

## **GRANT-ING RIGHTS: THE POLITICS OF RIGHTS, SEXUALITY AND EUROPEAN UNION**

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### **INTRODUCTION**

On 17 February 1998, the European Court of Justice delivered its judgment in *Grant v South-West Trains*, holding that a refusal by an employer to grant travel concessions to a person of the same sex with whom a worker has a “stable relationship” does not constitute discrimination based directly on the sex of the worker, as prohibited by Article 141 (then 119) of the EC Treaty and by the Equal Pay Directive, even where such concessions are allowed to a person of the opposite sex with whom a worker has a stable relationship outside marriage.<sup>1</sup> The reaction to this decision by activist and academic commentators alike was both surprise and indignation: the latter generated by the apparent “injustice” of the decision on the basis of formal equality; the former, because the Advocate General had reached the contrary result in an opinion on 30 September 1997. For the legal rights-oriented activist group “Stonewall”, the outcome of this litigation strategy – which they actively supported – was somewhat embarrassing as well as unexpected, underscoring how the privileging of a rights based activist programme can lead to disappointing results. Not surprisingly, Stonewall assumed the moral high ground, describing the judgment as “a blow to lesbians and gay men everywhere in the EC”.<sup>2</sup> Academics have found the decision in *Grant* a rich source for analysis. The decision of the European Court of Justice has been deconstructed from a queer theoretical perspective,<sup>3</sup> interrogated for what it reveals about the emerging conception of European citizenship,<sup>4</sup> and examined for what it suggests about the relationship between the institutions of the European Union.<sup>5</sup>

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<sup>1</sup> Case C-249/96 [1998] ECR I-621.

<sup>2</sup> *Stonewall News*, 17 February 1998 (<<http://www.stonewall.org.uk/stonewall/cgi-bin/news.cgi?equalpaylost>>).

<sup>3</sup> Beger, “Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)Potency of Rights Politics at the European Court of Justice” (2000) 9 *Social and Legal Studies* 250.

<sup>4</sup> See *eg*, Bell, “Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*” (1999) 5 *ELJ* 63.

<sup>5</sup> See *eg*, Armstrong, “Tales of the Community: Sexual Orientation Discrimination and EC Law” (1998) 20 *Journal of Social Welfare and Family Law* 455.

In this article, I will also touch upon some of these themes, but the focus of analysis is rather different, in that I will deploy the *Grant* litigation in order to illuminate the wider limitations and distortions which rights politics can foster when it is privileged so centrally within an activist strategy. In particular, given the absence of any explicit basis for sexual orientation discrimination protection within EC (or UK) law, the turn to Article 141, I argue, was most probably a deeply flawed strategy from the outset; which, if successful, also would have distorted the meaning of this sex discrimination provision. I develop this (admittedly contentious) argument from the perspective of an emerging discourse on the political economy of rights, sexuality, and citizenship, which to date has been articulated primarily within North American debates on the politics of rights and sexuality.<sup>6</sup> My claim is that given the focus of European rights discourse on the “market citizen”<sup>7</sup> and the creation of a “transnational capitalist society”,<sup>8</sup> the sometimes taken-for-granted politics of European sexual citizenship rights is much in need of interrogation for its broadly political economic implications. In so doing, the aim is to question the privileging of rights discourse in sexual citizenship strategies, particularly within the European arena, because of its limitations as a vehicle for challenging underlying structural barriers to full citizenship. I advocate instead, not a sceptical approach to European politics and law, but an engagement of activism with the construction of, and participation in, democratic institutions, and a politics, not only of legal recognition, but more broadly, of recognition *and* redistribution.

### BACKGROUND TO THE DECISION

The facts and background to the *Grant* litigation have become extremely well known and thus may be summarised only briefly here. Lisa Grant, an employee of South-West Trains Ltd (SWT), was refused a travel pass for a female partner, despite the fact that her contract of employment stated that “you will be granted such free and reduced rate travel concessions as are applicable to a member of your grade. Your spouse and dependants will also be granted travel concessions”.<sup>9</sup> It was company policy to grant “privilege tickets” to a common law spouse of the opposite sex provided a statutory declaration was made that a meaningful relationship had existed for a period of two or more years.<sup>10</sup> Grant’s request for travel concessions was denied because her partner was of the same sex. She claimed that this was contrary to EC law given that her male predecessor in post had received the benefit for his opposite sex partner.

An industrial tribunal referred several questions to the European Court of Justice, all of which turned on the issue of whether SWT’s actions

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<sup>6</sup> See eg, Goldberg-Hiller, “‘Entitled to be Hostile’: Narrating the Political Economy of Civil Rights” (1998) 7 *Social and Legal Studies* 517; Boyd, “Family, Law and Sexuality: Feminist Engagements” (1998) 8 *Social and Legal Studies* 369.

<sup>7</sup> Everson, “The Legacy of the Market Citizen” in Shaw and More (eds), *New Legal Dynamics of European Union* (1995), p 73.

<sup>8</sup> Ball, “The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community’s Legal Order” (1996) 37 *Harv Int’l LJ* 307.

<sup>9</sup> [1998] ECR I-621 at 623.

<sup>10</sup> *Ibid.*

constituted “discrimination based on sex” for the purposes of Article 141, the Equal Treatment Directive and the Equal Pay Directive. The case received the support of Stonewall, which “mounted an intense media campaign to raise awareness of the significance of a ruling favourable to Grant”.<sup>11</sup> Before the ECJ, both the United Kingdom and France intervened in support of SWT.

Despite a finding in favour of Grant by Advocate General Elmer, who reasoned that this difference in treatment constituted discrimination on the basis of “gender”,<sup>12</sup> the ECJ held that the refusal to grant travel concessions did not constitute discrimination based directly on the sex of the worker prohibited by Article 141 of the EC Treaty or the Equal Pay Directive.<sup>13</sup> Nor did sex discrimination include discrimination on the basis of sexual orientation. First, the condition applied in the same way to male and female workers, and therefore could not be regarded as constituting discrimination directly based on sex.<sup>14</sup> Moreover, discrimination based on sexual *orientation* did not constitute discrimination on the basis of the sex of a worker, and Community law does not regard stable relationships between two persons of the same sex as equivalent to stable relationships outside marriage between two persons of the opposite sex.<sup>15</sup> According to the Court, “in those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position”.<sup>16</sup>

Although mention was made by the Court of the International Covenant on Civil and Political Rights, and the view of the Human Rights Committee that “sex” “is taken as including sexual orientation”,<sup>17</sup> that in itself could not give rise to a general principle of Community law:

“although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community”.<sup>18</sup>

In terms of institutional competence, the Court also noted that the Treaty of Amsterdam enables the Council of Europe – by unanimous vote on a proposal from the Commission after consultation with the European Parliament – “to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation”.<sup>19</sup>

It is this judgment by the European Court of Justice, and the events which led to it, which form the backdrop against which my analysis proceeds.

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<sup>11</sup> Armstrong, *supra* at 456.

<sup>12</sup> [1998] ECR I-621 at 629-630.

