Two remarks on queer law and queer politics: Thomas Spijkerboer Responds to Jenni Millbank & Guglielmo Verdirame

by NYU Journal Of International Law And Politics

Panel 3 of the *NYU JILP* Vol. 44:2 Online Symposium

Thomas Spijkerboer is professor of migration law at VU University Amsterdam. His publications in English include *Gender and Refugee Status* (Ashgate, 2000), *Women and Immigration Law* (Routledge, 2007, edited volume with Sarah van Walsum), and *Fleeing Homophobia* (VU University Amsterdam/COC Nederland, 2011, with Sabine Jansen).

A couple of weeks ago, a friend of mine who works for the Dutch asylum authorities told me an example of why he feels uneasy about the Dutch asylum policy towards gay Iraqi asylum seekers. The short version, which is sufficient for our purposes, is that a man was badly beaten because he was (correctly) thought to be gay because he wore very tight jeans. Even from this short summary, it is clear that this man was subjected to persecution on account of his being gay. Such past persecution as a result of membership of a particular social group gives rise to a presumption of a well-founded fear of being persecuted in the future; state practice to this effect has been codified in Article 4(4) of EU Directive 2004/83.

The Hathaway/Pobjoy article gives ample arguments to deny this claim, allowing this man to return to a situation in which he has a well-founded fear of being persecuted on account of being gay. The reason why they argue that this claim has to be denied is because "[w]here risk accrues only by virtue of an applicant having engaged in an activity no more than peripherally associated with sexual identity – including where risk arises from an imputation of sexual identity derived solely from having engaged in such activity – it cannot be reasonably said to be a risk that arises " 'for reasons of' sexual orientation." Without any doubt, dressing in tight jeans is in the same category as the examples taken from Lord Rodgers' statement which apparently so turns on Hathaway and Pobjoy: attending Kylie concerts, drinking exotically colored drinks, and doing boy talk.

The Hathaway/Pobjoy argument leads to denial of a refugee claim, which clearly should not be denied. Something is fundamentally wrong with their argument. I posit that their article has two problems. The first is an incorrect application of refugee law doctrine – surprising, because Hathaway's 1991 book is such an impressive doctrinal analysis. The second consists of the fantasy (current among legal scholars, therefore less surprising) that law and politics can be meaningfully separated.

I

The doctrinal error consists of mixing up persecution and persecution ground. They argue that – translated to the case I want to focus on – wearing tight jeans is not a protected activity. They promise to come up with internationally agreed standards to distinguish protected activities from non-protected activities, but they fail to devise a meaningful set of standards.

The way in which a political opinion or sexual identity is expressed may take many forms: from waving flags to holding speeches. The form which such an expression takes is immaterial; what is material is the fact that it may be followed by persecution not on account of the means of expression (waving a multi-colored piece of cloth or tight jeans), but on account of what is (perceived to be) expressed (political affiliation or sexual preference). In other words, the way in which potential persecutors find out that someone belongs to a group which they want to persecute is irrelevant. It may be that in 1942 a Lithuanian assimilated Jew was careless, as a result of which he was found out to be circumcised. It may be sheer stupidity that made a hair get out from under a chador which brought the religious police to believe an Iranian woman was a loose woman. Hiding forbidden political or religious materials in stupid places may expose someone's political or religious convictions. Hathaway and Pobjoy would argue that such carelessness and stupidity are not protected activities. This is most correct. But it is equally irrelevant. These people are not persecuted on account of being stupid, but rather on account of their race, gender, or political and religious convictions.

Why is it that Hathaway and Pobjoy, in their discussion of Kylie, cocktails, and boys, don't see this evident point? First, because they have no sense of humour – which is bad enough in itself. Second, because they transfer a discussion which is relevant in the context of persecution to a context where it is irrelevant—namely persecution ground. In the second part of their article, they correctly argue that in cases turning around the concealment requirement, the persecution will normally consist of being forced back into the closet. The continual state of "fear and anguish" (comp. ECtHR 8 November 2005, *Bader and others v Sweden*, par. 47; ECtHR 22 June 2006, *D. And others v Turkey*, par. 56) which being in the closet implies constitutes inhuman treatment, and therefore it constitutes persecution. It is in this context that tight jeans, Kylie concerts, cocktails, and boy talk are relevant.

Being forced to conceal my sexuality by the continual threat of violence constitutes persecution (although I find the term "endogenous" an unfortunate term; the threat of violence is crucial in finding this situation rising to the level of persecution, and being beaten up is not endogenous). If I merely cannot wear tight jeans during a Kylie concert while drinking my favourite

cocktail and discussing boys, this does show my surroundings are narrow minded, bigoted, and homophobic. But this impossibility does not rise to the level of persecution, because it is not sufficiently serious. Important as tight jeans, etc. may be to me personally, this denial is not "sufficiently serious…as to constitute a severe violation of basic human rights," as Article 9 ¶ 1 of EU Directive 2004/83 formulates it.

The Hathaway/Pobjoy analysis is incorrect on a technical legal level because it mixes up two questions. For the question of what constitutes persecution, it makes sense to argue that trivialities of the tight jeans/cocktail variety are insufficient. For the question of when there is a persecution ground, trivial signifiers (a loose hair, a green shawl, a red scarf – we all know the classical cases, don't we?) may unleash persecution on account of what the triviality, correctly or incorrectly, is taken to stand for. To formulate this as the question of whether one's hairstyle is protected by international human rights law reflects a fundamental misunderstanding of what refugee protection means in situations such as these.

II

There are two ways in which the Hathaway/Pobjoy article reflects something that might be taken for political ignorance.

