3 CONCEPTS OF GENDER AND TRANS(SEXUALITY) PRIOR TO, AND DURING THE LAW REFORM DEBATE

3.1 DEVELOPMENTS AND DEBATES ON TRANS(SEXUALITY) IN SEXOLOGY FROM THE 1990S TO 2010

The sexological debate in Germany from the 1990s to 2010 was marked by four major developments. First, while enquiries into the aetiology of transsexuality, like in other Western countries, overall shifted towards somatic research, perspectives that questioned the search for a cause of transsexuality and called for a depathologisation of transsexuality entered the debate. Second, alongside homogenising concepts of transsexuality, perspectives emerged that acknowledged the publicly discernible proliferation of trans subjectivities, including the heterogeneity of transsexual subjects. Third, while the vast majority of sexologists continued to endorse a course of treatment based on authoritative psycho-medical control of trans subjects, one sexologist argued in favour of taking into account trans expertise and self-determination. Fourth, despite disagreement over concepts of transsexuality and the organisation of the treatment of transsexual individuals, sexologists developed authoritative national guidelines for the treatment and diagnostic assessment of transsexual individuals.

This chapter analyses clinical categories and underlying concepts of trans according to the perspectives and resulting tensions that emerged in the course of the developments mentioned above. Drawing upon articles from the sexological journals *Zeitschrift für Sexualforschung*, *Sexuologie* and relevant articles in *Psychoendocrinology*, *Zeitschrift für Humanontogenetik* (Journal for Human Ontogenetics) and a sexological handbook, the chapter starts out with a systematic account of aetiological approaches to transsexuality.

The next section deals with the reconceptualisation of transsexualism as it features in terminology and definitions, clinical pictures and differential diagnoses. Thereafter this chapter will address the debate on the diagnostics of transsexualism with a particular focus on the patient history, the physical

examination, the psychopathological examination and psychotherapy and the ›real life test‹.

Finally, this chapter deals with the medical management of transsexuality since the introduction of the German Standards. This section contextualises the legal and medical transition from the one to the other of the two officially recognised genders within the complex relationships between law and medicine, health insurance company administration and advisory body practices and psycho-medical professionals as well as county courts and psycho-medical practitioners in the field of transsexuality. Sources for this section are in addition to Langer's (1995), Langer and Hartmann's (1997) and Becker et al.'s (2001) articles in *Sexuologie* and the *Zeitschrift für Sexualforschung*, respectively, relevant articles in Clement and Senf's anthology.

The sections on the reconceptualisation, diagnostics, assessment and management of transsexuality draw upon articles in the journals *Zeitschrift für Sexualforschung*, including the interdisciplinary debate on the German Standards,[1] *Sexuologie* and relevant sexological articles in *Andrologia*, *Psychiatrische Praxis* (Psychiatric Practice), *Der Urologe* (The Urologist) and *Nervenarzt* (The Neurologist). Further sources are two influential sexological handbooks, relevant contributions to Clement and Senf's (1996) anthology, a monography by the Swiss psychologist Rauchfleisch (2006) and the Federal Social Court (*Bundessozialgericht*; BSG) decisions on 06 Aug. 1988 (BSG 1988) and 10 Feb. 1993 (BSG 1993).

Throughout the 1990s and the first decade of the 21st century and despite tensions between the recognition of individual subjectivities and homogenisation, depathologisation and ongoing pathologisation and the issue of surveilling transitions as opposed to granting trans individuals self-determination, neither depathologising approaches nor an overall higher degree of self-reflexivity in recommendations for clinical practice led to loosening the psycho-medical grip on transsexual individuals. Instead, dominant sexologists frequently manoeuvered within the restrictive regulatory regime it had fed into at an earlier point in time, such as the Transsexual Act (1980), a development that accounts for the specific national route that sexology took on trans in Germany.

3.1.1 Approaches to transsexuality in the sexological debate

The concern for finding a cause of transsexuality among sexologists in Germany was overall less prominent in the period between 1990 and 2010 than in the

1 | The debate on the German Standards includes perspectives of trans and cis sociologists, a lawyer and the national trans organisation Transidentitas e. V.

time preceding the Transsexual Act.[2] Nevertheless, the search for a cause did not cease. Like in other Western countries,[3] the focus of the research on the aetiology shifted in favour of somatic approaches (cf. Becker 2013: 153), and attitudes towards research on the aetiology of transsexuality became more diverse. Perspectives and research on the aetiology of transsexuality debated in German sexology journals can be divided into three categories. The first questioned the search for a cause of transsexuality. The second pursued ongoing somatic research. The third engaged in research on multi-causal factors.

Critical approach

Sigusch was the first sexologist in Germany who questioned research on potential causes of transsexuality. While he did not reject research *per se*, he took a vehement stance in his concept of the detotalisation of transsexuality[4] against

2 | The reasons for this development are twofold. First, the majority of sexologists agreed that there was no conclusive single factor or known set of factors that causes transsexuality, regardless of whether sexologists questioned or reproduced pathologising concepts of transsexuality (Becker et al. 1997: 147; Sigusch 2007: 351). Most of the sexologists did not refer to aetiology at all (e. g. Clement/Senf 1996; Langer/Hartmann 1997; Gauruder-Burmester/Popken/Beier 2006; Seikowski 2007), since hypotheses on biological causes have so far been either falsified or proven unverifiable, and psychosocial causes have turned out not to be generalisable (Bosinski 2000: 72; Rauchfleisch 2006: 20). Second, the debate in sexology from the 1990s to 2010 placed more emphasis on pragmatic issues, such as aspects related to the overall concept of treatment (e. g. Clement/Senf 1996; Kockott 1996; Becker et al. 1997; Beier/Bosinski/Loewit 2005; Gauruder-Burmester/Popken/Beier 2006; Sigusch 1996; 2007), specific aspects in psychotherapy (e. g. Meyenburg 1992; Bosinski 1994; Laszig/Knauss/Clement 1995; Clement/Senf 1996a; Pfäfflin 1996; Eicher 1996; Rauchfleisch 2006; Seikowski 2007; Seikowski et al. 2008) and on conceptual aspects, such as the issue of depathologisation (Sigusch 1991; 1991a; 1992; 1995; 1995a; Hirschauer 1992; Lindemann 1992; Augstein 1992; Langer 1995).

3 | For a comprehensive discussion of somatic approaches to transsexuality in Western countries, see Nieder/Jordan/Richter-Appelt 2011).

4 | Sigusch developed his concept of detotalisation in the first part of his article »*Die Transsexuellen und unser nosomorpher Blick*« (Transsexuals and our nosomorphic perspective). He discussed three issues. First, he critically reflected upon the dynamics between sexology and psychotherapy in the preliminary stages of the establishment of the programme of treatment in Frankfurt (Sigusch 1991: 225-230). Second, he discussed the resurging debate on psychotherapy vs. surgery in the 1980s (ibid: 230-240), which was sparked by Meyenburg and Ihlenfeld's report on successful psychotherapeutical treatment of trans individuals in the United States (Meyenburg/Ihlenfeld 1982). Third, Sigusch compared the current pathologisation of transsexuality with the pathologisation of individuals engaging in same-sex erotic activities in the 19th century (Sigusch 1991: 247).

attempts in medicine to find a single ›cause‹ to explain a complex and unusual social phenomenon. His criticised this kind of research for two reasons.

First, Sigusch objected to the unidimensionality of such an undertaking. He argued that there was no »pure« natural scientific model of sexual or gender identity that could unambiguously prove a direct effect of genes or hormones. In his view, sexual desire, sexual preferences, gender roles or gender identities could not be stripped from the cultural contexts that shape them. He held that just as human beings would not even exist biologically without society, nor would social human beings exist without genes, hormones and a brain. Sigusch suggested approaching complex phenomena by taking into consideration interrelations and interdependencies (Sigusch 2007: 352).

Second, Sigusch criticised the pathologising impetus of aetiological research on transsexuality. Alarmed by the similarity between the pathologisation of individuals featuring same-sex desires in the 19th century and the current medical understanding of trans individuals (Sigusch 1991: 247),[5] Sigusch uncovered the logic that rendered possible the representation of homosexuality as a disease earlier on and the current pathologisation of transsexuality. According to Sigusch, this logic operates to the effect that medical science pathologises phenomena when properties assumed to be linked by nature fall apart (ibid: 248). Hence, he cautioned against a scientific attitude that,

> subjects all manifestations in life to its criteria and its theories, against the bad habit of psychological medicine to psycho-pathologise everything that appears offensive and incomprehensible, against the bad habit of somatic medicine to reduce highly complex phenomena to possibly one tangible cause, in short, against the *nosomorphic perspective* […]. (Ibid: 249 f.)

However, he anticipated that an aetiopathogenetic approach would continue to produce theories of transsexuality »regardless of the waste of time, nerves or money, the strain on the patients. As soon as a new product of a gene emerges, it will not be shied away from« (Sigusch 1991a: 311), especially since »[n]othing appears to be more reassuring to the reified medical awareness than a noxa of which one believes that one can assume that it is concrete and immediately effective« (ibid: 311).

5 | Sigusch observed that v. Krafft-Ebing perceived of the ›urning‹ in Psychopathia sexualis (1886) in the same way contemporary professionals understand transsexuality (Sigusch 1991: 247).

Somatic approaches

Indeed, various disciplines in medical science continued to search for a ›noxa‹ that might cause transsexuality. In the 1990s, e. g. the endocrinologist Dörner continued to refine his thesis that prenatal hormone imbalances cause transsexuality during a particular phase in the differentiation of the human brain. Based on results of experiments on rats and clinical examinations of human beings, Dörner identified disorders in the adrenal steroid biosynthesis, in particular 21-hydroxylasis and 3ß-hydroxysteroid-dehydrogenasis deficiencies during the second trimenon of pregnancy as factors that organise the »sex centres«[6] in the brain to induce homo- and transsexuality (Dörner 1995: 22-25).

According to Dörner, the combination of a genetically, gonadally and genitally male foetus with a neuronally feminised brain develops when the testicular androgen secretion in a male foetus is inhibited due to stress and/or a maternal 21-hydroxylasis deficiency or a fetal 3ß-hydroxysteroid-dehydrogenasis deficiency during the organisation of the brain. Either endocrinological situation triggers the overproduction of adrenal androgens. The latter are aromatised to estrogen and conjugated to estrogen sulfate in the placenta. Estrogen sulfate inhibits the testicular production of androgens. Dörner suggested that the person's brain would be more or less feminised, resulting in a »female sexual orientation« and/or »female gender role behaviour« in these males (ibid: 29).

According to Dörner, the determination of the gender identity constitutes the fifth and last phase[7] of the sex differentiation in human beings. The consciously experienced understanding of oneself as a man or woman is primarily

6 | According to Dörner's observations, sexual orientation and gender role behaviour are immediate effects of endocrinological processes at a specific time of prenatal brain development. The sex centres control typically female or male patterns of gonadotropin secretion. The sex centres are organised by estrogens only (Dörner 1995: 27). The mating centres control the person's sexual orientation. These centres are organised by estrogens and androgens alike. The gender role centres control typically female and male gender role behaviour and are exclusively organised by androgens (ibid: 28).
The critical phases for the sex differentiation of the brain are not identical. However, they overlap (ibid: 27). Dörner's findings suggest that both the absolute sex hormone level as well as the ratio of androgens to estrogens affect the sexual differentiation of the brain in these critical phases, allowing for »various combinations of, or dissociations between the sex hormone-dependent development of the gonadotropin secretion, sexual orientation and gender role behaviour« (ibid: 28).

7 | This phase is preceded by four others. The first is genetic and is determined by the presence of an x or y chromosome in the semen. The gonadal sex is determined by the sex-determining gene. The genital sex is determined by the Müllerian-Inhibitory-Substance (MIS) and in particular by androgens during the second to the fourth month of pregnancy. Neuronal sex, i. e. the typically female or male gonadotropin secretion pattern,

determined by the prenatal, sex-hormone induced differentiation of the somatic and neuronal sex and depends on pre- and postnatal psychosocial influences (ibid: 28).

Dörner's search for an aetiology of homosexuality[8] and transsexuality was not value-free. Homosexuality and transsexuality featured as results of biological processes largely deemed deficient as opposed to seemingly unremarkable hetero and cis developments. Heteronormativity and the naturalised gender binary with stereotypical, universal and ahistorical understandings of the exclusive categories ›man‹ and ›woman‹ formed the unquestioned background of his research as well as the assumption that biological, or to be precise, neuroendocrinological processes immediately affect the social.

Moreover, his research on the aetiology of homosexuality and transsexuality was not non-directional either. While he believed that the value of such findings to sexology would continue to decriminalise, dediscriminate and depathologise homo- and bisexuality, he placed his findings on the alleged aetiology of transsexuality in a ›reparative‹ and preventative context:

> In case further neuroendocrinological and genetic examinations confirm our results, it is possible to assume that the 3ß-HSD and the 21-hydroxylasis deficiency not only represent a predisposition for the development of transsexualism, but for hyperandrogenous anovulation and idiopathic oligospermia, too. This should in future be in part recognisable via neonatal or prenatal diagnostics. Hence, severe gender identity disorders or the most frequent forms of infertility in both sexes would in principle be at least in part accessible for treatment at an early stage or for prevention. (Ibid: 29)

The assumption that either particular prenatal, and to a lesser degree postnatal hormonal constellations condition transsexuality informed several somatic approaches. As a result, various parts of trans bodies were scrutinised for an either unusual hormonal status or traces of potential prenatal endocrinological peculiarities. Among these were studies by Bosinski, Schröder, Arndt, Heidenreich and Wille (1995), and Schneider, Pickel and Stalla (2006).

Based on anthropomorphic measurements considered sex dimorphic in fifteen hormonally untreated ftm trans subjects, nineteen ›healthy‹ female, i.e. ciswomen, and twenty-one ›healthy‹ male controls, i.e. cismen, Bosinski, Schröder, Arndt, Heidenreich and Wille investigated into the relationship between physical constitution and trans identity (Bosinski et al. 1995: 326 f.). While the researchers could not detect any differences between ciswomen and

sexual orientation and gender role behaviour are organised by sex hormones and in part neurotransmitters as mediators of the hormonal effects (Dörner 1995: 28).

8 | For a critique of Dörner's concept of homosexuality, see Bock von Wülfingen 2007: 65.

transmen in terms of absolute body measurements,[9] a comparison of physical proportions suggested contradictory results, which Bosinski and his colleagues interpreted to be overall leaning towards an »intermediate« or »masculine« side (ibid: 333).[10]

Bosinski, Schröder, Arndt, Heidenreich and Wille tentatively concluded that ftm transsexual subjects and ciswomen differed with regard to a few body measurements and proportions that allegedly establish sex dimorphism. They equally tentatively suggested that the differences reveal that ftm trans individuals tend to match the parameters of the gender they identify with (ibid: 333 f.).

As the researchers readily admitted, the research design was flawed. First, the sample was too small to produce representative data. Second, the groups were too heterogeneous. While there were e. g. two blue collar workers each in the control groups, the trans group hosted six blue collar workers. As the research team conceded, different types of labour, diets and exercising shape bodies in different ways (ibid: 334).

Bosinski, Schröder, Arndt, Heidenreich and Wille's study also constitutes an episode in the cultural production of sex dimorphism and the naturalisation of an apparent link between a person's genitalia and gender identity. The researchers e. g. maintained an understanding of two polarised sexes, despite the fact that seven ciswomen's bodies were reported to have transgressed the values for females on the Thanner scale (ibid: 329). By contrast, variations in ftm body measurements were emphasised, hence accentuating the ›abnormality‹ of transsexuality and implying the ›health‹ of gender identities that appear to follow from a particular genital status at birth.

Based on an anthropomorphic study, the neuroendocrinologist Stalla and his research team believed to have found a biological explanation for the development of transsexuality in mtf trans individuals. The research team measured the 2D:4D finger length ratios of more than 100 trans individuals.[11] The researchers found out that in mtf transsexual subjects the ratio was higher than in cismen. The ratio corresponded with that of heterosexual women. Schnei-

9 | On average ftm trans subjects and ciswomen in this non-representative study were smaller, had less weight, more narrow shoulders and waists, shorter and thinner upper and lower arms and radioulnar diameters than cismen (Bosinski et al. 1995: 329).

10 | Indices such as the androgyny score by Thanner and the body mass index indicated that in five of sixteen cases ftm trans individuals disposed of more male than female proportions, whereas some proportions such as the shoulder pelvis index suggested more female proportions in ftm trans subjects than in ciswomen (ibid: 330-333). The Thanner scale is used to distinguish between males and females (ibid: 329).

11 | Some researchers assume that the value between the finger length ratio indicates the prenatal androgen situation in the phase when fingers develop. High levels of testosterone are deemed to result in longer ring fingers in relation to index fingers.

der, Pickel and Stalla concluded that mtf transsexuals are more likely to have experienced lower intrauterine androgen levels than average cismen (Schneider/Pickel/Stalla 2006: 268).

Apart from the intriguing simplicity of the sociobiologistic line of argument, the usefulness of data on finger length ratios becomes questionable when compared with research in this field elsewhere. E.g., in a study of 60 individuals each per group, Rahman and Wilson in the UK related finger length ratio to sexual orientation. Their findings suggest that homosexual males and females show significantly lower 2D:4D ratios than heterosexual males and females (Rahman/Wilson 2003: 288).

Taking for granted for the sake of the argument an immediate link between sex steroids and social behaviour or identity, respectively, the comparison of the aforementioned finger-length-ratio studies raises a few questions. When does a particular finger-length ratio indicate a case of transsexuality and when does it indicate homosexuality? How do finger length ratios feature in lesbian as opposed to heterosexual ftm subjects? How does a change in sexual orientation fit together with rather stable finger lengths?

Moreover, when taking further studies on finger length ratios into consideration, findings are contradictory. While Rahman and Wilson held that homosexual males and females show significantly lower 2D:4D ratios in comparison to heterosexual controls, Lippa's findings suggested that 2D:4D finger length ratios in cismen are related to sexual orientation, whereas they are not related to ciswomen's sexual orientation (Lippa 2003: 179).[12] Findings in studies on finger length ratios seem to vary from study to study.

Multi-causal approach

In the light of the deficiencies of biological[13] and psychological[14] approaches and based on a discussion of various studies on the gender identity of intersex individuals (Bosinski 2000a), Bosinski suggested that gender identity development

12 | In Lippa's study homosexual men were said to feature ›female‹ finger length ratios.

13 | Bosinski detected four major flaws in biological approaches to transsexualism. First, being a human feature, gender identity cannot be derived from animal experiments. Second, species vary. Therefore, results from experiments on rats cannot be applied to other species. Moreover, biosocial aspects influence sexual and social behaviour. Third, biological approaches cannot explain why the overwhelming majority of persons with congenital adrenal hyperplasia (CAH) do not develop a ›gender identity disorder‹ or homosexuality. Finally, endocrinological findings in transsexual individuals are contradictory (Bosinski 2000: 72).

14 | According to Bosinski, psychological approaches have two drawbacks. First, psychological assumptions are based on subjective interpretations of individual cases, which cannot be empirically verified. Second, while specific factors might apply to

is determined by a »highly complex, time-dependent biopsychosocial complex of conditions« (ibid: 96). He argued that further research into transsexuality was required to analyse biological and psychological factors in the same sample of individuals, pay more attention to physical aspects in untreated transsexual individuals, create sufficiently large ›healthy‹ control groups in studies and supplement group differences with case studies (Bosinski 2000: 73).

With these ideas in mind, Bosinski conducted research on the aetiology of female-to-male transsexualism based on a sample of sixteen untreated female-to-male transsexual individuals and a control group group of nineteen ciswomen and twenty-one cismen. He applied several methods, including standardised personality tests and depth interviews covering issues such as the family situation, childhood and adolescent gender behaviour, school history, psycho- and somatosexual development and the development of gender identity (ibid: 73). Moreover, he conducted anthropometric, endocrinological and transvaginal ultrasound examinations (ibid: 74).

With regard to gender-specific socialisation in childhood and adolescence, Bosinski's findings suggest that ftm transsexual individuals experience significantly more asymmetrical family structures, either identify with their fathers like the cismen in the control group do or experience the loss of their fathers as traumatic (ibid: 74). Furthermore, he observed that ftm transsexual persons engage in masculine playing activities like the male cis controls and profoundly dislike ›girls' clothing‹ (ibid: 75).

Bosinski's findings on the psychosomatic and psychosexual development suggest that the vast majority of ftm transsexual individuals experience menstrual problems (ibid) and perceive chest development as traumatic (ibid: 76). They masturbate as early and frequently as do cismen in the control group (ibid: 76 f.). All participants of the study lived as heterosexuals. Incidences of sexual abuse did not feature significantly higher in any group (ibid: 77).

The endocrinological findings in this study revealed significantly higher levels of T and A4 levels in female-to-male transsexual individuals than in female cis control subjects. However, there was no difference between these groups with regard to DHEAS, SHBG, LH and FSH. After stimulation with ACTH, the cortisol precursors 17 OHP and OHPREG happened to be higher in ftm transsexual individuals than in ciswomen in the control group (ibid). Moreover, Bosinski diagnosed more non-classical CAH and higher rates of PCOS in ftm transsexual individuals than in female cis controls (ibid: 78).

Based on the results of his psychological explorations, physical examinations and on the hypothetical assumption that hyperandrogeny in adults mirrors pre- and perinatal hormonal imbalances (ibid: 79), Bosinski developed a

transsexual individuals more frequently, psychological approaches cannot explain why children who experience similar influences do not develop transsexualism (ibid).

›hypothetical developmental model for ftm transsexualism‹, which he divided into a childhood and a pubertal phase. According to this model, the transposition of an ftm transsexual person's gender identity is established in childhood due to misidentification. As early as in childhood, hyperandrogeny stimulates behaviour stereotypically associated with boys. Masculine behaviour leads the child to consider itself more a boy than a girl (ibid: 80). The boyish behaviour causes the child's environment to reinforce the child's masculine understanding of self (ibid: 81).

According to Bosinski, puberty marks the completion of this development. He argued that the ftm transsexual individual develops an aversion to specifically female aspects of his body, since a female puberty does not match the adolescent's self-categorisation (ibid: 81). Moreover, the in part masculinised physical appearance during and after puberty contributes to the »illusionary« self-understanding of being similar to boys, and the masculine habitus causes the social environment to refrain from encouraging femininity. Furthermore, hormonal imbalances produce physical discomfort in the female body. Finally, the developing homosexual orientation matches the individual's feeling of being a man, but does not fit the expectations associated with the role as a woman (ibid).

As several of the somatic approaches mentioned earlier on, Bosinski's multi-causal concept is premised upon normative understandings of gender and sexuality, which render transsexuality an anomaly. Seen from such a perspective, factors assumed to play into the development of transsexuality are necessarily deemed deficient compared to cis developments. Hence, when the social environment reinforces behaviour culturally associated with masculinity in a female-bodied child, Bosinski evaluates such a reaction as »inappropriate« (ibid: 82). Similarly, Bosinski frames the fact that trans children do not accept that a person's gender cannot be changed as a deficiency (ibid: 80), rather than e. g. the product of a creative and/or questioning mind.

Moreover, Bosinski's model contains a decidedly heterosexual bias. This applies to the sample as well as to the explanatory range of his concept. Gay transmen are not conceptualisable in his model for a biopsychosocial approach to ftm transsexuality.

Bosinski's multi-causal concept shares with somatic approaches the assumption that pre and/or perinatal hormonal imbalances form the biological basis of transsexuality. Since this hypothesis has so far not been verified, the entire concept necessarily remains speculative.

3.1.2 Reconceptualising transsexuality

While the diversification of trans subjects resounded in the terminology used for unusual gender identities in the DSM-IV,[15] sexologists in Germany with few exceptions continued to use the term ›transsexuality‹ or variations of the term throughout the 1990s and the first decade of the 21st century. At the same time, clinical pictures of transsexuality reveal that sexologists more or less agreed that transsexual individuals were a heterogeneous group. However, sexologists were deeply divided over the issue of whether transsexuality constitutes a psychopathological state or a variant of gender expression.

Terminology, definitions and concepts from the 1990s to 2010

While pathologising concepts generally classified transsexuality as a ›gender identity disorder‹, sexologists in Germany, unlike their U.S. colleagues, clung to the term ›transsexuality‹ or variations of the term. Moreover, despite the fact that the majority of sexologists employed the terms ›transsexuality‹ (e. g. Sigusch 1991a; 2007; Clement/Senf 1996; Becker et al. 1997; Seikowski 2007; Seikowski et al. 2008) or ›transsexualism‹ (e. g. Langer 1995), the meanings were not necessarily identical.

Sigusch for instance did not define the term. His concept of ›transsexuality‹ is marked by two characteristics. First, as the title of the chapter »*Transsexuelle Entwicklungen*« (Transsexual developments) in the 2007 edition of his sexological handbook suggests, he stressed the diversity of transsexual people's lives. Second, he used the terms imprecisely. While he e. g. occasionally dis-

15 | In the DSM-IV which was published in 1994 and revised in 2000 (DSM-IV-TR), the APA abandoned the term ›transsexuality‹ in favour of ›gender identity disorders‹ (GID). The APA decided to drop the diagnosis of transsexualism in the DSM-IV in order to sever the clinical diagnosis of gender identity disorder from the criteria for sex reassignment. Moreover, the committee acknowledged different developments of transsexual individuals' gender identities and sexual orientations. Another reason for replacing ›transsexualism‹ with ›gender identity disorder‹ was because of the lack of clear boundaries between persons considered gender dysphoric with and without the desire to transition physically (Langer 1995: 266).

The DSM-IV distinguished between symptoms in childhood on the one hand and adolescent and adult manifestations on the other (APA 1994: 533 f.). Among the diagnostic criteria for a GID in the latter was a »strong and persistent cross-gender identification« (ibid: 532) and »evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex« (ibid: 533). Furthermore, intersexuality was excluded from a diagnosis of gender identity disorder. Finally, the person needed to display clinically significant discomfort or impairment at work, in social situations, or other important areas of life (ibid).

tinguished between transsexuality and transvestism (e. g. Sigusch 1991a: 328), he used the terms ›transsexuality‹ and ›transgender‹ interchangeably in other instances (Sigusch 2007: 347 f.).

Unlike Sigusch, Clement and Senf, and the authors of the German Standards defined transsexuality narrowly. According to Clement and Senf,

> [t]ranssexuals are conscious of belonging to the other gender. The core of the transsexual experience is the suffering due to the discrepancy between the sexed body and the subjective sense of gender belonging. They perceive the sex realistically, however, they feel it is subjectively wrong. This discrepancy is absolute in the sense that the subjective sense of belonging to the other gender is without any doubt experienced as an unchangeable identity. Accordingly, transsexual persons try to align their physical features with their subjective experience. They do so by adopting the outer appearance (clothing, haircut) and the typical behaviour of the other gender and by undergoing hormonal and surgical treatment. (Clement/Senf 1996: 1)

However, they added that transsexual subjects shape their gendered selves individually (ibid 1996a: 19).

By contrast, the authors of the German Standards entail a more rigid, homogenising and pathologising concept of transsexuality than the aforementioned sexologists. The Standards hold that transsexual individuals strive to approximate the physical appearance according to their respective gender identity as much as possible:

> Transsexuality is marked by the permanent inner certainty of belonging to the other gender. This includes the rejection of the physical features of the innate sex and the role expectations that are linked to the biological sex as well as the desire to adapt the physical appearance to the gender identity as much as possible, using hormonal and surgical measures, and to live socially and legally recognised in the desired gender. (Becker et al. 1997: 147)

The definition proposed by the German Standards does not leave space for individual modes of shaping gender.[16] In addition, they classify transsexuality as a gender identity disorder: »According to currently valid diagnostic classification schemes, transsexuality is considered a special form of gender identity disorder.« (Ibid)

16 | By contrast, Becker suggested that the German Standards allow for individual solutions (Becker 1998: 157). Nevertheless, the German Standards consider their outline of a transition normative as the following quotation suggests: »The following Standards of Treatment and Diagnostic Assessment of Transsexuals are minimum requirements. Deviations from these Standards need to be justified in the patient's health record in writing.« (Becker et al. 1997: 148)

Langer decided to continue using the term ›transsexuality‹ after discussing the shortcomings of the term ›gender identity disorder‹. He argued that abandoning the terms ›transsexualism‹ and ›transvestism‹ would not solve the problems they denote. Moreover, he claimed that transsexuality would no longer be visible as an extreme form of gender dysphoria. He feared that the indication for sex reassignment surgery could become arbitrary (Langer 1995: 267).

However, the term ›transsexuality‹ was also contested. Seikowski and Rauchfleisch e. g. suggested exchanging the term ›transsexuality‹ for ›transidentity‹ (›*Transidentität*‹). In his critique of the German Standards, Seikowski mentioned two reasons for dropping the conventional psycho-medical term. First, he believed ›transsexuality‹ implies a sexual disorder (Seikowski 1997: 352).[17] Second, he claimed that trans individuals were more likely to identify with the term ›transidentity‹ (ibid: 352 f.).[18] Despite suggesting a change of terminology, Seikowski rarely used the term ›transidentity‹ in his studies. With few exceptions,[19] he used the term ›transsexuality‹ (Seikowski 2007; idem et al. 2008).

Unlike Seikowski, Rauchfleisch used the term ›transidentity‹ consistently in his handbook on psychotherapy with trans individuals. Rauchfleisch developed his preference for ›transidentity‹ in a discussion of the terms ›transsexuality‹ and ›transgender‹. Like Seikowski, he considered the term ›transsexuality‹ confusing. Rauchfleisch argued that identity is the issue and not sexuality when dealing with the phenomenon (Rauchfleisch 2006: 21). However, he also favoured the term ›transidentity‹ over ›transsexuality‹, because the former signifies a departure from the pathologising connotation of the latter (ibid: 22 f.).

Rauchfleisch favoured ›transidentity‹ over ›transgender‹ when discussing issues that are associated with the medical term ›transsexuality‹. He considered the term ›transidentity‹ to be more specific than the term ›transgender‹. ›Transgender‹ constitutes an umbrella term for all individuals who are not sufficiently, or not at all described by the gender they were assigned to. Con-

17 | However, ›sex‹ in ›transsexuality‹ does not refer to sexuality but to *sexus*, the body.

18 | Seikowski referred to the umbrella organisation Transidentitas e. V., which operated from the mid-1980s to the mid-1990s. However, it is for two reasons hard to quantify trans individuals' preferred self-designations. First, there are no studies to this effect. Second, self-definitions and preferred terminology vary historically. The trans movement in Germany has changed rapidly over the past decades. The term ›transidentity‹ seems to have been rather popular among trans individuals in the mid- to the end of the 1990s as e. g. the name of the national lobby organisation *Deutsche Gesellschaft für Transidentität und Intersexualität* (German Association for Transidentity and Intersexuality; dgti e. V.) suggests. See chapter 3.2.2 for the use of terminology in contemporary trans lobby organisations.

19 | See e. g. Seikowski et al. 2008: 137.

sequently, the category ›transgender‹ includes transsexual individuals, transvestites, cross-dressers of all kinds, drag kings and queens, transwomen and transmen, whereas the latter are not necessarily identical with transsexual individuals (ibid: 21f.).

Unlike Rauchfleisch, Becker, Berner, Dannecker and Richter-Appelt suggested using the term ›transgender‹ in their statement on the reform of the Transsexual Act on behalf of the DGfS. Like Seikowski and Rauchfleisch, they argued that transsexuality is foremost a gender identity and gender role problem rather than an issue concerning sexuality (Becker et al 2001: 259). However, by arguing that the Transsexual Act should apply to transsexual individuals only (ibid), they implicitly suggested that ›transsexuality‹ can be distinguished from other trans manifestations.

Beier, Bosinski and Loewit developed further terminological variants without however abandoning the term ›transsexual‹. They defined persons with a ›transsexual gender identity disorder‹ as individuals who more or less reject their birth gender, its physical characteristics and the gender role expectations that society links to their sex. They permanently consider themselves as members of the other sex and strive to achieve its physical features by resorting to medical measures and use legal declarations in order to live and be socially accepted in this role (Beier/Bosinski/Loewit 2005: 365).

Beier, Bosinski and Loewit did not consider every deviation from socially sanctioned understandings of gender pathological.[20] They considered gendered conditions pathological that require massive and irreversible medical and surgical interventions. The latter necessitate the diagnosis of an illness and a scientifically founded indication (ibid: 368). They subsumed transsexuality which they understood to be the most severe form of gender identity disorder under those gender manifestations they deemed pathological (ibid: 365).

Beier, Bosinski and Loewit distinguished between ›biological men with a transsexual gender identity disorder‹ (formerly ›male-to-female transsexuals‹) and ›biological women with a transsexual gender identity disorder‹ (formerly ›female-to-male transsexuals‹) (ibid: 368).[21] While any term for a gender start-

20 | Beier, Bosinski and Loewit did not classify individuals as sick who transgress conventional gender norms without medical and surgical means. They considered transgender, queers and drag kings and queens among the latter (Beier/Bosinski/Loewit 2005: 367). However, these categories cannot at all times be neatly distinguished from one another.

21 | Beier, Bosinski and Loewit's terminology and typology of transsexual individuals is based on earlier work by Bosinski. His 1994 study on the classification of gender identity disorders in men, i. e. males who identify as women, constituted an initial attempt to systematise transsexual individuals according to sexual orientation (Bosinski 1994). By 2003, Bosinski had developed a comprehensive model in which he added ›biological

ing with the prefix ›trans‹ while leaving cisgenders unmarked suggests an original link between a person's morphology and gender identity, no terminology introduced before so vehemently reveals the naturalising effects of the gender binary and the express will to police the borders of the hegemonic gender regime than that of Beier, Bosinski and Loewit.[22]

As the terminology and definitions suggest, sexological perspectives on transsexuality varied from understandings as unusual but non-pathological to notions of transsexuality as a pathological state of mind. Concepts that depathologised transsexuality were rare throughout the 1990s and the first decade of the 21st century, and pathologising understandings prevailed.

With his concept of depathologisation, Sigusch wrested transsexuality away from the realm of illness. First, he self-critically highlighted the process of ›othering‹ individuals who deviate from normative understandings of gender and sexuality in sexology by revising the cardinal symptoms he and his colleagues Meyenburg and Reiche had put forward in 1979 (Sigusch 1991a: 317-327). Inspired by the characteristics v. Krafft-Ebing attributed to individuals with a ›contrary sexual feeling‹ in Psychopathia sexualis (1886), Sigusch conceded that the cardinal symptoms he and his colleagues had formulated were characterised by medical totalisation and clinical pathologisation (Sigusch 1991a: 318). In his view, the eleventh cardinal symptom for instance mirrored at least as much his situation and defence as the patients' situation and defence at the time (ibid: 319).

Second, he problematised cissexuality and related cissexualism and transsexualism to each other (ibid: 329-335). He argued that masculinity and femininity required of every person to limit him- or herself either to the one or to the other side. He questioned the seemingly self-evident link between a male person's gender identity as a man and a female person's identity as a woman (ibid: 333). Since it is impossible to escape compulsory gendering, transsexualism and cissexualism necessarily are relational categories:

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women with a transsexual gender identity disorder‹, i. e. females who identify as men, to his systematic and detailed account of transsexual developments (Bosinski 2003).

22 | From a perspective that considers every gender expression equally valid, Beier, Bosinski and Loewit's terminology is ethically and logically questionable. Calling trans individuals ›men‹ or ›women‹ based on their assigned gender is disrespectful, if it is known that they do not identify as such. Moreover, while ›woman‹ or ›man‹ signify a gender role or gender identity, ›female‹, ›male‹ and ›intersex‹ signify socially generated classifications of the human body. The terms ›biological man‹ or ›biological woman‹ do not make sense, unless one subscribes to a perpective that a body produces a gender role or identity.

> The obsessiveness of transsexuals, their ›gender delusion‹ is an individual reflex to compulsory social gendering and the collective gender delusion of the normal, which continues to be perfectly concealed in most people. The stronger the one, the more rigid the other. (Ibid: 334 f.)

While Sigusch's concept of depathologisation met with resistance in German sexology of the 1990s,[23] the Swiss psychotherapist Rauchfleisch took up his concept again in 2006. Rauchfleisch suggested transidentity ought to be considered a variant of the (cis) norm (Rauchfleisch 2006: 8). He held that transidentity was not linked to any psychiatric disorders. Rather, depressions, adjustment disorders, addictions and suicidal crises often occur as reactions to the difficult social situations transidentified individuals experience (ibid: 48).

Sigusch and Rauchfleisch's concepts differ with regard to the motivation, the significance that is accrued social discrimination and the social vision. While Sigusch admitted that the prospect of no longer having to decide on irreversible surgical measures motivated him to develop his concept of depathologisation (Sigusch 1991a, 329),[24] Rauchfleisch mentioned several reasons for favouring a depathologising concept over a pathologising one. One of his reasons was pragmatic. Rauchfleisch suggested that it was easier to differentiate between primary and reactive disorders in transidentified individuals, if transidentity was no longer pathologised (Rauchfleisch 2006: 49). Moreover, transidentified individuals cannot be sufficiently considered partners in a therapeutic setting as long as they are considered sick (ibid: 50). Second, abandoning a pathologising concept would also strengthen transidentified individuals' self-confidence

23 | Langer e. g. insisted on the »clinical perspective«, in particular since he believed that sex reassignment surgery had increasingly become a solution for various »gender identity problems« (Langer 1995: 265).

24 | Sigusch argued that sex reassignment surgery was only justified, if transsexual individuals were not considered sick and if they were as »free« as possible to decide on these interventions (Sigusch 1991a: 329). Augstein commented on Sigusch's motivation that anybody who feels uncomfortable about deciding on sex reassignment surgery should leave it (Augstein 1992: 259).

Lindemann criticised Sigusch's assessment of a reversal of sex reassignment surgery as a »catastrophe«. She suggested that Sigusch feared »gender disorder« (Lindemann 1992: 267). In her response to the critique of the German Standards, Becker countered Lindemann's undramatic perspective on a »double transsexuality«. Becker argued that repeated changes of gender were only possible without surgical measures (Becker 1998: 162). I suggest that whether a reversal of a physical transition amounts to a catastrophe or not depends upon several factors, such as, e. g. a realistic assessment of surgical possibilities and/or a person's ability to integrate the episode in the reassigned sex and gender into their own life.

and self-esteem (ibid: 8). In addition, he argued that the depathologisation of transidentity would open up perspectives on gender discourse in the wider society (ibid).

While the significance Sigusch accrued to social discrimination in trans individuals' lives is uneven throughout his concept of depathologisation,[25] Rauchfleisch consistently acknowledges forms of social discrimination that impinge on transidentified individuals' lives. He noted that, »[t]he spectrum of *discrimination and exclusion* ranges from titillating comments in private and public to non-consideration of applications for flats and workplaces to manifest violence« (ibid: 87 f.). Like Sigusch (1991: 235), Rauchfleisch explained the social discrimination of transidentified individuals with the irritation they cause in cis subjects. Based on Lindemann's elaborations, Rauchfleisch argued that transidentical individuals shatter the certainty that there are two (and only two) gender categories. Rauchfleisch built upon Hirschauer's insights when he suggested that representatives of norming instances, such as psychologists, psychiatrists, endocrinologists, jurists, etc. mobilise normalising strategies. To define transidentity as a disorder is one such means of normativity in order to protect the normality of the gender binary and to fend off irritation (ibid: 141 f.).

While Sigusch's social vision ideally allows for a pluralisation of genders and sexualities, if social arrangements allowed for more genders than men and women (1991a: 335) and provided transsexual individuals were not a »transitory minority« (ibid: 329), Rauchfleisch suggested that transidentity poses three challenges to society. First, the phenomenon invites radically questioning the gender dichotomy and the categorisation of genders. As a result it becomes possible to accept that there are not only two genders and that there is space for individual life schemes (Rauchfleisch 2006: 146) Second, transidentity suggests that the distinction between sex and gender is questionable. He concluded that equality could be achieved, if society was to return to a ›one-sex-model‹ (ibid: 147 f.).[26] Third, transidentity renders visible that sex is socially constructed in the sense that the meanings allocated to physical features are socially determined. Rauchfleisch suggested that transidentity could become a paradigm for the recognition of equality (ibid: 148). His insight that gender is socially

25 | His attitude oddly shifted from a scathing critique of the medicocentric perspective, which debases transsexual individuals, to instances when he seemed unaware of effects of social discrimination, to discriminatory statements on trans individuals.

26 | Rauchfleisch idealises the one-sex-model. This type of gender regime did not polarise genders to the extent the binary gender system does. Therefore, it tolerated feminine men, masculine women, and within limits, hermaphrodites. However, the gender model was nonetheless androcentric. The male became the norm of the human, whereas females featured as lesser (Laqueur 1992: 10). Hence, the one-gender-model cannot serve as a model for gender equality.

constructed raises the question why he did not enquire into the construction of cis instead of using transidentity as a paradigm for the recognition of equality.

Pathologising concepts of transsexuality can be subdivided into two categories. Representatives of one group considered transsexuality a gender identity disorder without psychiatric cocommitants. Proponents of the other category insisted that transsexuality was a disorder accompanied by several other psychiatric disorders.

Seikowski suggested that transsexuality was a gender identity disorder without cocommitants. Despite considering transsexuality a disorder, he disagreed with the classification of transsexuality as a psychiatric condition. While Sigusch claimed that, »[t]he crazy thing about transsexualism is that transsexuals are not crazy« (Sigusch 1991a: 331), Seikowski, Gollek, Harth and Reinhardt delivered evidence for this thesis in an extensive quantitative study. He and his colleagues examined 164 transsexual subjects, using the Borderline Personality Inventory (BPI), the Freiburg Personality Inventory (FPI) and the Questionnaire for the Assessment of One's Own Body (*Fragebogen zur Beurteilung des eigenen Körpers*; FbeK). The objective of their study was to find out whether there was, as several sexologists suggested, an increased incidence of borderline personality disorders in transsexual individuals (Seikowski et al. 2008: 141).

Major findings of the study were that 88 % of the individuals examined did not feature any symptoms associated with a borderline disorder (ibid: 139 f.). Moreover, the researchers could not detect any further psychopathological symptoms, which sexologists commonly associated with transsexuality (ibid: 140).

The group of sexologists that claimed that transsexuality was a gender identity disorder with additional psychiatric abnormalities was not homogenous. While Pfäfflin, and Clement and Senf agreed with Seikowski that the diagnosis of transsexuality did not justify the general assignment to a borderline disorder,[27] they observed several psychiatric cocommitants, such as depressions, suicidality, and a history of drug abuse (Clement/Senf 1996: 5 f.; Pfäfflin 1996: 29). However, Clement and Senf suggested that in principle the examination of transsexual individuals did not require any other diagnostic procedure than with other patients (Clement/Senf 1996: 5).

Other sexologists however pathologised transsexuality to an extent that is reminiscent of the pathologisation in the 1970s. Langer and Beier, Bosinski and Loewit assumed that transsexual individuals were frequently ›abnormal‹ in psychopathological terms. In a study consisting of eleven ftm and twenty mtf transsexual individuals, Langer classified one third of the probands as

27 | Pfäfflin suggested that the diagnostic allocation of transsexuality to borderline personality disorders impedes therapeutic work (Pfäfflin 1996: 29).

disturbed (Langer 1995: 271). Similarly, Beier, Bosinski and Loewit described transsexual individuals as

> internally torn, subdepressive, emotionally unstable and suicidal. Data on auto-aggressive actions that range from excessive alcohol abuse over self-mutilation (e. g. constriction of the breasts or the penis) to suicide, can regularly be found [...] in the older literature. The social marginalisation these patients experience (also due to their not always harmonious appearance in the role of the desired gender) amplifies the distress. (Beier/Bosinski/Loewit 2005: 365)

According to Beier, Bosinski and Loewit, cocommitant disorders are unevenly distributed among trans individuals. They distinguished between biological women with a transsexual gender identity disorder and androphilic and gynophilic biological men with a transsexual gender identity disorder. According to Beier, Bosinski and Loewit, biological women with a transsexual gender identity disorder present a whole array of variations, ranging from inconspicuous to borderline personalities (ibid: 371). They considered androphilic biological men with a gender identity disorder psychopathologically inconspicuous except for the odd depression and dependent personality disorder (ibid: 374). By contrast, they claimed that gynophilic biological men with a gender identity disorder were more apt to display disorders, such as histrionic or antisocial personalities and borderline disorders, depressions and suicidal tendencies (ibid: 377).

The vast differences in the understanding on the same group of individuals suggest that the classification of transsexuality as a gender variant or a disorder with or without cocommitants depended on the sexologists' subjective concepts of masculinity and femininity and the number of genders they considered legitimate.

Clinical pictures from the 1990s to the end of the first decade of the 21st century

While most of the sexologists stated that transsexual subjects express their gender identity very differently, they disagreed over the extent to which transsexual subjects wish to undergo surgery and perceivably live according to the gender they identify with. Three different clinical observations emerged on the issue of surgical interventions. According to some sexologists, transsexual individuals' surgery requirements range from no interventions to extensive measures. Others tentatively suggested that the type and extent of surgery correlates with a person's sexual orientation and assigned gender. To other sexologists, surgery remained the defining feature of transsexualism.

Clement and Senf e. g. observed that some transsexual individuals do not reveal their gender identity publicly. Others wish to be accepted in public and private life as the gender they identify with without wanting to undergo hor-

mone treatment and surgery, whereas some transsexual subjects require one particular surgical measure only of a set of several possible surgical interventions (Clement/Senf 1996: 1).[28] Similarly, Kockott observed that while several transsexual individuals require extensive sex reassignment surgery, there is a significant number of individuals that opts for other solutions (Kockott 1996: 15).[29]

Becker, Berner, Dannecker and Richter-Appelt suggested that the consistent experience of living and enjoying recognition as a member of the gender the respective individual identifies with is crucial to a transsexual person's psychological stability. Hence, a successful transition does not necessarily include surgical measures (Becker et al. 2001: 261). A few years later, Becker summarised this observation succinctly when noting that, while surgery continues to be indicated urgently in order to alleviate distress in some transsexual individuals, »[o]nly fundamentalists hang onto the ›real‹ (genuine, true) transsexuality that is by definition always linked to the desire for sex-transforming operations« (Becker 2006: 157 f.).

Sigusch's statements at the beginning of the 1990s were contradictory. While Sigusch observed that transsexualism had changed as a psychiatric and social phenomenon,[30] he reported in his concept of depathologisation[31] that in the 1970s, he encountered transsexual individuals living according to their concepts of gendered selves without resorting to medical means or frequently changed their gender affiliation (Sigusch 1991: 324), suggesting that several ways existed of leading a transsexual life.

In his discussion of the issue of whether transsexual individuals were in the process of becoming a minority (ibid: 325-329), however, his understand-

28 | Clement and Senf's observations are congruent with those by Rauchfleisch (2006: 17).

29 | As early as in 1987, Kockott and Fahrner noted in their follow-up study on transsexual individuals without surgery that a highly valued job or the development of a meaningful partnership that could only be maintained in the initial gender or with the initial physical characteristics were among the reasons for transsexuals not to undergo surgery (Kockott/Fahrner 1987: 520).

30 | Sigusch observed that transsexualism had changed with regard to diagnostic findings (Sigusch 1991a: 322 f.), therapeutic concepts (ibid: 323) and the social and psychological situation of transsexual individuals (ibid).

31 | Sigusch reiterated several of his arguments presented in his initial article on the depathologisation of transsexuality in an interview in 1992, a monography in 1995, journal articles (1992; 1995a; 1997) and in articles in the sexological reference books he published in 1996 and revised in 2001, 2006 and 2007. Sigusch's concept constituted the most extensive and radical published sexological perspective on the depathologisation of transsexuality throughout the 1990s and the first decade of the 21st century.

ing of transsexuality took on a totalising ring. Sigusch e. g. argued that unlike the gay movement, which he believed had developed beyond narrow issues, transsexual individuals were due to their characteristics tied to the law and in particular to medical science:

> In some ways the dawn of transsexuals is reminiscent of the dawns of homosexuals 90 to 150 years ago and once more after World War II: low intellectual and political standards, simple-minded smugness, narrow-mindedness, great redundancy and struggling for everything, public coming out, the founding of clubs, members, subscribers, a right to speak before jurists and physicians, etc. However while homosexuals soon looked beyond their noses, transsexuals are *due to their characteristics tied to law and especially medicine.* (Ibid: 326)[32]

According to Sigusch, other than with the »collective of homosexuals«, which is in his opinion based on mutual sexual attraction, »medical science is the bond that renders transsexuals a collective in a historical and an individual sense« (ibid: 330).[33]

Moreover, he argued that the transsexual community did not, unlike the protest cultures of the 1960s challenge the gender binary.[34] He suggested that transvestites and transsexuals were corrupted by the system via the benefit

32 | Sigusch's understanding of the gay and trans movements is problematic. First, Sigusch's concept of homosexuality is ahistorical. As Hirschauer points out, social phenomena Westphal termed contrary sexuals in 1869 are not the same as present-day homosexuals (Hirschauer 1992: 250 f.). Second, Sigusch romanticises the gay movement (ibid: 251).

In the 2007 edition of his sexological reference book, Sigusch no longer maintained the ahistorical concept of homosexuality: »At any rate, in some ways the present situation of transsexuals reminds me of the people over a hundred years ago who are currently called homosexuals« (Sigusch 2007: 354).

33 | Sigusch's evaluation of trans subcultures is flawed. First, he inappropriately distances homosexuality from transsexuality. As Hirschauer points out, the differentiation of homosexuality from sodomy did not occur without reliance on and resistance to, medical science (Hirschauer 1992: 251). Moreover, with a similarly distancing gesture Sigusch suggests that transsexuality is a historical construction, while he features homosexuality as a pre-social, essentialist phenomenon (Lindemann 1992: 262). Furthermore, Augstein and Hirschauer suggest that rather than the awkward juxtaposition of medical science and desire, social discrimination (Augstein 1992: 257; Hirschauer 1992: 251) as well as the creation of spaces for developing gay and trans lifestyles (Hirschauer 1992: 251) constitute unifying elements in both minoritised populations.

