Jurisdiction in gender recognition: governing legal embodiment

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Abstract

This thesis examines the impact of the adoption of legislation premised upon the 'self-declaration model' of legal gender recognition, which allows legal subjects to make a personal declaration of their gender status and have this granted legal effect. It presents findings from an in-depth fieldwork visit to interrogate how self-declaration is working in Denmark, the first European state to have adopted it in June 2014. These findings draw upon doctrinal analysis of various legislative materials, including parliamentary debates, as well as empirical interviews conducted with 33 respondents – including trans people, activists, politicians, civil servants, and medical practitioners – over the course of the three-month visit. These interviews sought to establish how respondents were professionally involved in, or personally affected by, the process of these reforms.

By reading this interview material through a Foucauldian framework which brings socio-, feminist, and trans legal scholarship on embodiment and governance together in an innovative manner, the thesis provides the first empirically-based and theoretically-informed analysis of how self-declaration of legal gender status is working in practice. It argues that jurisdictional boundaries were established and maintained throughout the reform process, limiting the implementation of self-declaration to the administrative sphere. Authorising these boundaries between civil and medical institutions had serious consequences for trans people's legal consciousness; as a restriction of access to body modification technologies could be justified at the same point in time as the regulations around amending legal gender status were being liberalised. With the list of states that have adopted the self-declaration model now including Argentina, Malta, Colombia, the Republic of Ireland, and Norway - and with Sweden and now the United Kingdom apparently on course to follow – this intervention offers activists and policymakers critical insights which might shape how they respond to these, and other, reform proposals in the future.

Table of Contents

Γi	itle Page	1
	Acknowledgements	3
	Abstract	5
	Table of Contents	6
	Table of Cases	8
	Table of Legislation	9
	List of Figures and Illustrative Material	10
	Abbreviations	11
	1. Introduction	12
	Situating the thesis	12
	Research Questions	16
	Background Context	20
	Denmark	27
	Chapter Outline	37
	2. Theorising legal embodiment	40
	Introduction	40
	The problem of the body	42
	From bodies to embodiment	47
	Subjectivity	50
	Intersubjectivity	55
	Materiality	58
	Symbolism	62
	Institutions	66
	Jurisdiction	72
	Conclusion	79
	3. Methodology	81
	Introduction	81
	Methodological approach	82
	Epistemological perspective	85
	Ontological perspective	88
	Legal consciousness	93
	Feminist ethics	99
	Methodological framework	103
	Access and sampling	105
	Negotiating outsider status	113
	Ethics and consent	115
	Confidentiality and security	119

4. Civil regulation	125
Introduction	125
Legislative impact	128
Separating law and medicine	132
Jurisdictional effect	137
Safeguarding	145
Civility and conscience	151
Conclusion	157
5. Medical governance	160
Introduction	160
Recognising jurisdiction	162
Expanding jurisdiction	165
Maintaining jurisdictional divisions	172
Rationalities of governance	180
Capacities of governance	189
Conclusion	195
6. Mind/body dualism	198
Introduction	198
Dualistic framings	200
Leaving the body out	202
The 'wrong body' narrative	212
Risky bodies	216
Suffering souls	222
Conclusion	229
7. Conclusion	231
Introduction	231
Stable platform	233
Discipline	239
Regulation	246
From eugenics to border controls	251
Consequences for legal studies	257
Conclusion	260
Bibliography	263
Appendix 1. Call for Participants	284
Appendix 2. Participant Information Sheet	285
Appendix 3. Consent Form	286

Table of Cases

Bellinger v Bellinger [2003] 2 WLR 117420		
Corbett v Corbett [1970] 2 All ER 33 [1971] P 8320		
Goodwin v UK [2002] 35 EHRR 44720		
R v McNally [2013] EWCA Crim 105122		
R v Newland (Chester Crown Court, 12 November 2015)149		
Washington v Glucksberg 521 US 702, Vacco v Quill 521 US 793		
(1997) (US)152		

Table of Legislation

74 L Law amending the legal gender 2016 (NO)	15
Gender Identity Law 2012 (AR)	15
Gender Identity, Gender Expression and Sex Characteristics Act	
2015 (MT)	15
Gender Recognition Act (GRA) 2004	12
Gender Recognition Act 2015 (ROI)	15
Guideline no 10077 on surgical castration for the purposes of	
sex/gender modification (27 November 2006) (DK)16	66
Guideline no 10353 on the treatment of transgender (19 December	
2014) (DK)	36
Health Act (13 July 2010) (DK)16	66
Health Act (19 November 2014) (DK)16	66
_ 182 Law amending the Act on the Central Person Registry (11	
June 2014) (DK)	15
_ 189 Law amending the Health Act and the Act on Assisted	
Reproduction in connection with treatment, diagnosis, and	
research, etc. (11 June 2014) (DK)	37
_ 546 Health Act (24 June 2005) (DK)16	66
Name Act 2012 (DK)	29
Order #1227 of 2015 (CO)	15
Order on sterilisation and castration (12 July 1994) (DK)16	65
Order on the Authorisation of Medical Professionals and Healthcare)
Provision (4 August 2011) (DK)16	67
Order regarding the Act on the Central Person Registry (9 January	
2013) (DK)	29
2. (Drder regarding the Central Person Registry no 1153 (2006)	29
Order regarding the law on on complaints and compensation in	
health care (7 November 2011) (DK)1	78
Penal Code (4 July 2014) (DK)14	46
Rights of the Terminally III Act 1995 (AU) (NT)1	52

List of Figures and Illustrative Material

Figure 1: The Danish mainland and major islands	28
Figure 2: Campaigner interviewees by organisation	106
Figure 3: Demographics	109
Figure 4: Interviewees by geographical location	110
Figure 5: 'Elite' interviewees by organisation	112
Figure 6: Flyer 1	284
Figure 7: Flver 2	284

Abbreviations

AIDS Acquired Immunodeficiency Syndrome

ALT Alternativet (The Alternative)

CPR Centrale Personregister (Central Person Registry)

DF Dansk Folkeparti (Danish People's party)

DHMA Danish Health and Medicines Authority

(Sundhedsstyrelsen)

EL Enhedslisten (Red-Green Alliance)

EU European Union

FATID Foreningen af Transkønnede i Danmark (Association for

Transgender in Denmark)

FtM Female-to-Male trans person

GRA Gender Recognition Act 2004

GRP Gender Recognition Panel

ICD International Statistical Classification of Diseases and

Related Health Problems

ILGA International Lesbian, Gay, Bisexual, Trans and Intersex

Association

KF Konservative Folkeparti (Conservative People's party)

LA Liberal Alliance (Liberal Alliance)

LGBT Lesbian, Gay, Bisexual, and Transgender

MtF Male-to-Female trans person

OECD Organisation for Economic Co-operation and

Development

RV Radikale Venstre (Social Liberal party)

S Socialdemokratiet (Social Democrats)

SF Socialistisk Folkeparti (Socialist People's party)

STS Science and Technology Studies

TGEU Transgender Europe

UK United Kingdom of Great Britain and Northern Ireland

US United States of America

V Venstre (Liberals)

WHO World Health Organization

1. Introduction

Situating the thesis

This thesis constitutes a critical intervention into debates around proposed reforms of the regulation of gendered embodiment in the UK, one decade on from the Gender Recognition Act (GRA) 2004. It addresses embodiment, as an ontological and epistemological process of becoming, to acknowledge how gendering affects all legal subjects. However, in a world characterised by unequal power relations, some bodies are regulated in quite specific ways, which can lead to them becoming more marginalised than others. Famous theoretical developments made within queer theory and gender studies which suggest that we are all 'doing' gender (in that every subject is embroiled in gendering processes) ought not to obscure the feminist insight that this has been made more difficult for some bodies than others.

Trans people,⁴ for instance, are pathologised for the way in which they perform gender, in a manner and with an intensity which would be inconceivable for non-trans ('cis') others.⁵ Since this thesis is inspired

¹ Candace West and Don Zimmerman, 'Doing Gender' (1987) 1(2) Gender and Society 125.

² Judith Butler, *Gender Trouble: Feminism and the subversion of identity* (first published 1990, Routledge 2008).

³ This is addressed in Butler's later work; Judith Butler, *Bodies That Matter: On the discursive limits of 'sex'* (first published 1993, Routledge 2011).

⁴ I use the word 'trans' primarily as an adjective to refer to people who do not identify with the gender status that they were assigned at birth, and embark upon some sort of transition across or beyond normative gender categories. When used without the suffixes '-sexual' or '-gender', 'trans' is more inclusive of various groups, and (as above) avoids dichotomising sex and gender; Tobias Raun, 'Trans as Contested Intelligibility: Interrogating how to Conduct Trans Analysis with Respectful Curiosity' [2014] (1) Lambda Nordica 13, fn 1.

⁵ I use the word 'cis' as an adjective to refer to people who do not actively identify as 'trans'; in spite of my concerns around reproducing the view that just because a person does not actively dis-identify with the gender they have been assigned at birth, this implies stasis (in accordance with the Latin root of 'cis-', which prefixes things that stay put or do not change property; A Finn Enke, 'The Education of Little Cis: Cisgender and the Discipline of Opposing Bodies' in A Finn Enke (ed), *Transfeminist Perspectives: in and beyond Transgender and Gender Studies* (Temple University Press 2012) 60). I would dispute this a-temporal understanding of gender, which neglects how bodies develop and change in markedly gendered ways across the life-course. Yet I am more than sympathetic to the argument that

by sociological research on the recognition of gendered practices as much as it is by legal and socio-legal critiques of the GRA 2004, I suggest that this paradox is best acknowledged by focussing on the embodied aspect of trans subjectivity. This marks a point of distinction from previous studies of trans jurisprudence, which have approached the legal recognition of gender from the perspective of anti-discrimination,⁶ or human rights.⁷ Eschewing these legalistic points of focus, sociological research has approached trans issues from a range of theoretical perspectives: including care ethics, ⁸ relationality, ⁹ citizenship, ¹⁰ and phenomenology; ¹¹ situating trans subjects in a more grounded, socially-embedded, embodied way.

While strongly influenced by the sociological research, this thesis also seeks to enrich existing literature by bringing it into conversation with feminist theories of embodiment. The justification for doing so is that a careful conceptualisation of embodiment (and, specifically, legal embodiment) appears well-suited to holding issues of regulation, subjectivity, identity, and physicality in tension – without prioritising one or another. The reason for this, as I will demonstrate, is that feminist theories of embodiment highlight the importance of both ontological and epistemological accounts of becoming; supplementing the Foucauldian understanding that all bodies are always already

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creating such a label – however imperfect and generalising – may be strategically useful in certain contexts. It could, for example, be used to de-naturalise non-trans subject positions – which are often left as 'man' and 'woman', or, worse, preceded by the prefix 'bio-'; B Aultman, 'Cisgender' (2014) 1(1-2) Transgender Studies Quarterly 61. 'Cis' could also facilitate attempts to account for the various structural advantages that people who do not actively dis-identify with the gender they were assigned at birth have access to in comparison to those who embark upon a (more or less) intentional transition; Erica Lennon and Brian J Mistler, 'Cisgenderism' (2014) 1(1-2) Transgender Studies Quarterly 63.

⁶ Alex Sharpe, *Foucault's Monsters and the Challenge of Law* (Routledge 2010). Although some of Sharpe's publications cited in this thesis were published under a previous forename (Andrew), I cite them all under Sharpe's current name, Alex.

⁷ Jens T Theilen, 'Depathologisation of Transgenderism and International Human Rights Law' (2014) 14 Human Rights Law Review 327.

⁸ Sally Hines, *TransForming gender* (Polity Press 2007).

⁹ Tam Sanger, *Trans People's Partnerships: Towards an Ethics of Intimacy* (Palgrave Macmillan 2010).

¹⁰ Sally Hines, *Gender Diversity, Recognition and Citizenship* (Palgrave Macmillan 2013).

¹¹ Zowie Davy, Recognizing Transsexuals: Personal, Political and Medicolegal Embodiment (Ashgate 2011).

regulated by norms and codes with the insight that experiences of this regulation might also be constitutive of subjectivity and legality (and therefore very much worth exploring). Taking this point of tension as a point of departure for this thesis has allowed me to expand the scope of my inquiry beyond a legal analysis of which bodies are recognised in, and granted rights by, legislative frameworks. I have also been able to address legal embodiment as an ongoing process; involving both the production of normative bodies and bodily practices *and* the possibility of forms of embodied resistance.

Although they may not position themselves as doing so explicitly, I suggest that many of the critiques of the GRA 2004 could be said to concern themselves with the failure of this legislation to adequately deal with, or even acknowledge, the complexities of gendered embodiment. While it has been celebrated for instigating the first formal gender recognition process in UK history, the binary conceptions of sex, gender, and sexuality which are promulgated in the GRA 2004 have shaped a regulatory system which has led many trans people to face new problems, in addition to those they had encountered before, as they have sought to access legal recognition. Many continue to face legal exclusion, whether formally or in practice; as is demonstrated in the critical literature on the GRA 2004, which I will review in the context section, below.

However, I have also identified that a gap is developing between this critical literature and proposals for legislative reform. While scholars producing more critical analyses have tended to focus upon the various practical and theoretical limitations of the GRA 2004, they have also spent less time concerning concrete proposals for reform. In the absence of detailed evidence-based empirical analysis of prospective reform strategies, it has been left to comparative legal scholarship to draw attention to the increasing number of states that have adopted the so-called 'self-declaration model' of legal gender recognition. Such legislation purportedly allows trans subjects to make a declaration of their gender status, and have this given legal

effect. At the time of writing, the list of states that have adopted self-declaration includes Argentina,¹² Denmark,¹³ Malta,¹⁴ Colombia,¹⁵ the Republic of Ireland, ¹⁶ and Norway; ¹⁷ with Sweden apparently on course to follow.¹⁸

While it has provided an admittedly useful overview of international developments, comparative literature has thus far offered little by way of substantive analysis - not least in relation to the question of how self-declaration has been implemented in practice. It has also engaged with the findings of the critical literature only on a superficial level, offering little indication as to whether the self-declaration model can adequately respond to the established critiques. Instead, some campaigners and commentators are content to advocate replacing the existing GRA 2004, and adopting a new 'model' of gender recognition in its place, without exploring the limitations of one or the other in any notable detail. 19 This is the gap which this thesis will fill; by reflecting upon the theoretical limitations of the GRA 2004, before commencing an in-depth qualitative analysis of how the proposed alternative – selfdeclaration – has been implemented in Denmark, the first European state to have adopted it, in 2014. In this respect, the thesis makes an original contribution to debates around the implementation of selfdeclaration, in the UK and other contexts, providing theoretical reflection and empirical findings which will be of interest to policymakers and legislators, campaigners and activists alike.

¹² Gender Identity Law 2012 (*Identidad de Genero Ley 26.743*) (AR).

¹³ L 182 Law amending the Act on the Central Person Registry (11 June 2014) (*L* 182 Lov om ændring af lov om Det Centrale Personregister) (DK).

¹⁴ Gender Identity, Gender Expression and Sex Characteristics Act 2015 (MT).

¹⁵ Order #1227 of 2015 (Decreto 1227 de 2015) (CO).

¹⁶ Gender Recognition Act 2015 (ROI).

¹⁷ 74 L Law amending the legal gender 2016 (*74 L Lov om endring av juridisk kjønn*) (NO).

¹⁸ Government Enquiry, *Juridiskt kön och medicinsk könskorrigering: Betänkande av Utredningen om åldersgränsen för fastställelse av ändrad könstillhörighet* (SOU 2014: 91) (SWE).

¹⁹ A recent exception is offered by Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43(4) Journal of Law and Society 483.

Research Questions

The main research questions that this thesis seeks to answer are:

- 1) How effective has the implementation of the self-declaration model of legal gender recognition been in Denmark, and what are its limitations?
- 2) What can policymakers, legislators, campaigners, and activists tasked with responding to proposals to adopt the selfdeclaration model learn from its implementation in Denmark?

To explore these overarching questions, I have developed three conceptual questions, which will be answered with evidence of how institutional aspects of embodiment have been affected by the adoption of self-declaration in Denmark:

- 3) How is jurisdiction mobilised in the governance of embodiment?
- 4) How are jurisdictional boundaries constructed between institutional power-knowledges in law reform processes?
- 5) How do embodied subjects register jurisdictional arrangements on an affective level?

In accordance with my first research question, the objective behind conducting a fieldwork visit was to assess how effective the implementation of the self-declaration model has been in Denmark, and to uncover its limitations. This would enable an assessment to be made as to how far the Danish implementation of self-declaration responds to the critiques of how gendered embodiment has been regulated in other contexts, including that of the UK. But rather than presenting a comparative analysis – between the UK and Denmark, for example – I decided to conduct an in-depth investigation of how gender is being regulated in the Danish context instead; referring back to the critiques of the GRA 2004, and the regulation of gendered embodiment in other contexts (such as in the US), only as and when this was deemed necessary.

17

In one respect, the influence of these contexts reflects my own scholarly background – as I have trained in, and studied, law, in both UK and Nordic contexts. My decision to avoid comparative analysis between the two was a deliberate one, based upon a judgement that an in-depth study of the Danish context would be a more valuable contribution to UK legal scholarship on gender recognition; given that extensive critical literature on the GRA 2004, and how trans embodiment has been regulated before this statutory intervention,²⁰ has already been published in a UK context. Moreover, upon my arrival in Denmark, it also emerged that the same could not be said of the regulation of gendered embodiment there. As will become apparent throughout the course of this thesis, very little has been published on gender recognition in the Danish context. As I conducted a review of this marginalised literature, and had the fact that trans studies was an under-funded research field in Denmark confirmed to me by various scholars during my visit, I hoped that I would be able to expand the reach of this thesis, so that it could be of use to Danish activists and policymakers in addition to those based in the UK, and other states, which might seek to adopt legislation based upon the principles of self-declaration at some point in the future. After making this decision, I have been able to include much more information about the Danish governance project than I would have done had I felt it necessary to present a comprehensive and equally-proportioned comparative analysis of Danish law in relation to that of the UK.

Beyond its empirical base, the thesis also represents an original contribution to the theoretical literature on legal embodiment. As I have stated, above, it draws heavily upon feminist theories of embodiment, and, specifically, the understanding that processes of

²⁰ For historical legal analysis in a UK context, see Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish 2002); and Stephen Whittle, *Respect and Equality: transsexual and transgender rights* (Cavendish 2002).

embodiment are equally 'material' and 'discursive'.²¹ Yet it also seeks to augment this literature, by investigating how processes of embodiment are additionally affected by institutional regulations. Influenced by the work of governance scholar Mariana Valverde and others, the thesis conducts a jurisdictional analysis of the Danish reforms to ascertain how far institutional competences governing key aspects of trans embodiment were affected by the adoption of self-declaration, and in what manner.

Addressing how jurisdictional divisions are drawn and maintained between different institutions in the governance of legal embodiment also distinguishes this thesis from existing critiques of the GRA 2004, and other discussions of gender recognition in the trans studies literature. Previously, there has been a tendency among scholars to highlight areas of coincidence between medicine and law when discussing the regulation of gendered embodiment - for example in sociologist Zowie Davy's characterisation of the gatekeepers to recognition established by the GRA 2004 as forming a 'medicolegal alliance'.²² As I began to turn my attention to an analysis of selfdeclaration - which purports to remove medical influence from the gender recognition process – I realised that a lens which construes medicine and legal practice as working in stable alliance would not be particularly well-suited to my analysis. Rather than seeking to capture the essence of the arrangement between civil and medical institutions, I decided to employ a jurisdictional analysis to explore the complex interplay between medical and legal power-knowledges instead highlighting important points of divergence as well as convergence. In conducting the first explicitly jurisdictional analysis of the governance of legal embodiment in the gender recognition context, I illuminate the largely hidden processes through which law orders and contains the

²¹ Karen Barad, 'Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter' (2003) 28(3) Signs: Journal of Women in Culture and Society 801, 822-823.

²² Zowie Davy, 'Transsexual Agents: Negotiating Authenticity and Embodiment within the UK's Medicolegal System', in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 119.

knowledge claims, politics, and embodied effects of medical and legal institutions. By emphasising these institutional aspects of embodiment, alongside the more readily-acknowledged discursive and material elements, I work towards a richer conception of (specifically) legal embodiment. Jurisdictional critique is, in turn, advanced by being read alongside literatures on institutional vulnerability and the professions.

Finally, in addition to supplementing the burgeoning governance literature on jurisdiction, the thesis also offers an important methodological contribution to this literature which could help guide future researchers in their encounters with jurisdiction. This concerns my decision to employ a legal consciousness methodology as I conduct jurisdictional analysis. As the study of legal consciousness requires tentative exploration of the effect of law on people's everyday lives, it appears well-suited to grounding a humanistic analysis of how legal embodiment is affected by law reforms and other regulatory amendments. As I will demonstrate in Chapter 2, relational subjectivity forms an important dimension of legal embodiment, and so an investigation of the latter will demand at least some consideration of the former. As exploring legal consciousness offers insights into how embodied subjects register jurisdictional arrangements on an affective level, it constitutes a useful avenue for investigating how a governance project is experienced by those who are subjected to it.

Having introduced my thesis, and described its broad contributions to the literature, I will now lay out its background context in greater detail in the section below, beginning with a description of the initial reception that the GRA 2004 received upon its enactment in the UK, before detailing some of its shortcomings. This will demonstrate how criticism has been steadily growing in the decade that has passed since this legislation was enacted. I will then explain how this has led to calls for UK gender recognition law to be reformed around the principles of self-declaration of legal gender status, and how these calls led me to conduct my fieldwork in Denmark.

Background Context

The GRA 2004 was introduced in the wake of a European Court of Human Rights decision that UK legal precedent – which understood gender to be synonymous with biological sex, and that both were 'fixed at birth'23 - stood in violation of human rights to privacy and marriage (as defined by Articles 8 and 12 of the European Convention on Human Rights).²⁴ Yet, by the time it had been drafted.²⁵ the GRA 2004 went well beyond what was required by European human rights law.²⁶ This had as much to do with what the legislation did not concern itself with as that which it did. For, unlike most other European legal systems at that time, the GRA 2004 did not include a specific requirement that an applicant for gender recognition had to have undergone any form of surgical intervention – including sterilisation or castration – before they could be granted recognition.²⁷ Nor did it require applicants to have undergone any form of hormonal treatment.²⁸ And no 'community' clause – requiring the applicant to evidence 'passing' in the eyes of others ('family members, acquaintances, work colleagues')²⁹ – was explicitly included.

For these reasons, the GRA 2004 was welcomed within the socio-legal studies literature as 'a great leap forward',³⁰ and a 'groundbreaking reform';³¹ instigating 'seismic developments in the substantive legal

²³ Corbett v Corbett [1970] 2 All ER 33 [1971] P 83, 104.

²⁴ Goodwin v UK [2002] 35 EHRR 447.

²⁵ Which was only following a UK House of Lords declaration of incompatibility between European human rights standards and domestic law in *Bellinger v Bellinger* [2003] 2 WLR 1174.

²⁶ Alex Sharpe, 'Gender Recognition in the UK: a Great Leap Forward' (2009) 18 Social & Legal Studies 241, 242.

²⁷ Sharpe, 'Gender Recognition in the UK' (n 26) 242. Yet as Sharpe subsequently noted, a Government Minister, David Lammy, explicitly stated during Parliamentary debates that 'ultimately [transsexuals] have surgical treatment if it is viable'; Sharpe, *Foucault's Monsters* (n 6) 106 fn 69, citing SC Deb (A) 9 March 2004, col 19. If the applicant has not undergone surgical procedures, a medical report is required to explain why this is the case; GRA 2004, s 3(3).

²⁸ Sharpe, 'Gender Recognition in the UK' (n 26) 242.

²⁹ Sharpe, 'Gender Recognition in the UK' (n 26) 242-243. This is a requirement in Australian law; see *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 (AU).

³⁰ Sharpe, 'Gender Recognition in the UK' (n 26) 242.

³¹ Sharon Cowan, 'Looking Back (To)wards the Body: Medicalization and the GRA' (2009) 18 Social & Legal Studies 247.

rights of trans persons.'³² It was said to put the UK into what was then 'pole position' – not just in Europe but in the wider world – in terms of gender recognition.³³ And still, when it came to discussing what actually had been included in the GRA 2004, legal commentary was more ambivalent. It has been subjected to numerous critiques, including suggestions it reproduces binary understandings of gender as male or female,³⁴ authorises psychiatric discourses that distinguish between an internally gendered mind and an externally sexed body,³⁵ and requires gender and sexuality to align if applicants for gender recognition are to retain recognition of their intimate relationships.³⁶ The effect of these provisions is to legally authorise particular ways of 'passing', to the detriment of those that are unable or unwilling to meet these normative standards in the eyes of institutional authorities.

The necessity of several GRA provisions has been questioned; including the 'permanence provision' (which requires an applicant to declare an intention 'to continue to live in the acquired gender until death'),³⁷ the 'sporting exception' (which permits the exclusion of trans people from competitive sporting activity), ³⁸ and the obligation to disclose a trans history before marriage.³⁹ Scholars have identified how these exceptions indicate a discriminatory logic – whereby the recognition of a trans person's 'acquired' gender identity need not preclude the possibility that, in specific circumstances, law might turn

³² Ralph Sandland, 'Running to Stand Still' (2009) 18 Social & Legal Studies 253.

³³ Sharpe, 'Gender Recognition in the UK' (n 26) 242.

³⁴ Sandland (n 32) 254.

³⁵ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

³⁶ Blu Tirohl and Imogen Ruth Bowers, 'Opposite Sex – A Discussion of Rights Under the Gender Recognition Act' (2006) 15(1) Journal of Gender Studies 83. Although this specific requirement has been removed following the enactment of the Marriage (Same Sex Couples) Act 2013, schedule 5 still requires trans people to include 'a statutory declaration by the applicant's spouse that the spouse consents to the marriage continuing after the issue of a full gender recognition certificate' in their application for gender recognition; Flora Renz, 'Consenting to gender? Trans spouses after same-sex marriage', in Nicola Barker and Daniel Monk (eds) *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015).

³⁷ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19(1) Social & Legal Studies 107.

³⁸ David McArdle, 'Swallows and Amazons, or the Sporting Exception to the Gender Recognition Act' (2008) 17(1) Social & Legal Studies 39.

³⁹ Alex Sharpe, 'Transgender Marriage and the Legal Obligation to Disclose Gender History' (2012) 75(1) Modern Law Review 33.

back the clock, and regulate them in accordance with their previous legal status – construed as the 'true' 'biological' sex.⁴⁰ Such concerns appeared to have been well-founded by a body of case law concerning rape by 'gender deception', ⁴¹ which established a precedent that consent to sex can be vitiated if a defendant has failed to disclose their legal gender status, ⁴² before a Court of Appeal decision cast doubt over whether this will be maintained. ⁴³

Alongside this critical legal scholarship there has been a corresponding growth in the sociological literature developed within the field of trans studies in the UK. Theoretical and empirical research has been used to develop sociological analyses of how trans subjectivities are shaped in relation to care practices, 44 intimate relationships, 45 and bodily aesthetics. 46 And, following the enactment of the GRA 2004, one study of trans citizenship recognition supplemented both legal and sociological literatures by investigating the numerous ways in which this legislation impacted upon these and other aspects of trans identity formation and politics. 47 From my perspective, it appears that much of this critique centres around the GRA 2004's failure to address what legal scholar Sharon Cowan has termed 'the problem of the body'. 48 That is to say that critique tends to coalesce around a particular theme; which is that the particular trans body inscribed in the GRA 2004 does not accord with the embodied experiences of those trans subjects who cannot, or will not, position

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 $^{^{\}rm 40}$ Alex Sharpe, 'A Return to the 'Truth' of the Past' (2009) 18 Social & Legal Studies 259.

⁴¹ Notably including *R v McNally* [2013] EWCA Crim 1051.

⁴² For critical analysis see Alex Sharpe, 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent' [2014] Criminal Law Review 207; and Alex Sharpe, 'Expanding Liability for Sexual Fraud through the Concept of 'Active Deception': A Flawed Approach' (2016) 80(1) Journal of Criminal Law 28.

⁴³ The Court of Appeal recently quashed the conviction of Gayle Newland; Frances Perraudin, 'Woman jailed for impersonating man to trick friend into sex faces retrial' (*The Guardian*, 12 October 2016) https://www.theguardian.com/uk-

news/2016/oct/12/woman-jailed-for-impersonating-man-to-trick-friend-into-sex-faces-re-trial-gayle-newland> accessed 11 November 2016.

⁴⁴ Hines, *TransForming gender* (n 8).

⁴⁵ Sanger, *Trans People's Partnerships* (n 9).

⁴⁶ Davy, Recognizing Transsexuals (n 11).

⁴⁷ Hines, Gender Diversity (n 10).

⁴⁸ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

themselves in line with these normative framings – to 'pass' in 'the other gender'⁴⁹ – at specific times in important spaces. By separating consideration of the trans person's mind from their body, and reproducing 'the heteronormative imperative to line up one's somatic sex with one's sexuality and one's internal sense of sexed/gendered self',⁵⁰ the GRA 2004 encourages legal subjects to engage in a form of 'passing' which simply fails to grasp, or even acknowledge, the complexities of trans embodiment.

Though such a reading is heavily influenced by feminist theories of embodiment, I have developed this argument primarily through reviewing the published critical legal literature on the GRA 2004. While this may not constitute an original contribution in itself, it does make up for the fact that few synchronisations of trans legal studies literature in the UK have been developed to date. This may explain how many of the established critiques have yet to permeate into activist and policy making debates about how the GRA 2004 ought to be reformed. Within such debates, the critique of the existing legislation that has most successfully transferred into the public sphere has been targeted at the Gender Recognition Panel (GRP) – the 'hybrid, medical-legal tribunal' that was created to determine that the GRA 2004's evidential requirements had been met before approving a gender recognition application.⁵¹ So while a requirement to evidence 'passing' in the eyes of 'the community' was not exactly proscribed by the GRA 2004, as I mentioned above, the GRP could be construed as officially - and authoritatively - standing-in and making a judgement on its behalf. Although there have been numerous other critiques targeted at the GRA 2004, it is those that challenge the continuing existence of a GRP that appear to have gained most traction in the current political climate. The GRP comprises six legal professionals and six medical professionals (including General Practitioners, psychiatrists and psychologists),⁵² and was described as 'positively Victorian' in a recent

⁴⁹ GRA 2004, s 1(1)(a).

⁵⁰ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

⁵¹ Sandland (n 32) 255.

⁵² Cowan, 'Looking Back (To)wards the Body' (n 31) 252 fn 8.

media broadcast.⁵³ Stephen Whittle, legal scholar and co-founder of the UK-based trans rights organisation Press for Change, has described the GRA 2004 as the result of a compromise between the needs of trans people and opposition from the Christian evangelical right.⁵⁴ Hence the GRP itself draws little support from any interest group. During a period of severe UK Government-enforced public-sector funding cuts, it is perhaps unsurprising that a tribunal which meets, at public expense, purely to ensure that the requirements of the GRA 2004 have been met is considered open to mainstream critique.

In July 2015, after the UK General Election of May 2015 returned a majority Conservative Government, a House of Commons Women and Equalities Committee ('the Committee') inquiry into 'transgender equality' was established to investigate 'how far, and in what ways, trans people still have yet to achieve full equality; and how the outstanding issues can most effectively be addressed'. ⁵⁵ In the resulting report, this Committee acknowledged witness testimonies which had characterised the process of applying to the GRP as "bureaucratic", "expensive" and "humiliating". ⁵⁶ These charges correspond with the critical literature. Yet in the oral evidence session, ⁵⁷ and one chapter of their subsequent report, ⁵⁸ dedicated to assessing the GRA 2004, the Committee moved discussion beyond mere critique, turning, notably, to the question of legislative reform.

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⁵³ Newsnight, 'Is transgender the new civil rights frontier?' *BBC* (London, 5 January 2016).

⁵⁴ Stephen Whittle, legal scholar and co-founder of the UK-based trans rights organisation Press for Change, describes the GRA 2004 as the result of a compromise between the needs of trans people and the opposition of the Christian evangelical right; Stephen Whittle, 'The Opposite of Sex is Politics – the UK Gender Recognition Act and Why it is Not Perfect, Just Like You and Me' (2006) 15(3) Journal of Gender Studies 267, 267-8.

⁵⁵ Women and Equalities Committee, 'Transgender equality inquiry launched' (*Parliament UK*, 27 July 2015)

http://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2015/inquiry-into-transgender-equality accessed 2 September 2016.

⁵⁶ Women and Equalities Committee, *Transgender Equality* (HC 2015-16, 390) para 33.

⁵⁷ Women and Equalities Committee (n 56) 90.

⁵⁸ Women and Equalities Committee (n 56) ch 3.

As few attempts have been made to synchronise the critiques of the GRA 2004, almost no published research could directly inform this reform discussion. Instead, it fell to comparative legal scholarship to draw attention to the growing number of states that have adopted the self-declaration model of legal gender recognition.⁵⁹ One comparative scholar, Peter Dunne, who had previously described self-declaration as 'the optimal gender recognition model', 60 was called to give oral evidence during the inquiry. In his testimony, Dunne repeated the essence of this claim, telling the Committee that self-declaration amounted to 'the gold standard' of gender recognition legislation. 61 The Committee's attention was also drawn to a petition calling for the adoption of self-declaration, which had, at the time of the inquiry, gained over 30,000 signatures on the UK Government and Parliament petitions website. 62 Such testimonies clearly influenced the Committee's findings, as evidenced by a key paragraph of their report:

Within the current Parliament, the Government must bring forward proposals to update the Gender Recognition Act, in line with the principles of gender self-declaration that have been developed in other jurisdictions. In place of the present medicalised, quasi-judicial application process, an administrative process must be developed, centred on the wishes of the individual applicant, rather than on intensive analysis by doctors and lawyers. ⁶³

A central motivation of this thesis is to offer activists and campaigners, legislators and policymakers detailed and evidence-based insights into the possible consequences of reforming the regulation of gendered embodiment in one direction rather than another. In this respect, advocating that the UK Government should adopt 'the principles of gender self-declaration that have been developed in other jurisdictions', ⁶⁴ without considering any evidence as to how self-declaration has been working in practice, appears misguided.

⁵⁹ Women and Equalities Committee (n 56) para 39.

⁶⁰ Peter Dunne, 'Ten years of gender recognition in the United Kingdom: still a "model for reform"?' [2015] Public Law 530, 539.

⁶¹ Women and Equalities Committee (n 56) para 40.

⁶² Women and Equalities Committee (n 56) para 41.

⁶³ Women and Equalities Committee (n 56) para 45.

⁶⁴ Women and Equalities Committee (n 56) para 45.

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In their official response to the Committee's report, the UK Government agreed to review the GRA 2004 'to determine whether changes can be made to improve it in order to streamline and demedicalise the gender recognition process'. ⁶⁵ This reference to 'streamlining' appears to confirm my suspicion that abolishing the GRP would be the most politically palatable way of reforming the GRA in the context of deep public-sector funding cuts. Yet the Government also appears to share my concern that insufficient thought has been given to the consequences of implementing the self-declaration model, when they suggest that more research is needed:

We would like to see more evidence on the case for change and the implications of [...] moving to a self-declaration process and extending legal recognition to non-binary gender identities. We will therefore monitor the implementation of alternative gender recognition processes in other jurisdictions and we will analyse the evidence placed before the Committee to inform our work.⁶⁶

This thesis seeks to address this gap in the literature by presenting the first in-depth qualitative analysis of the implementation of self-declaration in Denmark; to enrich understandings of what adopting similar reforms might amount to in practice. It does so not only for the benefit of the UK Government, and other policymakers, but also for the activists and campaigners who will be tasked with formulating clear strategies capable of responding to reform proposals. By offering critical insights into how self-declaration has been working in Denmark in practice, this thesis seeks to uncover how effective the adoption of this model has been, and where it has been limited. With the benefit of these insights, interested parties will be better placed to judge how they ought to respond to similar reform proposals than they are at present.

