

Europe's Other: European Law Between Modernity and Postmodernity

Edited by
PETER FITZPATRICK
Professor of Law
Queen Mary and Westfield College
University of London

and

JAMES HENRY BERGERON
Lecturer in Law
University College Dublin

Ashgate

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10 Querelle Asks for Asylum¹

Thomas Spijkerboer²

This one is for Zoran – but for which one?

It must have been in the fall of 1982 (I was in my second year of studying law) that I was early for a party. No music and no alcohol yet. But I was not alone; H. and M. were early also. We decided to go and see a movie. Fassbinder's posthumous film, *Querelle*, had just opened in Amsterdam. We went to one of the biggest cinemas in town, got in, and were only a few minutes late. I missed the – crucial – first scene, yet the film made a great impression. I still vividly remember the blue and yellow light. I had to go to the toilet, and remember thinking that others must think I went to masturbate. I don't remember the party afterwards. The film stayed with me, and I saw it at least three more times before starting to work on this chapter.

On 13 August 1981, the Judicial Department of the Council of State, then the highest Dutch court in asylum cases, decided that persecution on the grounds of sexual orientation should be considered as persecution that can lead to refugee status (Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 13 August 1981, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1981, 5, *Gids Vreemdelingenrecht (oud)* [Guide on Immigration Law (old edition)] D12–51). And let's be precise about things. At that time, Rainer Werner Fassbinder was in Berlin, acting the main role in Wolf Gremm's film *Kamikaze '89* – an adaptation of Per Wahloo's detective novel *Murder on the Thirty-first Floor* (Katz, 1987, p. 176). Dutch jurisprudence was ahead of legal developments in other countries. In Germany, for example, homosexuality was recognized as a relevant persecution ground only in 1986, while it is accepted by some courts that a particularly stringent burden of proof can be put on the asylum-seeker in these cases, as homosexuality is despised in all cultures and states to some degree (Marx, 1991, p. 847–8). In Canada persecution on the grounds of sexual orientation was recognized as persecution in the sense of refugee law in 1986 (Hathaway, 1991, p. 163; comp. the Canadian Supreme

Court decision in *Canada (Attorney General) v. Ward* [1993], 103 D.L.R. (4th), 1, at 34). In the US, the first reported decision granting asylum to a persecuted homosexual dates from 1990 (Decision of the Board of Immigration Appeals *In re Fidel Armando Toboso-Alfonso* A23-220-664 Int. Dec. 3222 (12 March 1990), abstracted in *International Journal of Refugee Law*, 1994, pp. 475–6 as IJRL/0201; see on this decision Goldberg, 1993, p. 617, Grider 1994, p. 221). The Attorney General in 1994 designated that decision as precedent in all proceedings involving the same issue (Order of 16 June 1994, of Janet Reno, US Attorney General). In the United Kingdom, the first decision that allowed for the possibility of persecuted homosexuals to be recognized as refugees dates from November 1994 (in the case of *Vraciu*, unreported, Immigration Appeal Tribunal No. 11559). However, in a case heard the day after this one the same court (in a different composition) decided that homosexuals do not constitute a social group and therefore cannot be refugees (in the case of *Jacques*, unreported, Immigration Appeal Tribunal No. 11580. See on these cases Haran, 1995).

The refugee definition requires not only that a person fears persecution, but also that the fact that persecution may occur is linked to one of the five persecution grounds, being race, religion, nationality, membership of a particular social group or political opinion. At stake in case-law is whether or not there is a persecution ground if gays and lesbians are persecuted. The 1981 Council of State decision provided the first affirmative answer, by deciding that 'a reasonable interpretation of persecution for reasons of membership of a particular social group can include persecution for reason of sexual nature'.³ As a result, persecuted gays and lesbians could be recognized as refugees. However, this was to be one of the last Dutch asylum decisions that gay rights activists could welcome. The problem since 1981 was not the persecution ground. Somehow what had happened to the applicants (or what they had good reasons to fear) was never sufficiently serious to amount to persecution. The long series of negative decisions has given rise to rather sharp accusations (e.g. *Nieuwsbrief Asiel- en Vluchtelingenrecht* [Newsletter Asylum and Refugee Law] 8 1992, pp. 230–3; Bos, Pot and Willems (1992)). I have some problems with this line of criticism. The fact that homosexual asylum-seekers are turned down is no conclusive proof of homophobia. *Prima facie*, there is no reason to believe that gays and lesbians are even less welcome than straight men and women who claim asylum. And in some cases, gays and lesbians have been recognized as refugees by the administration (e.g. decision of the State-Secretary of Justice of 16 November 1993, No. 9110.09.0034 (Russian gay man); refugee status for a lesbian woman from Iran, reported in *Nieuwsbrief Asiel- en Vluchtelingenrecht* [Newsletter Asylum and Refugee Law] 8 (1992), p. 327). The administration wants to admit as few refugees as possible; I see no

reason why it would be especially restrictive when it comes to gays and lesbians.

But things are more interesting than that. What concerns me in this chapter is not the equality principle, but how gay and lesbian asylum-seekers are treated. When one thinks of how one is treated in, say, a restaurant, one doesn't think of whether one gets food, yes or no. Treatment in this context refers to the attitude of the waiter, the interactions between customers and personnel. It is this treatment I want to investigate. The result of the treatment may be negative for the asylum-seeker; but how was the treatment itself? My argument will be that, although it is hardly possible to argue that the outcome of the procedures in themselves show homophobia, the treatment of homosexual asylum-seekers is queer. That queerness, I will argue, does have something to do with homosexuality. It is only then that the question whether or not this could have influenced the outcome of the procedure resurfaces.

I will first explain why Fassbinder's *Querelle* is important to me, and how. I will then give an interpretation of one court decision concerning a gay asylum-seeker from Russia, which, as I will argue on the way in the footnotes, is representative for Dutch case law. I will do so in the light of *Querelle*. My line of argument will be that the problem with Dutch case-law on homosexual asylum-seekers is *not* that it is homophobic, as has been argued up to now (e.g. *Nieuwsbrief Asiel- en Vluchtelingenrecht* [Newsletter Asylum and Refugee Law] 8 (1992), pp. 230–3; Bos, Pot and Willems (1992)). Quite the reverse: it is exemplary of the laid back liberalism that is characteristic of Dutch mainstream thinking on *any* form of otherness or deviance. What is problematic is the idea that straights and non-straights are two clearly distinct groups of people. This presumption plays an implicit, but all the more central, role in both Dutch case-law and in writings of gay and lesbian refugee advocates. In *Querelle*, Fassbinder shows that such dichotomic thinking is extremely violent and even celebrates violence. Furthermore, because of the triangular structure of the film, *Querelle* is particularly useful in analysing how, in the court decision that I will analyse, the judge, the applicant and his lawyer are brought to re-enact this celebration of violence. The last section of this chapter will enquire whether refugee law doctrine allows for the possibility to advocate cases of gay and lesbian asylum-seekers while at the same time undermining the straight/non-straight distinction.

One caveat seems opportune. This chapter interprets a decision on a gay man by looking closely at a film with lots of male characters and just one woman. This analysis is written from and about a man's world. I am sure that female sexualities are constructed in a different way. I think however that the theoretical and doctrinal points that I will try to make are relevant for cases of lesbian asylum-seekers as well.

In La FERIA, a brothel in Brest, Lysiane, who together with her (black) husband Nono owns the brothel, lays cards for her lover, Robert. Looking up from her cards to Robert, she asks him:⁴

LYSIANE: You have a brother?

ROBERT: So what if I do?

LYSIANE: You've never even mentioned him? You're quite alike, aren't you?

ROBERT: Well, that's what people say. But it's not true. Querelle is a sailor.

LYSIANE: Maybe they are right, after all. And ... uh, you two love each other, more, uh, more than you'd really like to.

ROBERT: Don't be crazy! We're just brothers, that's all. Why are you shaking your head? What do you see now?

LYSIANE: I don't know exactly, but your brother is in great danger.

ROBERT: Danger? What kind of danger?

LYSIANE: He's ... he's in danger of finding out who he really is.

