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

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CHAPTER SIX

Gender Identity and Sexual Orientation: Legal Rights Politics

...the law remains a powerful (but not 'all powerful') toll in the constitution and regulation of identities, as well as in their repression. In the end, the law is an arena which demands and warrants social struggle, for despite the frequent failures of the past, it can prove to be (sometimes unintentionally) one mechanism for social/sexual change.

(Carl Stychin 1995:156)

The law is an important site of struggle in activism for rights. Yet, it is also a site to which political participation and rights have often been reduced and which, in turn, presents a nearly hegemonic signifier of what is understood to be the political, liberation, progress, and success in the history of lesbian and gay rights struggles. Law is more than the texts of treaties, directives and codes. Through its reference to the juridical it includes the discursive logic of ordering social, economical and political relations and of what subjects and societies are before the law. The questions of how the juridical maintains its hegemonic position in the field of civil and individual rights, and how dominant forms of political practices are so inextricably interwoven with the juridical are questions I explored in Chapter Five. In this chapter I will investigate some specific instances of legal politics as production sites of gendered and sexual meaning.

The last three decades have seen great achievements in lesbian and gay legal politics in Europe, from de-criminalisation and anti-discrimination legislation to registered partnership. These rights are indeed powerful insignia. They often feature as final justice for those historically considered to be subjects of non-belonging and without legal rights. Gay and lesbian, but also transgender rights are among the many leftovers of the unfinished business of modern democracies. (Kaplan 1997a:3) However, justice and rights are not only given as positive re-enforcement for finally recognised gay identities: they are, and have historically been, more than a protective shield. Through its legal system and means of social control, the state is also a primary agent in regulation, normalisation and exclusion. The legal rights won have changed the status of gay men and lesbians in society. However, as demonstrated before, while that may hold true for many gay and lesbian activists, these rights have also been seen by scholars in gay and lesbian and feminist studies as an effective extension of privileges to some—mainly to those who benefit from other racial, class or gender hierarchies—maintaining a heteronormative and binary gender norm(ality).

139 Most of the content of this chapter has been published as Beger (2000a).
Critical and feminist jurisprudence has placed race, gender, and sexuality at the centre of defining legal discourses, the constitution of the law, and practices in court rooms. Adding to this analysis, queer legal theorists have contributed another critical observation: the legal realm has been described as fundamentally heterosexual in that it is based on heteronormative discourses that essentialise sexual identities. (Halley 1993:97) According to many queer legal theorists, the legal realm essentialises homosexuality, creates the subjects it needs to govern and is, thus, a major force in maintaining the privilege of heterosexuality. (Morgan 1995:10) Nevertheless, while the law plays a role in the regulation of sexuality, the processes of courtrooms can also inadvertently produce ungovernable pluralities. (Stychin 1995:140) The legal realm is, thus, not simply seen as the site of dominant and exclusionary regulation, but can potentially produce an entry point of challenge and change.

Thus, the complex political significance of the legal realm as a major site of rights movements needs to be investigated alongside the double-edged possibilities that realm contains. This means that the importance of legal battles is not denied from a queer theoretical perspective, but rather specifically and locally examined for the dilemma legal politics produce: a dilemma whose tensions are simultaneously irresolvable and productive. I will analyse two court cases at the European Court of Justice to demonstrate points of collusion between legal rights politics and queer critiques, and probe the consequences of this complicity.

Before the Amsterdam Treaty came into force a few specific anti-discrimination court cases were heard. Two of them attempted to broaden the then existing anti-discrimination legislation based on sex and gender to cover gender identity and sexual orientation before the European Court of Justice: P v S and Cornwall County Council (C-13/94 ECR (1996)) and Lisa Grant v South West Trains Ltd (C-249/96 ECR (17.2.1998)). Both cases evolve around questions of sex discrimination in employment concerning transsexuals (in P) and homosexuals (in Grant). As there was no anti-discrimination legislation that explicitly included gender identity or sexual orientation, activists tried to argue protection under the existing EU directive on sex discrimination—successfully in P and unsuccessfully in Grant. The arguments employed in both cases unveil and question a distinction commonly unquestioned in European gay and lesbian politics: the distinction between sex and gender and the resulting separation of issues relating to gender identity—transgender—and sexual

140 There was a third case still pending after the Grant decision, R v Secretary of State for Defence, ex parte Perkins (C-168/97), which was concerned with the same argumentation as Grant. This case was, however, never completed since the British Court that referred it to the ECJ withdrew the case a while after the Grant decision. On the 28th of January 1999, the Court of First Instance dismissed another anti-discrimination case concerning employment of gays and lesbians at the EU institutions and the acceptance of Swedish registered partnership for employment purposes at the EU Commission (D v Council of the European Union, T-264/97). The appeal to the ECJ is dealt with in 2001 (C-122/99P and C-125/99P, D. and Sweden v Council). The Advocate General Mischo issued a negative opinion on 22nd February 2001, yet final judgement is not pronounced. However this case does not relate to the argumentation of concern here and is, thus, not analysed further.
orientation—homosexuality. However, for queer theoretical purposes a reconnection of these issues is a primary concern. This chapter will, therefore, also focus on a theoretical contribution to the queer claim of fundamental alliances within l/g/b/t movements based on shared political and structural ground.  

For the purpose of my analysis of the sex/gender divide I critique a traditional feminist argument in which sex is defined as the biologically fixed and basically value-free difference between men and women, their chromosomal and visible bodily difference. Gender is then used to emphasise the social construct of roles ascribed to men and women, institutionalising a hierarchy that structurally disadvantages women. This distinction has been an important concept of feminist thought prior to the advent of feminist poststructuralism, which has consequently reshaped most feminist scholarship with respect to the gender/sex distinction. This distinction has long moved from feminist thought into different academic fields and is by now also quite commonly found in the legal and political sphere in Europe, both among activists and within political and legal institutions. The distinction has, thus, gained a certain dominance in the perception of sexual difference and often counts as the modern, new approach to gender inequality. This distinction is one of the reasons for the lack of alliances between homosexual and transgender rights movements since the advent of identity based fights for liberation in Europe in the late 60s.