Government Equalities Office, Government Response to the Women and Equalities Committee Report on Transgender Equality (Cm 9301, 2016) 11.
 Government Equalities Office (n 65) 11.

Having described the UK-based research and policy background of my thesis, I will now describe the Danish context of my fieldwork visit. This will include some general contextual information about Danish geography and politics, followed by a more detailed doctrinal outline of how regulations concerning trans embodiment have been affected by the adoption of the self-declaration model of legal gender recognition in June 2014.

Denmark

Denmark is situated in the north of Europe, sharing borders with Germany and Sweden, which position the country as a gateway to the other Scandinavian and Nordic countries. It has an estimated population of just under 6 million people, ⁶⁷ split across the mainland peninsula of Jutland, and two of the larger islands, Zealand and Funen (see **Figure 1**). Around one-third of the population reside in the region surrounding the capital city, Copenhagen, on the island of Zealand. ⁶⁸

⁶⁷ With an estimated 5.7 million people living in Denmark in 2016, its population is around one-eleventh of the size of the UK (estimated population 65 million); Statistics Denmark, 'Population at the first day of the quarter by region, sex, age and marital status' <www.statbank.dk/FOLK1A> accessed 26 July 2016.
⁶⁸ Statistics Denmark (n 67).

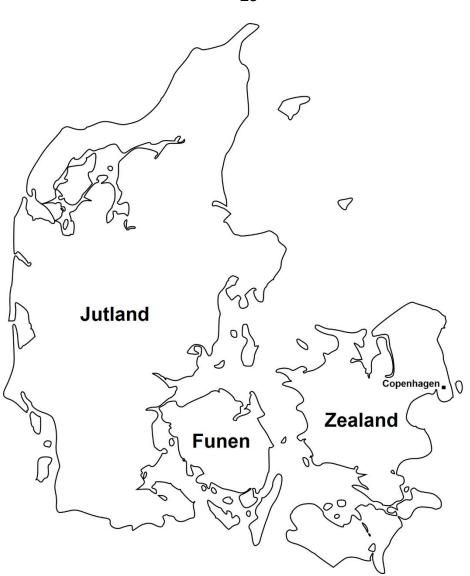


Figure 1: The Danish mainland and major islands

In the Danish context, a major technology mobilised to register and regulate the population is the Central Person Registry (CPR). Established in 1968, in part to facilitate a pay-as-you-earn taxation system, ⁶⁹ each person registered as residing in Denmark is recorded within this CPR system. A 10-digit person number is allocated in accordance with the so-called 'odd/even rule'; which states that the final digit determines the person's legal sex/gender. ⁷⁰ If this is odd,

⁶⁹ Anders Vind Ebbesen, 'The Creation of the Central Person Registry in Denmark' in Christian Gram, Per Rasmussen, and Søren Duus Østergaard (eds), *History of Nordic Computing 4* (Springer 2015) 50.

⁷⁰ I translate the Danish term '*køn*' as 'sex/gender' whenever the conceptual distinction is unclear. (This does not apply where its use is clarified with a prefix; such as '*biologiske køn*' or '*fysisk køn*' – 'sex' – or '*kønsidentitet*' – 'gender'.) While combining these terms may not be ideal, it does at least work against the assumption that English-language conceptual divisions are the 'right' ones, and

this indicates that the person is male; if it is even, the person is female.⁷¹ Access to personal identification documentation (passports, drivers' licence, birth certificate),⁷² and certain names,⁷³ is restricted in accordance with this legal status.

To date, legal gender recognition has been granted by allocating people a new CPR number corresponding with a new sex/gender status. The two numbers remain linked in the CPR system to ensure that administrators and other authorised personnel can join up past and present activities undertaken by the individual citizen in question. Before 2014, a practice had been established whereby trans people could be allocated a new CPR number in accordance with a provision in the Act on the Central Person Registry permitting the correction of 'errors' included on the previous one. ⁷⁴ However, this was only available to people who could demonstrate that they had been castrated 'for the purposes of sex/gender modification', ⁷⁵ which

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that that the absence of an exact parallel in Danish somehow constitutes a 'lack'; Stella Sandford, 'Thinking Sex Politically: Rethinking "Sex" in Plato's Republic' (2005) 104(4) South Atlantic Quarterly 613, 622. It may also go some way towards acknowledging that, on many of the occasions on which it is used in the English language, 'gender' still undertakes the 'ideological work of sex'; Stella Sandford, 'Philosophy and Gender' (Public Lecture, University of Copenhagen, May 2015). For example, it has been noted that while the GRA 2004 did instigate a shift in legal terminology from 'sex' to 'gender', the object of governance remained much the same; Sharon Cowan, 'Gender Is No Substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 Feminist Legal Studies 67. This coincides with assertions that sex is 'always already gender' in most circumstances; Butler, *Gender Trouble* (n 2) 9-10.

71 Order regarding the Central Person Registry no 1153 (2006) (*Bekendtgørelse om folkeregistrering mv*) (DK), s 1.

⁷² It has been possible to apply for an unspecified gender designation ('X') in Danish passports, provided the applicant has been diagnosed with 'unspecified transsexualism' at the Sexological Clinic in Copenhagen; Ministry of Justice, Rapport fra arbejdsgruppen om juridisk kønsskifte (27 February 2014) http://justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2014/Ra pport%20om%20juridisk%20k%C3%B8nsskifte.pdf> accessed 21 July 2016, 26. ⁷³ The Name Act 2012 (*Navneloven*) (DK), s 13 para 2, states that a first name 'may not denote the opposite sex/gender to the one that will bear the name'. The National Appeals Board (Ankestyrelsen) maintains a list of pre-approved male and female names. Names that are accepted as being gender-neutral feature on both lists. It is also possible to apply for authorisation to take a gender-neutral name which has not been pre-approved; see Ministry of Justice, Rapport (n 72) 23. ⁷⁴ Order regarding the Act on the Central Person Registry (9 January 2013) (Bekendtgørelse af lov om Det Centrale Personregister) (DK), s 3 para 5. ⁷⁵ Ministry of Justice, Rapport (n 72) 20. The compound nouns 'kønsskifte' and 'kønsmodificerende' appear interchangeably within official documentation of the 2014 reform process. 'Kønsskifte' translates most directly to 'sex/gender change'; but the terminology of 'sex change' is highly loaded – and has come under strong

required them to submit evidence that they had undergone removal of their uterus (hysterectomy) and both ovaries (bilateral oophorectomy), or penis (penectomy) and both testicles (orchiectomy). ⁷⁶ Genital reconstruction surgery was not a pre-requisite. ⁷⁷ Even after 2014, it remains the case that access to such procedures is dependent upon having been diagnosed with 'transsexualism'; ⁷⁸ a psychiatric diagnosis that can only be made following a sustained period of observation and evaluation at the Sexological Clinic (*Sexologisk Klinik*) of the National Hospital (*Rigshospitalet*) in Copenhagen. ⁷⁹

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critique within trans studies for neglecting how every transition will have its own duration and trajectory (including different 'beginning' and 'end' points); Julian Carter, 'Transition' (2014) 1(1-2) Transgender Studies Quarterly 235. The broader term 'transition' has been used to encompass the myriad ways in which trans people move across gendered boundaries, away from the gender they were assigned at birth – including in bodily aesthetics. Yet, for this very reason, the term 'transition' is too broad to convey with any specificity how kønsskifte is deployed within the 2014 reforms to refer to changes induced by medicine and law. I have therefore translated both kønsskifte and kønsmodificerende as 'sex/gender modification'; to provide a point of compromise between the need to capture the specific body modification procedures referred to within the official documentation, and the incentive to recognise that embodied transitions cannot be conceptualised as an isolated event. I am aware that employing the terminology of 'modification' to refer to the various hormonal and surgical body modification technologies understood as constitutive of sex/gender modification treatments itself risks reproducing instrumentalist understandings of such technologies as external to the body they are mutually entangled with; Nikki Sullivan, 'Somatechnics' (2014) 1(1-2) Transgender Studies Quarterly 187. Yet while, out of the available alternatives, 'somatechnologies' seems to counter this risk well - breaking down distinctions between the technologies that trans people use to transition and those which nontrans people rely upon when performing gender (or other aspects of embodiment) - this would not be appropriate here. To refer to 'somatechnologies' when interrogating the 2014 reforms might give the misleading impression that these wider technological apparatuses (razors, exercise equipment, the contraceptive pill) are understood as equally integral to processes of gendering within official documentation (such as the medical guidelines published by the Danish Ministry of Health and authored by the Danish Health and Medicines Authority). In fact, the opposite is the case; as it is those technologies more commonly understood as constitutive of 'sex/gender modification' treatments that are rendered exceptional, and subjected to heightened regulation, within the Danish regulations. ⁷⁶ Natalie Videbæk Munkholm, 'Legal Status of Transsexual and Transgender

⁷⁶ Natalie Videbæk Munkholm, 'Legal Status of Transsexual and Transgender Persons in Denmark' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 153.

⁷⁷ Munkholm (n 76) 153.

⁷⁸ 'Transsexualism' is currently defined in the World Health Organization's tenth 'International Statistical Classification of Diseases and Related Health Problems' as 'A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex'; WHO ICD-10, 'F64.0 Transsexualism' http://apps.who.int/classifications/icd10/browse/2015/en#/F64 accessed 22 May 2015.

⁷⁹ Ministry of Justice, *Rapport* (n 72) 8.

Denmark is a constitutional monarchy governed by representative parliamentary democracy. The legislature, the Danish Parliament (Folketinget), is based in Copenhagen. 80 Its 179 members (including 4 members from the Faroe Islands and Greenland) are elected by proportional representation in general elections that must be held at four year intervals.81 From 2011 to 2015, the Parliament was led by a of minority centre-left coalition the Social Democrats (Socialdemokratiet – S), the Social Liberal party (Radikale Venstre – RV) and the Socialist People's party (Socialistisk Folkeparti – SF). This coalition ruled with support from the left-wing Red-Green Alliance (Enhedslisten – EL), and three of the four parties representing the Faroe Islands and Greenland. This comprised the 'Red Bloc' (rød blok) of parliamentary parties. 82 From 2011 to 2015, the Government's official opposition was provided by the 'Blue Bloc' (blå blok): the Liberals (Venstre – V), the Danish People's party (Dansk Folkeparti – DF), the Liberal Alliance (*Liberal Alliance* – LA), and The Conservative People's party (Det Konservative Folkeparti – KF).

The legal process in Denmark is such that any member of the Parliament – from either bloc, Government or opposition – can propose a Bill (*Beslutningsforslag*) for consideration. Yet the possibility of such a Bill being passed is dependent upon it gaining a parliamentary majority in its support. Hence, while the question of gender recognition has been on the Danish parliamentary agenda for almost a decade (with Bills tabled in 2007, 2008, 2009, and 2010), ⁸³ it was not until the 2011 general election – when the incumbent centreright coalition Government of the Liberals and the Conservative People's party lost power to the Red Bloc – that it became likely that

^{80 &#}x27;About the Danish Parliament' (Folketinget)

http://www.thedanishparliament.dk/About_the_Danish_Parliament.aspx accessed 26 September 2016.

^{81 &#}x27;179 Members' (*Folketinget*)

http://www.thedanishparliament.dk/About_the_Danish_Parliament/179_Members. aspx> accessed 26 September 2016

⁸² Although the Red Bloc was bolstered by the addition of The Alternative party (*Alternativet* – ALT) in the 2015 General Election, this was not enough for them to retain control of the parliament, after the Blue Bloc secured 90 of the 179 seats.

⁸³ Munkholm (n 76) 151-152.

any of these Bills would become law. This suspicion was all but confirmed when the new centre-left coalition Government policy agreement document (*Regeringsgrundlaget*) included the first ever section on 'sex/gender equality'.⁸⁴ Here, the Government expressed a comprehensive commitment to 'examine the rules concerning sex/gender modification treatment, including opportunities to change legal sex/gender without the need for surgical intervention.'⁸⁵

Coincidentally, in the same month that the new Government published this policy commitment, trans issues - and one trans person in particular – briefly came to be the centre of attention of the Danish print media. In what became known as the 'Caspian case', 86 a story hit the news that a 15-year-old trans boy (named Caspian Drumm) had undergone a mastectomy at a private hospital in Odense, on the island of Fyn, in May 2011. In response to the media controversy that followed, Astrid Krag, the new Government's Minster of Health at the time, called for the Danish Health and Medicines Authority (DHMA) to investigate the existing healthcare regulations and practices concerning trans people's access to body modification technologies, and to determine whether the private hospital had 'acted responsibly'.87 By November 2012, the surgeon who had performed Caspian's mastectomy had been reprimanded by the DHMA Disciplinary Committee for failing to subject Caspian to sustained psychiatric assessment beforehand.⁸⁸ The DHMA then issued interim

⁸⁴ Prime Minister's Office, 'Et Danmark, Der Står Sammen' (October 2011) http://www.stm.dk/publikationer/Et_Danmark_der_staar_sammen_11/Regeringsgrundlag_okt_2011.pdf> accessed 20 August 2015.

⁸⁵ Prime Minister's Office (n 84) 66.

⁸⁶ Tobias Raun, 'The "Caspian Case" and Its Aftermath: Transgender People's use of Facebook to Engage Discriminatory Mainstream News Coverage in Denmark' in Jenny Björklund and Ursula Lindqvist (eds), *New Dimensions of Diversity in Nordic Culture and Society* (Cambridge Scholars Publishing 2016) 79.

⁸⁷ Raun, 'The "Caspian Case" and Its Aftermath' (n 86), citing 'Minister går nu ind i Caspian-sag' (*TV2 Nyhederne*, 15 October 2011)

http://nyhederne.tv2.dk/article.php/id-44674432:minister-går-nu-ind-i-caspiansag.html.

⁸⁸ Patients⁷ Ombudsman, 'Kritik for behandling – speciallæge i plastikkirurgi Jens Pilegaard Bjarnesen' (1 November 2012)

https://www.patientombuddet.dk/Afgoerelser_og_domme/Afgoerelser_fra_Sundhedsvaesenets_Disciplinaernaevn/Afgoerelser_med_navn/2012/1294528.aspx accessed 16 September 2015.

guidelines, which stated that, while they were working on the investigation demanded by the Government, medical practitioners were to refer all new trans patients, and all existing patients below the age of 18, to the Sexological Clinic in Copenhagen. ⁸⁹ This closed the legal loophole through which trans people in Denmark had been granted access to body modification technologies other than those associated with surgical castration through a small number of medical practitioners, working in the private sector, who had been willing to prescribe hormones and perform minor surgeries on an informed consent basis. ⁹⁰ In its place, a state monopoly was established; whereby all new and underage trans patients seeking access to body modification technologies would have to present themselves for sustained psychiatric assessment at the Sexological Clinic.

After the interim guidelines were published, an 'inter-ministerial working group on legal sex/gender change' (the working group) was established, in January 2013, to investigate how the Government's policy commitment to 'examine the rules concerning sex/gender modification treatment, including opportunities to have a legal sex/gender change without the need for surgical intervention' could be put into practice. 91 This working group was made up of representatives from the Ministry of Justice (Justitsministeriet), the Ministry of Health (Ministeriet for Sundhed og Forebyggelse), the Ministry of Equality and the Church (*Ministeriet for Ligestilling og Kirke*), the Ministry of the Economy and the Internal Affairs (\Omega konomi- og Indenrigsministeriet), and the Ministry of Social, Children and Integration Affairs (Social-, Børne- og Integrationsministeriet). It was given a mandate to 'develop and evaluate possible models for achieving legal sex/gender recognition in Denmark'. 92

⁸⁹ Danish Health and Medicines Authority, 'Behandling af transseksuelle' (23 November 2012) https://sundhedsstyrelsen.dk/da/nyheder/2012/behandling-aftransseksuelle accessed 30 November 2015.

 $^{^{90}}$ The creation, development, and closure of this legal loophole will be discussed in detail in Chapter 5.

⁹¹ Prime Minister's Office (n 84) 66.

⁹² Ministry of Justice, 'Kommissorium for tværministeriel arbejdsgruppe om udmøntning af regeringsgrundlagets afsnit om kønsskifte' (17 May 2013) https://panbloggen.files.wordpress.com/2013/05/kc3b8nsskifte-kommissorium-

One year later, in the same month as Amnesty International released a report criticising both the diagnostic process at the Sexological Clinic and the requirement that trans people had to be castrated before they could access legal gender recognition, 93 the working group published its report; proposing four different models for granting legal gender recognition — including one based upon the principles of self-declaration of legal gender status. 94 When the Government decided to implement this self-declaration model, a Bill was drafted for the purpose of 'assigning a new personal number to people who experience themselves as belonging to the other sex/gender'. 95 In June 2014, the Bill passed through the Danish Parliament, and a new subsection was inserted into the Act on the Central Person Registry: 96

The Ministry of the Economy and the Interior will issue, after a written application, a new CPR number to a person who experiences themselves as belonging to the other sex/gender. Assigning a new CPR number is conditional upon the person concerned making a written declaration that the desire for a new personal identity is based upon an experience of belonging to the other sex/gender, and that they confirm, in writing, this application following a reflection period of six months from the filing date. It is a further condition that, at the time of the application, the applicant is 18 years old. 97

The L 182 Law amending the Act on the Central Person Registry ('the CPR law') permits Danish residents to self-declare their legal gender status — irrespective of whether they have undergone medical treatment, or been granted a 'transsexualism' diagnosis.

jm.pdf&usg=ALkJrhjLszn-4IJPOaQMon8NdRzCGtYKSA> accessed 10 September 2015.

⁹³ 'The state decides who I am: Lack of legal gender recognition for transgender people in Europe' (*Amnesty International*, 4 February 2014)

https://www.amnesty.org/en/documents/EUR01/001/2014/en accessed 8 April 2015.

⁹⁴ Ministry of Justice, Rapport (n 72).

⁹⁵ Bill for amending the Act on the Central Person Registry (30 April 2014) (*Forslag til Lov om ændring af lov om Det Centrale Personregister*) (DK).

⁹⁶ After paragraph 5 (which provides for the assigning of a new CPR number for individuals who have errors in the information contained in their current one); Order regarding the Act on the Central Person Registry (n 74).

⁹⁷ L 182 (n 13), s 1; Order regarding the Act on the Central Person Registry (n 74), s 3 para 6.

As soon as the CPR law had been adopted, campaigners in the UK, ⁹⁸ and elsewhere in Europe, ⁹⁹ began celebrating its enactment. It was said to constitute the first European gender recognition legislation to respect the 'self-determination of the individual', ¹⁰⁰ and has been described as 'something revolutionary, yet very sensible' – for making Danish trans people 'the sole decision makers on their gender and body, without any conditions imposed by the state.' ¹⁰¹ The state of Denmark was itself congratulated for having 'pioneered another significant change in Europe'; ¹⁰² and 'other countries' were immediately encouraged to 'follow the Danish example'. ¹⁰³ The CPR law thus plays into Denmark's established reputation as a pioneer of liberalism, which dates back to the beginning of the 20th century.

When it comes to trans issues, Denmark's liberal reputation is based upon how it is linked with two of the earliest and most widely-reported instances of genital reconstruction surgery. The first of these involved the Danish artist Lili Elbe, who travelled to Germany to undergo a series of procedures in the 1920s and 1930s.¹⁰⁴ The second involved

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⁹⁸ Nathan Gale, 'Denmark Leads Europe on Gender Recognition' (*Scottish Trans*, 18 June 2014) http://www.scottishtrans.org/denmark-leads-europe-on-gender-recognition accessed 14 November 2014.

⁹⁹ 'Denmark goes Argentina! Denmark passes best legal gender recognition law in Europe' (*TGEU*, 11 June 2014) http://tgeu.org/denmark-goes-argentina accessed 8 February 2016.

¹⁰⁰ Arja Voipio, Co-Chair of TGEU, cited in 'Denmark goes Argentina!' (n 99); TGEU Statement, 'Historic Danish Gender Recognition Law comes into Force' (*TGEU*, 1 September 2014)

http://www.tgeu.org/TGEU_statement_Historic_Danish_Gender_Recognition_Law_comes_into_Force accessed 26 November 2014.

¹⁰¹ Dennis de Jong MEP, Vice-President of the LGBT Intergroup, cited in LGBT Press Network, 'Denmark becomes Europe's leading country on legal gender recognition' (*GayAsUs.com*, 14 June 2014)

http://gayasus.com/pub/2014/06/14/denmark-becomes-europes-leading-country-legal-gender-recognition/17> accessed 26 November 2014.

¹⁰² Gabi Calleja, Co-Chair of ILGA-Europe's Executive Board, cited in 'Denmark becomes the first European country to allow legal change of gender without clinical diagnosis' (*ILGA Europe*, 11 June 2014) http://www.ilga-

europe.org/home/news/for_media/media_releases/denmark_becomes_the_first_e uropean_country_to_allow_legal_change_of_gender_without_clinical_diagnosis> accessed 26 November 2014.

Julia Ehrt, TGEU Executive Director, cited in 'Denmark goes Argentina!' (n 99); see also: 'World must follow Denmark's example after landmark transgender law' (Amnesty International, 12 June 2014)

https://www.amnesty.org/en/latest/news/2014/06/denmark-transgender-law-accessed 25 September 2016.

¹⁰⁴ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

former US solider Christine Jorgensen, who underwent two widely-reported operations while visiting relatives in Denmark in 1951 and 1952. ¹⁰⁵ Denmark also has a strong international reputation for liberalism in areas relating to gender and sexuality more generally, having been the first state to legalise pornographic texts and images (in 1967 and 1969, respectively), ¹⁰⁶ and to introduce civil partnership legislation for gay and lesbian couples (in 1989). ¹⁰⁷ The reputation for 'sexual liberalism' has been described as constituting an important aspect of Danish 'self-understanding'. ¹⁰⁸ But while the international reception of the CPR law as 'the best' of its kind in Europe can be construed as playing into this narrative, domestic controversies – around the Caspian case, and the restriction of access to body modification technologies that followed – have motivated Danish communications scholar Tobias Raun to debunk what he calls 'the myth of liberal Denmark'. ¹⁰⁹

In December 2014, only months after the CPR law had been enacted, the DHMA replaced the interim guidelines that had been established following the Caspian case with new formal guidelines 'on the evaluation and treatment of transgender' ('the 2014 guidelines'). 110 These 2014 guidelines codify that 'sex/gender modification' treatments (such as hormone replacement treatment and various surgical operations) 111 can only be administered by a 'multidisciplinary team of collaborating specialists in psychiatry, obstetrics/gynaecology and plastic surgery, who have special knowledge of transgender patients'. 112 The result is that the *de jure* monopoly established following the Caspian case was abolished – as no explicit reference is

¹⁰⁵ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

¹⁰⁶ Christian Graugaard and others, 'Denmark' in Robert T Francoeur and Raymond J Noonan (eds), *The Continuum Complete International Encyclopaedia of Sexuality* (Continuum 2004) 330.

¹⁰⁷ Graugaard and others (n 106) 332.

¹⁰⁸ Raun, 'The "Caspian Case" and Its Aftermath' (n 86), citing Michael Nebeling Petersen, 'Somewhere Over the Rainbow: Biopolitiske rekonfigurationer af den homoseksuelle figure' (PhD thesis, University of Copenhagen 2012).

¹⁰⁹ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

¹¹⁰ Guideline no 10353 on the treatment of transgender (19 December 2014) (*Vejledning nr 10353 om udredning og behandling af transkønnede*) (DK).

¹¹¹ Guideline no 10353 (n 110), s 1.

¹¹² Guideline no 10353 (n 110), s 2.

made to the Sexological Clinic. However, a *de facto* state monopoly is effectively retained – as the Sexological Clinic is currently the only clinic with sufficient capacity to put together this multidisciplinary team and meet these requirements. In contrast to previous international commentators, then, when I refer to 'the 2014 reforms' that took place in Denmark, throughout this thesis, I will be referring to reforms of both civil and medical regulations concerning trans embodiment. includes not only the celebrated reforms of civil registration that were made by the CPR law, 113 but also the new 2014 guidelines concerning the processes authorising body modification access to technologies. 114 Finally, I also wish to include the less well-reported reforms of medical legislation by the L 189 Law amending the Health Act and the Act on Assisted Reproduction in connection with treatment, diagnosis, and research, etc. ('the amendment to the Health Act') introduced, as an independent Bill, after the CPR law in June 2014. 115

Chapter Outline

The thesis is structured in seven chapters. In Chapter 1, I have situated it in relation to relevant academic scholarship and legal practice, and contemporary debates around legislative reform. I began by explaining my decision to develop a jurisdictional analysis of legal embodiment, with a view to supplementing the existing critiques of the GRA 2004. I then explained how I have undertaken fieldwork which hopes to inform both activists and policymakers in a UK context, without conducting a comparative analysis *per se*. I ended by introducing the Danish regulatory background of the 2014 reforms, highlighting immediate concerns which I believe have justified my decision to conduct my fieldwork in Denmark.

¹¹³ L 182 (n 13).

¹¹⁴ Guideline no 10353 (n 110).

¹¹⁵ L 189 Law amending the Health Act and the Act on Assisted Reproduction in connection with treatment, diagnosis, and research, etc. (11 June 2014) (*L 189 Lov om ændring af sundhedsloven og lov om assisteret reproduktion i forbindelse med behandling, diagno stik og forskning m.v.*) (DK).

In Chapter 2, I build upon some of the points that I have made when situating the thesis thus far; fleshing out and justifying the theoretical framework that I have constructed to conduct this research. I expand upon my argument that a conceptualisation of legal embodiment is capable of addressing some of the complexities and effects of how gendered embodiment is regulated. Chapter 2 also supplements the embodiment literature by suggesting that it should consider contemporary developments in socio-legal studies and governance literature, particularly that relating to jurisdiction. Jurisdictional analysis, it will be argued, offers great insight here, particularly with regard to the institutional processes affecting legal embodiment.

Chapter 3 lays out this thesis's methodological basis. It begins by discussing my methodological approach; situating the categories of analysis discussed in Chapter 2 in relation to the methods through which they will be interrogated and examined. It introduces key elements, including legal consciousness and feminist ethics; as well as describing the ontological and epistemological perspectives that will be mobilised herein, and how these will be employed within the specific methods I have adopted. The chapter goes on to address my methodological framework; describing how the research was structured and carried out, and reflecting upon the effectiveness of decisions made in relation to the research questions detailed above.

The next three chapters present empirical findings and theoretical reflections from the fieldwork visit in Denmark. Chapter 4 comprises an investigation into how jurisdiction was arranged during the 2014 reform process. It charts the relationship between civil and medical regulations; noting how jurisdiction was mobilised throughout the 2014 reforms to sort and separate these institutions, to prevent the administrative reform of civil law from being considered alongside more holistic concerns of trans embodiment – including access to body modification technologies regulated in accordance with medical laws. This will be shown to have had a significant effect on the 2014 reforms from the perspective of those governed in accordance with them.

Chapter 5 conducts another jurisdictional analysis; this time addressing the amendment of medical regulations which form part of the 2014 reforms. It discusses how the medical jurisdiction of the DHMA expanded from 2006 to present, reading this analysis through governance literatures concerning professional organisations and institutional vulnerability. Borrowing from Valverde's research agenda, it assesses the rationalities and capacities of the institutions tasked with undertaking the practical work of regulating gendered embodiment in Denmark, comparing regulators' stated intentions with the effects that regulations appear to be having on an embodied level.

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Although it still concerns the question of how distinctions are made in the practice of governance, Chapter 6 moves away slightly from the previous chapters' focus on jurisdiction. Instead, it proceeds on a slightly more abstract level, to consider how the 2014 reforms might be read through an analytical lens built around feminist theories of embodiment. It finds that the implementation of self-declaration in Denmark has been premised upon mind/body dualism — with civil recognition granted to those who experience themselves as belonging to the other sex/gender, without any serious consideration being given to the ways in which this is likely to be shaped by embodied concerns.

The conclusion of this thesis, presented in Chapter 7, offers a moment for reflection; summarising the findings of the research, before asking what they mean for socio- and feminist and trans legal studies more broadly. After outlining my empirical, theoretical, and methodological contributions to the various literatures, I also attempt to develop some broader conclusions for scholars, activists and policymakers interested in the regulation of gendered embodiment — notably by supplementing my jurisdictional analysis with a bio-political governmentality perspective. This uncovers how regulatory population controls, such as the CPR law, relate to the nationalist agendas of the nation-state form. This has significances for those 'left behind' by law reforms, and perhaps for law reform in general.

2. Theorising legal embodiment

Introduction

In Chapter 1, I expressed concern that a failure to integrate the various critiques of the GRA 2004 into prospective reform proposals might ensure that the problems it has caused are ongoing long after legislators have lost their appetite for reform. I noted that little academic work has managed to synchronise existing critiques of the GRA 2004 to develop a conceptual framework capable of interrogating proposed reforms. In Chapter 1, I began developing such an analysis; drawing upon Cowan's finding that the GRA 2004 fails to confront 'the problem of the body', 116 and suggesting that this insight could be used to ground a critique of the GRA 2004 overall; including the problems it causes by reproducing binary dualisms between mind and body, gender and sex, male and female, hetero- and homo-sexuality. I went on to propose enhancing Cowan's critique; suggesting that it could be usefully supplemented by being read alongside feminist theories of embodiment – drawing together different spheres of experience into one category of analysis.

In this chapter, I flesh out, and present my justification for, this argument. As noted in Chapter 1, previous critiques of how gender is governed by the GRA 2004 have been framed from various different perspectives, centring around recognition of gendered citizenship, 117 intimate relations, 118 care ethics, 119 phenomenology, 120 and anti-discrimination. 121 And while the trope of being born in the 'wrong body' is highlighted in many of these accounts – drawing attention to how trans narratives are developed in relation to experiences of physicality – these issues are rarely theorised in relation to the critiques of

¹¹⁶ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

¹¹⁷ Hines, Gender Diversity (n 10).

¹¹⁸ Sanger, *Trans People's Partnerships* (n 9).

¹¹⁹ Hines, *TransForming gender* (n 8).

¹²⁰ Davy, Recognizing Transsexuals (n 11).

¹²¹ Sharpe, Foucault's Monsters (n 6).

mind/body dualism that have been developed in feminist theories of embodiment more generally. This chapter seeks to remedy this deficit, by considering the different embodiment literatures – emerging from feminist theory and feminist legal studies – together; drawing on their insights and addressing their limitations. By engaging with these embodiment literatures, I identify a tendency to underplay the extent to which institutional power-knowledges affect embodiment. This is particularly problematic for my present purpose of defining a specifically legal embodiment. The solution I propose in this chapter draws upon recent governance literature to develop a jurisdictional analysis of how embodiment is regulated in Denmark. This jurisdictional perspective offers insight into how institutional authorities shape embodied experience. By bringing together embodiment and jurisdiction literatures, I also highlight another way in which jurisdictional analysis might be mobilised; to investigate the interplay between rules and bodies, legality and embodiment.

I begin this chapter by reviewing alternative ways in which scholars have sought to encapsulate 'the problem of the body' through various decades of feminist theory. To structure this review, I adopt a taxonomy developed by feminist legal scholars Marie Fox and Thérèse Murphy; working through conceptions of 'the body', and 'bodies', before settling upon 'embodiment' as the analytical lens best suited to the critical interrogation of self-declaration which constitutes the substance of my empirical analysis. I go on to demonstrate how the embodiment literature could be reoriented to consider the ways in which institutional power-knowledges saturate and produce certain modes of embodiment by regulating forms of embodied action and reaction. Finally, drawing upon emerging governance literature,

¹²² I use the term 'power-knowledges' to gesture towards the interdependency of power and knowledge, particularly when the two are mobilised and inscribed within institutional arrangements; Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume One* (first published 1976, Robert Hurley tr, Penguin 1998). Valverde also refers to power-knowledges as governing 'assemblages', to acknowledge the 'combinations of capabilities and resources that do the work of governing', which – she adds – are often 'only partially planned'; Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015) 51, citing Saskia Sessen, *Territory, Authority, Rights* (Princeton University Press 2006)

and from Valverde in particular, I conclude this chapter by suggesting that these institutional factors might be better illuminated by considering how the regulation of gendered embodiment is structured through jurisdiction. In identifying this clear point of focus, I lay the theoretical grounds for the jurisdictional analysis which will be conducted in Chapters 4 and 5. Moreover, jurisdiction provides the necessary bridge between theory and methodology; which leads to me specifying exactly how it will be analysed in Chapter 3.

The problem of the body

The body, as feminist theorist Elizabeth Grosz has noted, has long constituted 'a conceptual blind spot' for both mainstream and feminist philosophy. 123 Until relatively recently, those seeking to conceptualise human subjectivity have tended to position 'the body' in opposition to its correlative - 'the mind' - from which it is assumed to be distinguishable. Theorists, as well as legislators and other policymakers, have tended to construe mind and body as separate entities, failing to consider that the two phenomena may be coconstitutive. As the literature review I conducted in Chapter 1 would suggest, dualistic conceptions of mind and body have rarely arisen in isolation from other dualisms. Just as I described mind/body dualism being mapped onto other binaries (sex/gender, male/female, hetero-/homo-sexual) in the workings of the GRA 2004, Grosz describes a dualistic conception of mind and body being mapped onto other dichotomies in the history of philosophy ('thought and extension, reason and passion, psychology and biology'). 124

5. A key example for the purposes of this thesis would be the amorphous and uncontainable interplay between different structures and agents governing legal embodiment; including psychiatric discourses, medical institutions, state legislators, and even individual trans people. Each of these subjects will inhibit power or resistance at some point – as all of them are constituted by power and resistance (on a discursive level at least).

¹²³ Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Indiana University Press 1994) 3.

¹²⁴ Grosz (n 123) 3.

Such divisions have rarely been drawn between equals. Instead, as befits binary thinking, 125 hierarchies have been imposed upon the two poles of the dichotomy, with one pole (the mind) constituting 'the privileged term', and the other pole (the body) becoming 'its suppressed, subordinated, negative counterpart.' Although Grosz traces the practice of separating mind and body back to the conception of philosophy as a self-contained discipline in ancient Greece; she accepts that it was the work of Enlightenment philosopher René Descartes (with whom the mind/body split is more famously associated) which placed them into the binary that subsequently saw the contents of the mind become privileged over and above the concerns of the body. 127 Grosz suggests that the clearest ongoing legacy of Cartesian thinking can be found in theoretical conceptions which construe the body as a means to an end; as an object, instrument or tool, or a 'vehicle for public expression'. 128

This is what feminist legal scholar Emily Grabham refers to as 'a propertied or sovereigntist understanding of embodiment as the subject's ownership and determination of the soma'. 129 Within sovereigntist conceptions, the body does little more than put into effect the mind's will and bidding. In the bioethics literature, which informs debates in healthcare law, such understandings are identified with what relationality theorist Catriona Mackenzie calls the 'maximal choice' conception of autonomy – conveyed by political slogans such as 'Whose body is it, anyway?' and 'My body, my property'. 130 These

As Grosz has noted: 'The problem of dichotomous thought is not the dominance of the pair [...]; rather, it is the *one* which makes it problematic, the fact that the one can allow itself no independent, autonomous other. All otherness is cast in the mould of sameness, with the primary term acting as the only autonomous or pseudo-autonomous term. The one allows no twos, threes, fours. It cannot tolerate any *other*. The one, in order to be a one, must draw a barrier or boundary around itself, in which case it is necessarily implicated in the establishment of a binary – inside/outside, presence/absence'; Grosz (n 123) 211 fn 1.