First, they equate international law with law in Anglophone jurisdictions, blissfully unaware of other legal systems (most notably European ones). In the Anglophone world, the concealment requirement has been abolished. Therefore, it makes sense to worry about the durability of this gain, and pointing out that one shouldn't get too radical may be a sensible part of that. It is a bit of a nuisance when these tactical manoeuvres are ill-conceived at the level of legal technique (see above), and if (partly as a consequence of this problem of legal technique) they may negatively impact other legal systems where people are still fighting for asylum for persecuted lesbians, gays, bisexuals and trans people being returned to the closet. The Anglo automania of which the Hathaway/Pobjoy article suffers makes them unaware of the consequences of their action outside of the Anglo-American world.

Second, the way in which the developing countries are represented is unnecessarily blunt. While it is clear that many places in the developing countries are worse places to live for LGBT people than many places in the West, the contrast is made to look more stagnant and absolute than it is. The High Court decision in India remains unmentioned, notwithstanding the enormous number of people whose life will be affected by it. On the other hand, the disastrous effects of the Vatican and US based evangelicals on the situation in, in particular, Africa remains unmentioned. In the context of the Hathaway/Pobjoy argument, contrasting the West and the Rest is entirely superfluous.

One might take these two points as examples of ignorance. But that would be too innocent. The term ignorance suggests an absence of information. But the ignorance at stake here is typical of people in the (in this case: Anglophone) centre of a (real or imagined) core/periphery system. They imagine themselves to be in *the* core. Whatever happens in the core is evidently crucial for the situation in the periphery. What is good for the core is good for the periphery. The core is advanced and good, the periphery is lagging behind and, at best, trying to catch up. This is how the Hathaway/Pobjoy article implicitly positions itself both in the Anglo-Europe and in the West-Rest distinctions which it implies. What, in fact, the Hathaway/Pobjoy text is part of, is the endless mutation of the discretion virus. As Millbank has shown, discretion can mutate into disbelief. As Wessels has shown, discretion can mutate into "voluntary" discretion, as it has done in the UK Supreme Court's *HJ and HT* judgement. Where the discretion requirement has been abolished, discretion issues may be reformulated into *sur place* issues, as Battjes has shown.[1] The Hathaway/Pobjoy article proposes yet another way of keeping discretion reasoning alive: by reformulating it so as to be about trivialities such as tight jeans.

What is it about discretion that it is such a big thing? It is evident that there is nothing discreet about straight sexualities. Whenever sexuality is potentially relevant, one is presumed to be straight unless one signals that one is not. Heterosexuality is the presumption (the exception being separated spaces which are coded as non-straight, such as a gay bar). It is not necessary to keep one's straight sexual preferences to oneself so as not to shock or offend, in order to be polite, or in order to avoid harassment. Thus, heterosexuality and non-straight sexualities are not equal when it comes to disclosing or concealing them. It is not necessary to disclose oneself as being straight – that was the presumption all along. It is not necessary to be discreet about one's straight sexual preferences, because there is nothing to hide.

For non-straight sexualities, disclosure and concealment are crucial, and we can observe this in asylum procedures. When people are too late in coming out to the asylum authorities or give evasive responses to explicit sexual questions, these actions damage their credibility. Asylum authorities require immediate and total disclosure. At the same time they may require concealment in the country of origin. This double bind reflects the position of non-straight sexualities in our societies. They are always simultaneously too public (*don't flaunt it*) as well as too private (*you might just as well have told me before that you're trans*). Instead of finding yet another way of dismissing asylum claims by deploying the concealment/disclosure imperative, it would be a better idea if we tried to figure out how it affects us and how it makes us affect others.

Dealing with the fantasy of being the core and addressing the concealment/disclosure predicament requires more than good legal technique. It requires confronting dilemmas which we face as human beings, legal academics, and people whose actions may have political effects. Ideas such as *can a lesbian reasonably be expected to hide her sexuality* (dismissed by now in a few countries) or *is wearing tight jeans an activity protected by international human rights law* (the discretion mutant proposed by Hathaway and Pobjoy) can only function in dominant discourse. This discourse finds it no more than natural to refer lesbian, gay, bisexual, and transgendered people to discretion, be it in the closet or in baggy jeans. One of the presumptions which the Hathaway/Pobjoy text seems to rely on is that one can make legal arguments without dealing with such discourse. Some people with tight jeans, loose hair, green shawls, and red scarves are going to suffer from this – while we are still talking about Kylie concerts, cocktails, and boys.

1 These papers can be found of the ***Fleeing Homophobia*** **website**.

March 9th, 2012 - 2:00 PM EDT | **Trackback Link** |
http://opiniojuris.org/2012/03/09/two-remarks-on-queer-law-and-queer-politics-thomas-spijkerboer-responds-to-jenni-millbank-guglielmo-verdirame/

Related Posts

Jenni Millbank Reflects on Panel 3 and Responds to Guglielmo Verdirame
Discretion in the Netherlands: Sabine Jansen Responds to Jenni Millbank & Guglielmo Verdirame
Queer Cases, Great Law: S. Chelvan Responds to Jenni Millbank & Guglielmo Verdirame
Rt. Hon. Sir Richard Buxton Responds to Jenni Millbank & Guglielmo Verdirame
Dr. Hugo Storey Responds to John Tobin
John Tobin Reflects on Panel 2
Bojana Asanovic Responds to John Tobin
Lucy Yeatman Responds to James Hathaway & Jason Pobjoy
Connie Oxford Responds to James Hathaway & Jason Pobjoy
Queer Cases Make Pretty Good Law – at Least in the United States: Victoria Neilson Responds to James Hathaway & Jason Pobjoy
Sarah Hinger Responds to James Hathaway & Jason Pobjoy
David John Frank Responds to James Hathaway & Jason Pobjoy

Comments are closed.