The struggles for inclusion of lesbian and gay concerns in the transgender movement and vice versa are bound to the consequences the sex/gender divide bears on the distinctions between gender identity and sexual orientation. Both movements have long struggled to explain that lesbians and gay men are still real women and men and that transsexuals are primarily concerned with changing their outer appearance to their inner true sex. Matters of sexual object choice are only of secondary concern. (Currah 1997a:1380) This explanation is a historical product of the dominant gender order not an invented choice of the movements. Yet, it does lead once again to the belief in the biological essence of sex and the social construction of gender. This belief, in turn, produced politics based on the fact that sexual orientation and gender identity are two distinct and unconnected issues. Thus, while the separation is not an issue of false consciousness, these politics do continuously veil the intrinsic link between a normalised binary gender system and the exclusion of homosexuality from the pantheon of naturally, socially, and morally promotable choices. These politics also obscure the fundamental connections of transgender and homosexual or bisexual issues which would turn the alliances of those movements into more than a sympathy towards other oppressed people.

141 See Paisley Currah (1997a) for an exploration of the conflation of sex/gender and sexual orientation in legal argumentation in the US context. Currah also argues for a connection between transgender politics and homosexual politics.

142 This is even true for language contexts, such as German, that do not know such distinction. In these contexts words like gender role (Geschlechterrolle) became the substitute for the English term gender and gender (Geschlecht) remained the equivalent of sex.
Throughout the following discussion I will focus on both concerns outlined. I illuminate the complex potential of rights struggles in the legal field and argue for the intrinsic connections of transgender and homosexual issues through drawing out the intriguing interrelationship between gender, sexuality, and gay and lesbian rights politics. For this purpose I offer a critical reading of *P v S* and *Grant v SWT*. First, the two cases and the responses given to *Grant* by lesbian and gay rights activists are described. This is followed by a brief theorisation of the categories sex, gender, and identity from a queer perspective to illustrate what is at stake in politics based on notions of stable definitions of those concepts. Finally, I will offer a more in-depth analysis of *P* and *Grant* to show how the complexity of legal discourse can be an instrument of normative regulation, while at the same time highlighting the contingency of boundaries and disrupting the seeming coherence of gender and sexuality.

*The Cases and the Responses: Fabricating Legal Politics*

Equality of men and women in the workplace is one of the fundamental pillars of the EU. The definition of the parameters of sexual discrimination has been dealt with regularly at the European Court of Justice in Luxembourg. In the second half of the 1990s, sex discrimination parameters have been tested as to their applicability to discrimination on the basis of gender identity and sexual orientation. In both cases, the issue at stake was the compliance with the 1976 Equal Treatment Directive and Article 119 of the Maastricht Treaty.¹⁴³

*P v S* and *Cornwall County Council* involved a male to female transsexual, P, who worked as a senior manager in a Cornwall Education Establishment. On informing her employers that she was undergoing gender reassignment and wished to come to work as a woman, she was given notice of the termination of her contract. She was not allowed to return to work during the period of her transition, when she was living full time as a woman but had not undergone surgical genital reassignment. Her period of employment terminated without her returning to work. P brought an action before an Industrial Tribunal claiming that she had suffered discrimination on the grounds of sex. Both S and Cornwall County Council claimed that, on the contrary, she had been dismissed by reason of redundancy. The Tribunal referred the case to the European Court of Justice, which decided in favour of the transsexual and found evident discrimination on grounds of Article 5(1) of the 1976

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Directive. This decision was undeniably a huge step forward for the transgender movement.144

The outcome of the Lisa Grant case on 17th of February 1998 was less favourable. Lisa Grant, an employee of South West Trains, claimed discrimination on grounds of sex. Travel concessions of her employer were granted to the common law opposite sex spouse of her predecessor in her job—a man—but were denied to her partner—a woman—on the grounds that the “privilege tickets are granted for one common-law opposite sex spouse of staff... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more”. (C-249/96 para.5) Grant had been living with her partner, Jill Percey, in a long-term relationship that formally fulfilled the requirement South West Trains Ltd set for those employees that live with an opposite sex partner. The annual travel pass disputed by Lisa Grant amounts to a substantial pay benefit. Grant's counsel argued along the lines of sex discrimination instead of sexual orientation discrimination, for which the EU had no mandate at the time.145 They took the sex of Grant's partner as given and argued that if Lisa Grant had been a man, her woman partner would have had access to travel concessions—the “but for” test.146 (para. 17)

The granting or not granting of the pay benefit depended, thus, on the sexes of the partners. Although the Advocate General, similar to P v S, had advised in favour of applying Article 119 of the EC Treaty—equal treatment for women and men—the Court ruled against Grant—and in doing so diverged from its common practice of accepting the opinion of the Advocate General. It denied that there was sex discrimination and it identified sexual orientation discrimination to which a man living with a man would be subjected as well (the equal misery argument). The Court also found that in view of the EU law and the law in most Member States, homosexual couples could not be regarded as equivalent to married or unmarried heterosexual couples. (para. 35) Interestingly enough, the Court comes to this conclusion by calling on the decisions of most Member States to grant, if at all, partial rights only and by citing negative decisions of the European Court of Human Rights on Article 14—Protection of Family Rights. It mainly mentions X, Y and Z v United Kingdom (Case No 75/1995/581/667) in which a transsexual British man claimed the right to be named as the father of the daughter born to him and his female partner through officially granted AID—as is common for other heterosexual couples in the same situation in Britain. His claim was dismissed. Apart

144 For responses from the transgender community to this case see the Press for Change web archive http://www.pfc.org.uk (particularly the response by Stephen Whittle and Christine Burns).
145 The “Employment Directive” that followed the Amsterdam Treaty in October 2000 has changed that situation.
146 The discussion around the disaggregation of sex and gender in sexual discrimination litigation is not new within legal scholarship. See for diverse general discussions Katherine Franke (1995) and Mary Ann Case (1995) and for the specific European context Robert Wintemute (1997).
from being the follow-up case to $P \nu S$, $Grant$ is, thus, also compared to $XYZ$ as another transgender case.

