Adrian de Silva

Negotiating the Borders of the Gender Regime

Developments and Debates on Trans(sexuality) in the Federal Republic of Germany

[transcript] Gender Studies

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In loving memory of Harm Dunkhase and Elisabeth Rösch

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Esch-sur-Alzette in May 2018
Adrian de Silva

1 INTRODUCTION

1.1 Research interest and research questions

1.1.1 Research interest

In 1965, the category ›transvestitism‹ appeared as a ›sexual deviation‹ in the eighth version of the World Health Organisation's (WHO) International Statistical Classification of Diseases and Related Health Problems (ICD-8). Ten years later, the term ›transvestitism‹ vanished from the ICD-9, and the terms ›trans-sexualism‹ [sic!] and ›transvestism‹ were added to the ›sexual deviations‹ in the ICD-9. When the ICD-10 appeared in 1990, ›transsexualism‹[1] was reclassified as a ›gender identity disorder‹ and placed in the mental health section of chapter V Disorders of adult behaviour and personality, along with a number of other forms of gender identity deemed pathological (Drescher 2014: 141).

The effects of entering ›transsexualism‹ into medical classification systems, such as the ICD and the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA), were twofold on the subjects subsumed under this category. On the one hand, psychiatrists acknowledged that some individuals experience a gender that is not socially associated with their assigned sex and frequently seek medical and/or surgical interventions to alter gendered parts of their bodies to match their identity. On the other hand, ›transsexualism‹ was conceptualised as a mental health problem rather than as one of many equally legitimate possibilities to relate to ›gender‹.

Social marginalisation and lacking legal recognition and health insurance assumption of sex reassignment measures provided points of departure for social and political struggles in several liberal democracies. These struggles

1 | In 1923, the sexologist and physician Magnus Hirschfeld coined the term ›Transsexualismus‹. The general practitioner Cauldwell translated the term as ›transsexualism‹ into English, whereas the physician and endocrinologist Benjamin popularised the term in his book *The Transsexual Phenomenon*, which appeared in 1966 (Stryker 2008: 18; idem/Whittle 2006: 28-57).

developed unevenly, depending on the healthcare system, the medical, the national[2] and occasionally supranational legal and political environment and developments in related and in part overlapping social struggles, such as e. g. lesbian and gay movement struggles, to name a few factors, and the (temporary) outcomes differ.

This book examines how struggles over trans(sexuality)[3] evolved in the Federal Republic of Germany. Soon after sexology consolidated transsexualism as a distinct and pathologised form of embodying gender in the course of the 1970s,[4] legal and political conflicts over recognising transsexual subjects and securing health-insured access to healthcare unfolded. Having gained the right to change first names and revise gender status as early as in 1981[5] and having achieved statutory health insurance assumption of costs for hormonal and surgical interventions in 1987, these struggles continued to develop into an ongoing battle over the terms of recognition and access to transition-related healthcare in an increasingly complex and changing mesh of concepts of trans(sexuality), practices and institutions. They also were, and continue to be,

2 | For the impact of, for example, state structures on social movements, see Johnston 2011; for country-specific developments of the trans movement in the USA and the UK, see Stryker 2006: 5 f.

3 | The terminology used to describe the population addressed here in sexology, law, federal politics and in the social movement varied historically and is frequently contested in historically-specific settings. Seeking a historically correct term and one that respects the self-definitions the subjects of this study addresses is a challenging endeavour. ›Trans(sexuality)‹ is my proposed solution when referring to the whole period of investigation. Whenever historically-specific sexological, legal, political or social movement concepts are subject to analysis, I take up the terms that happen to be used in this specific context, and wherever possible, I refer to individuals the way they describe themselves. The term ›trans‹ (*Trans**) is frequently used in the trans movement in Germany since the late 1990s as a self-description of, and category for a broad spectrum of individuals who temporarily or permanently do not consider themselves adequately described by the gender assignment at birth. In this sense, ›trans‹ may include e. g. ›transgender‹, ›transsexual‹, ›non-binary‹ individuals and ›cross-dressers‹. Whenever I am not bound by an analysis, I use the term ›trans‹ as a non-pathologising umbrella term for the population described above.

4 | For historical developments on sexing the body, see Balzer 2008: 84-105, Klöppel 2010 and Meyer 2015: 223-299. For earlier developments on transvestitism and transsexuality in sexology, see Herrn 2005 and Weiß 2009.

5 | The Federal Republic of Germany was second only to Sweden, which passed an act to revise gender status called *Lag om fastställande av könstillhörighet I visa fall* in 1972 (Scherpe 2004: 62). For a report on committee proceedings leading to the Swedish Act, see Carsten 1970.

disputes over definitions of gender and challenges to a gender regime, which is based on the assumption that there are ›by nature‹ two ›healthy‹ genders (›man‹ and ›woman‹) that can be derived from one particular of exclusively two polarised sexes (›male‹ and ›female‹).

This project addresses the period prior to, and during the processes leading to the Act to change first names and establish gender status in special cases (Transsexual Act [TSG])[6] in 1980, the period of the transsexual law reform debate between 2000 and 2009 and developments in the immediate aftermath of the Act to amend the Transsexual Act (*Transsexuellen-Änderungsgesetz* [TSG-ÄndG]). The motivation for conducting this research was to find out how social change evolved in the broader contexts of the legislative processes related to a change of first names and a revision of gender status with regard to considering trans a viable way of embodying gender in the Federal Republic of Germany.

Developments and debates on trans(sexuality) within and between the major actors involved in these processes were uneven. This study covers developments and debates in sexology from the 1970s to the early 1980s and from the early 1990s to 2014. It traces developments and debates in law from the late 1950s to 2013. The project deals with the trans movement from the mid-1970s to the mid-1990s briefly and in depth with a focus on major trans organisations and networks with a decidedly political agenda between the mid-1990s to the time of writing in 2014. Finally, this study addresses federal politics as it relates to the Transsexual Act from the early 1970s to the beginning of 1981 in detail and briefly from the beginning of the reform period in 2000 to the Act to amend the Transsexual Act in 2009.

1.1.2 Research questions

The major question is how sexology, the law, the political branch of the trans movement and federal politics interacted prior to, and during the above-mentioned processes to either generate, establish or challenge concepts of trans(sexuality). While this project addresses a number of issues, it focuses on three questions to answer the main question:

1. How did sexology, the law, the political branch of the trans movement and federal politics, mirrored in the practices and mediated by the procedures of the respective discipline and area, construct trans(sexuality) in relation to socially accepted genders? This project relates concepts of trans(sexuality) to concepts

6 | The German name of the Act is *Gesetz zur Änderung des Vornamens und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen* (*Transsexuellengesetz* [TSG]). The Act to change first names and establish gender status in special cases will be referred to as the Transsexual Act.

of socially accepted genders, i. e. cismen and ciswomen[7] as they emerge in the respective debates, practices and procedures for three reasons. First, a comparison reveals the degree of accepting or rejecting trans(sexuality) as a socially viable way of relating to gender. Second, naturalised genders are frequently the yardstick according to which trans individuals are granted or denied access to legal and medical provisions. Third, a comparison allows conclusions to be drawn from how negotiations over trans(sexuality) impacted on the gender binary, or more specifically, how outcomes of legal and political struggles for recognition challenged hegemonic notions of gender, sexuality and embodiment.

2. What dynamics developed within sexology, the law, the social movement and federal politics with regard to trans(sexuality)? Sexology, the law, the social movement and federal politics are sites of conflict and power struggles involving various perspectives on trans(sexuality), gender and gender regime. How did some concepts become authoritative and others marginalised?

3. What dynamics developed between sexology, the law, the social movement and federal politics with regard to trans(sexuality)? The interplay of sexology, the law, the political branch of the trans movement and federal politics highlights how and what concepts of trans(sexuality) entered other disciplines and fields and how concepts of trans(sexuality) were read into, or challenged in the respective parameters of the disciplines or social arenas in an uneven and frequently conflictual process.

1.2 State of the art and contextualisation of the project

1.2.1 State of the art

No study has to date dealt with the constructions of trans(sexuality) and challenges to these constructions, in sexology, the law, the political branch of the trans movement and federal politics, dynamics within, and the interplay of these disciplines and arenas and the effects on the gender regime in the entire period this project addresses. Previous studies have overall been disciplinary,

7 | Sigusch coined the term ›cissexuality‹ (*Zissexualität)* in his concept of depathologising transsexuality. Cissexuality denotes the unquestioned, seemingly natural concurrence of sex and gender identity (Sigusch 1991: 338). In doing so, he ruptured the assumed naturalness of gender based on anatomy. I will frequently use either the phrase ›socially accepted genders‹ or, drawing upon Bauer, attach the prefix ›cis‹ to men and women who live according to the gender they were assigned to at birth. In addition to pointing to all genders as socially constructed, the prefix avoids privileging morphology as a point of reference (cf. Bauer 2014: 257).

only randomly refer to other disciplines involved, cover other or shorter periods and/or focus on other research questions. I will briefly address the studies that have dealt with either discourses or concepts of trans(sexuality) before turning to the research situation regarding the dynamics within and between the disciplines and fields under investigation.

Constructions of trans(sexuality)

Most of the studies engage with the medical construction of transsexuality. Contextualised within a genealogy of the change from the concept of genital homology of male and female sexes to a radical difference, based on social interactionist premises and using an ethnographic approach, Hirschauer's study (1999) traces the way professionals carry out medical transitions and how psycho-medical and transsexual individuals interact in transition processes, i. e. the production of knowledge in the concrete setting of a medical transition from a micro-sociological perspective. While offering insights into the medical construction of transsexuality as part of the contemporary construction of the gender binary, he does not deal with the dynamics within sexology. Rather, he constructs medicine as monolithic.

In contrast, Weiß (2009) deals with the medical construction of transsexuality over a longer historical period. He approaches the subject by analysing medical discourses. He distinguishes between three periods: the ›formative phase‹, beginning with early experimental surgery in the 1910s; the ›construction phase‹, starting with the establishment of gender clinics in the USA in the mid-1960s, and the ›management phase‹, beginning with the entry of transsexuality as a disease in the DSM-III, published by the APA in 1980. His study focuses on the first period.

The approach to constructions of trans(sexuality) in sexology in this book differs from Weiß's study in several ways. First, rather than skip from one continent to the other, this project, wherever applicable, examines how US developments influenced the debate in sexology in the Federal Republic of Germany and in which ways sexology diverted from international developments. Moreover, rather than consider sexology as a monolithic bloc, the approach used here allows uncovering dynamics and power struggles within the discipline in a particular national political and legal setting. Third, every phase involved specific constructions and developments in the management of transsexuality that warrant attention.

Medical constructions of transsexuality have also been subject to investigation in sexology itself. In contrast to the sociological studies mentioned above, sexological introspections into medical constructions of transsexuality have so far been unsystematic and based on limited sources. In the second of his two-part article published in the *Zeitschrift für Sexualforschung* (German Journal for Sex Research [ZfS]) in 1991, Sigusch self-critically assesses the medical totalisa-

tion and clinical pathologisation he and his colleagues had contributed to when developing cardinal symptoms of transsexuality in the late 1970s. Moreover, he criticises the pathologising impetus of aetiological research on transsexuality. Hence, Sigusch focuses on a small, albeit momentous episode in the sexological construction of transsexuality.

Richter-Appelt (2012) traces developments of trans(sexuality) and intersex over a period of 25 years. While being insightful, her article only summarises articles on trans(sexuality) that appeared in the sexological journal *Zeitschrift für Sexualforschung*. Becker (2013) briefly points out to major social factors that contributed to a pluralisation of trans in the 1990s and offers a well-grounded critique of the recent re-essentialisation of trans in sexology. In contrast to the aforementioned sexological studies, this study offers a broader and systematic analysis of constructions of trans(sexuality) in sexology.

Despite having generated a large body of publications on trans(sexuality) in law and while being informed by various notions of gender and trans, few legal scholars have engaged with legal constructions of trans(sexuality). In the course of developing the concept of gender as an expectation to improve anti-discrimination law on the grounds of gender and sexual orientation, Adamietz (2011) addresses concepts of trans in Federal Constitutional Court (*Bundesverfassungsgericht* [BVerfG]) decisions on the Transsexual Act. She identifies scrutinising the applicants' past, distinctions from other ›disorders‹ and the portrayal of transsexual individuals as either victims of an irreversible disease or discrimination in everyday life as major patterns Federal Constitutional Court jurisdiction related to in contradictory ways (ibid: 153-162).

This analysis of Federal Constitutional Court decisions on the Transsexual Act confirms her conclusion (ibid: 161-171) that over time basic rights and dilemmas posed by rules of the Transsexual Act became more pertinent to Federal Constitutional Court reasoning and ultimately led to shifts within the heteronormative gender binary. However, this analysis of legal concepts of trans(sexuality) in law differs from Adamietz's study in three ways. First and in addition, this study addresses the period prior to the Transsexual Act in order to show the conflictual process of accepting sexological concepts in law in the field under investigation. Since concepts or perceptions of gender and trans(sexuality) in legal scholarship and jurisdiction were heterogeneous at the time, this study also addresses constructions of trans(sexuality) in reported lower court cases.[8] Second, once sexology had established its power to define

8 | I will refer to local (*Amtsgerichte* [AG]) and regional courts (*Landesgerichte* [LG]) as lower courts and to high regional courts (*Oberlandesgerichte* [OLG]), the Federal Court of Justice (*Bundesgerichtshof* [BGH]), the Federal Administrative Court (*Bundesverwaltungsgericht* [BVerwG]) and the Federal Constitutional Court as higher courts.

trans(sexuality) vis-à-vis the law, this project focuses less on legal perceptions of individual applicants than on the way transsexuality was conceptualised in relation to hegemonic notions of gender in procedures for recognising a claim. Third, this study also analyses concepts of trans(sexuality) in legal scholarship, rather than in jurisdiction only.

Sieß's project (1996) offers a concise account of the legislative process leading to the Transsexual Act. His chronology of the process serves as a background for dealing with procedural aspects regarding non-contentious jurisdiction rather than the construction of transsexuality in this political process.

So far there has been little research on constructions of trans(sexuality) in the social movement. In hir analysis of developments of self-imagery and self-organisation of transgender cultures from the 1960s to the beginning of the 21st century, Balzer (2008) focuses on the emergence of transgender movements in Rio de Janeiro, New York and Berlin. While hir research meticulously analyses the transgender subculture in Berlin, s_he only addresses the Transgender Network Berlin (*Transgender-Netzwerk Berlin* [TGNB]) as a political organisation, which emerged from the subculture.

Regh's article (2002) focuses on the early history of the organisation TransMann e. V. (*TransMan*), the conflictual relationship between transsexual support groups and the newly emerging trans movement and outlines the conditions that led to conceptual change in the social movement in the course of the mid- to late 1990s in the Federal Republic of Germany. While his research ends in the early 2000s, his article has inspired my way of approaching the social movement, and I extend the analysis to further trans organisations in the time of his research and continue to follow this route until 2014.[9]

Dynamics among the actors and within the disciplines and areas

Studies so far have barely addressed the dynamics between and within the disciplines and areas under examination in this project. While Adamietz's (2011) and Wielpütz's (2012) studies are informed by broader conceptual developments on trans and in the trans movement, these developments only serve as a background for discussing the legal question that is at the heart of their respective analyses.[10]

Sieß's study (1996) comes closest to taking into consideration the interplay between law, politics and the social movement during the legislative process on the Transsexual Act. However, sexology only serves as background knowledge for defining transsexuality, and in contrast to Adamietz (2011) and Wielpütz's

9 | For a brief summary of structural and conceptual changes in the trans movement since the mid-1990s to 2014 in German, see de Silva 2014.

10 | While Adamietz problematises the medical authority to define trans rather than the subjects themselves (Adamietz 2011: 33-38), Sieß and Wielpütz do not.

studies (2012) does not take developments in sexology into consideration. De Silva (2013) has so far dealt with the constructions of transsexuality and the dynamics between and within sexology, legal scholarship and jurisdiction in the period prior to the Transsexual Act only.

Other contributions have addressed dynamics between law and politics in small episodes. In their suggestions for revising the Transsexual Act, Grünberger (2007; 2008) and Windel (2008) refer to developments in federal politics in this specific point in time only. In contrast to the abovementioned studies, this project addresses the developments and conflicts within each discipline and area and the complex and frequently uneven interrelations between sexology, law, federal politics and the political branch of the trans movement over a comparatively long period.

1.2.2 Contextualisation of the project

As an interdisciplinary study, this project draws upon, and/or contributes to, a larger body of work in gender and queer studies, transgender studies, sexology, sociology of law, social movement research in sociology and political science. In contrast to institutional developments in academia in the USA, neither queer studies, nor transgender studies have so far been institutionalised as separate, albeit mutually inspiring foci of academic interrogation in Germany. Rather, queer and transgender studies are frequently situated in gender studies. This study evolved in the context of various debates within the heterogeneous field of gender studies and contributes to the emerging field of transgender studies in Germany and internationally.

(Trans)Gender Studies

This project developed against the background of two paradigm shifts in gender studies and one shift in the study of trans(sexuality). Social constructionist studies on transsexuality, historicising studies of human bodies and deconstructionist thought have generated a body of work, which has questioned the seemingly natural gender binary. This body of thought is in part shared with, or constitutive of, gender, queer and transgender studies.

The first shift set the foundation for a critical investigation of the gender binary. While ethnomethodological studies on transsexuality have shaped much of the Anglo-American interrogations into gender since the mid-1960s, comparable studies only appeared in Germany in the early 1990s. Ethnomethodological studies suggest that gender is achieved in interactive social processes, rather than being based on ›natural‹ features of the human body (cf. Garfinkel 2006; Kessler/McKenna 2006; West/Zimmerman 1987; Hirschauer 1999; Lindemann 1993).

Garfinkel develops a number of propositions on the perceived environment of »normally sexed adult individuals« with regard to gender. These propositions include that society exists of exclusively two immutable and ›natural‹ sexes, ›male‹ and ›female‹ of which the possession of a penis by a male and a vagina by a female are considered essential insignia (Garfinkel 2006: 62).[11] However, as Garfinkel notes, rather than being a matter of medical or biological fact, the existence of a »dichotomized society is decided as a matter of motivated compliance with this society as a legitimate order« (ibid: 62) and is conditioned upon notions of self-respect and the threat of enforcement through others (ibid).

While Garfinkel does not take into consideration the hierarchical organisation of socially accepted genders, Kessler and McKenna specify in their examination of cues that lead to gender attribution that genital attribution is foremost »penis attribution« (Kessler/McKenna 2006: 173). They conclude that the bias towards male gender attribution mirrors social androcentrism (ibid: 179). Based on an analytical distinction between the natal classification (sex), the social allocation to a sex (sex category) and the mutual validation of the sex category in social interactions (gender), West and Zimmerman (1987) suggest that doing gender is a continuous process.[12]

Hirschauer (1999) and Lindemann (1993) are major proponents of a social interactionist approach to transsexuality in Germany. Using in addition a phenomenological approach, Lindemann addresses the subjective dimension of transsexual individuals' body experience and examines how the affective dimension of bodily materiality is entwined with the objectivised gender binary.

The second paradigm shift deconstructs sex and gender and relates both to desire as a structuring element. In an academic context, queer theory emerged as a heterogeneous set of theories in the USA in the late 1980s[13] and with

11 | In cases in which males possess vaginas and females possess penises, they must nonetheless be classifiable as members of either group, and a person appearing female is considered to be entitled to a vagina as well as an individual appearing male is deemed entitled to a penis (Garfinkel 2006: 64).

12 | Hirschauer contests the notion of doing gender as a continuous process. While he contends that gender congeals to a stable und self-perpetuating social fact through interactions and institutional arrangements (Hirschauer 1994; 2004), he suggests that assuming an omnirelevance of gender ignores interactions during which participants decide not to render gender significant and rather opt to treat gender as a ›seen but unnoticed feature‹ (Hirschauer 1994: 677 f.).

13 | Early proponents in the USA were, for example, de Lauretis 1991, Butler 1990, 1993, 2004, Sedwick-Kosofsky 1990, Fuss 1991, Duggan 1992, Warner 1993, Doty 1993, Hennessy 1994, 1995 and Halperin 1995.

some delay in Germany.[14] Queer theory emerged amidst, and was influenced by broader intellectual endeavours in the historically-specific formations of late twentieth-century western thought. These were particularly conceptual shifts in feminist and postcolonial theory, which question the unitary concept of ›woman‹ and denaturalise ›race‹ (Jagose 1996: 77) and critiques of racism and sexual normativity by populations marginalised in the lesbian, gay and women's movements (ibid: 62 f.).

Drawing to varying degrees upon poststructuralist (Foucault, Derrida), structuralist (Althusser) and psychoanalytical thought (Freud, Lacan) and speech act theory (de Saussure; cf. Jagose 1996: 75-83), queer theory questions the notion of a homogeneous, coherent and stable subject and identity (ibid: 77). Queer theory identifies heteronormativity (cf. Warner 1993: xxvi), i. e. practices and discourses that privilege heterosexuality, as a structuring principle in society. Suggesting that sex, gender and sexuality are discursive or performative effects,[15] queer theory challenges naturalised and binary assumptions on sex and gender. Rather than invest in constructing marginalised populations as quasi-ethnic minorities, queer theory at its best focuses on intersecting hegemonic regimes that bring forth marginalisation.[16]

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14 | In Germany, Hark and Engel developed influential queer theoretical perspectives in sociology. Drawing upon Butler, Foucault, Laclau, Mouffe and Arendt, Hark (1996) deconstructs ›lesbian‹ and explores the conditions for a politics of deviant subjectivities without reifying disciplinary differences. In her discussion of options for political and social transformation of a neoliberal regime that increasingly operates with flexible normalisation and differentiated social and/or economic integration, Engel (2002) criticises a politics of concentrating on modes of subjectivation and normalising regimes and develops a queer-feminist strategy of rendering gender and sexuality ambiguous (›*VerUneindeutigung*‹).

15 | I will return to the term ›performativity‹ when discussing Butler's theorems on sex, gender, sexuality, the subject and gender regime.

16 | Critics have pointed to biases in queer theorising toward homonormativity (James 1996; Stryker 2006), omitting or marginalising bisexuality (cf. James 2006; Gammon/Isgro 2006; Erickson-Schroth/Mitchell 2009), neglecting race and class (Goldman 1996), failing to address white queer racism (cf. Haritaworn 2005) or ignoring issues related to disability (cf. Teichert 2014). Some have suggested that queer theory cannot account for the traumatising split between sex and gender some transsexual individuals experience (cf. Prosser 1997) and the complex realities transsexual individuals face (cf. Namaste 1996; 2000). As Engel, Schulz and Wedl (self-)critically note, depictions of complexly interlocking social differences usually remain programmatic in white queer theory (Engels/Schulz/Wedl 2005: 14). Drawing e. g. upon Crenshaw's (1989) concept of intersectionality, postcolonial/decolonial theory and crip theory, others have continued to develop queer theory further or to shift its focus to marginalised queers. Prominent representatives of what Ferguson (2004) termed ›a queer of colour critique‹ are e. g.

In addition to queer investigations into the gender binary, historicising studies of the human body reinforce the idea that the gender regime has not been a consistent and immutable arrangement based on the notion of two polarised sexes. In her socio-historical study, Honegger (1991) traces how medicine and philosophy gradually transformed the assumption of differences between ›man‹ and ›woman‹ into fundamental differences in the course of the late 19th century. In particular, Honegger notes the rise of a ›special female anthropology‹ (›*weibliche Sonderanthropologie*‹) that deduced intellectual and psychological properties from female features as a basis for social, political and cultural inequality.

Based on a cross-cultural and cross-century analysis of anatomical and medical writings from »the Greeks to Freud«, Laqueur (1992) observes an epistemic shift from a ›one-sex-model‹ to a ›two-sex-model‹ since the late 18th century. According to Laqueur, the ›one-sex-model‹ was based on the assumption that sexes are human variations bearing homologous organs with external sex organs in males and internal sex organs in females. In contrast, the ›two-sex-model‹ is premised upon the notion of a fundamental difference between female and male bodies. Lacqueur suggests that this reinterpretation of bodies »is explicable only within the context of battles over gender and power« (ibid: 11).[17]

In the course of the 1990s in the USA and since the first decade of the 21st century in Germany, a shift in the study of transsexuality took place. Ethnomethodological studies ›dissected‹ transsexual individuals rather than, for example, examine cis individuals in order to gain insights into the operations of the gender binary (Hoenes 2014: 37). While queer theory in principle allows conceptualising gendered practices and embodiments that question the gender binary (cf. Schirmer 2010: 24; Hoenes 2014: 35 f.) and has been drawn upon as such in Germany, queer theory has, at least in the US, frequently accentuated the same-sex choice side in anti-heteronormative enquiries (Stryker 2006: 7). In contrast, transgender studies highlights embodiments of »other modes of

Conerly 1996, Cohen 1997, Gutiérrez Rodriguez 1999, Muñoz 1999, and El-Tayeb 2003, 2004 and 2012. Castro Varela and Dhawan's work (2005) is inspired by postcolonial perspectives. McRuer (2006) and Raab (2013) render queer theory productive for disability studies, whereas e. g. Cromwell (1999), Genschel (2001; 2003), Chase (2003) and Stryker (2004; 2006) engage with queer theory as a framework for studies in the field of transgender and intersex.

17 | Voß (2010) suggests that Laqueur overrates the ›one-sex-model‹. Based on a deconstructionist analysis of biological and medical studies, Voß argues that there were binary concepts of sex in the time Laqueur identifies as the ›one-sex-model‹ period and that sex was a conglomeration of various assumptions and ascriptions in society at all times.

queer differences« (ibid), e. g., unusual genders, without necessarily neglecting issues related to their heterogeneous desires.

According to Stryker, the evolving interdisciplinary field of transgender studies, briefly summarised, examines three broad areas. First, transgender studies investigates human gender diversity in historically-specific contexts, fields and theories. Second, transgender studies examines rearticulations of gendered personhood and disruptions to normative assumptions on gender, embodiment and theories. Third, this field of investigation analyses how embodied differences are transformed into social hierarchies, including the impact of these systems of power on ›gender atypical‹ persons (Stryker 2003: 3).

The evolving body of academic work in Germany that according to the definition above can be classified as contributions to transgender studies cannot be detached from subcultural and political developments in the trans movement. Balzer's (2008) ethnological study on self-imagery and forms of self-organisation in transgender subcultures in Rio de Janeiro, New York and Berlin and Schirmer's (2010) empirical study on drag kinging in large German cities attest to rearticulations of gender.[18] Since the late 1990s, the trans movement has grown and diversified which is evidenced, for example, in the rise of national lobbying groups and networks with broad political agendas and heterogeneous, until then publicly barely noticed trans(gender) subjects (de Silva 2014: 153). Despite diverse perspectives on gender and trans, social movement politics challenges the hegemonic orchestration of gender on the political terrain along the lines of heteronomy, gendered embodiment and the limitation of viable genders to two.

In Germany, transgender studies have so far engaged with a number of areas of investigation.[19] In the humanities, Kilian (2004) explores gender bending in contemporary English and North American literature, focusing particularly on in- and exclusionary parameters of hegemonic gender discourse, the destabilising potential of gender bending and the epistemic space art and literature create to imagine genders that defy classification and render gender boundaries

18 | For further explorations of dragkinging, gender self-perceptions and realities, see Schirmer 2012, 2012a, 2013 and 2014.

19 | For Anglo-American engagements with transgender studies, see e. g. empirical studies on trans men (Devor 2016; Cromwell 1999; Rubin 2003; Green 2004). For the diversity of trans subjectivities, see e. g. Hines 2006, for legal studies, see Whittle 2002. For theoretical perspectives, see Stone 1991, Stryker 1994, Wilchins 1997 and Namaste 2000 (cf. Whittle 2006: xiv). For the significance of the internet for the trans community, see Whittle 1998. For historical accounts, see Meyerowitz 2002 and Stryker 2008, and for an examination of the relationship between gender normativity and technologies of gender-related bodily alteration, see Spade 2006.

fluid (cf. Kilian 2004: 250).[20] Based on an analysis of visual representations of trans masculinities developed in trans and queer subcultures, Hoenes (2014) examines rearticulations of trans masculinities that challenge hegemonic understandings of masculinity as well as the notion of transsexuality as a state of being trapped in the ›wrong body‹. In her analysis of *Fra Mand til Kvinde*, its editorial history and historical contextualisation, Meyer (2015) explores how the public sphere, medical discourses and practices of normalisation and state regulation shaped Lili Elvenes' subjectivity and gender alterity.

Transgender studies in the social sciences include examinations of the formation of trans subjectivities and collectivities under the constraints of heteronormative hegemony. In addition to Balzer's and Schirmer's studies mentioned above, Genschel (2001) traces Lou Sullivan's struggle for a livable life as a female transvestite with a homosexual orientation or as a gay transsexual individual, respectively in a sexual and gender regime that defines as coherent a gendered self that follows a particular morphology and desires heterosexually.

Another set of social scientific enquiries into the field of transgender studies deals with self-concepts and community building on the fringes of community subcultures. Balzer (2007) explores the changes and continuities in the self-concepts of queens (›*Tunten*‹) in Berlin against the background of the emerging trans movement towards the end of the 1990s. Embedded in a discussion of power, consent and boundaries, Bauer (2014) examines a broad spectrum of identities and collectivities, including trans, in his empirical study on queer BDSM intimacies in Europe and the US.

Social movement research and political community building constitute another field of investigation in social scientific transgender studies. Regh (2002), Balzer (2008), de Silva (2014) and Lauwaert (2016; 2016a) address episodes in the contemporary trans movement. Regh (2002) and Balzer (2008) deal with developments from the mid-1990s to the turn of the century; de Silva (2014) engages with structural and conceptual developments in the period from the late 1990s to 2014, and Lauwaert (2016; 2016a) addresses political strategies in the 1980s. In addition, Beger, Franzen and Genschel (2002) discuss trans politics.

Transgender studies in the social sciences also include explorations of regulations and practices that shape trans. De Silva (2013) analyses how sexology and law constructed trans in relation to socially accepted genders prior to the enactment of the Transsexual Act. He also examines how law and medicine produce knowledge on trans from a hegemonic perspective and outlines trans movement reactions to the Transsexual Act, including suggestions for law reform at the beginning of the 21st century (ibid 2005). Hamm and Sauer (2014) point to flaws in the medical management of trans and argue for health service provision that responds to the needs of trans individuals, rather than main-

20 | See also Kilian 2004a, 2008 and 2014.

taining a regime of pathologisation, compulsory medicalisation and psycho-medical surveillance.

Franzen and Sauer (2010), Fuchs, Ghattas, Reinert and Widmann (2012) and LesMigraS e. V. (2012) conducted studies on the life situations of trans individuals. While Franzen and Sauer (2010) focus on issues related to work, Fuchs and her colleagues (2012) conducted an empirical study on experiences of trans individuals with the bureaucracy, the psycho-medical assessment process and the health system, education, work and private life in North-Rhine Westphalia. Informed by an intersectional approach, the study conducted by LesMigraS e. V. (2012) covers issues related to violence and multiple discrimination against lesbian and bisexual ciswomen and trans individuals.

Further contributions to transgender studies address tensions between queer theory and trans (Genschel 2003), concepts that conceal gender normativity (Hoenes 2007) and address the nexus of gender identity and international human rights (Sauer/Mittag 2012). Regardless of how diverse studies within the interdisciplinary field of transgender studies may be, the abovementioned non-exhaustive body of enquiries examines the life situations and subjectivities and/or collective cultural/political rearticulations of socially marginalised genders against the background of the gender binary in historically-specific settings.

This study is informed by, and contributes to, the growing body of transgender studies by providing the first in-depth analysis of concepts of gender and trans(sexuality), their materialisation in practices and procedures in sexology, the law, federal politics and the trans movement and their interactions as well as their contestations from within the fields within the initially defined limits.

This project also contributes to the body of non-clinical work on trans(sexuality) in sexology. It traces the history of trans(sexuality) in the discipline and offers a critical reflection of norms and psycho-medical practices in the period from the early 1970s to the early 1980s and from the 1990s to 2014. The latter is particularly relevant in the light of the ongoing guideline debate and the debate on psycho-medical involvement under the Transsexual Act.

This study also contributes to sociology of law. It engages with major debates on trans(sexuality) in law from the mid-1960s to 2013, offers a history of reported jurisdiction related to the change of first names and revision of gender status in cases of transsexuality and provides the first socio-economically contextualised and structured account of reported cases in social law with regard to trans(sexuality). The study also offers a reflection of concepts of trans and gender in legal studies and the abovementioned fields of jurisdiction.

While there is a study on the trans movement in the US (Stryker 2008), studies in Germany have so far dealt with smaller fragments of the social movement. By offering the first in-depth exploration of major trans lobby groups and networks in Germany from the late 1990s to 2014, this project adds to these

fragments and contributes to social movement research in sociology. Embedded in a concept of heteronormative hegemony, drawing upon premises and parameters of feminist theories of the state and focusing on the legislative process leading to the Transsexual Act, this project also renders issues related to trans and the gender regime a subject of investigation in political science.

1.3 Sources and approaches

This study is based on sources that lend themselves to an analysis of three aspects. These are first, concepts of trans(sexuality), gender and gender regime within the disciplines and fields under investigation; second, sources that mirror authoritative concepts within the respective discipline and area and third, sources that indicate dynamics between sexology, the law, the trans movement and the federal political arena in the period between roughly the 1960s and 2014. Further sources embed these concepts within the different parameters, procedures and practices of the abovementioned disciplines and fields. Due to uneven developments and different operational logics, sources and approaches will be introduced separately for each discipline and area. Since this study is based on a large selection of heterogeneous written sources, they will be mentioned cursorily in the following and specified in the introductions of individual chapters.

Sexological sources and approaches

Relevant developments and debates on trans(sexuality) in sexology were most pronounced in the period between the 1970s and the early 1980s and from the early 1990s to 2014. The 1970s, 1990s and the period after the Act to amend the Transsexual Act were periods of intense debate in sexology leading to reconceptualisations of trans(sexuality) and the establishment or adjustment, respectively of treatment programmes. While it is too early to assess the outcome of the current debate, authoritative concepts of transsexuality that emerged from the debates in the earlier periods influenced notions on trans(sexuality) in law and federal politics and sparked resistance in the social movement.

Sexological material includes monographs, a comprehensive scientific paper, the national guidelines, disciplinary and interdisciplinary anthologies, articles in sexological and psychiatric anthologies and relevant journals, including legal journals, published and unpublished submissions and an influential article in a weekly news journal. While not sexological material, articles and the guidelines produced by advisory bodies of statutory health insurance companies are included, because they impact on the psycho-medical management of transsexuality and are debated in sexology as well as in the trans movement.

Compilations of case studies[21] and single case studies[22] are not included. Compilations of case studies addressed different questions, such as post-operative satisfaction, and ›reversals‹, which are not the issue in this project. While individual case studies lend themselves to an analysis of concepts of trans(sexuality), gender and gender regime, they mostly featured individual problematic developments.

Debates on trans children in sexological journals are also excluded. The study of trans children warrants a separate analysis that observes further power relations, such as for example, between parents or legal guardians and children, other parameters and other guidelines.[23]

Sexological sources are systematised along four sets of material, which occasionally overlap. With few exceptions,[24] the sets of material lend themselves to an analysis of concepts of trans(sexuality), gender and gender regime, psycho-medical practices and the dynamics within the discipline.

The first set of publications foremost deals with clinical aspects of trans(sexuality) and usually involved cis psychologists and psychiatrists, and to a significantly lesser degree, surgeons. Clinical publications on trans(sexuality) cover issues related to the aetiology, clinical manifestations, diagnostics, differential diagnostics and treatment. The clinical debate draws through the entire period under investigation and features in individual articles on one or several clinical aspects, articles in anthologies and a scientific paper.

The second set of material is composed of authoritative documents. These documents represent outcomes of struggles within the discipline and contain recommended or binding rules. The national guidelines on transsexuality that regulate clinical aspects related to transsexuality as well as assessment procedures under the Transsexual Act (Becker et al. 1997) are to date the most prominent example.

The third set of publications deals with sexological interventions in other fields engaged with issues related to trans(sexuality). These sources are particularly relevant to the analysis of the dynamics between sexology and the law and sexology and federal politics. A number of articles published in legal journals prior to, and in the decade following the enactment of the Transsexual Act served to impart state of the art sexological knowledge on transsexuality with legal experts and to pave the way for health insurance assumption of costs

21 | See e. g. Pfäfflin/Junge 1990; 1992.

22 | See e. g. Meyenburg 1992; Laszig/Knauss/Clement 1995; Soyka/Nedopil 1995; Becker et al. 1999; Diederichs 1999; Preuss 2005.

23 | For debates and studies on trans children and adolescents, see Cohen-Kettenis 1994; Meyenburg 1994; Cohen-Kettenis 1995; Franzen 2007; Hellen 2009; Kennedy/Hellen 2010; Kennedy 2014; Schneider 2015; Schneider/Haufe 2016.

24 | The recent debate on the Transsexual Act is one such exception.

of sex reassignment surgery. A further source is a sexologist's address to the public in *der spiegel* amidst the parliamentary debate on the Transsexual Bill (Pfäfflin 1980).

Without necessarily neglecting clinical aspects, the last set of publications related to trans(sexuality) engages with reflections on clinical practices, theoretical reflections on trans and gender and issues related to the overall institutional environment that shapes the conditions for medical and legal transitions and psycho-medical professionals working in this field. This set of debates frequently involved, in addition to the abovementioned contributors, cis and trans sociologists, lawyers, scholars in gender studies and/or trans activists and organisations.[25]

The debates will be briefly contextualised here. Between the enactment of the Transsexual Act and the beginning of the reform period, a number of articles emerged in sexology, which dealt with interpretations of the Act from a medical perspective. One debate dealt with issues related to interpretations of somatic requirements. Another set of publications addressed assessment procedures under the Act and issues related to medical law.

Debates on the overall institutional setting related to medical and surgical interventions gained momentum with the enactment of the Transsexual Act in 1981 and statutory health insurance assumption of costs of medical and surgical interventions in 1987. This debate reignited in the late 2000s.

Sigusch's two-part article on the depathologisation and detotalisation of transsexuality (Sigusch 1991; 1991a) sparked an interdisciplinary debate, whereas reflections on gender and trans in sexology were only taken up several years later.

Another extensive and interdisciplinary debate ensued after three sexological associations had published national guidelines on the treatment and assessment of transsexual individuals in 1997.

Two major debates have arisen recently. One debate focuses on the guidelines on gender dysphoria that will replace the German Standards for the Treatment and Diagnostic Assessment of Transsexuals (*Standards der Behandlung und Begutachtung von Transsexuellen*).[26] The other debate addresses the Transsexual Act, in particular, options for future procedures for a change of first names and a revision of gender status and the role psycho-medical experts should play in these procedures.

25 | With exception of trans organisations and their spokespersons, who are easily identifiable, trans individuals will not be marked as such in this book. However, trans individuals contributed to debates, if not propelled them, in all academic areas throughout the entire period under investigation.

26 | The German Standards for the Treatment and Diagnostic Assessment of Transsexuals will be referred to as the German Standards.

Wherever possible, the clinical, meta-level debates and the German Standards are systematised according to clinical parameters and discussed within these parameters for three reasons. First, such an approach reveals the heterogeneity of perspectives and concepts within the discipline. Second, (re)conceptualisations and practices can be compared over a long period. Third, an approach that considers the parameters that limit manoeuver within a discipline appears more constructive than an approach that ignores them. Hence, while this project is analytical, conclusions can be drawn for sexology.

With regard to the German Standards, the most authoritative document to date, I also outlined the document and conducted a separate analysis of the concept of transsexuality, gender and gender regime. The discrepancy between the heterogeneous concepts within the discipline and the concept of transsexuality and diagnostic and treatment scheme laid down in the German Standards allows conclusions to be drawn on the power relations within the discipline and the authoritative concepts of transsexuality that resulted from these dynamics.

Legal sources and approaches

Relevant developments and debates on revisions of gender status in cases of trans(sexuality) began in the late 1950s, gained momentum in the mid-1960s and have been a continuous process until 2011 and so far from 1987 to 2013 in jurisdiction related to statutory health insurance coverage of sex reassignment measures. The process of reading gender into the Civil Status Act (*Personenstandsgesetz* [PStG]) and revisions of gender status began earlier. Therefore, I will also briefly address relevant jurisdiction in the period prior to the late 1950s.

This study analyses concepts of trans(sexuality), gender and gender regime in jurisdiction and in legal debates pertaining to the change of first names and the revision of gender status in cases of transsexuality, and jurisdiction in social law as it relates to the statutory health insurance assumption of costs of sex reassigning measures. The latter are included for two reasons. First, jurisdiction on constitutional issues and issues relevant to social law are subject to different parameters and operate according to different principles. Second, without outlining developments in social law in the field of transsexuality, trans movement demands can barely be comprehended.

This study draws upon a large selection of different legal sources. These are court decisions, legal commentaries, legal comments, individual articles in legal and sexological journals, monographs, statutes and in less quantity articles in disciplinary and interdisciplinary anthologies.

Relevant sources in jurisdiction include all reported court cases on the Civil Status Act relating to transsexuality[27] before the Transsexual Act was enacted, all Federal Constitutional Court decisions prior to, and after the enactment of the Transsexual Act, several reported higher and lower court cases on the Transsexual Act and a large selection of reported court cases on statutory health insurance issues related to the assumption of costs of sex reassignment surgery that are available in legal journals and publicly accessible and non-commercial online data bases.

A number of legal articles immediately lend themselves to an analysis of dynamics between sexology and law that appeared in sexological journals in the period prior to the enactment of the Transsexual Act as well as prior to the reform process. Written by cis and trans lawyers, these articles problematised inaccuracy in medical terminology and engaged in debates related to conceptualising and assessing transsexual individuals.

Developments in jurisdiction and federal politics frequently sparked legal academic debates on issues related to the revision of transsexual individuals' gender status or evolved at the same time. This study considers the following legal academic debates and developments in jurisdiction. The controversy in jurisdiction and in legal scholarship over reading transsexuality into the Civil Status Act prior to the Transsexual Act lends itself to an analysis of three aspects. These include conflicts over medical and legal concepts of transsexuality and gender in law, differences between higher and lower courts as well as the selection and interpretations of individual sections of the Civil Status Act, including the complex interrelations of these factors.

The fact that the Transsexual Act required somatic measures but did not specify concrete medical or surgical inventions also led to debates on the interpretation of relevant rules of the Transsexual Act in jurisdiction and legal scholarship. High regional courts and legal scholars engaged in interpretations of somatic measures under the Transsexual Act in the 1980s and 1990s.

Somatic requirements under the Transsexual Act once more became a topic in the first decade of the 21st century in jurisdiction and in the legal debate. The academic debate generated a number of legal comments and articles on Federal Constitutional Court decisions and legal designs for a revision of the Transsexual Act. In the context of Federal Constitutional Court decisions in the course of the first decade of the 21st century and the pending transsexual law reform process in federal politics, legal scholars also discussed the issue of marriage and registered life partnership.

27 | While this project also draws upon Augstein's (1982) research on unreported lower court decisions on transsexuality and intersexuality prior to the Transsexual Act, I did not conduct any research on unreported court decisions.

Legal and gender studies scholars also discussed trans in anti-discrimination law throughout the reform period. This debate ties in with the Federal Constitutional Court decision on the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under the Transsexual Act.

In addition, the study considers an article, which alerted to constitutional issues of the Transsexual Act well before other legal experts did so, and an article on the development of applications under the Act.

Analogously to the sexological debate and for the same reasons, I will analyse concepts of transsexuality and gender, and wherever applicable, interpretations of sexological and trans movement concepts of trans in jurisdiction and the legal academic debates, within the respective statutory context and parameters of the discipline.

Trans movement sources and approaches

Relevant periods of an analysis of concepts of trans(sexuality), gender and gender regime in the political branch of the trans movement cover the period between the 1970s and the early 1980s and from the mid-1990s to 2014. The earlier period was marked by social movement struggles for a change of first names and a revision of gender status and for health insurance assumption of costs of sex reassignment treatment, whereas the period since the mid-1990s saw the rise, consolidation and increasing differentiation of the political branch of the trans movement. Among other things, the social movement took issue with normative psycho-medical concepts and disciplinary practices, the statutory health insurance management of trans(sexuality), rules of the Transsexual Act, and more recently, the Act altogether, and government inactivity.

With exception of researching petitions directed to the federal government during the legislative process leading to the Transsexual Act, I did not conduct any empirical research on the social movement in the period from the 1970s to the mid-1990s. Research for this period is being undertaken elsewhere at the time of writing. Sources for the period prior to the Transsexual Act are based on references to the social movement in interdisciplinary debates in sexology and an activist's article (Regh 2002). The abovementioned sources offer different perspectives on trans in the period prior to the Transsexual Act, the context and development of the social movement and assessments of trans movement contributions to the Transsexual Act.

The analysis of trans(sexuality), gender and gender regime in the social movement from the mid-1990s to 2014 examines all major and long-lived trans lobby groups and networks in Germany with a national and occasionally international scope of political involvement. In addition, the most prominent temporary coalitions are considered, especially since formulating political demands and suggestions for trans law reform were frequently collaborative

endeavours. This study also includes a regional coalition and a nationwide network, which has emerged recently and a supranational trans organisation of which some of the organisations and networks are members. Regional and supranational organisations and networks are included to describe the overall structure of trans movement lobby organisations and networks that developed in the course of the period under investigation.

Research was conducted on the websites of the selected organisations, networks and coalitions. Sources include mission statements, self-presentations, presentations of the respective trans organisation or network history, by-laws, programmes, reports to various UN organisations, suggestions for law reform, declarations, statements and press releases, flyers, frequently asked questions (FAQs), brochures, published talks and speeches, submissions to the federal government and open letters. Further sources include observations by Whittle (1998), Regh (2002) and the German Association for Sex Research (*Deutsche Gesellschaft für Sexualforschung* [DGfS]).

Considering the lack of research on the trans movement, the sources to varying degrees and in partly overlapping ways provide a basis for describing trans organisations and networks structurally, conceptually and politically. In order to describe the overall structural changes within the trans movement, this study draws upon the history of organisations, self-presentations, membership lists and by-laws.

In order to outline trans lobby group and network activities, I divided these into information and education, support and outreach, and lobbying and networking. The purpose of addressing these fields is to present a brief overview of activities before turning to an in-depth analysis of politically relevant issues. I drew upon by-laws, mission statements, flyers, announcements of events and references to further activities and community services.

Speeches, reports, programmes and a flyer addressed to doctors, by-laws, TransMann's FAQs (TransMann 2004a) and an open letter to psycho-medical professionals engaged in assessment procedures (Alter 2008a) provide a background for outlining trans movement perspectives on legal rules, psycho-medical premises, procedures and practices. The history of the organisations, the abovementioned FAQs, talks, speeches and articles published on organisation websites, programmes, reports, flyers that present the organisation or network and mission statements are used to analyse concepts of trans(sexuality), gender and gender regime in the trans movement. While submissions, suggestions for trans law reform, suggested drafts for legislation and declarations also provide a basis for such an analysis, they additionally reveal how these concepts were negotiated within concrete constellations of power, parameters of the legislative processes and outcomes of related social struggles.

Sources and approaches to the legislative processes

Relevant periods of an analysis of concepts of trans(sexuality), gender and gender regime in federal politics cover the period from the early 1970s to the beginning of 1981 and from 2000 to 2009. The first period begins with pre-legislative parliamentary calls for legislation, and ends with the enactment of the Transsexual Act in Jan. 1981 and will be dealt with in depth. The second period begins with enquiries conducted by the Federal Home Office (*Bundesministerium des Innern* [BMI]) with trans organisations and sexologists on the Transsexual Act in Oct. 2000 and ends with the enactment of the Act to amend the Transsexual Act in July 2009. Since the legislative processes on the federal level developed and are treated differently in this study, sources and approaches will be described separately, starting with those for the process leading to the Transsexual Act.

Sources include one motion, a draft bill, a government bill, minutes of plenary debates in the German *Bundestag* (*Deutscher Bundestag*)[28] and in the *Bundesrat*, minutes of committee debates, a sexological submission, one article submitted by a Member of Parliament (MP), a questionnaire and a summary of answers from sexologists, petitions, letters by petitioners to the Federal Home Office, parliamentary enquiries and government responses and the Transsexual Act.

The sources are organised along four criteria. The first set allows a contextualisation and description of the legislative process, highlighting the overall lines of conflict between various state actors over issues related to trans legislation prior to, and during the process. The former erupted between a small group of social democratic Members of the *Bundestag* and the social-liberal government. The latter was marked by conflicts between the *Bundestag* and the *Bundesrat*. In these instances, parliamentary enquiries and government responses are particularly relevant sources. With regard to the outline of the legislative process, I drew upon a number of sources. These include the Draft Bill TSG-R, the Government Bill TSG-E, minutes and recommendations of the committees involved in the legislative proceedings, minutes of the *Bundestag* and *Bundesrat* plenary debates, a statement by the federal government and documentation of the compromise negotiated between the *Bundestag* and the *Bundesrat*.

The second set of sources deals with sexological and trans interventions that accessed the federal political level during the legislative proceedings. These sources lend themselves to an examination of venues sexologists and trans individuals were offered to impart their perspectives, trans and sexologists' perspectives on the Transsexual Bill and an in-depth analysis of concepts of trans(sexuality). Among these sources are an influential article mentioned ear-

28 | The German *Bundestag* will be referred to as *Bundestag*.

lier on, a summary of the answers to a questionnaire, an article co-authored by an MP, petitions[29] and letters to the Federal Home Secretary (*Bundesinnenminister*) and to the *Bundestag* Committee on Home Affairs (*Deutscher Bundestag – Innenausschuss*).

The third set of sources allows an in-depth analysis of concepts of trans(sexuality), gender and gender regime as they were debated along the parameters of the Transsexual Bill, balancing rights between trans and cis individuals and the way medical and trans knowledge was deployed. The analysis relies on a selection of minutes of the plenary debates in the *Bundestag*, and minutes of *Bundestag* and *Bundesrat* committee meetings that document debates on transsexuality.

The fourth set lends itself to an analysis of authoritative concepts of trans(sexuality), gender and gender regime. The Transsexual Act as the legally binding outcome of a conflictual process functions as an authoritative text. Therefore, the document will be outlined prior to conducting a separate analysis along the abovementioned criteria.

In addition to minutes of plenary and committee debates and motions, sources on the second legislative process include sexological and trans movement submissions on a (failed) initial draft, statements on the initial draft, trans movement and psycho-medical responses to the initial draft, submissions for a public hearing and minutes of the hearing, draft bills by political parties, the Government Bill and the Act to amend the Transsexual Act.

An initial attempt to reform the Transsexual Act began in 2000 and failed in 2009. While there were a number of parliamentary enquiries since Nov. 2001[30] and government responses,[31] increasingly motions[32] and drafts for a revision of the Transsexual Act by political parties,[33] there was, with exception of devising the Government Bill[34] and conducting a public hearing in 2007, no substantial government activity related to a revision of the Transsexual Act. While several of these sources lend themselves to an analysis of trans, gender and gender regime, it is beyond the scope of this study to provide such an analysis. However, I will briefly draw upon draft bills and the Act to amend the Transsexual Act to highlight aspects indicating social change.

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29 | There were eight petitions in all, two of which were authored by the same person. All petitioners are anonymised and not pseudonymised. I numbered the petitioners according to the appearance of the documents.

30 | See, e. g. Deutscher Bundestag 2001; 2002; 2004.

31 | See, e. g. Deutscher Bundestag 2001a; 2002a; 2004a.

32 | See, e. g. Deutscher Bundestag 2006; 2008; 2009.

33 | See, e. g. Deutscher Bundestag 2007; 2009a; 2009b.

34 | See Deutscher Bundestag 2009b.

Documents on the legislative process on the Transsexual Act are compiled in vol. 738 and documents on the legislative process on the Act to amend the Transsexual Act in vol. XVI/0529 in the Parliamentary Archive (*Parlamentsarchiv*) in Berlin.[35] Documents regarding the Transsexual Law Reform Bill, which never entered the parliamentary debate, were obtained from three places. The Draft Transsexual Law Reform Bill is published online. Minutes of the public hearing on 28 Feb. 2007 that served as one source for devising the bill are enclosed in vol. XVI/0529 in the Parliamentary Archive. I obtained submissions by trans organisations and sexological submissions on the Transsexual Act in 1999 and 2000 in the Federal Home Office in 2009. The latter are not included in the documentation of proceedings on the Act to amend the Transsexual Act and are on file with the author.[36]

1.4 Perspectives on trans and the trans movement

1.4.1 Perspectives on trans(sexuality)

Trans(sexuality) has been conceptualised in a number of ways in sexology, jurisdiction, in the trans movement and during the negotiations in federal politics in the period this study addresses. The following perspectives emerge more or less consistently and for different purposes. They occasionally overlap or constitute each other and cross the fields under investigation with shifting margins over time, both within the fields as a whole and within individuals engaging with issues related to trans(sexuality).

Perspectives range from variations of pathologisation[37] to perspectives on trans(sexuality) that consider trans(sexuality) one of many viable modes of embodying gender.[38] Another set of perspectives suggests that trans(sexuality)

35 | Parliamentary enquiries, suggestions for bills devised by political parties and the statutes for the reform period are also available online at https://www.bundestag.de/parlamentsdokumentation.

36 | While some trans organisations published their submissions online, sexological submissions are, with exception of the submission of the DGfS, unpublished.

37 | See, for instance, Becker 1965, Sigusch/Meyenburg/Reiche 1979 in the period prior to the Transsexual Act, and sexological contributions by Hartmann/Becker 2002 and Beier/Bosinski/Loewit 2005 and premises of the neuroscientific research by Bauer 2010 during the reform period.

38 | See, for example, Sigusch 1991, Hirschauer 1992 and Lindemann 1992 in the debate on depathologisation and Lindemann 1997, Kaltenmark/Kasimir/Rauner 1998 and de Silva 2005 in the debate on the German Standards.

constitutes a minority,[39] whereas others are informed by perspectives that investigate into processes of minoritisation.[40] Some perspectives are informed by essentialist premises,[41] while others draw upon social constructionist and/or deconstructionist thought.[42] A few perspectives construct trans(sexuality) as the privileged subject predestined to eliminating the gender binary.[43]

Like Bauer (2014), my perspective is premised on the notion of human difference. I question the validity of dividing certain embodiments of gender into ›healthy‹ and ›normal‹ on the one hand and others as ›sick‹ and ›abnormal‹ on the other hand. Shaped by queer and deonstructionist transgender studies thought, I question the heteronormative gender binary as a natural fact and consider the gender regime a social construction that operates to establish and sustain social hierarchies.

Informed by queer political and legal critiques of liberal thought, I also question the assumption that society is inevitably divided into majorities and irreducible minorities. With regard to trans, this assumption conceals the operations of power that have transformed gendered embodiments into social hierarchies, i.e. the process of minoritisation (cf. Herman 1994: 38). Moreover, minoritising perspectives easily lend themselves to essentialism, paternalism and a legitimation of transphobia.[44]

I also reject the notion of trans individuals as privileged subjects for dismantling the gender binary for two reasons. First, such a perspective neglects other political struggles that directly or indirectly challenge the gender binary, such as intersex[45] politics. Second, rather than place the onus of unmaking the

39 | See, for example, the plenary debate on the Transsexual Bill and Windel 2008 and Wielpütz 2012 in the legal debates on marriage and registered life partnership and somatic requirements for a revision of gender status under the Transsexual Act.

40 | See, for example, Adamietz 2006, 2011 and Grünberger 2006, 2007 and 2008 in the abovementioned debates.

41 | See, for instance, Neumann's (1970) and Dörner's (1995) quest for a somatic ›cause‹ of transsexuality and in a fraction of the contemporary social movement.

42 | See, for example, Alter 2002 and Adamietz 2006; 2011.

43 | This perspective is most prominently represented by Sigusch (1991).

44 | For an example, see the section »Perspectives on somatic requirements for a revision of gender status in legal scholarship since the turn of the century« towards the end of chapter 3.3.4.

45 | As I will explain in more detail elsewhere, medical, legal and subcultural terminology in Germany language has been, and continues to be heterogeneous with regard to intersex. As this study evolved, the term ›inter‹ (›*Inter**‹) emerged in intersex subcultures, which is used analogously to ›trans‹ (›*Trans**‹). I will for pragmatic reasons usually refer to this heterogeneous population with the term ›intersex individuals‹, a term that continues to be widely accepted within the community.

gender binary on minoritised subjects (cf. Lindemann 1992: 268), redressing social injustice of any kind is a task that necessarily involves society as a whole, without however, ignoring the voices of social movements organising for social change.

1.4.2 Perspectives on the trans movement

Currently, there is a controversy among social movement lobby organisations over the issue whether there are two separate social movements, i. e. a trans movement and a transsexual movement or whether we are dealing with one social movement, i. e. the trans movement. This rift in the social movement features most prominently between the organisation ATME e. V. and other major trans movement lobby organisations and networks considered in this study.

Representatives of the perspective that there are two social movements present two arguments to support their perspective. First, subsuming transsexuality under any umbrella term, such as ›trans‹ or ›transgender‹ renders transsexual individuals invisible. Second, subsuming transsexual individuals under the umbrella term ›trans‹ and the ›transsexual movement‹ under ›trans movement‹ disregards self-determination (Schicklang 2013).

Other major organisations and networks suggest that ›trans‹ is a category that defies definitional closure and consists of diverse individuals, who cannot, or do not want to live according to the gender they were assigned to at the time of birth (cf. TrIQ 2009). From this perspective and since the definition and policy aimed at an acceptance of gender diversity includes transsexual individuals, there is one social movement with different articulations.

In this study, the contemporary ›trans movement‹ is broadly defined as a set of diverse individuals, networks and organisations organising for a range of purposes that is not limited to, but includes the goal of achieving the means and conditions to live without discrimination based on the embodiment of gender. According to this definition, there is one social movement made of individuals with diverse perspectives and self-definitions.

1.5 Theoretical considerations

1.5.1 Sex, gender, sexuality, the subject and gender regime

Outline of Butler's concept of sex, gender, sexuality, the subject and gender regime

Butler draws upon a Foucauldian notion of power. Hence, power fulfils two functions. On the one hand, power is restrictive and regulatory; on the other hand, power is productive (Butler 1990: 2). Power is a constituent feature of all

social and cultural interactions. Therefore, there is no position outside the field of juridical structures of language and politics (ibid: 5).

Butler develops her concept of the subject by setting out from a critique of a stable, universal and unitary concept of woman as the subject of feminism in representational discourse, i. e. a prediscursive subject created and restrained within the structures of power (ibid: 1). She argues that a naturalised foundation of ›woman‹ serves to legitimate the law's regulatory hegemony (ibid: 2) and suggests that the subject is constituted of multiple social intersections that cannot be reduced to a privileged, consistent and coherent subject position (ibid: 3). Therefore, any analytical and political decontextualisation from other axes of power fails to be exhaustive (ibid).

Noting that gender is historically and culturally diverse, Butler concludes that gender cannot be deduced from sex in any one way. Taken to its logical limits, Butler suggests a radical discontinuity between sexed bodies and culturally constructed genders. Assuming for the sake of the argument that sexes and genders are limited to two, ›man‹ and ›masculine‹ could signify a female body and ›woman‹ and ›feminine‹ a male body (ibid: 6). Butler deconstructs the notion of sex as prediscursive, arguing that if it is e. g. possible to trace the discursive production of seemingly natural facts of sex, then ›sex‹ is as culturally constructed as is ›gender‹ (ibid: 7).

Butler suggests that gender is produced performatively. Performativity describes a repetition of norms that constitute the subject. ›Gender‹ is the performative effect of a regulatory regime of gender differences in which genders are divided and hierarchised under constraint (Butler 1997: 16). The reiteration of norms congeals over time to appear as ›natural‹ (ibid 1990: 33). Regulatory practices of gender formation produce gender identity as a normative ideal according to which only those genders are considered intelligible and sexualities not perverse that maintain a coherence of sex, gender, sexual practice and desire. The heterosexualisation of desire demands and reproduces the production of distinct and asymmetrical oppositions between the ›feminine‹ and the ›masculine‹ (ibid: 17). Therefore, the gender binary is also heteronormative.

Since gender discourse precedes the subject and drawing upon Althusser, Butler suggests that the subject only comes into being through interpellation. As a result, the status of individuals who do not follow gender norms of cultural intelligibility is called into question. Individuals whose gender does not follow from sex and whose desire does not follow from sex or gender appear as disorders or logical impossibilities (ibid).

Critiques of Butler's concept of sex, gender, sexuality, the subject and gender regime

Butler's theorems offer three major insights relevant to the subsequent analysis. First, by denaturalising sex, she deconstructs the seemingly causal link

between the sexed body as ›female‹ or ›male‹ and gender as ›woman‹ or ›man‹, respectively. Theoretically, a ›woman‹ with a ›male‹ body and vice versa can be conceptualised. Second, Butler's axioms call into question the gender binary.[46] Third, she uncovers heterosexuality as one of the governing principles that structures the relations between the naturalised sexes.

However, Butler's concepts of the subject and gender regime in her early work are limited. Framing socially minoritised subjects as ›unintelligible‹ suggests that Butler considers these subjects in relation to the hegemonic only (cf. Schirmer 2010: 44). Such a perspective precludes conceptualising socially minoritised subjectivities and their articulations, social realities and political struggles. In his study on FTMs and transmen, Cromwell for example notes that,

> Butler discusses the power positions that disallow non-normal (i. e. nonheterosexual) identities and identifications. From a legal standpoint (and possibly from her philosophical perspective) such positions are illegitimate. In everyday life, however, the non-normal occurs with great frequency. Although those in positions of power continually try to erase subject-positions outside of what is viewed as culturally legitimate (and consequently normal and viable), people who live those subject-positions continue to attempt to articulate them. As they find their tongues, they subvert the concept of identity and the binary construction of bodies, sexes, genders, and sexualities. (Cromwell 1999: 126)

While Foucault focuses on sexuality, his concept of practices of self in his late work offers a theoretical axiom that allows conceptualising heterogeneous articulations and modes of becoming a subject without losing sight of the historically-specific power relations and formations of knowledge through which subjects emerge (cf. Schirmer 2010: 49). Foucault distinguishes between systems of rules and values that operate in society in multifarious and contradictory ways, and »models proposed for setting up and developing relationships with the self, for self-reflection, self-knowledge, self-examination, for the decipherment of the self by oneself, for the transformations that one seeks to accomplish with oneself as object« (Foucault 1990: 29). Foucault notes that while codes of behaviour and forms of subjectivation can never be entirely separated, »they may develop in independence from one another« (ibid), generating conflicts or compromises at different times (ibid: 30). Rather than being relegated to an ›outside‹, the concept of practices and technologies of self allow trans subjec-

46 | In her earlier work (1990), she indicates that further sexes and genders are imaginable, and in her later work (2004), she engages with existential issues related to socially minoritised genders (Kilian 2010: 102; 2011: 232).

tivities to be conceptualised, for example, as a plurality of subjects that relate to gender codes differently.[47]

Second, Butler conceptualises the link between sex, gender and heterosexuality, i. e. the ›heterosexual matrix‹ (Butler 1990: 27) abstractly and ahistorically. As a result, historically-specific power relations remain opaque (Ludwig 2012: 100) and social struggles cannot be conceptualised. Engel suggests that this problem occurs, because Butler focuses on normativity and neglects issues related to normalisation (Engel 2002: 70 f.).[48]

Engel proposes two solutions. First, she develops a concept of »rigid normativity and flexible normalisation«[49] (ibid: 72 ff.).[50] However, as Mesquita suggests, heteronormativity and normalisation do not exist apart from each other. Rather, mechanisms of normalisation develop from heteronormative assumptions. She argues that normalisation can have exclusionary effects, while heteronormativity may operate to normalise. She therefore suggests that the relationship between normativity and normalisation can only be determined in concrete instances (Mesquita 2012: 51).

However, Engel's second suggestion contributes to an extension of the ›heterosexual matrix‹ that allows conceptualising dynamics and, as an effect, social struggles, including their complex interrelationships. Engel suggests taking into consideration a plurality of norms that operate simultaneously, possibly in contradictory and interwoven ways, rather than focus on a singular norm (Engel 2002: 75-80). This way, norms regulating e. g. sexuality and gender, and queer and trans struggles can be conceptualised and related to each other.

The findings in this study underscore Engel's considerations. Successful struggles for the decriminalisation of male homosexuality in 1994 and the recognition of same-sex partnerships in 2001 e. g. impacted on Federal Constitutional Court jurisdiction on rules of the Transsexual Act since 2005, and they

47 | While Butler does not integrate the Foucauldian concept of practices of self consistently in a theoretical framework, there are hints in her later work that she considers practices of self, e. g. when referring to the concept of fantasy. According to Butler, »[f]antasy is what allows us to imagine ourselves and others otherwise; it establishes the possible in excess of the real; it points elsewhere, and when it is embodied, it brings the elsewhere home.« (Butler 2004: 29)

48 | In her later work, Butler takes into consideration processes of normalisation (Butler 2004: 41-43).

49 | With exception of Articles from the Basic Law, the Argentinian *Ley de identidad de género* and ATME e. V.'s bilingual reports, all translations from German to English are mine.

50 | Engel's concept of normalisation is based on Foucault's concept of biopower that encompasses disciplinary, regulatory as well as technologies of self as means of subjectivation and individualisation (Foucault 1978).

also offered trans organisations and individual litigants a basis to shape their demands in submissions to the government.

Taking into consideration critiques of Gramsci's concept of hegemony[51] (Ludwig 2011: 81-85), critiques of the omission of gender as an analytical category in Foucault's concept of governmentality and technologies of self as well as critiques of the emphasis on normativity and the ahistoricity of Butler's concept of the ›heterosexual matrix‹, Ludwig (2011) fuses the adjusted concepts to develop a queer-feminist theory of the state, subject and heteronormativity as a co-constitutive and hegemonic relationship. The focus of this project is not on the co-constitutive inscription of state power into the subject and vice versa. However, I draw upon Ludwig's extended concept of Gramsci's concept of hegemony to suggest that the gender binary is a hegemonic regime.[52]

Inspired by Gramsci, Ludwig suggests that alongside other interlocking hegemonic relationships (Ludwig 2012: 106 f.), heteronormative hegemony is an integral part of contemporary state formation that operates using coercion and consent and an expression and (temporary) result of social struggles[53] (ibid: 104). A hegemonic regime is a contested power formation in which heterogeneous demands are articulated and which is sustained precisely by integrating demands and heterogeneous perspectives. As such, the dynamics of permanent transformation enables its stability (ibid: 105). Moreover, heteronormative hegemony is a historically-specific state formation, i. e. there is no universal heteronormative hegemony. It can only be analysed in a concrete and historically-specific space (Ludwig 2011: 234).

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51 | Gramsci's concept of hegemony includes a state-theoretical dimension and a dimension of social transformation (Schreiber 1984: 49 f.). The former dimension provides instruments for historically-specifically analysing a state formation, i. e., the state and civil society (SPN 1991: 263; cf. Priester 1979: 524; Buci-Glucksmann 1979: 218), or, what Gramsci calls the ›integral state‹; the latter a strategy for subalterns to achieve hegemony. According to Gramsci, a hegemonic order is maintained economically (SPN 1991: 345), institutionally, ideologically (ibid: 328), culturally (ibid: 268) and through social practices (ibid: 265) in civil society as well as on the level of the state. Laclau and Mouffe (1990: 69) criticised his class-reductionist concept and developed the counter-hegemonic dimension of Gramsci's concept of hegemony further in their concept of radical democracy, using poststructuralist theorems.

52 | In the discussion between Butler, Laclau and Zizek (2000), Butler briefly contemplates the notion of hegemony (Butler/Laclau/Zizek 2000: 13 f.; cf. Ludwig 2011: 183). However, as Ludwig notes, she does not reformulate the ›heterosexual matrix‹ to ›heterosexual hegemony‹ (Ludwig 2011: 184).

53 | ›Consent‹ in a Gramscian sense is a product of cultural and moral leadership (Ludwig 2011: 57).

Ludwig relates heteronormative hegemony to contemporary neoliberal processes of transformation and considers cismen and -women (ibid: 218-245). While I do not rule out that neoliberalism and heteronormative hegemony might be interwoven, the focus of this analysis is not on relating trans to neoliberalism. Rather, effects of struggles over homosexuality form the background developments against which developments and debates on trans are analysed.

1.5.2 The liberal-democratic state

Ludwig (2011; 2012) offers a concept for theorising the macro-level of the state, i.e. heteronormative hegemony as a constitutive element of state formation, and the micro-level, i.e. subject constitution as an effect of state power and vice versa. However, she does not theorise the intermediate level, such as concrete state apparatuses, their interrelationship or social struggle on the terrain of the state. Therefore, I will turn to feminist theories of the state that address this dimension.

Few feminist theories of the state have so far engaged with the gender binary or the relationship between the state and minoritised genders. Feminist theories of the state have so far usually concentrated on the masculinist character of the state e.g. from its very foundation (Pateman 1988), or as inscribed into its procedures (MacKinnon 1989). The same applies to queer or feminist theories of the state that address the nexus between the state and sexuality (Cooper 1993; 1994; 1995). They nevertheless, albeit to varying degrees, provide analytical tools for conceptualising issues relevant to capturing the specifities of a concrete national development, such as definitions of the state, the relationship between state apparatuses and state-society dynamics, including the relative autonomy of the state, state agency, state boundaries and access to the state.

Definitions of the liberal-democratic state, state structure and the interrelationship between state apparatuses

Feminist theories of the state have defined the state in various ways, ranging from unitary concepts to concepts that stress the fragmentation of the state. MacKinnon (1989) developed a unitary concept of the state by equating the state with the law. By reducing the state to the law, she develops too unsophisticated a concept of the state. Her concept precludes analysing the relationship between state apparatuses, including competing concepts of trans, gender and gender regime within and among state apparatuses.

Moreover, and as Franzway, Court and Connell (1989: 30) note, the law itself is not monolithic. With regard to this study, court decisions e.g. differed substantially in the period prior to the Transsexual Act. In addition, different areas of the law, such as for example jurisdiction in constitutional law and social law operate according to very different parameters and logics.

Socialist feminist (e.g. Franzway/Court/Connell 1989), poststructuralist (e.g. Pringle/Watson 1990; Brown 1992) and approaches to the state that combine social constructionist and poststructuralist approaches (Cooper 1993; 1994; 1995) provide more complex definitions of the state and its apparatuses. However, they address, and respond to, the complexity of the state in different ways.

One response in feminist theorising of the state to the complexity of the state has been not to define the state at all. Allen (1990) suggests that the concept of the state is

> too aggregative, too unitary, and too unspecific to be of much use in addressing the disaggregated, diverse and specific (or local) sites that must be of most pressing concern to feminists. ›The state‹ is too blunt an instrument to be of much assistance (beyond generalizations) in explanations, analyses or the design of workable strategies. (Allen 1990: 22)

She suggests focusing on more nuanced theoretical categories, such as the police, legal, medical or bureaucratic cultures instead, to name a few examples (ibid: 35).

This perspective of the state has been contested. While Cooper does not deny the usefulness of exploring specific governmental practices, she suggests continuing to explore the concept of the state (Cooper 1995: 59). She argues that entirely dispersed models of the state cannot adequately consider specific racialised, gendered and class inscriptions into the state, which »are articulated together in ways that may lead to an intensification of power, or alternatively, generate conflict and the subversion of particular state practices« (ibid: 60).

This study suggests that despite different parameters, operational logics, practices and rules, and tensions between various state apparatuses and levels of jurisdiction, dominant state apparatuses interacted to restore the gender binary as one of its hegemonic inscriptions. Therefore, I suggest maintaining a definition of the state that is however based on a complex understanding of its composition, operations, institutional interrelations, ideologies and state-society dynamics.

Franzway, Court and Connell define the state as

> the *central* institutionalisation of social *power* [...]. As a *central* institution the state is involved with the overall patterning of gender relations, the ›gender order‹ of the society as a whole. The state has itself a particular gender regime, but this internal order is not necessarily the same as the overall patterning of gender relations, the ›gender order‹ of society as a whole. (Franzway/Court/Cornell 1989: 52)

They suggest defining the state apparatuses along the lines of gender and identify four state instrumentalities. These are the central directorate, i. e. the policy-making levels of the bureaucracy and the political leadership (ibid: 42); the machinery of coercion and social order, i. e. the military, the police, courts and prisons; welfare instrumentalities, such as education, health and social security and finally infrastructural services (ibid: 42). The unity of the state is established as a limited but constantly renewed accomplishment of which administration, finance and ideology are the key instruments (ibid: 45). By determining these factors, the state is also endowed with clear boundaries, a fixity it does not possess (cf. Cooper 1995: 60 f.). However, Franzway, Court and Connell outline a number of analytical tools for examining the state, some of which I will draw upon. These are the place of the state, state structure and state-society dynamics (ibid: 37-55).

In contrast, poststructuralist feminist definitions of the state emphasise »the contingency of outcomes, the non-unitary nature of the state, and the plurality of social interests« (Cooper 1994: 7). Pringle and Watson for example define the state »not as an institution but as a set of arenas; a by-product of political struggles whose coherence is as much established in discourse as in shifting and temporary connections« (Pringle/Watson 1990: 229). The state features as a historically-specific product of social struggles (ibid).

Brown's definition is slightly more specific. She describes the state as »an incoherent, multifaceted ensemble of power relations« (Brown 1992: 12). The state is not »an ›it‹«, »a thing, system, or subject« (ibid). Rather, it features as »a significantly unbounded terrain of powers and techniques, an ensemble of discourses, rules and practices, cohabiting in limited, tension-ridden, often contradictory relation with one another« (ibid).

However, as Cooper points out, some poststructuralist concepts of the state have three major drawbacks. First, they do not distinguish between the state and other terrains. Second, by downplaying cultural and economic factors, poststructuralist state theory frequently »underestimates the difficulty of achieving change compared with the relative ease of reproducing (more or less) status quo power relations«. Third, the linkages between state bodies are often neglected (1994: 7).

Cooper develops a concept that combines social constructionist and poststructuralist approaches. According to Cooper, the state is »possessed of many identities: it is a set of institutions, a condensation of social relations, a national, corporate identity, and monopolist of legitimate public violence. These identities slide over each other, the articulation between them, to the extent it exists, temporary and contingent.« (Cooper 1993: 258; 1993a: 192)

Most feminist state theories discussed here agree on the issue that the state is a site of conflicts and hierarchies. Cooper, for instance, suggests that »even among dominant state forces there is conflict« (Cooper 1993: 259; 1993a:

193). Using British local government politics on homosexuality in the 1980s as an example, she describes that the latter »gave access to very different forces to those welcomed or admitted by central government« (Cooper 1993a: 198). Similarly, and using legislation on social security in Australia as an example, Pringle and Watson illustrate »conflicts and compromises between different state apparatuses« (Pringle/Watson 1990: 238), a perspective the analysis of e. g. the conflictual relationship between the federal government and the parliament prior to the legislative process leading to the Transsexual Act confirms.

State-society dynamics, relative autonomy and state agency

As some of the definitions indicate, feminist concepts of the state are inextricably linked to a social analysis of gender. However, the complexity differs and, together with the respective definition of the state, have repercussions for conceptualising state-society dynamics, including the relative autonomy of the state[54] and state agency.

Focusing on rape law, pornography and sex equality in a US context, MacKinnon sets out from the premise that the liberal-democratic state through its norms, procedures and policies coercively constitutes the social order in the interest of men (MacKinnon 1989: 161f.). The supposed neutrality of the state is based on the universalisation of ›the‹ male perspective (ibid: 163) and features in objectivity as its norm (ibid: 162).

While her unitary concept of ›man‹ and ›woman‹ and social analysis are problematic for reasons that have been indicated earlier on, so is her concept of state-society dynamics and state agency. Her concept of the state does not allow for analysing state-society dynamics adequately, in particular struggles on the terrain of the state. By downplaying the outcomes of social struggles (Franzway/Court/Connell 1989: 30),[55] state and society appear static and ahistorical. Second, she does not accord the state relative autonomy, which is for reasons of legitimation indispensable in liberal democracies (Franzway/Court/Connell 1989: 53; Connell 1994: 161; Cooper 1993a: 195) and, I wish to add, to sustain its hegemonic orders. Third, MacKinnon focuses on the coercive dimension of state agency only.

While Pringle and Watson set out from the premise that the state is a site for the construction of gendered power relations (Pringle/Watson 1990: 235) they, too, seem to downplay the relative autonomy of the state:

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54 | The term ›relative autonomy‹ was coined by Poulantzas (1978). While Poulantzas conceptualised the state as a capitalist state only, this concept is useful to explain how limited state independence from dominant forces maintains hegemonic relations.

55 | Hence, successful litigation against unconstitutional rules of the Transsexual Act since the early 1980s can e. g. not be conceptualised or appreciated.

> The current collection of practices which we refer to as ›the state‹ are a historical product, not structurally a ›given‹. This is not to say that there is no intentionality or purpose. But what intentionality there is comes from the success with which various groupings are able to impose themselves; it is always likely to be partial and temporary. (Pringle/Watson 1990: 229; cf. Cooper 1995: 64)

In contrast, Franzway, Court and Connell (1989), Connell (1994) and Cooper (1993a) suggest that state and society are mutually constitutive and that the state possesses agency. Franzway, Court and Connell set out from the premise that the state is a result of historically-specific struggles: »It is the product of specific, historically located social processes. Quite specifically, the shape of the state is the outcome of particular social struggles. What kind of state we have depends on who was mobilised in social struggle, what strategies were deployed, and who won.« (Franzway/Court/Connell 1989: 35) In another instance, Franzway, Court and Connell suggest that the state is also an actor in social struggle (ibid: 40).

Connell continued to develop this initially collaborative project on state theory further. She suggests that, »[t]he state is constructed within gender relations as the central institutionalization of gendered power. Conversely, gender dynamics are a major force constructing the state, both in the historical creation of state structures and in contemporary politics.« (Connell 1994: 148) With regard to state agency, Connell suggests that, »[a]s the central institutionalization of power the state has a considerable, though not unlimited, capacity to regulate gender relations in the society as a whole.« (Ibid: 155) Since the state and social forces mutually shape each other, the state is also an actor.

Cooper offers the most precise and complex concept of state agency and it is her concept of state agency I will draw upon. When discussing local government politics on homosexuality in Britain in the 1980s, she takes into consideration two dimensions of state agency. The first deals with the complex interrelationships between state apparatuses. According to Cooper, »[i]t is not simply a matter of certain institutions, or dominant forces within them, making decisions that are then transparently implemented. For the making and operationalisation of such decisions will themselves be shaped and mediated by a range of state processes, practices, and ideologies.« (Cooper 1993a: 193)

The second dimension of state agency relates to the effects of state agency on shaping the politics and identities of those involved in the struggle on the terrain of the state. Cooper suggests that, »if we are to go on to understand the state as a terrain of struggle, we need also to understand the state's ability to help construct the players before, during, and after the game« (Cooper 1993: 259). With regard to the subject matter in this study, government activity, or more precisely, government inactivity e. g. contributed to shaping the social movement structurally as indications towards the bureaucratisation of parts

of the movement as a reaction to government unresponsiveness in the period after the Act to amend the Transsexual Act suggest.

In her later work, Cooper suggests that it is a matter of perspective, whether the state is accorded agency or not:

> In relation to agency, I argue that the state both does and does not possess it. [...] Confusion over agency reflects once again the multiple identities at stake when the state is discussed. If the state is seen as a corporate body, then it can act through its subjecthood – the ›We‹ for instance of international relations (although this will be internally fractured to reflect competing needs, agendas and interests). On the other hand, as a set of arenas, the state constitutes a terrain through which other forces act, facilitating and structuring their agency in the way Pringle and Watson (1992) describe. (Cooper 1995: 63 f.)

However, with regard to the procedures this project deals with her perspective outlined earlier on applies.

State agency is closely related to the concept of relative autonomy. Franzway, Court and Connell (1989: 53), Connell (1994: 161) and Cooper suggest that the state has relative autonomy from the forces that struggle on the terrain of the state. In the context of discussing sexual struggles on the terrain of the state, Cooper for example suggests that relative autonomy is a requirement for state stability and legitimacy. The latter are achieved through »an overdetermined process that combines the interests and agendas of politicians and bureaucrats, the hierarchical structures of decision-making and power, electoral considerations, state ideology [...], and cultures of governance« (Cooper 1993a: 195). Moreover, she argues that the need for stability and legitimacy may require having to respond to social forces, if ignoring them might otherwise mean to »arouse disruptive activity and a loss of credibility« (Cooper 1993: 261). The findings in this study suggest that the Federal Constitutional Court took on the legitimation role of the state in the face of government inactivity during the transsexual law reform period.

Access to the state and the boundaries of the state

In contrast to the other theorists, Cooper addresses the issue of access to the state. She gives three reasons for differential access of lesbian and gay groups to the state's terrain in Britain. Among the reasons, she puts forth are the abovementioned drive of the state for stability and legitimacy (ibid: 260) and the congruence between movement discourses and those of the state and between their respective ways of operating (ibid: 261). As an example, she suggests that lesbian and gay groups resorting to formal equality »are more congruent with the explicit ideologies expressed by the state than are campaigns based on radical or revolutionary feminism« (ibid).

While the processes studied in this project confirm Cooper's observations, I suggest adding the issue of structurally unequal access to the terrain of the state. With regard to issues related to gender and drawing upon Foucault's historical findings, Kilian suggests that medicine has since the 19th century become the authoritative voice on issues related to defining a person's gender (Kilian 2004: 34 f.). As the first legislative process reveals, trans individuals were not invited to consultations on the Transsexual Bill or asked for submissions and sought other means and channels to influence the process.

Cooper also addresses the issue of state boundaries. She argues that, »however proliferative, fluid and contingent,« state boundaries need to be considered for two reasons:

> First, where people understand the borders of the state to lie will affect the character of their own state engagement, that is, whether they perceive their location and the focus of their interest to be inside or outside of the state. Second, notions of legitimate state practice differ from conceptions of legitimate community activism. Therefore whether a site, practice or relationship is considered within or beyond the state will impact upon its discursive character and content. For instance, more radical practices may be possible if they are *considered* to be taking place outside the state. (Cooper 1995: 63)

Cooper's insight holds true for the processes examined in this study. A comparison between concepts of gender and trans in the social movement and the strategic proposals for legislative change in the transsexual law reform period suggest that trans movement demands appeared more radical while not directly confronted with the constraints involved when engaging with the state, whereas suggestions for law reform took into consideration anticipated political feasibility.

For the purpose of this study, the state will be considered as a historically-specific and dynamic central condensation of social relations with fuzzy boundaries, which contributes to shaping social relations and organises the actors before, during and after the proceedings. The state is endowed with relative autonomy, and it requires legitimacy. The state is a set of hierarchically organised institutions in frequently conflict-ridden constellations with specific modes and logics of operation.

1.6 Structuring the argument

Despite uneven developments in sexology, the law, the political branch of the trans movement and federal politics, conflicts within every discipline and area and in the complex interplay between the actors involved in processes related to recognising trans, a number of developments have taken place. With regard to

sexology, this development can be broadly described as a gradual shift from pathologising and homogenising to depathologising and heterogeneous concepts of trans(sexuality). In the course of the abovementioned processes, the trans movement has developed from local and dispersed activism to a political actor, representing a broad array of heterogeneous subjects. The overall development in government politics can be described as a shift from initially reluctant, but active government politics to a marked decline of political investment. With regard to jurisdiction in the area of constitutional law, the development can be broadly described as a shift from initially reluctant higher court jurisdiction to becoming a driving force of change on the level of the state. In the face of increasing government inactivity, the Federal Constitutional Court has taken on the legitimation role of the liberal-democratic state with regard to issues concerning changes to the conditions for a change of first names and a revision of gender status. Overall, these developments have contributed to an ongoing process of social change with regard to trans, without however displacing the heteronormative gender binary, which remained in place, albeit in varying, historically-specific forms.

This book contains three analytical chapters. Chapter 2 deals with the period from the consolidation of transsexuality as a medicalised subject in the 1970s to generally binding regulations in the Transsexual Act (1980), a period marking the gradual recognition of the complexity of gender. This chapter starts out with exploring how sexology shaped and managed transsexuality in the 1970s and early 1980s, established psycho-medical authority on issues related to transsexuality vis-à-vis the law, politics and the subjects themselves and reorganised marginalised genders. The second part of chapter 2 examines how various levels of jurisdiction and legal scholarship dealt with applications for a revision of gender status in the course of the 1960s and traces the conflictual process of adapting to the sexological notion that sex does not necessarily determine a person's gender identity. This subchapter takes into account debates on the use of pre-legislative legal provisions and instruments, interpretations of sexological knowledge and controversies over the public order, marriage and gender. These factors interrelated in complex and different ways and finally resulted in the legal recognition of a change of first names and a revision of gender status in the Federal Constitutional Court decision on 11 Oct. 1978. The third part of chapter 2 deals with the legislative process leading to the Transsexual Act, taking into consideration sexological and trans concepts and access to the consultations, controversies over transsexuality and marriage as they manifested in debates on the structure of the Bill, balancing rights and medical knowledge. This part ends with an outline and analysis of the Transsexual Act, which provides generally binding rules for a change of first names and a revision of gender status. Drawing upon debates on the early stage of the trans movement, the final part of chapter 2 outlines basic structural and conceptual

features of the movement, identifies factors that contributed to the homogeneous image and isolation of transsexual individuals, despite heterogeneous self-concepts, sexual orientations and desired somatic interventions and engages with the debate on assessing the trans movement's contribution to gender recognition.

Chapter 3 covers the period before and shortly after the Act to amend the Transsexual Act in 2009, a period characterised by a publicly discernible pluralisation of genders in the trans movement and a further modification of the heteronormative gender binary as an effect of broader discursive changes and social movement struggles. The first part of the chapter analyses how the heterogeneity and the increasing regulatory complexity regarding transsexuality resonated in clinical categories and practices and discusses the national guidelines issued by the three major sexological associations. The second part of chapter 3 examines structural and conceptual change and differentiation in the trans movement, taking into consideration the social and discursive factors that contributed to these changes. Thereafter trans perspectives on legal rules, procedures and practices as well as psycho-medical premises, procedures and practices will be addressed. Finally, the second part of chapter 3 deals with trans organisation and network activities in order to promote social change, with a special focus on lobbying and networking to achieve trans law reform, including a brief consideration of the government response. I decided to place developments and debates in the trans movement second to those in sexology in order to avoid redundancies, especially since a critique of psycho-medical practices and guidelines is only possible after having introduced them. Jurisdiction and legal debates continued soon after the Transsexual Act was enacted. Before turning to legal developments under the Act, the third part of the chapter examines developments in jurisdiction on trans(sexuality) in health insurance law. Wherever applicable, the rest of the chapter takes into consideration legal interpretations of sexological concepts of transsexuality, sexological interpretations of individual rules of the Act and legal debates on court decisions from the 1980s to 2010, and I will briefly address the Act to amend the Transsexual Act in this chapter.

Chapter 4 engages with the period from the Federal Constitutional Court decision on 11 Jan. 2011 until 2014, the beginning of a period indicating that the link between sex and gender is becoming undone under clearly defined circumstances. The first part of this chapter discusses the Federal Constitutional Court decision, including sexological knowledge it based its decision upon, trans and legal critiques of the court reasoning and initial lower court interpretations of the decision. The second part of the chapter deals with developments in trans politics in the aftermath of the legislative process, featuring major political projects. The last part of the chapter deals with renewed debates in sexology on conceptualising, diagnosing and treating trans individuals, the health-insurance manage-

ment of trans individuals and psycho-medical involvement under the Transsexual Act against the background of social movement struggles for a recognition of gender diversity, international guideline developments, the abovementioned Federal Constitutional Court decision and increased consideration of social constructionist and poststructuralist thought.

2 CONCEPTS OF GENDER AND TRANSSEXUALITY PRIOR TO, AND DURING THE LEGISLATIVE PROCESS LEADING TO THE TRANSSEXUAL ACT

2.1 Developments and debates on transsexuality in sexology in the 1970s and early 1980s

The 1970s and early 1980s gave rise to four major developments in sexology on transsexuality in the Federal Republic of Germany. First, increased sexological research on transsexuality contributed to a proliferation of distinct approaches to the phenomenon. Second, despite persisting contradictory clinical observations and scanty surveys, sexologists were to produce the first comprehensive and highly influential scheme of treatment by the end of the 1970s. Third, in a strategic undertaking, sexology established itself as the authoritative voice on trans in the course of the decade. Fourth, by trying to pinpoint transsexuality, sexology reorganised marginalised genders.

In the following chapter, these issues will be explored in more depth. Starting out from a systematic account of approaches organised around the aetiology of transsexuality, the impact of US sexological concepts on West German approaches and the management of transsexuality will be outlined. This will be followed by a description of the psycho-medical regimen for transsexual individuals based on the diagnostic process and the therapy.

The analysis of the aforementioned aspects is based on conference proceedings of the DGfS,[1] articles in the sexological journal *Sexualmedizin* (Sexual

1 | The DGfS was founded in 1950. It is the oldest and largest German sexological association. The association strives to promote sexological research, teaching and medical practice. While it hosts members from several disciplines, such as medicine, psychology, sociology, law and cultural studies, the DGfS initially was a medical association with a distinct normative orientation. Towards the end of the 1960s, the DGfS placed more emphasis on social sciences, thereby taking on a more critical stance towards social conditions and processes. The DGfS investigates into the theory and history of sexuality, and develops and systematically evaluates psychotherapeutical treatment, in particular

Medicine), a sexological article (Eicher 1976) in the journal *Der Gynäkologe* (Gynaecologist), a comprehensive and highly influential scientific paper written by the sexologists Sigusch, Meyenburg and Reiche (1979), a monography by Eicher (1984) and one article each from the *Deutsche Medizinische Wochenschau* (German Medical Weekly) and an anthology.

Using an influential sexological article by Nevinny-Stickel and Hammerstein (1967) in the law journal *Neue Juristische Wochenzeitschrift* (New Legal Weekly [NJW]), a sexological submission to the Minister of Justice (Krause et al. 1974) as quoted in Sigusch (1991) and a sexological appeal to the *Bundesrat*[2] (Sigusch/Gindorf/Kentler 1979), I will thereafter focus on the steps sexologists undertook to gain the power to define transsexualism vis-à-vis the legal realm, institutionalised politics and trans individuals.

Finally, this chapter deals with the effects sexological defining power had on the fringes of the gender regime. Initially, I will trace sexological constructions of the transsexual subject by analysing clinical pictures of transsexuality. Based on an analysis of the differential diagnosis of transsexualism, I will explore the shifts that occurred on the margins of the gender regime as a result of the medicalisation of transsexuality.

Despite unsecured and in part contradictory knowledge on transsexualism, the 1970s and early 1980s witnessed a consolidation of the medical management of transsexuality, the emergence of a distinct transsexual subject, the es-

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in the areas of sexual dysfunctions, so-called perversions, sexual offences, transsexuality, intersexuality and disorders resulting from sexual traumatisation. Furthermore, the DGfS engages in women's and gender studies, e. g. through clinical studies on gender-specific aspects of sexual disorders and reproductive problems, psychoendocrinology, social epidemic aspects of sexual traumatisation and studies on power and violence in gender relations. Its social science research focuses on changes in sexuality in adolescence and among students, sexual socialisation and changing gender relations, homosexuality and HIV/AIDS. The DGfS also conducts research in the area of sexual forensics (DGfS undated).

2 | The *Bundesrat* represents the interests of the eleven *Länder* prior to unification on 03 Oct. 1990 and sixteen *Länder* since then. It is involved in federal state legislation and administration as well as in European Union matters (Art. 50 GG). Along with the federal government and the *Bundestag*, the *Bundesrat* is entitled to initiate legislation (Art. 76[1] GG). Legislation that deals with amendments to the Constitution (Art. 79[2] GG), affects the budget (Art. 104a[4] GG; Art. 105[3] GG) or administration (Art. 84[1] GG) of the *Länder* require the consent of the *Bundesrat*. The *Bundesrat* is also entitled to object to bills introduced by the *Bundestag* (Art. 77[2a] GG; Art. 77[3] GG). Sexologists appealed to the *Bundesrat* dominated by a conservative majority in 1979, since it threatened to thwart the Government Bill to change first names and establish gender status in specific cases.

tablishment of sexological defining power over transsexualism and the shift of transvestism from a gender category to a sexual entity.

2.1.1 Approaches to transsexuality in the West German sexological debate

Drawing heavily upon the US-American sexological debate, several approaches to transsexuality emerged in the Federal Republic of Germany throughout the decade prior to trans legislation. The approaches offered various aetiologies of transsexuality. The frequently eclectic nature of the individual approaches indicates that sexologists were at best groping for an explanation of the phenomenon.

Somatic and multi-causal approaches

Despite the fact that every single approach differed from the other, they can however be divided into three distinct categories. Some authors attributed transsexuality to somatic processes (cf. Dörner 1969; Neumann 1970; Eicher et al. 1980). Others located the cause of transsexuality in interlocking somatic, psychological and cultural factors (cf. Haynal 1974; Schorsch 1974; Sigusch/Meyenburg/Reiche 1979; Eicher/Herms 1978). Only few authors suggested that any explanation so far was unconvincing (cf. Kockott 1978: 47) or that the causes of a transsexual development were unknown (cf. Richter 1977: 913).

During the 1970s, two variants of somatic explanations for transsexuality emerged of which the first and to this day most influential explanation is hormonal, the other genetic. Neumann summarised his own and several other researchers' findings, among others, those of the East German endocrinologist Dörner, on the effects of pre- and postnatal administration of sex hormones on various vertebrates. He set out from socio-biological premises when stating that, »nearly all vertebrates demonstrate a behavioural pattern that in the end serves to maintain the individual and the species. Many of these modes of behaviour more or less correlate with the reproductive cycle and are different in male and female individuals.« (Neumann 1970: 55) Such an approach implies that gender role behaviour ultimately derives from a person's physical substratum.

According to Neumann, transsexuality is caused by a disorder in the hypothalamus. The disorder is produced by sex hormones at a specific point during embryonic development or in the postnatal period, depending on the species. The sex hormones are assumed to restructure specific centres in the hypothalamus, which can thereafter only catalyse a certain behavioural pattern (ibid 1970: 54). Neumann assumed that the somatic differentiation of sex in humans occurs between the eighth and twelfth week of embryonic develop-

ment. The differentiation of the hypothalamus is complete by the time of the fifth month of embryonic development (ibid: 67).

While Neumann mentioned that it is difficult to apply insights gained through animal experiments to human beings, he nevertheless believed that hormonal disorders of differentiation could be the cause of transsexuality rather than early childhood impressions (ibid: 67). Since there was no evidence in humans for this hypothesis, he backed up his argument with Hinman's findings. The latter concluded from his research on individuals with congenital adrenal hyperplasia (CAH) that they often demonstrate male sexual behaviour, even when raised as girls (ibid: 68).

However, it is questionable whether alleged male sexual behaviour in phenotypically female or intersex individuals serves as a proof of Neumann's findings, since gender role behaviour and gender identity are not interchangeable variables. While sexual behaviour socially associated with male-bodied persons might be demonstrated by female-bodied or intersex individuals, this does not necessarily mean that the latter identify as transsexual individuals.

The second somatic approach assumed a genetic cause of transsexuality. Eicher observed genetic differences in a majority of his transsexual patients in Munich. Eicher and his collaborators discovered that six of eight mtf transsexual individuals were H-Y antigene negative and six of seven female-to-male transsexual individuals (ftm) were tested H-Y antigene positive.[3] Since Eicher believed to have discovered a genetic cause of transsexuality, he tentatively suggested that transsexuality be classified as a form of intersexuality (cf. Eicher 1979: 476, 15; Eicher et al. 1980).

While another team of researchers observed the same H-Y antigene expression among its transsexual patients (Engel et al., 1980: 497), they held that it was premature to conclude that the H-Y antigene was responsible for gender identity, including the »disorder« in transsexual individuals (ibid: 494). First, they argued that test procedures of the time were too limited to come up with a conclusive answer, since there was no test that would be able to prove the existence of H-Y, if the antigene determinants of the H-Y antigene were missing (ibid: 497). Second, they demanded tests on a control group to find out whether the H-Y antigene is related to a transsexual identity in the first place (ibid: 498). Indeed Eicher's thesis proved to be premature, and he repealed it in 1984 (Eicher 1984; cf. Sigusch 1984: 680).

Proponents of multi-causal approaches did not necessarily rule out biological factors as possible explanations for transsexuality. Not only did they discuss

3 | H-Y antigene stands for the gene product histocompatibility antigene and is a cell membrane glycoprotein (Sigusch 1991: 310). It is a part of the male cell membrane and the expression of a gene, which Eicher and his collaborators assumed that it was located on the Y-chromosome.

the relevance of the findings in studies on intersex individuals (Haynal 1974: 112; Sigusch/Meyenburg/Reiche 1979: 278), twin research (Haynal 1974: 112) and hormone experiments in animals (Haynal 1974: 112 f.; Schorsch 1974: 196; Eicher 1976: 39; Eicher/Herms 1978: 35 f.; Kockott 1978: 47; Sigusch/Meyenburg/Reiche 1979: 276-278). They added these findings to various assumed psychological and/or environmental causes, and the assumption of an unphysiological influence of androgens in a critical phase of embryonic development proved to be particularly popular among sexologists.

However, the degree varied to which biological arguments figured in multi-causal approaches. While Kockott (1978: 47) and Sigusch, Meyenburg and Reiche (1979: 278) tentatively suggested that biological grounds might contribute to a transsexual development, Schorsch's explanations were contradictory. Initially, he argued that genetic and environmental influences structure an individual's gender identity (Schorsch 1974: 196). At a later point, he conceded that the influence of somatic factors on a transsexual development remains insecure. Despite this insecurity, he assumed a hormonal and/or genetic involvement:

> According to the current state of research the differentiation of sexes as an effect of in detail unknown genetic and/or hormonal influences during the prenatal phase needs to be considered an insecure and ambiguous explanation of transsexuality. When the child postnatally meets upon environmental influences in the family that reinforce this uncertainty or unintentionally operate to affect identification with the gender role that contradicts the physical equipment, a transsexual development will evolve. (Ibid: 198)

Taken for themselves, though, none of the alleged biological causes of transsexuality appeared conclusive to the proponents of multi-causal approaches. Rather, they assumed that transsexuality was possibly determined by biological, psychological and sociological aspects (Haynal 1974: 111; Sigusch/Meyenburg/Reiche 1979: 275), biological factors and family constellations (Schorsch 1974: 196 f.) or a set of biological factors, upbringing, gender allocation and environmental influences, such as e. g. family structures (Eicher 1976: 39; idem/Herms 1978: 35).

The relationship between these determinants differed. According to Schorsch, biological and environmental influences equally contribute to the development of a transsexual identity: »It would definitely be wrong to consider somatic-biological and environmental influences as alternatives or contrasts; instead, they presumably work together and reinforce each other.« (Schorsch 1974: 198)

Sigusch, Meyenburg and Reiche attributed transsexuality foremost to psychological factors, in particular to an unusual degree of early childhood traumatisation (Sigusch/Meyenburg/Reiche 1979: 275). However, they did not rule

out that social and biological factors were involved in a transsexual development (ibid: 272).

Eicher's explanations were contradictory. Until he presented the H-Y-antigene-thesis, he assumed that either biological or postnatal factors or a combination of both cause transsexualism (Eicher 1976: 42). Based on studies on intersex individuals, however, he was convinced that gender assignment and upbringing most definitely determine a person's gender identity. Hence, in this instance, he considered postnatal psychosocial factors in early life, in particular the relationship to the parents, crucial to the development of transsexualism (ibid: 45).

The US American influence on multi-causal approaches to transsexuality

All proponents of multi-causal explanations of transsexuality developed their concepts by taking into consideration theories and findings in US-American research on transsexuality.[4] Schorsch (1974), Sigusch, Meyenburg and Reiche (1979) and Kockott (1978) for instance discussed Stoller's assumption that particular family constellations induce transsexuality. However, they arrived at different conclusions.

According to Stoller, family dynamics that trigger a transsexual identity are different for male and female children (Stoller 1972: 62; cf. Sigusch/Meyenburg/Reiche 1979: 256). The male child is believed to grow up in a setting that is shaped by a symbiotic mother/son-relationship and a psychologically absent father (Stoller 1968: 125). Driven by »penis envy«, the mother encourages feminine traits in her child and the father »does not interrupt the process of the son's feminization« (Stoller 1968: 138; cf. Sigusch/Meyenburg/Reiche 1979: 255).

With regard to the female transsexual-to-be, Stoller observed that the mother is in poor health, depressed and barely attends to her child. The masculine father distances himself from the mother and the family. The daughter has to stand in for the father at a very early age in life and is not encouraged to develop a female mode of behaviour (Stoller 1972: 50; cf. Sigusch/Meyenburg/Reiche 1979: 256; Schorsch 1974: 198; Eicher 1976: 42).

While Schorsch relied on Stoller's concept (Schorsch 1974: 197), Sigusch, Meyenburg and Reiche (1979), and Kockott (1978) refuted Stoller's notion of a particular family constellation that pertains to a transsexual development. While the former did not doubt that certain family constellations are found more frequently among transsexual individuals, they questioned that there was a typical mother-child or parent-child constellation (Sigusch/Meyenburg/Re-

4 | For a comprehensive account of US-American approaches see Meyerowitz 2004: 98-129 and Weiß 2009: 266-305.

iche 1979: 274). Kockott did not detect any particular family structure among his patients (Kockott 1978: 48).

Several authors discussed Money's findings. Eicher e. g. referred to Money, Hampson and Hampson's assumptions on gender role development in intersex individuals (Money/Hampson/Hampson 1957) to underline the importance of socialisation for the development of a gender identity, regardless of the individual's chromosomal, hormonal and phenotypical status (Eicher 1976: 42). Schorsch's concept was influenced by Money and Ehrhardt (1972), Green (1969) and Pauly (1969; 1969a), among others. The latter suggested that transsexual individuals' gender identity is fixed in early childhood (Money/Ehrhardt 1972: 16 f.; Green 1969: 34; Pauly 1969: 57; 1969a: 86). By that time, the child behaves according to the ›other‹ sex/gender (Schorsch 1974: 197).

The psychoanalysts Socarides, Person and Ovesey inspired Sigusch, Meyenburg and Reiche's concept of transsexuality. The latter developed their concept of transsexuality by discussing and comparing the psychoanalysts' perspectives with their clinical observations.

Socarides considered transsexuality a perversion, which develops because transsexual individuals are unable to pass the symbiotic and individuation phase of early childhood successfully (Socarides 1970: 348; cf. Sigusch/Meyenburg/Reiche 1979: 253). While Sigusch, Meyenburg and Reiche disagreed with Socarides' therapeutic approach,[5] they picked up the notion of transsexuality as a perversion. According to this concept, transsexuality features as a particularly early and with that complete attempt at restitution which, unlike other perversions, is assumed to occur at such an early stage of a child's development that sexualisation is precluded. The authors used this assumption to explain their clinical observation that transsexual individuals were asexual (Sigusch/Meyenburg/Reiche 1979: 270).

While Person and Ovesey suggested that transsexuality is caused by similar factors, they classified transsexuality as a borderline pathology (Person/Ovesey 1974: 19; cf. Sigusch/Meyenburg/Reiche 1979: 254). Sigusch, Meyenburg and Reiche considered this classification convincing, because it was congruent with their clinical observation that splitting mechanisms, which are typical of borderline pathologies, occur in transsexual individuals, too: The »desire for a sex change [is] in a way the sum of manoeuvres that are organised around splitting« (Sigusch/Meyenburg/Reiche 1979: 269).

5 | Socarides disapproved of hormonal and surgical treatment of transsexual individuals. To him, such measures sanction the »transsexual's pathological view of reality and cannot solve the underlying conflict« (Socarides 1969: 1419; cf. Sigusch/Meyenburg/Reiche 1979: 254).

However, Sigusch, Meyenburg and Reiche disagreed with Person and Ovesey's distinction between primary and secondary transsexuality.[6] According to Person and Ovesey, primary transsexuality is caused by a severe disorder of the core gender identity in early childhood (Person/Ovesey 1974: 5; cf. Sigusch/Meyenburg/Reiche 1979: 257). The category of secondary transsexuality is comprised of formerly effeminate homosexual individuals and transvestites. The latter are assumed to desire a medical transition after experiencing extremely stressful situations. These situations spark a psychodynamic process that prevents the respective person from maintaining his or her emotional equilibrium. As a result, the individual is believed to fall back upon an early childhood fantasy (Person/Ovesey 1974a: 192; cf. Sigusch/Meyenburg/Reiche 1979: 258).

At this point Sigusch, Meyenburg and Reiche abandoned the psychoanalytical framework and turned to a historical perspective. They argued that social and cultural factors shape the formation of symptoms. Hence, the point in time when an individual wishes to transition depends on aspects such as the development of medical technology, sex morals and the media. They supported this argument with their clinical observation that transvestites have become increasingly rare in sexual medical offices and so-called secondary transsexuals visit sexologists' offices more frequently (Sigusch/Meyenburg/Reiche 1979: 272).

2.1.2 Developments in the treatment of transsexual individuals

Just as US approaches to transsexuality left a deep imprint on the West German sexological debate of the 1970s, so did US developments in the management and therapy of the subjects.[7] US influence figured strongly in surgery as the therapeutic route, the interdisciplinary organisation of the treatment of trans-

6 | However, other authors, such as e. g. Spengler, categorised transsexual individuals according to Person and Ovesey's distinction between the two types of transsexuals (Spengler 1980: 102).

7 | In June 1969, the German Association on Sex Research invited Money and Ehrhardt to give a paper at the 10th scientific congress featuring their experiences with the diagnostic and surgical programme at Johns Hopkins Hospital in Baltimore. Money and Ehrhardt's report was published in the association's conference proceedings (Money/Ehrhardt 1970). West German sexologists continued to refer to the findings in this publication throughout the 1970s. In addition, Benjamin's commitment to transsexual patients and sex reassignment surgery deeply impressed sexologists in the Federal Republic of Germany (Sigusch 1991a: 227 f.). Several sexologists relied on his observations. On one occasion, Eicher e. g. stated that, »[t]he surgical method is undisputed nowadays. Benjamin (1954) is unaware of any case where an intensive and long psychoanalysis would have been successful and considers the attempt a waste of time« (Eicher 1976: 44).

sexual individuals, extensive diagnostic measures and strict guidelines for an indication for surgery. These trends are mirrored in Sigusch, Meyenburg and Reiche's comprehensive and influential programme of treatment that appeared in 1979 as well as in several other programmes of the time.

The therapeutic route[8]

With few exceptions in the 1970s, medical and surgical interventions became the method of choice in the treatment of transsexual individuals. While Haynal was convinced that transsexual individuals could be successfully treated with psychotherapy (Haynal 1974: 114), the vast majority of West German sexologists argued that sex reassignment surgery was the only viable method for treating individuals with »an irreversibly transposed gender identity« (Eicher/Herms 1978: 45). Eicher and Herms noted that in their clinical experience any other known treatment in fact had detrimental effects on transsexual persons: »Psychiatric or psychotherapeutic treatments or a hormone treatment according to the physical image can be found in the case history. They were unsuccessful in all cases and agonising for the patients. They may even lead to attempted suicide as we observed in two cases.« (Eicher/Herms 1978: 44)

While there was widespread agreement on surgery as the best available treatment (Eicher 1976: 44; Spengler 1980: 103; Schorsch 1974: 197; Richter 1977: 913), proponents of the surgical route were in part ambiguous about this solution. Sigusch, Meyenburg and Reiche expressed their unease by associating sex reassignment surgery with »emergency therapy« (Sigusch/Meyenburg/Reiche 1979: 289).[9] In a similar vein, Eicher and Herms suggested that while surgery offered a solution, it nevertheless remained »a compromise« (Eicher/Herms 1978: 45).

8 | A brief outline of the therapeutic route and the medical management of transsexuality is published in German in de Silva 2013, 85-87.

9 | In a medical commentary on the Transsexual Act, Sigusch expanded on this notion: »Irreversible physical interventions should not be the be-all and end-all of medicine. Transsexualism is a psychological disease and therefore needs to be treated with psychological means. That this has so far rarely been successful is certainly also up to the therapists who, urged by patients and without effective psychotherapeutical means, have got more and more used to a type of emergency therapy that was from the beginning an act of desperation for both, the therapist and the patient.« (Sigusch 1980: 2745) He repealed his statement in an interview in 1992, arguing that he »nowadays no longer had the totalitarian illusion that psychiatric examinations or psychological treatment could ›capture‹, understand or even comprehend a patient's life« (Sigusch 1992: 656).

Sexologists who endorsed the surgical route generally agreed on administering counter-sexed hormones and surgery in adult female-bodied men and male-bodied women, provided there were no serious contraindications.[10] The extent of the medical, surgical and otherwise therapeutic interventions deemed necessary or advisable varied, depending on the programme in the respective hospital.

Medical measures in male-to-female transsexual individuals (mtf) involved treating the individual with estrogenes. Eicher and Richter suggested administering estrogenes in order to induce the development of the breast glands, the redistribution of fat according to a female pattern and the softening of the skin (Eicher 1976: 43; Richter 1977: 914). However, Sigusch, Meyenburg and Reiche proposed possibly supplementing the estrogene regimen with gestagenes, since they believed the latter to have an additional positive effect on breast development and the reduction of body hair (Sigusch/Meyenburg/Reiche 1979: 295).

