

# European Sexual Nationalism: Refugee Law After the Gender & Sexuality Critiques<sup>1</sup>

*Thomas Spijkerboer, VU University Amsterdam - Nordic Asylum Seminar,  
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The feminist critique of refugee law was first formulated in the early 1980s. It concerned the public/private distinction (disregard for sexual violence, for women's contributions to political opposition), and the neglect of gender as a persecution ground. Sexual violence as a form of persecution and gender as a persecution ground were incorporated in Western refugee law in the wake of the Bosnian refugee influx, via UNHCR and EU law. In the early 1990s the first arguments for asylum for lesbians and gays were made. Here, main issues were recognition of the multi-faceted predicament of LGBT (Lesbian, Gay, Bisexual and Trans) people as persecution; recognition of sexual orientation as a persecution ground; discretion (i.e. do it yourself-protection by giving up the right you want to exercise – I will get back to that); and credibility.

In this contribution, I want to take stock of what the gender and sexuality based critiques of refugee law have achieved. As this is an over-ambitious aim for a 35-minute talk, this will reflect a very partial perspective. I will not be able to do justice to the vast and very valuable body of literature on these topics.

I will first address statistical issues, because it makes sense to start with the question whether female or LGBT asylum seekers get asylum less often than straight men. Then I will address the question how law is being applied today, now the gender and sexuality critiques of refugee law have been incorporated in legal practice. Having done that, I will try to understand this reformulated refugee law by using the concept of sexual nationalism.

## **Statistical evidence on discrimination**

In the debate, a number of statistical claims have been made about under-representation of, in particular, women among the people who are granted asylum. As I am not aware of substantially new findings since my own book 15 years ago, so I will shortly present these data. Contrary to a widely held folklore belief<sup>2</sup> there is no over-representation of women in the world refugee population; roughly 50% is female (and also 50% are minors; the cause of the idea that 75% of

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<sup>1</sup> I am very grateful for the invitation to speak at this seminar. I also thank Deniz Akin, Gregor Noll and Janna Wessels for critical comments on earlier versions.

<sup>2</sup> I.a. Hathaway's *Law of Refugee Status*, Butterworths, 1991, p. v, footnote 1.

the world refugee population is female is the conflation of women and children into one category of females). However, only abt. one third of asylum claimants in western countries is female.<sup>3</sup> This one third is unevenly distributed over countries of origin: women tend to come from countries with high granting of asylum rates.<sup>4</sup> So statistics on decision making in themselves therefore are not an indication of discrimination against women.<sup>5</sup> Women do not get asylum less often than men.

For LGBT asylum claims, Dauvergne & Millbank<sup>6</sup> and Rehaag<sup>7</sup> concluded that there are no indications that decisions on gay and lesbian claimants less favourable than general asylum decisions.

Despite these reassuring outcomes, a few points have to be made. First, gender plays a significant role in who goes to the West (only one third of asylum seekers in Western countries are female). In light of the risks of this journey, it remains to be discussed who is discriminated against. But forced migration to the West is clearly gendered. Secondly, trans applications are very low compared to levels of violence faced by trans people. This suggests that trans people have problems in accessing the asylum system altogether. Thirdly, bisexuals seem to be granted asylum less often than gays & lesbians as well as straight applicants.<sup>8</sup> This is consistent with the trend in decision making to assume that bisexuals don't need international protection because they can protect themselves by acting straight.

However, the conclusion so far is that statistics are not evidence that female, lesbian or gay asylum applicants are discriminated against compared to straight men. For bi and trans applicants, statistics do indicate discrimination compared to straight men. However, even the data on women, lesbians and gays do not address the concern that asylum applications of women and LGBT people may be rejected in a way that does not do justice to their position as women or LGBT people. So let us look at two examples of how the law is applied in women's and LGBT cases.

### **Refugee law after the gender and sexuality critiques**

The feminist critique of refugee law showed that sexual violence was considered as private regardless of whether it occurred during interrogation or in a relationship. Campaigns of NGOs and analyses by authors like Deborah Anker and Katherine MacKinnon argued that sexual violence counted as inhuman treatment if it occurred during interrogation or ethnic cleansing.