34 | According to Hirschauer, Sigusch overestimated the challenge protest movements of the 1960s posed to the gender binary (Hirschauer 1992: 250).

of a law and of health insurances, tv and treatment programmes (ibid: 328).[35] Hence, transvestites and transsexuals are unable to articulate the growing unease with gender publicly in this culture. Instead, they succumb to the tyranny of the gender binary, »because they are addicted to normality and unable to ascend from gender dysphoria to gender relaxation« (ibid: 328 f.):[36]

> If they owned up to their transgression as a *transgression*, i. e., to their femininity with a male body and their masculinity with a female body, they would transition from the ›dignity of a psychiatric-surgical entity of disease‹ to the ›dignity of a social minority‹. This would be contranomic, the height of a provocation in a society that does not grant an institutional space for a change of gender and gender crossings beyond clinics and chambers, in a society that despite all weakening of gender roles ranging from the social division of labour to the legal system leaves no doubt about which gender is the sexus sequior. (Ibid)[37]

In his sexological reference book referred to earlier on, Sigusch did not repeat his depreciative and homogenising statements on trans individuals and the trans movement. Instead, he noted that transsexual individuals manifest a wide range of very different identities, roles and lifestyles (Sigusch 2007: 347). He also implicitly repealed his former equation of transsexuality with surgical measures in his critique of the German Standards (ibid).

Beier, Bosinski and Loewit tentatively suggested that the need for surgery correlates with the assigned sex/gender and sexual orientation. While they cautioned that their typology did not apply to every single case, their attempt to systematise transsexual individuals led to more homogenous clinical pictures compared to those of the aforementioned sexologists. Beier, Bosinski and

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35 | As Augstein pointed out, Sigusch conflated transsexualism with transvestism. Especially in the context of the Transsexual Act and medicine, it is misleading not to differentiate between transvestites and transsexual individuals, since there are neither legal nor medical provisions that transvestites might benefit from (Augstein 1992: 256).

36 | Sigusch's assumptions on transsexual subjects who undergo surgery and on social change are problematic for several reasons. With regard to the former, Sigusch defamed all trans individuals who opt for surgical measures (Augstein 1992: 257; Lindemann 1992: 265). This devaluation is also inappropriate considering that in particular sexology, the media and the law produced the image that genital surgery stands for the social treatment as a man or woman (Hirschauer 1992: 248). Sigusch's concept of social change is debatable, since he adhered to an emancipatory policy model, which places the onus for social change on trans individuals (Lindemann 1992: 268).

37 | It remains unclear why Sigusch mentioned transvestites in this context, since they ›own up‹ to their femininity in a male body and their masculinity in a female body (Augstein 1992: 256).

Loewit e. g. claimed that biological women with a gender identity disorder profoundly reject their secondary sex characteristics (Beier/Bosinski/Loewit 2005: 369 f.). They prioritise mastectomies over the construction of phalloplasties (ibid: 370 f.). According to their observations, gynophilic biological men with a gender identity disorder most urgently wish to have large breasts and tend to be ambivalent with regard to their genitalia (ibid: 376), while androphilic biological men with a gender identity disorder preferably opt for a neovagina (ibid: 374).

The German Standards mirror the most homogenising clinical picture of transsexual individuals with regard to gendered self-concepts and attitudes towards surgery. According to the Standards, transsexual individuals wish to resemble the physical appearance of the gender they identify with as much as possible through hormonal and surgical measures and to live socially and legally recognised in the desired gender role (Becker et al. 1997: 147).

Most sexologists agreed that transsexual developments vary. While some sexologists pointed out to individual variations in general (e. g. Sigusch 2007; Clement/Senf 1996; Rauchfleisch 2006), others believed it was possible to systematise them (e. g. Bosinski 2003; Beier/Bosinski/Loewit 2005).

Clement, Senf and Rauchfleisch observed that while some transsexual developments begin at such an early age with the effect that the respective trans individuals feel they have always been transsexual, other developments manifest as late as from the thirties onward (Clement/Senf 1996: 1; Rauchfleisch 2006: 16). Clement and Senf suggested that transsexual individuals frequently experience uneasiness with their morphology in childhood. The difficulties increase in puberty when physical features associated with a particular gender emerge or become more prominent (Clement/Senf 1996: 1 f.).

Clement, Senf and Rauchfleisch agreed that the terms ›primary‹ and ›secondary‹ transsexuality simply attest to the time of manifestation (ibid; Rauchfleisch 2006: 16). They do not require different treatment and cannot be distinguished aetiologically (Sigusch 2007: 354). Similarly, the authors of the German Standards suggested that a persistent transsexual desire »is the result of sequential factors that have an impact in various episodes of the psychosexual development and possibly become effective cumulatively. Accordingly, »different developmental paths can lead to the development of a transsexual desire« (Becker et al. 1997: 147).

Beier, Bosinski and Loewit suggested that transsexual developments can be typified along the lines of gender and sexual orientation. Beier, Bosinski and Loewit e. g. claimed that biological women with a gender identity disorder usually present in the physician's office in the twenties to the mid-thirties (Beier/Bosinski/Loewit 2005: 369). They have a childhood history of tomboy behaviour, experienced their puberties as traumatic and profoundly reject their sec-

ondary sex characteristics (ibid: 369 f.). They appear as masculine as possible with regard to clothing and hairstyle (ibid: 370).

According to their observations, androphilic biological men with a gender identity disorder are usually in the mid-twenties as opposed to gynophilic biological men with a gender identity disorder who tend to be ten to fifteen years older when they first present in a physician's office (ibid: 372). Unlike the latter, so-called androphilic biological men with a gender identity disorder cross-dress and engage in activities conventionally associated with female children (ibid: 373 f.). While gynophilic biological men with a gender identity disorder develop transvestic fetishism during their puberties (ibid: 374), androphilic biological men with a gender identity disorder envision themselves as heterosexual women who desire cismen and cross-dress as a means to express their femininity (ibid: 373).

Sexologists observed that unlike clinical and theoretical descriptions in the late 1970s and early 1980s, transsexual developments appeared to be more diverse. Sigusch and Langer observed that transsexual individuals seeking sex reassignment surgery in the 1990s were on average clearly younger than a few decades ago. Moreover, the sex ratio of female-to-male transsexuals and male-to-female transsexuals had become more even (Sigusch 1991a: 321; Langer 1995: 265). Furthermore, the choice of sex partners was no longer consistently heterosexual (Sigusch 1991a: 323; Langer 1995: 265) and female-to-male transsexuals appeared less aggressive and more driven by sexual desires (Sigusch 1991a: 322).

However, the abovementioned sexologists explained these changes differently. Sigusch did not rule out that so-called experts were maybe only now able to observe things that existed before or that transsexual individuals were only at this point able to disclose more information to medical professionals, because the latter no longer reacted as rigidly as they did earlier on. However, he attributed the changes foremost to changed gender relations (Sigusch 1991a: 320). Langer however suggested that gender identity disorders were symptomatic variants of contemporary »frequent structural deficits of personality« for which a »sex change is a propagated solution« (Langer 1995: 263).

Since the beginning of the 1990s, most sexologists considered transsexual individuals sexual beings. Sigusch stated that unlike in earlier clinical descriptions, sexologists no longer ruled out that transsexual individuals could be sexual (Sigusch 2007: 353 f.; Sigusch 1991a: 322).[38] The German Standards e. g.

38 | Sigusch argued that transsexual individuals' gender identities are no longer as fragmentary as they used to be. He suggested that a structured sexuality is impossible without a gender identity. Morever, collective notions of genders changed to the effect that women are nowadays constructed as sexual beings (Sigusch 2007: 353 f.).
However, his argumentation is not convincing. His, Meyenburg and Reiche's argumentation in the late 1970s was premised on psychoanalytic assumptions that suggest that transsexual individuals are not likely to develop much of a sexuality due to very early

implicitly affirmed that transsexual individuals could relate to sexuality, since the psychosexual development, including the sexual orientation constituted part of the diagnostics (Becker et al. 1997: 149).

This notion was reinforced by Bosinski (2003: 713 f.) and Beier, Bosinski and Loewit (2005: 372-375) who systematised transsexual individuals according to their respective sexual orientations. While Sigusch did not elaborate on transsexual individuals' sexual involvement, Beier, Bosinski and Loewit assumed that pre-operative transsexual individuals' erotic lives were usually dissatisfying. With regard to biological women with a transsexual gender identity disorder, they e. g. suggested that, »[o]ccasional attempts to act out this gynophilic orientation in a lesbian setting remain dissatisfying, since the patients (unlike lesbian women) cannot pleasurably bring in their physicality in such relationships« (Beier/Bosinski/Loewit 2005: 371).

While sexologists more or less considered transsexual individuals to be heterosexual in the 1970s and 1980s, clinical pictures from the 1990s onward with few exceptions[39] suggested that transsexual individuals' sexual orientations are more diverse. Sigusch stated in his concept of depathologisation that gender roles and sexual preferences vary in transsexual individuals as they do in cis subjects (Sigusch 1991a: 322).

Bosinski distinguished between biological women with a transsexual gender identity disorder, which he believed were predominantly heterosexual (Bosinski 2003: 713) and biological men with a transsexual gender identity disorder who feature as either androphilic or gynophilic (ibid: 713 f.). While Beier, Bosinski and Loewit adopted Bosinski's model, they added autogynophilic subjects to the group mentioned last (Beier/Bosinski/Loewit 2005: 376).

Differential diagnoses from the 1990s to the end of the first decade of the 21st century

The pluralisation of transsexual phenomena (or the recognition of the diversity) suggests that the borders of transsexuality had become fuzzy throughout the 1990s and early 2000s. This situation complicated the differential diagnosis on a practical and theoretical level. Several sexologists problematised this issue,

splitting mechanisms and a lack of psychic maturity that is assumed to be a precondition to the genital orgasmic function (Sigusch/Meyenburg/Reiche 1979: 270).

I suggest that it was not that transsexual individuals were necessarily asexual. Rather, it was due to a limited approach that transsexual individuals engaging in sexual activities were rendered unthinkable.

39 | As late as in 1995 Soyka and Nedopil parroted Sigusch, Meyenburg and Reiche's cardinal symptoms, including the eighth symptom, which describes transsexual individuals as heterosexual (Soyka/Nedopil 1995: 46), despite the fact that from 1991 onward Sigusch published revisions of the cardinal symptoms in several medical journals.

and they nevertheless developed various systems to distinguish transsexuality from similar, if not partially overlapping, phenomena.

While Clement and Senf addressed the practical side of the problem, Sigusch pointed out to a theoretical dilemma that arises in the event of having to isolate transsexuality from other phenomena. Clement and Senf suggested that while e. g. fetishist transvestism[40] was distinguishable from transsexuality, episodes of transvestism did not necessarily rule out a transsexual development:

> The categorically unambiguous distinction cannot [...] always be met with in every single diagnostic case. Transsexuals do not rarely report earlier transvestic phases in the course of their transsexual development. Also, there are occasional reports of transvestites who picture themselves as women with whom they are having sex in masturbation fantasies. (Clement/Senf 1996: 4)

While Sigusch insisted on a differential diagnosis when establishing a case of transsexuality, he cautioned that such a procedure necessarily ignored combinations »which cannot be simply considered transitions from one big and clear form to another« (Sigusch 1991a: 317). According to Sigusch, the infinite multiplicity of sexual and gender identities is reduced in order to fit into general and clinical understandings (ibid).

Sexologists considered different gender manifestations that could be mistaken for transsexuality. With the exception of so-called gender identity disorders, which arise as an effect of intersex or in the event that an intersex individual feels that s/he has been socially and surgically falsely assigned to another gender at an early age, Clement and Senf's categories resembled those of the 1970s and 1980s. Clement and Senf distinguished transsexuality from fetishist transvestism, effeminate behaviour in some homosexual men and gender identity disorders in the course of a psychosis. Unlike the differential diagnoses in the earlier period, however, neither transvestism, nor psychotic developments or intersex necessarily excluded a diagnosis of transsexuality (Clement/Senf 1996: 4 f.).

Unlike the APA, the authors of the German Standards did not mention any somatic phenomena, such as intersex as diagnostic categories that needed to be distinguished from transsexuality. The German Standards suggest the following differential diagnoses:

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40 | Clement and Senf defined fetishist transvestism as an inclination to cross-dress for the purpose of sexual arousal. This behaviour is not linked to a consciousness of belonging to, or a desire to belong to the ›other‹ gender. The clothing is not a means to express the individual's identity, as it would be in the case of transsexuality. Instead, it is a fetishistic object. In other words, clothing is an object to a transvestite, while it is a part of oneself to a transsexual (Clement/Senf 1996: 4).

- discomfort, difficulties or non-conformity with established gender role expectations that do not coincide with a lasting and profound gender identity disorder;
- partial or fleeting gender identity disorders, such as adolescent crises;
- transvestism and fetishist transvestism in the course of which critical constitutions can arise;
- difficulties with the gender identity that result from a rejection of a homosexual orientation;
- a psychotic misjudgement of the gender identity;
- severe personality disorders with an effect on the gender identity (Becker et al. 1997: 149).[41]

In his critique of the German Standards, Seikowski suggested cisidentity be added to the differential diagnosis. Seikowski defined cisidentified individuals as persons who wish to live as ›both‹ genders and who may want to undergo hormonal treatment but not sex reassignment surgery (Seikowski 1997: 352). In her response to the critique of the German Standards, Becker rejected Seikowski's suggestion. In her opinion, such a differential diagnosis was clinically not useful (Becker 1998: 159 f.).

Sigusch suggested a set of psychiatric, psychological and somatic conditions as differential diagnoses. The former are identical with those listed in the German Standards. However, Sigusch added »psychopathologically rather inconspicuous ›cultural‹ confusions and transgressions of gender roles, e. g. with a transgender gender dysphoria« (Sigusch 2007: 354) to the developments that needed to be distinguished from transsexuality or that could possibly develop into transsexuality. Sigusch suggested organic ›conditions‹ such as intersex or temporal lobe diseases as somatic differential diagnoses (ibid).

Hence, the blurring of the boundaries of transsexuality revealed in the clinical pictures resounded in the differential diagnosis. Not only did differential diagnostic concepts become more diverse. In the period between the 1990s and the end of the first decade of 21st century, the differential diagnosis increasingly allowed phenomena to overlap, such as e. g. transvestism and transsexuality.

41 | Bosinski's (2003: 716) and Beier, Bosinski and Loewit's (2005: 381-383) differential diagnoses are identical, except that they pull together psychotic misjudgement of the gender identity and severe personality disorders with an effect on the gender identity. Unlike the German Standards, which did not elaborate on the treatment of trans adolescents, Beier, Bosinski and Loewit rejected sex reassigning measures in adolescents and suggested using reversible puberty suppressants instead in the event of a severe gender identity disorder that does not cease despite psychiatric-psychopharmaceutic and psychotherapeutic interventions (Beier/Bosinski/Loewit 2005: 382).

3.1.3 Diagnosing transsexuality and assessing transsexual individuals

During the 1990s and the first decade of the 21st century, medical surveillance and (exclusive) medical expertise was not only challenged by trans individuals and/or social scientists and legal experts[42] involved in the sexological debate, but by individual sexologists themselves,[43] albeit to a significantly lesser degree. Various aspects of the tension between trans self-determination and medical control and contestations over medical and extra-medical expertise in the sexological debate throughout the 1990s and early 2000s are mirrored in the diagnostic parameters patient history, psychopathological and physical examination, psychotherapy and ›real life test‹, which have formally remained unchanged since the introduction of the German Standards in 1997.

General perspectives on trans self-determination, medical surveillance and psycho-medical expertise

Two major perspectives marked the sexological debate on diagnosing transsexuality in the 1990s and early 2000s. One strand of the debate, usually represented by psycho-medical professionals, claimed that establishing a case of transsexuality necessarily required medical attendance, whereas the other, mostly cis and trans social scientists and legal experts, leaned towards trans self-determination.[44]

Defenders of the psychiatric or psychological surveillance of a transition presented several arguments to legitimate their claim. Langer (1995: 265) and Bosinski (2003: 715 f.) argued that the desire for a transition could function as a model solution for various problems with a person's identity or gender identity. Therefore, the severity of the desire for sex reassignment and the self-diagnosis alone were not reliable indicators for diagnosing transsexuality.

Moreover, Beier, Bosinski and Loewit suggested that it was a contradiction to on the one hand expect of physicians not to intervene into aspects related to the identity and on the other hand to demand of them significant and irreversible medical and/or surgical interventions. They argued that such interven-

42 | With regard to the debate on the German Standards in the 1990s and the first decade of the 21st century, these are Augstein, Hirschauer, Lindemann, Kaltenmark, Kasimir, Rauner and de Silva.

43 | The most prominent voices from the medical and psychological communities on diagnosing and assessing trans individuals in the 1990s and the first decade of the 21st century were Langer, Hartmann, Becker, Beier, Bosinski, Clement, Eicher, Hartmann, Kockott, Langer, Pfäfflin, Rauchfleisch, Senf, Seikowski and Sigusch.

44 | However, the contributions of the latter barely influenced the clinical perspective at the time.

tions required a high degree of responsibility, the diagnosis of a disease and a scientifically based medical indication (Beier/Bosinski/Loewit 2005: 378).

Sexologists that followed this line of argument also brought forward pragmatic reasons. Bosinski advised physicians to adhere to the diagnostic route outlined in the German Standards in order to avoid adverse legal consequences. He argued that in the case a patient regretted surgery and sued the surgeon, the latter would be held responsible in the event of insufficiently indicated sex reassignment surgery.

Finally, Beier, Bosinski and Loewit proposed that if a ›transsexual gender identity disorder‹ was no longer considered a disease and a person's freely chosen and self-determined expression of self instead, there was no reason for the community of individuals covered by health insurances to pay for sex reassignment surgery. As a result, trans individuals would be asked to pay for such interventions, an outcome Beier, Bosinski and Loewit considered undesirable (Beier/Bosinski/Loewit 2005: 368).

Proponents of the concept of self-determination argued that any decision on behalf of a person's life contravenes a person's right to self-determination and human dignity. Kaltenmark, Kasimir and Rauner (1998: 266), Lindemann (1997: 329), and Hirschauer (1997: 337) suggested respecting a person's decision to transition from one gender to another as a life decision.

In contrast to Beier, Bosinski and Loewit's opinion and referring to abortion, Hirschauer (1997: 337) and Lindemann (1997: 329) doubted that major and irreversible medical and surgical interventions necessarily required the status of a disease. They argued that individuals who seek abortions do not ask for a medical intervention based on a disease but due to a personal decision.[45] They suggested treating transsexual individuals analogously.

In addition, de Silva questioned whether it was in the light of human dignity and the right to the free development of one's personality appropriate for any person to assess another individuals' gendered concept of self (de Silva 2005: 269). He suggested placing the responsibility for the decision to live in another gender than the one assigned to the person at the time of birth on the trans individual.

Three distinct perspectives emerged among psycho-medical practitioners on the question of the subjects deemed appropriate to decide upon whether an individual may be considered transsexual or not. One perspective suggested psycho-medical expertise ought to be considered authoritative. Another pro-

45 | Becker countered Hirschauer's and Lindemann's analogy of sex reassignment surgery and abortion. She argued that an abortion did not preclude future pregnancies. If an abortion was possible as sterilisation only, she assumed that sexology would be more cautious (Becker 1998: 161).

posed trans and psycho-medical expertise be deemed equal when diagnosing transsexuality. Other practitioners were ambivalent about this issue.

Beier, Bosinski and Loewit argued in favour of psycho-medical practitioners as the only agents entitled to decide on a case of transsexuality in the last instance. As pointed out earlier on, they took it for granted that largely irreversible consequences of a medical and surgical sex reassignment treatment require a secured indication. Moreover, they held that only a psycho-medical expert was able to decide whether a person's distress could be permanently alleviated with medical and surgical means (Beier/Bosinski/Loewit 2005: 377). Hence, Beier, Bosinski and Loewit considered trans individual's urge to transition physically secondary.

Seikowski however suggested that transsexual individuals are »unusual patients«. In his critique of the German Standards, he argued that transsexual individuals are specialists on issues regarding transsexuality (Seikowski 1997: 351). According to his observations, trans individuals frequently turn to medical institutions after having gone through an adequate process of self-recognition or self-diagnosis. Hence, a transsexual individual's self-diagnosis and categories of assessment ought to be accrued equal authority and credibility (ibid). To impose a lengthy process of consultation upon such individuals would simply mean to postpone life in the preferred gender (ibid: 352).

Sigusch's perspective mirrors the conflicts that arise when wanting to acknowledge a person's right to self-determination while feeling the need to obey clinical rules at the same time. He noted,

> I always ask myself how I would deal with such situations, if I were affected myself or persons who are closest to me. If I were transsexual, I would with or without consultation insist on the right to decide by myself whether I want to undergo surgery or not. I would not accept that so-called experts determine how I am supposed to live. As an expert however I got to insist vis-à-vis the transsexual on being able to follow my own professional and non-professional ideas, ideas that refer to all the world and his brother and the art of healing and to clinical experience and rules, too, that I imposed upon myself in order not to without further reflection serve irrational patient desires with disastrous consequences of irreversible manifestation. (Sigusch 1991a: 330)

Hence, Sigusch's perspective was biased towards clinical authority due to his position as a medical practitioner. In contrast to Beier, Bosinski and Loewit however, he problematised the contradictions and the ethical dilemma that go along with such a stance.[46]

46 | The different perspectives on the issue of expertise are revealed in the assessment of support groups, too. Pfäfflin and Eicher perceived of trans support groups as extra-medical contestations of psycho-medical expertise. According to Pfäfflin, members of

Patient history

Among the key aspects that are at issue in the course of establishing the patient history are, as the German Standards propose, the person's gender identity development, psychosexual development, including the sexual orientation, and the current life situation (Becker et al. 1997: 149). Hence, the trans person's past and present gender performance are at the heart of the negotiations between the medical professional and the so-called patient. However, medical examiners dealt, and continue to deal, very differently with the findings.

While Clement and Senf for instance stressed the importance of the examiner's impression of a trans person's current gender performance, they cautioned against evaluating it. According to Clement and Senf, neither a gender-neutral appearance nor a patient's overcompensated gender performance indicate whether a person is trans. Clement and Senf concluded that the examiner's impression is not a diagnostic criterion. It may however give an idea of whether the patient will encounter difficulties in his or her social and professional life or not (Clement/Senf 1996: 16 f.).

When investigating into a trans person's gender development, Langer tried to detect the »subjective experience of the gender identity disorder as well as objective aspects of behaviour in the desired role« (Langer 1995: 272). Beier, Bosinski and Loewit were more explicit about the indicators they perceived to be gender-typical behaviour. Among these were e. g. favourite childhood games and toys, cross-dressing, and favourite subjects in school (Beier/Bosinski/Loewit 2005: 379). Likewise, Langer and Hartmann sought indicators in order to assess a patient's transsexual development. They e. g. suggested to enquire into the patient's childhood preferred games and playmates and his or her social behaviour in school (Langer/Hartmann 1997: 866).

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support groups were primarily concerned about the knowledge on psychiatric experts (Pfäfflin 1996: 26 f.) they shared among each other and instances of self-medication (Pfäfflin 1996a: 35; Eicher 1996: 49). By contrast, Seikowski highlighted the enabling effects support groups, subcultural networks and publications have in the process of self-diagnosis (Seikowski 2007: 250 f.). While Rauchfleisch, like Sigusch, insisted on psychomedical diagnostics in the event of transsexualism, he acknowledged the significance support groups have for the acceptance of trans individuals and the exchange of knowledge and experience (Rauchfleisch 2006: 89). Unlike Seikowski, he also developed a critical perspective on support groups when pointing out to the pressure they exert on trans individuals to conform to mainstream notions of trans (ibid: 90). In his chapter, »What can transidentified people do themselves?« (*Was können transidente Menschen selbst tun?*) he presents as his recommendations tasks support groups have taken on since the 1970s at the very latest, such as, offering information and consultation for trans individuals and physicians (ibid: 122).

Moreover, Beier, Bosinski and Loewit as well as Langer and Hartmann suggested painstakingly investigating into a trans person's intimate life. Their proposed patient histories e. g. explore the individual's masturbation scenarios and fantasies (Beier/Bosinski/Loewit 2005: 379; Langer/Hartmann 1997: 866), favourite sexual positions and practices (Beier/Bosinski/Loewit 2005: 379) and sexual orientation (Langer/Hartmann 1997: 866).

Finally, Langer and Hartmann suggested inquiring into the family history with a particular emphasis on psychiatric symptoms, delinquency, depressions, attempts at suicide and self-mutilation. They argued that this information was relevant in order to understand the effects these incidences had on the individual's development (ibid).

Langer's, Langer and Hartmann's, and Beier, Bosinski and Loewit's approach to the trans patient and his or her patient history are problematic from an ethical and analytical point of view. With regard to the latter, neither Beier, Bosinski and Loewit (2005) nor Langer and Hartmann (1997) questioned the gender norms and stereotypes that informed their perspective. Moreover, their exploration of a trans person's sex life suggests that sexual practices, positions and fantasies indicate a particular gender identity. A trans person's intimate life seen through the lense of normative and reductionist concepts of gender and sexuality become criteria for granting or denying trans individuals access to medical and/or surgical treatment and/or legal provisions.

Moreover, the sexologists' gender concepts and ethics clash in a setting characterised by an unequal distribution of power. This particular diagnostic situation is prone to render psycho-medical experts' subjective understandings of gender and sexuality authoritative.[47] While Langer appeared to be aware of

47 | Langer and Hartmann's stance on the medical assessment for a revision of gender status serves as an example of the hierarchical relationship and with that the trans person's dependence on what medical experts deem a healthy gender identity and an appropriate gender performance. Langer and Hartmann argued that a medical assessment for the purpose of a revision of gender status should not be taken lightly, despite the fact that sex reassignment surgery and the change of first names might have taken place (Langer/Hartmann 1997: 868). They stressed that the medical assessment should state whether a change of gender has taken place convincingly or at least satisfactorily in a psychosocial sense (ibid). Langer and Hartmann did not mention what was supposed to happen in the event that a person had undergone a physical transition and did not appear psychosocially convincing to a medical expert.

The normative effect of the examiners' subjective concepts of gender and sexuality also becomes evident in Langer and Hartmann's example case studies. First, they called male-to-female trans individuals ›men‹ and female-to-male subjects ›women‹, which apart from being disrespectful, suggests that a person's gender identity is necessarily linked to a particular morphology. Second, their examples also suggest that a person's

this problem, his suggestion that the medical expert reflect upon his or her understanding of gender when assessing the psychic and physical chances of a trans person's life in the desired gender (Langer 1995: 272) remains entirely voluntary. There is no mode of fostering or supervising the psycho-medical expert's degree of self-reflexivity and gender knowledge. Nor do any of the sexologists mentioned above give a plausible reason why a medical examiner's assessment of a trans person's gender performance or experience as a trans person is less prone to misjudgement and with that superior to that of a trans individual's concept of self.

In a setting characterised by unequal power relations and possibly conflicting concepts of gender, the examiner's concept of gender becomes the trans person's obstacle that needs to be overcome in order to gain access to medical and surgical treatment and to legal provisions during the assessment process prior to a change of first names and revision of gender status. Hence, Lindemann's critique of the German Standards, which in her opinion deny trans individuals their respective subjectivities acutely applies in this particular step of the diagnostic process. With regard to the investigation into the trans person's intimate life, conducting the patient history according to Beier, Bosinski and Loewit's, and Langer and Hartmann's concept denies a trans person the right to privacy.

willingness to submit to the psycho-medical assessment regime is among the criteria that contribute to a favourable outcome. Their following descriptions in note form back up this assumption: »33-year-old man whose change of first names could not be approved despite extremely large doses of hormones (without any therapeutical monitoring) and despite benevolent statements by individuals the person is attached to. Information on the amnesis with unproblematic male professional life and without perceivable distress due to the identity considerably contradictory. Laboured short-run stereotyped ideas and travesty-like appearance. [...] Diagnostic criteria for transsexuality not fulfilled« (Langer/Hartmann 1997: 864) and »31-year-old natural scientist with a PhD and high achievement motivation. Ideal psychiatric supervision. In its setting simultaneous application and commencement of the hormone treatment. Complicated development from insecure boyishness. Postpuberal pure fetishism, experienced as deeply foreign to him, embedded in a strong sexual appetence and masochistically tinted autoeroticism. Later on diffusion of gynophilic orientation and cross-gender identification. Four relationships with women with a transvestic-penetration-ambivalent sexual style and gradual development of crossdressing. Finally self-critically completed stable change of gender. Overall a transformation of a paraphilic into a transsexual state with an apparently bisexual orientation.« (Langer/Hartmann 1997: 863)

Physical examination

Sexologists were, and continue to be divided over the necessity and extent of physical examinations as a diagnostic means in the course of the assessment process. Three perspectives emerged in the period from the 1990s until the end of the first decade of the 21st century. Some sexologists demanded an extensive set of physical examinations. Others developed a differential perspective on the relevance of, and degree to which a physical examination should be undertaken. Others again questioned the diagnostic value of physical examinations for diagnosing transsexuality.

The authors of the German Standards, Langer and Hartmann, and Beier, Bosinski and Loewit considered extensive physical examinations mandatory for a diagnosis of transsexuality. The German Standards and Beier, Bosinski and Loewit specify that the diagnostic and assessment processes require a gynaecological or urological examination, respectively, and data on the endocrinological status (Becker et al. 1997: 149; Beier/Bosinski/Loewit 2005: 380).

While the German Standards do not offer a reason for these requirements, Langer and Hartmann as well as Beier, Bosinski and Loewit presented a number of arguments to justify somatic examinations. Langer and Hartmann for instance held that a physical examination is self-evident, because »[a] person has become transsexual *with* his body« (Langer/Hartmann 1997: 867). The fact that a person develops a gender identity that does not correspond with the socially expected identity does not however explain the requirement for a physical examination.

Moreover, Langer and Hartmann claimed that requiring a trans individual to disrobe serves diagnostic purposes, since the individual's attempt e. g. to conceal his or her genitalia indicates the extent of bodily aversion (ibid). Clement and Senf however indicated that the desire to cover up one's genitalia is not necessarily a feature that characterises transsexual individuals alone (Clement/Senf 1996: 6).[48]

Langer and Hartmann furthermore suggested that an inspection of the genitalia »protects« transsexual individuals »from lack of knowledge of his or her genital status« (Langer/Hartmann 1997: 867). It is questionable whether this information is required, since transsexual individuals are no less aware of their respective genitalia than cis persons are, of whom usually no physical examination is demanded to confirm their gender status.

48 | In the light of the reasons mentioned above, it appears that Langer and Hartmann lack ethics, and gender and cultural competency. Quoting the trans organisation TransMann e. V., Becker holds that physical examinations during the assessment process are abusive and »cannot be justified by any means« (Becker 2013: 19).

Moreover, they argued that somatic parameters serve as a supplement to the patient history (ibid). This requirement however is merely bureaucratic and therefore neither contributes to the diagnosis nor to the trans individual's health.

Beier, Bosinski and Loewit demanded an endocrinological examination in order to exclude CAH, one of many forms of intersex (Beier/Bosinski/Loewit 2005: 380). Unlike the DSM-IV, the German Standards to which Beier, Bosinski and Loewit otherwise doggedly adhered to do not exclude intersex from a diagnosis of transsexuality.

In addition, Langer and Hartmann, and Beier, Bosinski and Loewit suggested that a somatic examination reveals physical preconditions for sex reassignment and the effects of hormones (Langer/Hartmann 1997: 867; Beier/Bosinski/Loewit 2005: 380). Clement and Senf argued that requiring transsexual individuals to undress for this purpose was unnecessary (Clement/Senf 1996: 6). Moreover, individual bodies respond to sex hormones at a different pace. Therefore, any finding would be inconclusive with regard to either a person's post-pubertal appearance or the person's identity.

Beier, Bosinski and Loewit argued that a physical inspection helps establish signs of self-mutilation (Beier/Bosinski/Loewit 2005: 380). Self-harm however does not apply to all transsexual individuals and is not restricted to transsexual persons either.

They also required of ›biological women‹ an ultrasound of the gonads to exclude polycystic ovaries (ibid). Like intersex, polycystic ovaries are not a counter indication to transsexuality. Moreover, Langer and Hartmann argued that a physical examination might give hints at the risks of sex reassignment surgery (Langer/Hartmann 1997: 867).

Proponents of a differentiated perspective on the necessity of physical examinations disagreed with the diagnostic value the aforementioned sexologists accrued to physical examinations. While Clement and Senf ascertained that somatic examinations may serve individuals' general health, they held that they are irrelevant to the diagnosis of transsexuality (Clement/Senf 1996: 6). Unlike the German Standards, Beier, Bosinski and Loewit, and Langer and Hartmann, they proposed inspecting a trans person carefully, i. e. without demanding of the individual to undress (ibid).

Kaltenmark, Kasimir and Rauner vehemently opposed mandatory physical examinations of any sort for the purpose of diagnosing transsexuality and assessing a trans individual. Like Clement and Senf (1996), they questioned the relevance of such measures. They held that a somatic examination is only justified in a surgical context. They argued in favour of banning an examination of the genital status from the assessment situation and suggested leaving it up to trans individuals to undergo physical examinations or not (Kaltenmark/Kasimir/Rauner 1998: 148).

When considering the criteria according to which the German Standards identify transsexuality, there is no causal relationship between the features associated with transsexuality and the requirement for physical examinations. The German Standards hold that transsexuality is characterised by a profound and permanent cross-gender identification, a long-standing unease with a person's sex and a clinically relevant impairment in e. g. the areas of work and social life (Becker et al. 1997: 148). Hence, the criteria refer to a person's self-understanding and cannot be derived from physical parameters.

The same applies to formal criteria medical professionals are asked to assess prior to the legal change of first names and gender status. According to s. 1(1)1 TSG, the court is required to change a person's first names, if the applicant due to his or her »transsexual imprinting« no longer identifies with the gender specified in his or her birth entry but to the ›other‹ gender instead and has felt compelled to live according to his or her ideas since at least three years. Moreover, the application needs to be granted, if the identification with the gender will not change with a high degree of probability (s. 1[1]2 TSG). None of the answers to these requirements are written on the body.

Prior to the Federal Constitutional Court decision on 11 Jan. 2011 that ruled the surgery requirement mandatory for a revision of gender status unconstitutional, medical experts were asked, in addition to the requirements specified in s. 1 (1) 1 and 1(1)2 TSG, to assess whether the individual was permanently unable to reproduce (s. 8[1]3 TSG) and had undergone a surgical intervention that had changed their external sex characteristics in a way that a clear approximation to the appearance of the ›other‹ sex/gender had been achieved (s. 8 [1]4 TSG). However, surgical reports suffice to prove that the physical conditions have materialised. Hence, the requirement of physical examinations raises the suspicion that mandatory physical examinations in this context primarily served disciplinary or other ulterior purposes.

Psychopathological examination

As mentioned earlier on, the sexological community in Germany was deeply divided over the issue of the psychiatric health of transsexual individuals in the 1990s and 2010s. However, approaches that claimed to be depathologising in this period did not necessarily coincide with the abandonment of a psychopathological examination. Two major approaches to this diagnostic means emerged throughout the 1990s and the first decade of the 21st century. One dealt flexibly with this diagnostic requirement. The vast majority of sexologists however maintained that a psychopathological examination ought to be considered mandatory in every incidence of diagnosing transsexuality.

Seikowski doubted that every diagnosis of transsexuality requires a psychopathological examination. In his critique of the German Standards, he therefore suggested to supplement the extensive list of psychiatric conditions and

personality traits the German Standards enumerate with the diagnosis of mental health. According to Seikowski, there is no reason to demand a long-term diagnostic process, if somebody is psychologically healthy and feels uncomfortable about his or her gender identity (Seikowski 1997: 351 f.).[49]

The German Standards however enumerate a set of psychiatric conditions and personality traits clinical-psychiatric and/or psychological diagnostics they recommend to take into consideration when assessing whether the criteria for a diagnosis of transsexuality apply or not. Among these are the structural level of personality and its deficits, neurotic dispositions and conflicts, substance abuse and addictions, suicidal tendencies and self-harming behaviour, paraphilias and perversions, psychotic diseases, cerebral disorders and poor aptitude (Becker et al. 1997: 149).

Like the requirement for physical examinations outlined in the Standards, Langer and Hartmann as well as Beier, Bosinski and Loewit used the enumeration of psychiatric conditions and personality traits for disciplinary purposes. Beier, Bosinski and Loewit e. g. attached the condition of one year of abstinence of drug abuse to the initial phase of treatment (Beier/Bosinski/Loewit 2005: 381). Langer and Hartmann considered contact, including countertransference, the willingness to impart information, the ability to verbalise something and collaboration important parameters of the psychopathological examination.

Psychotherapy and the ›real life test‹

Considerable disagreement arose among those involved in the sexological debate on the necessity of, and the right to enforce psychotherapy and a ›real life test‹ as part of the diagnostic process. Perspectives on the usefulness and legitimacy of these instruments as supportive[50] and diagnostic means can be divided

49 | It would be more precise to associate the feeling of discomfort with the initial gender assignment and/or particular gendered physical attributes.

50 | Until the German Standards recommended psychotherapy to be neutral with regard to sex reassignment measures (Becker et al. 1997: 150), the function of this means was contested, too. Based on the experience with one individual who underwent more than 300 therapeutic sessions over a period of six years and finally decided not to undergo surgery, Meyenburg e. g. suggested that a psychotherapy should include questioning the desire for sex reassignment measures (Meyenburg 1992: 106 f.). In contrast, Laszig, Knauss, Clement and Senf argued in favour of psychotherapeutic neutrality in this respect (Clement/Senf 1996a: 19; Laszig/Knauss/Clement 1995: 25). Laszig and colleagues argued that psychotherapic collaboration between a psychotherapist and a ›patient‹ is hampered, if the former aims at reconciling the trans individual's mind with his or her sexed bodily features. In such an instance, a transsexual individual necessarily experiences psychotherapy as a threat. Rather, the psychotherapeutic attitude should be focused on

into three distinct categories. The first endorsed a concept of compulsory psychotherapy and mandatory ›real life test‹.[51] The second perspective postulated that compulsory psychotherapy and the ›real life test‹ should apply to some individuals only. Proponents of the third perspective rejected mandatory psychotherapy and the ›real life test‹ as means of generating a diagnosis. Each perspective had very different implications with regard to trans self-determination and psycho-medical surveillance.

Beier, Bosinski and Loewit, the authors of the German Standards, the authors of the statement on the reform of the Transsexual Act on behalf of the DGfS, Bosinski and Sigusch considered both instruments as vital for all ›patients‹ with a ›gender identity disorder‹. Proponents of this approach reasoned that a diagnosis of an irreversible transposition of the gender identity can only be substantialised in a long-term diagnostic process (Beier/Bosinski/Loewit 2005: 385; Bosinski 2003: 715 f.; Becker et al. 1997: 149; Becker et al. 2001: 262; Sigusch 2007: 354). Based on non-representative single case studies on 20 ›biological men‹, i. e. transwomen, Bosinski e. g. concluded that the self-diagnosis was an unreliable means to establish a diagnosis of transsexuality (Bosinski 1994: 210).

Beier, Bosinski and Loewit, the authors of the Germans Standards and the authors of the statement on the reform of the Transsexual Act on behalf of the DGfS held that psychotherapeutical support in combination with the ›real life test‹ must indiscriminately precede somatic measures (Becker et al. 1997: 149; Becker et al. 2001: 262). With regard to the ›real life test‹, Beier, Bosinski and Loewit e. g. stated that, »[i]f the patient refuses to try out the role of the desired gender in everyday life *prior to body-modifying reassignment measures* (medical and/or surgical), the indication cannot be issued« (Beier/Bosinski/Loewit 2005: 385). Moreover, they held that, »[i]n this case doubts about the diagnosis ›transsexual gender identity disorder‹ are justified« (ibid). Becker, Berner, Dannecker and Richter-Appelt argued in favour of an extensive diagnostic and psychotherapeutic procedure, including the ›real life test‹, in order

supporting and understanding the transsexual individual's development (Laszig/Knauss/Clement 1995: 25 f.).

51 | Beier, Bosinski and Loewit, Kockott and Rauchfleisch define the ›real life test‹ as a period of at least one year in which a transsexual individual lives according to the conventions associated with the gender he or she wishes to be recognised as for 24 hours a day (Rauchfleisch 2006: 27; Beier/Bosinski/Loewit 2005: 385; Kockott 1996: 12). The purpose of the ›real life test‹ is in their opinion twofold. First, the transsexual individual has the opportunity to develop his or her sense of masculinity or femininity, respectively and to check whether the role suits him or her. Second, the transsexual person is advised to test the environment and to learn how to deal with the reactions.

to prevent access to hormone treatment and surgery based solely on demand (Becker et al. 2001: 262).

Like Pfäfflin (1996: 33) and Rauchfleisch (2006: 27), Sigusch argued in the revision of his, Meyenburg's and Reiche's cardinal symptoms that an analytic psychotherapy and the ›real life test‹ are the most appropriate methods of examining a transsexual individual's development (Sigusch 2007: 353). Sigusch suggested that the transference and countertransference process that takes place during an analytical psychotherapy allows the examiner to gain the security that a particular individual is a man or a woman (ibid).

Finally, he argued that an analytical psychotherapy aims at increasing or rendering possible the patient's self-reflection. He concluded that this type of psychotherapy is the most appropriate means to combine the patient's self-determination with the professional's responsibility (ibid: 348).

He also emphasised the necessity of psychotherapy for differential-diagnostic purposes. Like Langer, he held that the desire for sex reassignment surgery alone does not justify the diagnosis of transsexuality, since several developments occur as attempts to solve very different conflicts and tensions. At the same time, organic findings and psychological illnesses do not necessarily exclude the diagnosis of transsexuality. However, such distinctions are only possible within a sufficiently long and intensive therapeutic relationship (Sigusch 2007: 354).

The first perspective is based upon five premises. First, transsexual individuals are either more prone to manifest psychopathological disorders than cis individuals (Becker et al. 1997: 149), or there are persons that desire a transition for ulterior reasons, respectively (Sigusch 2007: 354). Second, transsexual individuals lack self-knowledge, a situation which requires a ›real life test‹ (Rauchfleisch 2006: 27; Beier/Bosinski/Loewit 2005: 385) and psychotherapy (Sigusch 1991: 867). Third, contrary to Langer and Hartmann's claim that the ›real life test‹ is not an examination the transsexual individual needs to pass vis-à-vis a medical professional or any other person for that matter (Langer/Hartmann 1997: 867), a transsexual individual has to convince the examiner that he or she identifies with, and is capable of performing the gender the respective individual claims to be, and be it simply for the sake of an examiner's sense of security. Fourth, psychotherapy and the ›real life test‹ are considered superior to any other means of self-enquiry. Finally, examiners imply that it does not make a difference in everyday life, if a person e. g. with a male body presents him- or herself as a woman or a man.[52]

52 | However, the examiners underestimated social sanctions that individuals are exerted to when a person's gender performance diverges from (assumed) physical properties. Beier, Bosinski and Loewit e. g. hold that, »[h]ormones and an operation neither cause a change in one's opinions and thoughts, nor in principle change the reaction of the environment« (Beier/Bosinski/Loewit 2005: 385). They add that, »[i]t should be pointed

The second and third perspective on compulsory psychotherapy and mandatory ›real life test‹ either entirely or in part questioned the validity of these assumptions. In its critique of the German Standards, Transidentitas e. V. held that neither psychotherapy nor the ›real life test‹ are necessary and appropriate as a means to establish a person's transsexuality in every case. Mandatory psychotherapy should be restricted to persons with significant psychological problems. In these particular instances, though, the duration, comprehensiveness and intensity of these measures should be agreed upon in advance and on equal terms between the psychotherapist and the ›patient‹ (Transidentitas 1997: 344).

Transidentitas e. V. rejected the demand for the general imposition of a compulsory ›real life test‹. The organisation argued that to pose a ›real life test‹ as a condition for all transsexual individuals amounts to an incapacitation (ibid: 343). Transidentitas e. V. held that most ›patients‹ either in part or completely live their lives according to their identities, while at the same time guarding or regaining their stability (ibid: 345). The organisation suggested that a »negative real life test«, i. e. the inability to live as the assigned gender ought to suffice for an indication for hormones (ibid). Moreover, the organisation rejected an approach that does not take into consideration individual situations (ibid: 346).

While Transidentitas e. V. agreed to compulsory ›real life tests‹ and psychotherapy under certain conditions, Clement and Senf (1996a: 22), Seikowski (1997: 252; 2007: 250), Lindemann (1997: 324; 329) and Kaltenmark, Kasimir and Rauner (1998: 267) rejected mandatory psychotherapy for various reasons.[53]

While Beier, Bosinski and Loewit emphasised that catamnestic studies have proven that successful post-operative adaptations depend on the patient's pre-operative psychotherapeutic and psychiatric care,[54] results of Seikowski's

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out to patients that since a long time it is neither punishable by law in Germany to wear clothes of the other gender, nor to bear another name than the Christian name« (ibid). Interestingly, Beier, Bosinski and Loewit's terminology ›biological woman with a transsexual gender identity disorder‹ or ›biological man with a transsexual gender identity disorder‹ and their reference to a »not always harmonious appearance in the role of the desired gender« as one of the reasons for social marginalisation (Beier/Bosinski/Loewit 2005: 365) mirror the discriminatory social reactions they wish to downplay.

53 | While the authors agreed that psychotherapy should be voluntary, their suggestions were not homogeneous. Clement and Senf e. g. recommended supportive psychotherapy to all transsexual individuals in order to help the latter secure his or her decision (Clement/Senf 1996a: 22). Seikowski however suggested psychotherapy be offered to all transsexual individuals and recommended to some only (Seikowski 2007: 249).

54 | Beier, Bosinski and Loewit based their argument on a survey of findings compiled by Pfäfflin/Junge 1992.

extensive quantitative study suggest that with a high degree of probability about two thirds of transsexual individuals do not need deeper psychotherapy. They are emotionally strong enough to cope with gender reassignment without psychotherapeutic support (Seikowski 2007: 249).

Unlike the proponents of the first approach, Seikowski questioned the assumption that transsexual individuals necessarily lack self-knowledge. As mentioned earlier on, he observed that trans individuals frequently obtain an appropriate degree of self-knowledge before turning to medical professionals. Consequently, he argued that to impose psychotherapy on individuals who believe they do not need it obviously does not make sense to them (Seikowski 1997: 351; 2007: 250 f.).[55] Depending on the examiner's attitude, the situation can become tense: »They [Transsexual individuals] react ›allergically‹, if the

55 | In a study on the acceptance of therapeutical assessment prior to a change of first names, Luther, Osburg and Weitze examined whether the assessment of trans individuals matches the negative public image of these procedures (Luther/Osburg/Weitze 1998: 31). For this purpose, the authors sent questionnaires to sixty patients who had undergone such an assessment with the authors from 1985 to 1994. Among other things, the patients were asked to give their opinion on this process, taking into consideration the duration of the assessment, the choice of experts, the relationship to them and the issue of double assessment (ibid: 32-36).

Forty previous patients responded to the questionnaire. The findings suggest that one third of the respondents considered the assessment procedure positively. An equal number of individuals answered to the contrary. Approximately 10 % were ambivalent and less than 5 % responded that the assessment did not have any effect on them (ibid: 36).

Those who responded negatively did so for mainly two reasons. First, they had the impression that they had to justify their decision. Second, they considered the assessment an illegitimate intervention into their personal lives (ibid). The respondents who took an affirmative stance towards the assessment procedure emphasised that the process contributed to their self-confidence, social skills and knowledge. Moreover, the expert opinion contributed to their sense of security with regard to the decision they had made (ibid).

Luther, Osburg and Weitze concluded that nearly half of the respondents considered a »thorough and objective assessment« (ibid: 30) worthwhile. In their opinion, the study affirmed Pfäfflin and Junge's (1992) conclusion from their compilation of catamnestic studies. The latter suggested that the duration and thoroughness of the examination correlates with post-surgical satisfaction (Luther/Osburg/Weitze 1998: 37). Similarly, they held that Beck-Managetta and Böhle's (1989) study supports their findings. The latter suggested that the significance of the relationship between the so-called expert and the assessed increases with the duration of the procedure (ibid).

While the authors repeatedly classified individual trans person's and trans organisation's critique of the assessment procedure as polemical (ibid: 30; 37), their study reveals

therapist claims to be a specialist who knows better than the patient.« (Seikowski 2007: 251)

Moreover, Seikowski suggested that simplistic psychopathological concepts are inappropriate when dealing with transsexual individuals. Since transsexuality is not an emotional disorder, trans individuals do not want to be psychiatrised (ibid).

Finally, Seikowski suggested deprivileging psychotherapy as the only appropriate means of acquiring support. He held that support groups or other consulting facilities can equally well contribute to a favourable treatment outcome (ibid).

Kaltenmark, Kasimir and Rauner argued that compulsory therapy[56] is only justified in legally clearly defined situations, such as in a forensic context. To require mandatory therapy that is not executed in a legitimate legal sense as it holds true for transsexuality contravenes the right to self-determination and human dignity (Kaltenmark/Kasimir/Rauner 1998: 267).

Furthermore, the authors profoundly rejected psychotherapy that aims to adapt the transsexual person to notions of gendered normality.[57] They argued that the German Standards raise such expectations when demanding as an outcome of psychotherapy an »inner coherence and stability of the identity of the gender the person identifies with and its individual embodiment«. Kaltenmark, Kasimir and Rauner demanded that psychotherapeutic treatment of transsexual individuals should take place on a voluntary basis only (ibid).

Unlike Transidentitas e. V., which held that a compulsory ›real life test‹ is justifiable in individual cases, Kaltenmark, Kasimir and Rauner vehemently

substantial methodological flaws. First, Luther, Osburg and Weitze did not raise the crucial question, whether the respondents considered an assessment *per se* as good and justified. Second, the empirical study is not representative. Third, while the authors affirm Pfäfflin and Junge's findings, there are to date no studies in Germany on post-surgical satisfaction in those trans individuals who decide to circumvent assessment for medical and surgical treatment, albeit with the effect of having to pay for sex reassignment surgery by themselves and to do without a legally recognised change of first names and revision of gender status.

56 | Kaltenmark, Kasimir and Rauner define compulsory therapy as a directly or indirectly enforced therapy, in that a person who refuses to participate will be denied access to material goods and legal provisions, which the person subjectively considers important (Kaltenmark/Kasimir/Rauner 1998: 266).

57 | Similarly, Lindemann opposes mandatory psychotherapy, arguing that it is a means of social control to ensure the gender binary (Lindemann 1997: 324).

opposed the ›real life test‹.[58] They argued that this procedure violates human dignity, humiliates those individuals upon whom such a measure is imposed and gravely violates an individual's privacy for two reasons. First, a test is an exceptional situation and is therefore necessarily not identical with everyday life (ibid: 269). Second, the ›real life test‹ forces transsexual individuals to adapt to the examiner's ideas, in particular to fetishised notions of life in the ›new‹ gender. Hence, they demanded to ban the ›real life test‹ as a means of diagnostics and suggested that the diagnosis be limited to the examination and evaluation of voluntarily and spontaneously generated social relations and individual modes of demeanour (ibid).