The endocrinological treatment of ftm transsexual individuals varied, too. In general, all sexologists proposed treating ftm transsexual individuals with testosterone. However, while Eicher and Richter considered this hormone treatment permanent (Eicher 1976: 43; Richter 1977: 914), Sigusch, Meyenburg and Reiche suggested initially administering testosterone until the desired effects such as the lowering of the voice, increased facial hair and clitoral enlargement materialise. They furthermore proposed to use progestins in order to suppress menstruation (Sigusch/Meyenburg/Reiche 1979: 295).[11]

10 | The contraindications were (and in part continue to be) subdivided into internal, psychiatric, neurological, social, personal and legal aspects. Physical contraindications are those that threaten the physical well-being or even the life of a transsexual person, such as e. g. an estrogene therapy in individuals who suffer from liver diseases or damages or who experienced thromboses, embolism or hypotonia (Richter 1978: 56). Psychiatric contraindications are e. g. psychoses and borderline pathologies »other« than transsexuality (Sigusch/Meyenburg/Reiche 1979: 289). Temporal lobe diseases are a neurological contraindication in the case of transsexuality. Lack of intelligence and reason and the inability or unwillingness to collaborate are personal contraindications. Social contraindications are according to Richter e. g. a marriage and the lack of a partner's consent to get divorced, adolescent age and the risk of triggering a socio-economic and cultural crisis. Legal aspects are a criminal record that is not related to transsexualism and the refusal to sign a declaration stating that the physician is not responsible for the effects of the intervention, if it has been conducted properly (Richter 1977: 914; 1978: 58 f.).

11 | Sigusch, Meyenburg and Reiche only suggested a bilateral oophorectomy in cases of insufficient virilisation (Sigusch/Meyenburg/Reiche 1979: 298). They argued that if the ovaries were retained, the virilisation through initial doses of testosterone alone would

All authors mentioned here agreed on an orchidectomy, a penectomy and the construction of a neovagina as appropriate surgical interventions for mtf transsexual individuals (Eicher 1976: 43; Richter 1977: 914; 1978: 57; Sigusch/Meyenburg/Reiche 1979: 297). Sigusch, Meyenburg and Reiche rejected requests for any other sex reassignment surgery, such as oto-rhinoplasties or the injection of liquid silicon as a means to augment breasts, arguing that they wanted to avoid complications that may result from any of these types of interventions (Sigusch/Meyenburg/Reiche 1979: 298).

Unlike Sigusch, Meyenburg and Reiche, Eicher and Richter proposed additional, albeit optional surgical interventions. These included the construction of labia out of scrotal skin, breast augmentation surgery, if estrogene-induced breast gland growth was considered insufficient, oto-rhinoplasty, the smoothing out of male facial wrinkles (Eicher 1976: 43; Richter 1978: 57; 1977: 914) and »whatever else is felt to be disturbing and in need of correction« (Richter 1978: 57).

As with male-to-female transsexual individuals, Sigusch, Meyenburg and Reiche opted for as few surgical interventions as possible in female-to-male individuals. They proposed a bilateral mastectomy. In their opinion a hysterectomy and bilateral oophorectomy were only indicated, if the ovaries interfered with the process of virilisation. They did not propose a phalloplasty due to dissatisfactory results (Sigusch/Meyenburg/Reiche 1979: 298). In contrast to Sigusch, Meyenburg and Reiche, a hysterectomy and adnectomy were part of the standardised programme with Eicher and Richter (Eicher 1976: 43; Richter 1977: 914; 1978: 57). In addition, Richter suggested a colpectomy (Richter 1977: 914). While both authors mentioned the possibility of a phalloplasty,[12] they, too, did not consider this means mandatory due to poor surgical results (Eicher 1976: 43; Richter 1977: 914; 1978: 58).[13]

Otherwise therapeutic measures for male-to-female transsexual individuals potentially consisted of electrolysis and speech therapy. While Sigusch, Meyen-

suffice, and when the hormone therapy with testosterone ends, the body would continue to be supplied with growth hormones.

12 | Surgeons did not offer a standardised procedure in the 1970s, and phalloplasties were considered experimental surgery. The phalloplasty Eicher had in mind had a neourethra. The penoid was non-erectable (Eicher 1976: 43). Richter suggested a phalloplasty that may or may not have a urethra and a penis prosthesis. He also proposed the construction of a scrotum, possibly with an implantation of testicles (Richter 1977: 914; 1978: 58).

13 | Frequent complications were strictures and fistulae. Occasionally thromboses and necroses occurred, resulting in a loss of the neo-phallus. These complications continue to occur to the present.

burg and Reiche did not mention any of these options in their programme of treatment, Eicher suggested offering all measures (Eicher 1976: 43).

The medical management of transsexuality

The US organisation of treatment inspired the medical management of transsexual individuals in the Federal Republic of Germany. While West German medical professionals did not succeed in establishing gender identity committees and gender identity clinics, the surgeries of the *Institut für Sexualwissenschaft* (Institute for Sexology) in Frankfurt and the *Institut für Sexualforschung und Forensische Psychiatrie* (Institute for Sex Research and Forensic Psychiatry) in Hamburg e. g. became centres that, among other areas of sexological investigation, specialised in the treatment of transsexual individuals.

Like their fellow colleagues at Johns Hopkins Hospital who organised the treatment of transsexual people in committees consisting of an endocrinologist, a gynaecologist, a urologist, two plastic surgeons, two psychologists and three psychiatrists of which one was a specialist for neuro-endocrinological cases (Money/Ehrhardt 1970: 70), West German physicians and psychologists decided to collaborate in multidisciplinary teams (Schorsch 1974: 198; Richter 1977: 913; Kockott 1978: 49). As Eicher and Herms pointed out, »[t]he therapeutic procedure requires at least the collaboration of a psychiatrist, a gynaecologist or surgeon, respectively, and a social worker in order to do justice to the social, medical and legal problems« (Eicher/Herms 1978: 50). Schorsch explicitly referred to the US model of gender identity committees and suggested that a team consist of a psychologist, a psychiatrist, a gynaecologist, a plastic surgeon, an endocrinologist and a urologist (Schorsch 1974: 198).

As the line-up of the psychological and medical team suggests, a thorough diagnostic programme preceded the treatment of transsexual individuals. Sigusch, Meyenburg and Reiche divided the diagnostic process into psychosocial examinations and psychotherapy, physical examinations and an examination by a second expert.

The psychosocial examination involved a psychiatric examination of a duration of at least six months that was supposed to indicate whether the individual was suitable for treatment and to exclude homosexuality, transvestism, borderline pathologies and psychoses (Sigusch/Meyenburg/Reiche 1979: 289). Moreover, a case history was compiled and the parents or other persons who were closely related to the patient in early childhood were interrogated. Based on the results of these examinations, the individual was either referred to an analytical therapy or a therapy that was meant to support the person during the programme of treatment (ibid: 289 f.).

The physical examinations included a comprehensive internal examination with a special emphasis on sex-specific characteristics, a blood picture in order to exclude contraindications, an ECG and x-rays of the thorax. The latter

mainly served documentation purposes. Female men were required to undergo a gynaecological examination in order to exclude pregnancy. All transsexual individuals were examined endocrinologically for scientific purposes and to exclude intersexuality, hypogonadism and thyroid diseases. These examinations were followed by a genetic test to exclude intersexuality and a neurological test to exclude diseases of the temporal lobe (ibid: 290-294).

Finally, a second expert was consulted. The expert was required to have gained experience in the field of so-called sexual perversions and transsexuality (ibid: 294).

More than a decade later Sigusch explained the extent and rigorousness of the treatment scheme as follows:

> In retrospect, I must say that there was no group of patients with which we dealt with in such a conventional, orthodoxly medical way in the course of the decades than with those with a gender identity disorder. I was particularly scared of so-called desires for retransformation and suicides after having undergone a sex reassignment operation. It is especially for this reason that we formulated our concept of examination and treatment so painstakingly and so comprehensively. We pulled out all the stops, we wanted to make sure that the most improbable contraindication was excluded and attached great importance to a competent differential diagnostics for an indefinite period of time, which is only possible within a therapeutic relationship. (Sigusch 2007: 352 f.)

At the time though, Sigusch, Meyenburg and Reiche also published their treatment scheme in order to counter the unregulated and dissatisfactory treatment of transsexual individuals (Sigusch/Meyenburg/Reiche 1979: 249). Their programme was to become influential in medical practice and institutions throughout Western and Eastern Europe (Sigusch 1991: 227).

While programmes of treatment initially varied throughout the Federal Republic of Germany, several other sexologists set up similarly rigorous and time-consuming schemes. Eicher's somatic and psychological diagnostics, for instance, was as extensive as Sigusch, Meyenburg and Reiche's. Eicher required of transsexual individuals to undergo internal, gynaecological, urological and endocrinological examinations and psychological tests. Eicher insisted on a biographical case history, including an evaluation of extensive aspects of the patient's personality with a particular emphasis on the sexual case history, attitudes towards masculine and feminine role behaviour in the respective person's history and interviews with parents, siblings, friends and partners, among others (Eicher 1976: 43).

The series of examinations, tests and interviews were meant to enable the physician to decide on four issues. First, he or she was supposed to be able to answer the question whether the patient was either a candidate for psychotherapy or for surgery. Second, the physician was supposed be able to judge

whether the patient was really motivated. For Eicher »real motivation« meant that the patient revealed no signs of ambivalence or a fleeting, situational identification with the gender the individual longed to be recognised as. Third, the physician was supposed to be able to decide whether the patient was psychotic and predict whether the patient was going to encounter a postoperative sociocultural crisis (ibid).

Criteria for an indication for sex reassignment surgery

Analogously to the selection criteria at Johns Hopkins Hospital (Money/Ehrhardt 1970: 71), a committee of the DGfS developed strict guidelines for an indication for surgery. Several sexologists adhered to these guidelines, albeit with minor deviations (Kockott 1978: 49; Eicher 1979: 476; Spengler 1980: 102; Richter 1977: 914; Sigusch/Meyenburg/Reiche 1979: 296 f.).

The committee suggested eight criteria for an indication for surgery. First, it recommended a minimum age of 20 years (Kockott 1978: 51). Unlike the criteria at the Johns Hopkins Hospital that proposed an age of at least 21 in order to avoid legal complications (Money/Ehrhardt 1970: 71), the committee argued that candidates for surgery were supposed to have completed their psychosexual development (Kockott 1978: 51).[14]

The next three criteria consisted of a thorough somatic and psychiatric diagnostics, one to two years of preoperative medical observation of the patient and ›a real life test‹, which was facilitated by hormone therapy (ibid: 51).[15] Kockott summarised the reasons for the abovementioned preconditions:

> Prior to an operation, the transsexual should be carefully observed and looked after medically for one to two years in order to check the stability of the desire to change gender roles, to prepare for the change and to decide whether the transsexual can cope with this change psychologically. The transsexual should have lived for at least a year in the desired role (the so-called real life test) in order to experience whether he can live in the desired role before proceeding to the final surgical step. In this time, the additional hormone treatment can facilitate the development in the desired direction. (Ibid: 50)

Spengler (1980: 102) accorded particular significance to the ›real life test‹ and the preoperative hormone treatment.

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14 | Sigusch, Meyenburg and Reiche suggested a minimum age of 21 years. However, in exceptional cases surgery was considered in individuals that had reached the age of 18, provided the candidate had passed his or her adolescence (Sigusch/Meyenburg/Reiche 1979: 296).

15 | The fourth criterion corresponded with the seventh criterion Money and Ehrhardt listed as a precondition for sex reassignment treatment at Johns Hopkins Hospital (Money/Ehrhardt 1970: 71).

The committee's fifth criterion stated that two independent specialists were meant to give the indication for an operation. This criterion also resonated in Eicher's scheme of treatment. According to Eicher, two specialists on transsexuality, preferably psychiatrists and sexologists were responsible for the diagnosis (Eicher 1979: 476).

The sixth and seventh criteria dealt with issues pertaining to the pre- and postoperative care of patients. According to the sixth prerequisite, the candidate for surgery needed to be informed about the risks of surgery and the uncertain legal situation. Both the surgery and the legal situation required postoperative and social aftercare (Kockott 1978: 51).

Analogously to Money and Ehrhardt's eighth criterion (Money/Ehrhardt 1970: 71), the committee's last criterion stated that psychoses and cerebral diseases were a contraindication for sex reassignment surgery (ibid).

2.1.3 Establishing sexology as the authoritative voice on transsexuality

In the pre-legislative period, sexology firmly established itself as the authoritative voice on trans issues in the Federal Republic of Germany. Three measures contributed to this status. First, sexologists managed to achieve the impression of internal cohesion within and outside the discipline. Second, sexologists presented medical knowledge as expert knowledge to the legal and political realm, regardless of how speculative it was. Third, sexologists gained control of trans individuals seeking treatment.

Creating a sense of cohesion

As pointed out earlier on, in the 1970s the medical disciplines involved in the therapy of transsexual individuals had begun to organise sex reassignment treatment in multidisciplinary teams. Tasks were clearly distributed in the team with psychiatrists as the gatekeepers and plastic surgery, gynaecology, urology and endocrinology as executing disciplines. This division of labour, including its implicit hierarchy, was undisputed. As the plastic surgeon Lichtenfeld stated,

> [i]t is not the patient's desire or even the fees that constitute the indication for surgery but the knowledge on the patient. In my opinion, the complete exploration of the transsexual patients' psyche should be up to competent psychiatrists, psychotherapists and sexologists. They make a diagnosis and give the indication. Of course, the surgeon who performs the sex-transforming operations not only requires excellent surgical [skills] in this specialised area in plastic surgery but urological and gynaecological knowledge and skills at the same time, too. Nevertheless, he can only be an executing force with this particular clientèle. Undoubtedly, we surgeons are responsible for the surgical suc-

cess. The overall success of such an operation cannot be measured with our criteria. It can only be judged by the colleagues who hand over the patient to us. (Lichtenfeld 1980: 181)

The consensus on the organisation of a somatic transition produced a sense of cohesion within sexology.

Sexologists also demonstrated this cohesion to the outside through joint submissions at crucial points during the legislative process. On 18 June 1974 e. g., a commission of the DGfS submitted suggestions for legal provisions addressing the needs of transsexual individuals and in an effort to secure their basic rights to the then Minister of Justice (Krause et al. 1974).[16] On 28 Feb. 1979, German sexological associations collectively appealed to the *Bundesrat* and the minister presidents of the *Länder* to support trans legislation and to consider medical and psychological findings (Sigusch/Gindorf/Kentler 1979: 36). The latter is all the more remarkable, since the *Gesellschaft zur Förderung sozialwissenschaftlicher Sexualforschung* (Association for the Advancement of Social Scientific Sexuality Research [GFSS])[17] and the DGfS were at odds with each other prior to collaborating on the joint submission (ibid).

Sexological interventions into the political and legal realm

The abovementioned submissions marked clear interventions into the political realm. In the letter accompanying the 1974 medico-legal statement on transsexuality mentioned above, the authors urged the Federal Minister of Justice to

16 | The DGfS has a history of interventions into law and politics through public statements, reports and expert witnesses. Issues were e. g. the decriminalisation of male homosexuality (see, e. g., Giese 1958: 134-139; Sigusch et al.: 1980: 36; Sigusch et al.: 1981: 9; Pro Familia et al. 1989: 4), the decriminalisation of abortion (see, e. g., Dannecker et al. 1987: 28 f.; Hauch et al. 1993: 335-338) and issues pertaining to transsexuality and the law (see, e. g., Sigusch/Gindorf/Kentler 1979: 36; Becker et al. 2001: 258-268). For more public declarations and submissions, see DGfS undated a.

17 | The GFSS was founded in 1971 by Rolf Gindorf. It is the oldest non-medical sexological association in Germany. Its aim is to supplement traditional medical, biological and psychoanalytical approaches to human sexualities with social science perspectives, taking into account sociological, psychological, ethnological, pedagogical, legal and historical aspects. While acknowledging a biological substratum of sexuality, the GFSS argues that the variability of human sexualities cannot be explained without taking into consideration social norms that shape them (DGSS 2014). Unlike the DGfS, the GFSS mainly focused on issues pertaining to homosexualities and bisexualities in the decade prior to trans legislation (DGSS 2014a). In 1982, the GFSS became part of the German Society for Social Scientific Sexuality Research (*Deutsche Gesellschaft für Sozialwissenschaftliche Sexualforschung*; DGSS) (ibid 2014a).

draft legislation appropriately, quickly and comprehensively. They furthermore suggested treating the statement as a proposal and impetus (Sigusch 1991: 228).

Sigusch stated later on that framing transsexual individuals as »a minority disadvantaged by fate whose basic rights are withheld by the legal order« played an essential role in the politico-legal struggle that led to the Transsexual Act (ibid). The DGfS finally presented itself as spokesperson for the »transsexual minority consisting of one to three thousand individuals« (ibid).

As early as in the 1960s, sexologists had begun to publish their findings in law journals and to claim an expert position on transsexualism.[18] In 1967, e. g., the gynaecologist Nevinny-Stickel and the legal scholar Hammerstein collaboratively published the article »*Medizinisch-rechtliche Aspekte der menschlichen Transsexualität*« (Medico-legal aspects of human transsexuality) in the law journal *NJW*.

In the article, the authors commented on the latest jurisdiction of their time in higher court cases dealing with the legal recognition of post-operative transwomen. They contrasted the courts' rulings with state of the art medical knowledge on transsexuality, in particular male-to-female transsexuality. Moreover, the authors demanded of courts to take into consideration medical expertise in their decisions.

In both court cases, a post-operative transwoman pleaded to have the entry specifying an infant's sex/gender in the birth register altered from ›boy‹ to ›girl‹.[19] In the mid-sixties, the Chamber Court (*Kammergericht* [KG]*)* Berlin[20] and the High Regional Court Frankfurt ruled that surgical and hormonal measures removing male genitalia, forming a neovagina and inducing chest growth in a person who was at the time of birth unambiguously male did not render a person a female. Hence, the revision of the entry in the birth register does not apply as it would in the case of »ambiguous« genitalia at the time of birth (KG 1965: 1084; OLG Frankfurt 1966: 407).

The courts reasoned that an individual is assigned to a gender based on a person's morphology at the time of birth. The external sex characteristics are of particular relevance to the determination of gender (ibid). Moreover, the

18 | However, this was not a unilateral process. As we will see in the following subchapter, legal scholars and courts turned to medicine for reliable information on trans issues. The same applies to policy-makers as will become evident in the course of the legislative process.

19 | In the Federal Republic of Germany, s. 47[1] PStG provides for a revision of the entry in the birth register in cases in which a person was assigned to a gender that based on morphological facts proves to be wrong later on. Judges applied this particular section to intersex individuals. Since there was otherwise no legal provision to revise a person's gender status, some trans people attempted to be recognised as intersex individuals.

20 | The Chamber Court is the (translated) name of the high regional court in Berlin.

judges argued that a person's psychic gender affiliation was legally irrelevant compared to an individual's morphology (KG 1965: 1084; OLG Frankfurt 1966: 408). Finally, they reasoned that a transition from male to female was not possible, since a neovagina was not a »real« and »permanent« structure. Rather, it was »artificial« and simply resembled female genitalia (ibid). Furthermore, the court in Frankfurt blamed the transwoman for the adverse social consequences following sex reassignment surgery:

> The applicant's lack of recognition as a woman and the possibly resulting psychological distress as well as difficulties in his [sic!] social and professional life cannot be accounted for, since considerations of equity have no influence on this decision. He [sic!] should have been aware of the far-reaching consequences of his [sic!] voluntary decision before undergoing the operation. (OLG Frankfurt 1966: 409)

Nevinny-Stickel and Hammerstein criticised the courts' reasoning. They claimed that the courts did not sufficiently take into consideration fundamental medical principles and that they failed to interpret medical facts appropriately (Nevinny-Stickel/Hammerstein 1967: 664). The authors argued that based on the premise that bisexuality is a ubiquitous principle in humans and that a person's gender depends on a multitude of determinants, the psyche in humans is at least as significant with regard to a person's gender as are morphological facts. Therefore, the human psyche cannot be derived from morphological facts alone (ibid).

Nevinny-Stickel and Hammerstein extended their concept of intersexuality to encompass the ›incongruence‹ of the psyche and bodily facts (ibid: 665). Moreover, they believed to have observed a genetically induced feminisation in mtf transsexual individuals from puberty onward. This observation prompted them to classify male-to-female transsexuality as a form of intersexuality (ibid).

With regard to male-to-female transsexuality, which they called ›male transsexuality‹, they argued that sex reassignment surgery was the only justifiable medical response, since psychotherapeutic and androgenising hormonal treatment had failed so far. The authors also refuted the notion that a neovagina differs substantially from a vagina with regard to its appearance, functionality and permanence (ibid).

In the light of these medical facts, they insisted that medical experts were responsible for determining a person's gender and that the courts should therefore base their decisions on medical expertise:

> In this not so small circle of people with a discrepancy between the various determinants of gender, the assignment to a gender should occur according to the prevailing male or female predisposition while acknowledging all physical and psychic features. It is up to the medical expert to state this based on medical results and biological princi-

ples, and the courts should base their decisions on the expert recommendations. (Ibid: 666)

Gaining control of transsexual individuals

Apart from presenting themselves as experts vis-à-vis the legal realm and institutionalised politics, sexologists also claimed an authoritative role in relation to transsexual individuals seeking sex reassignment surgery. The conditions for an indication for surgery required of transsexual individuals to comply with profound interventions into their personal lives.

Although the programmes of treatment provided support during the ›real life test‹, such as e. g. issuing doctor's notes explaining the discrepancy between the outer appearance and the information on the ID (Sigusch/Meyenburg/Reiche 1979: 295), transsexual individuals seeking surgery were required to take on the role of the gender they wished to be recognised as in all wakes of life for at least a year prior to surgery (ibid: 297). This also meant to earn one's living while observing the conventions commonly associated with the gender the person identified with, despite having physical features that were in everyday life conventionally attributed to another sex/gender.

Another prerequisite for surgery was that transsexual individuals were expected to be willing to engage in frequent and extensive observations as well as in post-operative check-ups and follow-up examinations for years. Sexologists stopped short of requiring of trans people to pitch their tents on hospital grounds when stating that, »[t]he patient should be prepared for check-ups and follow-up examinations for years and should therefore have his permanent place of residence in a reasonable distance from the therapist« (ibid).

Moreover, the diagnostic process bereft transsexual individuals of privacy. As mentioned earlier on, Eicher's programme e. g. demanded an investigation into the patient's biography, including the sexual case history, and the enquiries extended to any number of persons the transsexual individual related to at any particular time of his or her life.

Sexologists also sought control over the transsexual subject by claiming the monopoly of knowledge on transsexuality and by monopolising treatment. Spengler e. g. attested an unfavourable prognosis to socially poorly integrated mtf transsexual individuals. He listed ties to the transvestite subculture among the signifiers of poor social integration (Spengler 1980: 102). The author particularly criticised hormonal self-treatment in the subculture (ibid: 103).

Finally, sexologists determined who was considered transsexual and eligible for treatment. Spengler e. g. differentiated between primary and secondary transsexuals and was inclined to give individuals who lived as effeminate homosexuals or as transvestites earlier on an indication for surgery in exceptional cases only and only after a long period of observation (ibid: 102 f.). Hence, the

self-understanding of a transsexual individual was accrued less credibility and authority than a medical expert's opinion.

2.1.4 Reorganising marginalised genders

The medicalisation of transsexuality required defining and isolating it from similar phenomena. This process of specification had two effects on the margins of the gender regime. First, transsexuality was created as a distinct category of subjects with specific properties. Second, transvestism, which was formerly a gender category, was subsumed under sexual perversions.[21]

Creating transsexuality as a distinct category[22]

All approaches to transsexuality defined the phenomenon as a completely transposed gender identity that occurs in men and women. I.e. the male-bodied transsexual considers herself a woman and the female-bodied transsexual considers himself a man (Eicher 1976: 42; Sigusch/Meyenburg/Reiche 1979: 250; Haynal 1974: 111; Schorsch 1974: 195; Eicher et al., 1980: 12).

However, clinical pictures of transsexualism mirrored less unanimous descriptions of transsexual individuals, and contradictory clinical observations even occurred within one approach itself. This applied in particular to issues pertaining to personal traits attributed to transsexual individuals and sexuality.

Despite these variations among clinical pictures, sexologists more or less constructed the transsexual subject as a phenotypically inconspicuous person who usually from early childhood onward identifies with, and stereotypically performs the gender other than the one he or she was assigned to. Moreover, the transsexual individual was said to manifest a profound hatred of his or her genitalia. Finally, sexologists generally constructed transsexual persons as heterosexual.

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21 | The differential diagnosis offers a more clear-cut separation of sexed and gendered subjects, including a homogeneous transsexual subject. Basing the construction of transsexuality on the differential diagnosis however at the same time means unduly homogenising sexological understandings of the transsexual subject, since clinical pictures of transsexual subjects varied. Therefore, I will initially deduce the construction of the transsexual subject from the clinical pictures and thereafter use the differential diagnosis to elaborate on the effects the delimitation of transsexuality had on gendered subjects formerly considered closely related.

22 | For a brief summary in German of the creation of transsexuality as a distinct category, using clinical pictures of transsexuality and the isolation of transsexuality from transvestism and male homosexuality based on the differential diagnosis, see de Silva 2013: 82-88.

On the whole sexologists either overtly (Schorsch 1974: 195) or by implication (König/Grünberger 1974: 734; Eicher 1976: 42; Eicher/Herms 1978: 36) suggested that transsexuals are biologically unambiguous. Sigusch, Meyenburg and Reiche described transsexual individuals' phenotypes more cautiously. They stated that genetic, chromosomal, gonadal and primary and secondary sex characteristics occur as often in transsexual individuals as in »other mentally ill« persons (Sigusch/Meyenburg/Reiche 1979: 251).

All sexologists agreed that in most cases the identification with the ›other‹ gender and gender role can be traced from an early age onward (König/Grünberger 1974: 734; Eicher/Herms 1978: 36). Eicher and Herms e. g. observed that childhood games usually correspond with the stereotypical behaviour demonstrated by the ›other‹ gender (Eicher/Herms 1978: 44). Sigusch, Meyenburg and Reiche noted that cross-dressing occurs as early as in childhood (1979: 251).

Sexologists observed that adult transsexuals have a sense of belonging to the ›other‹ gender, an identity König and Grünberger qualify as »nearly delusionary« (König/Grünberger 1974: 735). According to Schorsch, transsexual individuals live up to this sense of belonging as far as possible. Female-bodied men wear clothing culturally allocated to male-bodied men and vice versa. Male-bodied women live their social lives as women as do female-bodied men as men. Their gender performance includes the gender-specific language and gestures of the gender they identify with (Schorsch 1974: 195).

Like König and Grünberger, Sigusch, Meyenburg and Reiche added further impetus to their observations when they stated in their sixth cardinal symptom[23] that all transsexual individuals imitate and exaggerate the reactions, modes of expression and behaviour of the gender they perceive themselves to be:

> Nobody advocates gender-specific attributes more passionately and uncompromisingly than they do. At an adult age, transsexuals carry out a change of gender role in the private and professional realm up to the point of marrying in the new gender role and not infrequently without any medical measures. This transformation is often times expressed through rigidly and stereotypically taking on, and hyperbolising culturally dominant or dated ideals of masculinity or femininity. (Sigusch/Meyenburg/Reiche 1979: 251)

All sexologists concurred explicitly (e. g. Schorsch 1974: 195; Eicher/Herms 1978: 43) or by implication (e. g. Eicher 1976: 42; Kockott 1978: 50) that transsexual individuals present in the surgery as people who believe they are living in the wrong body. Schorsch observed that transsexuals with great persistence

23 | Sigusch, Meyenburg and Reiche (1979) organised their clinical picture of transsexual individuals according to twelve cardinal symptoms.

strive to get rid of the body with its hated attributes (Schorsch 1974: 195). In their fourth cardinal symptom, Sigusch, Meyenburg and Reiche specified that transsexual individuals react to their gender-specific features, in particular the culturally most prominent ones, with »hatred and revulsion« (Sigusch/Meyenburg/Reiche 1979: 251). The sexologists observed that transsexual individuals reject psychotherapy, which aims at »reconciling« the psychological gender with the physical one (Kockott 1978: 49; Eicher 1976: 42).

While Eicher (1976: 42) and Kockott (1978: 49) described transsexual individuals' requests neutrally, Sigusch, Meyenburg and Reiche's account severely pathologised transsexual individuals wanting (or needing) to change their assigned sex/gender status medically, socially and legally. In their third cardinal symptom, they qualified this urge as »obsessive« and »addiction-like« (Sigusch/Meyenburg/Reiche 1979: 251). While Kockott noted that transsexual individuals approach the doctor asking for help to adapt the body to the identity (Kockott 1978: 49), he observed that, »it is however not uncommon that transsexuals find their equilibrium without surgical intervention or with few surgical modifications only as long as they can socially live according to their desired gender role as far as possible« (ibid: 50).

Several sexologists observed psychological concomitants of transsexualism, such as addictions (König/Grünberger 1974: 735) or depressions (ibid; Kockott 1978: 49; Spengler 1980: 102). However, they assessed the results differently. While Kockott, and König and Grünberger considered transsexual individuals as such inconspicuous, they attributed depressions to conflicts with the environment (Kockott 1978: 49) or disturbed social integration (König/Grünberger 1974: 735). According to Spengler, the legal and social situation of post-operative transsexual individuals in the Federal Republic of Germany and the resulting stigmatisation unnecessarily endanger transsexual individuals' mental health (Spengler 1980: 102).

In contrast, Sigusch, Meyenburg and Reiche believed transsexual individuals to be *per se* profoundly disturbed. In their eleventh cardinal symptom, they noted that transsexual individuals' interpersonal relationships are troubled due to their lacking capacity for empathy and their inability to create ties with other people. The authors characterised transsexual individuals as »cold and distant, without affects, rigid, intangible and uncompromising, egocentric, demonstrative and coercive, urgently obsessed and constricted, strangely uniform, completely typified« (1979: 252). They concluded that, »once the inexperienced examiner has seen the second transsexual patient, he believes he knows all of them« (ibid). Furthermore, the authors observed a tendency toward psychotic breakdowns during crises (ibid). Considering that Sigusch, Meyenburg and Reiche's approach to transsexuality was to become highly influential in Germany (Sigusch 1991: 227), these psycho-medical assumptions finally homogenised

transsexual individuals and rendered them »decidedly barmy« (Whittle 1996: 207).

Sexuality constituted another area in which clinical pictures of transsexualism diverged among sexologists. Occasionally sexologists even presented a clinical picture, which contradicted their own observations. While König and Grünberger e. g. were not always able to observe a reduced libido in their patients (König/Grünberger 1974: 735), they nevertheless listed the latter in their clinical picture. According to Sigusch, Meyenburg and Reiche's seventh cardinal symptom, sexuality takes on a subordinate role compared to the »gender problem« (Sigusch/Meyenburg/Reiche 1979: 252).

With few exceptions, sexologists described transsexual individuals' sexualities as heterosexual. While Eicher and Herms reported rare cases in which psychologically female transsexuals consider themselves lesbians (ibid: 40), they observed that transsexual individuals usually engage in stereotypical heterosexual sex (Eicher/Herms 1978: 44). These exceptions did not appear in Sigusch, Meyenburg and Reiche's clinical picture. In their eighth cardinal symptom, they claimed that all transsexuals consider themselves heterosexual (Sigusch/Meyenburg/Reiche 1979: 252).

Separating transvestism and male homosexuality from transsexuality

The medical construction of a distinct transsexual subject went along with a reorganisation of the margins of the gender regime. In order to avoid treating individuals with similar ›symptoms‹ albeit different ›disorders‹ with an unsuitable therapy, sexologists drew clear borders between phenomena that were formerly understood to overlap or to display different degrees of the same characteristics. Transsexuality in male-bodied individuals was clearly set off against transvestism and feminine expressions of homosexuality.

In the 1950s to the mid-1960s, sexologists frequently conceptualised transsexuality on a continuum with transvestism. Nevinny-Stickel and Hammerstein, for instance, noted that transvestism and transsexuality are closely related phenomena (Nevinny-Stickel/Hammerstein 1967: 665). On this continuum of unusual expressions of gender, transsexuality featured as an extreme form of transvestism.[24]

However, in the process of delimiting transsexuality from transvestism, the latter was reframed as a disguising fetishism. Sexologists described transvestites as (male) individuals who wear clothing culturally associated with female-bodied women for sexual arousal and gratification. After the orgasm subsides,

24 | See also Bürger-Prinz/Albrecht/Giese 1966: 51. As Hirschauer notes, Benjamin, too, initially considered transsexuality as the most extreme form of transvestism and transvestism as the mildest form of transsexuality (Hirschauer 1999: 97).

transvestites were said to lose all interest in female clothing (Schorsch 1974: 196; Eicher 1976: 43; Sigusch/Meyenburg/Reiche 1979: 279). Unlike with mtf transsexual individuals, then, cross-dressing in transvestites was considered a temporary phenomenon (Sigusch/Meyenburg/Reiche 1979: 279 f.).

Nor was cross-dressing considered an expression of gender identity as with transsexual individuals. According to Schorsch, Sigusch, Meyenburg and Reiche, transvestism occurs in usually heterosexual men with a male identity, which is never questioned except for in moments of sexual arousal (Schorsch 1974: 196; Sigusch/Meyenburg/Reiche 1979: 279), while Eicher stated that transvestites may be homosexual or not (Eicher 1976: 43).

Sexologists also differentiated between transsexuality and transvestism based on the age they believed cross-gendered behaviour to emerge. As pointed out to in the analysis of the clinical picture of transsexual individuals, cross-gendered behaviour and a female identity in male-bodied women was said to usually manifest in early childhood, whereas cross-gendered behaviour in transvestites was most often observed to occur from puberty onward (Schorsch 1974: 196; Eicher 1976: 43).

The most important criterion sexologists used to distinguish between transsexualism and transvestism was their respective attitude towards their bodies, in particular their genitalia. According to Schorsch, Eicher, Sigusch, Meyenburg and Reiche, male-bodied transsexuals abhor every male attribute of their bodies and turn to physicians to have them removed (Schorsch 1974: 196; Eicher 1976: 43; Sigusch/Meyenburg/Reiche 1979: 279), while transvestites do not. Medical and surgical interventions then became the defining feature of transsexualism.

Sexologists also delimited transsexuality in males from homosexuality, in particular feminine expressions of male homosexuality, or in their terms, ›effeminate homosexuals‹. Sigusch, Meyenburg and Reiche distinguished between two categories of homosexual individuals who desire sex reassignment surgery. The first group desires sex reassignment surgery as part of a defence mechanism against problems resulting from homosexuality. Persons in the second group contemplate sex reassignment surgery as a means to attract a masculine, heterosexual man as a partner (Sigusch/Meyenburg/Reiche 1979: 279; Schorsch 1974: 196). Again, the main distinguishing feature between transsexual and homosexual individuals was that feminine homosexual persons do not reject their genitalia as transsexual individuals do (Sigusch/Meyenburg/Reiche 1979: 279).

2.1.5 Summary: Sexological constructions of gender and transsexuality in the pre-legislative decade

Despite variations in approaches to transsexuality, the notion that genitalia do not necessarily determine a person's gender was firmly established in West German sexology of the 1970s. This notion was based on the assumption that gender is comprised of different constitutive parts, such as chromosomes, gonads, hormones, internal and external genitalia and the psyche, and that these elements do not necessarily presuppose each other or relate to one another. As Nevinny-Stickel and Hammerstein point out, gender is so complex that there is no secure criterion for a person's ›true‹ gender (Nevinny-Stickel/Hammerstein 1967: 664). As a result, a gendered entity such as transsexualism became conceptualisable (de Silva 2013: 99).

However, sexologists marked transsexuality as an aberrant form of gendered self-understanding vis-à-vis female-bodied persons who identify as women and male-bodied persons who identify as men. The marginalisation of transsexuality and the normalisation of cis manifested themselves in the search for a cause of transsexualism while, by contrast, conventionally gendered individuals were not problematised. Moreover, the notion of transsexualism as abnormal was reinforced by attributing pathologising characteristics to transsexual individuals, such as e. g. classifying transsexual individuals as borderliners in psychoanalytically inspired approaches or by assuming that hormonal and genetic disorders trigger a transsexual development as somatic approaches suggested. Hence, despite the fact that sexology could not detect a secure criterion for a person's gender, it most certainly embarked upon, and reinforced the notion of ›normal‹ genders (cf. ibid: 100).

While sexology took on a constitutive and enabling role on behalf of transsexual individuals in the process of establishing itself as an authoritative power apparatus in regard to transsexualism vis-à-vis the legal and political realms, the medicalisation of transsexualism came at the cost of leaving little or no space for trans subjectivity and self-determination. On the one hand, sexology homogenised transsexual individuals by heterosexualising them, generalising the notion of having the ›wrong body‹ and by featuring transsexualism as a permanent disposition, which reaches back to early childhood (ibid: 100). On the other hand, contradictions in clinical pictures combined with sexological and psychiatric gatekeeping roles contributed to transsexual individuals' strong dependency on individual expert notions of gender-appropriate behaviour and, by implication, ›proper‹ signs of transsexuality. As TransMann e. V., a German political organisation of transmen and ftm transsexual individuals, states, expert assessments of whether a person is a ›real‹ man or woman led and continue to lead to arbitrary decisions in psycho-medical practice on the life of another person (TransMann undated).

The creation of clear boundaries between transsexuality, transvestism and homosexuality rendered individuals unintelligible from a hegemonic perspective that fell into the cracks of the newly framed categories of individuals with unusual gender expressions. Subjects, such as homosexual transsexual individuals, transsexual individuals who wished to be recognised as the experienced gender without surgical interventions, transvestites who wished to cross-dress other than for sexual purposes or who wished to temporarily modify their bodies with hormones were no longer conceptualisable (de Silva 2013: 100).

2.2 Legal developments and debates on transsexuality in the 1960s and 1970s

The shift from the notion of the immutability of sex and gender to the recognition of their mutability in legal terms marked the most striking development in pre-legislation jurisdiction and legal scholarship on trans. This chapter addresses the processes that contributed to this development.

A legal regulation of a transition from one gender to another only makes sense in a context, which renders gender legally significant. Drawing upon Walter (1975) and using examples from various fields of law that at some point made gender and sexuality relevant, the principles upon which law on sex/gender was premised prior to trans legislation in the Federal Republic of Germany will be briefly outlined.

The next section deals with formal aspects provided for a change of first names and a revision of gender status in the register of births before the Transsexual Act came into force. The respective legal rules outlined in the Civil Status Act are subject to interpretation. Therefore, jurisdiction on first names and legal options for a revision of gender status offered by courts and debated in legal scholarship will be discussed.

Thereafter this chapter elaborates on the relationship between law and medicine. Using examples from court decisions and the legal debate, this section investigates into legal interpretations of knowledge on transsexuality and transvestism generated in sexology. Furthermore, this section addresses the knowledge the legal scholar Eberle (1974) imparted with sexologists in the journal *Sexualmedizin*.

Based on an overview of reported court decisions on gender recognition in cases of trans, this chapter finally traces the development of jurisdiction prior to the Transsexual Act. Emphasis will be placed on procedures and arguments that either contributed to, or prevented a legal transition. Moreover, legal constructions of trans will be deduced from court opinions.

The findings in this chapter rely on the rules of the Civil Status Act that were applied in cases of trans(sexuality) before the Transsexual Act came into

force, legal commentaries, legal articles on transsexuality published in the law journals *NJW, Das Standesamt* (The Register Office [StAZ]), *Zeitschrift für das gesamte Familienrecht* (Journal for the entire Family Law [FamRZ]) and the *JuristenZeitung* (The Jurists' Journal [JZ]) as well as reported cases on trans.

The shift from the notion of the immutability of sex/gender to the acceptance of the sexological insight that a person's morphology does not alone determine a person's gender proved to be uneven in jurisdiction and legal scholarship. It largely depended on higher courts' willingness to engage in judge-made law and to subscribe to the notion that the psyche constitutes a determinant of a person's gender in combination with a constitutional reading of the Civil Status Act.

2.2.1 Principles in law on gender

The law in the Federal Republic of Germany rendered (and, at the time of writing, to a lesser extent continues to render) gender legally relevant. Depending on the matter of regulation, acts that deal with gender oscillate between two principles. One of them is the rule of differentiation, the other the rule of equal treatment (Walter 1975: 118). While Walter considered gender a »natural fact with fundamental social significance« (ibid: 117), the development of the acts mentioned in the non-exhaustive list of examples he uses to explain these two principles with, uncovers the social construction of this seemingly natural fact.

The rule of differentiation and the rule of equal treatment

According to the rule of differentiation, the law provides for different legal consequences for men and women. Until 01 Jan. 1975, marriage law e. g. provided for different marriageable ages for men and women. Labour law provided for the protection of expectant and nursing mothers (*Mutterschutzgesetz*; MutterschutzG) as does in a more general way the Basic Law (*Grundgesetz* [GG]) in Art. 6(4) GG. The latter rules that, »[e]very mother shall be entitled to the protection and care of the community« (BMJV 2017). The Conscription Act (*Wehrpflichtgesetz*; WehrpflichtG) ruled that men are required to perform compulsory military service (Deutscher Bundestag 2011).[25]

The rule of differentiation also applied in some acts in the criminal code (*Strafgesetzbuch* [StGB]). Sexual assault and rape (s. 177 StGB) was e. g. formulated in a gender-specific way. The perpetrator was defined as a man who rapes a woman. The victim was defined as a woman who was forced to engage in unwanted sexual and/or penetrative sexual acts (lexetius.com undated). The rule

25 | If a person refused to serve in the armed forces for reasons of conscience, the Civilian Service Act (*Zivildienstgesetz*; ZivildienstG) provided for an alternative service (BMJV undated).

of differentiation also applied to homosexuality. Section 175 StGB criminalised male homosexuality only.

The rule of equal treatment applies in instances in which the law rather wishes to see an equal treatment of men and women in areas of life in which the two legitimised genders are treated differently (Walter 1975: 118). Art. 3(2) GG e. g. rules that, »[m]en and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.« (BMJV 2017)

The dynamics of the principles

Several acts mentioned earlier on have been modified or abolished to the effect that the rule of equal treatment applies more often than the rule of differentiation. Hence, the laws have been reformed or supplemented to provide for individual situations, independent of a person's gender.

Since 01 Jan. 1975 marriage law and since the abolition of the latter on 01 July 1998, s. 1303 of the Civil Code (*Bürgerliches Gesetzbuch* [BGB]) e. g. rules that the marriageable age is in principle 18 years,[26] regardless of an individual's gender and with that identical with the age of majority. While the protection of expectant and nursing mothers remains in place, the Parental Support and Parental Leave Act (*Gesetz zum Elterngeld und zur Elternzeit – Bundeselterngeld- und Elternzeitgesetz* [BEEG]) which passed parliament on 05 Dec. 2006 allows for parental support and parental leave on application, regardless of the parent's gender.[27]

The rule of differentiation no longer applies to the two acts in criminal law mentioned above. On 05 July 1997, s. 177 StGB was reformed to encompass sexual assault. Moreover, rape and sexual coercion were no longer limited to extra-marital sexualised violence (lexetius.com undated). Most important for this argument is that the current act is formulated gender-neutrally (Laue 2008: 999). Hence, sexualised violence among persons of the same sex and sexual-

26 | Since 01 July 1998, exceptions are permitted, if at least one of the partners is 18 years old and the other partner is no younger than 16 years of age. In cases in which one of the partners has not reached the age of majority, the minor is required to apply to a local court to be exempted from the age limit (s. 1303[2] BGB). The minor can be either a man or a woman (Strätz 2007: 253). For a history of the development of the age of consent for men and women, see Strätz 2007: 250-252.

27 | The BEEG regulates the pay (s. 2[1] BEEG) or allowance (s. 2[2] BEEG) the parent taking care of the child is eligible to, the period parental support covers (s. 4[1] BEEG) and the modalities that apply when parental leave is shared (s. 4[3] BEEG). Moreover, the Act determines that working hours may be reduced or organised flexibly (s. 15[5] BEEG). For more details on the BEEG, see BMJV undated b).

ised violence perpetrated by women against men can be penalised. Section 175 StGB was abolished on 11 June 1994 (lexetius.com undated a).

In other areas, the law continued to distinguish between men and women for more than two decades to follow. While male homosexuality was decriminalised in 1994 and same-sex partnerships gained recognition on 01 Aug. 2001 when the Registered Life Partnership Act (*Gesetz über die Eingetragene Lebenspartnerschaft – Lebenspartnerschaftsgesetz*; LPartG [cf. BMJV undated a]) was passed, this does not mean that same-sex desire was considered equal to heterosexuality. The registered life partnership was designed as an institution ranking lower than marriage.[28]

Shifts in the application of the rules of differentiation and equal treatment that have occurred since pre-trans legislation times suggest that gender and gender relations are socially and legally modifiable. At the same time, notions of a binary gender system with polarised genders and heterosexuality as a privileged way of relating to one another continued to inform jurisdiction during the investigation period, albeit in a different guise than prior to the Transsexual Act.

2.2.2 Legal provisions for a revision of first names and the entry of gender in the register of births prior to the Transsexual Act

Since gender matters to law, it offers legal provisions that lay down the procedure to determine a person's gender and to state the outcome as binding

28 | While the Registered Life Partnership Act (2001) recognises same-sex partnerships, it initially provided significantly fewer rights than a marriage. This applied particularly to the areas of tax law, adoption law, survivor's social security, collective bargaining law and salary law (Adamietz 2008: 117). Since then, several Federal Constitutional Court decisions have contributed to an approximation of rights. On 21 July 2010, the Federal Constitutional Court ruled that it is unconstitutional to discriminate against registered life partners in inheritance tax (BVerfG 2010). On 19 Feb. 2013, the Court decided that the ban on successive adoption for registered life partners was unconstitutional (ibid 2013). A few months later, the Court declared the unequal treatment of registered life partnerships and marriages in tax law, especially the method of calculating income jointly for married couples only, unconstitutional (ibid 2013a).
While the section on marriage does not define marriageable genders, jurisdiction with few exceptions as of 27 May 2008 (see chapter 3.3.3) continued to interpret marriage as a state-santioned union of a woman and a man and, as such, as an exclusively heterosexual institution. On 30 June 2017, the *Bundestag* passed the Bill to introduce the right to marriage for same-sex individuals (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*) (Deutscher Bundestag undated).

(Walter 1975: 118). Prior to the Transsexual Act, the Civil Status Act was the only instrument that served this particular function in the Federal Republic of Germany.[29] I will initially outline relevant rules of the Civil Status Act[30] before turning to legal controversies over the interpretation in cases in which trans was at issue. While the Civil Status Act lays down the procedure to determine a person's gender and provides for a revision of gender status in certain cases, neither the 1957 (Gaaz/Bornhofen 2008), nor the revised version of 2007 (BMJV undated c) define the criteria for an individual's gender, the number of gendered subjects or the rules that apply to naming.

Relevant regulations of the Civil Status Act

Former s. 2 PStG of the Civil Status Act described the purpose of the registers of births, marriages, families and deaths. Section 2(2) PStG specified that the registers of births, marriages,[31] families and deaths serve to document the aforementioned events. The registrar was responsible for the documentation of a person's civil status (s. 1[1] PStG). Section 1(2) PStG ruled that the registrar conducts the abovementioned registers, which altogether constitute the registries on a person's civil status.[32]

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29 | Until the first German Civil Status Act was established in 1875, Protestant and Catholic churches had conducted christening, marriage and death registers. It is part of the endeavour of the Prussian state to separate the state from religion that Prussia and later on, the whole empire introduced the obligatory civil marriage and the certification of a person's civil status that was to be executed by state-implemented registrars. The second German Civil Status Act came into force in 1937. It has so far undergone two major reforms in 1957 and 2007 (Gaaz/Bornhofen 2008: 17).

30 | Unless stated otherwise, descriptions of the Civil Status Act refer to the version that was valid prior to the Transsexual Act. Otherwise, the legal debate on gender recognition based on provisions in ss. 30(1), 30(2), 46(1)3, 46(2), 47(1) and 47(2) PStG prior to the Transsexual Act would not make sense. Wherever relevant to the argument, major revisions to the Civil Status Act (2007) will be pointed out to.

31 | The registered life partnership (2001) is nowadays legally integrated into the registry system. It appears in the legal text as an event equal to marriage, birth and death (see e. g. s. 1[1] PStG 2007). Moreover, ss. 1, 3 and 9 LPartG rule that the registrar's office is in charge of accepting explanations to found a life partnership and of determining the name. These regulations are subject to provisions that allow the *Länder* to maintain regulations that differ from the model of the register office or else to provide for such regulations (Gaaz/Bornhofen 2008: 118).

32 | As of 19 Feb. 2007, the Civil Status Act defines the term ›civil status‹ (*Personenstand*) in s. 1(1) PStG (Gaaz Bornhofen 2008: 19). Moreover, the term ›registrar‹ (*Standesbeamte*) has been replaced by the name of the administrative body, i. e. the ›register office‹ (*Standesamt*) (ibid: 21). Section 1(2) PStG now states that, »[t]he authorities

Section 16 PStG ruled that a child's birth be reported to the registrar of the district within a week's time. Among other facts, the registrar entered the child's gender (s. 21[1]3 PStG), first names and surname (s. 21[1]4 PStG) into the birth register.[33] If the person announcing the child's birth was unable to name the child's first names, they had to be announced within a month's time. The names were then recorded on the margin of the birth entry.[34]

However, delaying the announcement of a birth for a period exceeding three months without an investigation into the matter was prohibited (s. 28[1] PStG). According to s. 28(2) PStG, the person who failed to announce the child's birth

responsible for civil registration according to the law of the *Länder* document the civil status in accordance with this Act; they assist in contracting marriage and founding life partnerships«.

33 | The fact that the law asks for the specification of an individual's gender is based on 19th-century medical knowledge, which assumes that every person has a gender (Plett 2007: 164).

34 | The provisions for a delayed announcement e. g. applied to children born with genitalia that do not fit medical norms established for either male or female individuals. The grounds for the provision were that the diagnostic process and doctor-parent consultations taking place before a child is assigned to either the female or the male sex might exceed the time limit stated in s. 16 PStG.

In the aftermath of extensive consultations (cf. Deutscher Ethikrat 2011; 2012) and recommendations published by the German Ethics Council (cf. Deutscher Ethikrat 2012a) on 23 Feb. 2012, s. 22(3) PStG came into force on 01 Nov. 2013. This section rules that if a child cannot be assigned to the female or male sex, a child's sex may not be entered into the birth register. While the introduction of s. 22(3) PStG was meant to improve the situation of intersex individuals, intersex organisations criticised the amendment on several grounds. The German branch of the Organisation Intersex International (OII-Germany/ Internationale Vereinigung intergeschlechtlicher Menschen e. V. [IVIM]) e. g. argued that the provision is prescriptive, rather than optional. Moreover, the new regulation continues to leave it up to physicians to define an individual's sex/gender. In addition, OII-Germany fears that the amendment will increase the pressure on parents and physicians to prevent intersexuality, using abortion, prenatal and postnatal interventions as means. Finally, OII-Germany suggests that instead of providing for an option for all individuals to leave vacant the sex/gender entry, the new regulation produces exclusions and risks the stigmatisation of intersex individuals (OII-Germany 2013).

On 10 Oct. 2017, the Federal Constitutional Court decided that civil status law must provide for a further »positive« gender entry. The Court ruled that s. 22(3) PStG violates general rights of privacy and the ban on discrimination as laid down in the Basic Law when civil status law demands a gender entry but does not provide individuals, who cannot be assigned to the male or female sex any other positive entry than ›male‹ or ›female‹ (BVerfG undated).

was obliged to bear the costs of the investigation. Moreover, s. 68 PStG defined the delay or absence of an announcement of any event covered by ss. 16-19, 25, 32 and 34[35] as an infringement of law subject to a fine (Plett 2007: 168).

Neither the 1957 nor the revised version of the Civil Status Act (nor any other German statute for that matter) define the criteria for determining a child's gender. Instead, courts ruled that a child's gender is in general established on the basis of an inspection of the physical constitution at the time of birth, in particular the external genitalia (cf. KG 1965: 1084 and KG 1971: 80).

The Civil Status Act does not state that the gender category ›boy‹ or the adult version ›man‹ follows from a male constitution and the category ›girl‹ or ›woman‹ from a female anatomy. In a court decision on 01 Nov. 1957, the Chamber Court ruled that the physical constitution determines the gender of a married partner, regardless of the individual's psyche (KG 1958: 61).[36] This is all the more remarkable, since an adult is, unlike a newborn child, usually able to express his or her understanding of self.

The Civil Status Act does not lay down the number of possible genders, either. It is only in a legal commentary on s. 21(1)3 PStG that the number of genders is limited to the entry of ›boy‹ and ›girl‹ (Hepting/Gaaz 2000: PStG s. 21, note 17; quoted in Plett 2003: 26). The commentator's opinion was based on a decontextualised and truncated Chamber Court ruling[37] of 09 Nov. 1928 stating that »[t]he entry ›*Zwitter*‹[38] is inadmissible, because the term is unknown

35 | These sections dealt with the announcement of various circumstances of births and deaths.

36 | In this particular case, the Court declared a marriage between two female individuals of which one identified as a man a ›non-marriage‹. The Court reasoned that marriage in a legal sense is a union of a man and a woman that is oriented towards building a full life partnership. Therefore, a same-sex marriage was conceptually impossible and considered a »non-marriage« (KG 1958: 61). For a more detailed account of this case, including medical opinions on the individual who identified as a man, see Klöppel 2010: 565 f.

37 | The full passage states that »[t]he German Civil Code assumes that every person may belong to one gender only. It is only acquainted with man and woman and does not, unlike the General State Law for the Prussian States include any regulations on *Zwitter*. *Zwitter* are, depending on the findings, assigned to the male or female sex. The prevailing sex is decisive. If no sex prevails, the rules that require a certain gender cannot be applied.« (KG 1931: 1495)

38 | Several terms currently circulate in German language to signify individuals with uncommon genitalia. These are the older terms ›*Zwitter*‹ and ›*Hermaphroditen*‹ and the newer terms ›*intersexuelle Menschen*‹ (intersex individuals), and – since the publication of new guidelines on the clinical treatment of intersex infants and children in the aftermath of the Intersex Consensus Conference in Chicago in 2005 (Hughes et al. 2006) – [*Menschen mit*] ›*Störungen der Geschlechtsentwicklung*‹ (AWMF 2011). Variations on the latter are

to German law« (ibid).[39] This understanding is repeated in a later version of the legal commentary. However, the commentary also states that in instances in which an unambiguous identification is not possible, the gender is undeterminable (Gaaz/Bornhofen 2008: 143).

Finally, the Civil Status Act does not specify a link between a child's sex and the first names. This particular link was established in a Federal Court of Justice decision on 15 Apr. 1959. The Court ruled that with exception of the additional first name ›Maria‹,[40] boys may not obtain a female name (BGH 1959: 1582).[41] The Court reasoned that it contravenes the »right order« established by customs and conventions when naming does not observe the »natural order« of the sexes/genders and when boys are given names that are in general known

›*Besonderheiten und Störungen der Geschlechtsentwicklungen*‹ (UniversitätsKlinikum Heidelberg undated) or ›*Besonderheiten der Geschlechtsentwicklung*‹ (Netzwerk DSD 2008) as translations of the current medical terminology and classification ›Disorders of Sex Development‹ (DSD).

Legal texts at the time of the General State Law for the Prussian States referred to the phenomenon as ›*Zwitter*‹. *Zwitter* implies ›*zwei*‹ (two). There is no equivalent in English. I will use the German term ›*Zwitter*‹ when referring to legal texts in German prior to the introduction of the term ›*intersexuelle Menschen*‹. When discussing current issues related to intersexuality, I will not refer to intersex individuals as ›individuals with DSD‹ because of the normative, pathologising and stigmatising implications of the term ›disorders of sex development‹.

39 | Plett refutes the notion that the term ›*Zwitter*‹ is unknown to German law. She points out that the General State Law for the Prussian States of 1794 [*Allgemeines Landrecht für die Preußischen Staaten*; PrALR] was very well acquainted with the term. According to s. 19 PrALR, it was up to the parents to decide on the gender according to which they wished to educate their intersex child. Section 20 PrALR ruled that at age 18 the intersex individual (*Zwitter*) was permitted to choose the gender s_he wished to live according to. Hence, the law only tolerated intersexuality for a certain duration. The choice was relevant, because different rules were in force for men and women as s. 22 PrALR suggests. However, if third-party rights depended on the *Zwitter*'s gender, the former was allowed to apply for an expert investigation. Section 23 PrALR ruled that in the latter case, the expert's findings decided on the *Zwitter*'s gender, regardless of whether it supported or contravened the *Zwitter*'s or the parent's choice (Plett 2002: 31; 2003: 27).

40 | In some Catholic regions in Germany, it is a custom to add Maria to a boy's other first name(s) (cf. Sieß 1996: 53).

41 | In this particular case, a father wanted to give his male child two names conventionally given to male children and one name usually given to a female child (however, not Maria). While the High Regional Court Saarbrücken supported the parent's position, adverse rulings in Bavaria and Hesse prompted the OLG Saarbrücken to forward the case to the Federal Court of Justice.

to be girl's names and vice versa. The purpose of the first name is, among other things, to mark a person's sex/gender (ibid).[42]

However, the Civil Status Act provides for changes to, and revisions of initial announcements. In its 1957 version, ss. 30(1) and 30(2), 46a(1)3, 46(2) and 47(1) and 47(2) PStG were particularly relevant to the academic debate on acknowledging a person's gender prior to the enactment of the Transsexual Act. The provisions can be distinguished according to the institution entitled to change completed entries.

Section 30 PStG dealt with the establishment and change of descent and name. Section 30(1) PStG ruled, among other things, that a note needed to be entered in the margin with exception of facts regulated in ss. 29 and 29b PStG[43] when the child's descent or name had been established with generally binding effects or when the civil status or the child's name had changed.[44] In these cases, a certified copy, which explained the course of events, had to be sent to the registrar who had documented the child's birth (s. 30[2] PStG).

Similar to the revised version of s. 46 PStG, the former s. 46a PStG regulated the revision of a completed entry by a registrar. According to s. 46a(1) PStG, a registrar was allowed to correct obvious spelling mistakes. Based on public documents or investigations of his or her own, the registrar was furthermore entitled to correct statements on the parent's profession and place of residence in the register of births and the announcing person's statements on the first and family names, the profession and place of residence (s. 46a[1]3 PStG). According to s. 46a(2) PStG, the registrar had the authority to revise other completed entries in the registers of marriage, birth and death, if the correct or complete facts had been established by domestic certificates on a person's civil status.

Section 47 PStG[45] regulated the revision of an entry by a court. In any other case than the aforementioned, a completed entry could only be revised by an

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42 | The Federal Court of Justice claimed that the fact that the name signifies a person's sex/gender is generally considered self-evident. Therefore, the Civil Status Act limited the entry of an individual's sex/gender in the civil status registers to the entry in the register of births. In entries in registers of marriage, family and death, a person's sex/gender can only be derived from an individual's first name (BGH 1959: 1583).

43 | Section 29 PStG regulated cases in which the recognition or establishment of fatherhood were entered in the margin, while s. 29b PStG dealt with the recognition of motherhood.

44 | As a result of the enactment of the Transsexual Act (TSG), the statement on gender was added to the list.

45 | The current version of s. 47 PStG substantially extends the powers of the register office. Section 47(2)1 PStG for instance permits the register office to revise a child's sex/gender entry upon notification. However, areas subject to revisions listed in s. 47 PStG may also involve courts (s. 48 PStG). One of the reasons for increasing the powers of the

order of court. The same applied when the registrar was in doubt whether he or she was permitted to revise an entry (s. 47[1] PStG). In such an instance, all parties involved and the supervisory authority were given the option to file a claim for revision. They had the right to be heard before the decision was made (s. 47[2] PStG). Legal procedures had to follow the regulations on matters of non-contentious jurisdiction (*Freiwillige Gerichtsbarkeit*; s. 48[1] PStG). Local courts located at a regional court were exclusively responsible for decisions on matters provided in ss. 45 and 47 PStG (s. 50[1] PStG).[46]

Section 45 PStG dealt with court orders in instances in which the registrar refused to execute an official duty. Section 45(1) PStG ruled that if a registrar refuses to carry out an official duty, the party involved or the supervisory authority may file a claim to the local court. The latter was entitled to order him or her to perform the duty.[47] However, the registrar, too, was in cases of doubt permitted to bring about a decision of the local court on whether he or she had to carry out an official duty. The procedure in these cases followed the rules of handling a refusal to perform an official duty (s. 45[2] PStG).

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register offices was to relieve the burden on the courts (Gaaz/Bornhofen 2008: 294). Since the reform of the Civil Status Act in 2007, regulations on revisions based on an order by a court have been moved to s. 48 PStG.

46 | The High Administrative Court of Northrhine Westphalia (*Oberverwaltungsgericht* NRW; OVG) in Münster dealt with the case of an intersex individual (*Zwitter*) whose gender was entered as ›girl‹ in the birth register. The 45-year-old plaintiff wished to have his birth entry changed to ›boy‹, since he felt he was a man and disposed of functioning male gonads, whereas his female gonads had ceased to function. While several medical expert reports supported his claim, the High Administrative Court argued that it could not decide on the matter for procedural reasons. The Court reasoned that administrative courts do not revise the entry of gender, and even if they did, civil courts were not bound by administrative court rulings. The Court cited s. 50 PStG to substantialise its decision (OVG NRW 1954: 254).

47 | The legal case history of the Chamber Court decision on 08 Sept. 1970 provides an example of this variant of s. 45 PStG. In this particular case, the registrar had sent a transwoman's application for a revision of gender status in the birth entry to the local court. The latter granted the application and ordered a revision of the gender status via a note in the margin of the birth entry. Following an immediate complaint by the authorities, the regional court reversed the local court decision. The transwoman filed a complaint with the Chamber Court against the decision. The Chamber Court in turn argued in favour of reversing the regional court decision (KG 1971: 80). However it referred the case to the Federal Constitutional Court, since the High Regional Court Frankfurt had interpreted s. 47 PStG differently in its decision on 14 Feb. 1969 (ibid: 82) (cf. Sieß 1996: 66).

The legal academic debate on reading transsexuality into the Civil Status Act

When devising the Civil Status Act the legislator did not anticipate that a person's sex might change in the course of an individual's life, nor that a person's gender identity might not follow from the external genitalia at the time of birth. Faced with law suits initiated by trans individuals who wished to have their respective genders formally recognised, legal controversy arose over whether and how to interpret the regulations established in the Civil Status Act to accommodate this request. Legal scholars focused on analogous applications of ss. 30(1), 46a and 47(1) PStG as possible solutions.

Eberle suggested reading transsexuality into s. 46a PStG by resorting to a legal fiction. A legal fiction means to create a legal regulation according to which an unreal fact is treated as though it existed. Eberle cautioned that such a fiction needs to be limited to specific legal relations only. Applied to transsexuality, Eberle suggested that such a legal fiction regulates that a person be counted as a member of the ›other‹ sex, if he or she has due to a »psychosexual abnormality« developed a psychic attitude and demeanour known of the ›other‹ gender, even though he or she is on the basis of physical characteristics »not really« a member of the ›other‹ sex (Eberle 1971: 223).

Walter however doubted that Eberle's suggestion constituted a viable approach to recognise a legal transition from one gender to another. First, the procedure implies ›revising‹ an entry in the register of births, although the initial entry continues to be correct. This applies particularly since Eberle based his criteria for gender assignment on physical features (Walter 1975: 120). Second, Walter argued that an application of s. 46a PStG was unsuitable, since a judge is responsible for deciding on core areas of a person's civil status (ibid: 119).

While Walter suggested that ss. 47(1) and 30(1) PStG lend themselves to an analogous application, he opted for the latter. He argued that s. 47(1) PStG refers to entries that are incorrect from the outset, while s. 30(1) PStG covers instances that occur later on. Transsexuality only manifests itself at a later point in life, and a transsexual predisposition cannot be proved at the time of birth (Walter 1972: 267). Moreover, he argued that s. 47(1) PStG may lead to backdating the recognition of the ›acquired‹ gender to the time of birth. Such a linear concept contributes to a regulation of legal consequences that rules out differentiated solutions (Walter 1975: 119).

By contrast, Fuglsang-Petersen argued in favour of an analogous application of s. 47(1) PStG as opposed to s. 30(1) PStG. He assumed courts would presumably reject an analogous application of s. 30(1) PStG to a revision of gender status. He argued that this rule presupposes a change of first names. Moreover, it would not assign to the registrar the task of deciding upon a revision of gen-

der status and of stating this event in a public certificate (Fuglsang-Petersen 1971: 128).[48]

Fuglsang-Petersen argued that the revision of an entry in the register of births according to s. 47(1) PStG does not linguistically assume the initial incorrectness. The section also covers instances in which an entry becomes wrong due to actual facts. He claimed that a transsexual individual has significantly and forever changed his or her actual appearance since he or she was born. Since the differentiation of people into males and females determines social life and the legal order in many ways, it is the purpose of s. 47(1) PStG to guarantee that the entry into the register of births conforms with the person's actual civil status (ibid: 130).

As the legal academic debate shows, none of the aforementioned sections of the Civil Status Act could be directly applied to cases of transsexuality. The debate also suggests that s. 47(1) PStG proved most suitable for an analogous application.

Jurisdiction on the application of s. 47(1) PStG to cases of transsexuality

Indeed, s. 47(1) PStG was the regulation judges considered most frequently in cases that dealt with gendered manifestations the law had not accounted for. However, and in contrast to cases that involved intersex individuals (Sieß 1996: 60; Klöppel 2010: 563),[49] court decisions in cases of transsexuality ranged from downright rejection of an analogous application of this section to an analogous application, and the latter was linked to various requirements.

The decision of the High Regional Court Frankfurt on 08 Dec. 1965 is an example of a rejection of an analogous application of s. 47(1) PStG. As with all courts that refused to apply this section analogously,[50] the Court interpreted s. 47(1) PStG narrowly as opposed to the broad reading Fuglsang-Petersen suggested. I.e. the courts reasoned that they could not grant a revision of gender status in the register of births for lack of a legal basis.

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48 | Indeed, in its decision on 08 Sept. 1970, the Chamber Court ruled out an analogous application of s. 30(1) PStG). The Court reasoned that the regulation was clearly designed for legal facts that could be proved by certificates. The Court argued that a case of a subsequent revision of a person's gender status is a procedure that relies on an appreciation of evidence, most notably an appreciation of medical expert reports. The latter are however not recognised as certificates in the sense of s. 30(2) PStG (KG 1971: 81).

49 | For a comparison of the different treatment of intersex and trans individuals dealing with a revision of gender status in the Federal Republic of Germany and the German Democratic Republic from 1945-1980, see Klöppel 2010: 551-584.

50 | See e. g. the decision of the Chamber Court on 11 Jan. 1965 (KG 1965: 1084).

The abovementioned court ruled in the case of a post-operative transwoman that from a legal point of view a transition from male to female was not possible, since the »natural« physical findings as opposed to psychological factors are decisive for assigning a person to a gender. The loss of the external male genitalia due to a surgical intervention is legally analogous to the loss of genitalia resulting from an accident, war or emasculation (OLG Frankfurt 1966: 406; cf. Sieß 1996: 64).

Several courts decided to apply s. 47(1) PStG analogously. However, this did not necessarily coincide with a legal recognition of an applicant's gender. Depending on the conditions added to the analogous applications, the respective court ruling led to a rejection or recognition of the demand for a revision of gender status in the birth entry.

The decision of the High Regional Court Frankfurt on 14 Feb. 1969 is an example of a very limited application of the regulation that necessarily led to the rejection of a post-operative transwoman's request to have her gender legally recognised. As in the earlier decision, the Court interpreted s. 47(1) PStG narrowly when stating that only a birth entry that was incorrect from the beginning may be corrected. However, the Court implied that if there was a provable biological basis for transvestism,[51] (s. 47[1] PStG) could be applied.

The Court ruled that as long as medical science cannot state the cause of, and the conditions for the development of transvestism, a person who belongs to this group of people cannot be legally assigned to the ›other‹ gender, even though the individual's genitalia have been surgically reorganised. The Court held that jurisdiction and legal scholarship were not authorised to fill out a lack of knowledge in the field of medical science (OLG Frankfurt 1969: 1575).[52]

The decision of the Regional Court in Münster on 31 Jan. 1963 serves as an example of an analogous application of s. 47(1) PStG, which resulted in recog-

51 | As Eberle pointed out, the Court subsumed transsexuality under transvestism, which was incorrect from a medical perspective of the time (Eberle 1971: 221). Sieß suggested that the Court made a »classical legal mistake« by examining a matter that was not even submitted for a decision (Sieß 1996: 64).

52 | Legal scholars severely criticised this decision. Walter e. g. considered the decision inhumane (Walter 1975: 266). According to Sieß, the decision only contributed to confusion and dissatisfaction among transsexual individuals (Sieß 1996: 65). Similarly, the Chamber Court deviated from the High Regional Court's decision when it stated that s. 47(1) PStG applied, if this change was not based on the person's arbitrary behaviour. According to the Chamber Court, it was irrelevant whether the cause and the formation of this change were scientifically provable or whether there was a biological predisposition at the time of the entry (KG 1971: 79).

nising the applicant's gender.[53] In this case, the Court stated that the legislator did not provide for a case in which an originally male individual claimed to have always conceived of herself as a girl or woman, respectively, and who had obtained the physical characteristics of a female individual. Cases of this kind have only become possible and known due to progress in medicine (LG Münster 1963: 250).

The Court decided to fill the legal gap via an analogous application of s. 47(1) in accordance with the purpose of the Civil Status Act to provide correct records on a person's civil status in public registers. The Court ruled that such a procedure is justified in a case in which an individual no longer disposes of the features that reveal the original sex, manifests »all« the characteristics of the ›other‹ sex, identifies with this gender and is considered as such in his or her social environment (ibid).

2.2.3 Medical knowledge in jurisdiction and legal scholarship on transsexuality

German law does not have an inherent and static concept of gender. Rather, it relies on medical knowledge of sex and gender, and the law is expected to take into account medical advances in this field (Walter 1975: 120; KG 1971: 81).[54] However, in instances in which medical knowledge is at issue in court cases and legal scholarship, it is at the same time subject to legal interpretation.

Legal interpretations of gender, and trans in particular, ranged from direct quotations of medical literature to ›creative readings‹. Judges' and legal scholars' subjective perspectives on gender and trans as well as in part medical experts' and scholars' imprecise use of terminology contributed to a wide array of concepts in jurisdiction and legal scholarship.

Legal interpretations of medical concepts of gender in jurisdiction and legal scholarship[55]

Legal concepts of gender alternated between those common in everyday knowledge and the latest medical concepts. While e. g. the Chamber Court rulings on marriage and trans in the 1950s and 1960s were informed by social conventions of the time, the Chamber Court revised its opinion in a court ruling on

53 | Further examples are the decision of the Regional Court Hamburg on 20 Feb. 1956 on a case of ›true hermaphroditism‹ (LG Hamburg 1958: 128 f.) and the Chamber Court opinion in a case of transsexuality on 08 Sept. 1970 (KG 1971: 79-82).

54 | This dependence on medical knowledge also explains why judges consult medical experts when deciding on a person's gender.

55 | For a German version on the findings presented in this and the following section, see de Silva 2013: 89-93.

trans at the beginning of the 1970s to accommodate latest developments in medicine on gender.

In its decision on 07 Nov. 1957 on the status of a marriage of two (presumably) female-bodied partners of whom one identified as a man, the Chamber Court ruled that according to general and undisputed understandings a person's gender depends on his or her physical constitution (KG 1958: 61). The Chamber Court specified determinants of gender and the hierarchy of its constituent components in its decision on 11 Jan. 1965 when it held that »a person's gender assignment is generally determined by the external physical constitution, in particular by the external genitalia. By contrast, the psychic attitude is not decisive.« (KG 1965: 1084)

The Chamber Court revised its former opinion on gender in its landmark decision on the recognition of a trans person's gender on 08 Sept. 1970. Based on an excerpt from Nevinny-Stickel and Hammerstein's influential article (Nevinny-Stickel/Hammerstein 1967: 663 f.), the Court stated that, »[n]owadays it needs to be considered secured medical knowledge that a person's gender is not determined by the constitution of the genitalia and sex characteristics alone but by the psyche, too« (KG 1971: 81; cf. Sieß 1996: 65).

Legal interpretations of medical concepts of trans in jurisdiction and legal scholarship

Just as concepts of gender varied in jurisdiction and legal scholarship, so did legal understandings of trans. Here again, legal interpretations of trans ranged from precise accounts of the latest medical findings to obvious misunderstandings of medical notions.

The legal scholar Walter, e. g., precisely summarised state of the art medical understandings of transsexuality as they appeared in publications by e. g. Schorsch (1974). Walter described transsexual individuals as male or female individuals who dispose of a contrasting gender identity and therefore consider their bodies as an »error of nature«. Transsexual individuals try with all means to adapt their physical appearance to the gender they experience psychologically (Walter 1975: 117).

According to Walter, this endeavour is not only restricted to medical aspects but extends to the social environment, too, in particular to the adaptation of appropriate first names. In accordance with the widespread sexological opinion of the time, Walter pointed out that the only cure consists of supporting the request for sex reassignment surgery after a period of careful observation, since psychotherapy and hormone treatment that conform to the body have failed. As in sexological publications discussed earlier on, Walter distinguished between transsexuality and transvestism (ibid).

Both court opinions in decisions on trans by the High Regional Court Frankfurt in the 1960s provide examples of legal misinterpretations of medi-

cal knowledge. In its decision on 08 Dec. 1965, the Court e. g. held that the applicant's, i. e. the transwoman's, vagina and female breasts and the hormone-induced psychological development only produced an »artificial« as opposed to a »natural« condition that does not functionally correspond with the internal gender predisposition (OLG Frankfurt 1966: 408). Walter critically commented on this particular statement that, »[s]uch jurists' psychology constitutes an (unscientific) transgression« (Walter 1975: 120).

In a later ruling on a transwoman's gender, the same court suggested that, »initially he [sic!] identified psychologically and later on physically with the female sex due to hormone treatment and surgery« (OLG Frankfurt 1969: 339). The lawyer Eberle countered this notion. He correctly noted that sex reassignment surgery does not create a break in the sense that it is only possible to consider a person transsexual after surgery. Rather, it is the psycho-sexual attitude that renders a person a transsexual individual, regardless of medical and surgical interventions (Eberle 1971: 222).

However, misreadings, if not arbitrary readings of medical concepts were not limited to jurisdiction. They also occurred in scholarly legal articles. The leading senior government official Becker e. g. gave the following reasons for the development of transvestism in his journal article called *Mann oder Frau? Rechtsprobleme der Intersexualität* (Man or woman: Legal problems of intersexuality):

> Causes of transvestism are very complex. However, it is not possible to ascertain a unanimous opinion. Probably a hyperfunction of the pituitary gland, a specific predisposition in combination with particular environmental influences, a tendency towards perversion, in particular towards fetishist interests, an identification complex, a narcissism, but also neuroses and the so-called Freudian castration complex have a determining influence. One can distinguish between permanent and partial transvestites, whereas the groups with which especially police authorities deal with are mostly homosexual transvestites. (Becker 1965: 191)

As Eberle stated, transsexualism and transvestism were frequently and erroneously subsumed under intersexuality in jurisdiction and in medical publications (Eberle 1971: 222). Apart from confusing categories and based on medical categorisation of the 1950s, Becker fabricated further causes of transvestism than did medicine.

Indeed, an inconsistent use of terminology runs through several medical and legal texts, contributing to a confusion of terms in jurisdiction and legal scholarly publications. Carsten, e. g., subsumed transsexuality under intersexuality (Carsten 1970: 107) as did e. g. Nevinny-Stickel and Hammerstein, who classified male-bodied transsexuality as a psychic form of intersexuality: »Male transsexuality is an extremely rare, apparently genetically produced variant of

human nature which is to be included in the circle of intersexuality.« (Nevinny-Stickel/Hammerstein 1967: 666)

In another instance, a medical expert report in the case the High Regional Court Frankfurt decided upon on 14 Feb. 1969 described the applicant as a »true transvestite« (OLG Frankfurt 1969: 338). Despite the fact that the applicant manifested characteristics that medical scholarship at the time associated with transsexuality, the Court decided not to consider the application analogous to that of a transsexual individual (ibid: 339 f.).

Medical and legal concepts diverged most significantly on trans subjects that were associated with sexuality. This particularly pertained to transvestism, which was sexualised in medicine and law. However, while sexologists simply framed transvestism as a sexual category, legal scholars frequently stigmatised transvestism. Eberle for instance devalued transvestism when he suggested that, »[t]he nasty taint of perversion will stick to transsexuality as long as it is mentioned in the same breath as transvestism« (Eberle 1974: 139).

The devaluation of transvestism was even more pronounced when transvestism was associated with homosexuality. Becker e. g. assumed that, »one can find heterosexual transvestites among members of all strata, whereas the morons and imbeciles prevail among homosexual transvestites who regularly lack the ability to respond positively to criticism and lack a sense of shame and who come together in known transvestite bars« (Becker 1965: 191).

While sexologists explained the delinquency rate with transvestites' and trans individuals' precarious situation in society (see, e. g., Kockott 1978: 49), Becker constructed homosexual transvestites as criminals *per se*:

> Transvestites' susceptibility to crime is considerably larger than the corresponding figures in the average of the population. Apart from criminal offences according to s.175 StGB, one can especially find criminal acts of theft, robbery and extortion among them. Transvestism needs to be characterised as a phenomenon of pathological significance and degeneration. [...] As experience has shown, social rehabilitation is barely possible, because transvestites usually do not regularly hold down a job, and they live an erratic life. The danger of transvestism should not be exaggerated. However, it is dangerous when a young person gets into the circles of these perverts and possibly gets involved in their practices. For that reason, an appropriate preventive protection of the youth is an essential task of the authorities. (Becker 1965: 191 f.)

Translating current medical concepts of trans to the legal realm

In the light of legal misinterpretations of medical concepts and the inconsistent use of terminology in medicine and law, Eberle took on the role of translating legal problems to sexology. In his article published in *Sexualmedizin*, he identified four major problems for which he suggested medicine might contribute to a solution.

First, he deplored that medicine had so far failed to provide secured knowledge on the causes of transsexuality and had in general not come up with a unified opinion (Eberle 1974: 139). Second, he stated that there was no generally accepted definition of transsexuality in law and medicine, and he pointed out to the necessity of formulating a definition medicine and law could subscribe to for strategic reasons (ibid).[56] Third, he advised sexologists to clearly distinguish between transsexuality and transvestism, especially since transvestism was strongly associated with perversion (ibid). Based on Money and Ehrhardt's as well as Schorsch's concept of transsexuality and transvestism, he suggested a definition for both phenomena (ibid: 140). Finally, he criticised health policy that forced transsexual individuals to undergo surgery outside the Federal Republic of Germany (ibid: 142 f.). In addition, Eberle informed medicine on current developments in West German jurisdiction on trans (ibid: 143-145).

2.2.4 Pre-legislative jurisdiction on transsexuality

Pre-legislation jurisdiction on transsexuality was marked by a gradual shift from legal non-recognition to a legal accommodation of a transition from one gender to the ›other‹. This process however was uneven in terms of time and region. I will elaborate on the discrepancy between higher and lower court decisions and between reported and unreported cases before providing a systematic account of the legal reasoning in reported cases. I will argue that the willingness of courts to recognise a change of sex and/or gender depended on complex interrelations of individual judges' worldviews, including notions of the public order and gender, and their willingness to employ existing legal provisions and to engage in judge-made law.

Lower and higher court jurisdiction on trans

Lower and higher court jurisdiction of which usually the latter was reported[57] differed from each other. The discrepancies were particularly pronounced with regard to the number of recognised revisions of gender status, the gender ratio and the physical requirements expected from individuals who had applied to be recognised as another gender than the one they had been assigned to at the time of birth.

First, lower courts tended to recognise a trans person's gender more frequently than higher courts, and this applied to reported and unreported lower court decisions alike. In 1963, the Regional Court Münster e. g. granted a re-

56 | Eberle took on this task vis-à-vis jurisdiction, too, in his article in the *NJW* (Eberle 1971: 221 f.).

57 | Exceptions are the LG Münster (1963: 249-250) and the AG Flensburg (1980: 246-248).

vision of first names and gender status in the birth register in the case of a transwoman who had undergone sex reassignment surgery (LG Münster 1963: 249 f.) as did the Local Court Flensburg in 1979 (AG Flensburg 1980: 246-248). In a comprehensive study of local court decisions until 31 Dec. 1980, Augstein stated that of overall 90 cases 87 trans individuals were granted a revision of their gender status (Augstein 1982: 240).[58]

By contrast, until the Federal Constitutional Court decision in 1978 (BVerfG 1979: 9-13) higher courts felt impeded by other equally high ranking court decisions to grant a revision of first names and gender in the register of births, as was the case with the Chamber Court in 1970 (KG 1971: 79-82). More frequently, they simply rejected requests for a revision of gender status and/or change of first names or demanded conditions, which resulted in a factual denial of recognition.[59]

Second, the gender ratio differed between (reported) higher court cases and (usually) unreported lower court cases. The overwhelming majority of reported court cases dealt with transwomen.[60] By contrast, of 93 applications for a change of first names and a revision of gender status before the Transsexual Act came into force, transwomen submitted 56 applications as opposed to 37 applications by transmen (Augstein 1982: 240).

Third, lower court jurisdiction was more uneven than that of higher courts with regard to the physical conditions that they required for a revision of first names and gender status in the birth register. Lower courts granted a revision in cases ranging from no surgery at all to several medical and surgical means of sex reassignment. In the case of a non-operative transwoman, a court e. g. ruled that the applicant could not be forced to undergo surgery for legal reasons (ibid). In the case of a transman, a court decided that chest surgery sufficed in order to have his birth entry revised (ibid). The Regional Court Münster ruled in the reported case that, among other things, an analogous application of s. 47 PStG was justified, if the individual no longer revealed the original

58 | Three applications were unsuccessful. In one case, the court denied a revision of gender and first names because the applicant did not undergo sex reassignment surgery (Augstein 1982: 240). In another case, the court turned down a transman's request for a revision of the gender entry and first names in the register of births after having undergone a bilateral mastectomy, because he did not have abdominal surgery. The court reasoned that it could only order a change of first names and gender, if the applicant could provide a statement to the effect that he was no longer able to reproduce (LG Hamburg 1980: 155). In another case, the local court felt inhibited to decide in favour of a revision of the birth entry, because the parliament hat passed the Transsexual Act, and the applicant was younger than the minimum age of 25 laid down by the Act (Augstein 1982: 240).

59 | See OLG Frankfurt 1969: 338-340 as an example of the latter.

60 | The 1980 lower court decision in Hamburg is an exception (LG Hamburg 1980: 155).

sex characteristics and manifested »all« aspects of the »other« sex instead (LG Münster 1963: 249).

Unlike lower court cases, reported higher court cases from the outset only dealt with trans women who had undergone sex reassignment surgery, including a penectomy, an orchiectomy and the construction of a neo-vagina. However, extensive sex reassignment surgery did not necessarily mean that an application would be successful. As mentioned earlier on, in most reported higher court cases prior to trans legislation judges turned down transwomen's requests to have the gender status and first names altered to match their outer appearance and identity.

An account of pre-legislation jurisdiction on trans in reported cases:[61] Controversies over constitutional and legal instruments and judge-made law

The legal recognition of a transition was closely linked to individual judges' willingness to employ existing legal provisions or to read a change of gender status and first names into existing provisions, respectively, in the absence of an act that explicitly regulated such a procedure. Courts particularly disagreed on the interpretation of s. 47(1) PStG, the relevance of constitutional rights and issues concerning legal security.

Reported cases on trans offered three different readings of the Civil Status Act. In its decision on 08 Dec. 1965, the High Regional Court Frankfurt interpreted s. 47(1) PStG narrowly. According to this interpretation, an entry in the registry of births could only be revised, if it was incorrect from the beginning (OLG Frankfurt 1966: 407). By contrast, the Federal Constitutional Court offered a reading of the term ›revision‹ to the effect that it did not necessarily suggest the incorrectness of the initial statement. Instead, it could also mean to correct a statement that proved to be wrong later on (BVerfG 1979: 12) (cf. Sieß 1996: 72 f.). While the Chamber Court agreed that s. 47(1) PStG could not be applied directly, it suggested that there was, on the other hand, no legal rule that excluded the change of gender or from which one could conclude that a change of gender that took place after birth could *per se* not be legally recognised (KG 1971: 81).

The status of constitutional rights, in particular Art. 1(1) of the Basic Law which states that, [h]uman dignity shall be inviolable« (BMJV 2017) and Art. 2(1) GG which declares that »[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law« (ibid) featured differently in jurisdiction on trans prior to the Transsexual Act. The Chamber Court was

61 | For a systematic account of pre-legislative jurisdiction on trans in reported cases in German, see de Silva 2013: 94-99.

the first court to resort to Articles 1(1) and 2(1) GG in the case of transsexuality (cf. Sieß 1996: 67). In its decision on 08 Sept. 1970, the Chamber Court argued that human dignity and the basic right to develop one's personality freely forbid forcing a person to live as a member of a sex/gender to which he or she no longer belongs physically or psychologically because of a birth entry (KG 1971: 81; cf. Sieß 1996: 66). The Federal Constitutional Court and several other courts followed this reading.[62]

Courts also took different stances on the issue of judge-made law. As early as in 1963, the Regional Court Münster felt that there was a real need to regulate a person's civil status in cases in which an individual no longer disposed of the characteristics of the original sex, revealed »all« characteristics of the »other« sex,[63] had a gender identity corresponding with the person's sex and was socially recognised as such. Consequently, the Court argued in favour of filling the legal gap via analogy (LG Münster 1963: 250).

However, several courts refused to follow this route for various reasons. The Chamber Court and the High Regional Court Frankfurt saw no need for such a legal regulation in 1965, since they denied a sex change had taken place in the first place (KG 1965: 1084; OLG Frankfurt 1966: 408; cf. Sieß 1996: 62). The Federal Court of Justice acknowledged the applicant's desire for legal recognition according to her experienced gender (BGH 1972: 85). Nevertheless, it refused to embark on judge-made law. The Court reasoned that the legal order was entirely determined by the principle of human sexual immutability. It anticipated a host of regulatory difficulties for which the given legal order offered no measures and guidelines. In the opinion of the Court, judge-made law would inevitably lead to legal uncertainty (ibid: 84) and that the legislator was much more suitable to generate a comprehensive solution (ibid: 85; cf. Sieß 1996: 80).[64]

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62 | Se e. g. AG Flensburg 1980: 246-248 and Hanseatisches OLG Hamburg 1980: 244-246.

63 | Walter suggested that it cannot be deduced from the decision that the Court necessarily insisted on all the criteria mentioned for a change of first names and gender status in the birth entry. He argued that the court obviously saw that the applicant fulfilled the requirements and possibly mentioned these facts in order to limit the effects of its ruling and to emphasise the distinctive nature of the case (Walter 1975: 119).

64 | The Federal Court of Justice was particularly concerned about fixing the point of time for a change of gender status and tentatively suggested to use sex reassignment surgery as the right time to do so (BGH 1972: 84). Furthermore, it opined that under no circumstances may a change of gender status be assumed as long as the applicant disposed of functioning genitalia he or she was born with. First, it needed to be ruled out that a male transsexual was able to commit criminal offences according to s. 175 StGB. Second, the Court argued that it should be avoided that a person with male genitalia

The Federal Constitutional Court to which the applicant appealed to, and legal scholars severely criticised the Federal Court of Justice decision. While Walter sympathised with the Court's argument that judge-made law would most probably not solve all problems that required regulation, he argued that this procedure was not expected to do so in one sweep. In his opinion, the Federal Court of Justice decision amounted to a denial of justice (Walter 1972: 267). The Federal Constitutional Court repealed the decision of the Federal Court of Justice,[65] arguing that it was the Court's duty to interpret the law in accordance with the Constitution, and it returned the case to the Federal Court of Justice to find a legal solution[66] (cf. Sieß 1996: 73):

> The Federal Court of Justice's opinion that problems of regulation linked to a sex change cannot be solved by means of judge-made law misjudges that whereas a legal gap might exist, one cannot however speak of a gap in legal regulation in the light of the presented situation under constitutional law, which according to the basic right in Art. 2(1) in combination with Art. 1(1) of the Basic Law immediately leads to an obligation of courts. Of course, on behalf of legal security it appears necessary that the legislator regulate questions regarding a person's civil status in the case of a sex change and its effects. As long as this has not happened, the task for courts is no different than in the case of the equality of men and women before the Equal Rights Act came into force. (BVerfG 1979: 13)

Controversies over the public order, marriage and the status of gender, and the social order

Whether a court decided to order a revision of gender status and first names or not was closely related to the judges' respective assessments of potential disruptions to the public order, customs and institutionalised heterosexuality. Here, too, legal reasoning differed substantially.

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marries a person of the male sex as long as the applicant is able to »perform sexually as a man« (ibid: 84 f.).

65 | It is hard to say whether the Federal Constitutional Court felt encouraged by political developments. However, the Court was aware of the provisions in the Bill on the establishment of gender status in specific cases in its version of 31 Aug. 1978 (cf. Federal Constitutional Court 1979: 11) and the agreement between the Federal State and the *Länder* allowing transsexual individuals to use a gender-neutral name in addition to their respective birth names (cf. ibid).

66 | On 14 Mar. 1979, the Federal Court of Justice finally ruled that s. 47 PStG was to be applied by entering a note in the margin of the registry of births stating the gender status (BGH 1979: 1287).

Different assessments of the effects on the public order are mirrored in the debate on the purpose of the Civil Status Act. In the case of a post-operative transwoman, the Regional Court Münster started out from the premise that human communities and the public order required clear statements on a person's civil status, which the Court understood as conclusive statements on family law relationships to other living persons. The Court argued that this was not the case, if an individual's outer appearance, the shape of her external genitalia and the position in society that derives from the former contradicted the gender stated in civil status certificates (LG Münster 1964: 250; cf. Sieß 1996: 61).

However, the Federal Administrative Court disagreed with such an interpretation. In the case of a transvestite who wished to supplement his first names by the name ›Maria‹, the Court cited the Federal Court of Justice decision on 15 Apr. 1959. The latter reasoned that it contradicted the right order fixed by morality and tradition, if naming did not observe generally accepted »natural« limitations (cf. BVerwG 1969: 858). The Court argued that it was only due to the individual's first names that a person's gender could be inferred from in the registries of marriage, family and death, since the Civil Status Act provided for an entry of a child's gender in the registry of births only (ibid).[67]

Courts were also divided over the implications of the revision of a married individual's first name and gender status. Defenders of marriage as an exclusively heterosexual living arrangement assumed a same-sex marriage would pose a threat to the traditional and constitutionally protected concept of marriage as a union of a man and a woman.

In its decision on a marriage between two (presumably) female individuals of which one identified as a man and the other as a woman, the Chamber Court defined marriage as a union between a man and a woman. However, the Court determined a person's gender status based on the physical constitution, regardless of the individual's identity. Hence, the Court declared the union between the (presumably) female man and female woman that the registrar had initially entered as a marriage a »non-marriage« (KG 1958: 61).

By contrast, in the case of two married partners of which one had post-operatively been legally recognised as a woman, the Hanseatic High Regional Court Hamburg decided that there was no valid reason for the State not to protect a life partnership of individuals, who had once entered marriage as a man and a woman and whose partnership had become a same-sex partnership as an effect of one partner's transition. The Court argued that such exceptional

67 | The Federal Administrative Court ruled out that the applicant add ›Maria‹ to his first names. It reasoned that while the additional name ›Maria‹ may be added to male children's first names for religious purposes, the conditions for such an exception were not given in the applicant's case. The applicant was a Protestant and simply desired the first name ›Maria‹ in order to live as a woman (BVerwG 1969: 858).

cases did not threaten the image of marriage as a union between a woman and a man. Moreover, constitutional rights guaranteed in Art. 2(1) in conjunction with Art. 1(1) GG were paramount to potential disruptions of the public order, and irritations and complications that might arise for authorities (Hanseatisches OLG Hamburg 1980: 245; cf. Sieß 1996: 77).[68]

Whether courts decided to change a person's first name and gender status in the birth entry also depended on the emphasis the respective court placed on individual rights in relation to the social order of the time. In its decision on 08 Dec. 1965, the High Regional Court Frankfurt e. g. opposed the notion that a post-operative transwoman's sex had changed. It argued that social and economic developments take into consideration biological dispositions. Therefore, the determination of a person's gender needs to observe »natural« facts, which outweigh a person's attitude (OLG Frankfurt 1966: 408). According to the Court's opinion, individualised concepts of gender posed a threat to the legal and social order:

> If one wanted to render the personal attitude decisive, an individual would be able to influence our moral and legal order as long as the differentiation of human beings into those of a female and a male sex dominates our existence in many ways and cannot at all be thought of as missing in people's imagination and behaviour towards each other. One only needs to e. g. think of the family as the cell of our social order and social system and of the criminal law provisions, which presuppose the qualification of an offender as a man or woman. (Ibid)

As Klöppel suggests, according to the High Regional Court Frankfurt, the freedom of the individual was subject to conditions:

> It is only under the condition that the individual subordinates itself under the existing social order with its premises that it may develop itself freely, i. e., it has to accept the social demand for an unambiguous gender classifiability of all individuals as either male *or* female as well as the assumption of a natural-fateful gender. (Klöppel 2010: 579)

The Federal Constitutional Court, however, took a different stance on the issue of the social and legal order. Unlike the High Regional Court Frankfurt, the Federal Constitutional Court defined a person's gender identity and the ability to live up to the conventions of the experienced gender as one of »the most intimate areas of the personality to which the state has is in principle no access. It is a sphere which may only be intervened into in the case of particular

68 | The Transsexual Act that was to come into force on 01. Jan. 1981 however ruled in s. 8(1)2 TSG that a marriage had to be dissolved before the trans person's gender would be recognised.

public interests.« (BVerfG 1979: 12)[69] To the Federal Constitutional Court, then, it was constitutive of the social and legal order that an individual's dignity be protected and that a person has the right to develop him- or herself freely.

Controversies over concepts of gender

Concepts of gender also played a role in reported court decisions on the issue of whether to order a revision of transsexual individual's first names and gender status in the birth entry. Judges who based their understandings of gender on physical properties only declined to recognise a trans person's gender. Higher courts in the 1960s devalued trans bodies and delegitimised trans identities. The Chamber Court and the High Regional Court Frankfurt e. g. considered trans genitalia to be either deficient (OLG Frankfurt 1966: 408), »artificial« (ibid) or »unreal« (KG 1965: 1084) and their transition from one sex/gender to another either impossible or an effect of arbitrary behaviour:

> The non-recognition of the applicant as a woman and the psychological distress and the difficulties in his [sic!] social and professional life that might possibly result [from surgery] cannot be taken into consideration; he [sic!] should have thought about the effects of his [sic!] voluntary decision before undergoing surgery. (OLG Frankfurt 1966: 409; cf. Sieß 1996: 63; cf. Klöppel 2010: 579)

By contrast, courts that engaged in judge-made law and adapted to law the contemporary medical concept of gender as comprised of multiple factors recognised a change of sex and a trans person's gender.[70] However, the status of the psyche vis-à-vis physical determinants of gender varied. The Chamber Court which in line with Nevinny-Stickel and Hammerstein (1967) classified transsexuality as a form of psychic intersexuality ruled that psychological factors

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69 | The Court argued that according to medical evidence the complainant was a woman whose outer appearance had been hormonally and surgically reassigned to match her experienced gender. However, in legal terms she is treated as a man against her volition. In doing so, she is bereft of the possibility to live an inconspicuous, socially adapted life as a woman. Since the Civil Status Act assumes that the first name signifies the bearer's gender, the complainant can only achieve a change of first names after the gender status has been changed in the register of births. However, the fact that this had been denied her produces conflictual situations for the complainant despite her gender-neutral first name (BVerfG 1979: 11 f.). The Federal Constitutional Court decided that the transwoman's complaint was permissible, because the Federal Court of Justice decision she had appealed against infringed upon the complainant's basic right to develop her abilities and strengths freely as provided in Art. 2(1) GG in conjunction with her right to dispose of herself and to shape her fate, as implied by Art. 1(1) GG (ibid).

70 | See e. g. LG Münster 1963: 250; KG 1971: 81; BVerfG 1979: 12.

should be considered, if the »natural« physical development gives reason to investigate into the question of the »true« gender (KG 1971: 79; cf. Klöppel 2010: 575 f.).[71] The Regional Court Münster and the Federal Constitutional Court, however, considered intersexuality and transsexuality as separate phenomena and physical and psychological aspects of a person's gender as equally significant (LG Münster 1963: 249; BVerfG 1979: 12).

Judges in reported higher court cases in the 1970s who were convinced of the respective trans person's claim to have his or her first names and gender entry revised in the register of births discussed the rules that should apply in these cases. All courts were, albeit to a different degree, concerned about the issues of irreversibility, surgery and the motivation for a revision of gender status.

The Chamber Court explicitly ruled that, among other things, s. 47 (1) PStG applies, if the change was not based on the respective trans person's arbitrary behaviour (KG 1971: 79; cf. Klöppel 2010: 575). The Chamber Court and the Federal Constitutional Court ruled out that the respective applicant's desire to live according to another gender than the one he or she had been assigned to at the time of birth was arbitrary. Expert reports had convinced the courts that the applicant's urge to change gender status was beyond her volition (KG 1971: 82; BVerfG 1979: 12).

Both Courts assumed that the fact that the applicant had undergone sex reassignment surgery served as a clue to the irreversibility of the applicant's decision to live as a woman (KG 1971: 82):

> Art. 2(1) GG in combination with Art. 1(1) GG demands the revision of the transsexual's male gender in the register of births, at any rate in a case that according to medical knowledge deals with irreversible transsexualism and when a sex-reassigning operation has been performed. (BVerfG 1979: 9)

2.2.5 Summary: Legal constructions of gender and transsexuality in the pre-legislative phase

Granting trans individual's requests for a change of first names and a revision of gender status in the birth entry prior to the Transsexual Act proved to be an uneven process and depended on several factors. These factors were interpretations of legal and constitutional provisions, the willingness to engage in judge-made law, interpretations of medical literature and expert reports, assessments

71 | In this particular case, medical experts stated that the applicant's psychological and physical development deviated from a boy's one, since she featured a slight swelling on the chest in puberty and later on proved to be impotent (KG 1971: 82).

of the public order, morality and society, including marriage and concepts of gender.

The abovementioned factors interrelated in various ways, although not all factors were necessarily discussed and even less so to the same extent in every individual court case. In reported court cases in the 1960s, e. g., interpretations of s. 47(1) PStG featured particularly strongly without any reference to the Constitution. However, ever since the Chamber Court introduced Art. 2(1) and 1(1) GG into the debate in 1970, no court in a reported court case failed to refer to the Constitution, although courts differed on the significance of the abovementioned articles in relation to judge-made law and legal consistency.

Moreover, the period from the 1960s to the late 1970s was marked by a gradual shift from a legal concept of sex/gender as innate and immutable to an understanding of sex/gender as mutable. This shift largely depended on whether a court decided to interpret gender according to contemporary medical knowledge, according to which gender was a complex conglomeration of several factors, including the psyche, or not. Whereas reported higher court decisions in the 1960s were based on an understanding of gender as based on a person's morphology, in particular the genitalia at the time of birth, in the 1970s higher courts increasingly accrued more importance to the psyche (de Silva 2013: 100 f.).

Concepts of gender in jurisdiction not only had tangible effects on trans individuals' applications to have their respective birth entries revised. The assumption that female-bodied individuals were girls and male-bodied persons boys at the time of birth who grow up to be women and men, respectively, e. g. rendered trans individuals unconceptualisable and did not allow for claims to dignity and the right to the free development of one's personality.

Discussions in jurisdiction in the 1960s on possible causes of transsexuality also gave way to clearly defined conditions for a revision of the entry of gender and first names in the birth register. In accordance with the Draft Bill, the Federal Constitutional Court held that the birth entry was to be revised at least in cases where medical experts stated that the applicant irreversibly identified with the ›other‹ gender and had undergone a sex-reassigning operation.

Roughly a year before the Transsexual Act passed the West German parliament, courts recognised a person as a member of the ›other‹ legitimised gender in cases when the following conceptual and procedural factors coincided: courts read s. 47(1) PStG constitutionally, engaged in judge-made law, interpreted gender in accordance with the latest insights in medicine and when a trans person according to medical evidence fulfilled the criteria mentioned above (ibid: 101).

At the same time, the case the High Regional Court Frankfurt decided upon in 1969 reveals that trans categories were less tidy than sexology or legal rules in the late 1970s claimed them to be. In this particular case, a person

identified as a transvestite, although the individual had undergone sex reassignment surgery (ibid).

While legal scholarship overall tended to be more sympathetic to transsexual individuals' claims to recognition than jurisdiction, this did not apply to transvestites and, unlike in sexology, legal scholars' reactions to transvestites were markedly deprecative. Reactions ranged from unease to pathologisation with features that exceeded pathologising constructions in sexology and amounted to downright criminalisation. The latter was more pronounced when a transvestite engaged in homosexual acts, which underscores that with few exceptions the law, legal scholarship and jurisdiction of the time contributed to producing and reproducing a heteronormative society (ibid).

While the mutability of sex and gender became entrenched in jurisdiction by the end of the 1970s, the gender binary remained untouched in principle. Intersexuality and trans continued to be pathologised as physically or psychologically defective sex and gender developments, respectively, and a transition from one gender to the ›other‹ was recognised only under the condition that a physical adaptation to normative and conventional understandings of men and women had taken place (ibid: 101f.).

Jurisdiction is deeply embroiled in historically-specific relations of power, including its productions of gender and transsexuality. Courts read the number of genders into the Civil Status Act and defined the relation of the two in heteronormative terms. Jurisdiction produced different interpretations of, and assessed differently, the same legal and constitutional provisions in similar facts of a case. Courts subscribed to different concepts of gender and transsexuality.

2.3 Devising the Transsexual Act

Faced with the Federal Constitutional Court decision in the 1978 that considered transsexual individuals' demand for gender recognition legitimate, and confronted with pressure from sexological associations and Members of the *Bundestag*, the West German social-liberal government drafted the Bill to change first names and establish gender status in specific cases (*Entwurf eines Gesetzes über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*).[72] This chapter deals with the legislative process that led to the Transsexual Act.

The first section of this chapter gives an overview of the legislative proceedings. It focuses on the dynamics between jurisdiction, government policy

72 | The Bill to change first names and establish gender status in specific cases will be referred to as the Bill, the Government Bill or the Transsexual Bill (*Entwurf des Transsexuellengesetzes*).

and parliamentary activities with regard to trans in the pre-legislative phase and addresses the effects major controversies between the *Bundestag* and the *Bundesrat* had on the development of the Draft Bill during the legislative proceedings. The findings of this section are based on higher court decisions, government documents, stenographic records of the parliamentary debates in the *Bundestag* and the *Bundesrat* (*Stenographische Berichte*), committee minutes of both chambers and printed matters of the *Bundestag* (*Bundestagsdrucksachen*) and the *Bundesrat* (*Drucksachen des Bundesrates*),

The abovementioned chapter will be followed by an analysis of sexological and trans movement interventions and concepts of transsexuality as they featured during the legislative process. This section draws upon several sources. Among these are summaries of sexological submissions in appendages to minutes of plenary and committee meetings, the sexologist Pfäfflin's (1980) comment on the legislative debate on the Draft Bill in the influential news magazine *der spiegel* and petitions and letters by trans individuals, including responses by government officials. Further sources are the answers to a questionnaire on medical issues the Christian democratic opposition submitted to the Federal Home Office and a medico-legal article in the medical journal *Der Gynäkologe*, co-authored by the MP Müller-Emmert (Müller-Emmert/Hiersche 1976), which was submitted to the *Bundestag* Committee on Domestic Affairs.

After a brief summary of general characteristics of the parliamentary debate, the next chapter analyses the constructions of transsexuality and outlines the negotiations on trans rights as they emerged during the debates in the plenary sessions of the *Bundestag* and the *Bundesrat* and committee meetings. The analysis takes into consideration both explicit statements on transsexuality as well as the issues around which the parliamentary debate on transsexuality unfolded.

The final section of this chapter deals with the outcome of the legislative process, i. e. the Act to change first names and establish gender status in specific cases. An outline of the Act will be followed by an analysis of gender, trans and gender regime as laid down by the Act.

Despite occasional challenges to heteronormativity, the parliamentary debate in the *Bundestag* and the *Bundesrat* at no point questioned the hegemonic gender order, and while the Transsexual Act provided for a revision of first names and gender status, it nonetheless restored the heteronormative gender binary.

2.3.1 Outline of the legislative process

While pre-legislative parliamentary activities began as early as in March 1972, the legislative process only began three years later and ended with the signing of the Transsexual Act on 10 Sept. 1980. Pre-legislative developments were

marked by the dynamics between jurisdiction, government policy and parliamentary activities. The legislative phase was, by contrast, characterised by fundamental disagreements between the *Bundestag* and the *Bundesrat*.

Pre-legislative dynamics between jurisdiction, the government and the Bundestag on trans legislation

The fact that the governing social-liberal coalition introduced a draft bill to provide for a revision of first names and gender status into the *Bundesrat* on 05 Jan. 1979 (Bundesrat 1979) was attributable to a complex set of relations between jurisdiction, the government and the parliament. Federal jurisdiction and federal government policy on trans initially consisted of shifting to and fro the responsibility for regulating the revision of first names and gender status in the birth registry in cases of transsexuality.

On 21 Sept. 1971, the Federal Court of Justice acknowledged that transsexual individuals' claim to be legally recognised as the gender »they irresistibly feel compelled to align themselves to and have more or less succeeded in doing so« (BGH 1972: 85) was legitimate. Nevertheless, the Court shied away from filling a legal gap arguing that judge-made law could not take into consideration all the effects recognising a transsexual person's gender would have on other areas of the law and spheres of life. Instead, the Federal Court of Justice suggested the legislator was more suitable to accomplish such a task (ibid; cf. Sieß 1996: 80).

However, the West German government, too, was reluctant to introduce a draft bill into parliament in the aftermath of the abovementioned court decision. As the Secretary of State of the Federal Ministry of Justice (*Staatssekretär im Bundesministerium der Justiz*), Dr. Erkel, explained in his answer to the parliamentary enquiry by the social democratic MP for Hamburg, Dr. Arndt, (Deutscher Bundestag 1972: 10270 A) on 15 Mar. 1972, the federal government felt inclined to wait for the Federal Constitutional Court decision on the transsexual litigant's complaint against the Federal Court of Justice ruling on 21 Sept. 1971 (ibid: 10270 C; cf. Sieß 1996: 81).

With its decision on 11 Oct. 1978, the Federal Constitutional Court put an end to the practice of deferring responsibility. While it suggested that legislative provisions would contribute to legal certainty, it ruled that to deny a transsexual individual the revision of the entry of sex in the birth registry was incompatible with the Constitution. Therefore, the Federal Constitutional Court decided that in the light of a legal gap, courts were required to interpret s. 47(1) PStG constitutionally (BVerfG 1979: 13).

The written decision of the Federal Constitutional Court sheds a light on the relationship between the *Bundestag* and the federal government prior to the legislative process. In its presentation to the Federal Constitutional Court, the Federal Ministry of Justice (*Bundesministerium der Justiz* [BMJ]) held that the complainant could not be considered a member of the female sex despite hav-

ing undergone genital surgery, since the individual's chromosomes were male (Federal Ministry of Justice, quoted in ibid: 11).

However, the Federal Constitutional Court was aware of the unanimous resolution of the *Bundestag* on 10 June 1976 (Deutscher Bundestag 1976c: 17818 B), which demanded the government to submit a proposal to design a procedure to legally recognise a transsexual individual's gender after medical reassignment interventions had taken place (BVerfG 1979: 11). As a result, the government had devised a Draft Bill to establish the gender status in specific cases on 31 Aug. 1978 (BMI 1978).

Indeed, the relationship between the government and the parliament suggest that the federal government was reluctant to address questions regarding the regulation of trans (cf. Sieß 1996: 84). It was largely due to constant pressure by a group of social democratic MPs, foremost Dr. Arndt and Dr. Meinecke that the government put the issue on the agenda.

The government faced a sequence of parliamentary enquiries from 15 Mar. 1972 onwards. In response to the initial question by Dr. Arndt (Hamburg, SPD) whether the government intended to introduce legislative measures to regulate sex reassignment surgery in cases of transsexuality and transvestism in the aftermath of the Federal Court of Justice decision on 21 Sept. 1971 (Deutscher Bundestag 1972: 10270 A), the Secretary of State of the Federal Ministry of Justice, Dr. Erkel, pointed out that the government lacked conclusive knowledge on transsexuality and that it did not know when it could address the matter (ibid: 10270 D; cf. Sieß 1996: 81). The Secretary of State of the Federal Ministry of Justice's answer needs to be appreciated considering that with exception of Sweden no other country had any comparable experience with regulating matters pertaining to a change of gender status in the event of transsexuality.

However, the responses by the Parliamentary Secretary of State of the Home Office (*Parlamentarischer Staatssekretär beim Bundesministerium des Innern*), Dr. Schmude, to Dr. Arndt's (Deutscher Bundestag 1975: 10943 A, B, C) and Dr. Meinecke's (ibid: 10943 D) parliamentary questions on 18 Mar. 1975 suggest that the government was not particularly inclined to introduce trans legislation in the first place. When asked about legislation to revise the Civil Status Act and to issue administrative regulations that provide for an entry of a transsexual person's new first name and gender in the birth registry, Dr. Schmude simply referred to the answer Dr. Erkel had given three years ago (ibid: 10943 A).

Government reluctance also becomes evident in the answer to the question whether the state's entitlement to a particular order, which in Dr. Arndt's opinion generates significant psychological strain on trans individuals (ibid: 10944 C), was not secondary to the right to develop one's personality freely according to Art. 2 GG. In this instance, Dr. Schmude responded that the government did not consider such an extensive entitlement to follow from Art. 2 GG (ibid; cf. Sieß 1996: 83).

