Que(e)rying political practices in Europe: Tensions in the struggle for sexual minority rights

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CHAPTER FIVE
Claiming Protection: Anti-Discrimination

It is said that human conditions do not exist until they are named: but they are not named until they are noticed, and they are hardly ever noticed until their existence becomes a matter of concern, of active search and creative/defensive efforts.
(Zygmunt Baumann 1996:49)

If rights thus codify even as they may slightly mitigate certain modalities of subordination or exclusion, it behoves radical democrats not simply to proliferate rights but to explore the historically and culturally specific ground of the demand for them.
(Wendy Brown 1995:12)

The last chapter illustrated human rights as composite and contestable territory. The apparent objectivity and universal applicability of human rights was challenged and human rights argumentation in lesbian and gay rights struggles put to the test of its own premises. One central aspect of the claim for human rights is freedom from discrimination. Throughout the world, marginalised groups base their claim to rights on their effort to render the harsh discrimination against them visible and to obtain protection against such discrimination. Therefore, the demand for anti-discrimination legislation is a crucial part of rights struggles. It is a part of rights struggles that is generally acceptable even to those critical of mainstream rights politics. The implications of anti-discrimination discourse are taken for granted and are rarely analysed. In fact, anti-discrimination claims are probably the only rights claim that have not been substantially deconstructed by queer theorists so far. In the following, I will offer a theoretically and politically critical reflection on the speaking about discrimination and on the discourse of anti-discrimination legislation as a tool to combat violations, injustice, and threat.

Rights have historically been distinguished into civil, political, and social rights. Civil rights are commonly understood to mean liberal negative rights which protect the private legal subject against illegal infringement of the state on her or his individual freedom and property. Political rights historically refer to the rights of political participation that enable the active citizen to take part in the democratic processes of opinion and will formation, and social rights secure for the client of the welfare state a minimum of social security. (Habermas 1992:10) On a structural level, rights can be divided into two types: first, negative rights as freedom from something—for example persecution—establishing inhibitions of official powers and prerogatives; second, positive rights as freedom to do or have something—for example the right to marry or to adopt.
In a political context strongly attached to human rights discourses both structural forms are central. Considering the fact that human rights were a historical response to the modern power of states and to horrific events such as genocide, the attempt to protect the individual against society and the state—and, thus, to secure his or her negative rights—are more significant. Human rights present minimum guarantees of basic personal dignity and are essential guarantees of individual autonomy. (Donelly 1984:417) Besides a set of individual protection rights—such as the right to life, liberty, and integrity of the person—it has historically been important to ensure equality irrespective of status and identities—such as race, gender, religion, age, disability and now sometimes sexual orientation and gender identity. These negative rights function as *a protection from* infringement and have politically been more widely accepted as inalienable and universal than most positive rights have been. Historically, freedom from discrimination has been established more quickly than any right to act differently from the norm.

Anti-discrimination rights as a shield against abuse are among the first minority rights to be established within the European Union. The importance of anti-discrimination was established for the first time in the 1994 white paper on Social Policy, which recognised that the EU could not achieve its aim of integration, common market, and freedom of movement without providing a guarantee for people against fear of discrimination. The Treaty of Maastricht (1993) prepared the ground for a formal decision on this and the Treaty of Amsterdam (1999) finally ensured anti-discrimination for the first time in its Article 13. Indeed, the largest success of European NGOs concerned with social rights lobbying has been the establishment of precisely this Article 13 in the Amsterdam Treaty. An employment directive covering sexual orientation was formally adopted in October 2000. Additionally, Article 21 of the Charter of Fundamental Rights signed in December 2000 promises to grant a more far-reaching anti-discrimination prohibition should the Charter be legally enforceable in the future.\(^{103}\)

This chapter begins with a reading of the first successful inclusion of sexual orientation into an international Treaty’s anti-discrimination section: the European Union Treaty of Amsterdam, ratified on the 1st of May 1999, and the legislation drafted by the European Commission in November 1999 with respect to Article 13. I will critically examine the legal conditions of the draft directive and point to the intrinsic problems of discrimination rights for gay men and lesbians apparent in this draft. This is followed by an examination of the way in which ILGA-Europe speaks about discrimination and, thus, politically materialises and utilises the situation of lesbians and gay men in Europe.\(^{104}\) I draw out the themes and concepts upon which anti-discrimination as a political practice is based and argue why anti-discrimination

\(^{101}\) See Chapter One for a detailed explanation of the Treaties and the Charter.

\(^{104}\) I use, as instances of ILGA-Europe’s approach to anti-discrimination, its discrimination report to the Council of Europe in early 2000 and its submissions to include sexual orientation and gender identity in the broadening of Article 14 of the European Convention of Human Rights in 1999.
is tainted with many implicit problems. Those problems will be addressed in a more philosophical manner in part three, which ends with a reflection on the theoretical and political demands this analysis bequests on future political argumentation for anti-discrimination legislation.

*Article 13 of the Amsterdam Treaty and the Proposals of the EU Commission: An Example of Anti-Discrimination Legislation*

Since the mid 1990s the EU institutions developed some dynamism with respect to anti-discrimination. Many NGOs, supported by the European Parliament, lobbied for years to extend the existing anti-discrimination focus on sex and nationality. Finally, in 1997, the member states agreed to amend the Treaty establishing the European Community (Maastricht) with Article 13 in the Amsterdam Treaty stating:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This rather weak formulation was nevertheless celebrated as a victory by NGOs and the Commission acted on the momentum faster than is usual. In April 1998 it announced the launch of a broad debate on the use of Article 13 in its Social Action Programme 1998/2000. At the Second European Social Policy Forum in June 1998 considerable pressure was exerted on DG V—the directorate general responsible for social affairs—by individual NGOs, the Platform of European Social NGOs and the European Trade Union Confederation (ETUC). The Commission then launched a consultation conference in Vienna, in December 1998 culminating in the publication of the Commission's anti-discrimination package on 25th November 1999.

This package was characterised by three central elements. First, a “proposal for a Council directive establishing a general framework for equal treatment in employment and occupation”. This directive prohibits employment discrimination on the grounds of racial or ethnic origin, religion or belief, age, disability or sexual orientation. Second, a “proposal for a Council directive implementing equal treatment between persons irrespective of racial or ethnic origin”. This directive has the objective of prohibiting racial discrimination in employment, social protection, education and access to goods and services. And third, a “proposal for a Council Decision establishing a Community Action Programme to combat discrimination,

105 See for this the information provided by Thomas F. Kramer (1997), and Mark Bell & Lisa Waddington (1996).
2001-2006”.109 This action programme seeks to combat discrimination on grounds of racial or ethnic origin, religion or belief, age, disability or sexual orientation through non-legislative avenues. In particular, funding will be provided for activities to develop understanding of issues related to discrimination, to promote exchange of information and good practice, and to “disseminate the values and practices underlying the fight against discrimination”.110 The reduction to employment for all forms of discrimination apart from race and ethnicity was heavily criticised by NGOs, the European Parliament, and the Committee of the Regions of Europe. Yet, the Council of Ministers adopted the “Race Directive” in June 2000 and the “Employment Directive” as well as the “Action Programme” in October 2000 without taking this critique into consideration.111

In the following I will scrutinise the draft of the employment directive in its relevance to sexual orientation.112 I have chosen the draft rather than the finally adopted directive since it contains an explanatory section, written by the Commission, justifying the proposal to the Council and these explanations are relevant to understand the current logic behind anti-discrimination legislation in the EU. The draft employment directive contains material gain in its explicit reference to issues such as recruitment, working conditions, pay, dismissals, and promotion. In the legal practice that occurs after implementation, it might be interpreted to include all people within the EU, thus extending to third country nationals and not only EU citizens.113 What is interesting with respect to the theoretical discussion in this chapter, however, is the definition of discrimination that forms an integral part of the directive.