<sup>13</sup> *Ibid.*, at 646.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at 648.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, at 650, citing Communication No. 488/1992 *Toonen v Australia* (31 March 1994). I have considered the implications of the *Toonen* decision elsewhere; see Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (1998), pp 145-193.

<sup>18</sup> [1998] ECR I-621 at 650.

<sup>19</sup> *Ibid.*, at 651.

### THE POLITICS OF RIGHTS IN A EUROPEAN CONTEXT

The “rights debate” in legal theory is now sufficiently well known that it need not be replayed in this article.<sup>20</sup> The debate concerns the political implications of (primarily) constitutional rights struggles, particularly in a North American context, and it was propelled by a recognition of the inadequacy of liberal, modernist assumptions about the inherently progressive character of rights discourse. In reaction to that traditional legal “faith” in rights, some have argued that rights struggles tend to produce politically conservative (or more accurately) classic liberal outcomes, and that this provides the ideological underpinning of many rights “victories”.<sup>21</sup> More progressive political struggles thus come to be channelled and neutralised through the turn to rights. Others are sceptical of this position, and point to the powerful emancipatory potential of the language of rights in some forms, and its role particularly in civil rights struggles in the United States.<sup>22</sup> Still others see rights as having a highly disciplinary function, particularly when conjoined to the language of responsibility.<sup>23</sup> In this article, I reject the imperative to make a decisive choice as between these various positions. Rather, my approach might broadly be described in terms of the “critical pragmatism” advocated by Didi Herman, namely, that rights have their pragmatic uses depending upon the precise context, but that rights struggles should not be divorced from broader social, political and economic movements for progressive change.<sup>24</sup>

In fact, the *Grant* litigation contains many diverse strands of the rights debate. Although in this article I focus primarily on the ideological grounding of rights which was articulated (explicitly and implicitly) in the case, and how potentially progressive rights discourse was largely “transformed into dominant ideological terms”,<sup>25</sup> I make no claim that this is the “grand narrative” of the litigation. Instead, it demonstrates simultaneously that rights can function importantly as a “heuristic device” for social movement politics, drawing attention to social struggles and, indeed, diverse “ways of life”.<sup>26</sup> It thus can educate people about political change, citizenship demands, and also – in the context of a European rights struggle – the potentiality and limitations of membership in a transnational community.<sup>27</sup>

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<sup>20</sup> For a good overview, see Herman, “Beyond the Rights Debate” (1993) 2 *Social and Legal Studies* 25.

<sup>21</sup> See eg, Bakan, *Just Words: Constitutional Rights and Social Wrongs* (1997); Fudge and Glasbeek, “The Politics of Rights: A Politics with Little Class” (1992) 1 *Social and Legal Studies* 45.

<sup>22</sup> See eg, Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22 *Harv Civil Rights–Civil Liberties L Rev* 401.

<sup>23</sup> See eg, Brown, *States of Injury: Power and Freedom in Late Modernity* (1995).

<sup>24</sup> Herman, “The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms” (1994) 14 *OJLS* 589.

<sup>25</sup> Bakan, *supra* at 117.

<sup>26</sup> Kingdom, “Transforming Rights: Feminist Political Heuristics” (1996) 2 *Res Publica* 73.

<sup>27</sup> See Shaw, “The Politics of Membership in EU Citizenship” in Bankowski and Scott (eds), *The European Union and its Order* (2000), forthcoming.

Moreover, an analysis of the use of EC sex equality law as a tool in rights struggles importantly demands that the insights flowing from the academic commentary on the politics of rights be contextualised in the unique circumstances of European Union. Certainly, EC sex equality law illustrates both the practical potentiality and the limitations to the use of rights discourse. More broadly, the role of rights themselves in the EU legal order is specific, and should be differentiated from the rights debates that go on in North American academic communities. As Carlos Ball suggests, constitutional rights in the American sense are grounded in the value of individual autonomy, and rights are ostensibly designed to facilitate the individual atomistically choosing the ends that she desires to achieve.<sup>28</sup> By contrast, in the EU, freedoms and rights have had a more instrumental role, in that their fundamental character is a result of “their consequentialist function, namely their being necessary to achieve Community objectives”.<sup>29</sup> As a result, the protection of individual rights is geared, not towards a belief in the inviolability of individual autonomy, but rather, rights become a *means* “of enforcing the positive obligation of the Community and of the member states” towards the achievement of the objectives of the integration project.<sup>30</sup> The objectives, as is well known, are highly economic in character: “the creation of an integrated and ‘efficient’ market” underpinned by a “neo-liberal market ideology”.<sup>31</sup>

Thus, while some North American academics of the “left” go to great pains to demonstrate (often persuasively) the ideological grounding of rights discourse, those interested in European rights need not follow such a tortuous path. Individual rights have an *explicit* ideology, and while they can and often have been deployed towards moderately progressive ends – particularly in the context of employment related rights – such successes do not negate the claim that there is an ideological underpinning to rights discourse centred on market relations. Thus, for example, Tamara Hervey argues that a hierarchy exists among EU citizens with respect to social security, and at its apex “is the migrant EU citizen who is an employee or a self-employed person”.<sup>32</sup>

The history of sex equality rights in EC law provides ample evidence for this argument. It is universally acknowledged in EC legal history that economic factors were the motivating force behind Article 141; namely, the perceived need to avoid distortions in competition between member states which had differing levels of protection for sex equality rights in the workplace.<sup>33</sup>

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<sup>28</sup> Ball, *supra* at 333.

<sup>29</sup> *Ibid.*, at 340.

<sup>30</sup> *Ibid.*, at 344.

<sup>31</sup> Hervey, *European Social Law and Policy* (1998), p 204.

<sup>32</sup> *Ibid.*, at 106.

<sup>33</sup> See *eg*, Barnard, “The Economic Objectives of Article 119”, in Hervey and O’Keeffe (eds), *Sex Equality Law in the European Union* (1996), p 321. Article 141 EC provides for equal pay for men and women, and has been supplemented by Directives concerning equal pay and equal value (75/117), equal treatment in employment (76/207), equal treatment in social security (79/7), equal treatment in occupational pensions (86/378), and equal treatment for self-employed women (86/613). For an outline of the legal framework, see Hervey and Shaw, “Women,

Subsequently, in the landmark case of *Defrenne 2*, the objectives of EC sex equality law were described as two fold, embracing both the need to avoid distortions in competition, and also the desire for social progress and the improvement in the working and living conditions of the peoples of Europe.<sup>34</sup>

The effect of European sex equality rights in practice has been well documented, particularly by feminist analyses which have highlighted the positive benefits of the resort to rights, but also the limitations imposed both by the structure of the rights, and the broader ideological project of the formation of an internal *market* in which rights discourse is embedded.<sup>35</sup> The dominant focus on formal equality and equal opportunities in the workplace has had a “revolutionary affect”<sup>36</sup> for some women – namely, working European women, particularly around issues such as part time work and pregnancy discrimination. And it has been through rights struggles – often by “lone women” – that these successes have been realised as a result of often protracted litigation.<sup>37</sup>

However, the limitations of EC sex equality law are also well known. The emphasis on “fair” competition in the marketplace, the “merit” principle, and “equal” opportunities leaves little scope for the use of rights discourse to tackle the underlying structural barriers to substantive equality, many of which result from the private sphere of the home and from impediments to full entry into the labour market, such as “the double burden of ‘care’ and ‘work’ for women”.<sup>38</sup> This is a realm considered beyond the role of rights which, because of the ideological basis of those rights, is focused on the public sphere, employment relation.<sup>39</sup> There is no recognition, for example,

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Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law” (1998) 8 *Journal of European Social Policy* 43 at 46-47.