In the screenplay, Lysiane says: 'He's in danger of committing a murder.'

The ship of Querelle, a sailor in the Merchant Marine, arrives in Brest. Querelle heads for La FERIA, and Robert introduces him to Nono. They make a business deal concerning opium. Querelle returns to the ship, where he gets another sailor, Vic, to help him smuggle the opium past customs. They meet again in a park, where Querelle slashes the throat of the sailor. Querelle goes to La FERIA. In order to sleep with Lysiane, he has to gamble with Nono. If he wins, he can have her; if he loses, Nono can have him. Querelle loses, but as Nono says, he probably cheated in order to lose. Querelle denies this. It is, he adds, the first time he will have been fucked.

After Nono has told Robert that he has fucked his brother, Robert takes Querelle out for a fight. The screenplay describes the battle as 'brutal and strangely erotic'.

ROBERT: You goddamn fucking asshole! Let yourself get fucked by some nigger, will you! You're some swell brother, getting fucked by a nigger!

NARRATOR: The resemblance between the two brothers grew greater and greater. Their fight was more like a battle between two lovers.

QUERELLE: Say it again! Say I'm a fucking asshole! Say it! Say it again!

ROBERT: I've got nothing to say.

QUERELLE: I am wading across the river filled with clutching seaweed. Help me to reach your bank.

ROBERT: That will be hard, brother. I can feel you resisting.

QUERELLE: What did you say? I can hardly hear you. Leap up into my laughter.

Hold fast to it. Don't be afraid that it might hurt me. Leap! come on, leap!

ROBERT: Be yourself!

QUERELLE: I am becoming myself, I can feel it!

ROBERT: Not so loud. Speak softer now. I am already near you.

QUERELLE: I love you more than I love myself. My hate was only an illusion. Dangerous melancholy draws me to you, but my struggling keeps me away. My smiles are sunshine and drive away the shadows you cast on me. I was the one to seek out the night of daggers. I put up the barricades. My laughter cuts me off, it separates me from you. You're so exciting and so beautiful.

ROBERT: You're just as beautiful.

QUERELLE: Don't talk. Be still. Be careful that we don't lose ourselves in a union that is too complete. Set your hounds and wolves on me!

ROBERT: It's hopeless. Every battle crowns you with a radiance that wounds me.

QUERELLE: Don't be discouraged. Try hard!

During the fight, a religious procession crosses the street and walks through the battle scene. A Christ is carrying his Cross, accompanied by familiar figures who follow Him on the way to the Crucifixion. Most notably, Seblon (the captain of Querelle's ship) in a white toga and Lysiane recalling Mary walk right next to the Christ.

Meanwhile, on the ship, Seblon – whom we have seen earlier speaking into a tape recorder on his fascination for sailors in general and for Querelle, who serves him, in particular – records that he is in love with Querelle.

SEBLON: (...) The more I love Querelle, the more defined the woman in me becomes, and the more sensitive, delicate, and sad, because she cannot be fulfilled. (...)

Back in La FERIA, Lysiane is tending Robert after the fight. They dance. Nono invites Mario – who has been constantly present in La FERIA and is said to be a policeman, but looks like a gay leather freak – to throw dice. Querelle is also willing to play. Then Robert suddenly attacks him. Mario and Nono keep the two apart.

Mario and Querelle take a walk. Mario suggests that if Querelle lets Nono fuck him, he might let him as well. Querelle says, 'That's no reason for you to get any funny ideas. I'm not a faggot'. Mario worms the admission out of Querelle that he liked being fucked by Nono. Mario says he gets a hard-on from talking about this and invites Querelle, who says he doesn't believe this, to feel whether it is true. Querelle, encouraged by Mario, starts to masturbate Mario, and ends up being fucked by him.

Gil Turko, a Polish worker, is accused by his colleague Theo of being gay, and in revenge slashes his throat with a broken bottle. He hides in a deserted bagno, suspected of both the murder of Theo and of the sailor who was killed by Querelle. His friend Roger asks Querelle for help. Querelle is fascinated by Gil, as he is meeting another person who has killed. He gives Gil a pistol, and tells him he can rob Seblon when he is in the pissoir where Seblon 'gets himself all horny and worked up from the junk scribbled on the

walls'. He gives Gil a false moustache – and at that moment the spectator sees that Gil and Robert are played by the same actor. Gil robs Seblon (and wounds him while doing so), after Seblon has resisted and has been able to recognize him. Gil returns to the bagno, and there Querelle fully realizes he is in love with him. However, as he was the passive partner up to now, it seems impossible to fuck Gil. Gil (still wearing the moustache) and Querelle tell each other they want to live together always, and kiss. The screenplay says that Gil fellates Querelle, but this scene was cut in order to appease the American distributor of the film (Lardeau, 1990, p. 74).

Querelle then informs the police that Gil will be on the 4.20 train for Bordeaux. Querelle himself has urged Gil to leave Brest and has bought the ticket.

Querelle returns to the ship, and goes into Seblon's cabin. Seblon is absent. Querelle pushes the button of the tape recorder and hears Seblon's voice pronounce an ode on himself. Seblon walks in, Querelle draws his knife.

SEBLON: I've always known you were a common murderer, Querelle. Come on then, stab me, kill me!

Then Mario and another policeman come on board and take Seblon with them to identify the suspect of the attack on him. At the police station Seblon declares that he is absolutely sure that he doesn't know Gil (now again without moustache).

Querelle, who has become the lover of Lysiane, is in Lysiane's bedroom. Earlier, we have seen a similar scene with Lysiane and Robert, where it is suggested that Robert is impotent. Lysiane has expressed the fear that in between Robert and Querelle, there is no room for her.

Lysiane asks Querelle why he rejected her for so long. Querelle says that was because she was his brother's woman.

LYSIANE: And what about now?

QUERELLE: Now I'm taking revenge on my brother.

LYSIANE: That's the reason? And what about me? What about me??

QUERELLE: What about you? You're just a woman, that's all.

In a final scene, Lysiane tells Querelle that he is nothing more than a fairy, a faggot. Querelle laughs, and says that that makes Nono a faggot too.

LYSIANE: And Robert?

QUERELLE: Robert? What do I care about Robert? I'm me!

LYSIANE: You're disgusting. You're my enemy! You're destroying me! You've got some secret kind of power; some power that goes multiplying forever. Querelle, you're not human; you don't come from this world.

Seblon enters, and recognizes Robert as the man who attacked him. Querelle, who has declared his dedication to Seblon in the scene before, follows him to the ship. He says to Seblon:

QUERELLE: I am very close to that point of disgrace from which there is no return; but I think that it is also a place where I shall find eternal peace. I am so weak; I am subdued, completely subdued. And my thoughts are sad – sad because of the premonitions of autumn and filth and delicate mortal wounds I feel inside myself. I shall not find this peace until you have taken me. But you must do it in such a way that afterwards I may rest across your thighs, as in a pieta, and you will watch over me as Mary watches over the dead Jesus.

Lysiane joins Robert, who is totally drunk, at his table. She again lays cards and looks at them.

LYSIANE: I was wrong all along. You don't have a brother. Can you understand? I made a mistake. Did you hear me, Robert? I made a mistake; you haven't got any brother! He hasn't got any brother. Did you hear me, everybody?

*

It is not a coincidence that the first words that are spoken in *Querelle* are about murder:

NARRATOR: The thought of murder often awakens in us thoughts of the sea and sailors. Thoughts of the sea and thoughts of murder are then usually followed by thoughts of love or sexuality.

Querelle murders the sailor, Vic. Gil murders Theo. But the theme of murder is even more prominent than that if we include the metaphorical killings that occur in the movie. In the brothel, Lysiane several times sings

Each man kills the thing he loves
Each man kills the thing he loves
Some when young
Some when old
Some with passion
Some with gold
Each man kills the thing he loves.