Article 1 of the proposal states that equal treatment shall extend to “all persons irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation.” There is no further definition provided for any of the grounds, but, in its commentary on Article 1 of the directive, the Commission states that “a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour which is not.”114 The most likely explanation for this commentary is to assume a concern that a ban on sexual orientation discrimination could extend to cover all forms of sexual behaviour, most notably sexual abuse. This concern is worrisome since nothing in the directive calls into question criminal law, which clearly and rightly penalises sexual abuse. No anti-discrimination legislation

110 Article 3
111 See Chapter One for an elaboration of the process.
112 I am grateful to Mark Bell for summarising the consequences of the directives from a legal point of view for the ILGA-Europe executive board. The following paragraphs are strongly informed by his analysis in the legal aspects.
113 See Mark Bell (2001:4-5) for an explanation of this possibility.
114 COM (1999) 565, 25.11.1999. The Commission published two versions of this draft, one in October and one in November 1999. It only clarified the two different versions in February 2000. The October draft does not contain this explanatory note. ILGA-Europe inquired with regards to this aspect and it seems that some pressure by Austrian Catholic bishops has fuelled this restriction.
could, thus, truly cover a criminal offence without abolishing it. It seems as if this is another instance where perceived public opinion was taken into account as a precautionary measure against a non-existing ghost: the traditional connection between paedophilia and gay male sexuality.\textsuperscript{115} The formulation is, thus, potentially open to a homophobic interpretation which could have been avoided by clearly stating “sexual abuse” rather than “sexual behaviour”.

More to the point, though, the formulation insists on naming a necessary lesbian or gay identity. It refers to sexual orientation rather than merely to sexual behaviour as a pre-condition for access to protection. Sexual orientation is equated with an identity. The term becomes a clear marker of personality, an unchangeable aspect of a person’s character, rather than a chosen behaviour that does not necessarily materialise an identity. In consequence it will presumably be difficult to obtain protection if a person does not proclaim a firm sexual orientation for himself or herself, but rather the right to sexual choices. Here is a clear instance of the legal proliferation of fixed minority identities, which, in turn, make equality a critical concept as was argued in the previous chapter. The issue of sexual orientation as gay and lesbian identity as a distinctive marker of difference permeates the whole draft directive.

The draft directive sets out to define unlawful discrimination in four dimensions: direct discrimination, indirect discrimination, harassment and failure to provide reasonable accommodation. The latter only pertains to disability specifically and will not be further investigated here. Article 2(2)(a) states “direct discrimination shall be taken to occur where, on any of the grounds referred to in Article 1, one person is treated less favourably than another is, has been or would be treated.” In practice, this formulation will mean that the establishment of sexual orientation discrimination requires a comparison between the treatment of gay men, bisexuals or lesbians, and the treatment accorded to heterosexuals. There is no provision for a distinction between sexual orientation and homosexual or bisexual identity. The draft directive stipulates two exceptions to this total ban on direct discrimination: genuine occupational requirements and positive action schemes.\textsuperscript{116} The former will potentially allow religious employers to discriminate against gay men, bisexuals, and lesbians. The latter is meant to allow affirmative action to take place.

Indirect discrimination is defined in Article 2(2)(b) of the directive, which states:

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to adversely affect a person or persons to whom any of the grounds referred to in Article 1 applies, unless that

\textsuperscript{115} This connection is a traditional homophobic argument and denies the fact that most sexual abuse is of heterosexual nature and occurs between an adult and a child known to each other. In fact, paedophilia as a term is so heavily linked to a history of prejudice against gay men that I prefer the term sexual abuse since that term names what the issue actually concerns, not sexual behaviour or sexual orientation, but abuse.

\textsuperscript{116} A further set of exceptions is provided in Article 5 of the proposed directive, but only in relation to age.
provision, criterion or practice is objectively justified by a legitimate aim and
the means of achieving it are appropriate and necessary.

This is progressive in comparison to the 1976 directive on gender discrimination that
demands proof of a substantially higher proportion of women or men to be affected
and, thus, involves the necessity of statistical data, which would be highly
contentious in the case of sexual orientation at the best of times. Here the onus is
only to prove that something is liable to adversely affect a certain group to which a
person can be ascribed or to which s/he ascribes herself or himself. (Bell 2001:7)117
Additionally the framework directive proposes a ban on harassment, which it also
defines broadly.

Harassment is behaviour “which has the purpose or effect of creating an
intimidating, hostile, offensive or disturbing environment”.118 This could imply that
not only direct harassment—such as promotion in exchange for sexual favours—will
be potentially in breach of the directive, but any behaviour which damages the
working environment. (Bell 2001:8) Legally speaking this is a strong article, but with
regards to sexual orientation it contains a glitch: what are the standards used to
determine whether certain actions create a hostile environment? It is to be expected
that courts will draw on the standards a so-called reasonable person would be likely
to have rather than on the perception of the victim. (Bell 2001:8)

A few clearly positive possibilities are included in the provisions for enforcement.
First, NGOs are given legal standing to bring cases on behalf of a complainant, with
the latter’s approval.119 Second, there is provision for a shift in the burden of proof
where the complainant establishes “facts from which it may be presumed that there
has been direct or indirect discrimination”.120 Third, victimisation of complainants is
forbidden.121 And, finally, the penalties for violations of the directive must be
“effective, proportionate and dissuasive.”122 These provisions of enforcement are
promising and take into account the difficulties of individuals with respect to
carrying a complaint through to courts. To a large extent they cover the demands
made by NGOs.

The problems I raised so far could have been accounted for in a re-drafting of the
directive or will be accounted for in a progressive development in the judgements to
come. What is of theoretical and political interest beyond this point, however, is to

117 One example of indirect discrimination could be employers’ dress codes, where, for example, a woman
might find that certain skirts and blouses offensively foreground a sexuality she does not wish to
118 Article 2(3).
119 Article 8(2). To demonstrate how serious the commission takes this possibility it also includes the legal
standing of NGOs in Article 8(2). In practical terms, this allows lesbian and gay organisations to act
legally on behalf of an individual victim of discrimination. It also permits trade unions to represent
individuals in discrimination cases.
120 Article 9(1).
121 Article 10.
122 Article 14.
ask another series of questions: questions that relate to the principle nature of anti-discrimination rights within a political field in which the juridical is a hegemonic and definitional site of equality, politics, rights and difference. The employment directive is a result of many years of lobby work and a change in political climate. To understand the problems of this first pan-European result, the language of discrimination employed by activists has to be scrutinised further.

