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SUBJECTIVATION AND THE LAW: BODILY DESIRE BETWEEN NORMALIZATION AND SUBVERSION

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Abstract

As a contribution to a critical theory of the subject, we seek to establish a connection between legal theory and psychoanalysis, which we develop by way of an example regarding a recent 2008 ruling of the German Constitutional Court concerning transsexuality. This ruling brought about the de facto recognition of same-sex marriage in the Federal Republic of Germany. Drawing on the critical social theory of Alfred Lorenzer, who argues in the tradition of the Frankfurt School, this article links his materialist psychoanalysis to the queer-feminist approach of Judith Butler in order to introduce the Lorenzerian perspective into the international socio-political discourse on law and the subject. At the centre of our inquiry stands the question of how hegemonic norms produced by legal forms instruct the micro-political practices of subject constitution.

Keywords: legal theory, psychoanalysis, body, transsexuality, critical theory of the subject

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Subjectivity, body, psyche, relationships, desire – just those things which feel most intimate and essential – turn out to be fundamentally socially constructed: “The fact that I am other to myself precisely at the place where I expect to be myself follows from the fact,” according to Judith Butler, “that the sociality of norms exceeds my inception and demise” (Butler, 2004, p.15). The network of social norms is multifaceted and reaches from unconscious, hardly accessible practical knowledge and contested ethical norms of self-conduct, to procedurally created legal norms, which are subject to public processes of justification and claim to define the right way of life reinforced by sanctions. What these norms have in common is that they express a hegemonic world-view, or ‘common sense’ of a specific form of society. They, in fact, structure the realm of what is possible and liveable (Ibid. p. 28).

A recent legal case, adjudged by the first Senate of the German Constitutional court on May 27, 2008 may illustrate this clearly.¹ Two people marry in 1952, they have three children, and share their life for more than four decades. The claimant in the initial proceeding of the judicial review of legal norms (konkrete Normenkontrollklage) is born in 1929 as a ‘man,’ defined according to the law of civil status. However, since she ‘felt that she belonged to the female gender’ for a long time, she had adopted a female name and had also undergone a ‘sex-change’ operation in the course of the marriage. Thereupon, the claimant had applied to be deemed to belong to the female gender according to § 8 (1) of the Transsexuals Act (TSG).² Recognition of the latter, however, would effectively constitute a same-sex marriage, which is banned by the same article, since in Germany marriage is still exclusively reserved for heterosexual couples. In this instance, divorce would remain the only course of legal action, in turn requiring that the marriage break down. However, the very opposite is the case:

“His marriage was extremely burdened by the traumatisations experienced during the Hitler era. His wife was the only person able to penetrate his inner loneliness and to share his misery. She had stuck to him through all irritations, which cause many marriages to fail, and had made this the task of her life. [...] Both would not separate. For more than half a century, they had lived together intensively, had together become old and mature and as partners irreplaceable to each other. Divorce would pose an unreasonable, overtaxing insult to their emotions. It outraged them that their precious long-term relationship was treated like a broken down marriage by law and was meant to be determined by divorce”.

(Decision, 27 May 2008 – 1 BvL 10/05, marginal no. 16.)

1 Decision, 27 May 2008 – 1 BvL 10/05.

2 The TSG was passed in 1980, effective from 1.1.1981, and regulates the conditions for changing the first name or civil status for persons not living in the gender attributed to them when they were born. It provides for either a change of the person’s legal (first) name or a complete adaption of the gender category in the person’s childbirth index and birth certificate.

Gender relationships, family relationships, forms of desire are far from being natural matters, rather they are regulative effects. The unusual ‘legal case’ cited above reveals the whole naturalised regime of the hetero-normative binary conception of gender (Stychin, 1995, p. 7), usually hidden and taken-for-granted everyday life, as constitutive of the very subjects the law presumes to address. The legal concept of gender gains its stability only in the framework of the heterosexual matrix, i.e. a pattern of social comprehensibility that naturalises bodies, gender identities and desires, and disciplines the “subversive multiplicity” of sexuality (Butler 1990, p.19).

In what follows we examine the processes of the (re-)production of mutually reinforcing hegemonic legal norms and subjects. How might the production of hegemonic subjects be questioned, from the perspective of legal theory concerned with societal structure and from the inside of the subject, without thereby dissolving both into each other?

As a possible answer, we propose connecting materialist legal theory with materialist psychoanalysis in order to elaborate the role of norms, generated by the procedures of the legal form, in the constitution of gendered subjects.³ Both approaches share the social theoretical framework of a critical theory of society resting upon Marx, which revolves around the analysis of the material living conditions of capitalist socialisation. We understand these ‘relations of production’, as Marx already did, not merely as ‘economic’ relations in a narrow sense, but as the fundamentally necessary relations organizing capitalist society and operating beyond the will of persons. It is through these relations that individuals are constituted and enter into “the societal production of their lives,” (Marx and Engels, 1958, vol. 13, p. 8) including both their gender relations and the corporeal conditions for the constitution of their subjectivity, in the same manner that the “person socialised in work does not arrive overnight as an opaque finished product ‘worker’ to the workplace, but brings with them an entire life story” (Lorenzer and Görlich, 1980, p. 347).

