

5 CONCLUSIONS

Embedded in a concept of heteronormative hegemony and using analytical tools from complex feminist state theories on the liberal-democratic state, this study analysed how sexology, the law, the political branch of the trans movement and federal politics interacted to produce social change with regard to considering trans a viable way of embodying gender in the broader contexts of legislative processes related to a change of first names and a revision of gender status in the Federal Republic of Germany from approximately the mid-1960s to 2014. I will offer major findings of my analysis.

The period prior to, until the end of the legislative process leading to the Transsexual Act was marked by the gradual modification of the gender regime from the notion of a naturalised link between the sexed body and gender identity to the recognition of the complexity of gender against the background of homophobia, in particular the criminalisation of male homosexuality, and the socially deeply rooted notion of two somatically and socially polarised genders. This shift occurred unevenly in the disciplines and areas and usually involved conflicts.

Well before sexology had begun to classify transsexuality as a separate entity, trans individuals turned to courts for a revision of gender status under the Civil Status Act. Different decisions on various levels of jurisdiction underscore the state structure as a set of hierarchically organised institutions. While lower courts tended to grant a revision of gender status based on varying somatic conditions, higher courts in the 1960s rejected the claim, arguing that sex/gender is somatically based and immutable and, as a result, trans individuals were perceived of as ›unreal‹ women and men despite the fact that the applicants had undergone genital surgery. In addition, higher courts feared that the public order, morality and society, including marriage and hegemonic concepts of gender, would become undone.

Sexology intervened into the legal realm after it had isolated transsexuality from transvestism and homosexuality, arguing that several factors determine a person's gender and that the psyche was no less determining than somatic conditions; that transsexuality could not be treated other than with surgery and that surgically altered genitalia functioned like, and had the appearance of cis

genitalia. Legal scholars who overall tended to be more sympathetic to transsexual individuals' claims to recognition than jurisdiction facilitated spreading sexological notions of gender and transsexuality in law. However, this did not apply to transvestites. In contrast to sexology, legal scholars' reactions to transvestites were markedly depreciative. Reactions ranged from unease to pathologisation and criminalisation. The latter was more pronounced when transvestites engaged in homosexual acts.

The effects of this intervention were threefold. First, the concept of gender as a complex phenomenon allowed conceptualising transsexuality in law. Second, sexology created a homogeneous, heterosexual subject with the desire for genital surgery as the defining feature and as an effect rendered other forms of trans embodiments and sexualities unconceptualisable. Third, sexology re-established its power to define gender.

While higher courts continued to grapple with issues related to judge-made law, on 11 Oct. 1978, the Federal Constitutional Court granted an applicant a change of first names and a revision of gender status in the face of pending legislation, especially since the applicant irreversibly identified with the 'other' gender and had undergone sex reassignment surgery.

Situated in a favourable legal climate, having been exerted to continuing pressure from a small group of social democratic MPs since 1972, of whom representatives from Hamburg also had contact with a local trans lobby group, and pressure from sexologists, the social-liberal government tabled the draft Transsexual Bill. Sexologists and trans individuals were granted unequal access to the federal political arena. Moreover, sexologists presented transsexual individuals as a homogeneous entity and tied in with a liberal minoritising rhetoric, whereas trans contributions were individual and diverse. A trans activist's warning of constitutional pitfalls of several rules of the Bill was ignored.

However, privileged access to influencing the course of the Bill did not necessarily translate directly into legislation. Rather, the Christian democratic opposition, which enjoyed a majority in the *Bundesrat*, used sexological knowledge on transsexuality strategically to fend off challenges to conventional modes of gendering, assumed disruptions to cis individuals' everyday lives and perceived encroachments of their rights and, above all, potential threats to marriage as a privileged and exclusively heterosexual institution in a debate that with few exceptions was marked by heteronormative perspectives. The result necessarily required a compromise in order to ensure the passage of the Bill.

The outcome of the legislative process in 1980 marks the culmination and political consolidation of a gradual shift within the gender regime by providing provisions for a change of first names and a revision of gender status without however endangering the heteronormative gender binary. In order to restore the gender regime, transsexual applicants were subjected to trade fundamental human rights, such as the constitutionally guaranteed rights to human dig-

nity, physical integrity, marriage and family for gender recognition. Moreover, and in compliance with the rules of non-contentious jurisdiction, transsexual individuals were not recognised as experts on their own behalf, and the provisions applied to transsexual individuals only. Furthermore, medicine and law became intertwined.

While the Transsexual Act provided for a change of first names and a revision of gender status for transsexual individuals, the conditions sparked resistance. As early as on 16 Mar. 1982, the Federal Constitutional Court decided that the age limit of 25 years for a revision of gender status was unconstitutional. A lawyer and a sexologist critically commented on the Court's refusal to render the age limit for a change of first names unconstitutional at the same time. This happened roughly a decade later.