3.1.4 The medical management of transsexuality

A medical and legal transition in Germany takes place in a complex institutional and regulatory setting. This setting includes the German Standards, legal provisions, federal jurisdiction and the Medical Advisory Services of the Statutory Health Insurance Companies (*Medizinische Dienst der Krankenversicherung* [MDK]).[59] Despite being distinct regulatory systems with formal procedures of their own, they form complex interrelations in the event of a legal and/or medical transition. The German Standards, the relationship between law and medicine, medical practitioners and the MDKs or the Medical Advisory Service of the Central Federation of Statutory Health Insurance Companies (*Medizinischer Dienst des Spitzenverbandes Bund der Krankenkassen* [MDS]),[60] respectively,

58 | Kaltenmark, Kasimir and Rauner subsume the ›real life test‹ under »social-experimental diagnostic procedures«. They define such a procedure as a scientifically unfounded means used to generate social and psychosocial relations for diagnostic purposes via experiments (Kaltenmark/Kasimir/Rauner 1998: 269).

59 | The MDK is a public body. Most *Länder* usually have one MDK. Exceptions are Northrhine Westfalia, which has two (MDK Nordrhein and MDK Westfalen-Lippe), Berlin and Brandenburg that have created a joint MDK as well as Hamburg and Schleswig-Holstein that have established the MDK Nord (MDK 2015). The health insurance companies finance the medical advisory services. The MDKs serve the health insurance companies and as of 01 Jan. 1995, the nursing care insurance companies by e. g. providing health insurances with expert statements in cases specified by law or the type, severity, duration and frequency of the disease (Banaski 1996: 64).

60 | The MDS has three major functions. First, the MDS advises the Central Association of the Statutory Health Insurance Funds (*Spitzenverband der Gesetzlichen Krankenversicherung*; *GKV-Spitzenverband*) on issues related to medical care, services and organisation. Second, it advises the Central Association of the Statutory Health Insurance Funds on issues related to compulsory long-term care insurance (*Pflegeversicherung*) and contributes to the development of standards. Third, it coordinates the professional work

and the courts and medical professionals open up spaces for different interpretations with effects on trans individuals in the process of undergoing a medical transition.

The German Standards for the Diagnostic Assessment and Treatment of Transsexuals

As outlined in the previous sections of this chapter, sexologists and medical practitioners widely disagreed on several clinically relevant issues pertaining to transsexuality. Despite these profound differences, three major German sexologist associations[61] agreed to compile a set of authoritative guidelines for the diagnostic assessment and treatment of transsexual individuals under the lead of Sophinette Becker. The German Standards were first published in 1997[62] and they mark a compromise between different perspectives on transsexuality and its treatment at the time in several ways.[63]

Following a brief description of the main components of the German Standards, this section will initially address the issues of psycho-medical surveillance and expertise. Thereafter, the question of pathologisation will be raised. Finally, the issue of the gender order as it features in the German Standards and in the ensuing debate will be discussed.[64] I will argue that while the debate on the abovementioned issues and expertise did not cease, the German Stand-

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of the MDKs with regard to advice and expert reports and promotes uniform procedures in organisational matters. The MDS is primarily funded by the Central Association of the Statutory Health Insurance Funds (MDS 2015).

61 | These are the DGfS, the Academy for Sexual Medicine (*Akademie für Sexualmedizin*) and the Association for Sexology (*Gesellschaft für Sexualwissenschaft*).

62 | Unlike the World Professional Association for Transgender Health (WPATH; formerly Harry Benjamin International Gender Dysphoria Association; HBIGDA) Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People that have been revised several times over the past decades, the German Standards have remained unchanged to the time of writing. The process of revising treatment standards for trans individuals in Germany has only begun recently. For more details on this development, see chapter 4.3.

63 | The deliberate omission of speculations on the aetiology of transsexuality (Becker 1998: 161), the consensus on psychotherapeutic neutrality despite differing views on this issue (ibid: 156) and the provision that the patient and the therapist determine the frequency and duration of psychotherapy together (Becker et al. 1997: 150) indicate that the involved sexologists sought for compromises.

64 | The German Standards also lend themselves to a discussion of the intermingling of law and medicine, an issue that will be dealt with in more detail in the section »The relationship between law and medicine« in this chapter.

ards enshrined notions of authoritative psycho-medical expertise and control, the pathological state of transsexual individuals and the gender binary.

The German Standards are composed of six distinct components. Starting with an introduction that is comprised of the definition of transsexuality, a note on transsexual developments and premises of the diagnostic and assessment procedure (Becker et al. 1997: 147 f.), the document outlines the standards for diagnostics and differential diagnosis (ibid: 148 f.). These sections are followed by standards for psychotherapy/psychotherapeutic support (ibid: 149 f.), standards for the indication for somatic treatment (ibid: 151 f.) and the standards for somatic treatment, i. e. hormone treatment and sex reassignment surgery (ibid: 152-154). The latter lists recommended surgical measures for ftms (ibid: 153) and mtfs (ibid: 153 f.) separately. Finally, the Standards specify the rules for the assessment of transsexual individuals according to ss. 1 and 8 TSG (ibid: 154 f.).

While the German Standards did not put a halt to the sexological debate on psycho-medical control and trans self-determination, they however did resolve the tension between the two in favour of the former. This becomes evident e. g. in one of the purposes of the Standards, the diagnostic means of psychotherapy and the indication for somatic treatment.

Well before the German Standards were established as an authoritative guide to the diagnostic assessment and treatment of transsexual individuals, Langer, and Langer and Hartmann called for national standards to regulate psycho-medical aspects of a transition from one gender to another. One of their reasons was expressly to curb trans self-determination.[65] As early as in 1995, Langer decried that the process of sex reassignment was gaining a life of its own (Langer 1995: 264). Langer and Hartmann in particular pointed out to transsexual individuals' practice of contacting county courts prior to appearing at a physician's office. Having obtained expert reports issued for changing first names according to s. 1 TSG, they would then produce these reports at health

65 | These and other authors gave further reasons for specifically national standards. Langer and Hartmann e. g. claimed that the international Standards of Care issued by the then HBIGDA did not apply to the German context for clinical and legal reasons. Langer considered the Standards of Care deficient, since they did not take psychiatric contraindications into consideration (Langer 1995: 271). In their critique of the German Standards, Kaltenmark, Kasimir and Rauner however convincingly argued that clinical pictures of transsexual individuals do not stop at national borders. However, the institutional way of dealing with transsexual subjects very well does. They suggested that the German Standards were devised to function as a »transsexual- and psychiatry-political regulation« (Kaltenmark/Kasimir/Rauner 1998: 262).
In her defense of the German Standards Becker mentioned a further reason for devising national guidelines. She stated that the German Standards were meant to express the common sense of the treatment centres (Becker 1998: 155).

insurance company offices and subsequently use them as an indication for surgery (Langer/Hartmann 1997: 868). Langer and Hartmann warned that, »[m]edical experts could be in danger of testifying to a self-determined sex change, if the current inflation of the concept of self-determination was not recognised as such and questioned« (ibid: 869).

While the German Standards mirror the change of the modalities and the functions of psychotherapy since the 1970s,[66] this diagnostic means at the same time operates as an instrument of psychiatric control. The German Standards support the widespread consensus among those sexologists who considered psychotherapy necessary as a supportive and diagnostic means (Becker et al. 1997: 150).[67] It is up to the psychotherapist to decide whether the following three criteria apply:

- the inner coherence and stability of the gender identity and its individual embodiment;
- the ability to live according to the desired gender role;
- the realistic assessment of the possibilities and limits of somatic treatment (Becker et al. 1997: 150).

By contrast, the severity of a transsexual individual's urge for sex reassignment surgery and the self-diagnosis are not considered reliable indicators for establishing a diagnosis of transsexuality (ibid: 148).

The notions of psycho-medical surveillance and control reemerge in the section on the standards for the indication for somatic treatment. The German Standards e. g. outline an extensive set of requirements that needs to be fulfilled prior to issuing an indication for sex reassignment surgery. Psychotherapists or other medical experts have to confirm the requirements.

Among these requirements are that the patient has to be known to the therapist since at least one-and-a-half years. The patient needs to have performed a

66 | In his critique of the Frankfurt treatment scheme of the 1970s, Sigusch described the function of psychotherapy at the time. He stated that the two departments of sex research in Germany sent transsexual applicants for probatory psychotherapeutic sessions in order to prove that it was impossible to treat transsexual individuals psychotherapeutically (Sigusch 1991: 231). Moreover, psychotherapy was considered successful in the 1970s when a patient decided to give up his or her desire for sex reassignment surgery (Sigusch 2007: 356). By contrast, psychotherapeutic treatment of transsexual individuals in the 1990s and 2010s was guided by the principles of an open outcome (Kockott 1996: 15; Pfäfflin 1996: 26; Sigusch 2007: 356) and a psychotherapist's neutrality towards sex reassignment surgery (Beier/Bosinski/Loewit 2005: 387; Clement/Senf 1996a: 19; Becker et al. 1997: 150; Rauchfleisch 2006: 55 f.).

67 | See e. g. Sigusch 1991a, Clement/Senf 1996a and Beier/Bosinski/Loewit 2005: 387 f.

›real life test‹ on a continuous basis for at least the same duration. Moreover, the patient is required to have undergone at least half a year of hormone treatment.

The therapist is required to describe whether the patient's identity is stable and whether he or she has permanently taken on the role of the ›other‹ gender. Moreover, the therapist has to characterise the patient's outer appearance, behaviour, experience and personality. In addition, the indication should include a patient history with a particular focus on the complete individual course of the transsexual development and the factors that influenced this development (ibid: 151).

Moreover, the Standards demand information on the ›real life test‹, such as when it started, whether and, if so, when the patient applied for a change of first names according to the Transsexual Act. In addition, the therapist is asked to describe the effects of the ›real life test‹ on the patient's psychic equilibrium, the security in the role of the desired gender role, sexuality, relationships to partners, family and friends, ability to work and acceptance in the workplace (ibid: 152).

The Standards also require a detailed description of the physical conditions for a life in the ›other‹ gender role, such as physical and psychological effects of the hormone treatment, the patient's evaluation of the physical changes and the way the he or she deals with possibly negative reactions to his or her outer appearance and behaviour (ibid).

Furthermore, the therapist is among other things asked to describe whether the patient has realistically thought about unwanted effects of surgery that might occur and his or her expectations with regard to the outer appearance, functionality and sexuality. The report must explain why the patient would experience more distress without surgery. Finally, the therapist is required to anticipate the effects of sex reassignment surgery with regard to the patient's social integration, ability to form partnerships, ability to work, and his or her autonomy (ibid).

In the process of drafting the guidelines, the authors of the German Standards also resolved the question of expertise in favour of sole psycho-medical expertise. Despite demands by some members of the committee to involve sociologists and transsexual individuals or trans organisations, respectively, the German Standards were exclusively authored by members of the three national sexological associations (Becker 1998: 155). In response to Seikowski's (1997: 351) and Transidentitas e. V.'s (1997: 350) critique of this omission, Becker reasoned that the opinions among the treatment centres on this and many other issues the Standards address diverged to such an extent that the committee finally decided to leave out any further input (Becker 1998: 155).[68]

68 | Lindemann criticised the exclusion of trans individuals in the process of drafting the German Standards. She doubted that the procedure outlined by the Standards would lead

With regard to the tension between pathologising and depathologising transsexuality, the German Standards are clearly biased towards the former. The pathologisation of transsexuality features in the definition and the reason for a psychopathological examination. The authors of the German Standards define transsexuality among other ascriptions as »a special form of gender identity disorder« (Becker et al. 1997: 147).

The necessity of a psychopathological examination is premised upon the notion that individuals with so-called gender identity disorders frequently exhibit significant psychopathological abnormalities. As mentioned earlier on, the German Standards suggest that transsexual individuals should be screened for the structural level of personality and its deficits, neurotic dispositions and conflicts, substance abuse and addictions, suicidal tendencies and self-harming behaviour, paraphilias and perversions, psychotic diseases, cerebral disorders and poor aptitude (Becker et al. 1997: 149).

However, the German Standards do not suggest what to do with these findings.[69] As a result, psycho-medical experts interpret the findings differently or, to put it bluntly, as they please. While Seikowski e. g. does not consider poor aptitude a contraindication (Seikowski 1997: 352), Rauchfleisch does. The latter insists that this particular finding should be treated as a contraindication, since the transidentified person would not be in a position to assess the effects of hormonal and surgical interventions (Rauchfleisch 2006: 25).

Finally, the German Standards reproduce several notions that characterise the gender binary of the time, including essentialist and polarised notions of gender to which the definition of transsexuality, several criteria mentioned for an indication for sex reassignment surgery and the recommendations for sex reassignment surgery attest. Lindemann suggests that the modern gender binary is based upon three assumptions. First, every person is gendered and belongs to one gender only. Second, a person belongs to a gender for life. Third, gender is based upon physical properties (Lindemann 1997: 324). In addition, the gendering process is not self-determined.

The definition suggests that, like any other individual, the transsexual individual was initially assigned to a gender. However, transsexual individuals subjectively perceive this assignment to be inappropriate and therefore require medical, surgical and legal measures in order to transition to the ›other‹ gender (Becker et al. 1997: 147). Hence, the definition implies that every subject is gendered and that there is one option only to which an individual can transition.

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to more objectivity and security. Instead, transsexual individuals might simply consider the Standards as guidelines to achieve their goal (Lindemann 1997: 326).

69 | Kaltenmark, Kasimir and Rauner suggested that the German Standards do not offer an interpretation of the findings, because there was no consensus on this issue among the researchers (Kaltenmark/Kasimir/Rauner 1998: 364).

The definition does not allow a person to take on the identity of two (or more) genders, an identity other than ›man‹ or ›woman‹, or none at all.

The definition and the criteria for an indication for somatic treatment suggest that a person's gender identity is a permanent disposition. The German Standards hold that, »[t]ranssexuality is marked by the permanent inner certainty of belonging to the other gender« (ibid). Likewise, the indication for somatic treatment requires that a patient's identity be stable (ibid: 157) and coherent (ibid: 150) before an indication may be issued.

Moreover, the definition, the criteria for an indication for somatic treatment and the recommendations for somatic treatment are based on the assumption that a person's morphology, gender role and identity are linked. Transsexual individuals are by definition portrayed as persons who reject the physical characteristics of the innate sex and the role expectations attached to the physical appearance (ibid: 149). In a similar vein, the indication for somatic treatment requires an assessment of the physical conditions for a life according to the ›other‹ gender role (ibid: 152).

The recommendations for sex reassignment surgery reproduce »somatic fundamentalism« (Lindemann 1997: 327). According to this principle, a person's body may not be more similar to the body of a member of the ›other‹ gender (ibid: 324). The German Standards recommend a penectomy, an orchiectomy, the creation of a vulva, clitoris and a neovagina, epilation and breast augmentation surgery for male-to-female trans individuals in the event of insufficient gynaecomasty (Becker et al. 1997: 153 f.). Female-to-male trans individuals are recommended to undergo a bilateral mastectomy, a hysterectomy and an adnectomy (ibid: 153). The Standards suggest that genital surgery in female-to-male transsexual individuals requires individual solutions,[70] since phalloplasties and the implantation of surrogate testes are still at an experimental stage of surgical development (Becker et al. 1997: 153).

Neither transmen's nor transwomen's subjective attitudes towards their respective genitalia are considered at all. As early as in 1997, Lindemann for instance observed that many transmen approach their respective transitions pragmatically. A significant number of transmen are content with the effects of testosterone treatment and a bilateral mastectomy and consider a hysterectomy

70 | Individual solutions range from no surgery to the creation of a metadoioplasty with or without an extension of the urethra and with or without the construction of a scrotal sack and testicular implants, to various forms of phalloplasties with or without an extended urethra and erection devices. Phalloplasties in Germany are currently created, using either a radial forearm flap or a flap harvested from the lower leg and erection devices, such as an erection pump, a semi-rigid rod or a bone. Some surgeons also offer to shape the tip of the penoid to resemble a glans. To ensure sensitivity, nerves in the phalloplasty are connected to nerves in the clitoris or the groin, respectively.

and an adnectomy a destructive means imposed upon them by the Transsexual Act (Lindemann 1997: 327).[71]

Finally, the German Standards are informed by the assumption that a person's gender identity can be derived from the genitalia at the time of birth, i. e. at a time no individual can speak on behalf of him- or herself. The gendering of a person uncovers the seemingly natural link between a person's morphology, gender role and gender identity as a heteronomous process based on social conventions. The fact that the recognition of a gender identity that does not follow the originally assigned gender requires psycho-medical assessment even past the age of majority implies that a person's gender or gender recognition is at no time self-determined.

The relationship between law and medicine

Law and medicine are interwoven in several moments of a legal and medical transition from one sex/gender to another, necessitating medicine to interpret legal rules. As an effect, two problems arise. First, 1970s medical knowledge on transsexuality informed the Transsexual Act in ways that conflict with current medical understandings of transsexuality. Second, medical procedures occasionally contradict the legislator's intentions.

While the Transsexual Act does not prescribe exact medical procedures, the legal revision of gender status was until the Federal Constitutional Court ruled ss. 8(1)3 and 8(1)4 TSG unconstitutional premised upon somatic measures. Section 8(1)3 TSG demanded permanent sterility as a prerequisite for a revision of gender status. Since there is a (slight) possibility of reversing a person's reproductive capacity using less invasive measures, such as a vasectomy or a tubal ligation, respectively, the German Standards suggest that the legal requirement is best met with maximum surgery, i. e. an orchidectomy in male-to-female transsexual individuals and a hysterectomy and adnectomy in female-to-male transsexual individuals.

Moreover, s. 8(1)4 TSG required as a precondition for a revision of gender status a surgical intervention on the external sex characteristics to approximate the outer appearance of the ›other‹ sex/gender. As mentioned earlier on, the German Standards interpret this legal requirement to be a penectomy, an orchidectomy, the reconstruction of external genitalia that resemble female ones, epilation and, if necessary, breast augmentation surgery in male women and a bilateral mastectomy, a hysterectomy and an oophorectomy in female men.

71 | In her defence of the German Standards, Becker readily admitted that the Standards were based on normative understandings of gender. However, she defended the establishment of maximum psychotherapeutic and surgical measures as a means to secure health insurance coverage of psychotherapeutic support and sex reassignment surgery in the light of austerity politics in the health system (Becker 1998: 158).

In her defence of the German Standards Becker claimed that the Standards did not invent sex reassignment surgery or the requirements laid down by the Transsexual Act, such as genital surgery and infertility as a precondition for a revision of gender status (Becker 1998: 155). However, she conceded that medicine contributed to the awkward link between gender reassignment and surgery at an earlier point in time (ibid: 156).

Apart from wanting to curb trans self-determination, sexologists tailored the German Standards to fit the legal environment. Langer and Hartmann e. g. explained the need for national standards of care with the specific legal context in the Federal Republic of Germany. They argued that such an environment required guidelines for surgical measures and the assessment according to the Transsexual Act (Langer/Hartmann 1997: 864). This notion is also expressed in the German Standards:

> [s]ince 1980 there is the Transsexual Act (TSG) in the Federal Republic of Germany, which regulates the legal preconditions for a change of first names and the gender status of a person. However, so far authoritative guidelines for the treatment and assessment of transsexuals are non-existent. The ›Standards of Care‹ issued by the Harry Benjamin International Gender Dysphoria Association which were initially presented in 1979 and have since then been revised several times can only be applied in a limited way under German circumstances. (Becker et al. 1997: 147)

Hence, while the German Standards constitute a medical document, the last section of the guidelines takes into consideration the requirements the Transsexual Act lays down in ss. 1 and 8 TSG.

Medical interpretations of legal provisions for a change of first names not only indicate ways of translating legal requirements into medically manageable steps. They also highlight how sexologists grapple with legally enshrined interpretations of medical concepts. Section 1(1) TSG e. g. rules among other things that the court is required to change a person's first name following an application, if the person due to his or her transsexual imprinting no longer identifies with the gender entered in the birth entry but with the ›other‹ gender. Sexologists agree that the behavioural concept of imprinting does not apply. Rather, the currently widely held concept of transsexuality suggests that transsexuality is the result of a multifactorial and cumulative development (Langer/Hartmann 1997: 865; Pfäfflin 1996b: 82). Therefore, the section on the standards of diagnostic assessment determines that the psycho-medical assessment according to s. 1 TSG requires the expert to reconstruct and discuss the transsexual individual's gender identity development, including environmental influences on the development of the ›disorder‹ in specific phases in life. The standards of diagnostics and differential diagnostics serve as guidance (Becker et al. 1997: 154).

Section 1(1) TSG rules that the applicant needs to have felt compelled to live according to his or her ideas for at least three years. The authors of the German Standards understand the term ›compulsion‹ to mean that the individual is unable to ›reconcile‹ his or her concept of gender with the assigned gender and has the persistent inner certainty of being a member of the ›other‹ gender.

In another instance, the timing of medical diagnostic instruments clashes with the legislator's intentions. The legislator expressly devised the provision for a change of first names to help transsexual individuals live according to their desired gender role in everyday life (Pfäfflin 1996a: 41; 1996b: 83; Augstein 1996: 76). At the same time, the statute requires that the person's gender identity will not change »with a high degree of probability« (s. 1[1]2 TSG). In order to assess the trans individual's consistency of the desire (or urge) to live according to the ›other‹ gender, psycho-medical experts employ the ›real life test‹ as a diagnostic means (Becker et al. 1997: 155). In doing so, the German Standards follow Langer and Hartmann's opinion that, »one can with or without support expect a certain amount of testing according to the desired role by means of the real life test as a precondition for a change of first names« (Langer/Hartmann 1997: 866 f.). However, by rendering a ›real life test‹ a medical precondition for meeting legal requirements for a change of first names, the German Standards turn the legislator's intentions upside down:

The indications for a change of first names on the one hand and surgical interventions on the other are basically different. The ›small solution‹ of the TSG, i. e. the possibility to change first names was legally fixed in order to facilitate the real life test for the patient in the new gender role, to protect them at the workplace, while contracting tenancy agreements, at the bank counter, during border crossings etc. from the critical gaze and inquisitory enquiries, since the outer appearance contrasts with the gender-specific first names entered in their documents. The indication for a change of first names is meant foremost to achieve social relief, and this indication can therefore be issued earlier than the medical indication for irreversible somatic interventions. (Pfäfflin 1996a: 41)

The relationship between the health insurance company administration and their medical advisory bodies and psycho-medical professionals

Disagreements between the health insurance company administration and advisory bodies on the one hand and medico-psychiatric professionals on the other complicate a medical transition from one sex/gender to another. In the period from 1987 until 2010, controversies arose over the interpretation of the Federal Social Court decision on 06 Aug. 1987 and the number of expert reports and the experts' qualifications.

On 6 August 1987 the Federal Social Court decided in a legal dispute between a transwoman and her health insurance company that she may demand of the health insurance to pay for sex reassignment surgery, »if her former psychophysical condition legally qualifies as an illness requiring treatment according to ss. 182 11, 184 I RVO« (BSG 1988: 1550). In its discussion of the Regional Social Court (*Landessozialgericht*; LSG) decision, the Federal Social Court held that not all forms of transsexuality qualify as an illness. Therefore, the pathological state needs to be established in every individual case (ibid: 1551).

In this particular case, the Court reasoned that the degree of the tension between the woman's male body and her identity was such that it amounted to an illness. According to the High Regional Social Court and the Federal Social Court, it is not the identity but the psychological strain that produces the illness (ibid).

The Federal Social Court argued that the eligibility to health care coverage is based on the condition that the illness can be healed, alleviated or that a deterioration of a person's health can be prevented. The Federal Social Court supported the High Regional Social Court's argumentation that in this particular case an indication for sex reassignment surgery was the only measure to alleviate her situation after all psychiatric and psychotherapeutic means had been unsuccessful (ibid).

The Federal Social Court suggested that the High Regional Social Court might have misjudged the expedience of the treatment, had it not considered psychiatric and psychotherapeutic treatment prior to surgery. However, it established that the High Regional Social Court had considered this issue, too, and resolved that all these means had been unsuccessful in this particular case (ibid).

Representatives of the medical advisory services of the health insurances companies and medical practitioners treating transsexual individuals as well as legal experts interpret this court decision differently. Banaski, a representative of the medical advisory services of the statutory insurance companies in Northrhine Westfalia, for instance concludes from the decision that statutory health insurance companies only need to pay for sex reassignment surgery after all psychiatric and psychotherapeutic means have failed to alleviate or eliminate the tension between a person's sex and his or her psychological identification with the ›other‹ gender (Banaski 1996: 65).

The lawyer Augstein disagrees with Banaski's interpretation of the court decision. She argues that the conditions laid down by the court ruling are sufficiently met with, if the specialist treating the individual states that psychiatric or psychotherapeutic treatment is unpromising right from the outset (Augstein 1996: 75 f.).

Indeed, the Federal Social Court decision on 10 Feb. 1993 seems to support Augstein's reading. In this particular decision, the Court argued that sex reas-

signment surgery is the only option for those individuals whose distress emanating from the tension between sex and gender identity constitutes an illness, regardless of whether the transsexual individual agrees to undergo psychiatric/psychotherapeutic treatment or not (BSG 1993: 2400).

Controversies also arise between the MDKs and medical specialists who treat trans individuals over the number of expert reports required for an indication for surgery and the experts' qualifications. With regard to the latter, Eicher and Pfäfflin suggest that it is irrelevant, whether a psychotherapist or a psychiatrist issues an indication for sex reassignment surgery (Eicher 1996: 48; Pfäfflin 1996a: 37).[72]

However, MDKs have defined the rules of the game at will. For example, until 2004 the medical advisory service of the health insurance companies in Bremen accepted expert reports, including indications for surgery from physicians experienced with trans individuals and with additional psychotherapeutic qualifications. In the course of the year, the MDK changed the rules to the effect that it no longer accepted expert reports from medical professionals other than from psychiatrists.

With regard to the number of expert reports required for meeting the costs of sex reassignment surgery, MDKs frequently ask for two expert reports. This means that trans individuals need to produce two expert reports for the county court and two for the respective statutory health insurance company of which the latter includes an indication for sex reassignment surgery.

Eicher, and Becker, Berner, Dannecker and Richter-Appelt suggest that this and further arbitrary requirements and interpretations of the law complicate the whole procedure (Eicher 1996: 64), hamper the medical and psychotherapeutic procedures and unduly prolong the proceedings under the Transsexual Act (Becker et al. 2001: 265). Similarly, Pfäfflin criticises the additional work, especially because the reports are presented to the MDKs, which will once more and finally decide upon the indication. Pfäfflin argues that this procedure produces a further controlling authority (Pfäfflin 1996a: 46).

The relationship between county courts and psycho-medical professionals

Occasionally tensions arise between the courts and psycho-medical professionals over procedural issues. Langer and Hartmann e. g. deplore that courts do not commission all qualified experts to write expert reports and exclude some

72 | However, Pfäfflin (1996a: 37) excludes endocrinologists, gynaecologists, urologists and general practitioners from the pool of potential experts for issuing an indication for sex reassignment surgery. He argues that the task of the latter is to exclude somatic contraindications, to determine individual hormone dosages and to control the effects and side effects of hormone treatment on a long-term basis.

instead. Moreover, they criticise the practice of some courts to address the applicant with the desired first name at the beginning of the legal and diagnostic procedures (Langer/Hartmann 1997: 868). Hence, Langer and Hartmann seem to be concerned about limitations of their power.

Pfäfflin is more concerned about the practice of some county courts to wait for one expert report before assigning an expertise to the second expert, and as such, with adverse effects of this practices on trans individuals. Like several trans organisations, he objects to such a practice, since this unnecessary delay prevents the applicants from sorting out their usually challenging lives (Pfäfflin 1996b: 87).

3.1.5 Summary: Sexological constructions of gender and transsexuality in the reform period

While approaches that attempt to explain transsexuality have increased in Western countries and research on assumed somatic causes has become more diverse, the sexological debate during the reform period in Germany appears to have engaged less with questions related to aetiology than in the period prior to the enactment of the Transsexual Act. Furthermore and in contrast to the 1970s and early 1980s, perspectives in sexology emerged in the early 1990s and the first decade of the 21st century calling for a critical enquiry into cis and the heteronormative gender binary. Like in the earlier period, though, somatic and multi-causal approaches were premised upon unquestioned gender and sexual norms, and an understanding of transsexuality as an anomaly prevailed.

Definitions, clinical pictures and differential diagnoses of transsexuality varied among sexologists. The sexological debate in the last decade of the 20th and the first decade of the 21st century mirrors a pluralisation of trans subjects and transsexual developments. As a result, the borders between transsexuality and other phenomena inhabiting the fringes of the gender regime became blurred. In addition, while the majority of concepts continued to pathologise transsexuality to varying degrees, in the early 1990s, a depathologising concept of transsexuality entered the sexological debate.

While the sexological debate in the time of the enactment of the Transsexual Act did not question psycho-medical authority and expertise on matters pertaining to transsexualism, the latter began to be challenged from within the discipline. Depathologising concepts however did not necessarily coincide with the acceptance of a transition from one gender to another as a self-determined decision.

The diagnostic process for an indication for medical and surgical measures and the assessment for a change of first names or gender status, respectively, reveals more or less disciplinary traits, in particular with regard to the controversially debated physical examination. Moreover, the hierarchically organised

situation between the assessing or diagnosing person, respectively, and the assessee renders the examiner's concepts of gender and sexuality the benchmark according to which access to sex reassignment treatment and legal goods were, and continue to be granted or denied.

A legal and medical transition from one gender to another takes place within a complex regulatory regime. Specific laws, jurisdiction, the German Standards and guidelines of the MDKs are part of this regime. All areas offer possibilities to those in a position to decide upon a trans person's gender identity to do so according to their respective interpretations of rules and guidelines. Furthermore, despite being very different regulatory regimes, the national psycho-medical guidelines for the treatment and assessment of transsexual individuals were devised taking into account the legal situation of the time. The Transsexual Act, however, was largely based upon medical knowledge and even more so of political interpretations of medical knowledge generated at a very different moment in the history of gender.

3.2 Developments and debates in the trans movement from the mid-1990s to 2010

Since the mid-1990s, the trans movement in Germany has changed structurally, conceptually and politically. Drawing heavily upon documents produced by trans organisations with an decidedly political agenda that are published on their respective web pages, this chapter traces the abovementioned developments of the trans movement from the mid-1990s until 2010.

While structural and conceptual changes within the trans movement were inextricably linked with each other, they will for analytical purposes be addressed separately. The first section of this chapter provides an overview of major structural changes within the trans movements that evolved in the abovementioned period. I will use as examples major local and national support and lobby groups, broad local networks and a multinational lobby group with German participation and membership that have emerged since the mid-1990s and draw upon self-representations of the organisations and networks, their respective history, membership lists and by-laws as sources.

The second section of this chapter focuses on concepts of gender, trans and perspectives on the gender binary in order to capture conceptual change and differentiation as it features on a trans-organisational level.[73] This section

73 | This does not mean however that the concepts that emerged in trans organisations with a political agenda comprehensively cover concepts within the trans movement. The focus here is on a systematic account of basic concepts in an influential part of the trans movement which in part co-exist throughout the entire social movement.

draws upon the history of the organisations, TransMann's FAQs (TransMann 2004a), talks and articles published on organisation websites, programmes, reports, flyers presenting the organisation or network and mission statements.

The initial sections are followed by an analysis of trans perspectives on legal rules of the Transsexual Act, procedures under the Act, sexological concepts of trans and the psycho-medical management of trans subjects in the abovementioned period. This section particularly deals with human rights issues raised by the Act, problems that arise with legal proceedings and practices trans individuals face and with trans perspectives on the classification of trans as a psychiatric and / or medical condition as well as the diagnostic and treatment process and health insurance practices. The analysis is foremost based on speeches, reports, programmes and a flyer addressed to doctors, by-laws, the abovementioned FAQs and an open letter to psycho-medical professionals engaged in assessment procedures (Alter 2008a).

While the new organisations that have emerged since the mid-1990s, like their predecessor organisation Transidentitas e. V., provide support and outreach, and information and education, they also operate in the areas of lobbying and networking. The fourth section of this chapter addresses means and concepts of social change to redress discrimination and major attempts to achieve trans law reform from the late 1990s to the Act to amend the Transsexual Act in 2009. By-laws, mission statements, flyers, announcements of events, suggested draft legislation for trans law reform, a submission and a key issues paper constitute major sources for this section.

I will argue that the mid- and late 1990s witnessed a substantial growth and diversification of the trans movement, most notably the rise of national lobbying groups and an increased visibility of until then barely noticed heterogeneous (trans)gender subjects in the political arena. These subjects largely challenge the heteronormative gender binary and decidedly object to legal regulations and psycho-medical concepts and practices that are perceived to curtail trans self-determination and infringe upon human rights.

3.2.1 Structural change[74]

Trans activism and organising has undergone significant structural change since the mid-1990s. These changes are mirrored in the development, growth and differentiation of national lobby and educational trans associations with local helpdesks; the increased consolidation of local activism and the local organisation of individuals and groups with marginalised genders and sexualities in broad networks; the creation of a supranational organisation and network; the

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

rise and proliferation of web-based trans organisations and networks, and the increased visibility of (trans)gender subjects that were previously barely or not at all represented in transsexual organisations and largely left unnoticed and unaccounted for in the political arena (de Silva 2014: 153).

Institutional differentiation and proliferation marks one of the most striking features of the German trans movement since the mid-1990s. While the foundation of Transidentitas e. V. in 1985 already indicated a tendency towards creating a nationwide infrastructure for trans individuals and whereas traditional local support groups continue to exist to this day,[75] three national organisations with regional chapters have emerged since Transidentitas e. V. gradually folded in the period from 1995 to 1997. These are the *Deutsche Gesellschaft für Transidentität und Intersexualität e. V.* (German Association for Transidentity and Intersexuality [dgti e. V.]), founded in Cologne in 1998 (Ottmer 2011),[76] TransMann e. V. (TransMan e. V.), which emerged in the same city a year later (TransMann undated)[77] and *Aktion Transsexualität und Menschenrecht e. V.* (Campaign for Transsexuality and Human Rights; ATME e. V.), founded in April 2008 in Ludwigsburg (ATME 2011; 2011a).[78]

75 | See e. g. *VIVA TS* in Munich (VivaTS München undated), *Trans-Ident Nürnberg* (www.nuernberg.trans-ident.de) and TransidentX in Stuttgart (TransidentX 2015), to name a few. While VivaTS was open to transsexual individuals and transvestites in the period discussed here, it has meanwhile shifted its focus to transsexual women and their families, friends and partners (VivaTS München undated). TransidentX serves ftm and mtf transsexual individuals. In 2010 and 2011, support groups in Bavaria (*Freistaat Bayern*), including Trans-Ident Nürnberg, organised under the umbrella support group Selbsthilfeorganisation Trans-Ident e. V. (Selbsthilfeorganisation Trans-Ident undated).

76 | The national headquarters of the dgti e. V. has changed over time, depending on the respective first chairperson's place of residence. The dgti e. V. maintains several helpdesks. At the time of writing, they are located in Bavaria and Baden-Württemberg in the south, Hesse (*Hessen*) in the centre, Lower Saxony (*Niedersachsen*) and Schleswig-Holstein in the north, Northrhine Westphalia (*Nordrhein-Westfalen*; NRW) and Rhineland Palatinate (*Rheinland-Pfalz*) in the west and Brandenburg in the east of Germany (dgti undated a).

77 | TransMann e. V. is registered in Munich (2004). Except for the branch in Cologne (Köln), the activities of TransMann e. V. were mainly located in the south of Germany from the late 1990s to 2010 (TransMan 2007).

78 | The bulk of ATME e. V.'s activities are centred in Baden-Württemberg. While ATME e. V. has so far only established one workgroup, the heading »*Landes-AKs*« *(Länder-Arbeitskreise; Länder* workgroups) (ATME 2015a) suggests that ATME e. V. does not rule out establishing local chapters in other German *Länder*.

The consolidation of local activism and organising in broad local networks is another structural feature of the German trans movement since the mid-1990s. Of these, the TGNB is the largest and most prominent one (TGNB 2006). The TGNB was founded during the annual Transgender Conference (*Transtagung*) in Berlin in 2001. Founding members were the dgti Berlin, the Drag Kingdom,[79] IdentX,[80] the then IGTF and now IVTF (*Interessenvertretung transsexueller Frauen*; Lobby Group for Transsexual Women), the Sonntags-Club e. V.,[81] TransSisters[82] and v.e.b. transgender united, which is nowadays known as Wigstöckel transgender united[83] (TGNB 2006a). By 2006, the TGNB constituted a network of 21 transgender and intersex groups that are active in the areas of education, counselling, support, social and political life, religion, migration, academia, fine arts, show and recreation (ibid).[84]

Since the middle of the first decade of the 21st century, networking and lobbying exceeds the local, regional and national level. Several German trans

79 | The Drag Kingdom is a group of drag kings and transmen which stages shows, organises workshops, maintains a website at www.dragkingdom.de and launches parties for political causes, such as the aid party on 09 Oct. 2010 called »Boobs, Brain & Bollocks« as a means to support a court case against ss. 8(1)3 and 8(1)4 TSG (Drag Kingdom undated).

80 | *IdentX* was a group of transmen, which has folded in the meantime.

81 | The Sonntags-Club e. V. is a centre that organises events and serves the lesbian, gay, bisexual and trans communities in Berlin (Sonntags-Club 2015). The Sonntags-Club e. V. was founded in 1990. Its roots lie in the East German gay movement (Sonntags-Club 2015a).

82 | TransSisters is a group of transvestites and transsexual individuals in Berlin.

83 | Wigstöckel e. V. emerged as an association in 2004 (Wigstöckel 2004-2015). It hosts an annual festival to »celebrate trans ways of life and performances« (Wigstöckel 2004-2015a). The first Wigstöckel transgender united festival in Berlin took place in 1996 (Wigstöckel 2004-2015b).

84 | Among these groups are e. g. 1-0-1 [one 'o one] intersex, a political fine arts and archive project on intersexuality, the Black Girls Coalition, the Free Sisters of Perpetual Indulgence (*Freie Schwestern der Perpetuellen Indulgenz*), Inbetween, which has become a part of ABqueer e. V., an information and counselling organisation for adolescents, and Transgender-Radio (TGNB 2006b). In addition, the TGNB founded several workgroups, such as »*Arbeitskreis Vernetzung*« (Workgroup Networking) (TGNB 2006c), »*Arbeitskreis Recht*« (Workgroup Law and Antidiscrimination) (TGNB 2006d) and »*Arbeitskreis Beratung und Fortbildung*« (Public Education and Counselling) (TGNB 2006e). In 2004, the TGNB established a scientific board (TGNB 2006f) and issued the online magazine *Liminalis* (TGNB 2006g). The so far last issue of the *Liminalis* appeared in 2009 (Liminalis 2009), and the scientific board no longer operates at the time of writing.

groups, such as the dgti e. V. and the TGNB or individual members engage in shaping the policies of e. g. the international network and lobby organisation Transgender Europe (TGEU) (TGEU 2009). The latter was founded in Vienna, Austria in 2005 (ibid).[85] By Sept. 2011, TGEU consisted of 38 member groups from 23 countries (TGEU 2012).[86] While most of the groups come from European countries, the association is also host to members outside Europe.[87]

New means of communication, in particular the internet added a further structural dimension to the trans movement. The internet not only greatly facilitated common policy-making over large geographical distances (Whittle 1998: 393) that organisations such as e. g. TGEU face. It also became a host for solely internet-based trans organisations, such as trans forums. In Germany, a group of transmen for instance established FTM-Portal.net (FTM-Portal.net 2009-2011) in December 2005.[88] It has since then become the largest German-speaking internet forum and the most comprehensive source of information and debates on e. g. transition-related legal, medical and social issues and gender politics specifically for transmen.

Structural change is however not limited to institutional change. Several organisations in part include in their policies or are even headed and staffed by community members who were marginalised, if at all present in transsexual support groups and on the political agenda of transsexual lobby groups until the mid-1990s. TransMann e. V. for instance initially emerged from a group of transmen's regulars in Cologne with the goal of creating a supportive infrastructure for transmen (TransMann undated), since transsexual support groups at the time mostly catered to the needs of transsexual women (Regh 2002: 196).

The dgti e. V. and ATME e. V. include trans children in their support efforts. The former provides trans children and adolescents and their parents support in everyday life.[89] On a political terrain, ATME e. V. demands an end

85 | TGEU defines as its mission to counter discrimination, in particular on the grounds of gender identity and gender expression and to achieve conditions in Europe that enable individuals to live according to any gender they prefer, without interference (TGEU 2010).

86 | By 2015, TGEU was host to 78 member organisations from 40 countries (TGEU 2015).

87 | See e. g. Armenia and Kyrgyztan (TGEU 2012).

88 | Until then, the website of TransMann e. V. served as a platform for this particular forum. Apart from ftm-portal.net, there have been several other forums for transmen, such as jungx.de, which folded in the early 2000s and ftm-city.de, which adopted conservative concepts of masculinity and no longer exists, either.

89 | Among these services are e. g. a comprehensive brochure for trans children and their parents (dgti 2015a), recommendations for parents of children with an atypical gender expression (Alter 2000), a networking service for parents and young trans individuals

to conversion therapies aimed at homo- and transsexual minors in Germany (ATME 2012: 46-51).

Similarly, the dgti e. V. and the Berlin-based association *TransInterQueer* e. V. (TrIQ e. V.)[90] include intersex individuals[91] in their respective staff, support programmes and policies.[92] While the preamble of the by-laws suggests that the dgti e. V. focuses on trans (cf. dgti 1998), it includes intersexuality in its name and ss. 2.1 and 2.3 of its by-laws (ibid) and at least temporarily created a space for intersex individuals and their respective issues.[93] As its name suggests, TrIQ

(dgti undated b) and sample letters written by the trans activist Alter that support trans children in schools (ibid undated c; d; e).

90 | TrIQ e. V. was founded in Berlin in Sept. 2006. The association was initially designed to offer professional counselling services in collaboration with inbetween/ABQueer e. V. and the TGNB, to educate the general public on issues related to trans, inter and queer individuals and to establish a centre, including a café for groups and events for the above mentioned individuals (TrIQ undated). TrIQ e. V. has, like several other organisations mentioned earlier on since then expanded its agenda to cover lobbying (cf. TrIQ 2013: 2), a process that will be addressed in chapter 3.2.2.

91 | Unlike the dgti e. V., TrIQ e. V. frequently uses the term ›intergender‹ (*Intergeschlechtlichkeit*) or as of late ›inter‹ (*Inter**) to refer to the phenomenon subculturally otherwise known as intersex. ›*Inter**‹ stands for a number of different possible identities and self-designations, such as intersex individuals (*Intersexuelle*), hermaphrodites (*Hermaphroditen*) or *Zwitter* (TrIQ 2009). The term *Intergeschlechtlichkeit* signifies a depathologising perspective on intersexuality (TrIQ 2009a) and serves as a gender identity without however suggesting that intersex individuals necessarily identify as such (ibid).

92 | Trans and inter may occasionally overlap. However, they are a set of different phenomena with specific issues. They have in common that they trouble conventional physical and/or socially normalised gender expectations. The relationship between trans and intersex organisations in Germany has been (Ghattas 2009: 1), and continues to be quite conflict-ridden.

93 | Support and lobbying by, and on behalf of intersex individuals within the dgti e. V. are e. g. mirrored in a so-called first aid brochure on intersexuality compiled by the intersex activist Claudia Klüsserath (Klüsserath 2001), a presentation by the trans activist Katrin Helma Alter during a hearing on 27 Feb. 2002 (Alter 2002), several talks on the Transsexual Act which take into consideration specific issues intersex individuals face (e. g. Alter 2000a; 2007) and the dgti e. V. key issues paper of 20 Mar. 2011 on the reform of the Transsexual Act (dgti 2011: 2). All of the lobbying efforts and talks mentioned above call for a right to intersex self-determination, such as the right to leave vacant the gender entry in the birth registry (ibid) and/or a ban on cosmetic surgery on intersex infants (ibid; Alter 2000a; Alter 2002).

e. V. serves the trans, intersex and queer communities. The activities and by-laws of TrIQ e. V.[94] suggests that intersex activism and services for intersex individuals appear to be more integrated into the organisation as a whole.[95]

3.2.2 Conceptual change and differentiation

Drawing upon different social contexts and discursive traditions, the new associations and networks mirror conceptual change and differentiation that have taken place in the trans movement since the mid-1990s. So far, and minor differences between associations and networks notwithstanding, two fundamentally different concepts of trans and transsexuality, respectively, have evolved within the trans-political arena in Germany, most notably between the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. on the one hand and ATME e. V. on the other. The respective concepts have different implications for inclusion. Despite these differences, the associations and networks mentioned above have in common that they demand the right to self-determination and an end to discrimination.

Conceptual change: Social and discursive factors

The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. emerged amidst wider social change, developments in communication technology and both personal and theoretical debates on gender and sexuality. These interlocking processes were conducive to calling into question apparent truths of gender and sexuality, such as the seemingly causal link between a person's morphology, gender expression and heterosexual orientation as well as the gender binary.

The DGfS and the trans activist Regh succinctly summarise tendencies towards social change in wider society that have taken place during the past decades. In its submission to the German government, the DGfS observe »an

94 | See the by-laws of TrIQ 2007; 2014.

95 | TrIQ e. V. closely collaborates with OII Germany/IVIM e. V., a fact that is e. g. mirrored in the adoption of the latter's understanding of intersexuality (see TrIQ 2009a) and the conference »Inter* Aktion« in Oct. 2011 in Berlin, which was organised in collaboration with the German chapter of OII/IVIM e. V. The conference was designed to create a space for intersex individuals, their respective parents and other relatives to meet, exchange experiences and establish networks (IVIM e. V./TrIQ 2011). Moreover, TrIQ e. V. offered a free of charge workshop on trans and inter in work situations (*Trans- und Intergeschlechtlichkeit in der beruflichen Praxis*) for executives, equal opportunities commissioners, personnel administrators, among others in 2011 (TrIQ 2011). TrIQ e. V. also offers counselling services and hosts the *Zwittercafé*, also known as »*Hermcafé*« or »*Inter* Café*«, a meeting point for intersex individuals, their friends and relatives (TrIQ 2007-2012).

ongoing flexibilisation of formerly rigid characteristics of gender belonging« (Becker et al. 2001: 260). The authors argue that the representation and social recognition of masculinity and femininity are based on a number of specific cultural signs that occasionally render sexed features of the body less prominent in everyday life (ibid).

While the authors of the abovementioned statement suggest a dwindling significance of the sexed body, Regh observes an increasing flexibility of gender roles. Arguing that cis lesbian and gay individuals were no longer denied their femininity or masculinity, respectively when choosing employment traditionally associated with the ›other‹ gender, he suggests that in the light of these developments, trans individuals no longer saw a point why they were expected to live (or feign) heterosexual lives or seek employment conventionally deemed appropriate for their respective gender (Regh 2002: 193).

The internet and poststructuralist concepts of gender and sexuality most dramatically propelled conceptual change in the trans movement in Germany in the period from the mid-1990s to the turn of the century. As Regh states, the internet provided access to medical information, including the risks and limitations of genital surgery, and to theoretical debates on gender and sexuality, most notably queer theory (ibid: 192). These technological and theoretical developments allowed trans individuals whose gendered and sexual lives deviated from the standardised route prescribed for transsexual individuals to become visible and to communicate with each other. As a result, trans individuals gained more independence of transsexual support groups and the medical community, which at the time generally endorsed conservative perspectives on gender and sexuality (ibid 191; 195).

The new organisations that evolved amidst the abovementioned processes provided sites for self-reflection and the development of trans subjectivity, offered a space for the development of a counter-discourse to hegemonic understandings of masculinity, femininity, gender and sexuality and became a basis for claiming trans as an identity (de Silva 2005: 264). These shifts are mirrored in the terminology and concepts of trans and gender the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. endorse.

Conceptual change: Terminology

Struggles over terminology have marked the German trans movement since at least the mid-1980s. The use of various terms other than ›transsexual‹ (*transsexuell*) or ›transsexuality‹ (*Transsexualität*) to describe trans individuals or the phenomenon, respectively, initially served as a means for trans organisations, such as Transidentitas e. V., to distance themselves from the pathologising connotations of medical ascriptions.

As the name of the organisation suggests, the dgti e. V. initially followed in the footsteps of Transidentitas e. V. by referring to individuals sexologists called

›transsexuals‹ as individuals with trans identities (*Transidente*) and the phenomenon as trans identity (*Transidentität*).[96] The dgti e. V. adopted this particular term for two reasons. First and as mentioned earlier on, like Transidentitas e. V., it rejected the pathologisation associated with the medical term ›transsexuality‹. Second, the dgti e. V. wanted to avoid the common misunderstanding that transsexuality is a sexual orientation (Ottmer 2011).

However, the term ›trans identity‹ was contested, too. While TransMann e. V. rejected ›transsexuality‹ as a general term for trans individuals,[97] it also decided against using the term ›trans identity‹, arguing that this particular term suggests an individual identity problem.[98]

Starting with TransMann e. V. in 1999, by the turn of the century the organisations mentioned above as well as the local networks mentioned earlier on that were founded in the course of the first decade of the 21st century decided to take on the term ›transgender‹ when speaking of trans individuals in general (Alter 2007; TransMann 2004a; TGNB 2006a; TrIQ 2009).[99] At the same time, the associations and networks continue to refer to individuals as transsexual or as persons with a trans identity, if the latter identify as such (see e. g. Alter 2000; TGNB 2006a; TransMann 2004a; TrIQ undated a: 11). Frequently, the organisations use the German translation ›*Transgeschlechtlichkeit*‹

96 | At the time of writing, the dgti e. V. faces a history of one and a half decades. In the light of rapid developments in trans politics, perspectives on a number of issues, such as e. g. the perceived legitimacy of medical expertise and aspects related to law reform, have changed over time. The same applies to the term ›trans identity‹. While current members of the dgti e. V. doubt the founders of the organisation would nowadays use this particular term against the background of a policy that insists on the self-determination of one's own individual gender identity, the current leadership decided to stick to the name as a historical »brand name« (Ottmer 2011).

97 | TransMann e. V. objected to the term ›transsexuality‹ for two reasons. First, and like the dgti e. V. TransMann e. V. holds that transsexuality is frequently and incorrectly associated with a sexual preference (TransMann e. V. 2004a). Second, the organisation disagrees with the notion that medical and surgical measures constitute the defining feature of transsexuality, suggesting instead that trans phenomena such as transvestites and transsexual individuals cannot be clearly distinguished from each other (ibid).