The following argument unfolds in three sections: Firstly, we will recapitulate the production of hegemonic legal norms from the perspective of legal theory (1). Taking the above outlined legal case as paradigmatic, the decision of the Federal Constitutional Court helps to highlight our theoretical considerations. Subsequently, we will turn to the question of how those hegemonic norms enter the process of subjectivation (2). To this end, we follow the socialisation theory of the psychoanalyst and social scientist Alfred Lorenzer.⁴ In the 1970s and 1980s, Lorenzer sought to integrate the concept of nature theoretically and conceptually into a critical theory of the subject in an effort to transcend the confines of natural science. In doing so, he suggests a materialist reformulation of psy-

3 This will not result in a ‘psychoanalytical legal theory’, since the analysis of the objective structure of law and the subjective structure of the subject follows independent respective premises, which cannot be reconciled with each other without mediation.

4 Alfred Lorenzer (1922-2002) is seen as a pioneer of interdisciplinary psychoanalysis, who highlighted the irreducible nexus of psychological, biological and social dimensions in the science of men – and especially in psychoanalysis. Lorenzer was the first West German doctor and psychoanalyst appointed to a chair for social psychology in Bremen in 1971 and to a chair for sociology in Frankfurt am Main in 1974. For decades he was little known in the Anglophone world - even so, a special issue of *Psychoanalysis, Culture and Society* (Bereswill et al, 2010) recently initiated an introduction of Lorenzer’s work to the english-speaking scientific community.

choanalysis, which would not exclude biology as a misconstruing simplification, but would rather include it critically and understand it as always already socially mediated. In contrast to Lorenzer's methodological works, his approach to the field of subject and socialisation theory remains widely unexplored.⁵ As the binary gender order stands at the centre of the problem at hand, and as Lorenzer was heedless of this aspect in his theory of socialisation, we also feel obliged to fill this gap. We therefore have found it necessary to integrate Judith Butler's studies of the heterosexual matrix into our discussion, as she describes the (re-)production mechanisms of existing gender relations, which Lorenzer leaves open as abstract "sociability".

Still, hegemonic norms cannot determine subjects completely. Quite the contrary, we would like to stress that on a certain level they continually oppose subjects' embodied desires, even while they are binding in the constitution of both the subject and its desires. For this reason, our conclusion ultimately turns to the subversive potential that emerges from these contradictions and the conflicts arising from them, both of which might eventually lead to new, counter hegemonic norms (3).

I. The Production of Hegemonic Legal Norms

The initial assumption of materialist legal theory is that societal power relations are reflected in law, but in a specific manner that follows the inherent logic of the legal form (For this point Buckel, 2007). This inherent logic of law is the product of a process in which societal relations become independent in capitalist societies, which, following Marx, we call "social forms" (Brentel, 1989). These are technologies that mediate the societal context, which in capitalist societies is precarious per se as a result of the anarchy of commodity production on the basis of private interests, through the practices of social actors. In the legal form, norms are generated in a self-referential network of interlinking legal practices: from specific judicial rulings, legal commentary, specialist literature, legal theories, expert reports, and newspaper articles, to societal processes of norm generation more generally. Court proceedings provide the institutional backbone of a relationally autonomous legal form: it is left to the courts to decide in individual cases how 'undecidable' legal issues might be resolved, and their decisions have 'legal force', which fixes the norm generation process temporarily and relieves it of constant contestation (Luhmann, 1995, pp. 316 ff.). The court's procedural orders provide an "objective grammar" of procedures, competences, modes of decision and argumentation", which effectively makes them "the transformation authority of societal conflicts" (Hitzel-Cassagnes, 2006, p. 386). Here, legal argumentation becomes the operational mode through which past decisions are linked into a legal fabric and extra-legal realities become legally coded. As such, it serves as the infrastructure for the universalisation of hegemonic projects, which is to say, only in this way do dominant

5 Lorenzer's concept of 'scenic understanding' is in the german-speaking community widely acknowledged in clinical psychoanalytic practice and training as well as in the social sciences (cf. Klüwer, 2001; Froggett & Hollway, 2010), and his methodological outline of 'depth hermeneutics' has been put into practice (cf. f.i. Bereswill, 2007; König, 2001) and furthermore systematically advanced (cf. Haubl, 1995 and 1999; König, 1993, 2003 and 2006; also in Ulrike Prokop's further development as 'conversion analysis', cf. Prokop et al, 2009).

societal interests acquire an intellectually, culturally and politically leading position. Legal discourse has to formulate a hegemonic societal consensus that transcends a mere biased perspective, i.e. it has to generate a worldview, a conception of what is right, which simultaneously inscribes itself into societal institutions (in detail Buckel and Fischer-Lescano, 2007).

