).

158. Interview with Sean, Lawyer, in the UK (on file with author).

[I]t can also be that later on, an appellant has remembered certain things which they didn't understand would be useful or they have got more confidence to speak out in the tribunal. I mean, there could be a lot of factors in play.¹⁵⁹

Nonetheless, judges are not immune to using their power to look negatively upon delays in confessions:

[S]he had been here for ten years, and she had done nothing in that ten years. So, I suppose that was an issue that had to be addressed. She had been here unlawfully . . . she hadn't made an asylum claim, she just kept under the radar. The longer someone stays unlawfully without making a claim, I think, the more likely it is without explanation, as there was in that case. As you will see, someone is going to make an adverse credibility finding.¹⁶⁰

Strikingly, what all the data analyzed in this Part evidences is that “the agency of domination does not reside in the one who speaks (for it is he who is constrained), but in the one who listens and says nothing.”¹⁶¹ The questioning authority retains most power in this dramatically asymmetrical relationship, expecting to not only hear about the sexual act but also the “thoughts that recapitulated it, the obsessions that accompanied it, the images, desires, modulations, and quality of the pleasure that animated it.”¹⁶² At the end of claimants' confessions, asylum authorities will act as “master of truth,” constituting “a discourse of truth on the basis of its decipherment.”¹⁶³ It is clear that there is much work to be done to ensure statutory and policy standards are appropriate and that decision-making practices comply with those standards.

V. CONCLUSION: ADDRESSING THE POWER IMBALANCE AND INJUSTICE

The analysis above dissected the role that power and confession play in relation to the specific issue of late disclosures in SOGI asylum. From a Western perspective, it would be as if “truth”—no matter how intimate and secret—demands to come out and be liberated through an articulation against the “violence of power.”¹⁶⁴ In the context of SOGI asylum, such power could be seen as the persecutory forces in countries of origin and the discriminatory practices of diasporas and host societies alike. Nonetheless, that would be “an inverted image of power,” as what happens in reality is that—as a form of pastoral power—it is

159. Interview with Adrian, Judge, in the UK (on file with author).

160. Interview with Harry, Senior Judge, in the UK (on file with author).

161. FOUCAULT, *supra* note 22, at 62.

162. *Id.* at 63.

163. *Id.* at 67.

164. *Id.* at 60.

(the asylum authorities') power that coerces the confession of "what one is and what one does, what one recollects and what one has forgotten[.]"¹⁶⁵ The confession is thus not liberating but rather oppressive; it does not come from a place of freedom but of power, because it is done in the terms of the one who forces the confession and not of the one who makes the confession—and this is all too clearly illustrated in the asylum procedure.

As if throwing us back to the end of the 18th century, we witness the legal asylum system justifying "its authoritarian and constraining influence by postulating that all sexuality must be subject to the law; more precisely, that sexuality owes its very definition to the action of the law: not only will you submit your sexuality to the law, but you will have no sexuality except by subjecting yourself to the law."¹⁶⁶ The deployment of sexuality meets border control, underscoring the perversity of the asylum system, in the Foucauldian sense of concealing its real powers over sex with the aim of rendering such powers effective. The politics of sex meets the asylum system, with all its disciplinary potential and pastoral power. As Peter Showler puts it:

[S]ome [countries], including all of the Western industrialized nations of the world, have highly developed refugee systems based on complex administrative structures and quite legalistic interpretations of the convention refugee definition. Unfortunately legal sophistication does not ensure a just result and is sometimes the means by which nations engineer unjust results.¹⁶⁷

The way decision-makers across the SOGICA project country case studies and beyond deal with the matter of late disclosures is but another example of such sophistication being used to reach unfair results. SOGI asylum claimants are penalized for keeping their SOGI private and having a fluid SOGI, as well as deprived of the possibility of experimenting with their SOGI or only later in their lives identifying as a member of a SOGI minority.¹⁶⁸ This emphasizes the particular ways in which asylum systems oppress SOGI refugees through pastoral power. Privacy and agency are luxuries SOGI claimants cannot afford, because—as Foucault asserts—"between each of us and our sex, the West has placed a never-ending demand for truth[.]"¹⁶⁹ Yet, imposing an obligation to confess does not necessarily lead to more

165. *Id.*

166. *Id.* at 128.