98 | Despite its unease with the term ›trans identity‹, TransMann e. V. uses this term in its by-laws of 2004 (TransMann e. V. 2004).

99 | The suggestion for a Transgender Bill (*Transgendergesetz*; TrGG) which the dgti e. V. and TransMann e. V., among other organisations and individuals, produced and submitted to the Federal Home Office in 2000 mirrors the consensus to use the term ›transgender‹ among these at the time two trans organisations with a national scope.

(TrIQ undated a: 1), the abbreviation ›*Trans**‹[100] (trans) (TransMann 2004a) or, more specifically ›*Transmann*‹ (transman) or ›*Transfrau*‹ (transwoman) (Alter 2002; TransMann undated a; 2001).

Conceptual change: Concepts of gender and trans

This particular terminological shift towards the end of the 20th century within trans organisations with a decidedly political agenda in Germany not only defies heteronomous and pathologising medical concepts. Setting out from the premise of a plurality of highly individualised genders and a concept of gender that challenges conventional notions of masculinity and femininity, ›transgender‹ or simply ›trans‹ stands for diverse phenomena and multiple social identities, challenges heteronormative expectations, disrupts the normalised link between a person's morphology, gender expression and identity, reclaims trans from the medical realm and challenges the gender binary.

The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. set out from a concept of gender that challenges gender dualism. The dgti e. V. holds that regardless of whether a vast majority of individuals are able to relate to either of the exclusively framed categories ›male‹ and ›female‹ or ›man‹ and ›woman‹, respectively, these phenomena are at best bi-polar with fluid boundaries (Alter 2007). Similarly, TransMann e. V. suggests that ›male‹ and ›female‹ are not irreconcilable opposites, but »two halves of a scale that spans the whole spectrum of human possibilities« (TransMann 2001). Like the dgti e. V., TransMann e. V. suggests that the sparsely populated but highly volatile region in the middle of the spectrum is inhabited by individuals who identify as bi-gendered, non-gendered or intersex (ibid; Alter 2002).

The associations and networks discussed here also question the notion of the immutability of an individual's gender. The dgti e. V. e. g. notes that gender is not necessarily a permanent condition (Alter 2000). The TGNB conceptualises gender as a fluid spectrum of diverse identities (TGNB 2006a), a concept reminiscent of Bornstein's idea of gender fluidity, which she defines as »the ability to freely and knowingly become one or many of a limitless number of genders, for any length of time, at any rate of change. Gender fluidity recognizes no borders or rules of gender.« (Bornstein 1994: 52)

Moreover, the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. challenge the notion that a person's gender performance and gender identity can be deduced from physical properties and functions, such as genitalia, hormones and procreative capacity. Rather, as the dgti e. V. notes, it is a cultural practice to assign a person to a particular gender on the basis of genitalia (Alter 2002) or to

100 | Borrowed from computer language, the asterisk denotes the inclusivity or indefinite number of individuals who either temporarily or permanently do not or only in part identify with the assigned gender and who identify as trans (Regh 2002: 192).

assume a particular parental role and identity based on reproductive potential (ibid 2000), rendering unimaginable subject positions, such as male mothers and female fathers.

Finally, the organisations insist on the right of an individual to determine its respective gender and to be socially recognised. Like the dgti e. V. (cf. Alter 2002), TransMann e. V. holds that every gender is valid. The organisation demands that nobody should be forced to move from a position the respective person feels comfortable with, simply for the purpose of maintaining the currently hegemonic bi-polar gender system (TransMann 2001; ibid undated a).

TrIQ e. V. defines ›transgender‹ as an umbrella term for individuals who cannot, or do not want to live according to the gender they were assigned to at the time of birth (TrIQ 2009; ibid undated a: 11). Similarly, the TGNB conceptualises ›transgender‹ as being comprised of individuals to whom the experienced gender is not a binding consequence of the gender they were assigned to at the time of birth (TGNB 2006a). Analogously TransMann e. V. defines ›transmen‹ (*Transmänner*) as individuals who feel they are not, or insufficiently described by their original birth entry as girls (TransMann undated).[101] These definitions imply that the body or, more specifically, a person's genitalia are neither decisive for an individual's self-perception, nor of that of others. Rather, as TransMann e. V. notes, it is the identity and an individual's performance that determine a person's gender (ibid 2004a).

The dgti e. V. emphasises that ›transgender‹ is not equivalent to the concept of a ›third gender‹, arguing that the latter reproduces a normative category (Alter 2000). Instead, transgender is composed of diverse identities on a fluid spectrum that as the TGNB and TrIQ e. V. suggest include, but are not limited to self-identified cross-dressers/transvestites (*Transvestiten*), drag kings, drag queens, trannies (*Transen*), some transsexual individuals, transwomen, transmen, individuals with trans identities, transgender and fairies (*Tunten*) (TGNB 2006a; TrIQ undated a: 11).[102] Following the same principles, ›transman‹ covers multiple social identities, such as e. g. FTMs (*FzM-Transsexuelle*), drag kings, boys and fags, just to name a few.[103]

›Transgender‹ also stands for individuals with heterogeneous decisions with regard to surgical and legal measures, without however compromising

101 | Hence, an individual with a female anatomy might not identify as a woman, but in part or entirely as a man and wishes to be recognised as such (TransMann e. V. 2004a).

102 | While the TGNB does not use medical terms, such as ›transsexuals‹ or ›transvestites‹, replacing them instead with terms, such as ›trannies‹ or ›cross-dressers‹, TrIQ e. V. endorses a concept of radical self-determination, hence accepting that some individuals might self-identify as transsexual individuals.

103 | In his landmark study on FTMs and transmen in the USA, Cromwell observes a similar heterogeneity among transmen (Cromwell 1999: 28-30).

individuals who require some or all of the measures possible to ensure their survival. As TransMann e. V. notes in its web-based list of frequently asked questions (FAQ),

> And what happens after achieving the self-awareness that one is trans? Some don't do anything except for to live their lives as they deem right for themselves. Medical and legal measures are not necessarily required. However, they make some things easier (and render things possible for some in the first place). They are, however, neither necessary, let alone defining. (TransMann e. V. 2004a)

Hence, TransMann e. V. like TrIQ e. *V.* advocates self-determination with regard to the abovementioned measures, arguing that whether a person requires medical and/or legal interventions and recognition of any sort depends on the person's individual needs when negotiating a life with him/herself and his/her environment (ibid).[104]

The diversity of trans individuals subsumed under the term ›transgender‹ extends to sexuality, too. Sexual preferences cover a large spectrum that not only questions heteronormative expectations. They question an immutable choice of subjects (or objects). TransMann e. V. observes that trans individuals more frequently than non-trans individuals live as lesbians or gay men. Some trans individuals do not even bother to define their respective sexual preferences (ibid). In fact, if trans spans a range of gendered subjects, not to mention individuals that refuse to be gendered, or persons who consider themselves bi-gendered, categories such as homo- or heterosexuality no longer make any sense.

More consistently than the dgti e. V. or TransMann e. V., the TGNB and TrIQ e. V. integrate into their respective policies an intersectional approach to transgender, hence acknowledging the multiplicity of vectors of power that constitute an individual and deprive it of, or bestow upon it social privilege. Both organisations are acutely aware of e. g. racism, sexism, heterosexism, ableism, ageism and lookism that influence a person's access to social and medical goods and services.[105] This particular insight is a precondition for developing a politics of inclusion.

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104 | TrIQ e. V. and the dgti e. V. provide some reasons why some trans individuals do not, or only partially follow the prescribed legal and medical route. Among these are an incompatibility between self-perception and pathologisation, health reasons that do not allow for extensive medical and surgical interventions (TrIQ undated a: 11) or simply the desire not to become unambiguously male or female (Alter 2000).

105 | TrIQ e. V. e. g. explicitly notes that there is no space for racism, sexism, right-wing extremism or fascism or any other offending or discriminatory practices on its premises (TrIQ 2009b). Like TrIQ e. V., the TGNB intends to create an inclusive environment, to

Like TransMann e. V., TrIQ e. V. rejects a policy of ›passing‹, hence rendering trans visible while acknowledging different individual needs at the same time.[106] The TrIQ e. V. and TGEU member Julia Ehrt suggests in her speech on perspectives and aims of the transgender movement that a poorly shaved transwoman need not hide herself in TrIQ e. V. According to Ehrt, this particular network is a space in which »nonconformity constitutes the norm and not the deviation« (Ehrt 2009: 3). By insisting on the right not to pass, the associations and networks not only rearticulate the meaning of bodies. They take the, as Sandy Stone puts it »responsibility for *all* of their history, to begin to rearticulate their lives not as a series of erasures […], but as a political action begun by reappropriating difference and reclaiming the power of the refigured and reinscribed body« (Stone 1991: 298 f.).

The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. also reclaim transgender from the medical realm. Arguing that other societies managed to, and continue to deal with trans without resorting to medical and surgical interventions, TransMann e. V. holds that transgender is not foremost a medical problem, but a social phenomenon. Regardless of the fact that many trans individuals opt for medical and surgical measures, they are not the solution to

which hosting groups such as the Black Girls Coalition, a group created for, and by trans migrants, attests to (TGNB 2006b).

In s. 2(4) of its by-laws, TrIQ e. V. states that it aims at countering prejudice and discrimination with regard to the body, gender identity, gender expression and sexual orientation and tries to cushion their social effects (TrIQ 2007). The local network strives to support elderly trans, inter and queer individuals (ibid: s. 2[17]). In addition, TrIQ e. V. hosts the group *Transsexuelle Menschen mit Behinderungen* (Transsexual Individuals with Disabilities), a group of individuals with mental and physical disabilities, who frequently encounter larger obstacles in diagnostic assessment and surgical situations than trans individuals who are deemed healthy in this regard by medical standards. As the 2012 motto »Wigstöckel for every_BODY« (Wigstöckel 2004-2015b) suggests, TrIQ e. V. as the main organiser of the event challenges dominant body norms by hosting performances e. g. by wheelchair-bound individuals or individuals who, according to weight norms prevailing in German society would be considered as obese.

106 | Whittle, Bornstein and Stone stress the inadequacy of a policy of ›passing‹ or ›assimilation‹. They argue that this type of policy and personal conduct have contributed to hierarchising subjects within the community (Whittle 1998: 397; Bornstein 1994: 67 f.). ›Passing‹ and ›assimilation‹ have also developed a narrow focus on privacy rights as opposed to anti-discrimination policies (Whittle 1998: 397) and a lack of solidarity with trans individuals, in particular transwomen, who frequently cannot pass beyond casual inspection (ibid: 398). Moreover, such a policy has created trans as a homogeneous category and forecloses authentic relationships (Stone 1991: 298).

the problem. According to TransMann e. V. medical interventions are simply a means of survival for some in current German society (TransMann 2001).

›Transgender‹ also figures as a political concept, which identifies and challenges the heteronormative gender binary as the source of discrimination and seeks emancipation from its debilitating effects. The dgti e. V., TransMann e. V., the TGNB and TrIQ e. V. consider the gender binary a pervasive normative, reductionist and oppressive regime that marginalises all other genders, using structural discrimination, pathologisation and exoticisation as its means (Alter 2002; TransMann 2001; ibid undated a; TGNB 2006; TrIQ 2011a; ibid 2011; Ghattas 2009: 2 f.).

Setting out from a depathologising and emancipatory concept of transgender, the associations and networks aim to achieve self-acceptance, social inclusion, freedom of prejudice and discrimination, and acceptance by society as one of many facets of human life (dgti 1998: 1; TransMann 2001; TrIQ 2009b; TGNB 2006). These aims are succinctly summarised in s. 3 of the TGNB by-laws:

> It is the aim and task of the TGNB to create links between transgender groups operating in Berlin in order to campaign more effectively for the individual and social matters of trans individuals. Moreover, [the TGNB] brings home to society the limits and the fallibility of the binary gender system. The TGNB aims at sensitising the public for prejudices against transgender individuals and to reduce their pathologisation, criminalisation, discrimination and exoticisation. In doing so, the constraints that arise from a bi-polar gender concept are meant to be dissolved for the benefit of all individuals in our society. (TGNB 2006h)[107]

Conceptual differentiation: Social and discursive factors

With the advent of ATME e. V. in 2008, concepts of trans(sexuality) began to differentiate substantially among trans organisations with a political agenda. Drawing upon other discursive traditions, frustrated with continuing government inactivity in the face of discrimination, and threatened by prolonged and humiliating procedures on the route to health-insurance-covered sex reassignment measures and legal recognition, ATME e. V. developed a concept of transsexuality that, a common stance on the issue of self-determination notwithstanding, is incompatible with those of the aforementioned associations and networks.

While sexologists in Germany have overall been less preoccupied with aetiological research and considerations since the 1990s, German and interna-

107 | See also ss. 2(1) to 2(10) of the original by-laws of TrIQ e. V. (TrIQ 2007), the preamble of the by-laws of the dgti e. V. (1998: 1) and ss. 2.1.1 to 2.1.3 of the programme of TransMann e. V. (TransMann e. V. 2001).

tional research on potential somatic causes of transsexuality did not cease. The period around the turn of the century faced a surge of international neuroendocrine research and research in human genetics that was frequently based on the assumptions of two polarised sexes and a prenatally induced predisposition towards cross-gender identification in transsexual individuals. ATME e. V. heavily draws upon the findings, or what the association considers to be findings of this research.

ATME e. V.'s policy also is motivated by continuing government indifference towards trans, legal and parliamentary demands to reform trans legislation. Since its very enactment in 1981, trans individuals and organisations have challenged several sections of the Transsexual Act, if not the entire Act. Moreover, and initiated by trans litigants, from 1983 onward, the Federal Constitutional Court ruled several sections of the Act unconstitutional and therefore either void or inapplicable. Furthermore, individual parliamentarians and opposition party members increasingly launched parliamentary enquiries and made suggestions for law reform to the respective governing coalitions to no avail. Despite obvious and widespread discontent with the Transsexual Act and with exception of the Bill on Transsexual Law Reform, which was devised and quashed, the respective federal governments have been unwilling to seriously engage with transsexual law reform.

Furthermore, demands for a more individualised and self-determined approach to trans did not lead to less psycho-medical surveillance and health insurance obstacles and increased options for a flexible and self-determined use of medical and surgical interventions covered by statutory health insurances. Instead, instructions of the MDS e. g. reinforced a uniform regimen with a fixed timeframe for psychotherapeutic and psychiatric treatment prior to any rather rigid sequence of medical and surgical interventions (MDS 2009), while at the same time insisting that every individual step requires assessment. These developments rendered particularly those individuals vulnerable who relied on health insurance coverage of medical and surgical interventions. These factors inform ATME e. V.'s concepts and policies.

Conceptual differentiation: Terminology

Unlike the dgti e. V., TransMann e. V., the TGNB and TrIQ e. V., ATME e. V. embraces the term ›transsexuality‹. The organisation employs the terms ›*Transsexualität*‹ (transsexuality), or more specifically ›*transsexuelle Frau*‹ (transsexual woman) or ›*transsexueller Mann*‹ (transsexual man), respectively, to describe the subjects it claims to represent (ATME/MUT 2008: 5). At the same time, ATME e. V.'s concept of transsexuality differs from sexological meanings in several ways.

Conceptual differentiation: Concepts of gender and transsexuality

Other than refuting the notion that a person's gender can be determined externally and the assumption that an individual's identity can be derived from his or her genitalia, ATME e. V.'s concepts of gender and transsexuality have little in common with those of the aforementioned organisations. Rather, ATME e. V. endorses an essentialist, homogenising and pathologising concept of transsexuality and only by implication questions the gender binary.

ATME e. V. endorses an essentialist, ahistorical, species-transcending concept of gender and transsexuality. The organisation claims that transsexuality is innate and immutable: »Scientific research is convinced by now that the gender identity is determined before birth and cannot be changed after birth.« (ATME 2010: 51)[108] ATME e. V. argues that transsexuality occurs in all cultures and has done so at all times (ibid 2010a: 1; 2011b).[109] Spokeswomen of the association suggest that, »transsexual behaviour can also be observed [...] among animals« (ibid 2013: 51).[110]

Consequently, ATME e. V. refutes social constructionist or deconstructionist approaches to gender and, more specifically, transsexuality or any approach that suggests that transsexuality develops cumulatively. The organisation argues that the latter are either »nonsense« (ATME 2015b) or »ideological« (ibid 2010: 22 and 29). The association relies on the premises and (assumed) findings of neuroscientific research and research in human genetics instead, arguing that this type of research produces »scientific facts« (ibid 2013: 56).[111]

108 | In a later report, ATME e. V. however claimed that gender identity »is not very suitable to describe the problems of transsexual people«. According to ATME e. V., »[t]ranssexuality is not about what you do, it's about who you are« (ATME 2012b: 5).

109 | While individuals who do not identify with the gender assigned at birth exist in other several other cultures, too, different societies offer different interpretive patterns and individuals develop different concepts of self, use different terms to describe themselves and experience historically-specific forms of discrimination and/or social recognition and appreciation.

110 | For an analysis and critique of applying human concepts of gender on animals, see Ebeling 2011.

111 | However, neuroscientific research and research in human genetics are informed by gender discourses circulating in society. With few exceptions (cf. Luders et al. 2009), studies on the aetiology of transsexuality to date in the abovementioned fields for example share the assumptions that cis is normal and transsexuality pathological. This notion is mirrored in frequently used attributes such as ›healthy‹ for men and women whose gender identity appear to follow from male and female genitalia (see, e. g., Hulshoff Pol et al. 2006) and by referring to transsexuality as a ›gender identity disorder‹ (see, e. g. Kruijver et al. 2000; Bentz et al. 2007; Bentz et al. 2008; Bauer 2010).

Results of neuro-biological studies to date do not allow firm conclusions to be drawn (Nieder/Jordan/Richter-Appelt 2011: 205; Cubasch undated) and at best allow to generate hypotheses (Nieder/Jordan/Richter-Appelt 2011: 216). Nevertheless, ATME e. V. interprets the findings as though they either provide evidence for a biological basis of transsexuality (ATME 2009: 9; 2010: 15; 2011b; 2013: 6) or at the very least render such a conclusion highly probable (ATME/MUT[112] 2008: 7).[113]

ATME e. V. adopts assumptions on gender as given and polarised entities as they feature in several studies on transsexuality in neuroendocrinology and human genetics (cf. ATME 2013). Based on the premise that prenatal hormonal processes configure male and female brains differently (ATME 2013: 24) in conjunction with the assumption that »transsexual women are really women, because they have an anatomically female brain« (ibid 2012a: 3), ATME e. V. defines transsexual individuals as people whose genitalia and chromosomes do not correspond with their »brain sex« (ibid: 2011a).

According to ATME e. V., gender consists of multiple factors, such as gonads, genitalia, hormones and the brain. While an arbitrarily chosen physical feature such as e. g. genitalia may indicate a person's gender, it is according to ATME e. V. the brain that determines an individual's gender identity (ATME/MUT 2008: 2; ATME 2009: 32; 2010: 51; 2011b). Hence, »[a] transsexual women who was born as a girl with a penis and testicles is a woman. A transsexual man who was born with a uterus and a vagina is a man.« (ATME 2009: 32)

Since the development is according to ATME e. V. based on biological factors that are either invisible or at least not immediately visible, the association

112 | ATME e. V. emerged from the group »*Menschenrecht und Geschlecht*« (Human Right and Transsexuality; MUT) (ATME 2009: 32).

113 | For example, neuroendocrine studies by Zhou et al. (1995) and Kruijver et al. (2000) suggest that the volume of transsexual women's central subdivision of the bed nucleus of the stria terminalis (BSTc) (Zhou et al. 1995) or the number of somatostatin-expressing neurons in the BSTc (Kruijver et al. 2000), respectively, are equal to those of ciswomen rather than men's. Both research teams interpreted their findings as supportive of the hypothesis that transsexuality develops in interaction between the developing prenatal brain and sex hormones (Zhou et al. 1995: 70; Kruijver et al. 2000). Research from within the discipline and by sexologists alike have challenged these studies. Chung, De Vries and Swaab's neuroendocrine study for instance generated different findings. The researchers suggest that sex dimorphism in the BSTc begins at puberty (Chung/De Vries/Swaab 2002: 1031) and may also be shaped by experience (ibid: 1032). Sigusch questioned the abovementioned studies for methodological reasons (cf. Sigusch 2007: 352). Regardless of these critical interventions, ATME e. V. insists that the initially mentioned studies indicate a neuro-biological cause of transsexuality (ATME 2012a: 3; see also 2013: 6; 43; 2010: 15).

claims that only the individual itself can impart reliable information on his or her gender identity (ibid; 2011; 2011b; 2013: 5). ATME e. V. argues that while gender assignments based on the inspection of the genitalia at the time of birth frequently apply, in a case of transsexuality, however, a gender assignment based on genitalia at birth leads to physical and emotional distress and violates a person's dignity (ibid 2010: 82 f.; 2011; 2011c: 25; 2012: 47 f.).

While ATME e. V. does not consistently subsume transsexuality under intersexuality, there are three indicators suggesting that the organisation toys with such a classification. First and based on the assumption that the brain develops in another direction than e. g. the genitalia, ATME e. V. assumes that there is a somatic cause of transsexuality that causes distress (ibid 2012a: 22). Second, in its report to the WHO in 2012 and its compendium on the development of transsexuality in 2013, ATME e. V. quotes researchers who argue that transsexuality is a form of intersexuality (ibid: 14; 2013: 53), without however commenting on this assumption. Finally, ATME e. V. tentatively suggests that, »[i]n all likelihood, transsexuality is a form of intersexuality« (ibid 2010: 82) and that, »[t]hat transsexuality is a natural sex variation« (ibid 2015c).

However, in other instances, ATME e. V. distinguishes between transsexuality and intersexuality. This distinction occurs in the 2012 report against reparative therapies in children featuring gender expressions and identities that are conventionally associated with the other of the two socially accepted genders (ibid 2012: 14). The same applies to ATME's second UPR human rights report in 2012: »But in contrast to intersex people transsexual people are sexual normvariances [sic!] whose variation is considered as being outside the measurability of sex, along the following lines: Those who aren't able to prove who they are, are people who only have ›subjective feelings‹.« (Ibid 2012b: 1; cf. ibid 2015c)

ATME e. V. frames transsexuality as a pathological condition by invoking the concept of the ›wrong body‹, by suggesting classifying transsexuality as a somatic disorder and suggesting that the distress requires treatment. The organisation describes a »transsexual woman [...] [as] a woman from birth on and a transsexual man [...] [as] a man from birth an [sic!] – just born with the wrong gonads« (ibid 2010: 51). ATME e. V. suggests to create a somatic classification Q 57.0 in the ICD or to subsume transsexuality under »congenital dysplasia, deformities and chromosomal anomalies« (ibid 2009: 30; 2010: 84). Finally, ATME e. V. argues that transsexual individuals' distress can only be mitigated by »adapting as far as medically possible the deviating body parts and organs to the real gender« (ibid 2012a: 22).

At the same time, ATME e. V. vehemently opposes the psychopathologisation of transsexuality. The organisation holds that so far there is no scientific evidence for considering transsexuality a mental disorder (ibid 2010: 65; 2012a: 12, 18). Drawing upon Seikowski's representative study on trans individuals' need for psychotherapy, ATME e. V. suggests that transsexual individuals are

no more »mentally disturbed« than anybody else (ibid 2012a: 15). ATME e. V. argues that classifying transsexuality as a gender identity disorder violates human dignity (ibid 2010: 44; 2011; 2012a: 17 f.). Therefore, the organisation demands removing the diagnosis transsexuality (F64.0) as a psychiatric disorder from the ICD and the diagnosis ›gender identity disorders‹ from the DSM (ibid 2008: 1; 2011b; 2011c; 2010: 84).

ATME e. V. paints a rather homogeneous picture of transsexuality. The organisation for example generalises the need for surgery. This assumption is mirrored in the following statement: »German health insurance funds and insurance companies often refuse to pay for the costs of treatments otherwise provisioned in the Standards of Treating and Assessing Transsexuals. This contradicts scientific knowledge regarding the necessity of sex alignment procedures in cases of transsexuality.« (Ibid 2010: 63)

ATME e. V. also subscribes to a policy of ›passing‹. The association suggests that all medical and surgical measures possible should be considered necessary interventions. ATME e. V. argues that the head, here meaning the face, hair, voice and throat, constitute the most significant sex characteristics in everyday life.[114] ATME e. V. holds that transsexual individuals' distress caused by living ›in the wrong body‹ and social discrimination against transsexual individuals can only be mitigated or prevented by granting access to all possible measures (ibid 2010: 68 f.). As an effect of this policy, individuals are left to fend for themselves, who for various reasons cannot, or do not want to undergo medical and/or surgical treatment.

In addition, ATME e. V.'s concept is biased towards white transsexual individuals as evidenced when ATME e. V. conflates transphobia with racism. ATME e. V. claims that the discrimination against transsexual individuals is the »most widespread global form of racism of our days« (ibid: 15) and suggests that, »this racism is associated with a sort of worldwide ›race ideology‹ that isn't propagandized by National Socialists, but rather is spread worldwide by unscrupulous doctors and psychologists. To view humans as inferior, mentally disordered or non-intelligent due to their physical otherness is racism of the worst kind.« (Ibid: 15 f.) While racism and transphobia are based on the creation of differences and ascriptions in order to legitimate the unequal distribution of resources and violence, they are different relations of power with differ-

114 | According to the relevant guidelines generated by the MDS in 2009, statutory health insurances do not cover facelifts, rhinoplasties and liposuction, because they are considered cosmetic interventions (MDS 2009: 14). In exceptional cases, statutory health insurances may take on the costs of phonosurgery prior to the ›real life test‹ (ibid: 29). Although the MDS holds that a chondrolaryngoplasty is primarily a cosmetic intervention, it does not entirely rule out that the statutory health insurance cover the costs of such an intervention in cases of female-to-male transsexuality (ibid: 30).

ent historically-specific manifestations (de Silva 2014: 162). The conflation of transphobia and racism renders invisible transsexual individuals whose lives are affected by transphobia *and* racism.

The gender binary does not seem to be the declared target of ATME e. V. Rather, the association focuses on having transsexuality recognised as a biologically based, innate and unalterable condition as a means to end human rights violations and discrimination against transsexual individuals (ATME 2010: 69 f.; 2012a: 22). ATME e. V. identifies sexology, legal and medical regulations, practices and classifications and the premises they build upon, the media, Christianity and its institutions and public opinion and discrimination in education and at work as the prime sources of discrimination against transsexual individuals (ibid 2010: 17-36).

3.2.3 Trans perspectives on legal rules, procedures and practices and psycho-medical premises, procedures and practices

Despite representing very different concepts of gender and trans, or transsexuality, respectively, the trans organisations operating on a national scale and the local networks mentioned earlier on voice considerable dissatisfaction with the provisions and procedures under the Transsexual Act and psycho-medical premises and procedures. The issues that contributed to, and in part continue to fuel this discontent will be addressed in the following.

Trans perspectives on legal rules, procedures and practices

Since their very foundation, trans organisations have voiced grievances over four sets of issues related to legal rules, procedures and practices. These are human rights breaches entailed in the Transsexual Act, procedures laid out in its individual provisions and the implementation, concepts of transsexuality that inform the wording and practices that are not necessarily covered by the Act but nevertheless occur to the detriment of trans individuals.

Trans organisations hold that several rules of the Transsexual Act violate human rights, which are supposed to be protected by a number of fundamental rights laid down in the Basic Law. The rules of the TSG at issue are the provisions that define the preconditions for submitting an application for a change of first names (s. 1[1] TSG)[115] and gender status (ss. 8[1]1-4 TSG), and the conditions that lead to the nullity of a change of first names (ss. 7[1]1-2 TSG) as well

115 | Section 1(1)3 TSG which provides that an applicant needs to be at least 25 years of age for a change of first names was successfully challenged in 1993. The Federal Constitutional Court ruled that this particular provision is incompatible with Art. 3(1) GG and void (BVerfG 1993: 112).

as the use of expert reports in s. 4(3) TSG.[116] The basic rights that these rules are considered to contravene in various constellations are the inviolability of a person's dignity guaranteed by Art. 1(1) GG, the right to the free development of one's personality (Art. 2[1] GG), the right to life and physical integrity (Art. 2[2] GG), the equality of men and women (Art. 3[2] GG), the right not to be discriminated against on the basis of gender (Art. 3[3] GG) and the right to state protection of marriage and family (Art. 6[1] GG).

After defining the gender of individuals who may apply under the Act, s. 1(1)1 TSG specifies the scope of individuals entitled to apply under the Act. The rule includes German citizens according to the Basic Law, stateless or homeless foreigners with common residency or persons entitled to asylum or foreign refugees with a place of residence in the area of the validity of the law. Trans organisations critically point out to the constitutionally problematic exclusion of transsexual refugees from the provisions under the Transsexual Act. The latter lose their status as refugees as soon as the conditions apply for a return to the home country, regardless of whether the respective individual, who may thereafter have obtained exceptional leave to remain is in the process of transitioning medically and surgically or not. The activist Alter argues that this situation is incommensurate with human rights (Alter 2007).[117]

Sections 7(1)1 and 7(1)2 TSG and s. 8(1)3 TSG are among the provisions of the Act that either regulate the conditions under which the decision to change first names becomes invalid (ss. 7[1]1-2 TSG) or the preconditions for a change of gender status, respectively (s. 8[1]3 TSG). Section 7(1)1 TSG rules that the decision which led to the applicant's change of first names is reversed when a child is born to the applicant three hundred and two days after the decision to change the first names has entered into effect, starting with the day of the child's birth. The same applies when the applicant's parentage of a child has been recognised or declared by a court after the same period of time, beginning with the recognition or the legal effect of the declaration (s. 7[1]2 TSG).

116 | In the meantime, the Federal Constitutional Court declared several of the provisions of the Transsexual Act unconstitutional and either void or inapplicable. While the Federal Constitutional Court decisions will be pointed out to in the footnotes in this section, the following chapter will deal with the cases in more detail.

117 | On 18 July 2006, the Federal Constitutional Court ruled that s. 1(1)1 TSG contravenes the non-discrimination precept (Art. 3[1] GG) in combination with the basic right to the free development of one's personality (Art. 2[1] in conjunction with Art. 1[1] GG), when it excludes foreign transsexual individuals who are legally and not only temporarily staying in Germany from the right to apply for a change of first names and gender status according to s. 8(1)1 TSG, provided that their respective right of residence does not have comparable regulations (BVerfG 2007: 14).

As mentioned in the systematic outline of the Transsexual Act, s. 8(1)3 TSG rules that a court declares the applicant a member of the ›other‹ gender on application of a person, provided he or she is permanently sterile. Trans organisations oppose these provisions, arguing that the right to procreate or to bear children is a human right (ATME 2010: 55; TransMann 2001) and that forcing individuals to undergo sterilisation violates the right to health (ATME 2009a: 9; 2010: 53).[118]

Sections 7(1)3 TSG and 8(1)2 TSG determine further reasons for revoking a decision to change first names (s. 7[1]3 TSG) or define prerequisites for a revision of gender status, respectively, that are considered to infringe upon constitutionally guaranteed privacy rights. Section 7(1)3 TSG specifies that the court decision to grant the applicant's change of first names becomes invalid when he or she marries.[119] Section 8(1)2 TSG provides that the court declare

118 | ATME e. V. attributes the sterility requirement outlined in s. 8(1)3 TSG to remnants of National Socialist policies in the Federal Republic of Germany. In its human rights report *Transsexual People in Germany/Transsexuelle Menschen in Deutschland*, ATME e. V. notes with reference to the verdicts of the National Socialist Hereditary Health Courts (*Erbgesundheitsgerichte*): »In this context, it is nearly blood-curdling that the German Transsexuals Act also arose under the influence of the German Society for Sex Research and there exists to this day transsexuals who were force sterilized, similar to the »law for the prevention of Genetically Diseased Offspring [*Gesetz zur Verhütung erbkranken Nachwuchses*; insertion mine] from 1933. In this way, Nazi ideologies live on to this day in Germany, especially with regard to the Transsexuals Act and the medical treatment of transsexual people.« (ATME 2010: 24)
However, the parliamentary debate on the Transsexual Bill suggests that the legislator was more concerned about maintaining the link between a person's sex/gender and reproductive function. In its response to the parliamentary enquiry by Schenk and the parliamentary faction of the Democratic Socialist Party (*Partei des Demokratischen Sozialismus*; PDS; since 16 June 2007 *DIE LINKE*; The Left) on 31 July 2002, the then governing Christian Democratic and Free Democratic Party coalition reiterated this »cultural dogma« (Alter 2007) that women may not procreate and men may not bear children (Deutscher Bundestag 2002: 7). Moreover, the sterility prerequisite was also demanded of transsexual individuals in Sweden, which suggests that compulsory sterilisation is rather an effect of a gender regime than National Socialist ideology. This does however not mean that it renders the prerequisite less of a breach of human rights.

119 | On 06 Dec. 2005, the Federal Constitutional Court declared s. 7(1)3 TSG inapplicable, since it violates a homosexual transsexual individual's right to a name, i. e. a basic right that is protected under Art. 2(1) GG in conjunction with Art. 1(1) GG and constitutionally guaranteed privacy rights as long as the respective individual is barred from entering a legally secured partnership without losing the first name, that corresponds with his or her own sense of gender belonging (BVerfG 2006: 102).

the applicant a member of the ›other‹ gender on the condition that he or she is unmarried.[120]

Trans organisations argue that these provisions force transsexual individuals to either forgo the right to enter (s. 7[1]3 TSG) or to maintain a marriage (s. 8[1]3 TSG), respectively, in return for the constitutionally protected rights under Art. 1(1) GG in conjunction with Art. 2(1) GG or vice versa (Alter 2000; 2007). Moreover, trans organisations suggest that s. 8(1)3 TSG conflicts with ss. 1565-1568 BGB, which define the conditions for getting divorced. A divorce is premised upon the breakdown of a marital relationship. Hence, transsexual individuals and their respective partners wishing to continue to live together do not fulfil the conditions for a divorce (ibid 2007; MUT 2007: 8).

Section 8(1)4 TSG requires of the applicant to have undergone a surgical intervention on his or her external sex characteristics to the effect of having clearly approximated the outer appearance of the ›other‹ gender.[121] As in the case of s. 8(1)3 TSG, the legislator did not define the concrete measures required to fulfil the prerequisites for a formal change of gender status. However, neither of these conditions for a revision of gender status can be met without invasive means, unless the applicant is for other reasons unable to procreate or bear children.

Trans organisations oppose to these requirements. They argue that ss. 8(1)3 TSG and 8(1)4 TSG violate a person's dignity and physical integrity and consequently contravene Articles 2(1) and (2) GG in conjunction with s. 1(1) GG (Alter 2000; 2007; TransMann 2001: 6; ATME 2010: 59). The organisations hold that nobody but the person concerned can determine, whether genital surgery is necessary (TransMann 2001; Ghattas 2009). In addition and considering the medical risks and the risk of poor surgical results, which contrary to medical rhetoric affect transmen and transwomen alike (TransMann 2000: 6; Alter 2000), the organisations hold that the legislator should not be entitled to render surgery mandatory for a revision of gender status (TransMann 2001).

Trans organisations also criticise the narrow focus on surgery in general. TransMann e.V. argues that transgender is too complex a phenomenon than that it could be reduced to measures that modify an individual's body (TransMann 2001). In particular, the dgti e.V., ATME e.V. and TransMann e.V. criticise the focus on genital surgery, especially since genitalia are usually not discernible in public (Alter 2007; ATME 2009a: 7; TransMann 2001). Finally,

120 | This particular section may no longer be applied. On 27 May 2008, the Federal Constitutional Court decided that s. 8(1)2 TSG was incompatible with Art. 2(1) GG in conjunction with Art. 1(1) GG and Art. 6 (1) GG (BVerfG 2008: 312).

121 | On 11 Jan. 2011, the Federal Constitutional Court ruled that to require sterility and surgical measures of a person who wishes to enter a registered life partnership violates Art. 2(1) and Art. 2(2) GG in conjunction with Art. 1 GG (BVerfG 2011).

the dgti e. V. suggests that the requirement of genital surgery violates Art. 3(1) GG, since transwomen and transmen are not treated alike in this respect (Alter 2000).[122]

Section 4(3) TSG rules that the court may only grant an application according to s.1 TSG after it has obtained reports by two experts who are, »based on their training and their professional experience sufficiently familiar with the specific problems of transsexualism«. According to trans organisations, a heteronomous assignment to a gender violates the constitutionally protected dignity of a person (Art. 1[1] GG) and his or her right to develop his or her personality freely (Art. 2 [1] GG), since gender identity is a part of an individual's personality (ATME 2010: 50; TransMann 2001).[123]

Trans organisations also criticise the procedures defined in the Transsexual Act and the deficient implementation. The provisions at issue here are in particular the parties involved in the proceedings (s. 3[2] TSG), the court proceedings (ss. 4[1] and [3] TSG) and the prohibition of disclosure (s. 5[1] TSG).

Section 3(2) TSG determines that the applicant (s. 3[2]1) and the representative of the public interest (s. 3[2]2)[124] are the only parties involved in the proceedings. Trans organisations hold that the representative of the public interest is not only dispensable, but unnecessarily contributes to delays in the court proceedings (Alter 2007).

Section 4(1) TSG rules that proceedings under the Transsexual Act follow the regulations provided for family matters and non-contentious jurisdiction.

122 | Until the Federal Constitutional Court ruled that the mandatory surgery provision was unconstitutional, transwomen and transmen were treated differently for three reasons. First, and as pointed out in chapter 2.3.3, the legislator at the time wanted to avoid homosexual marriages and genital sex among male-bodied individuals. Second, the surgical construction of phalloplasties was considered insufficiently developed. Third and partly due to the abovementioned reasons, transmen successfully litigated against mandatory genital surgery (see chapter 3.3.4).

123 | As the trans organisations note, this provision has additional effects. First, it creates a difference between ›normal‹ individuals and transsexual individuals, since the latter are required to have their gender identity approved of by psychologists (Ghattas 2009: 2) instead of leaving it up to transsexual individuals themselves to decide which gender they identify with (TransMann 2001). Second, law and medicine have become amalgamated in practice. While it is possible to obtain a change of first names without having to undergo medical and surgical treatment, experts frequently do not write supportive reports, if the individual signalises that he or she does not want to transition physically (ibid). Furthermore, experts have transformed a procedure that was initially devised to facilitate a transition into a »steeplechase« (ibid).

124 | Based on statutory instruments, the governments of the *Länder* determine the representative of the public interest (s. 3[3] TSG).

Hence, individuals who apply for a change of first names and/or a revision of gender status are required to pay for the court proceedings and to take on the costs for the expert reports. Trans organisations object to the facts that a court procedure is required to this end, especially since these entries were initially based on a heteronomous administrative act and that, depending on the respective trans individual's income,[125] either the applicant or the taxpayers have to pay for these costs (ibid; TransMann 2001; ATME 2010: 48).

As mentioned earlier on, s. 4(3) TSG rules that the court proceedings rely on expert reports. In addition to considering this provision unconstitutional and a source of considerable delay, trans organisations argue that transsexuality cannot be diagnosed, albeit for different reasons. The dgti e. V., for example, argues that transsexuality cannot be diagnosed, because it is not a disease. Rather, transsexuality deviates from a standardised concept of human being (Alter 2008). Hence, if transsexuality cannot be diagnosed, examinations by experts do not make sense (Alter 2000). In line with its premises that in the case of transsexuality, a person's sex cannot be easily measured and that, »[o]ur knowledge on variations of sex tells us that transsexual individuals exist in nature« (ATME 2012a: 3), ATME e. V. argues that transsexual individuals' statements on behalf of themselves are true (ibid).

Section 5 TSG provides for the prohibition of disclosure, which was devised to protect the privacy rights of transsexual individuals (s. 5[1] TSG) as well as their next of kin (s. 5[2] and [3] TSG). Section 5(1) TSG rules that if the decision that changed the applicant's first names is legally binding, it is prohibited to disclose or conduct research on the applicant's first names at the time of the decision, unless special reasons pertaining to the public interest or legal matters require this information. Trans organisations criticise that official notices, such as e. g. election voting cards, are frequently addressed to the respective individual, using the new first names and the address of the official gender status. The dgti e. V., ATME e. V. and its predecessor MUT claim that this and similar procedures are impermissible and discriminate against transsexual individuals (dgti 2007; ATME/MUT 2008: 4).[126]

Considerable dissatisfaction also arises with the wording of the Act. Trans organisations in particular object to the narrow focus of the Act, the concept of transsexuality it endorses and the imprecise, if not unanswerable questions they pose for the experts in ss. 1(1) and 1(1)2 TSG.

125 | Individuals with a low income may apply for legal aid.

126 | On 15 Aug. 1996, the Federal Constitutional Court ruled that Art. 2(1) GG in conjunction with Art. 1(1) GG demands that the gender-specific address that correlates with a person's first names be used with individuals who have changed their first names according to the ›small solution‹ (BVerfG 1997: 1632).

Section 1(1)2 TSG rules that the first names of a person who due to his or her »transsexual imprinting« no longer identifies with the gender recorded in the birth entry but with the ›other‹ gender and who has since three years felt compelled to live according to his or her ideas are to be changed on application to the court, if it can be expected with a high degree of probability that the sense of belonging to the ›other‹ gender will not change anymore.[127]

Trans organisations criticise the narrow scope of the Transsexual Act. The formulation »belonging to the other gender« only makes sense against the background of the gender binary. Hence, an individual who does not identify with the gender in the birth entry nor with the other of the two legitimised options or with both of them is excluded from the provisions of the Transsexual Act (Alter 2007).

Discontent with the concept of transsexuality is threefold. First, trans organisations reject the concept of ›transsexual imprinting‹. The latter suggests that extraneous influences cause transsexuality. As the dgti e. V. and ATME e. V. suggest, upbringing or any other extraneous influence could so far not be substantiated (Alter 2007; ATME 2009: 10).

Second, the section mirrors the legislator's assumption that it is possible to diagnose transsexuality. The activist Alter argues that all attempts to establish general criteria for transsexuality have so far failed. As mentioned earlier on, she suggests that transsexuality is a self-diagnosis, which can only be supported by a differential diagnosis (Alter 2007).

Third, the Transsexual Act leaves it up to experts other than the applicant him- or herself to decide whether a person is transsexual or not, a procedure ATME e. V. considers demeaning and humiliating (ATME 2011c: 20). This however means that individuals who do not fulfil the criteria listed under the diagnosis ›transsexualism‹ (F 64.0), such as e. g. those who reject genital surgery, can be denied a change of first names and gender status (Alter 2007).

Trans organisations also consider formulations, such as »who has since three years been compelled to live according to his or her ideas« and »with a high degree of probability« problematic. Both formulations are imprecise.

127 | Three questions can be derived from these requirements, which experts are expected to answer in their reports on an individual who has applied for a change of first names according to s. 1 TSG. The first question enquires into the applicant's gender identity, more specifically, whether the applicant is transsexual. The second question asks whether the applicant has felt compelled to live according to the ›other‹ gender for three years. The third question asks of the expert to predict whether the applicant's sense of belonging to the ›other‹ gender will with a high degree of probability not change anymore (MDS 2009: 11; Alter 2008a).

While the former gives experts the opportunity to define the criteria for the ›compulsion‹,[128] the latter cannot be measured objectively (ibid).

Trans organisations also voice dissatisfaction with legal practices that exceed the provisions of the Act. Trans organisations particularly criticise the process of selecting experts as well as procedural errors and discrimination at court. With regard to the selection of experts, ATME e. V. states that, »a judge must simply be satisfied that a person is suitable to be an expert. A special skill or training is not necessary.« (ATME 2011c: 10)

The dgti e. V. points out to a number of procedural errors and discriminatory practices at court. Although e. g. s. 4(3) TSG specifies that experts are required to work independently of each other, the dgti e. V. observed that some judges order reports consecutively instead of simultaneously and send the first report to the second expert (Alter 2008a). In other instances, judges make judgmental comments on the applicant's gender performance. Frequently, trans individuals who have obtained a change of first names are addressed incorrectly on the grounds that the experienced gender is not yet legally valid (ibid 2000).

Trans perspectives on psycho-medical premises, procedures and practices

Trans organisations' concepts of trans or transsexuality, respectively, and notions of good medical practices frequently collide with psycho-medical assumptions, procedures and practices. Despite considerable differences among trans organisations, they object to (psycho)pathologising psycho-medical premises, heteronomous definitions and procedures and practices perceived to be degrading. These issues will be addressed, using the German Standards, the most recent MDS instructions on transsexuality and practices performed by psycho-medical experts in the assessment process according to ss. 1(1)1 TSG, 8(1)3-8(1)4 TSG.

The German Standards and the MDS instructions classify transsexuality as a »special form of gender identity disorder« (Becker et al. 1997: 147) or simply »a gender identity disorder« (MDS 2009: 3). In addition, both guidelines assume that transsexual individuals feature additional psychopathological »abnormalities« (Becker et al. 1997: 149; MDS 2009: 8). Unlike the German Standards, however, the MDS instructions specify that psychiatric comorbidities need to be reassessed when dealing with »transsexual disorders« (MDS 2009: 8).

The classification of transsexuality as a gender identity disorder is not acceptable to trans organisations who consider trans or transsexuality as one of many possible ways of expressing gender (cf. TrIQ undated a: 11) or a way of

128 | Some experts have come to interpret this particular formulation to the effect that the transsexual individual is required to have lived according to the conventions of the ›other‹ gender for three years (Alter 2008a).

being human (cf. dgti 1998: 1; TransMann 2001). The same applies to organisations, such as ATME e. V., who understand transsexuality to be a somatic disorder (ATME 2010: 51). As ATME e. V. suggests, »[t]o foist a psychic disorder on a mentally healthy transsexual individual, because the occurrence of transsexuality does not fit into his world view is injustice« (ATME 2009a: 9).

Unlike the German Standards, the MDS instructions formally adopt a less homogenising concept of transsexuality. While the definitions of transsexuality initially resemble each other,[129] the MDS instructions differentiate between ›primary‹ and ›secondary‹ transsexualism, of which the former signifies a gender identity disorder beginning in childhood or adolescence, while the latter emerges in early adulthood to middle aged individuals (MDS 2009: 7).

Despite this slightly broader concept of transsexuality, the concept endorsed by the MDS is incompatible with a concept of gender fluidity (cf. TGNB 2006a), a variable construction (cf. dgti undated f) or a concept of transsexuality as an innate und immutable condition (cf. ATME 2010: 51). Moreover, the MDS instructions continue to distinguish between transsexualism and transvestitism. While TransMann e. V. suggests that this distinction cannot be maintained (TransMann 2004a), ATME e. V. implicitly insists on such a distinction (ATME 2015c).

Like the German Standards, the MDS instructions reinforce psycho-medical surveillance and underline the role of (sole) psycho-medical expertise. Couched in paternalism, the MDS instructions demand that any somatic intervention needs to be preceded by psychiatric or psychotherapeutic treatment (MDS 2009: 9). The MDS instructions have in common with the German Standards that they demand a fixed schedule for psychological observation and a ›real life test‹ of at least twelve months prior to hormone treatment (ibid 18) and eighteen months before surgical measures may be undertaken (ibid 23).

Against the background of a radical claim to self-determination and challenges to (sole) psycho-medical expertise, all nation-wide trans organisations and the local networks mentioned earlier on oppose these specifications. TransMann e. V. and the dgti e. V. suggest that psychological support and living according to the respective gender role might be helpful in individual cases. However, they hold that neither a psychotherapy, nor a ›real life test‹ may be forced upon transsexual individuals (Alter 1998; TransMann 2004a). Similarly, ATME

129 | The MDS instructions define transsexualism as follows: »The permanent certainty of belonging to the biologically other sex, the rejection of the role expectations that are associated with the biological sex and the pressing desire to live socially and legally recognised in the desired gender characterises transsexualism. The necessity to align the physical appearance to the gender identity as far as possible, using hormonal and surgical measures, results from a rejection of the characteristics of the innate sex to various degrees.« (MDS 2009: 7)

e. V. rejects psycho-medical assessments (ATME 2010: 82 f.),[130] and a ›real life test‹ (cf. ibid 2010: 62).[131]

While the MDS instructions, unlike the German Standards, formally appear to account for individualised approaches to medical and surgical interventions, the approach has little in common with demands brought forward by trans organisations. Trans organisations demand not to indiscriminately expect certain medical or surgical measures to be undertaken and to grant medical or surgical interventions to trans individuals who need them (cf. TransMann 2004a). While the guidelines claim that the expert assessment is foremost informed by an appropriate case-sensitive assessment (MDS 2009: 17), the assessment procedure becomes more complicated for individuals who deviate from the standard route. The following statement on bilateral mastectomies for transsexual men prior to the ›real life test‹ attests to this fact: »In special exceptional cases the bilateral mastectomy may for instance take place in advance in order to facilitate the real life test. This needs to be substantiated by an expert with reference to medical circumstances.« (Ibid 24)

Trans organisations also criticise malpractices that occur during the expert assessment period according to s. 4(3) TSG. Among these are e. g. physical examinations and the photographic documentation of the applicant's genitalia,[132] procedures that because the genital status is irrelevant for a change of first names according to s. 1 TSG, are grossly inappropriate. Trans organisations claim that these practices encroach upon trans individuals' privacy and violate Art. 1(1) GG (Alter 2008a; TransMann 2001).

Trans organisations report that these practices also occur during expert assessments for a revision of gender status. While TransMann e. V. suggests that the verification that surgery has taken place should not be performed in front of medical students (TransMann 2001), MUT demands that no such verification should take place at all (MUT 2007: 6 f.). In addition, trans organisations object to enquiries into an applicant's sexual practices and orientation in the

130 | ATME e. V. argues that it is so far »not possible to measure a person's gender identity. […] Only each individual person is capable of determining the gender they belong to, their gender identity and the sex of the soul.« (ATME 2010: 82 f.)

131 | ATME e. V. considers a mandatory ›real life test‹ as a means of diagnostics cruel, inhumane and degrading. The means that render a ›real life test‹ possible, such as e. g. epilation for transsexual women are according to ATME e. V. frequently withheld (ATME 2010: 61), hence forcing a transsexual woman »to make a fool of herself« (ATME/MUT 2008: 6). At the same time, ATME e. V. suggests that it is necessary for transsexual individuals to gain sufficient self-awareness about their gender identities. However, this self-awareness ought to be achieved in a protected environment (ibid; ATME 2010: 62).