<sup>34</sup> Case 43/75 *Defrenne v Sabena (No. 2)* [1976] ECR 455.

<sup>35</sup> See *eg*, Barnard, *supra*; McGlynn, “EC Sex Equality Law: Towards a Human Rights Foundation” in Hervey and O’Keeffe, *supra* at 239; Everson, *supra*; Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (1996); More, “Equality of Treatment in European Community Law: the Limits of Market Equality” in Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (1996), p 261; Hervey and Shaw, *supra*.

<sup>36</sup> Everson, *supra* at 209.

<sup>37</sup> Hoskyns, *supra* at 78.

<sup>38</sup> Hervey and Shaw, *supra* at 60. See generally Fredman, *Women and the Law* (1997). Of course, it is not simply EC sex equality law which can be criticised for its inability to deal with structural disadvantage. Rather, it is a critique which can be levelled more broadly at liberal anti-discrimination legislation: see Fredman, *supra*; Lacey, “Legislation Against Sex Discrimination: Questions from a Feminist Perspective” (1987) 14 *JLS* 411; McColgan, *Just Wages for Women* (1997). Recent European legislative initiatives, to some extent, can be interpreted as tackling that structural disadvantage: *eg*, the Parental Leave Directive, the Pregnancy Directive, and Child Care initiatives.

<sup>39</sup> See *eg*, Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECJ 3047 at 3075: “It is apparent. . . that the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents”.

of voluntary work and informal care as leading to entitlements to rights such as social security.<sup>40</sup>

Thus, two of the many sides of rights discourse become apparent. The language of rights has meant that “the EU system can be politicised in the interests of the democratic majority”<sup>41</sup> (and, in that sense, rights prove a useful heuristic device), but, by virtue also of the explicit ideological grounding of EC law, rights struggles are channelled into an economically liberal model tied to the atomistic individual actor freely and fairly working in the competitive labour market.<sup>42</sup> The potential for social change through the employment relation is certainly present (and has been achieved to some degree), but the role of rights in social change is constrained from the outset.

It is on such a politically ambiguous terrain that actors engaged with sexual orientation struggles have sought to “graft” their claims. Such a move is practically and politically problematic, however, in several important respects. Most obviously, such a move runs into difficult questions regarding the interpretation of the words of the provision, and the fairly clear intention that Article 141 was not intended to cover sexual orientation discrimination. Of course, it also can be argued that if the Treaty is a central constitutional document, then it should be construed in a purposive and teleological fashion and, if Article 141 is designed to foster social progress, then a broad interpretation is justifiable.<sup>43</sup> The issue, according to Kenneth Armstrong, is how two central tensions in EC law are to be resolved:

“The first is the extent to which the ECJ is willing to extend the scope of Community law beyond the domain of economic integration and to embrace the broader political dimension of laying the legal foundations for a citizenship of the EU. The second . . . is the tension between the interpretation and construction of the EC Treaty as a typical agreement between nation-states or as a constitutional text to be given meaning in the context of a process of constitution building”.<sup>44</sup>

These core tensions suggest that a victory in *Grant* was never going to be straightforward or inevitable.

As well, the question of institutional legitimacy for the European Court of Justice inevitably pushed it away from such a broad interpretation of Article 141.<sup>45</sup> The inclusion of Article 13 EC as a result of the Treaty of Amsterdam may suggest that this is an area for legislative, as opposed to judicial,

<sup>40</sup> Ackers, “Citizenship, Gender and Dependency in the European Union: Women and Internal Migration” in Hervey and O’Keeffe, *supra* at 221, 226.

<sup>41</sup> Hoskyns, *supra* at 210.

<sup>42</sup> See Shaw, “Law, Gender and the Internal Market” in Hervey and O’Keeffe, *supra* at 283. The role of rights is undoubtedly multifaceted, and my focus is undeniably narrow. As well, rights should not be singled out as the sole means by which the European Court of Justice pursues legal integration; see Hilson and Downes, “Making Sense of Rights: Community Rights in E.C. Law” (1999) 24 *ELR* 121.

<sup>43</sup> Armstrong, *supra* at 462.

<sup>44</sup> *Ibid.*

<sup>45</sup> On the problem of legitimacy and the institutions of the European Union, see generally de Búrca, “The Quest for Legitimacy in the European Union” (1996) 59 *MLR* 349.

activity. Although it remains open to speculation whether and how this enabling treaty article will be implemented in the immediate (or, indeed, longer term) future, that in itself may be a reason for the Court to exercise self-restraint. As Steve Terrett suggests, “at a time when ratification of the Amsterdam Treaty [wa]s by no means a certainty, the ECJ may have felt it prudent to refrain from providing ammunition to eurosceptics in the various Member States by adopting a gung-ho approach to Community legal development”, an approach which might well have been perceived as illegitimate action on the part of the Court.<sup>46</sup> Indeed, the emotiveness of the combination of sexuality, rights and judicial activism has frequently resulted in claims of judicial illegitimacy in other constitutional jurisdictions and contexts.<sup>47</sup>

A third problem is closely related to the institutional issue, namely, the difficulty of finding a level of uniformity in views across the member states sufficient to warrant judicial activism. Terrett analyses this point doctrinally in terms of the way in which the ECJ was asked to widen the meaning of “sex” discrimination on the basis of a general principle of law. As he argues, the essential requirement for recognising a general principle of law is “that the principle should be widely accepted by the Member States”, and that it “will require some level of uniformity, albeit short of precise consensus, before it [the Court] is willing to incorporate a principle into the EC system and offer it protection at a Community level”.<sup>48</sup> One of the explicit bases for the Court’s decision was the absence of such a consensus to ground a legal principle against discrimination on the basis of a person’s sexuality:

“As for the laws of the Member States, while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognised in any particular way”.<sup>49</sup>

This recognition of variation and difference in the attitudes of member states might well be understandable in terms of the relationship of sexuality to the private sphere. Again, in terms of legitimacy, Catherine Hoskyns argues that the ECJ has been of the view that “intervening in personal or domestic matters is not the function of either EC law or the Court”.<sup>50</sup> Rather, the personal becomes associated with the national, even though the precise issue – right to equal pay – is quintessentially a public, Community law matter.<sup>51</sup> The alternative approach in these circumstances would be the judicial

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<sup>46</sup> Terrett, “A Bridge too Far? Non-Discrimination and Homosexuality in European Community Law” (1998) 4 *European Public Law* 487 at 505.

<sup>47</sup> See generally my analysis in *A Nation by Rights*, *supra*.