Speaking about Discrimination: Implicit Problems

On Wednesday, 26th January 2000, parliamentarians from across Europe voted to recommend that sexual orientation be added to the list of prohibited grounds of discrimination in a new legal instrument designed to strengthen the anti-discrimination provisions of the European Convention on Human Rights. This historic development took place during the review by the Parliamentary Assembly of the Council of Europe of a draft protocol put forward by the Council's governing body—the Committee of Ministers—with the intention of making good the shortcomings in the existing anti-discrimination provisions of the Convention.123 The vote was a result of extensive lobbying efforts within the Council of Europe and by ILGA-Europe, which submitted a legal request for sexual orientation and gender identity to be included in the revision of Article 14 ECHR.124 The vote in the Parliamentary Assembly of the Council of Europe occurred at the same time as the publication of a discrimination report by ILGA-Europe, originally designed as part of a motion for resolution tabled by Social Democratic Parliamentarians. Together with the ILGA-Europe Equality report for the EU (1998), this report to the Legal Affairs and Human Rights Committee, published on 16th February 2000, forms a comprehensive overview of the legal and social situation of lesbians and gay men in Europe.125 All these documents submitted to the European institutions are written in the conceptual language of discrimination.

123 Draft Protocol No 12. This parliamentary decision did not mean that sexual orientation was actually added. Draft Protocol 12 was signed in November 2000 without sexual orientation. See Chapter One for an elaboration on the process.

124 The submission on gender identity, however, was unsuccessful. Legal experts within ILGA-Europe consider this to be due to two reasons: a) the fact that almost no legislation in the whole world includes specific reference to gender identity—so the Council of Europe, as a rather conservative organisation, is unlikely to take a lead in this. And b) the fact that transgenders people are a very small minority: the argument about not having an endless number of rather small minorities specially mentioned in the list of grounds and of leaving some to be defined under "other status" comes into play. I am grateful to Robert Wintemute and Nigel Warner for this assessment.

125 The full title of the Equality report is "Equality for Lesbians and Gay Men. A Relevant Issue in the Civil and Social Dialogue". The introduction to this report has been examined in Chapter Three. The official title of the Council of Europe report is: "Report to the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe as a Contribution to the Preparation of its Report and Recommendations on the Situation of Lesbians and Gays in the Member States of the Council of Europe, Motion for a Resolution" (Doc. 8319).
With the discrimination report ILGA-Europe tried to argue that “discrimination against lesbian, gay and bisexual persons remains endemic and extremely serious.” (Rex Wockner International News, 13th March 2000) The report to the Legal Affairs and Human Rights Committee alleges severe discrimination and illustrates this allegation with literature, research and statistics. It covers discrimination in the following areas: 1. Discrimination in sexual offences law—including age of consent and terminology used in sexual offences law; 2. Freedom of expression and association; 3. The classification of homosexuality as an illness; 4. The police’s use of beatings and torture in custody, their general harassment of the lesbian, gay and bisexual community, acts of extortion and blackmail, and police lists of lesbian, gay and bisexual persons; 5. Support for sexual orientation discrimination by some religious leaders; 6. Hate crimes and other abuses by private parties; 7. Violence; 8. Countries in which lesbian, gay and bisexual communities do not exist; 9. Lesbian invisibility; 10. Young gays, bisexuals, and lesbians; 11. Employment discrimination through denying access to jobs and promotional opportunities, as well as harassment; 12. The denial of parenting rights; and finally 13. The legal recognition of same-sex relationships. Additionally the report asserts evidence of a world-wide trend towards recognising lesbian and gay rights as fundamental human rights in areas such as international and national law, anti-discrimination legislation, and legal recognition of same-sex couples.

The formulation “to end hundreds of years of persecution and intolerance” “on the threshold of a new millennium” makes use of the successful shift of boundaries within legal liberal constructions of homosexuality. In Europe the gay and lesbian movement has achieved a conceptual move “from the ‘deviant and dangerous offender’, to the ‘minority’ subject of human rights protection, to the ‘spousal’ recipient of social benefits previously available only to heterosexual couples.” (Herman 1994:8)

The wish to “end hundreds of years of persecution and intolerance” and the address to equality as a fundamental principle of the identity of the Council of Europe, is clearly an appeal to liberal legal ideology. The discourse of liberal legal equality in European democracies inhabits an authoritative dominance within European institutions to the extent of excluding or marginalising other possible
concepts of equality from debate. This liberal legal ideology of equality—strongly bound to the principle of human rights—produces a consensus within which lesbian and gay equality is defined and permitted to some extent. Legal equality for lesbians, gay men, bisexuals, and transgender people has become imaginable and achievable in the assumed consensus about what is realistically possible in Europe politics.

The appeal to the liberal legal tradition of European institutions in political practices that utilise a language of discrimination is firmly connected to a hope of progress and future change. “On the threshold of a new millennium” hundreds of years of discrimination can be ended through anti-discrimination legislation. This quest for anti-discrimination legislation is premised upon a particular understanding of society: namely that it contains a variety of diverse minority-like populations, each of which suffers a kind of antiquated prejudice no longer tolerable in liberal democracies. The state or the pan-European institution then acts as a neutral protector, facilitating the eradication of what is seen to be individual aberrations through the passage and enforcement of anti-discrimination measures. Legal scholar Morris Kaplan points to this logic of hope in his justification for anti-discrimination legislation in spite of the queer critique he opposes:

The underlying rationale of the anti-discrimination provisions of civil rights legislation is the recognition that formal legal equality is inadequate to provide for equal citizenship under conditions of popular hostility and pervasive social inequality. It is precisely the intensity and extent of the prejudice against homosexuality that justifies the claims of lesbian and gay citizens to protection against discrimination. (Kaplan 1997a:43)

The hope Kaplan expresses—namely that a long existent prejudice can be countered by a legal prohibition—is also typically evident in ILGA-Europe’s argument. The submission on the extension of Article 14 ECHR, with regards to gender identity, exemplifies this:

It is only by adding to Article 14 that there will be no discrimination based on gender identity that nation states will be obligated to initiate some steps towards addressing this contradiction and the other legal anomalies that transgender and transsexual people face.

Here, the changes to an anti-discrimination article only valid within the bounds of the rights granted in the ECHR are made significant in the struggle to better the actual living conditions of a specific minority group. The hope of progress and change, which forms the central theme of arguments for anti-discrimination legislation, is based on a set of concrete visions of change. The law and the state are addressed as the most significant agents of political and social change. This address affirms the political hegemony of the juridical. The logic of hope, then, runs approximately like this: through anti-discrimination legislation, the hegemony of the juridical in European political culture will assure equal treatment and, thus, reap
ideological rewards and material change for those suffering from discrimination. Let me examine the steps of this logic one by one.