It doesn't go too far, then, to consider the moment when Lysiane declares Querelle has never existed as a murderous act, in which Robert participates. Robert also kills Querelle by denying they are very much like each other, by fighting with him and by not being Gil. On the other hand, when Querelle

says he is not interested in Robert and leaves him, this can be seen as murder. In the same scene, Lysiane is not wrong when she says that Querelle is destroying her. And finally, when Querelle betrays Gil he murders him. Furthermore, Seblon encourages Querelle to kill him, and Querelle wants to lie dead on Seblon's lap. They have a mirrored wish to be dead to the other.

The murders mirror each other in a complex way. But first, let us remark that only Querelle and Gil, two gay characters, commit literal murders. They commit visible murders that we immediately recognize for what they are. The murder of Vic by Querelle is filmed as a liturgy, and contains many visual references to Christian imagery; e.g. when he is killed Vic only wears briefs that remind one of the loincloth Christ wears on the cross; and after the murder Querelle washes his hands. The scene is accompanied by organ music. Also, the scene is very sexually charged. Querelle and Vic slowly undress just before the murder and one expects a sexual scene; which in fact, the murder turns out to be as well. This murder is the more shocking as an opening scene because it is perfect. And by murdering the sailor, Querelle begins to discover who he himself is.

Gil's murder is almost accidental. In a fit of rage, provoked by Theo's insinuations that he is gay, he kills him with a broken bottle and runs away. In a way, by this murder Gil becomes who he is not: he is charged with the murder of Vic as well, and will masquerade as Robert when he robs Seblon. But it is this murder which causes the meeting between Querelle and Gil, which makes Gil into 'another criminal, a brother, a murderer of his own class, someone with whom he could discuss business'. Querelle realizes that Gil is just an 'awkward youth' who has committed an imperfect crime, but Gil's 'reputation had now been crowned with a true murder', i.e. Querelle's. But because Gil has committed this murder Querelle considers him as a brother; Gil in a way will become Robert: and, as the narrator says, Gil becomes

... a little Querelle for whom Querelle cherished a strange feeling of admiration mixed with curiosity. He wanted to make love to Gil, for then he would be even more intimately united with him. But he did not know what he had to do. Until now, he had always been the passive partner, and it seemed impossible for him to fuck another guy. [...] Querelle sensed that love was something voluntary. One must want to love. Even if one is not in love with another man, it can still be fun to get fucked by him. But to be able to fuck someone else, one must love him even only for a split second. And so, if he wanted to love Gil, he had to relinquish his passivity. Querelle made that effort.

The love scene between Querelle and Gil is tender and romantic – the only one in the entire film. It is followed immediately by Querelle's betrayal. It is through murder that Querelle begins to gain the dangerous knowledge of

who he is; it is through murder that Querelle discovers the will to love and the accompanying desire of being active sexually. As if this is not perverse enough, it seems as if this love cannot exist and has to be betrayed. In this act of betrayal, Querelle not only betrays Gil; he also betrays Robert (his older brother, played by the same actor), and himself (Gil is 'a little Querelle'). The betrayal is Querelle's way of doing what he told Gil he would like: to live together always.

We should not forget that when Gil kills Theo, this might also be seen as Robert killing Querelle. Gil says he wanted to be Theo's friend at some moment, but that now he wants to smash him in the mouth and to fuck him, in order to make clear that he himself is a man. He goes as far as saying that Theo is not a man, but a whore. This combination of repulsion and attraction, of masculinity that is both threatened and acted out, is characteristic of the relation between Robert and Querelle as well. As we saw, Querelle at some moment finds Gil his brother. Gil and Robert are played by the same actor, so in this act Robert kills the man he desires and fears: Querelle. But the parallel works the other way round as well. Theo and Robert both are queer-bashers. Gil is 'a little Querelle'. When Gil kills his queer-basher, this is also Querelle killing his.

The central relation in *Querelle* is the one between the two brothers. Querelle and Robert are the same person. We have already seen this in the killing of Theo by Gil. Also, Lysiane says to Robert:

The two of you are close in this world, and night is stretched over the loneliness of an endless plateau. Your double statue is reflected in each of its two halves. You are lonely, living within your double loneliness. [...] You live only within your brother – in his eyes. Only in your own brother. And he – he lives in you. You know that.

The narrator then says about Lysiane: 'She saw the inexorable, precise, and yet indefinable fusion of the two muscular, sinewy bodies.' Apart from being the same person, they are also brothers; they are lovers (via Gil, but also during the fight); they fight each other; and they kill each other. It is during the fight – caused by Robert's anger at Querelle's sexual behaviour – that they are closest, but they seem to be unable to reach each other. The fight is about whether they will be the same person or not; it is also a way of being close yet distant. It is the only physical contact in the film that is represented as involving 'true' feelings apart from the love scene between Querelle and Gil, and thus is the counterpart of that scene (that significantly involves the same actors). It is this scene that sets off the process in which the worlds of Robert and Querelle will be totally segregated. Robert will

end up in Lysiane's arms, drunk and impotent, as Querelle will end up in Seblon's arms, equally drunk but not impotent, I think. Robert in *La FERIA*, on land, law abiding; Querelle on the sea, surrounded only by gorgeous men, an outlaw.

At the origin of everything is Lysiane, who imagines Querelle and thus gives birth to him. Querelle initially is just a fantasy of Lysiane, who is joined in it by Robert. Querelle becomes an outlaw by killing the sailor, but nobody knows that. He then becomes an outlaw because Robert outlaws Querelle's sexual behaviour. Subsequently he is seduced into having outlawed sex by and with the law, personified by the cop Mario. Only after that does Querelle become gay, loving Gil and entering into a relationship with Seblon. Initially Querelle denies being gay, although he admits he enjoys being fucked. Querelle becomes gay and an outlaw during the movie, because that is where the violent vectors from outside direct his desire. For Robert in particular it is unacceptable that Querelle's sexual orientation is unclear; he has to be able to tell the difference between gay and straight, between himself and Querelle. It is made clear to Querelle that he is gay and an outlaw, and therefore he becomes one. But he is not a passive victim of this process. By taking on the role that is given him, he can become sexually active. Initially, he is passive, being hardly more than the embodiment of the repressed side of the straight world. But being forced to live up to other people's fantasies, he becomes fantastic.

Having seen murder as ritual (Querelle), murder as powerlessness (Gil) and murder as denial of the self (Robert, Lysiane, Querelle), we can end with love taking the form of – minimally fantasized – murder in the relationship between Seblon and Querelle. Seblon wants to be killed by Querelle because he knows that Querelle is a common murderer; that is precisely what he is in love with. And Querelle wants to rest dead over Seblon's thighs, impersonating Christ on Mary's lap. Querelle and Seblon act out an S/M fantasy, with Querelle polishing Seblon's boots and getting himself dirty and sweaty by doing heavy work. In a way, Seblon (played by 'the virile Italian star' (White, 1994, p. 615) Franco Nero) is very masculine: he is powerful, in control, wears a uniform. On the other hand he is totally dependent on Querelle; he is passive, waits for his chance, and is obsessed with the strength and hardness of Querelle's body. 'The more I love Querelle, the more defined the women in me becomes,' says Seblon. But he also says that he is increasingly filled with a sense of absolute power. One might see Seblon as the sum of Mario and Nono – Mario, the powerful man, and Nono with, in Lysiane's words, 'something feminine that oozes out of him'. This does make some sense, as long as it is recognized that Seblon's character, like the others in the film, is not a stable one but constantly shifting. But in the relation with Seblon, Querelle also moves. As we saw, during the film

Querelle becomes sexually active, masculine in a sense. In his relationship with Seblon he is passive, dependent, and in the final scenes totally drunk. The film culminates in utter melodrama. Seblon more or less carries Querelle to the ship; they are exiled to a men's world that consists of hierarchy. Robert is totally drunk as well, and Lysiane denies that she ever gave birth to Querelle; to have thought so is a mistake.