Since the Transsexual Act prescribed permanent sterility and surgical measures to approximate the appearance of the ›other‹ gender for a revision of gender status without specifying the interventions, legal scholars and sexologists discussed this issue controversially in legal journals throughout the 1980s and early 1990s. Higher courts overall interpreted the prerequisites extensively in cases of female-to-male transsexualism and restrictively regarding male-to-female transsexualism.

The period since the mid-1990s was marked by a socially and legally more favourable climate towards homosexuality without however displacing heteronormativity. Fuelled by policing in transsexual support groups, an increasing flexibility of gender roles, queer theory and the options for communication provided by the internet, the trans movement began to grow from the mid-1990s onward, developing lobby organisations with heterogeneous trans(gender) subjects and networks operating on regional, national and supranational levels. These organisations questioned hegemonic understandings of gender, masculinity, femininity and sexuality.

Sexologists were faced with an increasingly visible heterogeneity of trans subjectivities, including transsexual individuals with different sexual orientations and needs for somatic measures. These changes entered clinical categories to varying degrees, overall allowing for conceptualising a greater diversity of transsexual individuals. A concept of depathologisation entered the sexological debate as early as in 1991 that questioned the heteronormative gender binary, and another sexologist suggested respecting trans self-knowledge in 1997. However, until the early 2010s, the majority of sexologists did not critically reflect upon pathologisation, medical surveillance, gatekeeping practices and medical expertise in relation to trans individuals that had characterised the psycho-medical conceptualisation and treatment of transsexual individuals from the very outset. However, terminology, definitions and the degree of pathologisation varied quite considerably.

Despite disagreements on several issues, the three sexological associations devised national guidelines for the treatment and diagnostic assessment of transsexual individuals without external participation, defined assessment rules under the Transsexual Act and enshrined a narrow concept of transsexuality, clear differential diagnostics, the pathologisation of transsexual individuals and a rigid diagnostic regimen. Sexologist associations remained immune to the critique by cis and trans sociologists, the then national trans organisation Transidentitas e. V. and from some sexologists themselves that followed immediately upon publication.

The new trans organisations rejected the pathologisation of trans, psycho-medical expertise as opposed to their self-knowledge and practices and procedures they consider violations of human dignity and privacy, such as the obligatory ›real life test‹, undue physical examinations, inappropriate enquiries into their sexual orientations and practices and a subjection to expert understandings of sex, femininity, masculinity and gender. Likewise, they opposed legal requirements, such as mandatory sterility, sex reassignment surgery, expert assessments, bars to officially sanctioned living arrangements, prolonged procedures and the disenfranchisement of populations that did not fit the category ›transsexualism‹ on the grounds that they violate basic human rights. Since previous governments and the then government did not attempt to revise the Transsexual Act, the PGG devised a suggestion for a draft bill meant to redress grievances that had accumulated.

This episode is remarkable in a number of ways. First, it reveals how successful struggles around homosexuality had an enabling effect on struggles around trans. Second, the proposed legislation contributed to sparking a legislative process. Third, it reveals how anticipated limits shaped the draft, i.e. how the state shapes actors before entering the terrain of the state. Fourth, its immediate effects suggest that on a surface level trans individuals were granted equal access. Fifth, the announcement of fundamental revisions also raised expectations in the political branch of the trans movement. Drawing upon continuing legal and social developments in the area of homosexuality, international developments in trans legislation in the first decade of the 21st century and being part of a broader social movement themselves that questioned singling out non-conforming genders in the first place enabled trans activists to demand more rights in their suggestions for law reform in this period than their predecessors.

Rather than follow up on its promise to comprehensively revise trans law, government activity dwindled to non-activity after the initial announcement to fundamentally revise the Transsexual Act. At the same time, trans individuals took to the courts. The Federal Constitutional Court took on the legitimisation role of the state. With increasingly rapid frequency, Federal Constitutional Court decisions eroded the Transsexual Act. On 18 July 2006, the Federal Con-

stitutional Court ruled the exclusion of foreigners with permanent residency in the Federal Republic of Germany unconstitutional and set the first deadline for the legislator to devise a constitutional regulation.

While a further depathologising approach emerged in sexology, there were few developments in the discipline with regard to trans. With few exceptions, sexology had detached itself from international debates, barely engaged with theoretical developments that increasingly shaped thought in sociology and gender studies and resolved itself to surveying and policing trans rather than to question the own contribution to sustaining a hegemonic project. While a publication of the submission of the influential German Association for Sex Research did not question assumed sexological superior knowledge in relation to trans individuals' knowledge, its emphasis on the heterogeneity of transsexuality and legal constraints on trans individuals proved to be an alternative to the German Standards for the Federal Constitutional Court to draw upon on decisive issues.