<sup>48</sup> Terrett, *supra* at 498.

<sup>49</sup> [1998] ECR I-621 at 647.

<sup>50</sup> Hoskyns, *supra* at 160. See also Kofman, “Citizenship for Some but not for Others: Spaces of Citizenship in Contemporary Europe” (1995) 14 *Political Geography* 121 at 132.

<sup>51</sup> On the public/private distinction in EC law, see generally More, “‘Equal Treatment’ of the Sexes in European Community Law: What does ‘Equal’ Mean?” (1993) 1 *Feminist Legal Studies* 45.

“recognition” (or, more accurately, imposition) of a principle of Community law. Arguably, that is the approach which the Court took in *P. v S. and Cornwall County Council*, in which it took no notice of national variation in the treatment of transsexuals.<sup>52</sup> In interpreting that decision, Larry Backer suggests that judicial interpretation can act as a form of “normalizing harmonization”,<sup>53</sup> in which “subnational cultural determinism” gives way to the discipline imposed by legal standards.<sup>54</sup> That tension between harmonisation and self-determination is common in rights claims around sexuality<sup>55</sup> and, indeed, it can be argued that the politics of sexuality is characterised by a dialectical relationship between the local and the global.<sup>56</sup> This tension may well have been an important factor which motivated the Court to defer to the local, and it is a factor closely related to the issue of judicial legitimacy.

Finally, it has been argued that a central problem with this litigation strategy was, quite simply, “the facts”. As is well known from the history of civil rights struggles in the United States, constitutional litigation strategies demand compelling “test cases”, and Mark Bell has argued that the “justice” of the issue in *Grant* was simply not overwhelmingly compelling.<sup>57</sup> By contrast, a set of facts dealing with an outright, irrational dismissal from employment (as was the case in *P. v S.*) may well have resulted in a different outcome.<sup>58</sup> The granting of employment “perks” may well seem to many a less than compelling human rights case, particularly when those perks are not granted to employees who are not in *any* sort of traditional spousal-type relationship and who thus continue to suffer this “discrimination” no matter what the result of the case.

Although Bell’s point is intuitively appealing, I want to argue, by contrast, that the claim in *Grant* does fit nicely into the ideological parameters of EC law, and particularly European rights discourse, despite the fact that the claim was ultimately unsuccessful. In making this argument, I hope to illustrate again how law has an often complex and contradictory role in social movement politics, and this is exacerbated in the realm of EC law. Thus, although the facts of *Grant* may appear to lack the moral imperative of a human rights claim, that is also arguably why it fits within this paradigm of rights discourse. Indeed, it has been argued that the advantage of deploying EC law for gays and lesbians is that the economic paradigm of rights

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<sup>52</sup> [1996] IRLR 374. See also my analysis of the decision: Stychin, “Troubling Genders: A Comment on *P. v S. and Cornwall County Council*” (1997) 2 *Int’l Journal of Discrimination and the Law* 217.

<sup>53</sup> Backer, “Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems” (1997) 4 *Tulsa Journal of Comp and Int’l Law* 185 at 197.

<sup>54</sup> *Ibid.*, at 199.

<sup>55</sup> See generally Stychin, *A Nation by Rights*, *supra*.

<sup>56</sup> See Nardi, “The Globalization of the Gay and Lesbian Socio-Political Movement: Some Observations about Europe with a Focus on Italy” (1998) 41 *Sociological Perspectives* 567.

<sup>57</sup> Bell, *supra* at 78-79.

<sup>58</sup> In fact, it has been argued that the Court of Justice might still find in favour of a claimant in a sexual orientation employment recruitment or dismissal case; see Denys, “Homosexuality: a non-issue in Community law?” (1999) 24 *ELR* 419 at 425.

abstracts them from an obviously moral underpinning, making it easier to make claims in a morally “neutral”, economically grounded language.<sup>59</sup> As a consequence, “successes” will be more likely. Discrimination becomes a distortion of the transnational marketplace and a barrier to free movement, and the sort of controversies which are fuelled by gay rights litigation in other constitutional jurisdictions can be avoided. In other words, the economic teleology of rights in the EU can “sanitise” the claim, making it more likely that a court will conclude that it can legitimately find in the claimant’s favour. Although I have argued that such an instrumental approach to rights as an activist strategy is misguided,<sup>60</sup> that instrumentalism does capture something about the ideology of rights discourse, in some of its forms.

In fact, the focus in *Grant* on relationships also closely fits the ideology of the “family” as it has developed in EC law. Louise Ackers and Helen Stalford have examined how the family is conceived in EC law in the context of the free movement provisions, in which a series of social rights for the families of EU migrant workers has been recognised, providing equal treatment protection in matters of employment, pay and working conditions.<sup>61</sup> The assumption made by the European Court of Justice is that there is a close correlation between the exercise of the right of free movement and the granting of free movement rights to family members.<sup>62</sup> However, Ackers and Stalford emphasise that “the rationale for the Court’s incursion into areas of family policy in this area of Community law is based firmly on a conceptualisation of women and children as the non-productive appendages of male workers”.<sup>63</sup> Moreover, only a marital relationship can be used to underpin the claim as far as the dependent partner of an EU migrant worker is concerned.<sup>64</sup> Thus, a “breadwinner” model of “coupledom” is assumed, in which labour mobility depends upon the ease with which the worker can move the dependent spouse with “him” when he, as a factor of production, is more highly valued in another member state. The facts of *Grant* tap into that same ideology, in which perks are for dependents, in a model of family based upon a breadwinner, “family” wage earner. Thus, *Grant* exemplifies a well known litigation strategy, in which test cases draw upon fact situations which are constructed so as to replicate very traditional gendered relationship patterns, albeit with a same sex twist. Replication is assumed to be the path to litigation success.

This strategy is problematic in several respects, and a variety of commentators have highlighted the various reasons why. For example, in the context of *Grant* itself, Amy Elman has argued that “bartering over privileges, rather than demanding their eradication – represents a lack of

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<sup>59</sup> Ball, *supra* at 387.

<sup>60</sup> See Stychin, *A Nation by Rights*, *supra* at 143.

<sup>61</sup> Ackers and Stalford, “Children, Migration and Citizenship in the European Union: Intra-Community Mobility and the Status of Children in EC Law” (1999) 21 *Children and Youth Services Rev* 699.

<sup>62</sup> *Ibid*, at 705. See also Hervey, *supra* at 106.

<sup>63</sup> Ackers and Stalford, *supra* at 702.

<sup>64</sup> *Ibid*, at 708.

political judgment and a lack of ambition".<sup>65</sup> She suggests that the litigation symbolises how lesbian and gay movements have now "begun embracing patriarchy's principal institution, the family".<sup>66</sup> A similar argument is made by Momim Rahman, who claims that these strategies endorse, rather than challenge, institutionalised heterosexuality as a model for human relationships, which is then replicated by same sex couples.<sup>67</sup> Both Elman and Rahman argue in favour of wider strategies for social and economic change, a point to which I return later in this article.