$Grant$ was referred to the ECJ citing the ECJ's decision in $P$ and the comparison of both cases has created a stir in legal academic circles and among activists. The failure of $Grant$ then sparked a deep sense of disappointment among activists, who had believed that by virtue of $P$ and the opinion of the Advocate General Michael Elmer, $Grant$ was virtually already decided. The complications implied in the working of the European legal system concerning the understandings of sex and gender are expressed in those responses in two ways: in the discussions of the merits of sex discrimination being applicable to sexual orientation and in the disappointment about the failure.

Jill Percey, Lisa Grant's partner, stated: "We are bitterly disappointed by this ruling. It is scandalous that Lisa's employers can discriminate against her just because she is a lesbian. We hope the government will now act to make such discrimination unlawful." (Stonewall Press release 17.2.98). Anya Palmer called the judgement a "blow to lesbians and gay men everywhere in the EC", and Angela Mason—Executive Director of Stonewall—said "it is unbelievable that in this day and age, we have a judgement that means that lesbians and gays effectively have no rights in the workplace". (Stonewall Press Release 17.2.98) “All speakers...” of the European Parliament Intergroup 'Equal Rights for Gays and Lesbians' "...were unanimous in their disappointment and regret about the decision, some called it a scandal. ...ILGA-Europe representative Kurt Kricker heavily criticised in his statement the arguments and substantiation put forward by the Court in its decision. He stressed that this was clearly a political decision by which the Court sent out the signal that lesbians and gays still are second class citizens in the EU.” (EP Intergroup minutes 18.2.98)

These responses are interesting on several levels. The decision is portrayed as a "blow to lesbians and gay men everywhere in the EC" or "a signal that lesbians and gays still are second class citizens in the EU". This portrayal implicitly substitutes Lisa Grant's lesbian identity, and the discrimination on grounds of it, with lesbian and gay citizens, and the lack of protection from discrimination suffered by those citizens. There is no distinction made between the failure of a sex discrimination case and the refusal to protect lesbians and gay men qua their identity from unjust exclusion of heterosexual pay privileges. Jill Percey's call for the moral responsibility of the Labour Government in Britain is a statement in kind. None of the official responses from the gay and lesbian press and political lobby groups made any distinction after the judgement. Before the judgement however, there was also strong critique about the equation of sexual orientation discrimination and sex discrimination among lesbian and gay EU lobbyists.

Three reasons were mentioned most frequently in my discussions with activists at the EU level: firstly a fear that mixing issues of gender and sexuality might potentially make it difficult for gay men to claim the same discrimination. Secondly,
a fear of aligning the gay and lesbian movement with the transgender cause, and thirdly, a fear of inhibiting the proper inclusion of sexual orientation discrimination legislation into upcoming EU directives. (EGALITE newsletter issue 22/23, 1998)

Politically speaking, for parts of the European lesbian and gay rights movement the case was an attempt to do something now with the existing legislation rather than wait for a possible prohibition of sexual orientation discrimination in the EU later. As such it was and is a viable goal. Its negative outcome has, however, prompted lobbyists to focus once again on including sexual orientation in the anti-discrimination shopping list of EU law on its own merits, which has since happened.

The Court already referred to Article 13 in its judgement in Grant pointing to the fact that the Council will under certain conditions—such as an unanimous vote on a proposal from the Commission after consulting the European Parliament—be able to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation. (para. 48) This has since then happened. The reference to Article 13 prompted hopeful responses from ILGA-Europe and the European Parliament Intergroup on lesbian and gay issues. (ILGA Press release 18.2.98; Minutes of the EP intergroup meeting 18.2.98) Although the chances of success in creating a directive on anti-discrimination seemed slim at the time, activists responded to Grant with an increased effort to stabilise a system of anti-discrimination shopping-lists that name sexual orientation in its own right. In doing so, gender identity is excluded from the discussion and the strategy of arguing via sex discrimination is entirely abandoned. From a practical perspective, this move might make sense. From a queer theoretical perspective, it gives away important avenues of creating more fundamental change in the epistemological workings of the law.

As I hope to show, the implicit disruption of the separation between lesbian identity and gender identity in Grant did not work for two reasons. On the one hand, the epistemological and ontological gender hierarchy of Western law cannot allow such disruption. On the other hand, the argumentation in Grant could simply not go far enough in calling heteronormativity into question. In the following discussion I theorise aspects of the evident connection of lesbian identity and gender identity in the two cases by introducing some fundamental critiques of sex, gender, and identity as foundations of rights battles. Rather than dismissing the argumentation in P and Grant, I wish to put it on a firmer footing than it was ever placed in the European gay and lesbian rights movement. Connecting gender identity and sexual orientation—or sex discrimination and sexual orientation discrimination—is a vital challenge to identity-based politics from a queer theoretical perspective.

Theorising Sex, Gender, and Identity

In both cases, P and Grant, the central turning point was officially a definition of sex discrimination. Also in both cases, the opinions of the Advocates General were
directed towards a more purposeful interpretation of sex discrimination, and the
decisions of the Court focused on a comparison centred test for discrimination. (Bell
1999:70) Mark Bell (1999:74) maintains that the legal incoherence of the two cases
relates to “the size of the group concerned; the potential political consequences; and
the 'moral' dimension”. His argumentation is undoubtedly correct, but there is
another set of fundamental parameters at work here. The actual question negotiated
in those cases is not, as the Court explicitly said, a definition of sex discrimination,
but the question underlying Grant is rather: what does the apparently natural fact of
two sexes/genders mean for permissible expressions of gender identity and sexual
object choice and their protection in the labour market? In other words, what kinds
of gender crossing or meaningful sexual relationships are worthy of protection if the
natural existence of two clearly distinct sexes is taken for granted?

From the legal perspective, Grant could have proven what Robert Wintemute
(1997:347) claims to be a tenable argument: “Once the definitional link between sexual
orientation and sex is understood, it should be clear that discrimination based on
sexual orientation is simultaneously discrimination based on sex as to who may choose
a partner of a given sex.” For Wintemute this legal argument does not, in
consequence, deny sexual difference, and it does not conflate gender identity and
sexual orientation. From a queer theoretical perspective, the dismantling of those
distinctions in the analysis of discrimination litigation is, in contrast, of particular
interest. The fundamental disturbance of stable, coherent identities is at the centre of
queer theoretical attention and the legal and political implications such disturbance
produces are significant.