When I speak of the juridical here, I mean to imply the discursive structure of social-legal regulation: everything that belongs to the discursive institutional processes of regulating and maintaining power over societies as sets of social networks. This includes concrete practices of institutions such as the law and the legal arena. The latter contains law-making bodies, courts, lawyers, and legal documents, as well as the discursive order of legality in parliamentary democracies in Europe. The juridical adds the ideological and discursive structures that assign power and truth to these institutions and maintain their rank of superior opinion. The juridical is, therefore, more than the written law and more than the practices of court rooms: it extends into the political and into the way individuals understand themselves as members of a social community, as well as into the mechanisms, the histories, the predicaments, and the workings of rights within democracies. The law itself is structured in its very existence by this ideological support from the juridical. There exists a certain historically singular access of the law to defining powers and the power to speak with physical consequence through Judeo-Christian culture and enlightenment. (Cover 1986:1611)

However, the rules of the juridical are a historical fact not a philosophical absolute nor a tangible entity. They are a discursive relational and contextual practice that takes shape in opposition to whatever is locally and ideologically conceived as the public and as the political. In European cultures the juridical ideologically grants liberal freedom, fitted to an economic order in which property and personhood are not equally distributed, and this freedom is conveyed by rights against arbitrary state power on one side and against anarchic civil society or property theft on the other. (Brown 1995:6)

Through the address to the state and the law, the juridical becomes yet again the dominant and central discursive site to effectively speak about discrimination as political capital and the site to receive alleviation. This dominance is maintained by the institutional prerogative concerning speech and silence. The law can serve to command speech and to preserve the ontological comforts of silence. (Goldberg-Hiller 1998:521) The power to apply both tactics, that of speech and that of silence, is a power that those who speak within the legal arena receive through the historical hegemony of the juridical in the politics of modern democracies. Both these tactics are the means to draw important distinctions between courts and publics. That has significance for the question whether discrimination is acceptable, indeed whether it exists as a recognisable structure at all, and whether the dominance of the definitional power of the juridical, and thus its political hegemony, can be maintained or not.

To speak with Robert Cover (1986:1611), this means that any legal interpretation is not only practical, but is a practice in itself in that the institutional context—and

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126 When I speak about the law in the following I do not imply the psychoanalytic use of this term.
Foucault might add, the historical claim to ultimate truth that characterises the law—ties the language act of practical understanding to the physical acts of others in a predictable, though not logically necessary way. The power and violence of the word (Cover) spoken, or not spoken within law-making institutions and court rooms, is the essence of maintaining the prerogative of political definition. Any political practice that addresses the law—that speaks and claims consequential speech to be made on somebody’s behalf—needs to locate itself somewhere within the juridical and its hegemonic discourses of institutional power and intelligible difference. No political practice can remain outside the hegemony of the juridical if it wants to address law.

As one significant part of the juridical, the legal arena is in that climate an obvious target of political negotiation about difference. In European cultures and modern democracies, the law functions as assurance of individual and property rights as well as ordering the duties of social belonging. For this reason “lesbian and gay rights movements, from their inception, have engaged in legal struggle partly on the basis of what changes in legal provision signify more generally.” (Herman 1994:4) Herman names the defeat of bigotry and the moral majority, safety to come out, feelings of self-worth, citizenship, and community identity as themes that are seen to be influenced by legal changes. The legal arena is, thus, said to provide a space for negotiating which differences are genuine and, hence, acceptable reasons for differentiation in treatment.

The logic of hope and change is, therefore, seemingly a realistic logic in the European political climate. The hegemony of the juridical promises that equal treatment in law will reap rewards on an ideological and a material level. This promise is part of how the juridical is maintained as hegemonic. The first step the logic of hope and change takes is to assure equal treatment in law. In order to make discrimination visible and understood as such, comparisons are needed. In legal discourse, discrimination occurs where one person that does not share one particular feature is treated unfavourably, all other aspects being the same. The establishment of discrimination in that respect features numbers and personal testimony as the most common political practice of writing and speaking. Both the Article 14 submissions and the discrimination report utilise exactly that technique in their substantial referencing of court cases and research. Each evidence of discrimination is supported as much as possible by a combination of personal witness, reviews of mainstream human rights organisation’s, academic assessment, existing judgements and statistical proof. Discrimination is rendered factual in that it contains a truth claim. That truth claim is maintained through a reference to the principle of equality and the seemingly agreed upon common sense judgement about what differentiation should be acceptable and what differentiation should not.

That gay men, lesbians, bisexuals, and transgender people are discriminated against is established as a political fact by the kind of discourses rights organisations use in their political practices. What becomes utilisable in the political arena is, thus,
not necessarily what is actually experienced. Or to say it differently, experiences of discrimination are closely bound in their possibility of recognition to the possibilities of turning them into political capital. Or to give it yet another twist: the very existence of mainstream lobby organisations, such as ILGA-Europe, actually facilitates the possibilities of recognition of discrimination. This is a similar argument to the identity critique of queer theory analysed in Chapter Three: whereas ILGA-Europe politically claims to represent a pre-existing group with a certain describable identity, in fact, it participates in the very production of this group as a group. ILGA-Europe’s representation of discrimination in Europe does not simply describe the existing reality out there, but is productive of that very reality. This does not mean that ILGA-Europe invents discrimination or that the reported discrimination is unreal. Nothing could be further from my argument. Yet, turning an accumulation of descriptions of discrimination into a cohesive understandable political practice is creative of the way in which discrimination is voiced and embedded in political discourses. Consequently, discrimination is experienced as politically negotiable only with reference to equality as base theme of liberal political and legal discourses.

The equality promised to accrue from anti-discrimination legislation is said to grant a specific ideological reward: it is hoped to adversely influence the acceptability of homophobia. This ideological effect is central to political practices that utilise a language of discrimination to render injustice and inequality visible. Hence, in order to call something discrimination—and to turn it into political capital and claim anti-discrimination rights—political practices have to be embedded within discourses of common sense. They have to be tailored to the dominant liberal legal ideology of equality, with regard to what is acceptable and what is not. To identify what is acceptable, social movement activists who enter a public debate on sexuality—legal or otherwise—“engage in a process of self-censorship whereby the movement’s internal politics are deliberately transformed and rendered compatible with the perceived prevailing social climate.” (Herman 1994:6) Indeed, the anti-discrimination report arguably taps into a perceived prevailing social climate:

The London pub bombing¹²⁷ was preceded by similar attacks on the city’s Afro-Caribbean and Bangladeshi communities, emphasising the many similarities between racism and homophobia. However, there is one big difference: for many people homophobia remains respectable. Statements and actions that would be unthinkable in respect of (sic) ethnic or religious minorities are commonplace with regard to the lesbian, gay and bisexual minority. Some governments or parliaments deliberately maintain discriminatory legislation, while some religious leaders oppose gay rights in terms that can only be described as inflammatory.