132 | See ATME 2011c for examples of humiliating and inappropriate conduct during assessment procedures.

assessment situation for a change of first names and a revision of gender status and subjection to experts' normative understandings of sexuality, masculinity or femininity (Alter 2000; 2007).[133]

3.2.4 Trans organising for social change

In the face of discrimination, all trans organisations mentioned earlier on strive for social change. Drawing upon the by-laws of trans organisations in Germany with a decidedly political agenda and using examples of their respective activities in the areas of support and outreach, information and education, and lobbying and networking, this subchapter addresses goals and means to achieve trans law reform, human rights and equality.

Support and outreach

With exception of the TGNB, the trans organisations mentioned above define support and outreach as one of three major areas of activity in their respective by-laws. The dgti e. V. states in ss. 2.4 and 2.5 of its by-laws that it intends to offer counselling services, assist support groups and promote training programmes for volunteers (dgti 1998: 1f.). As the preamble of its by-laws suggests, the organisation initially focussed on re(integrating) unemployed trans individuals into the labour process in order to counter the danger of downward mobility, which was at the time, and frequently continues to be, linked to a social change from one gender to another (ibid: 1).

As mentioned earlier on, TransMann e. V. was for lack of an infrastructure for transmen initially founded to establish regulars' tables in order to create a space for transmen to exchange experiences and to discuss aims and problems (TransMann undated). However, as the by-laws of 2004 suggest, TransMann e. V. soon aimed to extend its activities in the area of support and outreach. Sections 2(8) and 2(9) of its by-laws state that TransMann e. V. is committed to providing a counselling centre (s. 2[9]), assisting local transmen's groups and trans groups in general as well as organising conferences for trans individuals and anybody interested in trans persons (s. 2[9]) (TransMann 2004). Like the dgti e. V. (dgti 1998: 1), TransMann e. V. offers these support and outreach services to parents, relatives, partners and friends of trans individuals (TransMann undated).

In close collaboration with inbetween / AB Queer e. V. and the TGNB, TrIQ e. V. was among other things designed to offer professional counselling services in the areas of transgender, intersex and queer (TrIQ 2009b). As the local network states in its by-laws, it e. g. aims at supporting trans- and intergender as

133 | The dgti e. V. for instance reports that trans individuals have been denied a change of first names, because they got married and had children (Alter 2008a).

well as queer individuals in personal and social crises (s. 2[3]) and campaigning for health education among the aforementioned target groups (TrIQ 2007: 1).

So far, the organisations mentioned above have initiated and maintained a number of activities in the areas of support and outreach. Among these are peer- and volunteer-based counselling services for adolescent and adult trans individuals, peers, partners and parents of children with an unusual gender performance;[134] counselling on welfare issues (TrIQ 2013); online and print brochures providing information on social, medical and legal aspects of a transition;[135] offering a space for groups that deal with issues, such as coming out (TransMann undated b) or health promotion (TrIQ 2009b); hosting internet forums,[136] conferences, such as the trans conference (*Transtagung*) in Berlin; emergency hotlines and organising hospital visitations (TransMann undated b; ibid 2007).

While support and outreach are not the major area of ATME e. V.'s activities, ss. 2(1) and 2(2) of the by-laws suggest that the organisation strives to support transsexual individuals in need of help as well as parents and partners encountering difficulties when dealing with transsexuality (ATME 2011a). Section 2(3) of ATME e. V.'s by-laws specifies that consulting services, the establishment of, and involvement in local and regional facilities for transsexual individuals and e. g. their respective parents as well as training and supervising consultants and moderators are among the major forms of support and outreach ATME e. V. aims to provide (ibid).[137]

While all trans organisations agree that trans individuals are discriminated against,[138] the organisations convey different images of trans or transsexual individuals, respectively. TrIQ e. V. e. g. also mirrors trans individuals as self-confident subjects, an attitude demonstrated in the motto of the 2012 trans conference in Berlin that was announced as »*Trans**? Selbstverständlich!*« (Trans? Of course!). The poster features a compass, which points to directions that summarise the main values and principles the organisers stand for: visibility, freedom, self-determination, pride, self-confidence, respect, security and acceptance (Trans*tagung undated). In contrast, ATME e. V. portrays transsexual individuals as victims, which becomes evident in s. 2(1) of the organisation's by-laws:

134 | See e. g. Alter undated; TrIQ undated b.

135 | See e. g. TransMann 2004a; ibid 2008.

136 | See e. g. dgti undated g.

137 | At the time of writing ATME e. V.'s website however does not indicate to which extent any of the envisaged activities have materialised so far.

138 | See, for instance, TGNB 2006; ATME 2011; TrIQ 2011a; dgti undated f: 2 f.; TransMann 2001.

The purpose of the association is to press for the rights of people [...] who are due to their physical or psychological features dependent on support, because they a) dislike themselves, b) live isolated lives for fear of discrimination, c) do not dare to defend themselves against human and civil rights violations, d) and do not have the courage to confide in other people. (ATME 2011a)

Information and education

All trans organisations mentioned in this chapter engage in the task of informing and educating the public on trans or issues related to trans, respectively. In the preamble of its by-laws, the dgti e. V. states its commitment to campaign »for more openness towards the own identity and to account for the diversity of human existence« (dgti 1998: 1). According to s. 2(3) of the by-laws, the association intends to collect and provide information on transidentity and intersexuality as a means to contribute to »a self-determined life of individuals with transidentity and intersexuality« (ibid).

Phrased almost identically, TransMann e. V. adds in s. 2(3) of its by-laws that it especially wishes to collect and disseminate knowledge on transmen (TransMann 2004: 10) with the goal of promoting the social visibility and acceptance of transmen (s. 2[4]). In another document, TransMann e. V. specifies the range of its planned activities and the means to achieve the abovementioned goal. The organisation intends to reach the general public, the media, the administration and courts, psychologists, physicians and health insurances, experts and clinics, using personal consultations, information meetings, training in schools, universities and hospitals, the internet, brochures, radio interviews and public appearances in newspapers and on TV (ibid undated b).

Sections 2(5) to 2(7) of TrIQ e. V.'s by-laws specify the declared aims in the areas of information and education of the local network. These foremost consist of counselling and providing information on trans- and intergender as well as on queer ways of life (s. 2[5]), advocating and providing information on the abovementioned phenomena (s. 2[6]) and campaigning »for the promotion of research that respects the concerns of the emancipatory transgender and / or intersex movements« (s. 2[7]; TrIQ 2007: 1).

Setting out from a concept of diversity and a critical interrogation of the gender binary as a supposedly natural given, the TGNB outlines in its by-laws that it strives to present the various ways of life and the situation of transgender individuals in society, using public relations instruments (s. 3[1]), workgroups on general and current topics (s. 3[4]), a website (s. 3[5]) and a mailing list (s. 3[6]) as means (TGNB 2006h).

Based on the premise that it is scientifically verified that, »individuals who are born with organs of the other gender represent a part of natural variants of human life« (s. 2[4]) and that transsexual individuals have an innate core gender identity that deviates from their physical properties (s. 2[5]), ATME e. V. de-

fines as its purpose in the field of education and education »to inform the public about transsexuality [and] to reduce widespread prejudices« (ATME 2011a). In s. 2(5) of its by-laws, ATME e. V. specifies as means public events, comments on relevant sexological, pedagogical, theological, medical, psychological, social, legal and political issues, collaboration with national and international organisations with similar aims, information tables, public relations, public action, producing and distributing material on medical and psychological treatment, such as sex reassignment surgery and hormone replacement therapy (ibid).

So far, trans organisations have pursued a number of activities in the area of information and education. Among these are e. g. extending and rendering available the archives of the exhibition 1-'0-1 intersex to the public (TrIQ 2013: 1), workshops on trans and intersex in employment that provide information and recommendations for best practices for employers (ibid 2011), brochures and seminars for, and open letters to physicians and psychologists,[139] lectures on legal issues pertaining to trans for law students,[140] the trans/inter lecture series organised by the TGNB in collaboration with TrIQ e. V. (TGNB 2006i), a TGNB workgroup called »Public Education and Counselling«, which is designed to deliver professional information on transgender and intersex issues for individuals working with trans or intersex persons, organisations or other groups (TGNB 2006e) and an online journal with research that discusses deconstructionist approaches and critically reflects upon the role research plays in the construction, normalisation and naturalisation of the gender binary (TGNB 2006g), online information for the general public on the Transsexual Act,[141] an online list of frequently asked questions on trans (TransMann 2004) and information tables on Christopher Street Day events (ibid 2007).

Lobbying and networking

Lobbying and networking constitute the third major area of activity. The by-laws of the dgti e. V. and TransMann e. V. either do not[142] or barely refer to political means and goals. In s. 2(7) of its by-laws, TransMann e. V. merely mentions that the organisation intends to operate as an advocacy group for transmen and individuals with a trans identity vis-à-vis political, medical, social and other public institutions (TransMann 2004).[143] Instead, TransMann e. V. expands on

139 | See e. g. TrIQ undated a; Alter 1998.

140 | See e. g. Alter 2007.

141 | See e. g. Alter 2000.

142 | See dgti 1998.

143 | However, the marginal space allocated to political activism in the by-laws does not correspond with the organisations' actual political involvement. This discrepancy can be explained by two factors. First, both organisations emerged in the context of a lacking large-scale infrastructure for trans individuals. Second, as TransMann e. V. notes,

its political goals and the means to achieve them in a separate programme. The organisation subsumes its goals under the terms ›emancipation‹, which it applies to transgender individuals, transmen and society as a whole,[144] ›self-determination‹[145] and ›integration‹,[146] using information and exchange among trans organisations and coalitions with e. g. organisations that work on health-related issues or lesbian and gay organisations and international solidarity with trans organisations as means (TransMann 2001).

In s. 3 of its by-laws, the TGNB defines as its purposes to create a network among transgender groups in Berlin in order to effectively engage with individual and social affairs relevant to trans individuals, render visible the shortcomings of the gender binary and reduce the pathologisation, criminalisation, discrimination against, and the exoticisation of trans individuals (TGNB 2006h). The TGNB defines as its means supporting individuals and groups that engage in activities in the area of transgender (s. 3[2]), a monthly plenary (s. 3[3]) and work groups on general and current topics (s. 3[4]), among others (ibid).

Similar to the TGNB, TrIQ e.V defines as one of its political goals and means advocating the reduction of pathologisation and exoticisation of transgender and intersex individuals and all other individuals whose gender or gender expression do not fulfil binary expectations as well as to counter the taboo on trans- and intergenderism (s. 2[2]). In addition, TrIQ e. V. strives to counter, reduce or mitigate the social effects of prejudices and discrimination with regard to the body, gender identity, gender expression and sexual orientation (s. 2[4]). Furthermore, the organisation intends to campaign for the promotion of national and international networks of transgender, intersex and queer groups and individuals (s. 2[9]). In s. 2(10) TrIQ e. V. also outlines as one of its aims

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the organisation did not accrue much importance to its by-laws, which is mirrored in its understanding of by-laws as a »quite meagre framework, which is far from being filled with life« (TransMann undated c).

144 | According to TransMann e. V., ›emancipation‹ of transgender individuals and transmen means to consider legal and medical options as rights without however being expected to fulfil dated gender norms or having to comprise basic rights, such as the freedom of personal development and respect for human dignity (TransMann 2001). Like the dgti e. V. (undated f), TransMann e. V. defines an emancipated society as one which accepts human diversity as its most valuable asset (TransMann 2001).

145 | TransMann e. V. demands self-determination in the context of a change of first names and gender status and the medical treatment process (TransMann 2001).

146 | TransMann e. V.'s concept of ›integration‹ e. g. encompasses the integration of gender expression into anti-discrimination laws, the integration of trans individuals into the queer community, the integration of trans issues into education, research, culture and the media and the acceptance of prosecution on the basis of gender identity and/or expression as a ground for granting asylum (TransMann 2001).

to campaign for equal rights for all individuals, regardless of their respective gender identity and sexual orientation and to work towards achieving equal opportunities (TrIQ 2007: 1).

Setting out from the premise that transsexuality is innate, ATME e. V. works towards forcing the Federal Republic of Germany to comply with ratified human rights treatises (ATME 2011). The organisation primarily compiles human rights reports (ibid) and uses public statements on human rights treatises, the law and regulations as a means (s. 3) (ibid 2011a).

Lobbying and networking: Prominent examples of networking activities for human rights and equality

Since the end of the 1990s, political interventions have increased substantially, and political strategies have diversified. Political initiatives involve individual organisations and *ad hoc* as well as rather stable coalitions[147] around clearly defined issues. Trans organisations in the Federal Republic of Germany have so far focused particularly on trans law reform and networking for human rights and equality. Prominent examples of the latter on various levels of politics will be briefly outlined, starting with international networking activities, before turning to three major suggestions for trans law reform from the late 1990s until the federal government unsuccessfully tried to table the Transsexual Law Reform Bill in 2009.

Trans networking and lobbying for human rights and equality covers local, regional, national and international levels. The TGNB, which itself originated as a local network, contributed to successful international networking and organising for human rights and equality. In the aftermath of the first European Transgender Council in Vienna in Nov. 2005, the TGNB established the workgroup »Networking«. The workgroup hosted the second TGEU conference in Berlin in 2008. Since then, the workgroup has focused on collaborating with

147 | Building coalitions around single issues have become a frequently chosen method of pressing for change for a number of reasons. First, coalitions frequently enable trans organisations to collaborate on a common issue without necessarily having to compromise their basic principles and standpoints. Second, the strategy of speaking in unison is more compatible with the operations of representative democracy. Third, since the heteronormative gender binary affects queer, trans and intersex individuals, albeit in different ways, broad coalitions allow for a larger number of individuals and organisations to intervene into institutionalised politics (cf. TrIQ 2009a; Ehrt 2009: 3). While coalition politics have generated common demands and a possible guide for the respective governments, they are also frequently challenging endeavours. First, negotiating across different concepts, communities and political styles has proven to be conflict-ridden. See, for instance, Regh (2002: 199) with regard to the PGG and Ghattas (2009: 1) with regard to the collaboration between trans and intersex individuals.

trans and inter groups in Germany and non-European countries, in particular in the Americas (TGNB 2006c).[148]

Frustrated with federal government inactivity, ATME e. V. addresses the UN as a strategy of forcing the federal government to comply with ratified human rights treatises. To this effect, ATME e. V. has so far submitted several human rights reports outlining practices and regulations vis-à-vis transsexual individuals that the association considers contravening the respective agreements, declarations and treatises[149] and formulates measures to redress human rights breaches.[150]

148 | The TGNB workgroup »Law and Anti-Discrimination« proved to be less successful. Established in 2003, this particular workgroup collaborated with LGBT organisations to establish ›sexual or gender identity‹ as prohibited grounds of discrimination under the Anti-Discrimination Act (*Antidiskriminierungsgesetz*; ADG). The attempts to introduce this category into anti-discrimination legislation failed. At the end of 2005, the workgroup shifted its focus to the Transsexual Act and demanded that the change of first names be rendered easier and the change of gender status become possible without the preconditions of infertility and mandatory sex reassignment surgery (TGNB 2006d).

149 | Among these are e. g. the Alternative Report to the Sixth Report of the Federal Republic of Germany to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (MUT 2007), the Alternative Report to CAT (ATME 2011c), a bilingual human rights report to the Fifth State Report of the Federal Republic of Germany according to Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (ibid 2010) and a report on reparative therapies on children (ibid 2012).

150 | In its most comprehensive human rights report to date ATME e. V. summarises eight demands. First, the organisation demands of the UN to request that the WHO no longer classify transsexuality as a mental disorder (ATME 2010: 84). Second, ATME e. V. urges the UN to pressure the federal government to remove the requirement of expert reports from the Transsexual Act (ibid: 85). Third, the association suggests to the UN to render the Yogyakarta Principles (2013), i. e. the application of international human rights law to sexual orientation and gender identity legally binding and to press the Federal Republic of Germany to recognise these principles (ATME 2010: 86). Fourth, ATME e. V. demands the right to sex reassignment treatment (ibid: 86 f.). Fifth, the association requests of the UN to advise the Federal Republic of Germany to introduce gender identity into the Anti-Discrimination Act (ibid: 87). Sixth, ATME e. V. demands that all media in Germany be held accountable for transphobic reports and that transsexual individuals be included in broadcasting committees (ibid). Seventh, ATME e. V. demands more financial support and services for support groups and networking activities (ibid: 87 f.). Finally, the association demands that transsexual individuals represent themselves (ibid: 88).

The introduction of the supplementary ID (*Ergänzungsausweis*) is an example of a political activity in the area of equality and human rights on the national level. The dgti e. V. developed the supplementary ID for individuals whose outer appearance during the ›real life test‹ does not match the gender of the first names and gender status according to conventional standards and who have been diagnosed with transsexuality (dgti undated h). The document resembles the national ID card and is meant to prevent discrimination on behalf of the bureaucracy and difficulties that arise in situations that require producing an ID (ibid). The supplementary ID is the dgti e. V.'s response to government reluctance to implement a demand of the European Parliament to issue IDs valid throughout the then European Community to transsexual individuals bearing their chosen first name(s) (ibid).

Networking and lobbying takes place on a regional level, too. *Intra-BW* is one of the most recent networks of trans organisations at the time of writing. Founded in 2013 by ATME e. V., the dgti e. V., and the support group *Transident X* in Stuttgart,[151] the network elaborated on a set of demands directed towards the Social Democratic and Green Party coalition in Baden-Württemberg. The major demands were to establish an equal opportunities advisory council consisting of an equal number of transsexual individuals and members of the bureaucracy, to grant equal access to existing equal opportunities bodies and to seek direct contact with transsexual individuals (ATME 2013a). The dgti e. V. left the loosely connected coalition at the end of 2013 (intra-BW undated).

Lobbying and networking: Prominent examples of attempts to achieve trans law reform

There were several, in part collective, attempts to achieve trans law reform in the period between 1999 and 2009. Three major attempts were initiated of which one was carried out by the Project Group Gender and the Law (*Projektgruppe Geschlecht und Gesetz*; PGG) from late 1999 to the end of 2000, another by the TGNB Workgroup Law (*Arbeitskreis Recht*) in 2006 and the third by TGNB and TrIQ e. V. in 2009. Initiatives to achieve trans law reform took on various forms, occurred in various organisational constellations, mirrored rapidly changing social and legal developments with regard to homosexuality, successful trans litigation on a national level, international developments in

151 | The organisations forming the network are based on very different premises. However, the founding members of the network initially managed to agree on two major goals. One of these was to exert pressure on the *Länder* government to end the psychopathologisation of transsexual individuals. The second was to improve medical provisions for transsexual individuals, in particular for transsexual minors in Baden-Württemberg (ATME 2013a).

trans legislation, an increasing assertiveness of trans organisations as well as varying degrees of political compromise.

The Project Group Gender and the Law, and the Transgender Bill[152]

Established in late 1999 (dgti undated i), the formation of the nationwide workgroup PGG was, as a member of the dgti e. V. suggests, fostered by social developments. Successful lesbian and gay movement struggles left an imprint in legislation. For example, in 1994, the legislator abolished s. 175 StGB and, while the PGG was devising proposed trans legislation, the German parliament was debating the Registered Life Partnership Bill (dgti undated j). These legislative developments inspired rethinking sections of the TSG that had been devised in a more homophobic social and political environment.

Legitimation issues and developments within the lesbian and gay movement influenced the constitution of the workgroup. A project focusing on the development and submission of proposed legislation necessarily required gaining the consent of a broad spectrum of trans organisations. Moreover, parts of the lesbian and gay movement were starting to take into consideration transgender individuals, as the following excerpt of the Transgender Resolution (*Transgenderresolution*) adopted by the organisation *Lesben und Schwule in der SPD* (Lesbians and Gay Men in the SPD; [Schwusos]) on 15 Apr. 2000 in Stuttgart suggests:

> [i]t is only since quite recently that transgender individuals are struggling for the right to live beyond gender role stereotypes. The extent to which an individual takes on old roles or creates new ones for him- or herself is an individual decision everybody needs to decide for him- or herself. This freedom also needs to include the freedom to align one's body with one's inner feelings and/or the desired role or simply not to. This also applies to formal issues such as, for example, the name and civil status. It is precisely in this respect that the Schwusos will support efforts to reform the TSG accordingly. (dgti undated k)

152 | The Transgender Bill is not a bill in the sense that the *Bundestag*, the *Bundesrat* or the government drafted it. However, I will stick to the name of this suggestion for law reform, because it has become known as such.

Hence, the PGG consisted of a broad coalition of trans associations with a political agenda,[153] local trans workgroups and support groups,[154] lesbian and gay organisations[155] and some intersex individuals from Berlin and Kiel (dgti 2000).

In 2000 and after consultations with lawyers, intersex individuals and politicians, in particular members of the Green Party (dgti undated i), the PGG developed the Bill on the choice or revision of first names and the establishment of gender status (Transgender Bill) (*Gesetz über die Wahl oder Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit (Transgendergesetz;* [TrGG]). The workgroup submitted it to Members of the *Bundestag* and the government on 20 Nov. 2000 (ibid).

The Transgender Bill[156] provided rules for three situations. Part one (ss. 1-5 TrGG)[157] was devised to regulate the choice of first names and gender status in cases of ›biological ambiguity‹. Part two (ss. 6-11 TrGG) was designed to regulate a change of first names in instances of ›deviating gender identity‹. Part three (ss. 12-16 TrGG) was created to provide rules for establishing an individual's gender status.

Part one of the Transgender Bill mirrored the aim of PGG members to include intersex individuals as beneficiaries of the proposed legislation (Alter

153 | The dgti e. V. and TransMann e. V. contributed to the project team (dgti 2000).

154 | Among these were the *Arbeitkreis Transsexualität Kiel* (Workgroup Transsexuality Kiel; AK-TS Kiel), »*Ost-TS*« (East-TS), a group of transsexual individuals from the eastern part of Berlin, Transidentitas e. V., VIVA TS e. V. Munich, TransPeople Nuremberg and the *Selbsthilfe Kontakt und Informationsstelle Berlin* (The Central Support, Contact and Information Office Berlin [SEKIS Berlin]; dgti 2000).

155 | The Schwusos and the Sonntags-Club e. V. in Berlin were members of the PGG (dgti 2000).

156 | The PGG defined ›transgender‹ to include transmen, transwomen and intersex individuals (Alter 2001). Having just begun to organise in Germany in the 1990s, intersex individuals criticised subsuming ›intersex‹ under ›transgender‹, arguing that the umbrella term rendered them invisible. Given that intersex was – in contrast to transsexuality – literally erased due to medical policies of misleading information, secrecy and ›corrective‹ surgery in infancy, i. e. without intersex individuals' informed consent, and the legal dogma of intersex as unknown to the law, this is a valid point. For a critique of the medical management at the time, see for example Beh/Diamond 2000, Fausto-Sterling 2000, Guhde 2002, Chase 2003, Hester 2004 and de Silva 2007. For a critique of legal premises and practices, see for example Plett 2003; 2007. For an analysis of concepts of gender and sexuality that inform medical treatment concepts, see for example Kessler 1997, Fausto-Sterling 2000; Klöppel 2002; 2006, Hester 2003; 2004, Zehnder 2006 and de Silva 2008.

157 | All citations of the Transgender Bill are based on the edition provided by the dgti e. V. website (dgti undated l).

2001). Section 1 TrGG defined the conditions. Sections 2 and 3 TrGG dealt with issues related to birth entries (s. 2 TrGG) and revisions of birth entries (s. 3 TrGG). Sections 4 and 5 TrGG regulated areas of competency (s. 4 TrGG) and implementation (s. 5 TrGG).

Section 1 TrGG was foremost designed to ensure intersex individuals', their parents' or legal guardians' rights to information and intersex individuals' right to physical integrity. The first section of the proposed legislation was meant to prohibit the common medical practice of non-disclosure of an intersex status to the respective individual and of genital surgery at an age that necessarily precludes the infant's informed consent.

Sections 2 to 4 TrGG were devised to secure intersex individuals' legal recognition with minimum bureaucratic barriers. Section 2 offered several possibilities for registering first names in the birth entry. These included the choice of gender-neutral names, names of both socially accepted genders (s. 2[1] TrGG) or names given to one specific accepted gender, however with an additional indication of intersex in brackets (s. 2[3] TrGG).

With regard to the sex/gender entry, the proposed TrGG suggested leaving the initial entry vacant or allowing an entry as intersex (s. 2[2] TrGG). Moreover, the proposed draft bill provided options for an intersex individual to either accept or change the sex/gender entry at any point in life (s. 3 TrGG) at the local register office (s. 4[1] TrGG).

Section 5 TrGG was created to ensure protection against discrimination, secure privacy rights and to regulate issues related to marriages and registered partnerships. Section 5(3) TrGG, for example, specified that an intersex individual with either a vacant sex/gender entry or the entry as intersex may not be put at a disadvantage with regard to regulations that are commonly tied to a sex/gender. Section 5(4) TrGG provided for a prohibition of disclosure as provided for trans individuals in s. 9 TrGG. According to s. 5(5) TrGG, existing marriages and registered partnerships were meant to remain unaffected by a change of first names, whereas in the case of a revision of gender status, the same rules would apply as specified in the sections regulating the establishment of gender status.

The Transsexual Act served as a template for parts two and three of the Transgender Bill. Overall, the Transgender Bill suggested accelerated procedures and less demanding prerequisites for a change of first names and a revision of gender status than the Transsexual Act.

The TrGG suggested lowering the barriers for a change of first names for trans individuals. Rather than endowing the local court with the competency to decide upon a change of first names as s. 2 TSG determines, s. 7 TrGG suggested the register office should be responsible for attending to applications to this effect.

In contrast to ss. 4(3) and 9(3) TSG, the TrGG suggested to dispense with expert reports. Instead, the TrGG provided that an applicant provide a doctor's or psychologist's note for a change of first names (s. 8[1]1 TrGG) which was also to be valid for a revision of gender status (s. 12[1]1 TrGG). This particular note was simply to state that the applicant wished to improve or prevent a deterioration of his or her psychological and social situation. Moreover, the proposed legislation suggested that a medical statement suffices as a proof of the somatic measures undertaken (s. 13[4] TrGG). As a means to accelerate court proceedings dealing with a revision of gender status, the TrGG also determined that the judge hears the applicant and the representative of the public interest in person in one session (s. 13[3] TrGG).

The TrGG also suggested reducing somatic requirements. Rather than demand surgical interventions as a prerequisite for a revision of gender status as determined in s. 8(1)4 TSG, the TrGG provided that the applicant needs to have undergone medical measures to effect that his or her external sex characteristics have approximated the outer appearance of the ›other‹ sex (s. 12[1]3 TrGG). Unlike the TSG, the TrGG did not stipulate any sterility requirements.

The TrGG also suggested reformulating the requirements with regard to existing and future marriages and considering a registered partnership as an option for trans individuals. Like the TSG, the proposed legislation suggested that an existing marriage (or a registered partnership) remain unaffected by a change of first names. However, while the TSG ruled that the decision to change first names becomes void as soon as the applicant marries (s. 7[3] TSG), the TrGG suggested that an applicant may marry or enter a registered partnership according to the sex/gender specified in the birth certificate (s. 11 [3] TrGG). While s. 8(1)2 TSG stipulated that an applicant needs to be unmarried before being granted a revision of gender status, the TrGG provided that a marriage could either be divorced or converted into a registered partnership (s. 12[1]2.1 TrGG) or vice versa (s. 12[1]2.2 TrGG).

In addition, the PGG considered the Federal Constitutional Court decisions until the time of devising the proposed legislation and in part went beyond the decisions. The TrGG did not contain any age limits for a change of first names and gender status. It provided for the right that an applicant with a change of first names needs to be addressed according to the gender the name signifies,[158] including the entitlement to have his or her official documents and qualifying reports amended to match the chosen name (s. 8[3] TrGG). Well before the Federal Constitutional Court decided on the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under the Transsexual Act, the PGG decided to include foreigners intending to obtain

158 | For the Federal Constitutional Court decision on the gender-specific address of a trans individual after a change of first names, see chapter 3.3.4.

an unlimited residency permit and whose home countries do not provide for gender recognition or demand unreasonable prerequisites (s. 6[1]1.2 TrGG).

While the Transgender Bill would have met some demands of the then trans movement, taking into consideration the conservative political climate and anticipating conflicts with policy makers, the PGG included compromises in the TrGG. This becomes particularly obvious when comparing the provisions of the draft law with trans movement concepts of trans, gender and the gender regime. The workgroup conceded on the number of gendered options in the event of a transition, the notion of gender as independent of morphology, the concept of gender fluidity and radical self-determination.

Although the recognition of intersex and the inclusion of protective measures against medical and legal encroachments challenged the gender binary, the proposed legislation fell short of providing for the options not to be gendered or to be recognised as two or more genders in instances in which individuals were assigned either female or male at birth. The Transgender Bill suggested that female or male individuals have the choice of being recognised as the ›other‹ gender only (ss. 6[1]2 and 12[1] TrGG).

The PGG also anticipated that the legislator would not accept a revision of gender status without somatic measures. While ›medical measures‹ do not necessarily mean ›surgical measures‹, s. 12(1)3 TrGG implicitly perpetuated the notion that gender needs to be mirrored in physical traits.

Moreover, the workgroup also tried to appease potential adversaries by conveying the notion of ›gender‹ as a stable condition. The TrGG sought to lower the prognostic demands on the stability of a gender identity by suggesting as a prerequisite for a change of first names for trans individuals that it is »assumed that identifying with the other gender will not change anymore« (s. 6[1]2 TrGG), rather than adding »with a high degree of probability« as the TSG does in s. 1(1)2. However, the PGG increased the barriers for a reversal of the decision. While the TrGG suggested that the competency for an initial change of first names rest with the register office, s. 10(1)1 TrGG proposed that a reversal of the decision should, like a revision of gender status (s. 13[1] TrGG), take place in a local court proceeding.

Finally, the PGG anticipated that the legislator would not accept a change of first names or a revision of gender status without some medical evidence. The Transgender Bill neither repeated the debatable and pathologising formulations »transsexual imprinting« and »if the applicant has felt compelled to live according to his or her ideas since three years« in s. 1(1)1 TSG, nor suggested to obtain two expert reports. Nevertheless, the PGG estimated that a doctor's or psychologist's note, respectively, would be necessary, rather than a self-declaration.

The TrGG had an effect on the federal government, headed by a Social Democratic and Green Party coalition. In addition to grievances voiced else-

where, in particular over assessment practices and the duration of proceedings under the Transsexual Act, the Home Office announced that it intended to revise the Transsexual Act comprehensively. For this purpose and in contrast to the political process leading to the Transsexual Act, the Home Office asked for submissions from sexologists and psycho-medical practitioners known to be specialised in the field of transsexualism as well as from trans lobby groups and some support groups (BMI 2000: 1).[159] Despite its announcement and swift responses, the government remained inactive for years.

Suggestions for reforming the Transsexual Act by the TGNB Workgroup Law (*Arbeitskreis Recht des Transgender-Netzwerks Berlin*)

In 2006, the Workgroup Law of the TGNB[160] prepared a set of suggestions for a fundamental reform of the Transsexual Act. Unlike the PGG, the Workgroup was able to draw upon national developments in jurisdiction on the Transsexual Act, international developments in trans legislation, developments in society, scientific findings on trans(sexuality) and concrete suggestions for trans law reform made by other trans organisations and networks to support its course. In the light of these developments, the Workgroup Law was, with few exceptions, much less pressed and willing to trade demands for self-determination and limitations on human rights for reasons of political feasibility than the PGG.

The fact that the Workgroup contemplated a reform of the Transsexual Act itself constituted a compromise, since it favoured an abolishment of the special act and the integration of regulations providing for a change of first names and a revision of gender status in the Act on the change of family names and first names (*Namensänderungsgesetz*; NamÄndG) and the Civil Status Act (TGNB 2006j: 3), including the creation of ›intergender/transgender‹ or ›other‹ as an additional category for a sex/gender entry in the birth register (ibid: 5). The Workgroup however devised suggestions for a fundamental reform of the Transsexual Act in case their preferred solution would not find support (ibid: 3).

In contrast to the PGG, the Workgroup Law decided to adapt the structure of the Transsexual Act. Part one was meant to regulate issues related to a change of first names. Part two contained provisions for an establishment of gender status (ibid: 1f.). Rather than create elaborate provisions for intersex individuals which had been a priority for the PGG, the Workgroup suggested that given

159 | While the submissions to the Federal Home Office for the Draft Transsexual Law Reform Bill lend themselves to an analysis of trans, gender and gender regime, they with few exceptions mirror perspectives in sexological journals and handbooks, trans organisation programmes and the Draft Transgender Bill produced by the PGG.

160 | The TGNB Workgroup Law will be referred to as the Workgroup Law or the Workgroup in this chapter.

that the legislator planned to create an additional gender option, individuals seeking a revision of gender status must be eligible for the provisions outlined in the second part of the reformed Transsexual Act (ibid: 2).

While the Workgroup Law and the PGG opted for non-pathologising language in the conditions for applying for a change of first names and a revision of gender status, the wording of the Workgroup Law did not limit gender options to two or conceptualise gender identity as a permanent disposition. Rather, the Workgroup suggested to rephrase ss. 1(1) and 8(1) TSG to simply state as a condition that the person no longer identifies with the gender entered in the birth register (ibid: 1; 2).

In contrast to the PGG, the Workgroup Law suggested not only to locate proceedings for a change of first names with the register office. Rather, the Workgroup proposed to have applications for a change of first names, a reversal of the decision and applications for a revision of gender status processed with the abovementioned institution (ibid: 1; 2). Such a procedure would have reduced the barriers for any application under the Transsexual Act and accelerated the proceedings by dispensing with a representative of the public interest (ibid: 4).

With regard to the proceedings for a change of first names, the Workgroup reasoned in its explanatory notes that locating the competency with a local court, including the costs of expert reports and procedural costs, deters trans individuals from applying for a change of first names. As a result, respecting their chosen first names depends on the goodwill of their surroundings and exerts them to discrimination (ibid: 3). While the PGG tried to appease the legislator by suggesting that a reversal of the decision should be located with the local courts, the Workgroup Law only proposed to allow such an option in the event of repeated changes of first names or in case of reasonable suspicion of an improper use of the provision (ibid: 4).

Unlike the TrGG, the suggestions offered by the Workgroup Law wrested the legal procedure entirely from the medical realm. While the Workgroup's suggestions for a reform of the Transsexual Act did not rely entirely on an individual's self-declared intention to undergo a change of first names or a revision of gender status, the Workgroup acted on a suggestion the dgti e. V. had developed in the meantime (ibid: 1). According to this suggestion, the applicant would have been required to produce a counselling certificate (*Beratungsschein*) as evidence of having consulted a self-chosen counselling service on the issue and its potential consequences (ibid: 1; 2). The Workgroup specified the qualifications of the counselling service staff and that of any other institution as individuals who are based on their training and their professional experience sufficiently familiar with issues related to transgender and gender identity (ibid: 1).

Like the PGG, the Workgroup Law was intent on including foreigners with an unlimited residency permit as potential applicants under a reformed Transsexual Act. In contrast to the PGG, the Workgroup Law was able to refer to the

Federal Constitutional Court decision on 18 July 2006. Based on the Court's decision that ruled that the legislator needs to find a solution for s. 1(1)3 TSG that is compatible with equality rights laid down in Art. 3(1) GG and the right to the protection of one's personality (Art. 2[1] GG) in conjunction with the right to dignity (Art. 1[1] GG) (BVerfG 2007: 16), the Workgroup suggested as individuals eligible for a change of first names and a revision of gender status EU citizens, individuals with a permanent residence in the EU, stateless or displaced persons with usual residence within the territory of German law and individuals entitled to asylum or foreign refugees (TGNB 2006j: 1; 2).

Like s. 5 TSG and ss. 5(4) and 9 TrGG, the Workgroup Law suggested that a reformed Transsexual Act provide for a prohibition of disclosure. In contrast to the Transsexual Act, however, the Workgroup proposed a more restrictive provision. Based on suggestions made by the Workgroup Transsexuality in Northrhine-Westphalia (*Arbeitskreis Transsexualität in Nordrhein-Westfalen*), the Workgroup for example demanded that s. 5 TSG be extended to prohibit explorations on the initial gender, first names and the reasons leading to the respective gender status and first names (ibid: 2). Moreover and based on the Federal Constitutional Court decision on the address of a trans person who had been granted a change of first names, the Workgroup proposed to add to the section on the prohibition of disclosure the obligation to address a person according to the first name (ibid). While the Home Office had already decreed that a person's gender be amended in the passport to match the individual's first name (ibid: 4), the Workgroup suggested to legally secure this fact in the rules regulating the prohibition of disclosure (ibid: 2).

Like the PGG, the Workgroup Law suggested to dispense with the provisions regulating the invalidity of the decision to change first names (s. 7 TSG) and the rule in s. 8(1)2 TSG that requires of a transsexual individual to be unmarried prior to applying for a revision of gender status. With regard to the former rule, the Workgroup referred to the increasing number of ›rainbow families‹, scientific facts and social realities suggesting that there are trans individuals who do not seek a legally recognised change of gender status (ibid: 3). The Workgroup also referred to the Federal Constitutional Court decision on s. 7(1)1 TSG in Dec. 2005 (ibid: 4) to support its proposal. Arguing that, »[t]here is simply no reason why a person who has accomplished a change of first names according to s. 1 should be refused the right to found a family« (ibid), the Workgroup held that denying a person a changed first name in the case of a marriage or fathering or bearing a child is »pointless« (ibid).

With regard to s. 8(1)2 and in the light of the introduction of the registered life partnership for same-sex individuals, the Workgroup suggested that neither marriage nor a registered life partnership constitute an obstacle to establishing an individual's gender status. While the PGG suggested integrating in the TrGG rules that deal with issues related to marriage and registered life partner-

ships in the event of a revision of gender status (ss. 12[1]2.1 and 2.2 TrGG), the Workgroup Law suggested dealing with these issues in the respective acts that regulate marriages and registered life partnerships, rather than in a reformed Transsexual Act (TGNB 2006j: 3).

Like the TrGG, the Workgroup's suggestions did not entail any references to measures for achieving sterility. In its explanatory notes, the Workgroup Law dismissed any such prerequisite for a revision of gender status, arguing that such a stipulation violates human rights. According to the Workgroup, »[i]t is not justifiable to deny individuals wishing to change their gender status the right to reproduction and to found a family« (ibid: 4).

The Workgroup's suggestions most dramatically differed from the Transsexual Act and the Trangender Bill with regard to the somatic requirements for a revision of gender status. While the TrGG lowered the requirements from ›surgical‹ measures as stipulated in s. 8(1)4 TSG to ›medical‹ measures (s. 12[1]3 TrGG), the Workgroup Law rejected any somatic measures as prerequisites for a revision of gender status on the grounds that such a requirement violates the right to physical integrity (TGNB 2006j: 4).

In addition, the Workgroup pointed out to state of the art scientific findings, trans individuals' diverse social realities and international developments in trans legislation to refute the notion that a gender identity necessarily requires »adapted« genitalia (ibid: 4). Instead, the Workgroup suggested to follow the example of the Gender Recognition Act (2004), which does without any surgery requirements (ibid: 4 f.).[161]

The key issues paper on the reform of the Transsexual Act by the TGNB and TrIQ e. V.

In April 2009, the TGNB and TrIQ e. V. developed a key issues paper containing basic demands for law reform. Since the Federal Home Office was in the process of devising the Transsexual Law Reform Bill, the TGNB and TrIQ e. V. elaborated on potential amendments to the Transsexual Act, rather than on suggestions to integrate provisions for changing first names and revising gender status in existing statutes. Taking into consideration the political context, the abovementioned organisations compiled the key issues paper as a highly strategic paper[162] that was designed to bridge the gap between central trans movement demands and issues related to political implementation in a conservative political environment. As such, the key issues paper on the one hand included demands to consider diverse trans individuals in legislation and de-

161 | For more details on the Gender Recognition Act (2004), see the UK government website on legislation.

162 | The paper was submitted to the Federal Home Office the same month as a statement on the Draft Transsexual Law Reform Bill (*Transsexuellenrechtsreformgesetz*; TSRRG).

mands for accelerated procedures for a change of first names and a revision of gender status based on rules that are compatible with human rights, including the rights to self-determination and physical integrity, as well as pursuing a policy of appeasement and providing legally elaborate suggestions on the other hand.

The TGNB and TrIQ e. V. acted on several ideas developed by the TGNB Workgroup Law three years earlier on, such as simplifying procedures for a change of first names and a revision of gender status and suggesting prerequisites for the latter in compliance with human rights, and developed them further. Like the Workgroup Law, the TGNB and TrIQ e. V. demanded that the competence for processing applications for a change of first names and a revision of gender status should be removed from local courts and handed over to the register office (TGNB/TrIQ 2009: 1). With regard to the procedure for a change of first names, the organisations argued that court procedures were too time-consuming and, as such, increase the risk of discrimination, violate the basic right to privacy guaranteed in Art. 2(1) in conjunction with Art. 1(1) GG and Art. 8 ECHR and – quoting the Federal Constitutional Court – contradict the original intention of s. 1 TSG (ibid: 2). When considering the procedure for a revision of gender status, the TGNB and TrIQ e. V. argued that an application could be dealt with analogously to the initial sex/gender entry at birth, which is also located with the register office (ibid: 3).

While the Workgroup Law had already suggested dispensing with medical statements on a person's gender identity as a prerequisite for either a change of first names or a revision of gender status, the TGNB and TrIQ e. V. went a step further. The organisations demanded that the applicants should be asked to deliver a statutory statement only for a change of first names (ibid: 1). They argued that experience so far suggests that transgender and transsexual individuals do not apply for a change of first names frivolously (ibid: 2). As a result, a decision to change first names would have become a self-determined decision.

The TGNB and TrIQ e. V.'s demand for simplifying the procedure for a revision of gender status required more intricate suggestions and reasoning in order to ease the tension between trans movement demands for self-determination and issues related to political feasibility. The organisations solved this problem by radically separating medical and legal processes and concentrating on achieving maximum self-determination in the latter, while using the issue of medical supervision strategically as a means of appeasement, hence deferring the struggle for depathologisation to another arena for the time being. In addition, the organisations demanded that the practice of obtaining expert reports be replaced by three options instead. The TGNB and TrIQ e. V. suggested that a revision of gender status should be granted no sooner than twelve months after a change of first names or if the applicant has undergone sex reassignment measures or if the applicant has been diagnosed with transsexuality,

respectively (ibid: 1). The choice of three options would have left it up to the individual whether or not to opt for somatic measures for a revision of gender status.

In the explanatory notes, the organisations presented several reasons to substantialise their demands. With regard to the first option, they suggested that a period of one year between an individual's change of first names and an application for a revision of gender status sufficiently proves the stability of a person's gender identity. They justified the second option by arguing that trans individuals do not choose to undergo sex reassignment measures frivolously. Moreover, they are only possible after having obtained a medical indication, and the measures are usually irreversible. With regard to the third option, the TGNB and TrIQ e. V. suggested that assessing the stability of a person's gender identity is part of the medical diagnosis transsexuality, and as such, an adaptation of the sex/gender entry would be consistent (ibid: 3).

As the proposed procedures suggest, the organisations demanded procedures that comply with basic human rights, specifically with regard to the right to physical integrity and, in addition, to the right to the protection of marriages. Like the Workgroup Law, they demanded abolishing permanent sterility, sex reassignment surgery as well as having to be unmarried as prerequisites for a revision of gender status (ibid: 1). For strategic reasons, they quoted the opinion of the Federal Constitutional Court and referred to the latest developments in trans legislation elsewhere, rather than argue on the grounds of their own principles.

Setting out from the observation the Federal Constitutional Court had made in its decision on 06 Dec. 2005 that transsexual individuals are the only group of persons of whom the state requires permanent sterility (ibid: 2), the TGNB and TrIQ e. V. presented three reasons as part of their strategy of assuring the legislator that banning this requirement would not result in large-scale gender disorder. First, they suggested that ›contrasexual‹ hormone treatment usually leads to sterility, hence enabling few individuals only to reproduce. Second, the TGNB and TrIQ e. V. argued that pregnancy is incompatible with most transmen's self-perception. Third, they held that, »[p]ossible individual cases on no account justify that the state renders an intervention into transsexual and transgender individuals' physical integrity a prerequisite for a revision of gender status« (ibid).

The organisations proceeded similarly with regard to the requirement for sex reassignment surgery, while attempting to safeguard the rights of individuals requiring surgery at the same time. The TGNB and TrIQ e. V. quoted the Federal Constitutional Court, which opined in its decision on 06 Dec. 2005 that there were no acceptable reasons for treating transsexual individuals seeking a revision of gender status differently, regardless of whether they had undergone sex reassignment surgery or not. The TGNB and TrIQ e. V. interpreted the

statement as a recommendation to dispense with the sex reassignment stipulation (ibid: 2). In addition, they pointed out that neither the Gender Recognition Act (2004), nor the Spanish Act, passed in 2007, demanded somatic measures (ibid: 2 f.). However, the TGNB and TrIQ e. V. also referred to the Federal Social Court decision on 10 Feb. 1993, which ensured that statutory health insurance companies assume the costs of sex reassignment measures for individuals experiencing distress related to transsexuality. Anticipating that a reform of the Transsexual Act might impact on social jurisdiction, they suggested that the legislator guarantee that necessary sex reassignment measures remain part of the services offered by health insurance companies. The TGNB and TrIQ e. V. suggested adding s. 27b to the Social Security Code to this end (ibid: 3).

The TGNB and TrIQ e. V. also drew upon the then most recent Federal Constitutional Court decision on 27 May 2008[163] to demand that the legislator abolish s. 8(1)2 TSG, which requires of the applicant to be unmarried prior to filing an application for a revision of gender status. Employing the same strategy as they had used when arguing in favour of abolishing s. 8(1)4 TSG, the organisations reiterated one of the Court's options that the legislator may allow for a continuation of marriage in the light of the very small number of married transsexual individuals seeking a revision of gender status.[164] In addition, the organisations invoked Art. 6(1) GG, arguing that this option would re-establish marriage as a constitutionally protected institution and safeguard the respective partner's rights (ibid: 4).

Finally, the TGNB and TrIQ e. V. demanded renaming the reformed Act. Arguing that transsexual individuals only constituted a fraction of the target group (ibid: 4), they suggested that the Act be renamed »An Act on the change of first names and gender status« (*Gesetz über die Änderung der Vornamen und der Geschlechtszugehörigkeit*), hence providing for diverse individuals to be covered under the rules of the Act.

163 | On 27 May 2008, the Federal Constitutional Court decided that s. 8(1)2 TSG is unconstitutional on the grounds that the rule violates Art. 2(1) in conjunction with Art. 1(1) GG and Art. 6(1) GG, because the rule does not allowed a married transsexual individual to gain legal recognition of his or her gender without him or her having to terminate his or her marriage (BVerfG 2008: 317). For more details on this decision, see chapter 3.3.3.

164 | While the TGNB and TrIQ e. V. did not depart in substance from the suggestion the Workgroup Law brought forward three years earlier on, the TGNB and TrIQ e. V. opted for a different route to solve the legal problem.

In contrast to the PGG and the Workgroup Law, the TGNB and TrIQ e. V. decided to garner support for their demands. The key issues paper was signed by several trans,[165] lesbian and gay or queer organisations[166] and two individuals.[167]

3.2.5 Summary: Concepts of gender, trans and gender regime in trans lobby organisations

Fuelled by a number of internal and external factors, the trans movement was marked by a substantial growth, differentiation and consolidation of lobby organisations, an increased visibility of diverse trans subjects and the development of various concepts of trans, gender and gender regime. Influenced by different discursive traditions and emerging within shifting social contexts, concepts of trans(sexuality) and gender emerged that ranged from understandings shaped by social constructionist and poststructuralist thought that challenge the gender binary and clearly delineated concepts of trans to notions influenced by neuro-biological hypotheses that consider transsexuality a somatic disorder. While trans organisations endorsing the former set of concepts pursue a policy of inclusion, representatives of the latter focus on issues pertaining to a fraction of the transsexual community.

Despite these conceptual differences, trans lobby organisations share a number of demands and perspectives, most prominently demands for self-determination and the recognition of trans individuals as experts on their own behalf as well as the rejection of (psycho)pathologisation and a perspective that suggests that a person's gender identity can be derived from the sexed body. With regard to legal rules, procedures and practices, trans organisations oppose legal requirements that require sterility, sex reassignment measures, expert assessments and affect officially sanctioned living arrangements, arguing that these rules violate basic human rights. With regard to psycho-medical assumptions, procedures and practices, trans organisations reject the (psycho)pathologisation of trans(sexuality), psycho-medical expertise and procedures and practices they consider violations of human dignity and privacy. These include the obligatory ›real life test‹, undue physical examinations, inappropriate enquiries into trans individuals' sexual orientations and practices and a subjection to expert understandings of sex, femininity, masculinity and gender regime

165 | Among these were e. g. ABqueer e. V., the drag king group Kingz of Berlin, the support group SHG Chemnitz, TransGenderTown (Rosalinde Leipzig e. V.), Transvita Karlsruhe and VIVA TS e. V. München (TGNB/TrIQ 2009: 4).

166 | Lesbian and gay cosignatories of the paper were Queer Christ Berlin, the Sonntags-Club e. V. and the LSVD e. V. (TGNB/TrIQ 2009).

167 | These were the lawyer Reinert and the former MP Schenk (TGNB/TrIQ 2009).

in a setting that is marked by unequal power relations in order to achieve legal recognition and trans-related medical and surgical services.

Without compromising support and outreach, information and public education, trans organisations engage in networking on local, regional, national and supranational levels and individual or coalition-based lobbying aimed at achieving human rights and equality and trans law reform. Activities directed at achieving trans law reform have so far ranged from suggestions to elaborate proposed legislation. The analysis of designs for trans law reform suggest two conclusions. On the one hand, they mirrored rapidly changing social and legal developments with regard to homosexuality, national developments in jurisdiction on the Transsexual Act and growing assertiveness of trans organisations. On the other hand, trans organisations were faced with unswerving federal government gender-political conservatism. They to varying degrees tried to meet this challenge by strategically deploying the aforementioned national and international developments in their suggestions for law reform, by resorting to appeasement policies and/or by separating the struggle on the legislative terrain from the psycho-medical plane as means to achieve maximum self-determination and rules compliant with human rights in legislation on a change of first names and a revision of gender status.

3.3 Legal developments and debates on transsexuality from the 1980s to 2010

The period from the 1980s to 2010 witnessed a number of developments in legal scholarship and jurisdiction on trans with contradictory effects on transsexual individuals, depending on the area of the law, and a weakening, although not displacement, of the heteronormative character of the gender regime. This chapter traces major developments in jurisdiction and legal scholarship in insurance law and on the Transsexual Act in this period.

