Thank you very much for this excellent presentation. In my comment I aim to render more explicit some fundamental tensions or contradictions between legal emancipation and queerness, which are at stake in your description of the legal frameworks for the protection of queers. It thereby reopens the question of the strategic choice between appealing to the democratic legislator (political strategy) or judicial activism (legal strategy).

I will first describe the current human rights paradigm, in which the legal strategy around gender identity is framed, as based on liberal subjective rights which naturalize the individual will. Second, I show that this liberal strategy is problematic, as it is apologetic and open for right-wing criticism. Third, I examine a constructivist paradigm and its tension with the naturalist paradigm. Fourth, I argue that a legal strategy which is based on the constructivist paradigm works better than the naturalist one. However, it blurs the boundaries between law and politics.

1. Liberal subjective rights

The human rights framework conceptualizes gender identity as “each person’s deeply felt internal and individual experience of gender” – it naturalizes and individualizes gender, and argues that because it is such an internal trait, it deserves protection. This is no surprise when seen in light of Christoph Menke’s work, who recently analyzed our legal system as a liberal one based on exactly such naturalizing subjective rights. He is critical of subjective rights, as this naturalization leads to depoliticization of the individual will and thereby to an amoralist, capitalist society. Liberal law creates subjects who actually think that they have individual free will independent of society, while this very thinking is already the product of liberal legal subjectification. Naturalizing subjective rights blend out the social constitution of subjectivity and thereby depoliticizes it.

2. The problems with the liberal strategy and the born-that-way-argument

The liberal strategy, which is currently used to fight for rights for inter* and trans* people, is apologetic and prone to right wing criticism. It is apologetic as it is granting rights on the basis that gender is a natural trait, for which individuals are not responsible and therefore should not be discriminated for. The social homo- and transphobia is not questioned in this paradigm, it is even implicitly supported through the apologetic structure. This is the same problem which has been discussed regarding the born-that-way argument about homosexuality in religiously dominated societies such as the U.S.
Second, right wing politicians claim that queer politics indoctrinate people and bring them to embrace a diverse range of gender expressions and sexualities. And they are actually right. They point out what we lefties call subjectification – albeit from the opposite political corner. And this argument is quite persuasive, as people see very clearly that different legal frameworks and different education guidelines which support queer people lead to queerer attitudes and the loss of traditional values.

What is more, in the naturalistic human rights paradigm, it makes sense to claim that social recognition of a gender identity expression is dependent on the prove of its “naturalness”, i.e. to demand medical and psychological assessments. Free and individualistic power of definition cannot be supported through the naturalist subjective rights paradigm.

3. Constructivism

The long history of repression of queers based on naturalist (i.e. medical and psychological) arguments is criticized by queer theory through a constructivist analysis which shows that heteronormativity is a contingent power formation with subjectivating effects. This means that heterosexuality is not natural, but the result of heteronormative socialization. Queers, or more precisely SOGIESC rights activist, have been less vocal about the social construction of queerness, as a naturalist strategy is more promising in a context made up of homo- and transphobia and the liberal legal framework. In other words, it is a strategic choice to make politics based on the born-that-way-argument which is understandable given the context of liberalism, but nevertheless social-ontologically wrong and strategically problematic.

Against this naturalist strategy, the lesson of queer theory is that non-heteronormative SOGIESC feelings and expressions are dependent on social environments, in other words: you need gay culture to learn how to be gay and you need trans*/inter* communities to learn about pronouns and define yourself as non-binary, for example. People might have rudimentary biological non-heteronormative SOGIESC traits, but to live a queer life necessitates queer culture and politics and is also a choice to adhere to these cultures. Homosexuality is a potential to develop gayness, non-binary biological sex is a potential to develop non-binary cultural lives. Being a potential, it is possible that it is not realized, and often the reason for this non-realization lies politics, more precisely conservative, conformist, homonormative, politics, and it is not by accident that these homonormative politics are associated with a rights-based strategy. It is in this vein that David Halperin can say “Sometimes I think that homosexuality is wasted on gay people”.

4. Freedom as Critique

In the past I’ve worked on the concept of freedom in Foucault’s works, and I come up with this definition: Freedom is the capability to critically reflect one’s own subjectification, and this capability of critical reflection opens the possibility to transform one’s identity. This concept of freedom as critique shares certain elements with all three standard concepts of negative, reflective, and social freedom, but points out that subjectification has to
be taken into account for a convincing theory of freedom. Subjectification refers to the social constitution of our identities which has both repressive and enabling aspects, and it is only through critical reflection that they can be disentangled.

Freedom as critique is not as foreign to our liberal legal thinking as it first seems, even though it implies a shift of the foundational social ontology. We should think about how it could be implemented legally, in order to interpret human rights frameworks in a way that they foster the capability of critical reflection of subjectification through supporting queer culture. Against the right-wing concerns regarding indoctrination, the concept points out that all gender norms, especially heteronormative ones, are indoctrinating. And furthermore, that due to the huge evidence that heteronormativity is repressive, it should be criticized through the support queer counter identifications. The advantage of this argument is that it does not rely on the claim of individual-naturalist traits, but it based on the right to freedom independent of such traits. Freedom for all, independent of natural traits, requires critical reflection of social norms, especially gender norms, and the diversification of identity offers.

I hope that the concept of freedom as critique can help to implement such arguments into a legal strategy. This would help to get the legal discourse out of its straight jacked of subjective rights, which leaves so much room for right wing attacks. These thoughts also point to a more general legal philosophical problem in the current debate: How can there be a legal strategy which is not based on subjective rights, and does such a strategy automatically change into a political strategy? For example, the right to freedom as critique is a formal principle, and each positive interpretation of it will always be politically contested, for example the diagnosis that heteronormativity is repressive and therefore counter-culture has to be supported. I think that a first step to think forward in this direction is on the one hand to accept the lines between law and politics are always already blurred and to explicitly affirm political legal activism which aims at queering the law, and on the other hand to be aware that a legal strategy is not enough but that counter-hegemonic queer cultures are the basis for all legal developments towards queer emancipation.