¹²⁶ Grosz (n 123) 3.

¹²⁷ Grosz (n 123) 6.

¹²⁸ Grosz (n 123) 8-9.

¹²⁹ Emily Grabham, 'Bodily Integrity and the Surgical Management of Intersex' (2012) 18(2) Body & Society 1, 3.

¹³⁰ Catriona Mackenzie, 'Conceptions of the Body and Conceptions of Autonomy in Bioethics' in Jackie Scully, Laurel Baldwin-Ragaven, and Petya Fitzpatrick (eds)

slogans seek to respond to instances in which marginalised subjects are reduced to their bare physicality, with a view to increasing their capability to choose how 'their' body is intervened upon. The understanding of the body as an object extends beyond healthcare law though, and has been said to be characteristic of law more generally. For, as legal scholars Ngaire Naffine and Rosemary Owens noted while interrogating the connections between sex and the legal subject, ¹³¹ legal scholarship and practice has focused on the content of minds, first and foremost, and only later to the actions of bodies. ¹³²

When the mind is deemed to be failing or deviant, authority over the body is transferred by law to other institutions or individuals. This can be seen in the case of healthcare law - in assessments of legal capacity which might lead to detention in mental health facilities; and in the practice of criminal law – in the use of prisons or other detention centres. At the same time, law has also asserted claims to autonomy and objectivity. The pursuit of such ideals has required law to distance itself from specific and bodily concerns – not least those relating to age, class, disability, ethnicity, gender, and sexuality. 133 For this reason, law has been criticised both for seeking, and failing, to divorce itself from the body - in a paradox that Marcia Neave describes as the founding concern of feminist legal scholarship. 134 trajectory, Fox and Murphy, would conceptualise such an intervention as an attempt to insert the body into legal studies - with the aim of contesting the ways in which it had hitherto been misrepresented, excluded, or simply omitted. 135

Feminist Bioethics: At the Center, On the Margins (Johns Hopkins University Press 2010) 71-90, 72.

¹³¹ Ngaire Naffine and Rosemary J Owens (eds), *Sexing the subject of law* (LBC 1997).

¹³² Ngaire Naffine and Rosemary J Owens, 'sexing law' in Naffine and Owens (n 131) 12.

¹³³ Marcia Neave, 'foreword' in Naffine and Owens (n 131) v.

¹³⁴ By seeking to expose the extent to which law discriminated against women, Neave describes feminist legal scholars seeking to challenge law for 'falling short in meeting its own claims about gender-neutrality and objectivity'; Neave (n 133) v. ¹³⁵ Marie Fox and Thérèse Murphy, 'The Body, Bodies, Embodiment: Feminist Legal Engagement with Health' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 250.

At least conceptually, an attempt to relocate the emphasis of law – from mind onto body – still works from within the mind/body dichotomy. Evoking feminist theorist Audre Lorde's famous assertion that 'the Master's tools will never dismantle the Master's House', ¹³⁶ legal theorist Nicola Lacey has warned that any attempt to redistribute privilege from mind onto body within feminist studies risks leaving unchallenged 'the priority of the mental over the material' in other fields and disciplines. ¹³⁷ If dualism is itself understood to be part of the problem, then perhaps the mind/body split ought to be deconstructed rather than inverted. And if deconstruction is the goal, then any attempt to re-appropriate the languages of 'mind' and 'body' risks reducing the former to wistful idealism and the latter to blunt materiality. ¹³⁸

Fox and Murphy add weight to this argument when they suggest that one of the central limitations of early feminist legal scholarship on the body was that it concerned itself with questions of difference rather than differences. *The* body that early feminist legal scholars sought to insert into healthcare law was a singular body; implying boundedness, unity, and coherency. Such a conception could clearly exclude many of those with trans experience – perhaps on each count. This body was also a female body (rather than male, trans, or otherwise), and harboured reproductive capabilities. In essence, Fox and Murphy suggest that scholarship on the body amounted to a feminism without flesh.

¹³⁶ Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in *Sister Outsider: Essays and Speeches* (Crossing Press 2007) 110.

¹³⁷ Nicola Lacey, 'on the subject of sexing the subject' in Naffine and Owens (n 131) 73.

¹³⁸ Lacey (n 137) 73.

¹³⁹ This point is evidenced by Grosz's own work on sexual difference; Grosz (n 123). Grosz's position has been criticised for dismissing trans experience as an impossibility; Raewyn Connell, 'Transsexual Women and Feminist Thought: Toward New Understanding and New Politics' (2012) 37(4) Signs: Journal of Women in Culture and Society 857, 863.

¹⁴⁰ It was not, therefore, one that was sterile, infertile, young or ageing; Fox and Murphy (n 135) 252.

¹⁴¹ Fox and Murphy (n 135) 253, citing Thérèse Murphy, 'Feminism on Flesh' (1997) 8 Law and Critique 37.

Critiquing gender recognition legislation from the perspective of 'the body' would come up against conceptual limitation for similar reasons. There is also a question of whether the body even needs to be included within legal studies, or whether it is already there (however implicitly). 142 Where the body is already present, it makes little sense to try to insert it. Within gender recognition legislation, the body is rarely concealed to any great extent. For example, the requirement to declare a trans history before getting married, 143 and the restriction of recognition only to those in receipt of a diagnosis of gender dysphoria, 144 suggest that the body is certainly present in the GRA 2004. By aligning medical and legal understandings of trans phenomena, the GRA 2004 simply adjusts the legal precedent that gender is 'fixed at birth', 145 to render mind and body conceptually distinct. This distinction may allow for subjective change of the former (mind), but the objective determinacy of the latter (body) remains.

If not 'the body', then, Fox and Murphy describe a shift in the trajectory of feminist legal scholarship towards 'bodies'. This shift is said to have seen a range of bodies – including but no longer limited to the reproductive female body – brought within the frame of feminist legal scholarship, enabling researchers to explore 'not only how different bodies are legally regulated in differing ways, but [also] how the same body is regulated differently at different stages of its life course.' 146 Along with younger, ageing, or otherwise marginalised bodies, bodies that were deemed anomalous and in need of correction, modification or prohibition came to the fore. 147 It was at this point that feminist legal scholars began to explicitly consider the regulation of trans bodies. 148

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¹⁴² This reflection is indebted to Michel Foucault's assertion that the social construct of the body has been woven into various paradigms of law and science since the birth of the modern state; see Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Michel Senellart ed, Graham Burchell tr, Picador 2008).

¹⁴³ Sharpe, 'A Return to the 'Truth' of the Past' (n 40) 259.

¹⁴⁴ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

¹⁴⁵ Corbett (n 23).

¹⁴⁶ Fox and Murphy (n 135) 253.

¹⁴⁷ Fox and Murphy (n 135) 255.

¹⁴⁸ Fox and Murphy (n 135) 255.

Although a conception of 'bodies' points towards plurality – shedding connotations of boundedness and coherency – it might still underplay, to an extent, both plasticity and agency. The reason for this is that a focus upon bodies still carries an implicit association with the objectifying tendencies of biological determinism; underestimating the extent to which regulation relates with mutable and unpredictable physicality. Moreover, commonplace linguistic associations with the term 'bodies' offer only a slight point of distinction from the language of the body. This shift to bodies harbours only a partially mitigated risk of reproducing mind/body dualism when compared to previous feminist legal scholarship on the body. 149

From bodies to embodiment

As they enter the third phase of their trajectory, Fox and Murphy describe how, after having brought bodies back into view, feminist legal scholarship has now been tasked with moving 'beyond bodies'. One strand of contemporary scholarship which seeks to do so takes 'embodiment' as its 'category of analysis'. This marks a point of contrast with previous conceptions; which have tended to construe the body, or bodies, as an object of analysis instead. As Fox and Murphy explain:

Focusing on embodiment shifts attention from the singular body, or even multiple bodies, as the objects of analysis by mandating a broader focus on lived experience and the question of how we inhabit and experience the world through our bodies. 152

Rather than theorising *about* the body or bodies, then – in an incongruously disembodied manner – embodiment requires scholarship to theorise *from* embodied experience instead. ¹⁵³ One advantage of the shift to embodiment is that the distance between the

¹⁴⁹ Ruth Fletcher, Marie Fox and Julie McCandless, 'Legal Embodiment: Analysing The Body of Healthcare Law' (2008) 16 Medical Law Review 321, 335.

¹⁵⁰ Fox and Murphy (n 135) 256.

¹⁵¹ Fletcher, Fox and McCandless (n 149) 321.

¹⁵² Fox and Murphy (n 135) 256.

¹⁵³ Simon J Williams and Gillian Bendelow, *The Lived Body: Sociological Themes, Embodied Issues* (Routledge 1998) 3.

researcher and that which is researched can be actively diminished – and in some cases even eliminated – as embodied concerns are more explicitly inserted into analytical frameworks. Another consequence is that the distance between mind and body may also be reduced; assuming the distinction is even retained after more dynamic interrelation between mentality and physicality have been allowed to emerge.

The language of embodiment is advocated as the most promising lens through which to challenge mind/body dualism within feminist theory more generally. Lacey, for instance, notes that while 'an adequate linguistic framework has yet to be attained, it is preferable to frame arguments in the language of 'embodied experience' rather than of the body or bodies as this better captures 'continuity between the corporeal, the psychic and the emotional.'155 Grosz agrees that while 'within our intellectual heritage' there is no language which completely avoids mind/body dualism, some kind of understanding of 'embodied *subjectivity* ought to be developed. 156 Scholarship conducted through a lens of embodiment appears more capable of illuminating the manner in which law values and validates certain bodies, as well as embodied forms of action or reaction; contesting representations of legal subjectivity 'as universal and disembodied'. 157 embodiment has the ability to acknowledge inconsistency and unpredictability, plasticity and difference; and to move away from, even work against, mind/body dualism. 158

While it is generally accepted that to start 'with embodiment' allows for critical interrogation of how embodied actions or reactions are 'cast as socio-culturally legitimate or transgressive', Fox and Murphy admit that the concept allows for many different approaches and therefore will

¹⁵⁴ I address my own subject position in the next section, and again in Chapter 3.

¹⁵⁵ Lacey (n 137) 73-74.

¹⁵⁶ Grosz (n 123) 21-22.

¹⁵⁷ Fox and Murphy (n 135) 256.

¹⁵⁸ Ruth Fletcher, 'Embodied Practices' (2009) 17 Feminist Legal Studies 315, 316.

vary considerably in practice. So as to justify my use of embodiment in this thesis, I will now work methodologically through these various approaches. By reading the feminist legal studies literature alongside wider theories of embodiment, I glean insights and explore tensions between the two literatures as I aim towards a definition of embodiment that can be employed for my present purposes.

When issues of embodiment have arisen in the existing literature on gender recognition, they have been read through slightly different theoretical lenses. This has led to the relationship between the existing socio-legal and sociological research into gender recognition being under-theorised in relation to feminist legal scholarship and wider feminist theory on embodiment. For instance, when Davy considers the effects of the GRA 2004 in relation to trans people's bodily aesthetics, she does so through a framework built around phenomenology – which is itself an important influence on feminist theories of embodiment. 160 Phenomenology has had a strong influence on feminist theories of embodiment (an influence that will be discussed, briefly, in this part of the chapter), which Davy duly identifies. Yet she does not explore how this relationship has been developed within feminist legal scholarship (despite her interest in the embodied effects of the GRA 2004). Another sociologist who has studied the effects of the GRA 2004, and worked more closely with the various legal critiques, is Sally Hines. And while issues of embodiment do arise in Hines's study, these are not theorised in relation to the corresponding embodiment literature, but alongside care 161 and citizenship¹⁶² literatures instead. Building upon this sociological work, I will now demonstrate how it is possible to use feminist legal scholarship on embodiment as a bridge between feminist theories of embodiment and legal critiques of the GRA 2004.

¹⁵⁹ Fox and Murphy (n 135) 257.

¹⁶⁰ Davy, Recognizing Transsexuals (n 11).

¹⁶¹ Hines, *TransForming gender* (n 8).

¹⁶² Hines, Gender Diversity (n 10).

In what follows of this chapter, I enhance these approaches by considering what the feminist legal studies literature deems to be the most important factors that must be encompassed within an embodiment framework, before reading these alongside both the wider feminist theoretical literature on embodiment, and the sociolegal critiques of the GRA 2004. Ruth Fletcher, Fox, and Julie McCandless, have suggested that the 'four key dimensions' of legal embodiment involve subjectivity, intersubjectivity, materiality, and symbolism.¹⁶³ This example from the embodiment literature will be supplemented by my suggestion that it ought to be slightly reorientated to consider institutional aspects of embodiment more explicitly – especially when they are concerned with legal embodiment. To this end, I develop a definition of embodiment that will be employed in the rest of this thesis, before laying down some pointers as to how this will be mobilised (which will then be explored more comprehensively in Chapter 3).

Subjectivity

For Fletcher, Fox, and McCandless, the first key dimension of legal embodiment concerns the different ways in which legal subjects value their own bodies. Within healthcare law, the issue of subjectivity has arisen most frequently when legal subjects have been permitted to undertake, or prohibited from undertaking, certain embodied actions (or reactions). And in the specific context of gender recognition, the importance of access to body modification technologies is dependent upon (among other factors) the subjective value a trans person places on their embodied characteristics – vis-à-vis the possibility of having these modified in one way or another. Traditionally, law has struggled to incorporate subjective value, in part because of its claim to objectivity, discussed above. This is particularly apparent in legislation; the primary function of which has been to set and uphold

¹⁶³ Fletcher, Fox and McCandless (n 149) 321.

¹⁶⁴ Fletcher, Fox and McCandless (n 149) 335-336.

¹⁶⁵ Fletcher, Fox and McCandless (n 149) 336.

general normative standards. Fletcher, Fox, and McCandless suggest that it is 'the impossibility of resolving epistemological questions about how to substantiate claims about subjective value, which partly explains why law remains wedded to objective standards.' 166

Such epistemological concerns – around what does or does not constitute a legitimate subjective claim - have not only caused problems for law. They have also concerned scholars of both embodiment and gender recognition, as turning to these two literatures makes abundantly clear. In the first part of this chapter, I cited Grosz advocating that scholars consider 'embodied subjectivity', 167 and Lacey 'embodied experience'. 168 While subjectivity and experience may be taken as synonyms elsewhere, distinctions between conceptions of subjectivity and experience have been proposed and contested for decades within the feminist theoretical literature. In an important intervention into the way experience has been used as 'evidence', Joan Scott has warned feminist scholars against taking experience as self-evident or constitutive of 'truth'. 169 If we are to better understand difference – as structurally and relationally constituted – Scott suggests we must study the historical processes that produce subjective experiences. ¹⁷⁰ For, Scott adds, 'It is not individuals who have experience, but subjects who are constituted through experience.'171 Scott's insight contains at least two important lessons. The first is that while experience is something clearly worth identifying and exploring, it is not something that can be reified and taken as authoritative knowledge. 172 The second is that subjectivity is not commensurate with experience - it exceeds it - as subjectivity encompasses various (Foucauldian) processes which shape and even produce the subject (and their subjective experience).

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¹⁶⁶ Fletcher, Fox and McCandless (n 149) 336.

¹⁶⁷ Grosz (n 123) 22.

¹⁶⁸ Lacey (n 137) 74.

¹⁶⁹ Joan W Scott, 'The Evidence of Experience' (1991) 17 Critical Inquiry 773.

¹⁷⁰ Scott (n 169) 779.

¹⁷¹ Scott (n 169) 779 (emphasis added).

¹⁷² Scott (n 169) 780.

Like Scott, Grosz takes great care not to conflate subjectivity and experience, developing a careful distinction through her engagement with the work of phenomenologist philosopher Maurice Merleau-Ponty. For Grosz, Merleau-Ponty's work occupies 'a unique position to provide a depth and sophistication to feminist attempts to harness experience in political evaluation.' ¹⁷³ This is because, while he 'refuses to relegate experience to an ineffable, unquestionable, given category' ¹⁷⁴ – outside of the influence of other (social, political, historical, cultural, etc.) fields – Merleau-Ponty still values experience 'as something to be explained.' ¹⁷⁵ Most importantly, for Grosz,

Merleau-Ponty locates experience midway between mind and body. Not only does he link experience to the privileged locus of consciousness; he also demonstrates that experience is always necessarily embodied, corporeally constituted, located in and as the subject's incarnation.¹⁷⁶

The nuanced strands of embodiment developed within phenomenology concur with Scott's suggestion that while subjectivity is constitutive of embodiment, it also encompasses more than experience – and must therefore be considered from different angles and perspectives, to incorporate structural as well as agential factors.

The positioning of embodied experience between mind and body also highlights a tension which has arisen within trans studies between narratives of personal experience and other factors that have shaped subjectivity. Instead of opposing mind/body dualisms, as I suggested would be important when framing this study, relying too straightforwardly upon reports of trans experience might even lead to it becoming complicit in replicating the mind/body dichotomy. The example of the 'wrong body' narrative, which frames current medical understandings of trans phenomena, is worthy of consideration here. As Cowan has noted:

¹⁷³ Grosz (n 123) 94.

¹⁷⁴ Grosz (n 123) 94.

¹⁷⁵ Grosz (n 123) 95.

¹⁷⁶ Grosz (n 123) 95.

Feeling that one's mind and body do not match, that one is in the 'wrong body' is not an uncommon way for transsexual people, or for those psychiatrists and other medial [sic] professionals who police the transgender boundaries, to understand and speak about the experience of what it means to be transsexual.¹⁷⁷

Bringing trans people's experiences of embodiment into this equation complicates any straightforward attempt to develop a non-dualistic conception of embodiment. If trans people report experiencing their mind and body as in conflict, and their experience is taken as indisputable, then this would unavoidably lead to the reproduction of mind/body dualism.

This conundrum demands a return to the first lesson of Scott's intervention. Scott argues that experience cannot be taken as self-evident or straightforward, but instead – like all categories of analysis – ought to be understood as 'contextual, contested, and contingent';¹⁷⁸ and 'always therefore political.'¹⁷⁹ Developing new conceptions of embodiment will therefore demand careful and politically-sensitive contextualisation of experience. Yet the politics around analysing experience, and specifically trans experience, are by no means uncontroversial.¹⁸⁰ The question of how to conduct analysis of trans phenomena with 'respectful curiosity' has been discussed at length in the trans studies literature. ¹⁸¹ The need to acknowledge 'the embodied experience of the speaking subject' is considered a normative imperative, ¹⁸² particularly when that research is being conducted by a researcher who, like myself, is 'cis'-identified. ¹⁸³ Without this, Raun suggests, the researcher risks neglecting

¹⁷⁷ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

¹⁷⁸ Scott (n 169) 796.

¹⁷⁹ Scott (n 169) 797.

¹⁸⁰ For a discussion of contemporary controversies, including in relation to the positioning of trans people within contemporary feminist movements, see Alison Phipps, 'Whose personal is more political? Experience in contemporary feminist politics' (2016) 17(3) Feminist Theory 303.

¹⁸¹ Raun, 'Trans as Contested Intelligibility' (n 4) 13.

¹⁸² Susan Stryker, '(De)Subjugated Knowledges: An Introduction to Transgender Studies' in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Routledge 2006) 12.

¹⁸³ This is not so much because cis researchers have no insight into trans experience, but because deconstructing trans identities without identifying as trans

an analysis of the individual renegotiation of self and body, or why one of the tropes is used (maybe strategically) or feels right, and not the other. To explore what function these different narratives serve in these people's life-projects would not only be analytically interesting, but also allow for the individual story 'to breathe.' 184

In the context of trans studies, Henry Rubin has argued that researchers 'should be wary of simple attempts to dismiss all experience as false consciousness'. A 'respectful' and politically-informed analysis of experience ought to consider how such subjectivities are shaped by structures and relations instead. 186

Within the regulation of trans embodiment, medical and legal regulations will always be paramount in this equation. In her discussion of mind/body dualism, Cowan cites the empirical research conducted by Hines as indicative of the extent to which the 'wrong body narrative' is complicated by the power dynamics inherent in trans people's relationships with gatekeepers to hormones and surgery. As her research participants portrayed keen awareness of the medical notions underpinning access to body modification, Hines found that the 'wrong body' narrative resulting from diagnoses of gender dysphoria was not a straightforwardly personal emotion but given at least partial meaning by social and political factors. 187 Hines's finding has subsequently been supplemented by Davy, who suggests that while trans people do exhibit agency in their pragmatic responses to medical discourses, this is particularly 'reflexive'. 188 Demonstrating an understanding of the conditions and requirements that would affect

can involve an element of 'othering' which may leave the researcher's own biases unexamined; Raun, 'Trans as Contested Intelligibility' (n 4) 18-19. For an explanation of how I use the term 'cis', see (n 5).

¹⁸⁴ Raun, 'Trans as Contested Intelligibility' (n 4) 18.

¹⁸⁵ Raun, 'Trans as Contested Intelligibility' (n 4) 19, citing Henry Rubin, *Self-Made Men: Identity and Embodiment Among Transsexual Men* (Vanderbilt University Press 2003) 12.

¹⁸⁶ Phipps (n 180).

¹⁸⁷ Cowan, 'Looking Back (To)wards the Body' (n 31) 248, citing Sally Hines, '(Trans)forming Gender: Social Change and Transgender Citizenship' (2007) 12(1) Sociological Research Online.

¹⁸⁸ Davy, 'Transsexual Agents' (n 22) 123.

their access to body modification technologies or legal gender recognition, participants in Davy's study acknowledged that their biographies would often require at least some manipulation if they were to secure practical benefits. ¹⁸⁹ Hence, situating trans embodiment between the extremes of voluntariness and internal fixity, Davy notes that her participants' agency and desire 'are imaginatively adapted through intersubjective validation by others and the social contexts in which people find themselves.' ¹⁹⁰

Intersubjectivity

The importance of validation developed through relational contexts draws discussion on to Fletcher, Fox, and McCandless's second dimension of embodiment: 'intersubjectivity'. Here, embodiment is valued for facilitating connection with other people and living entities; 'it has intersubjective or relational value.' ¹⁹¹ Such a focus, on intersubjectivity, qualifies without opposing previous consideration of subjectivity. By recognising that various kinds of bodily interventions require the help of others (for example, medical practitioners), ¹⁹² intersubjectivity challenges the individualisation of trans embodiment inherent in the 'wrong body' narrative that medicine itself promulgates, as Cowan has noted:

Treating the transsexual person as a medical subject, whose mind requires psychiatric intervention and whose body should if possible be surgically adjusted to reflect the deep-rooted internal sense of self, avoids the more pressing issue of the socio-political construction of the sexual self.¹⁹³

As in the work of Hines and Davy, stressing the importance of intersubjective aspects of embodiment situates medicine *within* the (relational) practice of embodiment; locating the embodied trans subject in relation to medical discourse and practice.

¹⁸⁹ Davy, 'Transsexual Agents' (n 22) 107, 123.

¹⁹⁰ Davy, Recognizing Transsexuals (n 11) 170.

¹⁹¹ Fletcher, Fox and McCandless (n 149) 337.

¹⁹² Fletcher, Fox and McCandless (n 149) 337.

¹⁹³ Cowan, 'Looking Back (To)wards the Body' (n 31) 248.

In an early predecessor of embodiment and affect theory, cultural theorist Elspeth Probyn addresses intersubjectivity as an important starting point for feminist theorising. Although Probyn insists that gender 'must be represented as processes that proceed through experience', ¹⁹⁴ she – like her contemporaries Scott and Grosz – stresses that this conception of experience cannot stand alone. Instead, she argues, it is important to understand experience as constituted by ontologically-informed accounts of existence *and* their epistemological limitations. Rejecting any opposition between ontology and epistemology, Probyn argues that the self – 'as a theoretical manoeuvring, not as a unifying principle' ¹⁹⁵ – must be understood as a mode of holding ontological and epistemological accounts of experience together. ¹⁹⁶

In her study of how the GRA 2004 has been experienced by trans subjects, Hines explores this tension between epistemological and ontological experience. She begins by addressing the positives of legal recognition, noting that a majority of her research participants reported feelings of social acceptance after having been awarded with a gender recognition certificate. However, this positivity with regard to ontology was tempered by an epistemological scepticism which emerged when participants were asked to reflect on what Hines calls the 'cause and effect' model of legal reformism — which expects cultural understandings and practices to shift in response to, and in direct accordance with, official changes in law and policy. This led most of Hines's participants to suggest that 'they were not so naive to think that the law would create total social harmony. Hines's methodological decision to employ qualitative interviews thus enabled

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¹⁹⁴ Elspeth Probyn, *Sexing the self: gendered positions in cultural studies* (Routledge 1993) 3.

¹⁹⁵ Probyn (n 194) 106.

¹⁹⁶ Probyn (n 194) 4.

¹⁹⁷ Hines, Gender Diversity (n 10).

¹⁹⁸ Hines, Gender Diversity (n 10) 22.

¹⁹⁹ Hines, *Gender Diversity* (n 10) 97.

²⁰⁰ Hines, Gender Diversity (n 10) 23.

her to probe *how* her participants responded when asked to reflect on the actual benefits of legal recognition. Having asked a more general question as to why participants saw the GRA 2004 as important, Hines went on to ask, more specifically and personally, why that interviewee had themselves sought recognition.²⁰¹ In response, many participants articulated strategic rather than symbolic reasons. 202 This allowed Hines to conclude that while the promotion of equality and diversity appeared to register as a benefit of recognition on an abstract level, her participants focused much more pragmatically on the practical legal benefits of the GRA 2004 on a more grounded, affective, level. 203

In a manner which concurs with Davy's characterisation of the process of engagement with legal and medical authorities as a 'negotiation', 204 Hines construes her participants as well-informed and capable of demonstrating 'reflexive awareness of legal restraints'. 205 example, one participant who rejected binary gender classification on a personal level was nevertheless successful in acquiring official recognition from the GRP.²⁰⁶ Explaining this apparent contradiction, this participant reflects that while she would not have ruled out 'elements of masculinity' on a personal level, the fact that she 'identifies more as female than male' enabled her to present a more coherent account which separates official classification from her otherwise 'gendered 'moods". 207 That Hines is able to report other participants distancing their subjective gender identity from that which is recorded on official registration documentation suggests that trans people - in accordance with Probyn's thesis - find themselves 'checking' official epistemological classification with ontological accounts of gender as subjectively experienced. 208

²⁰¹ Hines, Gender Diversity (n 10) 56.

²⁰² Hines, Gender Diversity (n 10) 56.

²⁰³ Hines, Gender Diversity (n 10) 56.

²⁰⁴ Davy, 'Transsexual Agents' (n 22) 125.

²⁰⁵ Hines, Gender Diversity (n 10) 56.

²⁰⁶ Hines, Gender Diversity (n 10) 56.

²⁰⁷ Hines, Gender Diversity (n 10) 56.

²⁰⁸ Hines, Gender Diversity (n 10) 57.

In a more direct commendation of Probyn's work, feminist theorist Clare Hemmings agrees that prioritising ontology or epistemology within research is to be avoided; for fear that this may result in 'an over-individualising account of subjectivity, or a determinist account of the social world and the modes through which it may be transformed'. 209 As Probyn argues, ontology and epistemology must be used with and against each other if a theory is to be elaborated in which social experiences are central to the material world.²¹⁰ On an ontological level, experience is instrumental in identifying the disjuncture that can appear between material and discursive aspects of the social; while on an epistemological level, experience draws forth an analysis of the material-discursive relations formed between that which is lived and that which is merely articulated.²¹¹ Meanwhile, these ontological moments of recognition are not left as self-evidently constitutive of knowledge, but are instead 'checked' by what Probyn calls 'the epistemological insistence precisely on theoretical exigency and social conjecture from and for which the self is spoken'. 212

Materiality

Discussing the interplay between discourse and the material world brings us to Fletcher, Fox, and McCandless's third dimension of embodiment: materiality. These authors define 'embodiment's material value' as 'the particular characteristics of objects whose value derives from their particularity and capacity to be developed.'²¹³ A dynamic definition of materiality allows it to sit alongside, without opposing, (inter)subjective dimensions of embodiment. Avoiding a tendency – identified in 'body theory' – to use materiality as a justification for re-asserting the need to return to biology,²¹⁴ this allows

²⁰⁹ Clare Hemmings, 'Affective solidarity: Feminist reflexivity and political transformation' (2012) 13(2) Feminist Theory 147, 149.

²¹⁰ Probyn (n 194) 21 (emphasis added).

²¹¹ Probyn (n 194) 22.

²¹² Probyn (n 194) 30-31.

²¹³ Fletcher, Fox and McCandless (n 149) 338.

²¹⁴ Chris Beasley and Carol Bacchi, 'Making politics fleshy: The ethic of social flesh' in Angelique Bletsas and Chris Beasley (eds), *Engaging with Carol Bacchi:* strategic interventions and exchanges (University of Adelaide Press 2012) 103.

the emphasis to remain on materiality as experienced socially – that is, both subjectively and intersubjectively. Insisting on the interdependency of materiality and sociality again allows the embodiment literature to develop in a way which challenges mind/body dualism. The work of feminist theorists Chris Beasley and Carol Bacchi is instructive. Drawing upon insights gleaned from the materiality of body theory, Beasley and Bacchi note that just as the mind cannot be considered separate from the body, neither can the self that emerges thereafter. 'We' are neither separate nor separable from our bodies; for 'we' neither control nor own them.²¹⁵ Instead, we simply 'are our bodies.'²¹⁶

Far from considering this material perspective in isolation, Beasley and Bacchi go on to explicitly politicise the material body. While they admit that the association with bodily material should be considered a resource rather than a limitation, they also concur with care ethics that 'sociality is embodied'. 217 This is even construed as an ontological perspective: 'embodied interconnection is the pre-existing condition of human life and therefore of sociality.' 218 Hence, while Probyn's account of feminist reflexivity would point back to the epistemological contingency which underscores this ontological perspective, Beasley and Bacchi look forward – stressing that what is done with this 'thin' social starting point will always be political. 219 In response to the critique of frameworks based around 'the body' (discussed in the previous section), they argue not for any body to be brought into citizenship theory, but rather a 'grounded' notion of the body as both plural (bodies) and lodged within its material and social particularities (embodiment). 220 Those bodies that have been 'conventionally

²¹⁵ Chris Beasley and Carol Bacchi, 'Citizen Bodies: embodying citizens – a feminist analysis' (2000) 2(3) International Feminist Journal of Politics 337, 344.

²¹⁶ Beasley and Bacchi, 'Citizen Bodies' (n 215) 344 (emphasis added).

²¹⁷ Chris Beasley and Carol Bacchi, 'Envisaging a new politics for an ethical future: Beyond trust, care and generosity – towards an ethic of 'social flesh" (2007) 8(3) Feminist Theory 279, 287.

²¹⁸ Beasley and Bacchi, 'Making politics fleshy' (n 214) 107.

²¹⁹ Beasley and Bacchi, 'Making politics fleshy' (n 214) 107.

²²⁰ Beasley and Bacchi, 'Citizen Bodies' (n 215) 349.

regarded as mired in biology, marginal or 'lacking", ²²¹ appear particularly well-suited to being made part of citizenship's participating subject. ²²²

To facilitate the inclusion of marginal bodies, Beasley and Bacchi posit a metaphor of 'social flesh' – highlighting 'embodied interdependence', and 'mutual reliance' – which could capture both the subjectivity, intersubjectivity and materiality of embodiment, without foreclosing transformative political possibilities:

Insistence upon this shared reliance underpins a profoundly levelling perspective, a radical politics, challenging the inadequacy of meliorist reforms that tinker at the edges of inequality.²²³

Their vision is therefore 'both about 'what *is*' and 'what *might be*'';²²⁴ 'a strategic political intervention' which challenges normative understandings of the body in society,²²⁵ and a piece of utopian imagery which opens up a realm of political possibilities. Social flesh thus accords with the understanding that bodies are both

'a constitutive part of who we are', and - importantly - who we may become. It [embodiment theory] encompasses more fluid visions of bodily integrity which, far from being static, accommodate the mutability and plasticity of bodies.²²⁶

In highlighting dynamism and plasticity in this way, Fox and Michael Thomson place an important caveat on attempts to understand the importance of embodied materiality. Like Beasley and Bacchi, they are wary that structuralist and materialist attempts to 'lodge' bodies within their material and social particularities have often been misunderstood or co-opted to stress biological determinism or fixity. The examples of trans and intersex people, excluded from citizenship

²²¹ Beasley and Bacchi, 'Citizen Bodies' (n 215) 350.

²²² Beasley and Bacchi, 'Citizen Bodies' (n 215) 349.

²²³ Beasley and Bacchi, 'Envisaging a new politics' (n 217) 280.

²²⁴ Beasley and Bacchi, 'Making politics fleshy' (n 214) 107.

²²⁵ Beasley and Bacchi, 'Making politics fleshy' (n 214) 103.

²²⁶ Marie Fox and Michael Thomson, 'Interrogating Bodily Integrity' (forthcoming) Journal of Law and Society, citing Eve Feder Kittay, 'Forever Small: The Strange Case of Ashley X' (2011) 26(3) Hypatia (2011) 610, 617.

on the basis of their bodies being in some way 'too' material,²²⁷ offer sufficient warning against the adoption of biological determinism here. By way of contrast, social flesh's mutable and fluid conception of embodiment appears well suited to the task of going 'beyond bodies'.²²⁸

One reason for this is that a critical conception of embodiment, which draws on social flesh, chimes with feminist theorist Drucilla Cornell's work on personhood. Cornell illustrates the importance of dynamism by tracing the etymology of the word 'person' back to the Latin persona (which literally means 'a shining-through'). 229 Drawing upon this tradition, Cornell defines 'a person' as something which 'shines through a mask'; in spite of the fact that the concept of the 'mask' is often most commonly associated with the word 'persona'. 230 This understanding of embodiment – as a process rather than an end state - challenges any conception of the body as an object. On these terms, a person can never be some thing which acts or is acted upon, but constitutes instead 'a possibility, an aspiration which, because it is that, can never be fulfilled once and for all. The person is, in other words, implicated in an endless process of working through personae.'231 'We', Cornell concludes, are not 'persons from the beginning', but rather 'creatures whose equal worth is postulated as personhood.'232

In the context of trans embodiment, Cornell's definition chimes with the phenomenological framework favoured by Grosz and Davy. By theorising the trans body through a framework based on bodily aesthetics rather than gender identity, Davy situates the trans body 'sociohistorically'; avoiding what she considers the mistaken understanding of trans as resulting from a purely internal identity.²³³

²²⁷ Emily Grabham, 'Citizen Bodies, Intersex Citizenship' (2007) 10(1) Sexualities 29, 43.

²²⁸ Fox and Murphy (n 135) 256.

²²⁹ Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography & Sexual Harassment* (Routledge 1995) 4.

²³⁰ Cornell (n 229) 4.

²³¹ Cornell (n 229) 5.

²³² Cornell (n 229) 18.

²³³ Davy, Recognizing Transsexuals (n 11) 5.