The idea of bringing up the issue of acceptability in the introduction to the discrimination report makes this usually implicit tailoring explicit. Any talk of

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¹²⁷ A homophobic bomb attack on a gay pub, in London in April 1999, that killed three and left dozens maimed.
discrimination is held up against liberal political, social, and legal discourses of acceptability in equal treatment. Discrimination is not acceptable for racial minorities, thus, it should not be acceptable for sexual minorities. While homophobia and racism have aspects in common, the assumed consensus about the non-acceptability of racism and the existence of anti-discrimination legislation in the area of race institutes a difference between racism and homophobia. The formulation of this passage was debated within the executive board since its implications of hierarchising forms of oppression were regarded as problematic by some. The argument partakes in inventing a certain social and political reality which does not actually exist even in the member states of the EU.

While, for example, in Great Britain anti-racist discourses carry a certain modest political weight in mainstream political discourse, in countries such as Germany racism and xenophobia are a perfectly acceptable mainstream political discourse. In fact, the xenophobia blatantly evident is in general much worse than any homophobia ever displayed by politicians or by the Catholic church. Asserting the non-acceptability of racism as agreed ground could be viewed as an affirmative act that now aims to elevate homosexuality to the same high moral ground racial protection should have. Yet that logic—besides being obviously problematic—does not actually argue facts, but argues perceived perception.

This leads me to conclude that the task of arguing discrimination can only be successful if it fits the generally perceived social and political climate. The ideological reward anti-discrimination legislation promises is to fit homosexuality—and potentially transgenderism—into the perceived social and political climate. Activists search out the most successful argument to address the audience with a minimum compromise on their own actual political thought. Speaking about discrimination with reference to gross injustices, such as physical harm and significant employment disadvantages, fits the climate of modern democracies. Hence, it is ultimately the perception of the social and political climate that defines what can progress and what cannot and this explains, in turn, why certain equalities are more easily achieved than others. Self-censorship with respect to perception is, therefore, an important aspect of ILGA-Europe’s daily business. What is seen to be manageable within a perceived political reality is the decisive factor for any decision on argumentation strategy.

Yet, this is so on both sides of the fence. European politicians and judges persistently talk about a perceived consensus about homosexuality within European societies irrespective of whether they support claims to rights or want to keep the

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128 This actual political thought, however, is often not formulated specifically among the leading activists but is rather assumed to be agreed in its content.

129 Urvashi Vaid (1995) devotes a whole chapter (Chapter Five) to arguing how political lobbying in professional organisations necessarily means the adoption of system-intrinsic political practices. There exists a logic of political structure withdrawn from individual agency or the individual wish to be as radical as possible. According to Vaid, this logic impregnates lobby work, and nobody can totally resist it.
status quo. Either homosexuality is portrayed as “now widely accepted” or as “generally considered to be morally wrong by the majority of the population”. The discrimination report anticipates such reference to society’s opinion. It appeals to European institutions to act as a civil protection shield so that gays and lesbians will become protected despite that fact that conservative, homophobic segments of society oppose such a move. If that protection is not granted, the significance of discrimination will continue to be severe:

The discrimination described in this report affects almost all aspects of the lives of lesbians and gays: many have homophobia instilled into them in childhood before they have even recognised their own sexuality, leading to self-hatred, isolation, difficulty in self-acceptance, and in some cases, suicide attempts; many hide their sexual orientation throughout their life, ‘living a lie’, with profound negative consequences for their self-esteem and happiness; and for many, legal discrimination, whether in the criminal law or in the recognition of their relationships, contributes to a sense of alienation and exclusion.

The assumption behind this formulation is that anti-discrimination legislation would protect the public announcement of a life-style and, thus, give self-confidence, sovereignty as a participating citizen, and a sense of equal belonging, as well as an identification with the social movements that have already worked to achieve those rights. The change of law is considered to have direct influence on everyday life in that under certain circumstances victims of discrimination have access to the courts to challenge injustice and access to legal recognition formerly denied. Eventually, this access will persuade the majority of the population to accept that discrimination is no longer acceptable. Anti-discrimination argumentation has a tinge of education: teaching the nations respect, forcing them to acknowledge and protect individual expression. In consequence, gay men and lesbians will gain material equality on a social, individual, and economic level.

Considering the rules that are necessitated in the speaking about discrimination and the demand for anti-discrimination legislation, the political territory of anti-discrimination features contradictions. This fact does not escape the ILGA-Europe documents: they proclaim a certain political territory as won—namely the liberal democratic ideology of equality in the European institutions—and at the same time demand the fulfilment of the equality promise, thus, fully acknowledging that the territory is not won entirely. For example, it is not yet won with respect to the hate speech many churches actively pursue, or with regard to the fact that severe discrimination persists. Thus, ILGA-Europe holds liberalism to its own promises. This is a conscious and clear tactic that permeates the utilisation of discrimination as political practice. Yet, within this logic, anti-discrimination rights are obviously a problematic or at least a location from which questions arise.

130 The apparent agreement of society about homosexuality is in fact mentioned in one way or the other in every court case that was heard so far before the European Court of Human Rights and before the European Court of Justice.
The centrality of the legal arena—and in consequence the support for the political hegemony of the juridical inherent in anti-discrimination claims—raises a few problems: considering the power of the word in legal practice, it is not enough to simply say that rights are self-affirming and consider their ideological consequence unproblematic. Anti-discrimination legislation affirms a homosexual self and it speaks on behalf of that self. Yet, that homosexual self is a historical construct born out of the late 19th century, and it is not something to be celebrated unquestioningly. Within anti-discrimination discourse the homosexual subject is permanently re-created as a discriminated subject. The effect of anti-discrimination legislation is up for definition within the constitutive power of the law and remains subjugated to the dominant liberal discourses of equality and freedom only.

Consequently, the mentioned problems inherent in political speech about discrimination should be scrutinised further with respect to the need in anti-discrimination politics to continuously create a subject of discrimination, a historical subject in possession of an identity that is at least temporarily injured. The implicit problems of anti-discrimination also warrant scrutiny towards the way in which the law is productive in maintaining a circle of heteronormative desire and in hiding its own involvement in the perpetuation of discrimination in the first place. Such further analysis will allow us to formulate different political and theoretical demands in the realm of anti-discrimination measures. To do so, I will return to some aspects of the Article 13 Employment Directive.