Although the 1976 EC Directive on sex discrimination does not attempt to offer
any real definition of sex, man or woman, any effective functioning of the legislation
depends on them having a clear meaning. The mapping of the law rests on two
assumptions: there are two types of human bodies, and two distinct sets of gendered
behaviour—including sexual object choice—follow from this alleged natural fact.
The existence of sexual orientation as a marker of difference arises out of the
construction of sex and gender as previously described. Any legal proceeding
concerned with questions of homosexual, transgender, or women’s rights
contributes to the definition of the relationship between sex and gender. Through
the predominantly heteronormative foundation of Western law, sexual identity
becomes the conflation of anatomical sex, socially constructed gender, and sexuality:
in that logic penis equals male and male equals sex with female. This rule has a long
historical tradition. According to Ernst van Alphen (1995:3) sexuality used to be
understood as derived from the gendered soul: “first we have a gendered identity,
next, in its wake, a sexual orientation. When the gendered mind is incarnated in the
corresponding body it results in authentic, that is heterosexual, sexuality.”

147 According to Ernst van Alphen the questioning of the relationship between the gendered soul and
sexual identity has a long history since Freud’s psychoanalytic theory. To open the relation between
gender and sexual desire we need not, however, turn to psychoanalysis. (1995:6-7) The contemporary
At the same time, however, an advanced modern European law insists on being able to distinguish between natural fact and social behaviour. Katherine Franke maintains that “by accepting these biological differences equality jurisprudence reifies as foundational fact that which is really an effect of normative gender ideology.” (1995:2) In other words an enlightened post women’s liberation law in Europe rests on an understanding of sex difference—as biological difference—accounting for the social construct of gender. This social construct might at times be acknowledged as discriminatory; but the fact of an existing gender difference that faithfully mirrors sex and biological difference is not really questioned. Within a poststructuralist feminist approach, however, this constitutes an exchange of fact and effect. The social and cultural construct of gender is here proclaimed to be (re)productive of biological difference. This exchange of fact and effect is evident in the activists’ responses to Grant and in the judgement itself; and it is central to a critique of the conceptualisation of sex and gender as brought forward in queer theory.

Identity politics are embedded in a language of establishing identity as difference from others: as a distinction of presence and absence. Hence, homosexual identity holds a promise of a group unity, solidarity, and universality which it perpetuates but cannot fully deliver. (Butler 1993:188) The performance of homosexual identity as a marker of discrimination rests on the existence of distinguishable genders as its precondition. In fact, the discursive establishment of the heterosexual/homosexual divide depends fundamentally on—and is part of—the discursive establishment of the gender binary. What we conceive of as identities, and, thus, make politically and legally intelligible, is constructed within the boundaries of permissible dominant discourses about the so-called fact of two biologically distinct sexes. The discourses on sexuality and gender apparent in the European legal and political contexts always rest on perceived bodily difference between the sexes. This is the case independent of whether the argumentation appropriates, enhances, constructs or contests the dominant perception of human sexuality as heterosexuality.

The perception of bodily difference—and the subsequent construction of a coherent gender identity that constitutes desire as directed to the opposite sex—is integral to the very (re)production of heterosexuality as the one and only healthy, normal, natural sexuality. As Judith Butler formulates it:

Gender can denote a unity of experience, of sex, of gender, and desire, only when sex can be understood in some sense to necessitate gender—where gender is a psychic and/or cultural designation of the self—and desire—where desire is heterosexual and therefore differentiates itself through an oppositional relation to that other gender it desires. The internal coherence or unity of either gender, man or woman, thereby requires both a stable and oppositional heterosexuality. That institutional heterosexuality both requires and produces
the univocality of each of the gendered terms that constitute the limit of gendered possibilities within an oppositional, binary gender system. This conception of gender presupposes not only a causal relation among sex, gender, and desire, but suggests as well that desire reflects or expresses gender and that gender reflects or expresses desire. (1990:22)

In addition, “neither sexuality nor social identity is given exclusively through the body” (Poovey 1988:51), and sex—as sexual difference and as sexual act—itself does not “describe a prior materiality, but produces and regulates the intelligibility of the materiality of bodies”. (Butler 1992:17) The dividing lines of sex and gender are, thus, disintegrated, for—as Butler writes—

If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all ... This production of sex as the predisursive ought to be understood as the effect of the apparatus of cultural construction designated by gender. (1990:7)

Hence, sexual orientation, or to be more precise the exclusion of homosexuality from definitions of natural human sexuality, is fundamentally a question of gender identity, or indeed sex difference, albeit not always a mere second consequence. Only through the maintenance of two clearly identifiable sexes, which produce coherent normal gender identities, can heterosexual object choice be the normalising effect of a regulatory regime that institutes heterosexuality as the foundation of human sexuality. Following this thought to its logical consequence results in an intrinsic connection between homosexuality in its basis and issues of sex discrimination as well as of gender identity, and, thus, to transgender politics. The infamous l/g/b/t alliances that combine the sexual politics of gays, lesbians, and bisexuals and the gender politics of the transgender movement, proclaimed by so many involved in queer critical thought, are a necessary consequence of this logic. Paisley Currah brings this to a political point:

In challenging the sex-based classifications so embedded in so much discrimination against gays, lesbians, bisexuals, queer, and transgendered people, it is vital that we get to the root of the problem and challenge the very premises of the classification system itself. (1997a:1385)

Along with Paisley Currah most queer critics argue that traditional gay and lesbian rights lobbying never reflects this connection.148 To some extent this observation is correct.