However, the small group of social democratic MPs did not cease to exert pressure on the federal government. On 18 Mar. 1975, Dr. Arndt (Hamburg, SPD) e. g. enquired into the reasons for the three-year government delay to submit its representation to the Federal Constitutional Court in the abovementioned case (ibid: 10948 A). In response, the Parliamentary Secretary of State of the Federal Ministry of Justice, Dr. de With, gave three reasons for the delay. First, complex legal and medical problems required of the Federal Home Office, the Federal Ministry of Justice and the Federal Office for Youth, Family and Health (*Bundesministerium für Jugend, Familie und Gesundheit*) to discuss the respective effects on legislation. Second, the Foreign Office (*Auswärtige Amt*) conducted time-consuming investigations into the regulation of similar matters in other countries. Finally, due to possible effects of the Federal Constitutional Court decision on the administration of the *Bundesländer*, the Federal Home Office had to consult the Home Offices of the *Bundesländer* (ibid: 10948 A/B; cf. Sieß 1996: 84).

On 30 Mar. 1976 a motion by Dr. Arndt, Dr. Meinecke, Kleinert and 26 other members of the Social Democratic Party (*Sozialdemokratische Partei Deutschlands* [SPD]) finally sparked the legislative process. The MPs demanded of the government to present a draft bill as soon as possible to the effect of legally recognising the gender of individuals according to the proceedings of non-contentious jurisdiction after genital surgery or other medical procedures had taken place (Deutscher Bundestag 1976; cf. Sieß 1996: 85). The motion was referred to the *Bundestag* Committee on Home Affairs and the *Bundestag* Committee on Legal Affairs (*Rechtsausschuss*), discussed in the latter on 05 May 1976 and on 21 May 1976 in the former (Deutscher Bundestag 1976b: 2). The Committee on Home Affairs suggested the *Bundestag* pass the motion (Deutscher Bundestag 1976a; cf. Sieß 1996: 86), and indeed the MPs unanimously voted in its favour on 10 June 1976 (Deutscher Bundestag 1976c: 17818 B; cf. Sieß 1996: 87).

Legislative proceedings

With the onset of the legislative process, the line of conflict shifted from the social-liberal government and the parliament to the *Bundestag* with a solid social-liberal majority and the *Bundesrat*, dominated by Christian democratic *Bundesländer*. Conflicts particularly arose over the structure of the Bill and the issue of marriage in the event of an establishment of gender status.[73]

73 | The reasons for particular perspectives on the ›small solution‹ and the issue of the dissolution of marriage prior to, or upon legal recognition of a trans person's gender will be discussed in more detail in chapter 2.3.3.

Both the Draft Bill (TSG-R)[74] that was circulated among all federal offices from 31 Aug. 1978 onward (BMI 1978, Anlage) and the revised Government Bill (TSG-E), which was submitted to the Secretary of the *Bundesrat* on 20 Dec. 1978 (BMI 1978a) and to the President of the *Bundesrat* on 05. Jan. 1979 (Bundesrat 1979) were subdivided into four parts (cf. Sieß 1996: 90).[75] The first part of the revised Government Bill dealt with the change of first names (ss. 1-7 TSG-E) and the second laid down the requirements for, and the effects of the establishment of gender status (ss. 8-12 TSG-E). The third and fourth parts of the Bill determined revisions to other acts (ss. 13-15 TSG-E) and contained interim and final regulations (ss. 16 and 17 TSG-E).

Since the application for a change of first names in the Government Bill was less ridden with prerequisites than the establishment of gender status, the former came to be known as the ›small solution‹ (*›Kleine Lösung‹)* and the latter as the ›big solution‹ (*›Große Lösung‹)*. Section 1(1)2 TSG-E of the so-called small solution disallowed the applicant to engage in generational reproduction, and s. 7(1)1 TSG-E considered the decision that changed the first names void, if the applicant had either given birth to a child 302 days after the decision entered into effect or if the applicant had procreated a child within this period of time. Like s. 1(1) TSG-R, s. 1(1) TSG-E required of the applicant to be at least 18 years old at the time of application.

By contrast, the so-called big solution required, among other things, that the applicant had to be sterile (s. 8[1]3 TSG-E) and had to have undergone a surgical procedure to approximate the appearance of the ›other‹ sex/gender (s. 8[1]4 TSG-E). Unlike s. 8(1) TSG-R which required the applicant to be 18 years of age for an application for the establishment of gender status, and as opposed to s. 1(1) TSG-E, s. 8(1) TSG-E determined that an applicant had to be at least 25 years old at the time of applying for an establishment of gender status (cf. Sieß 1996: 90).

Except for the Committee on Youth, the Family and Health of the *Bundesrat* (*Bundesrat Ausschuss für Jugend, Familie und Gesundheit*) which suggested to the House on 01 Feb. 1979 to pass the Bill without any modifications (Bundesrat – Ausschuss für Jugend, Familie und Gesundheit 1979: 8; cf. Sieß 1996: 103, footnote 52), the *Bundesrat* committees involved in discussing the Government Bill resisted the ›small solution‹. Based on a motion by the representative of Bavaria, the majority of the representatives of the *Bundesländer* voted against the ›small solution‹ during the *Bundesrat* Subcommittee on Legal Affairs (*Bundesrat Unterausschuss des Rechtsausschusses*; *Bundesrat* – RA-U) meeting on 24 Jan. 1979 (Bundesrat – RA-U 1979: 36). The *Bundesrat* Committee on Legal Af-

74 | The TSG-R stands for TSG-*Referentenentwurf* and refers to the initial draft, while TSG-E is an abbreviation for *Entwurf* (draft) and denotes the Government Bill.

75 | The analysis covers the first two parts of the Bill, since the third and fourth parts are irrelevant to an analysis of trans, gender and gender regime.

fairs (*Bundesrat Rechtsausschuss; Bundesrat* – RA) supported this decision in its 466th session on 31 Jan. 1979 (Bundesrat – RA 1979: 36).

On 02 Feb. 1979, the *Bundesrat* Committees on Home Affairs (*Bundesrat Innenausschuss*) and Legal Affairs unanimously recommended to the *Bundesrat* to dismiss the ›small solution‹ and to change the title and structure of the Bill accordingly. They suggested to change the provisions under s. 1(1) TSG-E to require of an applicant to be at least 25 years old, unmarried, permanently sterile and to have undergone a surgical intervention to the effect of approximating the outer appearance of the ›other‹ gender (Bundesrat 1979a).

The issue of marriage in the event of an establishment of an applicant's gender status became the second major area of contention during the legislative process. The respective majorities in both legislative bodies were divided over the issue whether a marriage was supposed to be divorced prior to the application for the establishment of gender status or after the court decision had come into force.[76] According to s. 10(2) of the Government Bill, an applicant's marriage was to be dissolved once the court decision on the gender status was to take effect. The effects of the dissolution of the marriage were to be determined according to the regulations pertaining to a divorce (BMI 1978a, Anlage: 9). However, the *Bundesrat* Committee on Home Affairs and the *Bundesrat* Committee on Legal Affairs opposed s. 10(2) TSG-E and suggested a marriage be terminated prior to an application (Bundesrat 1979a: 10 f.).

On 16 Feb. 1979, the *Bundesrat* followed the committee recommendations without any further plenary debate (Bundesrat 1979b: 27 A-D). By contrast, the majority of MPs in the *Bundestag* supported the Government Bill after a short debate on 28 June 1979 (Deutscher Bundestag 1979a: 13169 B-13176 A).

The resistance to the so-called small solution and to s. 10(2) TSG-E was significant to the legislative process. According to Art. 84(1) GG, the matter of the Government Bill required the approval of the *Bundesrat*.[77] Hence, the Bill to change first names and establish gender status in specific cases was doomed to fail without the consent of the *Bundesrat*.

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76 | The Free Democratic Party (*Freie Demokratische Partei* [FDP]) which was the minor of the two governing coalition parties opted for a solution that did not require a divorce in the first place (Deutscher Bundestag 1979a: 13175 C). However, the liberal party did not have the political weight to influence the course of the Bill.

77 | Bills are divided into approval bills (*Zustimmungsgesetze*) and objection bills (*Einspruchsgesetze*). With regard to the former, the *Bundesrat* may consent to a bill, demand that the Mediation Committee be convened or reject a bill. Objection bills do not require *Bundesrat* approval. However, if two-thirds of the members of the *Bundesrat* object to a bill, the *Bundestag* needs a two third majority to reject the appeal and render the bill effective. Since the reform of the federal system (*Föderalismusreform*) took effect in Sept. 2006, the proportion of approval bills has dropped (bpb undated).

The government decided to follow up upon some of the minor issues the *Bundesrat* raised against the Bill, such as for instance the amount and kind of medical knowledge that informed the Government Bill and court proceedings. While the government refuted the accusation that it had not sufficiently implemented state-of-the-art medical knowledge in the design of the Bill (Bundesregierung 1979, Anlage 3: 25), it accepted the opposition's demand to seek additional medical expertise by forwarding a questionnaire designed by Dr. Jentsch (Wiesbaden, CDU/CSU) to renowned sexologists (Deutscher Bundestag – In 1979: 18).

However, the perspectives of the *Bundestag* and the *Bundesrat* on the so-called small solution and the requirement to terminate a marriage either prior to, or upon the establishment of gender status remained irreconcilable, despite tedious negotiations in several committee meetings and repeated attempts to come up with a viable solution for the respective majorities in both legislative bodies.[78] Members of the Christian Democratic Union / Christian Social Union (*Christlich Demokratische Union* [CDU] / *Christlich Soziale Union* [CSU]) and the SPD simply reiterated their respective perspectives on these issues (Bundesregierung 1979, Anlage 3: 25; Deutscher Bundestag – R 1980a: 117; Deutscher Bundestag – In 1980: 24).

The *Bundestag* passed the Government Bill after second and third reading on 12 June 1980 (Deutscher Bundestag 1980a: 17738 B-D). Since the CDU dominated the *Bundesrat* Committees on Home Affairs and on Legal Affairs, the latter recommended to the *Bundesrat* to call upon the Mediation Committee (*Vermittlungsausschuss*)[79] (Bundesrat – In-R 1980: 1; cf. Sieß 1996: 106).[80] Once

78 | See for instance the negotiations during the 91st meeting of the Bundestag Committee on Legal Affairs on 05 Mar. 1980 (Deutscher Bundestag – R 1980), the 94th meeting of the Bundestag Committee on Legal Affairs on 16 Apr. 1980 (Deutscher Bundestag – R 1980a), the minutes of the 86th meeting of the Bundestag Committee on Home Affairs on 29 Nov. 1979 (Deutscher Bundestag – In 1979) and the debate during the 94th meeting of the Bundestag Committee on Home Affairs on 27 Feb. 1980 (Deutscher Bundestag – In 1980).

79 | The Mediation Committee is composed of Members of the *Bundestag* and the *Bundesrat* for joint consideration of bills in instances when the consent of the *Bundesrat* is required, the latter however objects to the bill becoming law (Art. 77[2] GG). Art. 77(2) and 77(2a) GG determine the institutions eligible to demand the convention of a Mediation Committee, deadlines for submission of bills to the Bundesrat, response times and voting procedures in cases of amendments or upon completion of the mediation procedure. For further details and the exact wording of Art. 77(2) and 77(2a) in English, see BMJV 2017.

80 | The Bundesrat Legal Committee's decision was preceded by a recommendation by the Bundesrat Subcommittee of the Legal Committee to this effect (Bundesrat – RA-U 1980).

more, the majority of votes in the *Bundesrat* followed the Committee's recommendations without any debate in its 489th session (Bundesrat 1980: 301 D; Deutscher Bundestag 1980b).

The Mediation Committee came up with a compromise on 03 July 1980 (cf. Sieß 1996: 107). The Committee suggested that the Bill remain divided into a ›small solution‹ and a ›big solution‹ as the majority in the *Bundestag* had opted for (cf. ibid). However, it also proposed to raise the age requirement for an application for a change of first names to 25 years and to require of a person to be unmarried prior to applying for the establishment of gender status (Deutscher Bundestag 1980d, Anlage 2; cf. Sieß 1996: 107). The two latter suggestions were in line with the demands of the majority in the *Bundesrat*. The compromise was communicated to both legislative bodies, and the Bill finally passed the German *Bundestag* and the *Bundesrat* on 04 July 1980 (Deutscher Bundestag 1980c: 18688 A; Bundesrat 1980b: 333 D; Bundesrat 1980c; cf. Sieß 1996: 108 f.).

The Act to change first names and establish gender status in specific cases (Transsexual Act – TSG) was finally signed on 10 Sept. 1980 by the then President Carstens, Chancellor Schmidt and the federal ministers of the offices that were involved in drafting the Bill. It was announced in the Federal Law Gazette (*Bundesgesetzblatt*) as BGBl 1980, Teil I, 1654. The Bill was enacted on 01 Jan. 1981 to give the administration and courts of the *Bundesländer* time to become acquainted with the Act.

2.3.2 Sexological and trans concepts and interventions

Sexologists and transsexual individuals alike intervened into the legislative process. However, the types of intervention and the authority accorded to the respective contributions differed. While sexological interventions were granted privileged access and significant space during the legislative debate,[81] trans interventions were limited to lobbying in local constituencies and petitions, and the contents of the latter were barely discussed during plenary debates and committee meetings.

Sources and interventions

Sexological knowledge appeared on the terrain of the state in various guises and via different channels. The latter can be divided into unrequested interven-

81 | As the analysis in chapter 3.3.3 will show, privileged access and extensive discussion on sexological information did not necessarily mean that medical knowledge was implemented in the Bill. Nor does this mean that medical knowledge was at all times the real issue whenever MPs and committee members referred to it.

tions from civil society agents, information upon request and medical knowledge by governmental sources.

Interventions that took the first route were necessarily proactive and decidedly strategic. Depending on the stage of the legislative process, these contributions either generally pressed for trans legislation, such as the medico-legal submission by the DGfS to the Federal Minister of Justice in 1974 (Krause et al. 1974), or exerted pressure on particular state actors in critical moments of the legislative process. One of the two most prominent interventions that took this route was the public appeal to the *Bundesrat* and the Prime Ministers (*Ministerpräsidenten*) of the *Bundesländer* by the three West German sexological associations on 28 Feb. 1979. In these documents, sexologists urged the addressees to support trans legislation and to take into consideration medical and psychological knowledge on the subject matter (Sigusch/Gindorf/Kentler 1979: 36). The other was the sexologist Pfäfflin's article called *Skalpell oder Couch? Probleme der Transsexualität*, which appeared in the weekly news magazine DER SPIEGEL on 11 Feb. 1980 and explicitly took a stance in favour of the ›small solution‹ as proposed by the West German social-liberal government (Pfäfflin 1980: 211; Deutscher Bundestag – In 1980, Beigabe).

Medical knowledge upon request appeared on the level of the state via oral consultations and written statements. Among these were an updated version of the sexological submission to the Federal Constitutional Court which served as background knowledge for the Bill (Deutscher Bundestag 1979a: 13170 D) and answers to an extensive questionnaire the Christian democratic MP, Dr. Jentsch presented to the Federal Home Office during the *Bundestag* Committee on Home Affair's meeting on 29 Nov. 1979 (Deutscher Bundestag – In 1979, Anlage 4: 2-4).

Medical knowledge also entered the parliamentary debate from sources on the terrain of the state. The minutes of the 86th session of the Bundestag Committee on Home Affairs for instance state that the physician, Dr. Meinecke (Hamburg, SPD), presented to the committee sexological assumptions on the aetiology of transsexuality (ibid).[82] In another instance, the legal expert and MP Dr. Müller-Emmert submitted a medico-legal article he co-authored with the physician Dr. Hiersche (1976) and which appeared in the medical journal *Der Gynäkologe* to the *Bundestag* Committee on Home Affairs on 02 July 1979. In a letter, he asked the chairperson of the committee, Dr. Wernitz, to distribute the article among the members of the committee (Müller-Emmert 1979).

82 | Dr. Meinecke stated that he was a physician during the plenary debate of the *Bundestag* at third reading of the Bill (Deutscher Bundestag 1980a: 17735 C).

Since trans individuals were not invited to any consultations at the government level, every intervention may be considered proactive.[83] Trans individuals used lobbying and petitions as channels to voice their demands and opinions. Trans individuals did not yet organise politically on a national scale in Germany during the 1970s. Rather, lobbying took place in local constituencies. Little written information is available on lobbying activities and the issues trans individuals raised. However, a transman's petition clearly indicates that trans people lobbied politicians in Hamburg prior to, and during the legislative proceedings (Petitioner 5 1979: 1).

While it is quite likely that lobbying was an effective means of influencing the legislative process, it is premature to arrive at such a conclusion in this particular case, given the scarce evidence. Interestingly, however, particularly social democratic Members of the *Bundestag* representing constituencies in Hamburg pressed for legislation, most notably Dr. Arndt in the pre-legislative era[84] and Dr. Meinecke during the legislative process.[85]

While the petitions suggest that most of the individuals acutely monitored the legislative process,[86] knowledge on legal and political conventions and proceedings varied. Contributions ranged from a highly unrealistic demand for a revision of the Act roughly 2.5 years after it had come into force (Petitioner 3 1982), a misplaced complaint (Petitioner 6 1979),[87] to a renowned activist and lawyer's far-sighted critique of constitutional pitfalls in several provisions of the Bill and future Act (Petitioner 4 1979; 1980).[88]

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83 | One petitioner only mildly criticised the legislator for not involving trans persons during the consultation process (Petitioner 7 undated).

84 | As mentioned earlier on, Dr. Arndt initiated all parliamentary enquiries throughout the 1970s and was, together with Dr. Meinecke, Kleinert and 26 other members of the SPD responsible for the motion on 30 Mar. 1976.

85 | Dr. Meinecke is one of the few MPs who is recorded to have mentioned the petitioners in his speech during the first plenary consultation in the *Bundestag* on 28 June 1979 (Deutscher Bundestag 1979a: 13173 D) and who consistently accompanied the legislative process of the Bill for the SPD in the *Bundestag* and during committee meetings.

86 | An obviously political and legal layperson for instance quoted from the *Bundestag* stenographic reports to support her argument (Petitioner 7 undated: 1).

87 | The petitioner complained to the *Bundestag* Committee on Petitions that the Home Office of the *Bundesland* Schleswig-Holstein had addressed a letter to her using her former male first name (Petitioner 6 1979).

88 | Her critique particularly focused on the provisions in ss. 8(1)1 and 7(2) TSG-E. Section 8(1)1 TSG-E rules that two experts are required to state that the applicant's sense of belonging to the ›other‹ gender will with a high degree of probability not change. Her opinion will be outlined in more detail later on. Section 7(2) of the Bill (and the Act) rules that the decision to change the first names is void, if a person marries.

Moreover, the focus of the petitions proved to be heterogeneous. The petitions ranged from brief pledges for legislation to allow a change of first names (Petitioner 1 1979; 1979a; Petitioner 2 1979) to the design of a bill (Petitioner 3 1982) at the end of a lengthy exchange between a transman and government officials (Petitioner 3 1979; BMI 1979; Petitioner 3 1979a; 1979b; BMI 1979a; Deutscher Bundestag – R 1979; Petitioner 3 1982). Some petitioners addressed their respective social and legal situation (Petitioner 1 1979; Petitioner 5 1979).[89] More frequently, though, transsexual individuals commented on various provisions of the Bill (Petitioner 4 1979; 1980; Petitioner 7 undated; Petitioner 3 1979; 1979b; Petitioner 5 1979).

Perspectives on the Bill

Not only did the channels of access to the arena of institutionalised politics vary between sexologists and transsexual individuals, so did the respective social agents' perspectives on the Bill. While sexological interventions with few exceptions focused on broad aspects of the Bill, transsexual individuals largely concentrated on individual provisions.

Sexologists unanimously and strongly supported the ›small solution‹ in their interventions during the legislative process. They favoured this particular structure of the Bill for three reasons. In the written response to the questions prepared by the opposition, sexologists suggested that the option to change first names contributes to a transsexual individual's social integration. They reasoned that the ›small solution‹ would enable the respective person to take on the social role he or she deemed more in accordance with his or her gender identity (Deutscher Bundestag – 1979, Beigabe 1: 2). Moreover, the ›small solution‹ was considered to facilitate the diagnostic decision-making process, since the transsexual individual had time to explore life in the desired gender role independently of endocrinological and surgical treatment (ibid; Pfäfflin 1980: 211). Finally, sexologists argued that it was a personal decision whether an individual wished to undergo sex reassignment surgery. Hence, those who did not opt for surgery could apply for a change of first names only (Deutscher Bundestag – In 1979, Beigabe 1: 3). Pfäfflin quite dramatically summarises sexologists' sentiment towards the opposition's plans to scrap the ›small solution': »Without the ›small solution‹ the Act would remain a torso, a monstrosity one can only caution against.« (Pfäfflin 1980: 211; cf. Sieß 1996: 103)

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89 | While one post-operative petitioner did not mention any social problems without legal recognition, she anticipated them in the workplace and with the bureaucracy (Petitioner 1 1979). Two other petitioners recounted problems in some areas of life, such as with the state bureaucracy (Petitioner 6 1979: 1; Petitioner 7 undated: 2) and none at all in everyday life (ibid) and when dealing with the health insurance and the bank (Petitioner 6 1979: 1).

However, unlike the Government Draft Bill, which initially allowed a change of first names as soon as the applicant reaches the age of majority, Sigusch and Schorsch recommended increasing the minimum age to 21 years. The sexologists admitted that the proposed age limit was somewhat arbitrary. However, they reasoned that even though some transsexual individuals were physiologically and psychosexually mature at the age of majority, such a measure was justified in order to avoid a premature and questionable indication in other cases (Deutscher Bundestag – In 1979, Beigabe 1: 4).

The petitioners' perspectives on the Bill were more heterogeneous than those sexologists presented. They ranged from hopes for a speedy passage of the Bill (Petitioner 1 1979; Petitioner 2 1979; Petitioner 5 1979: 2), objections to individual provisions of the Government Bill (Petitioner 4 1979; 1980; Petitioner 7 undated; Petitioner 5 1979) to a critique of the basic structure of the Bill and the Act, respectively (Petitioner 3 1979; 1979b; 1982).

The petitioners did not necessarily share a common critique or perspective on trans. While most petitioners e. g. either did not focus on, or as much as mention[90] the division of the Bill into provisions that regulate a change of first names and those that establish the gender status, those who did debated this issue controversially. One petitioner vehemently opposed the ›small solution‹ for two reasons. First, a change of first names without a revision of the entry in the birth registry would in his opinion transmit the split between the person's mind and body to official documents, too. Second, he feared that the ›small solution‹ might entice transvestites and homosexual cis individuals to seek solutions under a bill designed specifically for transsexual individuals. He suggested instead to sever the ›small solution‹ from the Transsexual Bill and to create a separate bill for transvestites (Petitioner 3 1979b: 3). By contrast, another petitioner defended the option to apply for a change of first names only. She presented two reasons to support her stance. First, the ›small solution‹ would enable married individuals to continue their marriage. Second, the Act should in her opinion not be more restrictive than the Federal Constitutional Court decision (Petitioner 4 1979: 5). Three other petitioners were foremost concerned about the option to have their first names changed in official documents (Petitioner 1 1979; Petitioner 6 1979; Petitioner 5 1979) and therefore can, by implication, be considered supporters of the so-called small solution.

In another instance, a petitioner objected to s. 8(1)2 TSG-E, which requires of a married individual to get divorced in order to be recognised as a member of the ›other‹ gender. She argued that it should be left up to the partners to decide whether they wished to continue or terminate their marriage (Petitioner 7 undated: 1). By contrast, another petitioner considered the abovementioned rule appropriate. Like many sexologists in the 1970s and 1980s, he was convinced

90 | See e. g. Petitioner 5 1979.

that unambiguously transsexual individuals were heterosexual (Petitioner 3 1979b: 5). Therefore, he believed that a marriage between a transsexual and a non-transsexual person was no longer possible.

Similarly, some petitioners disagreed over ss. 6 and 9 TSG-E. The latter provide for a reversal of the revision of first names or gender status, respectively. One petitioner who suggested that the desire for a reversal of any of these decisions would not occur frequently did not object to ss. 6 and 9 TSG-E (Petitioner 4 1979: 2). Another petitioner however insisted that transsexuality was caused by an organic predisposition and was therefore necessarily irreversible. He suggested that an initial decision be rendered permanent (Petitioner 3 1979: 3).

The petitioners were also divided over the status the Bill accrued to experts. Two petitioners vehemently opposed the regulation that provides that a successful post-operative trans person's application for the establishment of gender status relies on supportive expert reports. One of the petitioners cautioned that experts were fallible. Moreover, society could be expected to stomach rare incidents in which individuals desire a reversal of a decision. In her opinion, the possibility that an establishment of a person's gender status may be denied a post-operative applicant constituted a breach of Art. 1 GG (Petitioner 4 1979: 2). The other petitioner argued that expert reports were unnecessary, since a person's gender status was established forever due to surgery. In her opinion, the requirement to consult expert reports for an establishment of gender status would simply delay the procedure unnecessarily and render the procedure more expensive (Petitioner 7 undated: 1). Other petitioners did not object to this requirement at all.[91]

Nevertheless, petitioners who were quite at odds e. g. about the provisions laid down in s. 8(1)3 TSG-E agreed on other issues at the same time. Opposition was most prominent to the minimum age requirement of 25 years provided in s. 8(1) TSG-E to gain the legal recognition of the experienced gender.[92] The petitioners argued that based on Art. 3 GG,[93] it was unconstitutional to grant different rights to post-operative trans individuals based on age (Petitioner 4 1979: 3)[94] and that such a regulation placed undue hardship on individuals younger than 25 years of age who had undergone sex reassignment surgery (Petitioner 4 1979: 3; Petitioner 3 1979b: 4).

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91 | See e. g. the letter to the Federal Home Office on 15 Oct. 1979 (Petitioner 3 1979b).

92 | Unlike s. 8(1)1 TSG-R, which provided that an application for the establishment of gender status may only be granted, if the applicant is at least 21 years of age, the minimum age was increased to 25 years of age in the TSG-E during the legislative process.

93 | According to Art. 3(1) GG, »[a]ll persons shall be equal before the law« (BMJV 2017).

94 | Indeed, in 1982 the Federal Constitutional Court ruled that s. 8(1)1 TSG amounted to a breach of Art. 3(1) GG (BVerfG 1983: 170). For more details on this decision, see chapter 3.3.2.

The government's intention to regulate a person's change of first names and establish of gender status according to the proceedings of contentious jurisdiction (s. 14 TSG-E) also met upon resistance. The petitioners who raised this issue argued that it was inappropriate to expect of individuals to be burdened with costs in order to correct an error caused by what they considered to be a prenatal defect (Petitioner 3 1982: 3; Petitioner 7 undated: 1).

Three petitioners raised concerns about the wording used in some provisions of the Draft Bill, arguing that it was either misleading or discriminatory. One petitioner objected to the phrase »a person [...] is to be considered a member of the other gender« that introduces the prerequisites for gender recognition in s. 8(1) TSG-E. She argued that this particular formulation is discriminatory, since it implies that the respective person does not really belong to the ›other‹ gender (Petitioner 4 1979: 4). In another instance, a petitioner rejected the phrase »no longer feels he belongs to the gender, which is entered in the birth registry«, which precedes the conditions for a change of first names in s. 1(1) TSG-E. He suggested that the wording contradicted the notion that there was an organic cause of transsexuality (Petitioner 3 1979b: 2). The author also criticised the formulation »has felt compelled to live according to his ideas« in the same section, because it invokes the notion of a mental disorder. In his view, the abovementioned phrase violates an applicant's personality (ibid). Another petitioner held that the term ›transsexuality‹ itself was awkward, arguing that it is frequently associated with sexuality. In his opinion, however, transsexuality demarcates an identity problem (Petitioner 5 1979: 1).

Another transman suggested that the Bill was based upon flawed premises. Referring to s. 8(1)4 TSG-E, which rules that an establishment of gender status may only be granted, if the applicant has undergone surgery to change his external sex characteristics to the effect of having clearly approximated the appearance of the so-called other gender, he argued that the government had in mind transwomen only when it drafted the Bill. Quoting a surgeon, he argued that feminising surgery appeared to be quite advanced. By contrast, the results of masculinising surgical interventions were, with exception of sterilisation, unacceptable at the time of writing. He suggested that the Bill ought to take into consideration the different situations transwomen and transmen face and limit sex reassignment surgery to sterilisation for the latter until surgical methods have improved (Petitioner 3 1979b: 5).

Finally, one petitioner held that s. 7(2) TSG-E was unconstitutional. She argued that it is unjustifiable to declare a decision to change first names void, if a person marries, since the Bill allows a married person to change his or her first name without such a consequence. Moreover, a transwoman's desire to marry a ciswoman does not imply that the applicant no longer identifies as a woman. Instead, she might simply want to live with a woman as a woman (Petitioner 4 1979: 5).

Concepts of transsexuality

Sexologists and trans individuals raised similar issues when addressing transsexuality on the terrain of the state. The most prominent issues were transsexual individuals' understandings of self and mental health, the aetiology of transsexuality, the probability of reversals of the decision to transition from one gender to the ›other‹, surgery, sexual orientation and arguments to justify trans legislation. Altogether, the issues shed a light on their respective concepts of trans(sexuality).

Sexologists' and trans individuals' concepts concurred with regard to trans individuals' understandings of self, their respective mental state, statements on reversals and surgery. The sexologist Pfäfflin e. g. noted that transsexual individuals integrate transsexuality into their lives in different ways. While some transsexual individuals consider transsexuality a transitory condition, others suggest that this gender identity constitutes a permanent state (Pfäfflin 1980: 209 f.). These understandings of one's gender history are mirrored in the petitions. One author e. g. refers to herself as a »former transsexual«. She argues that since sex reassignment surgery has eradicated the discrepancy between her body and her mind, she no longer considers herself a transsexual individual (Petitioner 6 1979: 1). Another petitioner however continues to view him- or herself a transsexual individual despite having undergone surgical interventions (Petitioner 1 1979).

Neither sexologists nor transsexual individuals suggested that trans individuals were mentally disturbed. The sexologist Schorsch e. g. stated that transsexual individuals are not usually mentally ill. According to Schorsch, psychological disorders may however occur as a secondary effect due to strong social pressure and conflicts (Schorsch 1974: 195). With exception of one petitioner, trans individuals did not raise the issue of mental health. However, the person who did repeatedly criticised formulations in the Bill that in his opinion associated transsexuality with a psychological disorder (Petitioner 3 1979b: 2; ibid 1982: 2).

Sexologists and trans individuals shared the assessment of the frequency of reversals on decisions to transition after having undergone sex reassignment procedures. Sexologists and trans individuals alike held that instances of reversals were either unknown in the Federal Republic of Germany (Deutscher Bundestag – In 1979, Beigabe 1: 7) or rare occurrences (Pfäfflin 1980: 209; Petitioner 4 1980).

Sexologist and trans perspectives were more or less identical with regard to surgery as the defining feature of transsexuality. However, this did not necessarily mean that they believed all transsexual individuals opt for surgical interventions. While the sexologists who responded to the questionnaire agreed with Schorsch (1974: 198) that the desire for surgery was the most significant feature in transsexual individuals and a successful mode of treatment in most

cases, they emphasised that it was a personal decision, whether a person wanted to undergo surgery or not (Deutscher Bundestag – In 1979, Beigabe 1: 3). They also stressed that surgery was the final step during a prolonged course of treatment (ibid; Pfäfflin 1980: 206). These statements on the one hand mirror sexologists' unease with sex reassignment surgery and on the other hand indicate less rigid understandings of transsexuality than in the mid-1970s. Most trans individuals did not claim that all transsexual individuals wished to undergo surgery. However, several petitioners had undergone sex reassignment surgery at the time of writing.[95] One transman suggested that surgical measures were appropriate, provided surgical techniques were sufficiently advanced (Petitioner 3 1979b: 5) and did not threaten the individual's life (ibid 1982: 5).

Sexologists and trans individuals couched their respective demands for trans legislation in liberal rhetoric by referring to transsexual individuals as a »minority disadvantaged by fate« (Krause et al. 1974, quoted in Sigusch 1991: 228) or as victims of nature (Petitioner 7 undated: 1; Petitioner 5 1979: 1).[96] Sexologists emphasised that the lack of legal recognition impinged on transsexual individuals' mental health and social integration (Schorsch 1974: 195). Some trans individuals argued that their gender identity was caused through no fault of their own. Others suggested either implicitly (Petitioner 4 1979: 2) or explicitly (Petitioner 5 1979: 2), and with or without reference to essentialist concepts that the recognition of a transsexual individual's first name and gender status was a human right (Petitioner 4 1979; Petitioner 5 1979: 2).

The social agents were however divided over the aetiology of transsexuality and used different arguments to justify legislation. Sexologists who intervened into the legislative process offered a multi-causal explanation for transsexuality. Schorsch e. g. suggested that interlocking environmental and somatic conditions caused transsexuality (Schorsch 1974: 198). Pfäfflin assumed somatic and psychological causes (Pfäfflin 1980: 205 f.), and Müller-Emmert and Hiersche suggested that somatic, psychosocial and environmental factors triggered a transsexual development (Müller-Emmert/Hiersche 1976: 96). According to Dr. Meinecke (Hamburg, SPD), this conglomeration of potential causes indicated that the aetiology of transsexuality was unknown (Deutscher Bundestag – In 1979: 15). By contrast, some petitioners insisted that a prenatal organic defect caused a transsexual development (Petitioner 7 undated: 1; Petitioner 3 1979b: 2). One transman quoted a renowned medical expert and referred to Neumann's and Dörner's studies to support his assumption that prenatal endocrinological effects on the development of the brain were responsible for trans-

95 | See e. g. Petitioner 1 1979; Petitioner 6 1979; Petitioner 3 1979.

96 | For major characteristics of liberal rhetoric, see the following chapter.

sexuality (Petitioner 3 1979: 5). However, other petitioners did not refer to the aetiology of transsexuality at all.[97]

Sexual orientation was another issue where sexologists' and trans individuals' concepts did not concur. Nor were trans individuals' understandings of transsexual persons' sexual orientations congruent. While sexologists claimed that transsexual individuals were heterosexual (Schorsch 1974: 195; Müller-Emmert/Hiersche 1976: 95), trans individuals themselves were divided over the issue of whether transsexual individuals were *per se* heterosexual or not. While one of the petitioners e. g. insisted that trans individuals were usually heterosexual (Petitioner 3 1979b: 5), another suggested that more than half of all transwomen were lesbians (Petitioner 4 1979: 5).

2.3.3 Negotiating transsexuality and trans rights during the parliamentary debate

The parliamentary discourse on transsexuality and trans rights was shaped by liberal rhetoric and different perspectives on concrete provisions of the Bill. While all parties represented in the *Bundestag* and *Bundesrat* agreed on the essentialist nature of transsexuality and the legitimacy of trans rights, controversies over the Bill generated different concepts of transsexuality and notions on the scope of trans rights. In the course of the debate transsexuality was constructed, and medical knowledge on transsexuality deployed strategically to match the respective values the major political parties wanted to implement in the Bill.

General characteristics of the debate

The social-liberal government as well as the official Christian democratic opposition agreed that it was the legislator's task to create provisions that allow a legal recognition of a person's gender according to the proceedings of contentious jurisdiction after the applicant had undergone surgery or any other medical intervention to change his or her genitalia.[98] The all-party consensus can be explained by three factors. First, regardless of how unsettling this thought was to some MPs,[99] the MPs who engaged in the debate formally adopted two

97 | See e. g. Petitioner 4 1979; 1980.

98 | See e. g. Dr. Jentsch's (Wiesbaden, CDU/CSU) statement during second and third reading of the Bill on 12 June 1980 (Deutscher Bundestag 1980a: 17734 A).

99 | During a meeting of the *Bundestag* Committee on Home Affairs on 29 Nov. 1979, Dr. Jentsch (Wiesbaden, CSU/CSU) stated that a person's gender status was so far based on external biological findings. He feared that the determination of a person's gender status would become fraught with uncertainty, since the Bill took into consideration subjective criteria, too (Deutscher Bundestag – In 1979: 15).

basic premises medical science and jurisdiction had generated. One of them was that the external sex characteristics of a person at the time of birth do not necessarily determine a person's gender identity and the other was that gender is mutable. Second, the MPs were aware of the Federal Constitutional Court decision on 11 Oct. 1978. Third, the *Bundestag* had unanimously resolved to demand of the government to present a corresponding draft bill on 10 June 1976.

All MPs who spoke up on the issue of trans legislation engaged in liberal rhetoric to express their general support for legislation. One of the features of liberal ideology is that societies consist of unchangeable majorities and minorities. MPs of all political parties emphasised that transsexual individuals constitute a tiny minority that through no fault of its own suffers from a condition marked by a discrepancy between their respective bodies and minds. This split forces them to live in the gender accorded to the ›other‹ sex.[100]

However, in the opinion of all MPs involved in the debate on the Bill, transsexual individuals not only faced problems caused by »a special imprinting« (Deutscher Bundestag 1979a: 13169 C). Rather, they suggested that the law, widespread ignorance and social prejudice denied them citizenship and prohibited their social integration (Deutscher Bundestag 1979; 1979a: 13169 D; 13173 D; 1980a: 17733 D/17734 A).

A second characteristic of liberal rhetoric is that it is the duty of the liberal-democratic state to protect minorities. Regardless of the respective party membership, the MPs repeatedly emphasised that a bill to the abovementioned effect was a means of a credible and effective modern democracy whose task it is to socially include and take into consideration the needs of a small and vulnerable minority, which faced laws that increased their problems.[101] The appeal to the legitimacy of the liberal-democratic state is maybe best summarised in

100 | See, for instance, the motion by Dr. Arndt, Dr. Meinecke, Kleinert and 26 other members of the SPD on 30 Mar. 1979 (Deutscher Bundestag 1976), the plenary speeches by von Schoeler, Parliamentary Secretary of State, on 28 June 1979 (Deutscher Bundestag 1979a: 13169 C and Wolfgramm, representative of Göttingen and member of the FDP (ibid: 13174 D) and Dr. Jentsch's speech (Wiesbaden, CDU/CSU) on 12 June 1980 (Deutscher Bundestag 1980a: 17733 D).

101 | See e. g. von Schoeler's statement on 28 June 1979 (Deutscher Bundestag 1979a: 13169 D, Dr. Meinecke's (Hamburg, SPD) speech (ibid: 13173 D), Dr. Jentsch's (Wiesbaden, CDU/CSU) statement on 12 June 1980 (ibid: 1980a: 17734 A) and Wolfgramm's (Göttingen, FDP) statement (ibid: 17736 C). Only one MP (Dr. Mende (CDU/CSU) questioned whether trans legislation was of any public interest in the pre-legislative period, considering that transsexual individuals only constituted a small minority in a country with a population of approximately 61 million people (ibid 1975: 10943 D). Dr. Schmitt-Vockenhausen, the then Vice President of the *Bundestag*, responded to Dr. Mende's question as follows: »Ladies and gentlemen, if the Chair was to examine submitted questions

von Schoeler's statement during his introduction of the Bill to the *Bundestag* on first reading: »But I believe that the liberalness of a state can be measured by, and especially in the way it deals with minorities, whether it takes their problems seriously and is prepared to solve them.« (Deutscher Bundestag 1979a: 13171 A; cf. Sieß 1996: 99)

The parliamentary debate in the *Bundestag* and *Bundesrat* followed party lines. In addition, most of the negotiations on the Bill to change first names and establish gender status in specific cases did not take place during the plenary sessions of either the *Bundestag* or the *Bundesrat* but in the respective Committees on Home Affairs and Legal Affairs.

In fact, with exception of the MPs who negotiated on the Bill during committee meetings, no other MP got involved in the plenary debates. Frequently, MPs simply followed the recommendations of the respective party policy in the committees without any plenary debate at all.[102] Moreover, as Wolfgramm (Göttingen, FDP) noted in his speech during the first plenary consultation in the *Bundestag* on 28 June 1979, only few MPs were present in the first place (Deutscher Bundestag 1979a: 13174 A/B).

However, those who got involved on behalf of the Bill discussed controversial issues matter-of-factly as von Schoeler remarked in his contribution to the plenary debate in the *Bundestag* during second and third reading of the Bill (ibid 1980a: 17737 C). None of the MPs considered the recognition of a person's gender and the implications for marriage a moral issue. Moreover, while the conservative MP Dr. Jentsch had hoped for support from Christian congregations, neither the Protestant nor the Catholic Church published statements on the Bill (Deutscher Bundestag – In 1980, Beigabe 1: 10 f.). Finally, the West German parliamentary debate focused on possible effects of individual provisions of the Bill, rather than on the aetiology of transsexuality.

Controversial issues

Transsexuality and trans rights were debated in the context of the ›small solution‹, the point in time a marriage was to be dissolved under the provisions of the ›big solution‹, the relationship between trans and third-party rights, and medical knowledge. With exception of the minor governing coalition party, which questioned heteronormativity, neither the SPD nor the CDU/CSU challenged the privileged status of heterosexuality or the gender binary. However,

according to the criteria of how many people were affected by a question, some questions could not be introduced« (ibid: 10944 A; cf. Sieß 1996: 83).

102 | There was e. g. no further debate on the recommendations of the *Bundesrat* Committee on Home Affairs of 11 June 1980 (Bundesrat – Ausschuss für Innere Angelegenheiten 1980) during the plenary session of the *Bundesrat* on 27 June 1980 (Bundesrat 1980: 301 C).

the CSU/CSU stood for more conservative notions on the gender order, marriage and the family and more restrictive and homogeneous understandings of transsexuality than the SPD.

Controversial issues: Struggling over the ›small solution‹

The so-called small solution creates an option for a change of first names without surgery and allows an individual to revert to the former first names upon application (s. 6[1] TSG-E). Consequently, it challenges the legally produced link between first names and morphology and the notion that a person's gender identity might only change once in life.

Proponents of the ›small solution‹ presented several arguments to defend the non-surgical option. Dr. Baumann and the Parliamentary Secretary of State, von Schoeler, e. g. supported the ›small solution‹, arguing that nobody should be forced to undergo surgery (Bundesrat – RA 1979: 35; Deutscher Bundestag – In 1980: 25). Moreover, the Parliamentary Secretary of State, von Schoeler, and Dr. Meinecke (Hamburg, SPD) argued that the ›small solution‹ reduces the pressure on individuals under the age of 25 years, since the option of changing first names helps them circumvent several problems in everyday life until they are sufficiently mature to assess the consequences of surgery (Deutscher Bundestag 1979a: 13170 D; ibid 1980a: 17735 D; cf. Sieß 1996: 90 f.). Furthermore, the government coalition designed the ›small solution‹ in order to give inoperable transsexual individuals a chance to adapt themselves to the ›other‹ gender (Deutscher Bundestag 1979a: 13170 B; cf. Sieß 1996: 89 f.). Dr. Meinecke (Hamburg, SPD) also suggested that the ›small solution‹ provides a solution for individuals who fear surgery (Deutscher Bundestag 1979a: 13174 B). He added that the desire to undergo surgery does not alone indicate a transsexual person's gender identity (ibid; cf. Sieß 1996: 100).

As mentioned earlier on, the ›small solution‹ provides the option for a reversal to the initial first names. The governing coalition designed s. 6(1) TSG-E to avoid placing undue hardship on those individuals who, after changing first names, developed an understanding of self that was more compatible with the gender assignment at the time of birth (BMI 1978a, Anlage: 20; cf. Sieß 1996: 91). In summary, then, the governing coalition allowed for dynamic transsexual developments within the confines of the gender binary.

By contrast, the CDU/CSU staunchly resisted the ›small solution‹. The opposition argued in favour of maintaining a strict link between a person's first names, morphology and gender identity and against the possibility to revert to the former first names. The opponents of the ›small solution‹ held that a provision requiring less than the ›big solution‹ suggests that there are two groups of transsexuals, i. e. those who strive to adapt to the ›other‹ sex/gender as far as possible and those who are content with a change of first names. However, in their opinion it was characteristic of all transsexual individuals that they wish

to approximate the ›other‹ gender, using surgical means. Hence, individuals who reject surgery could not in their view be considered transsexual (Bundesrat 1979a: 9). To members of the opposition, it was appropriate, then, to require of transsexual individuals to undergo surgery (Deutscher Bundestag 1979a: 13172 B). Moreover, conservative MPs argued that it was not the task of the legislator to legally enshrine therapeutic measures for individuals who cannot or do not want to undergo surgery (Deutscher Bundestag 1980: 15; cf. Sieß 1996: 105). The opponents of the ›small solution‹ also argued that its particular provisions exceeded the motion of the *Bundestag* on 10 June 1976 and the Federal Constitutional Court decision on 11 Oct. 1978 (ibid: 14 f.; cf. Sieß 1996: 104). Finally, the CDU/CSU rejected the provision that allows a person to apply for his or her initial first names after a successful application to change first names, since transsexual developments were irreversible and such instances would only occur, if an applicant had abused the provisions of the ›small solution‹ (Bundesrat 1979a: 19; cf. Sieß 1996: 97). Overall, the CDU/CSU promoted a homogeneous and rigid concept of transsexuality.

Several arguments presented by the CDU/CSU reveal that the latter feared that the ›small solution‹ would threaten the gender order. This becomes particularly evident in the set of arguments aimed at limiting access to the legal provisions of the future Transsexual Act. Opponents of the ›small solution‹ for instance argued that this particular option enables non-transsexual individuals to make use of the regulations provided in ss. 1 to 7 TSG-E. Members of the CDU/CSU suggested that the comparatively easy access to provisions to change first names might lead persons with »transsexual leanings« to change sex prematurely, even though there were other solutions (Bundesrat 1979: 9; Deutscher Bundestag 1979a: 13172 C). Similarly, they argued that individuals should be safeguarded from presenting themselves in the role of the ›other‹ gender at an early stage in order to avoid promoting a premature transsexual fixation of an immature person (Bundesrat 1979: 10). Members of the CDU/CSU also countered the argument presented by the governing coalition that the provisions of the ›small solution‹ were meant to enable inoperable individuals to bear a first name reflecting their respective gender identity, arguing that there were no figures on inoperable transsexual individuals. Moreover, even if this were the case, the legislator could not prevent self-mutilation and suicides (Bundesrat – RA-U 1980: 15). According to the CDU/CSU, provisions to revise first names without surgery were unacceptable, considering, as Dr. Jentsch (Wiesbaden, CDU/CSU) suggested, that the ›small solution‹ tempted a large number of individuals to succumb to their »transsexual leanings« (Deutscher Bundestag 1979a: 13172 C). Moreover, conservative MPs suggested that the so-called small solution deviated from the legal principle that the first name corresponds with a person's gender (Deutscher Bundestag 1980: 15).

Members of the governing political parties emphasised enabling aspects of the ›small solution‹. According to the government coalition, the ›small solution‹ rendered possible the early involvement of experts (BMI 1978, Anlage 3). Moreover, members of the SPD and FDP argued that the provisions in ss. 1 to 7 TSG-E enabled individuals to live as members of the ›other‹ gender in their private lives and vis-à-vis the bureaucracy (Deutscher Bundestag 1979a: 13175 B) and would help reduce discrimination transsexual individuals face in everyday life (ibid: D). Von Schoeler reinforced his argument by mentioning that transsexual individuals had originally asked for the ›small solution‹ only (Deutscher Bundestag – In 1980: 26).

The CDU/CSU assessed the effects of the ›small solution‹ quite differently. Members of the opposition suggested that the provisions made to revise first names without surgery would disrupt transsexual individuals' everyday life and pose problems for others in specific situations. They cautioned that individuals who did not undergo any somatic steps towards the ›other‹ sex would, due to the discrepancy between the first name and the individuals' respective first names, encounter embarrassment and problems when presenting themselves as members of the ›other‹ gender (Deutscher Bundestag – R 1980a: 117; Deutscher Bundestag 1980a: 17734 C). Moreover, while Dr. Jentsch (Wiesbaden, CDU/CSU) conceded that provisions for a change of first names without the requirement to undergo surgery might help transsexual individuals deal with the bureaucracy, such a solution would however not be useful in the event of hospitalisation and imprisonment or when using washrooms (ibid).

Members of the CDU/CSU also rejected the ›small solution‹, arguing that it posed a threat to marriage. According to the CDU/CSU, the ›small solution‹ impinged on the notion of marriage as a constitutionally protected union between a man and a woman and provided a potential gateway for homosexual marriages (Deutscher Bundestag 1980: 15). This stance is vividly expressed in Dr. Jentsch's speech in the *Bundestag* on second and third reading of the Bill:

> The small solution bears a potential risk to the institution of marriage, which we do not want to unleash. If we allow a person to belie her sex by using a first name of the other sex, it can be expected for the future that ever more rights will be derived from this. [...] When will the time come for the demand that the transsexual whose outer appearance has remained that of a man, but who appears as a woman should also be allowed to marry another man? We do not want to open this floodgate. (Deutscher Bundestag 1980a: 17734 C/D)[103]

103 | Although the facts of the case were different, in principle, the floodgate opened on 06 Dec. 2005. For details on the Federal Constitutional Court decision that rendered a marriage possible between a male transwoman who had been granted a revision of first names and a ciswoman, see chapter 3.3.3.

The governing coalition countered the notion that marriage as a heterosexual institution was doomed to perish. While the SPD designed s. 7 TSG-E to allow a married transsexual individual to continue his or her marriage (Deutscher Bundestag 1980: 14), social democrats pointed out that s. 7(1)2 TSG-E provided that the decision on an applicant's first name would be considered void in the event of a marriage and that s. 7(1)1 TSG-E ruled that the court decision to change first names was equally void in the event of the birth of child [...]. (Ibid.)

Controversial issues: Negotiating marriage under the provisions of the ›big solution‹

The struggle over marriage as a heterosexual institution became even more prominent in the debate on s. 10(2) TSG-E. The political parties represented in the *Bundestag* and the *Bundesrat* developed three different perspectives on this issue. Despite conflictive perspectives on this particular provision, with exception of the FDP, none of the major political parties challenged heteronormativity.

Section 10(2) TSG-E suggested that if the applicant is married, the marriage needs to be dissolved as soon as the decision to change the applicant's gender status has come into force. The effects of the dissolution were to follow the regulations concerning divorce (BMI 1978a, Anlage: 24; Deutscher Bundestag 1980: 14). The SPD considered this provision appropriate for three major reasons. First, social democrats reasoned that it would be unfair to expect of an applicant to get divorced without having granted him or her the security of gender recognition (BMI 1978a: 24). Second, the SPD argued that the dissolution of a marriage prior to recognising a person's gender status produces unnecessary costs (ibid). Third, members of the SPD argued that a marriage needs to have broken down in order to be divorced. Transsexualism however does not constitute a legally acceptable reason for divorce. As a result, a court could deny a transsexual person a revision of gender status simply because the marriage did not break down (Bundesregierung 1979: 25; cf. Sieß 1996: 94).[104]

At the same time, the SPD did not endorse a concept of homosexual marriage. The SPD insisted that a marriage be divorced in the event of a court decision that grants an applicant a revision of gender status under the provisions of the ›big solution‹, suggesting that it did more justice to the ›nature‹ of marriage, if it was dissolved as soon as two individuals of the same sex were married (BMI 1978a: 24; cf. Sieß 1996: 94). Moreover, the government designed s. 8(4) TSG-E, which specified that a revision of gender status would be accorded only on the condition that he or she had undergone sex reassignment surgery to the effect of approximating the outer appearance of the ›other‹ sex,

104 | The Bundesrat Committee for Youth, Family and Health presented the same perspective (Bundesrat – Ausschuss für Jugend, Familie und Gesundheit 1979: 9).

particularly in order to avoid that a male person marries another person »as long as he can engage in sex as a man« (BMI 1978a: 15).

The CDU/CSU held that a person who applies for a revision of gender status should no longer be married at the point of application (Bundesrat – Ausschuss für Jugend, Familie und Gesundheit 1979, Anlage: 8 f.; Bundesrat 1979: 11 f.). Members of the CDU/CSU presented a number of reasons, ranging from constitutional concerns to third-party rights. One set of arguments defended the privileged status of marriage *per se* and the gender and sexual system it stands for. During the 154th meeting of the *Bundesrat* Committee on Youth, the Family and Health, the CDU/CSU suggested that an automatic termination of an existing marriage in the event of legally establishing a person's gender status was incompatible with the significance of marriage (Bundesrat – Ausschuss für Jugend, Familie und Gesundheit 1979, Anlage: 48 f.). In response to the solution proposed by the FDP, which will be presented later on, Dr. Jentsch (Wiesbaden, CDU/CSU) argued that the union of a transsexual person after a legally sanctioned revision of gender status had taken place with his or her partner contravened the traditional image of a marriage. According to Dr. Jentsch, the social order that informed the traditional understanding of marriage needed to be defended (Deutscher Bundestag – In 1979: 16).

Another set of arguments dealt with constitutional concerns. Members of the CDU/CSU argued that the dissolution of an intact marriage contravenes Art. 6 GG[105] (Bundesrat – Ausschuss für Jugend, Familie und Gesundheit 1979, Anlage: 49; cf. Sieß 1996: 96 f.). Moreover, the fact that the transsexual person's partner was involved in the legal proceedings under the provisions of the ›big solution‹ could impinge on the former's rights to the extent that he or she is prevented from adapting him- or herself to the ›other‹ gender (Deutscher Bundestag 1980: 15).

The opposition presented further arguments to support its perspective. The CDU/CSU suggested that it was in the interest of the applicant's partner to get divorced prior to the application for an establishment of gender status, because this was the only way of regulating the effects of a divorce in conjunction with the dissolution of a marriage (Bundesrat – Ausschuss für Jugend, Familie und Gesundheit 1979, Anlage: 49; cf. Sieß 1996: 97). Moreover, the CDU/CSU opted for a solution that avoided having to involve the applicant's partner in the legal proceedings (ibid). Furthermore, the opposition emphasised that courts were not supposed to decide upon a marriage under the Act but on an individual's gender status only (Bundesrat 1979a: 10 f.).

105 | Art. 6(1) GG declares that, »[m]arriage and the family shall enjoy the special protection of the state« (BMJV 2017).

The FDP proposed to leave it up to the partners to decide for themselves whether they wanted to terminate their respective marriage or not. In his speeches during the plenary sessions in the *Bundestag* on 28 June 1979 and 12 June 1980, Wolfgramm (Göttingen, FDP) presented two arguments to support his stance. First, he reasoned that marriage was based on a number of other, additional ties than sexuality. Second, he tentatively questioned whether intensive ways of living together necessarily needed to be heterosexual. He concluded that there was also an option to open up marriage to same-sex partners (Deutscher Bundestag 1979a: 13175 C; ibid 1980a: 17737 A; cf. Sieß 1996: 101).

The FDP was the only party that challenged the notion of marriage as a heterosexual institution, heterosexual relations as a superior form of human bonding and the significance assigned to sexuality in general. However, when faced with a lack of understanding on the part of the more powerful coalition partner and threats by the CDU/CSU majority in the *Bundesrat* not even to pass the more conservative solution favoured by the SPD, the FDP decided not to trigger a fundamental debate on this issue (Deutscher Bundestag – In 1980: 25).

Controversial issues: Balancing rights

The debate on the Bill also focused on the rights and interests of those who were considered to be affected by a court decision to change an applicant's first names and gender status. While no party doubted that third-party rights needed to be addressed, the political parties represented in the *Bundestag* and the *Bundesrat* assessed the government's attempt to balance transsexual individuals' rights vis-à-vis third-party rights differently.

The FDP emphasised two aspects of the Bill of which one was securing transsexual individuals' right to privacy. In his plenary speech in the *Bundestag* on 12 June 1980, Wolfgramm (Göttingen, FDP) particularly welcomed the provision in s. 5(1) TSG-E that prohibited passing on, or investigating into the applicant's previous first names after the decision to change first names had come into force, unless the public interest required such an investigation (Deutscher Bundestag 1979a: 13175 C).

The second aspect dealt with the issue of extending or creating provisions to include additional trans individuals. Wolfgramm suggested that transvestites, too, belonged to a group of individuals, which required support and provisions to create a less prejudiced environment (ibid: D).

As the debate on the ›small solution‹ reveals, the CDU/CSU was by contrast rather adamant about reducing the number of individuals eligible to apply for a change of first names and the establishment of gender status. Moreover, the CDU/CSU was concerned that transsexual individuals' rights provided in the Government Bill impinged on the rights of transsexual individuals' spouses

and children (cf. Sieß 1996: 99)[106] and demanded provisions to include further individuals in the provisions of the Bill that might possibly be affected by a change of first names or gender status. Section 5(2) TSG-E e. g. was designed to exempt the former spouse, the spouse and the offspring from being obliged to state the trans person's first names, unless this information was relevant to administrating public registries. The CDU/CSU demanded of the government to include the applicant's parents and grandparents, too (Bundesrat 1979a: 17; Bundesrat 1979: 17), a demand the governing SPD/FDP coalition decided to give in to (s. 5[2] TSG). In another instance, the representative of the then CDU/CSU-governed *Land Rheinland-Pfalz* (Rhineland Palatinate) demanded that the government examine how to make sure that a fiancé or fiancée, respectively, is informed that his or her partner is »a member of the other sex in a legal sense only« (Bundesrat – RA-U 1979: 49). The government did not follow up on this issue.

In fact, the CDU/CSU reproached the governing coalition for having created lopsided provisions to the benefit of transsexual individuals and to the detriment of third-party rights, in particular transsexual individuals' spouses and children. While the government laid down in s. 10 TSG-E that the decision to revise the applicant's gender status would not affect the parent/child-relationship, members of the CDU/CSU considered this provision insufficient and incomplete, as Dr. Jentsch's (Wiesbaden, CDU/CSU) statement attests:

> If the government have nothing more to say in its explanations than that the assignment to the other gender leaves the *legal position* towards the child unaffected, we think that that is insufficient. We believe that the transsexual's well-being is a legitimate concern, however, that the child's well-being is at least as important and must be regulated just as reliably and reasonably [...]. Here we have to expect that the federal government will improve its Draft significantly during the consultations. (Deutscher Bundestag 1979a: 13172 A)

In general, the CDU/CSU sought to tighten provisions in the Bill for the sake of securing third-party rights vis-à-vis those of transsexual individuals. In s. 8(1)3 TSG-E, the government for instance required of a transsexual applicant that he or she is no longer able to procreate or bear a child. The majority in the *Bundesrat* however suggested rephrasing the provision to ensure that the applicant

106 | See e. g. Dr. Jentsch's (Wiebaden, CDU/CSU) statement during the first plenary consultation in the *Bundestag*: »During the consultations on the Bill in the Committees, my faction is going to attach great importance to a very close examination of the effects the assignment of a person to the other gender has on third parties. Among these third parties are particularly the person's spouse and children.« (Deutscher Bundestag 1979a: 13171 D)

was permanently sterile (Bundesregierung 1979, Anlage 2: 18). The *Bundesrat* reasoned in its statement on s. 1 TSG-E that a child should have a chance to establish its parentage. The government decided to reformulate this particular requirement to meet the demands of the conservative majority in the *Bundesrat* (ibid: Anlage 3: 26).

In another instance, the *Bundesrat* was dissatisfied with the wording in s. 1(1)2 TSG-E that determined that an applicant's gender identity will with a high degree of probability not change anymore. The representative of Bavaria (*Bayern*) asked the federal government to check whether there was a way of rephrasing the term »with a high degree of probability« in the abovementioned section to ensure that the prognosis did not leave any reasonable doubt about the applicant's transsexuality (Bundesrat – RA 1979: 42; Bundesrat 1979a: 13). The government however responded that the formulation was appropriate (Bundesregierung 1979, Anlage 3: 26).

In many ways, the interventions of the *Bundesrat* not only suggest that the CDU/CSU wished to defend alleged third-party interests. Rather, the CDU/CSU was quite inclined to defend conservative notions of marriage, the family, sexuality and the gender regime. While the CDU/CSU emphasised its concern for the transsexual individual's spouse and children, it only deemed a particular type of marriage and family worthy of protection. The CDU/CSU was quite willing to expect partners to consent to a divorce and families with children to split up prior to a court decision to revise an applicant's gender status, regardless of the partners' and children's desires and perspectives on these issues.[107]

Controversial issues: Deploying medical knowledge

Medical knowledge constituted another area of political struggle during the parliament debates. No party contested the structurally privileged status of medical expertise, and the governing coalition and the opposition backed up their respective stances on specific provisions of the Bill, most notably with regard to the ›small solution‹, by referring to medical findings on transsexuality. However, as the course and outcome of the political debate suggest, it is fair to say that medical knowledge was at the hands of political dynamics.

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107 | Similarly, Dr. Jentsch's (Wiesbaden, CDU/CSU) plenary speech on first reading of the Bill in the *Bundestag* suggested that a transsexual person's gender was despite a court ruling to revise a transwoman's gender status less ›real‹ than that of a cisperson's, or put in another way, a cisperson's gender was regarded less of a fiction than that of a transperson. In his speech, he repeatedly associated a revision of sex and/or gender with a fiction: »A legal fiction of a sex change is supposed to be introduced.« (Deutscher Bundestag 1979a: 13171 B) »Surely all of us agree that such a change of gender in one parent in form of a fiction is naturally bound to have a very incisive significance for a child.« (Ibid: 13171 D/13172 A)

In its ruling on 11 Oct. 1978, the Federal Constitutional Court confirmed the structurally privileged status of medical knowledge when it held that,

> human dignity and the fundamental right to develop one's personality demand that the declaration of a transsexual individual's male gender be changed at any rate in a case that according to medical knowledge deals with irreversible transsexualism and when a sex-reassigning operation has taken place. Such a revision does not violate moral law, especially since the operation was medically indicated. (BVerfG 1979: 12)

The legislator was to implement the pivotal role of medical expertise in s. 4(3) TSG without any controversy among the political parties represented in either the *Bundestag* or the *Bundesrat*. Section 4(3) TSG states that,

> [t]he court may only grant an application according to s. 1 after it has obtained reports of two experts, who are based on their training and their occupational experience sufficiently familiar with the special problems of transsexualism. The experts need to act independently of each other; in their expert reports they are required to comment on whether the applicant's gender identity will not, according to medical knowledge, change anymore with a high degree of probability.

While the provision does not mention that experts necessarily need to be physicians, it has become a convention that psychiatrists, psychologists or sexologists are assigned the task of writing expert reports (cf. de Silva 2005: 259).

However, political strife arose over the contents of medical knowledge on transsexuality. As outlined in the debate on the ›small solution‹, the governing coalition and the opposition interpreted medical knowledge differently. Here again, the opposition deployed medical knowledge on transsexuality strategically as a means to press for legal provisions that render a change of first names and gender as little disruptive as possible to conservative notions on gender and the gender regime.

Setting out from a rigid and homogeneous concept of transsexuality and fierce opposition to the ›small solution‹, the CDU/CSU insinuated that the Government Bill was based on insufficient knowledge (cf. Sieß 1996: 95). According to the opposition, this lack of knowledge featured most prominently in the area of medical and natural science studies,[108] the effects of a legal assignment to the ›other‹ gender,[109] a legally applicable distinction between transsexuality,

108 | See Bundesrat 1979: 1 f. and ibid a: 1.

109 | This aspect was reiterated by the senior officer (*Regierungsdirektor*) Mischke and Dr. Weissauer (Bavaria) during the 466th meeting of the *Bundesrat* Legal Committee on 31 Jan. 1979 (Bundesrat – RA 1979: 34 and 35) and in the *Bundesrat* document BR-Drs. 6/79 (Bundesrat 1979: 1 f.).

homosexuality and transvestism, and on results of studies on transsexual individuals who decide to reverse their decision[110] (Bundesrat – RA-U 1979: 33 f.).

The government repudiated this allegation. When introducing the Bill to the plenary of the *Bundestag* on 28 June 1979, von Schoeler pointed out that the Government Bill was informed by an updated medical documentation compiled by the DGfS and hearings with renowned experts, such as sexologists of the *Institut für Sexualforschung* (Institute for Sex Research) in Hamburg (Deutscher Bundestag 1979a: 13170 D). It was, as Dr. Meinecke (Hamburg, SPD) suggested, particularly the insight that transsexual developments were dynamic that prompted the government to create the options of a ›big solution‹ and a ›small solution‹ (Deutscher Bundestag 1980a: 17735 D).

However, the CDU/CSU was not content with the answers the government and members of the SPD in parliament provided. Therefore, Dr. Jentsch (Wiesbaden, CDU/CSU) prepared a questionnaire, which he submitted to representatives of the Federal Home Office on 29 Nov. 1979. The first part of the questionnaire covered detailed questions on transsexuality from a medical point of view, especially with regard to what he termed »highly intensive« and »controllable« transsexuals, surgery, age limits, reversals and the number, type and organisation of recommended experts. The second part dealt with questions on legal effects of the assignment to the ›other‹ gender, e. g., on marriage, inheritance, social insurance, and the establishment of fatherhood (Deutscher Bundestag – In 1979, Anlage 4).

The experts' answers to the questionnaire in many ways supported the Government Bill and the governments' understanding of transsexuality. This applied particularly to the division of the Bill into a surgical and a non-surgical route, the assessment of surgery in relationship to a legal recognition of a transsexual person's gender identity (ibid: Beigabe 1: 2) and the occurrence of reversals in the Federal Republic of Germany (ibid: 6). Moreover, sexologists supported s. 4(3) TSG-E, suggesting that at least two experts be involved in the court proceedings (ibid).

Despite having received the medical information the CDU/CSU had asked for, it clung to its opinion that the ›small solution‹ be discarded. This clearly indicates that the issue of medical knowledge was only a pretext for the CDU/CSU not to accept the ›small solution‹. From then onward, the opposition decided to change its strategy. While it initially criticised that the Bill was based on insufficient medical and natural scientific knowledge on transsexuality, the opposition turned the argument around. The CDU/CSU reproached the government for its »total legislative perfectionism« (Deutscher Bundestag 1980a: 17734 B). During the 94th meeting of the *Bundestag* Committee on Home Af-

110 | Dr. Jentsch (Wiesbaden, CDU/CSU) repeated this reproach during first reading of the Government Bill in the *Bundestag* (Deutscher Bundestag 1979a: 13172 C).

fairs Dr. Jentsch (Wiesbaden, CDU/CSU) held that »therapeutic wishes cannot be implemented into the law in every case. It would be difficult to expect of the legal order to do justice to every situation« (Deutscher Bundestag – In 1980: 24).

Unsurprisingly, then, the CDU/CSU-dominated *Bundesrat* called upon the Mediation Committee to resolve the conflict between the *Bundestag* and the *Bundesrat*, when the latter learned of the former that it had passed the Bill after third reading on 12 June 1980 (Bundesrat 1980: 301 D). Anticipating that the CDU/CSU was not willing to budge, Dr. Meinecke (Hamburg, SPD) indicated that the governing coalition was willing to meet the demands of the opposition on some issues as early as on 27 Feb. 1980. However, the SPD was not willing to make any concessions on the division of the Bill into a ›small‹ and a ›big solution‹ (Deutscher Bundestag – In 1980: 23).

The compromise the Mediation Committee suggested to the *Bundestag* and the *Bundesrat* and to which both institutions consented to on 04 July 1980 (Deutscher Bundestag 1980c: 18688 A; Bundesrat 1980b: 333 D) illustrate that the results of the political negotiations were not congruent with medical knowledge. While the ›small solution‹ was maintained alongside the ›big solution‹, the age limit for the ›small solution‹ was raised to 25 years of age (Deutscher Bundestag 1980c: 18687 D).[111] The latter thwarted sexological intentions to gain time to diagnose transsexuality and to give transsexual individuals the opportunity to live according to their respective gender identities with the security of legally sanctioned matching first names.

2.3.4 The Transsexual Act

The Transsexual Act marked the outcome of a matter-of-fact and persevering struggle over transsexuality and the significance of trans rights in relation to third-party rights and, on a deeper level, the result of a controversy over the sexual and gender regime. While the legal recognition of a change of first names and gender status had enabling effects, the options were organised within the boundaries of the heteronormative gender binary. Hence, the Act stands for a shift within the gender regime without, however, seriously challenging the heteronormative gender binary.

111 | Moreover, the compromise entailed the demand of the CDU/CSU to require that a marriage be divorced prior to an application for the revision of gender status, as Jahn (SPD) and Senator Apel (Hamburg) reported in the *Bundestag* and in the *Bundesrat*, respectively (Deutscher Bundestag 1980c: 18687 D/18688 A; Bundesrat 1980b: 333 A).

A systematic outline of parts one and two of the Transsexual Act

Parts one (ss. 1-7) and two (ss. 8-12) of the Transsexual Act regulate four aspects. These are general procedural aspects, prerequisites for a change of first names and an establishment of gender status, the rights granted upon a court decision to change first names (ss. 4[4], 5, 6 TSG) and establish an applicant's gender status (ss. 5, 9[1] and 10 TSG), and the protection of third-party rights and/or the limitation of trans rights (ss. 3[2]2, 3[3], 7 and 8[1]2, 8[1]3 and 8[1]4 TSG.

Sections 1 and 8 TSG rule that the individual needs to initiate the procedure to change first names and/or to revise the gender status via application. The Transsexual Act allows the applicant to proceed in three different ways. Sections 1-7 TSG allow an individual to apply for a change of first names only under the provisions of the so-called small solution. Sections 8-12 TSG regulate the so-called big solution and offer two routes to achieve a revision of gender status. The applicant may either apply for gender recognition after having fulfilled the requirements outlined in ss. 1(1)1-3 and 8 TSG or via preliminary ruling (s. 9 TSG). Moreover, an individual who wishes to have his or her gender status changed under the legislation may do so in consecutive steps by applying for a change of first names first and for a revision of gender status in a second step, or may do so in one go.

Sections 2-4 TSG cover general procedural aspects that apply to a revision of first names and gender status alike. Section 2 TSG regulates the competence. According to s. 2(1) TSG, jurisdiction lies exclusively with county courts that are located in a regional court. Moreover, s. 2(2) TSG determines that the court, which is located in the applicant's municipality, is responsible for processing the application. If the applicant is a German citizen living outside the validity area, the responsibility for the application lies with the Local Court Schöneberg. However, the latter may for valid reasons transfer the responsibility to another court.

Section 3 TSG specifies the individuals who may engage in legal action and the interested parties. If a person is e. g. incapable of contracting, a legal representative will conduct the judicial proceedings on his or her behalf, provided the representative has been authorised by the guardianship court (s. 3[1] TSG). Section 3(2) TSG rules that the applicant (s. 3[2]1 TSG) and the representative of the public interest (s. 3[2]2 TSG) are the only individuals involved in the proceedings.[112] The government of a *Land* determines the representative of the public interest via statutory instrument (s. 3[3] TSG).

112 | The fact that the (former) spouse is not among the persons involved in the judicial proceedings is a concession to the CDU/CSU. Since the applicant is according to s. 8(1)2 TSG required to be unmarried, there is no spouse to speak up before a court.

Section 4 TSG determines the court proceedings. Section 4(1) TSG specifies that unless regulated otherwise in this statute, the rules of contentious jurisdiction apply. The court hears the applicant in person (s. 4[2] TSG). According to s. 4(3) TSG, the court may only grant an application according to s. 1 TSG after having obtained reports by two experts,

> who are based on their training and their occupational experience sufficiently familiar with the special problems of transsexualism. The experts need to act independently of each other; in their expert reports they are required to comment on whether the applicant's gender identity will not, according to medical knowledge, change anymore with a high degree of probability [...].

The persons involved may immediately appeal against the decision to grant the application (s. 4[4] TSG).

Sections 1, 8 and 9 TSG determine the prerequisites for either a change of first names or a revision of gender status. The requirements set forth in s. 1 TSG apply individuals applying for a change of first names. According to s. 1(1) TSG, a court is upon application required to change a person's first names, if he or she, based on her »transsexual imprinting« no longer feels he or she identifies with the gender specified in his or her birth entry and if the applicant has felt compelled to live according to his or her ideas since three years. Until 18 July 2006 this rule was limited to German citizens, stateless persons, foreigners without a home country, persons eligible for asylum and foreign refugees whose regular place of residence was in the validity area of the Act (s. 1[1]1 TSG).[113]

Moreover, and as mentioned earlier on, s. 1(1) TSG only applies, if the identification with the ›other‹ gender will with a high degree of probability not change anymore (s. 1[1]2 TSG) and provided the applicant is at least 25 years old (s.1 [1]3TSG).[114] Section 1(2) TSG provides that the application indicate the first names the applicant wishes to use in future.

The rules for a recognition of gender status include[115] and exceed the prerequisites called for under s. 1 (1)1-1(1)3 TSG. According to s. 8(1)2 TSG, an applicant

113 | The government had initially excluded this foreign citizens permanently living in the Federal Republic of Germany in order to avoid conflicts with laws in other countries (BVerfG 2007: 15). The Federal Constitutional Court decision on this particular rule will be discussed in chapter 3.3.2.

114 | See chapter 3.3.2 for the Federal Constitutional Court decision on s. 1(1)3 TSG on 26 Jan. 1993 (BVerfG 1993: 109).

115 | Section 8(1)1 TSG provides that an applicant needs to have fulfilled the prerequisites outlined in s. 1(1)1-1(1)3 TSG.

may not be married.[116] In addition, the applicant is required to be permanently sterile (s. 8[1]3 TSG) and to have undergone surgery on his or her external sex characteristics to the effect of having clearly approximated the outer appearance of the ›other‹ sex/gender (s. 8[1]4 TSG).[117] Like in s. 1(2) TSG, s. 8(2) TSG determines that the application lists the first names the applicant wishes to use, unless his or her first names have already been changed according to s. 1 TSG.

Section 9 TSG regulates the change of gender status under the provisions of preliminary ruling. Section 9(1) TSG rules that in case an application may not be granted, because the applicant has not yet undergone surgery as specified in s. 8(1)3 TSG, is not yet permanently sterile or is still married, the court states this in advance. The involved persons may immediately file a complaint against the decision. However, if the decision according to s. 9(1)1 TSG is incontestable and the prerequisites outlined in s. 8(1)2-8(1)4 TSG have been fulfilled, the court makes a final decision (s. 9[2] TSG). Expert reports are required to attest to the prerequisites according to ss. 8(1)3 and 8(1)4 TSG.

Individuals who have been granted either a change of first names or a revision of gender status are accorded additional rights. Some of these rights apply to the ›small‹ and the ›big solution‹ alike, whereas some apply to either the ›big‹ or the ›small solution‹ only. The prohibition to disclose the applicant's former first names and gender status applies to both decisions (s. 5[1] TSG; s. 10[2] TSG). More precisely, s. 5(1) TSG rules that if the decision that changed the first names has come into force, the first names the applicant had at the time of the decision may not be disclosed or investigated into without the applicant's consent, unless reasons pertaining to the public or a legal interest require this type of information. However, the former spouse, the parents, grandparents and the applicant's offspring are only obliged to mention the new first names, if this information is required in order to administrate public registries. However, this rule does not apply to children who were adopted after the decision under the provisions of s. 1 TSG (s. 5[2] TSG). Moreover, if a child was born to the applicant or if the applicant adopted a child prior to the decision to change first names, the child's birth entry remains unchanged (s. 5[3] TSG).

Section 6 TSG allows for an annulment of the decision to change the first names. Section 6(1) TSG rules that a court may upon application, annul the decision that changed the applicant's first names, if the applicant identifies with the gender entered in the birth registry ›again‹. In such an event, the procedure outlined in ss. 2-4 TSG applies (s. 6[2] TSG).

116 | See chapter 3.3.3 for the Federal Constitutional Court decision on s. 8(1)2 TSG on 27 May 2008 (BVerfG 2008: 312).

117 | Sections 8(1)3 and 8(1)4 TSG no longer apply since a Federal Constitutional Court decision on 11 Jan. 2011 (BVerfG 2011). See chapter 4.1.1 on this particular decision.

The rights and duties provided in ss. 10(1), 11 and 12 TSG apply to the ›big solution‹ only. According to s. 10(1) TSG, from the moment the decision that the applicant is to be considered a member of the ›other‹ gender comes into force, his or her rights and duties will be those of the ›new‹ gender, unless the law specifies the contrary.

Section 11 TSG regulates the parent/child-relationship. This section e.g. rules that the decision that the applicant is considered a member of the ›other‹ gender leaves the legal relationship between the applicant and his or her parents and between the applicant and his or her children unchanged. This rule only applies to adopted children as long as they were adopted before the decision came into force.

Finally, s. 12 regulates the issue of pensions and recurring payments. Among other things, s. 12(1) TSG rules that the decision that the applicant is considered a member of the ›other‹ gender leaves untouched the entitlement under a pension scheme and other comparable recurring payments.

At the same time, the Act provides several rules that limit trans rights. Among these are the already mentioned provisions in s. 8(1) of the ›big solution‹. However, trans rights are also curtailed in provisions of the ›small solution‹, such as in 7(1) TSG.[118] According to s. 7(1) TSG the decision that changed the applicant's first names becomes void, if the applicant gives birth to a child or fathers progeny 302 days after the decision has come into force (s. 7[1]1 TSG), if there is evidence of an applicant's parentage after the abovementioned period of time (s. 7[1]2 TSG) or if the applicant marries (s. 7[1]3 TSG).[119]

Gender regime, gender and transsexuality in the Transsexual Act

The Transsexual Act diverges from the previous principle of the immutability of gender in the law. At the same time, its rules are based upon, and restore the heteronormative gender binary. The (re-)establishment of heteronormativity and the gender binary occurs through three means. First, the Act limits the numbers and modes of legitimised gendered possibilities. Second, it conceals and reiterates the construction process of the gendered options ›man‹ and ›woman‹ as exclusive and polarised genders. Third, the Act minoritises subjects that deviate from conventional modes of gendering.

The Transsexual Act is based upon, and repeats several features constitutive of the gender regime of its time. First, the piece of legislation limits gendered options to two possibilities. Without any further specification, s. 1(1) TSG

118 | S. 7(2) TSG rules that a decision to change first names is void, if the applicant uses the first names he or she had prior to the decision.

119 | In its decision on 06 Dec. 2005, the Federal Constitutional Court declared that s. 7(1)3 TSG may no longer be applied (BVerfG 2006a: 102) See chapter 3.3.3 for an outline and discussion of this decision.

e. g. determines as a requisite for an application for a change of first names and a revision of gender status that the applicant identifies with the gender other than the one he or she was registered as in the birth entry. Hence, the Transsexual Act does not provide for subjects that refuse to categorise themselves as either of the legitimised genders or as both or anything else than one of the officially sanctioned genders (cf. de Silva 2005: 260).

Moreover, the Transsexual Act conveys the notion that a gender identity constitutes a permanent disposition. Despite the fact that the Act provides for a reversal of a court decision in s. 6(1) TSG, the Act also includes provisions that suggest that an individual's gender ought not to change more than once in life. Section 1(1) TSG e. g. rules that the applicant must have been compelled to live according to his or her ideas for at least three years. Section 4 (3) TSG reinforces this notion when determining that the application may only be granted, if two experts comment independently of each other on »whether the applicant's gender identity will according to medical knowledge not change anymore with a high degree of probability«.

Furthermore, a person's gender status is not based on an individual choice. A gender status is assigned to a person at the time of birth, or in the event of transsexualism medically assessed at a later point in time. As mentioned in the previous section, according to the Transsexual Act a court may only grant an application according to s. 1 TSG after having obtained reports by two experts, »who are based on their training and their occupational experience sufficiently familiar with the special problems of transsexualism« (s. 4[2] TSG). While s. 4(2) TSG does not explicitly define physicians and/or psychotherapists as potential experts, courts and physicians alike have interpreted the abovementioned phrase to justify expertise from within the realm of medical competency only.

Finally, the Transsexual Act reinforces the heteronormative character of the gender regime. The Transsexual Act for instance rules that the change of first names becomes ineffective, if the applicant marries (s. 7[1]3 TSG). Moreover, s. 8(1)2 TSG determines that a person who applies for the revision of gender status is required to be unmarried. As outlined earlier on, the legislator implemented both rules after a lengthy struggle with the opposition over the significance of marriage and in order to avoid homosexual marriages.

The Transsexual Act draws upon the premise that the two legitimised genders are polarised. This notion is implicitly entailed in the rules that regulate the ineffectiveness of the revision of first names and the prerequisites for a revision of gender status. As mentioned earlier on, s. 7(1)1 TSG e. g. determines that the decision that changed the applicant's first names becomes void, if the applicant gives birth or procreates a child 302 days after the decision has come into force. I. e. the Act lays down the rule that only a man may father progeny and only a woman may bear a child (cf. de Silva 2005: 260).

Moreover, the Transsexual Act is based on the premise that the two legally sanctioned genders can be derived from a person's morphology. This notion becomes evident in the demand for somatic measures as a prerequisite for recognising an applicant's gender identity. Section 8(1)3 TSG rules that an applicant needs to be permanently sterile, and s. 8(1)4 TSG requires that an applicant needs to have undergone surgery to modify his or her external sex characteristics to the effect of having clearly approximated the outer appearance of the ›other‹ sex.

Furthermore, the Transsexual Act reinforces the gender binary by minoritising transsexual individuals vis-à-vis the officially sanctioned gender categories ›man‹ and ›woman‹. The Transsexual Act clearly acts on the assumption that female infants identify as girls and male infants as boys, short »biological essentialism« (Cromwell 1999: 107). This assumption becomes evident in the following wording in s. 1(1) TSG: »The first names of a person, who due to his transsexual imprinting no longer identifies with the gender registered in the birth entry, but to the other gender [...].«. The formulation implicitly normalises a cis development and constructs trans as a deviation from this normative social construction.

Moreover, transsexuality is pathologised. In the same section, the Transsexual Act rules that an applicant needs to »have felt compelled to live according to his ideas for at least three years« (s. 1[1] TSG). While the term ›compulsion‹ suggests the proximity to a psychological disorder, using the term in this context also masks the fact that every person is forced to perform a gender (Hirschauer 1994: 679).

2.3.5 Summary: Legislative constructions of gender, transsexuality and gender regime

While the social-liberal government was initially reluctant to introduce legislation to regulate a revision of gender status, a favourable jurisdictional climate towards the end of the 1970s and constant pressure from within the *Bundestag* throughout the 1970s prompted the then government to design and introduce a Draft Bill to change first names and establish gender status in specific cases.

Social forces were granted unequal access to the consultations on the Bill. Moreover, legislators gave more attention and accrued more authority to sexological than to trans knowledge. While the voices of the former were marked by homogeneity with regard to concepts of transsexuality and mainly focused on the general structure of the Bill in order to extend freedoms for diagnostic purposes and trans individuals, trans individuals' demands concentrated on several sections of the Bill and ranged from more restrictive suggestions to rights that exceeded those demanded by sexologists.

Having privileged access to legislative consultations, however, did not necessarily mean that sexological knowledge was mirrored in the Act, and if so, for the reasons sexologists had put forward. Instead, a dynamic of its own developed during the legislative debate. The Christian democratic opposition used assumed sexological knowledge on transsexuality strategically to fend off anticipated challenges to the conventional mode of gendering, disruptions to cis individuals' everyday-life and perceived encroachments on their rights and, above all, potential threats to marriage as a privileged and exclusively heterosexual institution in a, with few exceptions, heteronormative and homophobic political climate.

The Transsexual Act marks the culmination and political consolidation of a gradual shift within the gender regime from the immutability to the mutability of sex/gender without, however, endangering either the gender binary or the heteronormative character of the gender regime. Recognising transsexual individuals' experienced gender while leaving intact the heteronormative gender binary, including its polarised notions of cismen and ciswomen, came at a cost. The restoration of the gender regime went hand in hand with the marginalisation of transsexuality, the continuing naturalisation of conventionally gendered individuals, the marking of transsexuality as an aberrant development and the legally sanctioned coercion to trade fundamental human rights, such as the constitutionally guaranteed rights to human dignity, physical integrity, marriage and family for gender recognition within a limited scope of options. Thus, while the Transsexual Act had enabling effects, it also provoked resistance.

2.4 A NOTE ON THE TRANS MOVEMENT FROM THE 1970S TO THE MID-1990S

While a comprehensive study of the early trans movement remains to be done, I will in the following address basic features of the trans movement. The deliberations in this chapter draw upon different perspectives on the trans movement from the 1970s to the mid-1990s as they emerged in the debate following Sigusch's (1991a) publication of his concept of depathologisation in the *Zeitschrift für Sexualforschung*. Further sources are the to date very few articles on the West German trans movement, selected court cases and findings from the previous chapters on medical, legal and political concepts of transsexuality.

The first section of this chapter outlines basic structural features and concepts of transsexuality in the trans movement from the time transsexuality appeared as a clearly defined psychiatric category until the mid-1990s. The second section identifies major factors that in addition to sexological ascriptions contributed to an overall homogeneous image and the isolation of transsexual individuals, despite heterogeneous individual concepts with regard to sexual

orientation, concepts of self and perspectives on sex reassignment treatment. The last two parts of this chapter engage with the controversy on the contribution of the early transsexual movement to legal recognition and responds to sceptical assessments of the future of the trans movement that arose in the aftermath of the Transsexual Act.

I will argue that the period from the 1970s until the mid-1990s marks an early stage of the trans(sexual) movement in (West) Germany rather than a transitory phase as Sigusch (1991a: 328) suggests and that external and internal factors contributed to the isolation and homogeneous representations of transsexual individuals. Moreover, any assessment of trans movement concepts and policies, achievements and anticipated developments needs to be contextualised within the historically-specific discourse on transsexuality and practices vis-à-vis transsexual individuals and requires complex understandings of social movements and social and political change.

2.4.1 Basic structural and conceptual features of the trans movement

Trans(sexual) individuals began to organise soon after transsexuality emerged as an isolated medical category. Their initial organisational structures and routes for social change involved local support groups that developed as early as in the 1970s (Regh 2002: 186), individual litigation for a change of first names and gender status in the birth register since at least the early 1960s, local lobbying for trans legislation since the early 1970s (Augstein 1992: 258) and petitioning during the legislative proceedings that led to the Transsexual Act. While the trans movement set out with rather informal, local and dispersed forms of organisation and actions from the 1970s to the mid-1980s, it proceeded to develop larger structures from the mid-1980s onward, of which Transidentitas e. V., as a trans support group that was to operate on a national scale, is an example. The early trans movement was host to a number of individuals with different gender expressions and a plurality of transsexual subjects. With regard to the former, Sigusch and Augstein described individuals who identified as either one of the two legitimised genders, who temporarily changed genders or who did not identify with any particular gender (Augstein 1992: 260; Sigusch 1991a: 324).

Transsexual individuals, too, appear to have been rather heterogeneous with regard to sexual orientation, understandings of transsexuality and perspectives on sex reassignment treatment. Augstein and Sigusch (1991a: 322) e. g. suggested that despite the psychiatric heterosexualisation of transsexuality sexual orientations varied among transsexual individuals. In her critical response to Meyenburg and Ihlenfeld's report on successful psychotherapeutic treatment of transsexuality in the USA (Meyenburg/Ihlenfeld 1982), Augstein

e. g. claimed that most trans women were lesbians, a significant number lived as bisexual women and that some transmen were gay (Augstein 1982a: 599).

Similarly, transsexual individuals' perceptions of transsexuality differed, ranging from transsexuality as a disorder to transsexuality as a gender variant. At the time, Augstein was a proponent of the former concept. In her opinion, transsexuality was a disorder, because transsexual individuals suffer from the discrepancy between their bodies and minds (Augstein 1992: 259). She held that transsexuality was a state of »lack« (ibid: 257) that is overcome once transsexual individuals transition to women and men with a transsexual past (ibid: 255), hence mirroring the at the time hegemonic medical concept of transsexuality in this regard. However, Transidentitas e. V.'s response to the German Standards suggests that some trans individuals opposed a pathologising model of transsexuality. Rather than consider transsexuality a disorder, Transidentitas e. V. perceived transsexuality to be a »special form of gender identity« (Transidentitas 1997: 342).

The same heterogeneity can be observed with regard to sex reassignment surgery. While Augstein echoed the dominant medical treatment paradigm of the time when she insisted that the desire for sex reassignment surgery was the defining feature of transsexuality (Augstein 1992: 257), several transsexual individuals went to court in the course of the 1980s and early 1990s in order to achieve a revision of gender status with limited or without any medical and surgical treatment at all. In the early 1980s, the High Regional Court Hamm e. g. dealt with an application for a revision of gender status in the case of a transman who had undergone a mastectomy but for health reasons refused to take hormones or undergo a hysterectomy and an oophorectomy (OLG Hamm 1983: 167). In the mid-1990s, a transwoman who desired a revision of gender status without wanting to undergo any sex reassignment treatment whatsoever in vain challenged the constitutionality of s. 8(1)3 and 8(1)4 TSG, (OLG Düsseldorf 1996: 43).[120] Moreover, Transidentitas e. V.'s comment on the German Standards suggests that sex reassignment surgery was either a necessary or dispensable therapeutic measure, depending on the respective individual (Transidentitas 1997: 342).

2.4.2 Factors leading to a homogeneous image and the isolation of transsexual individuals

Despite this heterogeneity of unusually gendered subjects and of transsexual individuals, support groups which constituted the bulk of collective organising throughout the 1980s and early 1990s (Regh 2002: 186) are frequently associ-

120 | For more details on court interpretations of somatic requirements under the Transsexual Act, see chapters 3.3.4 and 4.1.

ated with a homogeneous and narrow definition of transsexuality and subsequent internal policing. The significance, features and policies of early transsexual support groups cannot be detached from the historical context in which these groups operated.

Sigusch described transsexual support groups as a »paramedical subculture«.[121] According to him, transsexual support groups were foremost concerned about issues relating to epilation, hormones, surgery, authorities, courts and health insurances (Sigusch 1991a: 328). Considering the maze of legal and medical rules and procedures and social stigmatisation, and in the light of little information available, medical or otherwise, support groups and their respective artefacts and events provided opportunities for trans individuals to gain and exchange information and experiences required to achieve formal gender recognition, it does not come as a surprise that trans individuals who sought medical services and/or legal recognition organised in support groups.

Moreover, observers of early transsexual support groups notice that support groups functioned as rather exclusive organisations. Sigusch for instance suggested that these support groups welcomed transsexual individuals only (Sigusch 1991a: 328). At the same time, transsexuality was defined narrowly. While Sigusch seemed oblivious of the factors that induced this policy, Regh explained that support groups for transsexual individuals uncritically adopted the medical differential diagnosis, which was premised on the distinction between various trans phenomena (Regh 2002: 188). This meant that the desire for sex reassignment surgery was the defining feature and entrance ticket to support groups who on their part pursued a policy of producing »real women and men (with a transsexual past)« (ibid). Or, as Regh put it, support groups served to solve the problems the medical and psychiatric establishment generated and determined the solutions for (ibid: 186).

Several authors also agree upon the publicly perceivable conformity transsexual individuals represented with regard to gender norms prevailing at the time (Sigusch 1991a: 328 f.; Hirschauer 1992: 250; Augstein 1992: 256; Regh 2002: 186 f.). As Hirschauer, Augstein and Regh point out, adopting conservative gender roles was inextricably linked to hostile social conditions (Regh 2002: 187) and medical expectations, which had to be met in order to be eligible for medical and surgical treatment (ibid; Augstein 1992: 257). They functioned as a strategy to appease their social environment, which, in conjunction with concentrated medical and legal efforts mirrors how radically transsexual individuals pursued a claim to self-determination (Hirschauer 1992: 250). Hence,

121 | In the same vein, Becker calls Transidentitas e. V. a »professional association« (Becker 1998: 159) in her reply to the critique of the German Standards in the *Zeitschrift für Sexualforschung*.

it was only after surgery that transsexual individuals were free to deal critically with gender roles and heteronormative expectations (Augstein 1992: 257).

Developments in the women's and the lesbian and gay movements exacerbated the isolation of trans individuals. As Regh contended, from the end of the 1970s to the mid-1980s and very much like in the UK, Raymond's book *The Transsexual Empire* (1979)[122] greatly influenced the women's movement in West Germany to the effect of expelling trans individuals from its midst (Regh 2002: 189). Dominant forces in the gay movement contributed to the isolation of trans individuals in a different way, albeit no less effectively. Intent on assuring a homophobic society that gay men were no less masculine than other men, transsexual women, drag queens and transvestites were, if not entirely excluded, at least shoved to the fringes of the movement. Moreover, transmen were not even known to exist (ibid: 189 f.).

2.4.3 Discussing the contribution of the trans movement to formal gender recognition

The question of the achievements of the initial stage of the trans movement, in particular whom to credit for the Transsexual Act is debated controversially. Some scholars do not acknowledge trans movement contributions to this development at all. Sigusch for instance held that transsexual individuals and transvestites were, among other things, offered legal provisions and health insurance coverage (Sigusch 1991a: 328). The sociologist Hirschauer echoed Sigusch's assumption when suggesting that the state »offered« trans individuals an opportunity to legally »change gender« (Hirschauer 1992: 249).

By contrast, trans scholars and activists claimed that any legal or political success was attributable to battles fought by trans people. In his critical appraisal of the development of the trans movement in the Federal Republic of Germany, the activist Regh suggested that without the work of support groups, neither health insurance coverage of sex reassignment treatment, nor the Transsexual Act would have materialised (Regh 2002: 193). More precisely, and in critical response to Hirschauer, the trans activist and lawyer Augstein held that any rights and the Act were an effect of local lobbying efforts in Hamburg since 1972 and persistent individual litigation (Augstein 1992: 258).

122 | In her book, Raymond among other things held that »transsexuals« were part of a patriarchal conspiracy meant to colonise feminism and rape women's bodies (Raymond 1994: 104). For a critique of Raymond's concept, see Riddell 2006 and for the effects of the publication on the relationship between feminism and trans in the UK, see Whittle 2006).

Any answer to this question is necessarily flawed, unless it takes into consideration both individual and collective trans movement endeavours and e. g. the opportunity structures[123] in which these legal and political undertakings took place. Indeed, in the light of local lobbying in Hamburg it is most probably no coincidence that it was particularly social democratic MPs representing Hamburg who pressed for trans legislation. Moreover, the history of litigation suggests that however dispersed individual members that shaped the early days of the trans movement in the Federal Republic of Germany may have been, their activities initiated and fuelled attempts at gender recognition.

At the same time, trans struggles for legislation to regulate a change of first names and gender status occurred within an increasingly favourable context. As pointed out in previous chapters, since the early 1970s various societal forces and actors on the level of the state pressured the then West German government to introduce trans legislation. Sexological submissions, recurring parliamentary enquiries posed to the West German government by a small group of social democratic MPs headed by Dr. Arndt and later on Dr. Meinecke as well as the Federal Constitutional Court decision on 11 Oct. 1978 produced a favourable political climate to this effect.

2.4.4 Assessing the future of the trans movement

Another question that is debated controversially deals with the development of the trans movement throughout the 1980s and its future. Both Sigusch and Hirschauer (1992: 249) were sceptical about the »take-off« of the trans movement at the beginning of the 1990s. Sigusch observed an increase of e. g. journals, brochures and documentations produced by trans individuals, support groups, self-organised conferences, exhibitions, collaboration with health insurance companies, struggles for membership and the right to speak before legal experts and physicians. At the same time, he considered these activities politically and intellectually unsophisticated, narrow-minded and redundant

123 | According to Rayside, »[s]ocial movements operate within an ›opportunity structure‹ – one shaped by factors, such as the openness or permeability of the political system, the extent of centralization or decentralization of the regime, the relationship between executive and legislative, the capacity of the courts to challenge governmental action, the support for rights claims in the existing legal environment, and the array of media voices. These are not simply fixed elements, for there can be important shifts in party composition and leadership, and changes in judicial interpretation, some of which are of course subject to influence from the activity of social movements themselves.« (Rayside 1998: 9 f.)

(Sigusch 1991a: 326), hence shifting the totalisation of transsexual individuals from the medical to the politico-cultural sphere (Lindemann 1992: 261).[124]

However, it seems more likely that the time until the mid-1990s marked the period of the foundation of the social movement in the Federal Republic of Germany. While Sigusch predicted that the trans movement would at best be a transitory movement (Sigusch 1991a: 328), the period from the early 1970s to the mid-1990s was only the beginning of a political movement, which was partly due to resistance to internal policing, developments in theories of gender, new means of communication and as a reaction to ongoing external discriminatory regulations and practices going to grow and diversify from the mid-1990s onward.

2.4.5 Summary: Concepts of transsexuality in the trans movement

It would be premature to deduce conclusions on trans movement concepts of transsexuality, gender and gender regime in the period from the 1970s to the mid-1990s without an in-depth study of the social movement. However, findings so far indicate that there was a discrepancy between representations and psycho-medical descriptions of transsexual individuals on the one hand, and transsexual individuals' subjectivities on the other. Internal forces, most prominently transsexual support groups, as well as external factors, such as the pressure to appease a hostile social environment and the isolation from other social movements dealing with issues related to gender and sexuality contributed to predominantly homogeneous and gender-conformist representations of transsexual individuals. At the same time, there are indicators that transsexual individuals were far less homogeneous with regard to sexual orientations, understandings of self and perspectives on sex reassignment treatment than dominant factions in sexology suggested.

124 | In her response to Sigusch's concept of detotalisation and depathologisation of transsexuality, the sociologist Lindemann criticised Sigusch for consistently ignoring trans individuals' scholarly and political statements (Lindemann 1992: 268).

3 CONCEPTS OF GENDER AND TRANS(SEXUALITY) PRIOR TO, AND DURING THE LAW REFORM DEBATE

3.1 Developments and debates on trans(sexuality) in sexology from the 1990s to 2010

The sexological debate in Germany from the 1990s to 2010 was marked by four major developments. First, while enquiries into the aetiology of transsexuality, like in other Western countries, overall shifted towards somatic research, perspectives that questioned the search for a cause of transsexuality and called for a depathologisation of transsexuality entered the debate. Second, alongside homogenising concepts of transsexuality, perspectives emerged that acknowledged the publicly discernible proliferation of trans subjectivities, including the heterogeneity of transsexual subjects. Third, while the vast majority of sexologists continued to endorse a course of treatment based on authoritative psycho-medical control of trans subjects, one sexologist argued in favour of taking into account trans expertise and self-determination. Fourth, despite disagreement over concepts of transsexuality and the organisation of the treatment of transsexual individuals, sexologists developed authoritative national guidelines for the treatment and diagnostic assessment of transsexual individuals.

This chapter analyses clinical categories and underlying concepts of trans according to the perspectives and resulting tensions that emerged in the course of the developments mentioned above. Drawing upon articles from the sexological journals *Zeitschrift für Sexualforschung*, *Sexuologie* and relevant articles in *Psychoendocrinology*, *Zeitschrift für Humanontogenetik* (Journal for Human Ontogenetics) and a sexological handbook, the chapter starts out with a systematic account of aetiological approaches to transsexuality.

The next section deals with the reconceptualisation of transsexualism as it features in terminology and definitions, clinical pictures and differential diagnoses. Thereafter this chapter will address the debate on the diagnostics of transsexualism with a particular focus on the patient history, the physical

examination, the psychopathological examination and psychotherapy and the ›real life test‹.

Finally, this chapter deals with the medical management of transsexuality since the introduction of the German Standards. This section contextualises the legal and medical transition from the one to the other of the two officially recognised genders within the complex relationships between law and medicine, health insurance company administration and advisory body practices and psycho-medical professionals as well as county courts and psycho-medical practitioners in the field of transsexuality. Sources for this section are in addition to Langer's (1995), Langer and Hartmann's (1997) and Becker et al.'s (2001) articles in *Sexuologie* and the *Zeitschrift für Sexualforschung*, respectively, relevant articles in Clement and Senf's anthology.

The sections on the reconceptualisation, diagnostics, assessment and management of transsexuality draw upon articles in the journals *Zeitschrift für Sexualforschung*, including the interdisciplinary debate on the German Standards,[1] *Sexuologie* and relevant sexological articles in *Andrologia*, *Psychiatrische Praxis* (Psychiatric Practice), *Der Urologe* (The Urologist) and *Nervenarzt* (The Neurologist). Further sources are two influential sexological handbooks, relevant contributions to Clement and Senf's (1996) anthology, a monography by the Swiss psychologist Rauchfleisch (2006) and the Federal Social Court (*Bundessozialgericht*; BSG) decisions on 06 Aug. 1988 (BSG 1988) and 10 Feb. 1993 (BSG 1993).

Throughout the 1990s and the first decade of the 21st century and despite tensions between the recognition of individual subjectivities and homogenisation, depathologisation and ongoing pathologisation and the issue of surveilling transitions as opposed to granting trans individuals self-determination, neither depathologising approaches nor an overall higher degree of self-reflexivity in recommendations for clinical practice led to loosening the psycho-medical grip on transsexual individuals. Instead, dominant sexologists frequently manoeuvered within the restrictive regulatory regime it had fed into at an earlier point in time, such as the Transsexual Act (1980), a development that accounts for the specific national route that sexology took on trans in Germany.

3.1.1 Approaches to transsexuality in the sexological debate

The concern for finding a cause of transsexuality among sexologists in Germany was overall less prominent in the period between 1990 and 2010 than in the

1 | The debate on the German Standards includes perspectives of trans and cis sociologists, a lawyer and the national trans organisation Transidentitas e. V.

time preceding the Transsexual Act.[2] Nevertheless, the search for a cause did not cease. Like in other Western countries,[3] the focus of the research on the aetiology shifted in favour of somatic approaches (cf. Becker 2013: 153), and attitudes towards research on the aetiology of transsexuality became more diverse. Perspectives and research on the aetiology of transsexuality debated in German sexology journals can be divided into three categories. The first questioned the search for a cause of transsexuality. The second pursued ongoing somatic research. The third engaged in research on multi-causal factors.

Critical approach

Sigusch was the first sexologist in Germany who questioned research on potential causes of transsexuality. While he did not reject research *per se*, he took a vehement stance in his concept of the detotalisation of transsexuality[4] against

2 | The reasons for this development are twofold. First, the majority of sexologists agreed that there was no conclusive single factor or known set of factors that causes transsexuality, regardless of whether sexologists questioned or reproduced pathologising concepts of transsexuality (Becker et al. 1997: 147; Sigusch 2007: 351). Most of the sexologists did not refer to aetiology at all (e. g. Clement/Senf 1996; Langer/Hartmann 1997; Gauruder-Burmester/Popken/Beier 2006; Seikowski 2007), since hypotheses on biological causes have so far been either falsified or proven unverifiable, and psychosocial causes have turned out not to be generalisable (Bosinski 2000: 72; Rauchfleisch 2006: 20). Second, the debate in sexology from the 1990s to 2010 placed more emphasis on pragmatic issues, such as aspects related to the overall concept of treatment (e. g. Clement/Senf 1996; Kockott 1996; Becker et al. 1997; Beier/Bosinski/Loewit 2005; Gauruder-Burmester/Popken/Beier 2006; Sigusch 1996; 2007), specific aspects in psychotherapy (e. g. Meyenburg 1992; Bosinski 1994; Laszig/Knauss/Clement 1995; Clement/Senf 1996a; Pfäfflin 1996; Eicher 1996; Rauchfleisch 2006; Seikowski 2007; Seikowski et al. 2008) and on conceptual aspects, such as the issue of depathologisation (Sigusch 1991; 1991a; 1992; 1995; 1995a; Hirschauer 1992; Lindemann 1992; Augstein 1992; Langer 1995).

3 | For a comprehensive discussion of somatic approaches to transsexuality in Western countries, see Nieder/Jordan/Richter-Appelt 2011).

4 | Sigusch developed his concept of detotalisation in the first part of his article »*Die Transsexuellen und unser nosomorpher Blick*« (Transsexuals and our nosomorphic perspective). He discussed three issues. First, he critically reflected upon the dynamics between sexology and psychotherapy in the preliminary stages of the establishment of the programme of treatment in Frankfurt (Sigusch 1991: 225-230). Second, he discussed the resurging debate on psychotherapy vs. surgery in the 1980s (ibid: 230-240), which was sparked by Meyenburg and Ihlenfeld's report on successful psychotherapeutical treatment of trans individuals in the United States (Meyenburg/Ihlenfeld 1982). Third, Sigusch compared the current pathologisation of transsexuality with the pathologisation of individuals engaging in same-sex erotic activities in the 19th century (Sigusch 1991: 247).

attempts in medicine to find a single ›cause‹ to explain a complex and unusual social phenomenon. His criticised this kind of research for two reasons.

First, Sigusch objected to the unidimensionality of such an undertaking. He argued that there was no »pure« natural scientific model of sexual or gender identity that could unambiguously prove a direct effect of genes or hormones. In his view, sexual desire, sexual preferences, gender roles or gender identities could not be stripped from the cultural contexts that shape them. He held that just as human beings would not even exist biologically without society, nor would social human beings exist without genes, hormones and a brain. Sigusch suggested approaching complex phenomena by taking into consideration interrelations and interdependencies (Sigusch 2007: 352).

Second, Sigusch criticised the pathologising impetus of aetiological research on transsexuality. Alarmed by the similarity between the pathologisation of individuals featuring same-sex desires in the 19th century and the current medical understanding of trans individuals (Sigusch 1991: 247),[5] Sigusch uncovered the logic that rendered possible the representation of homosexuality as a disease earlier on and the current pathologisation of transsexuality. According to Sigusch, this logic operates to the effect that medical science pathologises phenomena when properties assumed to be linked by nature fall apart (ibid: 248). Hence, he cautioned against a scientific attitude that,

> subjects all manifestations in life to its criteria and its theories, against the bad habit of psychological medicine to psycho-pathologise everything that appears offensive and incomprehensible, against the bad habit of somatic medicine to reduce highly complex phenomena to possibly one tangible cause, in short, against the *nosomorphic perspective* […]. (Ibid: 249 f.)

However, he anticipated that an aetiopathogenetic approach would continue to produce theories of transsexuality »regardless of the waste of time, nerves or money, the strain on the patients. As soon as a new product of a gene emerges, it will not be shied away from« (Sigusch 1991a: 311), especially since »[n]othing appears to be more reassuring to the reified medical awareness than a noxa of which one believes that one can assume that it is concrete and immediately effective« (ibid: 311).

5 | Sigusch observed that v. Krafft-Ebing perceived of the ›urning‹ in Psychopathia sexualis (1886) in the same way contemporary professionals understand transsexuality (Sigusch 1991: 247).

Somatic approaches

Indeed, various disciplines in medical science continued to search for a ›noxa‹ that might cause transsexuality. In the 1990s, e. g. the endocrinologist Dörner continued to refine his thesis that prenatal hormone imbalances cause transsexuality during a particular phase in the differentiation of the human brain. Based on results of experiments on rats and clinical examinations of human beings, Dörner identified disorders in the adrenal steroid biosynthesis, in particular 21-hydroxylasis and 3ß-hydroxysteroid-dehydrogenasis deficiencies during the second trimenon of pregnancy as factors that organise the »sex centres«[6] in the brain to induce homo- and transsexuality (Dörner 1995: 22-25).

According to Dörner, the combination of a genetically, gonadally and genitally male foetus with a neuronally feminised brain develops when the testicular androgen secretion in a male foetus is inhibited due to stress and/or a maternal 21-hydroxylasis deficiency or a fetal 3ß-hydroxysteroid-dehydrogenasis deficiency during the organisation of the brain. Either endocrinological situation triggers the overproduction of adrenal androgens. The latter are aromatised to estrogen and conjugated to estrogen sulfate in the placenta. Estrogen sulfate inhibits the testicular production of androgens. Dörner suggested that the person's brain would be more or less feminised, resulting in a »female sexual orientation« and/or »female gender role behaviour« in these males (ibid: 29).

According to Dörner, the determination of the gender identity constitutes the fifth and last phase[7] of the sex differentiation in human beings. The consciously experienced understanding of oneself as a man or woman is primarily

6 | According to Dörner's observations, sexual orientation and gender role behaviour are immediate effects of endocrinological processes at a specific time of prenatal brain development. The sex centres control typically female or male patterns of gonadotropin secretion. The sex centres are organised by estrogens only (Dörner 1995: 27). The mating centres control the person's sexual orientation. These centres are organised by estrogens and androgens alike. The gender role centres control typically female and male gender role behaviour and are exclusively organised by androgens (ibid: 28).
The critical phases for the sex differentiation of the brain are not identical. However, they overlap (ibid: 27). Dörner's findings suggest that both the absolute sex hormone level as well as the ratio of androgens to estrogens affect the sexual differentiation of the brain in these critical phases, allowing for »various combinations of, or dissociations between the sex hormone-dependent development of the gonadotropin secretion, sexual orientation and gender role behaviour« (ibid: 28).

7 | This phase is preceded by four others. The first is genetic and is determined by the presence of an x or y chromosome in the semen. The gonadal sex is determined by the sex-determining gene. The genital sex is determined by the Müllerian-Inhibitory-Substance (MIS) and in particular by androgens during the second to the fourth month of pregnancy. Neuronal sex, i. e. the typically female or male gonadotropin secretion pattern,

determined by the prenatal, sex-hormone induced differentiation of the somatic and neuronal sex and depends on pre- and postnatal psychosocial influences (ibid: 28).

Dörner's search for an aetiology of homosexuality[8] and transsexuality was not value-free. Homosexuality and transsexuality featured as results of biological processes largely deemed deficient as opposed to seemingly unremarkable hetero and cis developments. Heteronormativity and the naturalised gender binary with stereotypical, universal and ahistorical understandings of the exclusive categories ›man‹ and ›woman‹ formed the unquestioned background of his research as well as the assumption that biological, or to be precise, neuroendocrinological processes immediately affect the social.