**Analysing the Problems: Political and Theoretical Demands on Anti-Discrimination**

The definition of discrimination as occurring when “one person is treated less favourably than another is, has been or would be treated” on grounds of that person’s sexual orientation—or any other ground for that matter—defines eligibility for a right. Protection is accorded to those who are directly or indirectly disadvantaged or harassed in comparison to those presumed to be in the possession of all available rights by virtue of belonging to the majority or the presumed average normality. This intrinsic and unavoidable comparison not only involves a normatising move—what normality functions as reference point?—but also necessitates the location of a discriminated subject. The language of anti-discrimination assigns a non-agentic position to those historically injured. Anti-discrimination necessitates a self-definition compatible with pre-existing concepts of identity. It continues to imply a homogenous minority population. In the logic of

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131 As a historical product of the 19th century, the homosexual self is located in medical and psychoanalytic as well as religious and early political movement discourses. This early cultural development of homosexual identity was not simple and clear cut, but subject to a differentiated debate, for example, between Magnus Hirschfeld and Karl-Heinrich Ulrichs. A more precise analysis can be found in Martha Vicinius (1993, 1994), Donna Stanton (1992), and Hans-Georg Stümke (1989).

132 Judith Butler elaborates this point through establishing a connection between hurt, a history of discrimination, and identities in her critical analysis of hate speech legislation. (1997a:43-71)
anti-discrimination there has always been and will always be a majority of heterosexuals and a minority of homosexuals. This carries a danger Didi Herman identified for the Canadian human rights charter:

...representing lesbians and gay men as an immutable minority may restrict rather than broaden social understandings of sexuality. Lesbians and gay men are granted legitimacy, not on the basis that there might be something problematic with gender roles and sexual hierarchies, but on the basis that they constitute a fixed group of ‘others’ who need and deserve protection. (Herman 1994:44)

The permanent recreation of a fixed group of others has an effect on discrimination: as I argued above, the protection granted participates in re-establishing, as injured or discriminate, the very individual subject that it seeks to protect. Anti-discrimination involves a permanent leap in logic from identity as a marker of a group to the individual subject as a historically injured subject. Sexual orientation—legally established in the employment directive as an identity not as a behaviour—becomes a protected subjectivity, but also a subjectivity presumed to be established prior to the event of discrimination. The discriminated subject in legal interpretation is a historical and discursive product of the two basic actions available in the political domain: telling and listening. The telling of discrimination—significantly bound to the possibility of experience—and the listening to those stories, as well as the telling of legal rules with regards to the acceptability of this discrimination is productive of a subjectivity and of the group to which that subject apparently belongs. Legal discourse demands that subjectivity be pre-established in order to make discrimination intelligible.

Yet, in the course of telling the story, this subjectivity is, in fact, invented for the first time as an injured subjectivity said to be the marker of membership to the identity group that is protected. The rules of the juridical come to constitute the subject by offering the possibility of locating oneself within them and, thus, becoming intelligible within the order that permeates the understanding of the political in a hegemonic way. So, paradoxically, legislation that makes the subject free to tell her or his story independent or in spite of the allegedly objective outside world—in which prejudice prevails—adheres at the same time to those orders that design that world as eternally structured by difference.

This interpretation connects the formation of a discriminated subject with the concept of experience. Experience is a strong element invoked for the ability to speak about discrimination. The discriminated subject is not merely a human individual, but more a position at which different discourses intersect: those of

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118 This approach is informed by a poststructuralist understanding of the subject and subjectivity. See for a general introduction to this concept, for example, Chris Weedon (1987). More specifically, Bronwyn Davies shows how “the humanist self is so convincingly achieved, and goes on being achieved, through the inscription of humanist discourses on the one who is always already a subject..., and who manages indeed to become what will always already have been...”. (1997:272)
individuality and those of membership in social groups. In that understanding, the rules of legal and political intelligibility can be productive of the experience of discrimination an individual expresses. According to Joan Scott, it is “not individuals who have experiences but subjects who are constituted through experience”. (1991:779) The experience of homosexuality is a historical and discursive event resulting from intersections between cultural meanings of homosexuality, from the availability of discourses that make homosexuality speakable, and from individual relations. Thus, homosexual experience is at once an interpretation of an alleged reality and in need of interpretation. (1991:797) The language of anti-discrimination legislation is one way of interpreting an experience that already is an interpretation of a perceived historical reality, namely that of discrimination.

Activists lobby actively for protection rights and, thus, present themselves as agentic. However, the game of legal anti-discrimination is a game that grants protection to victims who need the law to protect them from outdated but unfortunately wide-spread prejudice against which they have no weapons themselves. Hence, the language of anti-discrimination assigns a non-agentic position to those historically injured. Dorothy Smith’s feminist image of the gender hierarchy as a ball game is applicable here:

It is like a game in which there are more presences than players. Some are engaged in tossing a ball between them; others are consigned to the role of audience and supporter, who pick up the ball if it is dropped and pass it back to the players. They support, facilitate, encourage but their action does not become part of the play. (Smith 1987:32)

A member of a discriminated group becomes a presence in anti-discrimination: the injustice is heard and accepted as real. Yet, the ball tossing in deciding what constitutes discrimination, which groups are affected and what qualifies an individual for membership in that group—for example, sexual orientation and not sexual behaviour—does not include the victim of discrimination as equal player. Social movements lobby for anti-discrimination legislation actively, but that action does not give them definitional power in the game of meaning production about discrimination. In short, the general heteronormative structure of the political game contradicts anti-discrimination ideals.

This means that the intersection between discrimination as a political practice for rights and the dominance of the juridical in the domain of rights remain locked in a circle that offers no real remedy to the actual structure of discrimination. This detrimental circle is kept in place due to three processes: firstly, due to the production of subjectivities within a logic of identity as group membership, secondly, due to the investment into discrimination of the law itself, and thirdly, due to the finite list of grounds in anti-discrimination legislation.

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134 Dorothy Smith works from Marxist feminist theory and would probably not subscribe to the kind of analysis I put forward.
With regard to the first process, Renata Salecl (1993) offers in the context of women's human rights a reading of Lacan that can partly be deployed here. She connects rights and demand through distinguishing need, demand, and desire in legal rights.\(^{135}\)

When put into words, a need becomes articulated in the symbolic order. At this moment, we start to perceive it as a demand—as a demand to the Other to satisfy the need. On the level of demand the subject asks the Other for a specific object (the child, for example, wants food) which is supposed to fulfill a need, but by articulating this need as a demand the subject also asks the Other for its love (by demanding food the child also demands love and attention from the mother). The object of demand thus becomes the subject's means of attaining this other goal—the attention or love of the Other. At this point the third element of the triad, desire, emerges: desire arises as the excess of demand over need, as something in every demand that cannot be reduced to a need. As Lacan argues: "desire is neither the appetite for satisfaction, nor the demand for love, but the difference that results from the subtraction of the first from the second." (Salecl 1993:456)

Taking the aspects of psychoanalytic thought offered by Salecl's reading of Lacan to the intersection of individual subjectivity, identity as marker for a group, and political practices employed to demand anti-discrimination rights, the following logic can be applied.