Societal power relations are translated into juridical ones through the procedures of the legal form and come to be embedded in a hegemonic manner. In this way, judicial intellectuals (in Gramsci's terms), like those of the Federal Constitutional Court, become organisers of an intricate legally-based consensus that, through a longwinded process, integrates colliding interests in the form of breakthroughs and subsequent concessions into a hegemonic project. Temporary fixations of a fundamentally unstable and asymmetrical consensus emerge and are termed 'prevailing opinion' by the law. Modern law must therefore be seen as an independent site for the production of societal hegemony. The norms that emerge through this process are developed in specific procedures and follow their own discursive rationality. They constitute the "creative productive character of law," (Gramsci, 1991 ff., p. 792) as that which defines types of subjectivity and determines social relations, thereby instituting "technologies of the self" that allow individuals to constitute themselves as subjects of a particular way of life (Foucault, 1994, p. 12).

I.I. "Innate and unchangeable"?

Let us now scrutinize those hegemonic norms that were developed in the legal form on the occasion of the concrete case cited above. The decision of May 27, 2008 taken by the liberal first Senate of the Federal Constitutional Court can be seen as the climax of the deconstruction of the naturalness of gender, desire and the kinds of relationships recognized in law that began with an earlier decision of the Constitutional Court in 1978 to repeal a prior judgment of the supreme German civil court (the Federal Supreme Court). Previously the law had stated that "every person can be classified by the alternative category 'male' – 'female'" and that gender is "innate and unchangeable".⁶ The legal recognition of a sex change, however, also affects other areas; to belong to a particular gender is, for instance, the precondition for marriageability. As a result, the concern about the consequences gender deconstruction could have for marriage remained manifest in the legal debates of the next decades (Tolmein 2008, p. 29). The Constitutional Court had rejected the view of the Federal Court of Justice regarding gender by appealing to the common personal rights protected by the basic right to the free development of one's personality (Art. 2 (1)) in connection with human dignity (Art. 1 (1) Basic Law). Although it still shared the assumption of two genders, the 1978 decision nevertheless had doubts, based on the sexology of the day, concerning the thesis of the unchangeable nature of gender.⁷ An initial step was taken: the changeability of apparently natural gender was recognized.

6 BGHZ 57, 63.

7 BVerfGE 49, 286, marginal no. 50.

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Since this point, thirty years ago, societal discourse about gender and sexuality has been significantly transformed by the political practice of the women's and the LGBT movements. Furthermore, since the 1990s, the efforts of the transgender movement to avoid definite and permanent categorisations has stirred up the two-gender order – first in the USA (Jäger/Sälzer, 2000. Cf. also “International Bill of Gender Rights”) and then also in the Federal Republic of Germany (Wild, 2009). The European Court for Human Rights has recognized the ‘human right to gender identity’⁸ and the European Court of Justice has given it relevance in Community law.⁹ In 2001, the FRG introduced the Civil Partnership Act¹⁰ and a number of states, like the Netherlands, Belgium, Spain and Canada have opened their concept of marriage even more, or were forced to do so by court rulings, as, for instance, in Massachusetts and South Africa (Grünberger, 2007). In a petition to the Federal Ministry of the Interior, prominent sexologists argued for a revision of the TSG. Specifically, they argued for the “detachment of biological conditions and experienced gender affiliation,” and contested the medically produced unambiguity regarding gender identification, since the latter has to remain a “seeming” one and, as such, remains tied to a “stereotyped image of a perfect female or male body”. (Becker et al., 2001) In the German legal literature, there has also been an increasing demand to fundamentally reform the TSG (Boll, 2009, p.24; Grünberger, 2007, p. 363; Plett, 2004), which has been supported by the opposition parties FDP, Bündnis90/die Grünen and Linkspartei. In addition, the December 6, 2005 decision of the Federal Constitutional Court, which represented a “milestone for a new perspective” (Adamietz 2006, p. 369), enabled a quasi same-sex marriage in allowing both spouses to carry a female surname without the transperson having to undergo a medical sex change. Finally, in June 2006 the Austrian Constitutional Court repealed the Austrian ‘Transsexuals Order’ due to a stipulation comparable to § 8 (1) (2) TSG. (VfGH of 8 June 2006, V4/06. Cf. Greif 2009)

1.2. The Right to the Recognition of the Self-determined Gender Identity

In the previously mentioned legal case, the Court had to decide about the above outlined facts, namely whether the compulsory divorce according to § 8 (1) (2) TSG could be reconciled with the Basic Law. The decision stands out because all points to be examined for a potential basic rights violation of the “right to the recognition of the self-determined gender identity” – as an expression of general personal rights derived from Art. 2 (1) in connection with Art. 1 (1) Basic Law¹¹ – were reviewed in a quick and professional manner. The doctrinal argumentation the Court used had been developed over decades and the tenor of preceding decisions was followed strictly (Stüber 2009, p. 50). Hence, the intervention by § 8 (1) (2) TSG was established as a “substantial limitation” on the right to the recognition of the self-determined gender identity. Finally it was questioned whether or not this intervention could be justified, which on closer inspection, became the examination

8 EGMR, 11 July 2002, Nr. 25680/94 (I v.U.K.).

9 EuGH, 7 January 2004, Rs. C-117/01 K.B. v. National Health Service Pensions Agency.

10 6 February 2001, BGBl. I p. 266.