Trans embodiment emerges through a constitutive process of negotiation, rather than from an alignment between mind and body. Materiality meets subjectivity meets relationality, in the process of construing a holistic understanding of embodiment.

Though both Davy and Hines consider the 'wrong body' narrative as resulting from a mistaken framing of mind and body, they are careful not to deny the powerful effects that it may have when experienced subjectively. Hence, in addition to material, subjective, and intersubjective processes of embodiment, they accept that bodies will inevitably be shaped by cultural understandings. And at some stage of the embodiment process, symbolic meanings become culturally embodied. ²³⁴ This brings discussion on to Fletcher, Fox, and McCandless's fourth and final dimension of embodiment, which acknowledges that 'symbolic' understandings of the body must be recognised, even where they exceed or conflict with other values. ²³⁵

Symbolism

Embodiment relies upon symbolic value, and bodily perceptions are not only constructed in the material realm, but involve symbolic reflection on, and perception of, the body. With a view to conceiving of a body image in this way, Cornell sees the symbolic realm – which she calls the 'imaginary domain'²³⁶ – as a space central to the process of 'shining-through' personae.²³⁷ 'For a person to be able to shine through,' Cornell notes, 'she must first be able to imagine herself as whole even if she knows that she can never truly succeed in becoming whole.'²³⁸ This process of 'becoming a person' therefore depends on the 'psychic space of the imagination'.²³⁹

²³⁴ Fox and Thomson (n 226).

²³⁵ Fletcher, Fox and McCandless (n 149) 342.

²³⁶ Cornell (n 229).

²³⁷ Cornell (n 229) 4-5.

²³⁸ Cornell (n 229) 4-5.

²³⁹ Cornell (n 229) 232.

The idea that personhood requires working through different personae is echoed in Davy's decision to consider trans embodiment across three fluid sites; the 'social', 'sexual', and 'phenomenological'.²⁴⁰ The 'social body' is 'situated in various social spaces from which cultural meanings of other bodies may be incorporated';²⁴¹ and the importance of social symbolism is highlighted across the trans studies literature. Hines describes a majority of her participants reporting positive affective responses – including 'a renewed self-esteem and vitality'²⁴² – after being granted legal gender recognition under the GRA 2004. Such affects remain significant, even where they are 'checked' by a scepticism over whether law reform will benefit them in any substantive way (as was discussed, above, in the section on intersubjectivity).²⁴³

Davy's 'sexual body' presents itself in more intimate or sexualised situations 'in which people have sex or try to procure sex';²⁴⁴ while her 'phenomenological body' is said to refer to 'a semi-private site in which reflection; ideals, imagination and intentionality are grounded or fantasized.'²⁴⁵ In her work on 'imaginary anatomies', science and technology studies (STS) scholar Catherine Waldby agrees with Davy that the morphology of the body – or in Cornell's terms, the form that the body takes as it works through personae – cannot be dissociated with the 'psychic investment' of the subject who 'lives that body.'²⁴⁶ Imaginations produce anatomies which are thereby positioned

in relation both to its love objects, those whom it desires, and to socially generated 'imaginary anatomies', to ideas about bodies which circulate in the culture. The 'imaginary anatomies' of sexual difference can be regarded as indicative of certain historically available forms of desire.²⁴⁷

²⁴⁰ Davy, *Recognizing Transsexuals* (n 11) 10.

²⁴¹ Davy, Recognizing Transsexuals (n 11) 10.

²⁴² Hines, Gender Diversity (n 10) 23.

²⁴³ Hines, Gender Diversity (n 10) 97.

²⁴⁴ Davy, Recognizing Transsexuals (n 11) 10.

²⁴⁵ Davy, Recognizing Transsexuals (n 11) 11.

 ²⁴⁶ Catherine Waldby, 'Destruction: Boundary erotics and refigurations of the heterosexual male body' in Elizabeth Grosz and Elspeth Probyn (eds), Sexy Bodies: The strange carnalities of feminism (Routledge 1996) 268.
 ²⁴⁷ Waldby (n 246) 268.

This argument is used to illustrate Waldby's point that the animation of the physical body can only take place in a particular historical and social context.²⁴⁸ Davy augments this understanding by engaging with Merleau-Ponty's claim that 'subjectivity is only possible through the construction of a coherent body image'.²⁴⁹ Yet Davy takes care to note that a 'coherent' body image does not necessarily mean a normative one. ²⁵⁰ Instead, as in Waldby's formulation, coherency will be contextually dependent. In the 'wrong body' narrative, for example, it becomes unclear what the coherent opposite of the 'wrong body' would be. Challenging the idea of a 'right body', Davy asks: 'At what point is the body right? Can embodiment ever feel right?'²⁵¹

Legal scholar Nicolette Priaulx offers one response to Davy's provocation. Priaulx suggests that symbolic conceptions of bodily integrity – such as 'the right body', or any 'propertied or sovereigntist understanding of embodiment as the subject's ownership and determination of the soma'²⁵² – are not valuable in and of themselves, but rather for the opportunities that they may open up for people 'to craft their own sense of identity, to pursue their talents and quite simply, for fostering their 'own' sense of the good life.'²⁵³ Davy's trans subject could therefore be granted the opportunity to develop a personal narrative of embodiment without having to dwell on the question of whether their body is 'right' or 'wrong', as Priaulx suggests that

being able to take one's body more or less for granted (quite irrespective of what one's existing physical state actually is), rather than being conscious of and consumed by one's physicality all the time, is what is best captured by bodily integrity. It is a sense of self, a stable platform for pursuing one's plans, [rather] than an actual descriptor of our physicality.²⁵⁴

²⁴⁸ Waldby (n 246) 268.

²⁴⁹ Davy, *Recognizing Transsexuals* (n 11) 66, citing Maurice Merleau-Ponty, *Phenomenology of Perception* (C Smith tr, Routledge Classics 2002).

²⁵⁰ Davy, Recognizing Transsexuals (n 11) 66.

²⁵¹ Davy, Recognizing Transsexuals (n 11) 53.

²⁵² Grabham, 'Bodily Integrity' (n 129) 3.

²⁵³ Nicolette Priaulx, 'Rethinking Progenitive Conflict: Why Reproductive Autonomy *Matters*' (2008) 16 Medical Law Review 169, 183.

²⁵⁴ Priaulx (n 253) 185.

This goal of promoting bodily integrity as a 'stable platform' arguably constitutes the most practical ideal for regulations which aim to be supportive of embodiment. Rather than offering false hope and optimism, it restricts itself to a minimum standard marked by the understanding that legal protections can only ever be partial and limited. Yet it still looks beyond present conditions, offering a clear mandate for legal intervention in situations where authoritative powerknowledges require (or simply leave) subjects to become 'consumed' by their physicality. Citing Priaulx, Fox and Thomson endorse a conception of bodily integrity that encompasses 'not only decisions to modify our bodies but [also] emphasise the importance of being able to forget our bodies.'255 The possibility of forgetting the body, and simply being embodied, 256 may or may not be achieved via body modification. But the idea of bodily integrity promoted by the stable platform implies that the concern of those regulating access to body modification technologies ought to be to develop supported decisionmaking – through 'reflection and dialogue' 257 – more than either complete freedom of choice or paternalistic gatekeeping restrictions.

In this respect, Priaulx's idea of the stable platform touches on an important aspect of embodiment not explicitly stressed within Fletcher, Fox, and McCandless's typology, or much of the embodiment literature. This concerns the institutional aspects of embodiment – and addresses how institutions either support or encumber embodied subjects on their route to forgetting about their bodies. In some scenarios, being granted institutional support may involve being granted authorisation to undertake an affirmative action – such as body modification. In others, supportive regulation could require institutions to refrain from one course of action or another – by way of acknowledging how certain modes of governance adversely affect

²⁵⁵ Fox and Thomson (n 226).

²⁵⁶ This both echoes and supplements Beasley and Bacchi's suggestion that we simply 'are our bodies'; Beasley and Bacchi, 'Citizen Bodies' (n 215) 344. ²⁵⁷ John Harrington, 'Time as a dimension of medical law' (2012) 20 Medical Law Review 491, 514, citing AR Maclean, 'Autonomy, Consent and Persuasion' (2006) 13 EJHL 321.

embodiment. In the following section, I emphasise the importance of these institutional dimensions, concluding that they should be explicitly inserted into my definition of legal embodiment.

Institutions

Within a Foucauldian framework - commonly employed in various areas of embodiment and governance scholarship (including governmentality studies, socio-legal scholarship, feminist legal studies, and wider feminist theory) - the individual subject should not be construed as bound by regulation in the classical liberal sense.²⁵⁸ Instead, Foucault supplemented the Nietzschean understanding of the individual as made free by regulation with his own insight the individual subject is more accurately understood as *constituted by* regulation;²⁵⁹ given that it is impossible to identify the existence of an individual before the concept of 'the individual' was discursively constructed. This draws upon Foucault's understanding of power as productive, emerging from his analysis of the 19th century medicalisation of homosexuality. ²⁶⁰ Prior to this point, civil and canon law had understood the practice of sodomy one of a range of forbidden acts. Then, at this point in history, medical discourses of 'homosexuality' produced a 'homosexual' subject position; as a range of 'scattered sexualities rigidified' and became stuck to the homosexual body. 261

The idea that all forms of embodiment are always already regulated (in terms of which forms of embodied action or reaction are permitted or prohibited, supported or discouraged, within regulatory frameworks) is a useful premise. ²⁶² However, as I noted in Chapter 1, legal

²⁵⁸ As developed, for example, in John Locke, *Second Treatise of Government* (first published 1690, Hackett 1980).

²⁵⁹ For an early formulation of this theory see Michel Foucault, *Discipline and Punish: The Birth of the Prison* (first published 1975, Alan Sheridan tr, Penguin 1991) 202-203. A later elaboration can be found at Foucault, *The Will to Knowledge* (n 122) 48.

²⁶⁰ Foucault, *The Will to Knowledge* (n 122) 42-43.

²⁶¹ Foucault, *The Will to Knowledge* (n 122) 48.

²⁶² So although trans embodiment was addressed by UK statutory law before the GRA 2004, trans people still brought cases concerning their being denied rights (most commonly to marriage); see Robert Reed, 'Transsexuals and European

embodiment studies proceed from a slightly different point of departure. Inspired by feminist epistemology, legal embodiment looks beyond the production of bodies in discourse to consider the subsequent processes which fill bodies with meaning. The emphasis on the discursive realm is reduced just enough to account for (inter)subjectivity (how discourse is structured and experienced) and materiality (how subjectivity will be affected by materials that existed before the body was discursively produced). Beyond exploring how discourses produce certain bodies, then, legal embodiment concerns itself with the moment at which regulations *saturate* bodies.²⁶³

From this position, my definition of legal embodiment draws upon the literature on legal pluralism to acknowledge that permission to perform such embodied (re)actions must be sought not from some singular authority ('the state'), but from one or more of a range of diverse state, and non-state, formal and informal, institutions. ²⁶⁴ These include both public and private institutions, as well as hybrid organisations which blur the public/private distinction. ²⁶⁵ The trans studies literature suggests that it is in their relations with this level of institution, rather than a singular monolithic state, that trans people have reported experiencing discrimination and exclusion. ²⁶⁶ These will include civil registration systems, ²⁶⁷ but also the labour market, ²⁶⁸ the family, ²⁶⁹ and the clinical setting. ²⁷⁰

Human Rights Law' in Helmut Graupner and Phillip Tahmindjis (eds), Sexuality and Human Rights: A Global Overview (Harrington Park Press 2005) 49, 56.

²⁶³ I thank Olga Cielemęcka for helping me formulate legal embodiment in this way. Rosie Harding, *Regulating Sexuality: Legal consciousness in lesbian and gay lives* (Routledge 2011) 29-30.

²⁶⁵ Valverde, *Chronotopes of Law* (n 122) 83.

²⁶⁶ Connell (n 139) 865.

²⁶⁷ In a UK context, this exceeds the GRP. For a discussion of civil registration in the UK before the GRA 2004; see Sharpe, *Transgender Jurisprudence* (n 20). For evidence of discrimination thereafter; see Hines, *Gender Diversity* (n 10).

²⁶⁸ Dan Irving, 'Normalized Transgressions: Legitimizing the Transsexual Body as Productive' (2008) 100(1) Radical History Review 38.

²⁶⁹ Taylor Flynn, 'The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families' in Paisley Currah, Richard M Juang, and Shannon P Minter (eds), *Transgender Rights* (University of Minnesota Press 2006).

²⁷⁰ Sonja J Ellis, Louis Bailey, and Jay McNeil, 'Trans People's Experiences of Mental Health and Gender Identity Services: A UK Study' (2015) 19 Journal of Gay & Lesbian Mental Health 4.

Within clinics, for example, medical professionals have been described as wielding the

social power to determine what is considered sick or healthy, normal or pathological, sane or insane – and thus, often, to transform potentially neutral forms of human difference into unjust and oppressive social hierarchies.²⁷¹

In this light, attempts to position gender recognition disputes as taking place between an 'individual' trans person and 'the' state appear simplistic. And while the question of how trans people negotiate such discourses has been discussed under the dimensions of embodiment proposed by Fletcher, Fox, and McCandless, above, I suggest that it may merit being considered through a separate lens altogether. Whether the key dimensions of embodiment are conceptualised as they are by these authors (as subjective, intersubjective, material, and symbolic), or more succinctly, as they are within much of the feminist theoretical literature (where embodiment is conceived as 'material-discursive'),²⁷² it is my concern that relations between subjects and institutions may be obscured.

Yet when it comes to institutional power-knowledges – such as medicine, which have quasi-legal, if not fully legal, authority in the regulation of embodiment – it would seem remiss to underplay this relation as 'just' another discourse. It is not my intention to reignite feminist theoretical debates around whether powerful discourses can be written off as 'merely' cultural, particularly when the effects of the discursive realm can be so far reaching.²⁷³ It is merely to suggest that

²⁷¹ Susan Stryker, *Transgender History* (Seal Press 2008) 36.

²⁷² The neologism 'material-discursive' was coined by theoretical physicist and feminist theorist Karen Barad; see Barad (n 21) 822-823. Material-discursive analysis is, however, compatible with a number of theoretical perspectives, other than the post-humanism favoured by Barad; see Nikki Sullivan, 'The somatechnics of perception and the matter of the non/human: A critical response to the new materialism' (2012) 19(3) European Journal of Women's Studies 299.
²⁷³ This echoes the charge, associated with Nancy Fraser, that Judith Butler's conception of gender lacks a material basis, and is therefore 'merely cultural'; Nancy Fraser, *Justice Interruptus: Rethinking Key concepts of a Post-Socialist Age* (Routledge 1997). For a defence of Butler's work against this charge, see Elena Loizidou, 'The Body Figural and Material in the work of Judith Butler' (2008) 28 Australian Feminist Legal Journal 29.

it may be worth considering the institutional realm as somewhat distinct from the discourses that it is involved in producing; particularly when we are seeking to conceptualise a specifically legal embodiment. Drawing upon the many insights of the feminist theoretical, feminist legal, and trans studies scholarship detailed above, I have hereby developed a definition of legal embodiment; as an ontological and epistemological process of becoming which occurs at the intersection of subjective and intersubjective (discursive), material, symbolic, and institutional realms. ²⁷⁴ Legal embodiment thus illuminates the processes through which regulations constitute and saturate bodies, and where regulatory power meets embodied resistance. It addresses the question of how embodiment is affected by, and in turn affects, institutional power-knowledges and governing assemblages.

In developing this definition, I have stressed that while consideration of 'the body' or 'bodies', may neglect subjective, intersubjective, material and symbolic experiences of personhood, a critical conception of embodiment seems more capable of holding all these insights in productive tension. Moreover, by emphasising the importance of the institutional realm alongside these other dimensions of embodiment, I have developed a specifically 'legal' (albeit legally pluralist) framework, which I consider better suited to attending to the regulatory practices governing gendered embodiment. This definition harbours the capacity to move away from the theoretical constraints of mind/body dualism, developing an alternative (political) conception of embodiment as the process through which people are or are not granted a stable platform from which to access full legal subjectivity; insisting upon material (relational, fleshy), discursive (social, symbolic), and institutional (financial, practical) elements of this experience.

When developing this definition of legal embodiment through my specific engagement with how gender is being regulated in Denmark, it is by stressing its specifically legal orientation that I seek to

²⁷⁴ Sam Lewis and Michael Thomson, 'Corporeal or Embodied Humanisms' (Law & Society Association Annual Meeting, New Orleans, June 2016).

supplement the existing legal and sociological literature. Cornell's argument that legal provisions are required to guarantee 'the equivalent bases for this chance to transform ourselves into the individuated beings we think of as persons' is considered important.²⁷⁵ So too is her understanding of embodiment as 'an endless process of working through' which requires each legal subject to be granted 'the chance to take on this struggle in his or her own unique way.'²⁷⁶ The equal worth of each subject must 'be legally guaranteed, at least in part, in the name of the equivalent chance to take on that project.'²⁷⁷ This implies the need for the stable platform discussed by Priaulx.

Understanding embodiment as it is specifically affected by the practices of institutional power-knowledges including law and medicine will require analysis of the practical enactment and enforcement of institutional regulations. As Valverde has noted, what distinguishes Foucault's approach from previous analyses of institutions (such as sociologist Erving Goffman's) is that there is nothing more to institutions than their actual practices of governance:

Institutions are only coagulations or 'densifications' of certain assemblages of practices which are also found in other institutions, Foucault opines.²⁷⁸

It is therefore important to focus upon the actual practices promoted and shaped by institutional power-knowledges, more than on the particularities of the specific institutions themselves. This approach to legal embodiment – centring on institutional practices – gains support from the various literatures upon which I am drawing. From feminist theory, it does so implicitly, following the lead embodiment theorists who refuse to confine themselves to material or discursive realms, focussing on how institutional practices shape embodiment as well.²⁷⁹

²⁷⁵ Cornell (n 229) 5.

²⁷⁶ Cornell (n 229) 5.

²⁷⁷ Cornell (n 229) 4-5.

²⁷⁸ Mariana Valverde, 'Genealogies of European states: Foucauldian reflections' (2007) 36(1) Economy and Society 159, 161, citing Michel Foucault, *Sécurité, territoire, population: cours au Collège de France 1977-78* (Gallimard 2005) 121.
²⁷⁹ A recent discussion of the multiple institutions involved in regulating the embodiment of Paralympian athletes (including official Paralympic rules and

The importance of institutional practices has been discussed more explicitly within trans studies, particularly among advocates who wish to move research beyond the exploration of trans identity formations. Raewyn Connell, for example, has urged researchers to concentrate instead upon the institutional relations in which trans people (and specifically, for Connell, transsexual women) are embedded. 280 Approaching the question of legal embodiment from an institutional perspective also draws support from feminist legal scholars such as Fox and Murphy, who have implored researchers to engage more directly with the position of law within the wider regulatory environment. They formulate a plea for feminist legal scholarship ('FLS') to reach 'beyond law reform', and even beyond the state, to consider the role of institutions that 'act as, or instead of, the state' – particularly when attention turns to informal, and increasingly participatory, decisionmaking about access to treatment and health.²⁸¹ These issues invite further questions about resource allocation - both for treatment and research.²⁸² Hence, Fox and Murphy note

FLS, in short, faces a future where not just law but also governance must be an object of inquiry. One might even say that the broader field of feminist governance studies rather than FLS is where we ought to be headed.²⁸³

Focussing upon the manner in which embodiment intersects with institutional power-knowledges appears particularly well suited to such an agenda. On the one hand, by emphasising the role of institutions within processes of embodiment more explicitly than has been done previously, it centres questions of regulation more concretely than embodiment literatures have tended to do before. In this respect, my analysis of embodiment will be more specifically legal – in the pluralist

regulations, specific national benefits systems which either support or impede embodiment, and the transport system facilitating travel between accommodation and the stadium) provides one good example of how institutional embodiment could be interrogated; Margrit Shildrick, "Why Should Our Bodies End at the Skin?": Embodiment, Boundaries, and Somatechnics' (2015) 30(1) Hypatia 20.

²⁸⁰ Connell (n 139) 863-866.

²⁸¹ Fox and Murphy (n 135) 259.

²⁸² Fox and Murphy (n 135) 259.

²⁸³ Fox and Murphy (n 135) 259.

sense of being both normative and regulatory – than those that have been conducted to date. Yet on the other hand, maintaining a focus on institutional practices will also allow me to go beyond what is often ascribed as law – to include other institutional power-knowledges that do the work of governing, without being understood as 'legal' authorities in the traditional sense.

To help me do so in this thesis, I have supplemented my engagement with the embodiment literatures by drawing additionally upon emerging governance literatures on jurisdiction and the professions. My reasoning for doing so is that jurisdictional analysis centres upon the qualitative aspects of decision making processes, illuminating how governance is carried out in practice. In addition, by focusing upon governance, rather than simply law or legislation, jurisdictional analysis is attentive to law's place within the regulatory frameworks – and is particularly useful for identifying quasi-state formations tasked with doing the practical work of governing.

Jurisdiction

Jurisdiction is a practical legal technology which organises legal relations so that various institutions are able to perform the work of governance. 284 It has been subject to various definitions, but is generally understood as facilitating the authority 'to declare the law'. 285 The practical technology of jurisdiction has become the subject of increasing academic interest within recent socio-legal studies literature. Much of this can be traced back to the work of Valverde; who, after undertaking a series of research projects examining governance in practice, became dissatisfied with the analytical tools previously offered by governance literature. 286 Valverde criticises

²⁸⁴ Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge 2012) 4, 14. ²⁸⁵ Thomas Hobbes, 'A Dialogue of the Common Law', in William Molesworth (ed), *The English Works of Thomas Hobbes*, vol 6 (Bohn 1839) 118. This draws upon the term's Latin etymology: as the genitive of *jūs* ('law') and *dictio*; a noun of action ('to say, declare').

²⁸⁶ It ought to be noted that Valverde has also suggested a range of other modes of analysing a governance project; several of which she most recently located under

governance theorists for becoming 'obsessed' in their search for a sovereign power in order to account for regulatory authority.²⁸⁷ This search has led to researchers over-emphasising the unifying power of law; as that which delineates distinct territories, before allocating the responsibility to govern these territories to discrete, identifiable, authorities. Such searches are conducted in ignorance of the fact that the Hobbesian sovereign – with a 'unified, compete jurisdiction' – has never existed, even in a dictatorship.²⁸⁸ By failing to attend to the fragmented and plural practice of jurisdiction, Valverde charges governance studies with having underestimated the extent to which conflict and contestation bubble underneath what might seem – at first glance – to be a smoothly functioning governance arrangement.²⁸⁹

To an extent, Valverde's critique of the governance literature can be applied to the literature on gender recognition. For although trans scholars have been attentive to the complexities of power relations elsewhere, critics of the GRA 2004 have tended to stress the unity of medical and legal power-knowledges. Cowan describes medical institutions being granted a 'stamp of statutory authority' when the diagnosis of gender dysphoria was included as a pre-requisite to being granted gender recognition;²⁹⁰ whereas Davy employs the idea of a 'medicolegal alliance' in an attempt to capture how medical and legal institutions became re-aligned following the GRA 2004's enactment into law. ²⁹¹ As Valverde convincingly argues, such unifying conceptions of sovereignty are never likely to grasp how various institutions compete for or avoid the responsibility for governing at different times and in different places. Jurisdictional analysis provides an alternative through which latent conflicts may be illuminated:

a comprehensive understanding of scale (as encompassing spatial, temporal, affective, and aesthetic dimensions); Valverde, *Chronotopes of Law* (n 122).

²⁸⁷ Mariana Valverde, 'Jurisdiction and Scale: Legal `Technicalities' as Resources for Theory' (2009) 18 Social & Legal Studies 139, 145.

²⁸⁸ Mariana Valverde, 'Studying the governance of crime and security: Space, time and jurisdiction' (2014) 14(4) Criminology & Criminal Justice 379, 387.

²⁸⁹ Valverde, *Chronotopes of Law* (n 122) 84.

²⁹⁰ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

²⁹¹ Davy, 'Transsexual Agents' (n 22) 119.

governing projects and the power-knowledges that make them work are differentiated from one another and kept from overtly clashing by the workings of the machinery of 'jurisdiction', which instantly sorts governance processes, knowledges, and powers into their proper slots as if by magic, and sets up a chain by which (most of the time) deciding who governs where effectively decides how governance will happen.²⁹²

Instead of searching for sovereignty, Valverde proposes concentrating on the various uses of jurisdiction; a technology which 'distinguishes more than territories and authorities, more than the where and the who of governance', including 'the 'what' of governance — and, most importantly because of its relative invisibility, the 'how' of governance.'²⁹³ A hierarchy plays out as a four-step 'chain reaction':

- 1. where: territories:
- 2. who: authorities (whether sovereign, delegated, or private);
- 3. what: the objects of governance (e.g. potholes are municipal, aboriginal reserves are federal);
- 4. how which in turn has two dimensions:
- (a) governing capacities, and
- (b) rationalities of governance.²⁹⁴

Valverde gives the example of a dispute concerning jurisdiction over a hypothetical supply of fish. If these fish were found to have been in Canadian rather than international waters, then they would 'automatically' come under the jurisdiction of Canadian authorities. This would probably see them governed in accordance with a logic of 'natural resources', with extraneous factors such as unemployment in East Coast fishing villages factored into the equation. The decision of *where* the fish are located determines not only *who* they will be governed by, but also as *what*, and *how*, they will be governed. So once jurisdiction has been allocated to an authority within a certain territory, questions of 'what' the object of governance is, and 'how' it ought to be conducted, are decided quietly – almost as though they are assumed not to merit much discussion. ²⁹⁶

²⁹² Valverde, 'Jurisdiction and Scale' (n 287) 145.

²⁹³ Valverde, 'Jurisdiction and Scale' (n 287) 144.

²⁹⁴ Valverde, 'Jurisdiction and Scale' (n 287) 144.

²⁹⁵ Valverde, 'Jurisdiction and Scale' (n 287) 144.

²⁹⁶ Valverde, 'Studying the governance of crime and security' (n 288) 388.

Legal scholars Shaunnagh Dorsett and Shaun McVeigh echo Valverde's emphasis on the importance of considering the practice of jurisdiction. They note that the 'jurisdictional quality of persons [...] begins with a question of authority'. ²⁹⁷ And by considering under 'which' jurisdiction questions of persons are asked, they suggest that scholars will not only be given a source of authority, but also 'a sense of rival authorities'. ²⁹⁸ This insight suggests that viewing the regulation of trans embodiment within the GRA 2004, or the Danish reforms, 'simply as an act of sovereign will or reason' may both 'impose more uniformity than is present in legal practice' and deflect attention 'from the material and institutional ordering of law'. ²⁹⁹ In contrast to a formulation of law as that which enacts a sovereign demand, their work suggests that law is best understood as a contested process. This opens up the possibility of exploring the extent to which jurisdiction mediates underlying disunities in this material institutional ordering:

Treating the authority of law as a form of jurisdictional practice allows us to think of authority in terms of forms of conduct of community – of speakers and listeners – joined, however inadequately, through jurisdiction.³⁰⁰

In this light, each of the contributions to the debate and dialogue on the GRA 2004 might be said, in their own way, to be concerned – albeit implicitly – with the question of jurisdiction.

Dorsett and McVeigh describe jurisdiction as 'part of the technique and craft of legal ordering and the art of creating legal relations.'³⁰¹ It is, in their understanding, 'the most technical and prosaic ordering of legal authority.' ³⁰² They note that, in some cases, jurisdiction might inaugurate 'law itself';³⁰³ and in these instances, it is worth noting that

²⁹⁷ Dorsett and McVeigh (n 284) 82.

²⁹⁸ Dorsett and McVeigh (n 284) 82.

²⁹⁹ Dorsett and McVeigh (n 284) 95.

³⁰⁰ Dorsett and McVeigh (n 284) 134.

³⁰¹ Dorsett and McVeigh (n 284) 4.

³⁰² Dorsett and McVeigh (n 284) 4.

³⁰³ Dorsett and McVeigh (n 284) 4-5.

if jurisdiction inaugurates the law it must also in some sense precede it. This raises a number of conceptual and institutional questions about the nature and sources of authority. In particular, the idea that jurisdiction inaugurates law brings with it subsequent questions of transmission – how authority gets passed from one place to another – and the sense that each jurisdiction works as its own source of authority.³⁰⁴

In the context of the GRA 2004, questions of the transmission of authority between medical and legal discourses might be obscured by conceptualising their relationship as a sovereign 'alliance'. Searching for sovereignty could also be misguided in the context of the 2014 reforms in Denmark – which appear to have undone medico-legal alliances by removing medical influence from the gender recognition process. Yet this can only be said of civil registration, and otherwise offers little insight into how medical power-knowledges influence other institutional spheres of governance – such as the clinical setting – even though, as I have demonstrated in the previous section, such settings constitute important loci in the regulation of gendered embodiment.

As it authorises the various formal and informal institutional practices, jurisdictional analysis appears better suited to acknowledging what Valverde calls the 'internal legal pluralism' which is characteristic of all regulatory systems than ideas of sovereignty or alliance. ³⁰⁵ Governance disputes are understood as relational – involving various institutions and groups more than any abstract 'individual' or 'state'. ³⁰⁶ As I have stated above, regulatory pluralism warns against conceiving of a singular monolithic state as the source of discrimination and inequalities. However, it does not dismiss the idea of state responsibility altogether. For it would be equally misguided to assume that any institutions are somehow *un*regulated; merely because law is incorporated into 'a continuum of apparatuses (medical, administrative, and so on)' which perform the regulatory function. ³⁰⁷ In practice,

³⁰⁴ Dorsett and McVeigh (n 284) 11.

³⁰⁵ Valverde, *Chronotopes of Law* (n 122) 180.

³⁰⁶ For: 'even in states that have by and large marginalized or even suppressed alternative or specialized jurisdictions, a variety of overlapping jurisdictions still exist'; Valverde, *Chronotopes of Law* (n 122) 57.

³⁰⁷ Foucault, *The Will to Knowledge* (n 122) 144.

specific governing competences are delineated, and restricted, by, and through, jurisdiction; 'the governance of legal governance'. 308 While they may be permitted to govern in different ways at various times in certain places, it is ultimately state law that holds institutions and regulations together – determining the full extent and scope of their authority. 309

From a jurisdictional perspective, what is therefore most remarkable about state law is that it both governs *and* authorises the governance carried out by formal and informal institutions.³¹⁰ The state will always retain discretion – at the last instance in its courts of law – to have the final say about an institution's authority to implement almost any practice.³¹¹ Valverde notes that this will not usually involve the state querying the substance of an institutional decision, but more likely challenging the authority of the institution to issue such a judgement in the first place.³¹² As Dorsett and McVeigh have suggested, jurisdiction thereby holds the ability to 'delimit the scope of authority, determine the technical means of its representation or adjudicate on the proper form of lawful relations.' ³¹³ Hence the potential of jurisdictional analysis is not that it provides tools for 'overcoming the state', but rather those for 'putting the state in its place.' ³¹⁴

Beyond authorising and limiting institutional competences, jurisdiction also works as a 'sorting process',³¹⁵ organising and ordering different types and levels of authority, sorting them 'into ready-made, clearly separate pigeon-holes', ³¹⁶ and drawing strict boundaries between them. These boundaries may work 'spatiotemporally'; as in Valverde's example of the 'Murder on the Orient Express' conundrum – whereby

³⁰⁸ Valverde, 'Jurisdiction and Scale' (n 287) 141.

³⁰⁹ Valverde, *Chronotopes of Law* (n 122) 83.

³¹⁰ Valverde, *Chronotopes of Law* (n 122) 83, citing Mariana Valverde, 'Authorizing the Production of Urban Moral Order: Appellate Courts and their Knowledge Games' (2005) 29(1) Law and Society Review 419.

³¹¹ Valverde, Chronotopes of Law (n 122) 83.

³¹² Valverde, *Chronotopes of Law* (n 122) 83.

³¹³ Dorsett and McVeigh (n 284) 4.

³¹⁴ Dorsett and McVeigh (n 284) 51.

³¹⁵ Valverde, *Chronotopes of Law* (n 122) 83.

³¹⁶ Valverde, *Chronotopes of Law* (n 122) 85.

determining the exact time when the murder took place is necessary for deciphering the precise location of the train, and thus the police force that is obliged to investigate. Or, they might be differentiated in accordance with purported functionality; as the example Valverde gives of the doctor who is permitted to prescribe substances that are otherwise formally prohibited – in a manner which is neither spatially nor temporally limited. Such competences are allocated in accordance with value judgements about which institutional body is best-suited, in terms of capacity or expertise, to the task at hand.

Sociologist Andrew Abbott's work on professional boundaries suggests that such assumptions are, in turn, reliant upon occupational groupings which are themselves formed only following a series of 'turf battles' regarding influence and expertise.³¹⁹ Only when these battles align in a particular way will professions emerge; coalescing around a common cause and, allowing, for example, doctors to become doctors and midwives to become midwives.³²⁰ Such professional jurisdictions could have been allocated quite differently - and even have been at various points in the past. 321 They are also, presently, open to dispute.³²² Yet any deliberation about the practical appropriateness, or subsequent efficiency, of the authority performing this function is unlikely to be conducted in public. For while Valverde describes the first, authorising function, of jurisdiction as 'clearly apparent', its secondary sorting/separating function is considered much less visible. This relative invisibility serves to obfuscate power relations between institutions; suppressing disputes about how authority is arranged, and how governance operates in practice. 324

³¹⁷ Valverde, Chronotopes of Law (n 122) 84.

³¹⁸ Valverde, *Chronotopes of Law* (n 122) 56-57.

³¹⁹ Andrew Abbott, 'Things of boundaries: defining the boundaries of social inquiry' (1995) 62 Social Research 957, 860.

³²⁰ Michael Thomson, 'Abortion Law and Professional Boundaries' (2013) 22 Social & Legal Studies 191.

³²¹ Thomson (n 320).

³²² Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 1988) 2.

³²³ Valverde, *Chronotopes of Law* (n 122) 85.

³²⁴ Valverde understands such questions as concerning the 'qualitative features of governance'; Valverde, *Chronotopes of Law* (n 122) 84.

79

This depoliticising manoeuver is made possible by jurisdiction; which works to pre-empt, manage, and contain potential conflicts – avoiding exposure by quelling potential disagreements as close as possible to the source. The result, Valverde laments, is that an 'open-ended non-legalistic discussion about which type of governance is or is not appropriate in a given situation is thus foreclosed', 326 as

the game of jurisdiction acts to perform a kind of ethnomethodological miracle by which incommensurable processes are kept from clashing, and the consumers of legal decisions are kept from asking: how should problem X or Y be governed in the first place?³²⁷

By drawing attention to the processes through which law orders, and thus contains, the knowledge claims, politics, and embodied effects of various institutional practices, the value of jurisdictional analysis is that it harbours the possibility of de-mystifying, and subsequently repoliticising, such processes. In contrast to the sorting and separating work of jurisdiction, conducting such an analysis in the context of this thesis will enable me to uncover potential underlying tensions, as well as positioning the 2014 reforms of the regulation of gendered embodiment in Denmark in relation to one another, and broader shifts and developments. As with the thesis overall, the aim in so doing is to offer scholars, activists, and policymakers critical insights which might shape how they respond to similar reform proposals in the future.

