

Technologies of Truth and the LGBTI+ Asylum Reality

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RICARDO PRATA FILHO, DEC 8 2020

The 1951 Geneva Convention defined the concept of what a refugee would be internationally. In the text of the document it is established that refugee would be the one who fears “persecution for reasons of race, religion, nationality, belonging to a certain social group or political opinion” (United Nations, 1951, p. 6). The term “social group”, in this sense, was added at the end of the deliberations on the Convention in order to provide an opening for other reasons that are not covered by the text (Hathaway, 2012). It is common in international politics that themes related to gender and sexuality are read from generic categories such as “social group”. In the International Covenant on Civil and Political Rights (1966), for example, the provision of article 26 on non-discrimination includes the categories “race, color, sex” and “other status” (França, 2017). Numerous problems arise from this, since generic terms imply a diversity of interpretations that are not always favorable to LGBTI+ (acronym for lesbian, gay, bisexual, transgender, intersexual plus other gender and/or sexual identifications) issues.

Even so, since 2002 the United Nations High Commissioner for Refugees (UNHCR) has been working on issues related to gender identity and sexual orientation through the publication of guidelines and notes. Internationally, asylum has been recognized because of reasons based on gender and sexuality since the 1980s. The Netherlands was the first country to provide asylum along these lines, followed by Canada, Australia and the United Kingdom (Gorish, 2017). Although migrations because of gender and sexuality are not new, the numbers on the so-called “LGBTI+ asylum” have been progressively increasing worldwide in the last decades, imposing the need for new normative reflections and creative measures.

The diversity of cases and problems that arise from the intersection between asylum, gender and sexuality is immense. As genders and sexualities in their wide range of possibilities cannot be measured or proven objectively, they raise questions of a highly varied nature. In sum, the asylum-seeker’s eligibility process is anchored in his/her narrative before the opinion of the host country officials, who are theoretically trained to deal with a multitude of stories. Since each country has a different bureaucracy to perform this eligibility process, practices vary a lot. The idea of a “well-founded fear of persecution” of the 1951 Convention points to an objective subjectivity as Nyers (2006) would put it. The fear of persecution motivated by any of the reasons mentioned above must be founded, objective, certain, true. In this way, they seek the one who is considered a true asylum seeker and who needs international protection from a third country due to displacement.

But how to prove that the persecution on grounds of gender and sexuality is founded? How to prove a gender and a sexuality? Genders and sexualities are parts of the human experience and they are conditioned by different rules. Everyone has a gender and a sexuality that are expressed and recognized socially, between encounters, experiences and cultures. It is not possible to prove a gender and/or a sexuality because they are not measurable as something strictly biological or corporal. In our world, however, scientific discourse is used as a logical verifier of the “truths” of life. And this has also happened for a long time when it comes to gender and sexuality issues. In this way, I will briefly discuss how technology and science are used in cases where asylum seekers need to put their genders and sexualities to the test in order to be recognized as “true” refugees as the letter of the law presents.

The Truth of Science

According to Foucault (1978), sexuality has been the target of a repressive power mechanics for a long time. In the

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17th century, the bourgeois order established with the firmament of capitalism understood sex and sexuality from the Christian point of view of prohibition and censorship, which, conversely, produced even more discourses on the subject. In the 18th century, sexuality became a matter of public utility and of interest not only in theology but also in psychiatry and criminology. Hence the differences that make up what is considered normal and what is considered pathological/criminal are born. The word homosexuality is created as a medical category and becomes the subject of studies and experiments. For Foucault (1978), in the 19th century, this reproduction biology and sex medicine created truth establishments that became stone and univocal norms.

A truth is a construction of meanings stated by different forms of knowing. Through this logic, the truth about sex and sexuality, according to the author, can be obtained by two ways of understanding the world in general. As *ars erotica*, sex is seen by its qualities and its sacredness. It is a secret not because it is forbidden, but because it is discreet, magical, artistic. As a *scientia sexualis*, sex is understood by the logic of knowledge that is established as a form of power. The West, from this second view, produces truths about sexuality through religious confession within the sphere of sin and through science within the sphere of rationality. It is an obsession that organizes what is considered a normal practice or behavior and what is considered a sin and needs to be purged. And, sometimes, it comes as an obsession that is based on the ideal of normalcy and the danger of pathological deviances that need to be cured. These various discourses make up a web of fragmented, lost and broken meanings in science, philosophy, religion and law (Foucault, 1978). They constitute our static and unitary view on gender and sexuality and our fixation with these themes that are stressed by the multiplicity of existing identifications.