Based on relevant rules in social regulation and social court jurisdiction, reported in the *NJW, Versicherungsrecht* (Insurance Law [VersR]) and the online data bases *sozialgerichtsbarkeit.de* (social jurisdiction) and *openJur*, the first section of this chapter elaborates on developments in statutory health insurance coverage of sex reassignment measures in the Federal Republic of Germany. The relationships between definitions of disease and legal understandings of transsexuality pursuant to health insurance law, the legal distinction between sex reassignment surgery and cosmetic interventions and the relationship between transsexuality and other unusual gender identities in social court jurisdiction as well as in the context of general developments in health insurance law will be addressed.

The next three sections deal with jurisdiction and legal scholarship on the Transsexual Act. Taking into consideration sexological perspectives and points of view in legal scholarship and using as examples Federal Constitutional Court decisions on the age limits for a change of first names (s. 1[1]3 TSG) and a revision of gender status (8[1]1 TSG) and the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under ss. 1(1)1 and 8(1)1 TSG, the second section of this chapter focuses on the construction of transsexuality in relation to conventionally gendered men and women.

Jurisdiction under the Transsexual Act that deals with issues related to a registered life partnership (*Eingetragene Lebenspartnerschaft*), marriage, somatic measures and generational reproduction are particularly relevant to an assessment of shifts in concepts of trans, gender and gender regime. Taking into consideration legal interpretations of sexological concepts of transsexuality and developments in legal scholarship and jurisdiction, including Federal Constitutional Court decisions on these issues prior to, and during the reform period, the third section traces developments on civil partnership and marriage as they relate to the Transsexual Act and briefly addresses the government reaction to the Federal Constitutional Court decision on s. 8(1)2 TSG. The fourth section deals with sexological and legal interpretations of the rules on somatic measures and generational reproduction under the Transsexual Act in this particular period and briefly addresses government activities.

The analysis is based foremost on sexological and legal publications in *NJW*, *Zeitschrift für Rechtsmedizin* (Journal of Legal Medicine [*Z Rechtsmed*]), *Recht & Psychiatrie* (Law and Psychiatry [R & P]), the submission of the DGfS, reported court decisions on the abovementioned issues in *NJW* and *StAZ*, the Draft Transsexual Law Reform Bill (*Transsexuellenrechtsreformgesetz* [TSRRG]), the Draft Bill to change first names and establish gender status (*Entwurf eines Gesetzes über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit* [ÄVFGG]) proposed by the political party BÜNDNIS 90/DIE GRÜNEN and the Act to amend the Transsexual Act.

Insurance law and constitutional law follow different rationales and operate within different parameters that have led to more regulation of transsexuality in the former and less in the latter area since the late 1990s. Nevertheless, they have in common that they acknowledge an increasing diversity of transsexual individuals and bar trans individuals who do not qualify as transsexual in strictly medical terms from health insurance coverage of sex-modifying interventions and legal recognition. Moreover, Federal Constitutional Court jurisdiction on the Transsexual Act contributed to a shift within the gender regime, and the federal government was essentially content to follow one of the Federal Constitutional Court suggestions to do away with s. 8(1)2 TSG altogether. The gradual undoing of deeply homophobic rules in the Transsexual Act led to a

disruption of the heteronormative character of the gender binary under clearly defined circumstances. While the legal recognition of a trans person's gender continued to rely on somatic measures, the controversy among legal scholars on this issue in the first decade of the 21st century and Federal Constitutional Court jurisdiction in this period indicate that this link was becoming undone.

3.3.1 Jurisdiction on transsexuality in health insurance law

Statutory health insurance coverage of sex reassignment measures on trans individuals in Germany can so far be subdivided into three diffusely delimited stages. From the 1970s to 1987 statutory health insurance companies unevenly assumed the costs of sex reassignment surgery. Since the seminal Federal Social Court decision on 06 Aug. 1987, statutory health insurance companies are obliged to cover sex reassignment procedures in individual cases of transsexuality. The third and continuing period began in the late 1990s and is marked by a number of specifications and a general limitation of interventions statutory health insurance companies are required to cover.

Uneven statutory health insurance coverage of sex reassignment surgery

Despite a statutory basis that was oriented towards an expansion of the benefits catalogue of statutory health insurance companies, a broad definition of disease and the unanimous sexological assessment of transsexuality as a condition that required medical and surgical interventions, statutory health insurance companies initially assumed the costs of surgical sex reassignment surgery unevenly.

According to s. 182 RVO (*Reichsversicherungsordnung*),[168] a disease is defined as an anomalous physical or mental condition that requires treatment or causes an inability to work or both (BSG 1973: 582). ›Anomalous‹ signifies a condition that deviates from the concept of a healthy human being (BSG, decision on 16 Mar. 1972, reported in BSG 1973: 582). The Federal Social Court specified that a condition requires treatment, if it prevents an aggravation (BSG 1973: 582; BSG 1975: 2268) or is amenable to a cure or relief (ibid). Arguing that it would be

168 | The *Reichsversicherungsordnung* (RVO) was passed on 19 July 1911. It served as a statutory basis of the German welfare state from 1913 to 1992. Covering the statutes of the workers' health, the accident, the disability and the old age insurance companies, the RVO was one of the largest bodies of statutes of the German Reich (*Deutsches Reich*). Since 1975, the Social Security Code (*Sozialgesetzbuch;* SGB) has gradually replaced the RVO. In 1988, the Health Care Reform Act (*Gesundheitsreformgesetz*) extracted the statutes that regulate statutory health insurance companies from the RVO and placed them into Volume V of the Social Security Code (*Fünftes Buch des Sozialgesetzbuchs*; SGB V) (Wirtschaftslexikon.co 2015).

irresponsible to the community of the insured and unacceptable to the insured individual not to intervene medically, if there were better and less sophisticated means of treatment to prevent a serious risk of illness, the Federal Social Court held that such a risk qualified to obtain medical aid services (ibid).[169]

Although sexologist research concluded in the course of the 1970s that hormonal and surgical treatment appeared to be the best available means to prevent depression, self-mutilation, suicide and work incapacity in transsexual individuals, statutory health insurance companies dealt inconsistently with applications for sex reassignment surgery. Several insurance companies refused to cover sex reassignment surgery (Spengler 1978: 1193). Spengler summarised a number of arguments the latter put forth to turn down applications. Among these were that representatives of statutory health insurance companies held that transsexuality was not a disorder, did not impair a person's well-being and that transsexuality was based on an arbitrary decision. In other instances, sex reassignment surgery was not considered an appropriate treatment or was regarded as cosmetic treatment (ibid).

Statutory health insurance companies were in general more willing to assume the costs of extensive psychological and physical examinations as well as hormone treatment (Spengler 1978: 1193). The issue of hormone treatment was legally resolved earlier than the question of who was to meet the costs of sex reassignment surgery. Drawing heavily on Spengler's and Nevinny-Stickel and Hammerstein's narrow and homogeneous concepts of transsexuality in their respective articles published in the legal journal *NJW*, the Regional Social Court in Stuttgart applied to transsexuality the principles that define an illness according to the RVO.[170] Suggesting that transsexuality does not feature the

169 | While the Federal Social Court emphasised that this rule also applied to mental disorders, it anticipated that drawing the boundary between a mental illness and a simple psychological strain could pose some difficulties (BSG 1975: 2268). The Court dealt with a person who had given birth to a child with a hereditary illness. Fearing that any further child would be born with the same condition, she brought an action against her health insurance company, which had turned down her application for hormonal contraceptives (ibid: 2267).

The Federal Social Court formulated two guiding principles and remanded the case to the regional court. The Court held that measures to prevent a pregnancy are generally not considered medical aid benefits. This principle also applies, if a pregnancy leads to the birth of a sick child. However, hormonal contraceptives may be considered medical aid benefits, it they avert the risk of a serious impairment in individual cases, such as e. g. in a case in which the physical or mental health of the person giving birth is threatened (ibid).

170 | Statutory health insurance companies proceed according to the principle of benefits in kind. However, in this particular case, the court made an exception, arguing that the complainant had approached her health insurance company in time. The Court

relationship between the psychological and the physical condition in ›healthy‹ individuals, the Court defined transsexuality as a disease pursuant to statutory health insurance company regulations (LSG Stuttgart 1982: 718). After having considered the alleviating effects of the hormones on the ›disorder‹, the commensurability of the measure and its success, the Court ruled that the statutory health insurance company was obliged to reimburse the costs (ibid: 719).[171] However, the issue of meeting the costs of sex reassignment surgery by statutory health insurance companies remained unresolved for approximately another six years.[172]

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held that if the health insurance company did not grant a benefit in kind and this procedure proved to be unlawful at a later point in time, the respondent was obliged to reimburse the costs (LSG Stuttgart 1982: 719).

171 | In this particular case, a post-operative male-to-female transperson sued the health insurance company for refusing to reimburse the costs of hormones (LSG Stuttgart 1982: 718).

172 | The obligation to meet the costs of privately insured transsexual individuals' sex reassignment surgery was legally settled in 2003. On 08 Mar. 1995, the Federal Court of Justice decided not to accept a complaint launched by a private health insurance company against a decision of the appellate court. The appellate court had ruled that surgical modifications of the external sex characteristics need to be considered a medically required treatment for a disease pursuant to the model conditions for sickness costs and the hospital daily benefit insurance (*Musterbedingungen für die Krankheitskosten- und Krankentagegeldversicherung;* MB/KK) of private health insurance companies, if the member's recognition as a member of the ›other‹ sex was declared legally binding (BGH 1995: 447 f.).

In another instance, a female-to-male trans individual sued her private health insurance company for reimbursement of the costs of hormone therapy, 50 % of the costs of a sex reassignment operation and the assumption of costs of further hormone therapy. The national courts dismissed the case, arguing that the claimant had failed to prove the necessity of the treatment and that she was not entitled to reimbursement of costs, since she had deliberately caused her disease (ECtHR 2003: Van Kück v. Germany, nos. 22 f.).

The transwoman turned to the European Court of Human Rights (ECtHR), claiming that German court proceedings had contravened the right to a fair trial provided in Art. 6(1) ECHR (European Convention on Human Rights), the right to respect for an individual's private life (Art. 8 ECHR) and the prohibition to discriminate against an individual, here, on the basis of sex (Art. 14 ECHR) (ibid: no.3). On 12 June 2003, the European Court on Human Rights decided in the case of van Kück v. Germany that with regard to the alleged violation of Art. 6(1) ECHR and taking into consideration »the determination of the medical necessity of gender re-assignment measures in the applicant's case and also of the cause of the applicant's transsexuality, [...] the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing« (ibid: no. 64). With regard to the alleged

Gaining and extending statutory health insurance coverage of sex reassignment surgery

The second phase in striking the balance between transsexual individuals requiring sex reassignment surgery and statutory insurance companies is marked by legal security, a differentiated concept of transsexuality, a demarcation of sex reassignment surgery from so-called cosmetic interventions and an extension of surgical sex reassignment measures to be covered by statutory health insurance companies.

On 06 Aug. 1987, the Federal Social Court ruled that statutory health insurance companies were obliged to assume the costs of sex reassignment surgery in individual cases.[173] The Court maintained the Regional Court Lower Saxony – Bremen's (LSG Niedersachsen-Bremen) definition of disease pursuant to insurance law and its concept of transsexuality. With regard to the former, the Federal Social Court added to the initially depicted concept of disease a psychological strain that renders an anomaly a disease (BSG 1988: 1551). With regard to transsexuality and unlike the Regional Court in Stuttgart, the Federal Social Court did not act on the assumption that transsexuality was in general a pathological state requiring sex reassignment surgery. While the Court suggested that transsexuality constitutes an anomaly, only a case-by-case review could tell whether the inner tension between a transsexual individual's sex and his or her identity was pathologically significant (ibid: 1550 f.). In addition, the Federal Social Court suggested that the Regional Court Lower Saxony – Bremen might have misconceived the concept of expedience entailed in the concept of necessity of treatment, if it had not considered a priority of psychiatric and psychotherapeutic treatment. However, the Federal Social Court was satisfied

violation of Art. 8 ECHR, the Court concluded »that no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other« (ibid: no. 84). In addition, the Court held »that the German authorities overstepped the margin of appreciation afforded to them under paragraph 2 of Article 8« (ibid: no. 85). According to the Court, the applicant's allegation of a violation against Art. 14 of the Convention »did not give rise to any separate issue under Article 14 in conjunction with Article 6§1 and Article 8« (ibid: no. 92). The Court awarded the complainant compensation for non-pecuniary damage (ibid: no. 96) and for costs and expenses (ibid: nos. 97[I] and [II]).

173 | The Court dealt with a case in which a statutory health insurance company refused to meet the costs of sex reassignment surgery on a male-to-female trans person. Arguing that there was no anomalous physical condition prior to surgery that could have been cured, relieved or kept from aggravation (BSG 1988: 1550), the health insurance company brought the case before the Regional Court Lower Saxony-Bremen (LSG Niedersachsen-Bremen). The complainant did not succeed and appealed to the Federal Social Court.

that the lower court had noted that this kind of treatment had failed in this particular case.[174]

In the 1990s, courts established a distinction between sex reassignment surgery and so-called cosmetic surgery maintained to this day. In this regard, the Federal Social Court decision on 10 Feb. 1993, gave direction to further rulings. In this particular case, the Court dealt with a dispute between an individual who had undergone a surgical procedure to extend the length of his legs and the statutory health insurance company. The health insurance company refused to assume the costs of surgery, arguing that the latter are not obliged to pay for a surgical intervention into a physical state within a normal range in order to remedy a psychic disorder. The Federal Social Court decided in favour of the health insurance company (BSG 1993: 2398).

The Court rejected an analogy between cosmetic interventions and sex reassignment surgery, arguing that in the case of transsexuality the patient's entire condition is an anomaly. Quoting the reasons presented in the Federal Social Court decision on 06 Aug. 1987, the Court suggested that the inner tension between the morphology and the gender identity may in individual cases lead to a disease pursuant to insurance law requiring treatment. Statutory health insurance companies are required to assume the costs of sex reassignment surgery only after psychiatric and psychotherapeutic measures fail to provide relief or eliminate the tension. The Court suggested that the difference between the case at hand and that of transsexuality is that in exceptional cases of transsexuality, surgery poses the only remedy (ibid: 2400), regardless of whether the transsexual individual agrees to undergo psychiatric or psychological treatment or not.[175]

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174 | The Medical Services of the Statutory Health Insurance Companies interpreted the Federal Social Court's suggestion to the effect that surgery needs to be preceded by psychiatric or psychological treatment as the case of the MDK Northrhine reveals (cf. Banaski 1996: 65). In a case that will be addressed later on, a post-operative complainant who did not undergo psychological treatment prior to surgery in vain sued her health insurance company for reimbursement of sex reassignment surgery (BSG 2005, MDS 2009a: 103).

175 | The Federal Social Court presented two further arguments to dismiss the intervening party's request. First, the physical condition of the individual who had undergone surgery did not deviate from the norm prior to surgery and therefore did not qualify as a disease requiring treatment according to ss. 182 and 184(1) RVO (BSG 1993: 2399). Second, the Court held that even if the surgical procedure was the only possible remedy for the mental disease, statutory health insurance companies could not be expected to assume the costs of surgery, since such a procedure would lead to an extension of measures they would have to pay for. The Court reasoned that such an approach was incompatible with the provisions entailed in ss. 182 and 184(1) RVO. If statutory health insurance companies

In its decision on 11 Apr. 1994, the High Regional Court and Court of Appeal in Cologne (OLG Köln) reinforced the distinction between sex reassignment and cosmetic surgery.[176] The Court held that

> [t]he need to treat transsexuality in its individual development defies any comparison with other cosmetic operations or other hormonal or mental disorders in the development of an individual's gender identity and can only be assessed according to the very concrete individual facts of the individual case [...]. (OLG Köln 1995: 448)[177]

Most significantly, however, the Court determined that if transsexuality is pathologically significant as in the complainant's case, it is medically justifiable to indicate surgery, including a phalloplasty, especially since the Transsexual Act requests a physical alignment with the ›new‹ gender (ibid: 449).[178] Thus, in a period in which cost pressure in the health system was quite tangible, social court rulings established the obligation of statutory health insurance companies to meet the costs of sex reassignment surgery and extended the measures they had to cover.

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were to cover surgical interventions into a regular physical state simply because the individual is psychically fixated on the desired modifications, health insurance companies would have to assume the costs of expensive cosmetic interventions in individuals with a similar psychic fixation (ibid).

176 | In this particular case, a health insurance company appealed against a lower court decision, which had ruled that the company was obliged to meet the costs of sex reassignment surgery in the case of a transman who had undergone surgery, including a phalloplasty, abroad (OLG Köln 1995: 448).

177 | With reference to the trans individual's long lasting psychological strain that had resulted in a physical breakdown and after having undergone an unsuccessful psychotherapy, the Court ruled that regardless of whether transsexuality was a disease or not, in this particular case transsexuality had a pathological significance and required sex reassignment treatment (ibid: 448).

178 | In this particular case, surgery was in part unsuccessful. The Court argued that regardless of whether the intervention was successful or not, medical statements did not rule out the possibility of a successful outcome. The Court suggested that it was obvious that a sex change from female to male would include the construction of a penis that resembled the ›natural features‹ of a male person. In addition, it would be an unwarrantable danger, if the individual's appearance resembled that of a hermaphrodite (ibid: 449).

Limiting and regulating statutory health insurance coverage of sex reassignment surgery

The third phase in the regulation of statutory health insurance assumption of costs of sex reassignment measures began in the late 1990s and developed in the context of continuing cost pressure and efficiency rule of health care. The latter is mirrored in statutory change, legal interpretations of this change and a limitation and heavier regulation of statutory health insurance coverage of sex reassignment measures while maintaining the exceptional position of transsexuality as a condition that in clearly specified circumstances justifies health insurance coverage of costs of sex reassignment surgery.

In the course of this period, s. 27(1) SGB V took effect, replacing ss. 182 and 184 RVO and becoming part of the statutory framework for regulating principles of, and access to statutory health insurance benefits. Section 27(1) SGB V broadly provides that insured persons may claim medical treatment, if it is necessary to recognise or cure a disease, to prevent an aggravation or to relieve ailments. However, s. 1 SGB V rules among other things that insured individuals are jointly responsible for their health, hence indicating a tendency towards limiting the benefits catalogue of statutory health insurance companies (BMJV undated d).

The Federal Social Court interpreted the law to the effect that not every physical anomaly qualifies as a pathological condition under health insurance law. Rather, a physical condition only qualifies as a disease, if an insured individual experiences an impairment of bodily functions or if an anatomical deviation is defacing (BSG 2004a).

The limitation of the benefits catalogue of statutory health insurance companies also had effects on the obligation of statutory health insurance coverage of sex reassignment measures. From the late 1990s onward, courts began to define measures formerly subsumed under sex reassignment measures as cosmetic, while generally maintaining a distinction between sex reassignment surgery and cosmetic surgery.

In cases dealing with micromasties or breasts the respective transwomen considered disproportionately small, courts decided that statutory health insurance companies are not obliged to pay for mammo-augmentation-plasties. The High Regional Court and Court of Appeal in Saxony (Sächsisches OLG), the Social Court in Aachen (SG Aachen) and the Regional Social Court in Baden-Württemberg (LSG Baden-Württemberg) reasoned among other things that a psychological strain does not justify a surgical intervention at the expense of statutory health insurance companies (Sächsisches OLG 1999; SG Aachen 2009; LSG Baden-Württemberg 2012).[179]

179 | In all cases, transwomen had sued their respective health insurance companies after the latter had granted applications for vaginoplasties, but turned down applications for mammo-augmentation-plasties.

In the first case, the High Regional Court and Court of Appeal in Saxony held that small breasts do not constitute an irregular physical condition. Based on the assumption that female breasts cover a broad range of sizes, the Court argued that small breasts just as well fit the image of a healthy woman as do large breasts. More specifically, the Court held that it is not appropriate to define parameters for the size of breasts on a healthy woman and to pathologise deviations from this particular norm (Sächsisches OLG 1999).[180]

Moreover, the Court held that the health insurance company was not obliged to assume the costs of surgical measures in order to remedy a psychological disorder. A successful treatment is not measured by the individual's subjective notion or a physical contour considered »ideal« or »appropriate«, even in a

180 | In its aftermath, statutory health insurances continued to refer to the court ruling of the Regional Social Court of Saxony in order to avert coverage of costs. In one instance, the Social Court Wiesbaden (*Sozialgericht Wiesbaden*; SG Wiesbaden) dealt with the case of a transman who had undergone a subcutaneous mastectomy. Depending on several factors, such as size of breasts, skin texture and form of the breasts, such an intervention can be performed in one- or two-step procedures on small to medium-sized breasts, leaving less visible scars than double-incision mastectomies. The health insurance had initially granted coverage of costs of a mastectomy. The transman applied for a revision of the mastectomy, arguing that an enlarged breast envelope had been left over (SG Wiesbaden 2012, 35401: para 5). Unlike the surgeons who had unanimously stated that surgery did not achieve the goal of creating a male chest, since it featured visible and palpable bulges, the MDK however decided that there was neither excessive skin left over worth mentioning, nor functional impairment that would justify further surgery. Rather, additional surgery would simply be cosmetic (ibid: para 6). Based on the assessment of the MDK, the statutory health insurance refused to assume the costs of further surgery. The transman filed an objection, which was rejected by the health insurance company, whereupon the transman filed a case against the health insurance company (ibid: para 7). The Social Court Wiesbaden ordered additional medical reports, which in addition to the findings brought forth by the complainant stated a significant asymmetry of the breasts (ibid: para 15). The Court ruled that the complainant's breasts required revisions, since the surgical outcome did not correspond with a legitimately expected outcome of sex reassignment surgery (ibid: para 19). The Court held that the decision of the Regional Social Court of Saxony did not apply in this case (ibid: para 20). It argued that, if a health insurance company agrees to cover the costs of sex reassignment surgery, it – as in this case – has consented to assume the costs of surgery to model male breasts. The aim was not to eliminate defacement or functional impairment (ibid: para 21). Rather, and referring to the Federal Constitution Court decision on 11 Oct. 1978, it argued that transsexual individuals want to reach a congruence of the mind and the body of which surgery constitutes part of realising the goal (ibid: para 22). The Hessische LSG (*Hessisches Landessozialgericht*) confirmed the lower court decision (Hessische LSG 2014).

case in which the discrepancy between the outer appearance and the respective individual's self-perception produces considerable psychological strain. Rather, it is decisive that from the perspective of a »sensible« observer, an approximation towards the outer appearance of the ›other‹ gender has taken place (ibid).[181]

In the second case and in response to the complainant's statements,[182] the Social Court in Aachen held that a claim to mammo-augmentation-plasty at the expense of statutory health insurance companies is premised on a disease. A micromasty cannot be considered a disease requiring treatment, because it is not connected with a physical malfunction. Missing fatty tissue does not render the condition of breasts pathological, nor are they defacing. They can only be assessed as defacement, if their condition is objectively and significantly noticeable and if they are subject to reactions, such as curiosity or consternation (SG Aachen 2009).

In addition and with reference to the Federal Social Court decision in the case of a ciswoman seeking health insurance coverage of breast augmentation surgery,[183] the Court held that a transsexual individual is not entitled to every kind of surgical measure deemed necessary to approximate a supposed ideal. The Court argued that it is not justifiable that a transsexual individual can claim benefits a ciswoman with the same size of breasts may not. If the complainant wanted to be recognised and treated like a woman, she would have to accept the rules that apply to all women (ibid).

The third case, like the second case, dealt with mammary hypoplasia. The Regional Court in Baden-Württemberg reinforced the former court's decision that statutory health insurance companies are not required to take on the costs of a mammo-augmentation-plasty in transwomen. However, the Court conceded that transwomen may claim health insurance coverage for breast construction, provided there is no disposition towards developing breasts at all and the

181 | The Court decided to ignore the expert reports that supported the complainant's cause (SG Aachen 2009).

182 | In this particular case, the complainant argued that her micromasty constituted an anatomical deviation and defacement in her view, which produced significant psychological strain (SG Aachen 2009).

183 | In this case, a ciswoman experiencing a psychological strain due to small breasts with little glandular tissue in vain appealed to the Federal Social Court to revise the Marburg Social Court (SG Marburg) decision, which had imposed the costs of mammo-augmentation-plasty on the complainant. The Federal Social Court dismissed the complaint (BSG 2004a), referring among other things to its decision on 13 July 2004 of which some of the core arguments are mentioned above and recur in the court reasoning on mammo-augmentation-plasties on transwomen.

respective individual has obtained an indication for surgical measures due to transsexualism (LSG Baden-Württemberg 2012).[184]

Court rulings differed more strongly on issues pertaining to epilation on transwomen. While statutory health insurance companies do not cover epilation treatment on ciswomen, they do on transwomen, provided a physician carries out the measure. However, court rulings on health insurance coverage of costs of epilation performed by cosmeticians are contradictory. On 11 Dec. 2007, the Social Court in Düsseldorf (SG Düsseldorf) decided that the health insurance company had to reimburse the costs of needle epilation performed by a cosmetician on a transwoman and to assume the costs of a total of 120 hours of epilation (SG Düsseldorf 2007). By contrast, the Regional Court of Baden-Württemberg decided in a similar case that statutory health insurance companies are not obliged to take on costs of epilation treatment with a cosmetician (LSG Baden-Württemberg 2009).

184 | The LSG Baden-Württemberg also discussed the legitimacy of insurance-covered surgery into a healthy body in cases of transsexuality with pathological significance in the light of the Federal Constitutional Court ruling on ss. 8(1)3 and 8(1)4 TSG on 11 Jan. 2011 and the debate on depathologisation (LSG Baden-Württemberg 2012). The Federal Constitutional Court had stated that based on the latest sexological findings, 20 to 30 % of all transsexual individuals do not opt for surgery. However, the Federal Constitutional Court assumed that many transsexual individuals nevertheless require surgery to relieve psychological strain (cf. BVerfG 2011: para 31). Referring to the sexological debate on depathologisation, the Regional Social Court suggested that pursuant to current health insurance law, health insurance companies might no longer be responsible for covering the costs of somatic measures in transsexual individuals once transsexuality is depathologised or considered a healthy variant of an individual's gender identity (LSG Baden-Württemberg 2012). The Regional Social Court concluded however that the special position of transsexuality in terms of insurance law continues to be justified, arguing that, »[t]ranssexualism currently continues to be considered a mental irregularity rather than a simple variant. Due to its continuing exceptional position when manifested with pathological significance, this psychological abnormality generally justifies surgical interventions into a healthy body.« (Ibid) As Wielpütz points out, while it is problematic to compare transsexuality with a mental disorder, since the cause of transsexuality remains unknown (Wielpütz 2012: 286), she agrees with the Court's argumentation that it is likely that health insurance companies would no longer be obliged to assume the costs of sex reassignment surgery, once transsexuality is no longer classified as a disease (ibid: 284). However, it remains to be examined whether sex reassignment surgery for all individuals requiring these measures can e. g. be covered on the basis of a social indication, like abortions, or whether sex reassignment measures can be integrated into Volume V of the Social Insurance Code, like regulations on alternative insemination (cf. BAK TSG-Reform 2012: 10).

Despite limiting interventions statutory health insurance companies are obliged to cover, courts adhered to the special position of transsexuality as compared to other so-called gender identity disorders and cis individuals. This stance becomes evident in court cases that dealt with mammo-reduction-plasties and augmentation mammoplasties on ciswomen and in a case the respective court called ›cisidentity‹ (*Zisidentität*).

In 2004, the Federal Social Court argued in cases dealing with the reimbursement of costs of breast reduction[185] and meeting the costs of breast augmentation surgery that neither a mammary hyperplasia nor a mammary hypoplasia can be compared with transsexuality. Without failing to define the circumstances that limit or allow health insurance companies to meet the costs of sex reassignment surgery,[186] the Federal Social Court presented three arguments to substantiate its opinion. First, the Court pointed out that unlike s. 27(1) SGB V, s. 182(1)1 RVO was oriented towards expanding the benefits catalogue of statutory health insurance companies (BSG 2004a). Second, the Court

185 | In this particular case, a ciswoman with mamma hyperplasia sought reimbursement of costs of breast reduction surgery. Arguing that the disproportionate size of her breasts cannot be influenced by weight loss and that her breasts cause muscle tenseness in the neck and shoulders and a trachelokyphosis, she held that her irregular physical condition required treatment in order to prevent physical and psychological after-effects. Moreover, and in reference to transsexuality, the complainant suggested that there is no principle that psychological impairment excludes an indication for surgery (BSG 2004b). The Federal Social Court decided that the health insurance company is not obliged to reimburse the costs of breast reduction surgery on several grounds. With regard to the complainant's former argument, the Court held that not every physical irregularity qualifies as a disease pursuant to insurance law. In this particular case, the Court argued that the size of breasts does not limit bodily functions, and the orthopaedic problems can be eliminated, using physiotherapy. Moreover, the Court reasoned that statutory health insurance companies are not required to provide their respective members with every possible means that promote his or her health. In addition, the Court held that surgery on a healthy body only indirectly affects another health deficiency without a secure prognosis whether surgery will solve the problem (BSG 2004b). Reiterating the reasons presented by the Federal Social Court, the Regional Social Court in Northrhine-Westfalia (LSG NRW) arrived at the same decision in a similar case on 24 Jan. 2013 (LSG NRW 2013, 20249: paras 21; 22; 24; 26).

186 | As outlined earlier on, statutory health insurance companies were at the time of this Federal Social Court ruling only obliged to meet the costs of sex reassignment surgery in cases with severe symptoms. Moreover, the insured members usually had undergone psychiatric treatment or psychotherapy. Finally, courts did not grant transsexual individuals every possible kind of surgery that is oriented towards an alleged ideal image (BSG 2004a; 2004b).

reiterated the reason provided in an earlier court ruling that transsexuality was a complex and profound disorder affecting the entire personality, including psychological and physical impairment (ibid; ibid 2004b). Third, the Court argued that the fact that the legislator passed the Transsexual Act justifies an extraordinary legal assessment of transsexuality (ibid).

The Court also emphasised the special position of transsexuality among other so-called gender identity disorders. In the case of a ›gender identity disorder‹ the Court referred to as ›cisidentity‹,[187] a person with a female body wished to obtain male physical features while retaining the remaining physical characteristics defined as female. The health insurance had met the individual's costs of psychotherapy, hormone treatment with testosterone and a subcutaneous mastectomy. However, it refused to assume the costs of a surgical procedure to enlarge the clitoris and provide the labia with implants (BSG 2011, 95709: para: 4).

The Court dismissed the complainant's appeal against a lower court decision, which had ruled that the health insurance company was not required to meet the costs of masculinising surgery on a female person with a cisidentity (ibid: para 5). The Federal Social Court reiterated the arguments it had presented in earlier cases to substantiate the special position of transsexuality with regard to health insurance coverage of sex reassignment surgery (ibid: paras 17b; 19).

In addition, the Court held that the requirement to treat an individual according to the assessment in the Transsexual Act was linked to the approximation of a »regular« condition, i. e. the physical condition of a man or a woman, respectively, a state the complainant obviously did not intend to achieve (ibid: para 8). The Court argued that the desired physical goal of treatment in this particular case was not covered by s. 27(1) SGB V, since the hormonally induced anomalous physical condition was not conducive to healing an existing disease, preventing an aggravation or relieving the person's symptoms. Rather, the complainant was intent on creating a condition that deviates even further from the concept of a »healthy« person by opting for surgery to the effect of having male and female physical features:

> The debatable treatment is according to the complainant's wish meant to create a physical state between the two human gender types and not a most approximately regular state, such as that of a male body. The desire to develop a micropenis while maintaining

187 | The complainant was diagnosed with F64.8 according to the ICD-10, a category, which covers a number of so-called gender identity disorders other than transsexuality. According to Seikowski, ›cisidentity‹ describes individuals who identify as ›both‹ genders. Seikowski suggests that surgery is contraindicated in individuals with such an identity (Seikowski 1997: 352).

and enlarging the existing labia at the same time, using plastic surgery, neither corresponds with the regular state of a woman, nor of a man. The fact that there are individuals with features of both sexes, occasionally from birth onwards, does not, contrary to the complainant's opinion commend the regularity of such a [...] state. Such cases can be causes of claims to medical treatment oriented to aligning the respective insured individual with a normal sex type and not to deepen the state of ambisexedness. This would neither be a cure, nor a prevention of aggravation. (Ibid: para 22)

The third phase is also marked by a heavier regulation of eligibility to statutory health insurance coverage of sex reassignment measures. So far, court rulings have affected access to treatment in specialised private clinics, regulated reimbursement practices and unambiguously established the priority of psychiatric treatment or psychotherapy.

On 30 Oct. 2003, the Bavarian Regional Social Court (*Bayrisches Landessozialgericht*; Bayr. LSG) dealt with a dispute between a statutory health insurance and a transman over the full reimbursement of costs of a phalloplasty in a specialised private clinic. The Court ruled that the complainant did not qualify for the coverage of the remaining costs of surgery in this particular clinic (Bayr. LSG 2003).

The Court offered two reasons for its decision. First, the Court held that according to s. 108 SGB V, statutory health insurance companies may only pay for treatment in university hospitals that are part of the German Hospital Plan or hospitals that have signed a hospital provision contract. The Court specified that s. 13[2] SGB V rules out reimbursement, if a voluntarily insured member undergoes inpatient treatment in a hospital not approved by statutory health insurance companies (ibid). The Court held that the complainant was not eligible to reimbursement of costs, since he did not require urgent treatment and there was no gap in health care offered by contract hospitals (ibid).[188]

188 | More specifically, s. 13(2) SGB V provides that individuals insured with statutory health insurance companies may choose between benefits in kind instead of reimbursement. However, insured members are required to inform the health insurance company before undergoing treatment. The health insurance company is required to inform the insured member in advance that the latter needs to pay for the costs the health insurance company will not assume. In addition, s. 13(2) SGB rules that a limitation of the choice of medical care, dental care, inpatient care and induced benefits and services is possible. Statutory health insurance companies may approve of treatment, if medical or social reasons justify recourse to other health care providers and if an equivalent treatment is ensured. However, reimbursement may only be claimed to an extent that does not exceed the amount the health insurance company would have to cover for a benefit in kind. Section 13(3) SGB V provides that a health insurance company is required to provide a benefit that may not be delayed in time. If the health insurance wrongfully

Second, and in response to the transperson's argument that he believed the specialised private clinic offered the best possible treatment, the Court held that optimal patient-centred care is not the standard for statutory health insurance companies. Rather, the quality and effectiveness of the benefits need to correspond with the generally accepted state of art medical expertise and consider medical progress.[189] The Court ruled that an individual insured with a statutory health insurance company may not claim costs of treatment in a private clinic, even if the surgeon is – as in this particular case – internationally outstanding or if the hospital is specialised in the type of surgery sought after (ibid). On 06 Jan. 2005, the Federal Social Court confirmed the decision (BSG 2005).

In another instance, the Regional Court Berlin-Brandenburg (LSG Berlin-Brandenburg) dealt with a case involving a transman who had undergone an ambulant bilateral mastectomy. He sued the health insurance company for reimbursement of costs, despite the fact that the latter had in advance refused to assume the costs of this particular measure (LSG Berlin-Brandenburg 2012: para 21). On 16 Sept. 2009, the Court decided that the complainant was not entitled to a pecuniary claim towards his health insurance (ibid: para 24).

The Court presented three reasons for its decision. First, the Court held that an ambulant bilateral mastectomy did not qualify as an intervention that had to occur without delay (ibid: para 25). Second, the Court reasoned that the complainant was no longer insured with the health insurance company at the time surgery took place and that the health insurance company did not approve of the desired measure while the complainant was insured with this particular health insurance company (ibid: para 35). Third, a prescription for hospital treatment is only valid for inpatient treatment (ibid: para 30).

The decision of the Federal Social Court on 20 June 2005 regulates the relevance of psychiatric treatment or psychotherapy for health insurance coverage of costs of sex reassignment surgery. In this particular case, the Court dismissed a transwoman's complaint against the non-admission of the decision of the Regional Social Court Baden-Württemberg (LSG Baden-Württemberg). The latter had overturned the lower court decision that the health insurance company reimburse the costs of sex reassignment surgery, arguing that it was not possible to state that sex reassignment procedures were the only means to relieve the impairment, since the complainant did not undergo psychiatric treatment or psychotherapy (BSG, MDS 2009a: 103 f.).

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refuses to provide a benefit and if the ensured member as a result had to pay for the costs of treatment, the health insurance is required to reimburse the costs of necessary treatment.

189 | Section 12(1) SGB V provides that the benefits of the health insurance need to be sufficient, appropriate and efficient and may not exceed a certain degree.

While the Federal Social Court had tentatively suggested on 06 Aug. 1987 that psychiatric treatment and psychotherapy might have to precede surgery, the Court unmistakably ruled in this decision that statutory health insurance companies are only required to meet the costs of sex reassignment surgery when psychotherapy or psychiatric means have failed to provide relief or eliminate the tension between a person's physical gender and the individual's identity as a member of the so-called other gender (ibid).

3.3.2 Federal Constitutional Court decisions on age limits and the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under the Transsexual Act

Transsexual individuals began to challenge provisions of the Transsexual Act soon after it had come into force. From 1982 to 2010, the Federal Constitutional Court made six decisions on the Act. Taking into consideration sexological perspectives and standpoints in legal scholarship, the following section deals with Federal Constitutional Court decisions on age limits for a change of gender status and first names, and the eligibility of foreigners with lawful and more than temporary residency in the Federal Republic of Germany to applications to procedures provided by ss. 1(1)1 and 8(1)1 TSG.[190] The abovementioned Federal Constitutional Court decisions remedied human rights breaches against transsexual individuals. However, the fact that the Court consistently examined the relevant sections of the Transsexual Act according to the general rule of equality (Art. 3[1] GG) rather than discrimination based on gender and/or native country (Art. 3[3] GG) underlines that the Court did not consider transsexuality on a par with cis individuals.[191]

Relevant provisions of the Transsexual Act

Sections 1(1)1 to 1(1)4 and 8(1)1 to 8(1)4 TSG define the requirements transsexual individuals needed to comply with for a change of first names and gender status until trans individuals began to successfully challenge several rules of the Act before the Federal Constitutional Court. Section 1(1)3 TSG rules that a court must upon application change an applicant's first names who due to his or her transsexual imprinting no longer feels he or she belongs to the sex/gender entered in the birth register, but to the ›other‹ sex/gender and who has felt compelled to live according to his or her ideas for at least three years, provided he or she is at least 25 years of age.

190 | For summaries of all Federal Constitutional Court decisions on provisions of the Transsexual Act so far, see Adamietz 2011: 125-150.

191 | See also Adamietz 2011.

Section 8(1)1 TSG rules that a court must state that an applicant be considered a member of the ›other‹ sex/gender who due to his or her transsexual imprinting no longer feels he or she belongs to the sex/gender entered in the birth register, but to the ›other‹ sex/gender and who has felt compelled to live according to his or her ideas for at least three years, provided he or she fulfils the conditions outlined in s. 1(1)1 to 1(1)3 TSG. Section 1(1)1 TSG defines that German citizens according to the Basic Law or stateless or displaced foreigners with usual residence in the areas of validity of the Act or a person who has been granted the right to asylum or a foreign refugee may file an application.

The Federal Constitutional Court decision on the age limit of 25 years for a revision of gender status

The age limit of 25 years for a change of gender status according to s. 8(1)1 TSG was designed to prevent possibly immature individuals from following the transsexual route (Augstein 1981: 11).[192] However, the legislator did not determine an age limit for sex reassignment surgery. As a result, transsexual individuals under the age of 25 who had undergone sex reassignment surgery could not apply for a revision of gender status or for a change of first names (ibid).[193] The lawyer Augstein put the problem in a nutshell when asking, »What sense does it make to leave a person in the former legal gender after he or she has undergone gender-correcting operations, simply because he or she is not yet 25 years old?« (Ibid: 13) In addition to considering the particular vulnerability of young transsexual individuals, she suggested the reason for maintaining the age limit provided in s. 8(1)1 TSG was incompatible with the general rule of equality provided in Art. 3(1) GG (ibid).

Initiated by a constitutional complaint by a transwoman under 25 years of age who had undergone sex reassignment surgery, the Federal Constitutional Court dealt with the question whether it was compatible with the Basic Law to establish an age limit of 25 years when individuals fulfil all other criteria for a revision of gender status, especially since the legislator did not provide for an age limit for sex reassignment surgery (BVerfG 1983: 170).

192 | This precaution underlines the undesirability of a transsexual development, since there are no such precautions for cis individuals.

193 | As Augstein's surveys reveal, the age limit provided in s. 8(1)1 TSG affected a considerable number of young transsexual individuals. Augstein stated in her survey of decisions on transsexuality and intersexuality until 31 Dec. 1980 that 38.9 % of trans individuals of a total of 72 persons who had undergone sex reassignment surgery were under 25 years of age (Augstein 1982: 240). In her survey two years after the Transsexual Act had come into force, the number of individuals of the same age group who had undergone sex reassignment surgery amounted to 17.1 % of 123 individuals (Augstein 1983: 340).

The transwoman complained that the age limits for a change of first names (s. 1[1]3 TSG) and gender status (s. 8[1]1 TSG) infringed upon her constitutionally guaranteed rights to the inviolability of a person's dignity (Art. 1[1] GG) in conjunction with the right to the free development of one's personality (Art. 2[1] GG). Moreover, she held that the abovementioned provisions contravene Art. 3(1) GG, which states that all individuals shall be equal before the law (ibid: 171). The Court decided to deal with the question of the constitutionality of s. 8(1)1 TSG only (ibid).

On 16 Mar. 1982, the Federal Constitutional Court decided that s. 8(1)1 TSG contravenes Art. 3 (1) GG. The Court held that the age requirement excludes transsexual individuals under 25 years of age from the possibility to have their respective gender status revised, despite having undergone sex reassignment surgery and having fulfilled the other prerequisites (ibid: 170). Moreover, the Court argued that a provision contravenes the general rule of equality guaranteed under Art. 3(1) GG, if addressees of a statute are treated unequally, even though there are no substantial differences that justify unequal treatment. Since the legislator left it up to physicians to decide whether medical and surgical interventions are medically indicated, its margin of appreciation is limited. Legislation is not entitled to deny a transsexual individual under 25 years of age a revision of gender status a person over 25 years of age may obtain (ibid: 172).

However, the Court held that the unconstitutionality of the age requirement for an establishment of gender status does not indicate the unconstitutionality of the age limit for a change of first names (s. 1[1]3 TSG). The Court argued that the latter is possible under conditions that cannot be compared with those demanded under s. 8[1]1 TSG and therefore requires separate examination (ibid: 173).

The Federal Constitutional Court decision on the age limit of 25 years for a change of first names

While ss. 1(1)3 and 8(1)1 TSG indeed regulate different matters (Augstein 1982: 173), sexologists and legal scholars alike criticised that the Court did not examine the constitutionality of the age limit of 25 years for a change of first names. The legal experts Augstein and Sieß as well as the sexologist Pfäfflin pointed out that the age limit for the so-called small solution was an effect of political compromise (Augstein 1981: 10; Sieß 1996: 110) or tactics (Pfäfflin 1986: 201) rather than factual reasons.

Augstein and Pfäfflin presented a number of reasons in favour of either eliminating (Pfäfflin 1986: 201; Augstein 1983: 340) or at least reducing the age limits to 21 years of age (Augstein 1983: 340). Augstein held that the legislator needs a valid reason for the age limit regulated by s. 1(1)3 TSG. Augstein and Pfäfflin argued that the legislator's anxiety about a misuse of the ›small solution‹ had not materialised so far and continues to be highly unlikely, since the

legal decision to grant a change of first names involves two experts (Augstein 1983: 340; Pfäfflin 1986: 202).[194]

Furthermore, Augstein argued that the phase in the life of a transsexual individual who has not yet undergone surgery deserves the same protection provided in Art. 1(1) GG in conjunction with Art. 2(1) GG. A change of first names does not entail differences of such significance that it would justify unequal treatment (Augstein 1982b: 173).

Finally, Augstein and Pfäfflin argued that the legislator designed the so-called small solution in accordance with state of the art medicine, especially to allow transsexual individuals to test their new role in everyday life, regardless of whether the respective individual is over 25 years of age or not (Pfäfflin 1986: 202; Augstein 1982b: 173). Instead, the legal situation has the opposite effect to the one intended (Pfäfflin 1986: 202).

Local courts dealing with applicants for a change of first names who were younger than 25 years of age prompted the Federal Constitutional Court examination of the age limit for a change of first names under the Transsexual Act. The courts stayed the proceedings and called upon the Federal Constitutional Court to decide whether s. 1(1)3 TSG was constitutional (BVerfG 1993: 111).

The lower courts held that the cases suggest that irreversible transsexualism can be ascertained in individuals younger than 25 years of age. Moreover, the defeasance of s. 8(1)1 TSG forces young transsexual individuals to undergo sex reassignment surgery in order to acquire a change of first names, which runs contrary to the legislator's intention to prevent young individuals from undergoing surgery prematurely. Furthermore, the courts argued that it is a contradiction, if a change of first names depends on a minimum age, while surgical measures, which are a prerequisite for a revision of gender status, do not. Finally, the courts argued that there were no medical reasons for an age limit of 25 years (ibid).

On 26 Jan. 1993, the Federal Constitutional Court ruled that s. 1(1)3 TSG was indeed incompatible with Art. 3(1) GG and void (ibid: 112). The Court added to its reasoning in the decision on the ›big solution‹ that legislation requires a particularly strict examination, if the rule of equality involves personal characteristics that approximate those protected under Art. 3(3) GG.[195] In these instances unequal treatment risks discrimination against a minority (ibid).

The Court held that the unequal treatment of individuals under 25 years of age whom experts described as irreversibly transsexual with a high degree

194 | Osburg and Weitze's follow-up study ten years after the Transsexual Act came into force confirms Augstein and Pfäfflin's assessment (Osburg/Weitze 1993: 106).

195 | Art. 3(3) GG rules that, »[n]o person shall be favoured or disfavoured because of race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.« (BMJV 2017)

of probability severely discriminates against this group of individuals. Unlike transsexual individuals who have reached the age of 25 years, they are denied the option of living according to the gender role prior to undergoing sex reassignment surgery without encountering incriminatory situations e. g. at the workplace, in education or in everyday life (ibid). This discrimination is ever more severe when considering that the ›small solution‹ aimed at providing conditions for testing life in the ›other‹ gender before deciding to undergo surgery (ibid: 112 f.).

Since the legislator did not introduce a new age limit for individuals applying for a change of gender status, there was no plausible reason for protecting the same group of individuals from a reversible and less far-reaching decision. Referring to the latest sexological findings on this issue, the Court suggested that the ›small solution‹ seems to have contributed to improving the situation of transsexual individuals prior to surgery and enlarging the leeway in decision-making on behalf of physicians and transsexual individuals (ibid: 113).

The Federal Constitutional Court decision on the eligibility of foreigners with permanent residency in the Federal Republic of Germany to an application under the Transsexual Act

As early as in 1986, the sexologist Pfäfflin pointed out to the difficulties foreign transsexual individuals living in (West) Germany face. He argued that, based on clinical observations, foreign transsexual individuals frequently struggle in vain for years with the consulates and embassies of their respective home countries, while their social situation deteriorates from day to day due to the discrepancy between their outer appearance and their documents. Referring to comparatively lenient regulations in the Netherlands, Pfäfflin called on the West German legislator to solve this particular problem (Pfäfflin 1986: 203).

Roughly about ten years later, and based on referral proceedings provided by the Bavarian Highest Regional Court (*Bayrisches Oberstes Landgericht*; Bayr. ObLG)[196] and the High Regional Court in Frankfurt,[197] the Federal Constitu-

196 | The Bavarian Highest Regional Court dealt with the case of a Thai citizen living in Germany who had undergone surgery and wished to marry her German partner. Her application to exempt her from producing a certificate of no impediment to marriage was denied her with reference to the Transsexual Act. The complainant entered a registered life partnership with her partner, but continued to strive for a marriage (Bayr. ObLG 2004: 67).

197 | The High Regional Court Frankfurt dealt with the case of an Ethiopian citizen who had started with sex reassignment surgery in Germany. He was not deported from Germany on the grounds that he would neither be accepted as a transsexual individual in Ethiopian society, nor be treated medically in an appropriate manner (OLG Frankfurt 2005: 73). In the aftermath of a complaint by the representative of the public interest against a local court, the regional court decided that the applicant was not a foreign refugee, nor did

tional Court dealt with the question, whether it is constitutional to exclude transsexual foreigners from the options provided by the Transsexual Act to change first names and gender status, even if the law of the home country does not provide for such an option (BVerfG 2007: 9).

The referring courts held that s. 8(1)1 TSG in conjunction with s. 1(1)1 TSG was incompatible with Art. 3(1) GG and Art. 3(3) GG, if the home country of the foreign transsexual individual with usual residence in Germany did not have regulations or practices that correspond with s. 8 TSG (Bayr. ObLG 2004: 68; OLG Frankfurt 2005: 73). They presented four reasons for their legal opinion. First, they argued that this particular group of individuals is discriminated against when compared with applicants who are eligible for an application according to s. 8(1)1 TSG in conjunction with s. 1(1)1 TSG (Bayr. ObLG 2004: 68; OLG Frankfurt 2005: 73).

Second, they held that this particular discrimination violates the principle of commensurability. The reason provided by the legislator to leave the decision to change the foreign transsexual individual's gender status up to the home country is not of such significance that it would justify unequal legal consequences for German and foreign transsexual individuals, who are lawfully living in Germany (Bayr. ObLG 2004: 68; OLG Frankfurt 2005: 74).

Third, the courts reasoned that analogously to Art. 7 of German Private International Law (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*; EGBGB),[198] a person's gender status is incumbent upon the law of the individual's home country. However, if the law of the transsexual individual's home country does not grant a revision of gender status, s. 1(1)1 TSG collides with Art. 2(1) GG in conjunction with Art. 1(1) GG (Bayr. ObLG 2004: 68 f.; OLG Frankfurt 2005: 75). The OLG Frankfurt added that the protection of an individual's basic rights is paramount to another state's writ of law (OLG Frankfurt 2005: 75).

Finally, the Bayr. ObLG added that the legislator did not maintain such a limitation in a similar area. The registered life partnership does not require German citizenship, nor a place of residence in Germany (Bayr. ObLG 2004: 69).

On 18 July 2006, the Federal Constitutional Law decided that s. 1(1)1 TSG is incompatible with the non-discrimination precept provided in Art. 3(1) GG in conjunction with the basic right to the protection of the free development of one's personality guaranteed in Art. 2(1) GG in conjunction with Art. 1(1) GG, insofar as it exempts foreign transsexual individuals who are lawfully and not temporarily residing in Germany from applying for a change of first names and

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he hold a comparable status. He was therefore not eligible to apply for a change of first names. The complainant appealed to the OLG Frankfurt (ibid).