Conclusion

This chapter presented the theoretical analysis of legal embodiment which will be used to frame the rest of the thesis. By reviewing the various ways in which bodies have been conceptualised in different feminist theories and feminist legal studies of embodiment, it brought these two literatures together to develop a definition of legal

³²⁵ Valverde, Chronotopes of Law (n 122) 86.

³²⁶ Valverde, Chronotopes of Law (n 122) 85.

³²⁷ Valverde, Chronotopes of Law (n 122) 86.

embodiment which concerns the ontological and epistemological experience of becoming a subject at the intersection of subjective, intersubjective, material, symbolic, and institutional realms. Informed by the socio-legal and sociological literature on gender recognition, in the GRA 2004 and more widely, it suggested that these spheres are of paramount importance for those trying to capture the complexity of trans embodiment and construct a stable platform for legal subjectivity.

These insights largely accord with the existing literature on embodiment and gender recognition. Yet when stressing the final institutional realm, attention had to turn to recent governance studies literature to suggest that jurisdictional analysis – which addresses how different institutional power-knowledges are authorised, sorted, and separated to enable them to do the work of governance - could be used to mobilise a study of legal embodiment in the context of the 2014 reforms in Denmark. By emphasising how institutional practices affect experiences of becoming alongside the more readily-acknowledged material and discursive realms, I seek to re-orientate embodiment literatures to cast greater light on how embodiment is affected by, and in turn affects, institutional power-knowledges and governing assemblages – without becoming distracted by sovereignty. And by conducting jurisdictional analysis at the moment when law constitutes and saturates bodies, I seek to de-mystify, and potentially even repoliticise, how embodiment is affected by, and in turn affects, these regulatory processes.

Framed by my specific conceptualisation of legal embodiment, I have explained how jurisdictional analysis will be used to illuminate the various processes through which regulations constitute and saturate bodies, and where regulatory power meets embodied resistance. This thesis constitutes the first jurisdictional analysis to be undertaken in the context of the regulation of gender, and within trans legal studies more generally. In Chapter 3, my attention will turn to the question of exactly how, and in what contexts, this analysis will be conducted.

3. Methodology

Introduction

In Chapter 2, I presented the theoretical framework of this thesis; which explores how jurisdiction is mobilised in the governance of legal embodiment by interrogating how boundaries are drawn between institutional power-knowledges in law reform processes, and how these arrangements are registered by embodied subjects. Before that, in Chapter 1, I explained that this jurisdictional analysis centres around the question of how the regulation of embodiment has been developed in the specific context of the self-declaration model of gender recognition, adopted in Denmark in 2014. Its purpose is to assess how effective the implementation of the self-declaration model has been; to enrich understandings of jurisdiction and embodiment, and to present a critical analysis of self-declaration of use to policymakers, legislators, campaigners, and activists tasked with responding to proposals to implement self-declaration in the UK, and elsewhere, in the future.

In this chapter I describe how this jurisdictional analysis was conducted. The chapter is split into two parts. In the first part, I lay out my methodological approach, describing the ontological and epistemological focus of my study. In accordance with the theoretical framework detailed in Chapter 2, this concerns how legal embodiment has been affected by the implementation of the 2014 reforms in Denmark. Influenced by Valverde's epistemological agenda, I justify my decision to conduct an in-depth investigation of how self-declaration has been implemented in the Danish context. I then explain how this was conducted. Supplementing Valverde's research agenda with a legal consciousness methodology, I justify my decision to explore the understandings and experiences of those directly involved in the reforms process – including regulators, professionally involved in designing or enacting the reforms, and the regulatory subjects who have, to some extent, been personally affected by them.

The second part of the chapter discusses how this approach was put into practice within my methodological framework. This involves me describing how the fieldwork was planned and organised; in terms of access and sampling, and negotiating my own status as a researcher – reflecting upon some of the main benefits and limitations of the approach I developed. It continues by documenting the ethical concerns that I encountered – including around consent and confidentiality – and justifying the methods that were used. Finally, it discusses the locations where the interviews were conducted, how the material was recorded and analysed; before describing the ways in which my findings have since been disseminated back to interviewees and other interested parties.

Methodological approach

As I have demonstrated in the previous chapters, the only notable academic research that has considered the self-declaration model of gender recognition to date has been undertaken in comparative legal studies. As with those campaigners and commentators who have publicly advocated self-declaration, this scholarship has involved various generalisations being made as to how 'optimal' this model is considered when compared to other modes of gender recognition.³²⁸ Yet the epistemological rigour of making normative claims about the progressiveness of general 'models' of governance is questionable, particularly when these are used to justify proposals for a 'policy transfer' based on the limited evidence of how such reforms have been received within international human rights and LGBT media. 329 Those who have become engaged in such academic practice risk opening themselves up to accusations of having presented themselves as authorities on a subject, while having taken how a governance project describes itself at little more than face value.

³²⁸ Dunne, 'Ten years of gender recognition in the United Kingdom' (n 60) 539. 329 David P Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) 13(1) Governance: An International Journal of Policy and Administration 5.

While I accept that self-declaration may, in theory, be understood as constitutive of a step towards 'gender self-determination' (which is, itself, only cautiously advocated within trans studies literature), ³³⁰ this does not account for how it is being, or may be, put into practice. After developing similar concerns around the level of debate that had been taking place in security studies, Valverde has suggested that

it may be time to move to a different type of project, one that instead of focussing on security as a noun, a thing – a choice that inevitably leads into normative discussions about good security versus bad security – turns the gaze not on a single word or a concept but rather on the very wide variety of *activities* and *practices* that are being carried out under the name of 'security'. ³³¹

Rather than starting from an 'abstract noun' – such as 'self-declaration' - and commencing philosophical or linguistic analysis, Valverde advises scholars to begin with 'actually existing practices of governance'. 332 This shift away from the 'Oxford tradition' of conceptual clarification, and toward an epistemology centred upon the practice of governance, is what Valverde describes as Michel Foucault's 'great intellectual move'. 333 Certainly, Foucault's shift from concepts to practices has been well-received – spawning an entire field of 'governmentality' studies; where the 'political thinkers' deemed worthy of analysis are the public administrators and politicians practically engaged in the implementation of social policy more than the academics and theorists involved in providing abstract commentaries or retroactive justifications.³³⁴ One governmentality scholar, Bent Flyvbjerg, notes that this tendency towards examining the 'rationalities really at work' stems from Foucault's explicit decision that because the existence of universal abstractions has not yet been demonstrated, scholarship must proceed as if they do not. 335

³³⁰ see Eric A Stanley, 'Gender Self-Determination' (2014) 1(1-2) Transgender Studies Quarterly 89.

³³¹ Valverde, 'Studying the governance of crime and security' (n 288) 383.

³³² Valverde, 'Studying the governance of crime and security' (n 288) 383-384.

³³³ Valverde, 'Studying the governance of crime and security' (n 288) 383.

³³⁴ Valverde, 'Genealogies of European states' (n 278) 168.

³³⁵ Bent Flyvbjerg, *Making Social Science Matter: Why social inquiry fails and how it can succeed again* (Steven Sampson tr, CUP 2002) 100.

As Foucault understood power to be dynamically produced from one moment to the next at all positions and in all relations, it follows that it would be the "minor practices" or "micro-practice" of power that would become central to his scholarship. To investigate these practices, Flyvbjerg proposes undertaking 'phronetic research'; 338 which involves the pursuit of 'practical knowledge' concerning 'the actual daily practices which constitute a given field of interest'. 339 Valverde could easily be said to be conducting such research, as she works primarily at a 'concrete and empirically driven' scale, where 'the key object of study consists of governing mechanisms and the tools we have to analyse them'. 340 Following Foucault, both Flyvbjerg and Valverde agree that in-depth studies of concrete situations are of greater epistemological value than those which seek to grasp or clarify abstract universal concepts or principles.341 In a similar vein, my thesis investigates the workings of the Danish gender recognition project, rather than engaging in an abstract or philosophical discussion about what the concept of self-declaration 'means' in theory.

While Valverde has expressed reservations in respect of the concept of a 'case study', 342 her advice to develop concrete analyses of projects that are celebrated by engaged participants, rather than outside observers, as promoting a concept (such as 'security', or 'selfdeclaration')³⁴³ offers one solution to Flyvbjerg's problem of identifying what he considers a 'critical case' to study. 344 A critical case is defined as having 'strategic importance in relation to the general problem'. 345 In the current context, this required me to identify a fieldwork location

³³⁶ Valverde, 'Genealogies of European states' (n 278) 160.

³³⁷ Flyvbjerg, *Making Social Science Matter* (n 335) 120.

³³⁸ Flyvbjerg, Making Social Science Matter (n 335) 134.

³³⁹ Flyvbjerg, Making Social Science Matter (n 335) 134.

³⁴⁰ Valverde, 'Studying the governance of crime and security' (n 288) 380.

³⁴¹ Bent Flyvbjerg, 'Case Study' in Norman K Denzin and Yvonna S Lincoln, *The* Sage Handbook of Qualitative Research (4th edn, Sage 2011) 304.

³⁴² This is down to a wariness of the tendency to assume that a case study merely illustrates a grand theory; Mariana Valverde, 'Response to the book reviews' (2016) 31(1) Canadian Journal of Law and Society 130, 131.

³⁴³ Valverde, 'Studying the governance of crime and security' (n 288) 383-384.

³⁴⁴ Flyvbjerg, 'Case Study' (n 341) 307. 345 Flyvbjerg, 'Case Study' (n 341) 307.

which could inform academic consideration of the general issue of selfdeclaration of legal gender status. Yet when selecting one case among many – choosing to locate my fieldwork in Denmark rather than Argentina, for example – it was difficult to find any concrete guidance in the methods literature. As Flyvbjerg has noted, there are no 'universal methodological principles' that exist to identify one critical case over another; and the only general advice that he is able to offer is that 'it is a good idea to look for either "most likely" or "least likely" cases, that is, cases that are likely to either clearly confirm or irrefutably falsify propositions and hypotheses.' 346 However, by supplementing Flyvbjerg's advice to look for a 'most likely' case with Valverde's imperative to focus upon the claims of participants, 347 I have understood my search for a critical case to consist of finding the example of gender recognition 'most likely' to replace the GRA 2004, and most celebrated by those involved in that particularly recognition project. Campaigners involved in lobbying for the Danish reforms of 2014 have not been slow to go on record celebrating how this legislation now promotes self-declaration of legal gender status; 348 and the geopolitical differences between Denmark and the UK are such that its reform projects will be of interest to legislators and other policymakers (as evidenced by the recent recommendations of the Women and Equalities Committee discussed in Chapter 1).349 It is primarily for these reasons that Denmark was identified as the best place to conduct the fieldwork which grounds this thesis.

Epistemological perspective

While I share Foucault, Valverde, and Flyvbjerg's convictions around the epistemological value of in-depth grounded studies, it may appear, at times, that I am working in a slightly distinctive manner as I conduct

³⁴⁶ Flyvbjerg, 'Case Study' (n 341) 307.

³⁴⁷ Valverde, 'Studying the governance of crime and security' (n 288) 382.

³⁴⁸ Søren Laursen, 'Denmark: landmark gender recognition act' (*ILGA-Europe*, 27 June 2014) http://old.ilga-

europe.org/home/guide_europe/country_by_country/denmark/denmark_landmark_gender_recognition_act> accessed 15 September 2016.

³⁴⁹ Women and Equalities Committee (n 56) para 45.

my own research. For a start, I have already constructed a theoretical framework; a move which contrasts with their approaches. Valverde, for instance, presents what she describes as 'a set of questions' instead of 'a theory'; 350 questions which have themselves arisen out of her own previous research. 351 That Valverde considers this good practice suggests that she has been influenced by 'grounded theory'. 352 Established in the 1960s by sociologists Barney Glaser and Anselm Strauss, grounded theory positions itself as a methodology 'for the purpose of building theory from data." Grounded theorists eschew theory-testing ('deduction') in favour of theory-building ('induction'). 354 In contrast, I had already undertaken a significant amount of work constructing my theoretical framework before I had begun fieldwork. As I demonstrated in Chapter 2, this framework was at least initially – constructed in response to a literature review of the socio-legal studies, feminist legal scholarship, and feminist theoretical scholarship on gender recognition and embodiment.

My theoretical framework cannot, therefore, be said to have emerged solely *from* any of my own previous empirical findings. Yet the particularly chronology I have described – from theory to the empirical world – only roughly describes the various stages that I have gone through in the production of this thesis. Moreover, as Valverde has herself noted, much of the scholarship produced within the emerging fields that she congratulates for having made the epistemological shift from studying language to practices (including postcolonial studies and sexuality studies) has developed *in spite of* the constructed distinction between sociological theory and empirical research – to the extent that the 'theory-research binary' that Valverde talks about may

³⁵⁰ Valverde, 'Studying the governance of crime and security' (n 288) 380.

³⁵¹ Valverde, 'Studying the governance of crime and security' (n 288) 382.

³⁵² see also Mariana Valverde, *The Force of Law: A Groundwork Guide* (Groundwood Books 2010).

³⁵³ Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research* (3rd edn, Sage 2008) 1, citing Barney Glaser and Anselm Strauss, *The discovery of grounded theory* (Aldine 1967) (emphasis added).

³⁵⁴ Gayle Letherby, *Feminist research in theory and practice* (Open University Press 2003) 67.

be rendered irrelevant.³⁵⁵ Similarly, it has been noted that much sociolegal scholarship conducted in recent decades has challenged corresponding distinctions between theoretical legal scholarship and empirical or policy-driven socio-legal research.³⁵⁶ Although I may have structured this thesis so that the methodology I am describing in this chapter reads as though it flows logically on from the theoretical framework I described in the previous one, this structure has in practice been forced upon a much more organic thinking process (very much 'after the fact'). In my own research practice – as I imagine is the case for many, if not most, other researchers – the links that have been developed between theory, methodology, and research have been much more fluid than the standardised structure of this thesis could ever hope to reflect. These links have been quite dynamic, developing continuously and in relation to one another – almost up until the very moment that they have been cemented into text.

I ask, therefore, that my use of theory is not read as an attempt 'to build a new model or to argue for one of the existing models', 357 through which scholars may capture an aspect of reality in text. Although I argue for the importance of investigating legal embodiment, I have not sought to present a 'grand' theory of embodiment, or self-declaration of legal gender status, as such, but have developed an analytical framework through which to consider specific issues which are currently emerging out of the gender recognition and embodiment literatures. The objective in so doing is to provide a frame which could guide my research, generating issues and questions which are linked to embodied concerns, and which ought to be considered when it came to conducting my fieldwork. To labour the point made above, I have at no point considered this theoretical work to be a self-contained (or even *containable*) project; and the authorial trajectory from theory to methodology to research has not been linear in any practical sense.

³⁵⁵ Valverde, 'Studying the governance of crime and security' (n 288) 381.

³⁵⁶ Rosemary Hunter, 'Would You Like Theory with that? Bridging the Divide between Policy-Oriented Empirical Legal Research, Critical Theory and Politics' (2008) 41 Studies in Law, Politics, and Society 121.

³⁵⁷ Valverde, 'Studying the governance of crime and security' (n 288) 382.

I hope that the way I use my theoretical framework will not be read as overly rigid or 'static';³⁵⁸ not least for the reason, discussed in Chapter 2, that it has been constructed in opposition to abstract conceptions of the body or bodies, in preference to more grounded experiences of embodiment. The point applies equally to the empirical research that will be described in the chapters that follow this one. Although it is difficult to convey this in text, I have, throughout the research process, sought to use my framework iteratively; to allow it to develop through a conversation with the doctrinal and empirical research, building upon, or amending, its foundations as and when this seemed necessary and appropriate.

Ontological perspective

Another point at which this thesis may be considered to depart from previous examples of phronetic research is when it comes to the 'nature' of the phenomena it seeks to investigate. ³⁵⁹ It is acknowledged within the methods literature that the decision to adopt one particular ontological perspective or another will necessarily have epistemological implications for the research project as a whole. ³⁶⁰ Just as the feminist theoretical literature was cited as noting in Chapter 2, ³⁶¹ so the methods literature stresses that ontology and epistemology must be considered in relation to one another if the researcher is to establish how they will produce valid knowledge about particular phenomena. ³⁶² Valverde, for her part, does stress the ontological phenomena whose study she deems epistemologically valuable. Her advice that researchers should begin 'with actually existing practices of governance' ³⁶³ – such as the technical 'machinery' of 'jurisdiction' ³⁶⁴ – suggests that these phenomena are more valued

³⁵⁸ Valverde, 'Studying the governance of crime and security' (n 288) 389.

³⁵⁹ Jennifer Mason, *Qualitative Researching* (2nd edn, Sage 2002) 14.

³⁶⁰ Mason (n 359) 15.

³⁶¹ Probyn (n 194) 4; Hemmings (n 209) 147.

³⁶² Caroline Ramazanoğlu with Janet Holland, *Feminist Methodology: Challenges and Choices* (Sage 2002) 11.

³⁶³ Valverde, 'Studying the governance of crime and security' (n 288) 383.

³⁶⁴ Valverde, 'Jurisdiction and Scale' (n 287) 143.

than others that are not mentioned, or explicitly challenged, in her work (including legal 'doctrine' and general 'principles'). 365

However, Valverde is less clear when it comes to identifying what is constituted by a governance practice, or how these might be identified. Cues might be taken from her previously published work, or that which she has explicitly cited. They could also be inferred from wider trends in governmentality research. In both cases, the methods employed by governance researchers are largely ethnographic, drawing upon the researcher's observations and reflections. For my immediate purposes, this might be taken as implying that an investigation of the jurisdictional effect of a gender recognition project could be based on ethnographic observation of how boundaries between different powerknowledges are drawn and re-drawn during law reform processes. Yet such boundaries would be extremely difficult to 'observe', in any conventional sense, for a number of reasons. For a start, there is the question of gaining access to the relevant spaces - with many jurisdictional decisions made 'behind closed doors', away from the viewing public.³⁶⁶ Even this concern implies that such boundaries are openly drawn and maintained within private spaces; when to assume this much constitutes a privileging of the spatial scale over other (temporal, affective, aesthetic, etc.) scales - a tendency which Valverde has gone on record as particularly wary of in her most recent monograph.³⁶⁷ The idea that jurisdictional divisions can be easily observed is highly questionable; not least when, as Valverde has noted, their relative invisibility appears to constitute one of their great advantages when it comes to facilitating the 'smooth functioning' of law in practice.368

³⁶⁵ Valverde, 'Jurisdiction and Scale' (n 287) 143.

³⁶⁶ I draw from my own experience on this point, having had my initial research request to observe the decision-making processes of the Gender Recognition Panel rejected by the UK Ministry of Justice in March 2014.

³⁶⁷ Valverde, *Chronotopes of Law* (n 122) 56.

³⁶⁸ Valverde, Chronotopes of Law (n 122) 84.

If jurisdictional rearrangements may not be easily observed, then perhaps they could be evidenced in written documentation. While Valverde has gone on record to share doubts about the epistemological value of doctrinal analysis, 369 this may not amount to a complete dismissal of analysing legal documents, and how they are used in practice. Examination of her own research practice is enough to suggest that doctrine should not be jettisoned completely. For example, in the introduction of the monograph *Everyday Law on the Street* (which collates the results of several research projects studying urban governance processes in Toronto), Valverde admits working with 'a legally trained colleague [...] to study the formal law'. 370 Though this comes with a caveat (that the results of such research be recounted in an 'accessible' manner rather than being dryly recounted), 371 it is only once she has undertaken this doctrinal legal research that she even begins devising her own empirical study. 372

Before undertaking my fieldwork visit to Denmark, I similarly located the numerous legal documents concerning the 2014 reform process. I also decided to have the transcripts of the parliamentary debates which preceded the enactment of the CPR law translated, to provide a contextual background of the intentions of legislators which might benefit my analysis. During the fieldwork visit itself, I also expanded this sample of documentary resources to include less doctrinal documentation, such as the medical guidelines which shape clinical practice, and the interview questionnaires given to trans people as they present themselves for psychiatric assessment at the Sexological Clinic. The documentary materials which this thesis draws upon thus range from those that could be considered as representative of legal doctrine to those more likely to be mobilised in regulatory practice.

³⁶⁹ Valverde, 'Studying the governance of crime and security' (n 288) 387.

³⁷⁰ Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (University of Chicago Press 2012) 4.

³⁷¹ Valverde, Everyday Law on the Street (n 370) 20-21.

³⁷² Valverde, Everyday Law on the Street (n 370) 5.

The methods literature on documentary analysis raises a similar set of epistemological issues to those considered above. Scholars that are interested in understanding how a document works in practice are advised to consider its purposive function; in effect, the fact that it was created to formalise, or assist, the activities of an institutional organisation.³⁷³ It is stressed that the institutional life of a document will be dynamic and contextually-dependent, rather than static or selfevident. Merely analysing its contents, or interviewing its authors, will prove insufficient for understanding how it is being used in practice. As sociologist Lindsay Prior has noted: 'A study of what the author(s) of a given document (text) 'meant' or intended can only ever add up to limited examination of what a document 'is'.' 374 For this reason, among others, it was decided that this documentary analysis would be complemented with other methods of research, including interviews with campaigners and activists about their impressions of how the 2014 reforms had played out; including both the intentions that motivated them, and the effects that they had had in practice. This overview of regulatory intentions and assessments would then be supplemented by interviews with those subject to the 2014 reforms.

Arguably, even seeking to conduct interviews to explore how jurisdictional arrangements have been affected by a particular reform process could be considered as a departure from the more orthodox governmentality literature. The reason for this, as is acknowledged in the methods literature, is that 'it is the world of beliefs and meanings, not of actions, that is clarified by interview research.' And such ontological properties are at least one step removed from the 'concrete' observable behaviours, actions, and practices favoured within Foucauldian research. Yet Valverde's work evidences an element of ambiguity here; for at no point does she endorse one empirical method

³⁷³ John Scott, *A Matter of Record: Documentary Sources in Social Research* (Polity Press 1990) 11, citing Sidney Webb and Beatrice Webb, *Methods of Social Study* (CUP 1975) 100.

³⁷⁴ Lindsay Prior, 'Repositioning Documents in Social Research' (2008) 42(5) Sociology 821, 824.

³⁷⁵ Hilary Arksey and Peter Knight, *Interviewing for Social Scientists* (Sage 1999) 15.

as more or less useful than any other. While this might seem judicious, it could also leave her open to the criticism that she is failing to live up to her own high standards regarding critical clarity. Valverde insists that it is problematic for scholarship 'to proceed without a clear awareness of the pros and cons of the particular scale we happen to be using.' ³⁷⁶ And while she outlines, quite comprehensively, the various 'pros' of working at the 'concrete and empirically driven' scale which she has favoured in her own research, ³⁷⁷ she also fails to acknowledge one potential 'con' regarding the question of whether this scale is methodologically well-suited to the investigation of the various aesthetic and affective 'human' dimensions of a governance project. ³⁷⁸ While she is keen that researchers do not ignore these dimensions, Valverde is less clear as to how they should be measured – particularly in the 'concrete' sense that she is so strongly advocating. ³⁷⁹

My response to this ambiguity has been to decide that, for all their limitations and drawbacks, interview techniques would offer useful insights into the arrangement of jurisdiction in the 2014 reforms, particularly where the ontological 'beliefs and meanings' that they reveal can be interrogated reflexively (in terms of the epistemological limitations discussed in Chapter 2), and 'triangulated' with insights gleaned through other interviews or from another form of analysis (doctrinal or documentary). Rather than seeking to 'observe' how jurisdiction has been arranged in any definitive sense, I have accepted that being attentive to the human dimension of a governance project will require me to go beyond conventional ethnographic methods. Specifically, I have drawn upon the literature on legal consciousness, supplementing and augmenting Valverde's work by offering a pragmatic methodological solution to the question of how the embodied effects of a reform project ought to be considered.

³⁷⁶ Valverde, 'Studying the governance of crime and security' (n 288) 386.

³⁷⁷ Valverde, 'Studying the governance of crime and security' (n 288) 380.

³⁷⁸ Valverde, 'Studying the governance of crime and security' (n 288) 382.

³⁷⁹ I have noted this elsewhere; Chris Dietz, 'Book Review: Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance*' (2016) 25(1) Social & Legal Studies 126, 128.

³⁸⁰ Mason (n 359) 190-191.

Legal consciousness

Within the UK-based socio-legal studies literature, the impact of legal consciousness methodologies have been understood as something of 'a challenge' to existing modes of scholarship.³⁸¹ Developed for the most part in the US, legal consciousness moves away from tracking the 'causal' relationship between law and society, and towards tracing 'the presence of law *in* society'.³⁸² In her 2011 study of the legal consciousness of gay and lesbian interviewees, feminist legal scholar Rosie Harding describes this shift as representative of the move away from 'instrumentalist' studies which sought to examine the effects of 'law' on 'society',³⁸³ to more 'constitutive' studies which acknowledge that law is 'a part of society'.³⁸⁴ Constitutive studies are said to benefit from the understanding that 'society (and the part of society which is known as everyday life) creates effects on law as much as law creates effects on society.'³⁸⁵

Unlike its instrumentalist predecessor, the constitutive approach to legal consciousness is said to focus on wider (and potentially non-legal) effects and impacts of legal developments. In this respect, legal consciousness studies exhibit a clear influence from the literature on legal pluralism. Harding defines legal pluralism as 'a concept that challenges the idea that state law is the only form of law'; Positing that 'there are many normative orders of various descriptions that are not attached to the state', but which can be considered 'legal' nonetheless.' De-centring formal law in this way challenges the myth of the legislator being a sovereign power, and suggests that legal

³⁸¹ Dave Cowan, 'Legal Consciousness: Some Observations' (2004) 67(6) Modern Law Review 928.

³⁸² Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 35 (emphasis added).

³⁸³ Harding (n 264) 18.

³⁸⁴ Harding (n 264) 8.

³⁸⁵ Harding (n 264) 8.

³⁸⁶ Harding (n 264) 9.

³⁸⁷ Harding (n 264) 29.

³⁸⁸ Harding (n 264) 30.

consciousness, like Valverde, draws heavily upon the work of Foucault. Another UK-based socio-legal scholar who has engaged with legal consciousness, Dave Cowan, goes as far as suggesting that Foucault's theoretical interventions made the shift to constitutive studies of law and society possible. For, beyond reflecting a fear that scholars were 'asking the wrong set of questions', Cowan considers the 'conscious' decision to de-centre law as a social phenomenon to be an active riposte to the 'concern' that socio-legal research had hitherto failed to meet its objective of 'penetrating into everyday life'. 390

Just as phronetic research was based upon the Foucauldian understanding that power is dynamically produced in all relations, ³⁹¹ so legal consciousness warns against considering power only as a repressive force. A disciplinary regime is said to work by "gaps' rather than deeds'; ³⁹² and power is understood to be productive. Scholars must therefore be attuned to the proliferating effects of power – positive as well as negative, creative as well as repressive. ³⁹³ Importantly, this creative mode of power goes beyond the production of effects; and even produces subjects:

In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.³⁹⁴

The idea that power might be producing subjects as well as effects marks another point of common interest between the governance and legal consciousness literatures. Harding's marking of this point reads as follows:

A governmentality perspective attempts to [...] expose the contingency of particular modes of being and how governmental aims impact on the everyday lives of individuals

³⁸⁹ Cowan, 'Legal Consciousness' (n 381) 930.

³⁹⁰ Cowan, 'Legal Consciousness' (n 381) 929-930.

³⁹¹ Flyvbjerg, *Making Social Science Matter* (n 335) 120.

³⁹² Foucault, *Discipline and Punish* (n 259) 193-194.

³⁹³ Cowan, 'Legal Consciousness' (n 381) 930.

³⁹⁴ Foucault, *Discipline and Punish* (n 259) 194.

(the ways in which governance conducts conduct) and the technologies of the self that are a part of our subjectification and subjectivity. 395

I position this concern – with the impact of governmental aims on everyday technologies of the self – alongside Valverde's question about the 'human effects' and 'bodily habits' which constitute part of the everyday techniques of this form of governance. Yet where Valverde leaves gaps in her methodology as to how these human effects could be investigated, the legal consciousness literature is much more instructive; taking "ordinary" people's accounts of their everyday experiences as the starting point for thinking about law in everyday life, and the way that law works in society. 397

The focus of legal consciousness is said to reflect the understanding that 'law' and 'everyday life' are not distinct spheres but are rather 'interlinked' - in a manner which suggests that scholars ought to examine both if they are to understand either one or the other. 398 The question of how 'concrete' an ontological perspective centred upon the exploration of subjectivity can be is subsumed beneath an unreservedly humanistic interest in how legality is experienced.³⁹⁹ This move – from conduct to subjectivity – marks a clear point of distinction between legal consciousness and more orthodox governance studies. It also highlights the suitability of a legal consciousness methodology to an investigation of legal embodiment. For, as I demonstrated in Chapter 2, as regulations play a constitutive role in our embodied experience – shaping relational engagement with other bodies and institutions – the question of how conscious, if at all, legal subjects report to be of such processes would offer great insight into their effects in practice. For instance, if the effect of a particular project governing legal embodiment were such that it barely registered on a subjective level – enabling subjects to act and react in ways that

³⁹⁵ Harding (n 264) 39.

³⁹⁶ Valverde, 'Studying the governance of crime and security' (n 288) 388.

³⁹⁷ Harding (n 264) 9.

³⁹⁸ Harding (n 264) 9.

³⁹⁹ Harding (n 264) 9, citing Ewick and Silbey (n 382).

suggest that they are almost unaware of (and have even momentarily forgotten) the various complexities affecting their embodiment – then a study of legal consciousness might suggest that law has successfully constructed the 'stable platform for pursuing one's plans' discussed in Chapter 2.⁴⁰⁰ If, on the other hand, such regulations see, or leave, interviewees 'consumed' by their physicality almost constantly, the opposite may be inferred. ⁴⁰¹ By offering ways to contextualise subjectivity in relation to intersubjective, material, symbolic, and institutional factors, legal embodiment is not only compatible with, but can also offer new directions for, legal consciousness studies.

Theoretically, this humanistic shift could be explained by the additional influence which legal consciousness studies have drawn from the work of philosopher Michel de Certeau. While both literatures draw heavily upon Foucault's understanding of power and resistance as interdependent, 402 it was de Certeau who allowed resistance to emerge as a key theme in its own right when he began to flesh out agential responses to power. 403 As Foucault identified that the hold of disciplinary power on liberal capitalist societies was becoming more extensive, de Certeau felt it had become 'all the more urgent' to discover how members of that society resisted being 'reduced' to discipline. 404 He began by investigating the 'popular procedures' that the 'consumers' of discipline employed on an everyday basis to conform to governing mechanisms while simultaneously evading them. 405 Attention shifted from the top-down 'mute processes that organize the establishment of socioeconomic order' favoured by Foucault, to the quotidian 'ways of operating' that are developed from the bottom. 406 Analysis of these 'ways of operating' pose questions

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⁴⁰⁰ Priaulx (n 253) 183.

⁴⁰¹ Priaulx (n 253) 183.

⁴⁰² Cowan, 'Legal Consciousness' (n 381) 931, citing Michel Foucault, 'Powers and Strategies', in C Gordon (ed), *Michel Foucault: Power/Knowledge* (Harvester Wheatsheaf 1980) 142.

⁴⁰³ Cowan, 'Legal Consciousness' (n 381) 931.

⁴⁰⁴ Michel de Certeau, *The Practice of Everyday Life* (Steven Rendall tr, University of California Press 1988) xiv.

⁴⁰⁵ de Certeau (n 404) xiv.

⁴⁰⁶ de Certeau (n 404) xiv.

that de Certeau felt were at once 'analogous and contrary' to those considered by Foucault:

analogous, in that the goal is to perceive and analyse microbelike operations proliferating within technocratic structures and deflecting their functioning by means of a multitude of "tactics" articulated in the details of everyday life; contrary, in that the goal is not to make clearer how the violence of order is transmuted into a disciplinary technology, but rather to bring to light the clandestine forms taken by the dispersed, tactical, and make-shift creativity of groups of individuals already caught in nets of "discipline".⁴⁰⁷

Some legal consciousness commentators see value in supplementing Foucault's work on resistance with that of de Certeau. By considering de Certeau's distinction between 'tactics' and 'strategies', Cowan explains that while both constitute 'counter-methods' of resistance, it is tactics, rather than strategies, that are 'the preserve of the excluded'. In de Certeau's terms, 'a tactic is an art of the weak.' For Cowan, a greater understanding of these tactics is 'precisely' what legal consciousness studies seek to achieve by focussing upon 'ordinary people's perceptions of law in everyday life'. In the supplementing seek to achieve by focussing upon 'ordinary people's perceptions of law in everyday life'.

Other legal consciousness scholars agree that practices of resistance are worth exploring, but see no need to depart from the work of Foucault. For Harding, sticking with Foucault merely required a reconceptualisation of his work on resistance. This had been 'undertheorised', particularly within sexuality studies, where resistance had been restricted to refer to 'anything that is transgressive, subversive and/or counter-hegemonic' or 'as a way of describing negative forces that prevent the achievement of positive social change.' ⁴¹¹ In response, Harding develops 'a new lexicon of resistance' through which to unpack the various forms of resistance experienced by the lesbians and gay men interviewed in her legal consciousness study:

⁴⁰⁷ de Certeau (n 404) xiv-xv, citing Foucault, *Discipline and Punish* (n 259).

⁴⁰⁸ Cowan, 'Legal Consciousness' (n 381) 931.

⁴⁰⁹ de Certeau (n 404) 37.

⁴¹⁰ Cowan, 'Legal Consciousness' (n 381) 931.

⁴¹¹ Harding (n 264) 44.

Just as power is relational, so too is resistance; just as power can be used to discipline and shape, so too can resistance. [...] resistance is as much about the production of effects as power is.⁴¹²

At this point, Harding goes beyond even de Certeau. Rather than being determined 'by the absence of power', as his tactics are, 413 Harding conceptualises resistance as 'the same as', rather than the antithesis or corollary of, power. 414 This refusal to define resistance as conceptually distinct from power allows Harding to avoid reifying power and 'the powerful' 'at the expense of those who, in other perspectives, are 'powerless'.'415 In this respect, Harding's work is analogous with other governmentality scholars; such as Valverde, when she implores scholars to end their obsession with sovereignty. Instead of conceptualising power and resistance as distinct and oppositional - sovereign and subject - Harding suggests that Foucault's analytics of power (as productive and relational) will be better understood if power and resistance are conceived as being 'dependent on and related to one another'. 416 Consider, for example, how Harding describes a legal consciousness methodology borrowing from the literature on legal pluralism to respond to the critique that law has no direct effect on everyday life: 'The problematic of whether or not 'law' is actually salient in everyday life becomes a moot point if 'law' is anything that people, in their social practices, treat as law.'417 The aim is not to construct an objective theory of law and its instrumental effects but to focus 'above all' on subjective experience of legalism. 418

While more orthodox governance studies might concern themselves with 'the actual daily practices which constitute a given field of interest',⁴¹⁹ on the 'concrete and empirically driven' scale where the key object of study consists of governing mechanisms and the tools

⁴¹² Harding (n 264) 44.

⁴¹³ de Certeau (n 404) 38.

⁴¹⁴ Harding (n 264) 44.

⁴¹⁵ Harding (n 264) 44.

⁴¹⁶ Harding (n 264) 45.

⁴¹⁷ Harding (n 264) 31.

⁴¹⁸ Cowan, 'Legal Consciousness' (n 381) 929.