Individuals obtain anti-discrimination rights as a substitute for a fundamental, if implicit, prohibition: the discriminatory history of sexual and gender minority groups is an effect of normatising heterosexuality in a binary gender hierarchy. It is also an effect of creating a true, natural, and biologically essential way of being a gender and of being sexual.\(^{136}\) Anti-discrimination rights express a need and a demand for full acceptance and value within society. They express the hope to defeat homophobia as I have shown above. Yet, obtaining rights actually prevents the full and equal acceptance that is sought after, since equality, acceptance, and value with regard to gender and sexuality are defined by the prohibition of homosexuality, in this instance expressed through the heteronormative structure of the law.\(^{137}\) Anti-discrimination rights function as a substitute for something fundamental that all 'out' members of the designated minority group have indeed lost: the freedom from subjugation under

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\(^{135}\) I want to emphasise that the following is a critical engagement with Salecl's work and not with Lacan's directly. Hence, I do not claim to offer any comprehensive understanding of Lacanian thought here. Psychoanalytic theory of subject production is taken into consideration only in a very marginal way at the intersection lines of subjectivity and group identity, since I am interested in political practices and not in the complicated processes of the production of individual homosexual identity by themselves.

\(^{136}\) Much research has been conducted on the historical processes of this. See for further information Henning Bech (1997), John Boswell (1990), Joseph Bristow (1997), Vern Bullough (1990), and Judith Butler (1990).

\(^{137}\) See for an explanation of this Lisa Bower (1997), Janet Halley (1993), Wayne Morgan (1995), and Carl Stychin (1995). I also wish to emphasise again that the term law here does not refer to the "Law of the Father" in Lacanian thought.
the hegemony of the binary gender hierarchy which essentially connects sexual and
gender identity choices to essentialised sexed bodies.

As a substitute these rights surely fulfil a need—and as such they have a real
effect—but they do not actually fulfil the demand for substantial equality and
acceptance. This means, as Salecl puts it, that it appears as if “rights are not so much
linked to demand as they are to desire: they are akin to that surplus of demand over
need because of which demand always remains unfulfilled”. (1993:458) A
poststructuralist concept of desire, as I argued in Chapter Three, fundamentally
connects the desire for rights with the desire to express non-normative gender and
sexual practices. Desire—understood as discursive rather than a psychological reality
eternally fixed by the rules and laws of gender formation—functions as a
fundamental signifier of what constitutes people as deviant or belonging to a
minority and as persons that can and do claim rights which are denied them.

Claiming rights becomes an appropriation of the desire made relevant in the
discourses of participation and citizenship, which are among others based on the
regulatory practices of a binary gender order. It is this gender order which, in turn,
functions as the only available field in which sexual desire and the desire to belong to
a gender can be formed. Thus, beyond Salecl’s Lacanian approach, the Foucauldian
insight that social structures produce individuals as personal subjects, as social
subjects, and as subject of the law is relevant. Naming the conditions of desire—
understood as the central motor of any sexual identity and of the constitution of
oneself as a person entitled to rights—is a possible answer to the crucial question of
how anti-discrimination rights remain locked in a problematic that cannot be
resolved intrinsic to official rights discourses. Beyond desire, there are, however, two
further possible answers to this question.

First, anti-discrimination legislation is also a move to hide the power and
involvement of political institutions and the law itself in the establishment and
persistence of discrimination. In the definitional, procedural, and remedy sections of
the EU Commission’s draft directive on discrimination in employment, for example,
individual persons are reduced to observable social attributes and practices, and
consequently assigned membership to an identifiable identity group. These
attributes and practices are defined empirically and positivistically as if their existence
were intrinsic and factual, rather than effects of discursive and institutional power.
Yet, it is institutional power that connects sexual and gender identities to natural,
essential bodies and their desires. Definitions of discrimination additionally
participate in positivist definitions of persons as their attributes and practices and,
thus, fundamentally invests into a logic of fixed group identity. When these
definitions are written into law, they ensure that those people describable according
to them will now, through them, become regulated as members of a group: a group
that has historically suffered severe prosecution from the institution that now re-
defines it.
In consequence, anti-discrimination rights call on the state as the neutral arbiter of discrimination and, hence, onto the agency that institutionalises heterosexual legal privileges in the first place and that has historically been the persecutor of homosexual desire. Granting anti-discrimination protection is, thus, also a convenient way of hiding that involvement. One could go as far as considering whether anti-discrimination rights are not a perfect instance of the way in which the language of recognition is also the language of historical discrimination. Or how the articulation of political demands in a language bound to the context of liberal legal discourses can become a vehicle of subordination by re-establishing the discriminated group identity as an identity in need of protection without addressing the structural aspects of Euro-Christian thought through which that difference was produced. Anti-discrimination language has so far not included an emphasis on the “processes of differentiation” (Scott 1997:24): it leaves us in the dark as to why difference in sexual behaviour has any influence on the construction of our subjectivity, our political identities, our social relations, or why that difference is meaningful at all.

Second, another answer to the question why anti-discrimination remains problematic is the tendency in the European institutions to create a limited list of grounds for discrimination claims. Activists call this the shopping list of anti-discrimination. These lists necessitate the continual challenging of itself in order to accommodate more and more minorities. ILGA-Europe, for example, will be faced with the task of ensuring the inclusion of gender identity in the future. More importantly, however, these lists cannot deal with two fundamental aspects of the existing structures of discrimination: firstly, the emergence of new social groups and political alliances along lines of affiliation disconnected from ascribable identities. Secondly, they cannot deal with the structural interconnection of different kinds of discriminations, such as the intersections of racism, sexism and homophobia, and the intrinsic bonds of the binary gender hierarchy to heteronormativity.

Legal regimes, in general, produce and enshrine fragmented identities. People are forced to compartmentalise their complex subjectivities in order to make a claim. (Herman 1994:46) Considering Renata Salecl’s approach to rights again, the discourse of anti-discrimination presents a fantasy scenario. In this scenario society and the individual are perceived as a whole; a non-split entity that can be rationally organised to accommodate certain differences in a non-conflictual manner if we only believe in the promise of equality. (1993:459) Yet, in the existing language of the law the subject can never be satisfied in its desire to regain the fundamental social loss that has forced her or him into a minority subjectivity. There will always remain a gap between positive, written anti-discrimination law and the universal idea of equality.

Having said this much about the problem of anti-discrimination, it obviously remains necessary to ask what political consequences this critical analysis has to offer. The language of discrimination and demands for anti-discrimination legislation
will continue to be crucial in political practices as long as lesbians, gay men, bisexuals, and transgender people suffer from discrimination in European societies. What political and theoretical demands can, then, be made on anti-discrimination claims as political practice? The argument I have presented in this chapter does not imply that the acts of discrimination gay men, lesbians, bisexual, and transgender people experience almost daily are not harmful; they are, but the reason that certain acts are experienced as harmful is not universal and a-historical, but culturally and historically specific. It is that specificity which needs to be addressed if anti-discrimination measures are to have actual impact beyond individual acknowledgement of harm. I want to argue that this insight declares anti-discrimination legislation a primarily political terrain not a legal one. This means that legal change needs to be discussed in the wider terrain of the political and the juridical and not reduced to simply adding sexual orientation and gender identity to existing anti-discrimination articles.