Combined with overall shifts regarding homosexuality and without displacing heterosexuality as a structuring principle in society, two Federal Constitutional Court decisions on the Transsexual Act in 2005 and 2008 allowed homosexual marriages in the context of trans, the first one with regard to the social perception of the relationship and the second decision in terms of civil status. The last decision also marks another modification of the heteronormative gender regime under strictly defined conditions, without however displacing it.

Based on a different operational logic than e.g. jurisdiction in constitutional law, jurisdiction in social law began to define limits for sex reassignment interventions in cases of transsexuality since the late 1990s. Moreover, the rigid German Standards served as a model for restrictive practices of advisory bodies to statutory health insurances. While individual sexologists raised objections to these practices, they did not however consider revising or simply discarding the Standards. In addition to shared grievances over continuing government inactivity, objections to regulatory psycho-medical practices and assumptions, increasingly rigid practices in the healthcare management of transsexuality as well as denied recognition of self-knowledge under the Transsexual Act, growing popularity of neuro-scientific research on transsexuality formed the substratum for conceptual differentiation within the social movement.

The Federal Constitutional Court had set the government a deadline for finding a constitutional solution for the rule of the Transsexual Act that disallowed homosexual marriages in cases related to transsexuality. Expecting comprehensive legislation as it had been announced in 2000, divided over the issue of hetero- and cisnormativity and possible constitutional readings of the Transsexual Act, legal scholars debated several options for a comprehensive revision. In addition, BÜNDNIS 90/DIE GRÜNEN devised draft legislation that would have redressed a number of grievances in the trans movement and questioned

the gender binary. However, in 2009 the government simply implemented a suggestion made by the Federal Constitutional Court.

Soon after the Act to amend the Transsexual Act had passed, the Federal Constitutional Court ruled somatic requirements under the Transsexual Act for a revision of gender status unconstitutional, marking another modification of the gender regime. While heteronormative hegemony remains in place, including the initial heteronomous gendering process at birth, a body defined as male may signify a woman and vice versa under clearly defined circumstances.

This decision, psycho-medical developments in US and international guideline development on gender non-conforming individuals, increasingly successful trans movement struggles to be heard and the appreciation of theoretical developments on gender contributed to critical reflections on the gender binary in sexology and initiated a process of guideline development. While this process is still underway at the time of writing, there are indications that depathologising perspectives are gaining ground, while issues of psycho-medical surveillance remain highly contested. Moreover, several sexologists call for disentangling medicine from law, an amalgamation, which had contributed to its stagnation.

The political branch of the trans movement drawing upon social constructionist and poststructuralist perspectives on gender continues to define trans as a category that defies closure. In addition, the critique of minoritising perspectives expressed for example in special acts has gained momentum. As a result of government reluctance to seriously address issues related to the minoritisation and stigmatisation of trans and other minoritised gendered embodiments, the existing structures of the trans movement are in the process of creating a national bureaucratic structure to facilitate exchange and communication on issues related to trans.

To conclude, my study revealed that social change in the broader context of legislative processes related to a change of first names and gender status was an effect of complex and uneven interactions between sexology, the law, the political branch of the trans movement and federal politics. In the course of these interactions, three major social changes were achieved: Formerly disenfranchised embodiments defined as transsexual were recognised as subjects. The most severe human rights violations that were part and parcel of recognising the transsexual subject were redressed. There are indications that the heterogeneity of gendered embodiments and the gender binary itself have recently become a political issue.

Despite these significant changes, heteronormative hegemony restored itself by integrating some demands made by trans individuals, which suggests that the gender regime is historically specific and dynamic. Challenges to the heteronormative gender regime were resolved according to the principle of defining these embodiments as exceptions to the rule. For instance, recognising gender as mutable in a legal sense was, and continues to be exclusively

applied to individuals defined as transsexual. Moreover, recognising same-sex marriages applied to cases of transsexuality only. The latest example for the period this study examined is that gender is no longer necessarily based on sexed physical features, whereas the practice of assigning a person to one of exclusively two legitimate genders at birth remains in place. Hence, social change with regard to recognising all trans embodiments as viable will require further questioning and mobilising against hegemonic assumptions, rules and practices that govern state and society.

Recent developments after the period of investigation in this project indicate that other and occasionally overlapping struggles are successfully chipping away at the hegemonic heteronormative gender regime. In June 2017, the German parliament passed a Bill allowing cis-same-sex partners to marry as of 01 Oct. 2017, and on 10 Oct. 2017, the Federal Constitutional Court instructed the federal government to find a solution until 31. Dec. 2018 for a positive gender option other than ›male‹ or ›female‹ in regulations pertaining to a person's civil status in cases of intersexuality. While it remains to be seen, whether these and similar future developments will displace the gender regime, they indicate that as a social construction, heteronormative hegemony is dynamic, contested and in principle negotiable.