⁴¹⁹ Flyvbjerg, *Making Social Science Matter* (n 335) 134.

we have to analyse them, ⁴²⁰ legal consciousness proceeds from this different ontological premise. A governmentality perspective is considered merely 'useful' for thinking about power in legal consciousness research 'as it helps to draw links between the ways that individuals express their views of law and the ways in which governmental rationality attempts to control the population.' From here, an alternative conception of ontology is developed, where subjective experience – or 'consciousness' – meets governmentality studies' conventional ontological properties of 'rationalities' and 'practices'. This constitutes the combined methodology which I have employed to explore interviewees' experiences and understandings of the 2014 reforms, and to ascertain what effect they had (if any) on their experiences of embodiment in everyday life.

Feminist ethics

Given its concern with the subjective experience of law and regulation in everyday life, legal consciousness is also well-suited to feminist legal scholarship. The question of whether certain methods – such as qualitative interviews – are better suited to the production of feminist research than others has been the subject of a long-standing debate within feminist epistemology. However, it is now widely-accepted that there is no one feminist method, or aspect of feminist methods, which distinguishes it clearly from other methods; as 'any method can be used in a pro-feminist or non-feminist way.'422 Even those who have advocated the feminist credentials of qualitative interviewing have stressed important caveats.

For example, sociologist Ann Oakley has identified that the conditions of 'proper' interviewing are themselves based upon gender stereotyping – with the demand that interviewers maintain distance between themselves and their interviewees reproducing masculinist

⁴²⁰ Valverde, 'Studying the governance of crime and security' (n 288) 380.

⁴²¹ Harding (n 264) 39.

⁴²² Letherby (n 354) 5.

stereotypes around the desirability of objectivity, rationality, and self-restraint.⁴²³ Oakley considered it important that feminist researchers sought to debunk these stereotypes, to acknowledge instead that 'a sociology of feelings and emotion' did exist:⁴²⁴

A feminist methodology of social science [...] requires [...] that the mythology of 'hygienic' research with its accompanying mystification of the researcher and the researched as objective instruments of data production be replaced by the recognition that personal involvement is more than dangerous bias – it is the condition under which people come to know each other and to admit others into their lives. ⁴²⁵

One of the most well-known responses to ideas about 'hygienic' research and the dangers of 'bias' has been formulated within feminist standpoint theory. Feminist standpoint argues that, rather than constituting bias, theorising from experiences of discrimination gives marginalised populations 'epistemic privilege'; for what occurs 'on the margins' of society is unlikely to be visible from the untroubled 'centre'. 426 These insights have since been developed into what feminist STS scholar Donna Haraway has termed 'situated knowledges'. 427 In a notable challenge to the tendency among followers of standpoint to reify marginal subject positions, Haraway argues that the knowledges produced from such positions should not be 'exempt from critical re-examination'; on the basis that there are no "innocent" positions'. 428 Yet Haraway notes that this does not undermine standpoint completely, as the two share common objectives: of challenging those who suggest that 'hygienic' research is possible (let alone desirable); and developing an epistemology which does not advocate simple 'relativism'. In this vein, Haraway famously noted:

⁴²³ Ann Oakley, 'Interviewing women: a contradiction in terms' in Helen Roberts (ed), *Doing Feminist Research* (Routledge 1981) 38.

⁴²⁴ Oakley (n 423) 40.

⁴²⁵ Oakley (n 423) 58.

⁴²⁶ Bat-Ami Bar On, 'Marginality and Epistemic Privilege' in Linda Alcoff and Elizabeth Potter (eds), *Feminist Epistemologies* (Routledge 1993).

⁴²⁷ Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14(3) Feminist Studies 575.

⁴²⁸ Haraway (n 427) 584.

the alternative to relativism is not totalization and single vision [...]. The alternative to relativism is partial, locatable, critical knowledges sustaining the possibility of webs of connections called solidarity in politics and shared conversations in epistemology.⁴²⁹

Partial, locatable, and critical knowledge is afforded greater epistemological and political value than that which seeks, or purports, to be objective. This accords with an argument in the methods literature that what makes feminist research conceptually distinct from non-feminist research is 'the particular political positioning of theory, epistemology and ethics that enables the feminist researcher to question existing 'truths' and explore relations between knowledge and power.' Arguing against this position, Jennifer Mason suggests that *all* qualitative research should involve 'critical self-scrutiny' or 'active reflexivity' on the part of the researcher. Mason's reasoning is that reflexivity allows the researcher to hold themselves to account, to take responsibility for decisions made in the research process, and – by implication – to increase their research's epistemological validity.

Whether this has been in pursuit of feminist ethics, or qualitative research ethics more generally, I have sought to balance being attentive to power dynamics with being as transparent as possible about how the research was conducted. On occasion, this has been relatively straightforward; for example, writing in the first person, rather than the third person, to challenge traditionally disembodied academic 'authority'. The same could be said of admitting that I do not, myself, identify as a trans person. Yet in other respects, accounting for how my identity affected interviewees has been a little more complicated. Though I have not gone into detail about my own demographics, I have tried to reflect upon my experience, appearance, and background, 433 as and when this has seemed relevant (as in the second part of this

⁴²⁹ Haraway (n 427) 584.

⁴³⁰ Ramazanoğlu with Holland (n 362) 16.

⁴³¹ Mason (n 359) 7.

⁴³² Letherby (n 354) 7.

⁴³³ Helmi Järviluoma, Pirkko Moisala and Anni Vilkko, *Gender and Qualitative Methods* (Bruce Johnson tr, Sage 2003) 36.

chapter). But as these categories of analysis are fluid and dynamic, it has been difficult to account for them – let alone how they play into power relations – in writing. Even where power relations can be accounted for, it is questionable if they can ever be adequately ameliorated. Sceptics, such as Bob Matthews and Liz Ross, suggest that the researcher can merely account for the impact they have had on their work. Others, such as Karen O'Reilly, are more optimistic. Suggesting that the problem of unequal power relations is, at least in part, dialectical – i.e. problem and solution are one and the same – O'Reilly notes that awareness of the potential for exploitation and the role of representation 'is the first step in trying to avoid it'.

Irrespective of whether the problems it causes can be answered or not, the key insight of the methods literature is that the question is not so much about how I *identify* as how I *am identified*. For, even where the interviewer and their respondent share common experiences, the fact that they have assumed these roles for the purposes of the interview could be enough to emphasise differences more than similarities.⁴³⁶ Support for this position is offered by Haraway:

The knowing self is partial in all its guises, never finished, whole, simply there and original; it is always constructed and stitched together imperfectly, and *therefore* able to join with another, to see together without claiming to be another.⁴³⁷

In this formulation, the problem identity is inverted; rather than seeking to account, individually, for both power and resistance – and bemoaning their inevitable inability to succeed in doing so completely – scholars are reminded that there are benefits that come with being relationally, and partially, constructed. One such benefit is that, by seeking to account for how I am identified within the interview process – and considering both ontological and epistemological dimensions of

⁴³⁴ Bob Matthews and Liz Ross, *Research Methods: A practical guide for the social sciences* (Pearson 2010) 77.

⁴³⁵ Karen O'Reilly, Key Concepts in Ethnography (Sage 2009) 60.

⁴³⁶ Julie Wallbank, 'Returning the subject to the subject of women's poverty: An essay on the importance of subjectivity for the feminist research project' (1995) 3(2) Feminist Legal Studies 207, 219.

⁴³⁷ Haraway (n 427) 586.

experience – is that this holds my own identity up to the same standards as the trans people I am interviewing; acknowledging the 'embodied experience of the speaking subject', 438 and allowing the researcher to conduct research with 'respectful curiosity', 439 as demanded by the trans studies literature discussed in Chapter 2. A relational understanding of subjectivity also lays the foundations for an epistemology which is developed and negotiated on a collective, or at least inter-personal, level. Expectations will only ever be provisional, and stereotypes avoided as far as possible. The practical advice I took from this was that I ought not to concern myself with overly-individualised reflection on identity, but to focus upon the way this was negotiated throughout the research project instead. With this in mind, I began to design a framework through which to put this methodological approach into practice, which I present in detail, below.

Methodological framework

In January 2015, I made a pilot visit to Denmark to ascertain how viable it would be to conduct my fieldwork there. I attended the University of Copenhagen Postgraduate Law Conference with a view to developing academic contacts who might be working in this area. I also contacted, through my personal networks, someone involved in feminist activism in Copenhagen to see if she could recommend any events taking place while I was visiting. We attended a people's kitchen;⁴⁴⁰ a traditional Danish concept re-appropriated by a collection of activists, who ran this as a queer/feminist kitchen (serving vegan food in an environment which aimed to be actively inclusive of people experiencing discrimination along the intersections of class, ethnicity, gender, and sexuality) at the People's House (*Folkets Hus*) in the multicultural working-class district of Nørrebro.

⁴³⁸ Stryker, '(De)Subjugated Knowledges' (n 182) 12.

⁴³⁹ Raun, 'Trans as Contested Intelligibility' (n 4) 13.

⁴⁴⁰ The concept of a *folkekøkken* offers those who cannot afford to dine at a gourmet restaurant the opportunity to eat out, often on a pay-as-you-can basis. They take place on weekday evenings in different locations across Copenhagen.

It is noted in the methods literature that gaining access to a research field is both 'difficult', and a 'key' step. 441 That the timing of this pilot visit unexpectedly coincided with an event that was ideal for initiating a dialogue with trans and feminist activists and people highlights how good fortune can inadvertently affect the process of planning a fieldwork visit. 442 Meeting talkative people who were active to a greater or lesser extent in various grassroots organisations and groups, and willing to discuss trans issues in almost perfect English, left me concluding that the pilot visit had been a success - and that Copenhagen would be an excellent base for my fieldwork visit. However, I ought not to overstate the reception that plans of my research received in this environment. Although the reception was generally positive, I did encounter some who expressed reservations about how academic research related to their everyday lives, and the goals of their activism. These concerns related to previous experiences of cis researchers representing trans people and trans phenomena in particularly problematic ways. 443 Feeling compelled to describe, in lay terms, my methodological approach and how it centred around personal experiences of regulation, was an example of having to negotiate a complex 'insider'/'outsider' status within feminist and trans communities in Denmark. For while I was being read, in this space and for this audience, as an outsider in two aspects – as both cis in terms of gender and foreign in terms of residency and nationality - I was also seeking to present myself as a potential 'ally', 444 with enough knowledge of norms around queer/feminist spaces and praxis to judge what I thought was the 'right' response to this line of questioning, and what was a valuable and respectful type of research project to undertake.

⁴⁴¹ Alan Bryman, Social Research Methods (4th edn, OUP 2012) 433.

⁴⁴² Gary Alan Fine and James G Deegan, 'Three principles of Serendip: insight, chance, and discovery in qualitative research' (1996) 9(4) International Journal of Qualitative Studies in Education 434.

⁴⁴³ For a discussion of one example of problematic research in the Danish academy (presented alongside an example from the UK, and one from the US) see Raun, 'Trans as Contested Intelligibility' (n 4) 19-27.

⁴⁴⁴ For a critical discussion of the concept of 'allyship' in the specific context of cis and trans communities see A Finn Enke, 'The Education of Little Cis' (n 5) 68-71.

Another motivating factor that saw me leaving Denmark feeling excited about the prospect of beginning the fieldwork was that some of the personal perspectives shared with me by trans people at the people's kitchen greatly contrasted with the largely-uncritical receptions of the enactment of the self-declaration model that I had been able to uncover via international LGBT media, presented in Chapter 1. These included personal tales of dissatisfaction with the medical guidelines published only a month before my pilot visit, and helped me realise just how complex a story was waiting here to be told; about how gender was being regulated in a Danish context, and just how much more the international and UK audience had to learn about this.

Access and sampling

Upon returning to the UK, I contacted Søren Laursen, Chair of LGBT Denmark, one of the main interest groups involved in campaigning and lobbying for the adoption of the self-declaration model in Danish law. (Laursen was also the only Danish commentator who had contributed to its reception in international media.)445 He responded by providing me with links to legislative materials, and to an English translation of the new Central Person Registry law (CPR law). At this stage, the project was still framed around activist and campaigners' intentions behind supporting (or not supporting) this law, and how these compared with trans people's legal consciousness. 446 I spoke with Laursen about the possibility of organising an interview, which became the first I conducted upon arriving in Copenhagen in April 2015. In the weeks that followed, I interviewed another representative from LGBT Denmark, along with another ten representatives of various trans, LGBT, political, and human rights organisations – amounting to 12 interviews with campaigners or activists in all (see Figure 2).

⁴⁴⁵ see Laursen (n 348).

⁴⁴⁶ Only later would this frame expand, in response to initial findings, to include 'elite' interviews with regulators including policymakers, civil servants and medical authorities, as I go on to discuss, below.

Organisation	Base	Members	Interviewees
Amnesty	Zealand	89,620	Claus Juul
International			
Social	Zealand	85,838	Flemming Møller
Democrats			Mortensen
Red-Green	Zealand	74,144	Camilla Tved
Alliance			
AIDS-	Zealand	15,380	Ole Møller Markussen
Foundation			
Danish	Zealand	12,353	Peter Ussing,
Institute for			Maria Ventegodt Liisberg,
Human Rights			Sofie Aviaja Bünger
LGBT	Zealand	10,638	Søren Laursen,
Denmark			Linda Thor Pedersen
Trans Political	Zealand	723	Elvin Pedersen-Nielsen,
Forum			Elias Magnild
FATID	Jutland	245	Irene Haffner

Figure 2: Campaigner interviewees by organisation⁴⁴⁷

Beginning my empirical research with activists and campaigners enabled me to ask, at the end of each interview, if these respondents could recommend any professional contacts whom it would also be worth me interviewing, and if they would be willing to share my call for interviewees on their mailing list and social media pages. Much is made in the methods literature of the distinction between 'gatekeepers' and 'participants', 448 but here the line became blurred; as initial interviewees were subsequently positioned as gatekeepers to the members of their organisations that I might also wish to interview. The methods literature also suggests that the initial stages of the access process are likely to be characterised as involving a 'negotiation' between the researcher, gatekeepers, and research subjects. 449

⁴⁴⁷ Membership figures are based upon Facebook 'likes' as of 7 December 2016. ⁴⁴⁸ Bryman (n 441) 151.

⁴⁴⁹ Raymond Madden, *Being Ethnographic: A Guide to the Theory and Practice of Ethnography* (Sage 2011) 59.

In practice, all interviews were conducted amicably, and so my 'snowball' sampling strategy was received quite openly. 450 This was fortunate, for if disagreements had arisen, or relationships been strained for any reason, I was aware that I might lose the possibility to gain a fuller cross-section of trans communities, 451 which would have affected the quality of the sample. 452 As they did not, I was able to advertise my call for respondents on the information pages of several of the groups included in Figure 2 (including LGBT Denmark, Trans Political Forum and FATID – the Association for Transgender people in Denmark), as well as other, more grassroots organisations' social media pages (including LGBT Denmark's 'T-Gruppen', the KaPow Collective, activist Tina Thranesen's 'knowledge database on gender identity', and 'TransFAQ'). Membership of all of these organisations is more or less fluid; ranging from some that provide a platform for discussion that takes place exclusively on Facebook, to others which host regular events such as cafes and meetings in spaces local to their membership, and then those who campaign on a national level. This ensured that the call could be seen by people across Denmark, with different levels of experience of activism and organising, and varying degrees of access to trans communities.

In the absence of a permanent queer/trans social space, 453 and with the chosen organisations making little use of alternative social media platforms, such as Twitter, one effect of positioning them as gatekeepers to interview respondents will have been to exclude prospective interviewees who did not have access to Facebook (or indeed, the internet more generally). Deciding not to have the call for

⁴⁵⁰ Arksey and Knight (n 375) 4.

⁴⁵¹ Kate Hardy, 'Dissonant emotions, divergent outcomes: Constructing space for emotional methodologies in development' (2012) 5 Emotion, Space & Society 113. ⁴⁵² Even though, as is common in qualitative research, my snowball sample makes no claims to be representative.

⁴⁵³ While Copenhagen does have a vast array of gay bars – notably on and around the old Latin quarter street of Studiestræde – it was decided that these would not be ideal spaces for recruitment as they cater, primarily, to gay men more than trans people (although it ought to be noted that the two groups are not mutually exclusive, as is indicated by the demographic data laid out in Figure 3).

participants translated into Danish will also have excluded those who do not speak English. Given the strong English language proficiency of those educated in Denmark in the post-war era, 454 this may – as with only advertising on Facebook – have had a particularly marked effect on the recruitment of older people (of whom, out of 15 respondents, there was only one over the age of 50, and none over 60) and migrants (of whom there were two, from other countries within the EU).

The decision to formulate the call for participants in English may also have affected the recruitment of non-white interviewees, who were not well represented in the research (with only one interviewee classifying their ethnicity as 'Asian'). However, it was decided that, on balance, it was important to be clear that the interview could not be conducted in Danish from the outset – for reasons of my own lack of language skills, and a lack of resources to pay for live translation in the fieldwork budget. Still, the fact that one older activist did turn down my interview request on the grounds of their own perceived lack of English-speaking skills indicates that other, self-selecting, respondents may well have been deterred from responding to the call, and highlights one of the ongoing problems of conducting interviews overseas while only being able to speak English.

⁴⁵⁴ Denmark was ranked third in the world in the Education First English Proficiency Index 2015; 'The world's largest ranking of countries by English skills' (*Education First*, 2015) accessed 2 September 2016">http://www.ef.edu/epi> accessed 2 September 2016.

Gender		Sexuality		Ethnicity	
Male	5	Pansexual	7	Caucasian	14
Female	3	Heterosexual	6	Asian	1
Non-binary	3	Homosexual	1		
Transman	2	Bisexual	1		
Transwoman	1				
Intersex woman	1				
Employment		Age		Location	
Employment Paid employment	5	Age 18-30	8	Location Zealand	8
	5		8		8 4
Paid employment		18-30		Zealand	
Paid employment Unemployed	3	18-30 31-40	3	Zealand Jutland	4
Paid employment Unemployed Student	3	18-30 31-40 41-50	3	Zealand Jutland	4

Figure 3: Demographics

Limitations in terms of age and ethnicity aside, the sample was relatively mixed – particularly in respect of gender identification, sexual orientation, and employment status (as is demonstrated by **Figure 3**). A concern that my being based in Copenhagen, on the island of Zealand (see Figure 4), would create geographical barriers for trans people living on one of the other Danish islands or mainland also appeared ungrounded. One reason for this may have been explained, in part, by an unexpected side-effect of the 2014 medical guidelines. As these required all trans people who wish to undergo body modification to undergo psychiatric evaluation at the Sexological Clinic in Copenhagen, those that are required to travel there from other regions will have their travel expenses covered by the region in which they live. This enabled at least one respondent, who lived on the Danish mainland of Jutland, to meet me for an interview immediately after their appointment at the Sexological Clinic. For others located outside Copenhagen, the possibility of an online interview using Skype video-calling software was utilised on several occasions. In the end, this enabled geographic variation, with almost half of those interviewed

located outside of the most populous island of Zealand (see **Figure** 4).⁴⁵⁵

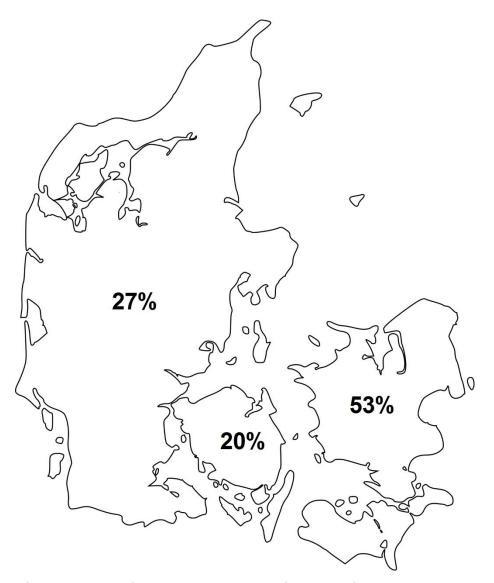


Figure 4: Interviewees by geographical location

I also decided that the call for respondents would benefit from targeting those who did not identify with the gender they were assigned at birth, rather than specifying a specific identity category – such as 'trans people' – as the subject of the study. This constituted a response to Davy's reflections about the difficulties of recruiting 'stealth' people (who are not 'out' – openly identifying – as trans) as interviewees.

⁴⁵⁵ Almost 2.5 million people – around 43% of the population – were registered as residing on Zealand as of 1 January 2016; Statistics Denmark, 'Population by island and date' http://www.statbank.dk/BEF4 accessed 13 December 2016.

⁴⁵⁶ Zowie Davy, 'Transsexual recognition: embodiment, bodily aesthetics and the medicolegal system' (PhD thesis, University of Leeds 2008) 91.

The call was therefore phrased as follows: 'Do you identify with the gender you were assigned at birth? If not, you are invited to participate in a project that helps a researcher from the UK understand how gender identity is recognised in Denmark'; and was advertised on two separate flyers which sought to appeal to trans people of different aesthetic sensibilities (see Appendix 1. Call for Participants). One flyer (Figure 6: Flyer) was designed with clear reference to LGBT political symbols, for those accustomed to that kind of visual language. A second (Figure 7: Flyer 2) was designed using an image from a short film by artist Vika Kirchenbauer, 457 for those who might be less accustomed or inclined towards LGBT political norms. Formulating the call in this way did have the intended effect of enabling the recruitment of eight interviewees that identified primarily as 'male' or 'female' (Figure 3), rather than 'trans'; with one noting that they live their day-to-day life in a manner which might be understood as 'stealth'. It also, more unexpectedly, led to the recruitment of one intersex woman, 458 who also felt that, as she did not identify with the gender she was assigned at birth, she could contribute to a project which sought to explore 'how gender is recognised in Denmark.'

When the additional opportunity arose to expand the scope of the inquiry to include those who had been professionally involved in the design and implementation of the 2014 reforms, it was also one that I willing took. My justification was that expanding the interviews that I had already begun conducting with activists and campaigners to encompass the insights of policymakers and professional regulators would allow me to develop a more comprehensive picture of the intentions and rationalities which shaped the reform process.

⁴⁵⁷ Vika Kirchenbauer, *The Multitude Is Feverish* (2010).

⁴⁵⁸ The term 'intersex' refers to people born with chromosomal, gonadal, hormonal, or anatomical characteristics that challenge the bio-medical sex/gender binary; Francesca Romana Ammaturo, 'Intersexuality and the 'Right to Bodily Integrity': Critical Reflections on Female Genital Cutting, Circumcision, and Intersex 'Normalizing Surgeries' in Europe' (2016) 25(5) Social & Legal Studies 591. Intersex embodiment coincides with trans experience in some respects, as many intersex people do not identify with the gender they were assigned at birth. Yet there are points of distinction in how this dis-identification is experienced, hence intersex being afforded a discreet category in academic and activist literature.

Supplementing the perspectives of those personally affected by the 2014 reforms with the professional insights of regulators would also enable me to develop my initial findings as to how these reforms were working in practise; providing an opportunity to draw insights from the opposite 'pole' of the regulatory arrangement – and developing a point of contrast between those tasked with designing and implementing the regulations and those who are governed in accordance with them. Testimonies could then be contrasted or corroborated, enhancing the 'concreteness' of the study, and alleviating the concerns developed in relation to exploring the embodied dimension of this governance project (discussed in relation to my ontological perspective, above).

Employer during	Name	Role in working
reform process		group
CPR Office	Grethe Kongstad	Secretary to member
Ministry of Health	John Erik Pedersen	Member
Danish Health and	Anne Mette Dons	Member
Medicines Authority		
Sexological Clinic	Annamaria Giraldi	Not officially involved
Department for	Trine Ingemansen	Member
Gender Equality		

Figure 5: 'Elite' interviewees by organisation

Of the five 'elite' interviewees, four had been professionally involved in the working group tasked with amending the civil legislation (see **Figure 5**). As the process of reforming the medical guidelines was less transparent, it is not completely clear which institutions were actively involved in this process, and to what extent. When interviewed, Anne Mette Dons attested to having supervised the 2014 guidelines (having authored the previous ones in 2006). Dons also admitted that the Sexological Clinic – and, presumably, Annamaria Giraldi, who is the Senior Registrar there – had been "consulted", along with other interested parties at some point during the process.

When recruiting these 'elite' interviewees, I again relied upon snowball sampling, and upon the professional connections between the professionals involved in the reform process. On one occasion, my request that one professional interviewee recommend me to their colleague revived an email exchange that had previously stagnated. While I had been made aware by the methods literature that access would not be comprehensive even after it had been partially granted by professional bureaucracy, ⁴⁵⁹ it appeared to help, as with the activists and campaigners, when my call came with a recommendation.

Negotiating outsider status

There is consensus in the methods literature that research conducted with specific social groups will be affected in cases where the researcher is perceived to be an 'insider' or an 'outsider' of the group in question. Yet such are the vagaries of social positioning that this may have an ambiguous or even incalculable effect. 460 This ambiguity was borne out in the interviews conducted with people about how they had been personally affected by the 2014 reforms. In some online interviews, and in many face-to-face interviews, I gleaned the impression that I was occasionally being positioned as a naïve cis law student from England – who was interested in investigating trans issues in Denmark, without much prior knowledge. In these cases, respondents would engage quite openly with the questions about the meanings of gender, transgender, and sexuality, which - in order to get our conversations flowing - I asked quite early on in the semistructured interviews. However, this also came with a tendency to explain things in a more basic, definitional way, in spite of the questions specifically asking what these terms meant to them personally. Although this may have helped make the interviewees feel comfortable and confident at the start of the interview, it may also have inadvertently reduced our ability to get beyond these strategic

⁴⁵⁹ Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice* (3rd edn, Routledge 2009) 41.

⁴⁶⁰ Even where identities or experiences are shared, insider/outsider status will never be guaranteed or static; Wallbank (n 436).

representations of trans experience – preventing the emergence of more complex and personal disclosures and insights. Being perceived to be an outsider may, in these cases, have compromised the range of responses I was able to solicit from interviewees.

Other face-to-face interviews proceeded guite differently. It has been noted within the methods literature that researchers ought to be aware that respondents may have their own expectations of the interview process, which might involve them attempting to place the researcher 'within the social landscape'. 461 Early on in most of the face-to-face meetings, particularly in the initial conversational exchanges before I had been able to initiate the consent process (and before the Dictaphone was recording), I did feel like some of the questions I was being asked may have amounted to my being 'tested out' by respondents as to how naïve I actually was. 462 And in around half of these face-to-face interviews. I got the impression that I was read as an ally, and perhaps, on occasion, as a(nother) gueer person. Some of the more unexpected responses to my later questions about topics such as the most important needs of trans people arose out of these situations. Yet some of these face-to-face interviewees were also taken aback by the same earlier questions about trans and gender which were pounced upon by online interviewees. Perhaps these came across as too 'basic' once I was understood not to be a complete 'outsider'.463 Irrespective of how I felt I was being read, I took great care not to make any assumptions about this, or to let this affect my interview manner, particularly where the lines were being blurred. As is warned in the methods literature, drawing attention to commonalities can be viewed as patronising and misguided - inferring that the interviewee is in some way 'like' the interviewer, or vice versa. 464

⁴⁶¹ Hammersley and Atkinson (n 459) 63.

⁴⁶² Hammersley and Atkinson (n 459) 46.

⁴⁶³ This impression was particularly marked in the interview I conducted with a respondent I had previously met at the queer/feminist kitchen during the pilot visit. ⁴⁶⁴ Vivienne Waller, Karen Farquharson, and Deborah Dempsey, *Qualitative Social Research: Contemporary Methods for the Digital Age* (Sage 2016) 89-90.

My 'outsider' status appeared more straightforward early on in interviews with those involved in designing and implementing the new regulations. With these regulators, being able to present myself as a relatively naïve legal scholar from overseas may have helped me gain access to conduct the interview in the first place. In this instance, the theoretical insights of feminist standpoint theory, discussed in the first part of this chapter, could be re-construed as practical advantages in terms of access; in that the 'problem' of my not being positioned as a trans person or activist enabled me to interview those who I may not have not otherwise had access to. Yet, again, and in parallel with Davy's experiences of 'insider' status proving 'slippery', found that 'outsider' status is also prone to suspicion. For example, I was looked up and down (with slight hesitation at the sight of my ear piercings) by one 'elite' interviewee, and asked: "You're not an activist, are you?"

Ethics and consent

Following the advice of the legal consciousness literature, I took care not to use terms such as 'law' and 'legal' on my call for participants (see **Appendix 1.** Call for Participants); on the understanding that such terms might unduly influence both responses to the call, and the eventual interview itself. Instead, I only alluded to terms such as 'recognition' in order to guide potential respondents as to what sort of topics would be discussed in the interview. Trying to maintain this strategy throughout the recruitment process proved quite difficult, especially as I was reliant upon previous interviewees to recruit others. After one activist, Tina Thranesen, agreed to share my flyer on her 'knowledge database on gender identity', 468 she did so with the accompanying message: 'Have you received legal gender recognition? Would you like to be interviewed, in English, about how legal gender

⁴⁶⁵ I was anecdotally informed by several activists and researchers that I would have been less likely to gain access to these elite interviewees had I been a Danish researcher with direct and established links to trans communities.

⁴⁶⁶ Davy, 'Transsexual recognition' (n 456) 93.

⁴⁶⁷ Ewick and Silbey (n 382) 25.

⁴⁶⁸ 'Knowledge database on gender identity' (*Thranesen*) http://www.thranesen.dk> accessed 9 November 2016.

recognition has affected your life?' Beyond precluding emerging understandings of legality and law, this message risked giving the impression that responses from those who had not sought legal gender recognition would not be included within the study; when, in fact, the testimonies of those who had not felt able to seek recognition via the CPR law were being sought as avidly as those that had. When I wrote to explain this latter point to Thranesen, she amended the advertisement as follows: 'Would you like to be interviewed, in English, about how trans people are recognised in Denmark?' This exchange serves to highlight the difficulty of maintaining consistent legal consciousness methods alongside a snowball sampling strategy.

When it came to obtaining respondents' informed consent at the interview itself, this practical problem gained an ethical dimension; as I realised that omitting any mention of law and legality in the interview materials would require me to obfuscate both the specific objectives of the research project and my contact information. Though it is generally accepted that researchers rarely explain 'everything about the research' to 'all the people they are studying', 469 I felt that omitting such information would be too great a breach of respondents' trust. So, I decided to go against the advice of the legal consciousness literature, and include my full address (including the words 'School of Law') and the precise objectives of the research project (as concerning 'recent changes in the law, and how these have affected people's everyday lives') on the consent forms which were to be completed at the beginning of each interview (see **Appendix 3.** Consent Form).

The decision to be transparent about the aims and objectives of the research on consent forms was informed by concerns I had developed when reading about the interview methods employed by Patricia Ewick and Susan Silbey in their ground-breaking study of legal consciousness in the US. 470 Deciding against a similar level of transparency, on the basis that mentioning legal consciousness might

⁴⁶⁹ Hammersley and Atkinson (n 459) 210.

⁴⁷⁰ Ewick and Silbey (n 382).

'imply or enforce a conventional definition of law and legality', 471 Ewick and Silbey asked their respondents to reflect upon 'community, neighbourhood, work, and family issues' during interviews instead.⁴⁷² Respondents were only informed of the actual research objectives once their interview had been completed. 473 It would be unfair to cast doubt upon the ethicality of Ewick and Silbey's methods purely on the basis of the two interviewees who admitted being left feeling uncomfortable at the end of this process – particularly as this would be to ignore the fact that 'most respondents' reported finding this experience 'interesting'. 474 Yet it could still be argued that methodological decisions which lead to even two interviewees reporting feelings of unease could be considered two too many. 475 Practically speaking, ethical dilemmas around informed consent were an inevitable consequence of the framing of Ewick and Silbey's study - which sought to 'locate the place of law in American culture' by testing exactly how and when legality arose in their respondents' legal consciousness. 476 For my purposes, legal consciousness was merely one aspect of legal embodiment, which I was investigating in order to assess how far self-declaration might affect experiences of governance. Legal consciousness was therefore employed as a way of exploring experiences of the regulation of gender - rather than as the central focus of the study. This informed my methodological decision that being unclear about the aims and objectives would not be ethically justifiable in the context of my specific inquiry.

As it turned out, the decision to be transparent about my legal background was rewarded in an unanticipated way. When asked why they had responded to my advert (as all respondents were asked to do at the beginning of each interview), several interviewees cited the practical focus of my study as a reason they deemed it worthy of their

⁴⁷¹ Ewick and Silbey (n 382) 25.

⁴⁷² Ewick and Silbey (n 382) 25.

⁴⁷³ Ewick and Silbey (n 382) 27.

⁴⁷⁴ Ewick and Silbey (n 382) 127.

⁴⁷⁵ I am grateful to Rosie Harding for her advice on this dilemma.

⁴⁷⁶ Ewick and Silbey (n 382) xii.

time and energy. One interviewee drew a point of contrast between this project and the apparently more intimate or sensationalised focus of calls for interviewees by "sociologists" or "journalists" that they suggested had been circulating with greater frequency in their networks over recent years. As a socio-legal scholar – with proud emphasis on the 'socio-' aspect of that title – this finding was unexpected, but welcome all the same. At the same time, as I came to undertake the 'elite' interviews conducted with those professionally involved in the reform process, being able to state my position as a legal scholar may also, as I have already noted, had a practical effect.

As I have noted, each respondent was given a summary of the aims and objectives of the research, on a written consent form, at the beginning of every interview. These consent forms also stated that they were being interviewed in accordance with informed consent; and that this would be ongoing – enabling them to withdraw their responses up until the point that the thesis, or any materials related to it, had been published (see **Appendix 3.** Consent Form). While it has been noted in the methods literature that the main drawback in seeking to obtain consent in this manner is that being required to sign such a form might prompt rather than alleviate possible concerns;477 within this project the consent process was viewed by most respondents as quite formulaic. Bureaucracy is more sophisticated in Denmark than it is in the UK – in many cases due to the wealth of information related to the CPR number - and so residents are much less accustomed to engaging with constant and visible examples of paperwork and auditing than their counterparts in the UK. There is also a less pronounced litigation culture, and so being asked to sign documentation confirming that you have been given certain information is less normalised. The consent forms thus placed a more formal slant on proceedings than they may have done elsewhere.

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⁴⁷⁷ Bryman (n 441) 140.

The formality exuded by the consent forms affected the context of what had been - in most cases - a relatively relaxed and informal atmosphere up until that point. Not all interviews were affected in the same way. In most cases, the consent process passed without much consequence. Yet where it was commented upon by respondents, it appeared to affect the atmosphere of the interview in one of two ways. In some cases, the effect was somewhat detrimental, as the consent forms gave the impression that the process was more serious than it had previously seemed (or necessarily needed to be). In others, though the consent procedure was unfamiliar - and perhaps even a little awkward – for interviewees, it also served on occasion as an icebreaker; inviting jokes about the formality of my approach (with one interviewee joking that: "No-one sues anyone else in Denmark, you know – it's not the United States!"). In any case, the impression that written consent appeared more about protecting myself, and - by consequence – the institution to which I am affiliated, did appear to have been made; even though, as the methods literature makes clear, this should not be the primary goal of the consent process. 478

Confidentiality and security

I had decided, while preparing my application for ethical review, that the need for confidentiality would be negotiated with, rather than assumed on behalf of, interviewees. I eschewed enforced confidentiality on the grounds that assuming a desire for anonymity could be construed as perpetuating what Raun has described as the 'transphobic myth' that being trans is something that one should hide, or of which they ought to be ashamed. Still, this principle had to be applied on a case-by-case basis, once the risks of being identifiable in research publications had been weighed against potential benefits

⁴⁷⁸ Stephen Webster, Jane Lewis, and Ashley Brown, 'Ethical Considerations in Qualitative Research' in Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls, and Rachel Ormston (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2nd edn, Sage 2014) 92.