The history of the identifications that make up the LGBTI+ acronym is echoed in a binary system organized by the ideas of female and male, heterosexual and homosexual, normal and pathological. Through medical and legal “curiosities” of the 19th century and through understandings about genetics, hormones, gonads and criminology, the truth of science around sexuality and gender has become another layer of the norms that provide a recognizable coherent identification. Still, gender or sexuality experiences are purely social and not scientific. The knowledge employed by doctors and “experts”, in this context, nourishes a narrative of normality that is reinforced by binary terms, surgical adjustments, treatments, therapies and invasive tests, narrowing the possibilities of life in supposedly timeless and universal terms and identity categories (Fausto-Sterling, 2000).

However, I must not exclude the bodily-biological factor of gender and sexuality (even more with the development of body modification surgeries and medications), but treat it in a more malleable way, without reinforcing truths that exclude other bodies and experiences or violate fundamental human rights. In this sense, the phallometric test applied to the LGBTI+ asylum is an important case that needs to be discussed. Phallometric testing, in general terms, is linked to arousal tests that measure blood flow variations in the asylum seeker’s genitalia from pornographic audiovisual stimulation in order to prove the alleged sexuality in his process (Nascimento, 2018). This type of test was used in the eligibility process for asylum seekers in the Czech Republic (the country where the test was invented) in recent years (França, 2017; Gorish, 2017).

The test was invented in the 1950s by the Czech physician Kurt Freund and was used to provide a diagnosis of men’s sexualities. Through visual/auditory stimulation and an air chamber with volumetric measurement around the genitalia, Freund observed erections to create his data. For the scientist, the test correctly pointed out the “sexual identity” of his patients, but it had no therapeutic purposes, that is, it could not treat sexual deviations. In the following decade, the 1960s, the behaviorist scientist S. Rachman began using phallometric test as a treatment for sexual deviations from the idea of aversion therapy. For the scientist, these deviations were constituted by fetishes that could be eliminated by classical conditioning techniques such as those used for training animals today. With the gay civil rights movement of the 1970s settling in the United States and in Europe, aversion therapy was abandoned (Epstein and Waidzunus, 2015).

The phallometric test started to be used in the 1980s to treat erectile dysfunction and, in the 1990s, it started to be used to create patterns that could help to identify pedophiles and sexual offenders. The moral panic surrounding sexual assault was strong in the 1990s, as rape as a weapon of war was present in the conflicts in Bosnia, Rwanda, Angola and the Democratic Republic of Congo. Just as the history of phallometric test has evolved over the years, so have its methods. Today, the test consists of electrodes that work by electrical impulses and no longer by measuring

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the volume of air as invented by Freund (Epstein and Waidzunas, 2015).

What intrigues me here, however, is its use in recent years to prove the sexuality of asylum seekers who already carry the trauma of having been persecuted for these reasons. These people are enveloped in an atmosphere of humiliation, shame and violence. The use of the phallometric test as an option in Europe exposes the scientific/biological bias in the West to deal with gender and sexuality issues. Somehow the body can be exposed to a test that measures the “exact amount of arousal” to determine if the asylum seeker narrative and identity are legitimate. And, because of this certainty, the test can be useful to locate this “true refugee” in need of international protection as the 1951 Convention puts it. If the asylum granting process remains attached to the idea of finding the “true refugee” based on its normative definitions, technologies such as phallometric testing can be used in a wrong way, crystallizing identifications, narratives and truly unique life experiences.

These uniform narratives do not exist. They are just a mirage that is stressed in the reality of different times, migration flows and individual cases. Genders and sexualities cannot be measured or validated because they are born in social and cultural interchange. It is impossible to apprehend the diversity of identifications, desires and practices as the international law of asylum tend to be applied, that means, with a similar fixation that science has of finding the exact right answer. Phallometric testing is not that answer. The invasion and pain that tests like that bring hurt people that are already marked by violence, prejudice and fear. The vast diversity of eligibility processes across the world cannot be conditioned by a sterile use of science echoing all the harm that this type of discourse caused and causes to LGBTI+ people.