However, these arguments are clearly contentious, and the tensions within the politics of *Grant* perhaps best can be illustrated through the academic debate staged between social and cultural theorists, Nancy Fraser and Judith Butler.<sup>68</sup> This is not the place to restage that debate, but suffice it to say that the basic issue which divides these two theorists is the relationship between struggles around the recognition of "sexual orientation", and wider issues of political economy and economic transformation. In the debate, this has been framed in terms of the language which Fraser has developed regarding the relationship between a politics of recognition and a politics of redistribution.<sup>69</sup> Fraser's point is that sexuality struggles are *essentially* about a politics of recognition, rather than about issues of redistribution in political economic terms. The two are separate struggles.

Butler, in response, has questioned the dichotomy, and has asked pointedly, "why would a movement concerned to criticize and transform the ways in which sexuality is socially regulated not be understood as central to the functioning of political economy?"<sup>70</sup> That is, Butler claims that sexuality must be understood as part of the mode of production itself. She also presents examples to refute Fraser's claim that recognition and redistribution are necessarily separate. Most obviously, lesbians as (marginalised) women as a group are going to experience both a wage gap (an issue of economic distribution), and a lack of social recognition.<sup>71</sup>

The relationship between recognition and redistribution claims has now begun to be analysed explicitly in legal scholarship. Susan Boyd, for example, argues that while Fraser's sharp dichotomy is problematic for precisely the reason that she seems to forget that lesbian women are gendered, and gender is central to the mode of production, Butler's position is also troubling.<sup>72</sup> As Boyd notes, similar to the critiques offered by Elman and Rahman, "it does not follow that legal recognition of non-normative

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<sup>65</sup> Elman, "Familiar Orientations: Sex Discrimination, Same Sex Partners and Migration in European Law", paper presented to the American Political Science Association Annual Conference, Atlanta, September 1999.

<sup>66</sup> *Ibid.*

<sup>67</sup> Rahman, "Sexuality and Rights: Problematising Lesbian and Gay Politics" in Carver and Mottier (eds), *Politics of Sexuality: Identity, Gender, Citizenship* (1998), p 79 at 85.

<sup>68</sup> See Fraser, *Justice Interruptus* (1997); Butler, "Merely Cultural" (1998) 227 *New Left Review* 33; Fraser, "Heterosexism, Misrecognition and Capitalism: A Response to Judith Butler" (1997) 15 (52/53) *Social Text* 279.

<sup>69</sup> Fraser, *Justice Interruptus*, *supra* at 12.

<sup>70</sup> Butler, *supra* at 39.

<sup>71</sup> *Ibid.*, at 41.

<sup>72</sup> Boyd, *supra* at 375-376.

sexualities (for example, same-sex relationships) will necessarily, of itself, constitute a fundamental challenge to the capitalist mode of production.”<sup>73</sup> Intuitively, given the purpose of EC rights discourse to further a free market transnational capitalist economy, it would be surprising if legal recognition in the European context would amount to such a challenge here.

In fact, the critique which Boyd offers – which is situated in the context of Canadian equality rights discourse around same sex partnership rights – is very similar to the feminist critiques of EC sex equality law. The argument in both contexts is that rights do little, if anything, to alter underlying structures which produce gender inequality, such as the role of unpaid labour in the private sphere, and barriers to entry in the workplace. Boyd argues that the nuclear family has a material role in capitalist relations of production, through a sexual division of labour and the privatisation within the nuclear family of the social costs of reproduction and care.<sup>74</sup> It is this same model of the nuclear family which, Ackers and Stalford argue, is privileged within EC legal discourse.<sup>75</sup> The agenda which Boyd then advances is one in which activists and academics should pay greater attention to whether that gendered economy is challenged by lesbian and gay legal struggles, or alternatively, whether the lesbian or gay subject is naturalised within the political economy through the (eventually successful) claiming of rights.<sup>76</sup> In this regard, it has been argued that the construction of sexual identities (and political priorities for a movement) historically has been shaped by the more privileged (in terms of social class) members of the group.<sup>77</sup> Thus, the question whether sexuality is integral to capitalism cannot be separated from whether sexual identities are significantly constituted and experienced in ways which reflect individual location within that mode of production.<sup>78</sup>

Taking up Boyd’s challenge to interrogate rights claims, my argument is that the *Grant* litigation provides a perfect example of such a normalisation, even though the litigation ultimately proved unsuccessful. On the immediate facts, a successful claim in *Grant* would have seen the extension of marital-type perks to “stable” same sex couples, which presumably would have marginally increased employer costs. The actual “take up” of the marital privileges no doubt would vary greatly across the EU depending upon local and corporate social attitudes towards homosexuality, the prevalence of such benefits in the cultural context in issue, and, indeed, whether there was already anti-discrimination legislation in place at national level in the EU member state which covered this field. The wider procedural right of non-discrimination in employment in itself can be seen as a means to “perfect” the marketplace to the extent that anti-discrimination law is effective in

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<sup>73</sup> *Ibid.*, at 376.

<sup>74</sup> *Ibid.*, at 376-377.

<sup>75</sup> Ackers and Stalford, *supra* at 709.

<sup>76</sup> Boyd, *supra* at 381.

<sup>77</sup> See *eg.*, Valocchi, “The Class-Inflected Nature of Gay Identity” (1999) 46 *Social Problems* 207; Robson, *Sappho Goes to Law School* (1998), ch 12.

<sup>78</sup> As Iris Marion Young notes, “political economy is cultural, and culture is economic”: Young, “Unruly Categories: A Critique of Nancy Fraser’s Dual Systems Theory” (1997) 222 *New Left Review* 147 at 154.

eradicating the use of irrelevant characteristics in hiring, promotion and dismissal.

However, what is also significant, as Bell points out, is that the UK government submission in the *Grant* litigation focused on the wider implications and potential future litigation which might flow from a decision in favour of Grant.<sup>79</sup> In particular, state pension and social security issues may well have been at the forefront of concern. These are areas that are expensive for the state in a capitalist economy. After all, maintaining the attractiveness of the institution of marriage and marriage-like relationships requires costly social engineering. But such institutions are necessary for the maintenance of a capitalist system with a clear public/private dichotomy, in which many costs are internalised within the domestic sphere of the home.<sup>80</sup> Although the European Court of Justice often has been prepared to reject the appropriateness of economic justifications for sex discriminatory employment practices,<sup>81</sup> many of these decisions are themselves ideologically “loaded” (such as those concerning protective treatment of pregnant workers), and do not in themselves refute the claim of an ideological basis to the legal order centred on the public/private dichotomy.<sup>82</sup>

Thus, a decision in favour of Lisa Grant would have fitted very well with the ideological grounding of EC rights discourse, in terms of the nuclear family and privatised responsibility within that private sphere and it would have furthered transnational cultural harmonisation through a common EU definition of “spouse”. However, the wider implications of the decision – with the resulting social costs – would not be easily distinguishable within the “all or nothing” paradigm of formal equality in EC law. The economic costs of legally normalising the homosexual subject are greater in terms of numbers than those of normalising the transsexual subject in *P. v S*. The scale of such costs no doubt is an inhibiting factor for the judiciary. By way of contrast, Canadian courts have found it much easier to make such distinctions.<sup>83</sup> As a result, as Claire Young argues, we now see Canadian courts developing broad definitions of “spouse” in the context of upholding private obligations (such as support), while constructing narrow definitions in the context of state pensions.<sup>84</sup> These results in Canadian jurisprudence should also make us sceptical as to whether rights in the North American context are so far removed from the economic teleology of the EC legal

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<sup>79</sup> Bell, *supra* at 76.