Moreover, his research on the aetiology of homosexuality and transsexuality was not non-directional either. While he believed that the value of such findings to sexology would continue to decriminalise, dediscriminate and depathologise homo- and bisexuality, he placed his findings on the alleged aetiology of transsexuality in a ›reparative‹ and preventative context:

> In case further neuroendocrinological and genetic examinations confirm our results, it is possible to assume that the 3ß-HSD and the 21-hydroxylasis deficiency not only represent a predisposition for the development of transsexualism, but for hyperandrogenous anovulation and idiopathic oligospermia, too. This should in future be in part recognisable via neonatal or prenatal diagnostics. Hence, severe gender identity disorders or the most frequent forms of infertility in both sexes would in principle be at least in part accessible for treatment at an early stage or for prevention. (Ibid: 29)

The assumption that either particular prenatal, and to a lesser degree postnatal hormonal constellations condition transsexuality informed several somatic approaches. As a result, various parts of trans bodies were scrutinised for an either unusual hormonal status or traces of potential prenatal endocrinological peculiarities. Among these were studies by Bosinski, Schröder, Arndt, Heidenreich and Wille (1995), and Schneider, Pickel and Stalla (2006).

Based on anthropomorphic measurements considered sex dimorphic in fifteen hormonally untreated ftm trans subjects, nineteen ›healthy‹ female, i. e. ciswomen, and twenty-one ›healthy‹ male controls, i. e. cismen, Bosinski, Schröder, Arndt, Heidenreich and Wille investigated into the relationship between physical constitution and trans identity (Bosinski et al. 1995: 326 f.). While the researchers could not detect any differences between ciswomen and

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sexual orientation and gender role behaviour are organised by sex hormones and in part neurotransmitters as mediators of the hormonal effects (Dörner 1995: 28).

8 | For a critique of Dörner's concept of homosexuality, see Bock von Wülfingen 2007: 65.

transmen in terms of absolute body measurements,[9] a comparison of physical proportions suggested contradictory results, which Bosinski and his colleagues interpreted to be overall leaning towards an »intermediate« or »masculine« side (ibid: 333).[10]

Bosinski, Schröder, Arndt, Heidenreich and Wille tentatively concluded that ftm transsexual subjects and ciswomen differed with regard to a few body measurements and proportions that allegedly establish sex dimorphism. They equally tentatively suggested that the differences reveal that ftm trans individuals tend to match the parameters of the gender they identify with (ibid: 333 f.).

As the researchers readily admitted, the research design was flawed. First, the sample was too small to produce representative data. Second, the groups were too heterogeneous. While there were e. g. two blue collar workers each in the control groups, the trans group hosted six blue collar workers. As the research team conceded, different types of labour, diets and exercising shape bodies in different ways (ibid: 334).

Bosinski, Schröder, Arndt, Heidenreich and Wille's study also constitutes an episode in the cultural production of sex dimorphism and the naturalisation of an apparent link between a person's genitalia and gender identity. The researchers e. g. maintained an understanding of two polarised sexes, despite the fact that seven ciswomen's bodies were reported to have transgressed the values for females on the Thanner scale (ibid: 329). By contrast, variations in ftm body measurements were emphasised, hence accentuating the ›abnormality‹ of transsexuality and implying the ›health‹ of gender identities that appear to follow from a particular genital status at birth.

Based on an anthropomorphic study, the neuroendocrinologist Stalla and his research team believed to have found a biological explanation for the development of transsexuality in mtf trans individuals. The research team measured the 2D:4D finger length ratios of more than 100 trans individuals.[11] The researchers found out that in mtf transsexual subjects the ratio was higher than in cismen. The ratio corresponded with that of heterosexual women. Schnei-

9 | On average ftm trans subjects and ciswomen in this non-representative study were smaller, had less weight, more narrow shoulders and waists, shorter and thinner upper and lower arms and radioulnar diameters than cismen (Bosinski et al. 1995: 329).

10 | Indices such as the androgyny score by Thanner and the body mass index indicated that in five of sixteen cases ftm trans individuals disposed of more male than female proportions, whereas some proportions such as the shoulder pelvis index suggested more female proportions in ftm trans subjects than in ciswomen (ibid: 330-333). The Thanner scale is used to distinguish between males and females (ibid: 329).

11 | Some researchers assume that the value between the finger length ratio indicates the prenatal androgen situation in the phase when fingers develop. High levels of testosterone are deemed to result in longer ring fingers in relation to index fingers.

der, Pickel and Stalla concluded that mtf transsexuals are more likely to have experienced lower intrauterine androgen levels than average cismen (Schneider/Pickel/Stalla 2006: 268).

Apart from the intriguing simplicity of the sociobiologistic line of argument, the usefulness of data on finger length ratios becomes questionable when compared with research in this field elsewhere. E.g., in a study of 60 individuals each per group, Rahman and Wilson in the UK related finger length ratio to sexual orientation. Their findings suggest that homosexual males and females show significantly lower 2D:4D ratios than heterosexual males and females (Rahman/Wilson 2003: 288).

Taking for granted for the sake of the argument an immediate link between sex steroids and social behaviour or identity, respectively, the comparison of the aforementioned finger-length-ratio studies raises a few questions. When does a particular finger-length ratio indicate a case of transsexuality and when does it indicate homosexuality? How do finger length ratios feature in lesbian as opposed to heterosexual ftm subjects? How does a change in sexual orientation fit together with rather stable finger lengths?

Moreover, when taking further studies on finger length ratios into consideration, findings are contradictory. While Rahman and Wilson held that homosexual males and females show significantly lower 2D:4D ratios in comparison to heterosexual controls, Lippa's findings suggested that 2D:4D finger length ratios in cismen are related to sexual orientation, whereas they are not related to ciswomen's sexual orientation (Lippa 2003: 179).[12] Findings in studies on finger length ratios seem to vary from study to study.

Multi-causal approach

In the light of the deficiencies of biological[13] and psychological[14] approaches and based on a discussion of various studies on the gender identity of intersex individuals (Bosinski 2000a), Bosinski suggested that gender identity development

12 | In Lippa's study homosexual men were said to feature ›female‹ finger length ratios.

13 | Bosinski detected four major flaws in biological approaches to transsexualism. First, being a human feature, gender identity cannot be derived from animal experiments. Second, species vary. Therefore, results from experiments on rats cannot be applied to other species. Moreover, biosocial aspects influence sexual and social behaviour. Third, biological approaches cannot explain why the overwhelming majority of persons with congenital adrenal hyperplasia (CAH) do not develop a ›gender identity disorder‹ or homosexuality. Finally, endocrinological findings in transsexual individuals are contradictory (Bosinski 2000: 72).

14 | According to Bosinski, psychological approaches have two drawbacks. First, psychological assumptions are based on subjective interpretations of individual cases, which cannot be empirically verified. Second, while specific factors might apply to

is determined by a »highly complex, time-dependent biopsychosocial complex of conditions« (ibid: 96). He argued that further research into transsexuality was required to analyse biological and psychological factors in the same sample of individuals, pay more attention to physical aspects in untreated transsexual individuals, create sufficiently large ›healthy‹ control groups in studies and supplement group differences with case studies (Bosinski 2000: 73).

With these ideas in mind, Bosinski conducted research on the aetiology of female-to-male transsexualism based on a sample of sixteen untreated female-to-male transsexual individuals and a control group group of nineteen ciswomen and twenty-one cismen. He applied several methods, including standardised personality tests and depth interviews covering issues such as the family situation, childhood and adolescent gender behaviour, school history, psycho- and somatosexual development and the development of gender identity (ibid: 73). Moreover, he conducted anthropometric, endocrinological and transvaginal ultrasound examinations (ibid: 74).

With regard to gender-specific socialisation in childhood and adolescence, Bosinski's findings suggest that ftm transsexual individuals experience significantly more asymmetrical family structures, either identify with their fathers like the cismen in the control group do or experience the loss of their fathers as traumatic (ibid: 74). Furthermore, he observed that ftm transsexual persons engage in masculine playing activities like the male cis controls and profoundly dislike ›girls' clothing‹ (ibid: 75).

Bosinski's findings on the psychosomatic and psychosexual development suggest that the vast majority of ftm transsexual individuals experience menstrual problems (ibid) and perceive chest development as traumatic (ibid: 76). They masturbate as early and frequently as do cismen in the control group (ibid: 76 f.). All participants of the study lived as heterosexuals. Incidences of sexual abuse did not feature significantly higher in any group (ibid: 77).

The endocrinological findings in this study revealed significantly higher levels of T and A4 levels in female-to-male transsexual individuals than in female cis control subjects. However, there was no difference between these groups with regard to DHEAS, SHBG, LH and FSH. After stimulation with ACTH, the cortisol precursors 17 OHP and OHPREG happened to be higher in ftm transsexual individuals than in ciswomen in the control group (ibid). Moreover, Bosinski diagnosed more non-classical CAH and higher rates of PCOS in ftm transsexual individuals than in female cis controls (ibid: 78).

Based on the results of his psychological explorations, physical examinations and on the hypothetical assumption that hyperandrogeny in adults mirrors pre- and perinatal hormonal imbalances (ibid: 79), Bosinski developed a

transsexual individuals more frequently, psychological approaches cannot explain why children who experience similar influences do not develop transsexualism (ibid).

›hypothetical developmental model for ftm transsexualism‹, which he divided into a childhood and a pubertal phase. According to this model, the transposition of an ftm transsexual person's gender identity is established in childhood due to misidentification. As early as in childhood, hyperandrogeny stimulates behaviour stereotypically associated with boys. Masculine behaviour leads the child to consider itself more a boy than a girl (ibid: 80). The boyish behaviour causes the child's environment to reinforce the child's masculine understanding of self (ibid: 81).

According to Bosinski, puberty marks the completion of this development. He argued that the ftm transsexual individual develops an aversion to specifically female aspects of his body, since a female puberty does not match the adolescent's self-categorisation (ibid: 81). Moreover, the in part masculinised physical appearance during and after puberty contributes to the »illusionary« self-understanding of being similar to boys, and the masculine habitus causes the social environment to refrain from encouraging femininity. Furthermore, hormonal imbalances produce physical discomfort in the female body. Finally, the developing homosexual orientation matches the individual's feeling of being a man, but does not fit the expectations associated with the role as a woman (ibid).

As several of the somatic approaches mentioned earlier on, Bosinski's multi-causal concept is premised upon normative understandings of gender and sexuality, which render transsexuality an anomaly. Seen from such a perspective, factors assumed to play into the development of transsexuality are necessarily deemed deficient compared to cis developments. Hence, when the social environment reinforces behaviour culturally associated with masculinity in a female-bodied child, Bosinski evaluates such a reaction as »inappropriate« (ibid: 82). Similarly, Bosinski frames the fact that trans children do not accept that a person's gender cannot be changed as a deficiency (ibid: 80), rather than e. g. the product of a creative and/or questioning mind.

Moreover, Bosinski's model contains a decidedly heterosexual bias. This applies to the sample as well as to the explanatory range of his concept. Gay transmen are not conceptualisable in his model for a biopsychosocial approach to ftm transsexuality.

Bosinski's multi-causal concept shares with somatic approaches the assumption that pre and/or perinatal hormonal imbalances form the biological basis of transsexuality. Since this hypothesis has so far not been verified, the entire concept necessarily remains speculative.

3.1.2 Reconceptualising transsexuality

While the diversification of trans subjects resounded in the terminology used for unusual gender identities in the DSM-IV,[15] sexologists in Germany with few exceptions continued to use the term ›transsexuality‹ or variations of the term throughout the 1990s and the first decade of the 21st century. At the same time, clinical pictures of transsexuality reveal that sexologists more or less agreed that transsexual individuals were a heterogeneous group. However, sexologists were deeply divided over the issue of whether transsexuality constitutes a psychopathological state or a variant of gender expression.

Terminology, definitions and concepts from the 1990s to 2010

While pathologising concepts generally classified transsexuality as a ›gender identity disorder‹, sexologists in Germany, unlike their U.S. colleagues, clung to the term ›transsexuality‹ or variations of the term. Moreover, despite the fact that the majority of sexologists employed the terms ›transsexuality‹ (e. g. Sigusch 1991a; 2007; Clement/Senf 1996; Becker et al. 1997; Seikowski 2007; Seikowski et al. 2008) or ›transsexualism‹ (e. g. Langer 1995), the meanings were not necessarily identical.

Sigusch for instance did not define the term. His concept of ›transsexuality‹ is marked by two characteristics. First, as the title of the chapter »*Transsexuelle Entwicklungen*« (Transsexual developments) in the 2007 edition of his sexological handbook suggests, he stressed the diversity of transsexual people's lives. Second, he used the terms imprecisely. While he e. g. occasionally dis-

15 | In the DSM-IV which was published in 1994 and revised in 2000 (DSM-IV-TR), the APA abandoned the term ›transsexuality‹ in favour of ›gender identity disorders‹ (GID). The APA decided to drop the diagnosis of transsexualism in the DSM-IV in order to sever the clinical diagnosis of gender identity disorder from the criteria for sex reassignment. Moreover, the committee acknowledged different developments of transsexual individuals' gender identities and sexual orientations. Another reason for replacing ›transsexualism‹ with ›gender identity disorder‹ was because of the lack of clear boundaries between persons considered gender dysphoric with and without the desire to transition physically (Langer 1995: 266).

The DSM-IV distinguished between symptoms in childhood on the one hand and adolescent and adult manifestations on the other (APA 1994: 533 f.). Among the diagnostic criteria for a GID in the latter was a »strong and persistent cross-gender identification« (ibid: 532) and »evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex« (ibid: 533). Furthermore, intersexuality was excluded from a diagnosis of gender identity disorder. Finally, the person needed to display clinically significant discomfort or impairment at work, in social situations, or other important areas of life (ibid).

tinguished between transsexuality and transvestism (e. g. Sigusch 1991a: 328), he used the terms ›transsexuality‹ and ›transgender‹ interchangeably in other instances (Sigusch 2007: 347 f.).

Unlike Sigusch, Clement and Senf, and the authors of the German Standards defined transsexuality narrowly. According to Clement and Senf,

> [t]ranssexuals are conscious of belonging to the other gender. The core of the transsexual experience is the suffering due to the discrepancy between the sexed body and the subjective sense of gender belonging. They perceive the sex realistically, however, they feel it is subjectively wrong. This discrepancy is absolute in the sense that the subjective sense of belonging to the other gender is without any doubt experienced as an unchangeable identity. Accordingly, transsexual persons try to align their physical features with their subjective experience. They do so by adopting the outer appearance (clothing, haircut) and the typical behaviour of the other gender and by undergoing hormonal and surgical treatment. (Clement/Senf 1996: 1)

However, they added that transsexual subjects shape their gendered selves individually (ibid 1996a: 19).

By contrast, the authors of the German Standards entail a more rigid, homogenising and pathologising concept of transsexuality than the aforementioned sexologists. The Standards hold that transsexual individuals strive to approximate the physical appearance according to their respective gender identity as much as possible:

> Transsexuality is marked by the permanent inner certainty of belonging to the other gender. This includes the rejection of the physical features of the innate sex and the role expectations that are linked to the biological sex as well as the desire to adapt the physical appearance to the gender identity as much as possible, using hormonal and surgical measures, and to live socially and legally recognised in the desired gender. (Becker et al. 1997: 147)

The definition proposed by the German Standards does not leave space for individual modes of shaping gender.[16] In addition, they classify transsexuality as a gender identity disorder: »According to currently valid diagnostic classification schemes, transsexuality is considered a special form of gender identity disorder.« (Ibid)

16 | By contrast, Becker suggested that the German Standards allow for individual solutions (Becker 1998: 157). Nevertheless, the German Standards consider their outline of a transition normative as the following quotation suggests: »The following Standards of Treatment and Diagnostic Assessment of Transsexuals are minimum requirements. Deviations from these Standards need to be justified in the patient's health record in writing.« (Becker et al. 1997: 148)

Langer decided to continue using the term ›transsexuality‹ after discussing the shortcomings of the term ›gender identity disorder‹. He argued that abandoning the terms ›transsexualism‹ and ›transvestism‹ would not solve the problems they denote. Moreover, he claimed that transsexuality would no longer be visible as an extreme form of gender dysphoria. He feared that the indication for sex reassignment surgery could become arbitrary (Langer 1995: 267).

However, the term ›transsexuality‹ was also contested. Seikowski and Rauchfleisch e. g. suggested exchanging the term ›transsexuality‹ for ›transidentity‹ (›*Transidentität*‹). In his critique of the German Standards, Seikowski mentioned two reasons for dropping the conventional psycho-medical term. First, he believed ›transsexuality‹ implies a sexual disorder (Seikowski 1997: 352).[17] Second, he claimed that trans individuals were more likely to identify with the term ›transidentity‹ (ibid: 352 f.).[18] Despite suggesting a change of terminology, Seikowski rarely used the term ›transidentity‹ in his studies. With few exceptions,[19] he used the term ›transsexuality‹ (Seikowski 2007; idem et al. 2008).

Unlike Seikowski, Rauchfleisch used the term ›transidentity‹ consistently in his handbook on psychotherapy with trans individuals. Rauchfleisch developed his preference for ›transidentity‹ in a discussion of the terms ›transsexuality‹ and ›transgender‹. Like Seikowski, he considered the term ›transsexuality‹ confusing. Rauchfleisch argued that identity is the issue and not sexuality when dealing with the phenomenon (Rauchfleisch 2006: 21). However, he also favoured the term ›transidentity‹ over ›transsexuality‹, because the former signifies a departure from the pathologising connotation of the latter (ibid: 22 f.).

Rauchfleisch favoured ›transidentity‹ over ›transgender‹ when discussing issues that are associated with the medical term ›transsexuality‹. He considered the term ›transidentity‹ to be more specific than the term ›transgender‹. ›Transgender‹ constitutes an umbrella term for all individuals who are not sufficiently, or not at all described by the gender they were assigned to. Con-

17 | However, ›sex‹ in ›transsexuality‹ does not refer to sexuality but to *sexus*, the body.

18 | Seikowski referred to the umbrella organisation Transidentitas e. V., which operated from the mid-1980s to the mid-1990s. However, it is for two reasons hard to quantify trans individuals' preferred self-designations. First, there are no studies to this effect. Second, self-definitions and preferred terminology vary historically. The trans movement in Germany has changed rapidly over the past decades. The term ›transidentity‹ seems to have been rather popular among trans individuals in the mid- to the end of the 1990s as e. g. the name of the national lobby organisation *Deutsche Gesellschaft für Transidentität und Intersexualität* (German Association for Transidentity and Intersexuality; dgti e. V.) suggests. See chapter 3.2.2 for the use of terminology in contemporary trans lobby organisations.

19 | See e. g. Seikowski et al. 2008: 137.

sequently, the category ›transgender‹ includes transsexual individuals, transvestites, cross-dressers of all kinds, drag kings and queens, transwomen and transmen, whereas the latter are not necessarily identical with transsexual individuals (ibid: 21f.).

Unlike Rauchfleisch, Becker, Berner, Dannecker and Richter-Appelt suggested using the term ›transgender‹ in their statement on the reform of the Transsexual Act on behalf of the DGfS. Like Seikowski and Rauchfleisch, they argued that transsexuality is foremost a gender identity and gender role problem rather than an issue concerning sexuality (Becker et al 2001: 259). However, by arguing that the Transsexual Act should apply to transsexual individuals only (ibid), they implicitly suggested that ›transsexuality‹ can be distinguished from other trans manifestations.

Beier, Bosinski and Loewit developed further terminological variants without however abandoning the term ›transsexual‹. They defined persons with a ›transsexual gender identity disorder‹ as individuals who more or less reject their birth gender, its physical characteristics and the gender role expectations that society links to their sex. They permanently consider themselves as members of the other sex and strive to achieve its physical features by resorting to medical measures and use legal declarations in order to live and be socially accepted in this role (Beier/Bosinski/Loewit 2005: 365).

Beier, Bosinski and Loewit did not consider every deviation from socially sanctioned understandings of gender pathological.[20] They considered gendered conditions pathological that require massive and irreversible medical and surgical interventions. The latter necessitate the diagnosis of an illness and a scientifically founded indication (ibid: 368). They subsumed transsexuality which they understood to be the most severe form of gender identity disorder under those gender manifestations they deemed pathological (ibid: 365).

Beier, Bosinski and Loewit distinguished between ›biological men with a transsexual gender identity disorder‹ (formerly ›male-to-female transsexuals‹) and ›biological women with a transsexual gender identity disorder‹ (formerly ›female-to-male transsexuals‹) (ibid: 368).[21] While any term for a gender start-

20 | Beier, Bosinski and Loewit did not classify individuals as sick who transgress conventional gender norms without medical and surgical means. They considered transgender, queers and drag kings and queens among the latter (Beier/Bosinski/Loewit 2005: 367). However, these categories cannot at all times be neatly distinguished from one another.

21 | Beier, Bosinski and Loewit's terminology and typology of transsexual individuals is based on earlier work by Bosinski. His 1994 study on the classification of gender identity disorders in men, i. e. males who identify as women, constituted an initial attempt to systematise transsexual individuals according to sexual orientation (Bosinski 1994). By 2003, Bosinski had developed a comprehensive model in which he added ›biological

ing with the prefix ›trans‹ while leaving cisgenders unmarked suggests an original link between a person's morphology and gender identity, no terminology introduced before so vehemently reveals the naturalising effects of the gender binary and the express will to police the borders of the hegemonic gender regime than that of Beier, Bosinski and Loewit.[22]

As the terminology and definitions suggest, sexological perspectives on transsexuality varied from understandings as unusual but non-pathological to notions of transsexuality as a pathological state of mind. Concepts that depathologised transsexuality were rare throughout the 1990s and the first decade of the 21st century, and pathologising understandings prevailed.

With his concept of depathologisation, Sigusch wrested transsexuality away from the realm of illness. First, he self-critically highlighted the process of ›othering‹ individuals who deviate from normative understandings of gender and sexuality in sexology by revising the cardinal symptoms he and his colleagues Meyenburg and Reiche had put forward in 1979 (Sigusch 1991a: 317-327). Inspired by the characteristics v. Krafft-Ebing attributed to individuals with a ›contrary sexual feeling‹ in Psychopathia sexualis (1886), Sigusch conceded that the cardinal symptoms he and his colleagues had formulated were characterised by medical totalisation and clinical pathologisation (Sigusch 1991a: 318). In his view, the eleventh cardinal symptom for instance mirrored at least as much his situation and defence as the patients' situation and defence at the time (ibid: 319).

Second, he problematised cissexuality and related cissexualism and transsexualism to each other (ibid: 329-335). He argued that masculinity and femininity required of every person to limit him- or herself either to the one or to the other side. He questioned the seemingly self-evident link between a male person's gender identity as a man and a female person's identity as a woman (ibid: 333). Since it is impossible to escape compulsory gendering, transsexualism and cissexualism necessarily are relational categories:

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women with a transsexual gender identity disorder‹, i. e. females who identify as men, to his systematic and detailed account of transsexual developments (Bosinski 2003).

22 | From a perspective that considers every gender expression equally valid, Beier, Bosinski and Loewit's terminology is ethically and logically questionable. Calling trans individuals ›men‹ or ›women‹ based on their assigned gender is disrespectful, if it is known that they do not identify as such. Moreover, while ›woman‹ or ›man‹ signify a gender role or gender identity, ›female‹, ›male‹ and ›intersex‹ signify socially generated classifications of the human body. The terms ›biological man‹ or ›biological woman‹ do not make sense, unless one subscribes to a perpective that a body produces a gender role or identity.

> The obsessiveness of transsexuals, their ›gender delusion‹ is an individual reflex to compulsory social gendering and the collective gender delusion of the normal, which continues to be perfectly concealed in most people. The stronger the one, the more rigid the other. (Ibid: 334 f.)

While Sigusch's concept of depathologisation met with resistance in German sexology of the 1990s,[23] the Swiss psychotherapist Rauchfleisch took up his concept again in 2006. Rauchfleisch suggested transidentity ought to be considered a variant of the (cis) norm (Rauchfleisch 2006: 8). He held that transidentity was not linked to any psychiatric disorders. Rather, depressions, adjustment disorders, addictions and suicidal crises often occur as reactions to the difficult social situations transidentified individuals experience (ibid: 48).

Sigusch and Rauchfleisch's concepts differ with regard to the motivation, the significance that is accrued social discrimination and the social vision. While Sigusch admitted that the prospect of no longer having to decide on irreversible surgical measures motivated him to develop his concept of depathologisation (Sigusch 1991a, 329),[24] Rauchfleisch mentioned several reasons for favouring a depathologising concept over a pathologising one. One of his reasons was pragmatic. Rauchfleisch suggested that it was easier to differentiate between primary and reactive disorders in transidentified individuals, if transidentity was no longer pathologised (Rauchfleisch 2006: 49). Moreover, transidentified individuals cannot be sufficiently considered partners in a therapeutic setting as long as they are considered sick (ibid: 50). Second, abandoning a pathologising concept would also strengthen transidentified individuals' self-confidence

23 | Langer e. g. insisted on the »clinical perspective«, in particular since he believed that sex reassignment surgery had increasingly become a solution for various »gender identity problems« (Langer 1995: 265).

24 | Sigusch argued that sex reassignment surgery was only justified, if transsexual individuals were not considered sick and if they were as »free« as possible to decide on these interventions (Sigusch 1991a: 329). Augstein commented on Sigusch's motivation that anybody who feels uncomfortable about deciding on sex reassignment surgery should leave it (Augstein 1992: 259).

Lindemann criticised Sigusch's assessment of a reversal of sex reassignment surgery as a »catastrophe«. She suggested that Sigusch feared »gender disorder« (Lindemann 1992: 267). In her response to the critique of the German Standards, Becker countered Lindemann's undramatic perspective on a »double transsexuality«. Becker argued that repeated changes of gender were only possible without surgical measures (Becker 1998: 162). I suggest that whether a reversal of a physical transition amounts to a catastrophe or not depends upon several factors, such as, e. g. a realistic assessment of surgical possibilities and/or a person's ability to integrate the episode in the reassigned sex and gender into their own life.

and self-esteem (ibid: 8). In addition, he argued that the depathologisation of transidentity would open up perspectives on gender discourse in the wider society (ibid).

While the significance Sigusch accrued to social discrimination in trans individuals' lives is uneven throughout his concept of depathologisation,[25] Rauchfleisch consistently acknowledges forms of social discrimination that impinge on transidentified individuals' lives. He noted that, »[t]he spectrum of *discrimination and exclusion* ranges from titillating comments in private and public to non-consideration of applications for flats and workplaces to manifest violence« (ibid: 87 f.). Like Sigusch (1991: 235), Rauchfleisch explained the social discrimination of transidentified individuals with the irritation they cause in cis subjects. Based on Lindemann's elaborations, Rauchfleisch argued that transidentical individuals shatter the certainty that there are two (and only two) gender categories. Rauchfleisch built upon Hirschauer's insights when he suggested that representatives of norming instances, such as psychologists, psychiatrists, endocrinologists, jurists, etc. mobilise normalising strategies. To define transidentity as a disorder is one such means of normativity in order to protect the normality of the gender binary and to fend off irritation (ibid: 141 f.).

While Sigusch's social vision ideally allows for a pluralisation of genders and sexualities, if social arrangements allowed for more genders than men and women (1991a: 335) and provided transsexual individuals were not a »transitory minority« (ibid: 329), Rauchfleisch suggested that transidentity poses three challenges to society. First, the phenomenon invites radically questioning the gender dichotomy and the categorisation of genders. As a result it becomes possible to accept that there are not only two genders and that there is space for individual life schemes (Rauchfleisch 2006: 146) Second, transidentity suggests that the distinction between sex and gender is questionable. He concluded that equality could be achieved, if society was to return to a ›one-sex-model‹ (ibid: 147 f.).[26] Third, transidentity renders visible that sex is socially constructed in the sense that the meanings allocated to physical features are socially determined. Rauchfleisch suggested that transidentity could become a paradigm for the recognition of equality (ibid: 148). His insight that gender is socially

25 | His attitude oddly shifted from a scathing critique of the medicocentric perspective, which debases transsexual individuals, to instances when he seemed unaware of effects of social discrimination, to discriminatory statements on trans individuals.

26 | Rauchfleisch idealises the one-sex-model. This type of gender regime did not polarise genders to the extent the binary gender system does. Therefore, it tolerated feminine men, masculine women, and within limits, hermaphrodites. However, the gender model was nonetheless androcentric. The male became the norm of the human, whereas females featured as lesser (Laqueur 1992: 10). Hence, the one-gender-model cannot serve as a model for gender equality.

constructed raises the question why he did not enquire into the construction of cis instead of using transidentity as a paradigm for the recognition of equality.

Pathologising concepts of transsexuality can be subdivided into two categories. Representatives of one group considered transsexuality a gender identity disorder without psychiatric cocommitants. Proponents of the other category insisted that transsexuality was a disorder accompanied by several other psychiatric disorders.

Seikowski suggested that transsexuality was a gender identity disorder without cocommitants. Despite considering transsexuality a disorder, he disagreed with the classification of transsexuality as a psychiatric condition. While Sigusch claimed that, »[t]he crazy thing about transsexualism is that transsexuals are not crazy« (Sigusch 1991a: 331), Seikowski, Gollek, Harth and Reinhardt delivered evidence for this thesis in an extensive quantitative study. He and his colleagues examined 164 transsexual subjects, using the Borderline Personality Inventory (BPI), the Freiburg Personality Inventory (FPI) and the Questionnaire for the Assessment of One's Own Body (*Fragebogen zur Beurteilung des eigenen Körpers*; FbeK). The objective of their study was to find out whether there was, as several sexologists suggested, an increased incidence of borderline personality disorders in transsexual individuals (Seikowski et al. 2008: 141).

Major findings of the study were that 88 % of the individuals examined did not feature any symptoms associated with a borderline disorder (ibid: 139 f.). Moreover, the researchers could not detect any further psychopathological symptoms, which sexologists commonly associated with transsexuality (ibid: 140).

The group of sexologists that claimed that transsexuality was a gender identity disorder with additional psychiatric abnormalities was not homogenous. While Pfäfflin, and Clement and Senf agreed with Seikowski that the diagnosis of transsexuality did not justify the general assignment to a borderline disorder,[27] they observed several psychiatric cocommitants, such as depressions, suicidality, and a history of drug abuse (Clement/Senf 1996: 5 f.; Pfäfflin 1996: 29). However, Clement and Senf suggested that in principle the examination of transsexual individuals did not require any other diagnostic procedure than with other patients (Clement/Senf 1996: 5).

Other sexologists however pathologised transsexuality to an extent that is reminiscent of the pathologisation in the 1970s. Langer and Beier, Bosinski and Loewit assumed that transsexual individuals were frequently ›abnormal‹ in psychopathological terms. In a study consisting of eleven ftm and twenty mtf transsexual individuals, Langer classified one third of the probands as

27 | Pfäfflin suggested that the diagnostic allocation of transsexuality to borderline personality disorders impedes therapeutic work (Pfäfflin 1996: 29).

disturbed (Langer 1995: 271). Similarly, Beier, Bosinski and Loewit described transsexual individuals as

> internally torn, subdepressive, emotionally unstable and suicidal. Data on auto-aggressive actions that range from excessive alcohol abuse over self-mutilation (e. g. constriction of the breasts or the penis) to suicide, can regularly be found [...] in the older literature. The social marginalisation these patients experience (also due to their not always harmonious appearance in the role of the desired gender) amplifies the distress. (Beier/Bosinski/Loewit 2005: 365)

According to Beier, Bosinski and Loewit, cocommitant disorders are unevenly distributed among trans individuals. They distinguished between biological women with a transsexual gender identity disorder and androphilic and gynophilic biological men with a transsexual gender identity disorder. According to Beier, Bosinski and Loewit, biological women with a transsexual gender identity disorder present a whole array of variations, ranging from inconspicuous to borderline personalities (ibid: 371). They considered androphilic biological men with a gender identity disorder psychopathologically inconspicuous except for the odd depression and dependent personality disorder (ibid: 374). By contrast, they claimed that gynophilic biological men with a gender identity disorder were more apt to display disorders, such as histrionic or antisocial personalities and borderline disorders, depressions and suicidal tendencies (ibid: 377).

The vast differences in the understanding on the same group of individuals suggest that the classification of transsexuality as a gender variant or a disorder with or without cocommitants depended on the sexologists' subjective concepts of masculinity and femininity and the number of genders they considered legitimate.

Clinical pictures from the 1990s to the end of the first decade of the 21st century

While most of the sexologists stated that transsexual subjects express their gender identity very differently, they disagreed over the extent to which transsexual subjects wish to undergo surgery and perceivably live according to the gender they identify with. Three different clinical observations emerged on the issue of surgical interventions. According to some sexologists, transsexual individuals' surgery requirements range from no interventions to extensive measures. Others tentatively suggested that the type and extent of surgery correlates with a person's sexual orientation and assigned gender. To other sexologists, surgery remained the defining feature of transsexualism.

Clement and Senf e. g. observed that some transsexual individuals do not reveal their gender identity publicly. Others wish to be accepted in public and private life as the gender they identify with without wanting to undergo hor-

mone treatment and surgery, whereas some transsexual subjects require one particular surgical measure only of a set of several possible surgical interventions (Clement/Senf 1996: 1).[28] Similarly, Kockott observed that while several transsexual individuals require extensive sex reassignment surgery, there is a significant number of individuals that opts for other solutions (Kockott 1996: 15).[29]

Becker, Berner, Dannecker and Richter-Appelt suggested that the consistent experience of living and enjoying recognition as a member of the gender the respective individual identifies with is crucial to a transsexual person's psychological stability. Hence, a successful transition does not necessarily include surgical measures (Becker et al. 2001: 261). A few years later, Becker summarised this observation succinctly when noting that, while surgery continues to be indicated urgently in order to alleviate distress in some transsexual individuals, »[o]nly fundamentalists hang onto the ›real‹ (genuine, true) transsexuality that is by definition always linked to the desire for sex-transforming operations« (Becker 2006: 157 f.).

Sigusch's statements at the beginning of the 1990s were contradictory. While Sigusch observed that transsexualism had changed as a psychiatric and social phenomenon,[30] he reported in his concept of depathologisation[31] that in the 1970s, he encountered transsexual individuals living according to their concepts of gendered selves without resorting to medical means or frequently changed their gender affiliation (Sigusch 1991: 324), suggesting that several ways existed of leading a transsexual life.

In his discussion of the issue of whether transsexual individuals were in the process of becoming a minority (ibid: 325-329), however, his understand-

28 | Clement and Senf's observations are congruent with those by Rauchfleisch (2006: 17).

29 | As early as in 1987, Kockott and Fahrner noted in their follow-up study on transsexual individuals without surgery that a highly valued job or the development of a meaningful partnership that could only be maintained in the initial gender or with the initial physical characteristics were among the reasons for transsexuals not to undergo surgery (Kockott/Fahrner 1987: 520).

30 | Sigusch observed that transsexualism had changed with regard to diagnostic findings (Sigusch 1991a: 322 f.), therapeutic concepts (ibid: 323) and the social and psychological situation of transsexual individuals (ibid).

31 | Sigusch reiterated several of his arguments presented in his initial article on the depathologisation of transsexuality in an interview in 1992, a monography in 1995, journal articles (1992; 1995a; 1997) and in articles in the sexological reference books he published in 1996 and revised in 2001, 2006 and 2007. Sigusch's concept constituted the most extensive and radical published sexological perspective on the depathologisation of transsexuality throughout the 1990s and the first decade of the 21st century.

ing of transsexuality took on a totalising ring. Sigusch e. g. argued that unlike the gay movement, which he believed had developed beyond narrow issues, transsexual individuals were due to their characteristics tied to the law and in particular to medical science:

> In some ways the dawn of transsexuals is reminiscent of the dawns of homosexuals 90 to 150 years ago and once more after World War II: low intellectual and political standards, simple-minded smugness, narrow-mindedness, great redundancy and struggling for everything, public coming out, the founding of clubs, members, subscribers, a right to speak before jurists and physicians, etc. However while homosexuals soon looked beyond their noses, transsexuals are *due to their characteristics tied to law and especially medicine.* (Ibid: 326)[32]

According to Sigusch, other than with the »collective of homosexuals«, which is in his opinion based on mutual sexual attraction, »medical science is the bond that renders transsexuals a collective in a historical and an individual sense« (ibid: 330).[33]

Moreover, he argued that the transsexual community did not, unlike the protest cultures of the 1960s challenge the gender binary.[34] He suggested that transvestites and transsexuals were corrupted by the system via the benefit

32 | Sigusch's understanding of the gay and trans movements is problematic. First, Sigusch's concept of homosexuality is ahistorical. As Hirschauer points out, social phenomena Westphal termed contrary sexuals in 1869 are not the same as present-day homosexuals (Hirschauer 1992: 250 f.). Second, Sigusch romanticises the gay movement (ibid: 251).

In the 2007 edition of his sexological reference book, Sigusch no longer maintained the ahistorical concept of homosexuality: »At any rate, in some ways the present situation of transsexuals reminds me of the people over a hundred years ago who are currently called homosexuals« (Sigusch 2007: 354).

33 | Sigusch's evaluation of trans subcultures is flawed. First, he inappropriately distances homosexuality from transsexuality. As Hirschauer points out, the differentiation of homosexuality from sodomy did not occur without reliance on and resistance to, medical science (Hirschauer 1992: 251). Moreover, with a similarly distancing gesture Sigusch suggests that transsexuality is a historical construction, while he features homosexuality as a pre-social, essentialist phenomenon (Lindemann 1992: 262). Furthermore, Augstein and Hirschauer suggest that rather than the awkward juxtaposition of medical science and desire, social discrimination (Augstein 1992: 257; Hirschauer 1992: 251) as well as the creation of spaces for developing gay and trans lifestyles (Hirschauer 1992: 251) constitute unifying elements in both minoritised populations.

34 | According to Hirschauer, Sigusch overestimated the challenge protest movements of the 1960s posed to the gender binary (Hirschauer 1992: 250).

of a law and of health insurances, tv and treatment programmes (ibid: 328).[35] Hence, transvestites and transsexuals are unable to articulate the growing unease with gender publicly in this culture. Instead, they succumb to the tyranny of the gender binary, »because they are addicted to normality and unable to ascend from gender dysphoria to gender relaxation« (ibid: 328 f.):[36]

> If they owned up to their transgression as a *transgression*, i. e., to their femininity with a male body and their masculinity with a female body, they would transition from the ›dignity of a psychiatric-surgical entity of disease‹ to the ›dignity of a social minority‹. This would be contranomic, the height of a provocation in a society that does not grant an institutional space for a change of gender and gender crossings beyond clinics and chambers, in a society that despite all weakening of gender roles ranging from the social division of labour to the legal system leaves no doubt about which gender is the sexus sequior. (Ibid)[37]

In his sexological reference book referred to earlier on, Sigusch did not repeat his depreciative and homogenising statements on trans individuals and the trans movement. Instead, he noted that transsexual individuals manifest a wide range of very different identities, roles and lifestyles (Sigusch 2007: 347). He also implicitly repealed his former equation of transsexuality with surgical measures in his critique of the German Standards (ibid).

Beier, Bosinski and Loewit tentatively suggested that the need for surgery correlates with the assigned sex/gender and sexual orientation. While they cautioned that their typology did not apply to every single case, their attempt to systematise transsexual individuals led to more homogenous clinical pictures compared to those of the aforementioned sexologists. Beier, Bosinski and

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35 | As Augstein pointed out, Sigusch conflated transsexualism with transvestism. Especially in the context of the Transsexual Act and medicine, it is misleading not to differentiate between transvestites and transsexual individuals, since there are neither legal nor medical provisions that transvestites might benefit from (Augstein 1992: 256).

36 | Sigusch's assumptions on transsexual subjects who undergo surgery and on social change are problematic for several reasons. With regard to the former, Sigusch defamed all trans individuals who opt for surgical measures (Augstein 1992: 257; Lindemann 1992: 265). This devaluation is also inappropriate considering that in particular sexology, the media and the law produced the image that genital surgery stands for the social treatment as a man or woman (Hirschauer 1992: 248). Sigusch's concept of social change is debatable, since he adhered to an emancipatory policy model, which places the onus for social change on trans individuals (Lindemann 1992: 268).

37 | It remains unclear why Sigusch mentioned transvestites in this context, since they ›own up‹ to their femininity in a male body and their masculinity in a female body (Augstein 1992: 256).

Loewit e. g. claimed that biological women with a gender identity disorder profoundly reject their secondary sex characteristics (Beier/Bosinski/Loewit 2005: 369 f.). They prioritise mastectomies over the construction of phalloplasties (ibid: 370 f.). According to their observations, gynophilic biological men with a gender identity disorder most urgently wish to have large breasts and tend to be ambivalent with regard to their genitalia (ibid: 376), while androphilic biological men with a gender identity disorder preferably opt for a neovagina (ibid: 374).

The German Standards mirror the most homogenising clinical picture of transsexual individuals with regard to gendered self-concepts and attitudes towards surgery. According to the Standards, transsexual individuals wish to resemble the physical appearance of the gender they identify with as much as possible through hormonal and surgical measures and to live socially and legally recognised in the desired gender role (Becker et al. 1997: 147).

Most sexologists agreed that transsexual developments vary. While some sexologists pointed out to individual variations in general (e. g. Sigusch 2007; Clement/Senf 1996; Rauchfleisch 2006), others believed it was possible to systematise them (e. g. Bosinski 2003; Beier/Bosinski/Loewit 2005).

Clement, Senf and Rauchfleisch observed that while some transsexual developments begin at such an early age with the effect that the respective trans individuals feel they have always been transsexual, other developments manifest as late as from the thirties onward (Clement/Senf 1996: 1; Rauchfleisch 2006: 16). Clement and Senf suggested that transsexual individuals frequently experience uneasiness with their morphology in childhood. The difficulties increase in puberty when physical features associated with a particular gender emerge or become more prominent (Clement/Senf 1996: 1 f.).

Clement, Senf and Rauchfleisch agreed that the terms ›primary‹ and ›secondary‹ transsexuality simply attest to the time of manifestation (ibid; Rauchfleisch 2006: 16). They do not require different treatment and cannot be distinguished aetiologically (Sigusch 2007: 354). Similarly, the authors of the German Standards suggested that a persistent transsexual desire »is the result of sequential factors that have an impact in various episodes of the psychosexual development and possibly become effective cumulatively. Accordingly, »different developmental paths can lead to the development of a transsexual desire« (Becker et al. 1997: 147).

Beier, Bosinski and Loewit suggested that transsexual developments can be typified along the lines of gender and sexual orientation. Beier, Bosinski and Loewit e. g. claimed that biological women with a gender identity disorder usually present in the physician's office in the twenties to the mid-thirties (Beier/Bosinski/Loewit 2005: 369). They have a childhood history of tomboy behaviour, experienced their puberties as traumatic and profoundly reject their sec-

ondary sex characteristics (ibid: 369 f.). They appear as masculine as possible with regard to clothing and hairstyle (ibid: 370).

According to their observations, androphilic biological men with a gender identity disorder are usually in the mid-twenties as opposed to gynophilic biological men with a gender identity disorder who tend to be ten to fifteen years older when they first present in a physician's office (ibid: 372). Unlike the latter, so-called androphilic biological men with a gender identity disorder cross-dress and engage in activities conventionally associated with female children (ibid: 373 f.). While gynophilic biological men with a gender identity disorder develop transvestic fetishism during their puberties (ibid: 374), androphilic biological men with a gender identity disorder envision themselves as heterosexual women who desire cismen and cross-dress as a means to express their femininity (ibid: 373).

Sexologists observed that unlike clinical and theoretical descriptions in the late 1970s and early 1980s, transsexual developments appeared to be more diverse. Sigusch and Langer observed that transsexual individuals seeking sex reassignment surgery in the 1990s were on average clearly younger than a few decades ago. Moreover, the sex ratio of female-to-male transsexuals and male-to-female transsexuals had become more even (Sigusch 1991a: 321; Langer 1995: 265). Furthermore, the choice of sex partners was no longer consistently heterosexual (Sigusch 1991a: 323; Langer 1995: 265) and female-to-male transsexuals appeared less aggressive and more driven by sexual desires (Sigusch 1991a: 322).

However, the abovementioned sexologists explained these changes differently. Sigusch did not rule out that so-called experts were maybe only now able to observe things that existed before or that transsexual individuals were only at this point able to disclose more information to medical professionals, because the latter no longer reacted as rigidly as they did earlier on. However, he attributed the changes foremost to changed gender relations (Sigusch 1991a: 320). Langer however suggested that gender identity disorders were symptomatic variants of contemporary »frequent structural deficits of personality« for which a »sex change is a propagated solution« (Langer 1995: 263).

Since the beginning of the 1990s, most sexologists considered transsexual individuals sexual beings. Sigusch stated that unlike in earlier clinical descriptions, sexologists no longer ruled out that transsexual individuals could be sexual (Sigusch 2007: 353 f.; Sigusch 1991a: 322).[38] The German Standards e. g.

38 | Sigusch argued that transsexual individuals' gender identities are no longer as fragmentary as they used to be. He suggested that a structured sexuality is impossible without a gender identity. Morever, collective notions of genders changed to the effect that women are nowadays constructed as sexual beings (Sigusch 2007: 353 f.).

However, his argumentation is not convincing. His, Meyenburg and Reiche's argumentation in the late 1970s was premised on psychoanalytic assumptions that suggest that transsexual individuals are not likely to develop much of a sexuality due to very early

implicitly affirmed that transsexual individuals could relate to sexuality, since the psychosexual development, including the sexual orientation constituted part of the diagnostics (Becker et al. 1997: 149).

This notion was reinforced by Bosinski (2003: 713 f.) and Beier, Bosinski and Loewit (2005: 372-375) who systematised transsexual individuals according to their respective sexual orientations. While Sigusch did not elaborate on transsexual individuals' sexual involvement, Beier, Bosinski and Loewit assumed that pre-operative transsexual individuals' erotic lives were usually dissatisfying. With regard to biological women with a transsexual gender identity disorder, they e. g. suggested that, »[o]ccasional attempts to act out this gynophilic orientation in a lesbian setting remain dissatisfying, since the patients (unlike lesbian women) cannot pleasurably bring in their physicality in such relationships« (Beier/Bosinski/Loewit 2005: 371).

While sexologists more or less considered transsexual individuals to be heterosexual in the 1970s and 1980s, clinical pictures from the 1990s onward with few exceptions[39] suggested that transsexual individuals' sexual orientations are more diverse. Sigusch stated in his concept of depathologisation that gender roles and sexual preferences vary in transsexual individuals as they do in cis subjects (Sigusch 1991a: 322).

Bosinski distinguished between biological women with a transsexual gender identity disorder, which he believed were predominantly heterosexual (Bosinski 2003: 713) and biological men with a transsexual gender identity disorder who feature as either androphilic or gynophilic (ibid: 713 f.). While Beier, Bosinski and Loewit adopted Bosinski's model, they added autogynophilic subjects to the group mentioned last (Beier/Bosinski/Loewit 2005: 376).

Differential diagnoses from the 1990s to the end of the first decade of the 21st century

The pluralisation of transsexual phenomena (or the recognition of the diversity) suggests that the borders of transsexuality had become fuzzy throughout the 1990s and early 2000s. This situation complicated the differential diagnosis on a practical and theoretical level. Several sexologists problematised this issue,

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splitting mechanisms and a lack of psychic maturity that is assumed to be a precondition to the genital orgasmic function (Sigusch/Meyenburg/Reiche 1979: 270).

I suggest that it was not that transsexual individuals were necessarily asexual. Rather, it was due to a limited approach that transsexual individuals engaging in sexual activities were rendered unthinkable.

39 | As late as in 1995 Soyka and Nedopil parroted Sigusch, Meyenburg and Reiche's cardinal symptoms, including the eighth symptom, which describes transsexual individuals as heterosexual (Soyka/Nedopil 1995: 46), despite the fact that from 1991 onward Sigusch published revisions of the cardinal symptoms in several medical journals.

and they nevertheless developed various systems to distinguish transsexuality from similar, if not partially overlapping, phenomena.

While Clement and Senf addressed the practical side of the problem, Sigusch pointed out to a theoretical dilemma that arises in the event of having to isolate transsexuality from other phenomena. Clement and Senf suggested that while e. g. fetishist transvestism[40] was distinguishable from transsexuality, episodes of transvestism did not necessarily rule out a transsexual development:

> The categorically unambiguous distinction cannot [...] always be met with in every single diagnostic case. Transsexuals do not rarely report earlier transvestic phases in the course of their transsexual development. Also, there are occasional reports of transvestites who picture themselves as women with whom they are having sex in masturbation fantasies. (Clement/Senf 1996: 4)

While Sigusch insisted on a differential diagnosis when establishing a case of transsexuality, he cautioned that such a procedure necessarily ignored combinations »which cannot be simply considered transitions from one big and clear form to another« (Sigusch 1991a: 317). According to Sigusch, the infinite multiplicity of sexual and gender identities is reduced in order to fit into general and clinical understandings (ibid).

Sexologists considered different gender manifestations that could be mistaken for transsexuality. With the exception of so-called gender identity disorders, which arise as an effect of intersex or in the event that an intersex individual feels that s/he has been socially and surgically falsely assigned to another gender at an early age, Clement and Senf's categories resembled those of the 1970s and 1980s. Clement and Senf distinguished transsexuality from fetishist transvestism, effeminate behaviour in some homosexual men and gender identity disorders in the course of a psychosis. Unlike the differential diagnoses in the earlier period, however, neither transvestism, nor psychotic developments or intersex necessarily excluded a diagnosis of transsexuality (Clement/Senf 1996: 4 f.).

Unlike the APA, the authors of the German Standards did not mention any somatic phenomena, such as intersex as diagnostic categories that needed to be distinguished from transsexuality. The German Standards suggest the following differential diagnoses:

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40 | Clement and Senf defined fetishist transvestism as an inclination to cross-dress for the purpose of sexual arousal. This behaviour is not linked to a consciousness of belonging to, or a desire to belong to the ›other‹ gender. The clothing is not a means to express the individual's identity, as it would be in the case of transsexuality. Instead, it is a fetishistic object. In other words, clothing is an object to a transvestite, while it is a part of oneself to a transsexual (Clement/Senf 1996: 4).

- discomfort, difficulties or non-conformity with established gender role expectations that do not coincide with a lasting and profound gender identity disorder;
- partial or fleeting gender identity disorders, such as adolescent crises;
- transvestism and fetishist transvestism in the course of which critical constitutions can arise;
- difficulties with the gender identity that result from a rejection of a homosexual orientation;
- a psychotic misjudgement of the gender identity;
- severe personality disorders with an effect on the gender identity (Becker et al. 1997: 149).[41]

In his critique of the German Standards, Seikowski suggested cisidentity be added to the differential diagnosis. Seikowski defined cisidentified individuals as persons who wish to live as ›both‹ genders and who may want to undergo hormonal treatment but not sex reassignment surgery (Seikowski 1997: 352). In her response to the critique of the German Standards, Becker rejected Seikowski's suggestion. In her opinion, such a differential diagnosis was clinically not useful (Becker 1998: 159 f.).

Sigusch suggested a set of psychiatric, psychological and somatic conditions as differential diagnoses. The former are identical with those listed in the German Standards. However, Sigusch added »psychopathologically rather inconspicuous ›cultural‹ confusions and transgressions of gender roles, e. g. with a transgender gender dysphoria« (Sigusch 2007: 354) to the developments that needed to be distinguished from transsexuality or that could possibly develop into transsexuality. Sigusch suggested organic ›conditions‹ such as intersex or temporal lobe diseases as somatic differential diagnoses (ibid).

Hence, the blurring of the boundaries of transsexuality revealed in the clinical pictures resounded in the differential diagnosis. Not only did differential diagnostic concepts become more diverse. In the period between the 1990s and the end of the first decade of 21st century, the differential diagnosis increasingly allowed phenomena to overlap, such as e. g. transvestism and transsexuality.

41 | Bosinski's (2003: 716) and Beier, Bosinski and Loewit's (2005: 381-383) differential diagnoses are identical, except that they pull together psychotic misjudgement of the gender identity and severe personality disorders with an effect on the gender identity. Unlike the German Standards, which did not elaborate on the treatment of trans adolescents, Beier, Bosinski and Loewit rejected sex reassigning measures in adolescents and suggested using reversible puberty suppressants instead in the event of a severe gender identity disorder that does not cease despite psychiatric-psychopharmaceutic and psychotherapeutic interventions (Beier/Bosinski/Loewit 2005: 382).

3.1.3 Diagnosing transsexuality and assessing transsexual individuals

During the 1990s and the first decade of the 21st century, medical surveillance and (exclusive) medical expertise was not only challenged by trans individuals and/or social scientists and legal experts[42] involved in the sexological debate, but by individual sexologists themselves,[43] albeit to a significantly lesser degree. Various aspects of the tension between trans self-determination and medical control and contestations over medical and extra-medical expertise in the sexological debate throughout the 1990s and early 2000s are mirrored in the diagnostic parameters patient history, psychopathological and physical examination, psychotherapy and ›real life test‹, which have formally remained unchanged since the introduction of the German Standards in 1997.

General perspectives on trans self-determination, medical surveillance and psycho-medical expertise

Two major perspectives marked the sexological debate on diagnosing transsexuality in the 1990s and early 2000s. One strand of the debate, usually represented by psycho-medical professionals, claimed that establishing a case of transsexuality necessarily required medical attendance, whereas the other, mostly cis and trans social scientists and legal experts, leaned towards trans self-determination.[44]

Defenders of the psychiatric or psychological surveillance of a transition presented several arguments to legitimate their claim. Langer (1995: 265) and Bosinski (2003: 715 f.) argued that the desire for a transition could function as a model solution for various problems with a person's identity or gender identity. Therefore, the severity of the desire for sex reassignment and the self-diagnosis alone were not reliable indicators for diagnosing transsexuality.

Moreover, Beier, Bosinski and Loewit suggested that it was a contradiction to on the one hand expect of physicians not to intervene into aspects related to the identity and on the other hand to demand of them significant and irreversible medical and/or surgical interventions. They argued that such interven-

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42 | With regard to the debate on the German Standards in the 1990s and the first decade of the 21st century, these are Augstein, Hirschauer, Lindemann, Kaltenmark, Kasimir, Rauner and de Silva.

43 | The most prominent voices from the medical and psychological communities on diagnosing and assessing trans individuals in the 1990s and the first decade of the 21st century were Langer, Hartmann, Becker, Beier, Bosinski, Clement, Eicher, Hartmann, Kockott, Langer, Pfäfflin, Rauchfleisch, Senf, Seikowski and Sigusch.

44 | However, the contributions of the latter barely influenced the clinical perspective at the time.

tions required a high degree of responsibility, the diagnosis of a disease and a scientifically based medical indication (Beier/Bosinski/Loewit 2005: 378).

Sexologists that followed this line of argument also brought forward pragmatic reasons. Bosinski advised physicians to adhere to the diagnostic route outlined in the German Standards in order to avoid adverse legal consequences. He argued that in the case a patient regretted surgery and sued the surgeon, the latter would be held responsible in the event of insufficiently indicated sex reassignment surgery.

Finally, Beier, Bosinski and Loewit proposed that if a ›transsexual gender identity disorder‹ was no longer considered a disease and a person's freely chosen and self-determined expression of self instead, there was no reason for the community of individuals covered by health insurances to pay for sex reassignment surgery. As a result, trans individuals would be asked to pay for such interventions, an outcome Beier, Bosinski and Loewit considered undesirable (Beier/Bosinski/Loewit 2005: 368).

Proponents of the concept of self-determination argued that any decision on behalf of a person's life contravenes a person's right to self-determination and human dignity. Kaltenmark, Kasimir and Rauner (1998: 266), Lindemann (1997: 329), and Hirschauer (1997: 337) suggested respecting a person's decision to transition from one gender to another as a life decision.

In contrast to Beier, Bosinski and Loewit's opinion and referring to abortion, Hirschauer (1997: 337) and Lindemann (1997: 329) doubted that major and irreversible medical and surgical interventions necessarily required the status of a disease. They argued that individuals who seek abortions do not ask for a medical intervention based on a disease but due to a personal decision.[45] They suggested treating transsexual individuals analogously.

In addition, de Silva questioned whether it was in the light of human dignity and the right to the free development of one's personality appropriate for any person to assess another individuals' gendered concept of self (de Silva 2005: 269). He suggested placing the responsibility for the decision to live in another gender than the one assigned to the person at the time of birth on the trans individual.

Three distinct perspectives emerged among psycho-medical practitioners on the question of the subjects deemed appropriate to decide upon whether an individual may be considered transsexual or not. One perspective suggested psycho-medical expertise ought to be considered authoritative. Another pro-

45 | Becker countered Hirschauer's and Lindemann's analogy of sex reassignment surgery and abortion. She argued that an abortion did not preclude future pregnancies. If an abortion was possible as sterilisation only, she assumed that sexology would be more cautious (Becker 1998: 161).

posed trans and psycho-medical expertise be deemed equal when diagnosing transsexuality. Other practitioners were ambivalent about this issue.

Beier, Bosinski and Loewit argued in favour of psycho-medical practitioners as the only agents entitled to decide on a case of transsexuality in the last instance. As pointed out earlier on, they took it for granted that largely irreversible consequences of a medical and surgical sex reassignment treatment require a secured indication. Moreover, they held that only a psycho-medical expert was able to decide whether a person's distress could be permanently alleviated with medical and surgical means (Beier/Bosinski/Loewit 2005: 377). Hence, Beier, Bosinski and Loewit considered trans individual's urge to transition physically secondary.

Seikowski however suggested that transsexual individuals are »unusual patients«. In his critique of the German Standards, he argued that transsexual individuals are specialists on issues regarding transsexuality (Seikowski 1997: 351). According to his observations, trans individuals frequently turn to medical institutions after having gone through an adequate process of self-recognition or self-diagnosis. Hence, a transsexual individual's self-diagnosis and categories of assessment ought to be accrued equal authority and credibility (ibid). To impose a lengthy process of consultation upon such individuals would simply mean to postpone life in the preferred gender (ibid: 352).

Sigusch's perspective mirrors the conflicts that arise when wanting to acknowledge a person's right to self-determination while feeling the need to obey clinical rules at the same time. He noted,

> I always ask myself how I would deal with such situations, if I were affected myself or persons who are closest to me. If I were transsexual, I would with or without consultation insist on the right to decide by myself whether I want to undergo surgery or not. I would not accept that so-called experts determine how I am supposed to live. As an expert however I got to insist vis-à-vis the transsexual on being able to follow my own professional and non-professional ideas, ideas that refer to all the world and his brother and the art of healing and to clinical experience and rules, too, that I imposed upon myself in order not to without further reflection serve irrational patient desires with disastrous consequences of irreversible manifestation. (Sigusch 1991a: 330)

Hence, Sigusch's perspective was biased towards clinical authority due to his position as a medical practitioner. In contrast to Beier, Bosinski and Loewit however, he problematised the contradictions and the ethical dilemma that go along with such a stance.[46]

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46 | The different perspectives on the issue of expertise are revealed in the assessment of support groups, too. Pfäfflin and Eicher perceived of trans support groups as extra-medical contestations of psycho-medical expertise. According to Pfäfflin, members of

Patient history

Among the key aspects that are at issue in the course of establishing the patient history are, as the German Standards propose, the person's gender identity development, psychosexual development, including the sexual orientation, and the current life situation (Becker et al. 1997: 149). Hence, the trans person's past and present gender performance are at the heart of the negotiations between the medical professional and the so-called patient. However, medical examiners dealt, and continue to deal, very differently with the findings.

While Clement and Senf for instance stressed the importance of the examiner's impression of a trans person's current gender performance, they cautioned against evaluating it. According to Clement and Senf, neither a gender-neutral appearance nor a patient's overcompensated gender performance indicate whether a person is trans. Clement and Senf concluded that the examiner's impression is not a diagnostic criterion. It may however give an idea of whether the patient will encounter difficulties in his or her social and professional life or not (Clement/Senf 1996: 16 f.).

When investigating into a trans person's gender development, Langer tried to detect the »subjective experience of the gender identity disorder as well as objective aspects of behaviour in the desired role« (Langer 1995: 272). Beier, Bosinski and Loewit were more explicit about the indicators they perceived to be gender-typical behaviour. Among these were e. g. favourite childhood games and toys, cross-dressing, and favourite subjects in school (Beier/Bosinski/Loewit 2005: 379). Likewise, Langer and Hartmann sought indicators in order to assess a patient's transsexual development. They e. g. suggested to enquire into the patient's childhood preferred games and playmates and his or her social behaviour in school (Langer/Hartmann 1997: 866).

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support groups were primarily concerned about the knowledge on psychiatric experts (Pfäfflin 1996: 26 f.) they shared among each other and instances of self-medication (Pfäfflin 1996a: 35; Eicher 1996: 49). By contrast, Seikowski highlighted the enabling effects support groups, subcultural networks and publications have in the process of self-diagnosis (Seikowski 2007: 250 f.). While Rauchfleisch, like Sigusch, insisted on psychomedical diagnostics in the event of transsexualism, he acknowledged the significance support groups have for the acceptance of trans individuals and the exchange of knowledge and experience (Rauchfleisch 2006: 89). Unlike Seikowski, he also developed a critical perspective on support groups when pointing out to the pressure they exert on trans individuals to conform to mainstream notions of trans (ibid: 90). In his chapter, »What can transidentified people do themselves?« (*Was können transidente Menschen selbst tun?*) he presents as his recommendations tasks support groups have taken on since the 1970s at the very latest, such as, offering information and consultation for trans individuals and physicians (ibid: 122).

Moreover, Beier, Bosinski and Loewit as well as Langer and Hartmann suggested painstakingly investigating into a trans person's intimate life. Their proposed patient histories e. g. explore the individual's masturbation scenarios and fantasies (Beier/Bosinski/Loewit 2005: 379; Langer/Hartmann 1997: 866), favourite sexual positions and practices (Beier/Bosinski/Loewit 2005: 379) and sexual orientation (Langer/Hartmann 1997: 866).

Finally, Langer and Hartmann suggested inquiring into the family history with a particular emphasis on psychiatric symptoms, delinquency, depressions, attempts at suicide and self-mutilation. They argued that this information was relevant in order to understand the effects these incidences had on the individual's development (ibid).

Langer's, Langer and Hartmann's, and Beier, Bosinski and Loewit's approach to the trans patient and his or her patient history are problematic from an ethical and analytical point of view. With regard to the latter, neither Beier, Bosinski and Loewit (2005) nor Langer and Hartmann (1997) questioned the gender norms and stereotypes that informed their perspective. Moreover, their exploration of a trans person's sex life suggests that sexual practices, positions and fantasies indicate a particular gender identity. A trans person's intimate life seen through the lense of normative and reductionist concepts of gender and sexuality become criteria for granting or denying trans individuals access to medical and/or surgical treatment and/or legal provisions.

Moreover, the sexologists' gender concepts and ethics clash in a setting characterised by an unequal distribution of power. This particular diagnostic situation is prone to render psycho-medical experts' subjective understandings of gender and sexuality authoritative.[47] While Langer appeared to be aware of

47 | Langer and Hartmann's stance on the medical assessment for a revision of gender status serves as an example of the hierarchical relationship and with that the trans person's dependence on what medical experts deem a healthy gender identity and an appropriate gender performance. Langer and Hartmann argued that a medical assessment for the purpose of a revision of gender status should not be taken lightly, despite the fact that sex reassignment surgery and the change of first names might have taken place (Langer/Hartmann 1997: 868). They stressed that the medical assessment should state whether a change of gender has taken place convincingly or at least satisfactorily in a psychosocial sense (ibid). Langer and Hartmann did not mention what was supposed to happen in the event that a person had undergone a physical transition and did not appear psychosocially convincing to a medical expert.

The normative effect of the examiners' subjective concepts of gender and sexuality also becomes evident in Langer and Hartmann's example case studies. First, they called male-to-female trans individuals ›men‹ and female-to-male subjects ›women‹, which apart from being disrespectful, suggests that a person's gender identity is necessarily linked to a particular morphology. Second, their examples also suggest that a person's

this problem, his suggestion that the medical expert reflect upon his or her understanding of gender when assessing the psychic and physical chances of a trans person's life in the desired gender (Langer 1995: 272) remains entirely voluntary. There is no mode of fostering or supervising the psycho-medical expert's degree of self-reflexivity and gender knowledge. Nor do any of the sexologists mentioned above give a plausible reason why a medical examiner's assessment of a trans person's gender performance or experience as a trans person is less prone to misjudgement and with that superior to that of a trans individual's concept of self.

In a setting characterised by unequal power relations and possibly conflicting concepts of gender, the examiner's concept of gender becomes the trans person's obstacle that needs to be overcome in order to gain access to medical and surgical treatment and to legal provisions during the assessment process prior to a change of first names and revision of gender status. Hence, Lindemann's critique of the German Standards, which in her opinion deny trans individuals their respective subjectivities acutely applies in this particular step of the diagnostic process. With regard to the investigation into the trans person's intimate life, conducting the patient history according to Beier, Bosinski and Loewit's, and Langer and Hartmann's concept denies a trans person the right to privacy.

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willingness to submit to the psycho-medical assessment regime is among the criteria that contribute to a favourable outcome. Their following descriptions in note form back up this assumption: »33-year-old man whose change of first names could not be approved despite extremely large doses of hormones (without any therapeutical monitoring) and despite benevolent statements by individuals the person is attached to. Information on the amnesis with unproblematic male professional life and without perceivable distress due to the identity considerably contradictory. Laboured short-run stereotyped ideas and travesty-like appearance. [...] Diagnostic criteria for transsexuality not fulfilled« (Langer/Hartmann 1997: 864) and »31-year-old natural scientist with a PhD and high achievement motivation. Ideal psychiatric supervision. In its setting simultaneous application and commencement of the hormone treatment. Complicated development from insecure boyishness. Postpuberal pure fetishism, experienced as deeply foreign to him, embedded in a strong sexual appetence and masochistically tinted autoeroticism. Later on diffusion of gynophilic orientation and cross-gender identification. Four relationships with women with a transvestic-penetration-ambivalent sexual style and gradual development of crossdressing. Finally self-critically completed stable change of gender. Overall a transformation of a paraphilic into a transsexual state with an apparently bisexual orientation.« (Langer/Hartmann 1997: 863)

Physical examination

Sexologists were, and continue to be divided over the necessity and extent of physical examinations as a diagnostic means in the course of the assessment process. Three perspectives emerged in the period from the 1990s until the end of the first decade of the 21st century. Some sexologists demanded an extensive set of physical examinations. Others developed a differential perspective on the relevance of, and degree to which a physical examination should be undertaken. Others again questioned the diagnostic value of physical examinations for diagnosing transsexuality.

The authors of the German Standards, Langer and Hartmann, and Beier, Bosinski and Loewit considered extensive physical examinations mandatory for a diagnosis of transsexuality. The German Standards and Beier, Bosinski and Loewit specify that the diagnostic and assessment processes require a gynaecological or urological examination, respectively, and data on the endocrinological status (Becker et al. 1997: 149; Beier/Bosinski/Loewit 2005: 380).

While the German Standards do not offer a reason for these requirements, Langer and Hartmann as well as Beier, Bosinski and Loewit presented a number of arguments to justify somatic examinations. Langer and Hartmann for instance held that a physical examination is self-evident, because »[a] person has become transsexual *with* his body« (Langer/Hartmann 1997: 867). The fact that a person develops a gender identity that does not correspond with the socially expected identity does not however explain the requirement for a physical examination.

Moreover, Langer and Hartmann claimed that requiring a trans individual to disrobe serves diagnostic purposes, since the individual's attempt e. g. to conceal his or her genitalia indicates the extent of bodily aversion (ibid). Clement and Senf however indicated that the desire to cover up one's genitalia is not necessarily a feature that characterises transsexual individuals alone (Clement/Senf 1996: 6).[48]

Langer and Hartmann furthermore suggested that an inspection of the genitalia »protects« transsexual individuals »from lack of knowledge of his or her genital status« (Langer/Hartmann 1997: 867). It is questionable whether this information is required, since transsexual individuals are no less aware of their respective genitalia than cis persons are, of whom usually no physical examination is demanded to confirm their gender status.

48 | In the light of the reasons mentioned above, it appears that Langer and Hartmann lack ethics, and gender and cultural competency. Quoting the trans organisation TransMann e. V., Becker holds that physical examinations during the assessment process are abusive and »cannot be justified by any means« (Becker 2013: 19).

Moreover, they argued that somatic parameters serve as a supplement to the patient history (ibid). This requirement however is merely bureaucratic and therefore neither contributes to the diagnosis nor to the trans individual's health.

Beier, Bosinski and Loewit demanded an endocrinological examination in order to exclude CAH, one of many forms of intersex (Beier/Bosinski/Loewit 2005: 380). Unlike the DSM-IV, the German Standards to which Beier, Bosinski and Loewit otherwise doggedly adhered to do not exclude intersex from a diagnosis of transsexuality.

In addition, Langer and Hartmann, and Beier, Bosinski and Loewit suggested that a somatic examination reveals physical preconditions for sex reassignment and the effects of hormones (Langer/Hartmann 1997: 867; Beier/Bosinski/Loewit 2005: 380). Clement and Senf argued that requiring transsexual individuals to undress for this purpose was unnecessary (Clement/Senf 1996: 6). Moreover, individual bodies respond to sex hormones at a different pace. Therefore, any finding would be inconclusive with regard to either a person's post-pubertal appearance or the person's identity.

Beier, Bosinski and Loewit argued that a physical inspection helps establish signs of self-mutilation (Beier/Bosinski/Loewit 2005: 380). Self-harm however does not apply to all transsexual individuals and is not restricted to transsexual persons either.

They also required of ›biological women‹ an ultrasound of the gonads to exclude polycystic ovaries (ibid). Like intersex, polycystic ovaries are not a counter indication to transsexuality. Moreover, Langer and Hartmann argued that a physical examination might give hints at the risks of sex reassignment surgery (Langer/Hartmann 1997: 867).

Proponents of a differentiated perspective on the necessity of physical examinations disagreed with the diagnostic value the aforementioned sexologists accrued to physical examinations. While Clement and Senf ascertained that somatic examinations may serve individuals' general health, they held that they are irrelevant to the diagnosis of transsexuality (Clement/Senf 1996: 6). Unlike the German Standards, Beier, Bosinski and Loewit, and Langer and Hartmann, they proposed inspecting a trans person carefully, i. e. without demanding of the individual to undress (ibid).

Kaltenmark, Kasimir and Rauner vehemently opposed mandatory physical examinations of any sort for the purpose of diagnosing transsexuality and assessing a trans individual. Like Clement and Senf (1996), they questioned the relevance of such measures. They held that a somatic examination is only justified in a surgical context. They argued in favour of banning an examination of the genital status from the assessment situation and suggested leaving it up to trans individuals to undergo physical examinations or not (Kaltenmark/Kasimir/Rauner 1998: 148).

When considering the criteria according to which the German Standards identify transsexuality, there is no causal relationship between the features associated with transsexuality and the requirement for physical examinations. The German Standards hold that transsexuality is characterised by a profound and permanent cross-gender identification, a long-standing unease with a person's sex and a clinically relevant impairment in e. g. the areas of work and social life (Becker et al. 1997: 148). Hence, the criteria refer to a person's self-understanding and cannot be derived from physical parameters.

The same applies to formal criteria medical professionals are asked to assess prior to the legal change of first names and gender status. According to s. 1(1)1 TSG, the court is required to change a person's first names, if the applicant due to his or her »transsexual imprinting« no longer identifies with the gender specified in his or her birth entry but to the ›other‹ gender instead and has felt compelled to live according to his or her ideas since at least three years. Moreover, the application needs to be granted, if the identification with the gender will not change with a high degree of probability (s. 1[1]2 TSG). None of the answers to these requirements are written on the body.

Prior to the Federal Constitutional Court decision on 11 Jan. 2011 that ruled the surgery requirement mandatory for a revision of gender status unconstitutional, medical experts were asked, in addition to the requirements specified in s. 1 (1) 1 and 1(1)2 TSG, to assess whether the individual was permanently unable to reproduce (s. 8[1]3 TSG) and had undergone a surgical intervention that had changed their external sex characteristics in a way that a clear approximation to the appearance of the ›other‹ sex/gender had been achieved (s. 8 [1]4 TSG). However, surgical reports suffice to prove that the physical conditions have materialised. Hence, the requirement of physical examinations raises the suspicion that mandatory physical examinations in this context primarily served disciplinary or other ulterior purposes.

Psychopathological examination

As mentioned earlier on, the sexological community in Germany was deeply divided over the issue of the psychiatric health of transsexual individuals in the 1990s and 2010s. However, approaches that claimed to be depathologising in this period did not necessarily coincide with the abandonment of a psychopathological examination. Two major approaches to this diagnostic means emerged throughout the 1990s and the first decade of the 21st century. One dealt flexibly with this diagnostic requirement. The vast majority of sexologists however maintained that a psychopathological examination ought to be considered mandatory in every incidence of diagnosing transsexuality.

Seikowski doubted that every diagnosis of transsexuality requires a psychopathological examination. In his critique of the German Standards, he therefore suggested to supplement the extensive list of psychiatric conditions and

personality traits the German Standards enumerate with the diagnosis of mental health. According to Seikowski, there is no reason to demand a long-term diagnostic process, if somebody is psychologically healthy and feels uncomfortable about his or her gender identity (Seikowski 1997: 351 f.).[49]

The German Standards however enumerate a set of psychiatric conditions and personality traits clinical-psychiatric and/or psychological diagnostics they recommend to take into consideration when assessing whether the criteria for a diagnosis of transsexuality apply or not. Among these are the structural level of personality and its deficits, neurotic dispositions and conflicts, substance abuse and addictions, suicidal tendencies and self-harming behaviour, paraphilias and perversions, psychotic diseases, cerebral disorders and poor aptitude (Becker et al. 1997: 149).

Like the requirement for physical examinations outlined in the Standards, Langer and Hartmann as well as Beier, Bosinski and Loewit used the enumeration of psychiatric conditions and personality traits for disciplinary purposes. Beier, Bosinski and Loewit e. g. attached the condition of one year of abstinence of drug abuse to the initial phase of treatment (Beier/Bosinski/Loewit 2005: 381). Langer and Hartmann considered contact, including countertransference, the willingness to impart information, the ability to verbalise something and collaboration important parameters of the psychopathological examination.

Psychotherapy and the ›real life test‹

Considerable disagreement arose among those involved in the sexological debate on the necessity of, and the right to enforce psychotherapy and a ›real life test‹ as part of the diagnostic process. Perspectives on the usefulness and legitimacy of these instruments as supportive[50] and diagnostic means can be divided

49 | It would be more precise to associate the feeling of discomfort with the initial gender assignment and/or particular gendered physical attributes.

50 | Until the German Standards recommended psychotherapy to be neutral with regard to sex reassignment measures (Becker et al. 1997: 150), the function of this means was contested, too. Based on the experience with one individual who underwent more than 300 therapeutic sessions over a period of six years and finally decided not to undergo surgery, Meyenburg e. g. suggested that a psychotherapy should include questioning the desire for sex reassignment measures (Meyenburg 1992: 106 f.). In contrast, Laszig, Knauss, Clement and Senf argued in favour of psychotherapeutic neutrality in this respect (Clement/Senf 1996a: 19; Laszig/Knauss/Clement 1995: 25). Laszig and colleagues argued that psychotherapic collaboration between a psychotherapist and a ›patient‹ is hampered, if the former aims at reconciling the trans individual's mind with his or her sexed bodily features. In such an instance, a transsexual individual necessarily experiences psychotherapy as a threat. Rather, the psychotherapeutic attitude should be focused on

into three distinct categories. The first endorsed a concept of compulsory psychotherapy and mandatory ›real life test‹.[51] The second perspective postulated that compulsory psychotherapy and the ›real life test‹ should apply to some individuals only. Proponents of the third perspective rejected mandatory psychotherapy and the ›real life test‹ as means of generating a diagnosis. Each perspective had very different implications with regard to trans self-determination and psycho-medical surveillance.

Beier, Bosinski and Loewit, the authors of the German Standards, the authors of the statement on the reform of the Transsexual Act on behalf of the DGfS, Bosinski and Sigusch considered both instruments as vital for all ›patients‹ with a ›gender identity disorder‹. Proponents of this approach reasoned that a diagnosis of an irreversible transposition of the gender identity can only be substantialised in a long-term diagnostic process (Beier/Bosinski/Loewit 2005: 385; Bosinski 2003: 715 f.; Becker et al. 1997: 149; Becker et al. 2001: 262; Sigusch 2007: 354). Based on non-representative single case studies on 20 ›biological men‹, i. e. transwomen, Bosinski e. g. concluded that the self-diagnosis was an unreliable means to establish a diagnosis of transsexuality (Bosinski 1994: 210).

Beier, Bosinski and Loewit, the authors of the Germans Standards and the authors of the statement on the reform of the Transsexual Act on behalf of the DGfS held that psychotherapeutical support in combination with the ›real life test‹ must indiscriminately precede somatic measures (Becker et al. 1997: 149; Becker et al. 2001: 262). With regard to the ›real life test‹, Beier, Bosinski and Loewit e. g. stated that, »[i]f the patient refuses to try out the role of the desired gender in everyday life *prior to body-modifying reassignment measures* (medical and/or surgical), the indication cannot be issued« (Beier/Bosinski/Loewit 2005: 385). Moreover, they held that, »[i]n this case doubts about the diagnosis ›transsexual gender identity disorder‹ are justified« (ibid). Becker, Berner, Dannecker and Richter-Appelt argued in favour of an extensive diagnostic and psychotherapeutic procedure, including the ›real life test‹, in order

supporting and understanding the transsexual individual's development (Laszig/Knauss/Clement 1995: 25 f.).

51 | Beier, Bosinski and Loewit, Kockott and Rauchfleisch define the ›real life test‹ as a period of at least one year in which a transsexual individual lives according to the conventions associated with the gender he or she wishes to be recognised as for 24 hours a day (Rauchfleisch 2006: 27; Beier/Bosinski/Loewit 2005: 385; Kockott 1996: 12). The purpose of the ›real life test‹ is in their opinion twofold. First, the transsexual individual has the opportunity to develop his or her sense of masculinity or femininity, respectively and to check whether the role suits him or her. Second, the transsexual person is advised to test the environment and to learn how to deal with the reactions.

to prevent access to hormone treatment and surgery based solely on demand (Becker et al. 2001: 262).

Like Pfäfflin (1996: 33) and Rauchfleisch (2006: 27), Sigusch argued in the revision of his, Meyenburg's and Reiche's cardinal symptoms that an analytic psychotherapy and the ›real life test‹ are the most appropriate methods of examining a transsexual individual's development (Sigusch 2007: 353). Sigusch suggested that the transference and countertransference process that takes place during an analytical psychotherapy allows the examiner to gain the security that a particular individual is a man or a woman (ibid).

Finally, he argued that an analytical psychotherapy aims at increasing or rendering possible the patient's self-reflection. He concluded that this type of psychotherapy is the most appropriate means to combine the patient's self-determination with the professional's responsibility (ibid: 348).

He also emphasised the necessity of psychotherapy for differential-diagnostic purposes. Like Langer, he held that the desire for sex reassignment surgery alone does not justify the diagnosis of transsexuality, since several developments occur as attempts to solve very different conflicts and tensions. At the same time, organic findings and psychological illnesses do not necessarily exclude the diagnosis of transsexuality. However, such distinctions are only possible within a sufficiently long and intensive therapeutic relationship (Sigusch 2007: 354).

The first perspective is based upon five premises. First, transsexual individuals are either more prone to manifest psychopathological disorders than cis individuals (Becker et al. 1997: 149), or there are persons that desire a transition for ulterior reasons, respectively (Sigusch 2007: 354). Second, transsexual individuals lack self-knowledge, a situation which requires a ›real life test‹ (Rauchfleisch 2006: 27; Beier/Bosinski/Loewit 2005: 385) and psychotherapy (Sigusch 1991: 867). Third, contrary to Langer and Hartmann's claim that the ›real life test‹ is not an examination the transsexual individual needs to pass vis-à-vis a medical professional or any other person for that matter (Langer/Hartmann 1997: 867), a transsexual individual has to convince the examiner that he or she identifies with, and is capable of performing the gender the respective individual claims to be, and be it simply for the sake of an examiner's sense of security. Fourth, psychotherapy and the ›real life test‹ are considered superior to any other means of self-enquiry. Finally, examiners imply that it does not make a difference in everyday life, if a person e. g. with a male body presents him- or herself as a woman or a man.[52]

52 | However, the examiners underestimated social sanctions that individuals are exerted to when a person's gender performance diverges from (assumed) physical properties. Beier, Bosinski and Loewit e. g. hold that, »[h]ormones and an operation neither cause a change in one's opinions and thoughts, nor in principle change the reaction of the environment« (Beier/Bosinski/Loewit 2005: 385). They add that, »[i]t should be pointed

The second and third perspective on compulsory psychotherapy and mandatory ›real life test‹ either entirely or in part questioned the validity of these assumptions. In its critique of the German Standards, Transidentitas e. V. held that neither psychotherapy nor the ›real life test‹ are necessary and appropriate as a means to establish a person's transsexuality in every case. Mandatory psychotherapy should be restricted to persons with significant psychological problems. In these particular instances, though, the duration, comprehensiveness and intensity of these measures should be agreed upon in advance and on equal terms between the psychotherapist and the ›patient‹ (Transidentitas 1997: 344).

Transidentitas e. V. rejected the demand for the general imposition of a compulsory ›real life test‹. The organisation argued that to pose a ›real life test‹ as a condition for all transsexual individuals amounts to an incapacitation (ibid: 343). Transidentitas e. V. held that most ›patients‹ either in part or completely live their lives according to their identities, while at the same time guarding or regaining their stability (ibid: 345). The organisation suggested that a »negative real life test«, i. e. the inability to live as the assigned gender ought to suffice for an indication for hormones (ibid). Moreover, the organisation rejected an approach that does not take into consideration individual situations (ibid: 346).

While Transidentitas e. V. agreed to compulsory ›real life tests‹ and psychotherapy under certain conditions, Clement and Senf (1996a: 22), Seikowski (1997: 252; 2007: 250), Lindemann (1997: 324; 329) and Kaltenmark, Kasimir and Rauner (1998: 267) rejected mandatory psychotherapy for various reasons.[53]

While Beier, Bosinski and Loewit emphasised that catamnestic studies have proven that successful post-operative adaptations depend on the patient's pre-operative psychotherapeutic and psychiatric care,[54] results of Seikowski's

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out to patients that since a long time it is neither punishable by law in Germany to wear clothes of the other gender, nor to bear another name than the Christian name« (ibid). Interestingly, Beier, Bosinski and Loewit's terminology ›biological woman with a transsexual gender identity disorder‹ or ›biological man with a transsexual gender identity disorder‹ and their reference to a »not always harmonious appearance in the role of the desired gender« as one of the reasons for social marginalisation (Beier/Bosinski/Loewit 2005: 365) mirror the discriminatory social reactions they wish to downplay.

53 | While the authors agreed that psychotherapy should be voluntary, their suggestions were not homogeneous. Clement and Senf e. g. recommended supportive psychotherapy to all transsexual individuals in order to help the latter secure his or her decision (Clement/Senf 1996a: 22). Seikowski however suggested psychotherapy be offered to all transsexual individuals and recommended to some only (Seikowski 2007: 249).

54 | Beier, Bosinski and Loewit based their argument on a survey of findings compiled by Pfäfflin/Junge 1992.

extensive quantitative study suggest that with a high degree of probability about two thirds of transsexual individuals do not need deeper psychotherapy. They are emotionally strong enough to cope with gender reassignment without psychotherapeutic support (Seikowski 2007: 249).

Unlike the proponents of the first approach, Seikowski questioned the assumption that transsexual individuals necessarily lack self-knowledge. As mentioned earlier on, he observed that trans individuals frequently obtain an appropriate degree of self-knowledge before turning to medical professionals. Consequently, he argued that to impose psychotherapy on individuals who believe they do not need it obviously does not make sense to them (Seikowski 1997: 351; 2007: 250 f.).[55] Depending on the examiner's attitude, the situation can become tense: »They [Transsexual individuals] react ›allergically‹, if the

55 | In a study on the acceptance of therapeutical assessment prior to a change of first names, Luther, Osburg and Weitze examined whether the assessment of trans individuals matches the negative public image of these procedures (Luther/Osburg/Weitze 1998: 31). For this purpose, the authors sent questionnaires to sixty patients who had undergone such an assessment with the authors from 1985 to 1994. Among other things, the patients were asked to give their opinion on this process, taking into consideration the duration of the assessment, the choice of experts, the relationship to them and the issue of double assessment (ibid: 32-36).

Forty previous patients responded to the questionnaire. The findings suggest that one third of the respondents considered the assessment procedure positively. An equal number of individuals answered to the contrary. Approximately 10 % were ambivalent and less than 5 % responded that the assessment did not have any effect on them (ibid: 36).

Those who responded negatively did so for mainly two reasons. First, they had the impression that they had to justify their decision. Second, they considered the assessment an illegitimate intervention into their personal lives (ibid). The respondents who took an affirmative stance towards the assessment procedure emphasised that the process contributed to their self-confidence, social skills and knowledge. Moreover, the expert opinion contributed to their sense of security with regard to the decision they had made (ibid).

Luther, Osburg and Weitze concluded that nearly half of the respondents considered a »thorough and objective assessment« (ibid: 30) worthwhile. In their opinion, the study affirmed Pfäfflin and Junge's (1992) conclusion from their compilation of catamnestic studies. The latter suggested that the duration and thoroughness of the examination correlates with post-surgical satisfaction (Luther/Osburg/Weitze 1998: 37). Similarly, they held that Beck-Managetta and Böhle's (1989) study supports their findings. The latter suggested that the significance of the relationship between the so-called expert and the assessed increases with the duration of the procedure (ibid).

While the authors repeatedly classified individual trans person's and trans organisation's critique of the assessment procedure as polemical (ibid: 30; 37), their study reveals

therapist claims to be a specialist who knows better than the patient.« (Seikowski 2007: 251)

Moreover, Seikowski suggested that simplistic psychopathological concepts are inappropriate when dealing with transsexual individuals. Since transsexuality is not an emotional disorder, trans individuals do not want to be psychiatrised (ibid).

Finally, Seikowski suggested deprivileging psychotherapy as the only appropriate means of acquiring support. He held that support groups or other consulting facilities can equally well contribute to a favourable treatment outcome (ibid).

Kaltenmark, Kasimir and Rauner argued that compulsory therapy[56] is only justified in legally clearly defined situations, such as in a forensic context. To require mandatory therapy that is not executed in a legitimate legal sense as it holds true for transsexuality contravenes the right to self-determination and human dignity (Kaltenmark/Kasimir/Rauner 1998: 267).

Furthermore, the authors profoundly rejected psychotherapy that aims to adapt the transsexual person to notions of gendered normality.[57] They argued that the German Standards raise such expectations when demanding as an outcome of psychotherapy an »inner coherence and stability of the identity of the gender the person identifies with and its individual embodiment«. Kaltenmark, Kasimir and Rauner demanded that psychotherapeutic treatment of transsexual individuals should take place on a voluntary basis only (ibid).

Unlike Transidentitas e. V., which held that a compulsory ›real life test‹ is justifiable in individual cases, Kaltenmark, Kasimir and Rauner vehemently

substantial methodological flaws. First, Luther, Osburg and Weitze did not raise the crucial question, whether the respondents considered an assessment *per se* as good and justified. Second, the empirical study is not representative. Third, while the authors affirm Pfäfflin and Junge's findings, there are to date no studies in Germany on post-surgical satisfaction in those trans individuals who decide to circumvent assessment for medical and surgical treatment, albeit with the effect of having to pay for sex reassignment surgery by themselves and to do without a legally recognised change of first names and revision of gender status.

56 | Kaltenmark, Kasimir and Rauner define compulsory therapy as a directly or indirectly enforced therapy, in that a person who refuses to participate will be denied access to material goods and legal provisions, which the person subjectively considers important (Kaltenmark/Kasimir/Rauner 1998: 266).

57 | Similarly, Lindemann opposes mandatory psychotherapy, arguing that it is a means of social control to ensure the gender binary (Lindemann 1997: 324).

opposed the ›real life test‹.[58] They argued that this procedure violates human dignity, humiliates those individuals upon whom such a measure is imposed and gravely violates an individual's privacy for two reasons. First, a test is an exceptional situation and is therefore necessarily not identical with everyday life (ibid: 269). Second, the ›real life test‹ forces transsexual individuals to adapt to the examiner's ideas, in particular to fetishised notions of life in the ›new‹ gender. Hence, they demanded to ban the ›real life test‹ as a means of diagnostics and suggested that the diagnosis be limited to the examination and evaluation of voluntarily and spontaneously generated social relations and individual modes of demeanour (ibid).

3.1.4 The medical management of transsexuality

A medical and legal transition in Germany takes place in a complex institutional and regulatory setting. This setting includes the German Standards, legal provisions, federal jurisdiction and the Medical Advisory Services of the Statutory Health Insurance Companies (*Medizinische Dienst der Krankenversicherung* [MDK]).[59] Despite being distinct regulatory systems with formal procedures of their own, they form complex interrelations in the event of a legal and/or medical transition. The German Standards, the relationship between law and medicine, medical practitioners and the MDKs or the Medical Advisory Service of the Central Federation of Statutory Health Insurance Companies (*Medizinischer Dienst des Spitzenverbandes Bund der Krankenkassen* [MDS]),[60] respectively,

58 | Kaltenmark, Kasimir and Rauner subsume the ›real life test‹ under »social-experimental diagnostic procedures«. They define such a procedure as a scientifically unfounded means used to generate social and psychosocial relations for diagnostic purposes via experiments (Kaltenmark/Kasimir/Rauner 1998: 269).

59 | The MDK is a public body. Most *Länder* usually have one MDK. Exceptions are Northrhine Westfalia, which has two (MDK Nordrhein and MDK Westfalen-Lippe), Berlin and Brandenburg that have created a joint MDK as well as Hamburg and Schleswig-Holstein that have established the MDK Nord (MDK 2015). The health insurance companies finance the medical advisory services. The MDKs serve the health insurance companies and as of 01 Jan. 1995, the nursing care insurance companies by e. g. providing health insurances with expert statements in cases specified by law or the type, severity, duration and frequency of the disease (Banaski 1996: 64).

60 | The MDS has three major functions. First, the MDS advises the Central Association of the Statutory Health Insurance Funds (*Spitzenverband der Gesetzlichen Krankenversicherung*; *GKV-Spitzenverband*) on issues related to medical care, services and organisation. Second, it advises the Central Association of the Statutory Health Insurance Funds on issues related to compulsory long-term care insurance (*Pflegeversicherung*) and contributes to the development of standards. Third, it coordinates the professional work

and the courts and medical professionals open up spaces for different interpretations with effects on trans individuals in the process of undergoing a medical transition.

The German Standards for the Diagnostic Assessment and Treatment of Transsexuals

As outlined in the previous sections of this chapter, sexologists and medical practitioners widely disagreed on several clinically relevant issues pertaining to transsexuality. Despite these profound differences, three major German sexologist associations[61] agreed to compile a set of authoritative guidelines for the diagnostic assessment and treatment of transsexual individuals under the lead of Sophinette Becker. The German Standards were first published in 1997[62] and they mark a compromise between different perspectives on transsexuality and its treatment at the time in several ways.[63]

Following a brief description of the main components of the German Standards, this section will initially address the issues of psycho-medical surveillance and expertise. Thereafter, the question of pathologisation will be raised. Finally, the issue of the gender order as it features in the German Standards and in the ensuing debate will be discussed.[64] I will argue that while the debate on the abovementioned issues and expertise did not cease, the German Stand-

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of the MDKs with regard to advice and expert reports and promotes uniform procedures in organisational matters. The MDS is primarily funded by the Central Association of the Statutory Health Insurance Funds (MDS 2015).

61 | These are the DGfS, the Academy for Sexual Medicine (*Akademie für Sexualmedizin*) and the Association for Sexology (*Gesellschaft für Sexualwissenschaft*).

62 | Unlike the World Professional Association for Transgender Health (WPATH; formerly Harry Benjamin International Gender Dysphoria Association; HBIGDA) Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People that have been revised several times over the past decades, the German Standards have remained unchanged to the time of writing. The process of revising treatment standards for trans individuals in Germany has only begun recently. For more details on this development, see chapter 4.3.

63 | The deliberate omission of speculations on the aetiology of transsexuality (Becker 1998: 161), the consensus on psychotherapeutic neutrality despite differing views on this issue (ibid: 156) and the provision that the patient and the therapist determine the frequency and duration of psychotherapy together (Becker et al. 1997: 150) indicate that the involved sexologists sought for compromises.

64 | The German Standards also lend themselves to a discussion of the intermingling of law and medicine, an issue that will be dealt with in more detail in the section »The relationship between law and medicine« in this chapter.

ards enshrined notions of authoritative psycho-medical expertise and control, the pathological state of transsexual individuals and the gender binary.

The German Standards are composed of six distinct components. Starting with an introduction that is comprised of the definition of transsexuality, a note on transsexual developments and premises of the diagnostic and assessment procedure (Becker et al. 1997: 147 f.), the document outlines the standards for diagnostics and differential diagnosis (ibid: 148 f.). These sections are followed by standards for psychotherapy/psychotherapeutic support (ibid: 149 f.), standards for the indication for somatic treatment (ibid: 151 f.) and the standards for somatic treatment, i. e. hormone treatment and sex reassignment surgery (ibid: 152-154). The latter lists recommended surgical measures for ftms (ibid: 153) and mtfs (ibid: 153 f.) separately. Finally, the Standards specify the rules for the assessment of transsexual individuals according to ss. 1 and 8 TSG (ibid: 154 f.).

While the German Standards did not put a halt to the sexological debate on psycho-medical control and trans self-determination, they however did resolve the tension between the two in favour of the former. This becomes evident e. g. in one of the purposes of the Standards, the diagnostic means of psychotherapy and the indication for somatic treatment.

Well before the German Standards were established as an authoritative guide to the diagnostic assessment and treatment of transsexual individuals, Langer, and Langer and Hartmann called for national standards to regulate psycho-medical aspects of a transition from one gender to another. One of their reasons was expressly to curb trans self-determination.[65] As early as in 1995, Langer decried that the process of sex reassignment was gaining a life of its own (Langer 1995: 264). Langer and Hartmann in particular pointed out to transsexual individuals' practice of contacting county courts prior to appearing at a physician's office. Having obtained expert reports issued for changing first names according to s. 1 TSG, they would then produce these reports at health

65 | These and other authors gave further reasons for specifically national standards. Langer and Hartmann e. g. claimed that the international Standards of Care issued by the then HBIGDA did not apply to the German context for clinical and legal reasons. Langer considered the Standards of Care deficient, since they did not take psychiatric contraindications into consideration (Langer 1995: 271). In their critique of the German Standards, Kaltenmark, Kasimir and Rauner however convincingly argued that clinical pictures of transsexual individuals do not stop at national borders. However, the institutional way of dealing with transsexual subjects very well does. They suggested that the German Standards were devised to function as a »transsexual- and psychiatry-political regulation« (Kaltenmark/Kasimir/Rauner 1998: 262).
In her defense of the German Standards Becker mentioned a further reason for devising national guidelines. She stated that the German Standards were meant to express the common sense of the treatment centres (Becker 1998: 155).

insurance company offices and subsequently use them as an indication for surgery (Langer/Hartmann 1997: 868). Langer and Hartmann warned that, »[m]edical experts could be in danger of testifying to a self-determined sex change, if the current inflation of the concept of self-determination was not recognised as such and questioned« (ibid: 869).

While the German Standards mirror the change of the modalities and the functions of psychotherapy since the 1970s,[66] this diagnostic means at the same time operates as an instrument of psychiatric control. The German Standards support the widespread consensus among those sexologists who considered psychotherapy necessary as a supportive and diagnostic means (Becker et al. 1997: 150).[67] It is up to the psychotherapist to decide whether the following three criteria apply:

- the inner coherence and stability of the gender identity and its individual embodiment;
- the ability to live according to the desired gender role;
- the realistic assessment of the possibilities and limits of somatic treatment (Becker et al. 1997: 150).

By contrast, the severity of a transsexual individual's urge for sex reassignment surgery and the self-diagnosis are not considered reliable indicators for establishing a diagnosis of transsexuality (ibid: 148).

The notions of psycho-medical surveillance and control reemerge in the section on the standards for the indication for somatic treatment. The German Standards e. g. outline an extensive set of requirements that needs to be fulfilled prior to issuing an indication for sex reassignment surgery. Psychotherapists or other medical experts have to confirm the requirements.

Among these requirements are that the patient has to be known to the therapist since at least one-and-a-half years. The patient needs to have performed a

66 | In his critique of the Frankfurt treatment scheme of the 1970s, Sigusch described the function of psychotherapy at the time. He stated that the two departments of sex research in Germany sent transsexual applicants for probatory psychotherapeutic sessions in order to prove that it was impossible to treat transsexual individuals psychotherapeutically (Sigusch 1991: 231). Moreover, psychotherapy was considered successful in the 1970s when a patient decided to give up his or her desire for sex reassignment surgery (Sigusch 2007: 356). By contrast, psychotherapeutic treatment of transsexual individuals in the 1990s and 2010s was guided by the principles of an open outcome (Kockott 1996: 15; Pfäfflin 1996: 26; Sigusch 2007: 356) and a psychotherapist's neutrality towards sex reassignment surgery (Beier/Bosinski/Loewit 2005: 387; Clement/Senf 1996a: 19; Becker et al. 1997: 150; Rauchfleisch 2006: 55 f.).

67 | See e. g. Sigusch 1991a, Clement/Senf 1996a and Beier/Bosinski/Loewit 2005: 387 f.

›real life test‹ on a continuous basis for at least the same duration. Moreover, the patient is required to have undergone at least half a year of hormone treatment.

The therapist is required to describe whether the patient's identity is stable and whether he or she has permanently taken on the role of the ›other‹ gender. Moreover, the therapist has to characterise the patient's outer appearance, behaviour, experience and personality. In addition, the indication should include a patient history with a particular focus on the complete individual course of the transsexual development and the factors that influenced this development (ibid: 151).

Moreover, the Standards demand information on the ›real life test‹, such as when it started, whether and, if so, when the patient applied for a change of first names according to the Transsexual Act. In addition, the therapist is asked to describe the effects of the ›real life test‹ on the patient's psychic equilibrium, the security in the role of the desired gender role, sexuality, relationships to partners, family and friends, ability to work and acceptance in the workplace (ibid: 152).

The Standards also require a detailed description of the physical conditions for a life in the ›other‹ gender role, such as physical and psychological effects of the hormone treatment, the patient's evaluation of the physical changes and the way the he or she deals with possibly negative reactions to his or her outer appearance and behaviour (ibid).

Furthermore, the therapist is among other things asked to describe whether the patient has realistically thought about unwanted effects of surgery that might occur and his or her expectations with regard to the outer appearance, functionality and sexuality. The report must explain why the patient would experience more distress without surgery. Finally, the therapist is required to anticipate the effects of sex reassignment surgery with regard to the patient's social integration, ability to form partnerships, ability to work, and his or her autonomy (ibid).

In the process of drafting the guidelines, the authors of the German Standards also resolved the question of expertise in favour of sole psycho-medical expertise. Despite demands by some members of the committee to involve sociologists and transsexual individuals or trans organisations, respectively, the German Standards were exclusively authored by members of the three national sexological associations (Becker 1998: 155). In response to Seikowski's (1997: 351) and Transidentitas e. V.'s (1997: 350) critique of this omission, Becker reasoned that the opinions among the treatment centres on this and many other issues the Standards address diverged to such an extent that the committee finally decided to leave out any further input (Becker 1998: 155).[68]

68 | Lindemann criticised the exclusion of trans individuals in the process of drafting the German Standards. She doubted that the procedure outlined by the Standards would lead

With regard to the tension between pathologising and depathologising transsexuality, the German Standards are clearly biased towards the former. The pathologisation of transsexuality features in the definition and the reason for a psychopathological examination. The authors of the German Standards define transsexuality among other ascriptions as »a special form of gender identity disorder« (Becker et al. 1997: 147).

The necessity of a psychopathological examination is premised upon the notion that individuals with so-called gender identity disorders frequently exhibit significant psychopathological abnormalities. As mentioned earlier on, the German Standards suggest that transsexual individuals should be screened for the structural level of personality and its deficits, neurotic dispositions and conflicts, substance abuse and addictions, suicidal tendencies and self-harming behaviour, paraphilias and perversions, psychotic diseases, cerebral disorders and poor aptitude (Becker et al. 1997: 149).

However, the German Standards do not suggest what to do with these findings.[69] As a result, psycho-medical experts interpret the findings differently or, to put it bluntly, as they please. While Seikowski e. g. does not consider poor aptitude a contraindication (Seikowski 1997: 352), Rauchfleisch does. The latter insists that this particular finding should be treated as a contraindication, since the transidentified person would not be in a position to assess the effects of hormonal and surgical interventions (Rauchfleisch 2006: 25).

Finally, the German Standards reproduce several notions that characterise the gender binary of the time, including essentialist and polarised notions of gender to which the definition of transsexuality, several criteria mentioned for an indication for sex reassignment surgery and the recommendations for sex reassignment surgery attest. Lindemann suggests that the modern gender binary is based upon three assumptions. First, every person is gendered and belongs to one gender only. Second, a person belongs to a gender for life. Third, gender is based upon physical properties (Lindemann 1997: 324). In addition, the gendering process is not self-determined.

The definition suggests that, like any other individual, the transsexual individual was initially assigned to a gender. However, transsexual individuals subjectively perceive this assignment to be inappropriate and therefore require medical, surgical and legal measures in order to transition to the ›other‹ gender (Becker et al. 1997: 147). Hence, the definition implies that every subject is gendered and that there is one option only to which an individual can transition.

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to more objectivity and security. Instead, transsexual individuals might simply consider the Standards as guidelines to achieve their goal (Lindemann 1997: 326).

69 | Kaltenmark, Kasimir and Rauner suggested that the German Standards do not offer an interpretation of the findings, because there was no consensus on this issue among the researchers (Kaltenmark/Kasimir/Rauner 1998: 364).

The definition does not allow a person to take on the identity of two (or more) genders, an identity other than ›man‹ or ›woman‹, or none at all.

The definition and the criteria for an indication for somatic treatment suggest that a person's gender identity is a permanent disposition. The German Standards hold that, »[t]ranssexuality is marked by the permanent inner certainty of belonging to the other gender« (ibid). Likewise, the indication for somatic treatment requires that a patient's identity be stable (ibid: 157) and coherent (ibid: 150) before an indication may be issued.

Moreover, the definition, the criteria for an indication for somatic treatment and the recommendations for somatic treatment are based on the assumption that a person's morphology, gender role and identity are linked. Transsexual individuals are by definition portrayed as persons who reject the physical characteristics of the innate sex and the role expectations attached to the physical appearance (ibid: 149). In a similar vein, the indication for somatic treatment requires an assessment of the physical conditions for a life according to the ›other‹ gender role (ibid: 152).

The recommendations for sex reassignment surgery reproduce »somatic fundamentalism« (Lindemann 1997: 327). According to this principle, a person's body may not be more similar to the body of a member of the ›other‹ gender (ibid: 324). The German Standards recommend a penectomy, an orchiectomy, the creation of a vulva, clitoris and a neovagina, epilation and breast augmentation surgery for male-to-female trans individuals in the event of insufficient gynaecomasty (Becker et al. 1997: 153 f.). Female-to-male trans individuals are recommended to undergo a bilateral mastectomy, a hysterectomy and an adnectomy (ibid: 153). The Standards suggest that genital surgery in female-to-male transsexual individuals requires individual solutions,[70] since phalloplasties and the implantation of surrogate testes are still at an experimental stage of surgical development (Becker et al. 1997: 153).

Neither transmen's nor transwomen's subjective attitudes towards their respective genitalia are considered at all. As early as in 1997, Lindemann for instance observed that many transmen approach their respective transitions pragmatically. A significant number of transmen are content with the effects of testosterone treatment and a bilateral mastectomy and consider a hysterectomy

70 | Individual solutions range from no surgery to the creation of a metadoioplasty with or without an extension of the urethra and with or without the construction of a scrotal sack and testicular implants, to various forms of phalloplasties with or without an extended urethra and erection devices. Phalloplasties in Germany are currently created, using either a radial forearm flap or a flap harvested from the lower leg and erection devices, such as an erection pump, a semi-rigid rod or a bone. Some surgeons also offer to shape the tip of the penoid to resemble a glans. To ensure sensitivity, nerves in the phalloplasty are connected to nerves in the clitoris or the groin, respectively.

and an adnectomy a destructive means imposed upon them by the Transsexual Act (Lindemann 1997: 327).[71]

Finally, the German Standards are informed by the assumption that a person's gender identity can be derived from the genitalia at the time of birth, i. e. at a time no individual can speak on behalf of him- or herself. The gendering of a person uncovers the seemingly natural link between a person's morphology, gender role and gender identity as a heteronomous process based on social conventions. The fact that the recognition of a gender identity that does not follow the originally assigned gender requires psycho-medical assessment even past the age of majority implies that a person's gender or gender recognition is at no time self-determined.

The relationship between law and medicine

Law and medicine are interwoven in several moments of a legal and medical transition from one sex/gender to another, necessitating medicine to interpret legal rules. As an effect, two problems arise. First, 1970s medical knowledge on transsexuality informed the Transsexual Act in ways that conflict with current medical understandings of transsexuality. Second, medical procedures occasionally contradict the legislator's intentions.

While the Transsexual Act does not prescribe exact medical procedures, the legal revision of gender status was until the Federal Constitutional Court ruled ss. 8(1)3 and 8(1)4 TSG unconstitutional premised upon somatic measures. Section 8(1)3 TSG demanded permanent sterility as a prerequisite for a revision of gender status. Since there is a (slight) possibility of reversing a person's reproductive capacity using less invasive measures, such as a vasectomy or a tubal ligation, respectively, the German Standards suggest that the legal requirement is best met with maximum surgery, i. e. an orchidectomy in male-to-female transsexual individuals and a hysterectomy and adnectomy in female-to-male transsexual individuals.

Moreover, s. 8(1)4 TSG required as a precondition for a revision of gender status a surgical intervention on the external sex characteristics to approximate the outer appearance of the ›other‹ sex/gender. As mentioned earlier on, the German Standards interpret this legal requirement to be a penectomy, an orchidectomy, the reconstruction of external genitalia that resemble female ones, epilation and, if necessary, breast augmentation surgery in male women and a bilateral mastectomy, a hysterectomy and an oophorectomy in female men.

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71 | In her defence of the German Standards, Becker readily admitted that the Standards were based on normative understandings of gender. However, she defended the establishment of maximum psychotherapeutic and surgical measures as a means to secure health insurance coverage of psychotherapeutic support and sex reassignment surgery in the light of austerity politics in the health system (Becker 1998: 158).

In her defence of the German Standards Becker claimed that the Standards did not invent sex reassignment surgery or the requirements laid down by the Transsexual Act, such as genital surgery and infertility as a precondition for a revision of gender status (Becker 1998: 155). However, she conceded that medicine contributed to the awkward link between gender reassignment and surgery at an earlier point in time (ibid: 156).

Apart from wanting to curb trans self-determination, sexologists tailored the German Standards to fit the legal environment. Langer and Hartmann e. g. explained the need for national standards of care with the specific legal context in the Federal Republic of Germany. They argued that such an environment required guidelines for surgical measures and the assessment according to the Transsexual Act (Langer/Hartmann 1997: 864). This notion is also expressed in the German Standards:

> [s]ince 1980 there is the Transsexual Act (TSG) in the Federal Republic of Germany, which regulates the legal preconditions for a change of first names and the gender status of a person. However, so far authoritative guidelines for the treatment and assessment of transsexuals are non-existent. The ›Standards of Care‹ issued by the Harry Benjamin International Gender Dysphoria Association which were initially presented in 1979 and have since then been revised several times can only be applied in a limited way under German circumstances. (Becker et al. 1997: 147)

Hence, while the German Standards constitute a medical document, the last section of the guidelines takes into consideration the requirements the Transsexual Act lays down in ss. 1 and 8 TSG.

Medical interpretations of legal provisions for a change of first names not only indicate ways of translating legal requirements into medically manageable steps. They also highlight how sexologists grapple with legally enshrined interpretations of medical concepts. Section 1(1) TSG e. g. rules among other things that the court is required to change a person's first name following an application, if the person due to his or her transsexual imprinting no longer identifies with the gender entered in the birth entry but with the ›other‹ gender. Sexologists agree that the behavioural concept of imprinting does not apply. Rather, the currently widely held concept of transsexuality suggests that transsexuality is the result of a multifactorial and cumulative development (Langer/Hartmann 1997: 865; Pfäfflin 1996b: 82). Therefore, the section on the standards of diagnostic assessment determines that the psycho-medical assessment according to s. 1 TSG requires the expert to reconstruct and discuss the transsexual individual's gender identity development, including environmental influences on the development of the ›disorder‹ in specific phases in life. The standards of diagnostics and differential diagnostics serve as guidance (Becker et al. 1997: 154).

Section 1(1) TSG rules that the applicant needs to have felt compelled to live according to his or her ideas for at least three years. The authors of the German Standards understand the term ›compulsion‹ to mean that the individual is unable to ›reconcile‹ his or her concept of gender with the assigned gender and has the persistent inner certainty of being a member of the ›other‹ gender.

In another instance, the timing of medical diagnostic instruments clashes with the legislator's intentions. The legislator expressly devised the provision for a change of first names to help transsexual individuals live according to their desired gender role in everyday life (Pfäfflin 1996a: 41; 1996b: 83; Augstein 1996: 76). At the same time, the statute requires that the person's gender identity will not change »with a high degree of probability« (s. 1[1]2 TSG). In order to assess the trans individual's consistency of the desire (or urge) to live according to the ›other‹ gender, psycho-medical experts employ the ›real life test‹ as a diagnostic means (Becker et al. 1997: 155). In doing so, the German Standards follow Langer and Hartmann's opinion that, »one can with or without support expect a certain amount of testing according to the desired role by means of the real life test as a precondition for a change of first names« (Langer/Hartmann 1997: 866 f.). However, by rendering a ›real life test‹ a medical precondition for meeting legal requirements for a change of first names, the German Standards turn the legislator's intentions upside down:

The indications for a change of first names on the one hand and surgical interventions on the other are basically different. The ›small solution‹ of the TSG, i. e. the possibility to change first names was legally fixed in order to facilitate the real life test for the patient in the new gender role, to protect them at the workplace, while contracting tenancy agreements, at the bank counter, during border crossings etc. from the critical gaze and inquisitory enquiries, since the outer appearance contrasts with the gender-specific first names entered in their documents. The indication for a change of first names is meant foremost to achieve social relief, and this indication can therefore be issued earlier than the medical indication for irreversible somatic interventions. (Pfäfflin 1996a: 41)

The relationship between the health insurance company administration and their medical advisory bodies and psycho-medical professionals

Disagreements between the health insurance company administration and advisory bodies on the one hand and medico-psychiatric professionals on the other complicate a medical transition from one sex/gender to another. In the period from 1987 until 2010, controversies arose over the interpretation of the Federal Social Court decision on 06 Aug. 1987 and the number of expert reports and the experts' qualifications.