148 Some critics maintain, however, that queer theory does not fully take into account the issue of transgenderism either. At worst queer theory is said to subsume transgender under gay and lesbian issues, at best it is said to make a spectacle out of transgendered people through its focus on performativity. See for an elaboration on this Ruth Goldman (1996) and Ki Namaste (1996a, 1996b, 1998).
For example, ILGA-world and ILGA-Europe include gay men, lesbians, bisexuals and transgender people in their mandate.\textsuperscript{149} The practice of ILGA’s political argumentation in Europe also shows a clear awareness of gender as an important theme related to sexual orientation, but omits the intrinsic connection of gender identity and sexuality. Homosexuals, while being in solidarity with transsexuals, mostly remain a discrete insular group with specific issues of concern.\textsuperscript{150} ILGA-Europe rarely makes gender identity an explicit target of political practice—transgender issues have only been added to ILGA-Europe’s work programme in October 2000. Where it is mentioned it usually remains separated. One example of a formulation is the convention address and the specific submission of 27\textsuperscript{th} April 2000 towards the EU draft Charter of Fundamental Rights. The submission argues:

…ILGA-Europe submits that the non-discrimination article of the EU Charter should also include the ground “gender identity” so as to make it clear that people who are transsexual or transgender are protected and in recognition of the particular vulnerability of this group.\textsuperscript{151} … Transsexual and transgender people are one of the most vulnerable minorities in Europe. Their relatively small numbers make it extremely difficult for them to obtain any protection against discrimination through new legislation. They face violence, harassment and the denial of jobs or services because their gender identity or expression does not correspond with their recorded birth sex. The discrimination they face can be quite as severe as that faced by other groups who traditionally are accorded specific protection by national and international anti-discrimination legislation.

\textsuperscript{149} The addition of transgendered people into ILGA’s mandate was rather accidental, simply being added to a draft of the constitution by the full time employee of ILGA world in 1994, Andy Quan. Andy Quan included transgender people in all principle statements he issued on behalf of ILGA. The world conference in Rio 1995 subsequently officially adopted a new constitution that included transgendered people in ILGA’s mandate. This was only made possible through the location of the conference in Latin America where the movements have a long tradition of joined work. (Private e-mail conversation with Andy Quan 18\textsuperscript{th} May 1998)

\textsuperscript{150} This is an insight gained from practical experience with presenting submissions on gender identity and sexual orientation at the Council of Europe and with pressing the issue of gender identity in the running work of the executive board of ILGA-Europe. That most activists see homosexuality and transgenderism as distinct issues was supported in almost all interviews I conducted and in many discussion during lobby work until about 2000, when the approach to transgender issues changed in ILGA-Europe. Yet, not only gay and lesbian activists separate homosexuality from transgenderism. The UK based lobby group Press for Change includes some interesting discussion on this matter in its webpage and had to address issues of homophobia (private e-mail discussion between the co-ordinator of PFC and the author in 1998).

\textsuperscript{151} ILGA-Europe defines the term transgender to “include both pre- and post-surgical reassignment transsexual people. It also includes transsexual people who choose not or who, for some other reason, are unable to undergo genital reconstruction. It further includes all persons whose perceived gender or anatomic sex may conflict with their gender expression, such as masculine-appearing women and feminine-appearing men.” This is the first time ILGA-Europe adopted such a broad and pro-active definition taken from the definitions European transgender organisations offer.
Here ILGA-Europe refers to a separation or division into different groups of marginalisation. This is not astonishing given the historical development of identity movements, in fact, it is a common approach taken by NGOs who designate their constituency as consisting of different groups. While it is important that ILGA-Europe finally designates some of its lobby-power to transgender issues, the origin of a separation approach is worrisome. This origin rests on the dominant discourse on gender and sexuality in European societies, which defines homosexual identity as unitary and essential, residing clearly, intelligibly, and unalterably in the body and psyche, fixing desire in a gendered direction. The ‘coming out’ rhetoric and a clear segregation of lesbians, gays, bisexuals, and transgender people into four distinct groups becomes a way of healing proper male or female gender identity which was historically damaged by homosexuality or the transition phase of transsexuals. Anything that opens this old wound seems at best too theoretical and away from political practices and at worst too dangerous to be entertained.\footnote{Underneath this fear is the presentation of rights as rights of individuals who are conceptually and ontologically prior to society. In consequence, this presentation makes it possible to pursue rights as if equality for lesbians and gays could be accommodated within the existing social gender order without significantly undermining heterosexual privilege. (Rahman & Jackson 1997:118) In principle, the segregation of sex and gender—and the disconnection of gender identity and sexual orientation—is theoretically and politically dissolvable at this point in time. Yet, it does involve a disclaiming of historically developed positions that more often than not appear to be the only positions that can be occupied with regards to justice and equality.}

The practices of politics are, though, never one-sided and simple whatever position they occupy. For example, through the reference to $P$ in the referral of \textit{Grant} to the ECJ and in the \textit{Grant} judgement itself as well as through the proceedings of both cases, the implications of the homosexual and transgender alliances favoured by a queer theoretical approach have already gained entry into the world of large scale European legal politics in an interesting and complex way. \textit{P v S} and \textit{Cornwall County Council} and \textit{Grant v South West Trains Ltd} can indeed both be read to re-inscribe and disrupt discourses of sexual and gender difference simultaneously. Further, while both cases create a logic of sexual difference, \textit{Grant}, in particular, additionally produces a site of ontological contestation.

\footnote{Individual activists in ILGA-Europe, however, see this issue decisively different. Tatjana Greif—Slovenian member of the executive board—for example, clearly states a connection although she also emphasises a clear distinction between biological and social gender:

I think that sexual orientation should be regarded as a part of the concept of a gender as such and that the g/l/b/t people can successfully subvert and challenge all this fixed mental models. Biological gender has nothing to do with someone's social gender. (Tatjana Greif, e-mail interview January 2000)}
The discourses underpinning the Court's decision in *Grant* re-create, maintain and defend the exclusion of gay men and lesbians as non-normal and not worthy of protection. However, *Grant* also contains a contestation of precisely that exclusion through implicitly exposing the contingency of the binary gender system. *Grant*, therefore, involves a two-fold logic.