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<sup>3</sup> See my *Gender and Refugee Status*, Ashgate, Aldershot 2000, p. 15-17.

<sup>4</sup> Ibid. p. 24-25.

<sup>5</sup> Ibid. p. 17-27 for Netherlands 1989-1995 and Canada 1989-1994.

<sup>6</sup> Catherine Dauvergne and Jenni Millbank: Burdened by Proof. How the Australian Refugee Review Tribunal has Failed Lesbian and gay Asylum Seekers, 31 *Federal Law Review* (2003), 299-432, at 302.

<sup>7</sup> Sean Rehaag: Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada, 53 *McGill Law Journal* (2008) p. 59-102 at 69-71.

<sup>8</sup> Sean Rehaag: Bisexuals Need Not Apply. A Comparative Appraisal of Refugee Law and Policy in Canada, the United States and Australia, 13 *International Journal of Human Rights* (2009), 415-436 at 421.

They argued that in private relationships the same was true, and that the core question was whether the state authorities were willing and able to grant protection. This campaign was successful. Sexual violence committed by state agents was not seen as just a matter of uncontrolled sexual urge (and therefore private), and non-state agents (including husbands) were recognised to be potential agents of persecution. However, at the same time the concept of agents of protection also became broader. In many cases, the mere existence of privately run women's shelters in the country of origin is sufficient to assume protection against domestic violence, even if there are only a dozen places for an entire country. Also, we see that relatives, and even asylum seekers themselves, are considered to be agents of protection.<sup>9</sup>

The European Court of Human Rights judgement in the case of *A.A. and others v Sweden*<sup>10</sup> concerns six Yemenite nationals, being a mother, her three daughters and two sons. At the moment of the judgement, only the youngest daughter is still a minor. The mother and the oldest daughter both have been married off at a young age. The second daughter was planned to be married off when she and her mother fled the country, while the youngest daughter would probably be married off as well. The mother's husband was very strict with her, burnt her and threatened her with a knife. She had tried to obtain a divorce but had been told by the court to solve her private problems with her husband. The husband of the oldest daughter treated her like a servant but had agreed to divorce her if he were to be reimbursed the USD 4.000 dowry. The mother had petitioned to prevent the marriage of the second daughter but the court decided that the head of the family was to make this decision. The mother's brother has helped to get the mother and second daughter out of the country, later followed by the other children.

The Court concludes that the forced return of the mother and her five children would not violate Article 3 ECHR. Although the court's reasoning is detailed, the recurring main argumentation consists of a combination of disbelief and alternative protection in the country of origin.

Disbelief is the first line of argument the Court uses to dismiss the application. The judgement continually refers to doubts about the veracity of the applicant's statements. But it does not first decide which parts of the statements are found credible, and then evaluates them in light of Article 3. Instead, it intersperses the passages on whether the facts amount to a real risk of inhuman treatment with interjections undermining the facts which are being evaluated. This has the effect of lowering the threshold for concluding there is no real risk.

The court's second line of argument concerns individualisation. The claim of the applicants essentially is that the women are forced to marry without their consent, are defenceless against violence from their husbands, and run the risk of crimes of honour if they try to leave their husbands. Together with the corroborating country information, this could have been considered as evidence that the women have been or will be married without their consent, which has

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<sup>9</sup> Hemme Battjes: *De ontwikkeling van het begrip bescherming in het asielrecht*, Inaugural lecture Vrije Universiteit Amsterdam, 2012.

<sup>10</sup> ECHR 28 June 2012, *A.A. and others v Sweden*, 14499/09.

already or will in all likelihood imply sexual intercourse without their consent. But while the risk of forced marriage had materialised for three of the four female claimants before they left the country of origin, this is considered as insufficient (even in these three cases) even for concluding the applicants have passed the initial threshold (“adduce evidence capable of proving deportation would run contrary to Article 3”, which would allow the respondent state to dispel any doubt about the risk).

