

# 1 INTRODUCTION

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## 1.1 RESEARCH INTEREST AND RESEARCH QUESTIONS

### 1.1.1 Research interest

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1.1.2 Research questions

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

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

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

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

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

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

## 1.2 STATE OF THE ART AND CONTEXTUALISATION OF THE PROJECT

### 1.2.1 State of the art

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

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

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

### **Constructions of trans(sexuality)**

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Dynamics among the actors and within the disciplines and areas**

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

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

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

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

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

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

### **1.2.2 Contextualisation of the project**

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

### **(Trans)Gender Studies**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 1.3 SOURCES AND APPROACHES

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

### Sexological sources and approaches

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Legal sources and approaches**

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

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

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

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

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

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

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

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

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

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

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

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

### **Trans movement sources and approaches**

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

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

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

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

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

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

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

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

### Sources and approaches to the legislative processes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**34** | See Deutscher Bundestag 2009b.

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

## 1.4 PERSPECTIVES ON TRANS AND THE TRANS MOVEMENT

### 1.4.1 Perspectives on trans(sexuality)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1.4.2 Perspectives on the trans movement

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

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

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

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

## 1.5 THEORETICAL CONSIDERATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

tivities to be conceptualised, for example, as a plurality of subjects that relate to gender codes differently.<sup>47</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **1.5.2 The liberal-democratic state**

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

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

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

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

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

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

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

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

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

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

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

Franzway, Court and Connell define the state as

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

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

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

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

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

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

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

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

### **State-society dynamics, relative autonomy and state agency**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Access to the state and the boundaries of the state**

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

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

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

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

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

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

## 1.6 STRUCTURING THE ARGUMENT

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

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

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

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

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

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

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