Dealing with anti-discrimination in the realm of specific laws only is likely to aid a manifestation of harm and discrimination as a natural burden to certain identities such as blackness, forms of femininity, homosexuality, and disability. The effects are similar to those I discussed with regard to human rights. It is not enough to reduce anti-discrimination to the existence of treaties and laws as some gay and lesbian scholars suggest. Politics of anti-discrimination need to address the concern that law in European cultures features the double bind of inclusion and exclusion. Anti-discrimination rights, thus, are to be dealt with as potential problems.

The effects of anti-discrimination rights are not only complex in their problematic, but also in the positive hope they present. As I argued above, there is a clear value ideal attached to anti-discrimination rights apart from the indisputable material effects they might have for individuals. Nevertheless, that value is not considered an objective gain of actual equality, it is crucial to put it to work. The political potency of anti-discrimination rights, then, lies not in their concrete content, but in their idealism. According to Wendy Brown, the value of the ideology of equal rights lies in a revelation of the limits of equality and political emancipation in the discursive struggles that surround it. (1995:134) The decisive potential is here that the parameters of the discursive struggle entered into with every discrimination claim are negotiated rather than secured in advance and that the outcome is never fully guaranteed. (Brown 1995:134) In consequence, anti-discrimination can be understood as a political and a theoretical discourse that consequently has theoretical and political demands made on it.

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138 Morris Kaplan, for example, suggests in an attempt to counter theoretical queer identity critique:

When a citizen believes that she has been unfairly treated in a relevant way, she may exercise her rights under the law to challenge the treatment as discriminatory. No one is obliged to do so; the definition of protected classes does not construct personal or political identities but rather than treating her in terms of her individual character and qualities. The objectionable construction of identity in cases of discrimination results from a social history of subordinating and stigmatizing specific groups, not from the laws designed to remedy such effects. (1997a:45)
On a theoretical level the relationship of anti-discrimination to identity—its promise to address a social harm that is itself constitutive of the discriminated identity—presents a contradiction in which difference is needed to conceptualise discrimination. Without clearly addressing this contradiction from the perspective of the discriminated, anti-discrimination strategies forfeit any capacity to analyse the basic structures of suffering. Hence, critical strategies need to be found that scrutinise the different forms of power the project of anti-discrimination is flanked by on all sides: the powers against which it is demanded—prejudice, legal disadvantages, institutional abuse—and the power a discriminated subject must claim to enact itself. Effective anti-discrimination measures deal with the powers that situate, constrain, and produce subjects as well as with the power entailed in taking up political agency in the claim for protection. They find ways to deal with the historical “processes of differentiation”. (Scott 1997:24) The defeat of homophobia cannot remain a goal that can actually be achieved, but political practices form a permanent struggle against heteronormative structures.

The demand I propose to make on anti-discrimination strategies from a theoretical perspective is, thus, to go beyond the discrimination logic into a questioning of the parameters of difference. In a Derridian sense of difference, this would imply staging difference politically as a diversity stemming from the Latin differere—to move or see apart from, to defer—rather than as discrimination and hierarchy as in the Latin discrimere—to differentiate. An injurious past cannot be compensated unless a necessarily discriminated identity ceases to be invested in it. Yet, identity cannot cease to be invested in the past without giving up essentialist identities as such, giving up the economy of hurt minorities and investing into the address of structures and ideological systems such as gender and sexuality themselves. (Brown 1995:73)

On a practical level scholars like Sabine Hark urge us not to confuse the sphere of the political with the sphere of the legal when we are trying to address the contradictions of legal rights in their protective and regulative aspects. (1998:17) Rights are not the same as equality, legal recognition is not emancipation. While I agree with this standpoint and with the necessity of questioning the dream of redemption by the law among rights activists, the contrary would seem to be an applicable way forward as well: addressing the political of the juridical—and law as the order under its auspices—making the realm of the law an intensively political realm whose inner life is up for negotiation whenever groups or individuals claim rights, whenever court cases are heard, whenever laws are lobbied and decided. Using the law and anti-discrimination only makes sense when it is accompanied by a political fight over their democratic “hardware and system configuration” with the aim of creating spaces in which prescribed forms of being can be constantly questioned.

This view maintains the language of discrimination as an acceptable political strategy, but with a different goal: the challenge of heteronorm(ality). The necessary
comparison intrinsic to discrimination argumentation brings definitions of the normal into the public, spoken realm. It presents the opportunity to actively allow or dis-allow certain comparisons and to present difference. Words and strategies in the formulation of discrimination do not necessarily have an inherent meaning. While there are surely dominant meanings with more power in court rooms and legislative bodies, struggles between social movements are exactly over the power to interpret social relations. (Herman 1994:64) In fact, anti-discrimination is also a process of historical interpretation that needs to be actively pursued. Acts of interpretation could be picked up much more consciously than they are to date.

This implies a change with regard to political argumentation. Political practices, then, move from arguing the existence of a sexual difference minority to arguing a political opposition to the dominance of heteronormativity. Occasionally that shift might simply cause a slight change of wording. Even so, a change in wording is important. Claiming anti-discrimination as a political opposition renders the project of protection against discrimination a continuing debate on normative gender and sexuality regimes, rather than a benevolent protection for a weak passive minority. The wording needs to emphasise that human beings as an entity or a group do not have prescribed fundamental protection rights, but that no one remains without rights of protection. Universalising norms according to which differentiating is reasonable means creating exceptions and deviations from the norm. Thus, a poststructuralist approach to protection rights could be based on the claim that no one should remain without anti-discriminations rights. This has the consequence that nobody can universally possess them and, thus, constitute the normal majority not in need of protection.

Conclusion

As it is high time to develop a more critical approach to anti-discrimination, and given the hegemony of the juridical in most spaces of politics, the realm of the law cannot be discarded from a queer theoretical point of view. In fact, just the opposite is the case: it needs to be carefully examined. According to the logic emphasised here, what happens through political practices that engage with juridical discourses cannot be solely normatising and reductive either. All political practices—in one way or another—already engage in negotiation about the political and in the pre-conditions of what can be conceptualised and granted as rights, although there is much scope for development in this respect. A similar insight prompts many theorists in critical legal studies to remain convinced that traditional rights do have some value. Carl Stychin is one of them:

I remain convinced that the struggle for the inclusion of ‘out’ gays and lesbians in the United States military, and the fight for same-sex marriage rights, could be discursively deployed to reimagine these central national institutions, and by
extension, the ways in which the nation state has been gendered and sexualised. (1998:198)

While that re-imagination remains doubtful—as Stychin himself acknowledges elsewhere (2001)—it would indeed be worthwhile to explore the possibilities of specific legal strategies in this respect. In the following chapter I will investigate two court cases at the European Court of Justice, that argue discrimination on grounds of sex to apply to transsexuals and to lesbians. This strategy—although only partly successful—potentially troubles the binary gender structure as the base of discrimination and challenges the now dominant listing of grounds in anti-discrimination articles.