Third, the court finds the applicants quite capable of taking care of themselves. The first applicant is praised for having “shown proof of independence by going to court in Yemen on several occasions to file for divorce from X and also shown strength by managing to obtain the necessary practical and financial means to leave Yemen.” (para 83). The two sons are “now adult men, they are free to find jobs and settle where they wish within the country.” (para 80). The oldest daughter “would be able to obtain a divorce if she paid the money demanded” (para 89). Of the second daughter the court finds it relevant to remark that “she is now adult” (92).

Fourth, the Court uses a very wide notion of agents of protection. The two by now adult sons of A.A., as well as her brother, are mentioned as sources of protection. The Court’s analysis on this point is devoid of any form of normativity. Are the brothers and sons obliged to protect the women, are the women entitled to protection by the men? Are there any guarantees that the men will deliver? Will they expect something in return for their services and for the risks they run in doing so? The Court simply finds it plausible that A.A.’s brother will protect her because he has assisted her before. And it assumes that the sons will be a source of protection, without indicating why.

In the court’s reasoning, forced marriage (with the domestic and sexual violence that comes with it) is in effect considered as insufficiently serious. This means that patriarchal notions of women belonging to men are being reinforced by the judgement. The Court takes as given, and thereby reproduces the assumption that seems to be dominant in Yemenite family relations that women need a male relative (father, husband, brother, son) in order to be protected against violence of other men. The judgement assumes and thereby reproduces the social system of female dependency on male relatives, of which forced marriage forms a part. Article 3 ECHR apparently does not protect women against patriarchy even in its most violent form. It requires women to play by its rules – try to pay back the dowry, try to identify nicer men to protect you and hope that alternative dependency will not turn violent as well. This fits with the Court’s case law on Al Shabaab (“playing the game”)<sup>11</sup>, gays,<sup>12</sup> and religion cases,<sup>13</sup> where the Court also expects people to “play by the rules”.

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<sup>11</sup> ECtHR 28 June 2011, 8319/07 and 11449/07, *Sufi and Elmi v the United Kingdom*, par. 275-277 & 295.

<sup>12</sup> ECtHR 26 June 2014, 71398/12, *M.E v Sweden*. The case was referred to the Grand Chamber but subsequently struck out because Sweden decided not to deport M.E.

<sup>13</sup> ECtHR 28 February 2006, 27034/05, *Z. and T. v the United Kingdom*.

### *Discretion in sexuality cases*<sup>14</sup>

A legal issue that came up in cases concerning sexual orientation was the idea of *discretion*. The idea behind discretion reasoning is that in many countries, even those where homosexual or transgender behaviour and/or identity are criminalised, people can live according to their identity without major risks, provided that they behave discreetly. Parks in Teheran, touristy beaches in Gambia, and the privacy of the bedroom are possibilities to which applicants are referred and where – or so decision makers claim – they can enjoy the privacy rights to which international human rights law entitles them without running excessive risk. Implicitly, the privacy rights which amount to the right to sexual autonomy are often limited to the right to have sex. These privacy rights are argued not to include the right to “flaunting”, “conspicuous” and “unnecessarily risky” behaviour. Applicants are, in other words, denied international protection because they are expected to protect themselves by keeping a low profile. In practice, LGB people will be expected not to share with their friends, relatives, colleagues and fellow students how they spent their weekend; they should not be seen too often with their partner; if they visit places that are marked as LGB venues they should keep it a secret that they have gone there. They should not even think of cohabitation. And they will have to figure out an explanation for not marrying. For many people, this will mean they have to conceal, in most of their social contacts, those parts of their lives that mark them as sexual minorities. And they will have to do so for life. Relying on the rallying cry that lesbian, gay and bisexual asylum applicants should not be ‘sent back to the closet’, a rather successful campaign for abolishing discretion reasoning has been made (New Zealand, Australia, the Netherlands, the United Kingdom, Sweden, Finland and Norway formally abolished discretion reasoning between 2003 and 2012, as did the Court of Justice of the EU). The success of this campaign is made possible in part by the clear cut-ness of its demand: ban one particular ground for denying refugee status.