167. PETER SHOWLER, REFUGEE SANDWICH 213 (2006).

168. Similarly, in the context of SOGI claimants' use of social media, see Andreassen, *supra* note 70.

169. FOUCAULT, *supra* note 22, at 77.

truth. As alluded to in Part II, an objective “truth” may indeed not exist, as claimants’ SOGI—along with all other aspects of their subject formation—are discursively, socially, and culturally constructed, and constitute fluid, performative, and negotiated categories.

By employing Foucault’s notions of power and confession in the analysis of primary and secondary data on late disclosures in SOGI asylum claims in Europe, we were able to render visible to a much greater extent than ever before the scale of the oppression and unfairness SOGI claimants suffer in their asylum journeys on account of mentioning their SOGI later than authorities require. Certainly, there is also resistance and attempts to control the when and how of the disclosure of one’s SOGI: refugees learn to the best of their ability to navigate the asylum system, obtain legal advice, garner community support, influence decision-making, and so on. Yet, the power differential is unavoidable. Foucault’s tools allowed us to see the invasive and pervasive nature of confession as a tactic of control of SOGI refugees—their bodies and souls—by asylum authorities. To start addressing the oppression and unfairness identified, counteract the pastoral power possessed by authorities, and rebalance power relationships, a multi-strand strategy is necessary, entailing the introduction of a range of measures at different jurisdictional and stakeholder levels. In the context of the Council of Europe, for example, it is urgent that the ECtHR improves its judgments as to give the principle of the benefit of the doubt the role it warrants,¹⁷⁰ and avoid excessive deference to domestic authorities in relation to the credibility assessment of SOGI claimants.¹⁷¹ Measures should also be taken at the EU level to deal with late disclosures in a fairer way. EU policy-makers are aware of this, as Jean, a member of the European Parliament, told us:

[T]here are certain circumstances in which you [as asylum claimant] wouldn’t necessarily again want to identify yourself at that point, in the whole of the system, because it is new, you don’t know where you are, you don’t know what this means, you don’t know what the implications are, if your experience has been, you know, fear for your life, fear of violence, fear of bullying, being ostracized. At that stage in the process, are you actually going to make your, are you basically going to declare yourself at that point, when you don’t know what the implications are?¹⁷²

170. Refugee Handbook, *supra* note 9, ¶¶ 203–04.

171. For a lengthier analysis of these arguments, see Ferreira, *supra* note 79, at 96–100.

172. Interview with Jean, member of the Eur. Parliament, in Brussels (on file with author).

In the process of reforming the Common European Asylum System (CEAS), the guidance provided by the CJEU in *A, B and C* and *XY* regarding late disclosure issues can be integrated into the Proposed Qualification Regulation.¹⁷³ This would strengthen the prohibition on using delays in disclosing one's SOGI to automatically harm claimants' credibility. Moreover, as explained in Part III.B, in *XY* the CJEU pointed out that—provided domestic legislation so specifies—Member States are allowed to reject subsequent asylum applications if new elements have not been brought up in the initial asylum process owing to the applicant's fault. The CEAS reform should be used as an opportunity to amend this norm and impose on Member States the obligation to consider late disclosures (including late claims) on their merits and in a holistic fashion, rather than depriving claimants of a fair hearing in those cases. Finally, in relation to *sur place* claims, it is important that any amendment of the current norms safeguards the position of those SOGI claimants who were previously unable to express their sexuality or gender identity, and now wish to do so.¹⁷⁴

More generally, the "New Pact on Migration and Asylum," proposed by the European Commission in 2020 and currently under negotiation, includes several elements.¹⁷⁵ These include the creation of the legal fiction of asylum claimants not being yet in a Member State's territory during pre-entry screening procedures, as well as the removal of a second level of appeal against decisions taken in border procedures. The Pact also proposes the speeding up of returns of irregular migrants to their countries of origin, and further accelerating procedures in conjunction with a wider use of the notion of safe country. All