<sup>80</sup> Boyd, *supra* at 377. See also Hervey and Shaw, *supra*.

<sup>81</sup> See *eg*, Case C-66/96 *Handels-og Kontorfunktionaerernes Forbund i Danmark* [1998] ECR I-7327 in the context of pregnancy. But see also Case C-394/96 *Brown v Rentokil* [1998] ECR I-4185 and Case C-179/88 *Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiver forening* [1990] ECR I-3979 (determining that pregnancy-related illness beyond the period of maternity leave is to be treated as sex-neutral).

<sup>82</sup> See Mancini and O’Leary, “The New Frontiers of Sex Equality Law in the European Union” (1999) 24 *ELR* 331.

<sup>83</sup> Compare, *eg*, *M. v H.* [1999] 2 SCR 3 (extending definition of “spouse” for purposes of spousal support law) and *Egan v Canada* [1995] 2 SCR 513 (no extended definition in the context of old age security legislation).

<sup>84</sup> Young, “Spousal Status, Pension Benefits and Tax: *Rosenberg v Canada*” (1998) 6 *Cdn Labour and Employment L J* 435.

system. Had the European Court of Justice seen a way to achieve this distinction, a different result might have been forthcoming.

I make this hypothesis because, on its facts, *Grant* is ideologically very attractive in terms of the underpinnings of EC law: no immediate cost to the state; recognisable model of relationships suggesting economic dependence on a breadwinner; and the cost of the perk is a product of a contractually regulated private employment relationship. It provides a clear example of “the domestication of deviant sexualities within a safe, useful and recognisable framework”,<sup>85</sup> while the cost of the relationship does not touch the state. At the same time, a standardised, normalised definition of “spouse” modelled on heterosexual marriage creates a level playing field across the EU (from which deviant “others” can then be excluded).

A central paradox in the use of legal discourse towards the recognition of same sex relationships thus becomes apparent. Social scientists increasingly are confirming through empirically based research what many have long known: that lesbians and gays construct an infinite variety of ways of living – and of relationships widely defined – which not only replicate but also resist the disciplinarity of heterosexual monogamous cohabitation.<sup>86</sup> Yet, when legal discourse is deployed in activist struggles for social change, the engagement with law seems to require constructing relationships which replicate monogamous, heterosexual cohabitation as an “ideal” to which lesbians and gays can successfully aspire, and from which benefits then flow. These two dynamics – of resistance and discipline – appear to coexist simultaneously, although it is also important to avoid the privileging of legal discourse in analysing processes of social change.

While the successful deployment of rights strategies will benefit some lesbians and gays materially, and no doubt symbolically, in terms of the affirmation of relationships (for otherwise, there would never have been litigation), the underlying economic question remains: what is the relationship between such claims – framed within the context of a sex discrimination provision – to underlying gender-based structural inequalities? More specifically, is there a necessary relationship between claims to recognition and what Butler refers to as the “holy family” of the capitalist mode of production?<sup>87</sup>

First, in engaging in such an analysis it is important to avoid the extreme positions which the Fraser-Butler debate produces. The particularities of any struggle are important, as is the cultural and political context. For example, relationship recognition struggles in the United States arise in a political context in which, for many, affordable health care is *dependent* upon establishing a relationship with someone who has a “good company plan”. Particularly in the context of new HIV therapies, this is a pressing issue, in which recognition issues and the material conditions of life are inextricably linked. Of course, at the same time, “success” through legal recognition is problematic to the extent that it detracts attention from the urgent need for

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<sup>85</sup> Boyd, *supra* at 377.

<sup>86</sup> Donovan, Heaphy and Weeks, “Citizenship and Same Sex Relationships” (1999) 28 *Journal of Social Policy* 689.

<sup>87</sup> Butler, *supra* at 41.

universally available health care. Moreover, even in this example, rights can be politically and materially indeterminate, for legal recognition may well result in a financial privatisation of care responsibilities, onto the responsible “spouse”.<sup>88</sup> My general point is that the issue of health care benefits has a particularly American resonance which does not travel well, for example, to the European arena.

However, it does seem a reasonably general proposition that employment rights protection will have a differential impact depending upon the intersection of identities implicated in any individual case, and this point is also related to the distinction between formal and substantive equality. At this juncture, it is useful to recognise that rights discourse around sexual orientation will benefit *most* those for whom there are no other structural, identity based impediments to the realisation of substantive equality; or, in other words, where there is no intersection of disadvantage.<sup>89</sup> But there is another dynamic at work here, for all gay men (except to the extent that they are perceived to embody cross-gender characteristics) *already* benefit “from the institutions and social customs that hinder female entry into certain jobs, including traditional notions that women should be committed to domestic life and not to market labour”.<sup>90</sup> That is, to the extent that rights discourse can eliminate irrational anti-gay animus in the workplace (and I do not want to exaggerate the extent to which law can achieve this aim), gay, childless men can benefit tremendously from patriarchal economic relations which largely privatise responsibility for the care of the young.

Meanwhile, many lesbian women *qua* women may well still face the structural barriers which are not rectifiable through a formal equality rights based discourse of equal opportunities alone (although statistically as a group they may fare better in some economic respects than heterosexual women). Michael Jacobs neatly summarises a political dynamic which increasingly rings true today:

“Gay families need not be modeled on the social norm of a two-adult household, but for gay male couples who do form a two-income household, the benefit of men’s generally higher wage earnings is doubled. This amplifies income differentials by gender within the gay community and perhaps makes gay men more conscious of the economic benefits of male privilege and less comfortable with an agenda that challenges this privilege. To the extent that their efforts to integrate into their families of origin are successful as well, many gay men may no longer find the social dominance of the family

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<sup>88</sup> See Flanagan, “People with HIV/AIDS, Gay Men, and Lesbians: Shifting Identities, Shifting Priorities” in Herman and Stychin (eds), *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (1995), p 195 at 210.

<sup>89</sup> I have developed a related argument concerning “intersectionality” in a different context; see Stychin, “Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada” (1995) 8 *Cdn Journal of Law and Juris* 49.

<sup>90</sup> Jacobs, “Do Gay Men have a Stake in Male Privilege?: The Political Economy of Gay Men’s Contradictory Relationship to Feminism” in Gluckman and Reed (eds), *Homo Economics: Capitalism, Community, and Lesbian and Gay Life* (1997), p 165 at 170.

particularly oppressive and thus may not respond favorably to a political rhetoric that describes it that way".<sup>91</sup>

In addition, for those gay male couples who do not reap the benefits of a two-income household, employment perks such as those at issue in *Grant* at least will allow them to keep pace with the heterosexual single income household. The point which this analysis drives at is that the use of sex equality laws – even if successful on its own terms – will definitely benefit some more than others (ironically, men more than women), and must be considered at best a modest part of a wider strategy of social change.