11 BVerfG, 1 BvL 10/05, 27 May 2008, marginal no. 40.

of its so-called proportionality. This proportionality check is the last part of the German basic rights check, which has also been introduced in EU law (especially in fundamental freedoms jurisprudence). The first step involves the question of the legitimation of the legislative rule of the TSG. In this case, the court found that such a legitimate end did exist, namely to take account of the structural principles of marriage especially protected by the state under Art. 6 (1) Basic Law, i.e. ‘marriage’ has to be understood as a permanently established partnership defined as the “union of a man and a woman”.¹² The court found, secondly that this objective was aspired to, with the appropriate and necessary means.¹³ Up to this point, the judges followed established doctrinal argumentation by repeating and reinforcing the state-protected hegemonic norm of the heterosexual, exclusive relationship as well as – and here the constitutive effect of the heterosexual matrix on the gender relation becomes apparent – the binary gender order. As a result the Court maintains the premise of heterosexuality as a constitutive feature of marriage.¹⁴ Paradoxically, only twelve days earlier, the Californian Supreme Court had stated that the constitutionally guaranteed right to establish an “officially recognized family” must not be dependent upon individual sexual orientation, so that ‘homosexual’ partnerships have also to be denoted as marriage.¹⁵

Nevertheless, in the decision of the Federal Constitutional Court a paradigmatic shift occurs in the term marriage, which goes further than the decision of the Austrian Constitutional Court (Bräcklein, 2008, p. 300). Yet this shift does not occur at the centre of the review of basic rights, nor does it involve a reinterpretation of the definition of marriage, which would provoke open confrontation. In the above case, the term marriage itself remains formally untouched. The established legal operations are only interrupted in the third and very last instance of the basic rights review: the ‘proportionality in the stricter sense’. A nearly exact interruption had already occurred in the prior decision of 2005 mentioned above. The examination of proportionality, however, is already fundamentally questionable from the perspective of democratic theory insofar as it subjects the political everyday decisions of the legislature to a review of its political objectives by the judiciary – a review which was originally reserved to the executive actions of the police (Maus, 1986, p. 47 f.). Hence, the examination of proportionality in the strict sense is finally a mechanism of political disenfranchisement masquerading as legality. In its independent operation, the legal form shows no consideration for arguments of democratic theory, instead, it incorporates them into its own systematic composition. A decision taken at this point indicates a hegemonic shift, since what happens through the ‘consideration’ of objects protected by law, or their ‘practical concordance’ respectively, is the “somehow reasonable mediation” (Fischer-Lescano, 2008, p. 170) of conflicting interests within an existing relation of forces – a mediation that requires a departure from well-trodden legal paths.

The process of consideration takes place as follows: at first, the significance of the legal institution of marriage and of the right to sexual self-determination are judged. Both are

12 BVerfG (FN 32), marginal no. 44 f.

13 Ibid., marginal no. 47 f.

14 So explicitly stated in the decision concerning the legality of the Civil Partnership Act, BVerfGE 105, p. 313, p. 345.

15 S147999, 15 May 2008, 4-7. It has to be added, that within a few months, as a result of Proposition 8, this decision was effectively overturned. But as a replica further judgments are expected soon.

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of “high importance” and carry “weight”.¹⁶ Therefore, the comparison of both objects protected by law leads nowhere.¹⁷ Following this comparison, however, the judicial intellectuals of the Constitutional Court develop the decisive hegemonic (that is, universalisable) generally acceptable argument. The claimant herself could invoke the right to marriage under Art. 6 (1) Basic Law given that, despite the surgical procedure, “a lasting partnership and community of responsibility” still existed.¹⁸ The judges were obviously impressed by the fact that the claimant’s marriage seemed to correspond to the bourgeois ideal much more than the majority of broken down, heterosexual, regular marriages (especially considering the backdrop of the claimant’s age and experience in the Third Reich). This unusual constellation made apparent the destructive effect of the hegemonic norm of heterosexual marriage and the particular burden of § 8 (1) (2) TSG, which lies in the fact that the enforcement of one right (the right to determine one’s own gender) depends on the renunciation of another (the protection of marriage).¹⁹ The distinctive relationship between the two elderly people, according to the Court, was subjected to an existential crisis by the ruling, the consequences of which carry a “subjective existential dimension”. In contrast, “the principle of different sexuality is only marginally affected in view of the specific circumstances. The specific cases only refer to a small number of transsexuals who initially married as man and woman”.²⁰ Ostensibly, neither heterosexual marriage, nor the binary gender order, are being directly called into question, as their “shaping power” is not eroded by the small number of possible cases. Yet, at the moment the apparent moral injustice of a concrete legal case is taken into account, this case becomes the first occasion in which homosexual marriage is guaranteed under the constitutional law of the Federal Republic. And, for this reason, Art. 8 (1) (2) TSG is deemed unconstitutional. The Court offered three suggestions, of which the legislator finally chose the most radical one, to withdraw § 8 (1) (2) TSG without substitution on 20 June 2009.²¹ We will address the consequences of this shift in the third section, but at this point we want to first analyse the relevance of legally created norms for the possibilities of subjectivation and subject constitution respectively.