173. Either as a recital as proposed by ILGA-Europe or as part of Article 4 as proposed by the UNHCR. See ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers and Refugees in the Reform of the Common European Asylum System*, 5–6 (2016), <https://www.ilga-europe.org/resources/policy-papers/protecting-rights-lgbti-asylum-seekers-and-refugees-reform-common-european> [<https://perma.cc/2SSY-U8XL>]; U.N. High Comm'r for Refugees, *Comments on the Eur. Comm'n Proposal for a Qualification Regul. – COM (2016) 466*, at 9–10 (2018), <http://www.refworld.org/docid/5a7835f24.html> [<https://perma.cc/QTQ4-4U4F>]; SOGICA Project, *32 recommendations to the Eur. Comm'n on the new EU LGBTI+ Equal. Strategy*, 6 (2020), <https://www.sogica.org/database/sogica-project-32-recommendations-to-the-european-commission-on-the-new-eu-lgbti-equality-strategy-2020> [<https://perma.cc/CQ2Z-SGWP>].

174. For more on the reform of Article 5(3) of the Qualification Directive, see NUNO FERREIRA ET AL., *THE REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM: FIFTEEN RECOMMENDATIONS FROM A SEXUAL ORIENTATION AND GENDER IDENTITY PERSPECTIVE* 16–17 (2018).

175. Eur. Comm'n, *Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020*, EUR. COMM'N (Sept. 23, 2020), https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en [<https://perma.cc/R9VZ-XAM6>].

these elements not only further endanger the human rights of asylum claimants in Europe and EU law's compliance with European and international legal standards,¹⁷⁶ but also potentiate greater unfairness when dealing with late disclosures.¹⁷⁷ It is thus crucial that the New Pact is not adopted or, if adopted, that these proposals be revised to avoid depriving SOGI claimants from the time, space and support they need to submit and argue their claims.

Domestically, there is also much scope to improve the way authorities usually deal with late disclosures. From a procedural perspective, it is crucial that authorities respect SOGI claimants' confidentiality, carry out their interviews separately from other family members, and act upon requests to change interviewer or interpreter on account of their gender, ethnicity or religious beliefs, as well as generally offering an empathic and respectful environment.¹⁷⁸ All these measures would lead to an interview setting that fosters claimants' trust in the system and prompts them to open up about their SOGI more easily. As Jules, a staff member at International Lesbian, Gay, Bisexual, Trans and Intersex Association - Europe (ILGA-Europe), asserted:

[T]o open up about something that makes you even more vulnerable, that just takes time and it takes trust and so, if you have officials and/or interpreters who really understand it and actually are able to express it and convey it and develop this trust with people, I think that is honestly the only real way, is through conversation, because each individual is individual.¹⁷⁹

To complement an empathic and respectful interview setting, authorities should accept the sharing of the burden of proof and be proactive in terms of gathering all potentially relevant evidence,¹⁸⁰ which

176. Daniel Thym, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum*, EU IMMIGR. AND ASYLUM L. AND POL'Y (Sept. 28, 2020), <http://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum> [<https://perma.cc/EEM9-T5SQ>]; Giuseppe Campesi, *The EU Pact on Migration and Asylum and the Dangerous Multiplication of 'Anomalous Zones' for Migration Management*, ASILE (Nov. 27, 2020), <https://www.asileproject.eu/the-eu-pact-on-migration-and-asylum-and-the-dangerous-multiplication-of-anomalous-zones-for-migration-management> [<https://perma.cc/6TFS-MP2S>]; Geoff Gilbert, *The New EU Pact on Migration and Asylum and the Global Compact on Refugees and Solutions*, ASILE (Sept. 2020), https://www.asileproject.eu/df_new-eu-pact-and-solutions-gilbert [<https://perma.cc/D65K-X8DZ>].

177. Matteo Bonini-Baraldi & Carmelo Danisi, *The 2020 LGBTIQ Strategy in Review: Study for Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies* ch. 5, 9 (forthcoming 2022) (on file with author).

178. DANISI ET AL., *supra* note 6, at 455–56.

179. Interview with Jules, Staff Member, ILGA-Eur., in Brussels, Belg. (on file with author).

180. U.N. HIGH COMM'R FOR REFUGEES, *Note on Burden and Standard of Proof in*

can contribute to understanding why SOGI may only be disclosed late in the procedure or in a subsequent claim. When it comes to reaching a decision on the asylum claim, and as already noted above in relation to the ECtHR's jurisprudence, authorities need to apply the principle of the benefit of the doubt as foreseen by the UNHCR.¹⁸¹ This principle can play an important role in dealing fairly with late disclosures to the extent that the evidence claimants are able to put forward to explain such late disclosures is commonly sufficient to meet this standard of proof.