Four aspects of the proceedings of *Grant* and *P* illustrate this two-fold logic and the connection of gender identity and sexual orientation. Firstly, the meanings of gender and sexuality are individualised and totalised. Although the sex of Lisa Grant is argued by her counsel as the grounds of discrimination (para. 16-18), her gender identity remains non-conforming for the Court, in that her sexual object choice is non-conforming: a real woman chooses a man not another woman. Thus, for the Court the discrimination has to be due to her lesbian identity not her woman identity. Secondly, in order to stand any chance of winning this case, the apparent disruption of the connection between gender norms and sexuality evident in Lisa Grant's argument had to remain on the surface; the argument could not disrupt biology, i.e. the body as the fundamental, transparent marker of difference.

Thirdly, the law needs that marker to order and create the possibility of equality, which is in itself a critical goal of gay and lesbian politics. Finally, allowing a conflation of sex discrimination and sexual orientation discrimination could render same-sex desire and other-sex desire an intrinsic possibility of all gender identities. The excluded homosexual would, thus, be allowed to return and disrupt the claim of two coherent heterosexual genders. To my mind it is at this last level that one finds the site of contestation in *Grant*, in that gender potentially ceases to be recognisable as a cultural inscription on a prior essential set of differences.

Wayne Morgan (1995:22), a queer legal theorist, identifies simultaneous individualisation and totalisation of the subject as a fundamental procedure of disciplinary power of modern states. *P* and *Grant*, and their comparison, perpetuate a simultaneous individualisation and totalisation of the meaning of gender and sexuality. On the one hand, identifying individuals as part of either one sex or the other, and subsequently of clear gender categories—even if those categories can be change—is part of exercising power in the direction of ordering and defining. Gender is acknowledged as changeable, sex—as biological and chromosomal foundation—is not. The individual subject can only ever be part of one or the other gender, a transition period is only temporarily acceptable and often constitutes the fundamental problem for the social and employment environment of individuals.

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153 Robert Wintemute—a legal theorist who writes on gay and lesbian rights—for example, painstakingly attempts to delineate a still existent chromosomal sex underneath all gender reassignment, and, thus, shows the deep difficulty some legal analysis has with a collapse or a final deconstruction of the sex/gender divide. (1997:335)
The law cannot know its subject if it cannot define it clearly in mutually dependent gender and sex categories.

In fact, from a queer theoretical point of view the law produces the subject as individual it claims to govern. On the basis of intrinsic signs of individuality and personhood, the legal procedures play with a clear unrelatedness of sex and sexual orientation, rendering permissible those gender identities that do not pervert themselves through the false sexual object choice. On the other hand, the applicability of sex discrimination to lesbians, gay men, and bisexuals as it was argued in Grant still totalises the definition of identities into a belief in a rigid biological system of two sexes. There is still a sense of normality, a total and complete identity, which is not transgendered or homosexual. In consequence, the embodied difference of those who are granted protection from discrimination must be retained. The discriminated subject can only remain discriminated. The opinion of the Advocate General in P illustrates the double bind of individualisation and totalisation:

I believe that the principle of non-discrimination on grounds of sex permits only those exceptions which, because they aim at attaining substantive equality, are justified by the objective of ensuring actual equality between persons... I must add that, for the purpose of this case, sex is important as a convention, a social parameter. The discrimination of which women are frequently the victims is not of course due to their physical characteristics, but rather to their role, to the image which society has of women. Hence the rationale for less favourable treatment is the social role which women are supposed to play and certainly not their physical characteristics. (Opinion of Advocate General Tesauro in P/1-2154/2155)

Tesauro's fairly progressive approach in fact re-inscribes the individualisation of gender identity and the clear-cut distinction between sex and gender, although he does not distinguish the terms. When he maintains that "any connotations relating to sex and/or sexual identity cannot be in any way relevant" (para. 2154), he dispels the equal misery argument, which would argue that female-to-male transsexuals would have suffered the same discrimination. He does this by invoking the notion of equality encapsulated in the directive, claiming that it required sex to be rendered a legally irrelevant criterion. He also claims that it is not the physical constituency of men and women per se that is the cause of the discrimination. It is rather the erroneous gender stereotyping that places the value of one sex over that of the other. His more dynamic, responsive interpretation of the directive is welcomed and progressive in comparison to the pure comparator-based approach (Skidmore 1997:107). It manifests and re-creates, however, the existence of two distinct sexes: only the content of gender and its meanings are up for discussion in relation to the situation in which one individual finds herself.

That argumentation works when approaching the case of gender reassignment, and could have worked in P—although the Court in the end did decide on the basis
of comparing the pre-operative person with the post-operative person. As soon as sexual orientation enters the stage, though, the sex/gender divide becomes more problematic through its maintenance of gender identity as distinct from sexual orientation. Subsequently, in Grant the Court promptly draws the line exactly at a distinction between gender identity and sexual orientation, and rules against Lisa Grant:

The Court (in P) considered that such discrimination was in fact based, essentially if not exclusively, on the sex of the person concerned. That reasoning, which leads to the conclusion that such discrimination is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex, is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation. (Judgement Grant para. 42)

At first sight the negotiation of sexual orientation discrimination as pertaining to forms of sex discrimination in Grant's argumentation could be a way out of rigid gender norms. Indeed, Grant's argument conflates sex and gender and, therefore, potentially makes the connection between gender identity and sexual orientation:

Ms Grant contends, next, that such a refusal constitutes discrimination based on sexual orientation, which is included in the concept of "discrimination based on sex" in Article 119 of the Treaty. In her opinion, differences in treatment based on sexual orientation originate in prejudices regarding the sexual and emotional behaviour of persons of a particular sex, and are in fact based on those persons' sex. She submits that such an interpretation follows from the judgement in P v S and corresponds both to the resolutions and commendations adopted by the Community institutions and to the development of international human rights standards and national rules on equal treatment. (Grant para. 18)

Grant's argument maintains that the discrimination on grounds of sexual orientation is part of discrimination based on sex. She claims the fact that only men are allowed to have female spouses creates a prohibition of homosexual relationships. Inherent in this argument is already a critique of the regulatory regime of sex and gender that binds the essence of real womanhood or manhood to heterosexual desire. Upon closer examination, however, this argument cannot disrupt the fixity of biology behind gender, i.e. the belief in the body as the objective marker of difference, whatever that difference means.