2. Towards a Critical Theory of the Subject

The dispute about the TSG highlights the role law plays in the constitution of subjects. If a ‘sexual nature’ preceded society and was determined as an ahistorical elemental force by ‘nature’, then – this is obvious – no Transsexuals Act would be required. If humans were heterosexual ‘by nature’, the regulation of homosexual relations would not be required. And further, if the heterosexual, romantic partnership of two, and only two persons, (cf. König, 2008) presupposing sexually different bodies were given by nature, then § 8 (1) (2) TSG would not be necessary, as this specific form of relationship would emerge automatically. Nevertheless, the legal regulation of relationships can not be adequately accounted for by the repression thesis, which assumes a pre-social ‘wild nature’ of human beings

16 BVerfG, 1 BvL 10/05, 27 May 2008, marginal no. 51 + 53.

17 Ibid. marginal no. 61 f.

18 Ibid. marginal no. 59.

19 Ibid., marginal no. 65.

20 Ibid., marginal no. 64.

21 Abrogation effective from 23 July 2009 by decision of 17 July 2009 (BGBl. p. 1978).

tamed by legal norms. In contrast to such positions, which are hard to advocate since Foucault (cf. Foucault, 1976/1998), it remains a question how the effects of (legal) norms inscribe themselves into the bodies and individual configurations of desire, and more interestingly how such significant ‘deviations’ from the desire-norm can occur at the same time, as illustrated by the previously discussed legal case. In this section we therefore turn to Butler and Lorenzer, who offer a theoretical account of subjectivation, and who outline the process by which the subject initially develops in exchange with internal and external nature in a “process of materialisation.” (Butler, 1993, p. 9) This process becomes more stable over time and “produce[s] the effect of boundary, fixity, and surface we call matter.” (Ibid.) According to Lorenzer, existing “nature-potentialities” [Natur-Möglichkeiten] (Lorenzer, 2002, p. 131) – for instance, the genetic make-up of humans as such – “are concretised in a socially determined form,” (ibid.), and emerge through human practice, beginning with the initial unit of a child and a primary attachment figure. However, when it becomes apparent, as in the discussed case, that norms do not have the same impact on individuals – they do not produce similar subjects with similar desire structures, but rather individuals in conflicting constellations of desire – then the relation of this deviant desire to hegemonic (legal) norms is in need of explanation. This question is of decisive importance with respect to the possibility of organising subjective-political body-desires [Körper-Wünsche] (Lorenzer, 1984, p. 196) as counter-hegemonic force in legal practice. As we will show, the analysis of such contradictions must therefore occupy a central place in the theory of subject constitution.

2.1. Body Constitution as the Constitution of Subjective-Sensual Desire Structures

Whereas Butler understands, following Foucault, the process of subject constitution abstractly as subjectivation (a productive effect of power) (cf. Butler, 1993, p. 2), Lorenzer reconstructs it in detail along processes of socialisation by retracing how the experience of a baby constitutes itself in bodily mediated processes of interaction. These processes begin before birth in the interplay of two organisms and manifest themselves in both the concrete-individual manner of a particular infant with its particular primary attachment figure, and also more generally in accordance with societal norms. Every individual interaction leaves traces of experience in the developing subject, which then produces an expectation concerning similar interactions in the future. The manner in which an adult reacts to the (bodily) need of an infant enters the bodily experience of that infant as an expectation and only then produces a directed want. Thus, this want emerges in a specific interaction with an adult attachment figure as the interplay of physiological functional formulas, which are simultaneously social functional formulas. In his account, Lorenzer emphasises the element of negotiation in each interaction. Even if the dominance of the adult attachment figure cannot be overlooked in the interaction with the infant, it can be said that the primary attachment figure and the child ‘agree on’ an individual-concrete practice and that the child already introduces its own ‘inner nature’ at a very early stage (Lorenzer, 1972, pp. 27 ff.). Lorenzer reformulates the subjective trace of this ‘agreement’ (in reference to the Freudian notion of the “memory trace”) as an “interactionform” in order to stress the significance of human practice for the after-effects of the interaction sequence in the

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(bodily) experience of the subject. (Ibid., pp. 44 ff.) In contrast to interactionist theorists of socialisation, Lorenzer stresses that these interactionforms do not only exist in a mental space, but that they initially manifest themselves pre-symbolically, or “sensual-organismically;” that is, the initially manifest themselves as body:

“Morphology, i.e. what emerges in tangible-corporeal shape, does not come overnight, rather it is the result of the interplay at the physiological level coagulated into functional formulas, in which the social structure of meaning has always already found its place. In this way, the body is constituted ‘tangibly’”.

(Lorenzer 1980, p. 341)

Encompassing a variety of interactionforms, each individual-concrete structure materialises as a corporeal-experience structure that also remains open to modification by further interactionforms. While existing interactionforms are continuously overwritten, rewritten, and modified throughout the life of an individual, they are not simply replaced by new interaction experiences. It is for this reason that desire and personality structures necessarily constitute themselves in a contradictory nature.