Furthermore, phallometric test violates fundamental human rights and the integrity of these migrants as we can see in the next section. It certifies eligibility processes that are stuck with stereotypes and cold data without considering the asylum seeker past and the limits of this type of degrading exam. Genders and sexualities cannot and must not be measured as something unitary, exact or stable. The next section will discuss the problems of phallometric test through the view of international human rights law and principles themselves.

Normative Problems

In 2011, UNHCR published the note “UNHCR’s Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation”. In it, the institution argues that phallometric testing is incompatible with international human rights standards. It is hardly possible for asylum seekers to be able to prove every part of their narratives and, therefore, to be able to prove their genders and sexualities. Gender identity and sexual orientation are not automatically recognized by “evidences”. These are broad concepts that involve self-identification and are related to the social and cultural contexts of each migrant. The scientific obsession with the matching gender/sexuality/genitalia is a powerful construct, but it excludes the plurality of ways of being, living and feeling these aspects of the human lives.

In these cases, information about the country of origin and the assistance of non-governmental organizations can help more since they can offer clues of different gender and/or sexuality identifications of each region/country and help with a respectful and decent welcome. Since they came from a persecution reality, asylum seekers need to feel secure. A well-trained staff to deal with the particularities of asylum requests due to gender and sexuality, in addition to the information already mentioned, should be enough to grant asylum according to the UNHCR documents (UNHCR, 2011).

Invasive tests have as effects feelings of shame, intimidation, humiliation and recreate a dynamic of persecution that the asylum seeker suffers from. According to the document, invasive tests violate the right to privacy and the prohibition of torture and cruel, inhuman, degrading or invasive treatment. The phallometric test involves exposing the genitalia under observation and intrusive inspection for long periods. This interferes the dignity of the human body, as well as the psychological and physical integrity of these people. Anxiety, pain and suffering may be involved in this logic. In addition, everyone must have protected the right to privacy, since sexuality, as well as gender, would be part of the private lives of these migrants. According to international human rights documents, phallometric testing should not be trusted to prove someone’s sexuality and, therefore, should not be applied in cases of asylum based on

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those terms. The text makes it clear that the same applies to the use of the photoplethysmography or “VPG” vaginal method in the case of lesbian asylum seekers (UNHCR, 2011).

In addition, the 2007 Yogyakarta Principles, drafted by gender and sexuality experts outside the scope of the United Nations, reinforces the right to asylum in its twenty-third principle: “everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, based on sexual orientation or gender identity” (The Yogyakarta Principles, 2007, p. 27). In addition, the document states in its eighteenth principle: “no person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity” (The Yogyakarta Principles, 2007, p. 23).

Finally, tests such as phallometry materialize male desire from the normal and pathological, heterosexual and homosexual binaries, excluding a series of identifications of what it means to be a man and his desires. In this way, the penis becomes the center of male sexuality, making invisible bodies that deviate from binaries and occupy in-between places like intersex people for example (Fausto-Sterling, 2000). This fixation with the genitalia only reinforces a Western neurosis with scientific truth around coherent genders and sexualities and, further, with the (re)production of truths about intrinsically international figures such as refugees.

Final Thoughts

Other technologies are currently being used to identify “true” LGBTI+ refugees. The use of retinal scanners is already a reality among asylum seekers worldwide (WebWire, 2019). In recent years, brain scanning via fMRI has been used to identify sexualities and/or sexual preferences based on the truths of the body (Epstein and Waidzunus 2015). But what is behind these technologies? What is behind the technologies used in expressive migrations in recent times such as the Venezuelan one by Latin America? What is the weight of technologies in cases involving gender and sexuality? These are questions that are put on the international agenda and that should not be forgotten even in a chaotic pandemic scenario. The truths that science seeks are not always in line with the plural uniqueness of gender and sexuality identifications and should be viewed with caution by those who implement the rules and have the power to apply their effects to the harsh reality of LGBTI+ people around the world. LGBTI+ asylum seekers need protection and opportunities to live their genders and/or sexualities without fear.

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