On 6 August 1987 the Federal Social Court decided in a legal dispute between a transwoman and her health insurance company that she may demand of the health insurance to pay for sex reassignment surgery, »if her former psychophysical condition legally qualifies as an illness requiring treatment according to ss. 182 11, 184 I RVO« (BSG 1988: 1550). In its discussion of the Regional Social Court (*Landessozialgericht*; LSG) decision, the Federal Social Court held that not all forms of transsexuality qualify as an illness. Therefore, the pathological state needs to be established in every individual case (ibid: 1551).

In this particular case, the Court reasoned that the degree of the tension between the woman's male body and her identity was such that it amounted to an illness. According to the High Regional Social Court and the Federal Social Court, it is not the identity but the psychological strain that produces the illness (ibid).

The Federal Social Court argued that the eligibility to health care coverage is based on the condition that the illness can be healed, alleviated or that a deterioration of a person's health can be prevented. The Federal Social Court supported the High Regional Social Court's argumentation that in this particular case an indication for sex reassignment surgery was the only measure to alleviate her situation after all psychiatric and psychotherapeutic means had been unsuccessful (ibid).

The Federal Social Court suggested that the High Regional Social Court might have misjudged the expedience of the treatment, had it not considered psychiatric and psychotherapeutic treatment prior to surgery. However, it established that the High Regional Social Court had considered this issue, too, and resolved that all these means had been unsuccessful in this particular case (ibid).

Representatives of the medical advisory services of the health insurances companies and medical practitioners treating transsexual individuals as well as legal experts interpret this court decision differently. Banaski, a representative of the medical advisory services of the statutory insurance companies in Northrhine Westfalia, for instance concludes from the decision that statutory health insurance companies only need to pay for sex reassignment surgery after all psychiatric and psychotherapeutic means have failed to alleviate or eliminate the tension between a person's sex and his or her psychological identification with the ›other‹ gender (Banaski 1996: 65).

The lawyer Augstein disagrees with Banaski's interpretation of the court decision. She argues that the conditions laid down by the court ruling are sufficiently met with, if the specialist treating the individual states that psychiatric or psychotherapeutic treatment is unpromising right from the outset (Augstein 1996: 75 f.).

Indeed, the Federal Social Court decision on 10 Feb. 1993 seems to support Augstein's reading. In this particular decision, the Court argued that sex reas-

signment surgery is the only option for those individuals whose distress emanating from the tension between sex and gender identity constitutes an illness, regardless of whether the transsexual individual agrees to undergo psychiatric/psychotherapeutic treatment or not (BSG 1993: 2400).

Controversies also arise between the MDKs and medical specialists who treat trans individuals over the number of expert reports required for an indication for surgery and the experts' qualifications. With regard to the latter, Eicher and Pfäfflin suggest that it is irrelevant, whether a psychotherapist or a psychiatrist issues an indication for sex reassignment surgery (Eicher 1996: 48; Pfäfflin 1996a: 37).[72]

However, MDKs have defined the rules of the game at will. For example, until 2004 the medical advisory service of the health insurance companies in Bremen accepted expert reports, including indications for surgery from physicians experienced with trans individuals and with additional psychotherapeutic qualifications. In the course of the year, the MDK changed the rules to the effect that it no longer accepted expert reports from medical professionals other than from psychiatrists.

With regard to the number of expert reports required for meeting the costs of sex reassignment surgery, MDKs frequently ask for two expert reports. This means that trans individuals need to produce two expert reports for the county court and two for the respective statutory health insurance company of which the latter includes an indication for sex reassignment surgery.

Eicher, and Becker, Berner, Dannecker and Richter-Appelt suggest that this and further arbitrary requirements and interpretations of the law complicate the whole procedure (Eicher 1996: 64), hamper the medical and psychotherapeutic procedures and unduly prolong the proceedings under the Transsexual Act (Becker et al. 2001: 265). Similarly, Pfäfflin criticises the additional work, especially because the reports are presented to the MDKs, which will once more and finally decide upon the indication. Pfäfflin argues that this procedure produces a further controlling authority (Pfäfflin 1996a: 46).

The relationship between county courts and psycho-medical professionals

Occasionally tensions arise between the courts and psycho-medical professionals over procedural issues. Langer and Hartmann e. g. deplore that courts do not commission all qualified experts to write expert reports and exclude some

72 | However, Pfäfflin (1996a: 37) excludes endocrinologists, gynaecologists, urologists and general practitioners from the pool of potential experts for issuing an indication for sex reassignment surgery. He argues that the task of the latter is to exclude somatic contraindications, to determine individual hormone dosages and to control the effects and side effects of hormone treatment on a long-term basis.

instead. Moreover, they criticise the practice of some courts to address the applicant with the desired first name at the beginning of the legal and diagnostic procedures (Langer/Hartmann 1997: 868). Hence, Langer and Hartmann seem to be concerned about limitations of their power.

Pfäfflin is more concerned about the practice of some county courts to wait for one expert report before assigning an expertise to the second expert, and as such, with adverse effects of this practices on trans individuals. Like several trans organisations, he objects to such a practice, since this unnecessary delay prevents the applicants from sorting out their usually challenging lives (Pfäfflin 1996b: 87).

3.1.5 Summary: Sexological constructions of gender and transsexuality in the reform period

While approaches that attempt to explain transsexuality have increased in Western countries and research on assumed somatic causes has become more diverse, the sexological debate during the reform period in Germany appears to have engaged less with questions related to aetiology than in the period prior to the enactment of the Transsexual Act. Furthermore and in contrast to the 1970s and early 1980s, perspectives in sexology emerged in the early 1990s and the first decade of the 21st century calling for a critical enquiry into cis and the heteronormative gender binary. Like in the earlier period, though, somatic and multi-causal approaches were premised upon unquestioned gender and sexual norms, and an understanding of transsexuality as an anomaly prevailed.

Definitions, clinical pictures and differential diagnoses of transsexuality varied among sexologists. The sexological debate in the last decade of the 20th and the first decade of the 21st century mirrors a pluralisation of trans subjects and transsexual developments. As a result, the borders between transsexuality and other phenomena inhabiting the fringes of the gender regime became blurred. In addition, while the majority of concepts continued to pathologise transsexuality to varying degrees, in the early 1990s, a depathologising concept of transsexuality entered the sexological debate.

While the sexological debate in the time of the enactment of the Transsexual Act did not question psycho-medical authority and expertise on matters pertaining to transsexualism, the latter began to be challenged from within the discipline. Depathologising concepts however did not necessarily coincide with the acceptance of a transition from one gender to another as a self-determined decision.

The diagnostic process for an indication for medical and surgical measures and the assessment for a change of first names or gender status, respectively, reveals more or less disciplinary traits, in particular with regard to the controversially debated physical examination. Moreover, the hierarchically organised

situation between the assessing or diagnosing person, respectively, and the assessee renders the examiner's concepts of gender and sexuality the benchmark according to which access to sex reassignment treatment and legal goods were, and continue to be granted or denied.

A legal and medical transition from one gender to another takes place within a complex regulatory regime. Specific laws, jurisdiction, the German Standards and guidelines of the MDKs are part of this regime. All areas offer possibilities to those in a position to decide upon a trans person's gender identity to do so according to their respective interpretations of rules and guidelines. Furthermore, despite being very different regulatory regimes, the national psycho-medical guidelines for the treatment and assessment of transsexual individuals were devised taking into account the legal situation of the time. The Transsexual Act, however, was largely based upon medical knowledge and even more so of political interpretations of medical knowledge generated at a very different moment in the history of gender.

3.2 Developments and debates in the trans movement from the mid-1990s to 2010

Since the mid-1990s, the trans movement in Germany has changed structurally, conceptually and politically. Drawing heavily upon documents produced by trans organisations with an decidedly political agenda that are published on their respective web pages, this chapter traces the abovementioned developments of the trans movement from the mid-1990s until 2010.

While structural and conceptual changes within the trans movement were inextricably linked with each other, they will for analytical purposes be addressed separately. The first section of this chapter provides an overview of major structural changes within the trans movements that evolved in the abovementioned period. I will use as examples major local and national support and lobby groups, broad local networks and a multinational lobby group with German participation and membership that have emerged since the mid-1990s and draw upon self-representations of the organisations and networks, their respective history, membership lists and by-laws as sources.

The second section of this chapter focuses on concepts of gender, trans and perspectives on the gender binary in order to capture conceptual change and differentiation as it features on a trans-organisational level.[73] This section

73 | This does not mean however that the concepts that emerged in trans organisations with a political agenda comprehensively cover concepts within the trans movement. The focus here is on a systematic account of basic concepts in an influential part of the trans movement which in part co-exist throughout the entire social movement.

draws upon the history of the organisations, TransMann's FAQs (TransMann 2004a), talks and articles published on organisation websites, programmes, reports, flyers presenting the organisation or network and mission statements.

The initial sections are followed by an analysis of trans perspectives on legal rules of the Transsexual Act, procedures under the Act, sexological concepts of trans and the psycho-medical management of trans subjects in the abovementioned period. This section particularly deals with human rights issues raised by the Act, problems that arise with legal proceedings and practices trans individuals face and with trans perspectives on the classification of trans as a psychiatric and / or medical condition as well as the diagnostic and treatment process and health insurance practices. The analysis is foremost based on speeches, reports, programmes and a flyer addressed to doctors, by-laws, the abovementioned FAQs and an open letter to psycho-medical professionals engaged in assessment procedures (Alter 2008a).

While the new organisations that have emerged since the mid-1990s, like their predecessor organisation Transidentitas e. V., provide support and outreach, and information and education, they also operate in the areas of lobbying and networking. The fourth section of this chapter addresses means and concepts of social change to redress discrimination and major attempts to achieve trans law reform from the late 1990s to the Act to amend the Transsexual Act in 2009. By-laws, mission statements, flyers, announcements of events, suggested draft legislation for trans law reform, a submission and a key issues paper constitute major sources for this section.

I will argue that the mid- and late 1990s witnessed a substantial growth and diversification of the trans movement, most notably the rise of national lobbying groups and an increased visibility of until then barely noticed heterogeneous (trans)gender subjects in the political arena. These subjects largely challenge the heteronormative gender binary and decidedly object to legal regulations and psycho-medical concepts and practices that are perceived to curtail trans self-determination and infringe upon human rights.

3.2.1 Structural change[74]

Trans activism and organising has undergone significant structural change since the mid-1990s. These changes are mirrored in the development, growth and differentiation of national lobby and educational trans associations with local helpdesks; the increased consolidation of local activism and the local organisation of individuals and groups with marginalised genders and sexualities in broad networks; the creation of a supranational organisation and network; the

74 | For a brief summary of the major structural and conceptual changes of the trans movement in Germany since the mid-1990s, see de Silva 2014.

rise and proliferation of web-based trans organisations and networks, and the increased visibility of (trans)gender subjects that were previously barely or not at all represented in transsexual organisations and largely left unnoticed and unaccounted for in the political arena (de Silva 2014: 153).

Institutional differentiation and proliferation marks one of the most striking features of the German trans movement since the mid-1990s. While the foundation of Transidentitas e. V. in 1985 already indicated a tendency towards creating a nationwide infrastructure for trans individuals and whereas traditional local support groups continue to exist to this day,[75] three national organisations with regional chapters have emerged since Transidentitas e. V. gradually folded in the period from 1995 to 1997. These are the *Deutsche Gesellschaft für Transidentität und Intersexualität e. V.* (German Association for Transidentity and Intersexuality [dgti e. V.]), founded in Cologne in 1998 (Ottmer 2011),[76] TransMann e. V. (TransMan e. V.), which emerged in the same city a year later (TransMann undated)[77] and *Aktion Transsexualität und Menschenrecht e. V.* (Campaign for Transsexuality and Human Rights; ATME e. V.), founded in April 2008 in Ludwigsburg (ATME 2011; 2011a).[78]

75 | See e. g. *VIVA TS* in Munich (VivaTS München undated), *Trans-Ident Nürnberg* (www.nuernberg.trans-ident.de) and TransidentX in Stuttgart (TransidentX 2015), to name a few. While VivaTS was open to transsexual individuals and transvestites in the period discussed here, it has meanwhile shifted its focus to transsexual women and their families, friends and partners (VivaTS München undated). TransidentX serves ftm and mtf transsexual individuals. In 2010 and 2011, support groups in Bavaria (*Freistaat Bayern*), including Trans-Ident Nürnberg, organised under the umbrella support group Selbsthilfeorganisation Trans-Ident e. V. (Selbsthilfeorganisation Trans-Ident undated).

76 | The national headquarters of the dgti e. V. has changed over time, depending on the respective first chairperson's place of residence. The dgti e. V. maintains several helpdesks. At the time of writing, they are located in Bavaria and Baden-Württemberg in the south, Hesse (*Hessen*) in the centre, Lower Saxony (*Niedersachsen*) and Schleswig-Holstein in the north, Northrhine Westphalia (*Nordrhein-Westfalen*; NRW) and Rhineland Palatinate (*Rheinland-Pfalz*) in the west and Brandenburg in the east of Germany (dgti undated a).

77 | TransMann e. V. is registered in Munich (2004). Except for the branch in Cologne (Köln), the activities of TransMann e. V. were mainly located in the south of Germany from the late 1990s to 2010 (TransMan 2007).

78 | The bulk of ATME e. V.'s activities are centred in Baden-Württemberg. While ATME e. V. has so far only established one workgroup, the heading »*Landes-AKs*« *(Länder-Arbeitskreise; Länder* workgroups) (ATME 2015a) suggests that ATME e. V. does not rule out establishing local chapters in other German *Länder*.

The consolidation of local activism and organising in broad local networks is another structural feature of the German trans movement since the mid-1990s. Of these, the TGNB is the largest and most prominent one (TGNB 2006). The TGNB was founded during the annual Transgender Conference (*Transtagung*) in Berlin in 2001. Founding members were the dgti Berlin, the Drag Kingdom,[79] IdentX,[80] the then IGTF and now IVTF (*Interessenvertretung transsexueller Frauen*; Lobby Group for Transsexual Women), the Sonntags-Club e. V.,[81] TransSisters[82] and v.e.b. transgender united, which is nowadays known as Wigstöckel transgender united[83] (TGNB 2006a). By 2006, the TGNB constituted a network of 21 transgender and intersex groups that are active in the areas of education, counselling, support, social and political life, religion, migration, academia, fine arts, show and recreation (ibid).[84]

Since the middle of the first decade of the 21st century, networking and lobbying exceeds the local, regional and national level. Several German trans

79 | The Drag Kingdom is a group of drag kings and transmen which stages shows, organises workshops, maintains a website at www.dragkingdom.de and launches parties for political causes, such as the aid party on 09 Oct. 2010 called »Boobs, Brain & Bollocks« as a means to support a court case against ss. 8(1)3 and 8(1)4 TSG (Drag Kingdom undated).

80 | *IdentX* was a group of transmen, which has folded in the meantime.

81 | The Sonntags-Club e. V. is a centre that organises events and serves the lesbian, gay, bisexual and trans communities in Berlin (Sonntags-Club 2015). The Sonntags-Club e. V. was founded in 1990. Its roots lie in the East German gay movement (Sonntags-Club 2015a).

82 | TransSisters is a group of transvestites and transsexual individuals in Berlin.

83 | Wigstöckel e. V. emerged as an association in 2004 (Wigstöckel 2004-2015). It hosts an annual festival to »celebrate trans ways of life and performances« (Wigstöckel 2004-2015a). The first Wigstöckel transgender united festival in Berlin took place in 1996 (Wigstöckel 2004-2015b).

84 | Among these groups are e. g. 1-0-1 [one 'o one] intersex, a political fine arts and archive project on intersexuality, the Black Girls Coalition, the Free Sisters of Perpetual Indulgence (*Freie Schwestern der Perpetuellen Indulgenz*), Inbetween, which has become a part of ABqueer e. V., an information and counselling organisation for adolescents, and Transgender-Radio (TGNB 2006b). In addition, the TGNB founded several workgroups, such as »*Arbeitskreis Vernetzung*« (Workgroup Networking) (TGNB 2006c), »*Arbeitskreis Recht*« (Workgroup Law and Antidiscrimination) (TGNB 2006d) and »*Arbeitskreis Beratung und Fortbildung*« (Public Education and Counselling) (TGNB 2006e). In 2004, the TGNB established a scientific board (TGNB 2006f) and issued the online magazine *Liminalis* (TGNB 2006g). The so far last issue of the *Liminalis* appeared in 2009 (Liminalis 2009), and the scientific board no longer operates at the time of writing.

groups, such as the dgti e. V. and the TGNB or individual members engage in shaping the policies of e. g. the international network and lobby organisation Transgender Europe (TGEU) (TGEU 2009). The latter was founded in Vienna, Austria in 2005 (ibid).[85] By Sept. 2011, TGEU consisted of 38 member groups from 23 countries (TGEU 2012).[86] While most of the groups come from European countries, the association is also host to members outside Europe.[87]

New means of communication, in particular the internet added a further structural dimension to the trans movement. The internet not only greatly facilitated common policy-making over large geographical distances (Whittle 1998: 393) that organisations such as e. g. TGEU face. It also became a host for solely internet-based trans organisations, such as trans forums. In Germany, a group of transmen for instance established FTM-Portal.net (FTM-Portal.net 2009-2011) in December 2005.[88] It has since then become the largest German-speaking internet forum and the most comprehensive source of information and debates on e. g. transition-related legal, medical and social issues and gender politics specifically for transmen.

Structural change is however not limited to institutional change. Several organisations in part include in their policies or are even headed and staffed by community members who were marginalised, if at all present in transsexual support groups and on the political agenda of transsexual lobby groups until the mid-1990s. TransMann e. V. for instance initially emerged from a group of transmen's regulars in Cologne with the goal of creating a supportive infrastructure for transmen (TransMann undated), since transsexual support groups at the time mostly catered to the needs of transsexual women (Regh 2002: 196).

The dgti e. V. and ATME e. V. include trans children in their support efforts. The former provides trans children and adolescents and their parents support in everyday life.[89] On a political terrain, ATME e. V. demands an end

85 | TGEU defines as its mission to counter discrimination, in particular on the grounds of gender identity and gender expression and to achieve conditions in Europe that enable individuals to live according to any gender they prefer, without interference (TGEU 2010).

86 | By 2015, TGEU was host to 78 member organisations from 40 countries (TGEU 2015).

87 | See e. g. Armenia and Kyrgyztan (TGEU 2012).

88 | Until then, the website of TransMann e. V. served as a platform for this particular forum. Apart from ftm-portal.net, there have been several other forums for transmen, such as jungx.de, which folded in the early 2000s and ftm-city.de, which adopted conservative concepts of masculinity and no longer exists, either.

89 | Among these services are e. g. a comprehensive brochure for trans children and their parents (dgti 2015a), recommendations for parents of children with an atypical gender expression (Alter 2000), a networking service for parents and young trans individuals

to conversion therapies aimed at homo- and transsexual minors in Germany (ATME 2012: 46-51).

Similarly, the dgti e. V. and the Berlin-based association *TransInterQueer* e. V. (TrIQ e. V.)[90] include intersex individuals[91] in their respective staff, support programmes and policies.[92] While the preamble of the by-laws suggests that the dgti e. V. focuses on trans (cf. dgti 1998), it includes intersexuality in its name and ss. 2.1 and 2.3 of its by-laws (ibid) and at least temporarily created a space for intersex individuals and their respective issues.[93] As its name suggests, TrIQ

(dgti undated b) and sample letters written by the trans activist Alter that support trans children in schools (ibid undated c; d; e).

90 | TrIQ e. V. was founded in Berlin in Sept. 2006. The association was initially designed to offer professional counselling services in collaboration with inbetween/ABQueer e. V. and the TGNB, to educate the general public on issues related to trans, inter and queer individuals and to establish a centre, including a café for groups and events for the above mentioned individuals (TrIQ undated). TrIQ e. V. has, like several other organisations mentioned earlier on since then expanded its agenda to cover lobbying (cf. TrIQ 2013: 2), a process that will be addressed in chapter 3.2.2.

91 | Unlike the dgti e. V., TrIQ e. V. frequently uses the term ›intergender‹ (*Intergeschlechtlichkeit*) or as of late ›inter‹ (*Inter**) to refer to the phenomenon subculturally otherwise known as intersex. ›*Inter**‹ stands for a number of different possible identities and self-designations, such as intersex individuals (*Intersexuelle*), hermaphrodites (*Hermaphroditen*) or *Zwitter* (TrIQ 2009). The term *Intergeschlechtlichkeit* signifies a depathologising perspective on intersexuality (TrIQ 2009a) and serves as a gender identity without however suggesting that intersex individuals necessarily identify as such (ibid).

92 | Trans and inter may occasionally overlap. However, they are a set of different phenomena with specific issues. They have in common that they trouble conventional physical and/or socially normalised gender expectations. The relationship between trans and intersex organisations in Germany has been (Ghattas 2009: 1), and continues to be quite conflict-ridden.

93 | Support and lobbying by, and on behalf of intersex individuals within the dgti e. V. are e. g. mirrored in a so-called first aid brochure on intersexuality compiled by the intersex activist Claudia Klüsserath (Klüsserath 2001), a presentation by the trans activist Katrin Helma Alter during a hearing on 27 Feb. 2002 (Alter 2002), several talks on the Transsexual Act which take into consideration specific issues intersex individuals face (e. g. Alter 2000a; 2007) and the dgti e. V. key issues paper of 20 Mar. 2011 on the reform of the Transsexual Act (dgti 2011: 2). All of the lobbying efforts and talks mentioned above call for a right to intersex self-determination, such as the right to leave vacant the gender entry in the birth registry (ibid) and/or a ban on cosmetic surgery on intersex infants (ibid; Alter 2000a; Alter 2002).

e. V. serves the trans, intersex and queer communities. The activities and by-laws of TrIQ e. V.[94] suggests that intersex activism and services for intersex individuals appear to be more integrated into the organisation as a whole.[95]

3.2.2 Conceptual change and differentiation

Drawing upon different social contexts and discursive traditions, the new associations and networks mirror conceptual change and differentiation that have taken place in the trans movement since the mid-1990s. So far, and minor differences between associations and networks notwithstanding, two fundamentally different concepts of trans and transsexuality, respectively, have evolved within the trans-political arena in Germany, most notably between the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. on the one hand and ATME e. V. on the other. The respective concepts have different implications for inclusion. Despite these differences, the associations and networks mentioned above have in common that they demand the right to self-determination and an end to discrimination.

Conceptual change: Social and discursive factors

The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. emerged amidst wider social change, developments in communication technology and both personal and theoretical debates on gender and sexuality. These interlocking processes were conducive to calling into question apparent truths of gender and sexuality, such as the seemingly causal link between a person's morphology, gender expression and heterosexual orientation as well as the gender binary.

The DGfS and the trans activist Regh succinctly summarise tendencies towards social change in wider society that have taken place during the past decades. In its submission to the German government, the DGfS observe »an

94 | See the by-laws of TrIQ 2007; 2014.

95 | TrIQ e. V. closely collaborates with OII Germany/IVIM e. V., a fact that is e. g. mirrored in the adoption of the latter's understanding of intersexuality (see TrIQ 2009a) and the conference »Inter* Aktion« in Oct. 2011 in Berlin, which was organised in collaboration with the German chapter of OII/IVIM e. V. The conference was designed to create a space for intersex individuals, their respective parents and other relatives to meet, exchange experiences and establish networks (IVIM e. V./TrIQ 2011). Moreover, TrIQ e. V. offered a free of charge workshop on trans and inter in work situations (*Trans- und Intergeschlechtlichkeit in der beruflichen Praxis*) for executives, equal opportunities commissioners, personnel administrators, among others in 2011 (TrIQ 2011). TrIQ e. V. also offers counselling services and hosts the *Zwittercafé*, also known as »*Hermcafé*« or »*Inter* Café*«, a meeting point for intersex individuals, their friends and relatives (TrIQ 2007-2012).

ongoing flexibilisation of formerly rigid characteristics of gender belonging« (Becker et al. 2001: 260). The authors argue that the representation and social recognition of masculinity and femininity are based on a number of specific cultural signs that occasionally render sexed features of the body less prominent in everyday life (ibid).

While the authors of the abovementioned statement suggest a dwindling significance of the sexed body, Regh observes an increasing flexibility of gender roles. Arguing that cis lesbian and gay individuals were no longer denied their femininity or masculinity, respectively when choosing employment traditionally associated with the ›other‹ gender, he suggests that in the light of these developments, trans individuals no longer saw a point why they were expected to live (or feign) heterosexual lives or seek employment conventionally deemed appropriate for their respective gender (Regh 2002: 193).

The internet and poststructuralist concepts of gender and sexuality most dramatically propelled conceptual change in the trans movement in Germany in the period from the mid-1990s to the turn of the century. As Regh states, the internet provided access to medical information, including the risks and limitations of genital surgery, and to theoretical debates on gender and sexuality, most notably queer theory (ibid: 192). These technological and theoretical developments allowed trans individuals whose gendered and sexual lives deviated from the standardised route prescribed for transsexual individuals to become visible and to communicate with each other. As a result, trans individuals gained more independence of transsexual support groups and the medical community, which at the time generally endorsed conservative perspectives on gender and sexuality (ibid 191; 195).

The new organisations that evolved amidst the abovementioned processes provided sites for self-reflection and the development of trans subjectivity, offered a space for the development of a counter-discourse to hegemonic understandings of masculinity, femininity, gender and sexuality and became a basis for claiming trans as an identity (de Silva 2005: 264). These shifts are mirrored in the terminology and concepts of trans and gender the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. endorse.

Conceptual change: Terminology

Struggles over terminology have marked the German trans movement since at least the mid-1980s. The use of various terms other than ›transsexual‹ (*transsexuell*) or ›transsexuality‹ (*Transsexualität*) to describe trans individuals or the phenomenon, respectively, initially served as a means for trans organisations, such as Transidentitas e. V., to distance themselves from the pathologising connotations of medical ascriptions.

As the name of the organisation suggests, the dgti e. V. initially followed in the footsteps of Transidentitas e. V. by referring to individuals sexologists called

›transsexuals‹ as individuals with trans identities (*Transidente*) and the phenomenon as trans identity (*Transidentität*).[96] The dgti e. V. adopted this particular term for two reasons. First and as mentioned earlier on, like Transidentitas e. V., it rejected the pathologisation associated with the medical term ›transsexuality‹. Second, the dgti e. V. wanted to avoid the common misunderstanding that transsexuality is a sexual orientation (Ottmer 2011).

However, the term ›trans identity‹ was contested, too. While TransMann e. V. rejected ›transsexuality‹ as a general term for trans individuals,[97] it also decided against using the term ›trans identity‹, arguing that this particular term suggests an individual identity problem.[98]

Starting with TransMann e. V. in 1999, by the turn of the century the organisations mentioned above as well as the local networks mentioned earlier on that were founded in the course of the first decade of the 21st century decided to take on the term ›transgender‹ when speaking of trans individuals in general (Alter 2007; TransMann 2004a; TGNB 2006a; TrIQ 2009).[99] At the same time, the associations and networks continue to refer to individuals as transsexual or as persons with a trans identity, if the latter identify as such (see e. g. Alter 2000; TGNB 2006a; TransMann 2004a; TrIQ undated a: 11). Frequently, the organisations use the German translation ›*Transgeschlechtlichkeit*‹

96 | At the time of writing, the dgti e. V. faces a history of one and a half decades. In the light of rapid developments in trans politics, perspectives on a number of issues, such as e. g. the perceived legitimacy of medical expertise and aspects related to law reform, have changed over time. The same applies to the term ›trans identity‹. While current members of the dgti e. V. doubt the founders of the organisation would nowadays use this particular term against the background of a policy that insists on the self-determination of one's own individual gender identity, the current leadership decided to stick to the name as a historical »brand name« (Ottmer 2011).

97 | TransMann e. V. objected to the term ›transsexuality‹ for two reasons. First, and like the dgti e. V. TransMann e. V. holds that transsexuality is frequently and incorrectly associated with a sexual preference (TransMann e. V. 2004a). Second, the organisation disagrees with the notion that medical and surgical measures constitute the defining feature of transsexuality, suggesting instead that trans phenomena such as transvestites and transsexual individuals cannot be clearly distinguished from each other (ibid).

98 | Despite its unease with the term ›trans identity‹, TransMann e. V. uses this term in its by-laws of 2004 (TransMann e. V. 2004).

99 | The suggestion for a Transgender Bill (*Transgendergesetz*; TrGG) which the dgti e. V. and TransMann e. V., among other organisations and individuals, produced and submitted to the Federal Home Office in 2000 mirrors the consensus to use the term ›transgender‹ among these at the time two trans organisations with a national scope.

(TrIQ undated a: 1), the abbreviation ›*Trans**‹[100] (trans) (TransMann 2004a) or, more specifically ›*Transmann*‹ (transman) or ›*Transfrau*‹ (transwoman) (Alter 2002; TransMann undated a; 2001).

Conceptual change: Concepts of gender and trans

This particular terminological shift towards the end of the 20th century within trans organisations with a decidedly political agenda in Germany not only defies heteronomous and pathologising medical concepts. Setting out from the premise of a plurality of highly individualised genders and a concept of gender that challenges conventional notions of masculinity and femininity, ›transgender‹ or simply ›trans‹ stands for diverse phenomena and multiple social identities, challenges heteronormative expectations, disrupts the normalised link between a person's morphology, gender expression and identity, reclaims trans from the medical realm and challenges the gender binary.

The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. set out from a concept of gender that challenges gender dualism. The dgti e. V. holds that regardless of whether a vast majority of individuals are able to relate to either of the exclusively framed categories ›male‹ and ›female‹ or ›man‹ and ›woman‹, respectively, these phenomena are at best bi-polar with fluid boundaries (Alter 2007). Similarly, TransMann e. V. suggests that ›male‹ and ›female‹ are not irreconcilable opposites, but »two halves of a scale that spans the whole spectrum of human possibilities« (TransMann 2001). Like the dgti e. V., TransMann e. V. suggests that the sparsely populated but highly volatile region in the middle of the spectrum is inhabited by individuals who identify as bi-gendered, non-gendered or intersex (ibid; Alter 2002).

The associations and networks discussed here also question the notion of the immutability of an individual's gender. The dgti e. V. e. g. notes that gender is not necessarily a permanent condition (Alter 2000). The TGNB conceptualises gender as a fluid spectrum of diverse identities (TGNB 2006a), a concept reminiscent of Bornstein's idea of gender fluidity, which she defines as »the ability to freely and knowingly become one or many of a limitless number of genders, for any length of time, at any rate of change. Gender fluidity recognizes no borders or rules of gender.« (Bornstein 1994: 52)

Moreover, the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. challenge the notion that a person's gender performance and gender identity can be deduced from physical properties and functions, such as genitalia, hormones and procreative capacity. Rather, as the dgti e. V. notes, it is a cultural practice to assign a person to a particular gender on the basis of genitalia (Alter 2002) or to

100 | Borrowed from computer language, the asterisk denotes the inclusivity or indefinite number of individuals who either temporarily or permanently do not or only in part identify with the assigned gender and who identify as trans (Regh 2002: 192).

assume a particular parental role and identity based on reproductive potential (ibid 2000), rendering unimaginable subject positions, such as male mothers and female fathers.

Finally, the organisations insist on the right of an individual to determine its respective gender and to be socially recognised. Like the dgti e. V. (cf. Alter 2002), TransMann e. V. holds that every gender is valid. The organisation demands that nobody should be forced to move from a position the respective person feels comfortable with, simply for the purpose of maintaining the currently hegemonic bi-polar gender system (TransMann 2001; ibid undated a).

TrIQ e. V. defines ›transgender‹ as an umbrella term for individuals who cannot, or do not want to live according to the gender they were assigned to at the time of birth (TrIQ 2009; ibid undated a: 11). Similarly, the TGNB conceptualises ›transgender‹ as being comprised of individuals to whom the experienced gender is not a binding consequence of the gender they were assigned to at the time of birth (TGNB 2006a). Analogously TransMann e. V. defines ›transmen‹ (*Transmänner*) as individuals who feel they are not, or insufficiently described by their original birth entry as girls (TransMann undated).[101] These definitions imply that the body or, more specifically, a person's genitalia are neither decisive for an individual's self-perception, nor of that of others. Rather, as TransMann e. V. notes, it is the identity and an individual's performance that determine a person's gender (ibid 2004a).

The dgti e. V. emphasises that ›transgender‹ is not equivalent to the concept of a ›third gender‹, arguing that the latter reproduces a normative category (Alter 2000). Instead, transgender is composed of diverse identities on a fluid spectrum that as the TGNB and TrIQ e. V. suggest include, but are not limited to self-identified cross-dressers/transvestites (*Transvestiten*), drag kings, drag queens, trannies (*Transen*), some transsexual individuals, transwomen, transmen, individuals with trans identities, transgender and fairies (*Tunten*) (TGNB 2006a; TrIQ undated a: 11).[102] Following the same principles, ›transman‹ covers multiple social identities, such as e. g. FTMs (*FzM-Transsexuelle*), drag kings, boys and fags, just to name a few.[103]

›Transgender‹ also stands for individuals with heterogeneous decisions with regard to surgical and legal measures, without however compromising

101 | Hence, an individual with a female anatomy might not identify as a woman, but in part or entirely as a man and wishes to be recognised as such (TransMann e. V. 2004a).

102 | While the TGNB does not use medical terms, such as ›transsexuals‹ or ›transvestites‹, replacing them instead with terms, such as ›trannies‹ or ›cross-dressers‹, TrIQ e. V. endorses a concept of radical self-determination, hence accepting that some individuals might self-identify as transsexual individuals.

103 | In his landmark study on FTMs and transmen in the USA, Cromwell observes a similar heterogeneity among transmen (Cromwell 1999: 28-30).

individuals who require some or all of the measures possible to ensure their survival. As TransMann e. V. notes in its web-based list of frequently asked questions (FAQ),

> And what happens after achieving the self-awareness that one is trans? Some don't do anything except for to live their lives as they deem right for themselves. Medical and legal measures are not necessarily required. However, they make some things easier (and render things possible for some in the first place). They are, however, neither necessary, let alone defining. (TransMann e. V. 2004a)

Hence, TransMann e. V. like TrIQ e. *V.* advocates self-determination with regard to the abovementioned measures, arguing that whether a person requires medical and/or legal interventions and recognition of any sort depends on the person's individual needs when negotiating a life with him/herself and his/her environment (ibid).[104]

The diversity of trans individuals subsumed under the term ›transgender‹ extends to sexuality, too. Sexual preferences cover a large spectrum that not only questions heteronormative expectations. They question an immutable choice of subjects (or objects). TransMann e. V. observes that trans individuals more frequently than non-trans individuals live as lesbians or gay men. Some trans individuals do not even bother to define their respective sexual preferences (ibid). In fact, if trans spans a range of gendered subjects, not to mention individuals that refuse to be gendered, or persons who consider themselves bi-gendered, categories such as homo- or heterosexuality no longer make any sense.

More consistently than the dgti e. V. or TransMann e. V., the TGNB and TrIQ e. V. integrate into their respective policies an intersectional approach to transgender, hence acknowledging the multiplicity of vectors of power that constitute an individual and deprive it of, or bestow upon it social privilege. Both organisations are acutely aware of e. g. racism, sexism, heterosexism, ableism, ageism and lookism that influence a person's access to social and medical goods and services.[105] This particular insight is a precondition for developing a politics of inclusion.

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104 | TrIQ e. V. and the dgti e. V. provide some reasons why some trans individuals do not, or only partially follow the prescribed legal and medical route. Among these are an incompatibility between self-perception and pathologisation, health reasons that do not allow for extensive medical and surgical interventions (TrIQ undated a: 11) or simply the desire not to become unambiguously male or female (Alter 2000).

105 | TrIQ e. V. e. g. explicitly notes that there is no space for racism, sexism, right-wing extremism or fascism or any other offending or discriminatory practices on its premises (TrIQ 2009b). Like TrIQ e. V., the TGNB intends to create an inclusive environment, to

Like TransMann e. V., TrIQ e. V. rejects a policy of ›passing‹, hence rendering trans visible while acknowledging different individual needs at the same time.[106] The TrIQ e. V. and TGEU member Julia Ehrt suggests in her speech on perspectives and aims of the transgender movement that a poorly shaved transwoman need not hide herself in TrIQ e. V. According to Ehrt, this particular network is a space in which »nonconformity constitutes the norm and not the deviation« (Ehrt 2009: 3). By insisting on the right not to pass, the associations and networks not only rearticulate the meaning of bodies. They take the, as Sandy Stone puts it »responsibility for *all* of their history, to begin to rearticulate their lives not as a series of erasures […], but as a political action begun by reappropriating difference and reclaiming the power of the refigured and reinscribed body« (Stone 1991: 298 f.).

The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. also reclaim transgender from the medical realm. Arguing that other societies managed to, and continue to deal with trans without resorting to medical and surgical interventions, TransMann e. V. holds that transgender is not foremost a medical problem, but a social phenomenon. Regardless of the fact that many trans individuals opt for medical and surgical measures, they are not the solution to

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which hosting groups such as the Black Girls Coalition, a group created for, and by trans migrants, attests to (TGNB 2006b).

In s. 2(4) of its by-laws, TrIQ e. V. states that it aims at countering prejudice and discrimination with regard to the body, gender identity, gender expression and sexual orientation and tries to cushion their social effects (TrIQ 2007). The local network strives to support elderly trans, inter and queer individuals (ibid: s. 2[17]). In addition, TrIQ e. V. hosts the group *Transsexuelle Menschen mit Behinderungen* (Transsexual Individuals with Disabilities), a group of individuals with mental and physical disabilities, who frequently encounter larger obstacles in diagnostic assessment and surgical situations than trans individuals who are deemed healthy in this regard by medical standards. As the 2012 motto »Wigstöckel for every_BODY« (Wigstöckel 2004-2015b) suggests, TrIQ e. V. as the main organiser of the event challenges dominant body norms by hosting performances e. g. by wheelchair-bound individuals or individuals who, according to weight norms prevailing in German society would be considered as obese.

106 | Whittle, Bornstein and Stone stress the inadequacy of a policy of ›passing‹ or ›assimilation‹. They argue that this type of policy and personal conduct have contributed to hierarchising subjects within the community (Whittle 1998: 397; Bornstein 1994: 67 f.). ›Passing‹ and ›assimilation‹ have also developed a narrow focus on privacy rights as opposed to anti-discrimination policies (Whittle 1998: 397) and a lack of solidarity with trans individuals, in particular transwomen, who frequently cannot pass beyond casual inspection (ibid: 398). Moreover, such a policy has created trans as a homogeneous category and forecloses authentic relationships (Stone 1991: 298).

the problem. According to TransMann e. V. medical interventions are simply a means of survival for some in current German society (TransMann 2001).

›Transgender‹ also figures as a political concept, which identifies and challenges the heteronormative gender binary as the source of discrimination and seeks emancipation from its debilitating effects. The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. consider the gender binary a pervasive normative, reductionist and oppressive regime that marginalises all other genders, using structural discrimination, pathologisation and exoticisation as its means (Alter 2002; TransMann 2001; ibid undated a; TGNB 2006; TrIQ 2011a; ibid 2011; Ghattas 2009: 2 f.).

Setting out from a depathologising and emancipatory concept of transgender, the associations and networks aim to achieve self-acceptance, social inclusion, freedom of prejudice and discrimination, and acceptance by society as one of many facets of human life (dgti 1998: 1; TransMann 2001; TrIQ 2009b; TGNB 2006). These aims are succinctly summarised in s. 3 of the TGNB by-laws:

> It is the aim and task of the TGNB to create links between transgender groups operating in Berlin in order to campaign more effectively for the individual and social matters of trans individuals. Moreover, [the TGNB] brings home to society the limits and the fallibility of the binary gender system. The TGNB aims at sensitising the public for prejudices against transgender individuals and to reduce their pathologisation, criminalisation, discrimination and exoticisation. In doing so, the constraints that arise from a bi-polar gender concept are meant to be dissolved for the benefit of all individuals in our society. (TGNB 2006h)[107]

Conceptual differentiation: Social and discursive factors

With the advent of ATME e. V. in 2008, concepts of trans(sexuality) began to differentiate substantially among trans organisations with a political agenda. Drawing upon other discursive traditions, frustrated with continuing government inactivity in the face of discrimination, and threatened by prolonged and humiliating procedures on the route to health-insurance-covered sex reassignment measures and legal recognition, ATME e. V. developed a concept of transsexuality that, a common stance on the issue of self-determination notwithstanding, is incompatible with those of the aforementioned associations and networks.

While sexologists in Germany have overall been less preoccupied with aetiological research and considerations since the 1990s, German and interna-

107 | See also ss. 2(1) to 2(10) of the original by-laws of TrIQ e. V. (TrIQ 2007), the preamble of the by-laws of the dgti e. V. (1998: 1) and ss. 2.1.1 to 2.1.3 of the programme of TransMann e. V. (TransMann e. V. 2001).

tional research on potential somatic causes of transsexuality did not cease. The period around the turn of the century faced a surge of international neuroendocrine research and research in human genetics that was frequently based on the assumptions of two polarised sexes and a prenatally induced predisposition towards cross-gender identification in transsexual individuals. ATME e. V. heavily draws upon the findings, or what the association considers to be findings of this research.

ATME e. V.'s policy also is motivated by continuing government indifference towards trans, legal and parliamentary demands to reform trans legislation. Since its very enactment in 1981, trans individuals and organisations have challenged several sections of the Transsexual Act, if not the entire Act. Moreover, and initiated by trans litigants, from 1983 onward, the Federal Constitutional Court ruled several sections of the Act unconstitutional and therefore either void or inapplicable. Furthermore, individual parliamentarians and opposition party members increasingly launched parliamentary enquiries and made suggestions for law reform to the respective governing coalitions to no avail. Despite obvious and widespread discontent with the Transsexual Act and with exception of the Bill on Transsexual Law Reform, which was devised and quashed, the respective federal governments have been unwilling to seriously engage with transsexual law reform.

Furthermore, demands for a more individualised and self-determined approach to trans did not lead to less psycho-medical surveillance and health insurance obstacles and increased options for a flexible and self-determined use of medical and surgical interventions covered by statutory health insurances. Instead, instructions of the MDS e. g. reinforced a uniform regimen with a fixed timeframe for psychotherapeutic and psychiatric treatment prior to any rather rigid sequence of medical and surgical interventions (MDS 2009), while at the same time insisting that every individual step requires assessment. These developments rendered particularly those individuals vulnerable who relied on health insurance coverage of medical and surgical interventions. These factors inform ATME e. V.'s concepts and policies.

Conceptual differentiation: Terminology

Unlike the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V., ATME e. V. embraces the term ›transsexuality‹. The organisation employs the terms ›*Transsexualität*‹ (transsexuality), or more specifically ›*transsexuelle Frau*‹ (transsexual woman) or ›*transsexueller Mann*‹ (transsexual man), respectively, to describe the subjects it claims to represent (ATME/MUT 2008: 5). At the same time, ATME e. V.'s concept of transsexuality differs from sexological meanings in several ways.

Conceptual differentiation: Concepts of gender and transsexuality

Other than refuting the notion that a person's gender can be determined externally and the assumption that an individual's identity can be derived from his or her genitalia, ATME e. V.'s concepts of gender and transsexuality have little in common with those of the aforementioned organisations. Rather, ATME e. V. endorses an essentialist, homogenising and pathologising concept of transsexuality and only by implication questions the gender binary.

ATME e. V. endorses an essentialist, ahistorical, species-transcending concept of gender and transsexuality. The organisation claims that transsexuality is innate and immutable: »Scientific research is convinced by now that the gender identity is determined before birth and cannot be changed after birth.« (ATME 2010: 51)[108] ATME e. V. argues that transsexuality occurs in all cultures and has done so at all times (ibid 2010a: 1; 2011b).[109] Spokeswomen of the association suggest that, »transsexual behaviour can also be observed [...] among animals« (ibid 2013: 51).[110]

Consequently, ATME e. V. refutes social constructionist or deconstructionist approaches to gender and, more specifically, transsexuality or any approach that suggests that transsexuality develops cumulatively. The organisation argues that the latter are either »nonsense« (ATME 2015b) or »ideological« (ibid 2010: 22 and 29). The association relies on the premises and (assumed) findings of neuroscientific research and research in human genetics instead, arguing that this type of research produces »scientific facts« (ibid 2013: 56).[111]

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108 | In a later report, ATME e. V. however claimed that gender identity »is not very suitable to describe the problems of transsexual people«. According to ATME e. V., »[t]ranssexuality is not about what you do, it's about who you are« (ATME 2012b: 5).

109 | While individuals who do not identify with the gender assigned at birth exist in other several other cultures, too, different societies offer different interpretive patterns and individuals develop different concepts of self, use different terms to describe themselves and experience historically-specific forms of discrimination and/or social recognition and appreciation.

110 | For an analysis and critique of applying human concepts of gender on animals, see Ebeling 2011.

111 | However, neuroscientific research and research in human genetics are informed by gender discourses circulating in society. With few exceptions (cf. Luders et al. 2009), studies on the aetiology of transsexuality to date in the abovementioned fields for example share the assumptions that cis is normal and transsexuality pathological. This notion is mirrored in frequently used attributes such as ›healthy‹ for men and women whose gender identity appear to follow from male and female genitalia (see, e. g., Hulshoff Pol et al. 2006) and by referring to transsexuality as a ›gender identity disorder‹ (see, e. g. Kruijver et al. 2000; Bentz et al. 2007; Bentz et al. 2008; Bauer 2010).

Results of neuro-biological studies to date do not allow firm conclusions to be drawn (Nieder/Jordan/Richter-Appelt 2011: 205; Cubasch undated) and at best allow to generate hypotheses (Nieder/Jordan/Richter-Appelt 2011: 216). Nevertheless, ATME e. V. interprets the findings as though they either provide evidence for a biological basis of transsexuality (ATME 2009: 9; 2010: 15; 2011b; 2013: 6) or at the very least render such a conclusion highly probable (ATME/MUT[112] 2008: 7).[113]

ATME e. V. adopts assumptions on gender as given and polarised entities as they feature in several studies on transsexuality in neuroendocrinology and human genetics (cf. ATME 2013). Based on the premise that prenatal hormonal processes configure male and female brains differently (ATME 2013: 24) in conjunction with the assumption that »transsexual women are really women, because they have an anatomically female brain« (ibid 2012a: 3), ATME e. V. defines transsexual individuals as people whose genitalia and chromosomes do not correspond with their »brain sex« (ibid: 2011a).

According to ATME e. V., gender consists of multiple factors, such as gonads, genitalia, hormones and the brain. While an arbitrarily chosen physical feature such as e. g. genitalia may indicate a person's gender, it is according to ATME e. V. the brain that determines an individual's gender identity (ATME/MUT 2008: 2; ATME 2009: 32; 2010: 51; 2011b). Hence, »[a] transsexual women who was born as a girl with a penis and testicles is a woman. A transsexual man who was born with a uterus and a vagina is a man.« (ATME 2009: 32)

Since the development is according to ATME e. V. based on biological factors that are either invisible or at least not immediately visible, the association

112 | ATME e. V. emerged from the group »*Menschenrecht und Geschlecht*« (Human Right and Transsexuality; MUT) (ATME 2009: 32).

113 | For example, neuroendocrine studies by Zhou et al. (1995) and Kruijver et al. (2000) suggest that the volume of transsexual women's central subdivision of the bed nucleus of the stria terminalis (BSTc) (Zhou et al. 1995) or the number of somatostatin-expressing neurons in the BSTc (Kruijver et al. 2000), respectively, are equal to those of ciswomen rather than men's. Both research teams interpreted their findings as supportive of the hypothesis that transsexuality develops in interaction between the developing prenatal brain and sex hormones (Zhou et al. 1995: 70; Kruijver et al. 2000). Research from within the discipline and by sexologists alike have challenged these studies. Chung, De Vries and Swaab's neuroendocrine study for instance generated different findings. The researchers suggest that sex dimorphism in the BSTc begins at puberty (Chung/De Vries/Swaab 2002: 1031) and may also be shaped by experience (ibid: 1032). Sigusch questioned the abovementioned studies for methodological reasons (cf. Sigusch 2007: 352). Regardless of these critical interventions, ATME e. V. insists that the initially mentioned studies indicate a neuro-biological cause of transsexuality (ATME 2012a: 3; see also 2013: 6; 43; 2010: 15).

claims that only the individual itself can impart reliable information on his or her gender identity (ibid; 2011; 2011b; 2013: 5). ATME e. V. argues that while gender assignments based on the inspection of the genitalia at the time of birth frequently apply, in a case of transsexuality, however, a gender assignment based on genitalia at birth leads to physical and emotional distress and violates a person's dignity (ibid 2010: 82 f.; 2011; 2011c: 25; 2012: 47 f.).

While ATME e. V. does not consistently subsume transsexuality under intersexuality, there are three indicators suggesting that the organisation toys with such a classification. First and based on the assumption that the brain develops in another direction than e. g. the genitalia, ATME e. V. assumes that there is a somatic cause of transsexuality that causes distress (ibid 2012a: 22). Second, in its report to the WHO in 2012 and its compendium on the development of transsexuality in 2013, ATME e. V. quotes researchers who argue that transsexuality is a form of intersexuality (ibid: 14; 2013: 53), without however commenting on this assumption. Finally, ATME e. V. tentatively suggests that, »[i]n all likelihood, transsexuality is a form of intersexuality« (ibid 2010: 82) and that, »[t]hat transsexuality is a natural sex variation« (ibid 2015c).

However, in other instances, ATME e. V. distinguishes between transsexuality and intersexuality. This distinction occurs in the 2012 report against reparative therapies in children featuring gender expressions and identities that are conventionally associated with the other of the two socially accepted genders (ibid 2012: 14). The same applies to ATME's second UPR human rights report in 2012: »But in contrast to intersex people transsexual people are sexual normvariances [sic!] whose variation is considered as being outside the measurability of sex, along the following lines: Those who aren't able to prove who they are, are people who only have ›subjective feelings‹.« (Ibid 2012b: 1; cf. ibid 2015c)

ATME e. V. frames transsexuality as a pathological condition by invoking the concept of the ›wrong body‹, by suggesting classifying transsexuality as a somatic disorder and suggesting that the distress requires treatment. The organisation describes a »transsexual woman [...] [as] a woman from birth on and a transsexual man [...] [as] a man from birth an [sic!] – just born with the wrong gonads« (ibid 2010: 51). ATME e. V. suggests to create a somatic classification Q 57.0 in the ICD or to subsume transsexuality under »congenital dysplasia, deformities and chromosomal anomalies« (ibid 2009: 30; 2010: 84). Finally, ATME e. V. argues that transsexual individuals' distress can only be mitigated by »adapting as far as medically possible the deviating body parts and organs to the real gender« (ibid 2012a: 22).

At the same time, ATME e. V. vehemently opposes the psychopathologisation of transsexuality. The organisation holds that so far there is no scientific evidence for considering transsexuality a mental disorder (ibid 2010: 65; 2012a: 12, 18). Drawing upon Seikowski's representative study on trans individuals' need for psychotherapy, ATME e. V. suggests that transsexual individuals are

no more »mentally disturbed« than anybody else (ibid 2012a: 15). ATME e. V. argues that classifying transsexuality as a gender identity disorder violates human dignity (ibid 2010: 44; 2011; 2012a: 17 f.). Therefore, the organisation demands removing the diagnosis transsexuality (F64.0) as a psychiatric disorder from the ICD and the diagnosis ›gender identity disorders‹ from the DSM (ibid 2008: 1; 2011b; 2011c; 2010: 84).

ATME e. V. paints a rather homogeneous picture of transsexuality. The organisation for example generalises the need for surgery. This assumption is mirrored in the following statement: »German health insurance funds and insurance companies often refuse to pay for the costs of treatments otherwise provisioned in the Standards of Treating and Assessing Transsexuals. This contradicts scientific knowledge regarding the necessity of sex alignment procedures in cases of transsexuality.« (Ibid 2010: 63)

ATME e. V. also subscribes to a policy of ›passing‹. The association suggests that all medical and surgical measures possible should be considered necessary interventions. ATME e. V. argues that the head, here meaning the face, hair, voice and throat, constitute the most significant sex characteristics in everyday life.[114] ATME e. V. holds that transsexual individuals' distress caused by living ›in the wrong body‹ and social discrimination against transsexual individuals can only be mitigated or prevented by granting access to all possible measures (ibid 2010: 68 f.). As an effect of this policy, individuals are left to fend for themselves, who for various reasons cannot, or do not want to undergo medical and/or surgical treatment.

In addition, ATME e. V.'s concept is biased towards white transsexual individuals as evidenced when ATME e. V. conflates transphobia with racism. ATME e. V. claims that the discrimination against transsexual individuals is the »most widespread global form of racism of our days« (ibid: 15) and suggests that, »this racism is associated with a sort of worldwide ›race ideology‹ that isn't propagandized by National Socialists, but rather is spread worldwide by unscrupulous doctors and psychologists. To view humans as inferior, mentally disordered or non-intelligent due to their physical otherness is racism of the worst kind.« (Ibid: 15 f.) While racism and transphobia are based on the creation of differences and ascriptions in order to legitimate the unequal distribution of resources and violence, they are different relations of power with differ-

114 | According to the relevant guidelines generated by the MDS in 2009, statutory health insurances do not cover facelifts, rhinoplasties and liposuction, because they are considered cosmetic interventions (MDS 2009: 14). In exceptional cases, statutory health insurances may take on the costs of phonosurgery prior to the ›real life test‹ (ibid: 29). Although the MDS holds that a chondrolaryngoplasty is primarily a cosmetic intervention, it does not entirely rule out that the statutory health insurance cover the costs of such an intervention in cases of female-to-male transsexuality (ibid: 30).

ent historically-specific manifestations (de Silva 2014: 162). The conflation of transphobia and racism renders invisible transsexual individuals whose lives are affected by transphobia *and* racism.

The gender binary does not seem to be the declared target of ATME e. V. Rather, the association focuses on having transsexuality recognised as a biologically based, innate and unalterable condition as a means to end human rights violations and discrimination against transsexual individuals (ATME 2010: 69 f.; 2012a: 22). ATME e. V. identifies sexology, legal and medical regulations, practices and classifications and the premises they build upon, the media, Christianity and its institutions and public opinion and discrimination in education and at work as the prime sources of discrimination against transsexual individuals (ibid 2010: 17-36).

3.2.3 Trans perspectives on legal rules, procedures and practices and psycho-medical premises, procedures and practices

Despite representing very different concepts of gender and trans, or transsexuality, respectively, the trans organisations operating on a national scale and the local networks mentioned earlier on voice considerable dissatisfaction with the provisions and procedures under the Transsexual Act and psycho-medical premises and procedures. The issues that contributed to, and in part continue to fuel this discontent will be addressed in the following.

Trans perspectives on legal rules, procedures and practices

Since their very foundation, trans organisations have voiced grievances over four sets of issues related to legal rules, procedures and practices. These are human rights breaches entailed in the Transsexual Act, procedures laid out in its individual provisions and the implementation, concepts of transsexuality that inform the wording and practices that are not necessarily covered by the Act but nevertheless occur to the detriment of trans individuals.

Trans organisations hold that several rules of the Transsexual Act violate human rights, which are supposed to be protected by a number of fundamental rights laid down in the Basic Law. The rules of the TSG at issue are the provisions that define the preconditions for submitting an application for a change of first names (s. 1[1] TSG)[115] and gender status (ss. 8[1]1-4 TSG), and the conditions that lead to the nullity of a change of first names (ss. 7[1]1-2 TSG) as well

115 | Section 1(1)3 TSG which provides that an applicant needs to be at least 25 years of age for a change of first names was successfully challenged in 1993. The Federal Constitutional Court ruled that this particular provision is incompatible with Art. 3(1) GG and void (BVerfG 1993: 112).

as the use of expert reports in s. 4(3) TSG.[116] The basic rights that these rules are considered to contravene in various constellations are the inviolability of a person's dignity guaranteed by Art. 1(1) GG, the right to the free development of one's personality (Art. 2[1] GG), the right to life and physical integrity (Art. 2[2] GG), the equality of men and women (Art. 3[2] GG), the right not to be discriminated against on the basis of gender (Art. 3[3] GG) and the right to state protection of marriage and family (Art. 6[1] GG).

After defining the gender of individuals who may apply under the Act, s. 1(1)1 TSG specifies the scope of individuals entitled to apply under the Act. The rule includes German citizens according to the Basic Law, stateless or homeless foreigners with common residency or persons entitled to asylum or foreign refugees with a place of residence in the area of the validity of the law. Trans organisations critically point out to the constitutionally problematic exclusion of transsexual refugees from the provisions under the Transsexual Act. The latter lose their status as refugees as soon as the conditions apply for a return to the home country, regardless of whether the respective individual, who may thereafter have obtained exceptional leave to remain is in the process of transitioning medically and surgically or not. The activist Alter argues that this situation is incommensurate with human rights (Alter 2007).[117]

Sections 7(1)1 and 7(1)2 TSG and s. 8(1)3 TSG are among the provisions of the Act that either regulate the conditions under which the decision to change first names becomes invalid (ss. 7[1]1-2 TSG) or the preconditions for a change of gender status, respectively (s. 8[1]3 TSG). Section 7(1)1 TSG rules that the decision which led to the applicant's change of first names is reversed when a child is born to the applicant three hundred and two days after the decision to change the first names has entered into effect, starting with the day of the child's birth. The same applies when the applicant's parentage of a child has been recognised or declared by a court after the same period of time, beginning with the recognition or the legal effect of the declaration (s. 7[1]2 TSG).

116 | In the meantime, the Federal Constitutional Court declared several of the provisions of the Transsexual Act unconstitutional and either void or inapplicable. While the Federal Constitutional Court decisions will be pointed out to in the footnotes in this section, the following chapter will deal with the cases in more detail.

117 | On 18 July 2006, the Federal Constitutional Court ruled that s. 1(1)1 TSG contravenes the non-discrimination precept (Art. 3[1] GG) in combination with the basic right to the free development of one's personality (Art. 2[1] in conjunction with Art. 1[1] GG), when it excludes foreign transsexual individuals who are legally and not only temporarily staying in Germany from the right to apply for a change of first names and gender status according to s. 8(1)1 TSG, provided that their respective right of residence does not have comparable regulations (BVerfG 2007: 14).

As mentioned in the systematic outline of the Transsexual Act, s. 8(1)3 TSG rules that a court declares the applicant a member of the ›other‹ gender on application of a person, provided he or she is permanently sterile. Trans organisations oppose these provisions, arguing that the right to procreate or to bear children is a human right (ATME 2010: 55; TransMann 2001) and that forcing individuals to undergo sterilisation violates the right to health (ATME 2009a: 9; 2010: 53).[118]

Sections 7(1)3 TSG and 8(1)2 TSG determine further reasons for revoking a decision to change first names (s. 7[1]3 TSG) or define prerequisites for a revision of gender status, respectively, that are considered to infringe upon constitutionally guaranteed privacy rights. Section 7(1)3 TSG specifies that the court decision to grant the applicant's change of first names becomes invalid when he or she marries.[119] Section 8(1)2 TSG provides that the court declare

118 | ATME e. V. attributes the sterility requirement outlined in s. 8(1)3 TSG to remnants of National Socialist policies in the Federal Republic of Germany. In its human rights report *Transsexual People in Germany/Transsexuelle Menschen in Deutschland*, ATME e. V. notes with reference to the verdicts of the National Socialist Hereditary Health Courts (*Erbgesundheitsgerichte*): »In this context, it is nearly blood-curdling that the German Transsexuals Act also arose under the influence of the German Society for Sex Research and there exists to this day transsexuals who were force sterilized, similar to the »law for the prevention of Genetically Diseased Offspring [*Gesetz zur Verhütung erbkranken Nachwuchses*; insertion mine] from 1933. In this way, Nazi ideologies live on to this day in Germany, especially with regard to the Transsexuals Act and the medical treatment of transsexual people.« (ATME 2010: 24)
However, the parliamentary debate on the Transsexual Bill suggests that the legislator was more concerned about maintaining the link between a person's sex/gender and reproductive function. In its response to the parliamentary enquiry by Schenk and the parliamentary faction of the Democratic Socialist Party (*Partei des Demokratischen Sozialismus*; PDS; since 16 June 2007 *DIE LINKE*; The Left) on 31 July 2002, the then governing Christian Democratic and Free Democratic Party coalition reiterated this »cultural dogma« (Alter 2007) that women may not procreate and men may not bear children (Deutscher Bundestag 2002: 7). Moreover, the sterility prerequisite was also demanded of transsexual individuals in Sweden, which suggests that compulsory sterilisation is rather an effect of a gender regime than National Socialist ideology. This does however not mean that it renders the prerequisite less of a breach of human rights.

119 | On 06 Dec. 2005, the Federal Constitutional Court declared s. 7(1)3 TSG inapplicable, since it violates a homosexual transsexual individual's right to a name, i. e. a basic right that is protected under Art. 2(1) GG in conjunction with Art. 1(1) GG and constitutionally guaranteed privacy rights as long as the respective individual is barred from entering a legally secured partnership without losing the first name, that corresponds with his or her own sense of gender belonging (BVerfG 2006: 102).

the applicant a member of the ›other‹ gender on the condition that he or she is unmarried.[120]

Trans organisations argue that these provisions force transsexual individuals to either forgo the right to enter (s. 7[1]3 TSG) or to maintain a marriage (s. 8[1]3 TSG), respectively, in return for the constitutionally protected rights under Art. 1(1) GG in conjunction with Art. 2(1) GG or vice versa (Alter 2000; 2007). Moreover, trans organisations suggest that s. 8(1)3 TSG conflicts with ss. 1565-1568 BGB, which define the conditions for getting divorced. A divorce is premised upon the breakdown of a marital relationship. Hence, transsexual individuals and their respective partners wishing to continue to live together do not fulfil the conditions for a divorce (ibid 2007; MUT 2007: 8).

Section 8(1)4 TSG requires of the applicant to have undergone a surgical intervention on his or her external sex characteristics to the effect of having clearly approximated the outer appearance of the ›other‹ gender.[121] As in the case of s. 8(1)3 TSG, the legislator did not define the concrete measures required to fulfil the prerequisites for a formal change of gender status. However, neither of these conditions for a revision of gender status can be met without invasive means, unless the applicant is for other reasons unable to procreate or bear children.

Trans organisations oppose to these requirements. They argue that ss. 8(1)3 TSG and 8(1)4 TSG violate a person's dignity and physical integrity and consequently contravene Articles 2(1) and (2) GG in conjunction with s. 1(1) GG (Alter 2000; 2007; TransMann 2001: 6; ATME 2010: 59). The organisations hold that nobody but the person concerned can determine, whether genital surgery is necessary (TransMann 2001; Ghattas 2009). In addition and considering the medical risks and the risk of poor surgical results, which contrary to medical rhetoric affect transmen and transwomen alike (TransMann 2000: 6; Alter 2000), the organisations hold that the legislator should not be entitled to render surgery mandatory for a revision of gender status (TransMann 2001).

Trans organisations also criticise the narrow focus on surgery in general. TransMann e.V. argues that transgender is too complex a phenomenon than that it could be reduced to measures that modify an individual's body (TransMann 2001). In particular, the dgti e.V., ATME e.V. and TransMann e.V. criticise the focus on genital surgery, especially since genitalia are usually not discernible in public (Alter 2007; ATME 2009a: 7; TransMann 2001). Finally,

120 | This particular section may no longer be applied. On 27 May 2008, the Federal Constitutional Court decided that s. 8(1)2 TSG was incompatible with Art. 2(1) GG in conjunction with Art. 1(1) GG and Art. 6 (1) GG (BVerfG 2008: 312).

121 | On 11 Jan. 2011, the Federal Constitutional Court ruled that to require sterility and surgical measures of a person who wishes to enter a registered life partnership violates Art. 2(1) and Art. 2(2) GG in conjunction with Art. 1 GG (BVerfG 2011).

the dgti e. V. suggests that the requirement of genital surgery violates Art. 3(1) GG, since transwomen and transmen are not treated alike in this respect (Alter 2000).[122]

Section 4(3) TSG rules that the court may only grant an application according to s.1 TSG after it has obtained reports by two experts who are, »based on their training and their professional experience sufficiently familiar with the specific problems of transsexualism«. According to trans organisations, a heteronomous assignment to a gender violates the constitutionally protected dignity of a person (Art. 1[1] GG) and his or her right to develop his or her personality freely (Art. 2 [1] GG), since gender identity is a part of an individual's personality (ATME 2010: 50; TransMann 2001).[123]

Trans organisations also criticise the procedures defined in the Transsexual Act and the deficient implementation. The provisions at issue here are in particular the parties involved in the proceedings (s. 3[2] TSG), the court proceedings (ss. 4[1] and [3] TSG) and the prohibition of disclosure (s. 5[1] TSG).

Section 3(2) TSG determines that the applicant (s. 3[2]1) and the representative of the public interest (s. 3[2]2)[124] are the only parties involved in the proceedings. Trans organisations hold that the representative of the public interest is not only dispensable, but unnecessarily contributes to delays in the court proceedings (Alter 2007).

Section 4(1) TSG rules that proceedings under the Transsexual Act follow the regulations provided for family matters and non-contentious jurisdiction.

122 | Until the Federal Constitutional Court ruled that the mandatory surgery provision was unconstitutional, transwomen and transmen were treated differently for three reasons. First, and as pointed out in chapter 2.3.3, the legislator at the time wanted to avoid homosexual marriages and genital sex among male-bodied individuals. Second, the surgical construction of phalloplasties was considered insufficiently developed. Third and partly due to the abovementioned reasons, transmen successfully litigated against mandatory genital surgery (see chapter 3.3.4).

123 | As the trans organisations note, this provision has additional effects. First, it creates a difference between ›normal‹ individuals and transsexual individuals, since the latter are required to have their gender identity approved of by psychologists (Ghattas 2009: 2) instead of leaving it up to transsexual individuals themselves to decide which gender they identify with (TransMann 2001). Second, law and medicine have become amalgamated in practice. While it is possible to obtain a change of first names without having to undergo medical and surgical treatment, experts frequently do not write supportive reports, if the individual signalises that he or she does not want to transition physically (ibid). Furthermore, experts have transformed a procedure that was initially devised to facilitate a transition into a »steeplechase« (ibid).

124 | Based on statutory instruments, the governments of the *Länder* determine the representative of the public interest (s. 3[3] TSG).

Hence, individuals who apply for a change of first names and/or a revision of gender status are required to pay for the court proceedings and to take on the costs for the expert reports. Trans organisations object to the facts that a court procedure is required to this end, especially since these entries were initially based on a heteronomous administrative act and that, depending on the respective trans individual's income,[125] either the applicant or the taxpayers have to pay for these costs (ibid; TransMann 2001; ATME 2010: 48).

As mentioned earlier on, s. 4(3) TSG rules that the court proceedings rely on expert reports. In addition to considering this provision unconstitutional and a source of considerable delay, trans organisations argue that transsexuality cannot be diagnosed, albeit for different reasons. The dgti e. V., for example, argues that transsexuality cannot be diagnosed, because it is not a disease. Rather, transsexuality deviates from a standardised concept of human being (Alter 2008). Hence, if transsexuality cannot be diagnosed, examinations by experts do not make sense (Alter 2000). In line with its premises that in the case of transsexuality, a person's sex cannot be easily measured and that, »[o]ur knowledge on variations of sex tells us that transsexual individuals exist in nature« (ATME 2012a: 3), ATME e. V. argues that transsexual individuals' statements on behalf of themselves are true (ibid).

Section 5 TSG provides for the prohibition of disclosure, which was devised to protect the privacy rights of transsexual individuals (s. 5[1] TSG) as well as their next of kin (s. 5[2] and [3] TSG). Section 5(1) TSG rules that if the decision that changed the applicant's first names is legally binding, it is prohibited to disclose or conduct research on the applicant's first names at the time of the decision, unless special reasons pertaining to the public interest or legal matters require this information. Trans organisations criticise that official notices, such as e. g. election voting cards, are frequently addressed to the respective individual, using the new first names and the address of the official gender status. The dgti e. V., ATME e. V. and its predecessor MUT claim that this and similar procedures are impermissible and discriminate against transsexual individuals (dgti 2007; ATME/MUT 2008: 4).[126]

Considerable dissatisfaction also arises with the wording of the Act. Trans organisations in particular object to the narrow focus of the Act, the concept of transsexuality it endorses and the imprecise, if not unanswerable questions they pose for the experts in ss. 1(1) and 1(1)2 TSG.

125 | Individuals with a low income may apply for legal aid.

126 | On 15 Aug. 1996, the Federal Constitutional Court ruled that Art. 2(1) GG in conjunction with Art. 1(1) GG demands that the gender-specific address that correlates with a person's first names be used with individuals who have changed their first names according to the ›small solution‹ (BVerfG 1997: 1632).

Section 1(1)2 TSG rules that the first names of a person who due to his or her »transsexual imprinting« no longer identifies with the gender recorded in the birth entry but with the ›other‹ gender and who has since three years felt compelled to live according to his or her ideas are to be changed on application to the court, if it can be expected with a high degree of probability that the sense of belonging to the ›other‹ gender will not change anymore.[127]

Trans organisations criticise the narrow scope of the Transsexual Act. The formulation »belonging to the other gender« only makes sense against the background of the gender binary. Hence, an individual who does not identify with the gender in the birth entry nor with the other of the two legitimised options or with both of them is excluded from the provisions of the Transsexual Act (Alter 2007).

Discontent with the concept of transsexuality is threefold. First, trans organisations reject the concept of ›transsexual imprinting‹. The latter suggests that extraneous influences cause transsexuality. As the dgti e. V. and ATME e. V. suggest, upbringing or any other extraneous influence could so far not be substantiated (Alter 2007; ATME 2009: 10).

Second, the section mirrors the legislator's assumption that it is possible to diagnose transsexuality. The activist Alter argues that all attempts to establish general criteria for transsexuality have so far failed. As mentioned earlier on, she suggests that transsexuality is a self-diagnosis, which can only be supported by a differential diagnosis (Alter 2007).

Third, the Transsexual Act leaves it up to experts other than the applicant him- or herself to decide whether a person is transsexual or not, a procedure ATME e. V. considers demeaning and humiliating (ATME 2011c: 20). This however means that individuals who do not fulfil the criteria listed under the diagnosis ›transsexualism‹ (F 64.0), such as e. g. those who reject genital surgery, can be denied a change of first names and gender status (Alter 2007).

Trans organisations also consider formulations, such as »who has since three years been compelled to live according to his or her ideas« and »with a high degree of probability« problematic. Both formulations are imprecise.

127 | Three questions can be derived from these requirements, which experts are expected to answer in their reports on an individual who has applied for a change of first names according to s. 1 TSG. The first question enquires into the applicant's gender identity, more specifically, whether the applicant is transsexual. The second question asks whether the applicant has felt compelled to live according to the ›other‹ gender for three years. The third question asks of the expert to predict whether the applicant's sense of belonging to the ›other‹ gender will with a high degree of probability not change anymore (MDS 2009: 11; Alter 2008a).

While the former gives experts the opportunity to define the criteria for the ›compulsion‹,[128] the latter cannot be measured objectively (ibid).

Trans organisations also voice dissatisfaction with legal practices that exceed the provisions of the Act. Trans organisations particularly criticise the process of selecting experts as well as procedural errors and discrimination at court. With regard to the selection of experts, ATME e. V. states that, »a judge must simply be satisfied that a person is suitable to be an expert. A special skill or training is not necessary.« (ATME 2011c: 10)

The dgti e. V. points out to a number of procedural errors and discriminatory practices at court. Although e. g. s. 4(3) TSG specifies that experts are required to work independently of each other, the dgti e. V. observed that some judges order reports consecutively instead of simultaneously and send the first report to the second expert (Alter 2008a). In other instances, judges make judgmental comments on the applicant's gender performance. Frequently, trans individuals who have obtained a change of first names are addressed incorrectly on the grounds that the experienced gender is not yet legally valid (ibid 2000).

Trans perspectives on psycho-medical premises, procedures and practices

Trans organisations' concepts of trans or transsexuality, respectively, and notions of good medical practices frequently collide with psycho-medical assumptions, procedures and practices. Despite considerable differences among trans organisations, they object to (psycho)pathologising psycho-medical premises, heteronomous definitions and procedures and practices perceived to be degrading. These issues will be addressed, using the German Standards, the most recent MDS instructions on transsexuality and practices performed by psycho-medical experts in the assessment process according to ss. 1(1)1 TSG, 8(1)3-8(1)4 TSG.

The German Standards and the MDS instructions classify transsexuality as a »special form of gender identity disorder« (Becker et al. 1997: 147) or simply »a gender identity disorder« (MDS 2009: 3). In addition, both guidelines assume that transsexual individuals feature additional psychopathological »abnormalities« (Becker et al. 1997: 149; MDS 2009: 8). Unlike the German Standards, however, the MDS instructions specify that psychiatric comorbidities need to be reassessed when dealing with »transsexual disorders« (MDS 2009: 8).

The classification of transsexuality as a gender identity disorder is not acceptable to trans organisations who consider trans or transsexuality as one of many possible ways of expressing gender (cf. TrIQ undated a: 11) or a way of

128 | Some experts have come to interpret this particular formulation to the effect that the transsexual individual is required to have lived according to the conventions of the ›other‹ gender for three years (Alter 2008a).

being human (cf. dgti 1998: 1; TransMann 2001). The same applies to organisations, such as ATME e. V., who understand transsexuality to be a somatic disorder (ATME 2010: 51). As ATME e. V. suggests, »[t]o foist a psychic disorder on a mentally healthy transsexual individual, because the occurrence of transsexuality does not fit into his world view is injustice« (ATME 2009a: 9).

Unlike the German Standards, the MDS instructions formally adopt a less homogenising concept of transsexuality. While the definitions of transsexuality initially resemble each other,[129] the MDS instructions differentiate between ›primary‹ and ›secondary‹ transsexualism, of which the former signifies a gender identity disorder beginning in childhood or adolescence, while the latter emerges in early adulthood to middle aged individuals (MDS 2009: 7).

Despite this slightly broader concept of transsexuality, the concept endorsed by the MDS is incompatible with a concept of gender fluidity (cf. TGNB 2006a), a variable construction (cf. dgti undated f) or a concept of transsexuality as an innate und immutable condition (cf. ATME 2010: 51). Moreover, the MDS instructions continue to distinguish between transsexualism and transvestitism. While TransMann e. V. suggests that this distinction cannot be maintained (TransMann 2004a), ATME e. V. implicitly insists on such a distinction (ATME 2015c).

Like the German Standards, the MDS instructions reinforce psycho-medical surveillance and underline the role of (sole) psycho-medical expertise. Couched in paternalism, the MDS instructions demand that any somatic intervention needs to be preceded by psychiatric or psychotherapeutic treatment (MDS 2009: 9). The MDS instructions have in common with the German Standards that they demand a fixed schedule for psychological observation and a ›real life test‹ of at least twelve months prior to hormone treatment (ibid 18) and eighteen months before surgical measures may be undertaken (ibid 23).

Against the background of a radical claim to self-determination and challenges to (sole) psycho-medical expertise, all nation-wide trans organisations and the local networks mentioned earlier on oppose these specifications. TransMann e. V. and the dgti e. V. suggest that psychological support and living according to the respective gender role might be helpful in individual cases. However, they hold that neither a psychotherapy, nor a ›real life test‹ may be forced upon transsexual individuals (Alter 1998; TransMann 2004a). Similarly, ATME

129 | The MDS instructions define transsexualism as follows: »The permanent certainty of belonging to the biologically other sex, the rejection of the role expectations that are associated with the biological sex and the pressing desire to live socially and legally recognised in the desired gender characterises transsexualism. The necessity to align the physical appearance to the gender identity as far as possible, using hormonal and surgical measures, results from a rejection of the characteristics of the innate sex to various degrees.« (MDS 2009: 7)

e. V. rejects psycho-medical assessments (ATME 2010: 82 f.),[130] and a ›real life test‹ (cf. ibid 2010: 62).[131]

While the MDS instructions, unlike the German Standards, formally appear to account for individualised approaches to medical and surgical interventions, the approach has little in common with demands brought forward by trans organisations. Trans organisations demand not to indiscriminately expect certain medical or surgical measures to be undertaken and to grant medical or surgical interventions to trans individuals who need them (cf. TransMann 2004a). While the guidelines claim that the expert assessment is foremost informed by an appropriate case-sensitive assessment (MDS 2009: 17), the assessment procedure becomes more complicated for individuals who deviate from the standard route. The following statement on bilateral mastectomies for transsexual men prior to the ›real life test‹ attests to this fact: »In special exceptional cases the bilateral mastectomy may for instance take place in advance in order to facilitate the real life test. This needs to be substantiated by an expert with reference to medical circumstances.« (Ibid 24)

Trans organisations also criticise malpractices that occur during the expert assessment period according to s. 4(3) TSG. Among these are e. g. physical examinations and the photographic documentation of the applicant's genitalia,[132] procedures that because the genital status is irrelevant for a change of first names according to s. 1 TSG, are grossly inappropriate. Trans organisations claim that these practices encroach upon trans individuals' privacy and violate Art. 1(1) GG (Alter 2008a; TransMann 2001).

Trans organisations report that these practices also occur during expert assessments for a revision of gender status. While TransMann e. V. suggests that the verification that surgery has taken place should not be performed in front of medical students (TransMann 2001), MUT demands that no such verification should take place at all (MUT 2007: 6 f.). In addition, trans organisations object to enquiries into an applicant's sexual practices and orientation in the

130 | ATME e. V. argues that it is so far »not possible to measure a person's gender identity. […] Only each individual person is capable of determining the gender they belong to, their gender identity and the sex of the soul.« (ATME 2010: 82 f.)

131 | ATME e. V. considers a mandatory ›real life test‹ as a means of diagnostics cruel, inhumane and degrading. The means that render a ›real life test‹ possible, such as e. g. epilation for transsexual women are according to ATME e. V. frequently withheld (ATME 2010: 61), hence forcing a transsexual woman »to make a fool of herself« (ATME/MUT 2008: 6). At the same time, ATME e. V. suggests that it is necessary for transsexual individuals to gain sufficient self-awareness about their gender identities. However, this self-awareness ought to be achieved in a protected environment (ibid; ATME 2010: 62).

132 | See ATME 2011c for examples of humiliating and inappropriate conduct during assessment procedures.

assessment situation for a change of first names and a revision of gender status and subjection to experts' normative understandings of sexuality, masculinity or femininity (Alter 2000; 2007).[133]

3.2.4 Trans organising for social change

In the face of discrimination, all trans organisations mentioned earlier on strive for social change. Drawing upon the by-laws of trans organisations in Germany with a decidedly political agenda and using examples of their respective activities in the areas of support and outreach, information and education, and lobbying and networking, this subchapter addresses goals and means to achieve trans law reform, human rights and equality.

Support and outreach

With exception of the TGNB, the trans organisations mentioned above define support and outreach as one of three major areas of activity in their respective by-laws. The dgti e. V. states in ss. 2.4 and 2.5 of its by-laws that it intends to offer counselling services, assist support groups and promote training programmes for volunteers (dgti 1998: 1f.). As the preamble of its by-laws suggests, the organisation initially focussed on re(integrating) unemployed trans individuals into the labour process in order to counter the danger of downward mobility, which was at the time, and frequently continues to be, linked to a social change from one gender to another (ibid: 1).

As mentioned earlier on, TransMann e. V. was for lack of an infrastructure for transmen initially founded to establish regulars' tables in order to create a space for transmen to exchange experiences and to discuss aims and problems (TransMann undated). However, as the by-laws of 2004 suggest, TransMann e. V. soon aimed to extend its activities in the area of support and outreach. Sections 2(8) and 2(9) of its by-laws state that TransMann e. V. is committed to providing a counselling centre (s. 2[9]), assisting local transmen's groups and trans groups in general as well as organising conferences for trans individuals and anybody interested in trans persons (s. 2[9]) (TransMann 2004). Like the dgti e. V. (dgti 1998: 1), TransMann e. V. offers these support and outreach services to parents, relatives, partners and friends of trans individuals (TransMann undated).

In close collaboration with inbetween / AB Queer e. V. and the TGNB, TrIQ e. V. was among other things designed to offer professional counselling services in the areas of transgender, intersex and queer (TrIQ 2009b). As the local network states in its by-laws, it e. g. aims at supporting trans- and intergender as

133 | The dgti e. V. for instance reports that trans individuals have been denied a change of first names, because they got married and had children (Alter 2008a).

well as queer individuals in personal and social crises (s. 2[3]) and campaigning for health education among the aforementioned target groups (TrIQ 2007: 1).

So far, the organisations mentioned above have initiated and maintained a number of activities in the areas of support and outreach. Among these are peer- and volunteer-based counselling services for adolescent and adult trans individuals, peers, partners and parents of children with an unusual gender performance;[134] counselling on welfare issues (TrIQ 2013); online and print brochures providing information on social, medical and legal aspects of a transition;[135] offering a space for groups that deal with issues, such as coming out (TransMann undated b) or health promotion (TrIQ 2009b); hosting internet forums,[136] conferences, such as the trans conference (*Transtagung*) in Berlin; emergency hotlines and organising hospital visitations (TransMann undated b; ibid 2007).

While support and outreach are not the major area of ATME e. V.'s activities, ss. 2(1) and 2(2) of the by-laws suggest that the organisation strives to support transsexual individuals in need of help as well as parents and partners encountering difficulties when dealing with transsexuality (ATME 2011a). Section 2(3) of ATME e. V.'s by-laws specifies that consulting services, the establishment of, and involvement in local and regional facilities for transsexual individuals and e. g. their respective parents as well as training and supervising consultants and moderators are among the major forms of support and outreach ATME e. V. aims to provide (ibid).[137]

While all trans organisations agree that trans individuals are discriminated against,[138] the organisations convey different images of trans or transsexual individuals, respectively. TrIQ e. V. e. g. also mirrors trans individuals as self-confident subjects, an attitude demonstrated in the motto of the 2012 trans conference in Berlin that was announced as *»Trans*? Selbstverständlich!«* (Trans? Of course!). The poster features a compass, which points to directions that summarise the main values and principles the organisers stand for: visibility, freedom, self-determination, pride, self-confidence, respect, security and acceptance (Trans*tagung undated). In contrast, ATME e. V. portrays transsexual individuals as victims, which becomes evident in s. 2(1) of the organisation's by-laws:

134 | See e. g. Alter undated; TrIQ undated b.

135 | See e. g. TransMann 2004a; ibid 2008.

136 | See e. g. dgti undated g.

137 | At the time of writing ATME e. V.'s website however does not indicate to which extent any of the envisaged activities have materialised so far.

138 | See, for instance, TGNB 2006; ATME 2011; TrIQ 2011a; dgti undated f: 2 f.; TransMann 2001.

The purpose of the association is to press for the rights of people [...] who are due to their physical or psychological features dependent on support, because they a) dislike themselves, b) live isolated lives for fear of discrimination, c) do not dare to defend themselves against human and civil rights violations, d) and do not have the courage to confide in other people. (ATME 2011a)

Information and education

All trans organisations mentioned in this chapter engage in the task of informing and educating the public on trans or issues related to trans, respectively. In the preamble of its by-laws, the dgti e. V. states its commitment to campaign »for more openness towards the own identity and to account for the diversity of human existence« (dgti 1998: 1). According to s. 2(3) of the by-laws, the association intends to collect and provide information on transidentity and intersexuality as a means to contribute to »a self-determined life of individuals with transidentity and intersexuality« (ibid).

Phrased almost identically, TransMann e. V. adds in s. 2(3) of its by-laws that it especially wishes to collect and disseminate knowledge on transmen (TransMann 2004: 10) with the goal of promoting the social visibility and acceptance of transmen (s. 2[4]). In another document, TransMann e. V. specifies the range of its planned activities and the means to achieve the abovementioned goal. The organisation intends to reach the general public, the media, the administration and courts, psychologists, physicians and health insurances, experts and clinics, using personal consultations, information meetings, training in schools, universities and hospitals, the internet, brochures, radio interviews and public appearances in newspapers and on TV (ibid undated b).

Sections 2(5) to 2(7) of TrIQ e. V.'s by-laws specify the declared aims in the areas of information and education of the local network. These foremost consist of counselling and providing information on trans- and intergender as well as on queer ways of life (s. 2[5]), advocating and providing information on the abovementioned phenomena (s. 2[6]) and campaigning »for the promotion of research that respects the concerns of the emancipatory transgender and / or intersex movements« (s. 2[7]; TrIQ 2007: 1).

Setting out from a concept of diversity and a critical interrogation of the gender binary as a supposedly natural given, the TGNB outlines in its by-laws that it strives to present the various ways of life and the situation of transgender individuals in society, using public relations instruments (s. 3[1]), workgroups on general and current topics (s. 3[4]), a website (s. 3[5]) and a mailing list (s. 3[6]) as means (TGNB 2006h).

Based on the premise that it is scientifically verified that, »individuals who are born with organs of the other gender represent a part of natural variants of human life« (s. 2[4]) and that transsexual individuals have an innate core gender identity that deviates from their physical properties (s. 2[5]), ATME e. V. de-

fines as its purpose in the field of education and education »to inform the public about transsexuality [and] to reduce widespread prejudices« (ATME 2011a). In s. 2(5) of its by-laws, ATME e. V. specifies as means public events, comments on relevant sexological, pedagogical, theological, medical, psychological, social, legal and political issues, collaboration with national and international organisations with similar aims, information tables, public relations, public action, producing and distributing material on medical and psychological treatment, such as sex reassignment surgery and hormone replacement therapy (ibid).

So far, trans organisations have pursued a number of activities in the area of information and education. Among these are e. g. extending and rendering available the archives of the exhibition 1-'0-1 intersex to the public (TrIQ 2013: 1), workshops on trans and intersex in employment that provide information and recommendations for best practices for employers (ibid 2011), brochures and seminars for, and open letters to physicians and psychologists,[139] lectures on legal issues pertaining to trans for law students,[140] the trans/inter lecture series organised by the TGNB in collaboration with TrIQ e. V. (TGNB 2006i), a TGNB workgroup called »Public Education and Counselling«, which is designed to deliver professional information on transgender and intersex issues for individuals working with trans or intersex persons, organisations or other groups (TGNB 2006e) and an online journal with research that discusses deconstructionist approaches and critically reflects upon the role research plays in the construction, normalisation and naturalisation of the gender binary (TGNB 2006g), online information for the general public on the Transsexual Act,[141] an online list of frequently asked questions on trans (TransMann 2004) and information tables on Christopher Street Day events (ibid 2007).

Lobbying and networking

Lobbying and networking constitute the third major area of activity. The by-laws of the dgti e. V. and TransMann e. V. either do not[142] or barely refer to political means and goals. In s. 2(7) of its by-laws, TransMann e. V. merely mentions that the organisation intends to operate as an advocacy group for transmen and individuals with a trans identity vis-à-vis political, medical, social and other public institutions (TransMann 2004).[143] Instead, TransMann e. V. expands on

139 | See e. g. TrIQ undated a; Alter 1998.

140 | See e. g. Alter 2007.

141 | See e. g. Alter 2000.

142 | See dgti 1998.

143 | However, the marginal space allocated to political activism in the by-laws does not correspond with the organisations' actual political involvement. This discrepancy can be explained by two factors. First, both organisations emerged in the context of a lacking large-scale infrastructure for trans individuals. Second, as TransMann e. V. notes,

its political goals and the means to achieve them in a separate programme. The organisation subsumes its goals under the terms ›emancipation‹, which it applies to transgender individuals, transmen and society as a whole,[144] ›self-determination‹[145] and ›integration‹,[146] using information and exchange among trans organisations and coalitions with e. g. organisations that work on health-related issues or lesbian and gay organisations and international solidarity with trans organisations as means (TransMann 2001).

In s. 3 of its by-laws, the TGNB defines as its purposes to create a network among transgender groups in Berlin in order to effectively engage with individual and social affairs relevant to trans individuals, render visible the shortcomings of the gender binary and reduce the pathologisation, criminalisation, discrimination against, and the exoticisation of trans individuals (TGNB 2006h). The TGNB defines as its means supporting individuals and groups that engage in activities in the area of transgender (s. 3[2]), a monthly plenary (s. 3[3]) and work groups on general and current topics (s. 3[4]), among others (ibid).

Similar to the TGNB, TrIQ e.V defines as one of its political goals and means advocating the reduction of pathologisation and exoticisation of transgender and intersex individuals and all other individuals whose gender or gender expression do not fulfil binary expectations as well as to counter the taboo on trans- and intergenderism (s. 2[2]). In addition, TrIQ e. V. strives to counter, reduce or mitigate the social effects of prejudices and discrimination with regard to the body, gender identity, gender expression and sexual orientation (s. 2[4]). Furthermore, the organisation intends to campaign for the promotion of national and international networks of transgender, intersex and queer groups and individuals (s. 2[9]). In s. 2(10) TrIQ e. V. also outlines as one of its aims

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the organisation did not accrue much importance to its by-laws, which is mirrored in its understanding of by-laws as a »quite meagre framework, which is far from being filled with life« (TransMann undated c).

144 | According to TransMann e. V., ›emancipation‹ of transgender individuals and transmen means to consider legal and medical options as rights without however being expected to fulfil dated gender norms or having to comprise basic rights, such as the freedom of personal development and respect for human dignity (TransMann 2001). Like the dgti e. V. (undated f), TransMann e. V. defines an emancipated society as one which accepts human diversity as its most valuable asset (TransMann 2001).

145 | TransMann e. V. demands self-determination in the context of a change of first names and gender status and the medical treatment process (TransMann 2001).

146 | TransMann e. V.'s concept of ›integration‹ e. g. encompasses the integration of gender expression into anti-discrimination laws, the integration of trans individuals into the queer community, the integration of trans issues into education, research, culture and the media and the acceptance of prosecution on the basis of gender identity and/or expression as a ground for granting asylum (TransMann 2001).

to campaign for equal rights for all individuals, regardless of their respective gender identity and sexual orientation and to work towards achieving equal opportunities (TrIQ 2007: 1).

Setting out from the premise that transsexuality is innate, ATME e. V. works towards forcing the Federal Republic of Germany to comply with ratified human rights treatises (ATME 2011). The organisation primarily compiles human rights reports (ibid) and uses public statements on human rights treatises, the law and regulations as a means (s. 3) (ibid 2011a).

Lobbying and networking: Prominent examples of networking activities for human rights and equality

Since the end of the 1990s, political interventions have increased substantially, and political strategies have diversified. Political initiatives involve individual organisations and *ad hoc* as well as rather stable coalitions[147] around clearly defined issues. Trans organisations in the Federal Republic of Germany have so far focused particularly on trans law reform and networking for human rights and equality. Prominent examples of the latter on various levels of politics will be briefly outlined, starting with international networking activities, before turning to three major suggestions for trans law reform from the late 1990s until the federal government unsuccessfully tried to table the Transsexual Law Reform Bill in 2009.

Trans networking and lobbying for human rights and equality covers local, regional, national and international levels. The TGNB, which itself originated as a local network, contributed to successful international networking and organising for human rights and equality. In the aftermath of the first European Transgender Council in Vienna in Nov. 2005, the TGNB established the workgroup »Networking«. The workgroup hosted the second TGEU conference in Berlin in 2008. Since then, the workgroup has focused on collaborating with

147 | Building coalitions around single issues have become a frequently chosen method of pressing for change for a number of reasons. First, coalitions frequently enable trans organisations to collaborate on a common issue without necessarily having to compromise their basic principles and standpoints. Second, the strategy of speaking in unison is more compatible with the operations of representative democracy. Third, since the heteronormative gender binary affects queer, trans and intersex individuals, albeit in different ways, broad coalitions allow for a larger number of individuals and organisations to intervene into institutionalised politics (cf. TrIQ 2009a; Ehrt 2009: 3). While coalition politics have generated common demands and a possible guide for the respective governments, they are also frequently challenging endeavours. First, negotiating across different concepts, communities and political styles has proven to be conflict-ridden. See, for instance, Regh (2002: 199) with regard to the PGG and Ghattas (2009: 1) with regard to the collaboration between trans and intersex individuals.

trans and inter groups in Germany and non-European countries, in particular in the Americas (TGNB 2006c).[148]

Frustrated with federal government inactivity, ATME e. V. addresses the UN as a strategy of forcing the federal government to comply with ratified human rights treatises. To this effect, ATME e. V. has so far submitted several human rights reports outlining practices and regulations vis-à-vis transsexual individuals that the association considers contravening the respective agreements, declarations and treatises[149] and formulates measures to redress human rights breaches.[150]

148 | The TGNB workgroup »Law and Anti-Discrimination« proved to be less successful. Established in 2003, this particular workgroup collaborated with LGBT organisations to establish ›sexual or gender identity‹ as prohibited grounds of discrimination under the Anti-Discrimination Act (*Antidiskriminierungsgesetz*; ADG). The attempts to introduce this category into anti-discrimination legislation failed. At the end of 2005, the workgroup shifted its focus to the Transsexual Act and demanded that the change of first names be rendered easier and the change of gender status become possible without the preconditions of infertility and mandatory sex reassignment surgery (TGNB 2006d).

149 | Among these are e. g. the Alternative Report to the Sixth Report of the Federal Republic of Germany to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (MUT 2007), the Alternative Report to CAT (ATME 2011c), a bilingual human rights report to the Fifth State Report of the Federal Republic of Germany according to Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (ibid 2010) and a report on reparative therapies on children (ibid 2012).

150 | In its most comprehensive human rights report to date ATME e. V. summarises eight demands. First, the organisation demands of the UN to request that the WHO no longer classify transsexuality as a mental disorder (ATME 2010: 84). Second, ATME e. V. urges the UN to pressure the federal government to remove the requirement of expert reports from the Transsexual Act (ibid: 85). Third, the association suggests to the UN to render the Yogyakarta Principles (2013), i. e. the application of international human rights law to sexual orientation and gender identity legally binding and to press the Federal Republic of Germany to recognise these principles (ATME 2010: 86). Fourth, ATME e. V. demands the right to sex reassignment treatment (ibid: 86 f.). Fifth, the association requests of the UN to advise the Federal Republic of Germany to introduce gender identity into the Anti-Discrimination Act (ibid: 87). Sixth, ATME e. V. demands that all media in Germany be held accountable for transphobic reports and that transsexual individuals be included in broadcasting committees (ibid). Seventh, ATME e. V. demands more financial support and services for support groups and networking activities (ibid: 87 f.). Finally, the association demands that transsexual individuals represent themselves (ibid: 88).

The introduction of the supplementary ID (*Ergänzungsausweis*) is an example of a political activity in the area of equality and human rights on the national level. The dgti e. V. developed the supplementary ID for individuals whose outer appearance during the ›real life test‹ does not match the gender of the first names and gender status according to conventional standards and who have been diagnosed with transsexuality (dgti undated h). The document resembles the national ID card and is meant to prevent discrimination on behalf of the bureaucracy and difficulties that arise in situations that require producing an ID (ibid). The supplementary ID is the dgti e. V.'s response to government reluctance to implement a demand of the European Parliament to issue IDs valid throughout the then European Community to transsexual individuals bearing their chosen first name(s) (ibid).

Networking and lobbying takes place on a regional level, too. *Intra-BW* is one of the most recent networks of trans organisations at the time of writing. Founded in 2013 by ATME e. V., the dgti e. V., and the support group *Transident X* in Stuttgart,[151] the network elaborated on a set of demands directed towards the Social Democratic and Green Party coalition in Baden-Württemberg. The major demands were to establish an equal opportunities advisory council consisting of an equal number of transsexual individuals and members of the bureaucracy, to grant equal access to existing equal opportunities bodies and to seek direct contact with transsexual individuals (ATME 2013a). The dgti e. V. left the loosely connected coalition at the end of 2013 (intra-BW undated).

Lobbying and networking: Prominent examples of attempts to achieve trans law reform

There were several, in part collective, attempts to achieve trans law reform in the period between 1999 and 2009. Three major attempts were initiated of which one was carried out by the Project Group Gender and the Law (*Projektgruppe Geschlecht und Gesetz*; PGG) from late 1999 to the end of 2000, another by the TGNB Workgroup Law (*Arbeitskreis Recht*) in 2006 and the third by TGNB and TrIQ e. V. in 2009. Initiatives to achieve trans law reform took on various forms, occurred in various organisational constellations, mirrored rapidly changing social and legal developments with regard to homosexuality, successful trans litigation on a national level, international developments in

151 | The organisations forming the network are based on very different premises. However, the founding members of the network initially managed to agree on two major goals. One of these was to exert pressure on the *Länder* government to end the psychopathologisation of transsexual individuals. The second was to improve medical provisions for transsexual individuals, in particular for transsexual minors in Baden-Württemberg (ATME 2013a).

trans legislation, an increasing assertiveness of trans organisations as well as varying degrees of political compromise.

The Project Group Gender and the Law, and the Transgender Bill[152]

Established in late 1999 (dgti undated i), the formation of the nationwide workgroup PGG was, as a member of the dgti e. V. suggests, fostered by social developments. Successful lesbian and gay movement struggles left an imprint in legislation. For example, in 1994, the legislator abolished s. 175 StGB and, while the PGG was devising proposed trans legislation, the German parliament was debating the Registered Life Partnership Bill (dgti undated j). These legislative developments inspired rethinking sections of the TSG that had been devised in a more homophobic social and political environment.

Legitimation issues and developments within the lesbian and gay movement influenced the constitution of the workgroup. A project focusing on the development and submission of proposed legislation necessarily required gaining the consent of a broad spectrum of trans organisations. Moreover, parts of the lesbian and gay movement were starting to take into consideration transgender individuals, as the following excerpt of the Transgender Resolution (*Transgenderresolution*) adopted by the organisation *Lesben und Schwule in der SPD* (Lesbians and Gay Men in the SPD; [Schwusos]) on 15 Apr. 2000 in Stuttgart suggests:

> [i]t is only since quite recently that transgender individuals are struggling for the right to live beyond gender role stereotypes. The extent to which an individual takes on old roles or creates new ones for him- or herself is an individual decision everybody needs to decide for him- or herself. This freedom also needs to include the freedom to align one's body with one's inner feelings and/or the desired role or simply not to. This also applies to formal issues such as, for example, the name and civil status. It is precisely in this respect that the Schwusos will support efforts to reform the TSG accordingly. (dgti undated k)

152 | The Transgender Bill is not a bill in the sense that the *Bundestag*, the *Bundesrat* or the government drafted it. However, I will stick to the name of this suggestion for law reform, because it has become known as such.

Hence, the PGG consisted of a broad coalition of trans associations with a political agenda,[153] local trans workgroups and support groups,[154] lesbian and gay organisations[155] and some intersex individuals from Berlin and Kiel (dgti 2000).

In 2000 and after consultations with lawyers, intersex individuals and politicians, in particular members of the Green Party (dgti undated i), the PGG developed the Bill on the choice or revision of first names and the establishment of gender status (Transgender Bill) (*Gesetz über die Wahl oder Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit (Transgendergesetz;* [TrGG]). The workgroup submitted it to Members of the *Bundestag* and the government on 20 Nov. 2000 (ibid).

The Transgender Bill[156] provided rules for three situations. Part one (ss. 1-5 TrGG)[157] was devised to regulate the choice of first names and gender status in cases of ›biological ambiguity‹. Part two (ss. 6-11 TrGG) was designed to regulate a change of first names in instances of ›deviating gender identity‹. Part three (ss. 12-16 TrGG) was created to provide rules for establishing an individual's gender status.

Part one of the Transgender Bill mirrored the aim of PGG members to include intersex individuals as beneficiaries of the proposed legislation (Alter

153 | The dgti e. V. and TransMann e. V. contributed to the project team (dgti 2000).

154 | Among these were the *Arbeitkreis Transsexualität Kiel* (Workgroup Transsexuality Kiel; AK-TS Kiel), »*Ost-TS*« (East-TS), a group of transsexual individuals from the eastern part of Berlin, Transidentitas e. V., VIVA TS e. V. Munich, TransPeople Nuremberg and the *Selbsthilfe Kontakt und Informationsstelle Berlin* (The Central Support, Contact and Information Office Berlin [SEKIS Berlin]; dgti 2000).

155 | The Schwusos and the Sonntags-Club e. V. in Berlin were members of the PGG (dgti 2000).

156 | The PGG defined ›transgender‹ to include transmen, transwomen and intersex individuals (Alter 2001). Having just begun to organise in Germany in the 1990s, intersex individuals criticised subsuming ›intersex‹ under ›transgender‹, arguing that the umbrella term rendered them invisible. Given that intersex was – in contrast to transsexuality – literally erased due to medical policies of misleading information, secrecy and ›corrective‹ surgery in infancy, i. e. without intersex individuals' informed consent, and the legal dogma of intersex as unknown to the law, this is a valid point. For a critique of the medical management at the time, see for example Beh/Diamond 2000, Fausto-Sterling 2000, Guhde 2002, Chase 2003, Hester 2004 and de Silva 2007. For a critique of legal premises and practices, see for example Plett 2003; 2007. For an analysis of concepts of gender and sexuality that inform medical treatment concepts, see for example Kessler 1997, Fausto-Sterling 2000; Klöppel 2002; 2006, Hester 2003; 2004, Zehnder 2006 and de Silva 2008.

157 | All citations of the Transgender Bill are based on the edition provided by the dgti e. V. website (dgti undated l).

2001). Section 1 TrGG defined the conditions. Sections 2 and 3 TrGG dealt with issues related to birth entries (s. 2 TrGG) and revisions of birth entries (s. 3 TrGG). Sections 4 and 5 TrGG regulated areas of competency (s. 4 TrGG) and implementation (s. 5 TrGG).

Section 1 TrGG was foremost designed to ensure intersex individuals', their parents' or legal guardians' rights to information and intersex individuals' right to physical integrity. The first section of the proposed legislation was meant to prohibit the common medical practice of non-disclosure of an intersex status to the respective individual and of genital surgery at an age that necessarily precludes the infant's informed consent.

Sections 2 to 4 TrGG were devised to secure intersex individuals' legal recognition with minimum bureaucratic barriers. Section 2 offered several possibilities for registering first names in the birth entry. These included the choice of gender-neutral names, names of both socially accepted genders (s. 2[1] TrGG) or names given to one specific accepted gender, however with an additional indication of intersex in brackets (s. 2[3] TrGG).

With regard to the sex/gender entry, the proposed TrGG suggested leaving the initial entry vacant or allowing an entry as intersex (s. 2[2] TrGG). Moreover, the proposed draft bill provided options for an intersex individual to either accept or change the sex/gender entry at any point in life (s. 3 TrGG) at the local register office (s. 4[1] TrGG).

Section 5 TrGG was created to ensure protection against discrimination, secure privacy rights and to regulate issues related to marriages and registered partnerships. Section 5(3) TrGG, for example, specified that an intersex individual with either a vacant sex/gender entry or the entry as intersex may not be put at a disadvantage with regard to regulations that are commonly tied to a sex/gender. Section 5(4) TrGG provided for a prohibition of disclosure as provided for trans individuals in s. 9 TrGG. According to s. 5(5) TrGG, existing marriages and registered partnerships were meant to remain unaffected by a change of first names, whereas in the case of a revision of gender status, the same rules would apply as specified in the sections regulating the establishment of gender status.

The Transsexual Act served as a template for parts two and three of the Transgender Bill. Overall, the Transgender Bill suggested accelerated procedures and less demanding prerequisites for a change of first names and a revision of gender status than the Transsexual Act.

The TrGG suggested lowering the barriers for a change of first names for trans individuals. Rather than endowing the local court with the competency to decide upon a change of first names as s. 2 TSG determines, s. 7 TrGG suggested the register office should be responsible for attending to applications to this effect.

In contrast to ss. 4(3) and 9(3) TSG, the TrGG suggested to dispense with expert reports. Instead, the TrGG provided that an applicant provide a doctor's or psychologist's note for a change of first names (s. 8[1]1 TrGG) which was also to be valid for a revision of gender status (s. 12[1]1 TrGG). This particular note was simply to state that the applicant wished to improve or prevent a deterioration of his or her psychological and social situation. Moreover, the proposed legislation suggested that a medical statement suffices as a proof of the somatic measures undertaken (s. 13[4] TrGG). As a means to accelerate court proceedings dealing with a revision of gender status, the TrGG also determined that the judge hears the applicant and the representative of the public interest in person in one session (s. 13[3] TrGG).

The TrGG also suggested reducing somatic requirements. Rather than demand surgical interventions as a prerequisite for a revision of gender status as determined in s. 8(1)4 TSG, the TrGG provided that the applicant needs to have undergone medical measures to effect that his or her external sex characteristics have approximated the outer appearance of the ›other‹ sex (s. 12[1]3 TrGG). Unlike the TSG, the TrGG did not stipulate any sterility requirements.

The TrGG also suggested reformulating the requirements with regard to existing and future marriages and considering a registered partnership as an option for trans individuals. Like the TSG, the proposed legislation suggested that an existing marriage (or a registered partnership) remain unaffected by a change of first names. However, while the TSG ruled that the decision to change first names becomes void as soon as the applicant marries (s. 7[3] TSG), the TrGG suggested that an applicant may marry or enter a registered partnership according to the sex/gender specified in the birth certificate (s. 11 [3] TrGG). While s. 8(1)2 TSG stipulated that an applicant needs to be unmarried before being granted a revision of gender status, the TrGG provided that a marriage could either be divorced or converted into a registered partnership (s. 12[1]2.1 TrGG) or vice versa (s. 12[1]2.2 TrGG).

In addition, the PGG considered the Federal Constitutional Court decisions until the time of devising the proposed legislation and in part went beyond the decisions. The TrGG did not contain any age limits for a change of first names and gender status. It provided for the right that an applicant with a change of first names needs to be addressed according to the gender the name signifies,[158] including the entitlement to have his or her official documents and qualifying reports amended to match the chosen name (s. 8[3] TrGG). Well before the Federal Constitutional Court decided on the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under the Transsexual Act, the PGG decided to include foreigners intending to obtain

158 | For the Federal Constitutional Court decision on the gender-specific address of a trans individual after a change of first names, see chapter 3.3.4.

an unlimited residency permit and whose home countries do not provide for gender recognition or demand unreasonable prerequisites (s. 6[1]1.2 TrGG).

While the Transgender Bill would have met some demands of the then trans movement, taking into consideration the conservative political climate and anticipating conflicts with policy makers, the PGG included compromises in the TrGG. This becomes particularly obvious when comparing the provisions of the draft law with trans movement concepts of trans, gender and the gender regime. The workgroup conceded on the number of gendered options in the event of a transition, the notion of gender as independent of morphology, the concept of gender fluidity and radical self-determination.

Although the recognition of intersex and the inclusion of protective measures against medical and legal encroachments challenged the gender binary, the proposed legislation fell short of providing for the options not to be gendered or to be recognised as two or more genders in instances in which individuals were assigned either female or male at birth. The Transgender Bill suggested that female or male individuals have the choice of being recognised as the ›other‹ gender only (ss. 6[1]2 and 12[1] TrGG).

The PGG also anticipated that the legislator would not accept a revision of gender status without somatic measures. While ›medical measures‹ do not necessarily mean ›surgical measures‹, s. 12(1)3 TrGG implicitly perpetuated the notion that gender needs to be mirrored in physical traits.

Moreover, the workgroup also tried to appease potential adversaries by conveying the notion of ›gender‹ as a stable condition. The TrGG sought to lower the prognostic demands on the stability of a gender identity by suggesting as a prerequisite for a change of first names for trans individuals that it is »assumed that identifying with the other gender will not change anymore« (s. 6[1]2 TrGG), rather than adding »with a high degree of probability« as the TSG does in s. 1(1)2. However, the PGG increased the barriers for a reversal of the decision. While the TrGG suggested that the competency for an initial change of first names rest with the register office, s. 10(1)1 TrGG proposed that a reversal of the decision should, like a revision of gender status (s. 13[1] TrGG), take place in a local court proceeding.

Finally, the PGG anticipated that the legislator would not accept a change of first names or a revision of gender status without some medical evidence. The Transgender Bill neither repeated the debatable and pathologising formulations »transsexual imprinting« and »if the applicant has felt compelled to live according to his or her ideas since three years« in s. 1(1)1 TSG, nor suggested to obtain two expert reports. Nevertheless, the PGG estimated that a doctor's or psychologist's note, respectively, would be necessary, rather than a self-declaration.

The TrGG had an effect on the federal government, headed by a Social Democratic and Green Party coalition. In addition to grievances voiced else-

where, in particular over assessment practices and the duration of proceedings under the Transsexual Act, the Home Office announced that it intended to revise the Transsexual Act comprehensively. For this purpose and in contrast to the political process leading to the Transsexual Act, the Home Office asked for submissions from sexologists and psycho-medical practitioners known to be specialised in the field of transsexualism as well as from trans lobby groups and some support groups (BMI 2000: 1).[159] Despite its announcement and swift responses, the government remained inactive for years.