This structure, which Lorenzer describes as “matrix” of sensual practice (cf. *ibid.*, p. 333), also encompasses the “already realised inner nature” of the subject. As drive, this structure does not belong to some “historical beyond,” (cf. *ibid.*, p. 333, original emphasis) but is understood as the unity of naturalness and sociality. By showing “how the drive is produced by identifiable institutions of socialisation and in identifiable socialisation steps,” (cf. *ibid.*, p. 329). Lorenzer maintains the body as a natural foundation – thereby preserving the energetic dynamism of the drive as a theoretical category – but his conceptual originality lies in the fact that he does so by identifying the body itself as the sociality of nature. Accordingly, he proposes that the Freudian concept of drive be understood

“as always already characterised by the unity of naturalness and sociality of the need in the directedness of bodily processes towards the respective environment and at the experience level of sensual interventions and sensual utterances”

(cf. ibid., p. 324).

Lorenzer discusses the unity of the natural and social (of body and society) in relation to the field of neuroscience, which in the last decade has become a prominent discipline. Psychoanalysis, Lorenzer contends, can be understood as “critical-hermeneutic empirical science” (Lorenzer, 1974, pp. 194 ff.) in principle only in connection with Freud’s neurophysiologic research, which already anticipated many of the current debates between neuroscience and psychoanalysis. (Cf. Leuzinger-Bohleber, 2002, p. 21; cf. also Starobinski et al 1999) Lorenzer had already discussed the close nexus between corporeal and cognitive processes in the 1980s when he characterized the memory as a proactive process of the whole organism. It is in the memory that the “scenic arrangement” (Lorenzer, 2002, p. 123) of that which is experienced finds expression. Via the nervous organisation of reflex arcs and other relay stations of the brain, memory expresses a scenic perceptive gestalt, or inner experience scene:

“Considering the multitude of perceptions at the periphery, the complexity of the sensorimotor interplay and the registration of this interplay in the different qualifying relay stations, this highlights how it is possible to arrange external real events into an inner experience scene. It becomes also apparent at how many sites the experience scene is inscribed in numerous ways into the body – and I repeat again: as body”

(Cf. ibid., p. 124).

The interaction scenes, which constitute subjectivity and can be deciphered as social scenes, therefore develop the body as such – they in fact constitute a body in the first instance. This body emerges as a distinct sensual experience and desire structure in which the socially shaped drive provides the foundation for the development of imagination, identity, and personality. For the purposes of our argument, this insight is of particular significance insofar as the category of identity (more than those of physiology or sexuality) poses the core problem for transpersons. It is for this reason that Becker et. al. argue in their petition to the Ministry of the Interior for the amendment of the TSG as “Transgender Act.” (Cf. Becker et. Al, 2001, p. 2.)

2.2. Normalisation

If interactionforms have to be taken as the manifestation of experienced real scenes and expectation formulas for future interaction, then every repetition of a scene enforces the interactionform, while conversely the absence of a specific repetition linked to a particular interaction context leads to reluctance, fear, and aggression. In this way, the need satisfied in a past real situation becomes, in the interactionform, a demand – or more precisely, a demanding want – that is already shaped by human practice and that strives to be satisfied again in a specifically socialised way (Lorenzer, 1992/1981, p. 88). The experienced satisfaction translates itself into a bodily desire, which is sensually-organismically embedded in a (fluid) structure and out of which it simultaneously develops its inherent dynamism.

Repetitive practice plays a central role in both Butler’s and Lorenzer’s accounts of the constitution of body-bound subjectivity. Each of them place emphasis on the structural level of societal objectivity and the perspective of the subject. For Lorenzer, the organism follows the practiced traces of an experience, traces which are then reinforced by every similar repetition. Butler, however, points out that the repetition process does not occur arbitrarily but is regulated by societal norms. (Butler, 1990, p. 33) Every performative repetition cites a norm. To the extent that this norm can never be repeated in the very same way, every repetition is, on closer inspection, always already a variation. Here, norms regulate social intelligibility, i.e. the comprehensibility and coherence of subjectivities within a hegemonic discourse: a ‘biological man’ can not be ‘biological woman;’ two women cannot be married (to do so one of them must be a man) (Butler, 2004, p. 42). What’s more, this coherent binarity is produced at the expense of those who do not accept it. The matrix of norms produces both the realm of the social and, at the same time, the realm of ‘depraved beings’, a hostile and uninhabitable zone of social life. (Butler, 2004, p. 3.)

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Societal norms are integrated in different ways into the practices of subjects (initially, via the individual manner of the adult attachment figure, whose practice is itself regulated by societal norms that constitute as social system of meaning and framework for the actions of adults). At the same time, the sociality mediated by the adult attachment figure is concretely ruptured by the individual history of that adult's processes of adopting those societal norms. Wants are therefore formed in accordance with particular societal norms and conventions, as well as by their particular social location. (Cf. Lorenzer, 1972, pp. 27 ff.) In this way, the very first subjective desire structure is already constituted by societal norms. "This is clearly one way in which norms work their way into what feels most properly to belong to me." (Butler, 2004, p. 15).