But discretion reasoning turns out to be a virus that easily deal with vaccines, by mutating. I have outlined this more extensively in my concluding contribution to the *Fleeing Homophobia* edited volume. I will limit myself here to briefly indicating the mutations. The internal flight alternative can function as one of them, as can rephrasing cases as *sur place* cases. Voluntary discretion, as applied by the UK Supreme Court, is a third variety, while the transformation of the normative requirement of discretion into a factual prediction as made possible by the EU Court of Justice is a fourth variety. A social visibility approach as developed in the US is the fifth mutant, and the position that only “activities properly understood to be inherent” in sexual orientation should lead to refugee status is a sixth.

The highest courts of our continent base their judgements on the assumption that female as well as LGBT people will “play by the rules”, by assuming that they will make use of the niches which patriarchal social systems contain in order to prevent violence being unleashed against

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<sup>14</sup> This passage is based on Thomas Spijkerboer: Sexual identity, normativity and asylum, in Thomas Spijkerboer (ed): *Fleeing Homophobia. Sexual orientation, gender identity and asylum*, Routledge, London/New York p. 219-222.

them. This leads to double standards. For example: whereas it is a human right for Europeans to live in a legal system which does not criminalise homosexual behaviour, this turns out to be a European, not a universal human right. This is reason for concern for Europeans, not just for asylum seekers. If a human right is not universal, it can hardly be considered as fundamental. If one of the political mood swings in Europe which we are witnessing these days goes in the direction of blatant sexism and homophobia, we cannot expect protection of our human rights because we can be expected to play by the rules.

### **Sexual nationalism**

So what we see is that notions on gender and sexuality which, to me at least, are obviously objectionable can survive in different legal contexts, and even when it seems reasonable to assume that the intention of the legislator, the policy maker or the judiciary was to declare a particular notion unacceptable. Dominant notions of gender and sexuality in Europe are not as liberated as they are often claimed to be.

How can we begin to understand this new situation of refugee law, where it has addressed the gender and sexuality critiques without having delivered the results one would expect of that? I propose to look at the concept of sexual nationalism.

In recent decades, the notion of citizenship has become culturalised. Citizenship has become less a question of formal status, more a question of cultural and moral identification. An example of this culturalisation is the notion of the ‘second generation migrant’ – a label which does not refer to the nationality of the people concerned, and which usually is plain incorrect because the people concerned have never migrated. What the notion refers to is the presumed cultural otherness of this group of people, and their presumed lack of capacity to participate in European societies – to “play by the rules” (our European rules, that is) as it were. But simultaneous with this culturalisation of citizenship, European culture has been redefined. It is not defined anymore by a common cultural heritage (literature, philosophy, music). Although an effort is being made to define European identity through democracy and the rule of law, that project is not doing too well either. The decreasing turn-up rates at elections, the influence of media hypes on the behaviour of the electorate, the incapacity of parliaments to effectively control specialised bureaucracies, the transfer of decisions with major social impacts to the market, the increasing objections to judicial oversight of human rights – these and other developments make it hard to make a convincing identity narrative out of democracy and the rule of law. Increasingly, European identity is defined by what it is not. Especially in North-Western Europe, it is defined in opposition to organised public religion, and as fundamentally characterised by women’s and gay rights. This means that people who are considered in dominant opinion as being attached to an organised public religion which is not as emancipated as Europe imagines itself to be (a cumbersome way of saying: Muslims) are non- or even anti-citizens. At first sight it seems problematic to define European identity with such an emphasis on women’s and gay rights. The nation has not at all been queered. Quite the contrary. For example: marriage has not been