Furthermore, Jacobs' point is that many gay men may well not have a tremendous stake in a wider strategy for social and economic change, particularly if they achieve the sort of formal legal guarantees which were at issue in *Grant*. Here again, the ideology underpinning the EU integration project illustrates how the construct of citizenship – which has been widely critiqued as a limited, market-centred concept by progressive legal academics<sup>92</sup> – is also one which is actually advantageous in its current form to many gay men. In fact, the subject position of EU citizenship has been described as "archetypically male" because of its market centredness, in which the citizen is imagined enjoying the benefits of free movement unconstrained, allowing him to sell his labour to the highest bidder transnationally, and enjoying ever widening consumer choice to satisfy his wants and desires.<sup>93</sup> This citizen is highly atomistic, unconstrained by relationships of dependence, and whose primary identity is derived from paid employment. For many gay men, such a construct is very appealing, particularly if formal legal protection against discrimination ensures that they can exercise these citizenship rights without fear of irrational prejudice by others. Homosexuality then becomes simply, as Mariana Valverde suggests, a "lifestyle choice" and "an innocuous feature of urban consumer life" for the market citizen who can choose to consume homosexuality unconstrained – and across national borders.<sup>94</sup> Many gay men, in this citizenship discourse, are themselves archetypically male: more man than most ( "new") heterosexual men who are increasingly expected to prioritise their familial relationships, and to share (albeit certainly not yet equally) in child care responsibilities. Thus, European law and social policy have been subject to critique for their "commodification of individuals" into workers (that is, producers).<sup>95</sup> But homosexuality is also increasingly criticised for its own form of commodification, centred on the consumption of goods, services and, indeed, a way of life, in which "consumerism becomes the embodiment of identity".<sup>96</sup>

Of course, this vision of the gay male EU citizen is also dependent upon the marginalisation of traditional familial and religious discourses of

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<sup>91</sup> *Ibid*, at 172.

<sup>92</sup> See generally the contributors to Shaw and More, *supra*.

<sup>93</sup> Shaw, *supra* at 297.

<sup>94</sup> Valverde, "'The Lifestyle that Fits the Doctrine of Sexual Orientation': The Disappearing Homosexual of Human Rights Law", paper presented to the American Law and Society Association Annual Conference, Chicago, May 1999.

<sup>95</sup> See Hervey, *supra* at 204.

<sup>96</sup> Valocchi, *supra* at 220.

homophobia; but, here again, the underlying ideology of EC law is sympathetic to such progressive change. A modernist discourse of capitalism has little room for such irrationality, which can serve to distort competitive labour markets, and an underlying desire for cultural harmonisation demands that one should be able to cross borders freely both to produce and consume a lifestyle unconstrained by bigotry in some member states. Historically, some lesbians and probably many more gay men have often benefited from capitalism, as the “marketplace cleared away all sorts of traditional social formations”.<sup>97</sup> As John D’Emilio has argued, it was only when wage labour became the widespread basis by which people lived that homosexuality could become the foundation of a personal identity.<sup>98</sup> Thus, for example, Peter Nardi makes the claim that in northern Italy, the preconditions for a lesbian and gay movement occurred only relatively recently, with the growth of urban middle class employment opportunities, economic development and personal mobility and the growth of non-religious associations.<sup>99</sup> These processes no doubt will continue and accelerate throughout the EU, particularly with the likely widening of its borders eastward.

The argument underscores that while capitalism has depended upon the heterosexual nuclear family to help maintain it, late capitalism can now accommodate (quite happily) a group of autonomous, unconstrained producers and consumers operating outside the traditional constraints of the nuclear family. One need only look to the “positive” attitude of many multinationals to gay consumers today for evidence of this point. It is somewhat ironic then that within legal discourse around relationships, activists and litigants seek to discipline citizenship into something which perhaps is inevitably going to replicate the nuclear “holy family”, at the same time as that “holy family” is increasingly decentred in many ways.<sup>100</sup> More than anything, this irony demonstrates how legal discourse functions and constrains argumentation through the demands of precedent and comparison. Finally, it suggests that Butler may underestimate the inherent conservatism of law when she suggests that same sex recognition struggles inevitably challenge the “holy family”, for it is only by making one’s self (or one’s client) look like the (admittedly decentred) norm that “success” in instrumental terms is likely to be achieved.

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<sup>97</sup> Adam, Duyvendak and Krouwel, “Gay and Lesbian Movements beyond Borders?” in Adam, Duyvendak and Krouwel (eds), *The Global Emergence of Gay and Lesbian Politics* (1999), p 344 at 356.

<sup>98</sup> D’Emilio, “Capitalism and Gay Identity” in Snitow, Stansell and Thompson (eds), *Powers of Desire: The Politics of Sexuality* (1983), p 100.

<sup>99</sup> Nardi, *supra* at 579.

<sup>100</sup> In examining the Danish experience – “the first country in the world” to enact same-sex registered partnership legislation (*infra* at 234) – Karin Lützen points out that marital-type benefits have come to same sex couples in a society in which 25% of couples with children are unmarried; see Lützen, “Gay and Lesbian Politics: Assimilation or Subversion: A Danish Perspective” (1998) 35 *Journal of Homosexuality* 233 at 239. Thus, she concludes that it is only when marriage as an institution becomes anachronistic – “a worn-out piece of folklore” (*ibid*, at 239) – that its benefits are made available to homosexuals.

## CONCLUSION: FROM EQUALITY TO ACTIVE CITIZENSHIP

Given what I have suggested about the relationship between capitalism and sexuality in the face of the decline of traditional social formations, it must be tempting (at least for those gays and lesbians who are secure in their jobs), to await the “liberalising effect of time”,<sup>101</sup> particularly given the limitations inherent in the use of rights discourse to advance social change. Why not “opt out” of law, once basic privacy rights are recognised and a libertarian approach is accepted to the criminal law regulation of sexuality? In answer, it is worth remembering that while we may point to the disciplinary effect of rights, and the way in which progressive politics can be ideologically channelled into principles such as formal equality, *particularly* in a legal context such as the EU, the potentialities of rights discourse also must be recalled. The problem seems to be that although it may be recognised widely that rights through law provide incomplete political strategies, the problem with rights discourse is the way in which it seduces its users to believe in its totalising potential as a political strategy.