198 | Art. 7(1) EGBGB rules that a person's capacity to act and capacity to contract are subject to the law of the state the person belongs.

the establishment of gender status according to s. 8(1)1 TSG, if the law of their respective countries does not provide comparable regulations (BVerfG 2007: 14).

The Federal Constitutional Court arrived at its decision after examining three aspects as they relate to the facts of the cases. First, the Court examined whether s. 1(1)1 TSG contravenes the general rule of equality (Art. 3[1] GG). Second, the Federal Constitutional Court examined whether the principle of citizenship contravenes the purpose of ss. 1(1)1 and 8(1)1 TSG to protect transsexual individuals' basic rights declared in Art. 2(1) GG in conjunction with Art. 1(1) GG. Third, the Court related s. 1(1)1 TSG to Art. 6 EGBGB.

With regard to the general rule of equality (Art. 3[1] GG), the Court established that if the unequal treatment of groups of individuals is linked to an impairment of personal privacy, it requires a justification that is commensurate with the extent of the impairment. The exclusion of foreign transsexual individuals under s. 1(1)1 TSG constitutes an unequal treatment of German citizens or individuals with a German status on the one hand and transsexual foreigners on the other hand. Unequal treatment is particularly severe for those transsexual individuals who cannot resort to similar regulations in their respective home countries. This discrimination severely and unjustifiably impairs the rights protected in Art. 2(1) GG in conjunction with Art. 1(1) GG of those lawfully and not only temporarily residing in Germany, who are excluded from any possibility to be recognised as the gender they perceive themselves to be (cf. ibid: 14).

With regard to the second issue, the Court conceded that the legislator pursued a legitimate goal by limiting the group of individuals eligible to an application under ss. 1(1)1 and 8(1)1 TSG to German citizens and individuals with a German status. The legislator's considerations were based on the respect for the legal orders of other states[199] and the assumption that a foreigner is more familiar with the law of the home country.

However, the Court argued that relegating without exception foreign transsexual individuals residing lawfully and more than temporarily in Germany to the law of their respective home country means that those foreign individuals experience discrimination whose home countries do not dispose of comparable regulations for a change of first names and gender status (ibid: 15). As a result, this particular group of individuals cannot enjoy the right to their respective gender identity and privacy protected by Art. 2(1) GG in conjunction with Art. 1(1) GG and provided for in s. 1(1)1 TSG for German citizens or individuals with a German status (ibid).

199 | Art. 10(1) EGBGB provides that a person's name is subject to the law of the state to whom the individual belongs.

Moreover, since s. 8(1)1 TSG refers to s. 1(1)1 TSG, foreign transsexual individuals cannot apply. If their respective home country does not provide for a change of gender status, foreign transsexual individuals are forced to live with a discrepancy between their outer appearance and their official documents, which, too, disadvantages this group of individuals compared to those individuals who may apply and dramatically impairs their right to the free development of one's personality guaranteed in Art. 2(1) GG in conjunction with Art. 1(1) GG (ibid). The Court concluded that the unrestricted validity of the citizenship principle for a change of first names and gender status is not a sufficiently substantial reason for depriving foreign transsexual individuals whose home countries do not provide for a legal recognition of their respective gender identity and who lawfully and more than temporarily live in Germany from the fundamental rights protected by Art. 2(1) GG in conjunction with Art. 1(1) GG (ibid).

The Court added that recognising the sovereignty of other states and respecting the independence of other legal orders in principle justify an approach that follows the principle of citizenship and refers foreigners to the respective national rules. However, neither international law, nor constitutional law demand the use of the principle of citizenship in private international law. Referring to the registered life partnership, the Court pointed out that the legislator has proven that there are exceptions to this principle (ibid).

Finally, the Court problematised the relationship between s. 1(1)1 TSG and Art. 6 EGBGB.[200] In particular, the Federal Constitutional Court found fault with the fact that s. 1(1)1 TSG follows the citizenship principle without entailing a choice of law clause with regard to the respective law of the individual's home country, which German courts could apply. As a result, courts can neither grant foreign applicants the rights provided in the Transsexual Act, nor apply and examine the compatibility of the corresponding foreign law with the *ordre public*. By denying foreign transsexual individuals eligibility to apply for a change of first names and an establishment of gender status, s. 1(1)1 TSG accepts violations of their basic rights, without courts having a chance to prevent these violations. The Court concluded that s. 1(1)1 TSG cannot be interpreted constitutionally, since foreign transsexual individuals whose home countries do not provide for a change of first names and gender status are excluded from the protection of basic rights secured by Art. 6 EGBGB and are exerted to a serious impairment of their right to the free development of one's personality provided by Art. 2(1) in conjunction with Art. 1(1) GG (ibid: 16).

200 | Art. 6 EGBGB provides for instances in which foreign regulations are not applied, if they lead to a result that is incompatible with fundamental principles of German law. In particular, a foreign regulation is inapplicable, if its use contravenes basic rights. This provision is also known as *ordre public* (public order).

Unlike the Federal Constitutional Court decisions on the age limits, the Court decided that the unconstitutionality of s. 1(1)1 TSG does not lead to its nullity, but to a declaration of its incompatibility with Art. 3(1) GG in conjunction with the basic right to the free development of one's personality (Art. 2[1] GG in conjunction with Art. 1[1] GG). The Court reasoned that the legislator has a few options to remedy the impairment of the rule of equality (ibid).

The first suggestion was to transform s. 1(1)1 TSG into a conflict rule or to integrate such a provision into private international law by providing a right to change the first name and gender status. While such a solution would mean adhering to the principle of citizenship, Art. 6 EGBGB would apply to foreign transsexual applicants whose home countries do not provide for comparable rights (ibid: 16 f.).

The second suggestion was that the legislator extend the provisions of the Transsexual Act to foreigners, using instruments, such as the lawful stay or the duration of the lawful stay in Germany as criteria for access to the procedures provided by ss. 1 and 8 TSG (ibid: 17).

The Federal Constitutional Court ruled that s. 1(1)1 TSG remains in force. However, the Court set a deadline until 30 June 2007 for the legislator to create a constitutional regulation (ibid).

The legislator decided to pursue the second option. Section 4(1) of the Act to amend the Passport Act and further prescriptions (*Gesetz zur Änderung des Passgesetzes und weiterer Vorschriften*; PassGÄndG) rules that a person whose first name has been changed according to s. 1 TSG may apply for a passport signifying the ›other‹ gender than the one entered in the birth register. The Transsexual Act was amended accordingly. Section 1(1)3d TSG specifies that in addition to the requirements that apply to all applicants, a foreigner whose home country does not provide for a comparable regulation may apply, provided he or she holds an unlimited right of residence or a renewable residence permit and is a lawfully a permanent resident in Germany.

Legal opinions were mixed on the legislator's choice. Windel welcomed the legislator's decision, arguing that the second suggestion would have unnecessarily disavowed foreign civil status law (Windel 2008: 73). Similarly, Pawlowski (2007: 413) recommended the second option. Grünberger however deplored the decision. The latter held that the placing the onus on local courts to commission expert reports in order to compare foreign laws and regulations with German regulations would delay proceedings involving transsexual individuals (Grünberger 2007: 368; 2008: 92). Adamietz subscribed to Grünberger's view (Adamietz 2011: 141).

Implications of the Federal Constitutional Court examination of Art. 3(1) GG as opposed to Art. 3(3) GG with regard to transsexuality, gender and gender regime

The Federal Constitutional Court did not examine the constitutionality of the sections of the Act according to Art. 3(3) GG, which among other grounds protects individuals from discrimination based on gender and home country.[201] Rather, the Court decided to examine human rights breaches of sections of the Act according to the general rule of equality (Art. 3[1] GG).

In its decision on the age limit for a change of gender status, the Federal Constitutional Court did not mention Art. 3(3) GG at all as a possible test for the constitutionality of the age limit for a revision of gender status. While the Court held that the personal characteristics approximate those protected under Art. 3(3) GG in its decision on the age limit for a change of first names, discrimination of transsexuality once more fell short of being considered discrimination on the grounds of gender. In the case on the eligibility of a particular class of foreigners to an application under the Transsexual Act, the Federal Constitutional Court evaded the issue.[202] The Court argued that since s. 1(1)1 GG violates the general rule of equality provided in Art. 3(1) GG in conjunction with the basic right to the free development of one's personality guaranteed in Art. 2(1) in conjunction with Art. 1(1) GG and is therefore unconstitutional, it is unnecessary to decide whether the regulation contravenes further basic rights (BVerfG 2007: 16).

While legal scholars agree that given the current anti-discrimination framework in Germany discrimination against transsexual individuals can only be considered a violation of Art. 3(3) GG after the respective individual has gained legal recognition as either a man or a woman,[203] Adamietz, Koch-Rein and Tolmein problematised this approach with regard to transsexuality, gender and gender regime. Adamietz suggests that the main reason for the Court's approach can be explained with a concept of gender which is based on the dichotomy between (cis)men and (cis)women. Hence, discrimination can only be detected under the Constitution, if a member of one of the legitimate genders is treated differently than a member of the other legitimised gender: »The comparison with a non-transsexual person without a ›problematic‹ gender was, and

201 | At the time of writing, the same applies to all Federal Constitutional Court decisions preceding or following the decisions mentioned above.

202 | The Bayr. ObLG and the OLG Frankfurt had called upon the Federal Constitutional Court to decide whether it was compatible with Art. 3(1) and Art. 3(3) GG to exclude foreign transsexual nationals usually living in Germany from eligibility to apply for a change of gender status and first names, if the respective home country does not provide for such procedures (Bayr. ObLG 2004: 67; OLG Frankfurt 2005: 73).

203 | See e. g. Windel 2008: 69 and Adamietz 2011: 129.

continues to be, unimaginable according to dominant constitutional dogmatics on Art. 3(3) GG« (Adamietz 2011: 129). While Tolmein cautions that transsexuality does not constitute a gender, since many transsexual individuals wish to live inconspicuously as a person according to the gender they identify with (Tolmein 2008: 114), he likewise suggests that ›gender‹ is conceptualised too narrowly. By defining ›gender‹ as a polarised construction of ›men‹ and ›women‹, the period of transitioning from one gender to another as well as ›ambiguous‹ genders are blocked out (ibid: 115). Moreover, and as Koch-Rein suggests, the gender binary itself is not considered a process of stereotyping and a problem (Koch-Rein 2006: 13).

3.3.3 Jurisdiction and legal scholarship on marriage and registered life partnership under the Transsexual Act

Sections 7(1)3 and 8(1)2 TSG affect transsexual individuals' options to enter or maintain a legally sanctioned marriage or registered life partnership in conjunction with a change of first names or gender status, respectively. Both rules were based on the sexological assumption that transsexual individuals are heterosexual and the rules were designed to prevent the appearance of, or *de facto* same-sex marriages. Jurisdiction and legal scholarship barely contested the abovementioned sections throughout the 1980s and 1990s.[204] During the first decade of the 21st century, jurisdiction and legal scholarship began to examine ss. 7(1)3 and 8(1)2 TSG in the light of recent developments in sexology on transsexuality and against the background of the Basic Law. As a result, the Federal Constitutional Court finally declared both sections unconstitutional, paving the way for same-sex marriages under specific circumstances. By implication, the Federal Constitutional Court decision on s. 7(1)3 TSG heralded a legal development towards recognising transsexual individuals' gender without surgery.

Relevant provisions of the Transsexual Act

Section 7(1)3 TSG defines one of three reasons for invalidating a change of first names, while s. 8(1)2 TSG defines one of four prerequisites for a revision of gender status. The former rules that the decision through which the applicant's first names were changed is reversed, if the applicant enters a marriage upon filing a statement according to s. 1310(1) BGB.[205] The latter rules that upon ap-

204 | Exceptions are Augstein 1981 and the Hanseatic High Regional Court Hamburg (Hanseatisches OLG Hamburg 1980: 245).

205 | Section 1310(1) BGB provides that a legal marriage may only be entered, if the couple wishing to enter into marriage declares its desire to marry before a registrar. The registrar is not allowed to deny his or her co-operation, unless it is evident that the marriage can be annulled according to s. 1314(2) BGB. Among these reasons are, e. g.,

plication a court must state that a person be considered a member of the ›other‹ sex/gender who due to his or her transsexual imprinting no longer has a sense of belonging to the sex/gender entered in the birth register, but to the ›other‹ sex/gender and who has felt compelled to live according to his or her ideas for at least three years, provided he or she is not married.

Interpretations of sexological concepts of transsexuality and gender in the Federal Constitutional Court decisions on ss. 7(1)3 and 8(1)2 TSG

The Federal Constitutional Court revised its earlier assumptions on gender and sexuality in its decision on s. 7(1)3 TSG, leaving an impact on all of the Court's decisions on the Transsexual Act that were to follow. The Court drew upon sexological notions that acknowledge the heterogeneity of transsexuality. Reconsidering transsexuality also had effects on the Court's understanding of gender, which while not displacing the gender binary marked a shift within the gender regime.

The Federal Constitutional Court's rethinking of its concept of transsexuality apply to transsexual individuals' sexual orientations, the idea of sex reassignment surgery as an indispensable feature of transsexuality and the significance of the so-called small solution. While the Court had previously adopted dominant sexological concepts of transsexuality that described transsexual individuals as heterosexual,[206] it based its argumentation in its decision on s. 7(1)3 TSG on findings provided by studies and sexological statements that question the homogeneity of transsexual individuals' sexual orientations. Referring to Sigusch (1991: 309; 322), Eicher (1992: 171), and Hartmann and Becker (2002: 162), the Federal Constitutional Court adopted the insight that transsexual individuals reveal all sexual orientations that can be found in cis individuals (BVerfG 2006: 103). Therefore, engaging in same-sex activities no longer questions a person's transsexuality (ibid: 106; cf. Adamietz 2006: 374).

Similarly, the Federal Constitutional Court revised its understanding of sex reassignment surgery as a key feature of transsexuality. Based on sexological assumptions of the time, the Court had initially considered sex reassignment

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if one of the partners is in a state of unconsciousness or temporarily mentally disordered (s. 1314[2]1 BGB) or unaware of the fact that he or she is entering a marriage (s. 1314[2]2 BGB), if the marriage was based on malicious deceit (s. 1314[2]3 BGB) or is an effect of a threat (s. 1314[2]4 BGB), or if the partners are not willing to take on responsibility for each other (s. 1314[2]5 BGB).

206 | The Federal Constitutional Court had stated in its first decision on transsexuality that, »according to scientific knowledge, the male transsexual does not desire homosexual relationships, but a bond with a heterosexual partner« (BVerfG 1979: 12).

surgery essential to transsexuality.[207] In its decision on s. 7(1)3 TSG, it adopted more recent findings provided by the DGfS that somatic measures do not necessarily follow from a largely secured diagnosis of transsexuality (Becker et al. 2001: 261) and, by implication, refuted the notion entailed in the definition of transsexuality provided by the German Standards. Quoting the published submission of the DGfS, the Court argued that the demand to undergo surgery has led to more surgical interventions in the past than were individually indicated (ibid: 266, quoted in BVerfG 2006: 103).

These findings are closely, but not reducibly related to findings on the legal measures transsexual individuals opt for. The Federal Constitutional Court departed from its earlier assumption that the change of first names constitutes a transitional stage for a change of gender status. Quoting the observations in Osburg and Weitze's study (1993: 102; 106) and the abovementioned statement produced by the DGfS, the Court considered as proven that about 20 to 30 % of all transsexual individuals seeking legal recognition apply for a change of first names only (BVerfG 2006: 103).

Reconceptualising transsexuality involved a reconsideration of gender. Based on recent sexological insights, the Court suggested that, »gender cannot be determined on the basis of physical characteristics alone. It also essentially depends on an individual's psychological constitution and his or her sustainable self-perceived gender.« (Ibid: 105) This perspective was reiterated in Federal Constitutional Court decisions on ss. 8(1)2, 8(1)3 and 8(1)4 TSG (BVerfG 2008: 314; ibid 2011: para 56). The emphasis on a person's gender identity rather than on physical properties served as a harbinger for the Federal Constitutional Court's decision on somatic requirements as a prerequisite for a revision of gender status roughly half a decade later.[208]

Moreover and without questioning the initial allocation to one of the two legally recognised genders at the time of birth, the Court concluded from the existence of homosexual transsexual individuals that a person's gender cannot be deduced from his or her sexual orientation (BVerfG 2006: 105), hence disrupting the heteronormativity of the gender binary. The Federal Constitutional

207 | In its first decision, the Federal Constitutional Court suggested that, »[a]ccording to secured knowledge in science, transsexual individuals do not want to manipulate their sex. Their emphasis is not on sexuality, but to strive towards the congruence of the mind and the body. [...] the operation needs to be considered a part of the realisation of this goal« (BVerfG 1979: 12; cf. Adamietz 2006: 377).

208 | As Adamietz suggests, »[i]t is conceivable for the Federal Constitutional Court that the future civil status may differ from the gender suggested by the given external sex characteristics, that is: it is possible that men with vaginas and women with penises exist« (Adamietz 2006: 375).

Court integrated these premises into its legal considerations on ss. 7(1)3 and 8(1)2 TSG.

The Federal Constitutional Court decision on s. 7(1)3 TSG

As early as in 1981, the lawyer Augstein questioned the constitutionality and the premises upon which s. 7(1)3 TSG was based. She suggested that the desire to marry does not necessarily mean that a person has decided to revert to the sex/gender assigned at the time of birth. It could also mean that a transsexual individual prefers same-sex relationships. Augstein observed that this particularly applies to transwomen (Augstein 1981: 12). Moreover, she pointed out that the regulation produces contradictory effects and violates Art. 3(1) and Art. 6 GG. While a transsexual individual cannot marry a person of either of the two officially recognised sexes/genders after a legal recognition of first names without risking a reversal of the decision to alter the first names, a person who was married prior to an application for a change of first names, may remain married (ibid).

It took nearly two-and-a-half decades, until the Federal Constitutional Court took up the issue. In 2003, the Regional Court Itzehoe asked the Federal Constitutional Court for clarification as to the constitutionality of s. 7(1)3 TSG.[209] Reiterating and exceeding the reasons Augstein had presented in 1981, the referring court suggested that the rule contradicts Art. 1(1) in conjunction with Art. 2(1) GG as well as Art. 3(1) and Art. 6(1) GG for a number of reasons. First, a change of first names is an equally valid option as is a revision of gender status that involves sex reassignment surgery. Therefore, a change of first names does not simply constitute an interim phase. Second, there are several reasons for transsexual individuals to decide not to undergo sex reassignment surgery. Third, since the Federal Constitutional Court clarified the advance effect of first names in an earlier decision, a compulsorily enforced change of first names violates Art. 2(1) in conjunction with Art. 1(1) GG. Fourth, s. 7(1)3 TSG is

209 | In this particular case, a transwoman with a change of first names married a ciswoman, upon which the registrar reversed the court decision to change the transwoman's first names. The trans individual in vain filed a constitutional complaint. Moreover, the Local Court Itzehoe refused to revise the birth register according to s. 47 PStG. The Court argued that the applicant's marriage revealed that she did not intend to undergo sex reassignment surgery, since s. 8(1)2 TSG stipulates as a prerequisite for a revision of gender status that a transsexual individual may not be married. The Court suggested the applicant reapply for a change of first names according to s. 1 TSG. However, the Local Court Oldenburg rejected the application, arguing that the applicant was trying to circumvent s. 7(1)3 TSG (BVerfG 2006: 103 f.). Upon an immediate complaint, the Regional Court Oldenburg stayed its proceedings and referred the question whether s. 7(1)3 TSG was unconstitutional to the Federal Constitutional Court (ibid: 104).

premised upon the heterosexuality of transsexual individuals, an assumption that does not generally apply. Rather, transsexual individuals reveal all kinds of sexual orientations. Fifth, s. 7(1)3 GG does not prevent the impression of a homosexual marriage, since the legislator accepts a change of first names within a marriage. Finally, the rule violates Art. 6(1) GG and the general rule of equality provided in Art. 3(1) GG, because it discriminates against transsexual individuals wishing to marry vis-à-vis those who want to remain single (LG Itzehoe, quoted in BVerfG 2006: 104).

Taking into consideration recent developments on transsexuality in sexology and older minority opinions, the Federal Constitutional Court decided on 06 Dec. 2005 that s. 7(1)3 TSG contravenes Art. 2(1) in conjunction with Art. 1(1) GG. The Court held that s. 7(1)3 TSG violates a homosexual transsexual person's legally protected right to a name and the right to the protection of his or her intimate sphere as long as a homosexual transsexual individual does not have an option to enter a legally secured partnership without losing the names corresponding with his or her identity (BVerfG 2006: 102).[210]

The Court arrived at its decision after examining two aspects as they relate to the facts of the case. After having reaffirmed the relevance of first names in relation to the basic right to develop one's personality freely as guaranteed in Art. 2(1) GG in conjunction with the right to privacy protected under Art. 1(1) GG, the Court examined whether s. 7(1)3 TSG violates the aforementioned basic rights. Thereafter, the Court examined the legitimacy, suitability, necessity and the proportionality of the rule against the background of the interplay of the regulations of the Transsexual Act with civil status law, marriage law regulations and those of the Registered Life Partnership Act in the light of new sexological findings on transsexuality.

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210 | As usual, the Court invited a statement from the federal government, represented by the Federal Home Office. However, this time the Court also invited statements from civil society organisations, such as, the *Deutsche Familiengerichtstag*, the DGfS, the LSVD e. V., Homosexuals and the Church (*Homosexuelle und Kirche*; HuK), the Sonntags-Club e. V. and the dgti e. V. Except for the *Deutsche Familiengerichtstag*, all civil society organisations considered s. 7(1)3 TSG unconstitutional (BVerfG 2006: 104).
To this day, the Federal Constitutional Court has maintained the practice of inviting statements from trans organisations, among others, when considering contested rules under the Transsexual Act. When considering the constitutionality of s. 1(1)1 TSG, for instance, the Federal Constitutional Court invited statements from the dgti e. V., the Sonntags-Club e. V. and the TGNB (BVerfG 2007: 12). With regard to s. 8(1)2 TSG, the Federal Court invited statements from the support group Transsexuelle Selbsthilfe München and the dgti e. V. (BVerfG 2008: 314) and with regard to ss. 8(1)3 and 8(1)4 TSG, the dgti e. V., Sonntags-Club e. V. and the TGNB (BVerfG 2011: para 45).

With regard to the first issue, the Federal Constitutional Court reiterated an earlier decision that had established that the basic right to one's free personal development in conjunction with the right to privacy cover a person's sexual self-determination, including his or her gender identity and sexual orientation. Art. 2(1) in conjunction with Art. 1(1) GG protect an individual's first names as a means of finding and expressing his or her identity and individuality, including his or her gender identity. The Court argued that s. 1 TSG takes into consideration that sex characteristics are not the only determinants of an individual's gender identity. The latter essentially depends on an individual's psychological constitution and his or her self-perceived gender (ibid: 104).

The Court suggested that in the light of these deliberations, s. 7(1)3 TSG restricts the basic rights protected under Art. 2(1) in conjunction with Art. 1(1) GG. The withdrawal of the legally recognised first names when entering a marriage runs counter to the individual's gender identity (ibid), hence restricting the constitutionally protected intimate and sexual sphere (ibid: 105). Since marriage and registered life partnership are based on gender status and not on sexual orientation, the transsexual individual's consent to the loss of his or her first names cannot be assumed, if he or she wishes to enter a legally secured partnership. This especially applies, if entering a marriage happens to be the only option for a formal recognition of a relationship (ibid).

With regard to the second issue, the Federal Constitutional Court considered the legislator's intention to foreclose the notion that same-sex partners may enter a marriage a legitimate public objective and a suitable and necessary end to this means (ibid: 105 f.). However, the Court found that s. 7(1)3 TSG was unreasonable as long as the law does not provide homosexual transsexual individuals who have not undergone sex reassignment surgery an option to enter a legally secured partnership without losing the first names that correspond with their respective identities (ibid: 106). The Court argued that this especially applies, since the concepts of transsexuality that informed legislation were outdated, such as the perception of the so-called small solution as an interim stage and genital surgery and heterosexuality as defining features of transsexuality (ibid).

The Court argued that adhering to external sex characteristics as a means of determining a person's gender in civil status law and basing legal institutions on these ascriptions leads to a situation in which a homosexual male-to-female-transsexual individual without sex reassignment surgery wishing to formalise her partnership with another woman cannot enter a registered life partnership because of her civil status as a man. Although marriage is the only remaining option for a legally secured partnership, she loses the legally recognised first names that correspond with her gender identity. The Court held that this legal interplay violates the constitutionally protected right to her intimate sphere and the right to a name that mirrors her gender identity (ibid: 107).

The Federal Constitutional Court ruled that the abovementioned breach of the Constitution did not lead to the nullity of the rule, because there were several options for a revision. The Court made three suggestions to the legislator. First, the legislator could decide to delete s. 7(1)3 TSG without replacement. Second, the legislator could revise the Civil Status Act to the effect of allocating a transsexual individual with a legally recognised change of first names to the experienced gender. Third, the Registered Life Partnership Act could be revised to accommodate homosexual transsexual individuals. The Court ruled that until the legislator devises a new regulation that enables a transsexual individual with a homosexual orientation and without sex reassignment surgery to enter a legally secured partnership without losing the first names, s. 7(1)3 TSG may no longer be applied (ibid).

The legal debate on the Federal Constitutional Court suggestions for a revision of s. 7(1)3 TSG and possible solutions for s. 8(1)2 TSG

The options the Federal Constitutional Court provided for a revision of s. 7(1)3 TSG sparked a controversy among legal scholars and, anticipating that the Federal Constitutional Court would declare s. 8(1)2 TSG unconstitutional before long, too, triggered a debate on s. 8(1)2 TSG.[211] Their respective recommendations for dealing with either rule is inextricably linked to the perspectives they endorse on marriage, gender and sex/gender as a necessary feature of a person's civil status. The legal debate reveals that maintaining institutionalised heteronormativity and the cis binary presupposes the legal category ›gender‹ and special regulations that limit the constitutional rights of individuals minoritised on the grounds of sexual orientation and gender.

Windel favoured solutions that defend marriage as a heteronormative and privileged institution and dismissed suggestions that threaten the concept of gender as a somatically-based phenomenon and sex/gender as a relevant feature of a person's civil status. Setting out from the premise that preventing the appearance of, or actual same-sex marriages constitute a legitimate public claim (Windel 2006: 266), he argued in favour of the third solution with regard to s. 7(1)3 TSG, i. e., of opening up the registered life partnership to lesbian and gay transsexual individuals who have legally been granted a change of first names. He suggested that it is preferable to opt for referring homosexual transsexual individuals with a change of first names to the registered life partnership, because »[t]he anomaly of a life partnership between individuals with different sexes/genders can be accepted more easily than that of a marriage of individuals who appear to be of the same sex/gender, since the partnership

211 | For a comprehensive comparative law study on the revision of gender status with regard to transsexuality in family law, including the legal consequences for German, English and French law, see Theile 2013.

has no tradition of sexed/gendered fixation comparable to that of marriage« (Windel 2008: 77). With regard to s. 8(1)2 TSG he suggested limiting access to marriage to transsexual individuals whose first names and civil status manifest that the partners are assigned to different sexes.

At the same time, Windel rejected the other solutions the Federal Constitutional Court provided. He dismissed the first solution, i. e., to delete s. 7(1)3 TSG on the grounds that such a measure would create the impression of marriage as a same-sex union and, hence, contradict the public interest to avoid such an impression (ibid). He rejected the second solution, i. e., to revise the Civil Status Act for two reasons. First, rendering the experienced gender a legal fact would mean giving up the distinction between the ›small‹ and the ›big solution‹. Second, the legal concept of sex/gender and the reproductive function of sex/gender would become undone (ibid).

Differences on individual issues notwithstanding,[212] Grünberger and Bräcklein argued in favour of revisions that treat marriage and registered life partnership alike[213] and allow an identity-based and self-determined understanding of gender.[214] With regard to s. 7(1)3 TSG, Grünberger suggested deleting the section without replacement (Grünberger 2007: 360; 2008: 98) or else to follow up with the second solution, i. e., to assign a transsexual individual to the gender he or she identifies with, without surgery (ibid: 360; 2008: 98). Like Augstein (1981: 12), he suggested that the only purpose of this particular rule, if not the entire section 7 TSG, was to police non-compliant behaviour in the ›new‹ gender role. Since sanctioning gender expression is not a legitimate public concern, curtailing the right to determine one's gender identity is unjustifiable (idem 2006: 518; 2007: 360).

212 | While Grünberger and Bräcklein questioned somatic or behavioural foundations of gender, Bräcklein explicitly challenged the legitimacy of ›gender‹ as a feature of an individual's civil status in the light of the right to self-determination over personal data (Bräcklein 2008: 298). Moreover, Bräcklein argued that removing ›gender‹ as a legitimate category in the Civil Status Act could render the Transsexual Act at least in part unnecessary and contribute to avoiding discrimination on the grounds of gender (ibid: 304).

213 | Grünberger identified opening up marriage to all individuals, regardless of their respective gender as a fourth option to solve the legal problem of granting transsexual individuals a legally secured partnership. However, he conceded that it was consistent with the Federal Constitutional Court's understanding of marriage as a union of a man and a woman that it did not mention this solution (Grünberger 2007: 366).

214 | While Grünberger discussed potential constitutional solutions for ss. 7(1)3 and 8(1)2 TSG in detail, Bräcklein only mentioned her favoured solution for s. 8(1)2 TSG in passing. Her article focuses on her concept of gender and the relevance of this particular category to an individual's civil status.

Grünberger dismissed Windel's preferred solution for legal and constitutional reasons. With regard to the legal reasons, he presented a systematic and a practical argument. While Windel held that, »in contrast to the reciprocal problem with marriage, there are no pressing reasons for exclusively opening up the registered life partnership for same-sex individuals« (Windel 2006: 266), Grünberger pointed out that referring homosexual transsexual individuals to the registered life partnership constitutes a system discontinuity, since the partners' sexual orientation is not the criterion for entering a legally secured partnership. Rather, it is a person's gender status. Moreover, having a registrar enquire into the partners' sex/gender and sexual orientation is incompatible with the right to privacy (Grünberger 2006: 519; 2007: 364 f.). With regard to the constitutional objection, Grünberger reiterated Augstein's observation (Augstein 1981: 12) that the Transsexual Act already allows the impression of same-sex marriages in the event of an existing marriage. According to Grünberger, the unequal treatment of individuals who are granted a change of first names within an existing marriage and those who lose their first names when entering a marriage violates Art. 3(1) GG (Grünberger 2006: 519; 2007: 365). Moreover, he identified heteronomous gender assignments as the cause of the civil status problems transsexual individuals with a change of first names encounter (Grünberger 2007: 365).

Grünberger considered the second solution, i. e. to grant a gender reassignment without surgery, superior to the third solution, because it provides for a consistent and constitutional Transsexual Act. Arguing that while the Federal Constitutional Court left it at the legislator's discretion to decide which option to follow up with, Grünberger suggested that the Court implied that ss. 8(1)2 and 8(1)4 TSG no longer comply with constitutional requirements (ibid: 360 f.). In contrast to Windel, Grünberger disagreed that dispensing with the surgery requirement necessarily contradicts distinguishing between the ›small solution‹ and the ›big solution‹. According to Grünberger, »[t]he ›small solution‹ is the constitutionally required instrument, if a change of first names sufficiently satisfies a transsexual individual's gendered concept of self, whereas the ›big solution‹ is the constitutionally required instrument, if the gendered concept of self requires changing the legal gender« (Grünberger 2008: 89).[215]

With regard to s. 8(1)2 TSG, Grünberger outlined and discussed three possible scenarios in compliance with the current legal framework. According to Grünberger, one option would be to stick to the current rule (ibid: 104), an option that is identical to Windel's recommendation. Another solution would be to delete s. 8(1)2 TSG. A third option consists of converting a marriage into

215 | In the end, the legislator remained inactive, tacitly allowing for marriages between legally differently gendered cis and transsexual individuals that socially appear as a married same-sex couple and that are considered as such by the partners themselves.

a registered life partnership (ibid: 105). Of all options mentioned, he preferred the second one for constitutional reasons (ibid).

Grünberger identified three problems with the first option. First, he pointed out to the constitutionally problematic situation that it is legally possible to achieve a revision of gender status without having to give up a registered life partnership, while this option does not exist for a marriage. Grünberger argued that there are no reasons for legitimating the unequal treatment of individuals in instances that affect the fundamental rights guaranteed in Art. 6(1) GG and Art. 2(1) GG in conjunction with Art. 1(1) GG (ibid 2007: 362). Second, he suggested that the conditions for divorcing a partner do not exist, if a marriage is not broken (ibid 2008: 105). Third, if partners are forced to get divorced in order to register as life partners, the former spouse and now life partner loses benefits (ibid).

According to Grünberger, the third option is problematic, too. He argued that despite the fact that the rights secured in a registered life partnership have in the meantime come to resemble those granted in a marriage, the latter continues to be privileged in several areas (ibid).

Grünberger and Bräcklein preferred the option to delete s. 8(1)2 TSG. While Grünberger anticipated that deleting the rule is incompatible with the »dogma that marriage is a union of a man and a woman« (ibid), he held that this option does justice to Art. 6(1) GG, since a marriage may not be dissolved against the spouses' will (ibid). Similarly, Bräcklein argued that with exception of deleting s. 8(1)2 TSG, all other options are legally problematic (Bräcklein 2008: 303).

The Federal Constitutional Court decision on s. 8(1)2 TSG

Shortly after the Federal Constitutional Court declared s. 7(1)3 TSG unconstitutional, and based on a referral proceeding provided by a local court, the Federal Constitutional Court dealt with the question whether s. 8(1)2 TSG is compatible with the Basic Law.[216] The referring court suggested that s. 8(1)2 TSG violates Art. 1(1) in conjunction with Art. 2(1) GG, Art. 6(1) GG and Art. 3(1) GG.

The lower court presented three major arguments to support its opinion. The local court argued that to force a transsexual individual to get a divorce in order to gain gender recognition infringes upon an individual's human dignity and the basic right to the free development of one's personality, which also cov-

216 | The case dealt with an elderly transwoman who was married for more than half a century, had undergone sex reassignment surgery in 2002 and wished to be legally recognised as a woman without having to divorce her spouse. The applicant argued that neither of the partners considered their relationship broken, which is a precondition for a divorce. Rather, their marriage was very valuable and of vital importance to them, since they were socially, emotionally and economically committed to, and dependent on each other (BVerfG 2008: 313).

ers the imperative to assign an individual to the gender he or she psychologically and physically identifies with. Moreover, the court held that the applicant's and her wife's marriage and family enjoy the special protection of the state, especially since their marriage does not satisfy the requirements for a divorce. Finally, the court suggested that to render a divorce mandatory for gender recognition contravenes the general rule of equality, since married transsexual individuals are affected by the provisions outlined in s. 8(1)2 TSG, while unmarried transsexual individuals are not (BVerfG 2008: 313).

On 27 May 2008, the Federal Constitutional Court decided that s. 8(1)2 TSG is incompatible with Art. 2(1) in conjunction with Art. 1(1) GG, because the rule grants a married transsexual individual who has undergone sex reassignment surgery gender recognition only under the condition that he or she gets divorced (ibid: 312). While the Court did not examine whether s. 8(1)2 TSG violated Art. 3(1) GG (ibid: 317), it confirmed the lower court's opinion on the other constitutional violations.

The Court arrived at its decision by examining four issues. First, it established an infringement of Art. 2(1) in conjunction with Art. 1(1) GG. Second, the Court examined whether the legislator's concern to secure marriage as a union between a man and a woman was legitimate. Third, it put the ensuing limitation of a trans individual's rights to the test of proportionality. Finally, the Court weighed the legislator's interest against the trans individual's right to achieve gender recognition without having to get divorced.

The Federal Constitutional Court ascertained that considering that a person's gender may change and that an individual's gender basically depends on his or her psychic constitution, s. 8(1)2 TSG in principle fulfils the right laid down in Art. 2(1) in conjunction with Art. 1(1) GG. The rule recognises a transsexual individual's gender identity and allows for a legal assignment to the gender to which he or she belongs to psychologically and physically after sex reassignment surgery. However, the Court argued that the prerequisite to be unmarried infringes upon a transsexual individual's right to gender recognition, despite the fact that he or she has undergone sex reassignment surgery, if the respective individual is forced to decide between trading his or her marriage for gender recognition, even though both partners wish to remain married or maintaining his or her marriage at the expense of a revision of gender status. The Court held that such a substantial limitation of basic rights is only permissible, provided it serves a legitimate goal and is proportionate (ibid: 314).

With regard to the second issue, the Federal Constitutional Court argued that the legislator pursued a legitimate goal by wanting to maintain marriage as a union between a man and a woman in order to prevent same-sex marriages. The Court suggested that the legitimacy of this goal is not diminished by the fact that the legislator accepts that the current legal situation allows the impression of, or actual same-sex marriages under specific circumstances. Due

to the legislator's inactivity, it has e. g. become possible for homosexual transsexual individuals with a legally recognised change of first names to marry a person bearing first names that signify the same gender without having undergone sex reassignment surgery. Moreover, married partners of which one has undergone sex reassignment surgery without having applied for a change of gender status appear as same-sex couples (ibid: 315).

The Court held that limiting gender recognition to the prerequisite of being unmarried constitutes an unreasonable strain on a married transsexual individual whose partnership continues to exist (ibid). Since a marriage may not be divorced, if it is not broken, a transsexual individual cannot gain gender recognition, unless he or she feigns the intention of permanently separating from his or her partner during the divorce proceedings. The Court suggested that it is neither reasonable to bar a transsexual individual from legal recognition of his or her gender, nor to create a situation where he or she is forced to impart untrue information with the court (ibid: 315 f.).

The Federal Constitutional Court argued that s. 8(1)2 TSG affects both partners wishing to continue their marriage. Upon entering the marriage, the transsexual individual's partner relied in *bona fide* upon the fact that the marriage would exist as long as the partners were willing to live together and bear responsibility for each other. Section 8(1)2 TSG forces the partner to decide whether he or she wishes to maintain the marriage, hence preventing the transsexual partner's gender recognition, or to get divorced against his or her volition and to relinquish legal protection that goes along with marriage (ibid: 316).

The Court held that Art. 6(1) GG protects a lawfully entered marriage of partners. This right also applies to lawfully married partners of which one turns out to be transsexual in the course of matrimony. This includes the situation in which the transsexual spouse has undergone sex reassignment surgery through which the union has become a same-sex marriage. The Court explained that marriage constitutes the sphere of privacy that is exempted from state interference. Therefore, it is up to the spouses to shape their marriage. State interventions that press spouses to get divorced runs counter to the feature of marriage as an enduring community in which partners share their lives and responsibility, deprives it of constitutionally guaranteed protection and encroaches upon the partners' decision to permanently live together and the trust in the preservation of the status quo that follows from a marriage (ibid).

While the Court initially suggested that the legislator's concern to reserve marriage for differently sexed partners on the one hand and the married transsexual individual's desire for gender recognition and the spouse's interest in the continuation of their marriage on the other hand bear significant weight (ibid), it decided that the latter outweighs the former in the light of the concrete facts of the case and, more generally, based on constitutional considerations:

> When [...] the individuals concerned refer to the permanency of their marriage, they refer to their personal wedding vows that affect their identities and that are considered irrevocably binding. In this respect, it is about the fate of a commonly shared path of life and as such about consequences of a subjectively existential dimension. In contrast, the impact of the principle of different sexes is only marginally affected in the face of the concrete circumstances. As with the case mentioned here, we are dealing with a small number of transsexuals who initially marry a woman as a man, discover or disclose their transsexuality during marriage and whose marriage did not break due this profound change in their partnership. Rather, it should according to the spouses' intention be continued. Moreover, the formative effect of the principle for the public is reduced for these constellations, since the couples concerned live according to the same sex/gender and legally bear the names of the same sex/gender anyway. (Ibid: 317)

In summary, the Court reasoned that the interplay of Art. 6(1) GG with Art. 2(1) in conjunction with Art. 1(1) GG and, as a result, the significance of the protected right to the legal recognition of an individual's self-determined gender identity are decisive. According to the Court, s. 8(1)2 TSG produces a specific burden in the sense that the realisation of one right depends on the abandonment of another in order to satisfy the legislator's intentions. Section 8(1)2 TSG requires married transsexual individuals to either decide in favour of gender recognition or the continuation of marriage. As a result, the other spouse's right to protection of his or her marriage under Art. 6(1) GG is compromised, too, and not only leads to a nearly insoluble inner conflict, but to an unreasonable encroachment on basic rights. The Court concluded that s. 8(1)2 TSG violates Art. 2(1) in conjunction with Art. 1(1) GG and Art. 6(1) GG, because the rule does not allow a married transsexual individual to gain legal recognition of his or her gender without him or her having to terminate his or her marriage. Therefore, s. 8(1)2 TSG is unconstitutional (ibid).

As in the case of s. 7(1)3 TSG, the Federal Constitutional Court decided that the unconstitutionality of s. 8(1)2 TSG did not lead to its nullity, since there were solutions for the abovementioned problem that comply with the Constitution. The Court suggested that if the legislator wished to maintain marriage as a union of two differently sexed individuals, it could either convert the marriage to a registered life partnership without stripping it of the duties and privileges arising from a marriage or it could create a legally secured partnership *sui generis* holding the same duties and rights of a marriage. Considering the small number of cases such as the one discussed above and the spouses' intention to continue their marriage, the legislator could also delete s. 8(1)2 TSG, thus allowing a same-sex marriage.

The Court set a deadline until 01 Aug. 2009 for the legislator to solve the problem and ruled that s. 8(1)2 TSG is no longer applicable until a new regulation comes into force (ibid).

The government reaction

While the Social Democratic and Green Party government coalition had announced a comprehensive revision of the Transsexual Act in 2000, the then government as well as the subsequent Christian Democratic/Christian-Social and Social Democratic governing coalition remained inactive for years. I will briefly address the Draft TSRRG before turning to the Green Party draft ÄVFGG and the Government Bill.

In 2009, the Federal Home Office presented the announced Draft Transsexual Law Reform Bill (BMI 2009). Since the submissions by psycho-medical professionals and trans organisations had been heterogeneous, the Draft TSRRG was a compromise. According to the draft, s. 9(5) TSRRG provided for the continuation of marriages of consenting partners (BMI 2009: 2), the rest of it addressed what had been announced as a fundamental revision of the Transsexual Act and of which I will address a few aspects.

Like the Transsexual Act, the Draft Bill proposed regulating a change of first names and a revision of gender under the proceedings of non-contentious jurisdiction. Sections 1(1) and 8(1)1 TSRRG tightened the prognostic requirements, suggesting a »continuing and irreversible inner conviction« (BMI 2009: 2). However, an option for a reversal of the decision was included (BMI 2009a; dgti 2014). In contrast to the Transsexual Act, the representative of the public interest was no longer a participant of the procedure. However, s. 3 TSRRG ruled that partners should be involved in the procedure (BMI 2009: 2).

In contrast to the Transsexual Act, the invalidity rule in the event of a marriage or birth of a child after a change of first names was no longer included (ibid). The Draft Bill suggested requiring sterility and sex reassignment measures for a revision of gender status, unless contraindicated on the grounds of health (ibid). The provision for assessment was reduced to a doctor's note (ibid). Trans organisations (e. g. ATME/MUT 2009; TGNB/TrIQ 2009), psycho-medical and legal experts (e. g. Grünberger 2009; Güldenring 2009) alike criticised the draft, and it never entered parliament.

The draft legislation proposed by Bündnis 90/Die Grünen differed substantially from the Draft TSRRG. One major difference was that proceedings for a change of first names and a revision of gender status would have been relocated to an administrative body, rather than involve court proceedings (Deutscher Bundestag 2009a: 2). Moreover, the ÄVFGG suggested that a change of first names and gender status rely on a self-declaration only (ss. 1[1]1 and 3[1]1 ÄVFGG; ibid). In addition, the wording of the proposed Bill did not specify the gender the applicant desired to be recognised as (ibid: 2). The draft legislation also left it up to the applicant to either continue a registered life partnership or marriage or to apply to transfer a life partnership into a marriage and vice versa (ibid). Moreover, it did not specify any particular gender, which implies that the draft would have included further genders.

In contrast, the governing coalition tabled the Bill to amend the Transsexual Act. All the Bill suggested was to delete s. 8(1)2 TSG (Deutscher Bundestag 2009b: 1). Based on the recommendation of the *Bundestag* Committee on Internal Affairs to pass the Bill (Deutscher Bundestag – In 2009: 4), the *Bundesrat* simply conducted an opinion poll (Bundesrat – Ausschuss für Frauen und Jugend 2009). There was no debate on the draft legislation worth mentioning (cf. Deutscher Bundestag 2009d), and given the CDU/CSU and SPD majority, the Act to amend the Transsexual Act passed on 19 June 2009 (Deutscher Bundestag 2009c: 25519 D).

3.3.4 Jurisdiction and legal scholarship on somatic requirements for a revision of gender status under the Transsexual Act

Sections 8(1)3 and 8(1)4 TSG vaguely define the somatic requirements for a change of gender status, leaving space for medical and legal interpretations. The concrete legal interpretation of the abovementioned sections depended on a number of factors. These were most notably developments in surgical techniques, the adoption of conservative or dynamic concepts of law, notions on transsexuality and assessments of the relationship between the social order and constitutionally guaranteed rights. While sexologists, legal scholars and the judiciary alike grappled with possible interpretations of the somatic requirements in the course of the 1980s and 1990s, they have increasingly called into question these requirements since the turn of the century with the effect of gradually eroding the principle that gender is necessarily marked by physical properties.

Relevant provisions of the Transsexual Act

While ss. 8(1)3 and 8(1)4 TSG stipulate the objectives of somatic interventions for a change of gender status, the legislator did not prescribe concrete measures. Rather, among other prerequisites for a revision of gender status, the lawmaker broadly established in s. 8(1)3 TSG that the applicant must be »permanently unable to reproduce«. Likewise, s. 8(1)4 TSG non-specifically demands that the applicant »must have undergone a surgical intervention to alter external sex characteristics, through which a distinct approximation of the appearance of the other sex has been achieved«.[217]

217 | As outlined earlier on, the reasons for demanding somatic alterations in the first place were informed by heteronormative and binary gender assumptions. With regard to s. 8(1)3 TSG, the lawmaker wanted to avoid a divergence of gender and gendered functions, in particular that men bear children and women father progeny (BT-Drs. 14/9837; Grünberger 2007: 363; de Silva 2012: 157 f.). The demand for gender-conforming surgery was meant to prevent a transwoman from marrying as long as she can »function sexually

The legislator did not prescribe any concrete measures for ss. 8(1)3 and 8(1)4 TSG for two reasons. First, the legislator followed expert recommendations not to narrowly define specific surgical procedures, since surgical methods change more rapidly than legislative adaptations (Pfäfflin 1996: 108). Second, with regard to the requirement stipulated in s. 8(1)4 TSG, the lawmaker wanted to provide equal rights for male-to-female and female-to-male transsexual individuals, considering that surgical techniques for constructing phalloplasties were deemed less developed than those for vaginoplasties (ibid).

Medical interpretations of somatic requirements for a revision of gender status in the 1980s and 1990s

While sexologists hailed the decision not to specify any concrete surgical measures in the Act (Sigusch 1980: 274; Pfäfflin 1993: 108), formulations in s. 8(1)3 TSG and even more so in s. 8(1)4 TSG caused irritation[218] and initially provoked different interpretations. Sexologists' interpretations of the somatic provisions of the Act were informed by the legislator's intentions, limitations of state of the art surgical techniques and prevailing concepts of transsexuality.

Interpretations of the somatic requirements diverged more pronouncedly with regard to female-to-male than male-to-female transsexual individuals. Sigusch suggested that a penectomy, orchiectomy and a vaginoplasty in female-to-male transsexual individuals definitely fulfil all the somatic requirements (Sigusch 1980: 2744). Similarly, Wille, Kröhn and Eicher held that the »complete demasculinising operation« involves an orchiectomy, the removal of parts of the penis and the creation of a neovagina and neopudendum, which they believed produces »quite appealing results« (Wille/Kröhn/Eicher 1981: 419).[219]

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as a man« and from engaging in sexual activities with a male person under 18 years of age. The latter was considered a criminal offence until the abolishment of s. 175 StGB in 1994 (cf. BT-Drs. 8/2947: 12; Grünberger 2007: 361).

218 | See e. g. the following questions posed by Wille, Kröhn and Eicher: »When are these two somatic prerequisites considered to be fulfilled? Is breast formation in male-to-female transsexuals only allowed to be affected by a *surgical* intervention or by hormonal provocation? How pronounced does the female body silhouette have to be? Is a phalloplasty required in female-to-male transsexuals? Does it suffice to sever the fallopian tubes to achieve permanent inability to reproduce in the light of as of late improved refertilisation possibilities or only a hysterectomy? Does menstruation belong to the external female sex characteristics?« (Wille/Kröhn/Eicher 1981: 419)

219 | However, several sexologists, including Kröhn and Wille, cautioned that feminising genital surgery is, regardless of the respective individual's postoperative satisfaction, fraught with complications. Drawing upon a catamnestic study of 18 male-to-female transsexual individuals, who had undergone feminising genital surgery, Kröhn and Wille note that depending on the age of the patients, significant postoperative complications

Sigusch doubted that breast augmentation surgery, shaving the larynge and osteotomies are required (Sigusch 1980: 2744). More emphatically, Wille, Kröhn and Eicher held that these procedures are medically highly controversial and should not be rendered a prerequisite (Wille/Kröhn/Eicher 1981: 419). While the former set of surgical interventions became the standard procedures for three decades which transwomen had to undergo in order to fulfil the requirements outlined in ss. 8(1)3 and 8(1)4 TSG, the latter were considered irrelevant for »a distinct approximation of the outer appearance of the other sex«.

With exception of phalloplasties and bilateral mastectomies, sexologists debated somatic requirements for female-to-male transsexual individuals controversially. Sexologists unanimously held that a phalloplasty could not be required as a means to fulfil the prerequisite stipulated in s. 8(1)4 TSG due to the experimental stage of surgical techniques (Sigusch 1980: 2744 f.; Wille/Kröhn/Eicher 1981: 419; Pfäfflin 1993: 116), lest legal requirements decreed »lifelong bodily harm« (Wille/Kröhn/Eicher 1981: 419). According to sexologists, a bilateral mastectomy definitely constituted an appropriate measure to approximate the appearance of the male sex (Sigusch 1980: 2744; Wille/Kröhn/Eicher 1981: 419).