Suggestions for reforming the Transsexual Act by the TGNB Workgroup Law (*Arbeitskreis Recht des Transgender-Netzwerks Berlin*)

In 2006, the Workgroup Law of the TGNB[160] prepared a set of suggestions for a fundamental reform of the Transsexual Act. Unlike the PGG, the Workgroup was able to draw upon national developments in jurisdiction on the Transsexual Act, international developments in trans legislation, developments in society, scientific findings on trans(sexuality) and concrete suggestions for trans law reform made by other trans organisations and networks to support its course. In the light of these developments, the Workgroup Law was, with few exceptions, much less pressed and willing to trade demands for self-determination and limitations on human rights for reasons of political feasibility than the PGG.

The fact that the Workgroup contemplated a reform of the Transsexual Act itself constituted a compromise, since it favoured an abolishment of the special act and the integration of regulations providing for a change of first names and a revision of gender status in the Act on the change of family names and first names (*Namensänderungsgesetz*; NamÄndG) and the Civil Status Act (TGNB 2006j: 3), including the creation of ›intergender/transgender‹ or ›other‹ as an additional category for a sex/gender entry in the birth register (ibid: 5). The Workgroup however devised suggestions for a fundamental reform of the Transsexual Act in case their preferred solution would not find support (ibid: 3).

In contrast to the PGG, the Workgroup Law decided to adapt the structure of the Transsexual Act. Part one was meant to regulate issues related to a change of first names. Part two contained provisions for an establishment of gender status (ibid: 1f.). Rather than create elaborate provisions for intersex individuals which had been a priority for the PGG, the Workgroup suggested that given

159 | While the submissions to the Federal Home Office for the Draft Transsexual Law Reform Bill lend themselves to an analysis of trans, gender and gender regime, they with few exceptions mirror perspectives in sexological journals and handbooks, trans organisation programmes and the Draft Transgender Bill produced by the PGG.

160 | The TGNB Workgroup Law will be referred to as the Workgroup Law or the Workgroup in this chapter.

that the legislator planned to create an additional gender option, individuals seeking a revision of gender status must be eligible for the provisions outlined in the second part of the reformed Transsexual Act (ibid: 2).

While the Workgroup Law and the PGG opted for non-pathologising language in the conditions for applying for a change of first names and a revision of gender status, the wording of the Workgroup Law did not limit gender options to two or conceptualise gender identity as a permanent disposition. Rather, the Workgroup suggested to rephrase ss. 1(1) and 8(1) TSG to simply state as a condition that the person no longer identifies with the gender entered in the birth register (ibid: 1; 2).

In contrast to the PGG, the Workgroup Law suggested not only to locate proceedings for a change of first names with the register office. Rather, the Workgroup proposed to have applications for a change of first names, a reversal of the decision and applications for a revision of gender status processed with the abovementioned institution (ibid: 1; 2). Such a procedure would have reduced the barriers for any application under the Transsexual Act and accelerated the proceedings by dispensing with a representative of the public interest (ibid: 4).

With regard to the proceedings for a change of first names, the Workgroup reasoned in its explanatory notes that locating the competency with a local court, including the costs of expert reports and procedural costs, deters trans individuals from applying for a change of first names. As a result, respecting their chosen first names depends on the goodwill of their surroundings and exerts them to discrimination (ibid: 3). While the PGG tried to appease the legislator by suggesting that a reversal of the decision should be located with the local courts, the Workgroup Law only proposed to allow such an option in the event of repeated changes of first names or in case of reasonable suspicion of an improper use of the provision (ibid: 4).

Unlike the TrGG, the suggestions offered by the Workgroup Law wrested the legal procedure entirely from the medical realm. While the Workgroup's suggestions for a reform of the Transsexual Act did not rely entirely on an individual's self-declared intention to undergo a change of first names or a revision of gender status, the Workgroup acted on a suggestion the dgti e. V. had developed in the meantime (ibid: 1). According to this suggestion, the applicant would have been required to produce a counselling certificate (*Beratungsschein*) as evidence of having consulted a self-chosen counselling service on the issue and its potential consequences (ibid: 1; 2). The Workgroup specified the qualifications of the counselling service staff and that of any other institution as individuals who are based on their training and their professional experience sufficiently familiar with issues related to transgender and gender identity (ibid: 1).

Like the PGG, the Workgroup Law was intent on including foreigners with an unlimited residency permit as potential applicants under a reformed Transsexual Act. In contrast to the PGG, the Workgroup Law was able to refer to the

Federal Constitutional Court decision on 18 July 2006. Based on the Court's decision that ruled that the legislator needs to find a solution for s. 1(1)3 TSG that is compatible with equality rights laid down in Art. 3(1) GG and the right to the protection of one's personality (Art. 2[1] GG) in conjunction with the right to dignity (Art. 1[1] GG) (BVerfG 2007: 16), the Workgroup suggested as individuals eligible for a change of first names and a revision of gender status EU citizens, individuals with a permanent residence in the EU, stateless or displaced persons with usual residence within the territory of German law and individuals entitled to asylum or foreign refugees (TGNB 2006j: 1; 2).

Like s. 5 TSG and ss. 5(4) and 9 TrGG, the Workgroup Law suggested that a reformed Transsexual Act provide for a prohibition of disclosure. In contrast to the Transsexual Act, however, the Workgroup proposed a more restrictive provision. Based on suggestions made by the Workgroup Transsexuality in Northrhine-Westphalia (*Arbeitskreis Transsexualität in Nordrhein-Westfalen*), the Workgroup for example demanded that s. 5 TSG be extended to prohibit explorations on the initial gender, first names and the reasons leading to the respective gender status and first names (ibid: 2). Moreover and based on the Federal Constitutional Court decision on the address of a trans person who had been granted a change of first names, the Workgroup proposed to add to the section on the prohibition of disclosure the obligation to address a person according to the first name (ibid). While the Home Office had already decreed that a person's gender be amended in the passport to match the individual's first name (ibid: 4), the Workgroup suggested to legally secure this fact in the rules regulating the prohibition of disclosure (ibid: 2).

Like the PGG, the Workgroup Law suggested to dispense with the provisions regulating the invalidity of the decision to change first names (s. 7 TSG) and the rule in s. 8(1)2 TSG that requires of a transsexual individual to be unmarried prior to applying for a revision of gender status. With regard to the former rule, the Workgroup referred to the increasing number of ›rainbow families‹, scientific facts and social realities suggesting that there are trans individuals who do not seek a legally recognised change of gender status (ibid: 3). The Workgroup also referred to the Federal Constitutional Court decision on s. 7(1)1 TSG in Dec. 2005 (ibid: 4) to support its proposal. Arguing that, »[t]here is simply no reason why a person who has accomplished a change of first names according to s. 1 should be refused the right to found a family« (ibid), the Workgroup held that denying a person a changed first name in the case of a marriage or fathering or bearing a child is »pointless« (ibid).

With regard to s. 8(1)2 and in the light of the introduction of the registered life partnership for same-sex individuals, the Workgroup suggested that neither marriage nor a registered life partnership constitute an obstacle to establishing an individual's gender status. While the PGG suggested integrating in the TrGG rules that deal with issues related to marriage and registered life partner-

ships in the event of a revision of gender status (ss. 12[1]2.1 and 2.2 TrGG), the Workgroup Law suggested dealing with these issues in the respective acts that regulate marriages and registered life partnerships, rather than in a reformed Transsexual Act (TGNB 2006j: 3).

Like the TrGG, the Workgroup's suggestions did not entail any references to measures for achieving sterility. In its explanatory notes, the Workgroup Law dismissed any such prerequisite for a revision of gender status, arguing that such a stipulation violates human rights. According to the Workgroup, »[i]t is not justifiable to deny individuals wishing to change their gender status the right to reproduction and to found a family« (ibid: 4).

The Workgroup's suggestions most dramatically differed from the Transsexual Act and the Trangender Bill with regard to the somatic requirements for a revision of gender status. While the TrGG lowered the requirements from ›surgical‹ measures as stipulated in s. 8(1)4 TSG to ›medical‹ measures (s. 12[1]3 TrGG), the Workgroup Law rejected any somatic measures as prerequisites for a revision of gender status on the grounds that such a requirement violates the right to physical integrity (TGNB 2006j: 4).

In addition, the Workgroup pointed out to state of the art scientific findings, trans individuals' diverse social realities and international developments in trans legislation to refute the notion that a gender identity necessarily requires »adapted« genitalia (ibid: 4). Instead, the Workgroup suggested to follow the example of the Gender Recognition Act (2004), which does without any surgery requirements (ibid: 4 f.).[161]

The key issues paper on the reform of the Transsexual Act by the TGNB and TrIQ e. V.

In April 2009, the TGNB and TrIQ e. V. developed a key issues paper containing basic demands for law reform. Since the Federal Home Office was in the process of devising the Transsexual Law Reform Bill, the TGNB and TrIQ e. V. elaborated on potential amendments to the Transsexual Act, rather than on suggestions to integrate provisions for changing first names and revising gender status in existing statutes. Taking into consideration the political context, the abovementioned organisations compiled the key issues paper as a highly strategic paper[162] that was designed to bridge the gap between central trans movement demands and issues related to political implementation in a conservative political environment. As such, the key issues paper on the one hand included demands to consider diverse trans individuals in legislation and de-

161 | For more details on the Gender Recognition Act (2004), see the UK government website on legislation.

162 | The paper was submitted to the Federal Home Office the same month as a statement on the Draft Transsexual Law Reform Bill (*Transsexuellenrechtsreformgesetz*; TSRRG).

mands for accelerated procedures for a change of first names and a revision of gender status based on rules that are compatible with human rights, including the rights to self-determination and physical integrity, as well as pursuing a policy of appeasement and providing legally elaborate suggestions on the other hand.

The TGNB and TrIQ e. V. acted on several ideas developed by the TGNB Workgroup Law three years earlier on, such as simplifying procedures for a change of first names and a revision of gender status and suggesting prerequisites for the latter in compliance with human rights, and developed them further. Like the Workgroup Law, the TGNB and TrIQ e. V. demanded that the competence for processing applications for a change of first names and a revision of gender status should be removed from local courts and handed over to the register office (TGNB/TrIQ 2009: 1). With regard to the procedure for a change of first names, the organisations argued that court procedures were too time-consuming and, as such, increase the risk of discrimination, violate the basic right to privacy guaranteed in Art. 2(1) in conjunction with Art. 1(1) GG and Art. 8 ECHR and – quoting the Federal Constitutional Court – contradict the original intention of s. 1 TSG (ibid: 2). When considering the procedure for a revision of gender status, the TGNB and TrIQ e. V. argued that an application could be dealt with analogously to the initial sex/gender entry at birth, which is also located with the register office (ibid: 3).

While the Workgroup Law had already suggested dispensing with medical statements on a person's gender identity as a prerequisite for either a change of first names or a revision of gender status, the TGNB and TrIQ e. V. went a step further. The organisations demanded that the applicants should be asked to deliver a statutory statement only for a change of first names (ibid: 1). They argued that experience so far suggests that transgender and transsexual individuals do not apply for a change of first names frivolously (ibid: 2). As a result, a decision to change first names would have become a self-determined decision.

The TGNB and TrIQ e. V.'s demand for simplifying the procedure for a revision of gender status required more intricate suggestions and reasoning in order to ease the tension between trans movement demands for self-determination and issues related to political feasibility. The organisations solved this problem by radically separating medical and legal processes and concentrating on achieving maximum self-determination in the latter, while using the issue of medical supervision strategically as a means of appeasement, hence deferring the struggle for depathologisation to another arena for the time being. In addition, the organisations demanded that the practice of obtaining expert reports be replaced by three options instead. The TGNB and TrIQ e. V. suggested that a revision of gender status should be granted no sooner than twelve months after a change of first names or if the applicant has undergone sex reassignment measures or if the applicant has been diagnosed with transsexuality,

respectively (ibid: 1). The choice of three options would have left it up to the individual whether or not to opt for somatic measures for a revision of gender status.

In the explanatory notes, the organisations presented several reasons to substantialise their demands. With regard to the first option, they suggested that a period of one year between an individual's change of first names and an application for a revision of gender status sufficiently proves the stability of a person's gender identity. They justified the second option by arguing that trans individuals do not choose to undergo sex reassignment measures frivolously. Moreover, they are only possible after having obtained a medical indication, and the measures are usually irreversible. With regard to the third option, the TGNB and TrIQ e. V. suggested that assessing the stability of a person's gender identity is part of the medical diagnosis transsexuality, and as such, an adaptation of the sex/gender entry would be consistent (ibid: 3).

As the proposed procedures suggest, the organisations demanded procedures that comply with basic human rights, specifically with regard to the right to physical integrity and, in addition, to the right to the protection of marriages. Like the Workgroup Law, they demanded abolishing permanent sterility, sex reassignment surgery as well as having to be unmarried as prerequisites for a revision of gender status (ibid: 1). For strategic reasons, they quoted the opinion of the Federal Constitutional Court and referred to the latest developments in trans legislation elsewhere, rather than argue on the grounds of their own principles.

Setting out from the observation the Federal Constitutional Court had made in its decision on 06 Dec. 2005 that transsexual individuals are the only group of persons of whom the state requires permanent sterility (ibid: 2), the TGNB and TrIQ e. V. presented three reasons as part of their strategy of assuring the legislator that banning this requirement would not result in large-scale gender disorder. First, they suggested that ›contrasexual‹ hormone treatment usually leads to sterility, hence enabling few individuals only to reproduce. Second, the TGNB and TrIQ e. V. argued that pregnancy is incompatible with most transmen's self-perception. Third, they held that, »[p]ossible individual cases on no account justify that the state renders an intervention into transsexual and transgender individuals' physical integrity a prerequisite for a revision of gender status« (ibid).

The organisations proceeded similarly with regard to the requirement for sex reassignment surgery, while attempting to safeguard the rights of individuals requiring surgery at the same time. The TGNB and TrIQ e. V. quoted the Federal Constitutional Court, which opined in its decision on 06 Dec. 2005 that there were no acceptable reasons for treating transsexual individuals seeking a revision of gender status differently, regardless of whether they had undergone sex reassignment surgery or not. The TGNB and TrIQ e. V. interpreted the

statement as a recommendation to dispense with the sex reassignment stipulation (ibid: 2). In addition, they pointed out that neither the Gender Recognition Act (2004), nor the Spanish Act, passed in 2007, demanded somatic measures (ibid: 2 f.). However, the TGNB and TrIQ e. V. also referred to the Federal Social Court decision on 10 Feb. 1993, which ensured that statutory health insurance companies assume the costs of sex reassignment measures for individuals experiencing distress related to transsexuality. Anticipating that a reform of the Transsexual Act might impact on social jurisdiction, they suggested that the legislator guarantee that necessary sex reassignment measures remain part of the services offered by health insurance companies. The TGNB and TrIQ e. V. suggested adding s. 27b to the Social Security Code to this end (ibid: 3).

The TGNB and TrIQ e. V. also drew upon the then most recent Federal Constitutional Court decision on 27 May 2008[163] to demand that the legislator abolish s. 8(1)2 TSG, which requires of the applicant to be unmarried prior to filing an application for a revision of gender status. Employing the same strategy as they had used when arguing in favour of abolishing s. 8(1)4 TSG, the organisations reiterated one of the Court's options that the legislator may allow for a continuation of marriage in the light of the very small number of married transsexual individuals seeking a revision of gender status.[164] In addition, the organisations invoked Art. 6(1) GG, arguing that this option would re-establish marriage as a constitutionally protected institution and safeguard the respective partner's rights (ibid: 4).

Finally, the TGNB and TrIQ e. V. demanded renaming the reformed Act. Arguing that transsexual individuals only constituted a fraction of the target group (ibid: 4), they suggested that the Act be renamed »An Act on the change of first names and gender status« (*Gesetz über die Änderung der Vornamen und der Geschlechtszugehörigkeit*), hence providing for diverse individuals to be covered under the rules of the Act.

163 | On 27 May 2008, the Federal Constitutional Court decided that s. 8(1)2 TSG is unconstitutional on the grounds that the rule violates Art. 2(1) in conjunction with Art. 1(1) GG and Art. 6(1) GG, because the rule does not allowed a married transsexual individual to gain legal recognition of his or her gender without him or her having to terminate his or her marriage (BVerfG 2008: 317). For more details on this decision, see chapter 3.3.3.

164 | While the TGNB and TrIQ e. V. did not depart in substance from the suggestion the Workgroup Law brought forward three years earlier on, the TGNB and TrIQ e. V. opted for a different route to solve the legal problem.

In contrast to the PGG and the Workgroup Law, the TGNB and TrIQ e. V. decided to garner support for their demands. The key issues paper was signed by several trans,[165] lesbian and gay or queer organisations[166] and two individuals.[167]

3.2.5 Summary: Concepts of gender, trans and gender regime in trans lobby organisations

Fuelled by a number of internal and external factors, the trans movement was marked by a substantial growth, differentiation and consolidation of lobby organisations, an increased visibility of diverse trans subjects and the development of various concepts of trans, gender and gender regime. Influenced by different discursive traditions and emerging within shifting social contexts, concepts of trans(sexuality) and gender emerged that ranged from understandings shaped by social constructionist and poststructuralist thought that challenge the gender binary and clearly delineated concepts of trans to notions influenced by neuro-biological hypotheses that consider transsexuality a somatic disorder. While trans organisations endorsing the former set of concepts pursue a policy of inclusion, representatives of the latter focus on issues pertaining to a fraction of the transsexual community.

Despite these conceptual differences, trans lobby organisations share a number of demands and perspectives, most prominently demands for self-determination and the recognition of trans individuals as experts on their own behalf as well as the rejection of (psycho)pathologisation and a perspective that suggests that a person's gender identity can be derived from the sexed body. With regard to legal rules, procedures and practices, trans organisations oppose legal requirements that require sterility, sex reassignment measures, expert assessments and affect officially sanctioned living arrangements, arguing that these rules violate basic human rights. With regard to psycho-medical assumptions, procedures and practices, trans organisations reject the (psycho)pathologisation of trans(sexuality), psycho-medical expertise and procedures and practices they consider violations of human dignity and privacy. These include the obligatory ›real life test‹, undue physical examinations, inappropriate enquiries into trans individuals' sexual orientations and practices and a subjection to expert understandings of sex, femininity, masculinity and gender regime

165 | Among these were e. g. ABqueer e. V., the drag king group Kingz of Berlin, the support group SHG Chemnitz, TransGenderTown (Rosalinde Leipzig e. V.), Transvita Karlsruhe and VIVA TS e. V. München (TGNB/TrIQ 2009: 4).

166 | Lesbian and gay cosignatories of the paper were Queer Christ Berlin, the Sonntags-Club e. V. and the LSVD e. V. (TGNB/TrIQ 2009).

167 | These were the lawyer Reinert and the former MP Schenk (TGNB/TrIQ 2009).

in a setting that is marked by unequal power relations in order to achieve legal recognition and trans-related medical and surgical services.

Without compromising support and outreach, information and public education, trans organisations engage in networking on local, regional, national and supranational levels and individual or coalition-based lobbying aimed at achieving human rights and equality and trans law reform. Activities directed at achieving trans law reform have so far ranged from suggestions to elaborate proposed legislation. The analysis of designs for trans law reform suggest two conclusions. On the one hand, they mirrored rapidly changing social and legal developments with regard to homosexuality, national developments in jurisdiction on the Transsexual Act and growing assertiveness of trans organisations. On the other hand, trans organisations were faced with unswerving federal government gender-political conservatism. They to varying degrees tried to meet this challenge by strategically deploying the aforementioned national and international developments in their suggestions for law reform, by resorting to appeasement policies and/or by separating the struggle on the legislative terrain from the psycho-medical plane as means to achieve maximum self-determination and rules compliant with human rights in legislation on a change of first names and a revision of gender status.

3.3 Legal developments and debates on transsexuality from the 1980s to 2010

The period from the 1980s to 2010 witnessed a number of developments in legal scholarship and jurisdiction on trans with contradictory effects on transsexual individuals, depending on the area of the law, and a weakening, although not displacement, of the heteronormative character of the gender regime. This chapter traces major developments in jurisdiction and legal scholarship in insurance law and on the Transsexual Act in this period.

Based on relevant rules in social regulation and social court jurisdiction, reported in the *NJW, Versicherungsrecht* (Insurance Law [VersR]) and the online data bases *sozialgerichtsbarkeit.de* (social jurisdiction) and *openJur*, the first section of this chapter elaborates on developments in statutory health insurance coverage of sex reassignment measures in the Federal Republic of Germany. The relationships between definitions of disease and legal understandings of transsexuality pursuant to health insurance law, the legal distinction between sex reassignment surgery and cosmetic interventions and the relationship between transsexuality and other unusual gender identities in social court jurisdiction as well as in the context of general developments in health insurance law will be addressed.

The next three sections deal with jurisdiction and legal scholarship on the Transsexual Act. Taking into consideration sexological perspectives and points of view in legal scholarship and using as examples Federal Constitutional Court decisions on the age limits for a change of first names (s. 1[1]3 TSG) and a revision of gender status (8[1]1 TSG) and the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under ss. 1(1)1 and 8(1)1 TSG, the second section of this chapter focuses on the construction of transsexuality in relation to conventionally gendered men and women.

Jurisdiction under the Transsexual Act that deals with issues related to a registered life partnership (*Eingetragene Lebenspartnerschaft*), marriage, somatic measures and generational reproduction are particularly relevant to an assessment of shifts in concepts of trans, gender and gender regime. Taking into consideration legal interpretations of sexological concepts of transsexuality and developments in legal scholarship and jurisdiction, including Federal Constitutional Court decisions on these issues prior to, and during the reform period, the third section traces developments on civil partnership and marriage as they relate to the Transsexual Act and briefly addresses the government reaction to the Federal Constitutional Court decision on s. 8(1)2 TSG. The fourth section deals with sexological and legal interpretations of the rules on somatic measures and generational reproduction under the Transsexual Act in this particular period and briefly addresses government activities.

The analysis is based foremost on sexological and legal publications in *NJW*, *Zeitschrift für Rechtsmedizin* (Journal of Legal Medicine [*Z Rechtsmed*]), *Recht & Psychiatrie* (Law and Psychiatry [R & P]), the submission of the DGfS, reported court decisions on the abovementioned issues in *NJW* and *StAZ*, the Draft Transsexual Law Reform Bill (*Transsexuellenrechtsreformgesetz* [TSRRG]), the Draft Bill to change first names and establish gender status (*Entwurf eines Gesetzes über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit* [ÄVFGG]) proposed by the political party BÜNDNIS 90/DIE GRÜNEN and the Act to amend the Transsexual Act.

Insurance law and constitutional law follow different rationales and operate within different parameters that have led to more regulation of transsexuality in the former and less in the latter area since the late 1990s. Nevertheless, they have in common that they acknowledge an increasing diversity of transsexual individuals and bar trans individuals who do not qualify as transsexual in strictly medical terms from health insurance coverage of sex-modifying interventions and legal recognition. Moreover, Federal Constitutional Court jurisdiction on the Transsexual Act contributed to a shift within the gender regime, and the federal government was essentially content to follow one of the Federal Constitutional Court suggestions to do away with s. 8(1)2 TSG altogether. The gradual undoing of deeply homophobic rules in the Transsexual Act led to a

disruption of the heteronormative character of the gender binary under clearly defined circumstances. While the legal recognition of a trans person's gender continued to rely on somatic measures, the controversy among legal scholars on this issue in the first decade of the 21st century and Federal Constitutional Court jurisdiction in this period indicate that this link was becoming undone.

3.3.1 Jurisdiction on transsexuality in health insurance law

Statutory health insurance coverage of sex reassignment measures on trans individuals in Germany can so far be subdivided into three diffusely delimited stages. From the 1970s to 1987 statutory health insurance companies unevenly assumed the costs of sex reassignment surgery. Since the seminal Federal Social Court decision on 06 Aug. 1987, statutory health insurance companies are obliged to cover sex reassignment procedures in individual cases of transsexuality. The third and continuing period began in the late 1990s and is marked by a number of specifications and a general limitation of interventions statutory health insurance companies are required to cover.

Uneven statutory health insurance coverage of sex reassignment surgery

Despite a statutory basis that was oriented towards an expansion of the benefits catalogue of statutory health insurance companies, a broad definition of disease and the unanimous sexological assessment of transsexuality as a condition that required medical and surgical interventions, statutory health insurance companies initially assumed the costs of surgical sex reassignment surgery unevenly.

According to s. 182 RVO (*Reichsversicherungsordnung*),[168] a disease is defined as an anomalous physical or mental condition that requires treatment or causes an inability to work or both (BSG 1973: 582). ›Anomalous‹ signifies a condition that deviates from the concept of a healthy human being (BSG, decision on 16 Mar. 1972, reported in BSG 1973: 582). The Federal Social Court specified that a condition requires treatment, if it prevents an aggravation (BSG 1973: 582; BSG 1975: 2268) or is amenable to a cure or relief (ibid). Arguing that it would be

168 | The *Reichsversicherungsordnung* (RVO) was passed on 19 July 1911. It served as a statutory basis of the German welfare state from 1913 to 1992. Covering the statutes of the workers' health, the accident, the disability and the old age insurance companies, the RVO was one of the largest bodies of statutes of the German Reich (*Deutsches Reich*). Since 1975, the Social Security Code (*Sozialgesetzbuch;* SGB) has gradually replaced the RVO. In 1988, the Health Care Reform Act (*Gesundheitsreformgesetz*) extracted the statutes that regulate statutory health insurance companies from the RVO and placed them into Volume V of the Social Security Code (*Fünftes Buch des Sozialgesetzbuchs*; SGB V) (Wirtschaftslexikon.co 2015).

irresponsible to the community of the insured and unacceptable to the insured individual not to intervene medically, if there were better and less sophisticated means of treatment to prevent a serious risk of illness, the Federal Social Court held that such a risk qualified to obtain medical aid services (ibid).[169]

Although sexologist research concluded in the course of the 1970s that hormonal and surgical treatment appeared to be the best available means to prevent depression, self-mutilation, suicide and work incapacity in transsexual individuals, statutory health insurance companies dealt inconsistently with applications for sex reassignment surgery. Several insurance companies refused to cover sex reassignment surgery (Spengler 1978: 1193). Spengler summarised a number of arguments the latter put forth to turn down applications. Among these were that representatives of statutory health insurance companies held that transsexuality was not a disorder, did not impair a person's well-being and that transsexuality was based on an arbitrary decision. In other instances, sex reassignment surgery was not considered an appropriate treatment or was regarded as cosmetic treatment (ibid).

Statutory health insurance companies were in general more willing to assume the costs of extensive psychological and physical examinations as well as hormone treatment (Spengler 1978: 1193). The issue of hormone treatment was legally resolved earlier than the question of who was to meet the costs of sex reassignment surgery. Drawing heavily on Spengler's and Nevinny-Stickel and Hammerstein's narrow and homogeneous concepts of transsexuality in their respective articles published in the legal journal *NJW*, the Regional Social Court in Stuttgart applied to transsexuality the principles that define an illness according to the RVO.[170] Suggesting that transsexuality does not feature the

169 | While the Federal Social Court emphasised that this rule also applied to mental disorders, it anticipated that drawing the boundary between a mental illness and a simple psychological strain could pose some difficulties (BSG 1975: 2268). The Court dealt with a person who had given birth to a child with a hereditary illness. Fearing that any further child would be born with the same condition, she brought an action against her health insurance company, which had turned down her application for hormonal contraceptives (ibid: 2267).

The Federal Social Court formulated two guiding principles and remanded the case to the regional court. The Court held that measures to prevent a pregnancy are generally not considered medical aid benefits. This principle also applies, if a pregnancy leads to the birth of a sick child. However, hormonal contraceptives may be considered medical aid benefits, it they avert the risk of a serious impairment in individual cases, such as e. g. in a case in which the physical or mental health of the person giving birth is threatened (ibid).

170 | Statutory health insurance companies proceed according to the principle of benefits in kind. However, in this particular case, the court made an exception, arguing that the complainant had approached her health insurance company in time. The Court

relationship between the psychological and the physical condition in ›healthy‹ individuals, the Court defined transsexuality as a disease pursuant to statutory health insurance company regulations (LSG Stuttgart 1982: 718). After having considered the alleviating effects of the hormones on the ›disorder‹, the commensurability of the measure and its success, the Court ruled that the statutory health insurance company was obliged to reimburse the costs (ibid: 719).[171] However, the issue of meeting the costs of sex reassignment surgery by statutory health insurance companies remained unresolved for approximately another six years.[172]

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held that if the health insurance company did not grant a benefit in kind and this procedure proved to be unlawful at a later point in time, the respondent was obliged to reimburse the costs (LSG Stuttgart 1982: 719).

171 | In this particular case, a post-operative male-to-female transperson sued the health insurance company for refusing to reimburse the costs of hormones (LSG Stuttgart 1982: 718).

172 | The obligation to meet the costs of privately insured transsexual individuals' sex reassignment surgery was legally settled in 2003. On 08 Mar. 1995, the Federal Court of Justice decided not to accept a complaint launched by a private health insurance company against a decision of the appellate court. The appellate court had ruled that surgical modifications of the external sex characteristics need to be considered a medically required treatment for a disease pursuant to the model conditions for sickness costs and the hospital daily benefit insurance (*Musterbedingungen für die Krankheitskosten- und Krankentagegeldversicherung;* MB/KK) of private health insurance companies, if the member's recognition as a member of the ›other‹ sex was declared legally binding (BGH 1995: 447 f.).

In another instance, a female-to-male trans individual sued her private health insurance company for reimbursement of the costs of hormone therapy, 50 % of the costs of a sex reassignment operation and the assumption of costs of further hormone therapy. The national courts dismissed the case, arguing that the claimant had failed to prove the necessity of the treatment and that she was not entitled to reimbursement of costs, since she had deliberately caused her disease (ECtHR 2003: Van Kück v. Germany, nos. 22 f.).

The transwoman turned to the European Court of Human Rights (ECtHR), claiming that German court proceedings had contravened the right to a fair trial provided in Art. 6(1) ECHR (European Convention on Human Rights), the right to respect for an individual's private life (Art. 8 ECHR) and the prohibition to discriminate against an individual, here, on the basis of sex (Art. 14 ECHR) (ibid: no.3). On 12 June 2003, the European Court on Human Rights decided in the case of van Kück v. Germany that with regard to the alleged violation of Art. 6(1) ECHR and taking into consideration »the determination of the medical necessity of gender re-assignment measures in the applicant's case and also of the cause of the applicant's transsexuality, [...] the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing« (ibid: no. 64). With regard to the alleged

Gaining and extending statutory health insurance coverage of sex reassignment surgery

The second phase in striking the balance between transsexual individuals requiring sex reassignment surgery and statutory insurance companies is marked by legal security, a differentiated concept of transsexuality, a demarcation of sex reassignment surgery from so-called cosmetic interventions and an extension of surgical sex reassignment measures to be covered by statutory health insurance companies.

On 06 Aug. 1987, the Federal Social Court ruled that statutory health insurance companies were obliged to assume the costs of sex reassignment surgery in individual cases.[173] The Court maintained the Regional Court Lower Saxony – Bremen's (LSG Niedersachsen-Bremen) definition of disease pursuant to insurance law and its concept of transsexuality. With regard to the former, the Federal Social Court added to the initially depicted concept of disease a psychological strain that renders an anomaly a disease (BSG 1988: 1551). With regard to transsexuality and unlike the Regional Court in Stuttgart, the Federal Social Court did not act on the assumption that transsexuality was in general a pathological state requiring sex reassignment surgery. While the Court suggested that transsexuality constitutes an anomaly, only a case-by-case review could tell whether the inner tension between a transsexual individual's sex and his or her identity was pathologically significant (ibid: 1550 f.). In addition, the Federal Social Court suggested that the Regional Court Lower Saxony – Bremen might have misconceived the concept of expedience entailed in the concept of necessity of treatment, if it had not considered a priority of psychiatric and psychotherapeutic treatment. However, the Federal Social Court was satisfied

violation of Art. 8 ECHR, the Court concluded »that no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other« (ibid: no. 84). In addition, the Court held »that the German authorities overstepped the margin of appreciation afforded to them under paragraph 2 of Article 8« (ibid: no. 85). According to the Court, the applicant's allegation of a violation against Art. 14 of the Convention »did not give rise to any separate issue under Article 14 in conjunction with Article 6§1 and Article 8« (ibid: no. 92). The Court awarded the complainant compensation for non-pecuniary damage (ibid: no. 96) and for costs and expenses (ibid: nos. 97[I] and [II]).

173 | The Court dealt with a case in which a statutory health insurance company refused to meet the costs of sex reassignment surgery on a male-to-female trans person. Arguing that there was no anomalous physical condition prior to surgery that could have been cured, relieved or kept from aggravation (BSG 1988: 1550), the health insurance company brought the case before the Regional Court Lower Saxony-Bremen (LSG Niedersachsen-Bremen). The complainant did not succeed and appealed to the Federal Social Court.

that the lower court had noted that this kind of treatment had failed in this particular case.[174]

In the 1990s, courts established a distinction between sex reassignment surgery and so-called cosmetic surgery maintained to this day. In this regard, the Federal Social Court decision on 10 Feb. 1993, gave direction to further rulings. In this particular case, the Court dealt with a dispute between an individual who had undergone a surgical procedure to extend the length of his legs and the statutory health insurance company. The health insurance company refused to assume the costs of surgery, arguing that the latter are not obliged to pay for a surgical intervention into a physical state within a normal range in order to remedy a psychic disorder. The Federal Social Court decided in favour of the health insurance company (BSG 1993: 2398).

The Court rejected an analogy between cosmetic interventions and sex reassignment surgery, arguing that in the case of transsexuality the patient's entire condition is an anomaly. Quoting the reasons presented in the Federal Social Court decision on 06 Aug. 1987, the Court suggested that the inner tension between the morphology and the gender identity may in individual cases lead to a disease pursuant to insurance law requiring treatment. Statutory health insurance companies are required to assume the costs of sex reassignment surgery only after psychiatric and psychotherapeutic measures fail to provide relief or eliminate the tension. The Court suggested that the difference between the case at hand and that of transsexuality is that in exceptional cases of transsexuality, surgery poses the only remedy (ibid: 2400), regardless of whether the transsexual individual agrees to undergo psychiatric or psychological treatment or not.[175]

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174 | The Medical Services of the Statutory Health Insurance Companies interpreted the Federal Social Court's suggestion to the effect that surgery needs to be preceded by psychiatric or psychological treatment as the case of the MDK Northrhine reveals (cf. Banaski 1996: 65). In a case that will be addressed later on, a post-operative complainant who did not undergo psychological treatment prior to surgery in vain sued her health insurance company for reimbursement of sex reassignment surgery (BSG 2005, MDS 2009a: 103).

175 | The Federal Social Court presented two further arguments to dismiss the intervening party's request. First, the physical condition of the individual who had undergone surgery did not deviate from the norm prior to surgery and therefore did not qualify as a disease requiring treatment according to ss. 182 and 184(1) RVO (BSG 1993: 2399). Second, the Court held that even if the surgical procedure was the only possible remedy for the mental disease, statutory health insurance companies could not be expected to assume the costs of surgery, since such a procedure would lead to an extension of measures they would have to pay for. The Court reasoned that such an approach was incompatible with the provisions entailed in ss. 182 and 184(1) RVO. If statutory health insurance companies

In its decision on 11 Apr. 1994, the High Regional Court and Court of Appeal in Cologne (OLG Köln) reinforced the distinction between sex reassignment and cosmetic surgery.[176] The Court held that

> [t]he need to treat transsexuality in its individual development defies any comparison with other cosmetic operations or other hormonal or mental disorders in the development of an individual's gender identity and can only be assessed according to the very concrete individual facts of the individual case [...]. (OLG Köln 1995: 448)[177]

Most significantly, however, the Court determined that if transsexuality is pathologically significant as in the complainant's case, it is medically justifiable to indicate surgery, including a phalloplasty, especially since the Transsexual Act requests a physical alignment with the ›new‹ gender (ibid: 449).[178] Thus, in a period in which cost pressure in the health system was quite tangible, social court rulings established the obligation of statutory health insurance companies to meet the costs of sex reassignment surgery and extended the measures they had to cover.

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were to cover surgical interventions into a regular physical state simply because the individual is psychically fixated on the desired modifications, health insurance companies would have to assume the costs of expensive cosmetic interventions in individuals with a similar psychic fixation (ibid).

176 | In this particular case, a health insurance company appealed against a lower court decision, which had ruled that the company was obliged to meet the costs of sex reassignment surgery in the case of a transman who had undergone surgery, including a phalloplasty, abroad (OLG Köln 1995: 448).

177 | With reference to the trans individual's long lasting psychological strain that had resulted in a physical breakdown and after having undergone an unsuccessful psychotherapy, the Court ruled that regardless of whether transsexuality was a disease or not, in this particular case transsexuality had a pathological significance and required sex reassignment treatment (ibid: 448).

178 | In this particular case, surgery was in part unsuccessful. The Court argued that regardless of whether the intervention was successful or not, medical statements did not rule out the possibility of a successful outcome. The Court suggested that it was obvious that a sex change from female to male would include the construction of a penis that resembled the ›natural features‹ of a male person. In addition, it would be an unwarrantable danger, if the individual's appearance resembled that of a hermaphrodite (ibid: 449).

Limiting and regulating statutory health insurance coverage of sex reassignment surgery

The third phase in the regulation of statutory health insurance assumption of costs of sex reassignment measures began in the late 1990s and developed in the context of continuing cost pressure and efficiency rule of health care. The latter is mirrored in statutory change, legal interpretations of this change and a limitation and heavier regulation of statutory health insurance coverage of sex reassignment measures while maintaining the exceptional position of transsexuality as a condition that in clearly specified circumstances justifies health insurance coverage of costs of sex reassignment surgery.

In the course of this period, s. 27(1) SGB V took effect, replacing ss. 182 and 184 RVO and becoming part of the statutory framework for regulating principles of, and access to statutory health insurance benefits. Section 27(1) SGB V broadly provides that insured persons may claim medical treatment, if it is necessary to recognise or cure a disease, to prevent an aggravation or to relieve ailments. However, s. 1 SGB V rules among other things that insured individuals are jointly responsible for their health, hence indicating a tendency towards limiting the benefits catalogue of statutory health insurance companies (BMJV undated d).

The Federal Social Court interpreted the law to the effect that not every physical anomaly qualifies as a pathological condition under health insurance law. Rather, a physical condition only qualifies as a disease, if an insured individual experiences an impairment of bodily functions or if an anatomical deviation is defacing (BSG 2004a).

The limitation of the benefits catalogue of statutory health insurance companies also had effects on the obligation of statutory health insurance coverage of sex reassignment measures. From the late 1990s onward, courts began to define measures formerly subsumed under sex reassignment measures as cosmetic, while generally maintaining a distinction between sex reassignment surgery and cosmetic surgery.

In cases dealing with micromasties or breasts the respective transwomen considered disproportionately small, courts decided that statutory health insurance companies are not obliged to pay for mammo-augmentation-plasties. The High Regional Court and Court of Appeal in Saxony (Sächsisches OLG), the Social Court in Aachen (SG Aachen) and the Regional Social Court in Baden-Württemberg (LSG Baden-Württemberg) reasoned among other things that a psychological strain does not justify a surgical intervention at the expense of statutory health insurance companies (Sächsisches OLG 1999; SG Aachen 2009; LSG Baden-Württemberg 2012).[179]

179 | In all cases, transwomen had sued their respective health insurance companies after the latter had granted applications for vaginoplasties, but turned down applications for mammo-augmentation-plasties.

In the first case, the High Regional Court and Court of Appeal in Saxony held that small breasts do not constitute an irregular physical condition. Based on the assumption that female breasts cover a broad range of sizes, the Court argued that small breasts just as well fit the image of a healthy woman as do large breasts. More specifically, the Court held that it is not appropriate to define parameters for the size of breasts on a healthy woman and to pathologise deviations from this particular norm (Sächsisches OLG 1999).[180]

Moreover, the Court held that the health insurance company was not obliged to assume the costs of surgical measures in order to remedy a psychological disorder. A successful treatment is not measured by the individual's subjective notion or a physical contour considered »ideal« or »appropriate«, even in a

180 | In its aftermath, statutory health insurances continued to refer to the court ruling of the Regional Social Court of Saxony in order to avert coverage of costs. In one instance, the Social Court Wiesbaden (*Sozialgericht Wiesbaden*; SG Wiesbaden) dealt with the case of a transman who had undergone a subcutaneous mastectomy. Depending on several factors, such as size of breasts, skin texture and form of the breasts, such an intervention can be performed in one- or two-step procedures on small to medium-sized breasts, leaving less visible scars than double-incision mastectomies. The health insurance had initially granted coverage of costs of a mastectomy. The transman applied for a revision of the mastectomy, arguing that an enlarged breast envelope had been left over (SG Wiesbaden 2012, 35401: para 5). Unlike the surgeons who had unanimously stated that surgery did not achieve the goal of creating a male chest, since it featured visible and palpable bulges, the MDK however decided that there was neither excessive skin left over worth mentioning, nor functional impairment that would justify further surgery. Rather, additional surgery would simply be cosmetic (ibid: para 6). Based on the assessment of the MDK, the statutory health insurance refused to assume the costs of further surgery. The transman filed an objection, which was rejected by the health insurance company, whereupon the transman filed a case against the health insurance company (ibid: para 7). The Social Court Wiesbaden ordered additional medical reports, which in addition to the findings brought forth by the complainant stated a significant asymmetry of the breasts (ibid: para 15). The Court ruled that the complainant's breasts required revisions, since the surgical outcome did not correspond with a legitimately expected outcome of sex reassignment surgery (ibid: para 19). The Court held that the decision of the Regional Social Court of Saxony did not apply in this case (ibid: para 20). It argued that, if a health insurance company agrees to cover the costs of sex reassignment surgery, it – as in this case – has consented to assume the costs of surgery to model male breasts. The aim was not to eliminate defacement or functional impairment (ibid: para 21). Rather, and referring to the Federal Constitution Court decision on 11 Oct. 1978, it argued that transsexual individuals want to reach a congruence of the mind and the body of which surgery constitutes part of realising the goal (ibid: para 22). The Hessische LSG (*Hessisches Landessozialgericht*) confirmed the lower court decision (Hessische LSG 2014).

case in which the discrepancy between the outer appearance and the respective individual's self-perception produces considerable psychological strain. Rather, it is decisive that from the perspective of a »sensible« observer, an approximation towards the outer appearance of the ›other‹ gender has taken place (ibid).[181]

In the second case and in response to the complainant's statements,[182] the Social Court in Aachen held that a claim to mammo-augmentation-plasty at the expense of statutory health insurance companies is premised on a disease. A micromasty cannot be considered a disease requiring treatment, because it is not connected with a physical malfunction. Missing fatty tissue does not render the condition of breasts pathological, nor are they defacing. They can only be assessed as defacement, if their condition is objectively and significantly noticeable and if they are subject to reactions, such as curiosity or consternation (SG Aachen 2009).

In addition and with reference to the Federal Social Court decision in the case of a ciswoman seeking health insurance coverage of breast augmentation surgery,[183] the Court held that a transsexual individual is not entitled to every kind of surgical measure deemed necessary to approximate a supposed ideal. The Court argued that it is not justifiable that a transsexual individual can claim benefits a ciswoman with the same size of breasts may not. If the complainant wanted to be recognised and treated like a woman, she would have to accept the rules that apply to all women (ibid).

The third case, like the second case, dealt with mammary hypoplasia. The Regional Court in Baden-Württemberg reinforced the former court's decision that statutory health insurance companies are not required to take on the costs of a mammo-augmentation-plasty in transwomen. However, the Court conceded that transwomen may claim health insurance coverage for breast construction, provided there is no disposition towards developing breasts at all and the

181 | The Court decided to ignore the expert reports that supported the complainant's cause (SG Aachen 2009).

182 | In this particular case, the complainant argued that her micromasty constituted an anatomical deviation and defacement in her view, which produced significant psychological strain (SG Aachen 2009).

183 | In this case, a ciswoman experiencing a psychological strain due to small breasts with little glandular tissue in vain appealed to the Federal Social Court to revise the Marburg Social Court (SG Marburg) decision, which had imposed the costs of mammo-augmentation-plasty on the complainant. The Federal Social Court dismissed the complaint (BSG 2004a), referring among other things to its decision on 13 July 2004 of which some of the core arguments are mentioned above and recur in the court reasoning on mammo-augmentation-plasties on transwomen.

respective individual has obtained an indication for surgical measures due to transsexualism (LSG Baden-Württemberg 2012).[184]

Court rulings differed more strongly on issues pertaining to epilation on transwomen. While statutory health insurance companies do not cover epilation treatment on ciswomen, they do on transwomen, provided a physician carries out the measure. However, court rulings on health insurance coverage of costs of epilation performed by cosmeticians are contradictory. On 11 Dec. 2007, the Social Court in Düsseldorf (SG Düsseldorf) decided that the health insurance company had to reimburse the costs of needle epilation performed by a cosmetician on a transwoman and to assume the costs of a total of 120 hours of epilation (SG Düsseldorf 2007). By contrast, the Regional Court of Baden-Württemberg decided in a similar case that statutory health insurance companies are not obliged to take on costs of epilation treatment with a cosmetician (LSG Baden-Württemberg 2009).

184 | The LSG Baden-Württemberg also discussed the legitimacy of insurance-covered surgery into a healthy body in cases of transsexuality with pathological significance in the light of the Federal Constitutional Court ruling on ss. 8(1)3 and 8(1)4 TSG on 11 Jan. 2011 and the debate on depathologisation (LSG Baden-Württemberg 2012). The Federal Constitutional Court had stated that based on the latest sexological findings, 20 to 30 % of all transsexual individuals do not opt for surgery. However, the Federal Constitutional Court assumed that many transsexual individuals nevertheless require surgery to relieve psychological strain (cf. BVerfG 2011: para 31). Referring to the sexological debate on depathologisation, the Regional Social Court suggested that pursuant to current health insurance law, health insurance companies might no longer be responsible for covering the costs of somatic measures in transsexual individuals once transsexuality is depathologised or considered a healthy variant of an individual's gender identity (LSG Baden-Württemberg 2012). The Regional Social Court concluded however that the special position of transsexuality in terms of insurance law continues to be justified, arguing that, »[t]ranssexualism currently continues to be considered a mental irregularity rather than a simple variant. Due to its continuing exceptional position when manifested with pathological significance, this psychological abnormality generally justifies surgical interventions into a healthy body.« (Ibid) As Wielpütz points out, while it is problematic to compare transsexuality with a mental disorder, since the cause of transsexuality remains unknown (Wielpütz 2012: 286), she agrees with the Court's argumentation that it is likely that health insurance companies would no longer be obliged to assume the costs of sex reassignment surgery, once transsexuality is no longer classified as a disease (ibid: 284). However, it remains to be examined whether sex reassignment surgery for all individuals requiring these measures can e. g. be covered on the basis of a social indication, like abortions, or whether sex reassignment measures can be integrated into Volume V of the Social Insurance Code, like regulations on alternative insemination (cf. BAK TSG-Reform 2012: 10).

Despite limiting interventions statutory health insurance companies are obliged to cover, courts adhered to the special position of transsexuality as compared to other so-called gender identity disorders and cis individuals. This stance becomes evident in court cases that dealt with mammo-reduction-plasties and augmentation mammoplasties on ciswomen and in a case the respective court called ›cisidentity‹ (*Zisidentität*).

In 2004, the Federal Social Court argued in cases dealing with the reimbursement of costs of breast reduction[185] and meeting the costs of breast augmentation surgery that neither a mammary hyperplasia nor a mammary hypoplasia can be compared with transsexuality. Without failing to define the circumstances that limit or allow health insurance companies to meet the costs of sex reassignment surgery,[186] the Federal Social Court presented three arguments to substantiate its opinion. First, the Court pointed out that unlike s. 27(1) SGB V, s. 182(1)1 RVO was oriented towards expanding the benefits catalogue of statutory health insurance companies (BSG 2004a). Second, the Court

185 | In this particular case, a ciswoman with mamma hyperplasia sought reimbursement of costs of breast reduction surgery. Arguing that the disproportionate size of her breasts cannot be influenced by weight loss and that her breasts cause muscle tenseness in the neck and shoulders and a trachelokyphosis, she held that her irregular physical condition required treatment in order to prevent physical and psychological after-effects. Moreover, and in reference to transsexuality, the complainant suggested that there is no principle that psychological impairment excludes an indication for surgery (BSG 2004b). The Federal Social Court decided that the health insurance company is not obliged to reimburse the costs of breast reduction surgery on several grounds. With regard to the complainant's former argument, the Court held that not every physical irregularity qualifies as a disease pursuant to insurance law. In this particular case, the Court argued that the size of breasts does not limit bodily functions, and the orthopaedic problems can be eliminated, using physiotherapy. Moreover, the Court reasoned that statutory health insurance companies are not required to provide their respective members with every possible means that promote his or her health. In addition, the Court held that surgery on a healthy body only indirectly affects another health deficiency without a secure prognosis whether surgery will solve the problem (BSG 2004b). Reiterating the reasons presented by the Federal Social Court, the Regional Social Court in Northrhine-Westfalia (LSG NRW) arrived at the same decision in a similar case on 24 Jan. 2013 (LSG NRW 2013, 20249: paras 21; 22; 24; 26).

186 | As outlined earlier on, statutory health insurance companies were at the time of this Federal Social Court ruling only obliged to meet the costs of sex reassignment surgery in cases with severe symptoms. Moreover, the insured members usually had undergone psychiatric treatment or psychotherapy. Finally, courts did not grant transsexual individuals every possible kind of surgery that is oriented towards an alleged ideal image (BSG 2004a; 2004b).

reiterated the reason provided in an earlier court ruling that transsexuality was a complex and profound disorder affecting the entire personality, including psychological and physical impairment (ibid; ibid 2004b). Third, the Court argued that the fact that the legislator passed the Transsexual Act justifies an extraordinary legal assessment of transsexuality (ibid).

The Court also emphasised the special position of transsexuality among other so-called gender identity disorders. In the case of a ›gender identity disorder‹ the Court referred to as ›cisidentity‹,[187] a person with a female body wished to obtain male physical features while retaining the remaining physical characteristics defined as female. The health insurance had met the individual's costs of psychotherapy, hormone treatment with testosterone and a subcutaneous mastectomy. However, it refused to assume the costs of a surgical procedure to enlarge the clitoris and provide the labia with implants (BSG 2011, 95709: para: 4).

The Court dismissed the complainant's appeal against a lower court decision, which had ruled that the health insurance company was not required to meet the costs of masculinising surgery on a female person with a cisidentity (ibid: para 5). The Federal Social Court reiterated the arguments it had presented in earlier cases to substantiate the special position of transsexuality with regard to health insurance coverage of sex reassignment surgery (ibid: paras 17b; 19).

In addition, the Court held that the requirement to treat an individual according to the assessment in the Transsexual Act was linked to the approximation of a »regular« condition, i. e. the physical condition of a man or a woman, respectively, a state the complainant obviously did not intend to achieve (ibid: para 8). The Court argued that the desired physical goal of treatment in this particular case was not covered by s. 27(1) SGB V, since the hormonally induced anomalous physical condition was not conducive to healing an existing disease, preventing an aggravation or relieving the person's symptoms. Rather, the complainant was intent on creating a condition that deviates even further from the concept of a »healthy« person by opting for surgery to the effect of having male and female physical features:

> The debatable treatment is according to the complainant's wish meant to create a physical state between the two human gender types and not a most approximately regular state, such as that of a male body. The desire to develop a micropenis while maintaining

187 | The complainant was diagnosed with F64.8 according to the ICD-10, a category, which covers a number of so-called gender identity disorders other than transsexuality. According to Seikowski, ›cisidentity‹ describes individuals who identify as ›both‹ genders. Seikowski suggests that surgery is contraindicated in individuals with such an identity (Seikowski 1997: 352).

and enlarging the existing labia at the same time, using plastic surgery, neither corresponds with the regular state of a woman, nor of a man. The fact that there are individuals with features of both sexes, occasionally from birth onwards, does not, contrary to the complainant's opinion commend the regularity of such a [...] state. Such cases can be causes of claims to medical treatment oriented to aligning the respective insured individual with a normal sex type and not to deepen the state of ambisexedness. This would neither be a cure, nor a prevention of aggravation. (Ibid: para 22)

The third phase is also marked by a heavier regulation of eligibility to statutory health insurance coverage of sex reassignment measures. So far, court rulings have affected access to treatment in specialised private clinics, regulated reimbursement practices and unambiguously established the priority of psychiatric treatment or psychotherapy.

On 30 Oct. 2003, the Bavarian Regional Social Court (*Bayrisches Landessozialgericht*; Bayr. LSG) dealt with a dispute between a statutory health insurance and a transman over the full reimbursement of costs of a phalloplasty in a specialised private clinic. The Court ruled that the complainant did not qualify for the coverage of the remaining costs of surgery in this particular clinic (Bayr. LSG 2003).

The Court offered two reasons for its decision. First, the Court held that according to s. 108 SGB V, statutory health insurance companies may only pay for treatment in university hospitals that are part of the German Hospital Plan or hospitals that have signed a hospital provision contract. The Court specified that s. 13[2] SGB V rules out reimbursement, if a voluntarily insured member undergoes inpatient treatment in a hospital not approved by statutory health insurance companies (ibid). The Court held that the complainant was not eligible to reimbursement of costs, since he did not require urgent treatment and there was no gap in health care offered by contract hospitals (ibid).[188]

188 | More specifically, s. 13(2) SGB V provides that individuals insured with statutory health insurance companies may choose between benefits in kind instead of reimbursement. However, insured members are required to inform the health insurance company before undergoing treatment. The health insurance company is required to inform the insured member in advance that the latter needs to pay for the costs the health insurance company will not assume. In addition, s. 13(2) SGB rules that a limitation of the choice of medical care, dental care, inpatient care and induced benefits and services is possible. Statutory health insurance companies may approve of treatment, if medical or social reasons justify recourse to other health care providers and if an equivalent treatment is ensured. However, reimbursement may only be claimed to an extent that does not exceed the amount the health insurance company would have to cover for a benefit in kind. Section 13(3) SGB V provides that a health insurance company is required to provide a benefit that may not be delayed in time. If the health insurance wrongfully

Second, and in response to the transperson's argument that he believed the specialised private clinic offered the best possible treatment, the Court held that optimal patient-centred care is not the standard for statutory health insurance companies. Rather, the quality and effectiveness of the benefits need to correspond with the generally accepted state of art medical expertise and consider medical progress.[189] The Court ruled that an individual insured with a statutory health insurance company may not claim costs of treatment in a private clinic, even if the surgeon is – as in this particular case – internationally outstanding or if the hospital is specialised in the type of surgery sought after (ibid). On 06 Jan. 2005, the Federal Social Court confirmed the decision (BSG 2005).

In another instance, the Regional Court Berlin-Brandenburg (LSG Berlin-Brandenburg) dealt with a case involving a transman who had undergone an ambulant bilateral mastectomy. He sued the health insurance company for reimbursement of costs, despite the fact that the latter had in advance refused to assume the costs of this particular measure (LSG Berlin-Brandenburg 2012: para 21). On 16 Sept. 2009, the Court decided that the complainant was not entitled to a pecuniary claim towards his health insurance (ibid: para 24).

The Court presented three reasons for its decision. First, the Court held that an ambulant bilateral mastectomy did not qualify as an intervention that had to occur without delay (ibid: para 25). Second, the Court reasoned that the complainant was no longer insured with the health insurance company at the time surgery took place and that the health insurance company did not approve of the desired measure while the complainant was insured with this particular health insurance company (ibid: para 35). Third, a prescription for hospital treatment is only valid for inpatient treatment (ibid: para 30).

The decision of the Federal Social Court on 20 June 2005 regulates the relevance of psychiatric treatment or psychotherapy for health insurance coverage of costs of sex reassignment surgery. In this particular case, the Court dismissed a transwoman's complaint against the non-admission of the decision of the Regional Social Court Baden-Württemberg (LSG Baden-Württemberg). The latter had overturned the lower court decision that the health insurance company reimburse the costs of sex reassignment surgery, arguing that it was not possible to state that sex reassignment procedures were the only means to relieve the impairment, since the complainant did not undergo psychiatric treatment or psychotherapy (BSG, MDS 2009a: 103 f.).

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refuses to provide a benefit and if the ensured member as a result had to pay for the costs of treatment, the health insurance is required to reimburse the costs of necessary treatment.

189 | Section 12(1) SGB V provides that the benefits of the health insurance need to be sufficient, appropriate and efficient and may not exceed a certain degree.

While the Federal Social Court had tentatively suggested on 06 Aug. 1987 that psychiatric treatment and psychotherapy might have to precede surgery, the Court unmistakably ruled in this decision that statutory health insurance companies are only required to meet the costs of sex reassignment surgery when psychotherapy or psychiatric means have failed to provide relief or eliminate the tension between a person's physical gender and the individual's identity as a member of the so-called other gender (ibid).

3.3.2 Federal Constitutional Court decisions on age limits and the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under the Transsexual Act

Transsexual individuals began to challenge provisions of the Transsexual Act soon after it had come into force. From 1982 to 2010, the Federal Constitutional Court made six decisions on the Act. Taking into consideration sexological perspectives and standpoints in legal scholarship, the following section deals with Federal Constitutional Court decisions on age limits for a change of gender status and first names, and the eligibility of foreigners with lawful and more than temporary residency in the Federal Republic of Germany to applications to procedures provided by ss. 1(1)1 and 8(1)1 TSG.[190] The abovementioned Federal Constitutional Court decisions remedied human rights breaches against transsexual individuals. However, the fact that the Court consistently examined the relevant sections of the Transsexual Act according to the general rule of equality (Art. 3[1] GG) rather than discrimination based on gender and/or native country (Art. 3[3] GG) underlines that the Court did not consider transsexuality on a par with cis individuals.[191]

Relevant provisions of the Transsexual Act

Sections 1(1)1 to 1(1)4 and 8(1)1 to 8(1)4 TSG define the requirements transsexual individuals needed to comply with for a change of first names and gender status until trans individuals began to successfully challenge several rules of the Act before the Federal Constitutional Court. Section 1(1)3 TSG rules that a court must upon application change an applicant's first names who due to his or her transsexual imprinting no longer feels he or she belongs to the sex/gender entered in the birth register, but to the ›other‹ sex/gender and who has felt compelled to live according to his or her ideas for at least three years, provided he or she is at least 25 years of age.

190 | For summaries of all Federal Constitutional Court decisions on provisions of the Transsexual Act so far, see Adamietz 2011: 125-150.

191 | See also Adamietz 2011.

Section 8(1)1 TSG rules that a court must state that an applicant be considered a member of the ›other‹ sex/gender who due to his or her transsexual imprinting no longer feels he or she belongs to the sex/gender entered in the birth register, but to the ›other‹ sex/gender and who has felt compelled to live according to his or her ideas for at least three years, provided he or she fulfils the conditions outlined in s. 1(1)1 to 1(1)3 TSG. Section 1(1)1 TSG defines that German citizens according to the Basic Law or stateless or displaced foreigners with usual residence in the areas of validity of the Act or a person who has been granted the right to asylum or a foreign refugee may file an application.

The Federal Constitutional Court decision on the age limit of 25 years for a revision of gender status

The age limit of 25 years for a change of gender status according to s. 8(1)1 TSG was designed to prevent possibly immature individuals from following the transsexual route (Augstein 1981: 11).[192] However, the legislator did not determine an age limit for sex reassignment surgery. As a result, transsexual individuals under the age of 25 who had undergone sex reassignment surgery could not apply for a revision of gender status or for a change of first names (ibid).[193] The lawyer Augstein put the problem in a nutshell when asking, »What sense does it make to leave a person in the former legal gender after he or she has undergone gender-correcting operations, simply because he or she is not yet 25 years old?« (Ibid: 13) In addition to considering the particular vulnerability of young transsexual individuals, she suggested the reason for maintaining the age limit provided in s. 8(1)1 TSG was incompatible with the general rule of equality provided in Art. 3(1) GG (ibid).

Initiated by a constitutional complaint by a transwoman under 25 years of age who had undergone sex reassignment surgery, the Federal Constitutional Court dealt with the question whether it was compatible with the Basic Law to establish an age limit of 25 years when individuals fulfil all other criteria for a revision of gender status, especially since the legislator did not provide for an age limit for sex reassignment surgery (BVerfG 1983: 170).

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192 | This precaution underlines the undesirability of a transsexual development, since there are no such precautions for cis individuals.

193 | As Augstein's surveys reveal, the age limit provided in s. 8(1)1 TSG affected a considerable number of young transsexual individuals. Augstein stated in her survey of decisions on transsexuality and intersexuality until 31 Dec. 1980 that 38.9 % of trans individuals of a total of 72 persons who had undergone sex reassignment surgery were under 25 years of age (Augstein 1982: 240). In her survey two years after the Transsexual Act had come into force, the number of individuals of the same age group who had undergone sex reassignment surgery amounted to 17.1 % of 123 individuals (Augstein 1983: 340).

The transwoman complained that the age limits for a change of first names (s. 1[1]3 TSG) and gender status (s. 8[1]1 TSG) infringed upon her constitutionally guaranteed rights to the inviolability of a person's dignity (Art. 1[1] GG) in conjunction with the right to the free development of one's personality (Art. 2[1] GG). Moreover, she held that the abovementioned provisions contravene Art. 3(1) GG, which states that all individuals shall be equal before the law (ibid: 171). The Court decided to deal with the question of the constitutionality of s. 8(1)1 TSG only (ibid).

On 16 Mar. 1982, the Federal Constitutional Court decided that s. 8(1)1 TSG contravenes Art. 3 (1) GG. The Court held that the age requirement excludes transsexual individuals under 25 years of age from the possibility to have their respective gender status revised, despite having undergone sex reassignment surgery and having fulfilled the other prerequisites (ibid: 170). Moreover, the Court argued that a provision contravenes the general rule of equality guaranteed under Art. 3(1) GG, if addressees of a statute are treated unequally, even though there are no substantial differences that justify unequal treatment. Since the legislator left it up to physicians to decide whether medical and surgical interventions are medically indicated, its margin of appreciation is limited. Legislation is not entitled to deny a transsexual individual under 25 years of age a revision of gender status a person over 25 years of age may obtain (ibid: 172).

However, the Court held that the unconstitutionality of the age requirement for an establishment of gender status does not indicate the unconstitutionality of the age limit for a change of first names (s. 1[1]3 TSG). The Court argued that the latter is possible under conditions that cannot be compared with those demanded under s. 8[1]1 TSG and therefore requires separate examination (ibid: 173).

The Federal Constitutional Court decision on the age limit of 25 years for a change of first names

While ss. 1(1)3 and 8(1)1 TSG indeed regulate different matters (Augstein 1982: 173), sexologists and legal scholars alike criticised that the Court did not examine the constitutionality of the age limit of 25 years for a change of first names. The legal experts Augstein and Sieß as well as the sexologist Pfäfflin pointed out that the age limit for the so-called small solution was an effect of political compromise (Augstein 1981: 10; Sieß 1996: 110) or tactics (Pfäfflin 1986: 201) rather than factual reasons.

Augstein and Pfäfflin presented a number of reasons in favour of either eliminating (Pfäfflin 1986: 201; Augstein 1983: 340) or at least reducing the age limits to 21 years of age (Augstein 1983: 340). Augstein held that the legislator needs a valid reason for the age limit regulated by s. 1(1)3 TSG. Augstein and Pfäfflin argued that the legislator's anxiety about a misuse of the ›small solution‹ had not materialised so far and continues to be highly unlikely, since the

legal decision to grant a change of first names involves two experts (Augstein 1983: 340; Pfäfflin 1986: 202).[194]

Furthermore, Augstein argued that the phase in the life of a transsexual individual who has not yet undergone surgery deserves the same protection provided in Art. 1(1) GG in conjunction with Art. 2(1) GG. A change of first names does not entail differences of such significance that it would justify unequal treatment (Augstein 1982b: 173).

Finally, Augstein and Pfäfflin argued that the legislator designed the so-called small solution in accordance with state of the art medicine, especially to allow transsexual individuals to test their new role in everyday life, regardless of whether the respective individual is over 25 years of age or not (Pfäfflin 1986: 202; Augstein 1982b: 173). Instead, the legal situation has the opposite effect to the one intended (Pfäfflin 1986: 202).

Local courts dealing with applicants for a change of first names who were younger than 25 years of age prompted the Federal Constitutional Court examination of the age limit for a change of first names under the Transsexual Act. The courts stayed the proceedings and called upon the Federal Constitutional Court to decide whether s. 1(1)3 TSG was constitutional (BVerfG 1993: 111).

The lower courts held that the cases suggest that irreversible transsexualism can be ascertained in individuals younger than 25 years of age. Moreover, the defeasance of s. 8(1)1 TSG forces young transsexual individuals to undergo sex reassignment surgery in order to acquire a change of first names, which runs contrary to the legislator's intention to prevent young individuals from undergoing surgery prematurely. Furthermore, the courts argued that it is a contradiction, if a change of first names depends on a minimum age, while surgical measures, which are a prerequisite for a revision of gender status, do not. Finally, the courts argued that there were no medical reasons for an age limit of 25 years (ibid).

On 26 Jan. 1993, the Federal Constitutional Court ruled that s. 1(1)3 TSG was indeed incompatible with Art. 3(1) GG and void (ibid: 112). The Court added to its reasoning in the decision on the ›big solution‹ that legislation requires a particularly strict examination, if the rule of equality involves personal characteristics that approximate those protected under Art. 3(3) GG.[195] In these instances unequal treatment risks discrimination against a minority (ibid).

The Court held that the unequal treatment of individuals under 25 years of age whom experts described as irreversibly transsexual with a high degree

194 | Osburg and Weitze's follow-up study ten years after the Transsexual Act came into force confirms Augstein and Pfäfflin's assessment (Osburg/Weitze 1993: 106).

195 | Art. 3(3) GG rules that, »[n]o person shall be favoured or disfavoured because of race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.« (BMJV 2017)

of probability severely discriminates against this group of individuals. Unlike transsexual individuals who have reached the age of 25 years, they are denied the option of living according to the gender role prior to undergoing sex reassignment surgery without encountering incriminatory situations e. g. at the workplace, in education or in everyday life (ibid). This discrimination is ever more severe when considering that the ›small solution‹ aimed at providing conditions for testing life in the ›other‹ gender before deciding to undergo surgery (ibid: 112 f.).

Since the legislator did not introduce a new age limit for individuals applying for a change of gender status, there was no plausible reason for protecting the same group of individuals from a reversible and less far-reaching decision. Referring to the latest sexological findings on this issue, the Court suggested that the ›small solution‹ seems to have contributed to improving the situation of transsexual individuals prior to surgery and enlarging the leeway in decision-making on behalf of physicians and transsexual individuals (ibid: 113).

The Federal Constitutional Court decision on the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under the Transsexual Act

As early as in 1986, the sexologist Pfäfflin pointed out to the difficulties foreign transsexual individuals living in (West) Germany face. He argued that, based on clinical observations, foreign transsexual individuals frequently struggle in vain for years with the consulates and embassies of their respective home countries, while their social situation deteriorates from day to day due to the discrepancy between their outer appearance and their documents. Referring to comparatively lenient regulations in the Netherlands, Pfäfflin called on the West German legislator to solve this particular problem (Pfäfflin 1986: 203).

Roughly about ten years later, and based on referral proceedings provided by the Bavarian Highest Regional Court (*Bayrisches Oberstes Landgericht*; Bayr. ObLG)[196] and the High Regional Court in Frankfurt,[197] the Federal Constitu-

196 | The Bavarian Highest Regional Court dealt with the case of a Thai citizen living in Germany who had undergone surgery and wished to marry her German partner. Her application to exempt her from producing a certificate of no impediment to marriage was denied her with reference to the Transsexual Act. The complainant entered a registered life partnership with her partner, but continued to strive for a marriage (Bayr. ObLG 2004: 67).

197 | The High Regional Court Frankfurt dealt with the case of an Ethiopian citizen who had started with sex reassignment surgery in Germany. He was not deported from Germany on the grounds that he would neither be accepted as a transsexual individual in Ethiopian society, nor be treated medically in an appropriate manner (OLG Frankfurt 2005: 73). In the aftermath of a complaint by the representative of the public interest against a local court, the regional court decided that the applicant was not a foreign refugee, nor did

tional Court dealt with the question, whether it is constitutional to exclude transsexual foreigners from the options provided by the Transsexual Act to change first names and gender status, even if the law of the home country does not provide for such an option (BVerfG 2007: 9).

The referring courts held that s. 8(1)1 TSG in conjunction with s. 1(1)1 TSG was incompatible with Art. 3(1) GG and Art. 3(3) GG, if the home country of the foreign transsexual individual with usual residence in Germany did not have regulations or practices that correspond with s. 8 TSG (Bayr. ObLG 2004: 68; OLG Frankfurt 2005: 73). They presented four reasons for their legal opinion. First, they argued that this particular group of individuals is discriminated against when compared with applicants who are eligible for an application according to s. 8(1)1 TSG in conjunction with s. 1(1)1 TSG (Bayr. ObLG 2004: 68; OLG Frankfurt 2005: 73).

Second, they held that this particular discrimination violates the principle of commensurability. The reason provided by the legislator to leave the decision to change the foreign transsexual individual's gender status up to the home country is not of such significance that it would justify unequal legal consequences for German and foreign transsexual individuals, who are lawfully living in Germany (Bayr. ObLG 2004: 68; OLG Frankfurt 2005: 74).

Third, the courts reasoned that analogously to Art. 7 of German Private International Law (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*; EGBGB),[198] a person's gender status is incumbent upon the law of the individual's home country. However, if the law of the transsexual individual's home country does not grant a revision of gender status, s. 1(1)1 TSG collides with Art. 2(1) GG in conjunction with Art. 1(1) GG (Bayr. ObLG 2004: 68 f.; OLG Frankfurt 2005: 75). The OLG Frankfurt added that the protection of an individual's basic rights is paramount to another state's writ of law (OLG Frankfurt 2005: 75).

Finally, the Bayr. ObLG added that the legislator did not maintain such a limitation in a similar area. The registered life partnership does not require German citizenship, nor a place of residence in Germany (Bayr. ObLG 2004: 69).

On 18 July 2006, the Federal Constitutional Law decided that s. 1(1)1 TSG is incompatible with the non-discrimination precept provided in Art. 3(1) GG in conjunction with the basic right to the protection of the free development of one's personality guaranteed in Art. 2(1) GG in conjunction with Art. 1(1) GG, insofar as it exempts foreign transsexual individuals who are lawfully and not temporarily residing in Germany from applying for a change of first names and

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he hold a comparable status. He was therefore not eligible to apply for a change of first names. The complainant appealed to the OLG Frankfurt (ibid).

198 | Art. 7(1) EGBGB rules that a person's capacity to act and capacity to contract are subject to the law of the state the person belongs.

the establishment of gender status according to s. 8(1)1 TSG, if the law of their respective countries does not provide comparable regulations (BVerfG 2007: 14).

The Federal Constitutional Court arrived at its decision after examining three aspects as they relate to the facts of the cases. First, the Court examined whether s. 1(1)1 TSG contravenes the general rule of equality (Art. 3[1] GG). Second, the Federal Constitutional Court examined whether the principle of citizenship contravenes the purpose of ss. 1(1)1 and 8(1)1 TSG to protect transsexual individuals' basic rights declared in Art. 2(1) GG in conjunction with Art. 1(1) GG. Third, the Court related s. 1(1)1 TSG to Art. 6 EGBGB.

With regard to the general rule of equality (Art. 3[1] GG), the Court established that if the unequal treatment of groups of individuals is linked to an impairment of personal privacy, it requires a justification that is commensurate with the extent of the impairment. The exclusion of foreign transsexual individuals under s. 1(1)1 TSG constitutes an unequal treatment of German citizens or individuals with a German status on the one hand and transsexual foreigners on the other hand. Unequal treatment is particularly severe for those transsexual individuals who cannot resort to similar regulations in their respective home countries. This discrimination severely and unjustifiably impairs the rights protected in Art. 2(1) GG in conjunction with Art. 1(1) GG of those lawfully and not only temporarily residing in Germany, who are excluded from any possibility to be recognised as the gender they perceive themselves to be (cf. ibid: 14).

With regard to the second issue, the Court conceded that the legislator pursued a legitimate goal by limiting the group of individuals eligible to an application under ss. 1(1)1 and 8(1)1 TSG to German citizens and individuals with a German status. The legislator's considerations were based on the respect for the legal orders of other states[199] and the assumption that a foreigner is more familiar with the law of the home country.

However, the Court argued that relegating without exception foreign transsexual individuals residing lawfully and more than temporarily in Germany to the law of their respective home country means that those foreign individuals experience discrimination whose home countries do not dispose of comparable regulations for a change of first names and gender status (ibid: 15). As a result, this particular group of individuals cannot enjoy the right to their respective gender identity and privacy protected by Art. 2(1) GG in conjunction with Art. 1(1) GG and provided for in s. 1(1)1 TSG for German citizens or individuals with a German status (ibid).

199 | Art. 10(1) EGBGB provides that a person's name is subject to the law of the state to whom the individual belongs.

Moreover, since s. 8(1)1 TSG refers to s. 1(1)1 TSG, foreign transsexual individuals cannot apply. If their respective home country does not provide for a change of gender status, foreign transsexual individuals are forced to live with a discrepancy between their outer appearance and their official documents, which, too, disadvantages this group of individuals compared to those individuals who may apply and dramatically impairs their right to the free development of one's personality guaranteed in Art. 2(1) GG in conjunction with Art. 1(1) GG (ibid). The Court concluded that the unrestricted validity of the citizenship principle for a change of first names and gender status is not a sufficiently substantial reason for depriving foreign transsexual individuals whose home countries do not provide for a legal recognition of their respective gender identity and who lawfully and more than temporarily live in Germany from the fundamental rights protected by Art. 2(1) GG in conjunction with Art. 1(1) GG (ibid).

The Court added that recognising the sovereignty of other states and respecting the independence of other legal orders in principle justify an approach that follows the principle of citizenship and refers foreigners to the respective national rules. However, neither international law, nor constitutional law demand the use of the principle of citizenship in private international law. Referring to the registered life partnership, the Court pointed out that the legislator has proven that there are exceptions to this principle (ibid).

Finally, the Court problematised the relationship between s. 1(1)1 TSG and Art. 6 EGBGB.[200] In particular, the Federal Constitutional Court found fault with the fact that s. 1(1)1 TSG follows the citizenship principle without entailing a choice of law clause with regard to the respective law of the individual's home country, which German courts could apply. As a result, courts can neither grant foreign applicants the rights provided in the Transsexual Act, nor apply and examine the compatibility of the corresponding foreign law with the *ordre public*. By denying foreign transsexual individuals eligibility to apply for a change of first names and an establishment of gender status, s. 1(1)1 TSG accepts violations of their basic rights, without courts having a chance to prevent these violations. The Court concluded that s. 1(1)1 TSG cannot be interpreted constitutionally, since foreign transsexual individuals whose home countries do not provide for a change of first names and gender status are excluded from the protection of basic rights secured by Art. 6 EGBGB and are exerted to a serious impairment of their right to the free development of one's personality provided by Art. 2(1) in conjunction with Art. 1(1) GG (ibid: 16).

200 | Art. 6 EGBGB provides for instances in which foreign regulations are not applied, if they lead to a result that is incompatible with fundamental principles of German law. In particular, a foreign regulation is inapplicable, if its use contravenes basic rights. This provision is also known as *ordre public* (public order).

Unlike the Federal Constitutional Court decisions on the age limits, the Court decided that the unconstitutionality of s. 1(1)1 TSG does not lead to its nullity, but to a declaration of its incompatibility with Art. 3(1) GG in conjunction with the basic right to the free development of one's personality (Art. 2[1] GG in conjunction with Art. 1[1] GG). The Court reasoned that the legislator has a few options to remedy the impairment of the rule of equality (ibid).

The first suggestion was to transform s. 1(1)1 TSG into a conflict rule or to integrate such a provision into private international law by providing a right to change the first name and gender status. While such a solution would mean adhering to the principle of citizenship, Art. 6 EGBGB would apply to foreign transsexual applicants whose home countries do not provide for comparable rights (ibid: 16 f.).

The second suggestion was that the legislator extend the provisions of the Transsexual Act to foreigners, using instruments, such as the lawful stay or the duration of the lawful stay in Germany as criteria for access to the procedures provided by ss. 1 and 8 TSG (ibid: 17).

The Federal Constitutional Court ruled that s. 1(1)1 TSG remains in force. However, the Court set a deadline until 30 June 2007 for the legislator to create a constitutional regulation (ibid).

The legislator decided to pursue the second option. Section 4(1) of the Act to amend the Passport Act and further prescriptions (*Gesetz zur Änderung des Passgesetzes und weiterer Vorschriften*; PassGÄndG) rules that a person whose first name has been changed according to s. 1 TSG may apply for a passport signifying the ›other‹ gender than the one entered in the birth register. The Transsexual Act was amended accordingly. Section 1(1)3d TSG specifies that in addition to the requirements that apply to all applicants, a foreigner whose home country does not provide for a comparable regulation may apply, provided he or she holds an unlimited right of residence or a renewable residence permit and is a lawfully a permanent resident in Germany.

Legal opinions were mixed on the legislator's choice. Windel welcomed the legislator's decision, arguing that the second suggestion would have unnecessarily disavowed foreign civil status law (Windel 2008: 73). Similarly, Pawlowski (2007: 413) recommended the second option. Grünberger however deplored the decision. The latter held that the placing the onus on local courts to commission expert reports in order to compare foreign laws and regulations with German regulations would delay proceedings involving transsexual individuals (Grünberger 2007: 368; 2008: 92). Adamietz subscribed to Grünberger's view (Adamietz 2011: 141).

Implications of the Federal Constitutional Court examination of Art. 3(1) GG as opposed to Art. 3(3) GG with regard to transsexuality, gender and gender regime

The Federal Constitutional Court did not examine the constitutionality of the sections of the Act according to Art. 3(3) GG, which among other grounds protects individuals from discrimination based on gender and home country.[201] Rather, the Court decided to examine human rights breaches of sections of the Act according to the general rule of equality (Art. 3[1] GG).

In its decision on the age limit for a change of gender status, the Federal Constitutional Court did not mention Art. 3(3) GG at all as a possible test for the constitutionality of the age limit for a revision of gender status. While the Court held that the personal characteristics approximate those protected under Art. 3(3) GG in its decision on the age limit for a change of first names, discrimination of transsexuality once more fell short of being considered discrimination on the grounds of gender. In the case on the eligibility of a particular class of foreigners to an application under the Transsexual Act, the Federal Constitutional Court evaded the issue.[202] The Court argued that since s. 1(1)1 GG violates the general rule of equality provided in Art. 3(1) GG in conjunction with the basic right to the free development of one's personality guaranteed in Art. 2(1) in conjunction with Art. 1(1) GG and is therefore unconstitutional, it is unnecessary to decide whether the regulation contravenes further basic rights (BVerfG 2007: 16).

While legal scholars agree that given the current anti-discrimination framework in Germany discrimination against transsexual individuals can only be considered a violation of Art. 3(3) GG after the respective individual has gained legal recognition as either a man or a woman,[203] Adamietz, Koch-Rein and Tolmein problematised this approach with regard to transsexuality, gender and gender regime. Adamietz suggests that the main reason for the Court's approach can be explained with a concept of gender which is based on the dichotomy between (cis)men and (cis)women. Hence, discrimination can only be detected under the Constitution, if a member of one of the legitimate genders is treated differently than a member of the other legitimised gender: »The comparison with a non-transsexual person without a ›problematic‹ gender was, and

201 | At the time of writing, the same applies to all Federal Constitutional Court decisions preceding or following the decisions mentioned above.

202 | The Bayr. ObLG and the OLG Frankfurt had called upon the Federal Constitutional Court to decide whether it was compatible with Art. 3(1) and Art. 3(3) GG to exclude foreign transsexual nationals usually living in Germany from eligibility to apply for a change of gender status and first names, if the respective home country does not provide for such procedures (Bayr. ObLG 2004: 67; OLG Frankfurt 2005: 73).

203 | See e. g. Windel 2008: 69 and Adamietz 2011: 129.

continues to be, unimaginable according to dominant constitutional dogmatics on Art. 3(3) GG« (Adamietz 2011: 129). While Tolmein cautions that transsexuality does not constitute a gender, since many transsexual individuals wish to live inconspicuously as a person according to the gender they identify with (Tolmein 2008: 114), he likewise suggests that ›gender‹ is conceptualised too narrowly. By defining ›gender‹ as a polarised construction of ›men‹ and ›women‹, the period of transitioning from one gender to another as well as ›ambiguous‹ genders are blocked out (ibid: 115). Moreover, and as Koch-Rein suggests, the gender binary itself is not considered a process of stereotyping and a problem (Koch-Rein 2006: 13).

3.3.3 Jurisdiction and legal scholarship on marriage and registered life partnership under the Transsexual Act

Sections 7(1)3 and 8(1)2 TSG affect transsexual individuals' options to enter or maintain a legally sanctioned marriage or registered life partnership in conjunction with a change of first names or gender status, respectively. Both rules were based on the sexological assumption that transsexual individuals are heterosexual and the rules were designed to prevent the appearance of, or *de facto* same-sex marriages. Jurisdiction and legal scholarship barely contested the abovementioned sections throughout the 1980s and 1990s.[204] During the first decade of the 21st century, jurisdiction and legal scholarship began to examine ss. 7(1)3 and 8(1)2 TSG in the light of recent developments in sexology on transsexuality and against the background of the Basic Law. As a result, the Federal Constitutional Court finally declared both sections unconstitutional, paving the way for same-sex marriages under specific circumstances. By implication, the Federal Constitutional Court decision on s. 7(1)3 TSG heralded a legal development towards recognising transsexual individuals' gender without surgery.

Relevant provisions of the Transsexual Act

Section 7(1)3 TSG defines one of three reasons for invalidating a change of first names, while s. 8(1)2 TSG defines one of four prerequisites for a revision of gender status. The former rules that the decision through which the applicant's first names were changed is reversed, if the applicant enters a marriage upon filing a statement according to s. 1310(1) BGB.[205] The latter rules that upon ap-

204 | Exceptions are Augstein 1981 and the Hanseatic High Regional Court Hamburg (Hanseatisches OLG Hamburg 1980: 245).

205 | Section 1310(1) BGB provides that a legal marriage may only be entered, if the couple wishing to enter into marriage declares its desire to marry before a registrar. The registrar is not allowed to deny his or her co-operation, unless it is evident that the marriage can be annulled according to s. 1314(2) BGB. Among these reasons are, e. g.,

plication a court must state that a person be considered a member of the ›other‹ sex/gender who due to his or her transsexual imprinting no longer has a sense of belonging to the sex/gender entered in the birth register, but to the ›other‹ sex/gender and who has felt compelled to live according to his or her ideas for at least three years, provided he or she is not married.

Interpretations of sexological concepts of transsexuality and gender in the Federal Constitutional Court decisions on ss. 7(1)3 and 8(1)2 TSG

The Federal Constitutional Court revised its earlier assumptions on gender and sexuality in its decision on s. 7(1)3 TSG, leaving an impact on all of the Court's decisions on the Transsexual Act that were to follow. The Court drew upon sexological notions that acknowledge the heterogeneity of transsexuality. Reconsidering transsexuality also had effects on the Court's understanding of gender, which while not displacing the gender binary marked a shift within the gender regime.

The Federal Constitutional Court's rethinking of its concept of transsexuality apply to transsexual individuals' sexual orientations, the idea of sex reassignment surgery as an indispensable feature of transsexuality and the significance of the so-called small solution. While the Court had previously adopted dominant sexological concepts of transsexuality that described transsexual individuals as heterosexual,[206] it based its argumentation in its decision on s. 7(1)3 TSG on findings provided by studies and sexological statements that question the homogeneity of transsexual individuals' sexual orientations. Referring to Sigusch (1991: 309; 322), Eicher (1992: 171), and Hartmann and Becker (2002: 162), the Federal Constitutional Court adopted the insight that transsexual individuals reveal all sexual orientations that can be found in cis individuals (BVerfG 2006: 103). Therefore, engaging in same-sex activities no longer questions a person's transsexuality (ibid: 106; cf. Adamietz 2006: 374).

Similarly, the Federal Constitutional Court revised its understanding of sex reassignment surgery as a key feature of transsexuality. Based on sexological assumptions of the time, the Court had initially considered sex reassignment

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if one of the partners is in a state of unconsciousness or temporarily mentally disordered (s. 1314[2]1 BGB) or unaware of the fact that he or she is entering a marriage (s. 1314[2]2 BGB), if the marriage was based on malicious deceit (s. 1314[2]3 BGB) or is an effect of a threat (s. 1314[2]4 BGB), or if the partners are not willing to take on responsibility for each other (s. 1314[2]5 BGB).

206 | The Federal Constitutional Court had stated in its first decision on transsexuality that, »according to scientific knowledge, the male transsexual does not desire homosexual relationships, but a bond with a heterosexual partner« (BVerfG 1979: 12).

surgery essential to transsexuality.[207] In its decision on s. 7(1)3 TSG, it adopted more recent findings provided by the DGfS that somatic measures do not necessarily follow from a largely secured diagnosis of transsexuality (Becker et al. 2001: 261) and, by implication, refuted the notion entailed in the definition of transsexuality provided by the German Standards. Quoting the published submission of the DGfS, the Court argued that the demand to undergo surgery has led to more surgical interventions in the past than were individually indicated (ibid: 266, quoted in BVerfG 2006: 103).

These findings are closely, but not reducibly related to findings on the legal measures transsexual individuals opt for. The Federal Constitutional Court departed from its earlier assumption that the change of first names constitutes a transitional stage for a change of gender status. Quoting the observations in Osburg and Weitze's study (1993: 102; 106) and the abovementioned statement produced by the DGfS, the Court considered as proven that about 20 to 30 % of all transsexual individuals seeking legal recognition apply for a change of first names only (BVerfG 2006: 103).

Reconceptualising transsexuality involved a reconsideration of gender. Based on recent sexological insights, the Court suggested that, »gender cannot be determined on the basis of physical characteristics alone. It also essentially depends on an individual's psychological constitution and his or her sustainable self-perceived gender.« (Ibid: 105) This perspective was reiterated in Federal Constitutional Court decisions on ss. 8(1)2, 8(1)3 and 8(1)4 TSG (BVerfG 2008: 314; ibid 2011: para 56). The emphasis on a person's gender identity rather than on physical properties served as a harbinger for the Federal Constitutional Court's decision on somatic requirements as a prerequisite for a revision of gender status roughly half a decade later.[208]

Moreover and without questioning the initial allocation to one of the two legally recognised genders at the time of birth, the Court concluded from the existence of homosexual transsexual individuals that a person's gender cannot be deduced from his or her sexual orientation (BVerfG 2006: 105), hence disrupting the heteronormativity of the gender binary. The Federal Constitutional

207 | In its first decision, the Federal Constitutional Court suggested that, »[a]ccording to secured knowledge in science, transsexual individuals do not want to manipulate their sex. Their emphasis is not on sexuality, but to strive towards the congruence of the mind and the body. [...] the operation needs to be considered a part of the realisation of this goal« (BVerfG 1979: 12; cf. Adamietz 2006: 377).

208 | As Adamietz suggests, »[i]t is conceivable for the Federal Constitutional Court that the future civil status may differ from the gender suggested by the given external sex characteristics, that is: it is possible that men with vaginas and women with penises exist« (Adamietz 2006: 375).

Court integrated these premises into its legal considerations on ss. 7(1)3 and 8(1)2 TSG.

The Federal Constitutional Court decision on s. 7(1)3 TSG

As early as in 1981, the lawyer Augstein questioned the constitutionality and the premises upon which s. 7(1)3 TSG was based. She suggested that the desire to marry does not necessarily mean that a person has decided to revert to the sex/gender assigned at the time of birth. It could also mean that a transsexual individual prefers same-sex relationships. Augstein observed that this particularly applies to transwomen (Augstein 1981: 12). Moreover, she pointed out that the regulation produces contradictory effects and violates Art. 3(1) and Art. 6 GG. While a transsexual individual cannot marry a person of either of the two officially recognised sexes/genders after a legal recognition of first names without risking a reversal of the decision to alter the first names, a person who was married prior to an application for a change of first names, may remain married (ibid).

It took nearly two-and-a-half decades, until the Federal Constitutional Court took up the issue. In 2003, the Regional Court Itzehoe asked the Federal Constitutional Court for clarification as to the constitutionality of s. 7(1)3 TSG.[209] Reiterating and exceeding the reasons Augstein had presented in 1981, the referring court suggested that the rule contradicts Art. 1(1) in conjunction with Art. 2(1) GG as well as Art. 3(1) and Art. 6(1) GG for a number of reasons. First, a change of first names is an equally valid option as is a revision of gender status that involves sex reassignment surgery. Therefore, a change of first names does not simply constitute an interim phase. Second, there are several reasons for transsexual individuals to decide not to undergo sex reassignment surgery. Third, since the Federal Constitutional Court clarified the advance effect of first names in an earlier decision, a compulsorily enforced change of first names violates Art. 2(1) in conjunction with Art. 1(1) GG. Fourth, s. 7(1)3 TSG is

209 | In this particular case, a transwoman with a change of first names married a ciswoman, upon which the registrar reversed the court decision to change the transwoman's first names. The trans individual in vain filed a constitutional complaint. Moreover, the Local Court Itzehoe refused to revise the birth register according to s. 47 PStG. The Court argued that the applicant's marriage revealed that she did not intend to undergo sex reassignment surgery, since s. 8(1)2 TSG stipulates as a prerequisite for a revision of gender status that a transsexual individual may not be married. The Court suggested the applicant reapply for a change of first names according to s. 1 TSG. However, the Local Court Oldenburg rejected the application, arguing that the applicant was trying to circumvent s. 7(1)3 TSG (BVerfG 2006: 103 f.). Upon an immediate complaint, the Regional Court Oldenburg stayed its proceedings and referred the question whether s. 7(1)3 TSG was unconstitutional to the Federal Constitutional Court (ibid: 104).

premised upon the heterosexuality of transsexual individuals, an assumption that does not generally apply. Rather, transsexual individuals reveal all kinds of sexual orientations. Fifth, s. 7(1)3 GG does not prevent the impression of a homosexual marriage, since the legislator accepts a change of first names within a marriage. Finally, the rule violates Art. 6(1) GG and the general rule of equality provided in Art. 3(1) GG, because it discriminates against transsexual individuals wishing to marry vis-à-vis those who want to remain single (LG Itzehoe, quoted in BVerfG 2006: 104).

Taking into consideration recent developments on transsexuality in sexology and older minority opinions, the Federal Constitutional Court decided on 06 Dec. 2005 that s. 7(1)3 TSG contravenes Art. 2(1) in conjunction with Art. 1(1) GG. The Court held that s. 7(1)3 TSG violates a homosexual transsexual person's legally protected right to a name and the right to the protection of his or her intimate sphere as long as a homosexual transsexual individual does not have an option to enter a legally secured partnership without losing the names corresponding with his or her identity (BVerfG 2006: 102).[210]

The Court arrived at its decision after examining two aspects as they relate to the facts of the case. After having reaffirmed the relevance of first names in relation to the basic right to develop one's personality freely as guaranteed in Art. 2(1) GG in conjunction with the right to privacy protected under Art. 1(1) GG, the Court examined whether s. 7(1)3 TSG violates the aforementioned basic rights. Thereafter, the Court examined the legitimacy, suitability, necessity and the proportionality of the rule against the background of the interplay of the regulations of the Transsexual Act with civil status law, marriage law regulations and those of the Registered Life Partnership Act in the light of new sexological findings on transsexuality.

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210 | As usual, the Court invited a statement from the federal government, represented by the Federal Home Office. However, this time the Court also invited statements from civil society organisations, such as, the *Deutsche Familiengerichtstag*, the DGfS, the LSVD e. V., Homosexuals and the Church (*Homosexuelle und Kirche*; HuK), the Sonntags-Club e. V. and the dgti e. V. Except for the *Deutsche Familiengerichtstag*, all civil society organisations considered s. 7(1)3 TSG unconstitutional (BVerfG 2006: 104).
To this day, the Federal Constitutional Court has maintained the practice of inviting statements from trans organisations, among others, when considering contested rules under the Transsexual Act. When considering the constitutionality of s. 1(1)1 TSG, for instance, the Federal Constitutional Court invited statements from the dgti e. V., the Sonntags-Club e. V. and the TGNB (BVerfG 2007: 12). With regard to s. 8(1)2 TSG, the Federal Court invited statements from the support group Transsexuelle Selbsthilfe München and the dgti e. V. (BVerfG 2008: 314) and with regard to ss. 8(1)3 and 8(1)4 TSG, the dgti e. V., Sonntags-Club e. V. and the TGNB (BVerfG 2011: para 45).

With regard to the first issue, the Federal Constitutional Court reiterated an earlier decision that had established that the basic right to one's free personal development in conjunction with the right to privacy cover a person's sexual self-determination, including his or her gender identity and sexual orientation. Art. 2(1) in conjunction with Art. 1(1) GG protect an individual's first names as a means of finding and expressing his or her identity and individuality, including his or her gender identity. The Court argued that s. 1 TSG takes into consideration that sex characteristics are not the only determinants of an individual's gender identity. The latter essentially depends on an individual's psychological constitution and his or her self-perceived gender (ibid: 104).

The Court suggested that in the light of these deliberations, s. 7(1)3 TSG restricts the basic rights protected under Art. 2(1) in conjunction with Art. 1(1) GG. The withdrawal of the legally recognised first names when entering a marriage runs counter to the individual's gender identity (ibid), hence restricting the constitutionally protected intimate and sexual sphere (ibid: 105). Since marriage and registered life partnership are based on gender status and not on sexual orientation, the transsexual individual's consent to the loss of his or her first names cannot be assumed, if he or she wishes to enter a legally secured partnership. This especially applies, if entering a marriage happens to be the only option for a formal recognition of a relationship (ibid).

With regard to the second issue, the Federal Constitutional Court considered the legislator's intention to foreclose the notion that same-sex partners may enter a marriage a legitimate public objective and a suitable and necessary end to this means (ibid: 105 f.). However, the Court found that s. 7(1)3 TSG was unreasonable as long as the law does not provide homosexual transsexual individuals who have not undergone sex reassignment surgery an option to enter a legally secured partnership without losing the first names that correspond with their respective identities (ibid: 106). The Court argued that this especially applies, since the concepts of transsexuality that informed legislation were outdated, such as the perception of the so-called small solution as an interim stage and genital surgery and heterosexuality as defining features of transsexuality (ibid).

The Court argued that adhering to external sex characteristics as a means of determining a person's gender in civil status law and basing legal institutions on these ascriptions leads to a situation in which a homosexual male-to-female-transsexual individual without sex reassignment surgery wishing to formalise her partnership with another woman cannot enter a registered life partnership because of her civil status as a man. Although marriage is the only remaining option for a legally secured partnership, she loses the legally recognised first names that correspond with her gender identity. The Court held that this legal interplay violates the constitutionally protected right to her intimate sphere and the right to a name that mirrors her gender identity (ibid: 107).

The Federal Constitutional Court ruled that the abovementioned breach of the Constitution did not lead to the nullity of the rule, because there were several options for a revision. The Court made three suggestions to the legislator. First, the legislator could decide to delete s. 7(1)3 TSG without replacement. Second, the legislator could revise the Civil Status Act to the effect of allocating a transsexual individual with a legally recognised change of first names to the experienced gender. Third, the Registered Life Partnership Act could be revised to accommodate homosexual transsexual individuals. The Court ruled that until the legislator devises a new regulation that enables a transsexual individual with a homosexual orientation and without sex reassignment surgery to enter a legally secured partnership without losing the first names, s. 7(1)3 TSG may no longer be applied (ibid).

The legal debate on the Federal Constitutional Court suggestions for a revision of s. 7(1)3 TSG and possible solutions for s. 8(1)2 TSG

The options the Federal Constitutional Court provided for a revision of s. 7(1)3 TSG sparked a controversy among legal scholars and, anticipating that the Federal Constitutional Court would declare s. 8(1)2 TSG unconstitutional before long, too, triggered a debate on s. 8(1)2 TSG.[211] Their respective recommendations for dealing with either rule is inextricably linked to the perspectives they endorse on marriage, gender and sex/gender as a necessary feature of a person's civil status. The legal debate reveals that maintaining institutionalised heteronormativity and the cis binary presupposes the legal category ›gender‹ and special regulations that limit the constitutional rights of individuals minoritised on the grounds of sexual orientation and gender.

Windel favoured solutions that defend marriage as a heteronormative and privileged institution and dismissed suggestions that threaten the concept of gender as a somatically-based phenomenon and sex/gender as a relevant feature of a person's civil status. Setting out from the premise that preventing the appearance of, or actual same-sex marriages constitute a legitimate public claim (Windel 2006: 266), he argued in favour of the third solution with regard to s. 7(1)3 TSG, i. e., of opening up the registered life partnership to lesbian and gay transsexual individuals who have legally been granted a change of first names. He suggested that it is preferable to opt for referring homosexual transsexual individuals with a change of first names to the registered life partnership, because »[t]he anomaly of a life partnership between individuals with different sexes/genders can be accepted more easily than that of a marriage of individuals who appear to be of the same sex/gender, since the partnership

211 | For a comprehensive comparative law study on the revision of gender status with regard to transsexuality in family law, including the legal consequences for German, English and French law, see Theile 2013.

has no tradition of sexed/gendered fixation comparable to that of marriage« (Windel 2008: 77). With regard to s. 8(1)2 TSG he suggested limiting access to marriage to transsexual individuals whose first names and civil status manifest that the partners are assigned to different sexes.

At the same time, Windel rejected the other solutions the Federal Constitutional Court provided. He dismissed the first solution, i. e., to delete s. 7(1)3 TSG on the grounds that such a measure would create the impression of marriage as a same-sex union and, hence, contradict the public interest to avoid such an impression (ibid). He rejected the second solution, i. e., to revise the Civil Status Act for two reasons. First, rendering the experienced gender a legal fact would mean giving up the distinction between the ›small‹ and the ›big solution‹. Second, the legal concept of sex/gender and the reproductive function of sex/gender would become undone (ibid).

Differences on individual issues notwithstanding,[212] Grünberger and Bräcklein argued in favour of revisions that treat marriage and registered life partnership alike[213] and allow an identity-based and self-determined understanding of gender.[214] With regard to s. 7(1)3 TSG, Grünberger suggested deleting the section without replacement (Grünberger 2007: 360; 2008: 98) or else to follow up with the second solution, i. e., to assign a transsexual individual to the gender he or she identifies with, without surgery (ibid: 360; 2008: 98). Like Augstein (1981: 12), he suggested that the only purpose of this particular rule, if not the entire section 7 TSG, was to police non-compliant behaviour in the ›new‹ gender role. Since sanctioning gender expression is not a legitimate public concern, curtailing the right to determine one's gender identity is unjustifiable (idem 2006: 518; 2007: 360).

212 | While Grünberger and Bräcklein questioned somatic or behavioural foundations of gender, Bräcklein explicitly challenged the legitimacy of ›gender‹ as a feature of an individual's civil status in the light of the right to self-determination over personal data (Bräcklein 2008: 298). Moreover, Bräcklein argued that removing ›gender‹ as a legitimate category in the Civil Status Act could render the Transsexual Act at least in part unnecessary and contribute to avoiding discrimination on the grounds of gender (ibid: 304).

213 | Grünberger identified opening up marriage to all individuals, regardless of their respective gender as a fourth option to solve the legal problem of granting transsexual individuals a legally secured partnership. However, he conceded that it was consistent with the Federal Constitutional Court's understanding of marriage as a union of a man and a woman that it did not mention this solution (Grünberger 2007: 366).

214 | While Grünberger discussed potential constitutional solutions for ss. 7(1)3 and 8(1)2 TSG in detail, Bräcklein only mentioned her favoured solution for s. 8(1)2 TSG in passing. Her article focuses on her concept of gender and the relevance of this particular category to an individual's civil status.

Grünberger dismissed Windel's preferred solution for legal and constitutional reasons. With regard to the legal reasons, he presented a systematic and a practical argument. While Windel held that, »in contrast to the reciprocal problem with marriage, there are no pressing reasons for exclusively opening up the registered life partnership for same-sex individuals« (Windel 2006: 266), Grünberger pointed out that referring homosexual transsexual individuals to the registered life partnership constitutes a system discontinuity, since the partners' sexual orientation is not the criterion for entering a legally secured partnership. Rather, it is a person's gender status. Moreover, having a registrar enquire into the partners' sex/gender and sexual orientation is incompatible with the right to privacy (Grünberger 2006: 519; 2007: 364 f.). With regard to the constitutional objection, Grünberger reiterated Augstein's observation (Augstein 1981: 12) that the Transsexual Act already allows the impression of same-sex marriages in the event of an existing marriage. According to Grünberger, the unequal treatment of individuals who are granted a change of first names within an existing marriage and those who lose their first names when entering a marriage violates Art. 3(1) GG (Grünberger 2006: 519; 2007: 365). Moreover, he identified heteronomous gender assignments as the cause of the civil status problems transsexual individuals with a change of first names encounter (Grünberger 2007: 365).

Grünberger considered the second solution, i. e. to grant a gender reassignment without surgery, superior to the third solution, because it provides for a consistent and constitutional Transsexual Act. Arguing that while the Federal Constitutional Court left it at the legislator's discretion to decide which option to follow up with, Grünberger suggested that the Court implied that ss. 8(1)2 and 8(1)4 TSG no longer comply with constitutional requirements (ibid: 360 f.). In contrast to Windel, Grünberger disagreed that dispensing with the surgery requirement necessarily contradicts distinguishing between the ›small solution‹ and the ›big solution‹. According to Grünberger, »[t]he ›small solution‹ is the constitutionally required instrument, if a change of first names sufficiently satisfies a transsexual individual's gendered concept of self, whereas the ›big solution‹ is the constitutionally required instrument, if the gendered concept of self requires changing the legal gender« (Grünberger 2008: 89).[215]

With regard to s. 8(1)2 TSG, Grünberger outlined and discussed three possible scenarios in compliance with the current legal framework. According to Grünberger, one option would be to stick to the current rule (ibid: 104), an option that is identical to Windel's recommendation. Another solution would be to delete s. 8(1)2 TSG. A third option consists of converting a marriage into

215 | In the end, the legislator remained inactive, tacitly allowing for marriages between legally differently gendered cis and transsexual individuals that socially appear as a married same-sex couple and that are considered as such by the partners themselves.

a registered life partnership (ibid: 105). Of all options mentioned, he preferred the second one for constitutional reasons (ibid).

Grünberger identified three problems with the first option. First, he pointed out to the constitutionally problematic situation that it is legally possible to achieve a revision of gender status without having to give up a registered life partnership, while this option does not exist for a marriage. Grünberger argued that there are no reasons for legitimating the unequal treatment of individuals in instances that affect the fundamental rights guaranteed in Art. 6(1) GG and Art. 2(1) GG in conjunction with Art. 1(1) GG (ibid 2007: 362). Second, he suggested that the conditions for divorcing a partner do not exist, if a marriage is not broken (ibid 2008: 105). Third, if partners are forced to get divorced in order to register as life partners, the former spouse and now life partner loses benefits (ibid).

According to Grünberger, the third option is problematic, too. He argued that despite the fact that the rights secured in a registered life partnership have in the meantime come to resemble those granted in a marriage, the latter continues to be privileged in several areas (ibid).

Grünberger and Bräcklein preferred the option to delete s. 8(1)2 TSG. While Grünberger anticipated that deleting the rule is incompatible with the »dogma that marriage is a union of a man and a woman« (ibid), he held that this option does justice to Art. 6(1) GG, since a marriage may not be dissolved against the spouses' will (ibid). Similarly, Bräcklein argued that with exception of deleting s. 8(1)2 TSG, all other options are legally problematic (Bräcklein 2008: 303).

The Federal Constitutional Court decision on s. 8(1)2 TSG

Shortly after the Federal Constitutional Court declared s. 7(1)3 TSG unconstitutional, and based on a referral proceeding provided by a local court, the Federal Constitutional Court dealt with the question whether s. 8(1)2 TSG is compatible with the Basic Law.[216] The referring court suggested that s. 8(1)2 TSG violates Art. 1(1) in conjunction with Art. 2(1) GG, Art. 6(1) GG and Art. 3(1) GG.

The lower court presented three major arguments to support its opinion. The local court argued that to force a transsexual individual to get a divorce in order to gain gender recognition infringes upon an individual's human dignity and the basic right to the free development of one's personality, which also cov-

216 | The case dealt with an elderly transwoman who was married for more than half a century, had undergone sex reassignment surgery in 2002 and wished to be legally recognised as a woman without having to divorce her spouse. The applicant argued that neither of the partners considered their relationship broken, which is a precondition for a divorce. Rather, their marriage was very valuable and of vital importance to them, since they were socially, emotionally and economically committed to, and dependent on each other (BVerfG 2008: 313).

ers the imperative to assign an individual to the gender he or she psychologically and physically identifies with. Moreover, the court held that the applicant's and her wife's marriage and family enjoy the special protection of the state, especially since their marriage does not satisfy the requirements for a divorce. Finally, the court suggested that to render a divorce mandatory for gender recognition contravenes the general rule of equality, since married transsexual individuals are affected by the provisions outlined in s. 8(1)2 TSG, while unmarried transsexual individuals are not (BVerfG 2008: 313).

On 27 May 2008, the Federal Constitutional Court decided that s. 8(1)2 TSG is incompatible with Art. 2(1) in conjunction with Art. 1(1) GG, because the rule grants a married transsexual individual who has undergone sex reassignment surgery gender recognition only under the condition that he or she gets divorced (ibid: 312). While the Court did not examine whether s. 8(1)2 TSG violated Art. 3(1) GG (ibid: 317), it confirmed the lower court's opinion on the other constitutional violations.

The Court arrived at its decision by examining four issues. First, it established an infringement of Art. 2(1) in conjunction with Art. 1(1) GG. Second, the Court examined whether the legislator's concern to secure marriage as a union between a man and a woman was legitimate. Third, it put the ensuing limitation of a trans individual's rights to the test of proportionality. Finally, the Court weighed the legislator's interest against the trans individual's right to achieve gender recognition without having to get divorced.

The Federal Constitutional Court ascertained that considering that a person's gender may change and that an individual's gender basically depends on his or her psychic constitution, s. 8(1)2 TSG in principle fulfils the right laid down in Art. 2(1) in conjunction with Art. 1(1) GG. The rule recognises a transsexual individual's gender identity and allows for a legal assignment to the gender to which he or she belongs to psychologically and physically after sex reassignment surgery. However, the Court argued that the prerequisite to be unmarried infringes upon a transsexual individual's right to gender recognition, despite the fact that he or she has undergone sex reassignment surgery, if the respective individual is forced to decide between trading his or her marriage for gender recognition, even though both partners wish to remain married or maintaining his or her marriage at the expense of a revision of gender status. The Court held that such a substantial limitation of basic rights is only permissible, provided it serves a legitimate goal and is proportionate (ibid: 314).

With regard to the second issue, the Federal Constitutional Court argued that the legislator pursued a legitimate goal by wanting to maintain marriage as a union between a man and a woman in order to prevent same-sex marriages. The Court suggested that the legitimacy of this goal is not diminished by the fact that the legislator accepts that the current legal situation allows the impression of, or actual same-sex marriages under specific circumstances. Due

to the legislator's inactivity, it has e. g. become possible for homosexual transsexual individuals with a legally recognised change of first names to marry a person bearing first names that signify the same gender without having undergone sex reassignment surgery. Moreover, married partners of which one has undergone sex reassignment surgery without having applied for a change of gender status appear as same-sex couples (ibid: 315).

The Court held that limiting gender recognition to the prerequisite of being unmarried constitutes an unreasonable strain on a married transsexual individual whose partnership continues to exist (ibid). Since a marriage may not be divorced, if it is not broken, a transsexual individual cannot gain gender recognition, unless he or she feigns the intention of permanently separating from his or her partner during the divorce proceedings. The Court suggested that it is neither reasonable to bar a transsexual individual from legal recognition of his or her gender, nor to create a situation where he or she is forced to impart untrue information with the court (ibid: 315 f.).

The Federal Constitutional Court argued that s. 8(1)2 TSG affects both partners wishing to continue their marriage. Upon entering the marriage, the transsexual individual's partner relied in *bona fide* upon the fact that the marriage would exist as long as the partners were willing to live together and bear responsibility for each other. Section 8(1)2 TSG forces the partner to decide whether he or she wishes to maintain the marriage, hence preventing the transsexual partner's gender recognition, or to get divorced against his or her volition and to relinquish legal protection that goes along with marriage (ibid: 316).

The Court held that Art. 6(1) GG protects a lawfully entered marriage of partners. This right also applies to lawfully married partners of which one turns out to be transsexual in the course of matrimony. This includes the situation in which the transsexual spouse has undergone sex reassignment surgery through which the union has become a same-sex marriage. The Court explained that marriage constitutes the sphere of privacy that is exempted from state interference. Therefore, it is up to the spouses to shape their marriage. State interventions that press spouses to get divorced runs counter to the feature of marriage as an enduring community in which partners share their lives and responsibility, deprives it of constitutionally guaranteed protection and encroaches upon the partners' decision to permanently live together and the trust in the preservation of the status quo that follows from a marriage (ibid).