In this reading, *Querelle* is a mirror palace. It is impossible to tell where things begin and end; there is no original, only representations exist. Everyone is everyone and as such betrays everyone. The characters are imagined by each other, but are far from imaginary. They hurt each other in a lethal way. Power, in the form of the male body, does not have one source, but is all around, goes all ways and hurts. Mirrors are an important and very frequent image in Fassbinder's work. On this, he said that 'it makes the whole thing even stranger and more distant. But it also has something to do with the actors, who get closer to their own identity in contact with mirrors' (Fassbinder, 1992, p. 151). At the end of the film, the narrator says

Querelle had arrived at the point of inner harmony, and this harmony was indestructible – for he was now on that lofty region where mirror images converge and are united.

It is significant that it is not Querelle's 'real' identity and his image that converge, but 'only' the mirror images. There is no original; at the core of identity, there is a void. The convergence is twofold: first, the image that Querelle has of himself and the image that the others have of him converge – he is a fairy, a faggot. But there is also a convergence, be it mirrored, of Robert and Querelle. They are both subjected to the roles that they participated in creating, but that violate them and leave them powerless, out of control. The fact that Querelle's identity is imagined and artificial does not mean that it is unreal. If nothing else, the fact that it is not only a product of violence, but also a cause for violence makes it real.

Thus, Fassbinder blows up the concept of identity and authenticity. It is fantasy to think that we can be liberated by living up to our true identity; also, it is fantasy that we can be free from power and thus be authentic (this is the analysis that makes Richard Dyer so hostile to *Querelle* (Dyer, 1990, p. 96). Identities and authenticities are constructed in violent struggle and thus fraught with violence. But that there is no beyond does not mean that people are puppets. Querelle actively takes on the role of the gay outlaw, and subverts its meaning. He 'slips out from under the phallic sign' (Silverman, 1992, p. 155), in a move that might be labelled as 'subversive repetition' (the term is taken from Butler, 1990). This leads to intense suffering, but also to intense joy; the joy is present in the film in the form of

the excessive aesthetics that drip from every image (cf. Shaviri, 1991, pp. 171–2). As Fassbinder wrote in the Introductory Notes to the screenplay of *Querelle*, 'every action that takes place in this world, every gesture, every glance, contains some added signification; in each case it is something else, something greater, generally something sacred'.

Querelle's identity is a product of violence and thus is violent. Instead of being a passive object of violence, *Querelle* refracts the violence directed at him, thus becoming its subject. As he chooses not to be an oppressed gay man, he has to find another way of giving meaning to violence. He does so by valuing it. This aesthetics of violence reflects, mirrors the violence directed at *Querelle*. The violence that makes him gay is lawful and invisible, and has a noble purpose: creating stable identities. *Querelle's* violence is visible and outlawed, and has a perverted noble purpose: beauty. It is his way of rejecting victimization, of shifting the meaning of the identity forced upon him.

Of course, Fassbinder has been bitterly attacked for his exuberant political incorrectness. At its kindness, his position is seen as 'politically dangerous' (Silverman, 1992, p. 155). To be sure, *Querelle* is one of Fassbinder's most disturbing films. It is also a central work in his oeuvre, as it picks up and combines many themes. That he was conscious of this may be concluded from the fact that all his three great loves have a role in this movie. Günther Kaufmann, the first one, plays Nono. The film is dedicated to El Hedi ben Salem M'Barek Mohamed Mustafa, the second. And in an interview from 1982, he linked Armin Meyer, his last great love who committed suicide in 1978, with *Querelle*, anticipating the criticism mentioned here.

You're very cautious when it comes to love affairs?

I wasn't always, which was stupid of me, and that's why I had the experience two or three times that relationships I'd entered into euphorically ended in disaster. [...]

The next film will be based on Genet's Querelle ...

That's really a difficult story; it can so easily turn out corny or fascistoid; I hope I can keep to the fine line where it's neither.

Fascistoid— what do you mean by that?

When you read it, it reads like a glorification of violence, of murder, of betrayal, simply because Genet says human existence is actually consummated only when you've descended to the worst, the lowest level possible in society. But, it has to be absolutely clear that this pertains only to this particular society. If you don't function perfectly in this society, you have to become a traitor, a murderer, you have to become violent. (Fassbinder, 1992, p. 71)

As Shaviri puts it, 'By aestheticizing violence, and providing such beautiful images of domination and submission, Fassbinder self-consciously locates himself within the very formations of social oppression which are the objects of his own radical critique' (Shaviri, 1991, p. 171).

Let us return once more to the two literal murders in the film. The murder of Theo by Gil we can understand, we can sympathize with Gil. The murder of Vic by *Querelle* is hardly bearable because it has no reason and is aestheticized. Couldn't we decide that the unbearable murder is not a real murder, but a metaphorical one? This would mirror the numerous unreal murders that have to be read as real murders. Surely, *Querelle's* murder is surreal and can be interpreted as such. One of the values of such an interpretation would be that thus we are confronted with an uneasy fact. We insist on metaphorizing the aesthetic, motiveless murder. But Gil's murder does have a motive: he wants to re-establish his masculinity. This motive makes it even more an act of powerlessness. No need for metaphors, here. A powerless gay man who, in this futile gesture, wants to prove his masculinity: that is murder as we like to see it.

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By the decision of 31 August 1994, the President of the District Court in Zwolle dismissed the request of the Russian national Mikhail K. to grant suspensive effect to the appeal in his asylum case, i.e. that he could await the result of that appeal in the Netherlands (Pres. Rb. Den Haag (Zwolle) 31 August 1994, *Rechtshulp* [Legal Aid] 1995, no. 5, pp. 22–9). The criterion for this procedure is not whether or not the complainant has made plausible that he is a refugee; that is the criterion in the appeal concerning refugee status. The criterion for this interim injunction procedure is whether there can be doubt as to whether or not he is a refugee; this is called the Mosa-criterion, after the name of the complainant in the case where it was first confirmed. When doubt is possible, the President has to grant suspensive effect (Hoge Raad [Supreme Court 22 June 1984, *Nederlandse Jurisprudentie* [Netherlands Jurisprudence] 1985, 82, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1984, 11, *Gids Vreemdelingenrecht (oud)* [Guide on Immigration Law (old edition)] F-131, *Administratiefrechtelijke Beslissingen* [Administrative Law Decisions] 1985, 40. The criterion is presently laid down in Article 32, first paragraph sub a of the Aliens Act).

The statements of Mikhail K. are rendered as follows.

(...) the complainant has stated that he has left Russia because of problems he has encountered in his country on account of his homosexual nature. As a result of his homosexuality he could not finish his studies. For a short time he has worked as a manager at a trade firm. In December 1993 he has been dismissed, officially on the ground of an 'immoral attitude'. At the end of November 1993

the police raided his apartment, where he lived together with his friend X. Five homophile couples were present in the apartment. At the police station a verbatim report was made after a four-hour interrogation. The police informed the complainant's employer, after which he was dismissed. About December 1993 the complainant received a call-up from the police. He didn't comply with it. Two friends who had done that before are still being detained, probably on the ground of their nature. His friend received a call-up as well two days later, but didn't comply either. On December 20 he went to the travelling agency together with his friend, where they booked a three-day journey to the Netherlands. On January 23 they left Moscow by bus. He travelled on his own passport and has not encountered difficulties at the border. On January 25, 1994, he arrived in the Netherlands.

The President first expresses doubts about the credibility of this flight story. One might consider it characteristic that the flight story of a homosexual is doubted, but that would be too easy a conclusion. It is a very common part of asylum decisions to express doubts about credibility (Spijkerboer and Vermeulen, 1995, pp. 54–62). This is not specific for gay asylum-seekers. Also, the decision contains an 'even so' version, which presumes the credibility of the flight story – which also is not exceptional.

A second preliminary remark is that, as we will see, the President does not use the Mosa-criterion, but the (substantially more stringent) criterion that should be used in the procedure on refugee status. However, any relation with the sexual orientation of the complainant cannot be laid. Strange as this may sound, application of the incorrect criterion is a routine affair (Spijkerboer and Vermeulen, 1995, pp. 430–5).

On the claim to asylum the President writes the following.

Whatever may be of the credibility of the flight story of the complainant, and assuming first of all that the position of a homosexual man in Russia might not be simple, this is not sufficient to consider the complainant a refugee. There is no systematic persecution of homosexuals in Russia, the less so as since May 27, 1993, Article 121 Paragraph 1 of the Penal Code⁵ has been withdrawn. [...]