Throughout asylum procedures, SOGI claimants (as all other asylum claimants) should have access to quality and free legal advice, which is crucial to ensure they are able to prepare their claims as fully and consistently as possible. To avoid late disclosures and prevent such circumstances from unduly jeopardizing claimants' chances of being granted asylum, the poor and limited availability of legal aid in many European countries needs to be addressed.¹⁸² Furthermore, all actors in the asylum system—including decision-makers, legal representatives, interpreters, and other agencies and individuals supporting SOGI claimants—should receive initial and regular training on SOGI and asylum matters,¹⁸³ thus increasing their awareness of the range of circumstances that may lead to late disclosures and why SOGI claimants in those circumstances are still entitled to see their claim assessed as objectively and fairly as possible. As Emily, an asylum decision-maker in the UK, confirmed, much more needs to be done to make all stakeholders aware of the possibility of claiming asylum on SOGI grounds and all issues related to it:

[M]aybe make people more aware. A lot of people [claimants] come in, and it certainly won't go against them at the end of the day, but the questions asked, like, "if you've been here for 15 years, why have you never claimed asylum?" So, if people knew . . . I don't think I knew before this job that [SOGI] is actually a specific reason for claiming asylum in this country, I've lived here for 28 years and I didn't know that, so it might be that, more awareness, I guess . . .¹⁸⁴

Refugee Claims, 6 (Dec. 16, 1998), <https://www.refworld.org/docid/3ae6b3338.html> [<https://perma.cc/3P25-EAAY>]; See U.N. HIGH COMM'R FOR REFUGEES, *supra* note 8, at 196.

181. *Refugee Handbook*, *supra* note 9, ¶¶ 203–04.

182. *E.g.*, REFUGEE ACTION & NACCOM, TIPPING THE SCALES: ACCESS TO JUSTICE IN THE ASYLUM SYSTEM, <https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf> [<https://perma.cc/T7UE-GRRB>].

183. DANISI ET AL., *supra* note 6, at 468–72. See also, in relation to interviewers in particular, Directive 2013/32/EU, *supra* note 53, at 71.

184. Interview with Emily, Decision-Maker, in the UK (on file with author).

Admittedly, this multi-strand strategy to improve the asylum system as far as SOGI late disclosures are concerned cannot solve all the problems identified, but it can go to some lengths to ameliorate the injustices analyzed throughout this article. It is unreasonable to expect claimants to feel comfortable and able to articulate a narrative of SOGI-based persecution immediately upon reaching a European country after a lifetime of hiding from officials who they are, what they do or how they feel. Without naively expecting decision-makers to fully realize and integrate the discursively constructed and fluid nature of SOGI, Western societies that have normalized confessional technologies across the board must understand the violence such expectations inflict on SOGI claimants. Moreover, often only a turn of events after arrival to Europe forces members of SOGI minorities to apply for asylum. Such delays do not in any way reflect a lack of genuine, well-founded fear of persecution. Late disclosure and late claims should thus be accepted and dealt with by the asylum system without any prejudicial outcomes. There seem to be some positive developments in some jurisdictions along these lines, with Amanda, an NGO worker, praising some progressive case law:

[T]here is quite a revolutionary approach in combining psychological harm with the credibility of the applicant and an understanding [of] why late disclosure is a specific issue in sexual orientation claims, which I haven't seen for any other [W]ell, which is quite rare to see for other grounds of persecution¹⁸⁵

This degree of understanding for late disclosures in SOGI asylum claims is very much welcome, in light of the range of factors affecting the confession of one's SOGI and the experiences of SOGI claimants within the complex networks of power analyzed throughout this article. Facilitated by a Foucauldian lens, the time has come for a full-fledged re-evaluation of the need to confess one's SOGI when and how asylum authorities determine. Instead, we need to reinterpret SOGI refugees' silence and "lateness" in asylum procedures.

185. Interview with Amanda, NGO Worker, in Brussels, Belg. (on file with author).