Gay men and lesbians in the excerpt quoted above still belong to a clear sex; it is their sexual and emotional behaviour that differs. Keeping in mind that Lisa Grant was trying to win a case within the limitations of existing anti-discrimination legislation in the EU, the limitations of legally arguable disruptions of a fixed biology become also very clear. In the end, it is the latter limitations that made the Court decide against Lisa Grant's case. Thus, the law cannot undo markers of difference such as biology since it depends on them in its very existence. Lisa Grant's argument
could not have gone much further and still remain legal. The belief in a fixed biology remains at the heart of the problem. This belief is a major justifier for institutionalising difference as the fundamental marker of social order and justice, against which the comparators of the judgements and the principle of equality are measured. Law, thus, needs this marker to purport any concept of equality at all. In short—to state the obvious again—difference is needed to conceptualise equality.

Equality looms large in the argumentation brought to the European Courts on matters of transgender and homosexuality. The press follow-ups to Grant quoted above identify the lost legal battle as a setback for progress towards equality for all lesbians and gay men in the EU. Yet, what equality is sought here? Which norm(ality) is the equaliser? Who compares what to whom? The Advocate General in P dispels the equal misery argument of the UK—no discrimination evident because female to male transsexuals are treated equally badly—by arguing that:

... to maintain that the unfavourable treatment suffered by P was not on grounds of sex because it was due to her sex change or else because it is not possible to speak of discrimination between the two sexes would be a quibbling formalistic interpretation and a betrayal of that fundamental and inalienable value which is equality. (para. 2155)

The Court in P reaffirmed the principle of equality as a fundamental principle in Community Law. It held that the scope of the directive had to be interpreted wider than discrimination “based on the fact that the person is of one or other sex” (para20) to include discrimination arising from gender reassignment. However, it located this again within a comparative approach. The appropriate comparator is not a female to male transsexual but the previous persona: had P continued to belong to the male sex and gender she would not have been discriminated against. (para21)

The appeal by the Court to higher values of equality, dignity and autonomy masks the difficulty of manipulating sex discrimination concepts to accommodate transsexuals: there cannot be any sex discrimination legislation without clear categorisation into man and woman. (Skidmore 1997:108-109) Sex needs to remain highly relevant in order to reach the goal of legislation in rendering sex irrelevant. There is a strong need in this to exclude the transition phase, there is no third sex in law. Tesauro is happy to treat P as a woman without regard to her chromosomes, gonads or genitalia, but she needs to be treated as either man or woman, a woman that has concluded the transition. She has concluded the transition and can now be compared by the court to her former complete and clear status as a member of the male sex. Gender identities are not questioned. The legal imagination is limited to binary poles with nothing outside them and a middle ground that can be crossed quickly in a state of sickness, but that cannot become a space of occupied identity.

The type of equality achieved for transsexuals is, thus, a system-intrinsic equality within a rigid binary gender system. The equality granted in P is surely highly welcome. If nothing else, the implementation of a universal right to equality reduces the salience of the binary divide between normal women and men and transsexuals.
in employment. However, it does not call the apparent nature of sex and the mutually dependent category of gender into question. It does not threaten privileges that come with conforming to one's apparently true sex in expressing the appropriate gender identity.

While the equal misery argument was dispelled in *P*, the equal misery of gay men was the deciding factor for the Court in *Grant* to justify its negative ruling. (para. 27) The argued comparison to a heterosexual man, who is allowed to choose a female partner, is denied. Equality—on a par with the fundamental human rights dimension—is a right that is taken as evident, it is not reasoned. It rests on the presumption that sex is an objective, coherent, and stable difference, while the law has now reached the point of allowing gender to be a changeable concept. All comparison is ultimately comparison to a norm(ality). When Lisa Grant's counsel compares her situation to unmarried heterosexual couples then all the Court does, and not unexpectedly, is to throw marriage into the discussion. It necessarily comes to the conclusion that gay and lesbian relationships are pretended relationships in comparison to real marriages or stable heterosexual relationships and can, thus, not be regarded as legally equal.\(^{154}\)

It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. (*Grant* para. 35)

As *Grant* proves once again, the campaign for equality in court rooms on the basis of two distinct sexes and a permanent homosexual minority remains somewhat misguided. The hope of equality litigation is that sex/gender and sexual orientation will one day be no more significant than being left handed. The significance of discrimination against gays, lesbians, bisexuals, and transgender people is reduced to the belief that an irrational prejudice must simply be abolished. However, neither gender nor sexuality is a natural difference, that can be treated by equality: each remain inevitably a discourse with a history of subordination, norms and hierarchies.

Having said this, it has to be noted that in *Grant* the implementation of a universalistic right of equality can be seen as progressive: in certain aspects it makes sexuality irrelevant in employment opportunities, reducing the salience of the binary divide between gay and straight. In practice, though, such a right need not call the

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\(^{154}\) The concept of heterosexual stability is particularly fraudulent here, considering the high divorce rates in Western Europe. The dream of "stable marriage forever" is explicitly retained as the marker distinguishing those who deserve to be protected from employment discrimination from those who do not. Stability of relationships is a concept in urgent need of more fundamental challenge from gay and lesbian lobbyists at EU level.
culturall y compulsory element of heterosexuality into question; it does not threaten the maintenance of heterosexual privileges. Claiming legal equality remains, therefore, a strategy that can be successful from a practical perspective, reducing the everyday hardship and cruelty many lesbians, gay men, bisexuals, and transgender people experience. Yet, it will not actually deliver what it promises, namely fundamental equality and social justice. As soon as rights are demanded in areas that are central to the institutionalisation of heterosexuality, mainly the family, political practices in legal equality will necessarily fail. The explicit exclusion of adoption and custody of children in almost all gay and lesbian partnership legislation in Europe—apart from the Netherlands—is a good example in this respect.\footnote{The Netherlands are the only country in the world that allow full civil marriage as of 1\textsuperscript{st} April 2001. Custody, artificial insemination, and adoption—but not of children outside the Netherlands—are allowed. Other registered partnership laws Europe allow some custody for daily matters, some make a second parent adoption possible, yet none grants the same rights as for heterosexual parents.}

In summary, \textit{Grant} is another instance in which homosexual identity is simultaneously inscribed, made intelligible, and excluded. These effects occur as the coherence of sex, and possible sex discrimination, comes to depend on the denial of any intervention that exposes the contingency of \textit{natural} sex, gender identities and sexuality. The Court cannot deal with a multiplicity of identities, sexualities and discriminations, that do not fit into neat categories. The specificity of Lisa Grant's lesbian identity can only be demarcated by exclusion; it cannot be allowed to enter the definition of sex discrimination, as that would be a disruption of a culturally dominant belief system. There are two natural and coherent sexes which result in the desire to have a normal heterosexual gender identity. So re-considered again from this perspective, sexual orientation discrimination argued as sex discrimination produces indeed a site of ontological contestation.