Subsequently it has to be established whether the personal experience of the complainant makes him a refugee. The flight story of the complainant gives insufficient clues to regard him as a refugee. The fact that he has been dismissed on the ground of his sexual nature is not decisive. The complainant also states that he has been arrested once. That also does not make him a refugee, as he has been released immediately. The penal investigation advanced by the complainant doesn't make this different. An offence against Article 121 second paragraph of the Penal Code⁶ is a common law offence, for which the protection of the Refugee Convention cannot be invoked.

In this case there is no violation of Article 3 of the European Convention on Human Rights.⁷ The complainant has stated that there is no issue of qualified

homosexuality, so one cannot see on which ground the applicant has to fear a prison sentence. The penalization of the civil offence of Article 121 paragraph 2 also is not of a scale that this would mean violation of Article 3 of the European Convention on Human Rights.

It is rare that courts which dismiss an asylum claim express their empathy with the complainant, as the judge does by first of all showing that he realizes that life may not be easy for Russian gays. This happens predominantly, if not solely, in cases concerning raped women (Spijkerboer, 1994a) and gay men.⁸ Statements of this kind may be considered as efforts by the President to show to the broader public that, although he is dismissing a claim of a homosexual, he is not homophobic. Thus, it can be seen as an expression that the President is aware of the possibility that his personal views on homosexuality might influence the decision. He indicates that his views on harassed homosexuals are sympathetic. There is no reason whatsoever to doubt this self-image of the President. Dutch law is very liberal in sexual matters; penalization of homosexuality as occurs in some American states look pretty much like the Stone Ages. The President here genuinely expresses a commonality he feels with the complainant.

We can see a parallel with the battle scene between Robert and Querelle. This is the moment of the most genuine communication between the two. The resemblance between them grows greater and greater. When Querelle challenges his brother to say he is a fucking asshole, Robert says that he has nothing to say.

The process at work in the battle between the brothers has been reversed, however. In the film, it is Querelle who is trying to reach his brother's bank. Mikhail K. has expressed his wish to reach the judge's bank by asking for asylum, and for an interim injunction. This happened before the decision was given. In the decision itself, it is the judge who tries to reach Mikhail K. Before explaining why he doesn't think Mikhail K. can reach his bank, the President expresses his sympathy. Implied in this is the judge's power over Mikhail K. Compassion in this sense of the word can only be given by someone in whose power it is to give or withhold it. By empathizing and thereby articulating his more powerful position, the judge also separates himself from Mikhail K. (comp. Halley, 1995). In this short sentence, thrown in between the real legal arguments, the judge precisely re-enacts the wish to be one, and the denial of the oneness that form the core of *Querelle*. The President and Mikhail K. together are in a river filled with clutching seaweed.

The judge then proceeds to state there is no systematic persecution of homosexuals in Russia. This should be understood as meaning that the sole fact that Mikhail K. is a Russian gay in itself does not make him a refugee;

this rejection of a possible appeal to the concept of group persecution is by now a standard passage in Dutch case-law (Spijkerboer and Vermeulen, 1995, pp. 82–97). The judge's position seems to be a legitimate one (comp. Gessen, 1994; Amnesty International, 1994, pp. 27–32).

The judge further finds that neither the dismissal, nor the single arrest, nor the criminal procedure constitute persecution. In themselves, these are correct statements. A single dismissal, a single arrest, and a single criminal procedure are insufficient for refugee status. However, these things didn't happen separately, but form one string of events that are related in a causal way. The police raid led to the arrest, which led to the dismissal; the raid also led to the criminal procedure. By chopping the flight story in pieces, the judge significantly weakens Mikhail K.'s claim to asylum. However, as before, concluding that this is homophobic would be too easy. It is again standard not to see the interconnection in flight stories of asylum-seekers, and this phenomenon is not unique to gay asylum-seekers.

Nevertheless, there is an observation to be made. The judge refuses to see the connection between the things that happened to Mikhail K. The fact that the police is behind the arrest and the dismissal and behind the criminal procedures suggests that, taken together, this might be persecution (see on this so-called persecution on 'cumulative grounds' UNHCR *Handbook*, para. 53). Whether or not that would be so in this case is open to debate. In *Querelle* we have seen the relevance of looking. When Lysiane and Robert cease to see Querelle at the end of the movie, this is a violent and murderous act. But also outside the cinematographic realm, not noticing gay-bashing is making it possible, is in a way joining in doing this to people. Not seeing, ignoring, is not an innocent thing.⁹

Again, I stress that this is not specific for asylum cases concerning gay men. But the judge, even when dismissing Mikhail K.'s claim, could have done what was in his power to do. He could at least have noticed (comp. Lahey, 1991).

Art. 121, Paragraph 2 of the Russian Criminal Code penalizes sexual conduct that in many jurisdictions is considered abusive. But the decision goes further. Mikhail K. is on the run. The judge concludes that the only thing he can be on the run for is a criminal procedure concerning unacceptable conduct. If, as one must conclude, Mikhail K. is not guilty of such conduct, he could as well have awaited his acquittal in Russia. If the judge really trusts the Russian legal system as he seems to do, his conclusion must be that it is well possible that Mikhail K. is guilty of something or other. Mikhail K. is thus pushed into the world of crime, in a way that parallels the script of *Querelle*.¹⁰

Isn't this an over-interpretation? Imagine the judge was conscious of the possibility that the legal system in Russia is well capable of criminalizing

gays for being gay, and not for committing criminal offences (see Gessen, 1994). Then he wouldn't have expressed the unwavering trust he places in the Russian judiciary. He does trust it however, and by implication he does not trust Mikhail K.

Although the judge at the beginning has expressed his sympathy for Mikhail K. that I take to be honest, he gives something away by using the term 'qualified homosexuality'. A qualified robbery is a robbery with violence, or with another aggravating circumstance. The term the word qualified is about, indicates something unacceptable and criminal. Did one ever hear of a qualified purchase, or of qualified heterosexuality? No. What one might call qualified purchase we call fraud, and what could have been called qualified heterosexuality in fact is called rape or incest. The judge expresses the view that homosexuality may not be criminal, but is unacceptable. Mikhail K. in other words is a fairy – a faggot.

It is the structure of the legal procedure that thrusts upon the judge the obligation to be impartial and objective. This requires having access to a universal sphere. No one has such access. But by taking on that position, one does choose a position in which one cannot but silence the people one has to decide about. It is the judge who writes the decision; a legal decision cannot be a conversation. The judge tries to reach the other bank, but is caught in the clutching seaweed. He drowns in the connections made by other people, to use a related Fassbinderian metaphor (Fassbinder, 1992, pp. 43–4). The decision – clearly involuntarily – reflects homophobia, and to a certain extent the decision has been influenced by it, especially in the closing remarks. If without it, the outcome would have been different is impossible to tell. But by its impartial voice it strengthens the homophobia it reflects, again explicitly against the wishes of the judge. At the basis of this inconsistency is the clash between the wish of the judge to be like Mikhail K., to be his brother, and his denial of their resemblance. It is the neurotic urge to tell apart gay and straight. This decision is *not* an illustration of homophobia. It is an illustration of heterosexuality.

Of course, the striking difference between this court decision and *Querelle* is that in the film *Querelle* is the hero and Robert is not. Here the judge is not a hero, but still definitely better off. Mikhail K. is not a refugee, but the victim beyond doubt. This is not caused by the wickedness or homophobia of the judge, I would maintain. It is caused by the fact that Mikhail K. cannot act, cannot speak. If Robert had been the only actor in *Querelle*, Querelle would have been the total victim. Robert is ready to victimize Querelle, but doesn't succeed. Mikhail K. is totally passive in this decision.

