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

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.

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

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*.

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]

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)

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).

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.

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).