abolished (as both radical feminist and queer activists demanded); marriage has been reinforced by allowing gays and lesbians to aspire to it as well. The identity that is being claimed by Europeans for themselves is not so much anti-patriarchal, but instead is one that considers identity as a matter of “unattached, self-fashioning and self-regulating individuality, (...) folded into a discourse of neo-liberal citizenship.”<sup>15</sup> Being a stay at home-mother or a staunch heterosexual is a choice, and is not necessarily seen as giving in to patriarchy. In this way, “gay identity does not threaten heteronormativity, but in fact helps shape and reinforce the contours of ‘tolerant’ and ‘liberal’ Dutch national culture.”<sup>16</sup> Similar analyses are made on gender.<sup>17</sup> The women’s and gay rights movements have been successful to the extent that equal treatment before the law is the norm and violence against women and LGBTs a criminal offense. In this way, non-traditional ways of living (such living single, or living openly with a same-sex partner, or being a full-time working mother) have become possible as options, while the idea of radically altering the tradition altogether has been given up. Traditional choices are a legitimate possibility, as long as they are considered to be autonomous choices. Wearing an outrageous piece of clothing is fine when it is seen as an expression of autonomy (as in: Gothic), but as a sign of non-citizenship when it is considered an expression of a lack of individual autonomy (as in: veiling). Being a stay at home-mother is fine when it is considered to be the choice of an emancipated woman, but as backward when it is considered to be imposed by the Muslim family of the woman. Identity must be an autonomous choice, not a group characteristic. The overwhelming majority of the population may be making very similar choices, but because these are honestly experienced as being autonomous they underscore, not undermine the emancipated character of European identity.<sup>18</sup> The irony of this (a compulsory experience of autonomy as the defining group characteristic) seems to be lost on most.

If we look at gender and sexuality in refugee law through the lens of sexual nationalism, the trends in European asylum law which I outlined above become easier to understand. Yemenite women simply do not have the right to live in a non-patriarchal society – neither do we. Ugandan gays simply do not have a right to live in a non-homophobic country – neither do we. Living freely and openly as a single woman or a gay man would lead to violent retaliations against Yemenite women and Ugandan gays. Yet this does not, in itself, entitle them to asylum. We do not, as a normative requirement, expect them to seek protection of a male relative, or to live in the closet. But we are confident that they will be able to (and actually *will*, as a matter of fact) make individual choices about how to live their lives. And our reasonable expectations about

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<sup>15</sup> Paul Mepschen and Jan Willem Duyvendak: *European Sexual Nationalisms: The Culturalization of Citizenships and the Sexual Politics of Belonging and Exclusion*, <http://religionresearch.org/closer/2012/12/30/sexual-nationalisms-culturalization-of-citizenship/>

<sup>16</sup> Ibid.

<sup>17</sup> Judith Butler: *Sexual Politics, Torture, and Secular Time*, *British Journal of Sociology* 59(2008), p. 1–23, compare the work Nira Yuval-Davis: *Gender and Nation*, Sage, London 1997; Sarah van Walsum: *The Family and the Nation. Dutch Family Migration Policies in the Context of Changing Family Norms*, Cambridge Scholars, Newcastle upon Tyne 2008.

<sup>18</sup> Comp. the experience of individuality and authenticity in collective emotions in situations as disparate as the death of Lady Di, the MH17 downing, and the Charlie Hebdo assault.

their behaviour will often make us confident they are not facing a well-founded fear of being persecuted. What at first may seem like cynicism may be perfectly honest: the Court's praise for the autonomy A.A. has displayed when navigating Yemenite patriarchy may be not that dissimilar to the way Europeans deal with the normative systems in which we have to get a life. As long as it is possible to discern some form of autonomy in the ways in which the dominant system is being navigated by the individuals concerned, things are ok: such Europeans are true citizens, and such Yemenite women and Ugandan gays are not in need of international protection.

We can see that legal discourse is one of the sites where sexual and gender identity are being produced. The resulting notions of gender and sexuality are full of internal tensions and they are continually shifting. Law – including refugee law – is one of the languages in which we reproduce ourselves in these gendered and sexualised systems of meaning.<sup>19</sup> The starting point of the analysis I propose to undertake does not focus on the outcomes of asylum cases or the holdings of courts in particular cases, as traditional analysis would do. Instead, or at least in addition to that, we can focus on the ways in which women and homosexuals (as well as, implicitly, their others: men and straights) are represented in law – in other words, we can focus on how we are representing ourselves in the refugee law discourse we produce.<sup>20</sup>