⁴⁷⁹ Tobias Raun, 'Screen-births: Exploring the transformative potential in trans video blogs on YouTube' (2010) 7(2) Graduate Journal of Social Science 113, 116-117.

with each interview respondent. Interviewees who decided to take up the offer of anonymity were asked, by the end of their interview, to have come up with a pseudonym of their own choosing. In some cases, this was welcomed as an amusing activity on which to end the process of interviewing. For other interviewees, it was one more thing to worry about (with one stating: "I had enough trouble settling upon this name!"). In retrospect, this process might have passed more smoothly had I prepared a list of potential pseudonyms that I could suggest in the eventuality that the respondent did not have one in mind.

For some interviewees, notably including those currently undergoing assessment at the Sexological Clinic, I had assumed that one advantage of confidentiality would be that it would enable them to speak more freely - reducing any anxieties about potentially negative consequences for the progress of their treatment. However, what I had not anticipated was that one interviewee's repeated insistence against anonymity would suggest they had inverted the logic of this argument - deducing that their testimony could also affect the progress of their case through the Sexological Clinic in a positive way. My impression that this respondent was willing to develop such a hopeful strategy adds a new emphasis to Davy's argument that trans people have developed a 'reflexive agency', 481 discussed in Chapter 2, whereby they disclose information strategically to those whom they assume have the authority to affect their treatment. 482 Beyond such strategic benefits, identifiability was also valued by some interviewees for offering prospective political advantages. One interviewee, Stephanie Stine Skaaning, even went beyond rejecting anonymity to demand greater identifiability – requesting that I refer to her by her full name, rather than merely her forename, to increase her profile as an intersex activist in a country with no official intersex policy.

⁴⁸⁰ Sally Hines, 'Transgender Identities, Intimate Relationships and Practices of Care' (PhD thesis, University of Leeds 2004) 102.

⁴⁸¹ Davy, 'Transsexual Agents' (n 22) 108.

⁴⁸² This impression also adds emphasis to the argument I develop in Chapter 5 around the limited capacities of the Sexological Clinic.

The information sheet sent out to those who had responded to my call to be interviewed was developed with a view to eliciting personal information about the respondent, that could be supplemented by, and expanded upon, during interviews (see **Appendix 2.** Participant Information Sheet). Drawing upon the logics of self-determination, but also non-binary identification, it included lines after biographical characteristics (including gender, sexuality, ethnicity) and boxes after the more impersonal question of employment status. It also asked participants to select a preferred name, rather than their legal, or even birth, name - as to insist on 'proper' names would have seemed ignorant of the complexities surrounding processes of naming in the formulation of trans identities. 483 However, one oversight, which put the information sheet at odds with non-binary and trans-inclusive practice, 484 was that a requirement to self-select preferred pronouns was not included. This required me to contact interviewees after we had completed the interview process to confirm how they would like to be referred to in publications reporting my findings (including this thesis). That this request generated some unexpected responses (with one interviewee stating their preference for "no pronouns", as opposed to gender-neutral ones such as 'they') confirmed my suspicion that not including a space to self-define preferred pronouns constituted an omission from the information sheet, but at least justified my subsequent decision to seek clarification before proceeding with the reporting of my findings.

In the end, interviews were conducted with 33 respondents; including trans people, activists, 485 campaigners, politicians, policymakers, civil servants, and medical practitioners. Interviews with stakeholders – including representatives from the main campaigning organisations, and the 'elite' interviewees from institutional authorities – were largely

⁴⁸³ Willy Wilkinson, 'Cultural Competency' (2014) 1(1-2) Transgender Studies Quarterly 68, 70.

⁴⁸⁴ West Anderson, 'Pronoun Round Etiquette' (*The Body is not an Apology*, 22 December 2015) https://thebodyisnotanapology.com/magazine/pronoun-round-etiquette accessed 27 September 2016.

⁴⁸⁵ Some, but not all, of the activists interviewed identify as trans people.

conducted in their own office buildings. And, in accordance with the practical advice of the methods literature, most of the interviews exploring people's personal experiences of the 2014 reforms were conducted in public spaces agreed upon as mutually convenient by myself and the interviewee.⁴⁸⁶

This reliance upon public space did not always work out as smoothly as anticipated. The first occasion on which a public meeting place was deemed inappropriate was by an interviewee who insisted that they would not meet me in a public place as they would not be able to "speak freely". While I was aware of the importance of selecting a public place where participants would not be overheard, 487 I had not anticipated all public spaces being vetoed completely. Specific clearance had to be sought to depart from the risk assessment I had submitted to the School of Law in Leeds, and was granted on the condition that this was a one-off, and that I was sure to 'check-in' and 'check-out' with a reliable person who would be sure to take immediate action if I had not 'checked-out' at a time pre-agreed before the interview. The decision not to include the possibility of conducting interviews in private spaces in the original risk assessment was that public spaces are better-suited to mitigating against risks to the researcher's personal safety, as well as shielding them from accusations of impropriety. 488 In the Danish context, where personal litigation is much less commonplace than in the US or the UK, risks to the researcher were deemed by interviewees to be less significant than those to their own personal safety and anonymity – which they felt would be more likely to be compromised in a public space. With the benefit of hindsight, this factor could have been included in the 'cultural considerations' section of the original risk assessment.

Another cultural factor which put the current research at odds with the methods literature from the UK related to the possibility of conducting

⁴⁸⁶ Waller, Farquharson, and Dempsey (n 464) 83.

⁴⁸⁷ Waller, Farquharson, and Dempsey (n 464) 83.

⁴⁸⁸ Arksey and Knight (n 375)138.

interviews on campus, in spaces generously provided for me by the Center for Gender Studies at KUA (the University of Copenhagen Faculty of Humanities). It is noted in the methods literature that it is important that the interviewee is comfortable with the interview location, 489 and this led to me assuming that the University campus should be avoided, where possible, for fear that this formal setting would intimidate interviewees – preventing them from speaking freely. Yet in the Danish context, where class-consciousness and elitism are relatively less pronounced than in higher education institutions in the UK,490 respondents exhibited the impression that the University is a public space which they had a right to enter – as a student or otherwise. Concerns about the risk of intimidation were assuaged as I observed two different respondents stride into the University building. When I asked why they had preferred to meet on campus, both mentioned that it was much easier to find parking spaces on Amager (the island upon which the Faculty of Humanities is located) than in the centre of Copenhagen – making my concern for how they might perceive the campus buildings seem impractical and even somewhat patronising.

Interviews were recorded using a Dictaphone, and then transcribed into Microsoft Word with the aid of a programme called 'Amazing Slow Downer', an application development by a company called Roni Music to enable musicians to adjust the speed of an audio file without affecting its pitch. This facilitated the manual transcription of most interview responses while I was still on the fieldwork visit, without the need for additional hardware (such as a stop-start audio pedal). Interview responses were then coded, upon my return to Leeds, using NVivo qualitative data analysis software. This software enabled me to chart emerging themes, as well as assessing their prevalence in relation to others.

⁴⁸⁹ Waller, Farguharson, and Dempsey (n 464) 83.

⁴⁹⁰ The proportion of Danish citizens in tertiary education from a disadvantaged socio-economic background is higher than the international Organisation for Economic Co-operation and Development (OECD) average; OECD, *Education at a Glance 2012: OECD Indicators* (OECD 2012) http://www.oecd.org/edu/EAG 2012_e-book_EN_200912.pdf> accessed 1 December 2016, 106.

In April 2016, I returned to Copenhagen and invited all interviewees to a public presentation of some of the key findings of my research at the University of Copenhagen Center for Gender Research. Although not all interviewees were able to attend, this was the most practical method (in terms of time, and financial expenses) to increase the credibility and ethicality of the research – in terms of testing some of my interpretations with interviewees before they were submitted or published (at which point, ongoing consent is no longer possible).⁴⁹¹

⁴⁹¹ Matthews and Ross (n 434) 12.

4. Civil regulation

Introduction

In this chapter, I present the first set of substantive findings gleaned during my fieldwork visit to Denmark. In accordance with the theoretical framework I laid out in Chapter 2, the chapter reflects upon the question of how legal embodiment has been affected by the 2014 It does so by interrogating how jurisdictional divisions between different institutional power-knowledges involved in the work of governing trans embodiment have been constructed in practice. Drawing from the governance literature on jurisdiction, it suggests that the mobilisation of this legal technology helped develop a distinction between civil and medical reforms - sorting and separating civil and medical understandings of trans phenomena, and allowing medical restrictions to be drafted at the same time as civil legislation was being amended. The result was that Denmark is left with two main jurisdictions, governing different aspects of trans embodiment.

The first, civil, jurisdiction, involves the bureaucratic management of people registered as residing in Denmark, and concerns itself largely with technical, administrative, issues – such as the question of how legal gender status is recorded within the CPR system. The way that this civil jurisdiction was delineated during the 2014 reform process led to the CPR law taking the form of a limited, inexpensive, and uncontroversial amendment of civil legislation. By presenting itself as a merely technical or administrative intervention, the CPR law prioritises matters of civil registration over more complex issues of principle and conscience – such as the possibility of withholding information about gender from state bureaucracies and institutions. Limiting civil reforms in this manner had a profound effect on the legislative process, and on the resulting rearrangement of jurisdiction; which has, in turn, had a significant effect in terms of the embodied impact, and effectiveness, of the 2014 reforms.

The purely administrative scope of the CPR law led to an individualisation of trans people; both in terms of the responsibility to self-declare legal gender status, but also to consider possible complications and conflicts which were anticipated, but not dealt with, during the process of the reforms. Furthermore, the fact that matters of conscience were excluded from the scope of the civil reforms also ensured the construction of a second, medical, jurisdiction, which concerns the health of Danish residents, and - in the case of trans people and others - regulates access to body modification technologies that are understood to be constitutive of sex/gender modification treatments. Before I go on to discuss the historical development of this medical jurisdiction as separate and distinct from the civil jurisdiction, in Chapter 5, I will focus, in this chapter, on the way in which the two were sorted and separated during the process of the 2014 reforms. This will see me draw upon the full range of sources that I described in Chapter 3 – including the doctrinal legal analysis of the parliamentary debates and other documentary sources, as well as the empirical interviews conducted with those professionally involved in, or personally affected by, the 2014 reforms. Documentary sources and interviews will be shown to have demonstrated that, while those professionally involved in the 2014 reform process - including politicians, civil servants, and medical practitioners - felt that the separating of civil and medical jurisdictions made logical sense, the same cannot be said for the trans subjects personally affected by the regulations. For these interviewees, civil and medical regulation is closely interrelated, and could not be so easily disentangled. In some cases, gaining recognition from one jurisdiction was experienced as being largely dependent on gaining recognition from the other.

So while the decision of the Danish Government to implement the self-declaration model of legal gender recognition has been much heralded by international commentators, its contemporaneous decision to oversee a centralisation of authorisation for trans people's access to body modification technologies such as hormones and surgeries – discussed in Chapter 1 – is deemed worthy of more analysis than it

has so far gained in international media and academic literature. In Chapter 2, I discussed how Valverde's jurisdictional perspective illuminates how state law not only governs directly, but also authorises other institutional forms of governance. I added that jurisdiction also works to sort and separate different forms and levels of governance into what Valverde describes as 'ready-made, clearly separate pigeonholes', before strict boundaries are drawn between them. It is this second, more invisible, function of jurisdiction that I address in this chapter as I illuminate how jurisdictional boundaries were drawn during the 2014 reform process. In contrast with previous examples of jurisdictional analysis, the objective in doing so is less to put the state 'in its place' than to illustrate how, in the Danish context, civil institutions were kept in theirs.

Given the international reputation of the self-declaration model, the fact that it could be implemented at the same point in time as restrictive medical reforms raises questions about how effective it can be for addressing the needs and desires of trans subjects. While it is not inconceivable that it could be mobilised as a constituent part of a reform process that would work to benefit trans communities, analysis of contexts and dynamics in the Danish legislation suggests that this is not an accurate description of how it has been received in Denmark. These various critiques raise serious questions that must be considered by activists and policymakers if self-declaration is to be implemented in the UK, and elsewhere, in the future.

⁴⁹² Amnesty International has since launched a domestic campaign criticising the treatment of trans people in the Danish medical system; see 'Briefing:

Transkønnedes adgang til sundhed i Danmark' (*Amnesty International*, 2016) http://amnesty.dk/media/2263/amnesty-transkoennedes-adgang-til-sundhed.pdf accessed 27 July 2016. Amnesty's strategy of supporting civil legislative reform in 2014 and only subsequently criticising medical developments could be criticised for neglecting how the two were designed and implemented at the same point in time.

⁴⁹³ Valverde, *Chronotopes of Law* (n 122), citing Valverde, 'Authorizing the Production of Urban Moral Order' (n 310) 419.

⁴⁹⁴ Valverde, *Chronotopes of Law* (n 122) 85.

⁴⁹⁵ Valverde, *Chronotopes of Law* (n 122) 85.

⁴⁹⁶ cf Dorsett and McVeigh (n 284) 51.

Legislative impact

As I arrived in Denmark, roughly six months after the law had come into effect, early applicants were being issued with new social security numbers based on their self-declared gender status, without having had to undergo surgical castration, for the first time in Danish history. For this reason, the CPR law was being welcomed as a 'landmark gender recognition act' by domestic, 497 as well as international, 498 campaigners. Yet when it comes to assessing how effective the implementation of self-declaration has been in practice, it is interesting to note that it was not celebrated by many of those interviewed about how they had been personally affected by it. Rather than debating the merits and limitations of the CPR law in isolation, each interviewee (without exception) sought to contextualise the amendment of civil legislation in relation to the wider 2014 reforms instead. From here, their viewpoint on the CPR law depended upon how they had been affected by the 2014 guidelines regulating access to body modification technologies understood as sex/gender modification treatments.

Broadly speaking, this saw interviewees split into two groups. The first group comprised interviewees who were satisfied with the progress of their personal transition; and included some who had already undergone one or more hormonal or surgical body modification procedures, and others who had either decided not to seek access to these technologies or were unable to do so for medical reasons. The second group was made up of interviewees who were seeking to gain access to one or more forms of body modification, but had yet to be able to do so. For the first group, the effect of the introduction of the 2014 guidelines had not had a significant personal impact; as they had either secured sufficient access, or did not require access, to body modification technologies by this point in time. For these interviewees, the effect of the CPR law — which afforded them the possibility of

⁴⁹⁷ Laursen (n 348).

^{498 &#}x27;Denmark goes Argentina!' (n 99).

acquiring a new CPR number for personal or practical reasons – was quite significant, and generally well-received:

the demand for you to get surgery or hormone therapy is no longer there, so if you don't need that, you can just do as I have done and ask for a new social security number with the right number at the end – an equal number if you are female. And now I have this, so I am a female in a legal sense.

(Kirsten, Female, 57)

that was, for me, and for now, the last step towards closing that thing down and moving on with my life — not having to worry about travelling with an 'F' in my passport. I recently got a new job, and being able to apply for a job with the right school papers and my social security number [...] — that means a lot to me. [...] I have my social security number in place, I've secured my hormone therapy treatments through the Sexological Clinic. So, right now, that's enough for me to move on.

(Jon, Male, 40)

In both quotations, the introduction of self-declaration is experienced as a progressive step, at least on a personal level; 499 providing a simple and accessible form of legal gender recognition. In Jon's testimony, there is a sense that the enactment of the CPR law has improved his experience of legal embodiment; legal regulation meets adequate healthcare provision to provide a somewhat 'stable platform' from which he can then engage with other authoritative institutions (including airport security, and his new workplace). In these examples, the implementation of the self-declaration model seems to have been quite effective; meeting one of the CPR law's stated intentions: that 'Many situations will become easier when there is consistency between CPR number and physical appearance'. 501

For the second group of interviewees, who had yet to secure access to their desired body modification technologies, the impact of the CPR law was less pronounced. When asked to reflect upon how they had

⁴⁹⁹ From a legal consciousness perspective, it ought to be noted that while they were not personally affected by the 2014 guidelines, many interviewees from this first group were still strongly critical of the 2014 reforms on a political level – expressing sympathy and even solidarity towards those who had not been as fortunate as they were.

⁵⁰⁰ Priaulx (n 253) 183.

⁵⁰¹ Bill for amending the Act on the Central Person Registry (n 95).

been affected by the 2014 reforms, difficulties in accessing healthcare – and the fact that these were not addressed in the CPR law – were repeatedly raised by those unable or unwilling to undergo the formal psychiatric evaluation process at the Sexological Clinic. In some cases, the decision of the healthcare authorities to maintain its policy of centralising access to body modification technologies in the 2014 guidelines may have had the apparently unintended effect of undermining the stated intentions of the CPR law. For trans people who have been denied access to body modification technologies, the fact that it would still be possible to amend the legal gender status would offer scant consolation, for reasons explained by one activist:

It would never be the first step for anyone to change your CPR number – you would just come in a lot of trouble every time you go out and get work with the wrong CPR number, or the wrong name, that you're not passing as.

(Elias Magnild, Trans Political Forum)

The finding that civil recognition can be trumped by medical restriction indicates that although self-declaration may grant anyone willing to declare an experience of belonging to the other sex/gender the opportunity to do so, this offer may not be particularly viable in the absence of accessible healthcare provision. In such instances, the legislative intention that 'Many situations will become easier when there is consistency between CPR number and physical appearance' may be undermined where access to body modification technologies is not addressed in kind. Otherwise, self-declaration may not address the issues that affect trans people most:

instead of focussing on access to healthcare, or more effective healthcare, there's a focus on documentation – which is less important, in a way.

(Sasha, Non-binary, 23)

The suggestion is that the self-declaration model was adopted in a manner which ignores how bodily aesthetics are 'intrinsic' to trans

⁵⁰² Bill for amending the Act on the Central Person Registry (n 95).

embodiment.⁵⁰³ As a result, it is rendered inaccessible for subjects who are wary of amending their legal status without material support.

Evidence that the Danish implementation of self-declaration may not be meeting its stated objectives turns attention to the legislative process through which it was adopted. By acknowledging the consolidations of the previous regulatory regime alongside the limitations of the new one, a governance lens attentive to jurisdictional (re)arrangement offers some indications as to what lay behind the Danish failings. For, while the CPR law does allow any legal subject to self-declare their gender status, this merely extends an existing possibility (to change CPR number) to a wider group of people (from those who had undergone surgical castration 'for the purposes of sex/gender change', 504 to anyone willing to self-declare 'an experience of belonging to the other sex/gender'). 505 This reform required no significant re-design of the CPR system, and was enacted simply by inserting a one paragraph into the existing law on the CPR. 506

Interviewees involved in the legislative process admitted that the CPR law constituted little more than an administrative amendment of the existing CPR. Though LGBT Denmark had lobbied hard to ensure reforms would pass before the 2015 general election,⁵⁰⁷ their Chair, Søren Laursen, was under no illusion as to the scope of the result:

Of course we were very satisfied with the Gender Recognition Act last year, [but] we actually wanted something a little different, or a little more! Because if you look at that Bill, that Act, it is not a 'Gender Recognition Act' – it is an Act on the CPR system.

(Søren Laursen, LGBT Denmark)

⁵⁰³ Davy, Recognizing Transsexuals (n 11) 45.

⁵⁰⁴ Ministry of Justice, *Rapport* (n 72) 20.

⁵⁰⁵ L 182 (n 13) s 1; Order regarding the Act on the Central Person Registry (n 74) s 3 para 6.

⁵⁰⁶ Hence the CPR law's full title: 'L 182 Law amending the Act on the Central Person Registry.'

⁵⁰⁷ Which, as anticipated, saw a narrow defeat for the incumbent Red Bloc; (n 82).

Separating law and medicine

In the Government's initial commitment to review 'the rules concerning sex/gender modification treatment, including opportunities to have a legal sex/gender change without the need for surgical intervention', civil and medical reforms were considered alongside one another. ⁵⁰⁸ By 2014, the two had been disentangled. ⁵⁰⁹ This is evidenced by the mandate issued to the working group; which requested a description of both medical *and* legal regulations of trans embodiment in Denmark, but invited international comparisons and reform proposals only in respect of civil (but not medical) recognition. ⁵¹⁰ Interviews suggest that the working group's jurisdiction was also limited in practice. Grethe Kongstad, speaking on behalf of the CPR Office, explained:

The thought was that everyone should have the possibility [to change their legal gender status]; and those that want to change their bodies – and where they are given permission to do so – of course they should carry on doing so. It's still two different possibilities: to change your CPR; and then to change your body. But of course, that's treated in a whole other system. (Grethe Kongstad, CPR Office)

The idea that decisions about how access to body modification technologies ought to be regulated belonged to a "whole other system" goes some way toward explaining why no attempt to evaluate the interim guidelines can be identified in the working group's report. That both the DHMA and the Ministry of Health had representatives in the working group will have helped ensure that policymakers respected this jurisdictional division. As Anne Mette Dons, who represented the DHMA in the working group, explained in an interview, the 2014 guidelines were already "in progress at that time anyway"; and were merely "stalled" until after the working group had published its report.

⁵⁰⁸ This was included in the 2011 coalition Government's policy agreement, introduced in Chapter 1; Prime Minister's Office (n 84).

⁵⁰⁹ It is my impression that the 'trigger' for this development may have been the media controversy around the Caspian case, discussed in Chapter 5. ⁵¹⁰ Ministry of Justice, 'Kommissorium' (n 92).

Civil and medical reforms could thus be enacted as part of the same reform process, but as distinct governing projects – which would not have to align in terms of principles or application. The result was that trans people who wish to access body modification technologies must engage with a medical jurisdiction which does not coincide with the administrative jurisdiction developed for the purposes of reforming civil registration. This lack of coincidence is no more apparent than when considering the 'rationalities of governance' that the two jurisdictions proceed under.⁵¹¹ While the CPR law is open to anyone who wishes to declare an experience of belonging to the other sex/gender, the same cannot be said of access to body modification procedures; as Annamaria Giraldi, Senior Registrar at the Sexological Clinic, noted:

We don't have the informed consent model totally in Denmark, because we have the guidelines that say that there are some strict things that need to be taken care of, and there are some things that need to be fulfilled, before you can have the permission. [...] the healthcare system also needs to find the people for whom it [body modification] is not a good idea.

(Annamaria Giraldi, Sexological Clinic)

Health lawyer John Harrington has demonstrated that legal and medical practices are marked by diverse temporalities. Here, this is reflected in their contrasting objectives. Civil regulation concerns itself mostly with the present, and is formally inclusive; while medical practice seems more concerned with a prospective future, and ends up being openly restrictive. Concerns that trans people may regret body modification motivate a paternalistic and risk-averse governing rationality (which I will address in more detail in Chapter 5) which starkly contrasts with the principles of self-declaration. Yet the two are held together, as plural knowledges are sorted and separated with the allocation of distinct jurisdictions to different authorities. In Valverde's understanding, this is not an atypical use of jurisdiction, as governing projects are always differentiated by the way in which they 'select' certain aspects of governance, while de-selecting or ignoring

⁵¹¹ Valverde, 'Jurisdiction and Scale' (n 287) 144.

⁵¹² Harrington, 'Time as a dimension of medical law' (n 257).

⁵¹³ For instance, changing CPR number on multiple occasions is permitted.

others. ⁵¹⁴ So although making strict divisions between civil and medical regulation did not make much sense when viewed from the perspective of those governed by them – as I demonstrated in the previous section – the same could not be said of policymakers, who followed their limited mandate in practice. Civil registration was viewed as a technical, administrative, concern – which could be amended by civil servants working at the CPR Office; but regulations governing access to body modification technologies were understood to be a purely medical concern – best left to professional regulators.

The process of reforming how access to body modification technologies is regulated was thus afforded an exclusively medical jurisdiction. When a civil servant representing the Department for Gender Equality was asked how they would deal with a written complaint about this process, they responded as follows:

If you wrote to us regarding that question, then we would send the letter on to the Ministry of Health.

CD: So that's a health issue and not at all a social issue?

Yes.

(Trine Ingemansen, Department for Gender Equality)

That the Department for Gender Equality always defers judgement on the trans people's access to body modification technologies to the Ministry of Health highlights the limited jurisdiction it has been allocated on this matter. The response is also indicative of how seriously this jurisdiction is respected, and offers some explanation as to why discussion of body modification technologies was so carefully avoided throughout the reform process. Not only are different types and levels of authority sorted and separated, but the curtness of this response suggests that this sorting process has been so normalised and depoliticised that Valverde's 'open-ended non-legalistic discussion about which type of governance is or is not appropriate in

⁵¹⁴ For, 'there is no such thing as a law in general, since every legal process comes already classified as belonging to a specific project (criminal law, family law, etc.)'; Valverde, *Chronotopes of Law* (n 122) 60-61.

a given situation is thus foreclosed'. 515 Once the jurisdiction of the working group was limited to cover only civil administrative issues, so the scope of its objectives was restricted to technical bureaucratic questions about how the Danish population could be better managed.

Mobilising jurisdiction in this manner may have limited the scope of the CPR law, but it did not come without governmental advantages. By allowing these different governing rationalities to be pursued within the same reform platform, sorting and separating civil and medical jurisdictions appears to have prevented potential conflict between different political constituencies and governing institutions. As a representative of the Danish Institute for Human Rights explained:

this was [...] technical legislation; it was all about name registration, and a change of the CPR legislation, so there was a not a big heated discussion about whether it's right or wrong – with declaring your own gender. It was very much a technical issue.

(Peter Ussing, Danish Institute for Human Rights)

That the 'technicality' of the CPR precluded a "big heated discussion about whether it's right or wrong" suggests that separating the 2014 reforms served to limit political opposition during the legislative process. That this was accomplished through a careful mobilisation of jurisdiction demonstrates that this technology is capable of preempting potential conflict and ensuring the 'smooth functioning of law' – hence Valverde's characterisation of jurisdiction as 'the true 'antipolitics machine". Some even interpreted this process of depoliticisation as a deliberate governmental strategy; as the centre-left minority Government did not stand to gain from politicising the issue on a national level – inviting widespread public debate about the different social and biological definitions of sex and gender, 517 and

⁵¹⁵ Valverde, *Chronotopes of Law* (n 122) 85.

⁵¹⁶ Valverde, *Chronotopes of Law* (n 122) 84, citing James Ferguson, *The Anti-Politics Machine: Development, Depoliticization and Bureaucratic Power in Lesotho* (University of Minnesota Press 1994).

⁵¹⁷ When this problem did arise in parliamentary debates around the CPR law, it could be dismissed as irrelevant by the Minister of the Economy and the Interior; Margrethe Vestager, Folketingstidende 20 May 2014, 91. møde, kl. 19:07.

goading social conservatives.⁵¹⁸ Still, they could be confident that the *prima facie* liberalness of the CPR law would ensure that it was received well among interest groups and international reformers:

none of the parties – even the ones in the Government – were advertising the new law in any way. I mean, we notice it [...], but I think the broader Danish society had no idea that this law was passing...

(Elvin Pedersen-Nielsen, Trans Political Forum)

No, not at all. But LGBT Denmark knew it, and Amnesty, and all these organisations had a big part in it, and the international world...

(Elias Magnild, Trans Political Forum)

To all them it was: "We are working with trans politics." But to the rest of society...I think no-one noticed in any way. [...] I think they tried to slip it [by] as quietly as possible.

(Elvin Pedersen-Nielsen, Trans Political Forum)

As the reception that the CPR law received attests, the involvement of human rights organisations such as LGBT Denmark and Amnesty International would be enough to ensure that its enactment would be well-publicised among select target constituencies, in Denmark and elsewhere. This even invited the suspicion that a purposeful intention to promulgate 'the myth of liberal Denmark' may have been "the main reason" for enacting the CPR law:

the CPR number law *only* came because Denmark should look like a liberal, trans[-friendly country] [...] because of the national pressure, but also international – because it's really important for Denmark, apparently, to look like an LGBT-friendly country. (Elias Magnild, Trans Political Forum)

The result is that while the CPR law which may, at face value, appear to meet its liberal intentions when considered in isolation, it seems seriously limited, and perhaps even poorly-drafted, when it is analysed in relation to an assessment of whether the needs of trans subjects

⁵¹⁸ Social conservatives comprise a political constituency whose influence in Danish politics is growing. This is reflected in the rise of the Danish People's Party; which became the second largest in the Parliament in 2015, after tripling the 7% vote-share it achieved the first time it competed in a general election in 1998. ⁵¹⁹ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

have effectively been met. And, as I suggested in Chapters 2 and 3, beyond identifying how this legal technology is mobilised to sort and separate the different power-knowledges involved in the practical work of governing, jurisdictional analysis could also be utilised to assess how particular arrangements of jurisdiction can affect experiences of regulation at the level of the embodied subject. It is these embodied effects which will now be discussed in what remains of this chapter.

Jurisdictional effect

Evidence garnered through interviews with those personally affected by the 2014 reforms suggests that the legislators involved in drafting the CPR law had failed to anticipate that a purely technical or bureaucratic amendment to civil regulations might prove incapable of responding to the complexities of trans embodiment in practice. It emerged in interviews that the need to even make a statutory declaration led to numerous problems for trans people, who described themselves assuming various responsibilities for making sure that the process of changing legal status went smoothly. Some of these responsibilities pre-existed the 2014 reforms, but others can be directly linked to the provisions of the CPR law. The former includes the responsibility to explain to various institutions that – and why – their CPR number had changed. These conversations had proven difficult for interviewees that were not 'out' about their trans history in sensitive institutional spheres – such as the labour market. Peter describes how his CPR number probably had the effect of 'outing' him to his employer (that is, unless it already had done on the day he was hired):

when I told my boss that my CPR is not right [...] he didn't care – I was really lucky. And now, after I changed it, I actually had to go and talk to him about my contract, because I needed a new copy with my new CPR on it. [...] I haven't told him why, but I'm pretty sure he did the math. [...] I think he put two and two together because he can see the old and the new; and he can see that it has gone from an even to an odd number – so I suppose he figured it out.

(Peter, Male/FtM, 27)

The implication is that the legal subject drafters envisaged making use of the CPR law was not one that was employed;⁵²⁰ or, at least, was already 'out' at work if they were. Moreover, this anticipated applicant is also not without access to disposable income. One interviewee referred to the small – but not insubstantial – processing fees required to amend personal documentation:

A new social security number means that every place where your social security number is registered is going to fuck up. [...] I think the passport costs around five hundred kroner [circa £50], I think driver's licence was four hundred kroner [circa £40]. [...] I had to go to Copenhagen to hand in my old diplomas, and pick up my new ones — that's time and money. But everything is difficult and nothing's automatic.

(Mark, Transman, 38)

With regards to civil administration, it could be surmised that, along with taking responsibility for declaring one's own legal gender status come various additional responsibilities for making sure that this is practically (and financially) possible. The neoliberal logic that citizenship rights ought not to be granted without corresponding responsibilities emerges,⁵²¹ as individuals are required to pay – quite literally – to access their newly-granted rights.⁵²²

Yet recognising gender in this neoliberal manner singularly fails to address the complexity of trans embodiment; which is not experienced individually but in relation to other bodies and institutional power-knowledges. As I noted in Chapter 2, seeking recognition in a gender other than that which was assigned at birth involves trans people having their gender status challenged by a range of institutional authorities on a day to day basis.⁵²³ This will include civil registration

⁵²⁰ This stereotype is informed by research undertaken at the Sexological Clinic, which found that unemployment rates were, on average, higher among individuals approved for surgical castration than among the Danish population in general; Rikke Simonsen and others, 'Sociodemographic Study of Danish Individuals Diagnosed with Transsexualism' [2015] 3 Sexual Medicine 109, 114.

⁵²¹ Carl Stychin. A Nation by Rights: National Cultures. Sexual Identity Politics and

⁵²¹ Čarl Stychin, A Nation by Rights: National Cultures, Sexual Identity Politics and the Discourse of Rights (Temple University Press 1998).

⁵²² For a critique of this neoliberal conception of autonomy, see Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004). ⁵²³ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press 2011).

systems, but will not be limited to them. Other institutions – including the family, the workplace, and the clinical setting – will also have to be negotiated. But when trans people have their gender status challenged in any of these non-state institutional settings, the CPR law offers little clarification of what rights – beyond the right to make the declaration itself – trans people have, or have not, been granted. Take the question of whether trans people are permitted to access gender-segregated spaces. When this issue was raised in parliamentary debates; 524 the Minister of the Economy and the Interior would not be drawn into offering any concrete guidance, stating only as follows:

we are finding solutions to [challenges such as] that, and we will continue to find solutions to [challenges such as] that. I do not think that should be the barrier in this case. 525

The idea that it could be the Government's responsibility to lay out the substantive and clearly-defined rights of trans people is brushed off and avoided. This 'hands-off' approach to governance has been criticised by Danish legal scholar Natalie Videbæk Munkholm:

The issue of access to participate in sports on the basis of legal gender or biological gender is not mentioned, neither are practical everyday challenges relating to the use of changing rooms in public sports facilities, or sleeping quarters when in the military, in hospital or in prison. [...] Likewise, the amendments have not touched on subjects such as existing employment on the basis of a certain gender (where legitimate). 526

The effect is that the question of whether trans people are expected to avoid accessing gender-segregated spaces, or whether such spaces are expected to accommodate them has been left unclear. ⁵²⁷ In practice, the responsibility to negotiate this lack of clarity will be borne by trans people. In the first scenario, where they are expected to only use spaces reserved for members of their newly-assigned gender

⁵²⁴ see Joachim B Olsen, Folketingstidende 20 May 2014, 91. møde, kl. 19:09; and Charlotte Dyremose, Folketingstidende 20 May 2014, 91. møde, kl. 19:24.

⁵²⁵ Vestager (n 517) 19:11.

⁵²⁶ Munkholm (n 76) 174.

⁵²⁷ Munkholm (n 76) 175.

when this is unlikely to cause offence, it is up to the individual trans person to make a judgement as to when and where they are expected to conform to the normative standards of others. In the second scenario, where the responsibility for accommodating trans people falls upon the public service provider, the fact that this was not explicitly stated in the CPR law ensures that this will only be clarified if a trans person is able to mount a successful legal challenge against an instance of discrimination. In both instances, trans people are left to deal with the consequences of the Government's unwillingness to delineate clear and practical boundaries between what constitutes (un)acceptable discrimination on the basis of sex/gender. Until they do, trans people are left to negotiate this legal vacuum – avoiding contentious situations when using toilets and changing facilities in everyday spaces such as the workplace or their local swimming pool.

Being merely inserted into the existing CPR system had also led to difficulties for those seeking to access 'gender-specific' services, such as the public healthcare system, which only generates automated offers to undergo certain treatments to those whose CPR number ends with an odd or even number (depending on the screening). Before they are granted a new CPR number, these calls will accord with a trans person's assigned gender status; once they have a new CPR number, they will correspond to the new gender status. As they are dichotomised, these calls may or may not correspond to the healthcare needs of the person in question. Yet it is that person who will assume responsibility for ensuring that they can access the screenings to which they are entitled. Several interviewees reported problems accessing such services:

the problem with intersex people is that we're not male- or female-specific, so we don't fit those categories. So, if I had gone into a hospital before I had my legal gender changed, I wouldn't get checked for breast cancer. But now that I've changed my legal gender, I won't get checked for prostate cancer. And [yet] I have both female breast development and a prostate, and other variables of sex anatomy.