The intersections of sex, gender identity, and sexual orientation that surface in parts of the \textit{Grant} argumentation begin to disintegrate the boundedness of the category of the homosexual, whose anti-discrimination rights were then not covered by Community legislation. Gender thereby ceases to be recognisable as a cultural inscription on a prior essential set of sex difference, to which compulsory heterosexuality is intrinsically bound. Thus, one could argue that what made \textit{Grant} fail while \textit{P} succeeded is more than the issues Mark Bell identified, namely the size of the group, the political consequence, and morality. (1999:74) Underlying this case is the urge to maintain homosexual identity separate from the definitions of gender identity, whose normality needs to remain heterosexual to continue serving as the comparator to which discrimination litigation adheres.

\textit{Grant} and \textit{P} have, thus, done more than participate in a legal discussion on the definition of sex discrimination. Potentially, their argumentation opens up a debate on the meanings of sex, gender identity, and sexual orientation. Surely, all rights claims and all political practices in that respect participate inadvertently in this debate, even if they do not challenge, but rather re-affirm hegemonic orders. \textit{Grant}
and $P$, though, carry the additional potential to render the intrinsic connections of those identity categories visible. The return to a shopping list that includes separate categories of discrimination, as in the Amsterdam Treaty, will ultimately not deliver the justice and equality gay men, lesbians, bisexuals, and transgender people hope for. It will not challenge any of the fundamental cultural markers of difference that produce the discrimination suffered in the first place. In fact, the law cannot undo these markers at all, since it is ontologically bound to them. At certain instances these cultural markers of difference can become visible and may be turned into the target of debate. The aim can, thus, not be a call for a resignation from litigation or legal rights. Yet, a heightened awareness and constructive use of the inevitably produced dilemma of legal politics is called for.

**Conclusion**

For many writers in queer theory the legal arena is one of the places where deviant subjects are produced. This is indeed a process to which we should turn our analytical attention. The legal arena cannot operate without the logic of identity, yet subjects of the law do not exist prior to their negotiation in the legal processes. The power of the law lies in representing something as real, as the only possible representation of the real. So while subjects in court rooms are real people, they can only ever be represented partially in their diversities. The legal subject can only present itself as subject in the discursive logic of the juridical. Other possible truths and realities are existent, but the reality that can be heard by the legal interpretation is hegemonic and dominant. Thus, the power of law is its acclamation of one reality as the most true reality, the most important reality. (Herman 1994:6)

This approach de-mythologises legal rights and destroys the sometimes illusionary hope for true justice. At the same time it acknowledges the epistemological authority of the law: not as an all-powerful discourse, but as an important site for the constitution, consolidation, and regulation of sexuality. (Stychn 1995:156) Certain activist discourses on legal rights as fulfilment of equality are surely ripe for ontological and epistemological doubt. However emancipatory the political and legal actors, texts, and regulations try to be, they somehow remain within the logic of a heteronormative binary gender system. This makes the whole process of staging l/g/b/t legal politics at least a complicated and at times a very critical project. The rhetoric of the liberated future whose approach we are apparently witnessing is marked by a romanticised fascination with equality before the law while gayness, bisexuality, and transgenderism continue to cross boundaries of cultural norms. This rhetoric, which remains the dominant rhetoric of gay and lesbian rights lobbying, does not always recognise the pre-condition of the existence of the legal order: manifesting regimes for normalised governable subjects.156

In spite of this, institutionalised legal battles are not only a site of normative regulation and the production of deviant subjects. They can never undo the cultural markers that create, cement, institutionalise and change the meaning of difference and identity. That can only be done by social movements in a historical process of discursive challenge. Yet, they are potentially a battle field on which cultural markers could be rendered visible and where human diversity can at least be spoken. The connection of gender identity and sexual orientation, i.e. of what constitutes a real woman and what sexual choices that woman makes—evident in the *Grant* case—is one instance that carries that political potential. The *Grant* case carries a political potential that is, to my mind, reaching further than the separate anti-discrimination shopping lists of the Amsterdam Treaty ever can.

Legal battles are a theatre in which activists try to stage a logic of emancipation while desperately aiming at going beyond that same logic to incorporate the experienced social ruptures of their constituency. This apparent clash needs to be vocalised. The great majority of those involved in fighting for legal rights do surely not pretend that the implications of rights argumentation are entirely unproblematic. Yet, so far the complexities of the discursive spaces available in legal politics have not been turned into a political practice in themselves. Political practices that engage the law frequently invest in a logic that incorporates diversity into the norm(ality), but rarely invest in a logic that questions the gender identities and sexuality of that norm(ality). Much depends on how and where gay men, lesbians, bisexuals, and transgender people want to constitute themselves as governable minorities to claim legal rights and where the coherence of sex, gender identity and sexuality can be disrupted. It is important to identify how legal arguments can be used to disrupt normative assumptions and how they can renegotiate the conditions for the constitution of the legal and political subject. Cases like *P* and *Grant* at the ECJ take one step in that direction and participate in the inadvertent production of ungovernable pluralities. (Stychin 1995:140). Ungovernable pluralities are also needed to conceptualise citizenship in a way that can be called democratic and that consciously engages in processes of recognition with regard to diversity.

157 For example, none of my interviewees saw legal rights as the ultimate solution, but almost all centralised the law in their work for rights.