Whereas autonomy has been made to be a central characteristic of European identity, we see a development towards vulnerability as the crucial ground for protection. We are witnessing the beginnings of a conceptual system in which autonomy excludes vulnerability.<sup>21</sup> The two concepts are defined in opposition to each other. A Yemenite woman who shows autonomy in her life choices is thereby not vulnerable, which allows the Court to disregard the social structure in which she has to make her life choices and which make her quite vulnerable, regardless of how autonomous she may be. Therefore, there cannot be ground for granting international protection to this woman, because of her autonomy & corresponding lack of vulnerability.<sup>22</sup> A Libyan gay man who can be reasonably expected to hide his sexual preference when in Libya is, by hiding his sexuality, exercising some form of autonomy. The social structures which make it a good idea that this man lives in the closet are not part of the analysis, and are taken for granted. Because a Libyan man has the option to live in the closet, he is not merely a passive victim who, by his vulnerability, is entitled to international protection but an autonomous person who will fend for himself.

## **Conclusion: a shift in the refugee concept**

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<sup>19</sup> Mary Joe Frug: A Postmodern Feminist Legal Manifesto (An Unfinished Draft), in: Dan Danielsen and Karen Engle: *After Identity. A Reader in Law and Culture*, Routledge, New York/London 1995, p. 7-23.

<sup>20</sup> Dan Danielsen: Identity Strategies. Representing Pregnancy and Homosexuality, in: Dan Danielsen and Karen Engle: *After Identity. A Reader in Law and Culture*, Routledge, New York/London 1995, p. 39-60

<sup>21</sup> Note that I do not claim that there is a sudden rupture. I do argue that we see a new trend where autonomy is not seen as emblematic of the archetypical refugee, but as his opposite.

<sup>22</sup> This analysis is inspired by work of Alison Diduck on developments in English family law.

Since the signing of the Refugee Convention in 1951, Western states have been developing new ways of looking at the refugee concept. Who is in need of protection, who is to be granted protection, which state should do so? In this way, the refugee concept mirrors the concerns of the receiving societies: what is considered to be important, what are core values? Because societies – including Western societies – continually develop, the refugee concept as it functions in Western states develops as well. The present day concern with equality regardless of gender or sexual orientation therefore does not so much reflect a new phenomenon (gender-based persecution and homophobia existed well before they were identified by the gender and sexuality critiques of refugee law), but can much better be understood as reflecting the more prominent role which gender equality and LGBT rights have come to play in the self-understanding of Western societies. Whereas in the 1950s and 60s a major element was that Western countries were non-communist and democratic, Western societies see themselves increasingly as places characterised by the promises of gender equality and LGBT rights. Changes in the refugee concept have always been advocated by actors in Western countries who were concerned with – successively – decolonisation, pacifism, ethnic minority rights, anti-fascism, as well as feminism and LGBT rights. The changes have not been the result of foreign refugees demanding recognition of their previously disregarded claims, but of domestic activists. There were no gay asylum seekers in the 1960s, not because there were no asylum seekers who were gay but because they would base their asylum claim on dominant social values like anti-communism and act prudently when it came to their sexual preference.

The Soviet response to the Hungarian uprising in 1956 made clear that Western countries also wanted to protect people fleeing events taking place after 1951; this was solved by the 1966 Protocol. In the early 1970s some European states valued conscientious objection to military service to such an extent that they gave asylum to draft evaders from the US, Portugal, Greece and Spain. The international recognition of draft evasion as a ground for asylum occurred in the wake of the war in former Yugoslavia. The late 1970s and 1980s saw people fleeing conflicts which did not play a clear role in the Cold War, or which occurred in Western allied countries: Turkish Christians, Turkish Kurds, Srilankan Tamils. Concepts like the country of first asylum, the internal flight alternative, non-state agents of persecution, and group protection were developed in a situation of conflicted reflexes in Western countries: an abhorrence of ethnic violence but also the feeling that as post-colonial states there is no Western responsibility for protracted ethnic conflict. These conceptual innovations were incorporated in policy and case law of Western states, and codified in UNHCR positions and EU law.

I posit that, today, we are witnessing a fundamental shift in the refugee concept: from the masculine autonomous dissident (think: Vaclav Havel, Vladimir Bukovsky) to the feminized vulnerable person lacking autonomy, therefore probably also lacking name. Granting asylum to heroic individuals is an honour we have passed on to other parts of the world. Edward Snowden is living in Moscow, not in Uppsala.