In addition to the repetitive practicing of sensual-organismic interactionforms, sensual-symbolic and symbolic-linguistic interactionforms come to gain significance in parallel with these earlier interactionforms. These concepts enable Lorenzer to reconstruct the development of thinking. While the previously described sensual-organismic interactionforms are unconscious experience structures, the concept of sensual-symbolic interactionforms includes memory traces of already objectively symbolised, but still pre-linguistic, interaction experiences of the child (especially with respect to objects operate as coagulated social practice). Symbolic linguistic interactionforms, however, denote interaction experiences that come to be symbolised in language, or more precisely, the linguistic determination of the sensual content of experiences as a collectively comprehensible and abstract symbol – a symbol, which is at the same time the expression of the societal norm system.

Through the sensual-symbolic interactionforms, the child already gains initial independence from the direct neediness produced in the relationship with a primary attachment figure insofar as the initial symbolisations of this relationship offer the opportunity for the child to re-experience it even in its absence. The introduction of linguistic symbols further elevates this emancipation from direct-bodily dependency at yet another level. As language allows one to recall past or absent situations, and to rehearse and reflect them with regard to identity and context, it provides the greatest possible independence from the imperative urge of sensual-organismic interactionforms (cf. Lorenzer, 1981, p. 91). Accordingly, the child gains its autonomy and independence from the relationship dyad with the primary attachment figure to the extent that the child is able to symbolise its wants. This emancipation, however, comes at the price of a fundamental subjugation to a system of collective symbols, specifically, the syntactic-semantically organised corpus of language, which is simultaneously the "manifestation of practice experience" and a normalising "system of practice instructions and practice interpretations" (ibid., p. 92). The interaction scenes related to the sensual-body, which have emerged out of the concrete interaction scenes between child and primary attachment figure, must now be arranged into an already existing and collectively binding system of symbols. However, as they can never be entirely dissolved into discursive linguistic symbols, a non-symbolised pre-linguistic 'remainder' persists. Scenes captured by the linguistic symbol remain linked to the sensual interactionforms through this remainder. Subject and body are therefore constituted in a process of numerous and often contradictory interactions. Emerging interactionforms are always demands to repeat satisfying experiences, but these processes of repetition are also always already guided by societal norms, norms which are not necessarily in agreement with embodied wishes.

Producing the body, a desire structure, and the ability to symbolise, these interactive repetition processes continue throughout life and the norms related to language acquisition, which are also of an abstract nature, increasingly play a significant role. Based on the internalisation of parental norms, individuals are confronted with a number of secondary institutions of socialisation (kindergarten, school, training place, labour relations, legal bodies and leisure institutions), within which (legal) norms have a far more explicit significance than in the unconscious and routinized practices of the family constellation. Before the backdrop of their own edifice of interactionforms, individuals finally, and necessarily, relate to themselves through societal hegemonic norms – a relation that has, to a large extent, a (self-)regulatory function.

The previously discussed legal case concerned adults with a long life story; one can reasonably assume that they have had many (often contradictory) interaction experiences in the course of their life. Childhood experiences are ruptured and overwritten in multiple ways by the experiences one has in puberty, adolescence, and adult life. Even if, in the case of most adults, sexuality and identity could be reduced to a common denominator, the subjective constellations of desire would still remain, to a high degree, ambiguous throughout these multiple ruptures. In the given context the crucial difference, regulated by hegemonic norms, and inscribed in every body, is the opposition of masculinity and femininity -- a constitutive binary within occidental society that is bodily manifested as the irreducibility of the 'biological' principle of two genders. This principle is permanently and performatively generated as a corporeal fact within the societally secured and normative institution of the heterosexual matrix. (Butler, 1990, p. 151) Within the binary framework of the heterosexual matrix, only two kinds of bodies – those that are explicitly and unambiguously “male” and “female” – are recognized (along with their respective heterosexual desire, which qualify them as ‘normal’ and, hence, as liveable). Moreover, these constructions are normatively guided in the interaction process (to the extent that they can largely be experienced with satisfaction according to hegemonic norms) and, as a result, turn into the passionate, bodily demand for repetition.

3. Hegemonic Shifts

Body and gender therefore emerge as traces of previous experience – what remains in and as body – and the constant urge for a desired repetition that accompanies these traces. In this way, Butler and Lorenzer dissolve the notion of corporeal “thingness”; instead, subjectivity emerges as the result of many individual processes of subjectivation, which is nothing less than “the term for what emerges as an object of a special ensemble of knowledge, norms and self-practices.” (Saar, 2007, p. 328) Biological sex is generated as the sedimented effect of an enduring repeated practice, in which repetition stages an apparently pre-existing substance. This process of repetition is not only instructed by societal norms, but also by legal norms. These are societally variable frameworks that, due to their necessary temporality, remain open for replacements and subversions. They are not the foundation of social practice, but exist only as long as they are exercised in social practices and integrated in technologies of the self. A clear gender identity requires continued performative repetition as well as the permanent blocking of what must not be. Since

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these exercises are always referencing repetitions, a corridor for potential subversions and transformation opens up.