This is particularly true in the EU context. Given the democratic deficit, the democratic potentiality of rights discourse is necessarily constrained. Thus, on the one hand, we might applaud the pleas of commentators Philip Alston and Joseph Weiler that the EU needs a general equal treatment provision and draft directive on sexual orientation discrimination<sup>102</sup> (which also has been called for by the European Commissioner responsible for Social Affairs and Employment<sup>103</sup>). Such a provision – however politically unlikely it may seem – undoubtedly would have important practical and symbolic importance. However, Alston and Weiler may well underestimate the resistance which such a provision might meet.<sup>104</sup> Here again, the dialectical relationship between the local and the global must be recalled. In other national contexts, rights claims around sexuality have a unique power to fuel a reaction grounded in the discourses of localism and cultural and legal self-determination.<sup>105</sup> Moreover, as empirical research continues to demonstrate, “there is no monolithic Continental attitude towards sexuality in Europe”,<sup>106</sup> and, in particular, “homosexuality generates more varied opinions across countries and more polarized responses within nations” than do other contentious issues surrounding sexuality (such as extra-marital heterosexuality).<sup>107</sup>

The other problem in the EU context, as Jo Shaw suggests, is that rights remain very much a “top-down” process, leaving little discursive space for

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<sup>101</sup> Scott, “Changing Attitudes to Sexual Morality: A Cross-National Comparison” (1998) 32 *Sociology* 815 at 839.

<sup>102</sup> Alston and Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy” (1998) 9 *European Journal of Int’l Law* 658 at 717.

<sup>103</sup> *Stonewall News*, 7 December 1998 (<<http://www.stonewall.org.uk/stonewall/cgi-bin/news.cgi?employmentcommission>>).

<sup>104</sup> See generally Backer, *supra*.

<sup>105</sup> For example, Tasmania, Alberta, Colorado, and Zimbabwe.

<sup>106</sup> Widmer, Treas, and Newcomb, “Attitudes Toward Nonmarital Sex in 24 Countries” (1998) 35 *Journal of Sex Research* 349 at 356.

<sup>107</sup> *Ibid.*, at 352.

the power of rights as an enabling device for social movement activism.<sup>108</sup> Even in Alston and Weiler's argument, rights remain "granted" from on high, rather than being perceived as the product of years of social movement mobilisation.<sup>109</sup> Although I have argued elsewhere that in recent years there has been some space for NGOs such as the International Lesbian and Gay Association Europe to intervene in European rights debates around sexuality, it remains a modest space, because European identities and transnational communities are still very much in their infancy.<sup>110</sup> However, as transnational communities, identities and affinities develop, there is no inherent reason why the European legal arena might not be one in which mobilisation and struggle from below could occur more widely.

In fact, one of the roles which sexuality politics might play is in seeking to expand that space of transnational politics, in an attempt to develop strategies of citizenship which go *beyond* the market towards a political and social citizenship of the European Union. The EU remains an important site, and there is some evidence that a notion of "social citizenship" has increasing currency through, for example, EU funding and "soft law",<sup>111</sup> as well as in some recent rights based discourse from the ECJ.<sup>112</sup> It is an arena which should not, then, be seen as solely one for the pursuit of legal rights, which can then be "consumed", but instead, as having the potential to mean something "more". Indeed, NGOs such as ILGA Europe do seek to combine calls for rights and democratic participation in the EU, and this provides a useful antidote to the privileging of rights discourse.<sup>113</sup> It might be helpful here to imagine a floor of anti-discrimination rights – perhaps guaranteed through EU law – which acts as a base for the development of strategies of democratic participation within the institutions of the EU (and within social movements themselves).<sup>114</sup>

Richard Bellamy has argued that European rights will only be made meaningful in the context of democratic political arrangements.<sup>115</sup> Otherwise, "rights prove too indeterminate and subject to conflicting interpretations to provide a constitutional basis for a European polity".<sup>116</sup> In the EU, things are "further complicated by the existence of a plurality of national political

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<sup>108</sup> Shaw, "European Union Citizenship: the IGC and Beyond" (1997) 3 *European Public Law* 413 at 427.

<sup>109</sup> Alston and Weiler, *supra*.

<sup>110</sup> See Stychin, "Disintegrating Sexuality: Citizenship and the European Union" in Bellamy and Warleigh (eds), *Citizenship and Governance in the European Union* (2000), forthcoming.

<sup>111</sup> See Hervey, *supra* at 205.

<sup>112</sup> See, in particular, *Martinez Sala v Freistaat Bayern*, Case C-85/96 [1998] ECR I-2708.

<sup>113</sup> See International Lesbian and Gay Association Europe, *Equality for Lesbians and Gay Men: A Relevant Issue in the Civil and Social Dialogue* (1998).

<sup>114</sup> See Bellamy and Castiglione, "The Communitarian Ghost in the Cosmopolitan Machine: Constitutionalism, Democracy and the Reconfiguration of Politics in the New Europe" in Bellamy (ed), *Constitutionalism, Democracy and Sovereignty* (1996), p 111 at 122.

<sup>115</sup> Bellamy, "The Constitution of Europe: Rights or Democracy?" in Bellamy, Bufacchi and Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (1995), p 153.

<sup>116</sup> *Ibid.*

traditions”,<sup>117</sup> and sexuality is certainly not exempt from these dynamics. Shared democratic arrangements are therefore necessary for the creation of common rights. This, I conclude, is a central limitation of litigation strategies such as *Grant*. Rights have been abstracted from any form of democratic politics.<sup>118</sup> At the same time, rights claims can appear undemocratic from the perspective of those who are members of the social group at the epicentre of the claim, to the extent that the case may not reflect what are thought to be grassroots priorities by some activists; and, furthermore, rights may privilege the interests of some in the group over others.

Yet, at the same time, the experience of the *Grant* litigation, I would conversely suggest, was a valuable exercise in terms of the way in which the claim for European rights operated as, in Elizabeth Kingdom’s terminology, a “heuristic device”.<sup>119</sup> The deployment of rights discourse – and most importantly its widespread publicity, at least in the United Kingdom – drew attention, not only to sexualities and relationships, but it also placed gay *women* at the forefront of a campaign. It served an important function in drawing attention at least to the possibilities and potentialities of European citizenship claims around sexuality. In a member state in which relatively few people are even aware that they are “citizens of the Union”, the *Grant* litigation made one group aware that there was a legal arena in which the language of citizenship could be articulated on their behalf.

However, as a normative matter, rights and democratic participation must operate as two strands of a political agenda. The creation of spaces of engagement traditionally has been tried – not always successfully – at the level of local, urban government.<sup>120</sup> But the transnational arena should not be abandoned. The fact that transnational constructs of citizenship and “belonging” have been closely linked to the market up to now, and that many in the lesbian and especially gay male communities may have little personal interest in broadening the horizon of transnational citizenship, does not mean that this should not be struggled over, so that recognition questions might be connected to issues of redistribution,<sup>121</sup> particularly in the context of a widening European Union, and in the face of the economic disparities which inevitably will be exacerbated as a result of that expansion.

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<sup>117</sup> *Ibid*, at 167.

<sup>118</sup> On the relationship between rights and deliberative democracy, see Benhabib, “Toward a Deliberative Model of Democratic Legitimacy” in Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (1996), p 67.

<sup>119</sup> Kingdom, *supra*.

<sup>120</sup> See generally Cooper, *Sexing the City: Lesbian and Gay Politics within the Activist State* (1994).

<sup>121</sup> On redistributive politics and “sexual orientation”, see Herman, “The Good, the Bad and the Smugly”, *supra*; Boyd, *supra*. On redistributive politics and sex equality, see Hervey, “Sex Equality as Substantive Justice” (1999) 62 *MLR* 614 at 622.