While the Court initially suggested that the legislator's concern to reserve marriage for differently sexed partners on the one hand and the married transsexual individual's desire for gender recognition and the spouse's interest in the continuation of their marriage on the other hand bear significant weight (ibid), it decided that the latter outweighs the former in the light of the concrete facts of the case and, more generally, based on constitutional considerations:

> When [...] the individuals concerned refer to the permanency of their marriage, they refer to their personal wedding vows that affect their identities and that are considered irrevocably binding. In this respect, it is about the fate of a commonly shared path of life and as such about consequences of a subjectively existential dimension. In contrast, the impact of the principle of different sexes is only marginally affected in the face of the concrete circumstances. As with the case mentioned here, we are dealing with a small number of transsexuals who initially marry a woman as a man, discover or disclose their transsexuality during marriage and whose marriage did not break due this profound change in their partnership. Rather, it should according to the spouses' intention be continued. Moreover, the formative effect of the principle for the public is reduced for these constellations, since the couples concerned live according to the same sex/gender and legally bear the names of the same sex/gender anyway. (Ibid: 317)

In summary, the Court reasoned that the interplay of Art. 6(1) GG with Art. 2(1) in conjunction with Art. 1(1) GG and, as a result, the significance of the protected right to the legal recognition of an individual's self-determined gender identity are decisive. According to the Court, s. 8(1)2 TSG produces a specific burden in the sense that the realisation of one right depends on the abandonment of another in order to satisfy the legislator's intentions. Section 8(1)2 TSG requires married transsexual individuals to either decide in favour of gender recognition or the continuation of marriage. As a result, the other spouse's right to protection of his or her marriage under Art. 6(1) GG is compromised, too, and not only leads to a nearly insoluble inner conflict, but to an unreasonable encroachment on basic rights. The Court concluded that s. 8(1)2 TSG violates Art. 2(1) in conjunction with Art. 1(1) GG and Art. 6(1) GG, because the rule does not allow a married transsexual individual to gain legal recognition of his or her gender without him or her having to terminate his or her marriage. Therefore, s. 8(1)2 TSG is unconstitutional (ibid).

As in the case of s. 7(1)3 TSG, the Federal Constitutional Court decided that the unconstitutionality of s. 8(1)2 TSG did not lead to its nullity, since there were solutions for the abovementioned problem that comply with the Constitution. The Court suggested that if the legislator wished to maintain marriage as a union of two differently sexed individuals, it could either convert the marriage to a registered life partnership without stripping it of the duties and privileges arising from a marriage or it could create a legally secured partnership *sui generis* holding the same duties and rights of a marriage. Considering the small number of cases such as the one discussed above and the spouses' intention to continue their marriage, the legislator could also delete s. 8(1)2 TSG, thus allowing a same-sex marriage.

The Court set a deadline until 01 Aug. 2009 for the legislator to solve the problem and ruled that s. 8(1)2 TSG is no longer applicable until a new regulation comes into force (ibid).

The government reaction

While the Social Democratic and Green Party government coalition had announced a comprehensive revision of the Transsexual Act in 2000, the then government as well as the subsequent Christian Democratic/Christian-Social and Social Democratic governing coalition remained inactive for years. I will briefly address the Draft TSRRG before turning to the Green Party draft ÄVFGG and the Government Bill.

In 2009, the Federal Home Office presented the announced Draft Transsexual Law Reform Bill (BMI 2009). Since the submissions by psycho-medical professionals and trans organisations had been heterogeneous, the Draft TSRRG was a compromise. According to the draft, s. 9(5) TSRRG provided for the continuation of marriages of consenting partners (BMI 2009: 2), the rest of it addressed what had been announced as a fundamental revision of the Transsexual Act and of which I will address a few aspects.

Like the Transsexual Act, the Draft Bill proposed regulating a change of first names and a revision of gender under the proceedings of non-contentious jurisdiction. Sections 1(1) and 8(1)1 TSRRG tightened the prognostic requirements, suggesting a »continuing and irreversible inner conviction« (BMI 2009: 2). However, an option for a reversal of the decision was included (BMI 2009a; dgti 2014). In contrast to the Transsexual Act, the representative of the public interest was no longer a participant of the procedure. However, s. 3 TSRRG ruled that partners should be involved in the procedure (BMI 2009: 2).

In contrast to the Transsexual Act, the invalidity rule in the event of a marriage or birth of a child after a change of first names was no longer included (ibid). The Draft Bill suggested requiring sterility and sex reassignment measures for a revision of gender status, unless contraindicated on the grounds of health (ibid). The provision for assessment was reduced to a doctor's note (ibid). Trans organisations (e. g. ATME/MUT 2009; TGNB/TrIQ 2009), psycho-medical and legal experts (e. g. Grünberger 2009; Güldenring 2009) alike criticised the draft, and it never entered parliament.

The draft legislation proposed by Bündnis 90/Die Grünen differed substantially from the Draft TSRRG. One major difference was that proceedings for a change of first names and a revision of gender status would have been relocated to an administrative body, rather than involve court proceedings (Deutscher Bundestag 2009a: 2). Moreover, the ÄVFGG suggested that a change of first names and gender status rely on a self-declaration only (ss. 1[1]1 and 3[1]1 ÄVFGG; ibid). In addition, the wording of the proposed Bill did not specify the gender the applicant desired to be recognised as (ibid: 2). The draft legislation also left it up to the applicant to either continue a registered life partnership or marriage or to apply to transfer a life partnership into a marriage and vice versa (ibid). Moreover, it did not specify any particular gender, which implies that the draft would have included further genders.

In contrast, the governing coalition tabled the Bill to amend the Transsexual Act. All the Bill suggested was to delete s. 8(1)2 TSG (Deutscher Bundestag 2009b: 1). Based on the recommendation of the *Bundestag* Committee on Internal Affairs to pass the Bill (Deutscher Bundestag – In 2009: 4), the *Bundesrat* simply conducted an opinion poll (Bundesrat – Ausschuss für Frauen und Jugend 2009). There was no debate on the draft legislation worth mentioning (cf. Deutscher Bundestag 2009d), and given the CDU/CSU and SPD majority, the Act to amend the Transsexual Act passed on 19 June 2009 (Deutscher Bundestag 2009c: 25519 D).

3.3.4 Jurisdiction and legal scholarship on somatic requirements for a revision of gender status under the Transsexual Act

Sections 8(1)3 and 8(1)4 TSG vaguely define the somatic requirements for a change of gender status, leaving space for medical and legal interpretations. The concrete legal interpretation of the abovementioned sections depended on a number of factors. These were most notably developments in surgical techniques, the adoption of conservative or dynamic concepts of law, notions on transsexuality and assessments of the relationship between the social order and constitutionally guaranteed rights. While sexologists, legal scholars and the judiciary alike grappled with possible interpretations of the somatic requirements in the course of the 1980s and 1990s, they have increasingly called into question these requirements since the turn of the century with the effect of gradually eroding the principle that gender is necessarily marked by physical properties.

Relevant provisions of the Transsexual Act

While ss. 8(1)3 and 8(1)4 TSG stipulate the objectives of somatic interventions for a change of gender status, the legislator did not prescribe concrete measures. Rather, among other prerequisites for a revision of gender status, the lawmaker broadly established in s. 8(1)3 TSG that the applicant must be »permanently unable to reproduce«. Likewise, s. 8(1)4 TSG non-specifically demands that the applicant »must have undergone a surgical intervention to alter external sex characteristics, through which a distinct approximation of the appearance of the other sex has been achieved«.[217]

217 | As outlined earlier on, the reasons for demanding somatic alterations in the first place were informed by heteronormative and binary gender assumptions. With regard to s. 8(1)3 TSG, the lawmaker wanted to avoid a divergence of gender and gendered functions, in particular that men bear children and women father progeny (BT-Drs. 14/9837; Grünberger 2007: 363; de Silva 2012: 157 f.). The demand for gender-conforming surgery was meant to prevent a transwoman from marrying as long as she can »function sexually

The legislator did not prescribe any concrete measures for ss. 8(1)3 and 8(1)4 TSG for two reasons. First, the legislator followed expert recommendations not to narrowly define specific surgical procedures, since surgical methods change more rapidly than legislative adaptations (Pfäfflin 1996: 108). Second, with regard to the requirement stipulated in s. 8(1)4 TSG, the lawmaker wanted to provide equal rights for male-to-female and female-to-male transsexual individuals, considering that surgical techniques for constructing phalloplasties were deemed less developed than those for vaginoplasties (ibid).

Medical interpretations of somatic requirements for a revision of gender status in the 1980s and 1990s

While sexologists hailed the decision not to specify any concrete surgical measures in the Act (Sigusch 1980: 274; Pfäfflin 1993: 108), formulations in s. 8(1)3 TSG and even more so in s. 8(1)4 TSG caused irritation[218] and initially provoked different interpretations. Sexologists' interpretations of the somatic provisions of the Act were informed by the legislator's intentions, limitations of state of the art surgical techniques and prevailing concepts of transsexuality.

Interpretations of the somatic requirements diverged more pronouncedly with regard to female-to-male than male-to-female transsexual individuals. Sigusch suggested that a penectomy, orchiectomy and a vaginoplasty in female-to-male transsexual individuals definitely fulfil all the somatic requirements (Sigusch 1980: 2744). Similarly, Wille, Kröhn and Eicher held that the »complete demasculinising operation« involves an orchiectomy, the removal of parts of the penis and the creation of a neovagina and neopudendum, which they believed produces »quite appealing results« (Wille/Kröhn/Eicher 1981: 419).[219]

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as a man« and from engaging in sexual activities with a male person under 18 years of age. The latter was considered a criminal offence until the abolishment of s. 175 StGB in 1994 (cf. BT-Drs. 8/2947: 12; Grünberger 2007: 361).

218 | See e. g. the following questions posed by Wille, Kröhn and Eicher: »When are these two somatic prerequisites considered to be fulfilled? Is breast formation in male-to-female transsexuals only allowed to be affected by a *surgical* intervention or by hormonal provocation? How pronounced does the female body silhouette have to be? Is a phalloplasty required in female-to-male transsexuals? Does it suffice to sever the fallopian tubes to achieve permanent inability to reproduce in the light of as of late improved refertilisation possibilities or only a hysterectomy? Does menstruation belong to the external female sex characteristics?« (Wille/Kröhn/Eicher 1981: 419)

219 | However, several sexologists, including Kröhn and Wille, cautioned that feminising genital surgery is, regardless of the respective individual's postoperative satisfaction, fraught with complications. Drawing upon a catamnestic study of 18 male-to-female transsexual individuals, who had undergone feminising genital surgery, Kröhn and Wille note that depending on the age of the patients, significant postoperative complications

Sigusch doubted that breast augmentation surgery, shaving the larynge and osteotomies are required (Sigusch 1980: 2744). More emphatically, Wille, Kröhn and Eicher held that these procedures are medically highly controversial and should not be rendered a prerequisite (Wille/Kröhn/Eicher 1981: 419). While the former set of surgical interventions became the standard procedures for three decades which transwomen had to undergo in order to fulfil the requirements outlined in ss. 8(1)3 and 8(1)4 TSG, the latter were considered irrelevant for »a distinct approximation of the outer appearance of the other sex«.

With exception of phalloplasties and bilateral mastectomies, sexologists debated somatic requirements for female-to-male transsexual individuals controversially. Sexologists unanimously held that a phalloplasty could not be required as a means to fulfil the prerequisite stipulated in s. 8(1)4 TSG due to the experimental stage of surgical techniques (Sigusch 1980: 2744 f.; Wille/Kröhn/Eicher 1981: 419; Pfäfflin 1993: 116), lest legal requirements decreed »lifelong bodily harm« (Wille/Kröhn/Eicher 1981: 419). According to sexologists, a bilateral mastectomy definitely constituted an appropriate measure to approximate the appearance of the male sex (Sigusch 1980: 2744; Wille/Kröhn/Eicher 1981: 419).

However, sexologists disagreed on further surgical measures, such as a colpectomy and a hysterectomy as requirements for female-to-male transsexual individuals under ss. 8(1)3 and 8(1)4 TSG. Although Sigusch noted that a bilateral mastectomy, the transformation of the outer labia to a scrotum, testicle prostheses and either a phalloplasty or severing the hypertrophied clitoris from its ligaments would meet all requirements, he warned not to call for more than a mastectomy. According to Sigusch, a hysterectomy and oophorectomy do not necessarily contribute to altering the external sex characteristics (Sigusch 1980: 2744).

Particularly concerned about the requirement to be permanently unable to reproduce, Wille, Kröhn and Eicher suggested that in cases of female-to-male transsexualism a mastectomy and a colpohysterectomy would best meet the prerequisites demanded in s. 8(1)3 TSG (Wille/Kröhn/Eicher 1981: 420). They argued against an oophorectomy in order to prevent a post-menopausal syndrome (ibid: 419). While Wille, Kröhn and Eicher conceded that it was highly

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arose. In three cases, a partial necrosis of the neovagina occurred. In addition, four individuals had to undergo dilation of their neovaginas. Two individuals experienced a stenosis of the urethra and required a meatomy. In two cases, the entire procedure of grafting a neovagina had to be repeated. In summary, half of the patients had to undergo revision surgery dues to postoperative dysfunctions (Kröhn/Wille 1981: 118). While Pfäfflin asserted that the surgical technique of creating vaginoplasties in male-to-female transsexual individuals was mature, he more than a decade later affirmed that the creation of neovaginas involves considerable complications requiring surgical revisions (Pfäfflin 1993: 113).

unlikely that a pregnancy would occur, if a hysterectomy was performed without a colpectomy, they argued that an absolute inability to reproduce was not guaranteed by a hysterectomy alone. Since there was a 20 % chance of refertilisation, severing the fallopian tubes was not an option either (ibid: 420).[220]

By contrast, Pfäfflin argued against demanding an extirpation of the vagina. Since a vagina was an inner organ, a colpectomy would not contribute to an approximation of the outer appearance of the male sex. Moreover, he suggested that several years of treatment with testosterone would cause the vagina to atrophy, rendering it useless for cohabitation (Pfäfflin 1993: 117).

Sigusch, Wille, Kröhn and Eicher followed the dominant concept of transsexuality of the time when suggesting that transsexual individuals strive to adapt their respective bodies to the gender they identify with (Sigusch/Meyenburg/Reiche 1979: 279; Wille/Kröhn/Eicher 1981: 419). However, they opted for different surgical approaches, in particular with regard to female-to-male transsexuality, depending on whether they emphasised the notion of the ›wrong body‹ or normative assumptions on transmen's sexuality. This becomes evident in the grounds presented for either removing or leaving the vagina.

Sigusch, Meyenburg and Reiche assumed that transsexual individuals were heterosexual (Sigusch/Meyenburg/Reiche 1979: 252). While a heterosexual orientation says nothing about individual sexual practices, Pfäfflin more specifically argued that transmen would »fight cohabitation tooth and nail« (Päfflin 1993: 117).

By contrast, Wille, Kröhn and Eicher's more radical approach to generating permanent reproductive incapacity in transmen, which includes the extirpation of the vagina, was motivated by a concept of transsexuality that was based on the notion of the ›wrong body‹. Wille, Kröhn and Eicher opined that,

> the stability of the transsexual feeling according to ss. 1(1)2 and 8(1)1 [TSG] can no longer be attested to with a high degree of probability, if apart from the amputation of the breasts only a sterilisation is asked for, thus preserving the ovaries, a vagina with the potential to cohabitate and the ability to menstruate [...]. (Wille/Kröhn/Eicher 1981: 420)

Interpretations of somatic requirements for a revision of gender status in legal scholarship in the 1980s and 1990s

The vague wording of the somatic requirements for a revision of gender status also prompted legal scholars and the judiciary to deliver interpretations of

220 | However, as the legal scholar Koch noted, »[t]he mere statistical possibility of refertilisation gives no indication of whether it is feasible in individual cases« (Koch 1986: 176).

ss. 8(1)3 and 8(1)4 TSG.[221] Drawing upon different medical assessments, weighing the feasibility of surgery differently in relation to the social order and building upon different understandings of the law, legal scholarship and jurisdiction altogether covered a broad range of interpretations throughout the 1980s and 1990s, offering extensive to restrictive interpretations. However, neither legal scholarship nor the judiciary questioned the constitutionality of the requirements in the abovementioned period.

Perspectives in legal scholarship were heterogeneous with regard to minimum requirements in cases of female-to-male and male-to-female transsexualism. Augstein advocated an interpretation of the somatic requirements laid down in the Act that was oriented towards greatest possible inclusion under conditions of constraint. Her suggestions for surgery to approximate the outer appearance of the ›other‹ gender fell below the surgical measures sexologists deemed feasible for transsexual women. While the aforementioned sexologists did not question the feasibility, let alone the reasonability, of constructing a neo-vagina despite studies that reported considerable complications, Augstein referred to the risks a vaginoplasty poses in particular to older transsexual women. As a result, she suggested that a penectomy and the removal of the testicles suffice to meet the prerequisites outlined in s. 8(1)4 TSG (Augstein 1981: 14).

With regard to transsexual men, Augstein's interpretation fell below the surgical interventions sexologists suggested for compliance with s. 8(1)3 TSG and concurred with sexologists that endorsed minimum interventions for the fulfilment of the prerequisites demanded in s. 8(1)4 TSG. Augstein held that the prerequisite of being permanently unable to reproduce is sufficiently met with long-term testosterone treatment, since this particular steroid causes female reproductive organs to deteriorate (ibid: 13). Like Sigusch, Augstein argued that a bilateral mastectomy fulfils the prerequisites stipulated in s. 8(1)4 TSG (ibid: 14).

Schneider offered the most restrictive interpretation of ss. 8(1)3 and 8(1)4 TSG at the time. Schneider's interpretation was based on three considerations. First, the lawmaker's original intention provides the basis for an interpretation of the provisions of the Transsexual Act (Schneider 1984: 142). Second, issues of social regulation require ample consideration (ibid: 142; Schneider 1992: 2940). Third, the Transsexual Act constitutes a special case in legislation (ibid: 2941).

Focusing on transsexual men only, Schneider held that s. 8(1)3 TSG demands either a hysterectomy and adnectomy or an oophorectomy, respectively,

221 | See e. g. Koch who stated that, »the minimum requirements pose significant problems: When has a distinct approximation of the appearance of the other sex been achieved?« (Koch 1986: 175)

since these interventions meet the legislator's intention to permanently disable reproductive capacity in transsexual individuals (Schneider 1984: 141f.). Regarding s. 8(1)4 TSG, Schneider found it alarming for reasons of »social regulation and the politics of marriage« that a transman should not have to undergo genital surgery (Schneider 1984: 146; 1992: 2941):

> The biologically female transsexual could [...] after the removal of the breasts and without an approximation of the male gender in the genital area marry as a man a person of his initial gender, thus a woman, whose external sex characteristics can basically only be distinguished from her partner due to her breasts, a consequence, which is for reasons of social regulation and the politics of marriage alarming and is barely compatible with the purpose of the Transsexual Act. (Schneider 1984: 142)

In another instance Schneider suggested that, »it is questionable whether it is [...] unproblematic for reasons of social regulation and the politics of marriage to interpret s. 8(1)4 TSG extensively in the sense that the *impossibility* to perform sexually according to the original gender is sufficient« (Schneider 1992: 2941).[222] As a result, Schneider held that s. 8(1)4 TSG be interpreted to demand a clitoris penoid (ibid).[223] Finally, Schneider opined that the somatic provisions should be interpreted restrictively, since it is the only act, which was passed especially for a »group of patients« (ibid).

Like Schneider, Koch dealt with possible applications of ss. 8(1)4 and 8(1)3 TSG to transmen only. Koch's interpretation is based on three premises. First and following Wille, Kröhn and Eicher's concept of transsexuality, he assumed that transsexual individuals strive for an approximation to the ›other‹ gender to the greatest possible extent (Koch 1986: 175). Second and unlike Schneider, he postulated that legal requirements may not exceed medical feasibility, since s. 8 TSG would otherwise become inapplicable (ibid). Third and in contrast to interpretations in sexology and legal scholarship of his time, he assumed that s. 8(1)3 TSG existed for declaratory purposes only in order to show transsexual individuals the consequences of treatment (ibid).

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222 | Schneider's interpretation of s. 8(1)4 TSG suggests that his perspective is informed by a polarised concept of human bodies, normative and reductionist understandings of sexuality and disregard for the private lives of partners.

223 | A clitoris penoid, also known as a metadoioplasty, is the outcome of a procedure, in which the clitoris, usually enlarged by testosterone, is severed from its ligaments and frequently provided with an extended urethra made of the inner labia. If surgery is successful, the outcome is an organ that resembles a small penis with regard to appearance and erectile and urological functions. Frequently, surgeons nowadays construct a scrotum of the outer labia and implant testicle prostheses.

With regard to s. 8(1)4 TSG, he suggested a restrictive interpretation of ›defeminising‹, and an extensive interpretation of ›masculinising‹ surgery. Like Wille, Kröhn and Eicher, he suggested that a transsexual individual could only be considered a member of the desired gender, if the individual had discarded »the essential characteristics of the original sex« (ibid). He suggested that the Act requires a permanent and irreversible loss of the ability to cohabitate. Otherwise, there is ample reason to doubt the individual's transsexual »imprinting« (ibid).

Like the aforementioned sexologists and in contrast to Schneider, Koch rejected calls for demanding genital surgery to the effect of constructing a penis and a scrotum, arguing that such procedures were not sufficiently developed. Moreover and referring to surgery that would allow an appropriate use of bathroom facilities, he held that any legally binding borders drawn in this respect would inevitably be ridiculous (ibid).

In contrast to the sexologists Wille, Kröhn and Eicher and the legal scholar Schneider, Koch took a relaxed stance towards the requirement to be permanently unable to reproduce (s 8(1)3 TSG). He suggested that the simple statistical option of refertilisation after a tubal ligation does not mean that the procedure can be successfully realised in individual cases. In line with his premise that this particular provision serves declaratory purposes only, he suggested that the debate did not bear a practical significance (ibid: 175 f.).

Interpretations of somatic requirements for a revision of gender status in jurisdiction in the 1980s and 1990s

In contrast to legal scholarship, the judiciary overall interpreted the prerequisites extensively in cases of female-to-male transsexual individuals and restrictively regarding male-to-female transsexualism. The first reported case on the somatic requirements under the Transsexual Act dealt with a transman who for health reasons refused to undergo hormone treatment with androgens and any surgery to incapacitate his reproductive functions (OLG Hamm 1983: 167).[224] Like the lower courts, the OLG Hamm decided on 15 Feb. 1983, that the permanent inability to reproduce was according to the law a condition precedent for an establishment of the gender status as a man (ibid). However, the relevance of this court case is that the Court discussed minimum requirements for rendering a transman unable to reproduce and surgery for approximating the outer appearance of the ›other‹ gender.

224 | The complainant had undergone psychotherapy, a subcutaneous bilateral mastectomy and had obtained a change of first names according to s. 1 TSG. He decided not to undergo any further somatic measures due to hepatic damage and after having been seriously injured during a road accident (OLG Hamm 1983: 167).

In contrast to Wille, Kröhn and Eicher's opinion, the Court suggested not to insist on the mandatory removal of the reproductive organs for three reasons. First, the Court suggested, albeit without a legally binding effect that a tubal ligation would suffice, if other methods to exclude the ability to reproduce were unreasonable due to serious health risks. Second, refertilisation would require a microsurgical intervention with low chances of achieving the goal. Third and drawing upon a concept of transsexuality that deemed the female reproductive capacity incompatible with the desire to live as a man, the Court argued that it would be highly unlikely that a transman would consent to refertilisation surgery (ibid: 169).

Taking into consideration sexologists' unanimous stance that surgery to construct a penis and scrotum was not feasible considering the experimental stage of masculinising genital surgery, the Court decided that any such procedure could not be demanded. In line with Sigusch, the Court held that transmen could only be expected to undergo a surgical removal of their breasts in order to meet the requirements outlined in s. 8(1)4 TSG.

The issue of surgery to achieve a distinct approximation to the outer appearance of the ›other‹ sex/gender was readdressed eight years later. The second reported case determined whether s. 8(1)4 TSG required of a transman to undergo surgery to align the external genitalia to the appearance of a male sex organ. In this particular case, a transman who had been diagnosed with transsexuality and had undergone hormone treatment, a bilateral mastectomy, a hysterectomy and adnectomy successfully applied for a change of gender status. However, the representative of the public interest filed a complaint against the local court's decision, arguing that the establishment of gender status was impermissible without the construction of a neo-phallus and scrotum (OLG Zweibrücken 1992: 761). Due to procedural errors, the OLG Zweibrücken accepted the complaint (ibid: 760 f.).

The OLG Zweibrücken set out from two basic assumptions. First, the Court followed a dynamic concept of the law, which takes into consideration changes that have occurred since its enforcement. In contrast to Schneider's interpretation of the Act, the Court held that the purpose of any act was not to reconstruct the historical legislator's subjective ideas (ibid: 761). Second and in accordance with prevalent sexological and legal concepts of transsexuality of the day, the Court assumed that the provisions of the Act did not collide with interests deserving protection, since medically feasible sex reassignment surgery was considered to correspond with transsexual individuals' aspirations (ibid).

With regard to ›masculinising‹ surgery, the Court held that contrary to Schneider's opinion and in line with sexological assessments and the earlier court decision, a transsexual man could not be expected to undergo surgery to construct a penis and a scrotum in the light of the current state of the art of

surgical technique without invading his privacy (ibid: 761f.). Unlike the OLG Hamm, however, the OLG Zweibrücken interpreted s. 8(1)4 TSG to the effect that the applicant must have undergone a surgical procedure on the vagina to prevent the applicant from »functioning sexually as a woman« (ibid: 762).[225]

However, the interpretation of s. 8(1)4 TSG in the case of female-to-male transsexualism re-emerged as a subject of legal proceedings soon after. The Bayr. ObLG dealt with a complaint filed by the representative of the public interest against the decisions of the local and regional courts to change or maintain a transman's gender status, respectively without requiring a phalloplasty and the surgical closure of the vagina.[226] In contrast to the OLG Zweibrücken the Bayr. ObLG decided that there was no justification to demand either somatic measure in order to comply with s. 8(1)4 TSG.[227] Rather, a mastectomy and a hysterectomy sufficed to revise the gender status according to the letter of the Act (Bayr. ObLG 1996: 792).

The Court presented several legal and medical arguments for its decision. First, the Court held that the legislator formulated s. 8(1)4 TSG to prevent statutory offence according to s. 175 StGB (ibid: 792). Second, the Court argued that the interpretation of s. 8(1)4 TSG needs to be appropriate with regard to the social order and feasible for the transsexual man, also with regard to his intention to retain his congenital features (ibid: 793). Third and referring extensively to Pfäfflin's influential article, the Court argued that the possibilities and outcome of genital surgery on transsexual men and transsexual women differed fundamentally. The Court reiterated the generally accepted opinion that the methods to construct an organ equivalent to a penis were not sufficiently devel-

225 | Pfäfflin severely criticised the Court's reductionist concept of female sexuality. He argued that, »[w]hether somebody can ›function sexually according to his original gender‹ [...] is not linked to whether a vagina is open or closed, because cohabitation is only one of many possible sexual activities. Women who due to a vaginal atresia, cancer or other diseases do not have a vagina can function sexually, too. The same applies to women who have a vagina, but cannot engage in sexual intercourse due to vaginism. They are amply able to engage sexually as a woman. Finally, there are women whose vagina is sound in every sense, but who for whatever reasons reject involving this organ in their sexual activity. The point of matter is that a female-to-male transsexual individual cannot due to his male gender identity engage according to his female original sex, because he does not experience himself as a woman. The mechanistic concept of the vagina as a ›sex tool‹ misses out on the complex operations of sexual experience.« (Pfäfflin 1993: 117)

226 | In this particular case, the local court had granted a transman a change of first names and gender status based on the fact that he had undergone a hysterectomy and subcutaneous mastectomy (Bayr. ObLG 1996: 791).

227 | The OLG Zweibrücken departed from its position. Therefore, the Bayr. ObLG did not refer the case to the Federal Court of Justice (ibid: 793).

oped (ibid). Moreover, the Court suggested that the same applies to the surgical closure of the vagina, especially since such a procedure involved severe health risks without contributing to the realisation of his desired sex/gender and instead complicated surgery towards creating a phalloplasty at a later point in time (ibid: 793).

While courts were prepared to interpret the somatic provisions outlined in ss. 8(1)3 and 8(1)4 TSG to the effect of taking into consideration transmen's subjective decisions with regard to genital surgery, this did not apply to transwomen in the 1980s and 1990s. After having been denied a revision of gender status, a transwoman living in divorce who had not undergone sex reassignment surgery and did not intend to do so in the future turned to the OLG Düsseldorf, claiming that the prerequisites for a change of gender status in s. 8 TSG were unconstitutional. However, the Court decided on 26 Apr. 1995 that s. 8 TSG was constitutional and that the transwoman's complaint was unjustified and unfounded (OLG Düsseldorf 1996: 43).

The Court argued that the existing legal and moral order and social life are based on the principle that every person is either male or female and that a person's gender is not freely chosen, disposable or independent of his or her physical constitution. Rather, an individual's gender depends on psychic and physical gender characteristics. According to the Court, the Basic Law does not allow for prioritising a person's subjective gender identity over physical features when assessing a person's gender status (ibid).

Despite the fact that courts interpreted the somatic requirements stipulated in s. 8 TSG differently with regard to genital surgery on transwomen and transmen, they did not question the constitutionality of the prerequisites, nor the surgical rationale as such in the 1980s or 1990s.[228] Until the Federal Constitu-

228 | At the same time, a Federal Constitutional Court decision on the address of a transsexual individual after a change of first names according to s. 1 TSG enabled transmen and transwomen alike to live socially according to their respective gender identities without having undergone somatic measures and having been granted a revision of gender status according to ss. 8(1)3 and 8(1)4 TSG. In this particular case, a male-bodied transwoman serving life imprisonment in vain complained to the head of the institution and the federal-state administration of justice department that prison officers addressed her as a man, despite the fact that she had obtained a change of first names (BVerfG 1997: 1632). The execution of sentence chamber to which she turned to thereafter held that she was not entitled to be addressed as a woman, since s. 10(1) TSG rules that the rights that follow from a gender only materialise after the gender status has changed according to s. 8 TSG, a decision the high regional court upheld (ibid: 1632 f.). Prompted by the transwoman's constitutional complaint, the Federal Constitutional Court decided on 15 Aug. 1996 that Art. 2(1) GG in conjunction with Art. 1(1) GG demand to interpret ss. 1 and 10(1) TSG to the effect that a person is after a change of first names to be addressed in written and

tional Court ruled ss. 8(1)3 and 8(1)4 TSG unconstitutional and inapplicable, the standard requirements for a change of gender status were a penectomy, orchiectomy and a vaginoplasty for transsexual women and usually a bilateral mastectomy, hysterectomy and adnectomy for potentially fertile transsexual men.

Sexological perspectives on the somatic requirements for a revision of gender status since the turn of the century

Since the turn of the century, sexologists engaged less with interpreting the somatic measures required for a legal change of gender status than throughout the 1980s and 1990s. However, the statement the DGfS submitted to the Federal Home Office in 2001 provides an authoritative sexological perspective on ss. 8(1)3 and 8(1)4 TSG. The continuing sexological debate on transsexuality notwithstanding, the statement mirrored a shift in the understanding of transsexuality, which refutes the notion that transsexuality inevitably requires surgical measures.

Based on the premise that in the past decades »an ongoing tendency towards a flexibilisation of heretofore relatively rigid characteristics of gender« (Becker et al. 2001: 266) has rendered physical features less relevant to determining a person's gender and increased social tolerance towards ambiguous gender characteristics (ibid), Becker, Berner, Dannecker and Richter-Appelt suggested that while transsexuality may require hormone treatment and surgery in individual cases, this does not apply to all transsexual individuals (ibid: 262).

The authors argued that against this background, the requirement to undergo surgery on the external sex characteristics for a revision of gender status has become problematic and scientifically untenable (ibid: 261). Rather, s. 8(1)4 TSG forces applicants to undergo operations they »by no means generally want« (ibid: 266).

With regard to the requirement to be »permanently unable to reproduce« (s. 8[1]3 TSG), the authors held that especially transmen experience the demand to remove the uterus as »an attack on their physical integrity« (ibid: 12). Becker, Berner, Dannecker and Richter-Appelt presented three arguments to rethink the current practice. First, a uterus does not necessarily interfere with

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spoken communication according to his or her »new role perception« (ibid: 1632). Citing earlier Federal Constitutional Court decisions, the Court reasoned that everybody can expect government bodies to respect a person's gender identity, which is as part of the private sphere protected by Art. 1(1) GG in conjunction with Art. 2(1) GG (ibid: 1633). Moreover, the Court argued that these constitutional principles apply to the interpretation and application of the Transsexual Act. The address as Mr or Ms is vital in order to perform according to a specific gender role, and the legislator created s. 1 TSG as an option to this effect. The Court concluded that the lower court's interpretations did not do justice to the regulations provided in ss. 1 and 10(1) TSG, nor to the complainant's basic rights (ibid).

the self-experience as a man, since transmen only consider their breasts and menstruation as stressful (ibid: 8). Second, although pregnancy in transmen cannot be entirely ruled out, the ›risk‹ of female-to-male transsexual individuals becoming mothers is highly unlikely, since motherhood is incompatible with the self-concept as a man (ibid: 12 f.). Third and this argument holds true for female-to-male and male-to-female transsexual individuals, developments in reproductive medicine have rendered this demand obsolete (ibid: 13).[229] In summary, the authors suggested that the Transsexual Act should no longer demand surgical interventions for a revision of gender status (ibid).

Perspectives on somatic requirements for a revision of gender status in legal scholarship since the turn of the century

Since the turn of the century, legal scholars gradually began to rethink their approach to the somatic requirements stipulated for a revision of gender status under the Transsexual Act. Taking into consideration the latest developments in sexology on transsexuality in the reform period and focusing less on surgical feasibility than on the legitimacy, necessity, reasonability and commensurability of mandatory sex reassignment measures in the light of constitutionally guaranteed basic rights, legal scholars began to question the requirements outlined in ss. 8(1)3 and 8(1)4 TSG.

Differences on single issues between individual perspectives notwithstanding, legal scholars involved in the debate on the somatic requirements prescribed for a revision of gender status under the Act represented two distinct

229 | A case before the OLG Köln (High Regional Court Cologne) confirms this development. In this particular case, a transwoman had deposited sperm in a sperm bank prior to transitioning from male to female. Her partner underwent an insemination procedure in a Belgian clinic, using her partner's sperm. After twins were born, the partners decided to enter a registered life partnership, and the transwoman acknowledged her paternity (OLG Köln 2010: 45).

The register office however was not sure whether the acknowledgement of paternity was effective, since the transwoman was legally recognised as a woman before she had fathered the children. Upon an enquiry with the local court, the latter ordered the register office to register the transwoman's paternity in the birth entry. The register office filed an immediate complaint with the OLG Köln on the grounds of wanting to obtain a higher court clarification of the legal situation (ibid).

The Court argued that every child has a right to know about its descent. Arguing that s. 11 TSG regulates the relationship between parents and their children (ibid: 46), the Court decided that the person who fathered progeny is entitled to acknowledge her paternity, even if a child was born after the decision according to s. 8(1) TSG came into force. In such a case, the first name and gender before gender recognition took effect are registered in the child's birth registry (ibid: 45).

perspectives on gender and the gender regime, the role of the law in structuring the gender regime and on trans(sexuality). While Windel and Wielpütz defended hegemonic notions on gender and the gender regime, Adamietz and Grünberger challenged them. The former perspective implies a minoritising approach to unconventionally sexed and gendered individuals, whereas the latter challenges hegemonic concepts precisely because of their marginalising effects.

Adamietz's perspective on gender and gender regime is informed by studies that reveal different understandings of sexed bodies and gender relationships in various cultures, (Adamietz 2011: 69), studies on the historicity of the sexed body (ibid: 79 f.) and medical and natural scientific studies that suggest that neither the notion of a ›natural‹ division into two polarised sexes, nor that of the gender binary can be maintained (ibid: 84). Drawing upon social interactionist and discourse theories that focus on the production of seemingly natural and unambiguous sexes/genders (ibid: 85-98) and without denying that there are biological factors that contribute to anatomical differences (ibid: 109), she developed a queer legal theory approach that frames ›gender‹ as an expectation (ibid: 250-271).

According to Adamietz, the notion of the ›natural difference of the sexes‹ features as the root of gender-based discrimination (ibid 2006: 380). As a result, she rejects the currently hegemonic concept of gender that insists on »coercive biological differences« (ibid 2011: 174). According to Adamietz, they deny those trans individuals recognition whose »bodies are not sufficiently ›male‹ or ›female‹ and who cannot fulfil expectations based on stereotypical notions of gender roles« (ibid 2006: 380). Instead, she envisions a state of »basic-rights-oriented gender freedom« (ibid: 370). According to Cottier, »[*g*]*enuine* gender freedom would defy a classification within the bipolar system ›male-female‹ and render possible a choice of gender identities« (Cottier 2006: 407, quoted in Adamietz 2006: 376).

In contrast, Wielpütz's approach is based on everyday knowledge and sexological approaches that set out from naturalised assumptions on sex/gender. With regard to the former, Wielpütz notes a deeply rooted preconception of the binary division into male and female individuals that coincides with notions of a typically male or female outer appearance and habitus (Wielpütz 2012: 138). Referring to Röttger-Rössler (2005), she holds that, »the fact may not be disregarded that the classification of another person as male or female resembles a biological reflex or is even described as a pre-reflexive mechanism of classification« (ibid: 145).[230]

230 | The sociologist Hirschauer notes that it is precisely »the pre-reflexive character of conduct that facilitates masking its construction process« (Hirschauer 1994: 674).

Based on these premises, Wielpütz develops an affirmative perspective towards the gender regime and necessarily rejects deconstructionist approaches to gender and the gender binary. She suggests that, »[t]he gender classification into which the vast majority of individuals integrate themselves into without any difficulty has stood the test of time as an assignment system« (ibid: 144).[231] In response to deconstructionist approaches, she holds that, »[t]his social fact [i. e. the gender binary; insertion mine] cannot of course simply be abolished by a challenge dictated from the outside« (ibid: 145).[232]

In the light of these irreconcilable perspectives on gender and the gender regime, defenders and critics of the gender binary attribute different roles to the law. Critics of the gender binary question the law's involvement in coercive gendering processes. Arguing that provisions that sanction gender behaviour intervene into a core area of the right to determine one's own sexual identity, Grünberger e. g. suggests that the role of the law should not be to perpetuate or reinforce stereotypical images of men and women (Grünberger 2007: 366). Rather, civil status law should grant gender self-determination (ibid: 368). Similarly, Adamietz suggests the Federal Constitutional Court interpret Art. 3(2) and Art. (3)1 GG to the effect that gender role expectations be prohibited in general (Adamietz 2006: 380; 2011: 258).

Defenders of the gender binary advocate the regulatory function of the law with regard to gender, albeit for different reasons. Wielpütz holds that the assignment of an individual to a gender is a »legal necessity« (Wielpütz 2012: 137) for two reasons. First, she considers a person's sex/gender to be the basis of the assignment to family structures (ibid). Second, she argues that the gender classification has despite legal equality not become obsolete (ibid: 144). Contrary to Adamietz who questions whether legal equality can ever be achieved as long as gender and sexual orientation exist as categories (Adamietz 2011: 174), Wielpütz suggests that, »this model needs to be maintained in order to be able to compensate for, or to struggle against, existing unequal treatment, using suitable countermeasures« (Wielpütz 2012: 145).

Windel presents three arguments in favour of supporting the regulatory function of the law. For reasons of legal doctrine and in opposition to Grünberger's and Adamietz's call for gender self-determination, he suggests that as long as a differentiation based on gender is generally permissible, privacy

231 | While it is questionable whether numbers are the appropriate parameters when dealing with fundamental human rights, such a perspective does not take into account the cost of maintaining the gender binary for those individuals who trouble and are troubled by it.

232 | A concept of society that expels counter-hegemonic approaches to an imagined ›outside‹ suggests a limited understanding of social antagonisms and delegitimises struggles for social change.

rights of individuals need to be directly balanced with immediately affected public concerns (Windel 2008: 71).

Second, Windel refers to procedural reasons. He notes that legal facts do not immediately correspond with social reality, since they are established and changed through proceedings. With regard to sex/gender, he argues that the medico-biological division into two biological sexes is a legal fact since the end of the 19th century at the very latest.[233] Hence, civil status law can overall only consider social aspects of gender on a medico-biological basis, more narrowly, on the establishment of a person's sex at the time of birth (ibid: 72).[234]

Third, and contrary to Wielpütz who focuses on the reactive function of the law, Windel advocates a productive role of the law in structuring gender. Arguing that religious and worldview-based regulatory factors have increasingly lost their functions, it is nowadays the law that gives members of society guidance. Suggesting that this regulatory framework grants freedoms and offers protection from discrimination, he classifies concepts of self-determination of sex identity or gender freedom as arbitrary and undesirable, if not illusionary (ibid: 74 f.).[235]

Despite using different terminology, defenders and critics of the gender binary to different degrees acknowledge the diversity among trans(sexual) individuals. Nevertheless and consistent with their respective perspectives, defenders of the gender regime mainly focus on transsexual individuals seeking sex reassignment surgery and legal recognition only, hence leaving unproblematised exclusionary effects on individuals whose understanding of self conflicts with the limited sexed and gendered options available.

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233 | Grünberger and Windel endorse historical understandings of law. However, they focus on different points of reference to support their respective perspectives. Unlike Windel, Grünberger advocates gender self-determination by referring to intersex self-determination in the General State Law for the Prussian States (1794).

234 | Grünberger contests such a perspective, arguing that laws regulating gender are effects of various constructions of gender. While the sterility prerequisite in the Transsexual Act e. g. reduces gender to a biological function, the German law distinguishes between biological and legal facts in the case of a child's descent. In the latter case, the man who was married to the woman at the time of the birth of a child is considered the child's father (Grünberger 2008: 104).

235 | In another instance, he considers the prospect of basic-rights-oriented gender freedom a »nightmarish vision«, since it would mean that cis individuals would have to consider themselves »misdirected by the ›power of the gender-binary‹« (Windel 2008: 73). However, the notion of gender freedom could also be read to suggest that morphological conditions are no longer privileged markers of gender. As a result, all genders would become equally legitimate, rather than being a privilege for some at the expense of others..

Grünberger, Adamietz and Wielpütz use the term ›transsexual individuals‹, whereas Windel resorts to the term ›transidentified individuals‹, albeit in a narrower sense than Transidentitas e. V. and the dgti e. V. defined the term. The legal scholars using the term ›transsexual individuals‹ draw upon medical observations and developments in the trans movement that suggest that some transsexual individuals do not require surgery (Grünberger 2007: 361; 2008: 102; Adamietz 2006: 361; 2011: 170 f.; Wielpütz 2012: 133).[236] In addition, Wielpütz and Adamietz distinguish between ›transsexual‹ and ›transgender‹ individuals.

Despite the, with exception of Windel, commonly shared knowledge that trans individuals and, more specifically, transsexual individuals constitute a diverse set of individuals, defenders of the gender binary either homogenise trans(sexual) individuals or simply assign a marginal space in their respective frameworks to those individuals whose self-understanding challenges the gender binary. Windel, e. g. unduly homogenises transidentified individuals when suggesting that, »[t]he phenomenon transidentity does not give gender orientation any impulses. […] Due to their desire that leads to physical and psychological suffering, the individuals concerned confirm the gender difference to a greater extent than cisidentified individuals do.« (Windel 2008: 72) Adamietz counters this notion, suggesting that,

> the phenomenon transsexuality would contradict the theory of the deconstruction of the gender binary, if there were two alternatives only and all transsexual individuals were compelled to classify themselves unambiguously. Hence, if there was nobody among the transsexual individuals who was *not* compelled to surgically align his body to the ›other‹ sex as far as possible and to remove the characteristics of the ›old‹ sex. However, it has been articulated since the 1990s that there are such individuals. (Adamietz 2006: 371)

Moreover, she contextualises individuals with a transgender identity who wish or need to confirm their concept of gendered selves using hormonal and surgical interventions as a means within the regulatory context in which a transition frequently takes place. I. e., trans individuals are frequently required to fulfil the respective expectations of psychotherapeutic, medical and court experts, if they wish to be recognised as the gender they identify with (ibid: 380).

Despite distinguishing between transsexual individuals who opt for medical treatment and those that do not, Wielpütz – like Windel – homogenises transsexual individuals, too. She sets out from the premise that, a »society that divides its actors into male and female automatically seeks for visible charac-

236 | Grünberger refers to Becker et al. 2001, while Wielpütz and Adamietz rely in addition on the findings of Osburg and Weitze's study in 1993.

teristics for classification in order to be able to classify individuals according to sex/gender without continuous enquiries« (Wielpütz 2012: 145). She applies this principle to transsexual individuals, suggesting that they »do not want to ›abolish‹ this gender regime. Instead, they only fight against their own classification as the – in their opinion – ›wrong sex/gender‹.« (Ibid)[237] Here, Wielpütz does not distinguish between subjective ways of shaping one's life and a political attitude towards the gender regime. While some transsexual individuals do not question the gender binary, others do while trying to negotiate a liveable life within a regulatory regime at the same time. Like Windel, Wielpütz decontextualises transsexual lives from the social demands the gender binary places on them. According to Genschel, however, processes of negotiating one's practices

> never occur beyond concrete contexts, conditions and their functions for subjectivity. Hence it is necessary to consider transsexual individuals as subjects [...] who are required to solve a (social) contradiction that cannot be solved (individually), but needs to be solved subjectively [...]. (Genschel 2001: 831)

While Wielpütz and Adamietz distinguish between ›transsexual‹ and ›transgender‹, Adamietz's definition of ›transgender‹ is identical with understandings of the term that circulate in parts of the trans movement conceptually influenced by social constructionist and desconstructionist thought, and her framework takes into account the rights of several possibilities of living a gendered life. According to Adamietz, ›transgender‹ denotes an umbrella term for a range of subjectivities that conflict with traditional gender norms and stereotypes and that may not produce exclusions itself. This spectrum of gendered possibilities

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237 | In another instance, Wielpütz assumes that, »transsexual individuals do not suffer from a binary gender system. Rather, they consider themselves as having been assigned to the wrong sex/gender in this system and struggle for the subjectively correct assignment and not for the entire negation or abolishment of sex/gender as a category. By insisting on not being assigned to a third or no sex/gender, but simply to the other one, they to some extent cede binary coding.« (Wielpütz 2012: 178 f.)
Wielpütz also homogenises transsexual individuals when suggesting that, »[a] transsexual person who acts sexually (according to his birth sex) and as a result fathers progeny or experiences a pregnancy needs to consider this occurrence as a contradiction to his gender identity« (Wielpütz 2012: 204). While such a perception applies to some transsexual individuals, transsexual individuals overall develop different perspectives on this issue. While some individuals temporarily put on hold the desire to present themselves as the gender they identify with in their own eyes and in those of others, others question the seemingly causal link between a specific gender and its reproductive function, allowing them to integrate their respective reproductive capacity into their self-concept as a man, woman or transperson.

includes individuals, regardless of change of first names and gender status, hormonal and surgical measures, duration of sex/gender affiliation or position in relation to legitimised sex/genders (Adamietz 2006: 371). Unlike Adamietz, Wielpütz only mentions ›transgender‹ fleetingly and constructs transsexual individuals as proponents and transgender individuals as opponents of the gender regime (Wielpütz 2012: 184).

While a minoritising approach to trans(sexuality) does not necessarily coincide with reading somatic and sterility requirements as constitutional, approaches that question current gender norms and the gender binary definitely consider the requirements stipulated in ss. 8(1)3 and 8(1)4 TSG unconstitutional. Before turning to the debate on the general legitimacy of demanding an alignment with hegemonic sexes/genders for a revision of gender status, I will focus on the commonly shared critique of the legislator's arguments to devising s. 8(1)4 TSG.

Grünberger, Windel and Wielpütz discuss and dismiss several reasons given by the legislator for s. 8(1)4 TSG. One of the reasons the legislator demanded surgery »to alter external sex characteristics, through which a distinct approximation of the appearance of the other sex has been achieved« was to avoid that a ›male transsexual‹ is able to render herself liable to prosecution under s. 175 StGB (Windel 2006: 269; Grünberger 2007, 361). The legal scholars agree that this particular rational has become obsolete since the abolishment of the abovementioned provision that criminalised male homosexuality (Windel 2006: 269; Grünberger 2007: 361; Wielpütz 2012: 138).

The legal scholars also suggest that the legislator's objective to prevent a male-to-female transsexual individual from marrying as long as she is able »to engage sexually as a man« is no longer relevant. Windel argues that the right to privacy renders the legislative argumentation obsolete (Windel 2006: 269). Grünberger adds that the Act would be contradictory, if it on the one hand assumed that the individual identified as the ›other‹ gender and was compelled to live according to this idea, and on the other hand implied that a transperson who considered herself a woman would act sexually like a man (Grünberger 2007: 361).

Grünberger and Wielpütz also examine the legitimacy of limiting constitutional rights in s. 8(1)4 TSG against the background of the legislator's concern about the improper use of the Act. Both scholars consider a limitation of basic rights in order to preclude an improper use of the Act legally and socially legitimate (Grünberger 2007: 361; Wielpütz 2011: 140). However, they suggest that such a use of the Act is highly unlikely. Grünberger argues that expert opinions and the requirement to have felt compelled to live according to the idea of belonging to the ›other‹ sex/gender for at least three years (s. 8[1]1 TSG) provide sufficient precautions against an improper use, e. g. to escape gender-

specific legal obligations, such as compulsory military service[238] (Grünberger 2007: 361). Similarly, Wielpütz holds that the bureaucratic procedures during a transition suggest that the risk of using the Act to abscond from prosecution is marginal (Wielpütz 2012: 142).

Windel adds further reasons for a revision of s. 8(1)4 TSG. First, he warns that current progress in medicine could lead to ever more restrictive prerequisites for the so-called big solution, which contradicts the general tendency in society that the outer appearance of genders »has not become clearer« (Windel 2008: 76). Second, he points out that the terms for female-to-male and male-to-female transsexual individuals are unequal. Unlike male-to-female transsexual individuals, female-to-male transsexual individuals are not required to undergo surgery to undermine sexual activities as a woman (ibid 2006: 269).

While the abovementioned scholars consider the current regulation untenable, their perspectives on the constitutionality of any demands that call for a physical alignment with conventionally gendered men and women as a prerequisite for gender recognition diverge. The major difference between gender regime critics and defenders of the gender binary is that the latter consider the notion of conventionally gendered women and men the background norm for all genders, hence offering a perspective of social and legal integration to transsexual individuals on cis terms, while the former reject a hierarchical concept of genders and develop a perspective of inclusion instead.

While Grünberger doubts that s. 8(1)4 TSG addresses a substantial public concern or pursues a legitimate goal in the first place (Grünberger 2007: 361), Windel (2008: 76) and Wielpütz argue to the contrary. Based on the premise that it serves a legitimate purpose that a person can be identified as a man or a woman (Wielpütz 2012: 137), she holds that a free and unconditional choice of gender without any limiting requirements does not appear to do sufficient justice to the public interest (ibid: 147). In contrast to Windel, however, she problematises the issue of authority in deciding whether a person resembles more a man or a woman, the lacking option for transsexual individuals to opt for individually appropriate measures and observes that the diversity of sexed bodies does not allow for any stereotypical characteristics (ibid: 133).

Having established or questioned the general legitimacy of alignment to hegemonic concepts of gender as a means to realise regulatory interests, the scholars discuss whether surgical and/or hormonal measures are proportionate prerequisites to achieve the goal of alignment. While Windel does not rule out the legitimacy of physical interventions as a prerequisite, Wielpütz rejects any general demands to this effect, and Grünberger considers any such stipulation unconstitutional. Windel tentatively suggests that e. g. demanding neg-

238 | On 24 Mar. 2011, the *Bundestag* passed a bill to suspend compulsory military service in peacetime. The Act came into force on 01 July 2011 (Deutscher Bundestag 2011).

ative measures to the sex that does not apply might constitute a reasonable compromise (Windel 2008: 76). According to Grünberger, any surgery requirement is unjustifiable under the Constitution, arguing that such a requirement is coercive and limits a person's right to sexual self-determination (Grünberger 2007: 361). Similarly, Wielpütz argues that,

> [t]he precondition of a surgical intervention in s. 8(1)4 TSG is incompatible with the basic rights of transsexual individuals. The indirect coercion to undergo surgery intervenes into general privacy rights, in particular the right to sexual self-determination guaranteed in Art. 2(1) GG in conjunction with Art. 1(1) GG as well as the right to bodily integrity in Art. 2(2) GG. (Wielpütz 2012: 187)

According to Wielpütz, a demand for hormone therapy would also place an unreasonable burden on transsexual individuals because of health risks and unwanted side effects. Such a stipulation contravenes the principle of proportionality (ibid).

Setting out from the premise that giving way to an unconditional choice of gender does not sufficiently consider the legitimate interests of a society that relies on allocating individuals to a gender (ibid: 147), she defends the notion that the legislator may in principle demand measures towards an adaptation of conventionally gendered individuals (ibid: 148). She discusses three models to arrive at a solution she deems constitutional and legitimate at the same time. She rules out current practices and interpretations of s. 8(1)4 TSG, arguing that a transperson's sexuality is none of the state's business (ibid: 182). She also rejects a dynamic requirement for an alignment to the ›other‹ sex, suggesting that demanding as many medical interventions as possible violates trans individuals' fundamental rights (ibid: 183). Instead, she suggests considering each case individually. Such a procedure would take into consideration a trans individual's personal and health situation. Moreover, she holds that the measure for gender alignment is conducive to successful social integration (ibid).

However, Wielpütz's proposed solution reveals two shortcomings. First, since it is unconstitutional to stipulate surgical and hormonal interventions and unlawful to prescribe gender-conforming attire and habitus in everyday life, there is no constitutionally sound measure that a trans person can be required to meet. Second, in Wielpütz's concept, hegemonic gender roles expectations continue to be the norm against which trans individuals are granted or denied recognition. However, »[t]he superficial impression of third parties and the diffuse notion what constitutes a man or a woman according to the outer appearance are no considerable matters of public interest that would justify a limitation of basic rights« (Grünberger 2007: 366).

While legal scholars agree on the reasons the legislator put forward to justify the demand for permanent sterility in s. 8(1)3 TSG, controversy arose over

the interpretations. According to Grünberger, the requirement was meant to prevent a discrepancy between a person's gender and his or her reproductive functions (Grünberger 2007: 363). Windel and Wielpütz add that the legislator intended to maintain the »unambiguity« of descent (Windel 2006: 269; Wielpütz 2012: 202). However, Windel argues that,

> [t]he requirement of the permanent *inability to reproduce* in s. 8(1)3 TSG should not be understood as a constraint or even as a prohibition to reproduce. [...] If it was medically feasible to generate reproductive capacity according to the desired gender, there would be no systematic conflict with the »big solution«. (Windel 2006: 269)

Wielpütz refutes Windel's argumentation. She suggests that it is cynical in the light of its impracticability to argue that the legislator did not object to reproduction in the experienced sex/gender (Wielpütz 2012: 190).

In contrast to the debate on s. 8(1)4 TSG, legal scholars agree that s. 8(1)3 TSG can be done away with. In Windel's opinion, however, deleting s. 8(1)3 TSG requires revisions to the law of descent (Windel 2008: 76). Grünberger and Wielpütz strongly oppose the sterility requirement on constitutional grounds. Grünberger holds that the sterility requirement is disproportionate for four reasons and should therefore no longer be applied (Grünberger 2007: 364). Like Wielpütz (2012: 210), with reference to Becker et al. (2001) and Whittle (1998a) and in contrast to Windel, Grünberger argues that the ›risk‹ of transsexual men becoming mothers and transsexual women becoming fathers is small, since these processes collide with their respective social roles (Grünberger 2007: 373).[239] Second, and relying once more on the abovementioned sexologists, Grünberger doubts that the possibility of a few trans individuals giving birth to, or procreating children, respectively, justifies requiring of all transsexual individuals to undergo an extensive intervention (Grünberger: 264; 2008: 103 f.). Moreover, Grünberger points out that the Transsexual Act provides for a reversal of the decision on the gender status upon application, while the prerequisite, permanent sterility, is irreversible (Grünberger 2007: 364). Finally, he refutes the argument that s. 8(1)3 TSG serves the best interest of the child by arguing that s. 9(7)1 LPartG provides for stepchild adoption, hence allowing for male or female couples to have children (Grünberger 2008: 103).[240]

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239 | Windel critically and correctly comments on Grünberger's statement, arguing that it is inappropriate to suggest that there is no ›risk‹ of transidentified individuals becoming parents. First, the desire to have children ought not to be classified as a risk. Second, such a scenario is realistic (Windel 2008: 76 f.).

240 | Wielpütz presents a similar argument, albeit couched in hetero- and gendernormative rhetoric when she suggests that, »[t]he confusion of roles can be [...] compared with a so-called rainbow family, i. e., a same-sex parent couple« (Wielpütz 2012: 201).

Wielpütz systematically examines s. 8(1)3 TSG in relation to the constitutional rights chartered in Art. 2(1) GG in conjunction with Art. 1(1) GG, and Art. 6(1) GG. The right to bear a child is in part covered by Art. 6 in conjunction with Art. 2(1) GG or by the basic right to the free development of one's personality according to Art. 2(1) GG in conjunction with Art. 1(1) GG. Wielpütz explains that the freedom to reproduce is predominantly perceived to be part of the private conduct of life and is therefore allocated to the free development of one's personality. In the case of a married couple, the desire to have children is additionally protected by Art. 6(1) GG, since founding a family entails the freedom to shape life in matrimony (Wielpütz 2012: 192).

Wielpütz discusses the legitimacy,[241] necessity and proportionality of the sterilisation requirement stipulated in s. 8(1)3 TSG against this constitutional background. Like Grünberger, Wielpütz suggests that sterilisation is unnecessary for legal and regulatory purposes. She deems a pregnancy in the case of a female-to-male transsexual unlikely, since pregnancy and motherhood contradict his experience of being a man (Wielpütz 2012: 210). Moreover, she suggests that, »[i]t is not the task of the state to protect transsexuals from self-chosen conflicts« (ibid: 212). Wielpütz also questions the proportionality of the requirements. According to Wielpütz, the sterility requirement renders the realisation of one basic right, such as gender recognition, dependent on the abandonment of another right, such as the right to bodily integrity (Art. 2[2]1 GG) and the right to found a family (Art. 6[1] GG). Arguing that the impairment of basic rights involved in the circumstances under s. 8(1)3 TSG are unreasonable and therefore not justifiable in relation to generally legitimate community concerns,[242] she concludes that the requirement of permanent sterility is unconstitutional (ibid: 215).

241 | Apart from the reasons brought forward by Grünberger and Windel, Wielpütz adds the protection of transsexual individuals from unwanted pregnancy (Wielpütz 2012: 204) and the avoidance of breaking a taboo (ibid: 207) as possibly legitimate reasons for a restriction of rights.

242 | However, Wielpütz's understanding of legitimate community interests once more reveals the limitations of a hegemonic and minoritising perspective. This becomes evident in her discussion of the visibility of pregnant men vis-à-vis community interests:
»In the case of transsexual individuals, it is not possible to entirely negate that third-party interests are involved, in particular of the community. However, the interests of the community are only marginally affected, for example, by the sight of a pregnant man compared to his own situation of a life-long prohibition to reproduce. It is only a narrowly delimited period of time that a pregnancy is visible to the social environment and lets the gender role of the pregnant person appear bizarre and strange. The community is irritated and unsettled by the divergence of the reproductive function and the gender role represented to the outside. It might even feel molested and disgusted. However, the confrontation is in general limited to a few random encounters.« (Wielpütz 2012: 197)

3.3.5 Summary: Legal constructions of gender, transsexuality and gender regime in the reform period

The increasingly visible heterogeneity of transsexual individuals since the late 1990s and corresponding sexological clinical observations were mirrored in legal scholarship and jurisdiction, albeit with contradictory effects, depending on the area of jurisdiction. Driven by constitutional considerations, jurisdiction on the Transsexual Act gradually eroded core rules of the Act, granting more space for individual transsexual developments. Confronted with, and shaping an increasingly budget-oriented health system, social jurisdiction contributed to tighter regulations and restrictions on health insurance coverage of sex reassignment measures since the late 1990s.

However, neither social jurisdiction nor the Transsexual Act were able to account for the heterogeneity of trans individuals other than those strictly defined as transsexual in medical terms. The Transsexual Act was from the outset meant to regulate the legal recognition of transsexual individuals only and continues to do so, while social jurisdiction bars non-transsexual trans individuals from health insurance-financed surgery.

Successful litigation in the course of the first decade of the 21st century against the rules that either prevented homosexual transsexual individuals with a change of first names from entering marriages or forced married transsexual individuals to get divorced before being granted a revision of gender status contributed to weakening heteronormativity without delegitimising it. As a result of the Federal Constitutional Court decision on 06 Dec. 2005, a marriage appearing homosexual to society became possible (de Silva 2012: 159), whereas the decision on 27 May 2008, allowed for same-sex marriages in a legal sense in cases that involve a married transsexual partner (ibid: 160). Since cis individuals did not have the option to enter a same-sex marriage at that time, successful challenges on behalf of the continuation of marriages for trans individuals created a legal inconsistency (ibid).

Legal scholars and judges, like sexologists, grappled with interpretations of the somatic rules for a revision of gender status throughout the 1980s and 1990s. Constitutional readings of the respective rules in conjunction with developments on transsexuality in sexology and trans organisation demands in a legal climate following the decriminalisation of male homosexuality increasingly led to questioning the surgery mandate for a revision of gender status in legal scholarship. In this context, the Federal Constitutional Court decided to draw upon clinical observations that emphasise the heterogeneity of transsexual individuals with regard to the desire to undergo sex reassignment surgery, sexual orientation and the choice of legal options for recognition, stopping short of rendering the surgery requirement unconstitutional.

4 CONCEPTS OF GENDER AND TRANS(SEXUALITY) AFTER THE ACT TO AMEND THE TRANSSEXUAL ACT

4.1 Legal developments with respect to the Transsexual Act in 2011

Soon after the *Bundestag* had passed the Act to amend the Transsexual Act, developments in jurisdiction on the Transsexual Act contributed to another profound shift within the gender regime without however displacing it. This chapter focuses on the Federal Constitutional Court decision on somatic requirements for a revision of gender status as stipulated in ss. 8(1)3 and 8(1)4 TSG and aspects related to this decision.

While the first section of the chapter provides a summary of the Court's deliberations leading to its decision, the second section deals with sexological knowledge the Federal Constitutional Court decided to rely on. Drawing upon relevant press releases by TrIQ e. V., the dgti e. V. and ATME e. V. and Grünberger's comment on the Court decision in the legal journal JZ, the third section addresses trans movement reactions and responses in legal scholarship to the Federal Constitutional Court before finally turning to lower court interpretations in the immediate aftermath of the decision.

The effects of the Federal Constitutional Court decision were twofold. While the initial assignment based on the external genitalia to one of two genders only at birth remains in place, gender is no longer necessarily based on physical grounds at a later point in life (de Silva 2012: 160). At the same, the Court chose to follow dominant sexological opinions that stress psycho-medical authority at the expense of trans self-determination.

4.1.1 The Federal Constitutional Court decision on somatic requirements for a revision of gender status under the Transsexual Act

On 11 Jan. 2011, the Federal Constitutional Court rendered stipulations for permanent sterility and sex-reassigning measures in ss. 8(1)3 and 8(1)4 TSG unconstitutional. The case dealt with the question whether a registered partnership can be denied a lesbian transwoman with a change of first names and without fulfilling the somatic requirements for a revision of gender status, since she has the option of marrying her partner.[1] The Court ruled that,

> [i]t contravenes Art. 2(1) and (2) in conjunction with Art. 1(1) GG, if a transsexual individual meeting the prerequisites demanded in s. 1(1)1 to 3 TSG and wishing to legally secure her same-sex partnership may enter a registered life partnership only after she has according to ss. 8(1)3 and 8(1)4 TSG previously undergone a surgical intervention to change her external characteristics and achieved permanent sterility on the basis of which she has according to civil status law gained recognition in her experienced and lived gender. (BVerfG 2011: head note)

Quoting earlier Federal Constitutional Court decisions, the Court set out from three principles. First, it held that Art. 2(1) in conjunction with Art. 1(1) GG safeguards the personal area of sexuality and sexual self-determination, including an individual's gender identity and sexual orientation (ibid: para 56). Second, the Court referred to the scientifically secured knowledge that a person's gender identity cannot be determined based on the external genitalia at the time of birth only. Rather, it significantly depends on an individual's psychological constitution and self-identified gender (ibid). Third, the Court confirmed that if a transsexual individual experiences a lasting contradiction between his or her gendered understanding of self and the gender he or she was legally clas-

1 | In this particular case, a lesbian transwoman had changed her first names according to s. 1 TSG and was undergoing hormone treatment without however intending to undergo sex reassignment surgery. On 08 Dec. 2005, she and her partner in vain sought to enter a registered life partnership in Berlin. The local court rejected the application, arguing that founding a registered life partnership relies on the same sex of both partners. According to the Court, the applicant did not undergo a sex reassignment operation as a prerequisite specified in s. 8(1)4 TSG for recognition as a woman. As a result, the partners only had the option of getting married. Upon further complaints, the regional court and the highest court in Berlin, the Chamber Court, confirmed the decision. On 28 Dec. 2007, the transwoman, who had in the meantime married her partner, filed a constitutional complaint, claiming that the previous courts had violated her constitutional rights in Art. 2(1) in conjunction with Art. 1(1) GG (BVerfG 2011: paras 41-46).

sified as based on external sex characteristics, human dignity in conjunction with the basic right to the protection of his or her personality demand that a person's self-determination and gender identity be recognised in order to render possible a life accordingly, without his or her identity being exposed due to the contradiction between his or her adapted outer appearance and his or her legal treatment (ibid).

The Court examined two major issues before arriving at its decision. First, it discussed the options marriage as an institution for differently sexed partners and the registered life partnership as an institution for same-sex partners present for homosexual transsexual individuals who have fulfilled the prerequisites stipulated by ss. 1(1)1 to 1(1)3 TSG without having undergone surgery to modify external sex characteristics or to bring about permanent sterility (ibid: paras 57-65). While the Court considered the legislator's concept of distinguishing access to marriage or the registered life partnership on the basis of the individuals' gender status legitimate (ibid: paras 58; 65), it suggested that for a homosexual transsexual individual with a legally recognised change of first names to enter either institution means an encroachment on her right to sexual self-determination (ibid: para 60). In the case of a marriage, the individual is identifiable in a gender role that contradicts her understanding of self (ibid: para 61). Moreover, her transsexuality becomes evident (ibid). Such a situation conflicts with Art. 2(1) in conjunction with Art. 1(1) GG that protects the recognition of a person's gender identity and privacy (ibid). If the homosexual transsexual individual chooses to enter a registered life partnership, he or she is required to undergo surgery to alter external sex characteristics and achieve permanent sterility (ibid: para 60). While the Court conceded that it is legitimate to rely on objectively verifiable prerequisites for entering a registered life partnership (ibid: para 58), unreasonable preconditions for gender recognition conflict with the right to sexual self-determination as understood in Art. 2(1) in conjunction with Art. 1(1) GG (ibid: para 64).

Second, the Court discussed whether ss. 8(1)4 and 8(1)3 TSG constitute unreasonable requirements for gender recognition (ibid: paras 66-77). Arguing that a person's gender can be relevant to the allocation of rights and duties and family attributions, the legislator's concern to accord civil status stability and unambiguity, to prevent biological and legal gender from falling apart and to grant a revision of gender status on the basis of sound grounds is legitimate (ibid: para 60). Therefore, the Court considered prerequisites in cases of transsexuality legitimate, such as e. g. further demands on medical supervision, the individual's outer appearance or the quality of expertise (ibid: paras 67-69). However, the Court held that evidence for the stability of the gender identity and a life in the ›other‹ gender are unreasonable and hence incompatible with Art. 2(1) in conjunction with Art. 1(1) GG, if ss. 8(1)3 and 8(1)4 TSG unconditionally and without exception require surgery to alter the external sex characteristics and bring about sterility (ibid: paras 68; 73).

With regard to s. 8(1)3 TSG, the Court reasoned that surgery that largely removes or reorganises sex characteristics to approximate those of the ›other‹ sex massively encroaches upon the right to physical integrity safeguarded in Art. 2(2) GG (ibid: para 71). Depending on a person's age and health condition, health risks and side effects can be so great that surgery of this magnitude is medically contraindicated (ibid: para 70). In addition, and relying heavily on the 2001 statement by the DGfS, the Court held that sex reassignment surgery is not indicated in every transsexual individual. Rather, it is the consistency of life in the ›other‹ gender and the recognition as such that attests to the stability and irreversibility of a transsexual individual's gender identity (Becker et al. 2001: 261, quoted in BVerfG 2011: para 71). Moreover, the Court noted that the legislator accepted that not all members of a gender entirely possess the ›matching‹ external genitalia. Section 9(3) in conjunction with s. 6(1) TSG e.g. allows a reversal of the decision to be recognised as a member of the ›other‹ sex without a surgery mandate (BVerfG 2011: para 72).

Similarly, the Court held that permanent sterility constitutes an unreasonable prerequisite for recognising a transsexual individual's gender as long as the permanency of the inability to reproduce requires surgical interventions. According to the Court, s. 8(1)3 TSG demands of a transsexual individual to trade the right to physical integrity protected in Art. 2(2) GG for the right to sexual self-determination without reasons that bear sufficient significance to justify such an infringement of basic rights (ibid: paras 73-75). The Court suggested that the legislator pursues a legitimate goal by preventing men from bearing children and women from fathering progeny, because such procedures »would contradict the understanding of gender and would have far-reaching effects on the legal order« (ibid: para 75). However, it presented several reasons that suggest that fears of disrupting widespread notions of gender and gender roles in generational reproduction are generally unfounded. While the Court did not rule out the possibility that transsexual individuals might make use of their respective reproductive capacities, it assumed that – based on Becker's statement (Becker 2004: 162) – the probability for female-to male transsexual individuals is low, since they are »predominantly heterosexual« (BVerfG 2011: 76). Whereas male-to-female transsexual individuals are more likely to procreate offspring, it needs to be considered that hormone treatment at least temporarily leads to sterility (ibid). With reference to the court case in Cologne (cf. OLG Köln 2010: 45 f.), developments in reproductive medicine render futile bans on reproduction, despite the requirement for permanent sterility (BVerfG 2011: para 76). Finally, the Court suggested that in these rare cases s. 11 TSG[2] secures a child's

2 | Section 11 TSG provides that the decision to consider the applicant a member of the ›other‹ sex does not affect the legal relationship between the applicant and his or her children or his or her parents, respectively. It only affects the relationship between the

allocation to a mother and a father (ibid: paras 76 f.). Since the Court decided that ss. 8(1)4 and 8(1)3 TSG were unconstitutional (ibid: para 77), it annulled the decisions of the courts that had previously dealt with this particular case (ibid: 78).

The Federal Constitutional Court decided that the incompatibility of ss. 8(1)3 and 8(1)4 TSG with Art. 2(1) and 2(2) in conjunction with Art. 1(1) GG does not lead to their nullity. Rather, the Court pointed out that the legislator has two options of creating constitutional prerequisites. One would be to develop more specific prerequisites for a legal recognition of a transsexual individual's gender that prove the seriousness of the desire to live in the ›other‹ gender in a way that exceeds the prerequisites laid down in s. 1(1) TSG. The other would be to generate a constitutional legal situation when revising the Transsexual Act (ibid: para 79). The Court declared ss. 8(1)3 and 8(1)4 TSG inapplicable until a new regulation takes effect (ibid: para 80). Since the legislator has so far been unable, if not downright unwilling to revise transsexual law, an individual's gender has, with exception of the initial gender allocation become independent of physical properties.

4.1.2 Sexological knowledge in Federal Constitutional Court reasoning on somatic requirements

The Federal Constitutional Court decision on somatic prerequisites for a revision of gender status once more followed the principle that the legislator may not force an individual to trade one basic right entirely for another as a means for the legislator to pursue its regulatory aims (Grünberger 2011: 369). At the same time, the Court relied on sexological perspectives with contradictory effects on trans self-determination. While the Court continued the route taken in the decision on s. 7(1)3 TSG with regard to somatic measures, hence expanding trans self-determination in this area, it drew upon sexological perspectives that confirm and allow a reinforcement of the primacy of psycho-medical expertise in establishing a case of transsexuality.

The Federal Constitutional Court reiterated that a diagnosis of transsexuality does not necessarily imply somatic measures. Referring to the statement by the DGfS (Becker et al. 2001: 261), Rauchfleisch (2006: 17) and Pichlo (2008: 119; 122), the Court suggested that transsexual individuals require individual solutions in order to live their lives according to their respective experienced gender. Therefore, therapeutic measures may range from no somatic interventions, hormone treatment to extensive sex reassignment surgery (BVerfG 2011: para 36). The Court quoted Becker et al. (2001) and Grünberger (2007) who

applicant and the children adopted after the decision took effect. The same applies to the relationship to these children's descendants.

suggest that in the light of these findings, the requirements defined in ss. 8(1)3 and 8(1)4 TSG are constitutionally problematic (BVerfG 2011: para 36).

With regard to establishing a case of transsexuality, the Federal Constitutional Court's perspective was in line with dominant sexological views that clearly limit self-determination rather than those that consider trans expertise at least equivalent to psycho-medical expertise. The Court for example emphasised the diagnostic significance of the ›real life test‹ as a means to determine whether an individual is able to handle the »change of gender roles« (ibid: para 37). Moreover, in order to satisfy the legislator's demand for the stability and irreversibility of trans individuals' gender identities, the Court confirmed the constitutionality of the assessment process regulated in s. 4(3) TSG (ibid: para 67). In fact, it suggested measures that reinforce psycho-medical gatekeeping and gender stereotypes:

> For this purpose, it [the legislator; insertion mine] may in addition to the conditions in s. 1(1) TSG specify, for example, its demands on the medical supervision of the transsexual individual, his outer appearance or the quality of the assessment. (Ibid)

4.1.3 Trans movement reactions and reactions in legal scholarship to the Federal Constitutional Court decision on somatic measures

Trans organisations with a political agenda and the legal scholar Grünberger welcomed the Federal Constitution Court decision to declare ss. 8(1)3 and 8(1)4 TSG unconstitutional and inapplicable until the legislator creates a new, constitutional regulation (dgti 2015; TrIQ 2005-2015; ATME 2015; Grünberger 2011: 371). However, the reactions differed, depending on whether they took into consideration two further issues the Federal Constitutional Court raised. One of these issues was that the Federal Constitutional Court decision allows the government to devise a regulation that demands of transsexual individuals to adapt their outer appearance to the ›other‹ gender. The second issue revolves around the fact that the Court confirmed psycho-medical diagnostic authority in the legal procedure.

Declaring the surgery and castration requirement for a revision of gender status unconstitutional fulfilled a crucial demand of trans organisations and coincided with opinions in legal scholarship stated since 2011.[3] In its press release on 28 Jan. 2011, TrIQ e. V. for instance hailed the Court decision, arguing that, »it was now possible for transgender individuals to achieve the gender status that corresponds with their gender, regardless of whether they undergo sex reassignment operations or not« (TrIQ 2006-2015). Similarly, the then president

3 | See, for instance, Wielpütz 2012: 228 f. and Grünberger 2011: 371.

of the dgti e. V., Alter, explained that, »[a]t long last, the Federal Constitutional Court gives individuals with a deviating gender identity the right to decide on their bodies themselves« (dgti 2015). More cautiously, ATME e. V. described the Court decision as »an important step« (ATME 2015).

While Alter posed the rhetorical question, »*What remains of the TSG now?*« at the end of her announcement (Alter 2011), ATME e. V., TriQ e. V. and Grünberger either implicitly or explicitly suggested that a lot remains to be done to create a regulation that complies with the Basic Law. ATME e. V. severely criticised the Court for reinforcing the psychopathologisation of transsexual individuals and suggesting that the government may require of transsexual individuals to adapt their outer appearance to stereotypical notions of the respective gender they wished to be recognised as. According to ATME e. V., the latter contravenes the right to develop one's personality freely as guaranteed in Art. 2 GG (ATME 2015).

Similarly, Grünberger suggested that the existing requirements for assessment in s. 4 TSG contribute to paternalism, pathologisation and heteronomy (Grünberger 2011: 370). He pointed out that there are no standards compliant with personal rights and rights to privacy that would allow a decision on whether a person's appearance and behaviour conforms to the respective individual's gender identity (ibid: 369). While TrIQ e. V. did not expressly criticise either of these issues in its press release, the association pointed out that a reform of trans law to the effect of reducing and debureaucratising the procedure was overdue (TrIQ 2006-2015).

4.1.4 Initial lower court interpretations of the Federal Constitutional Court decision on somatic measures

While the Federal Constitutional Court decision suggests that transsexual individuals achieve recognition without having to fulfil the unconstitutional prerequisites stipulated in ss. 8(1)3 and 8(1)4 TSG, various local, regional and higher regional courts initially interpreted the Federal Constitutional Court decision to the effect of staying proceedings for a revision of gender status altogether. The local courts Mannheim (AG Mannheim) and Stuttgart (AG Stuttgart) and the High Regional Court Stuttgart (OLG Stuttgart) are examples of such an interpretation (AG Mannheim 2012; AG Stuttgart, quoted in BVerfG 2011a: para 7; OLG Stuttgart, quoted in ibid: para. 9).

In its fourth guiding principle, the Local Court Mannheim opined that, »[p]ending actions whose decisions depend on unconstitutional (parts of) a section need to be stayed until a constitutionally required new law has been enacted. Anything to the contrary would at best apply, if the Federal Constitutional Court had made concrete orders for the transition period« (AG Mann-

heim 2012).[4] Upon the transperson's complaint against this decision, the High Regional Court Karlsruhe decided that, »[w]ith regard to the Federal Constitutional Court decision on 11 Jan. 2011, [...], it is not permissible to stay the proceedings for the establishment of a revision of gender status (s. 8 TSG) up to a new legal regulation« (OLG Karlsruhe 2012: 67178).

As a result of further appeals against decisions of the Local Court Stuttgart (AG Stuttgart) on 23 May 2011 (quoted in BVerfG 2011a: para 7) and the High Regional Court Stuttgart (quoted in ibid: para 9),[5] the Federal Constitutional Court rendered clear that staying proceedings to revise the civil status violates basic rights protected in Art. 2(1) in conjunction with Art. 1(1) GG, because it unlawfully delays the legal recognition of the complainant's gender identity (ibid: para 15). The Federal Constitutional Court explained that transsexual individuals are constitutionally entitled to be legally recognised according to their gender identity. The purpose of its former decision was to declare ss. 8(1)3 and 8(1)4 TSG unconstitutional and inapplicable until the legislator revises the sections in the not foreseeable future, hence allowing for individuals who do not fulfil the prerequisites to be granted a revision of gender status, regardless of whether the conditions for a change of first names and gender status are the same (ibid: para 16).

In addition, the Federal Constitutional Court reminded the High Regional Court Stuttgart that it had violated the complainant's constitutional rights by addressing her according to the gender assigned at the time of birth, despite the fact that she had been granted a change of first names (ibid: para 17).

4.1.5 Summary: Legal constructions of gender, transsexuality and gender regime in the immediate aftermath of the Act to amend the Transsexual Act

While the gender regime remains in place, the Federal Constitutional Court decision on 11 Jan. 2011 contributed to another shift in the gender binary. Al-

4 | In this particular case, a transman who had obtained a change of first names had applied for a revision of gender status without having undergone sex reassignment surgery (AG Mannheim 2012: para 4). He argued that the Federal Constitutional Court decision on 11 Jan. 2011 had rendered the prerequisites for a change of first names and a revision of gender status equal and that the somatic prerequisites laid down by ss. 8(1)3 and 8(1)4 TSG no longer applied (ibid: para 5).

5 | This case dealt with a transwoman who had successfully applied for a change of first names and was denied the recognition of her gender as a woman in both instances (AG Stuttgart, 23 May 2011 – F 4 UR III 571/2011 and OLG Stuttgart, 07 July 2011 – 8W 206/11), since she had not fulfilled the prerequisites for a revision of gender status demanded in ss. 8(1)3 and 8(1)4 TSG (BVerfG 2011a: paras 2-5).

though gender options remain limited to the categories ›man‹ and ›woman‹, with exception of the initial assignment at birth, the Court severed gender from a physical basis since the removal of the surgery mandate for a revision of gender status in cases of transsexuality. At the same time, determining an individual's gender continues to be based on an external decision at any point of a person's life.

The Federal Constitutional Court granted transsexual individuals the freedom to choose whether to undergo sex reassignment measures or not and homosexual trans individuals the right to choose between entering a marriage or a registered life partnership providing fewer rights. However, the Court decision also reveals that the two socially accepted genders remain the background norm against which transsexual individuals applying for a revision of gender status are measured. The Federal Constitutional Court allowed the legislator to develop more specific requirements for a revision of gender status that prove the seriousness of the transsexual individual's desire to live as the ›other‹ gender. As some scholars and trans lobby organisations point out, any such evidence necessarily emerges from, and contributes to imposing stereotypical notions of legally recognised genders on transsexual individuals.

While s. 4(3) TSG was not the issue of the case the Federal Constitutional Court decided upon on 11 Jan. 2011, based on dominant sexological perspectives, it confirmed and reinforced psycho-medical supervision of transsexual individuals. By implicitly underlining the sexological assumption that transsexual individuals lack self-knowledge, the Court reinforced this paternalistic attitude towards transexual individuals to the detriment of trans self-determination.

4.2 Developments in trans politics from 2011 to 2014

The outcome of the reform process stifled any expectations that the federal government would make any further efforts to amend trans law in the foreseeable future, even less so to the effect that it would take into consideration trans movement demands. Despite government reluctance to seriously engage with issues related to trans legislation, trans organisations continued to press for change.

Based on online sources provided by the dgti e. V., the Nationwide Workgroup Transsexual Law Reform (*Bundesweiter Arbeitskreis TSG-Reform* [BAK TSG-Reform]) and the Trans*Aktiv websites, this chapter deals with three major and distinct political projects that to varying degrees dealt with transsexual law reform in the period between 2011 and 2014. The first chapter outlines the dgti e. V. key issues paper for a reform of the Transsexual Act developed in 2011. The second chapter deals with the catalogue of demands for transsexual law reform published by the BAK TSG-Reform in June 2012. The third chapter out-

lines the Waldschlösschen declaration (*Waldschlösschen Erklärung*)[6] released in 2014. The premises, demands and strategies of each of the three political initiatives will be outlined and contextualised within the tradition of trans politics.

The three projects mentioned above indicate a number of political and structural developments in trans politics. First, the initiatives overall coincided on the issue that a special law is an inappropriate means to solve the problems in current transsexual law. Second, without ceasing to develop concepts for trans law reform, trans organisations and coalitions addressed the general public rather than the federal government. Third, the trans movement sought possibilities for intervention in other areas of the federal state. Fourth, the social movement reinforced attempts at creating cohesion and common demands. Finally, the political projects took a clear stance against identity politics in lobbying activities.

4.2.1 The dgti e. V. key issues paper for a reform of the Transsexual Act

Developed in 2011, the dgti e. V. key issues paper was the first of three major political initiatives aimed at legal change in the post-reform period. The paper formulates general principles upon which new legal regulations should be based.

Premises and parameters

The dgti e. V. set out from non-minoritising and non-identity premises and parameters. First and informed by a social constructionist perspective, the organisation suggested that social and cultural arrangements create the problems sex and gender non-conforming individuals face. According to the dgti e. V., it is the cultural reduction of sexes and social limitations on the development of the personality that damage the individuals the key issues paper was meant to provide for (Alter 2011a).

Second, the association pointed out that any sex/gender entry in the birth register is based on a heteronomous decision made at a time individuals are unable to speak out on behalf of their personalities. As such, the external sex/gender assignment applies to all individuals (ibid). Rather than emphasise the

6 | The declaration is named after the *Akademie Waldschlösschen*. The *Akademie Waldschlösschen* was founded in 1981 (Akademie Waldschlösschen undated) and is rooted in the 1970s West German gay movement (ibid: undated a). The institution is a LGBTIQ educational centre operating nationwide and located close to Göttingen (ibid). Since 2013, the *Akademie Waldschlösschen* has hosted the annual meeting of trans activists representing several trans lobby groups and members of trans support groups from all over the country (Trans*Aktiv undated).

special needs of the target groups, the dgti e. V. focused on systemic and procedural foundations of minoritising.

Third and like the PGG of which the dgti e. V. was a member, the organisation's political project was designed to include individuals whose morphologies do not fit polarised notions of ›male‹ and ›female‹. In contrast to the TrGG, the key issues paper does not subsume ›intersex‹ under ›transgender‹, nor does it define the target groups along the lines of identity. Instead, the dgti e. V. developed the set of principles to provide for individuals with ›ambiguous‹ sex characteristics and individuals whose respective gender identity differs from the sex/gender assigned at birth (ibid), hence acknowledging and providing for an indefinite number of sexed individuals and gender identities.

Fourth, the dgti e. V. stated that the Transsexual Act from the very outset did not comply with the Basic Law. Referring to the seven Federal Constitutional Court decisions on various rules of the Transsexual Act since its enactment in 1981, the association was convinced that no reform of the Transsexual Act would ever secure the abovementioned individuals' basic rights, most notably the rights to self-determination, physical integrity and the free development of one's personality (ibid).

Key issues for a new regulation

Based on the aforementioned premises and parameters, the dgti e. V. compiled five key issues. First and arguing that the sex/gender entry and the entry of first names in the birth register are based on a heteronomous decision in an administrative procedure, the dgti e. V. suggests that every individual should be entitled to change this information in an administrative procedure, too. Second, the organisation holds that parents should be entitled to choose gender-neutral first names and forgo a sex/gender entry in the birth register in the event of the birth of a child with ›ambiguous‹ sex characteristics.[7] Third, and on the grounds that only the individual featuring these characteristics has the right to decide upon somatic measures for the sole purpose of producing sex unambiguity, the dgti e. V. proposes to prohibit somatic measures in infants with ›unambiguous‹ sex characteristics to this end. Fourth, and in addition to reiterating trans movement demands for self-determination, the association suggests dispensing with assessment procedures for a change of first names and

7 | However, given that all sex/gender assignments at birth are based on heteronomous decisions, this particular key issue appears inconsistent. Taken to its radical end, a consistent solution would consist of either leaving the sex/gender entry vacant in general or dispensing with this category in the birth register altogether. Moreover, and as and OII-Germany suggests with regard to s. 22(3) PStG, singling out individuals with physical features that do not comply with conventional notions of ›male‹ and ›female‹ risks stigmatisation and discrimination.

a revision of gender status, given that nobody else is exerted to an assessment procedure to verify the initial and external gender assignment, either. Fifth, in the light of the limits of the socially constructed render regime, the dgti e. V. suggests that individuals with ›ambiguous‹ sex characteristics and individuals whose respective gender identity differs from the sex/gender assigned at birth should by law be entitled to social, psychological and somatic measures as a means of rehabilitation (ibid).

In contrast to the PGG, the dgti e. V. did not submit the key issues paper to policy makers. Rather, the organisation decided to publish the paper as an open letter and to collect signatures for its political project (ibid).

4.2.2 The catalogue of demands for transsexual law reform by the Nationwide Workgroup Transsexual Law Reform

Published in June 2012, the catalogue of demands for transsexual law reform[8] was the second major political project initiated and carried out for achieving trans law reform in the period between 2011 and 2014. While the dgti e. V. key issues paper broadly outlines the direction of desired legal reform, the catalogue of demands meticulously elaborates on suggestions for integrating rules regulating trans into existing statutes.

Reasons for founding the Nationwide Workgroup on Transsexual Law Reform and the constitution of the Workgroup

Established in Sept. 2011 for the purpose of developing a consensus among trans organisations with regard to transsexual law reform (BAK TSG-Reform 2012a), the Nationwide Workgroup on Transsexual Law Reform[9] consisted of representatives of more than 30 primarily trans and some intersex groups and organisations and individuals from the whole of Germany (ibid; ibid 2012: 1). Collaboration was open, participatory and decidedly non-party (ibid 2012a).

The Nationwide Workgroup dealt with the issue of transsexual law reform for two reasons. First and similar to the dgti e. V., the Workgroup considered the Transsexual Act to contain rules that collide with trans individuals' dignity and right to self-determination, despite several Federal Constitutional Court decisions that rendered a significant number of rules of the Act inapplicable.

8 | The catalogue of demands for transsexual law reform will be referred to as the catalogue of demands in this chapter.

9 | The Nationwide Workgroup Transsexual Law Reform will be referred to as the Nationwide Workgroup or simply the Workgroup in this chapter.

Second, the Workgroup suggested that in other instances, rules of the Transsexual Act had proven to be deficient and provoked discrimination (cf. ibid).[10]

The catalogue of demands for transsexual law reform

Presenting demands, offering a substantial body of reasons and suggestions for implementation, the catalogue of demands structurally resembled the key issues paper on the reform of the Transsexual Act issued in 2009. While the catalogue of demands also tied into the tradition of strictly outsourcing demands on issues related to psycho-medical premises and procedures, the demands were however, compared with those of the abovementioned model, overall more radical with regard to trans law reform.

Demands

The catalogue contained five demands that overall aimed at securing the rights to self-determination, privacy and health and, as the reasons suggest, were motivated by a desire for an inclusion and de-stigmatisation of trans. First, the Nationwide Workgroup demanded to abolish assessment and court proceedings in favour of trans self-determination (BAK TSG-Reform 2012: 1). The Workgroup presented five reasons to support this demand. The Workgroup held that expert reports cannot fulfil the purpose defined in s. 4(3) TSG. Arguing that a gender identity differing from the assigned gender cannot be diagnosed and that third parties cannot predict the stability of an individual's gender identity, the Workgroup concluded that expert reports cannot fulfil the purpose defined in s. 4(3) TSG (ibid: 2). Moreover, the Workgroup claimed that an expert assessment of an individual's gender identity is incompatible with the right to self-determination guaranteed in the Basic Law (ibid). In addition, the Workgroup claimed that implicitly linking the legal options of a change of first names and a revision of gender status to a diagnosis is not justifiable (ibid: 3). According to the Workgroup, the state is moreover not responsible for ›protecting‹ individuals from their respective decisions (ibid). Reiterating the reason put forth by the TGNB and TrIQ e. V. in 2009, there is little reason to believe that individuals will deal frivolously with these legal options due to their profound social effects (ibid). Finally, the Workgroup argued that social issues are unaffected by a change of first names and a revision of gender status, since a person's habitus and the perception of the habitus are more relevant in everyday life. Therefore, there is no need for the legislator to protect society from trans and intersex individuals either (ibid).

10 | The Nationwide Workgroup identified the exclusion of relevant social law regulations (BAK TSG-Reform 2012: 10) and insufficient regulations with regard to the prohibition of disclosure (ibid: 7) as major shortcomings.

Second, and in contrast to the TGNB Workgroup Law, which for reasons of political feasibility dispensed with its favoured suggestion for trans law reform, the Nationwide Workgroup demanded the abolishment of the Transsexual Act and the integration of provisions granting a change of first names and a revision of gender status into existing statutes (ibid: 1). The Nationwide Workgroup presented two reasons to support this demand. The Workgroup argued that special acts are *per se* stigmatising, because they define the respective group of individuals as beyond what is considered ›normal‹ (ibid: 3). Moreover, the Workgroup argued that a special act suggests that all individuals defined as the target group share the same needs. As a result, different individual needs are glossed over, excluding individuals requiring provisions under the special act, if they do not, or only in part correspond with the definition of the target group in the act (ibid).

Third, and like the suggestions put forward by the TGNB Workgroup Law in 2006 and the TGNB and TrIQ e. V. key issues paper in 2009, the Nationwide Workgroup demanded replacing court proceedings for a change of first names and a revision of gender status by an administrative procedure with the respective office responsible for issues related to a person's civil status (ibid: 1). The Workgroup argued that the current rules providing for a change of first names are unreasonable, unnecessarily laborious and provoke discrimination (ibid: 4).

Fourth, the Nationwide Workgroup demanded to extend the prohibition of disclosure and to locate the provisions in the Administrative Offences Act (ibid: 1), arguing that current provisions of the Transsexual Act are insufficient, particularly with regard to the address of individuals with a change of first names only, issuing reports and the private sphere (ibid: 7). The Workgroup argued that considering developments in social networks and relatives, public administration, schools and employers who frequently do not respect trans individuals' decisions, »a normal life is rendered impossible« (ibid: 8). Instead, individuals »living gender diversity« are frequently forced to explain themselves, and the disclosure of a person's former first name and gender history provokes discrimination. The Workgroup held that trans individuals' rights are not only a private matter (ibid).

Fifth, the Nationwide Workgroup demanded that the legislator create a legally binding provision to ensure health insurance assumption of transition-related medical, surgical and other relevant somatic costs (ibid: 1). Arguing that a change of first names and a revision of gender status do not of themselves entitle trans individuals to such measures, the Workgroup suggested that it is the legislator's duty to protect trans individuals' right to privacy and health (ibid: 11). In addition and based on past experiences (ibid: 10), the Workgroup suggested that failing to legally enshrine access to health insurance coverage of somatic measures risks that health insurance companies will not, or only insufficiently take on the costs of sex reassignment measures (ibid: 11).

Suggestions for implementation

The Nationwide Workgroup made a number of recommendations for implementation compliant with the abovementioned demands. The Workgroup suggested amending s. 11 of the Act to change family and first names (*Gesetz zur Änderung von Familien- und Vornamen*; NamÄndG) to include gender identity as an important reason for a change of first names (ibid: 4). The Workgroup drew upon the suggestion made by the TGNB and TrIQ e. V. key issues paper by recommending as a prerequisite for a change of first names that the applicant declares that he or she does not identify with the assigned gender. The Workgroup suggested that the applicant may apply with the register office for either a first name signifying another gender or a gender-neutral first name (ibid) and enjoy all the rights secured in Federal Constitutional Court decisions on rules of the Transsexual Act (ibid: 4 f.).

The Workgroup recommended to integrate regulations for a revision of gender status into the Civil Status Act and subordinate regulations (ibid: 4). Referring to Federal Constitutional Court decisions which had rendered the prerequisites for a change of first names and a revision of gender status identical, the Nationwide Workgroup suggested applying the same procedure for a revision of gender status as stated above (ibid). Moreover, it suggested that while the birth entry could be either male or female, a status should be created for individuals who consider themselves neither male nor female (ibid).[11]

The Nationwide Workgroup included in its recommendations that the applicant's right to self-determination precludes third-party codetermination (ibid). In addition to referring to the Federal Constitutional Court ruling that existing marriages or registered life partnerships remain unaffected by a revision of gender status, the Nationwide Workshop recommended to provide for transforming one legally sanctioned partnership into the other upon application (ibid: 6). Finally and in contrast to the TGNB and TrIQ e. V. key issues paper, the Nationwide Workgroup recommended regulations for a renewed change of first names and revision of gender status without suggesting sanctions or delivering arguments for appeasement purposes (ibid).

With regard to an extension of the prohibition of disclosure, the Nationwide Workgroup recommended to integrate two regulations into the Administrative Offences Act. The first regulation suggests encoding the rules provided in ss. 5(1) and 10(2) TSG in the Administrative Offences Act. According to the aforementioned sections, a person's former first names and gender status may not be disclosed or investigated into without the respective individual's

11 | Members of the Nationwide Workgroup only realised after the publication of the catalogue of demands that the Civil Status Act does not define sex/gender or the number of sexes/genders. Despite intentions to the contrary, the recommendations unnecessarily limit sex/gender options by suggesting three categories.

consent, unless there are reasons or reasons to believe, respectively, that the purpose serves the public interest (ibid: 7). The second regulation sought to limit relatives' right to refer to trans individuals with the former first name and gender status (ibid).

In addition, the Nationwide Workgroup recommended providing for three further regulations in the Civil Status Act in order to secure trans individuals' right to privacy and protection from discrimination. These include a right to reports, documents and certificates featuring the new names in otherwise unchanged documents within an appropriate time and a right to change the first names in personnel files (ibid). The Workgroup recommended including a provision as outlined in s. 11 TSG to the effect that the birth entry of children born to trans individuals prior to a change of first names and a revision of gender status remains unchanged (ibid).

In order to create a legally binding provision to ensure health insurance assumption of transition-related medical and surgical costs, the Workgroup suggested to extend s. 5 in chapter 3 of the fifth volume of the Social Code Book to ensure that, based on a medical indication, health insurance companies are obliged to cover the costs of all necessary somatic interventions, such as hormone therapy, sex reassignment surgery and further measures, such as for example, epilation (ibid: 10). With regard to epilation, the Workgroup suggested to include qualified professionals, such as cosmeticians among the service providers to be covered by health insurance companies (ibid). While the demands addressing a change of first names and a revision of gender status, including the effects, are overall more radical than the suggestions made by the TGNB and TrIQ e. V. in 2009, the demand for cost coverage of sex reassignment measures by health insurance companies necessarily involves a medical indication, thus compromising trans self-determination in the medical realm.

Like the dgti e. V., the Nationwide Workgroup did not submit the catalogue of demands to government officials. Instead, the Workgroup published the paper, including an extensive list of individuals and primarily lesbian, gay, bi, queer and trans organisations as initial signatories (ibid: 2012b) and encouraged further individuals and organisations to follow suit,[12] while rejecting signatures from political parties and their affiliated LGBTI organisations (ibid 2012c).

12 | By 07 Sept. 2015, more than 30 further organisations and groups engaging in the lesbian, gay, trans, queer and feminist spectrum (BAK TSG-Reform 2012c) and 1952 individuals cosigned the catalogue of demands (ibid 2012d).

4.2.3 The Waldschlösschen declaration by the nationwide network Trans*Aktiv

Issued on 24 Aug. 2014, the Waldschlösschen declaration[13] was the third major political project in the period between 2011 and 2014. Unlike the aforementioned initiatives, the declaration does not focus solely on trans law reform, nor does it elaborate on the implementation of its demands. Instead, the declaration served as the prelude to further consolidation and cohesion within the trans movement.

The institutional and political context of the Waldschlösschen declaration

Trans*Aktiv emerged as a nationwide network in 2013 (Trans*Aktiv undated). The network is composed of representatives of several organisations committed to supporting individuals »living gender diversity« (Trans*Aktiv undated a). The broad invitation policy and the overall purpose of the network suggest that it was created to bring together activists and support groups and to serve a broad population that was particularly, but not limited to transsexual, transgender and intersex individuals (ibid). As a summary of the second (ibid) and the invitation to the third annual network meeting reveal, the major purpose of the network was to establish a nationwide umbrella organisation for all participating associations and groups, taking into consideration an intersectional perspective on individuals »living gender diversity« (ibid undated b.)[14]

The Waldschlösschen declaration

Extending the protection of human rights of individuals »living gender diversity« by demanding that all legal, political, healthcare-related and social actions should follow the principles outlined in the Yogyakarta Principles,[15] constitutes

13 | In this chapter, the Waldschlösschen declaration will also be referred to as the declaration.

14 | Indeed, in Aug. 2015, the dgti e. V. announced in a press release that 59 members from the whole of Germany had founded the Federal Association Trans e. V. i. G. (*Bundesverband Trans**; BVT*). The BVT* represents roughly 33 associations, groups and individuals. It functions as a common platform for improving the social situation of trans individuals in Germany and serves as a contact for the federal government (dgti 2015).

15 | In the light of human rights violations towards individuals based on their actual or perceived sexual orientation, a group of human rights experts discussed and published a set of principles in 2006 that apply international human rights law specifically to sexual orientation and gender identity (The Yogyakarta Principles 2013a: 1). The Yogyakarta Principles cover rights to universal enjoyment of human rights, non-discrimination and recognition before the law (principles 1-3); rights to human and personal security

the overarching demand of the Waldschlösschen declaration (Trans*Aktiv 2014). Other than this, the demands compiled in the declaration address legal, political and healthcare-related issues as they relate to trans and range from long-standing general to very specific demands based on recent developments in federal politics and medicine. Overall, the demands focus on political participation, trans self-determination and human rights protection.

Trans*Aktiv formulated four political demands. Among these are the call for recognising and protecting the human rights of asylum seekers facing persecution and threats based on gender identity and/or sexual orientation in their home countries. According to the network, this demand includes full access to medical and surgical interventions during asylum procedures (ibid).[16] Moreover, Trans*Aktiv demanded financial and structural support for umbrella or-

(principles 4-11); economic, social and cultural rights (principles 12-18), rights to expression, opinion and association (principles 19-21); freedom of movement and asylum (principles 22 f.), rights of participation in cultural and family life (principles 24-26); rights of human rights defenders (principle 27); rights of redress and accountability (principles 28 f.) and additional recommendations as they relate to sexual orientation and gender identity (ibid: 2 f.). While the Yogyakarta Principles are not legally binding, they affirm the obligation of states to implement human rights (ibid: 3). For the authoritative version of the Yogyakarta Principles, see the Yogyakarta Principles 2013.

16 | The medical care of asylum seekers is in general precarious. Medical care of asylum seekers is regulated in s. 4 of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz* [AsylbLG]). According to s. 4(1) AsylbLG, an asylum seeker is granted necessary treatment, including medication and dressings, to ensure the recovery or relief of acute diseases and pain. Section 4(2) AsylbLG provides that expectant mothers and women in childbed are granted medical attendance and nursing care, midwife assistance, medication, dressings and remedies. As the nationwide workgroup for refugees PRO ASYL suggests, s. 4 AsylbLG is flawed, since the medical care of asylum seekers is excluded from the regular healthcare system and provides for emergency healthcare only (PRO ASYL 2013: 2). Moreover, the organisation points out that in practice asylum seekers do not obtain sufficient medical care, because frequently staff without medical qualifications decides on access to medical care for asylum seekers in refugee camps, and social welfare offices often deny asylum seekers preventive medical check-ups, if they do not consider them necessary (ibid: 11). Furthermore, the Asylum Seekers Benefits Act disregards the EU Reception Directive 2003/9/EG issued on 27 Jan. 2003. According to Art. 15(2) EU Reception Directive 2003/9/EG, particularly vulnerable asylum seekers should be granted necessary medical or other care. Art. 17 of the directive defines as especially vulnerable persons e. g. minors, unaccompanied minors, disabled individuals, elderly people, pregnant individuals, single parents with minors and individuals who have experienced torture, rape or other severe forms of psychological, physical or sexual abuse (ibid).

ganisations, associations, networks, support groups and all other organisations serving individuals »living gender diversity« (ibid). Sparked by the establishment of the Inter-Ministerial Working Group »Intersexuality/Transsexuality« (*Interministerielle Arbeitsgruppe »Intersexualität/Transsexualität«* [IMAG]) in Sept. 2014,[17] the network demanded the participation of individuals »living gender diversity« in this workgroup as well as in any other political institution, including health-related policy boards, and legislative panels and consultations on measures pertaining to the life situations of the aforementioned individuals (ibid). Finally, Trans*Aktiv demanded that the Magnus Hirschfeld Foundation (*Bundesstiftung Magnus Hirschfeld* [BMH])[18] include gender diversity in its by-

17 | In September 2014, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend* [BMFSFJ]) set up the Inter-Ministerial Working Group »Intersexuality/Transsexuality« for the purposes of finding legislative solutions for the problems trans and intersex individuals encounter and for establishing social diversity in all areas of life (BMFSFJ 2015). The IMAG focuses on issues related to the medical treatment of individuals with sex variations, the expansion and strengthening of counselling, education and prevention, the investigation into required legislative changes and the analysis of transsexual individuals' actual and legal situation (ibid).

18 | The BMH is a federal foundation located in Berlin (BMH 2015). According to the by-laws of the BMH, the purpose of the foundation is to promote education and research, particularly with regard to commemorating the national-socialist persecution of homosexual individuals (s. [1]1), presenting and conducting research on the life and work of Magnus Hirschfeld and homosexual men and women's living environments in Germany (s. [1]2) and countering social discrimination against homosexual men and women in Germany (BMH 2012: 1). The purpose of the BMH and the representation on the boards (cf. ss. 6 and 12 of the by-laws) suggest that the foundation was formally set up with a heavy white, gay, cis bias and a lopsided commemoration of Magnus Hirschfeld and his body of work. The staffing and purpose of the BMH sparked angry protest, particularly by TrIQ e. V. The latter demanded »an end to exclusion, ignorance, outside depictions and supposed inclusion« (TrIQ 2011b) and demanded an appropriate consideration of all LGBTI groups and research interests, including intersectional perspectives and trans and inter representatives on all boards of the foundation (ibid). While the by-laws were not amended, the BMH included one trans individual on the board of trustees and one intersex activist in the advisory committee. Moreover, the current research programme defines as its cornerstones history, diversity and intersectionality and promotes research and the inclusion of issues related to gender diversity in its events as the programme of the First LGBTI Science Congress in Berlin in 2013 attests to (cf. Hirschfeld-Kongress undated). These developments were an effect of intense struggles between trans organisations and the BMH as well as internal struggles.

laws and proportionately represent individuals »living gender diversity« on all boards of its institution (ibid).

With regard to legal reform, the network made two demands. First and like the initiatives portrayed earlier on, the network called for a timely reform of the Transsexual Act, including a change of first names and a revision of gender status without expert reports and court proceedings to the benefit of self-determination or an abolishment of the Transsexual Act altogether. Second, Trans*Aktiv demanded to extend anti-discrimination measures and the protection of privacy rights (ibid).

With regard to healthcare, Trans*Aktiv focused on two issues. The network demanded to secure and improve accessible, comprehensive, needs-oriented and preventive healthcare based on informed consent and without additional assessment by medical advisory bodies to the statutory health insurance companies for all individuals requiring healthcare services due to their gender identity (ibid). In addition, the network demanded that the committee of the Association of the Scientific Medical Societies in Germany (*Arbeitsgemeinschaft der Wissenschaftlichen Medizinischen Fachschaften e. V.* [AWMF])[19] work towards the depathologisation and destigmatisation of trans when revising their medical guidelines.[20]

4.2.4 Summary: Concepts of gender, trans and gender regime in trans politics since the Act to amend the Transsexual Act

The period between 2011 and 2014 witnessed three major trans movement projects. While the political initiatives had in common that they turned away from lobbying for a reform of the Transsexual Act and demanded an integration of rules in existing legislation instead, they set different priorities. While the dgti e. V. devised a broad conceptual framework for future legal regulations, the Nationwide Workgroup for Transsexual Law Reform developed concrete suggestions for implementation. The newly formed network Trans*Aktiv in contrast compiled a broad set of concrete political, legal and healthcare-related demands.

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19 | See chapters 4.3.1-4.3.3 on the AWMF guideline debate on gender dysphoria.

20 | ATME e. V. participated in the first meeting of Trans*Aktiv. The organisation refused to support the declaration. Spokespersons of ATME e. V. objected to the statement that the network trusts trans organisation representatives involved in the AWMF guideline process and supports their work. ATME e. V. claimed that individuals involved in a process based on the concept of ›gender dysphoria‹ or ›gender incongruence‹ do not speak in their name. Moreover, ATME e. V. argued that the trans individuals involved in this particular process do not represent all individuals concerned. Finally, they suggested that future developments on the treatment of transsexual and intersex individuals should be discussed publicly and in a transparent way (ATME 2014).

Disillusioned with the half-hearted, if any, past and present government coalitions' attempts to profoundly reform trans law, the political projects mark two shifts in transpolitical strategy. First, the projects indicate increasing efforts to create cohesion within the trans movement. The tendency towards creating common demands and an umbrella organisation however also suggest an adaptation to liberal-democratic rules that interest groups represent themselves with one voice. Second, the networks reinforced efforts to gain support from, and involve civil society actors. At the same time, the abovementioned networks continued to monitor federal politics for opportunities to bring trans issues back onto the agenda.

Enabled by prior achievements in trans litigation and less pressed to make anticipatory compromises in the light of federal government unwillingness to engage with fundamental trans law reform, trans concepts and demands radicalised. This tendency is expressed in the definitions of the target group and demands for law reform that without exception subscribe to a perspective of (trans) gender diversity and individuality and healthcare demands that base medical and surgical interventions on informed consent only.

The radicalisation of demands in trans politics is also mirrored in the identification of the gender binary, including its institutionalisation and procedures, as the cause of problems. Consequently and in addition to continuing to insist on respecting the basic human rights to self-determination, the free development of one's personality, privacy and health, the political projects reject stigmatisation and minoritisation materialised for instance in special acts and special assessment procedures.

4.3 Developments and debates in sexology on trans(sexuality) from 2011 to 2014

While few issues have been resolved at the time of writing, current debates in sexology indicate four major developments. First, successful social movement struggles for an acceptance of gender and sexual diversity, the appreciation of theoretical developments on gender and international psycho-medical developments on trans prompted sexologists in Germany to reconceptualise trans. Second, a shift in the balance of power between proponents of trans self-determination and defenders of psycho-medical surveillance within the discipline is mirrored in a number of contributions in the current sexological debate on trans. The former not only question central diagnostic instruments employed so far, but question the diagnostics of trans *per se* by any others than trans individuals themselves. Third, the abovementioned developments inspired sexologists to rethink the psycho-medical management of trans and to reinforce their critique of the rigid assessment instructions and practices exercised by advi-

sory bodies of statutory health insurance companies in the process of assuming the costs of sex reassignment treatment. Fourth, voices in sexology emerged that advocate a withdrawal from psycho-medical involvement in the procedures under the Transsexual Act and heavily criticise government inactivity.

This chapter outlines the abovementioned developments as they unfolded from 2011 to 2014. The first section of this chapter deals with the terminology and definitions that have been suggested so far, taking into consideration the concepts that inform them. Thereafter this chapter presents an overview of suggestions for diagnosing and treating gender dysphoria, including the discussion on the necessity and function of psychotherapy as a diagnostic instrument. The third section addresses developments in the psycho-medical management of trans, focusing particularly on the debate on the developing AWMF guidelines on gender dysphoria and on sexologists' responses to the MDS instructions for the assessment of cost coverage for sex reassignment measures in cases of transsexuality. Finally, this chapter takes up the sexological debate on psychologists' and psychiatrists' role under the Transsexual Act, taking into consideration disparate perspectives on psycho-medical engagement in legal proceedings under the Act as well as suggestions for future psycho-medical contributions by those endorsing further involvement in this field.