3.1. Body Desires

The societal norm system can never fully achieve the determination of subjects in their entirety, as every repetition already constitutes a variation. This is especially true when the system comes into conflict with subjective-embodied memory traces, for instance, when the desire of the subject cannot be realised within a hegemonic gender order. In this way, body-constituting repetition processes are both regulated by norms, but under certain circumstances these same processes give rise to contradictions motivated by nonconforming bodily desires (similar to the psychoanalytical view that the leitmotif of a life story are expressed in the conflicts of drive). (Cf. Lorenzer, 2002, p. 133.) Pleasure is more than the elimination of unpleasure; it also aims at the fulfilment of wishes (*ibid.*, p. 143). For this reason, the unconscious does not consist of ineffective or merely indifferent memory traces. Rather, these traces categorically require the fulfilment of necessities “in the form which is desirable. [...] The memory trace is again and again supposed to be realised.” (*ibid.*, p. 144) As subjects are not completely natural products, but have to be thought of as processes even in their corporeality, the possibility of variation and failure in the repetition process is at the same time the possibility of re-embodiment and subversion.

In the case discussed earlier, the lived homosexual marriage and the successful refusal of the claimant (like numerous other transpersons, and the transgender movement more broadly) to accept the existing gender order, and hence their own deprecation, changes societal practice. It is those practices that transform, bit by bit, societal structures like the legal form, which are crystalized through constant repetition. But these sedimented practices also become the starting point for new norms, which in turn bring out new forms of practice. As, for example, when the legislature followed the request of the Court and repealed § 8 (1) (2) TSG.

3.2. Constituting practice

For activists this ‘minimum solution’ does not go far enough (Wild, 2009). “The motive is clear, the SPD [Social Democrats] and the Union [Christian Democrats] want at all costs to avoid a debate about the privileging of the hetero-normative marriage” (Boll, 2009, p. 24). But the subversive practice of shifting repetition is already underway, whether political actors like it or not. New hegemonic norms have emerged through the practices of desiring subjects and their strategic reference to the relational autonomy of the legal form. The Constitutional Court argued that the ‘shaping force’ of marriage was not jeopardised by alternative practice because it did not occur often. The hegemonic norm of the heterosexual marriage is certainly still in force. Yet, the reaction to the ruling in the network of law also highlights the subversive effect that an inconspicuous shift in the doctrinal argumentation can have. Following a 2006 ruling, Laura Adamietz (2006, p. 380) still maintained that the Federal Constitutional Court had not discovered the notion of “natural gender difference”

as the “root of all evil” but that nevertheless some things were “in transition.” Only a few days later, the contradiction obviously grew more acute for the juridical intellectuals in that same ruling. But their argument, as it appears in the commentary, was not entirely convincing. The Court maintained the binary conception of gender as the constitutive feature of marriage, and as a result the matter of the fundamental right to marriage remained “necessarily limited by this concept of constitution” and cannot “include marriages which do not exist under constitutional law” (Cornils 2008, p. 86). But the Court’s suggestions led the legislature into a dilemma. The legislative act seemed to recognise that there are homosexual marriages protected by the law of civil status and that “it is more and more difficult to justify why marriage cannot be opened for same-sex couples under simple law.” The grand coalition of Social Democrats and the conservative (CDU) had therefore “a hard nut to crack” (Stüber, 2009, p. 50, p. 52). With this decision, it can no longer be argued that the structural principles of the institution marriage, underwritten by constitutional law, are not in question: “even if only a small group of people is concerned [...] compared to the current legal situation, the change is still significant” (Tolmein, 2008). Moreover, with this shift in the institutionalisation of the heterosexual matrix, the norms of hegemonic subjectivity also change: “to the extent that gender has become disposable, a legally and societally less and less important category, it is increasingly difficult to justify why the principle of sexual difference is taken as the constitutive character of marriage.” (Ibid.) Directly after the publication of the Constitutional Court’s ruling, the first political actors to respond already made reference to this shifting norm and pushed it forward: the Lesbian and Gay Federation claimed, for example, that “The ruling is the introduction of marriage by the backdoor.” (*die tageszeitung*, 22 June 2009) What would happen, if future German claimants also begin to question, for instance, the number of persons permitted to a marriage? What will then become of this basic institution of bourgeois society?

By combining materialist legal theory and psychoanalysis, we hope that we have highlighted the extent to which objective structural moments and subjective micro-mechanisms (such as interactionforms and bodily desires) are mutually mediated, and how practice therefore becomes the engine of the story. We are indeed in our most intimate moments irrevocably constituted by a social world – which we have never chosen and which we have never agreed to – but the suffering produced under these conditions, and the emerging inconsistency therein, is at the same time the starting point for our ability to act (Butler, 2004, p. 3). For the transformation of this constitutive social world occurs through our everyday practice. Practices can and do succeed in anchoring new norms – the “right to live gender and body in deviant and, hence, potentially subversive ways” (Jäger/Sälzer, 2000) – and, as such, make that life liveable. The inscription of a counter-hegemonic desire as norm into legal practice eases subjective suffering under existing conditions and, in doing so, reinvents the social.

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