However, sexologists disagreed on further surgical measures, such as a colpectomy and a hysterectomy as requirements for female-to-male transsexual individuals under ss. 8(1)3 and 8(1)4 TSG. Although Sigusch noted that a bilateral mastectomy, the transformation of the outer labia to a scrotum, testicle prostheses and either a phalloplasty or severing the hypertrophied clitoris from its ligaments would meet all requirements, he warned not to call for more than a mastectomy. According to Sigusch, a hysterectomy and oophorectomy do not necessarily contribute to altering the external sex characteristics (Sigusch 1980: 2744).

Particularly concerned about the requirement to be permanently unable to reproduce, Wille, Kröhn and Eicher suggested that in cases of female-to-male transsexualism a mastectomy and a colpohysterectomy would best meet the prerequisites demanded in s. 8(1)3 TSG (Wille/Kröhn/Eicher 1981: 420). They argued against an oophorectomy in order to prevent a post-menopausal syndrome (ibid: 419). While Wille, Kröhn and Eicher conceded that it was highly

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arose. In three cases, a partial necrosis of the neovagina occurred. In addition, four individuals had to undergo dilation of their neovaginas. Two individuals experienced a stenosis of the urethra and required a meatomy. In two cases, the entire procedure of grafting a neovagina had to be repeated. In summary, half of the patients had to undergo revision surgery dues to postoperative dysfunctions (Kröhn/Wille 1981: 118). While Pfäfflin asserted that the surgical technique of creating vaginoplasties in male-to-female transsexual individuals was mature, he more than a decade later affirmed that the creation of neovaginas involves considerable complications requiring surgical revisions (Pfäfflin 1993: 113).

unlikely that a pregnancy would occur, if a hysterectomy was performed without a colpectomy, they argued that an absolute inability to reproduce was not guaranteed by a hysterectomy alone. Since there was a 20 % chance of refertilisation, severing the fallopian tubes was not an option either (ibid: 420).[220]

By contrast, Pfäfflin argued against demanding an extirpation of the vagina. Since a vagina was an inner organ, a colpectomy would not contribute to an approximation of the outer appearance of the male sex. Moreover, he suggested that several years of treatment with testosterone would cause the vagina to atrophy, rendering it useless for cohabitation (Pfäfflin 1993: 117).

Sigusch, Wille, Kröhn and Eicher followed the dominant concept of transsexuality of the time when suggesting that transsexual individuals strive to adapt their respective bodies to the gender they identify with (Sigusch/Meyenburg/Reiche 1979: 279; Wille/Kröhn/Eicher 1981: 419). However, they opted for different surgical approaches, in particular with regard to female-to-male transsexuality, depending on whether they emphasised the notion of the ›wrong body‹ or normative assumptions on transmen's sexuality. This becomes evident in the grounds presented for either removing or leaving the vagina.

Sigusch, Meyenburg and Reiche assumed that transsexual individuals were heterosexual (Sigusch/Meyenburg/Reiche 1979: 252). While a heterosexual orientation says nothing about individual sexual practices, Pfäfflin more specifically argued that transmen would »fight cohabitation tooth and nail« (Päfflin 1993: 117).

By contrast, Wille, Kröhn and Eicher's more radical approach to generating permanent reproductive incapacity in transmen, which includes the extirpation of the vagina, was motivated by a concept of transsexuality that was based on the notion of the ›wrong body‹. Wille, Kröhn and Eicher opined that,

> the stability of the transsexual feeling according to ss. 1(1)2 and 8(1)1 [TSG] can no longer be attested to with a high degree of probability, if apart from the amputation of the breasts only a sterilisation is asked for, thus preserving the ovaries, a vagina with the potential to cohabitate and the ability to menstruate [...]. (Wille/Kröhn/Eicher 1981: 420)

Interpretations of somatic requirements for a revision of gender status in legal scholarship in the 1980s and 1990s

The vague wording of the somatic requirements for a revision of gender status also prompted legal scholars and the judiciary to deliver interpretations of

220 | However, as the legal scholar Koch noted, »[t]he mere statistical possibility of refertilisation gives no indication of whether it is feasible in individual cases« (Koch 1986: 176).

ss. 8(1)3 and 8(1)4 TSG.[221] Drawing upon different medical assessments, weighing the feasibility of surgery differently in relation to the social order and building upon different understandings of the law, legal scholarship and jurisdiction altogether covered a broad range of interpretations throughout the 1980s and 1990s, offering extensive to restrictive interpretations. However, neither legal scholarship nor the judiciary questioned the constitutionality of the requirements in the abovementioned period.

Perspectives in legal scholarship were heterogeneous with regard to minimum requirements in cases of female-to-male and male-to-female transsexualism. Augstein advocated an interpretation of the somatic requirements laid down in the Act that was oriented towards greatest possible inclusion under conditions of constraint. Her suggestions for surgery to approximate the outer appearance of the ›other‹ gender fell below the surgical measures sexologists deemed feasible for transsexual women. While the aforementioned sexologists did not question the feasibility, let alone the reasonability, of constructing a neo-vagina despite studies that reported considerable complications, Augstein referred to the risks a vaginoplasty poses in particular to older transsexual women. As a result, she suggested that a penectomy and the removal of the testicles suffice to meet the prerequisites outlined in s. 8(1)4 TSG (Augstein 1981: 14).

With regard to transsexual men, Augstein's interpretation fell below the surgical interventions sexologists suggested for compliance with s. 8(1)3 TSG and concurred with sexologists that endorsed minimum interventions for the fulfilment of the prerequisites demanded in s. 8(1)4 TSG. Augstein held that the prerequisite of being permanently unable to reproduce is sufficiently met with long-term testosterone treatment, since this particular steroid causes female reproductive organs to deteriorate (ibid: 13). Like Sigusch, Augstein argued that a bilateral mastectomy fulfils the prerequisites stipulated in s. 8(1)4 TSG (ibid: 14).

Schneider offered the most restrictive interpretation of ss. 8(1)3 and 8(1)4 TSG at the time. Schneider's interpretation was based on three considerations. First, the lawmaker's original intention provides the basis for an interpretation of the provisions of the Transsexual Act (Schneider 1984: 142). Second, issues of social regulation require ample consideration (ibid: 142; Schneider 1992: 2940). Third, the Transsexual Act constitutes a special case in legislation (ibid: 2941).

Focusing on transsexual men only, Schneider held that s. 8(1)3 TSG demands either a hysterectomy and adnectomy or an oophorectomy, respectively,

221 | See e. g. Koch who stated that, »the minimum requirements pose significant problems: When has a distinct approximation of the appearance of the other sex been achieved?« (Koch 1986: 175)

since these interventions meet the legislator's intention to permanently disable reproductive capacity in transsexual individuals (Schneider 1984: 141f.). Regarding s. 8(1)4 TSG, Schneider found it alarming for reasons of »social regulation and the politics of marriage« that a transman should not have to undergo genital surgery (Schneider 1984: 146; 1992: 2941):

> The biologically female transsexual could [...] after the removal of the breasts and without an approximation of the male gender in the genital area marry as a man a person of his initial gender, thus a woman, whose external sex characteristics can basically only be distinguished from her partner due to her breasts, a consequence, which is for reasons of social regulation and the politics of marriage alarming and is barely compatible with the purpose of the Transsexual Act. (Schneider 1984: 142)

In another instance Schneider suggested that, »it is questionable whether it is [...] unproblematic for reasons of social regulation and the politics of marriage to interpret s. 8(1)4 TSG extensively in the sense that the *impossibility* to perform sexually according to the original gender is sufficient« (Schneider 1992: 2941).[222] As a result, Schneider held that s. 8(1)4 TSG be interpreted to demand a clitoris penoid (ibid).[223] Finally, Schneider opined that the somatic provisions should be interpreted restrictively, since it is the only act, which was passed especially for a »group of patients« (ibid).

Like Schneider, Koch dealt with possible applications of ss. 8(1)4 and 8(1)3 TSG to transmen only. Koch's interpretation is based on three premises. First and following Wille, Kröhn and Eicher's concept of transsexuality, he assumed that transsexual individuals strive for an approximation to the ›other‹ gender to the greatest possible extent (Koch 1986: 175). Second and unlike Schneider, he postulated that legal requirements may not exceed medical feasibility, since s. 8 TSG would otherwise become inapplicable (ibid). Third and in contrast to interpretations in sexology and legal scholarship of his time, he assumed that s. 8(1)3 TSG existed for declaratory purposes only in order to show transsexual individuals the consequences of treatment (ibid).

222 | Schneider's interpretation of s. 8(1)4 TSG suggests that his perspective is informed by a polarised concept of human bodies, normative and reductionist understandings of sexuality and disregard for the private lives of partners.

223 | A clitoris penoid, also known as a metadoioplasty, is the outcome of a procedure, in which the clitoris, usually enlarged by testosterone, is severed from its ligaments and frequently provided with an extended urethra made of the inner labia. If surgery is successful, the outcome is an organ that resembles a small penis with regard to appearance and erectile and urological functions. Frequently, surgeons nowadays construct a scrotum of the outer labia and implant testicle prostheses.

With regard to s. 8(1)4 TSG, he suggested a restrictive interpretation of ›defeminising‹, and an extensive interpretation of ›masculinising‹ surgery. Like Wille, Kröhn and Eicher, he suggested that a transsexual individual could only be considered a member of the desired gender, if the individual had discarded »the essential characteristics of the original sex« (ibid). He suggested that the Act requires a permanent and irreversible loss of the ability to cohabitate. Otherwise, there is ample reason to doubt the individual's transsexual »imprinting« (ibid).

Like the aforementioned sexologists and in contrast to Schneider, Koch rejected calls for demanding genital surgery to the effect of constructing a penis and a scrotum, arguing that such procedures were not sufficiently developed. Moreover and referring to surgery that would allow an appropriate use of bathroom facilities, he held that any legally binding borders drawn in this respect would inevitably be ridiculous (ibid).

In contrast to the sexologists Wille, Kröhn and Eicher and the legal scholar Schneider, Koch took a relaxed stance towards the requirement to be permanently unable to reproduce (s 8(1)3 TSG). He suggested that the simple statistical option of refertilisation after a tubal ligation does not mean that the procedure can be successfully realised in individual cases. In line with his premise that this particular provision serves declaratory purposes only, he suggested that the debate did not bear a practical significance (ibid: 175 f.).

Interpretations of somatic requirements for a revision of gender status in jurisdiction in the 1980s and 1990s

In contrast to legal scholarship, the judiciary overall interpreted the prerequisites extensively in cases of female-to-male transsexual individuals and restrictively regarding male-to-female transsexualism. The first reported case on the somatic requirements under the Transsexual Act dealt with a transman who for health reasons refused to undergo hormone treatment with androgens and any surgery to incapacitate his reproductive functions (OLG Hamm 1983: 167).[224] Like the lower courts, the OLG Hamm decided on 15 Feb. 1983, that the permanent inability to reproduce was according to the law a condition precedent for an establishment of the gender status as a man (ibid). However, the relevance of this court case is that the Court discussed minimum requirements for rendering a transman unable to reproduce and surgery for approximating the outer appearance of the ›other‹ gender.

224 | The complainant had undergone psychotherapy, a subcutaneous bilateral mastectomy and had obtained a change of first names according to s. 1 TSG. He decided not to undergo any further somatic measures due to hepatic damage and after having been seriously injured during a road accident (OLG Hamm 1983: 167).

In contrast to Wille, Kröhn and Eicher's opinion, the Court suggested not to insist on the mandatory removal of the reproductive organs for three reasons. First, the Court suggested, albeit without a legally binding effect that a tubal ligation would suffice, if other methods to exclude the ability to reproduce were unreasonable due to serious health risks. Second, refertilisation would require a microsurgical intervention with low chances of achieving the goal. Third and drawing upon a concept of transsexuality that deemed the female reproductive capacity incompatible with the desire to live as a man, the Court argued that it would be highly unlikely that a transman would consent to refertilisation surgery (ibid: 169).

Taking into consideration sexologists' unanimous stance that surgery to construct a penis and scrotum was not feasible considering the experimental stage of masculinising genital surgery, the Court decided that any such procedure could not be demanded. In line with Sigusch, the Court held that transmen could only be expected to undergo a surgical removal of their breasts in order to meet the requirements outlined in s. 8(1)4 TSG.

The issue of surgery to achieve a distinct approximation to the outer appearance of the ›other‹ sex/gender was readdressed eight years later. The second reported case determined whether s. 8(1)4 TSG required of a transman to undergo surgery to align the external genitalia to the appearance of a male sex organ. In this particular case, a transman who had been diagnosed with transsexuality and had undergone hormone treatment, a bilateral mastectomy, a hysterectomy and adnectomy successfully applied for a change of gender status. However, the representative of the public interest filed a complaint against the local court's decision, arguing that the establishment of gender status was impermissible without the construction of a neo-phallus and scrotum (OLG Zweibrücken 1992: 761). Due to procedural errors, the OLG Zweibrücken accepted the complaint (ibid: 760 f.).

The OLG Zweibrücken set out from two basic assumptions. First, the Court followed a dynamic concept of the law, which takes into consideration changes that have occurred since its enforcement. In contrast to Schneider's interpretation of the Act, the Court held that the purpose of any act was not to reconstruct the historical legislator's subjective ideas (ibid: 761). Second and in accordance with prevalent sexological and legal concepts of transsexuality of the day, the Court assumed that the provisions of the Act did not collide with interests deserving protection, since medically feasible sex reassignment surgery was considered to correspond with transsexual individuals' aspirations (ibid).

With regard to ›masculinising‹ surgery, the Court held that contrary to Schneider's opinion and in line with sexological assessments and the earlier court decision, a transsexual man could not be expected to undergo surgery to construct a penis and a scrotum in the light of the current state of the art of

surgical technique without invading his privacy (ibid: 761f.). Unlike the OLG Hamm, however, the OLG Zweibrücken interpreted s. 8(1)4 TSG to the effect that the applicant must have undergone a surgical procedure on the vagina to prevent the applicant from »functioning sexually as a woman« (ibid: 762).[225]

However, the interpretation of s. 8(1)4 TSG in the case of female-to-male transsexualism re-emerged as a subject of legal proceedings soon after. The Bayr. ObLG dealt with a complaint filed by the representative of the public interest against the decisions of the local and regional courts to change or maintain a transman's gender status, respectively without requiring a phalloplasty and the surgical closure of the vagina.[226] In contrast to the OLG Zweibrücken the Bayr. ObLG decided that there was no justification to demand either somatic measure in order to comply with s. 8(1)4 TSG.[227] Rather, a mastectomy and a hysterectomy sufficed to revise the gender status according to the letter of the Act (Bayr. ObLG 1996: 792).

The Court presented several legal and medical arguments for its decision. First, the Court held that the legislator formulated s. 8(1)4 TSG to prevent statutory offence according to s. 175 StGB (ibid: 792). Second, the Court argued that the interpretation of s. 8(1)4 TSG needs to be appropriate with regard to the social order and feasible for the transsexual man, also with regard to his intention to retain his congenital features (ibid: 793). Third and referring extensively to Pfäfflin's influential article, the Court argued that the possibilities and outcome of genital surgery on transsexual men and transsexual women differed fundamentally. The Court reiterated the generally accepted opinion that the methods to construct an organ equivalent to a penis were not sufficiently devel-

225 | Pfäfflin severely criticised the Court's reductionist concept of female sexuality. He argued that, »[w]hether somebody can ›function sexually according to his original gender‹ [...] is not linked to whether a vagina is open or closed, because cohabitation is only one of many possible sexual activities. Women who due to a vaginal atresia, cancer or other diseases do not have a vagina can function sexually, too. The same applies to women who have a vagina, but cannot engage in sexual intercourse due to vaginism. They are amply able to engage sexually as a woman. Finally, there are women whose vagina is sound in every sense, but who for whatever reasons reject involving this organ in their sexual activity. The point of matter is that a female-to-male transsexual individual cannot due to his male gender identity engage according to his female original sex, because he does not experience himself as a woman. The mechanistic concept of the vagina as a ›sex tool‹ misses out on the complex operations of sexual experience.« (Pfäfflin 1993: 117)

226 | In this particular case, the local court had granted a transman a change of first names and gender status based on the fact that he had undergone a hysterectomy and subcutaneous mastectomy (Bayr. ObLG 1996: 791).

227 | The OLG Zweibrücken departed from its position. Therefore, the Bayr. ObLG did not refer the case to the Federal Court of Justice (ibid: 793).

oped (ibid). Moreover, the Court suggested that the same applies to the surgical closure of the vagina, especially since such a procedure involved severe health risks without contributing to the realisation of his desired sex/gender and instead complicated surgery towards creating a phalloplasty at a later point in time (ibid: 793).

While courts were prepared to interpret the somatic provisions outlined in ss. 8(1)3 and 8(1)4 TSG to the effect of taking into consideration transmen's subjective decisions with regard to genital surgery, this did not apply to transwomen in the 1980s and 1990s. After having been denied a revision of gender status, a transwoman living in divorce who had not undergone sex reassignment surgery and did not intend to do so in the future turned to the OLG Düsseldorf, claiming that the prerequisites for a change of gender status in s. 8 TSG were unconstitutional. However, the Court decided on 26 Apr. 1995 that s. 8 TSG was constitutional and that the transwoman's complaint was unjustified and unfounded (OLG Düsseldorf 1996: 43).

The Court argued that the existing legal and moral order and social life are based on the principle that every person is either male or female and that a person's gender is not freely chosen, disposable or independent of his or her physical constitution. Rather, an individual's gender depends on psychic and physical gender characteristics. According to the Court, the Basic Law does not allow for prioritising a person's subjective gender identity over physical features when assessing a person's gender status (ibid).

Despite the fact that courts interpreted the somatic requirements stipulated in s. 8 TSG differently with regard to genital surgery on transwomen and transmen, they did not question the constitutionality of the prerequisites, nor the surgical rationale as such in the 1980s or 1990s.[228] Until the Federal Constitu-

228 | At the same time, a Federal Constitutional Court decision on the address of a transsexual individual after a change of first names according to s. 1 TSG enabled transmen and transwomen alike to live socially according to their respective gender identities without having undergone somatic measures and having been granted a revision of gender status according to ss. 8(1)3 and 8(1)4 TSG. In this particular case, a male-bodied transwoman serving life imprisonment in vain complained to the head of the institution and the federal-state administration of justice department that prison officers addressed her as a man, despite the fact that she had obtained a change of first names (BVerfG 1997: 1632). The execution of sentence chamber to which she turned to thereafter held that she was not entitled to be addressed as a woman, since s. 10(1) TSG rules that the rights that follow from a gender only materialise after the gender status has changed according to s. 8 TSG, a decision the high regional court upheld (ibid: 1632 f.). Prompted by the transwoman's constitutional complaint, the Federal Constitutional Court decided on 15 Aug. 1996 that Art. 2(1) GG in conjunction with Art. 1(1) GG demand to interpret ss. 1 and 10(1) TSG to the effect that a person is after a change of first names to be addressed in written and

tional Court ruled ss. 8(1)3 and 8(1)4 TSG unconstitutional and inapplicable, the standard requirements for a change of gender status were a penectomy, orchiectomy and a vaginoplasty for transsexual women and usually a bilateral mastectomy, hysterectomy and adnectomy for potentially fertile transsexual men.

Sexological perspectives on the somatic requirements for a revision of gender status since the turn of the century

Since the turn of the century, sexologists engaged less with interpreting the somatic measures required for a legal change of gender status than throughout the 1980s and 1990s. However, the statement the DGfS submitted to the Federal Home Office in 2001 provides an authoritative sexological perspective on ss. 8(1)3 and 8(1)4 TSG. The continuing sexological debate on transsexuality notwithstanding, the statement mirrored a shift in the understanding of transsexuality, which refutes the notion that transsexuality inevitably requires surgical measures.

Based on the premise that in the past decades »an ongoing tendency towards a flexibilisation of heretofore relatively rigid characteristics of gender« (Becker et al. 2001: 266) has rendered physical features less relevant to determining a person's gender and increased social tolerance towards ambiguous gender characteristics (ibid), Becker, Berner, Dannecker and Richter-Appelt suggested that while transsexuality may require hormone treatment and surgery in individual cases, this does not apply to all transsexual individuals (ibid: 262).

The authors argued that against this background, the requirement to undergo surgery on the external sex characteristics for a revision of gender status has become problematic and scientifically untenable (ibid: 261). Rather, s. 8(1)4 TSG forces applicants to undergo operations they »by no means generally want« (ibid: 266).

With regard to the requirement to be »permanently unable to reproduce« (s. 8[1]3 TSG), the authors held that especially transmen experience the demand to remove the uterus as »an attack on their physical integrity« (ibid: 12). Becker, Berner, Dannecker and Richter-Appelt presented three arguments to rethink the current practice. First, a uterus does not necessarily interfere with

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spoken communication according to his or her »new role perception« (ibid: 1632). Citing earlier Federal Constitutional Court decisions, the Court reasoned that everybody can expect government bodies to respect a person's gender identity, which is as part of the private sphere protected by Art. 1(1) GG in conjunction with Art. 2(1) GG (ibid: 1633). Moreover, the Court argued that these constitutional principles apply to the interpretation and application of the Transsexual Act. The address as Mr or Ms is vital in order to perform according to a specific gender role, and the legislator created s. 1 TSG as an option to this effect. The Court concluded that the lower court's interpretations did not do justice to the regulations provided in ss. 1 and 10(1) TSG, nor to the complainant's basic rights (ibid).

the self-experience as a man, since transmen only consider their breasts and menstruation as stressful (ibid: 8). Second, although pregnancy in transmen cannot be entirely ruled out, the ›risk‹ of female-to-male transsexual individuals becoming mothers is highly unlikely, since motherhood is incompatible with the self-concept as a man (ibid: 12 f.). Third and this argument holds true for female-to-male and male-to-female transsexual individuals, developments in reproductive medicine have rendered this demand obsolete (ibid: 13).[229] In summary, the authors suggested that the Transsexual Act should no longer demand surgical interventions for a revision of gender status (ibid).

Perspectives on somatic requirements for a revision of gender status in legal scholarship since the turn of the century

Since the turn of the century, legal scholars gradually began to rethink their approach to the somatic requirements stipulated for a revision of gender status under the Transsexual Act. Taking into consideration the latest developments in sexology on transsexuality in the reform period and focusing less on surgical feasibility than on the legitimacy, necessity, reasonability and commensurability of mandatory sex reassignment measures in the light of constitutionally guaranteed basic rights, legal scholars began to question the requirements outlined in ss. 8(1)3 and 8(1)4 TSG.

Differences on single issues between individual perspectives notwithstanding, legal scholars involved in the debate on the somatic requirements prescribed for a revision of gender status under the Act represented two distinct

229 | A case before the OLG Köln (High Regional Court Cologne) confirms this development. In this particular case, a transwoman had deposited sperm in a sperm bank prior to transitioning from male to female. Her partner underwent an insemination procedure in a Belgian clinic, using her partner's sperm. After twins were born, the partners decided to enter a registered life partnership, and the transwoman acknowledged her paternity (OLG Köln 2010: 45).

The register office however was not sure whether the acknowledgement of paternity was effective, since the transwoman was legally recognised as a woman before she had fathered the children. Upon an enquiry with the local court, the latter ordered the register office to register the transwoman's paternity in the birth entry. The register office filed an immediate complaint with the OLG Köln on the grounds of wanting to obtain a higher court clarification of the legal situation (ibid).

The Court argued that every child has a right to know about its descent. Arguing that s. 11 TSG regulates the relationship between parents and their children (ibid: 46), the Court decided that the person who fathered progeny is entitled to acknowledge her paternity, even if a child was born after the decision according to s. 8(1) TSG came into force. In such a case, the first name and gender before gender recognition took effect are registered in the child's birth registry (ibid: 45).

perspectives on gender and the gender regime, the role of the law in structuring the gender regime and on trans(sexuality). While Windel and Wielpütz defended hegemonic notions on gender and the gender regime, Adamietz and Grünberger challenged them. The former perspective implies a minoritising approach to unconventionally sexed and gendered individuals, whereas the latter challenges hegemonic concepts precisely because of their marginalising effects.

Adamietz's perspective on gender and gender regime is informed by studies that reveal different understandings of sexed bodies and gender relationships in various cultures, (Adamietz 2011: 69), studies on the historicity of the sexed body (ibid: 79 f.) and medical and natural scientific studies that suggest that neither the notion of a ›natural‹ division into two polarised sexes, nor that of the gender binary can be maintained (ibid: 84). Drawing upon social interactionist and discourse theories that focus on the production of seemingly natural and unambiguous sexes/genders (ibid: 85-98) and without denying that there are biological factors that contribute to anatomical differences (ibid: 109), she developed a queer legal theory approach that frames ›gender‹ as an expectation (ibid: 250-271).

According to Adamietz, the notion of the ›natural difference of the sexes‹ features as the root of gender-based discrimination (ibid 2006: 380). As a result, she rejects the currently hegemonic concept of gender that insists on »coercive biological differences« (ibid 2011: 174). According to Adamietz, they deny those trans individuals recognition whose »bodies are not sufficiently ›male‹ or ›female‹ and who cannot fulfil expectations based on stereotypical notions of gender roles« (ibid 2006: 380). Instead, she envisions a state of »basic-rights-oriented gender freedom« (ibid: 370). According to Cottier, »[*g*]*enuine* gender freedom would defy a classification within the bipolar system ›male-female‹ and render possible a choice of gender identities« (Cottier 2006: 407, quoted in Adamietz 2006: 376).

In contrast, Wielpütz's approach is based on everyday knowledge and sexological approaches that set out from naturalised assumptions on sex/gender. With regard to the former, Wielpütz notes a deeply rooted preconception of the binary division into male and female individuals that coincides with notions of a typically male or female outer appearance and habitus (Wielpütz 2012: 138). Referring to Röttger-Rössler (2005), she holds that, »the fact may not be disregarded that the classification of another person as male or female resembles a biological reflex or is even described as a pre-reflexive mechanism of classification« (ibid: 145).[230]

230 | The sociologist Hirschauer notes that it is precisely »the pre-reflexive character of conduct that facilitates masking its construction process« (Hirschauer 1994: 674).

Based on these premises, Wielpütz develops an affirmative perspective towards the gender regime and necessarily rejects deconstructionist approaches to gender and the gender binary. She suggests that, »[t]he gender classification into which the vast majority of individuals integrate themselves into without any difficulty has stood the test of time as an assignment system« (ibid: 144).[231] In response to deconstructionist approaches, she holds that, »[t]his social fact [i. e. the gender binary; insertion mine] cannot of course simply be abolished by a challenge dictated from the outside« (ibid: 145).[232]

In the light of these irreconcilable perspectives on gender and the gender regime, defenders and critics of the gender binary attribute different roles to the law. Critics of the gender binary question the law's involvement in coercive gendering processes. Arguing that provisions that sanction gender behaviour intervene into a core area of the right to determine one's own sexual identity, Grünberger e. g. suggests that the role of the law should not be to perpetuate or reinforce stereotypical images of men and women (Grünberger 2007: 366). Rather, civil status law should grant gender self-determination (ibid: 368). Similarly, Adamietz suggests the Federal Constitutional Court interpret Art. 3(2) and Art. (3)1 GG to the effect that gender role expectations be prohibited in general (Adamietz 2006: 380; 2011: 258).

Defenders of the gender binary advocate the regulatory function of the law with regard to gender, albeit for different reasons. Wielpütz holds that the assignment of an individual to a gender is a »legal necessity« (Wielpütz 2012: 137) for two reasons. First, she considers a person's sex/gender to be the basis of the assignment to family structures (ibid). Second, she argues that the gender classification has despite legal equality not become obsolete (ibid: 144). Contrary to Adamietz who questions whether legal equality can ever be achieved as long as gender and sexual orientation exist as categories (Adamietz 2011: 174), Wielpütz suggests that, »this model needs to be maintained in order to be able to compensate for, or to struggle against, existing unequal treatment, using suitable countermeasures« (Wielpütz 2012: 145).

Windel presents three arguments in favour of supporting the regulatory function of the law. For reasons of legal doctrine and in opposition to Grünberger's and Adamietz's call for gender self-determination, he suggests that as long as a differentiation based on gender is generally permissible, privacy

231 | While it is questionable whether numbers are the appropriate parameters when dealing with fundamental human rights, such a perspective does not take into account the cost of maintaining the gender binary for those individuals who trouble and are troubled by it.

232 | A concept of society that expels counter-hegemonic approaches to an imagined ›outside‹ suggests a limited understanding of social antagonisms and delegitimises struggles for social change.

rights of individuals need to be directly balanced with immediately affected public concerns (Windel 2008: 71).

Second, Windel refers to procedural reasons. He notes that legal facts do not immediately correspond with social reality, since they are established and changed through proceedings. With regard to sex/gender, he argues that the medico-biological division into two biological sexes is a legal fact since the end of the 19th century at the very latest.[233] Hence, civil status law can overall only consider social aspects of gender on a medico-biological basis, more narrowly, on the establishment of a person's sex at the time of birth (ibid: 72).[234]

Third, and contrary to Wielpütz who focuses on the reactive function of the law, Windel advocates a productive role of the law in structuring gender. Arguing that religious and worldview-based regulatory factors have increasingly lost their functions, it is nowadays the law that gives members of society guidance. Suggesting that this regulatory framework grants freedoms and offers protection from discrimination, he classifies concepts of self-determination of sex identity or gender freedom as arbitrary and undesirable, if not illusionary (ibid: 74 f.).[235]

Despite using different terminology, defenders and critics of the gender binary to different degrees acknowledge the diversity among trans(sexual) individuals. Nevertheless and consistent with their respective perspectives, defenders of the gender regime mainly focus on transsexual individuals seeking sex reassignment surgery and legal recognition only, hence leaving unproblematised exclusionary effects on individuals whose understanding of self conflicts with the limited sexed and gendered options available.

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233 | Grünberger and Windel endorse historical understandings of law. However, they focus on different points of reference to support their respective perspectives. Unlike Windel, Grünberger advocates gender self-determination by referring to intersex self-determination in the General State Law for the Prussian States (1794).

234 | Grünberger contests such a perspective, arguing that laws regulating gender are effects of various constructions of gender. While the sterility prerequisite in the Transsexual Act e. g. reduces gender to a biological function, the German law distinguishes between biological and legal facts in the case of a child's descent. In the latter case, the man who was married to the woman at the time of the birth of a child is considered the child's father (Grünberger 2008: 104).

235 | In another instance, he considers the prospect of basic-rights-oriented gender freedom a »nightmarish vision«, since it would mean that cis individuals would have to consider themselves »misdirected by the ›power of the gender-binary‹« (Windel 2008: 73). However, the notion of gender freedom could also be read to suggest that morphological conditions are no longer privileged markers of gender. As a result, all genders would become equally legitimate, rather than being a privilege for some at the expense of others..

Grünberger, Adamietz and Wielpütz use the term ›transsexual individuals‹, whereas Windel resorts to the term ›transidentified individuals‹, albeit in a narrower sense than Transidentitas e. V. and the dgti e. V. defined the term. The legal scholars using the term ›transsexual individuals‹ draw upon medical observations and developments in the trans movement that suggest that some transsexual individuals do not require surgery (Grünberger 2007: 361; 2008: 102; Adamietz 2006: 361; 2011: 170 f.; Wielpütz 2012: 133).[236] In addition, Wielpütz and Adamietz distinguish between ›transsexual‹ and ›transgender‹ individuals.

Despite the, with exception of Windel, commonly shared knowledge that trans individuals and, more specifically, transsexual individuals constitute a diverse set of individuals, defenders of the gender binary either homogenise trans(sexual) individuals or simply assign a marginal space in their respective frameworks to those individuals whose self-understanding challenges the gender binary. Windel, e. g. unduly homogenises transidentified individuals when suggesting that, »[t]he phenomenon transidentity does not give gender orientation any impulses. […] Due to their desire that leads to physical and psychological suffering, the individuals concerned confirm the gender difference to a greater extent than cisidentified individuals do.« (Windel 2008: 72) Adamietz counters this notion, suggesting that,

> the phenomenon transsexuality would contradict the theory of the deconstruction of the gender binary, if there were two alternatives only and all transsexual individuals were compelled to classify themselves unambiguously. Hence, if there was nobody among the transsexual individuals who was *not* compelled to surgically align his body to the ›other‹ sex as far as possible and to remove the characteristics of the ›old‹ sex. However, it has been articulated since the 1990s that there are such individuals. (Adamietz 2006: 371)

Moreover, she contextualises individuals with a transgender identity who wish or need to confirm their concept of gendered selves using hormonal and surgical interventions as a means within the regulatory context in which a transition frequently takes place. I. e., trans individuals are frequently required to fulfil the respective expectations of psychotherapeutic, medical and court experts, if they wish to be recognised as the gender they identify with (ibid: 380).

Despite distinguishing between transsexual individuals who opt for medical treatment and those that do not, Wielpütz – like Windel – homogenises transsexual individuals, too. She sets out from the premise that, a »society that divides its actors into male and female automatically seeks for visible charac-

236 | Grünberger refers to Becker et al. 2001, while Wielpütz and Adamietz rely in addition on the findings of Osburg and Weitze's study in 1993.

teristics for classification in order to be able to classify individuals according to sex/gender without continuous enquiries« (Wielpütz 2012: 145). She applies this principle to transsexual individuals, suggesting that they »do not want to ›abolish‹ this gender regime. Instead, they only fight against their own classification as the – in their opinion – ›wrong sex/gender‹.« (Ibid)[237] Here, Wielpütz does not distinguish between subjective ways of shaping one's life and a political attitude towards the gender regime. While some transsexual individuals do not question the gender binary, others do while trying to negotiate a liveable life within a regulatory regime at the same time. Like Windel, Wielpütz decontextualises transsexual lives from the social demands the gender binary places on them. According to Genschel, however, processes of negotiating one's practices

> never occur beyond concrete contexts, conditions and their functions for subjectivity. Hence it is necessary to consider transsexual individuals as subjects [...] who are required to solve a (social) contradiction that cannot be solved (individually), but needs to be solved subjectively [...]. (Genschel 2001: 831)

While Wielpütz and Adamietz distinguish between ›transsexual‹ and ›transgender‹, Adamietz's definition of ›transgender‹ is identical with understandings of the term that circulate in parts of the trans movement conceptually influenced by social constructionist and desconstructionist thought, and her framework takes into account the rights of several possibilities of living a gendered life. According to Adamietz, ›transgender‹ denotes an umbrella term for a range of subjectivities that conflict with traditional gender norms and stereotypes and that may not produce exclusions itself. This spectrum of gendered possibilities

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237 | In another instance, Wielpütz assumes that, »transsexual individuals do not suffer from a binary gender system. Rather, they consider themselves as having been assigned to the wrong sex/gender in this system and struggle for the subjectively correct assignment and not for the entire negation or abolishment of sex/gender as a category. By insisting on not being assigned to a third or no sex/gender, but simply to the other one, they to some extent cede binary coding.« (Wielpütz 2012: 178 f.)
Wielpütz also homogenises transsexual individuals when suggesting that, »[a] transsexual person who acts sexually (according to his birth sex) and as a result fathers progeny or experiences a pregnancy needs to consider this occurrence as a contradiction to his gender identity« (Wielpütz 2012: 204). While such a perception applies to some transsexual individuals, transsexual individuals overall develop different perspectives on this issue. While some individuals temporarily put on hold the desire to present themselves as the gender they identify with in their own eyes and in those of others, others question the seemingly causal link between a specific gender and its reproductive function, allowing them to integrate their respective reproductive capacity into their self-concept as a man, woman or transperson.

includes individuals, regardless of change of first names and gender status, hormonal and surgical measures, duration of sex/gender affiliation or position in relation to legitimised sex/genders (Adamietz 2006: 371). Unlike Adamietz, Wielpütz only mentions ›transgender‹ fleetingly and constructs transsexual individuals as proponents and transgender individuals as opponents of the gender regime (Wielpütz 2012: 184).

While a minoritising approach to trans(sexuality) does not necessarily coincide with reading somatic and sterility requirements as constitutional, approaches that question current gender norms and the gender binary definitely consider the requirements stipulated in ss. 8(1)3 and 8(1)4 TSG unconstitutional. Before turning to the debate on the general legitimacy of demanding an alignment with hegemonic sexes/genders for a revision of gender status, I will focus on the commonly shared critique of the legislator's arguments to devising s. 8(1)4 TSG.

Grünberger, Windel and Wielpütz discuss and dismiss several reasons given by the legislator for s. 8(1)4 TSG. One of the reasons the legislator demanded surgery »to alter external sex characteristics, through which a distinct approximation of the appearance of the other sex has been achieved« was to avoid that a ›male transsexual‹ is able to render herself liable to prosecution under s. 175 StGB (Windel 2006: 269; Grünberger 2007, 361). The legal scholars agree that this particular rational has become obsolete since the abolishment of the abovementioned provision that criminalised male homosexuality (Windel 2006: 269; Grünberger 2007: 361; Wielpütz 2012: 138).

The legal scholars also suggest that the legislator's objective to prevent a male-to-female transsexual individual from marrying as long as she is able »to engage sexually as a man« is no longer relevant. Windel argues that the right to privacy renders the legislative argumentation obsolete (Windel 2006: 269). Grünberger adds that the Act would be contradictory, if it on the one hand assumed that the individual identified as the ›other‹ gender and was compelled to live according to this idea, and on the other hand implied that a transperson who considered herself a woman would act sexually like a man (Grünberger 2007: 361).

Grünberger and Wielpütz also examine the legitimacy of limiting constitutional rights in s. 8(1)4 TSG against the background of the legislator's concern about the improper use of the Act. Both scholars consider a limitation of basic rights in order to preclude an improper use of the Act legally and socially legitimate (Grünberger 2007: 361; Wielpütz 2011: 140). However, they suggest that such a use of the Act is highly unlikely. Grünberger argues that expert opinions and the requirement to have felt compelled to live according to the idea of belonging to the ›other‹ sex/gender for at least three years (s. 8[1]1 TSG) provide sufficient precautions against an improper use, e. g. to escape gender-

specific legal obligations, such as compulsory military service[238] (Grünberger 2007: 361). Similarly, Wielpütz holds that the bureaucratic procedures during a transition suggest that the risk of using the Act to abscond from prosecution is marginal (Wielpütz 2012: 142).

Windel adds further reasons for a revision of s. 8(1)4 TSG. First, he warns that current progress in medicine could lead to ever more restrictive prerequisites for the so-called big solution, which contradicts the general tendency in society that the outer appearance of genders »has not become clearer« (Windel 2008: 76). Second, he points out that the terms for female-to-male and male-to-female transsexual individuals are unequal. Unlike male-to-female transsexual individuals, female-to-male transsexual individuals are not required to undergo surgery to undermine sexual activities as a woman (ibid 2006: 269).

While the abovementioned scholars consider the current regulation untenable, their perspectives on the constitutionality of any demands that call for a physical alignment with conventionally gendered men and women as a prerequisite for gender recognition diverge. The major difference between gender regime critics and defenders of the gender binary is that the latter consider the notion of conventionally gendered women and men the background norm for all genders, hence offering a perspective of social and legal integration to transsexual individuals on cis terms, while the former reject a hierarchical concept of genders and develop a perspective of inclusion instead.

While Grünberger doubts that s. 8(1)4 TSG addresses a substantial public concern or pursues a legitimate goal in the first place (Grünberger 2007: 361), Windel (2008: 76) and Wielpütz argue to the contrary. Based on the premise that it serves a legitimate purpose that a person can be identified as a man or a woman (Wielpütz 2012: 137), she holds that a free and unconditional choice of gender without any limiting requirements does not appear to do sufficient justice to the public interest (ibid: 147). In contrast to Windel, however, she problematises the issue of authority in deciding whether a person resembles more a man or a woman, the lacking option for transsexual individuals to opt for individually appropriate measures and observes that the diversity of sexed bodies does not allow for any stereotypical characteristics (ibid: 133).

Having established or questioned the general legitimacy of alignment to hegemonic concepts of gender as a means to realise regulatory interests, the scholars discuss whether surgical and/or hormonal measures are proportionate prerequisites to achieve the goal of alignment. While Windel does not rule out the legitimacy of physical interventions as a prerequisite, Wielpütz rejects any general demands to this effect, and Grünberger considers any such stipulation unconstitutional. Windel tentatively suggests that e. g. demanding neg-

238 | On 24 Mar. 2011, the *Bundestag* passed a bill to suspend compulsory military service in peacetime. The Act came into force on 01 July 2011 (Deutscher Bundestag 2011).

ative measures to the sex that does not apply might constitute a reasonable compromise (Windel 2008: 76). According to Grünberger, any surgery requirement is unjustifiable under the Constitution, arguing that such a requirement is coercive and limits a person's right to sexual self-determination (Grünberger 2007: 361). Similarly, Wielpütz argues that,

> [t]he precondition of a surgical intervention in s. 8(1)4 TSG is incompatible with the basic rights of transsexual individuals. The indirect coercion to undergo surgery intervenes into general privacy rights, in particular the right to sexual self-determination guaranteed in Art. 2(1) GG in conjunction with Art. 1(1) GG as well as the right to bodily integrity in Art. 2(2) GG. (Wielpütz 2012: 187)

According to Wielpütz, a demand for hormone therapy would also place an unreasonable burden on transsexual individuals because of health risks and unwanted side effects. Such a stipulation contravenes the principle of proportionality (ibid).

Setting out from the premise that giving way to an unconditional choice of gender does not sufficiently consider the legitimate interests of a society that relies on allocating individuals to a gender (ibid: 147), she defends the notion that the legislator may in principle demand measures towards an adaptation of conventionally gendered individuals (ibid: 148). She discusses three models to arrive at a solution she deems constitutional and legitimate at the same time. She rules out current practices and interpretations of s. 8(1)4 TSG, arguing that a transperson's sexuality is none of the state's business (ibid: 182). She also rejects a dynamic requirement for an alignment to the ›other‹ sex, suggesting that demanding as many medical interventions as possible violates trans individuals' fundamental rights (ibid: 183). Instead, she suggests considering each case individually. Such a procedure would take into consideration a trans individual's personal and health situation. Moreover, she holds that the measure for gender alignment is conducive to successful social integration (ibid).

However, Wielpütz's proposed solution reveals two shortcomings. First, since it is unconstitutional to stipulate surgical and hormonal interventions and unlawful to prescribe gender-conforming attire and habitus in everyday life, there is no constitutionally sound measure that a trans person can be required to meet. Second, in Wielpütz's concept, hegemonic gender roles expectations continue to be the norm against which trans individuals are granted or denied recognition. However, »[t]he superficial impression of third parties and the diffuse notion what constitutes a man or a woman according to the outer appearance are no considerable matters of public interest that would justify a limitation of basic rights« (Grünberger 2007: 366).

While legal scholars agree on the reasons the legislator put forward to justify the demand for permanent sterility in s. 8(1)3 TSG, controversy arose over

the interpretations. According to Grünberger, the requirement was meant to prevent a discrepancy between a person's gender and his or her reproductive functions (Grünberger 2007: 363). Windel and Wielpütz add that the legislator intended to maintain the »unambiguity« of descent (Windel 2006: 269; Wielpütz 2012: 202). However, Windel argues that,

> [t]he requirement of the permanent *inability to reproduce* in s. 8(1)3 TSG should not be understood as a constraint or even as a prohibition to reproduce. [...] If it was medically feasible to generate reproductive capacity according to the desired gender, there would be no systematic conflict with the »big solution«. (Windel 2006: 269)

Wielpütz refutes Windel's argumentation. She suggests that it is cynical in the light of its impracticability to argue that the legislator did not object to reproduction in the experienced sex/gender (Wielpütz 2012: 190).

In contrast to the debate on s. 8(1)4 TSG, legal scholars agree that s. 8(1)3 TSG can be done away with. In Windel's opinion, however, deleting s. 8(1)3 TSG requires revisions to the law of descent (Windel 2008: 76). Grünberger and Wielpütz strongly oppose the sterility requirement on constitutional grounds. Grünberger holds that the sterility requirement is disproportionate for four reasons and should therefore no longer be applied (Grünberger 2007: 364). Like Wielpütz (2012: 210), with reference to Becker et al. (2001) and Whittle (1998a) and in contrast to Windel, Grünberger argues that the ›risk‹ of transsexual men becoming mothers and transsexual women becoming fathers is small, since these processes collide with their respective social roles (Grünberger 2007: 373).[239] Second, and relying once more on the abovementioned sexologists, Grünberger doubts that the possibility of a few trans individuals giving birth to, or procreating children, respectively, justifies requiring of all transsexual individuals to undergo an extensive intervention (Grünberger: 264; 2008: 103 f.). Moreover, Grünberger points out that the Transsexual Act provides for a reversal of the decision on the gender status upon application, while the prerequisite, permanent sterility, is irreversible (Grünberger 2007: 364). Finally, he refutes the argument that s. 8(1)3 TSG serves the best interest of the child by arguing that s. 9(7)1 LPartG provides for stepchild adoption, hence allowing for male or female couples to have children (Grünberger 2008: 103).[240]

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239 | Windel critically and correctly comments on Grünberger's statement, arguing that it is inappropriate to suggest that there is no ›risk‹ of transidentified individuals becoming parents. First, the desire to have children ought not to be classified as a risk. Second, such a scenario is realistic (Windel 2008: 76 f.).

240 | Wielpütz presents a similar argument, albeit couched in hetero- and gendernormative rhetoric when she suggests that, »[t]he confusion of roles can be [...] compared with a so-called rainbow family, i. e., a same-sex parent couple« (Wielpütz 2012: 201).

Wielpütz systematically examines s. 8(1)3 TSG in relation to the constitutional rights chartered in Art. 2(1) GG in conjunction with Art. 1(1) GG, and Art. 6(1) GG. The right to bear a child is in part covered by Art. 6 in conjunction with Art. 2(1) GG or by the basic right to the free development of one's personality according to Art. 2(1) GG in conjunction with Art. 1(1) GG. Wielpütz explains that the freedom to reproduce is predominantly perceived to be part of the private conduct of life and is therefore allocated to the free development of one's personality. In the case of a married couple, the desire to have children is additionally protected by Art. 6(1) GG, since founding a family entails the freedom to shape life in matrimony (Wielpütz 2012: 192).

Wielpütz discusses the legitimacy,[241] necessity and proportionality of the sterilisation requirement stipulated in s. 8(1)3 TSG against this constitutional background. Like Grünberger, Wielpütz suggests that sterilisation is unnecessary for legal and regulatory purposes. She deems a pregnancy in the case of a female-to-male transsexual unlikely, since pregnancy and motherhood contradict his experience of being a man (Wielpütz 2012: 210). Moreover, she suggests that, »[i]t is not the task of the state to protect transsexuals from self-chosen conflicts« (ibid: 212). Wielpütz also questions the proportionality of the requirements. According to Wielpütz, the sterility requirement renders the realisation of one basic right, such as gender recognition, dependent on the abandonment of another right, such as the right to bodily integrity (Art. 2[2]1 GG) and the right to found a family (Art. 6[1] GG). Arguing that the impairment of basic rights involved in the circumstances under s. 8(1)3 TSG are unreasonable and therefore not justifiable in relation to generally legitimate community concerns,[242] she concludes that the requirement of permanent sterility is unconstitutional (ibid: 215).

241 | Apart from the reasons brought forward by Grünberger and Windel, Wielpütz adds the protection of transsexual individuals from unwanted pregnancy (Wielpütz 2012: 204) and the avoidance of breaking a taboo (ibid: 207) as possibly legitimate reasons for a restriction of rights.

242 | However, Wielpütz's understanding of legitimate community interests once more reveals the limitations of a hegemonic and minoritising perspective. This becomes evident in her discussion of the visibility of pregnant men vis-à-vis community interests:
»In the case of transsexual individuals, it is not possible to entirely negate that third-party interests are involved, in particular of the community. However, the interests of the community are only marginally affected, for example, by the sight of a pregnant man compared to his own situation of a life-long prohibition to reproduce. It is only a narrowly delimited period of time that a pregnancy is visible to the social environment and lets the gender role of the pregnant person appear bizarre and strange. The community is irritated and unsettled by the divergence of the reproductive function and the gender role represented to the outside. It might even feel molested and disgusted. However, the confrontation is in general limited to a few random encounters.« (Wielpütz 2012: 197)

3.3.5 Summary: Legal constructions of gender, transsexuality and gender regime in the reform period

The increasingly visible heterogeneity of transsexual individuals since the late 1990s and corresponding sexological clinical observations were mirrored in legal scholarship and jurisdiction, albeit with contradictory effects, depending on the area of jurisdiction. Driven by constitutional considerations, jurisdiction on the Transsexual Act gradually eroded core rules of the Act, granting more space for individual transsexual developments. Confronted with, and shaping an increasingly budget-oriented health system, social jurisdiction contributed to tighter regulations and restrictions on health insurance coverage of sex reassignment measures since the late 1990s.

However, neither social jurisdiction nor the Transsexual Act were able to account for the heterogeneity of trans individuals other than those strictly defined as transsexual in medical terms. The Transsexual Act was from the outset meant to regulate the legal recognition of transsexual individuals only and continues to do so, while social jurisdiction bars non-transsexual trans individuals from health insurance-financed surgery.

Successful litigation in the course of the first decade of the 21st century against the rules that either prevented homosexual transsexual individuals with a change of first names from entering marriages or forced married transsexual individuals to get divorced before being granted a revision of gender status contributed to weakening heteronormativity without delegitimising it. As a result of the Federal Constitutional Court decision on 06 Dec. 2005, a marriage appearing homosexual to society became possible (de Silva 2012: 159), whereas the decision on 27 May 2008, allowed for same-sex marriages in a legal sense in cases that involve a married transsexual partner (ibid: 160). Since cis individuals did not have the option to enter a same-sex marriage at that time, successful challenges on behalf of the continuation of marriages for trans individuals created a legal inconsistency (ibid).

Legal scholars and judges, like sexologists, grappled with interpretations of the somatic rules for a revision of gender status throughout the 1980s and 1990s. Constitutional readings of the respective rules in conjunction with developments on transsexuality in sexology and trans organisation demands in a legal climate following the decriminalisation of male homosexuality increasingly led to questioning the surgery mandate for a revision of gender status in legal scholarship. In this context, the Federal Constitutional Court decided to draw upon clinical observations that emphasise the heterogeneity of transsexual individuals with regard to the desire to undergo sex reassignment surgery, sexual orientation and the choice of legal options for recognition, stopping short of rendering the surgery requirement unconstitutional.