He has a lawyer, but this representative speaks *for* him; he is safe in the knowledge that he cannot be interrupted by his client, by no fault of his own. I think the structure of the legal procedure implicates the lawyer in the legal structure. Like the characters in *Querelle*, s/he becomes entangled in a structure that s/he re-creates at the same time. It is only by defying the unspoken presumptions of the legal process, while at the same time taking part in it, that a lawyer could escape being a legitimizing part of a structure that as such leads to a negative decision for his client (Spijkerboer, 1993). It seems that in this case the lawyer did not succeed in this task – that, by the way, is impossible by definition. Thus, the lawyer is more the brother of the judge than of Mikhail K.

What is hidden from view in this way is what Fassbinder declared to be one of his central concerns in making *Querelle*: showing that what happens 'pertains only to this particular society'. The judge to the contrary does not take a position, but speaks the truth – in a sympathetic way. The judge honestly disclaims that he is biased. And that is the most powerful bias imaginable.

Thus, both the judge and the lawyer have been seduced by the legal aesthetics of violence. The legal system is fair, everyone can have his say, it is an objective and non-violent way of resolving conflict. *Querelle* however shows us that this view is a position. The invisible murders are disastrous and lead to visible murder. Admittedly, Mikhail K.'s invasion of Dutch territory was a violation of the norms, as the judge makes out. When, after dutiful deliberation, he decides against Mikhail K., he establishes on behalf of Dutch society that Mikhail K. should not be here. Echoing Lysiane's words, he discovers that he does not have a brother. Thus Mikhail K. (and his partner, whose case was dismissed on the same day) is banished from his refuge; he is not from this world. But his partner is not a captain; they cannot sail the seas on a ship called *Le Vengeur* [The Revenger]. The Court's decision is legitimized violence, but violence none the less. As Foucault wrote,

... the law is a calculated and relentless pleasure, delight in promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of violence. [...] Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, when the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination. (Foucault, 1977, p. 151)

In this analysis, the decision on Mikhail K. reflects the heterosexual matrix. At the same time, it strengthens it, because it represents heterosexuality not

as a position among many others, but as the valid, objective, unqualified one.

What happens pertains not only to this particular society; it pertains to the universal community of mankind. Bias is represented as truth, thereby reinforcing bias. And yes, seen this way it is true that the decision on Mikhail K. depends on bias. But, contrary to the criticism I shortly sketched at the beginning of this essay, this bias is not something the judge simply should get rid of. It is not the judge's prejudice that leads to the negative decision; it is the heterosexual matrix that we (straights, gays, lesbians, bisexuals, non-straight heterosexuals and other queers) are all part of, and that we re-enact every day.

However, as *Querelle* points out, there is more than one way to re-enact it. The judge in Mikhail K.'s case presumes that universality means homogeneity. As his decision and its wording make clear, he has a homogenized view of identity: there are people, and queers; people who belong, and foreigners. Robert and Querelle have separate identities. This homogeneity does not deny the existence of others, but can only perceive them as deviants, exceptions, or, liberally, as minorities. That is why the judge subtly but unmistakably places himself in a group of straights, and separates it from sexual minorities. As Mikhail K. deviates from the judge's homogeneity, he is cast out of the brotherhood of men.

Refugee law, I think, requires an experience of universality. We are willing to give protection to persecuted creatures like ourselves, not to persecuted trees or animals – assuming first of all that their position in many countries is not simple. But universality cannot only be imagined as homogeneity. At some level we all feel the necessity to believe we are different from everybody else; then why couldn't everybody else have the same wish to be different from us? To be sure: this experienced necessity of difference is just as artificial as the identities of the characters in *Querelle*. There is no difference with a capital D. But if we admit that it is central to (believe) our identities to be unique, then couldn't a basis for universality be that we assume that everyone wants to be that as well? Passion for fellow human beings, I believe, cannot be based on sameness; that leads to compassion, which is condescending, as we have seen. It can be based on the idea that this other person is taking part in the project we also take part in: that of making a difference.

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In this analysis, the early victory in Dutch refugee law, consisting of the recognition of homosexuals as a social group and persecution on account of homosexuality as a ground for asylum, was a Pyrrhic victory. We thought we were there when legal doctrine had done its thing. Since then, we have been complaining that jurisprudence doesn't live up to its promises – which, to be sure, it doesn't. Maybe the dogmatic neatness of Dutch jurisprudence

has blinded us to the fact that special rights and special rules for minorities do not win the battle (comp. e.g. Spijkerboer, 1994b; Macklin, 1995; Danielsen, 1995).

The most elaborate plea for considering homosexuals as a social group (and therefore eligible for refugee status) is Goldberg's article. Arguing along the lines of US case-law, she finds homosexuals are a minority group (Goldberg, 1993, pp. 613, 615), who share a common central feature of their individual identities (Goldberg, 1993, p. 609), and argues that 'sexual orientation – whether heterosexual, lesbian or gay – is fundamental to human identity and highly resistant to change. [...] In addition, like race, ethnicity, religion, and political opinion, sexual orientation cannot be altered or renounced according to the dictates of the government in power. Regardless of whether sexual orientation has a generic origin, lesbian women and gay men cannot dissociate themselves from the basis of their persecution. To that extent, sexual orientation is indeed immutable' (Goldberg, 1993, pp. 613–14, footnote omitted). She also finds that lesbian women and gay men form a close and voluntary association (Goldberg, 1993, p. 612). On these grounds, she finds lesbian women and gay men a social group.

Grider has criticized such an approach. He finds that immigration law is not the proper arena in which to debate whether or not sexual orientation is immutable, and whether or not sexual orientation is fundamental or incidental to identity (Grider, 1994, p. 220). He proposes as an argument for recognizing homosexuals as a social group that in situations where they are persecuted on the ground of their sexual orientation, they are considered as a social group by their persecutors or the society at large (Grider, 1994, pp. 221, 224). I fully share Grider's criticism of the approach advocated by Goldberg. Apart from the inconsistency in the simultaneous claims that sexual orientation is *immutable* and that there is a close and *voluntary* association of gay men and lesbian women, the debate on the nature or whatever of sexual orientation is a hopeless one. In this debate, Goldberg takes positions on homosexuality which are extremely simplistic. Would anyone, straight or queer, agree that sexual orientation is 'the shared fundamental characteristic' (Goldberg, 1993, p. 610); that there is a close and voluntary association among homosexuals as a group (Goldberg, 1993, p. 612); that one can make an opposition between popular confusion on the nature and origins of sexual orientation on the one hand, and apparently more enlightened social scientists and psychologists on the other, whose findings can be summarized in a few sentences (Goldberg, 1993, p. 613); that sexual orientation is immutable (Goldberg, 1993, p. 612)? Or even that it makes sense to put things this way? How intensely does one have to ignore Foucault and the popularized version thereof in order to be able to claim that 'Greeks and Romans had relatively free attitudes regarding sexu-

ality', and that in the eighteenth century homosexuality came to be viewed as pathological (Goldberg, 1993, p. 615, note 63)?

Is it really a requirement for being homosexual (or, if I understand Goldberg correctly, for being sexually oriented at all) to always experience sexual orientation as a fundamental characteristic? Are queers allowed to be as frivolous as to have as a dominant experience that they are eating a sandwich, enjoying a book, or swimming? Should we feel weird, oppressed or proud all the time because we don't share everybody else's preferences; can we never take a holiday from our sexualities? Do I really have to associate closely and voluntarily with the people with whom according to some I share one or more sexual orientations? About such identities Stephan Sanders wrote: 'Strongholds they are of liberation. It's just that there is no exit. The bridge has been drawn, the circuit is closed. Inside, the silence of unanimity reigns. And only who stands outside sees that it is a prison' (Sanders, 1989, p. 36).