The analysis of the aforementioned debates mainly draws upon two recent debates in the *Zeitschrift für Sexualforschung*. The first debate emerged in 2013 and mirrors cis and trans contributors' and/or psycho-medical practitioners' demands for a reform of the Transsexual Act. The second debate began in 2014 and engages with clinical and trans demands on the guidelines on gender dysphoria, which are in the process of being created and will replace the German Standards. Additional sources will be an article by Fritz that appeared in the journal *Gestalttherapie Forum für Gestaltperspektiven* (Gestalt Therapy Forum for Gestalt Perspectives) in 2013, the instructions produced by the MDS in 2009 and an article published in 2008 that presents the perspective of the MDK Nordrhein.

The current debates reveal that sexologists nowadays accept as an undisputed fact a plurality of trans individuals with different health care needs, and the debate suggests that the margin between pathologising and depathologising concepts is in the process of shifting towards the latter. Moreover, while some sexologists continue to advocate psycho-medical involvement for diagnostic and assessment purposes in legal proceedings under the Transsexual Act, regardless of whether they endorse pathologising or depathologising concepts of trans, others suggest withdrawing from any diagnostic and assessment operations in psycho-medical and/or legal settings in favour of trans self-determination.

4.3.1 The debate on reconceptualising transsexuality

Reconceptualising transsexuality is part of the current AWMF guideline debate in Germany. This particular part of the sexological debate has so far involved psycho-medical professionals and/or trans community members and feminist sympathisers. While some discursive traditions overlap, psycho-medical and trans contributions to the debate mirror different disciplinary and social contexts. Regardless of these differences, the current reconceptualisation of trans indicates a shift towards the depathologisation of trans, a recognition of gender diversity and, ultimately, calls into question the gender binary.

Major factors contributing to the debate on terminological and conceptual revisions

Psycho-medical contributions were fuelled by three major factors. These were observations of rapidly diversifying clinical manifestations of transsexualism, a multiplicity of trans subjects that defied any clear-cut categorisation and who revealed different health care needs, poststructuralist and social constructionist thought as well as terminological and conceptual revisions of trans by influential Western psycho-medical associations. Trans community contributions to varying degrees drew upon gender and transgender research and to a lesser degree on premises of community-based participatory research.

Since the late 1990s, the growing visibility of various manifestations of trans had already begun to blow the narrow boundaries of psycho-medical classifications, posing theoretical and practical problems. While Vogel's observation that transsexual developments manifest themselves in different ways and can no longer be subsumed under the twelve cardinal symptoms developed in the late 1970s (Vogel 2013: 181) seems overly cautious in the light of the debates on transsexualism throughout the 1990s and early 2000s, Becker's and Nieder and Strauß's observations appear more to the point. The latter state that ›trans‹ constitutes a »plural phenomenon« (Nieder/Strauß 2014: 73), whereas Becker suggests that dichotomous concepts increasingly fail to capture the growing spectrum of gender identity variants, some of which she identifies as

> pregnant transmen; *shemales*, i. e. biological men, who consciously live as ›women with a penis‹; biological men who live as men socially and ›only‹ wish to have the testicles removed; biological women who do not want to live as men socially, but – as their version of gender identity – ›only‹ wish to have their breasts surgically removed; mtfs who want to live as women socially and demand hormone treatment that guarantees the growth of breasts as well as the preservation of erectibility and many more – but also individuals who reject any assignment to a gender [...]. (Becker 2013: 151 f.)

While poststructuralist and social constructionist premises on gender do not necessarily feature consistently in every individual contribution to the current debate, several contributors stress the social dimension of gender, question the gender binary, and some critically address psycho-medical involvement in the construction of transsexualism.

The term ›liquid gender‹,[21] which Sigusch introduced into the sexologist debate »to do semantic justice to cultural change« (Sigusch 2013: 187) is one example of a historically-specific notion of gender. He describes as ›liquid gender‹ individuals »who glide to and fro between the two big cultural genders while being able to live convincingly according to both gender roles« (ibid).

Becker's article entails a self-reflexive perspective on psycho-medical contributions to the construction of transsexuality. While Becker is sceptical of the apparent »immateriality of poststructuralist gender discourse« (Becker 2013: 148),[22] she concedes that deconstructionist perspectives contributed to a critical analysis of transsexuality as a »medical project« (ibid: 147).

Most prominently, deconstructionist axioms feature, albeit inconsistently, in challenges to gender and the gender binary as hegemonic constructions. When contemplating the future role of psychotherapy in the treatment of gender dysphoria, Löwenberg and Ettmeier suggest questioning the gender binary for two reasons. First, they argue that such an approach helps identify gender stereotypes in psychotherapeutic concepts. Second, they suggest that the deconstruction of the gender binary according to which every individual is required to live unambiguously as a ›man‹ or a ›woman‹ necessarily implies a deconstruction of ›trans‹ in the sense that every unambiguous man is expected to become an equally unambiguous woman and vice versa. They conclude that psychotherapy and any other form of treatment need to take into consideration the pluralisation of life-concepts and hence question the binary gender model (Löwenberg/Ettmeier 2014: 49).

Quoting the transwoman Jean Lessenich,[23] Becker affirms the former's suggestion that, »masculinity and femininity are myths, transsexuality, too«

21 | Sigusch's concept of ›liquid gender‹ resembles Bornstein's concept of ›gender fluidity‹. Bornstein developed the concept ›gender fluidity‹ in 1994 to denote subject positions that resist categorisation on either side of the gender binary (cf. Bornstein 1994: 52).

22 | In her critical appraisal of poststructuralism, Becker (2007: 57) suggests that poststructuralist gender discourse has »disembodied« gender differences. »All that is left are language, discourse, symbolic construction and ›undoing gender‹, i. e. the representation, staging and performance of gender.«

23 | Jean Lessenich is the author of *Die transzendierte Frau*.

(Lessenich 2012: 175, quoted in Becker 2013: 154)[24] in her critique of re-essentialising approaches to transsexuality in sexology and the trans movement. Most apodictically, Sigusch suggests that, »here at least, the period of the rule of ›either man or woman‹ as well as of ›a man and a woman‹ is drawing to its dull close« (Sigusch 2013: 187).

Terminological and conceptual revisions in influential Western psychomedical associations finally sparked the debate on the reconceptualisation of trans among sexologists in Germany. In 2011, WPATH published the 7th version of the Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People.[25] Two years later, the APA produced the DSM-5. The latest version of the Standards of Care and the DSM-5 have in common that they depathologise gender identities and expressions that are not stereotypically associated with one's assigned gender at birth, recognise gender identities that exceed the gender binary, focus on the distress gender dysphoria may cause as a core diagnostic criterion, acknowledge multiple ways of living trans(sexual) lives and individual health care needs and point out to the social and political dimension of health and health impairment.

The depathologisation of gender identities and expressions that are not stereotypically associated with the assigned gender at the time of birth as well as the recognition of gender identities that exceed the gender binary feature in the definitions the abovementioned associations agreed on. As early as in May 2010, WPATH released a statement noting that, »the expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and cultural diverse phenomenon [that] should not be judged as inherently pathological or negative« (WPATH 2012: 4). This perspective is reflected in the Standards of Care that suggest that,

24 | Becker's statements are inconsistent. Although she subscribes to the notion that all genders are myths, the consequences for the myths that do not follow the hegemonic ones are not the same. While Becker insists on mandatory psychotherapy for trans individuals prior to somatic interventions (Becker 2013: 156), she does not suggest applying the same measure to cis individuals seeking somatic treatment such as e. g. hormone replacement therapy in postmenopausal cis women or mastectomies in cis men who develop gynaecomasty. While extending the assumption that individuals lack self-knowledge and require psychiatric assistance or surveillance to cis individuals would not be a desirable outcome from a human rights perspective, the question arises why trans and cis individuals should be treated differently with regard to similar issues, if all genders are myths.

25 | The Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People will be referred to as the Standards of Care.

»transsexual, transgender, and gender-nonconforming[26] individuals are not inherently disordered« (ibid: 6). Similarly, the APA describes ›gender identity‹ without any further ascriptions as »a category of social identity«, which »refers to an individual's identification as male, female, or, occasionally, some category other than male or female« (APA 2013: 451).

Both associations distinguish between gender identities and/or gender expressions on the one hand and gender dysphoria on the other. According to WPATH, ›gender dysphoria‹ is »broadly defined as discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)« (WPATH 2012: 2). Replacing ›gender identity disorders‹ with ›gender dysphoria‹,[27] the APA likewise defines ›gender dysphoria‹ as »the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender«, and it is the distress of gender dysphoria rather than an identity that forms the basis for a diagnosis (APA 2013: 453). In line with acknowledging non-binary genders, the APA considers ›gender dysphoria‹ a »multicategory rather than a dichotomy« (APA 2013a: 14), which is expressed in the DSM-5 accordingly: »Experienced gender may include alternative gender identities beyond binary stereotypes. Consequently, the distress is not limited to a desire to simply be of the other gender, but may include a desire to be of an alternative gender, provided that it differs from the individual's assigned gender.« (APA 2013: 453) Nor does a particular gender identity necessarily involve a lifelong sense of belonging to one gender as the definition of ›transgender‹ suggests: »*Transgender* refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender.« (Ibid: 451)

In addition, WPATH and the APA suggest that there are multiple ways of living trans lives, necessitating individualised health care regimens.[28] This applies to any individual experiencing gender dysphoria (cf. APA 2013: 454) as well as to those defined as ›transsexual‹: »*Transsexual* denotes an individual who seeks, or has undergone, a social transition from male to female or from female to male, which in many, but not all cases involves a somatic transition by cross-sex hormone treatment and genital surgery (*sex reassignment surgery*).«

26 | ›Gender nonconformity‹ is defined as »the extent to which a person's gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex« (WPATH 2012: 5).

27 | For a compilation of changes from DSM-IV-TR to DSM-5 on issues related to gender dysphoria, see APA 2013a: 14 f.

28 | WPATH e. g. notes that, »[f]or individuals seeking care for gender dysphoria, a variety of therapeutic options can be considered. The number and type of interventions applied and the order in which they take place differ from person to person.« (WPATH 2012: 9)

(Ibid: 451) WPATH also considers ways of living trans lives that have until recently been considered unthinkable among sexologists: »Many transgender, transsexual, and gender-nonconforming individuals will want to have children. Because feminizing/masculinizing hormone therapy limits fertility [...], it is desirable for patients to make decisions concerning fertility before starting hormone therapy or undergoing surgery to remove/alter their reproductive organs.« (WPATH 2012: 50) Unlike the DSM-IV-TR (APA 2000: 4), the DSM-5 no longer excludes intersex individuals from a diagnosis of gender dysphoria (APA 2013: 453).

Moreover, both associations recognise the impact of social interactions, policies and the legal environment on trans health. WPATH holds that stigma attached to gender nonconformity impinges on trans individuals' health (WPATH 2012: 4). While the APA points out to the adverse effects of prejudice, discrimination and victimisation (APA 2013: 458), WPATH additionally advocates interventions into the public sphere to achieve favourable conditions for trans health:

> WPATH recognises that health is dependent upon not only good clinical care but also social and political climates that provide and ensure social tolerance, equality, and the full rights of citizenship. Health is promoted through public policies and legal reforms that promote tolerance and equity for gender and sexual diversity and that eliminate prejudice, discrimination, and stigma. WPATH is committed to advocacy for these changes in public policies and legal reforms. (WPATH 2012: 1 f.)

Several statements in the revised Standards of Care reveal WPATH's struggle for depathologisation and anti-discrimination, whilst attempting to secure access to health care. While WPATH, like the APA, suggest that some instances of distress due to gender dysphoria may amount to a mental disorder (WPATH 2012: 5), WPATH at the same time cautions that, »[a] disorder is a description of something with which a person might struggle, not a description of the person or the person's identity« (ibid). WPATH notes that, »[t]he existence of a diagnosis for such dysphoria often facilitates access to health care and can guide further research into effective treatments« (ibid: 6).

Trans and feminist contributions to the debate on reconceptualising trans draw upon several sources. Among these are queer-feminist thought and results of gender and transgender research and trans activism, insights gained from community-based participatory research and human rights discourse. Trans and feminist contributions have in common that they are informed by research that renders visible multiple genders beyond the gender binary, approaches that question power relations and practices that marginalise genders and sexualities and demand that psycho-medical practitioners critically reflect upon their entanglement in the binary gender regime.

Fritz bases her approach to trans counselling on queer-feminist axioms. Referring to Butler's theorems of ›gender‹ as radically independent of ›sex‹ (Butler 1990: 7) and ›gender‹ as a performative effect of a regulatory regime that polarises and hierarchises genders under constraint (Butler 1997: 17), Fritz applies the effects of taking the gender binary for granted to psychotherapeutic contexts (Fritz 2013: 139).

She argues that psychiatry and psychotherapy with trans individuals during the assessment and therapeutic process mirrors a pronounced subject-object-relationship. As long as experts define norms and their deviations, trans individuals will be degraded to objects and questioned, hence enforcing a hierarchical relationship and leaving little space for exploring gender identity beyond the gender binary (Fritz 2013: 143). Fritz argues that it is »[o]nly reflexion and questioning the binary logic of gender that shed light on concepts of self-determination and human rights discourses« (ibid 2013: 140).

Hamm and Sauer (2014) draw upon transgender studies research in Germany. The authors particularly draw on two strands of transgender studies of which one engages with the broad spectrum of trans identities, lives and concepts. Hamm and Sauer as well as Radix and Eisfeld (2014: 32) point out to the diversity of trans individuals. Hamm and Sauer note that,

> [t]rans individuals are extremely diverse. They have in common that they cannot and/or do not want to occasionally, in part or at all relate to their assigned gender at birth. Trans individuals may identify as the ›other gender‹ within the gender binary or locate themselves between or beyond it or completely refuse a gender assignment. Individuals that live as ›neither nor‹, ›(gender)queer‹, ›non-gender‹ and the like beyond polarity may, but need not necessarily, consider themselves as trans. (Hamm/Sauer 2014: 6)

Hamm and Sauer's perspective also builds upon results of interdisciplinary gender and transgender studies research that examines the conditions and practices that construct certain genders and sexualities as deviant, while the norms and social negotiations minoritisation is based on remain unquestioned. This applies in particular to a body of research that examines how psychiatry and the law have contributed to normative concepts of gender and sexuality and the effects ›gender unambiguity‹ had (and continues to have) on social participation. Hamm and Sauer conclude from the findings of this research that psycho-medical perspectives on trans identities and bodies have contributed to reproducing the heterosexually organised gender binary and sex/gender unambiguity as a prerequisite for social participation (ibid: 6 f.).

Based on these findings, Hamm and Sauer argue that medicine and psychology have so far defined trans as psychological disorders and conducted research in the context of a paradigm of deviation, usually without having considered that ›gender‹ or the ›heteronormative gender binary‹ require an ex-

planation (ibid). Therefore, the authors argue that the ›objectivity‹, ›validity‹ and ›results‹ of binary research designs and interpretations as well as the lack of self-reflexion need to be questioned (ibid).

Based on the critique of psycho-medical premises and research on, and the treatment and management of trans individuals so far, and informed by insights from transgender studies research and trans activism, Hamm and Sauer suggest taking into consideration principles in community-based participatory research and fundamental human rights guaranteed in the Basic Law and the European Convention on Human Rights. With regard to the former, the authors demand that psycho-medical researchers question power relations in their projects and consider the question who profits from such an undertaking (ibid: 8). With regard to human rights, Hamm and Sauer argue that any research, development of guidelines and treatment of trans individuals needs to observe the right to the dignity of every person, which the Federal Constitutional Court defined as the right to individuality (ibid: 14); the right to self-determination, which includes the right to determine one's identity freely and the right to adapt one's body, name and gender status to one's identity (ibid: 11); the right to health, i. e. the right to a humane existence and the free development of one's personality (ibid: 12) and the right to privacy, which – applied to trans individuals – includes the rights to be legally recognised according to one's gender identity and to health insurance coverage of sex reassignment measures (ibid: 13).

Terminology and definitions from 2011 to 2014

The borders between psycho-medical and trans community concepts are not always clear-cut. However, most psycho-medical contributors to the current sexological debate have so far adopted the term ›gender dysphoria‹ (›*Geschlechtsdysphorie*‹), whereas trans community as well as some psycho-mediccal contributors use the term ›trans‹ (›*Trans**‹), including variations of the term, such as ›trans individuals‹ (›*Trans*-Menschen*‹ or ›*Trans*-Personen*‹ or ›*Transgeschlechtlichkeiten*‹).

The use of the term ›gender dysphoria‹ in the current sexological debate is inspired by the terminological shift in the DSM-5 (Strauß/Nieder 2014: 1). While Becker remains cautious of the term, suggesting that the merits and drawbacks remain to be seen (Becker 2013: 152 f.), most psycho-medical contributors to the continuing debate have adopted the term ›gender dysphoria‹.[29] Like the APA, Nieder and Strauß define ›gender dysphoria‹ as the »distress [...] that may result from the incongruence between individual experience and the assigned gender, which is usually based on primary sex characteristics«

29 | See, for instance, Strauß/Nieder 2014, Nieder/Strauß 2014, Löwenberg/Ettmeier 2014 and Vogel 2013.

(Nieder/Strauß 2014: 62). In essence, Vogel's, and Löwenberg and Ettmeier's (2014: 48) definitions are identical. Vogel e. g. defines ›gender dysphoria‹ as the psychological distress caused by the discrepancy between a person's identity and experienced sex (Vogel 2013: 181).

The abovementioned authors welcome the revised terminology for conceptual and pragmatic reasons. Löwenberg and Ettmeier, Vogel as well as Strauß and Nieder positively highlight the depathologising impetus of the term, which allows for a recognition of diverse, non-binary genders (Löwenberg/Ettmeier 2014: 48; Strauß/Nieder 2014: 1f.) as well as the acknowledgement of transsexuality as a heterogeneous, individual and self-defined identity (Vogel 2013: 181). Moreover, the revised terminology avoids any standardisation of gender and renounces gender role stereotypes, since it does not evaluate experienced or expressed gender (Nieder/Strauß 2014: 61; Strauß/Nieder 2014: 1; Vogel 2013: 182). In addition, Nieder and Strauß positively emphasise the inclusion of variations of sex development (Nieder/Strauß 2014: 61; Strauß/Nieder 2014: 2). Finally, Löwenberg and Ettmeier suggest that the term ›gender dysphoria‹ opens up a broader range of therapeutic options and individual solutions (Löwenberg/Ettmeier 2014: 48).

The term ›trans‹ originated from the trans community and has ever since been a decidedly non-pathologising term. All contributors to the sexological debate who occasionally[30] or continuously use the term ›trans‹ define ›trans‹ »as an umbrella term for diverse gender identities« (Fritz 2013: 135) or, more precisely, »for ›transsexual‹, ›trans-identified‹, ›transgender‹ etc. in order to include a multiplicity of self-identities and gendered (non-) localisations« (Hamm/Sauer 2014: 1), or, as Radix and Eisfeld suggest from a U.S. experience, »as an umbrella term [...] that includes those, too, who live beyond the gender binary (e. g. genderqueer, androgynous, bi-gendered and two-spirit) and those not interested in sex reassignment measures« (2014: 32). Nieder and Strauß define ›trans‹ as a category comprised of »individuals whose experienced gender identity does not (or not completely and/or permanently) concur with the gender assigned at birth« (Nieder/Strauß 2014: 59).

4.3.2 Diagnosing gender dysphoria

Reconceptualising trans necessarily involves reconsidering issues related to diagnostics. So far, the current sexological debate has addressed questions of classification, diagnostics and treatment models, in particular with regard to the necessity and function of psychotherapy and, to a lesser degree, further diagnostic instruments, most notably physical examinations and the so-called real life test. While the debate has only just begun and the struggle over trans

30 | See, for instance, Nieder/Strauß 2014.

self-determination remains contested, it indicates a shift towards more ›patient-centred‹, individualised health care and psycho-medical self-reflexivity.

Suggestions for classifying gender dysphoria

A diagnosis of gender dysphoria is contingent upon a classification. The debate on classifying gender dysphoria is marked by considerations on securing health insurance coverage of the costs of sex reassignment surgery and the tension between perspectives that ›other‹ trans and those that consider trans a legitimate gender on a par with any other gender. So far, four suggestions for classifying gender dysphoria have arisen.

The first suggestion opts for classifying gender dysphoria as a mental disorder. Löwenberg and Ettmeier give two reasons for this particular preference. First, they argue that since there are no scientifically verified somatic findings that support a classification of trans as a somatic phenomenon, the psychosocial problem remains paramount.[31] In addition, they point out that there are other ›mental disorders‹ that continue to be classified as mental illnesses, despite the fact that these conditions are demonstrably influenced by somatic factors (Löwenberg/Ettmeier 2014: 50). Second, the authors argue that the distinction between ›transsexuality‹ or ›transidentification‹ as non-pathological identities, respectively, and the clinical term ›gender dysphoria‹ mirrors the depathologising gesture with regard to diverse gender identities, whereas ›gender dysphoria‹, defined as the distress caused by the discrepancy between the assigned and the experienced gender, needs for pragmatic reasons to be understood as a mental disorder (ibid: 48).

31 | Becker agrees with Löwenberg and Ettmeier on the issue of somatic causes of transsexuality (cf. Becker 2013: 153). Apart from the lack of empirical evidence, Becker points out to three further shortcomings of monocausal, somatic aetiological reasoning. First, in her opinion any mono-causal aetiology appears improbable in the light of diverse transsexual developments. Quoting Nieder, Jordan and Richter-Appelt (2011: 218), she suggests that transsexual developments are rather conditioned by an interplay of biological, psychological and social factors in unique and multiple ways (Becker 2013: 154). Second, she anticipates that potential findings in imaging techniques, such as e. g. magnetic resonance imaging, will once more lead to distinctions between ›real‹ and ›unreal‹ transsexual individuals or to reinvoking the notion of the ›wrong body‹. As an effect, these notions will contribute to the homogenisation of transsexual individuals and ignore the complexity of transsexual individuals' situations and perceptions of their respective bodies (ibid: 154 f.). Finally, she argues that insisting on somatic causes of gender re-essentialises the categories ›woman‹, ›man‹ and »transsexual desire« (ibid: 151). However, Becker tends to equate calls for depathologisation with the essentialisation of gender (ibid). When taking into consideration deconstructionist perspectives on gender in trans organisations, such as e. g. in TrIQ e. V. and the TGNB, this does not apply.

The second suggestion considers developing an alternative classification in the ICD-11.[32] Fritz argues that responding to the distress caused by the incongruence between the experienced gender and the body with somatic measures calls into question a classification as a mental disorder. She points out that no other mental disorder is treated with physical interventions and court decisions. Since trans individuals are dependent on medicine and health insurance coverage of sex reassignment measures, and drawing upon the debate that arose during the Transgender Council in 2012, she tentatively suggests creating the classification ›Z‹ for trans individuals (Fritz 2013: 142).[33]

The third suggestion distinguishes between a preferable and a pragmatic or realistic solution. Ideally, Hamm and Sauer advocate a non-pathologising classification in the ICD 11 or a rule in social legislation, respectively that obliges health insurance companies to assume the costs of sex reassignment measures based on prior informed consent. Since neither option currently appears to be practicable in the current legal and political climate, they suggest that individuals involved in treating trans individuals will have to continue to operate with the existing diagnosis of ›gender identity disorders‹, i. e. a mental disorder.

The fourth suggestion is based on the premise that diagnostic categories as they exist in classification systems are in principle inappropriate means to deal with patients of any sort. Güldenring presents two arguments to support her view. First, she holds that subjective feelings cannot be captured using allegedly objective criteria (Güldenring 2013: 170). Second, she argues that, »psychiatric diagnostics measures nonconformity, deviance and the unusu-

32 | The ICD 10 GM is the German modification of the 10th revision of the ICD. In its 2015 version, ›Gender Identity Disorders‹ (›*Störungen der Geschlechtsidentität*‹) (F64) are subsumed in Chapter V ›Mental and Behavioural Disorders (F00-F99)‹ (›*Psychische und Verhaltensstörungen*‹). The most recent ICD 10 GM neatly distinguishes between various ›gender identity disorders‹, e. g. by codifying ›transsexualism‹ (›*Transsexualismus*‹) as F64.0 and ›dual-role transvestism‹ (›*Transvestitismus unter Beibehaltung beider Geschlechtsrollen*‹) as F64.1 (DIMDI 2015). The 11th revision of the International Classification of Diseases will be released in June 2018 (WHO undated).

33 | In a proposal made in June 2013, TGEU made three suggestions for a revision of the ICD 10. First, TGEU suggested to remove all trans-related diagnoses from the mental disorder section ›F‹ in order to avoid psychopathologisation and second, to create a new and separate chapter called ›Gender Incongruence‹ containing the diagnosis ›Gender Incongruence in Adolescence and Adulthood‹ as the only diagnosis to ensure access to health care for all trans individuals who need or seek it. Third, the organisation suggested to abolish the diagnosis ›Gender Identity Disorders in Childhood‹ and rather cover clinical needs of children in XXI (Z) ›Factors Influencing Health Status and Contact with Health Services‹, hence granting pre-pubertal individuals health care without exposing gender-nonconforming children to stigmatisation and discrimination (TGEU 2014: 2-4).

al« (ibid), usually equating the latter with disorders requiring treatment. As a result, a person's individuality is not treated with respect (ibid). The author suggests that rather than define and heteronomously categorise individuals, appropriate diagnostics ought to »respect the special nature of an individual, appreciate his or her desire for expression as an individual note and essential need« and »help the individual to achieve maximum self-determination under the conditions of a frequently limiting environment« (ibid). However, Güldenring remains silent on issues related to health insurance coverage of sex reassignment measures.

Suggestions for diagnostic and treatment models

Reconceptualising trans and gender dysphoria also raises questions about appropriate diagnostic and treatment schemes. The sexological debate in Germany has so far particularly discussed the necessity and function of psychotherapy. In the course of the debate, three models have been presented to date, which are based on different assumptions on trans expertise and have different effects on trans self-determination.

The first model regards psycho-medical diagnostics and psychotherapy as mandatory. Regardless of the critique that has been levied against this particular model from within sexology and, more profoundly, by trans organisations, Becker proposes sticking to this mode of enquiry. She reasons that trans individuals not only harbour contradictory desires. Even more so,

> many transsexuals only arrive at a clear and reflective attitude towards individual somatic measures in the course of a psychotherapy or the diagnostic-therapeutic process, which among other things potentially includes an active disillusionment of too high expectations with regard to operations, a solution for all problems [...]. (Becker 2013: 155)

While she concedes that transsexuality constitutes a self-diagnosis, this does not mean that all ›patients‹ have answered all their questions. Rather, many »patients with a transsexual desire« voluntarily seek physicians and psychologists in the period of self-enquiry, »because they wish to gain more clarity about their individual transsexuality, a competent clarification of their transsexual desire or ›recognition‹ (in a deeper sense) within the intimacy of a psychotherapeutic relationship« (ibid: 156).

While there are to date no reliable data on the number of trans individuals voluntarily seeking psychotherapeutic assistance, such a desire may indeed emerge in some trans individuals (cf. Hamm/Sauer 2014: 16). Becker's model of mandatory diagnostics and psychotherapy however does not explain why individuals who have fulfilled the tasks of self-exploration and enquiries on their own or by other means should have to undergo psychotherapy (cf. ibid: 17), nor

why psychotherapy features as a superior form of enquiry as opposed to e. g. peer support (cf. Seikowski 2007).

The second model suggests mandatory diagnostics and optional psychotherapy for individuals experiencing gender dysphoria and is inspired by the debate on the revision of guidelines in Germany. However, this model appears in two guises. Hamm and Sauer developed their variant of the model against the background of discriminatory experiences trans individuals make in the course of a transition, whereas Löwenberg and Ettmeier's concept is inspired by the latest revision of the Standards of Care. While the formers' variant is motivated by maximising trans self-determination, Löwenberg and Ettmeier focus on the clinical perspective, including thorough diagnostics.

Hamm and Sauer favour either a non-psychopathologising classification or a legal provision that – similar to the Argentinian *Ley de identidad de género*[34] – ensures coverage of medical and surgical sex reassignment measures on demand. However, in the face of the current situation in Germany they suggest in recognition of trans self-determination to reduce the diagnostic process to few appointments. Moreover, they suggest extending diagnostic competency to somatically oriented physicians in order to gain further independence of psy-

34 | On 08 May 2012, the Senate of Argentina approved the *Ley de identidad de género*, an Act that regulates the transition from the assigned gender to another. Section 1 broadly defines that »[a]ll persons have the right a) to the recognition of their gender identity; b) to the free development of their person according to their gender identity« and »c) to be treated according to their gender identity«, particularly with regard to first names, image and sex recorded in documents proving their identity (TGEU 2013). Section 2 defines gender identity in non-pathologising terms and suggests that an individual's gender identity can manifest itself in multiple ways, possibly including, but not limited to, freely chosen medical and surgical means (ibid). Section 3 rules that any person who does not identify with the assigned gender may request an amendment of the recorded sex according to the self-perceived gender identity (ibid).
The concept of self-defined gender identity runs through the entire Act. Section 4 e. g. specifies overall easily accessible requirements for formal gender recognition and in particular provides that, »[i]n no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place« (ibid), rendering the right to the recognition of one's gender identity radically independent of psycho-medical interventions and expertise. Moreover, s. 11 provides that access to surgical and/or hormonal treatment to adjust the body to the respective self-perceived gender identity does not require any judicial or administrative authorisation. Rather, the only requirement is the individual's informed consent. In addition, the Act rules that any health insurance company must guarantee the assumption of costs for medical procedures contemplated in the Act (ibid). For the original text in Spanish, see CDI/MECON undated).

chiatrists and psychologists, close gaps in health care provision, reduce waiting time and to relieve heavily frequently specialists (Hamm/Sauer 2014: 22).

Hamm and Sauer reject psychotherapy as a diagnostic instrument for two reasons.[35] First, they argue that in the light of the experiences made under the German Standards,[36] the therapist becomes the decision-maker on legitimate ways of expressing gender identity, and these decisions for most part have relied on a binary concept of gender (ibid: 15). As a result, trans individuals have generated narratives to match the stereotypical expectations of psychiatric gatekeepers. These practices put in question any meaningful psychotherapeutic assistance and preclude the establishment of trustful working relationships (ibid: 16). Second, they point out to the lack of psychotherapeutic or psychiatric diagnostic evidence. According to Hamm and Sauer, proponents of compulsory psychotherapy assume that there are a number of mentally ill transsexual individuals, without however defining the ascriptions ›healthy‹ and ›sick‹. Moreover, they observe that psychological and psychiatric professionals mainly focus on conflictual developments (ibid: 17).

35 | Hamm and Sauer also reject a mandatory ›real life test‹ and invasive questions as diagnostic means. They oppose the former for three reasons. First, requiring a ›real life test‹ exposes trans individuals to discrimination and verbal and physical abuse. Second, individuals are forced to disclose their trans status, which infringes upon their right to privacy. Third, life as a publicly discernible trans individual cannot be compared with the situation of passing as the gender a person identifies with (Hamm/Sauer 2014: 19). The authors suggest that it is for the trans individual to decide whether, when and where to present him- or herself according to his or her gender identity (ibid: 19 f.).
Hamm and Sauer demand banning invasive questions in diagnostic procedures, arguing that invasive enquiries in particular into sexual practices and sexual orientation violate a trans person's privacy. Moreover, the authors consider these and comparable questions inappropriate in a setting marked by unequal power relations and dependency. Furthermore, Hamm and Sauer suggest that they are entirely irrelevant, since trans individuals live diverse sexualities (ibid: 21).

36 | In a study on violence and multiple discrimination, LesMigraS e. V., an intercultural group of lesbian, bisexual migrants, black lesbians and trans individuals working in the area of anti-discrimination and anti-violence in a lesbian counselling centre in Berlin (*Lesbenberatung e. V.*) (LesMigraS 2011), e. g. stated that in addition to discrimination in everyday life, half of the trans individuals interviewed had experienced discrimination at the workplace or in vocational training, and 44.7 % reported having made negative experiences in the area of health care (LesMigraS 2012: 4).

The authors also reject compulsory psychotherapy as a means of treatment for two reasons.[37] First, they suggest that many trans individuals have accomplished all necessary tasks prior to seeking an indication for somatic interventions. Second, they doubt the legitimacy of a prescribed psychotherapy, since such a procedure violates three requirements for psychotherapeutic treatment: Psychotherapy is meant to ameliorate a mental disorder; the patient needs to be motivated, and treatment should involve economic considerations. Hamm and Sauer argue that none of these prerequisites apply in cases of mentally healthy trans individuals (ibid: 17 f.).

The second variant of this model focuses on thorough psychological or psychiatric diagnostics and comprehensive psychological support. Löwenberg and Ettmeier distinguish between a mandatory ›integrative treatment‹ and an optional psychotherapy.[38] Their proposed treatment model suggests that a psychologist, psychiatrist or neurologist should be responsible for the mandatory part of the treatment regimen. This so-called gender specialist is responsible for diagnosing gender dysphoria, conducting the differential diagnostics and coordinating the overall therapeutic scheme (Löwenberg/Ettmeier 2014: 50 f.), such as indicating treatment for potential comorbidities, conveying information on legal and therapeutic options, indicating somatic measures (ibid: 51) and referring the ›patient‹ to suitable colleagues (ibid: 52). According to Löwenberg and Ettmeier, the treatment schedule should provide the option for long-term

37 | However, Hamm and Sauer suggest that optional psychotherapy, which is entirely detached from diagnostics would be desirable and helpful for trans individuals (Hamm/Sauer 2014: 16).

38 | For comparison: In its 7th version of the Standards of Care, WPATH notes that a mental health screening and/or assessment is needed for referral to hormonal and surgical treatment for gender dysphoria (WPATH 2012: 28). Like Löwenberg and Ettmeier, WPATH holds that »psychotherapy – although highly recommended – is not a requirement« (ibid). Rather than outline a mandatory treatment programme, the Standards of Care develop principles that should inform interactions with transsexual, transgender and gender-nonconforming individuals seeking health care: »Exhibit respect for patients with nonconforming gender identities (do not pathologize differences in gender identity or expression); provide care (or refer to knowledgeable colleagues) that affirms patients' gender identities and reduces the distress of gender dysphoria, when present; become knowledgeable about the health care needs of transsexual, transgender, and gender-nonconforming people, including the benefits and risks of treatment options for gender dysphoria; match the treatment approach to the specific needs of patients, particularly their goals for gender expression and need for relief from gender dysphoria; facilitate access to appropriate care; seek patients' informed consent before providing treatment; offer continuity of care; and be prepared to support and advocate for patients within their families and communities (schools, workplaces, and other settings).« (Ibid: 3)

treatment to individuals whose gender dysphoria persists for various reasons, such as for example, with individuals who cannot undergo hormonal and/or surgical measures or whose professional and/or family circumstances do not allow for a social and/or somatic transition (ibid). While Löwenberg and Ettmeier emphasise that any treatment should be patient-centred, seek individual solutions and should not hierarchise various measures or fulfil gatekeeper functions (ibid: 51), they nevertheless point to a problem Hamm and Sauer's model tries to avoid, that is, encroachments on trans self-determination:

> The psychotherapeutic treatment of patients with gender dysphoria will [...] in most cases mean that the therapist is, in spite of all due neutrality, forced to ›participate‹. This happens, for example, when the therapist indicates somatic measures for adjustments to the experienced gender or more or less tacitly supports them or when he delays or impedes potentially helpful somatic measures by presenting objections. (Ibid: 56)

Like Hamm and Sauer, and for the same reasons, Löwenberg and Ettmeier oppose mandatory psychotherapy. Arguing that gender variance may require consultation (ibid: 53), there is no reason for an automatic indication for psychotherapy (ibid: 54). The authors advocate easy access to optional psychotherapy, regardless of whether comorbidities exist or not, arguing that an optional psychotherapy might assist individuals featuring adjustment problems, such as e. g., problems relating to coming out, partnerships or self-acceptance (ibid: 55 f.).

The third model that entered the current sexological debate relies solely on a trans person's informed consent as it is practiced in the Callen-Lorde Community Health Center (CLCHC)[39] in New York City. This particular model values patient autonomy highly and assumes that individuals seeking health care services are capable of self-determination, once they have been informed about the potential and risks of transition-related hormone therapy (Radix/Eisfeld 2014: 34).

The informed consent model was developed for two major reasons. First, the model takes into consideration the specificities of the US American health system, including its effects on trans individuals. Radix and Eisfeld note that since the US lacks a comprehensive health system, a significant number of individuals are not health insured. This applies particularly to trans individuals of which 47 % in 1999 and 2000 were said to be without a health insur-

39 | The CLCHC was founded in 1983 in New York City for providing medical care for gay men's sexual health. The scope of the CLCHC was gradually extended to e. g. provide general medical health care, offer transition-, HIV- and sexual health-related health care for lesbian, gay, bisexual and trans individuals. The CLCHC provides outpatient health care services only and no surgical interventions (Radix/Eisfeld 2014: 34).

ance. Moreover, commercial health insurance companies usually do not cover transition-related interventions, and Medicaid, the statutory health insurance company for low-income individuals, excludes transition-related health care provisions (ibid: 33).

Second, the model responds to the difficulties trans individuals face when consulting psychologists and psychiatric professionals. Like Hamm and Sauer, Radix and Eisfeld observe that only those trans individuals are granted access to sex reassignment measures who adapt themselves to the treatment provider's heteronormative and gender binary bias (ibid). These practices led the CLCHC to doubt the necessity of psychotherapy and psycho-medical indications for sex reassignment treatment (ibid).

Based on these experiences, the CLCHC developed procedures according to the informed consent model »which stress the necessity to provide trans-positive health care«, access to sex-reassignment-related health care provisions and include the entire spectrum of comprehensive health care provision (ibid: 34). While the revised WPATH Standards of Care suggest locating trans health care in the area of mental health (WPATH 2012: 36),[40] the CLCHC situates trans health care in the field of general health (Radix/Eisfeld 2014: 35). Since trans individuals frequently face discrimination in the health care system to the effect of delaying access to preventative health care measures and emergency care, the CLCHC monitors transition-related and general health parameters (ibid: 35 f.).

While in contrast to the USA, most individuals in Germany are health-insured,[41] and whereas health insurance companies are obliged to assume the costs of several medical and surgical sex reassignment measures, the CLCHC model of informed consent is nevertheless relevant to the German debate. Not only do Radix and Eisfeld's as well as Hamm and Sauer's contributions mirror trans individuals' distrust of the psychological and psychiatric disciplines.[42]

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40 | WPATH explains that mental health professionals can play an important role »in alleviating gender dysphoria and facilitating changes in gender role and psychosocial adjustment« (WPATH 2012: 36). At the same time, the organisation suggests that protocols developed in various US community health centres, such as the CLCHC, »are consistent with the guidelines presented in the WPATH *Standards of Care*, version 7. The *SOC* are flexible clinical guidelines; they allow for tailoring of interventions to the needs of the individual receiving services and for tailoring protocols to the approach and setting in which these services are provided« (ibid).

41 | Major exceptions are unregistered individuals, usually homeless people and low-income self-employed people.

42 | The strained relationship between trans individuals and sexological practitioners is also expressed by Güldenring: »With the publication of the ›cardinal symptoms‹ on ›transsexuality‹ in 1979, Sigusch et al. (250 ff.) paved the way for the nagging, at times extreme, mistrust between transidentified/transsexual patients and their practitioners

The former also provide data on trans individuals' ability to make informed decisions without psychological or psychiatric diagnostics and, by implication, refute the fear of so-called regretters:

> Making 0.8 % and only three documented cases of reversals, the number of regrets after irreversible measures for physical gender reassignment was low. Complaints with recourse to legal channels were not reported. Since the mentioned rate of 0.8 % corresponds with the rate of 0.5 to 3 % in the WPATH care guidelines, it is fair to say that both models appropriately assess the patients' ability to make suitable and informed decisions with regard to hormone treatment in the course of physical gender reassignment. (Ibid: 39)

Reconsidering principles in diagnostics and treatment with trans individuals

Despite suggesting different diagnostic and treatment models with different implications for trans autonomy, most contributions signal a shift from diagnostics, in particular psychotherapy, as a gatekeeping instrument to a supportive means. Indicators for such a development feature in demands from within and outside the discipline for individualised, patient-centred health care and a more restrained and self-reflexive attitude of psychotherapists and psychiatrists.

Several contributors to the debate suggest providing individualised patient-centred care, which includes respecting a trans individual's identity and individual choice and sequence of measures required to secure »the best possible health and comfort in life« (Güldenring 2013: 170). Löwenberg and Ettmeier, for instance, define as the aim of an ›integrative treatment‹ to find a solution for the health care-seeker »that does justice to his unique identity« (Löwenberg/Ettmeier 2014: 48). Löwenberg and Ettmeier as well as Güldenring agree that valuing a patient's personality and individuality is a condition for a patient-centred approach (Güldenring 2013: 170; Löwenberg/Ettmeier 2014: 55), which includes accepting a concept of life »beyond classical gender roles« (Löwenberg/Ettmeier 2014: 55).

Löwenberg and Ettmeier as well as Hamm and Sauer agree that patient-centred treatment requires somatic and psychotherapeutic therapies according to an

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and left scorched earth in their wake. […] In retrospect, I [Güldenring] understand these ›contemptuous‹ (Richter-Appelt 2012: 253) cardinal symptoms not only as Sigusch, Meyenburg and Reiche's views. The authors were symptom carriers of a deeply seated fear of the phenomenon transidentity/transsexuality, which dominated thought in medicine about gender and commonly allowed for treating trans individuals apodictically and discriminatorily. This fear continues to be expressed nowadays through exclusionary behaviour in medicine and clinical psychology in Germany.« (Güldenring 2013: 166 f.)

individual's needs. The former e. g. suggest that an individual should have the choice of all possible somatic and psychotherapeutic means without hierarchising any one of them (ibid: 51 f.). Similarly, Hamm and Sauer suggest that it should be up to »trans individuals themselves to decide in a dialogue with clinical experts which measures are individually longed for and needed and which ones are not« (Hamm/Sauer 2014: 20). The authors argue that taking into consideration »the diversity of trans, the desire for sex reassignment operations should no longer be a condition for diagnostics and [...] somatic treatment« (ibid: 21).

Contributions to the debate acknowledging the limitations of binary gender concepts in psychology and psychiatry and the demand that psychotherapists and psychiatrists abandon their role as gatekeepers suggest that a process of self-reflexivity has begun in sexology. While the aforementioned authors establish aims of trans health care, Fritz offers a blueprint for encounters at eye level with trans individuals in asymmetrical settings.

Fritz suggests questioning two asymmetrical settings of which one is social and the other therapeutic. The author notes with regard to the former that questions are unilaterally posed to those who do not comply with the norms of the gender binary. In contrast, cis individuals are not required to explain or justify their gender identities:

> We have made ourselves comfortable in the apparent self-conceptions of the gender binary and are not used to questioning ourselves or to being questioned. Questions are posed to those who do not merge with the logic of the gender binary. Questioning oneself is due to their biography a lifelong process in individuals with transidentity issues anyway. The asymmetry in which we operate and which also impacts on our gestalt therapeutic spaces becomes clear here. (Fritz 2013: 146)

The second asymmetry requiring critical interrogation is the power relations, including the role of the psychotherapist in a psychotherapeutic setting. Fritz argues that therapists are part of the dialogue, including who they have become, their self-concepts, attitudes, norms and values. This applies to their gender identity as well as to their client's. All these experiences impact on the therapeutic space (ibid: 145).

Fritz suggests that in order to create conditions for an immediate dialogue, it is necessary to question power relations that condition and limit it. Such a process includes questioning seemingly self-evident facts and allowing for a psychotherapist's insecurity on behalf of him- or herself rather than a false security by unilaterally insisting on interpretative authority. The author argues that such an encounter with trans individuals will transform therapists too, because,

now we are questioned with our logic of binary gender thought and knowledge. Likewise, gender-normative instruments in society, law and in the health system are questioned that stigmatise and question individuals with transidentity issues over and over again (ibid: 146 f.).

4.3.3 Rethinking the psycho-medical management of trans(sexuality)

The debate on reconceptualising transsexuality, suggestions for diagnostic and treatment models and reflexions on the role of professionals involved in trans health care are part of the debate on the AWMF guidelines that are currently being developed. The debate on guideline development includes a renewed critique of the German Standards and trans health care management, in particular of the MDS instructions for assessment (2009) as well as general suggestions for new guidelines and interim results of this process.

The critique of the German Standards in the AWMF guideline debate and recommendations for change

Different assessments of the German Standards notwithstanding,[43] contributors to the debate on the AWMF guidelines univocally agree that the former

43 | While all contributors agree that the German Standards are no longer up to date, if they ever were (cf. Hirschauer 1997: 337), they assess the contribution to trans health care differently. In their critical appraisal of the German Standards, Strauß and Nieder suggest that the German Standards constituted a »milestone«, since the compiled knowledge and scientific findings on transsexuality contributed to a significant improvement of trans health care (Strauß/Nieder 2014: 27). However, other authors disagree with this assessment. Löwenberg and Ettmeier suggest that the authors of the German Standards dismissed the fourth version of the then HBIGDA Standards of Care, despite the fact that they were based on research, because the international standards questioned the necessity of psychotherapy (Löwenberg/Ettmeier 2014: 46 f.). According to Löwenberg and Ettmeier, the merit of the German Standards was at the time however that they recommended psycho-medical professionals to adopt a neutral attitude towards an individual's »transsexual inclination« (ibid: 46). Hamm and Sauer tentatively suggest that the German Standards contributed to the discrimination against, and stigmatisation of trans individuals (Hamm/Sauer 2014: 5). I suggest that Löwenberg and Ettmeier's as well as Hamm and Sauer's assessment are more appropriate. As chapter 4.1.4 suggests, the German Standards were, rather than being the result of any systematic research and evaluation of scientific knowledge or consultations with trans organisations, informed by conservative notions of gender and sexuality, homogenising and unfounded psychopathologising assumptions on transsexuality and driven by the intention to control access to sex reassignment measures. Instead of contributing to the improvement of trans health care,

are outdated and flawed. Sexologists and/or trans individuals that have so far participated in the debate take issue with several conceptual, methodological and functional deficiencies.

Nieder and Strauß as well as Hamm and Sauer identify major conceptual shortcomings. The latter argue that in addition to the pathologisation of transsexuality (Hamm/Sauer 2014: 8), the standardised and limited concept of transsexuality underlying the German Standards not only led to the notion of ›real‹ and ›fake‹ transsexuality, but to the exclusion of several trans individuals requiring trans-specific treatment. The authors recommend to depathologise, destigmatise and de-discriminate trans individuals (ibid), recognise a broad range of trans identities and living circumstances and diverse health care needs[44] as well as to grant maximum self-determination[45] (Nieder/Strauß 2014: 6).

Nieder and Strauß suggest that rather than focus on reducing distress caused by gender dysphoria, the German Standards concentrate on transsexuality as the problem requiring treatment (2014: 62). As the interim report on the development of the AWMF guidelines reveals, the guideline work group has decided to reconsider the former paradigm. Drawing upon terminological and conceptual developments in the DSM-5, the workgroup focuses on clinically significant distress caused by gender dysphoria as the issue relevant to diagnostics and treatment; depathologising individuals whose experienced and expressed gender does not coincide with the assigned gender, and avoiding the re-establishment of gender norms and acknowledging a diversity of non-binary genders and sexes, of whom the latter may also experience gender dysphoria (ibid: 61).

Contributors to the debate point out to several methodological deficiencies when creating the German Standards. Hamm and Sauer, and Nieder and Strauß criticise that the authors of the German Standards ignored trans organisations in the process of devising the German Standards (Hamm/Sauer 2014: 5). As a result, the then workgroup failed to capture trans individuals' needs (Nieder/Strauß 2014: 62) and developed a paternalistic attitude towards them instead (Hamm/Sauer 2014: 11). With regard to the AWMF guidelines, Hamm

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the authors of the German Standards produced »an anachronistic document featuring persistent helplessness« (Hirschauer 1997: 337; cf. Hamm/Sauer 2014: 27). Given their lack of respect for an individual's decision to live according to the other than the assigned gender, the German Standards rather resemble a milestone in the discrimination of trans individuals.

44 | Hamm and Sauer include trans individuals who e. g. wish to have surgery without hormone treatment (Hamm/Sauer 2014: 21).

45 | The authors emphasise that the right to self-determination applies to individuals facing mental and psychological challenges, too.

and Sauer demand equal participation and status of trans organisations from the beginning of the consultations in all relevant areas (ibid: 23).

While Nieder and Strauß agree that trans organisations should be involved in the process of creating new guidelines, they report that the initial attempt to recruit democratically legitimated trans representatives as permanent participants entitled to vote in the guideline committee[46] failed (Nieder/Strauß 2014: 65). Faced with these difficulties, the committee invited two ›non-representative‹ trans individuals to participate in the process of guideline creation, giving each of them a vote. In addition, the committee invited trans support group members based on a list of known trans support groups in German-speaking countries to present their experiences and recommendations for changes in trans health care in person and offered them the opportunity to submit statements within a two-month period following the hearings (ibid: 66).

Hamm and Sauer point out to a second major methodological flaw following the publication of the German Standards. They suggest that sexologists failed to revise the German Standards, even though they were heavily criticised right from the outset (Hamm/Sauer 2014: 5). The authors call for participatory research on trans health care needs (ibid: 23; 25). Nieder and Strauß agree with Hamm and Sauer's assessment. They state that – unlike the German Standards – AWMF guidelines are *per se* subject to revision every five years (Nieder/Strauß 2014: 66), and they suggest conducting a participatory research project to identify trans individuals' needs (ibid: 67).

As an additional methodological shortcoming in the process of compiling the German Standards, Nieder and Strauß identify a lacking systematic literature review and formal consensus strategy (ibid: 62). In order to achieve the goals of improving treatment in various settings (ibid), diagnostic quality and results of treatment (ibid: 63), Nieder and Strauß report that the committee is aiming at developing the guidelines on gender dysphoria to match the rules applying to the highest level of quality according to AWMF regulations. The rules for achieving recognition according to the highest standard of quality, the S3-level, includes basing knowledge on systematic evidence, a representative guideline committee and a structured procedure to arrive at a consensus (ibid: 64).

Finally, Hamm and Sauer address a number of functional shortcomings of the German Standards. As mentioned in the previous section of this chapter, the authors suggest that the German Standards facilitated psychologists' and psychiatrists' gatekeeping role. Rather than support trans individuals, professionals limited options to express gender identity to those that were compatible with the

46 | At the time, the guideline workgroup consisted of fourteen German, Swiss and Austrian psychiatric, psychosomatic, sexological and psychological associations and three professional associations (Nieder/Strauß 2014: 64 f.).

binary concept of gender (Hamm/Sauer 2014: 15). While Löwenberg and Ettmeier suggest to solve this particular problem by formulating as the main aim of the guidelines to reduce gender dysphoria and not to attempt to change an individual's gender identity (Löwenberg/Ettmeier 2014: 55), Hamm and Sauer call for quality standards for voluntarily sought psychotherapeutic support during a transition (Hamm/Sauer 2014: 25).[47] The provisional outline of the new guidelines of 19 Sept. 2012 indicates that the committee is contemplating measures to ensure the ongoing further qualification of professionals (Nieder/Strauß 2014: 67).

Referring to the inflexible standardisation of trans health care in the German Standards and the 2009 MDS instructions, Hamm and Sauer argue that the rigid standardisation of treatment left, and continues to leave, little choice of individual timing and individually needed measures (Hamm/Sauer 2014: 20). As such, they do not serve trans individuals, nor a health care system that relies on efficiency and actual requirements (ibid: 20). In order to remedy this drawback, the authors suggest replacing the German Standards with guidelines that can be used like a flexible »modular construction system«, rather than enforcing an »all-or-none law« (ibid). As Nieder and Strauß's interim report on the AWMF guideline development suggests, all committee members agree that treating gender dysphoria requires a »non-linear and multimodal therapy« (Nieder/Strauß 2014: 73).

Developments in advisory body of statutory health insurance company policies on issues related to transsexuality

Trans and sexological critiques of MDK rules and practices in the 1990s went unheard. To the contrary, rather than redress the problematic issues, MDKs and particularly the in the meantime newly created MDS aggravated the strain on trans individuals and the professionals that treat them. Based on the MDK Northrhine's perspective (Pichlo 2008) and the MDS instructions for the assessment and eligibility to statutory health insurance coverage of costs of somatic sex reassignment measures (MDS 2009),[48] this section briefly outlines the purpose and aims of the instructions, formal requirements for applications for statutory health insurance assumption of costs of sex reassignment

47 | Hamm and Sauer also demand standards to ensure the quality of sex reassignment surgery, which would allow for redressing botched surgery (Hamm/Sauer 2014: 23). However, the provisional outline of the AWMF guidelines (cf. Nieder/Strauß 2014: 67) suggests that the committee has decided not to include any statement on standards for sex reassignment surgery.

48 | The MDS instructions for the assessment and eligibility to statutory health insurance coverage of costs of somatic sex reassignment measures will be referred to as the MDS instructions for the rest of the chapter.

measures and, using examples, criteria for assessment before turning to the renewed critique of the instructions in the AWMF guideline debate.[49]

The purpose and aims of the MDS instructions can be divided into general ones and those that specifically apply in a case of transsexuality. The MDS defines as the purpose of its instructions to examine whether the preconditions exist for eligibility to medical services and to advise statutory health insurance companies accordingly (MDS 2009: 6). General aims are to realise the principle of solidarity by securing the equal treatment of the community of the insured, ensuring consistent assessment procedures, securing the quality of assessments and improving the collaboration of statutory health insurance companies and the MDS (ibid).

With regard to transsexuality, the MDS purports to carry out an additional assessment procedure to ›protect‹ the health-insured individual applying for statutory health insurance assumption of costs of sex reassignment surgery (ibid). Arguing that, »[t]he rarity and the complexity of the disorders, the diversity of individual developments and arrangements and the special implications of expert assessments and recommendations in individual medical advisory services require consultation and an assessment by experienced experts« (ibid), the MDS defines as a goal of a socio-medical assessment to avoid ›false positive‹ diagnoses of transsexualism in cases where trans identification has emerged as an effect of psychiatric and/or endocrine disorders (ibid).

A comparison between the formal requirements for applications for statutory health insurance coverage of sex reassignment measures reveals an increase in demands on trans individuals. The MDK Northrhine and the MDS require the applicant to submit a substantial set of documents. Pichlo lists as mandatory documents a report on somatic, hormonal and, if applicable, genetic exclusion diagnoses; a report on endocrine findings or the course of hormone replacement therapy; both expert reports for a change of first names and the court decision, provided that they are available at the time of application;[50] a

49 | The general framework, which allows for applying for statutory health insurance company assumption of costs of sex reassignment measures, has remained unchanged since Banaski published his article on the criteria and proceedings for assessing transsexual individuals by medical advisory bodies of statutory health insurance companies in 1996. These can be summarised as clinically relevant distress in individual cases caused by the tension between an individual's gender identity and sex characteristics that persist after having been treated with psychiatric and/or psychological means (Banaski 1996: 64 f.; Pichlo 2008: 120; MDS 2009: 12).

50 | The demand for expert reports for a change of first names and the court decision is however problematic. First, the MDK Northrhine and the MDS instructions generate extra-legal psycho-medical and legal entanglements. Second, a privacy issue is involved, since the above mentioned reports frequently contain intimate and confidential information on

detailed psychiatric report or progress report, including an indication for sex reassignment measures and, finally, a specialist's report or treatment schedule that corresponds with the interventions the applicant intends to undergo (Pichlo 2008: 128). While Pichlo considers a biographical report on the applicant's transsexual background optional (ibid), the MDS decided to render such a report mandatory a year later. The MDS instructions specify that the biographical report should, among other details, include information on the transsexual background, the treatment undergone at the time of application and the ›real life test‹ (MDS 2009: 17).[51]

While the MDK Northrhine guidelines and the MDS instructions are informed by the diagnostic criteria outlined in the German Standards,[52] the MDS instructions establish more rigid criteria than the MDK Northrhine.[53] This becomes evident, e. g. in the demands on the duration of psychotherapeutic or

an individual and possibly on the individual's social environment. Since some applicants have not applied for a change of first names prior to approaching the statutory health insurance company for the assumption of costs of sex reassignment measures whereas others have, the question arises why reports written for a different purpose would be required in the first place.

51 | With regard to the biographical report, the MDS instructions demand of the applicant to provide additional information on issues that are not necessarily transition-related, that might or might not be affected by a transition and ones that are definitely not indicative of an individual's gender identity. The MDS instructions, e. g., require details relating to the applicant's current life situation, family and partnership, education, occupation and employment, friends and acquaintances as well as leisure time activities and hobbies (ibid). The instructions do not specify how to deal with this information, leaving ample space for an MDK expert's subjective interpretations and arbitrary decisions.

52 | Like the German Standards, Pichlo and the authors of the MDS instructions assume that neither a self-diagnosis nor the intensity of the desire to undergo sex reassignment surgery are reliable indicators of transsexuality. Rather, they claim that a diagnosis and the ability to live according to the conventions of the ›new‹ gender role as preconditions for indicating sex reassignment surgery can only be established in the course of an extensive diagnostic and psychotherapeutic process (Pichlo 2008: 121 f.; MDS 2009: 10) and a ›real life test‹ (Pichlo 2008: 124 f.; MDS 2009: 10).

53 | Neither Pichlo nor the authors of the MDS instructions take into consideration developments on trans(sexuality) in sexology, let alone developments in the trans movement. However, Pichlo's perspective is also informed by the version of the HBIGDA Standards of Care (Pichlo 2008: 121), whereas the MDS instructions rely on the German Standards and the international classification systems ICD-10 and the DSM-IV only (MDS 2009: 6). This in part explains why the MDS instructions are more rigid than the perspective of the MDK Northrhine.

psychiatric treatment and the so-called real life test and in the MDS decision-making algorithms.

While Pichlo points out that the German Standards demand at least twelve months of psychiatric/psychotherapeutic treatment prior to allowing hormone replacement therapy, he recommends six to twelve months before granting access to trans-specific somatic health care provision instead. In doing so, Pichlo takes into consideration the then latest version of the HBIGDA Standards of Care and the actual medical care situation (Pichlo 2008: 126). In contrast, the MDS instructions demand that the respective formal time requirements for psychiatric/psychotherapeutic treatment need to be fulfilled according to the period the German Standards allocated to the particular somatic measure (MDS 2009: 16). This means as a rule no less than twelve months of psychiatric/psychotherapeutic treatment prior to e. g. hormone replacement therapy (ibid: 18) and no less than eighteen months prior to a bilateral mastectomy (ibid: 24) or genital surgery (ibid: 26).

Pichlo's recommendations and the MDS instructions also differ on the timeframe considered appropriate for a ›real life test‹.[54] Acknowledging that the German Standards require a ›real life test‹ of at least twelve months prior to hormone therapy, he nevertheless suggests that a period of three to six months suffice (Pichlo 2008: 126). According to the MDS instructions, however, a ›real life test‹ should generally have been carried out for at least twelve months before cost coverage will be granted for hormone treatment (MDS 2009: 18) and epilation (ibid: 20) and, as a rule, no less than eighteen months for a bilateral mastectomy (ibid: 24)[55] or any genital surgery (ibid: 26).

The specifications of the MDS finally culminate in rigid decision-making algorithms for every somatic intervention. With regard to hormone treatment,

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54 | However, Pichlo and the authors of the MDS instructions agree on several other issues pertaining to the ›real life test‹. They e. g. consider this requirement an essential component of the treatment schedule (Pichlo 2008: 122 and 124; MDS 2009: 10). While Pichlo accrues specific importance to performing the ›real life test‹ at the workplace (Pichlo 2008: 124), they concur on the issue that the ›real life test‹ should be practiced continuously in all social contexts (ibid). The authors of both instructions emphasise that the measure should be laid out in a socially acceptable manner (ibid). However, they do not explain how social acceptance and a 24/7 ›real life test‹ fit together in potentially highly conflictual, if not dangerous settings.

55 | In »special exceptional cases« (MDS 2009: 24), the MDS will allow an applicant to fall short of fulfilling the time requirement for a bilateral mastectomy in order to facilitate the ›real life test‹ for transmen (ibid). The instructions do not however provide for such an option for transwomen requiring epilation, despite the fact that the MDS suggests that, »male beard growth is incompatible with the outer appearance of a woman in the light of male-to-female transsexuality« (ibid: 20).

the responsible MDK expert is e. g. asked to check every step in the following order: Has the diagnosis been secured sufficiently? Are comorbidities, in particular mental health problems, sufficiently stabilised or have they been ruled out, respectively? Has the psychiatric/psychotherapeutic treatment been carried out correctly with regard to the nature, extent and duration? Does the applicant suffer from clinically relevant distress? Are the preconditions and the prognosis for the planned hormone replacement therapy positive? An answer in the negative to any one of these questions will inadvertently lead to a recommendation for the statutory health insurance company not to cover the costs of hormone replacement therapy (ibid: 19).

The critique of trans health care management in the AWMF guideline debate and recommendations for change

The critique of trans health care management in the AWMF guideline debate focuses on three issues. These include the use of the German Standards by the advisory bodies of statutory health insurance companies, the role of psychiatrists and psychologists in a complex framework of assessment, diagnostics and treatment, and general conditions for medical services offered by statutory health insurance companies.

All contributors to the debate object to the use advisory bodies of the statutory health insurance companies, above all the MDS, have made of the German Standards. Löwenberg and Ettmeier as well as Hamm and Sauer note that the abovementioned advisory bodies have gradually converted the outdated German Standards to a requirements specification that needs to be completed in order to secure insurance coverage of sex reassignment treatment (Löwenberg/Ettmeier 2014: 46; Hamm/Sauer 2014: 15). While the MDS formally provides exceptions to the standard procedure, Löwenberg and Ettmeier argue that these can barely be implemented in practice (Löwenberg/Ettmeier 2014: 46).[56]

As a result, the inflexible adoption of the German Standards by advisory bodies has led to inappropriate health care services for trans individuals. As Nieder and Strauß, Löwenberg and Ettmeier, and Hamm and Sauer point out, MDK practices and MDS instructions e. g. define the goals of treatment, no matter whether they match those of the respective trans individual.[57] Moreover,

56 | Löwenberg and Ettmeier give as an example of unrealistic treatment scenarios the option of psychiatric monitoring as an alternative to compulsory psychotherapy (Löwenberg/Ettmeier 2014: 46).

57 | One of these controversial goals is e. g. to achieve the inner coherence and consistency of the individual's gender identity (Nieder/Strauß 2014: 60), regardless of the fact that some individuals refuse to temporarily or permanently identify as one of the two legitimised genders or with any gender at all. See also de Silva 2014, Eisfeld/Radix 2014 and Hamm/Sauer 2014.

they demand of trans individuals to complete a fixed sequence of measures, regardless of whether these measures are needed,[58] have proven to be harmful (Hamm/Sauer 2014: 19)[59] or disproportionate.[60]

Several contributors also problematise the roles psychologists and psychiatrists play in assessment, diagnostic and treatment procedures. Löwenberg and Ettmeier remark that psychotherapists currently cater for the rules and standards of health insurance companies while they at the same time try to find individual solutions for their clients. They suggest that the conflict resulting from these different requirements occasionally cannot be solved (Löwenberg/Ettmeier 2014: 47). Similarly, Güldenring holds that medical and psychiatric professionals can barely do justice to the different contents, roles, relationships and tasks in any responsible way (Güldenring 2013: 160).

The rules and regulations that define the terms for obtaining health insurance coverage for sex reassignment surgery constitute another area of contention. Hamm and Sauer e. g. address the parameters provided by social law that inform statutory health insurance company policy. The authors particularly focus on the Federal Social Court decision on 06 Aug. 1987, which provides that statutory health insurance companies are only obliged to assume the costs of sex reassignment surgery when an applicant displays distress. Hamm and Sauer believe that many trans individuals do not experience significant distress, nor constraint in everyday life, simply because they are aware of the option to transition, pursue this goal with determination and are frequently accepted and supported by their respective social environments. The authors argue that frequently distress only arises when trans individuals seeking cost coverage of sex reassignment surgery are turned down on the grounds that they do not experience sufficient distress (Hamm/Sauer 2014: 13). Rather than prevent distress, which should according to Hamm and Sauer be the main goal of trans health care (ibid: 20 f.), the organisation of trans health care contributes to the destabilisation of trans individuals.

Furthermore and as Hamm and Sauer suggest, the MDS instructions ensure that statutory health insurance companies do not cover the costs of individually indicated measures for those who wish to pass inconspicuously as one of the two legally accepted genders. Facial feminisation, body contouring,

58 | This applies e. g. to compulsory psychotherapy which, as Löwenberg and Ettmeier argue, impedes a working relationship between psychotherapists and clients (Löwenberg/Ettmeier 2014: 46).

59 | Hamm and Sauer quote findings by Fuchs et al. (2012) and Franzen and Sauer (2010) that suggest that the ›real life test‹ is a harmful requirement (Hamm/Sauer 2014: 19).

60 | Becker notes that the advisory bodies of the statutory health insurance companies make as high demands for covering the costs of epilation as for genital surgery (Becker 2013: 157).

speech therapy and penis-testicle-epitheses are examples Hamm and Sauer list to prove their point (Hamm/Sauer 2014: 14). The authors argue that the exclusion of the aforementioned services from the service catalogue of statutory health insurance companies contravenes the right to pass and, as such, infringes the right to privacy (ibid: 14).[61] They suggest as a remedy to include the right to pass in the social security statute book, hence rendering health insurance coverage to this effect obligatory (ibid: 22).

In addition, the contributors to the debate take issue with the procedure regulating cost coverage of transition-related health care. Nieder and Strauß, and Güldenring e. g. point out to the statutory insurance company policy of deciding on an application for sex reassignment surgery only after having obtained a socio-medical assessment by the MDS. This additional screening has become mandatory, despite the fact that psychotherapists and psychologists have previously confirmed the indication for surgery (Nieder/Strauß 2014: 60; Güldenring 2013: 165).

Finally, Löwenberg and Ettmeier (2014: 46) and Güldenring address the effects the mesh of in part contradictory requirements have on trans individuals. Güldenring e. g. suggests that in contrast to the requirements for revising first names and gender status, social law regulations demand »maximum comorbidity« for access to sex reassignment surgery (Güldenring 2013: 165). Taking into consideration the extensive procedures and assessments trans individuals need to »pass like examination situations« (ibid) and the requirements and expectations they have to meet in order to be granted the assumption of costs (ibid), she poses the rhetorical question, »Can trans health ever be organised more pathologically?« (Ibid)

In summary, while contributors to the debate identify several deficiencies in current trans health care management, they offer different solutions with different implications for trans individuals. Löwenberg and Ettmeier e. g. suggest psychologists and psychiatrists withdraw from the task of being an »obligatory component of the set of rules of the health insurers« and focus on diagnostics and integrative treatment instead. They demand that psychotherapy should not be part of a »mandatory element« in the treatment schedule or even a prerequisite for inducing somatic measures (Löwenberg/Ettmeier 2014: 57). By contrast, Hamm and Sauer demand to reduce diagnostics in general, curb health insurance companies and advisory body arbitrary decision-making and simplify procedures by establishing in social legislation the right to pass as a health insurance company obligation to be met (Hamm/Sauer 2014: 22). While the former are primarily concerned about improving the conditions for

61 | Hamm and Sauer also suggest that statutory health insurance companies should assume the costs of cosmetic sex reassignment measures such as e. g. epilation provided by non-medical professionals (Hamm/Sauer 2014: 25).

diagnostics and treatment, the latter strive to increase trans individuals' independence from psycho-medical professionals as well as from health insurance companies and their advisory bodies without endangering health insurance assumption of costs of sex reassignment measures.

4.3.4 Rethinking psycho-medical involvement under the Transsexual Act

While the sexological debate on psychologists' and psychiatrists' participation in proceedings under the Transsexual Act was influenced by the same broader social and discursive developments that shaped the debate on the AWMF guidelines, the debate on the Transsexual Act was also inspired by the Federal Constitutional Court decision of 11 Jan. 2011. All contributors to the debate agree that the Transsexual Act requires revisions, and some criticise the federal government for failing to introduce legislation to this effect.[62] However, they disagree on the issue of psycho-medical involvement under the Transsexual Act and, as a result, make different suggestions for change. The suggestions mirror different assumptions on trans self-knowledge, have different implications for trans self-determination and for the relationship between medicine and law in this particular area.

Critique of the Transsexual Act

The psycho-medical critique of the Transsexual Act focuses on three broad areas. Sexologists object to the amalgamation of the legal and the medical realm. Moreover, they argue that the Act is outdated in the light of social, legal and

62 | Güldenring, for example, argues that to this very day, the federal government has decided to ignore calls by sexologists and trans organisations for revisions of the Transsexual Act (Güldenring 2013: 161). As a result of government inactivity, she suggests that the legislator has tacitly tolerated inconsistencies of the Act, which allow for the psychiatrisation of trans individuals and arbitrary modes of assessment (ibid: 163).
Becker aptly identifies government lack of responsiveness on the Transsexual Act as part of a larger policy of non-policy. She provides a bitter critique of government inactivity with regard to issues related to gender and sexual orientation in general: »Since the red-green government (1998-2005) did not deliver on its promise to reform the Transsexual Act, one federal government after the other has refused this overdue reform. De facto a fundamental reform of the Transsexual Act has however taken place through the decisions of the Federal Constitutional Court (BVerfG) that has little by little declared relevant, widely criticised sections of the Transsexual Act incompatible with the Basic Law and, in doing so, annulled them. [...] Politics has obviously for a long time ceded its tasks with regard to dealing with gender and sexual orientation to the Federal Constitutional Court. (Becker 2013: 148)

discursive change. Finally, they suggest that the concept of transsexuality that informed this piece of legislation no longer applies.

While several authors consider the entanglement of the legal and medical spheres in the Act a drawback, their critique points to different effects. Becker e. g. argues that in contrast to the legislator's intentions, statutory health insurance companies and their medical advisory service bodies regularly misuse the Act by demanding that the applicants produce expert reports as a precondition for health insurance assumption of costs of somatic measures (Becker 2013: 146). While this use of provisions of the Act for ulterior purposes is indeed unfortunate and her critique welltaken, Becker does not address the more profound and lawful amalgamation of the legal and the medical realm established by the assessment procedure and stipulated in ss. 4(3) and 6(2) TSG.

Güldenring and Schmidt offer an ethical and methodological critique of the assessment procedure. Both contributors to the debate argue against psychomedical involvement in the legal proceedings under the Act. Güldenring offers two reasons. First, she holds that the Act delegates issues relating to the determination of a person's gender to experts' subjective perspectives (Güldenring 2013: 163). Second, she raises objections against the psychiatrisation of trans individuals within the framework of the Act, claiming that it forces individuals to conform to the rules of the gender binary instead of making society and the legislator responsible for dealing with trans and gender nonconforming individuals in general as means to create a pluralist and tolerant society (ibid: 171).

Based on his experience as an expert in court proceedings for a revision of first names and gender status, Schmidt provides two methodological reasons against demanding psycho-medical assessments under the Act. He argues that considering that psycho-medical experts only reject few applications, the assessment requirement barely contributes to improving predictions on the lasting stability of an applicant's gender experience (Schmidt 2013: 176). Moreover, he notes that applications for reversals of the decision to change first names and revise gender status rarely occur. He concludes that, »[s]ince expert reports almost always approve of the applications [...], the small number of individuals seeking a reconversion impressively states the applicants' subjective expertise« (ibid).

Two authors address the issue of discursive, social and legal change since the enactment of the statute that as an effect render the Transsexual Act outdated. Becker observes that the poststructuralist critique of heteronormativity and the gender binary allowed recognising homophobic notions that informed the Act, mirrored in particular in the provisions that prevent apparent and *de facto* same-sex marriages and the legislator's intention to maintain the »traditional, essentialist gender dichotomy« (Becker 2013: 146). She also points out to a number of social developments that require a reform of the Transsexual Act. Arguing that the previously rigid gender role characteristics have become

socially more flexible, it has become increasingly questionable to determine a person's gender based exclusively on physical characteristics. Moreover, she observes growing tolerance with regard to ›ambiguous‹ sex characteristics and less social acceptance of homophobic attitudes (ibid: 147). Finally, she notes that the trans movement has diversified, allowing for the representation of individuals formerly marginalised within the social movement and society in general (ibid). Referring to the Federal Constitutional Court decisions on the Transsexual Act, Vogel suggests that social processes affecting gender and gender regime are also mirrored in jurisdiction (Vogel 2013: 179).

Several authors suggest that the Transsexual Act is based on outdated medical assumptions on transsexuality. These assumptions feature in the concept and terminology used in the Act. Becker and Vogel point out that in contrast to the understanding of transsexuality as a homogeneous entity, medical science nowadays agrees that transsexual developments vary (Becker 2013: 147; Vogel 2013: 181). As such, a »diagnosis of transsexuality« does not necessarily lead to an indication for surgery (Becker 2013: 147; Vogel 2013: 182 f.). Güldenring and Becker also point out to terminological flaws. They suggest that neither the phrase »transsexual imprinting«, nor the phrase »compelled to live according to their ideas« (ss. 1[1]1 and 8[1] TSG) coincide with current notions on transsexuality (Güldenring 2013: 162; Becker 2013: 151).

Suggestions for a reform of trans law

Minor differences between individual suggestions for a reform of trans law notwithstanding, sexologists' designs for future regulations of trans can be divided into two sets. The first set of suggestions advocates continuing psycho-medical involvement under a reformed act and is represented by Becker and Vogel, while the second opts for psycho-medical withdrawal from future legal proceedings and is advocated by Güldenring, Schmidt and Sigusch. The former necessarily implies a limitation of trans self-determination, whereas the latter cedes expertise to trans individuals and endorses a separation of medical procedures from future provisions for a revision of first names and gender status.

Before offering her suggestion, Becker discusses two further options, one of which would be to abolish gender as a feature of the civil status altogether. The second option would allow for a change of first names and a revision of gender status via application to the register office without a diagnosis and assessment, as practiced in Argentina and suggested by the BAK TSG-Reform in 2012. Becker rejects the first suggestion, assuming that a great number of trans and presumably quite a few cis individuals would be dissatisfied with such a solution on the short and medium term (Becker 2013: 149). She also objects to the second suggestion as long as this particular solution affirms the gender binary. However, she suggests this problem could be solved by creating an additional

gender category (ibid: 150). She reckons though that it is politically unrealistic that the legislator will abolish the Transsexual Act.

As proponents of the first set of suggestions, Becker and Vogel propose a reform of the Transsexual Act, rather than entirely abolishing it, albeit for different reasons. They address the title of the proposed act, terminology and various aspects relating to the issue of experts and expert reports.

Both contributors to the debate on the Transsexual Act agree that the Act requires renaming to account for the heterogeneity of trans individuals or gender-nonconforming individuals in general. Drawing upon the solution proposed by the DGfS in 2001 (Becker et al. 2001), Becker suggests calling the reformed statute »Transgender Act« (*Transgendergesetz*) (Becker 2013: 150), whereas Vogel suggests reducing the title of the act to »An Act to change first names and establish gender status in special cases« (Vogel 2013: 183). While both suggestions would offer a larger range of individuals access to gender recognition, Vogel's formulation can be interpreted more broadly, allowing e. g. intersex individuals and individuals who do not identify as transgender to make use of the act. However, he limits options significantly when making suggestions for terminological revisions.

Becker and Vogel take issue with the terminology in s. 1(1) TSG and suggest rephrasing the section. While Becker proposes to replace the term »imprinting« with »development« and the phrase »have felt compelled« with e. g. »experienced a persistent inner necessity« (Becker 2013: 151), Vogel suggests to replace the former expression with »due to his or her transsexual (or gender dysphoric, respectively) experience« (Vogel 2013: 183). Whereas Becker's proposed terminology is non-pathologising, Vogel's reference to gender dysphoria in a potentially revised act re-establishes a psycho-medical diagnosis in a piece of legislation. In addition, Becker suggests to either abolish or at least reduce the requirement of having to have experienced oneself as another than the assigned gender for a period of three years prior to applying for a change of first names and a revision of gender status (Becker 2013: 151).

Becker and Vogel argue in favour of maintaining an assessment procedure under a reformed act. Becker insists on involving experts other than trans individuals themselves, despite being aware of the fact that such a procedure can also be considered a violation of the right to self-determination (ibid: 154) and that such an option risks exerting applicants to abuse. Becker e. g. acknowledges that no act can guarantee that experts deal respectfully with the applicants, reflect upon their own notions of gender and are open to various transsexual developments (ibid: 151). In her opinion, however, applicants require assistance (ibid: 155), and this conviction seems to outweigh the abovementioned concerns.

Vogel advocates for continuing assessment procedures on the grounds that transsexuality or gender dysphoria, respectively, require extensive diagnostics,

differential diagnostic and counselling procedures (Vogel 2013: 183). Moreover, Vogel suggests that the legislator make provisions for granting experts interventionist functions (ibid: 183 f.) which could however have the effect of increasing expert control. Hence, while Becker's perspective is based on the paternalistic assumption that trans individuals are unable to make informed decisions on behalf of their gender, Vogel's perspective is in addition informed by pathologising assumptions.[63]

However, the authors suggest reducing the number of expert reports. While Vogel generally suggests limiting the number of expert reports to one only (ibid), Becker distinguishes between procedures for a change of first names and a revision of gender status in case the legislator decides to stick to a two-part act. With regard to the former procedure, Becker argues in favour of either dispensing with an expert report or reducing the prognostic demands on these documents, respectively. She suggests requiring one instead of two expert reports for a revision of gender status with higher prognostic demands, while securing the option for a reversal of a decision (Becker 2013: 150).

Both authors expand on the qualifications required to perform as an expert. Becker takes a stand against authorising medical experts only to compile expert reports, arguing that neither physicians nor psychologists are *per se* trained on issues related to transsexuality and gender identity. Rather professionals of either group need to acquire these particular qualifications in addition to their regular training (ibid: 151). Her statement however raises the question why physicians or psychologists should be considered more suitable as experts than members of other professions, such as e. g. social workers or peer counsellors. Rather than specify the professions responsible for producing export reports, Vogel in essence suggests maintaining the broad description of experts as outlined in s. 4(3) TSG (Vogel 2013: 183).

Finally, Becker argues in favour of reducing the duration of the legal proceedings under the Act. She suggests as one means to this effect to dispense with the representative of the public interest as a participant in the court proceedings for a change of first names and a revision of gender status (Becker 2013: 150).

When contemplating a reform of trans law, Güldenring, Schmidt and Sigusch's guiding principle is to achieve maximum self-determination with regard to issues related to gender identity (Güldenring 2013: 172; Schmidt 2013: 175; Sigusch 2013: 185). Sigusch's contribution is in addition motivated by the socio-political goal of achieving gender liquidity (Sigusch 2013: 187). The sex-

63 | This notion is also mirrored in the terminology he uses for the subjects. When referring to the heterogeneity of individuals whose experienced gender does not match the assigned gender, he speaks of a »heterogeneity of gender identity disorders« (Vogel 2013: 183).

ologists address the effects of abolishing any external assessments, demands on a new regulation and expand on the issue of an improper use of such a regulation.

Güldenring, Schmidt and Sigusch point out to a number of effects, if the determination of gender identity was left to the individual. Güldenring argues that such a solution would untangle the administrative mesh trans individuals are caught up in. Moreover, she argues that psychological and psychiatric resources that are currently tied down in assessment procedures could be used to improve trans health care instead (Güldenring 2013: 172). Finally, Güldenring and Schmidt suggest that medicine and law would be severed from each other (ibid; Schmidt 2013: 176).

While concrete proposals for a new regulation differ, the proponents of profound changes to trans law make a number of suggestions to avoid the shortcomings of the Transsexual Act as they have been voiced in the trans movement. Güldenring, Schmidt and Sigusch advocate access to a change of first names and a revision of gender status with as few obstacles as possible (Güldenring 2013: 172; Schmidt 2013: 176; Sigusch 2013: 185). As such, they demand a solution that guarantees a swift, financially less costly and unbureaucratic processing of an individual's desire for assignment to another than the natal gender (ibid) that observes, as Güldenring emphasises, human rights, in particular the right to self-determination, and does not impede individual developments (Güldenring 2013: 172).

Güldenring proposes a new act that is free of discrimination and pathologisation. In addition to the abovementioned requirement, she demands that the act should consider recent findings and insights from disciplines and areas other than medicine and psychiatry, too, in order to produce a legislative text without scientifically untenable contents and phrases, such as e. g., »transsexual imprinting« and »compelled to live according to their ideas« (ibid). She expects of such a regulation to save expenses of court proceedings, costs of expert reports and psychotherapeutic and psychiatric resources and a limitation of psycho-social stress and its detrimental effects on trans individuals (ibid).

In contrast, Schmidt and Sigusch argue against passing a new act. The former suggests that a declaration of one's chosen name and gender in a register office and paying for the fees to this effect suffice (Schmidt 2013: 175). While Schmidt sympathises with the legislator's concern to have to change an individual's first names and gender status once only, if possible (ibid: 176), Sigusch opts for a solution without any approval procedures for all individuals who have reached the age of majority (Sigusch 2013: 185).

Finally, Güldenring and Schmidt discuss the issue of the risk of an improper or frivolous use of either the act or the declaration, respectively. Arguing that there are sufficient social stressors when a person decides to live according to another than the assigned gender, Güldenring anticipates that this scenario is

rather unlikely to happen (Güldenring 2013: 172). Schmidt suggests establishing a waiting period of three or six months between the time of application and the decision, i. e. if the applicant confirms his or her intention to change first names and gender status after the waiting period, the decision becomes operative (Schmidt 2013: 176).

4.3.5 Summary: Sexological constructions of gender, trans(sexuality) and gender regime from 2011 to 2014

Despite a number of unresolved controversies, the course of the current debates on trans in sexology give reason to believe that the margin towards the recognition of gender diversity and the depathologisation of individuals who defy conventional notions of gender, if not gendering as such, is shifting. This development is e. g. mirrored in the conceptual distinction between non-pathologically defined gender identities, such as trans, and the clinical term ›gender dysphoria‹, which focuses on the distress a gender-nonconforming individual possibly experiences. Moreover, several contributors to the debate call into question the formerly assumed essentialist basis of the two socially sanctioned categories ›man‹ and ›woman‹. Altogether, these developments call into question the gender binary. At the same time, a diagnosis of gender dysphoria, or any diagnosis for that matter, conceals social factors contributing to gender-related distress, such as social expectations to embody and ›do‹ gender.

Issues related to diagnostics are clearly more contested for several reasons, and the different perspectives indicate different statuses of trans individuals in relation to cis individuals. Means of diagnostics the dominant faction in sexology formerly considered central to diagnostics, such as the ›real life test‹, mandatory psychotherapy and physical examinations in an assessment setting, no longer seem to be considered state of the art. In addition, sexologists agree that psycho-medical interventions should provide ›patient-centred‹, individualised health care rather than assume a gatekeeping function. However, they are divided over the issue of diagnosing gender dysphoria in the first place. Perspectives range from the conviction that trans individuals unlike cis individuals indiscriminately require psycho-medical guidance to those that question any heteronomous diagnostics and opt for informed consent instead. In between there are perspectives that for pragmatic reasons and to varying degrees suggest psycho-medical guidance. While the former delegitimises trans self-knowledge most significantly, the second set of perspectives reveals the limitations of the overall social law framework within which trans health care takes place in Germany. The latter requires a diagnosis in order to ensure that health care insurances assume the costs of medical and surgical sex reassignment measures.

Reconceptualising trans and rethinking diagnostics is part of a larger project of devising new guidelines that will replace the conceptually outdated and methodologically flawed German Standards and delegitimise the widely criticised instructions and procedures condoned and practiced by the advisory bodies of statutory health insurance companies. At the time of writing, it is premature to anticipate the outcome of the debate on the AWMF guidelines, in particular with regard to issues relating to the organisation of diagnostics and an overdue implementation of quality standards for psycho-medical professionals dealing with gender-nonconforming individuals. However, there are indications that a terminological and conceptual shift from ›transsexuality‹ to ›gender dysphoria‹ will take place in the guidelines, including the abovementioned implications for trans, gender and the gender regime, and it is to be expected that the process will include some trans and social scientific expertise.

While calls for trans self-determination have overall become more prominent, the current sexological debate on the Transsexual Act reveals a controversy similar to the one on the AWMF guidelines with regard to acknowledging trans self-knowledge and observing trans self-determination on the one hand and ensuring the subjects' dependency on psycho-medical professionals on the other hand.

While sexologists disagree on the issue of future expert involvement under a reformed act to regulate transitions, calls for a retreat from assessment procedures under the law have gained ground for a number of reasons. Sexologists increasingly recognise trans self-knowledge and non-pathological gendered embodiments. They critically assess their own participation in a heteronormative hegemonic project. Moreover, sexologists note that the increasing entanglements of medicine, law and statutory health insurance management of transsexuality with contradictory and unintended effects put a strain on psycho-medical professionals and trans individuals. Finally, sexologists observe that the Transsexual Act lags behind rapid social developments in the area of gender and, more specifically, trans.

5 CONCLUSIONS

Embedded in a concept of heteronormative hegemony and using analytical tools from complex feminist state theories on the liberal-democratic state, this study analysed how sexology, the law, the political branch of the trans movement and federal politics interacted to produce social change with regard to considering trans a viable way of embodying gender in the broader contexts of legislative processes related to a change of first names and a revision of gender status in the Federal Republic of Germany from approximately the mid-1960s to 2014. I will offer major findings of my analysis.

The period prior to, until the end of the legislative process leading to the Transsexual Act was marked by the gradual modification of the gender regime from the notion of a naturalised link between the sexed body and gender identity to the recognition of the complexity of gender against the background of homophobia, in particular the criminalisation of male homosexuality, and the socially deeply rooted notion of two somatically and socially polarised genders. This shift occurred unevenly in the disciplines and areas and usually involved conflicts.

Well before sexology had begun to classify transsexuality as a separate entity, trans individuals turned to courts for a revision of gender status under the Civil Status Act. Different decisions on various levels of jurisdiction underscore the state structure as a set of hierarchically organised institutions. While lower courts tended to grant a revision of gender status based on varying somatic conditions, higher courts in the 1960s rejected the claim, arguing that sex/gender is somatically based and immutable and, as a result, trans individuals were perceived of as ›unreal‹ women and men despite the fact that the applicants had undergone genital surgery. In addition, higher courts feared that the public order, morality and society, including marriage and hegemonic concepts of gender, would become undone.

Sexology intervened into the legal realm after it had isolated transsexuality from transvestism and homosexuality, arguing that several factors determine a person's gender and that the psyche was no less determining than somatic conditions; that transsexuality could not be treated other than with surgery and that surgically altered genitalia functioned like, and had the appearance of cis

genitalia. Legal scholars who overall tended to be more sympathetic to transsexual individuals' claims to recognition than jurisdiction facilitated spreading sexological notions of gender and transsexuality in law. However, this did not apply to transvestites. In contrast to sexology, legal scholars' reactions to transvestites were markedly depreciative. Reactions ranged from unease to pathologisation and criminalisation. The latter was more pronounced when transvestites engaged in homosexual acts.

The effects of this intervention were threefold. First, the concept of gender as a complex phenomenon allowed conceptualising transsexuality in law. Second, sexology created a homogeneous, heterosexual subject with the desire for genital surgery as the defining feature and as an effect rendered other forms of trans embodiments and sexualities unconceptualisable. Third, sexology reestablished its power to define gender.

While higher courts continued to grapple with issues related to judge-made law, on 11 Oct. 1978, the Federal Constitutional Court granted an applicant a change of first names and a revision of gender status in the face of pending legislation, especially since the applicant irreversibly identified with the ›other‹ gender and had undergone sex reassignment surgery.

Situated in a favourable legal climate, having been exerted to continuing pressure from a small group of social democratic MPs since 1972, of whom representatives from Hamburg also had contact with a local trans lobby group, and pressure from sexologists, the social-liberal government tabled the draft Transsexual Bill. Sexologists and trans individuals were granted unequal access to the federal political arena. Moreover, sexologists presented transsexual individuals as a homogeneous entity and tied in with a liberal minoritising rhetoric, whereas trans contributions were individual and diverse. A trans activist's warning of constitutional pitfalls of several rules of the Bill was ignored.

However, privileged access to influencing the course of the Bill did not necessarily translate directly into legislation. Rather, the Christian democratic opposition, which enjoyed a majority in the *Bundesrat*, used sexological knowledge on transsexuality strategically to fend off challenges to conventional modes of gendering, assumed disruptions to cis individuals' everyday lives and perceived encroachments of their rights and, above all, potential threats to marriage as a privileged and exclusively heterosexual institution in a debate that with few exceptions was marked by heteronormative perspectives. The result necessarily required a compromise in order to ensure the passage of the Bill.

The outcome of the legislative process in 1980 marks the culmination and political consolidation of a gradual shift within the gender regime by providing provisions for a change of first names and a revision of gender status without however endangering the heteronormative gender binary. In order to restore the gender regime, transsexual applicants were subjected to trade fundamental human rights, such as the constitutionally guaranteed rights to human dig-

nity, physical integrity, marriage and family for gender recognition. Moreover, and in compliance with the rules of non-contentious jurisdiction, transsexual individuals were not recognised as experts on their own behalf, and the provisions applied to transsexual individuals only. Furthermore, medicine and law became intertwined.

While the Transsexual Act provided for a change of first names and a revision of gender status for transsexual individuals, the conditions sparked resistance. As early as on 16 Mar. 1982, the Federal Constitutional Court decided that the age limit of 25 years for a revision of gender status was unconstitutional. A lawyer and a sexologist critically commented on the Court's refusal to render the age limit for a change of first names unconstitutional at the same time. This happened roughly a decade later.

Since the Transsexual Act prescribed permanent sterility and surgical measures to approximate the appearance of the ›other‹ gender for a revision of gender status without specifying the interventions, legal scholars and sexologists discussed this issue controversially in legal journals throughout the 1980s and early 1990s. Higher courts overall interpreted the prerequisites extensively in cases of female-to-male transsexualism and restrictively regarding male-to-female transsexualism.

The period since the mid-1990s was marked by a socially and legally more favourable climate towards homosexuality without however displacing heteronormativity. Fuelled by policing in transsexual support groups, an increasing flexibility of gender roles, queer theory and the options for communication provided by the internet, the trans movement began to grow from the mid-1990s onward, developing lobby organisations with heterogeneous trans(gender) subjects and networks operating on regional, national and supranational levels. These organisations questioned hegemonic understandings of gender, masculinity, femininity and sexuality.

Sexologists were faced with an increasingly visible heterogeneity of trans subjectivities, including transsexual individuals with different sexual orientations and needs for somatic measures. These changes entered clinical categories to varying degrees, overall allowing for conceptualising a greater diversity of transsexual individuals. A concept of depathologisation entered the sexological debate as early as in 1991 that questioned the heteronormative gender binary, and another sexologist suggested respecting trans self-knowledge in 1997. However, until the early 2010s, the majority of sexologists did not critically reflect upon pathologisation, medical surveillance, gatekeeping practices and medical expertise in relation to trans individuals that had characterised the psycho-medical conceptualisation and treatment of transsexual individuals from the very outset. However, terminology, definitions and the degree of pathologisation varied quite considerably.

Despite disagreements on several issues, the three sexological associations devised national guidelines for the treatment and diagnostic assessment of transsexual individuals without external participation, defined assessment rules under the Transsexual Act and enshrined a narrow concept of transsexuality, clear differential diagnostics, the pathologisation of transsexual individuals and a rigid diagnostic regimen. Sexologist associations remained immune to the critique by cis and trans sociologists, the then national trans organisation Transidentitas e. V. and from some sexologists themselves that followed immediately upon publication.

The new trans organisations rejected the pathologisation of trans, psychomedical expertise as opposed to their self-knowledge and practices and procedures they consider violations of human dignity and privacy, such as the obligatory ›real life test‹, undue physical examinations, inappropriate enquiries into their sexual orientations and practices and a subjection to expert understandings of sex, femininity, masculinity and gender. Likewise, they opposed legal requirements, such as mandatory sterility, sex reassignment surgery, expert assessments, bars to officially sanctioned living arrangements, prolonged procedures and the disenfranchisement of populations that did not fit the category ›transsexualism‹ on the grounds that they violate basic human rights. Since previous governments and the then government did not attempt to revise the Transsexual Act, the PGG devised a suggestion for a draft bill meant to redress grievances that had accumulated.

This episode is remarkable in a number of ways. First, it reveals how successful struggles around homosexuality had an enabling effect on struggles around trans. Second, the proposed legislation contributed to sparking a legislative process. Third, it reveals how anticipated limits shaped the draft, i. e. how the state shapes actors before entering the terrain of the state. Fourth, its immediate effects suggest that on a surface level trans individuals were granted equal access. Fifth, the announcement of fundamental revisions also raised expectations in the political branch of the trans movement. Drawing upon continuing legal and social developments in the area of homosexuality, international developments in trans legislation in the first decade of the 21st century and being part of a broader social movement themselves that questioned singling out non-conforming genders in the first place enabled trans activists to demand more rights in their suggestions for law reform in this period than their predecessors.

Rather than follow up on its promise to comprehensively revise trans law, government activity dwindled to non-activity after the initial announcement to fundamentally revise the Transsexual Act. At the same time, trans individuals took to the courts. The Federal Constitutional Court took on the legitimation role of the state. With increasingly rapid frequency, Federal Constitutional Court decisions eroded the Transsexual Act. On 18 July 2006, the Federal Con-

stitutional Court ruled the exclusion of foreigners with permanent residency in the Federal Republic of Germany unconstitutional and set the first deadline for the legislator to devise a constitutional regulation.

While a further depathologising approach emerged in sexology, there were few developments in the discipline with regard to trans. With few exceptions, sexology had detached itself from international debates, barely engaged with theoretical developments that increasingly shaped thought in sociology and gender studies and resolved itself to surveying and policing trans rather than to question the own contribution to sustaining a hegemonic project. While a publication of the submission of the influential German Association for Sex Research did not question assumed sexological superior knowledge in relation to trans individuals' knowledge, its emphasis on the heterogeneity of transsexuality and legal constraints on trans individuals proved to be an alternative to the German Standards for the Federal Constitutional Court to draw upon on decisive issues.

Combined with overall shifts regarding homosexuality and without displacing heterosexuality as a structuring principle in society, two Federal Constitutional Court decisions on the Transsexual Act in 2005 and 2008 allowed homosexual marriages in the context of trans, the first one with regard to the social perception of the relationship and the second decision in terms of civil status. The last decision also marks another modification of the heteronormative gender regime under strictly defined conditions, without however displacing it.

Based on a different operational logic than e. g. jurisdiction in constitutional law, jurisdiction in social law began to define limits for sex reassignment interventions in cases of transsexuality since the late 1990s. Moreover, the rigid German Standards served as a model for restrictive practices of advisory bodies to statutory health insurances. While individual sexologists raised objections to these practices, they did not however consider revising or simply discarding the Standards. In addition to shared grievances over continuing government inactivity, objections to regulatory psycho-medical practices and assumptions, increasingly rigid practices in the healthcare management of transsexuality as well as denied recognition of self-knowledge under the Transsexual Act, growing popularity of neuro-scientific research on transsexuality formed the substratum for conceptual differentiation within the social movement.

The Federal Constitutional Court had set the government a deadline for finding a constitutional solution for the rule of the Transsexual Act that disallowed homosexual marriages in cases related to transsexuality. Expecting comprehensive legislation as it had been announced in 2000, divided over the issue of hetero- and cisnormativity and possible constitutional readings of the Transsexual Act, legal scholars debated several options for a comprehensive revision. In addition, Bündnis 90/Die Grünen devised draft legislation that would have redressed a number of grievances in the trans movement and questioned

the gender binary. However, in 2009 the government simply implemented a suggestion made by the Federal Constitutional Court.

Soon after the Act to amend the Transsexual Act had passed, the Federal Constitutional Court ruled somatic requirements under the Transsexual Act for a revision of gender status unconstitutional, marking another modification of the gender regime. While heteronormative hegemony remains in place, including the initial heteronomous gendering process at birth, a body defined as male may signify a woman and vice versa under clearly defined circumstances.

This decision, psycho-medical developments in US and international guideline development on gender non-conforming individuals, increasingly successful trans movement struggles to be heard and the appreciation of theoretical developments on gender contributed to critical reflections on the gender binary in sexology and initiated a process of guideline development. While this process is still underway at the time of writing, there are indications that depathologising perspectives are gaining ground, while issues of psycho-medical surveillance remain highly contested. Moreover, several sexologists call for disentangling medicine from law, an amalgamation, which had contributed to its stagnation.

The political branch of the trans movement drawing upon social constructionist and poststructuralist perspectives on gender continues to define trans as a category that defies closure. In addition, the critique of minoritising perspectives expressed for example in special acts has gained momentum. As a result of government reluctance to seriously address issues related to the minoritisation and stigmatisation of trans and other minoritised gendered embodiments, the existing structures of the trans movement are in the process of creating a national bureaucratic structure to facilitate exchange and communication on issues related to trans.

To conclude, my study revealed that social change in the broader context of legislative processes related to a change of first names and gender status was an effect of complex and uneven interactions between sexology, the law, the political branch of the trans movement and federal politics. In the course of these interactions, three major social changes were achieved: Formerly disenfranchised embodiments defined as transsexual were recognised as subjects. The most severe human rights violations that were part and parcel of recognising the transsexual subject were redressed. There are indications that the heterogeneity of gendered embodiments and the gender binary itself have recently become a political issue.

Despite these significant changes, heteronormative hegemony restored itself by integrating some demands made by trans individuals, which suggests that the gender regime is historically specific and dynamic. Challenges to the heteronormative gender regime were resolved according to the principle of defining these embodiments as exceptions to the rule. For instance, recognising gender as mutable in a legal sense was, and continues to be exclusively

applied to individuals defined as transsexual. Moreover, recognising same-sex marriages applied to cases of transsexuality only. The latest example for the period this study examined is that gender is no longer necessarily based on sexed physical features, whereas the practice of assigning a person to one of exclusively two legitimate genders at birth remains in place. Hence, social change with regard to recognising all trans embodiments as viable will require further questioning and mobilising against hegemonic assumptions, rules and practices that govern state and society.

Recent developments after the period of investigation in this project indicate that other and occasionally overlapping struggles are successfully chipping away at the hegemonic heteronormative gender regime. In June 2017, the German parliament passed a Bill allowing cis-same-sex partners to marry as of 01 Oct. 2017, and on 10 Oct. 2017, the Federal Constitutional Court instructed the federal government to find a solution until 31. Dec. 2018 for a positive gender option other than ›male‹ or ›female‹ in regulations pertaining to a person's civil status in cases of intersexuality. While it remains to be seen, whether these and similar future developments will displace the gender regime, they indicate that as a social construction, heteronormative hegemony is dynamic, contested and in principle negotiable.

6 ABBREVIATIONS AND TRANSLATIONS

ACTH	Adrenocorticotropes Hormon	Adrenocorticotropic hormone
ADG	Antidiskriminierungsgesetz	Anti-Discrimination Act
AG	Amtsgericht	Local court
AK-TS	Arbeitkreis Transsexualität Kiel	Workgroup Transsexuality Kiel
APA		American Psychiatric Association
APuZ	Aus Politik und Zeitgeschichte	Politics and Contemporary History
AsylbLG	Asylbewerberleistungsgesetz	Asylum Seekers Benefits Act
ATME e. V.	Aktion Transsexualität und Menschenrecht e. V.	Campaign for Transsexuality and Human Rights
ÄVFGG	Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit	An Act to change first names and establish gender status
AWMF	Arbeitsgemeinschaft der Wissenschaftlichen Medizinischen Fachgesellschaften	Association of Scientific Medical Societies
BAK TSG-Reform	Bundesweiter Arbeitskreis TSG-Reform	Nationwide Workgroup TSG-Reform
BEEG	Gesetz zum Elterngeld und zur Elternzeit – Bundeselterngeld- und Elternzeitgesetz	Parental support and parental leave Act
BGB	Bürgerliches Gesetzbuch	Civil Code
BGbl	Bundesgesetzblatt	Federal Law Gazette
BGH	Bundesgerichtshof	Federal Court of Justice
BMFSFJ	Bundesministerium für Familie, Senioren, Frauen und Jugend	Federal Ministry for Family Affairs, Senior Citizens, Women and Youth
BMH	Bundesstiftung Magnus Hirschfeld	Magnus Hirschfeld Foundation
BMI	Bundesministerium des Innern	Federal Home Office
BMJ	Bundesministerium der Justiz	Federal Ministry of Justice

BMJV	Bundesministerium der Justiz und für Verbraucherschutz	Federal Ministry of Justice and Consumer Protection
BPI		Borderline Personality Inventory
BSTc		Bed nucleus of the stria terminalis
BSG	Bundessozialgericht	Federal Social Court
Bundesrat RA	Bundesrat Rechtsausschuss	Bundesrat Committee on Legal Affairs
Bundesrat RA-U	Bundesrat Unterausschuss des Rechtsausschusses	Bundesrat Subcommittee on Legal Affairs
BVerfG	Bundesverfassungsgericht	Federal Constitutional Court
BVerwG	Bundesverwaltungsgericht	Federal Administrative Court
BVT* e. V.	Bundesverband Trans* e. V.	Federal Association Trans
CAH	Adrenogenitales Syndrom	Congenital adrenal hyperplasia
CAT		United Nations Convention Against Torture
CDU	Christlich Demokratische Partei	Christian Democratic Party
CEDAW		Convention on the Elimination of All Forms of Discrimination Against Women
CLCHC		Callen-Lorde Community Health Center
CSU	Christlich Soziale Union	Christian Social Union
Deutscher Bundestag-In	Deutscher Bundestag – Innenauschuss	German Bundestag Committee on Home Affairs
Deutscher Bundestag-In-R	Deutscher Bundestag – Innenausschuss- Rechtsausschuss	German Bundestag Committee on Home Affairs – Committee on Legal Affairs
Deutscher Bundestag-R	Deutscher Bundestag – Rechtsausschuss	German Bundestag Committee on Legal Affairs
DGfS	Deutsche Gesellschaft für Sexualforschung	German Association for Sex Research
DGSS	Deutsche Gesellschaft für Sozialwissenschaftliche Sexualforschung	German Society for Social Scientific Sexuality Research
dgti e. V.	Deutsche Gesellschaft für Transidentität und Intersexualität e. V.	German Association for Transidentity and Intersexuality
DHEAS	Dehydroepiandrosteron-Sulfat	dehydroepiandrosterone sulfate
DSM		Diagnostic and Statistical Manual of Mental Disorders

ECHR		European Convention on Human Rights
ECtHR		European Court of Human Rights
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch	German Private International Law
FamRZ	Zeitschrift für das gesamte Familienrecht	Journal for the Entire Family Law
FbeK	Fragebogen zur Beurteilung des eigenen Körpers	Questionnaire for the Assessment of One's Own Body
FDP	Freie Demokratische Partei	Free Democratic Party
FPI		Freiburg Personality Inventory
ftm		female-to-male
FSH	Follikelstimulierendes Hormon	Follicle stimulating hormone
GATE		Global Action for Trans* Equality
GFSS	Gesellschaft zur Förderung sozialwissenschaftlicher Sexualforschung	Society for the Advancement of Social Scientific Sexuality Research
GG	Grundgesetz	Basic Law
GID		Gender identity disorder
GLADT e. V.	Gays and Lesbians aus der Türkei e. V.	Gays and Lesbians from Turkey
HBIGDA		Harry Benjamin International Gender Dysphoria Association
HuK	Homosexuelle und Kirche	Homosexuals and the Church
ICD		International Classification of Diseases
ICESCR		International Covenant on Economic, Social and Cultural Rights
IfZ	Institut für Zeitgeschichte	Institute for Contemporary History
IMAG	Interministerielle Arbeitsgruppe	Inter-Ministerial Working Group
IVIM e. V,	Internationale Vereinigung intergeschlechtlicher Menschen	OII – Germany
IVTF	Interessenvertretung transsexueller Frauen	Lobby Group for Transsexual Women
JW	Juristische Wochenzeitschrift	Legal Weekly
JZ	JuristenZeitschrift	The Jurists' Journal
KG	Kammergericht	Chamber Court
LG	Landgericht	Regional court

LSG	Landessozialgericht	Regional Social Court
LGBTIQ		Lesbian Gay Bisexual Trans Intersex Queer
LH	Luteinisierendes Hormon	Luteinising hormone
LPartG	Gesetz über die Eingetragene Partnerschaft – Lebenspartnerschaftsgesetz	Registered Life Partnership Act
MB/KK	Musterbedingungen für die Krankheitskosten- und Krankentagegeldversicherung	Model conditions for sickness costs and the hospital daily benefit insurance
MDK	Medizinischer Dienst der Krankenkassen	Medical Advisory Service of the Statutory Health Insurance Companies
MDS	Medizinischer Dienst des Spitzenverbandes Bund der Krankenkassen	Medical Advisory Service of the Central Federation of Statutory Health Insurance Companies
MP		Member of Parliament
mtf		male-to-female
MUT	Menschenrecht und Transsexualität	Human Right and Transsexuality
MutterschutzG	Mutterschutzgesetz	An Act to protect expectant and nursing mothers
NamÄndG	Namensänderungsgesetz	An Act on the change of family names and first names
NJW	Neue Juristische Wochenzeitschrift	New Legal Weekly
OII		Organisation Intersex International
OLG	Oberlandesgericht	High Regional Court
ObLG	Oberstes Landgericht	Highest Regional Court
OHPREG		hydroxpregnenolone
OVG	Oberverwaltungsgericht	High Administrative Court
PassGÄndG	Gesetz zur Änderung des Passgesetzes und weiterer Vorschriften	An Act to amend the Passport Act and further prescriptions
PCO	Polyzystisches Ovar	Polycyctic ovary
PDS	Partei des Demokratischen Sozialismus	Democratic Socialist Party
PGG	Projektgruppe Geschlecht und Gesetz	Project Group Gender and the Law
PrALG	Allgemeines Landrecht für die Preußischen Staaten	General State Law for the Prussian States
PStG	Personenstandsgesetz	Civil Status Act

R & P	Recht & Psychiatrie	Law & Psychiatry
RVO	Reichsversicherungsordnung	Social Security Code of the Reich
SCHWUSOS	Lesben und Schwule in der SPD	Lesbians and Gay Men in the SPD
SEKIS Berlin	Selbsthilfe Kontakt und Informationsstelle Berlin	Central Support, Contact and Information Office Berlin
SGB	Sozialgesetzbuch	Social Security Code
SGB V	Fünftes Buch Sozialgesetzbuch	Volume 5 of the Social Security Code
SHBG	Sexualhormonbindendes Globulin	Sex hormone binding globulin
SPD	Sozialdemokratische Partei Deutschlands	Social Democratic Party of Germany
SPN		Selections from the Prison Notebooks
StAZ	Das Standesamt	The Register Office
StGB	Strafgesetzbuch	Criminal Code
TGEU		Transgender Europe
TGNB	Transgender-Netzwerk Berlin	Transgender Network Berlin
TrGG	Transgendergesetz – Gesetz über die Wahl oder Änderung der Vornamen und der Feststellung der Geschlechtszugehörigkeit	Transgender Bill – A Bill on the choice or revision of first names and the establishment of gender status
TrIQ e. V.	TransInterQueer e. V.	Trans Inter Queer
TSG	Gesetz zur Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz – TSG)	An Act to change first names and establish gender status in special cases (Transsexual Act – TSG)
TSG-ÄndG	Transsexuellengesetz – Änderungsgesetz	An Act to amend the Transsexual Act
TSG-R	TSG-Referentenentwurf	Draft Bill to change first names and establish gender status in special cases
TSG-E	TSG-Entwurf	A Bill to change first names and establish gender status in special cases (Transsexual Bill)
TSRRG	Transsexuellenrechts-reformgesetz	Transsexual Law Reform Bill
VersR	Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht	Journal for Insurance Law, Liability and Indemnity Law
WehrpflichtG	Wehrpflichtgesetz	Concription Act
WHO		World Health Organisation

WPATH		World Professional Association for Transgender Health
ZivildienstG	Zivildienstgesetz	Civilian service Act
ZfS	Zeitschrift für Sexualforschung	Journal for Sex Research
17 OHP	17-Hydroxprogesteron	17-hydroxyprogesterone

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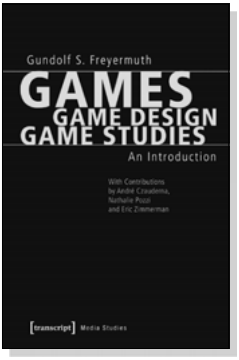

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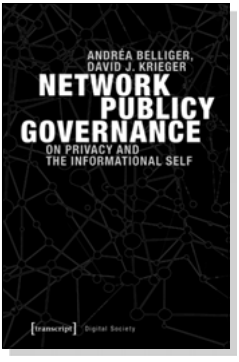

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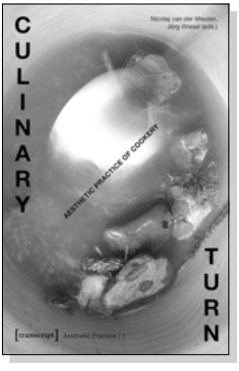

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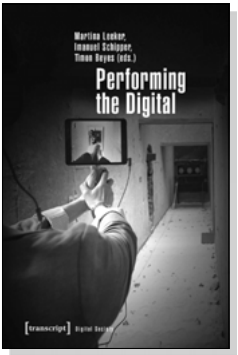

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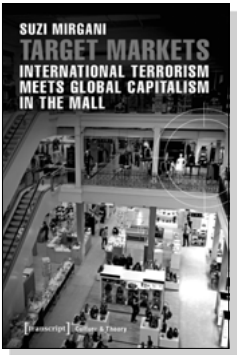

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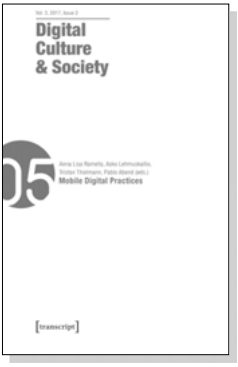

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