Apart from this (but is it apart, really?), it seems that at one point Goldberg sets the standard for recognition as a refugee too high. If consensual same-sex sexual behaviour is criminalized, she finds that persons guilty of this are refugees only 'when the penalties imposed are extremely disproportionate to the putative statutory goal, or administered without due process' (Goldberg, 1993, p. 620, footnote omitted). It is however incorrect to require more intense persecution when sexual orientation is the persecution ground than when other grounds are at stake.¹¹

The problem is not, as one might think after my summary of her argument, that Goldberg is berserk. The problem is that she argues that her position is confirmed by US case-law. Therefore, she has to deal with a decision such as *Bowers v. Hardwick* (478 US 186 (1986); see for an analysis of this decision Thomas, 1995); and she has to act as if she totally agrees with judges who are at great pains to decide (as Grider points out, not on the basis of social science but on the basis of legal precedent!) whether sexual orientation is immutable, and whether homosexuals are a group voluntarily and closely. In this respect, Goldberg's argument is a remarkable tight-rope act. But, indeed, as Grider remarks: what is to be done if scientists discover that sexual orientation is, for example, not immutable (Grider, 1994, p. 220)? Would we find then that persecuted homosexuals are not refugees? Grider allows himself more liberties, and without directly attacking precedent argues that a better foundation for the decisions taken would be the one he proposes. However, what do we care? Since the US Attorney General has designated a positive decision as precedent, everything is fine. Persecuted homosexual are refugees, who cares about the details?

I'm afraid that I do, and I'm afraid that 15 years of Dutch experience give cause for that. In the Netherlands, as in other countries, the social group

category has been used successfully to raise the issue of the persecution of homosexuals (and women). It is important that this happens. However, I think this popularity has more to do with the fact that the concept of the social group fits with a crude version of identity politics than with virtues inherent to the concept itself. It is possible to raise the issue without invoking the social group category. In as far as it is used (and when it works, why shouldn't one use it), its success just leads to the next problem. Far from being opposed to recognizing persecuted homosexuals as refugees, I think the doctrinal shift towards considering homosexuals as a social group both makes it possible to recognize persecuted gays and lesbians as refugees, and by the same gesture prevents that this possibility comes true (some extreme exceptions that prove the rule left aside). The claim that homosexuals form a social group has to presume that gays and lesbians exist as a group out there. As I have argued earlier, precisely this presumption, that separates straight and gay, is at the heart of the heterosexual matrix, of which homophobia (or at best finding all that a bit weird and ever so slightly disgusting¹²) is a part. The argument that homosexuals form a particular social group fits very well with this way of thinking. I have argued that its results are visible in Dutch case-law.

In *Querelle*, Fassbinder both denies and confirms that gays and straights exist. He acknowledges that gays are oppressed, but refuses to see gays as victims. And, most importantly, he refuses to leave the straight majority alone. Straights might not be that straight; and far from finding homosexuality alien, they might themselves participate in producing it. Straightness might be a way of dealing with same sex-eroticism. Is it possible to argue for recognition of persecuted gays and lesbians in a comparable way? Might that be done without getting stuck in the heterosexual matrix, as happened to Mikhail K.'s judge?

I think Grider sets a first step. He argues that it is the persecution in the country of origin that makes persecuted homosexuals a social group. This recognizes that sexual identities exist in interaction and do not exist out there (comp. Fernhout, 1990, p. 99). However, for the purposes of the asylum procedure in the country of refuge, homosexuality is something out there, even in Grider's approach. Therefore, I propose to pursue an idea that Goldberg once hints at in passing (Goldberg, 1993, p. 614): not to invoke a special persecution ground at all when arguing for recognizing persecuted homosexuals as refugees.

It is seductive to argue that sexual behaviour is something that occurs in the private sphere; that the boundaries of the private sphere are a matter of political contest; that doing something forbidden in the private sphere (e.g. engaging in sexual activities with persons of the wrong sex and/or gender) means at least implicitly making a statement on the boundaries of the

private sphere, and therefore is an expression of a political opinion; and that, in conclusion, persecution because of homosexuality is persecution on account of (minimally an attributed) political opinion. On this point, one might follow the very elaborate theory of Heinze. He argues that the right to privacy has a decisional and a spatial aspect. The decisional aspect of the right to privacy boils down to 'a right to choose the way in which, and the people with whom, one seeks to pursue intimacy'. The spatial aspect is exemplified by, but not limited to, the home (Heinze, 1994, p. 173). In the footsteps of Blackmun in his dissent to *Hardwick*, Heinze argues that the decisional aspect of the right to privacy itself contains two aspects. First, it includes the 'ability independently to *define one's identity* that is central to any concept of liberty'. Second, encompassing a 'right of *intimate association*', which 'does not depend in any way on ... sexual orientation', privacy includes the right to choose how and with whom one is to express one's affection (Heinze, 1994, p. 183, italics in original). 'The four brick walls of a "home" materially exemplify the private sphere. Yet, here again, it is not *per se* the material manifestation of that sphere, but rather [...] it is above all the quality of seclusion which characterizes the spatial aspect of the right to privacy' (Heinze, 1994, pp. 184–5, italics in original).

However, this approach has the same defects as the ones rejected earlier. Sexual acts and identity are still inseparable, and still certain acts have to be central to the identity. Second, central to the concept of privacy is the idea that the state shouldn't intervene in certain spheres; and that this increases the amount of liberty people enjoy in the private sphere. However, as has been argued extensively in feminist literature, non-intervention means liberty for some (people with more power, e.g. the husband), and less liberty for others (people with less power, e.g. the wife). Thus, non-intervention enhances the liberty of the powerful, and is not non-intervention but a form of intervention. Finally, this would mean just another ghetto for non-straight. There is nothing private about heterosexuality. As *Querelle* shows, we simply are confronted with normative heterosexuality and this has intense consequences for our lives. If the judge's sexuality is so blatantly public, why should Mikhail K.'s sexuality be referred to the liberal version of the closet called privacy (see Califia, 1994, esp. pp. 71–82)?

Let us step back, and wonder what is the reason that refugee status may be granted to someone who has engaged in, say, royalist activities in Iran. The reason is not that the legal order in the country of asylum is so fond of what the Shah used to do – or so I hope, as his regime used to violate the human rights of its citizens on a routine basis. The reason is that according to the legal order of the country of asylum the persecution is illegitimate – regardless of whether the particular political opinion is a valid or laudable one. The legitimacy or validity of political opinions is precisely the thing

that is not the affair of the state, neither of the country of origin nor of the country of asylum. In the same way, it is irrelevant what we think of homosexual behaviour, how we conceptualize it, whether we think it is central or immutable, or whether we think homosexuals characteristically form voluntary associations. It is essential whether or not we think penalizing homosexuality, or torturing people on account of same sex acts, is legitimate (or at least within the margin of appreciation of states).

What, then, would the persecution ground be? Grahl-Madsen in his classical work on refugee law wrote:

Any real, alleged or implied opinion which leads to persecution in violation of the Universal Declaration of Human Rights, may qualify as a 'political opinion' in the sense of the Refugee Convention. Thus, if a person is threatened with persecution merely because he prefers a blue flag to a green flag, or because he favours the construction of a road on the right bank of a river and not on the left bank, or because he wants to vote for candidate A and not for candidate B in a municipal or general election, or because he holds another opinion which is not in conformity with that of the authorities, he may claim fear of persecution 'for reasons of political opinion' because of the fact that the persons in power consider his opinion 'political' in the existing circumstances. This is but another facet of what we have pointed out in another connexion, namely that the behaviour of the persecutor determines what persons shall be considered refugees. (Grahl-Madsen, 1966, p. 250 (reference omitted))

Hathaway in this respect uses the term 'political opinion implicit in conduct' (Hathaway, 1991, pp. 152–7; the Canadian Supreme Court likewise finds that a political opinion may be manifested through other conduct than speech, in *Canada (Attorney General) v. Ward* [1993], 103 D.L.R. (4th), 1, at 40–1).

Clearly, opinions on the punishability of same sex sexual acts are of a political nature. They involve the contents of penal law and the activities of state authorities, such as police officers, public prosecutors etc. Engaging in homosexual conduct will normally be accompanied by the opinion that people should not be prosecuted because of that. Prosecution of homosexual acts occurs because those acts are seen as morally/politically undesirable. People engaging in same sex activities take liberties in this political context. Persecution on account of that is persecution on account of a (minimally attributed) political opinion. I do not say that asylum should be granted because the country of origin finds sexuality a political issue while it shouldn't. That would be an implicit appeal to the privacy principle. The country of origin is completely right to consider sexuality as political. It is because of the political reaction to same-sex acts, because the persecution is illegitimate in absolute terms,¹³ that asylum has to be granted.

However, this does not mean that every homosexual asylum-seeker has to be recognized as a refugee. It is simply incorrect to state that lesbian women and gay men are persecuted *globally* (Goldberg, 1993), at least if one uses the word persecution in the refugee law-sense. There should be a well-founded fear of being persecuted, and this is a standard that requires more than unpleasant or even extremely unpleasant experiences. There are however no special requirements for homosexuals on this point. But there are hosts of hard questions. When exactly does discrimination of homosexuals, when exactly does a danger of gay bashing while the police looks the other way, become persecution? As we have seen in Mikhail K.'s case, this is not an easy question. And it certainly isn't answered by facile criticism that sees a homophobic decision-maker around every corner. That doesn't mean, on the other hand, that dominant views on sexual orientations do not play a role.

In this way, I would hope, an argument for recognizing persecuted gays and lesbians would at the same time deny the importance of sexual orientation, and at least not reinforce the idea that sexual orientations are clear and separate things (or that there are just these boring two, for that matter). It is only when the majority ceases to exist, when its coherence is being exposed as a fragile construction, that 'the people who react a little different to reality' (Fassbinder, 1992, p. 16) will get some more space. Or as Mary Joe Frug wrote in respect to women and men: 'Only when sex means more than male or female, only when the word "woman" cannot be coherently understood, will oppression by sex be fatally undermined' (Frug, 1992, p. 153). So, when Querelle asks for asylum, at issue is not his 'minority' status, but the status of the 'majority'.

NOTES

- 1 This is a revised version of a paper originally written for the third Damwoude Conference, held at Bergen aan Zee, the Netherlands, 9–11 June 1995, presented in revised versions at the Critical Legal Conference in Edinburgh (UK), 8–10 September 1995, and at the Conference on New Approaches to International Law, Madison (Wisconsin), 14–16 June 1996. I thank Robert Barsky, José Bolten, Roel Fernhout, Dennis de Jong, Karl Klare and Audrey Macklin for their (rather diverse) comments on the earlier versions. I greatly thank Frans Lankers for allowing me to use his work in progress on homosexuality and asylum in Dutch case-law; and Chris Randall for information on homosexuality and asylum in British case-law.
- 2 Thomas Spijkerboer is Lecturer of Migration Law at Centre for Migration Law of the University of Nijmegen, the Netherlands, Address: Faculty of Law, PO Box 9049, 6500 KK Nijmegen, Netherlands. Tel + 31 - 24 - 36 123 07, fax +31 - 24 - 36 16 145. E-mail address: thomass@jur.kun.nl.
- 3 I use the word nature as a translation of the Dutch word *geaardheid*, which suggests that sexual orientation is innate.

- 4 Quotes conform to Fassbinder (1982). This contains the dialogues as spoken in the filmed version of *Querelle*, from which I will normally quote. Sometimes, I will quote the screenplay, also printed in this book. If so, this will be mentioned explicitly.
- 5 Penalizing 'sodomy', i.e. homosexual contacts between men, see Gessen 1994.
- 6 Arts 121, Paragraph 2 reads: Sexual relations between men committed with the use of force or in relationship to a minor or through taking advantage of the victim's dependent position shall be punishable by incarceration for a term up to seven years. See Gessen, 1994, p. 26.
- 7 Art. 3 ECHR, which forbids cruel or inhuman treatment, can be violated by deporting someone to a country where s/he can be treated in a way that is contrary to the standard laid down in that article, see European Court of Human Rights, 7 July 1989 (Soering), *Publications of the European Court of Human Rights*, Series A, vol. 161; European Court of Human Rights, 20 March 1991 (Cruz Varas), *Publications of the European Court of Human Rights*, Series A, vol. 201; European Court of Human Rights, 30 October 1991 (Vilvarajah), *Publications of the European Court of Human Rights*, Series A, vol. 215.
- 8 Compare the following examples on gay men. 'The fact that homosexuals have to live under difficult circumstances because homosexuality [...] is met with hostility in all of Latin America does not compel the conclusion that the complainant is a refugee', Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 28 July 1983, *Gids Vreemdelingenrecht (oud)* [Guide on Immigration Law (old edition)] D12-85; '[...] these incidents (gay bashing, TS), regrettable as they are in themselves, are insufficient [...]', Pres. Rb. Den Haag (Zwolle) 4 August 1994, no. VI 93/3/1457 (Ukraine). '[...] although present legislation in Rumania concerning homosexuals cannot stand close scrutiny [...]', Pres. Rb. Den Haag (Zwolle) 18 November 1994, no. AWB 94/6637.
- 9 Comp. Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 17 June 1992, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1992, 9 in a Czechoslovakian case that is comparable to Mikhail K.'s; and Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 26 May 1993, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1993, 4, *Gids Vreemdelingenrecht (oud)* [Guide on Immigration Law (old edition)] D12-230: a Russian case in which the complainant had been forcibly hospitalized in a psychiatric institution; the court finds that the complainant has not made plausible that his forced hospitalization occurred on account of his being gay.
- 10 Comp. Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 2 February 1987, *Gids Vreemdelingenrecht (oud)* [Guide on Immigration Law (old edition)] D12-139: an Austrian man had been sentenced twice (once to ten months conditionally and once to ten months unconditionally) for sexual contacts with 17-year-old men; under Dutch law these acts would not have been illegal, and under Austrian law this would not have been illegal if the partner would have been female. The court decides: 'Under these circumstances the fact of the criminal convictions of the complainant is no reason to conclude there is persecution as stated by the applicant. Also, in the light of the fact that the offence against Article 209 of the Austrian Penal Code is threatened with prison terms ranging from six months to five years, the punishment cannot be considered excessive, the less so as the Landesgericht für Strafsachen G., as is clear from the verdict of September 18, 1979, in its decision on the character of the punishment has taken into account on the one hand an earlier condemnation for the same offence and on the other hand that the acts have been repeated three times and that two minors were involved.' See for a comparable case of

a British man who, on account of sexual contacts with young men that under Dutch law would be legal, and in the UK were only illegal because of the sex of the persons involved, had served three prison terms (of 18 months, 28 months and 28 months respectively) and against whom again a criminal procedure had been started: Advisory Commission on Aliens Affairs, 12 November 1990, *Nieuwsbrief Asiel- en Vluchtelingenrecht* [Newsletter Asylum and Refugee Law] 8 (1992), pp. 283-5; the applicant nevertheless received a residence permit on humanitarian grounds, decision of 14 April 1992, o.c. p. 286.

- 11 Goldberg in fact deals with penalization of same-sex sex as if this were legitimate prosecution; only in cases where prosecution in itself may be legitimate the issues of disproportionality comes into view. It may be that Goldberg's position is influenced by her effort to deal with US case-law refusing to find criminalization of consensual same-sex sexual acts between adults unconstitutional, see Goldberg, 1993, p. 621. However, once one concedes that homosexual behaviour can be criminalized, pleas to find exactly that a ground for asylum become implausible.
- 12 In some decisions this disgust seeps through. We already noted the 'qualified homosexuality' thing. Comp. Afdeling rechtspraak van de Raad van State [Judicial Department of the Council of State] 17 June 1992, *Rechtspraak Vreemdelingenrecht* [Jurisprudence Immigration Law] 1992, 9, in which the court notes with badly concealed shudders that in Czechoslovakia in 1988 'so-called gay bars' (gay bars in Dutch original) were opened. Also, the word 'homophile' (according to Dyer, 1990, p. 74, it is of Dutch origin and was first used in 1949) in Dutch has a condescending tone. The word usually used in court decisions to refer to homosexuality, 'geaardheid' (translated here with nature) has biologicistic, 'these poor guys can't help it' - connotations and, although less outdated, is part of the same vocabulary as 'homophile'.
- 13 As the European Court of Human Rights has decided in several of its decisions in resolute terms; see most recently European Court of Human Rights, 22 April 1993 (Modinos), *Publications of the European Court of Human Rights*, Series A, vol. 259.

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