(Stephanie Stine Skaaning, Intersex woman, 29)

Although Stephanie's conundrum highlights a practical limitation of healthcare systems being built around binary conceptions of gender, her understanding – that she is not formally allowed access to various screenings – is not strictly accurate. The explanatory comments which accompany the amendment to the Health Act explicitly state that while recipients of a new CPR number will no longer receive automated calls for 'gender-specific' procedures (including breast examinations, smear tests, and the human papillomavirus vaccine) they do 'of course retain the right to access these treatments'.528 Yet the fact that Stephanie had not been made aware of this could still be considered a failure of the Danish healthcare system - which has no official policy on how intersex people's access to healthcare ought to be facilitated. And moreover, as the explanatory comments note, it is the individual patient who will be responsible for making sure that they can make use of such screenings. 529 The experience of another interviewee suggests that this may not prove so simple:

the last doctor I saw [...] did not understand trans people. [...] because I'm recognised as male here, when I asked them to do a smear test for me, she was like "I think I can, but you have to pay a lot of money for it. It's not covered, because you're male." (Steve, Trans man, 28)

In this case, it is the doctor whose understanding of the treatment provisions is legally incorrect. But even with the benefit of this knowledge, Steve will be individually responsible for asserting his rights within the doctor-patient relationship. As I noted in Chapter 2, the historical relationship between doctors and trans patients has been particularly complex; ⁵³⁰ and the clinical setting remains a highly

⁵²⁸ Bill for amending the Health Act and the Act on Assisted Reproduction in connection with treatment, diagnosis, and research, etc. (30 April 2014) (*Forslag til Lov om ændring af sundhedsloven og lov om assisteret reproduktion i forbindelse med behandling, diagnostik og forskning m.v.*) (DK), para 2.1.2.

⁵²⁹ Bill for amending the Health Act and the Act on Assisted Reproduction (n 528), para 2.1.2.

has been noted: 'Transsexuality is a medicalized phenomenon. The term was invented by a doctor. The system is perpetuated by doctors. But the demedicalization of transsexualism is a dilemma. There is a demand for genital surgery, largely as a result of the cultural genital imperative. Due to financial requirements, the fulfilment of the surgical dream is subject to cultural and class constraints; cosmetic and genital conversion surgery is available primarily to the middle and upper classes. [...] The demedicalization of transsexuality would further

sensitive space for trans people.⁵³¹ As the CPR law provides no clear guarantees in this area, and – furthermore – was enacted at the same point in time as access to body modification technologies was being actively restricted, its effectiveness at alleviating trans people's concerns around accessing healthcare has been seriously limited.

After the 2014 guidelines confirmed the restrictions that had been instigated following the Caspian case, around two-thirds of interviewees reported turning to informal or illicit alternatives – including buying hormones on the black market, or travelling to a different country for surgical intervention:

I actually contacted a doctor – an endocrinologist in Germany – and I am seeking counselling over the internet from the Philippines. So I am going my own way.

(Freyja, Transwoman, 46)

I actually ordered hormones from England that I'm taking as well. [...] I [...] use one thermal patch, [...] in addition to oestrogen pills that I get outside my gynaecologist, and then I'm having my T-blockers.

(Anna, Female, 29)

I've decided to go to Germany because a lot of trans people go there already – simply because it's easier. You just book a time and it's also by informed consent; you just have to explain: "Okay, I'm a trans person, I feel like this is the right thing for me." And they're just like: "Okay, you can have surgery."

(Sasha, Non-binary, 23)

The suggestion that healthcare policy could be motivating this turn towards the black market, or healthcare tourism, will be assessed in Chapter 5. When considered alongside the jurisdictional impacts of the CPR law, the most relevant effect of granting recognition only within a civil administrative jurisdiction is that trans people have again accrued the responsibility to facilitate their own inclusion into Danish society. While the CPR law did grant one new responsibility central to the self-declaration model of legal gender recognition – that is, the

limit surgery in this culture, as it would remove the label of "illness" [...]'; Kate Bornstein, *Gender Outlaw: on men, women, and the rest of us* (Vintage 1995) 119. ⁵³¹ Davy, 'Transsexual Agents' (n 22) 107-110; Grabham, 'Governing Permanence' (n 37) 107; and Ellis, Bailey, and McNeil (n 270) 4.

responsibility for declaring legal gender status – it also came with other, potentially unforeseen and largely unwanted responsibilities; including the need to cover the expenses of amending legal documents, negotiate gender-segregated and other sensitive spaces, and to finance their own access to body modifications where they are unable or unwilling to gain authorisation from the Sexological Clinic.

By neglecting to delineate exactly what rights trans people have been granted by the CPR law, jurisdiction beyond civil registration is effectively dispersed. This indicates that the avoidance of creating any new state responsibilities when it came to the regulation of trans people may have been an important governmental concern. Beyond the right to declare gender status, no substantive rights were clearly Thereafter, jurisdiction to govern access to body delineated. modification technologies was reserved for medical authorities. Formal gender status is sorted and separated so that it becomes something which is rendered distinct from the question of what actions and behaviours are legally permissible, and when. One effect of jurisdictional divisions between different assemblages is that, as Valverde has noted, more general rights may not be 'coordinated or harmonized' with more specific 'low-level' regulations governing particular spheres. 532 Dorsett and McVeigh have also identified how jurisdiction operates in different 'modes'; attaching to a person's status ('being a minor, a soldier or a refugee, for instance') or activities. 533 Both insights can be identified in the Danish context; as the question of what trans people can be (in terms of civil registration, and declaring legal gender status) is distinguished from what they can do (in terms of retaining employment, and accessing certain spaces or technologies). The logic of the 2014 reforms suggests that these two things can be sorted and separated – and then governed by different jurisdictions. Trans people's embodied experience of these regulations suggests that this logic is misguided.

532 Valverde, 'Jurisdiction and Scale' (n 287) 141.

⁵³³ Dorsett and McVeigh (n 284) 24.

In some cases, being unable to access body modification had the knock-on effect of rendering even self-declaration of legal gender status practically inaccessible, as I demonstrated in the first section of this chapter. When the 2014 reforms are considered in tandem, the result is that trans people who wish to assume the responsibility for declaring their legal gender status must also ensure that they can access body modification technologies (or deal with the consequences of not being able to). Otherwise, they must also be willing and able to be diagnosed with 'transsexualism' at the Sexological Clinic if they are to do so with the support of the Danish public healthcare system. If not, they will be individually responsible for funding their own body modifications - informally or abroad. Within trans studies, and wider critical literature, the process of psychiatric diagnosis has been subjected to much critique; for being based upon out-dated, 534 middleclass, white, 535 gender norms. 536 In Denmark, it is also difficult to be diagnosed with transsexualism if you are in receipt of another psychiatric diagnosis at the time. 537 The severity of the effect of separating civil and medical jurisdictions in the 2014 reforms will therefore depend upon an individual trans person's privilege in terms of age, class, disability, ethnicity, and sexuality. The possibility of going outside the formal healthcare system is not an option for all trans people; with one interviewee citing the financial costs involved:

Of course it's easier to get your operation when you pay for it yourself. You can still do that. I can still travel to Thailand or Canada, wherever, if I pay for it myself. It's no problem. Nobody can stop me. I just need the money, and I don't have it — so I have to go through the Danish system.

(Anita, Female, 46)

⁵³⁴ Mira J Hird, 'A typical gender identity conference? Some disturbing reports from the therapeutic front lines' (2003) 13 Feminism & Psychology 181.

⁵³⁵ Mary de Young, *Madness: An American History of Mental Illness and Its Treatment* (McFarland 2010); Dorothy E Roberts, 'Race, gender, and the political conflation of biological and social issues' (2012) 9(1) Du Bois Review 235; Jonathan M Metzl and Helena Hansen, 'Structural competency: Theorizing a new medical engagement with stigma and inequality' (2014) 103 Social Science & Medicine 126.

⁵³⁶ Zowie Davy, 'The DSM-5 and the Politics of Diagnosing Transpeople' (2015) 44 Archives of Sexual Behavior 1165.

⁵³⁷ One justification for requiring psychiatric evaluation is to clarify whether the patient is suffering from 'any concurrent physical or mental disorders (comorbidity) [...] that may contraindicate treatment'; Guideline no 10353 (n 110), s 1.

The effects of the decision to close off existing routes to body modification technologies will thus have a disproportionate impact upon trans people who do not have the resources to travel abroad or turn to the black market. 538 This insight must shape any attempt to assess the value or effectiveness of the self-declaration model - as jurisdictional divisions see responsibilities privatised in a manner which has significant class-related consequences. Even for those who possess sufficient resources to access body modification technologies through informal or illicit means, the consequences are hardly ideal. Any side-effects or complications associated with accessing technologies in this way could go undetected as restrictive guidelines push trans people outside the formal medical system. In both instances, the responsibility to facilitate one's own well-being falls upon individual trans people. When viewed from a broader perspective, it appears that the CPR law plays into wider trends concerning the privatisation of responsibilities in healthcare, limiting state responsibility and the exacerbation of existing inequalities – even as the CPR law claims that it seeks to ameliorate them.

Safeguarding

One final instance where trans people find themselves held responsible for their own circumstances is when they are making the declaration of legal gender status itself. While the main advantage of the CPR law has therefore been that it has granted trans people the right to self-declare legal gender status without requiring the support of any legal or medical gatekeepers, this is not to suggest that legislative drafters were particularly enthusiastic about doing so. On the contrary, the concern that it would not be possible to conduct 'a proper examination of whether the application is indeed justified by an

⁵³⁸ It has been noted in the trans studies literature that the 'vast majority' of trans people will not undergo genital surgeries, with one reason being many do not have access to medical care; A Finn Enke, 'Introduction' in A Finn Enke (ed), *Transfeminist Perspectives: in and beyond Transgender and Gender Studies* (Temple University Press 2012) 6.

experience of belonging to the other sex/gender' was explicitly raised by the working group, and is included in the explanatory comments which accompany the CPR law.⁵³⁹ As a consequence, a provision is included to 'safeguard' the new system from abuse or misuse:

it will not, for example, be permitted to change sex/gender 'for fun', as part of an action for greater equality between men and women etc., to obtain gender-related benefits, or in an attempt to disguise one's identity. 540

Again, jurisdiction is mobilised to sort and order conduct and behaviour. From a Foucauldian perspective, this provision explicitly excludes the possibility of a legal subject making a declaration of legal gender status based upon any of these reasons. These normative exclusions are prohibited with reference to this hypothetical scenario:

if the Ministry of the Economy and the Interior later – for example through publicity in the press – becomes aware that the statement is inaccurate, permission for legal sex/gender change could be revoked by the general rules of administrative law. The consequence of this would be that the person is reassigned their original social security number. Misrepresentation in the declaration of the reasons for the application for change of sex/gender will in these circumstances be punishable by section 163 of the Penal Code. 541

The relevant section of the Penal Code – covering misrepresentation – states that 'Whoever gives false statements to a public authority about matters as to which he is obliged to give evidence, shall be punishable by fine or imprisonment for up to 4 months.' 542 When challenged by opposition parties as to the inclusion of this provision, members of the coalition Government expressed the opinion that the possibility of a criminal sanction was 'enough' to assure them that the law would not be misused. 543

⁵³⁹ Bill for amending the Act on the Central Person Registry (n 95).

⁵⁴⁰ Bill for amending the Act on the Central Person Registry (n 95).

⁵⁴¹ Bill for amending the Act on the Central Person Registry (n 95).

⁵⁴² Penal Code (4 July 2014) (*Bekendtgørelse af straffeloven*) (DK), s 163.

⁵⁴³ Özlem Sara Cekic (SF), Folketingstidende 20 May 2014, 91. møde, kl. 18:25.

That the implementation of a model of gender recognition as accessible as self-declaration would require the backing of Danish criminal law would come as no surprise to the critical trans studies scholars involved in thinking through the coincidence of LGBT rights reforms and the expansion of the 'prison industrial complex' in US and UK contexts.⁵⁴⁴ Though it seems unlikely that a trans person would be criminalised in accordance with this provision, it remains a formal possibility nonetheless. The mere threat of criminal sanction may be enough to make trans people take care to 'pass' as guietly as possible; as the example of receiving negative 'publicity in the press' – explicitly cited in the explanatory comments - posits one scenario in which a prosecution might be pursued (for example if a trans person seeks to access a gender-segregated space in a controversial manner). As I noted in Chapter 2, Foucauldian analysis has established that it is not just norms about 'good' behaviour that are relayed by such a but also normative (and non-normative) subject prohibition, positions. 545 Here, the incentive to stick to normative trans embodiment is clearly communicated to trans people.

The same logic also presents itself in the Danish Government's decision to avoid responding to calls to grant subjects the opportunity to declare an experience of belonging to 'another sex/gender', or be allocated a gender-neutral CPR number — which had the effect of formally excluding non-binary trans people from legal recognition. While interviews demonstrated that this had not stopped some non-binary-identified interviewees from applying for recognition for strategic reasons, ⁵⁴⁶ the safeguarding provision — by design or coincidence — compounds the exclusion of non-binary trans people from the scope of legal gender recognition by making it more likely that they will be prosecuted on the basis of their application having not

⁵⁴⁴ Spade, *Normal Life* (n 523); Ryan Conrad (ed), *Against Equality: Prisons Will Not Protect You* (AE Press 2012); Sarah Lamble, 'Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment' (2013) 24(3) Law and Critique 229.

⁵⁴⁵ Foucault, *The Will to Knowledge* (n 122) 42-43.

⁵⁴⁶ If, for example, they are often 'read' as (assumed to be) 'the other sex/gender' than the one they were assigned at birth.

been justified by an experience of belonging to *the other* sex/gender than binary-identified others. Concerns around this formal risk of criminalisation had registered with some interviewees, including one non-binary interviewee who had changed gender status before 2014:

the way it's phrased criminalises non-binary people if they want to change their legal gender for pragmatic reasons. So I got my number changed before the new law; and of course having to go through surgery, and losing your reproductive system – I was going to do that anyway – but something like that should never be a prerequisite for having gender recognised. But at least I did it legally. If I wanted to do it today I would have to lie. (Pippin, Non-binary, 42)

Pippin demonstrates an interesting legal consciousness here; celebrating that the CPR law removes the need to undergo surgical castration by stating that "something like that should never be a prerequisite for having gender recognised." Yet, for all the faults of the previous regulatory regime, the fact that Pippin could acquire a new CPR number "legally" before 2014 - and would have undergone surgical castration "anyway" – makes it difficult to construe this sense of progress with any real enthusiasm. That it is no longer formally possible for a non-binary-identified trans person to amend their legal status without risking criminal prosecution challenges any attempt to situate the CPR law within a straightforwardly 'progressive' narrative – even when critique is limited to its internal dynamics. In a UK context, Hines has criticised the GRA 2004 for producing 'dichotomous frameworks, which reinstate old - and bring into being, new hierarchies', marked by intersections of age, class, disability, ethnicity, gender, and sexuality, which privilege 'the rights of individuals and social groups who are able and/or willing to conform to normative modes of being' to the detriment of others.⁵⁴⁷ A similar criticism might be made of the Danish reforms here, as norms about what constitutes an appropriate transition ensure that the inclusion of some trans people is made on the back of the exclusion of others.

⁵⁴⁷ Hines, *Gender Diversity* (n 10) 105.

The effect of this safeguarding provision is particularly relevant to UK-based readers in light of the 'gender deception' cases, discussed in Chapter 1, which had established a precedent for the criminalisation of non-normative gender expression. Close analysis is also timely following the assurance of Maria Miller, chair of the Women and Equalities Committee, that: 'Any new system that is put into place has to make sure that there are ways to catch abuses. The desire to stress the need for safeguarding, even among advocates of self-declaration, could indicate a concern that self-declaration may be too accessible, at least among certain groups. This certainly appears to have been the case in Denmark, as the civil jurisdiction of the CPR law was underscored by a criminal jurisdiction with the capacity to punish non-normative expressions of gender and/or transition.

Safeguarding involves a clear temporal dimension, as it works to exclude the formal possibility of non-, or post-binary transition, as well as more fluid movements across the gender binary. Parallels can therefore be drawn with Grabham's work on the GRA 2004 'permanence provision'. Though the CPR law does not require the 'acquired' legal gender status to be permanent, papelicants are still required to make a formal declaration of gender status to access recognition. As Grabham has noted, such a declaration forms part of 'a complex governmental terrain in which 'inclusion' begins (and arguably ends) with the assumption that one is an outsider, a potential fraud. The impression that the state remains suspicious of trans

⁵⁴⁸ With Dutton HHJ commenting upon Gayle Newland's 'history of low self esteem and blurred gender lines' before sentencing Newland to eight years in prison; *R v Newland* (Chester Crown Court, 12 November 2015)

https://www.judiciary.gov.uk/wp-content/uploads/2015/11/r-v-newlandsentencing.pdf> accessed 18 May 2016. As I added, above, at (n 42), this precedent has been thrown into doubt by the recent Court of Appeal decision to quash the conviction of Gayle Newland in October 2016.

⁵⁴⁹ Nick Duffy and Benjamin Cohen, 'Maria Miller: The law, the NHS and public services are all letting trans people down' *Pink News* (London, 14 January 2016) http://www.pinknews.co.uk/2016/01/14/maria-miller-the-law-the-nhs-and-public-services-are-all-letting-trans-people-down accessed 20 April 2016.

⁵⁵⁰ Dunne has submitted that 'Without doubt, self-declaration exacerbates risks of fraud or misuse'; Dunne (n 60) 538.

⁵⁵¹ Grabham, 'Governing Permanence' (n 37) 110.

⁵⁵² Changing CPR number numerous times is permitted, as I noted at (n 513).

⁵⁵³ Grabham, 'Governing Permanence' (n 37) 121.

people was reported by interviewees. When asked to reflect upon the inclusion of this safeguarding clause, Mark responded as follows:

it [...] indicates that probably some people would abuse it in order to gain access to whatever. And it also questions whether people can actually make that decision. Why make it easy, but not easy? [...] [B]ecause you can't trust people with this decision, apparently.

(Mark, Transman, 38)

As a legal mechanism, jurisdiction is mobilised so as to de-politicise and individualise, pre-empting and containing potential controversy, 554 with fear for the system inspiring new exclusions to be drawn up and enforced with the threat of the criminal law. Even in its own provisions, then, the CPR law fails to take the imperative to recognise trans people and reduce the discrimination they face seriously. My examination of trans people's legal consciousness suggests that this has not gone unnoticed, as any notion that the self-declaration model constituted part of a 'progressive' realisation of trans rights in Denmark, was challenged by a majority of interviewees. Among these was Freyja, who, when asked to reflect upon her ideal scenario, responded as follows:

That would be to go back to how the system was two or three years ago; where you could at least go another way if you didn't like the Sexological Clinic. You could choose some other paths – go private. And if your doctor felt up to it, you could get your hormones from your general practitioner, and that's not possible anymore.

(Freyja, Transwoman, 46)

That such a legal consciousness is not unrepresentative of the trans people interviewed raises questions as to how far self-declaration, or any model of gender recognition, which could be implemented at the same time as medical guidelines restricting access to healthcare, should be held up as an example for others to follow.

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⁵⁵⁴ Valverde, Chronotopes of Law (n 122) 86.

Civility and conscience

In this chapter, the CPR law has been characterised as an administrative and technical piece of legislation, which sought to depoliticise the process of granting legal gender recognition while respecting existing jurisdictional divisions between civil and other forms of regulation. This has had numerous detrimental effects on the effectiveness of the resulting regulatory arrangement, as trans people have understood on a practical and affective level. The identification of where the 2014 reforms went wrong that has been mooted in this chapter is that their ultimate objective appears to have been to maintain and consolidate civil registration systems more than it was to improve the everyday lives of trans people.

The governance literature suggests that this finding could be read alongside accounts of jurisdiction; and a distinction Dorsett and McVeigh draw between jurisdictions of 'civility' and 'conscience'. 555 Jurisdictions of conscience have traditionally arisen in relation to spiritual matters, historically delineated in canon or ecclesiastical law. 556 Touching upon questions of ethics and morality, they provide 'the institutional structure of the legal subject and the institutional means of achieving forms of subjectivity.' 557 In contemporary jurisprudence, issues of conscience are generally associated with liberal values - such as dignity and human rights. Meanwhile, jurisdictions of civility have tended to arise in relation to matters of common law and civil government. Civility concerns the pragmatic arrangement of legal subjects in lieu of more holistic concerns about subjectivity - inviting administrative questions about public order and prioritising smooth governance. While the consideration of conscience requires legislators to weigh different justifications for pursuing one course of conduct or another, civility limits concern to the question of how that conduct should be ordered or administered. 558 Even this

⁵⁵⁵ Dorsett and McVeigh (n 284) ch 5.

⁵⁵⁶ Dorsett and McVeigh (n 284) 82.

⁵⁵⁷ Dorsett and McVeigh (n 284) 82-83.

⁵⁵⁸ Dorsett and McVeigh (n 284) 82-83.

distinction between civility and conscience is facilitated by jurisdiction; which works to separate different types of authority, enabling them to govern smoothly by establishing clear boundaries between them.⁵⁵⁹

It would be possible to map this distinction directly onto the Danish legislation; with civility describing the administrative questions about population registration that the CPR law concerned, and conscience describing the issues – from accessing body modification technologies to declaring legal gender status without the threat of criminalisation – that were ignored. Yet this might also constitute a slightly simplistic reading of Dorsett and McVeigh's work. Like Valverde, they are attentive to jurisdictional plurality; so, the question is not so much one of which jurisdiction arises out of a regulatory framework, but how different jurisdictions are positioned in relation to one another. This is exemplified by their analysis of contrasting jurisdictional arrangements in a piece of legislation from Australia's Northern Territories⁵⁶⁰ and a US Supreme Court decision. 561 Both concerned the regulation of assisted dying; but while the Australian legislation limited itself to questions of civility (granting medical professionals legal immunity from criminal law, without framing this as a 'right to die'), 562 the justices of the US Supreme Court reflected upon matters of liberty, freedom, dignity and conscience. 563 However, while such matters took up a significant portion of the US justices' reasoning, they did not prove decisive - and matters of conscience were weighed against, and ultimately trumped by, public interest concerns (i.e. civility). Similarly, jurisdictional plurality is also reflected by the Australian legislation; which, although largely concerned with matters of administrative governance, still avoided being represented as subordinate 'to an administrative regime that departs fully from legal normativity.'564

⁵⁵⁹ Valverde, *Chronotopes of Law* (n 122) 83-85.

⁵⁶⁰ Rights of the Terminally III Act 1995 (AU) (NT).

⁵⁶¹ Washington v Glucksberg 521 US 702, Vacco v Quill 521 US 793 (1997) (US).

⁵⁶² Dorsett and McVeigh (n 284) 85, 88.

⁵⁶³ Dorsett and McVeigh (n 284) 92-94.

⁵⁶⁴ Dorsett and McVeigh (n 284) 88.

A jurisdictionally pluralist reading is instructive for present purposes. When asked whether legislators had considered going beyond a minor administrative amendment of the CPR system, one member of the working group was keen to highlight how a purely administrative jurisdiction could work for the benefit of trans people:

the Government was very focused [...] that this legal gender change was only an administrative issue; and it would make life so much easier for a group of people that already have a difficult time.

(Trine Ingemansen, Department for Gender Equality)

And, when asked if the working group had considered re-designing the CPR system, a representative of the CPR Office replied:

The working group concerning the transgender people was not going into a discussion concerning the whole CPR system – not at all. It was only a question of finding different models for making a transgender solution that satisfied the Government.

(Grethe Kongstad, CPR Office)

The first quotation concernss an issue of conscience; as Ingemansen identifies a governmental intention to "make life so much easier for a group of people that already have a difficult time." Although this does not amount to a deeply-held and theoretically nuanced assessment of how institutions affect trans people, it does at least acknowledge the everyday discrimination they face. Yet the articulation of this intention should not divert attention away from the way this concern is ultimately subsumed under the imperative that legislation must "only [be] an administrative issue". As in the US Supreme Court decision considered by Dorsett and McVeigh, what at first 'might look like a matter of conscience' is 'in the end [...] subordinated to the interests of state.'565 The second quotation delineates state interests more explicitly, as Kongstad describes the entire legislative process as "a question of finding different models for making a transgender solution that satisfied the Government'. While divergent concerns may have been held in tension by members of the working group, any pretence

⁵⁶⁵ Dorsett and McVeigh (n 284) 94.

that the CPR law primarily concerned itself with matters of conscience falls away once the state's interest in amending the civil registration system just enough to ensure its retention becomes paramount. ⁵⁶⁶

Although consolidation of the existing CPR system appears to have weighed heavily on those interviewees professionally involved in the legislative process, like the need to sort and separate civil and medical regulations, it was valued much less by those interviewed about how they had been personally affected by the reforms. Most interviewees were openly critical of the fact that the CPR law only permitted amendments of legal status to take place within the binary constraints of 'male' and 'female'. In addition to the various administrative consequences that this had created for binary-identified trans people discussed earlier in the chapter, this had also resulted in the formal exclusion of non-binary-identified trans people, such as Roi, who responded to my question as to whether they had considered changing their CPR number as follows:

No, because that would give me a male social security number – but I'm not a male, and I don't identify as a male. If they had made one that was unisex or non-gendered, I could have applied for that, definitely.

(Roi, Non-binary transgender, 26)

A preference for the abolition of the odd/even rule was shared by most interviewees personally affected by the 2014 reforms: 567

it would be easier if the system had our ID number, but with the last number not depending on whether I was male or female.

(Jakob, Male, 31)

I fail to see the good thing about a system that divides people into odd and even numbers, when the diversity of sex is broader than two sets.

(Stephanie Stine Skaaning, Intersex woman, 29)

⁵⁶⁶ Dorsett and McVeigh (n 284) 94.

⁵⁶⁷ Some would still have wanted the option to change CPR number to have been included in this hypothetical reform – so that they could avoid being misrecognised as belonging to the gender they were assigned at birth while assumptions that sex/gender status could be deduced from the final digit of the CPR number were yet to fall away completely.

The whole problem could be solved by not having these social security numbers gender-specific; that would make everything easier. [...]. I still don't know why they're doing it this way. [...] It'd be a lot easier just to keep my old number, definitely.

(Jon, Male, 40)

I think that would be ideal; if the whole odd-even number system was just dropped.

(Pippin, Non-binary, 42)

I think it is very problematic today with the numbers so separated – because it doesn't fit with how gender is. It's binary, in a way that gender is not. I wouldn't have changed it if it wasn't a binary system.

(Adam, Male, 30)

This group included some interviewees who had been able to make use of the CPR law even in its binary form. However, fledgling attempts to have the wording of the CPR law re-phrased to allow for the declaration of 'another sex/gender' were publicly dismissed at consultation stage – on the distinctly tautological basis that this would be incompatible with the binary orientation of the CPR itself. The possibility of re-orientating or dismantling the civil registration system – by abolishing the odd/even rule and creating gender-neutral CPR numbers – is not entertained at any other point in the publicly available legislative materials. Interestingly, though, this possibility was considered by the working group – as interviewees party to these

⁵⁶⁸ This could corroborate findings from research conducted in a UK context that binary-identified trans people feel a sense of solidarity with non-binary trans people. It may also indicate that trans people – irrespective of whether they identify with the gender binary – pursue legal gender recognition for strategic reasons (such as limiting everyday discrimination) as much as they do to reflect personal identifications; Hines, *Gender Diversity* (n 10) 56, 62.

⁵⁶⁹ The Government received an unsolicited recommendation from the Danish AIDS Foundation (*AIDS-Fondet*) during the consultation process, which suggested replacing the phrase 'the other sex/gender' with 'another sex/gender'; see AIDS Foundation, *Letter to the CPR Office* (28 March 2014)

<http://www.ft.dk/samling/20131/lovforslag/l182/bilag/1/1364174/index.htm> accessed 18 October 2015. Yet the proposal was dismissed by the Minister of the Economy and the Interior: 'Sex/gender is currently recorded in the CPR as either male or female. For this reason, it is deemed inappropriate to amend the Bill as proposed'; Consultation Note regarding the Bill for amending the Act on the Central Person Registry (Kommenteret høringsnotat over forslag til lov om ændring af lov om Det Centrale Personregister), para 2.6 (30 April 2014)

http://www.ft.dk/samling/20131/lovforslag/l182/bilag/1/1364173/index.htm accessed 18 October 2015.

proceedings admitted – though only at its very earliest stages, before being summarily dismissed (and then omitted from their report):

we [the working group] knew that there wasn't any political agreement on that – so we didn't go that much into it – but of course we considered it. But changing the CPR system is also very costly. [...] [W]e also knew that, in general, it seems that the Parliament is happy with the even and odd numbers.

(Trine Ingemansen, Department for Gender Equality)

The message that the Government was not open to this possibility was also communicated to campaigners and other interest groups:

we had a meeting with the Minister of [the Economy and] Internal Affairs [...] and she said "No! We don't want to do that – it is too expensive!" Because [...] if we got rid of that rule you would have to change all these systems [...].

(Søren Laursen, LGBT Denmark)

The reason why the abolition of the odd/even rule would have required various bureaucracies linked to the CPR system to be reformed is that many administrative systems do not record gender in any way other than by the final digit of the CPR number. Abolishing this rule would therefore have meant that numerous institutions would have had to develop a new registration system, or give up the possibility of registering this 'certified' form of gender altogether. ⁵⁷⁰ For this reason, abolishing the odd/even rule did not appear to align with governmental interests – as developing another method of regulating gender other than the final digit of the CPR number was dismissed as the "very costly" option deemed too "expensive" by the Minister. Again, this is also reflected by the limited mandate handed to the working group; which precludes consideration of abolishing the odd/even rule by requiring that proposals 'should not result in additional public expenditure.'571 As in the previous section, the possibility of extending state responsibilities is avidly avoided, with individual trans people made responsible for dealing with the consequences.

For a 'speculative' theoretical analysis of the potential regulatory consequences of 'decertifying' gender identity at state level, see Cooper and Renz (n 19).
 Ministry of Justice, 'Kommissorium' (n 92).

With possibilities of 'decertifying' gender,⁵⁷² or registering it in another manner, dismissed from the outset, the jurisdiction of the working group was limited to maintaining, and perhaps even augmenting, the binary orientation of the CPR system. Beyond inviting potential resistance from certain political constituencies, abolishing the odd/even rule would have required the Government to either increase public expenditure to cover the cost of transforming the CPR, or accept a diminished pool of data for identity surveillance. It was unwilling to consider either. Instead, the scope of the CPR law was limited once again; as it was drafted primarily with a view to avoiding potential conflicts, and to ensure it was both cheap and easy to implement.

It contained no new substantive rights provisions (other than the right to self-declare legal gender status), and failed to address contemporaneous reforms of access to body modification technologies. Although matters of conscience were considered in the legislative process, these were not afforded much weight when they became too controversial, or expensive – and came into conflict with government interests. Instead, divisions between civil and medical institutions were established and maintained, along with the consolidation of the existing CPR system. Jurisdiction was mobilised in a way that limited the effectiveness of self-declaration from the outset, individualising trans subjects, and privatising concerns that might – at another time, and perhaps in another political context – have been considered collective or state responsibilities.

Conclusion

This chapter has analysed the arrangement of jurisdiction in the enactment of the self-declaration model in Denmark. It interrogated jurisdictional boundaries in the 2014 reform process; contrasting the interview responses of those professionally involved in the legislative

572 Cooper and Renz (n 19).

process with those who are subject to the new regulations. It found that while the workings of jurisdiction might have succeeded in depoliticising this process – avoiding potential conflicts, and facilitating compromise from the outset – the resulting legislation is limited by the jurisdictional divisions maintained throughout the reform process.

After being implemented via an administrative amendment to the existing, binary-oriented, CPR system, the CPR law failed to address wider issues of embodied conscience. Civil and medical reforms were sorted and separated, and allowed to develop in different directions – in accordance with contrasting governing rationalities. While this made sense to legislators, it did not address the embodied concerns of trans subjects – and led to them being made individually responsible not just for declaring their own legal gender status, but also for dealing with the consequences of this and other aspects of the 2014 reforms – including the medical authorities' policy of centralising access to body modification technologies. The need to take responsibility for one's own inclusion saw several responsibilities privatised, and state responsibility minimised where possible. This and other governmental interests – including Denmark's international reputation – were prioritised to ensure a smoothly-functioning legal and political system.

While a quantitatively greater number of trans people are given the responsibility to accommodate themselves better into the existing CPR system, qualitative change is almost non-existent – as civil systems are reformed only as much as strictly necessary to ensure 'the myth of liberal Denmark' proliferates.⁵⁷³ Trans people's wider demands – for gender neutral regulation, access to healthcare and other forms of institutional support – are ignored as the legislative process is depoliticised to avoid matters of conscience altogether. Interrogating the legal consciousness of those who are governed suggests that Danish trans people are aware of these limitations, and the testimonies presented here suggest strong political awareness among

⁵⁷³ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

those interviewed. Still, they are limited to binary declarations of legal gender status, backed up with the threat of criminal sanction. Meanwhile, jurisdictional limitation was shown to have been highly useful for a government keen to maintain focus upon matters of civility rather than conscience; allowing legislators to pre-empt controversy by restricting change within the confines of civil administration.

Evidence suggests that the self-declaration model, or at least the way in which it was implemented in Denmark, remains very much open to critique; as broader contexts and developments external to the structures of the CPR law are left unchallenged; notably including the reforms of the medical guidelines, which I will describe in more detail in Chapter 5. This analysis raises critical questions that must be answered by trans activists and people in the UK and elsewhere, particularly when they are confronted with reform proposals from a Government committed to reducing public expenditure. Activists and trans people might be advised to be wary of a model of gender recognition that can be implemented at so little expense, and in such a limited and compromised manner. Any legislation so focused upon the privatisation of responsibilities will be more likely to exacerbate existing inequalities between trans people and others than to diminish or eradicate them.

5. Medical governance

Introduction

In Chapter 4, I identified how civil and medical reforms were separated during the 2014 reform process. By undertaking a close jurisdictional analysis of these reforms, complemented by an investigation of the legal consciousness of the subjects that are governed in accordance with them, I suggested that a careful mobilisation of jurisdiction had ensured that governmental interests – such as maintaining Denmark's international reputation and avoiding increasing state responsibilities or expenditure – had been prioritised over and above the embodied conscience of trans subjects when declaring gender, amending legal status, and seeking to access body modification technologies.

In this chapter I turn to one specific issue of conscience more directly, and consider in detail how access to body modifications such as hormones and surgery have been affected by the 2014 reforms. As in previous chapters, I draw heavily upon the governance literature, which has noted that jurisdictional divisions are often justified by assumptions that one type of authority is better equipped to make one type of decision or another. Borrowing from Valverde's work, this chapter acknowledges that such assumptions can naturalise jurisdictional divisions, stifling critical debate about exactly how key decisions are made. ⁵⁷⁴ By drawing upon literature on professional jurisdictions (introduced in Chapter 2), I challenge these assumptions by developing an analysis of these divisions as the result of 'boundarywork'; ⁵⁷⁵ a term coined by sociologist Thomas Gieryn in order to conceptualise the processes whereby expert bodies seek to claim or expand their jurisdiction over contested domains. ⁵⁷⁶

⁵⁷⁴ Valverde, *Chronotopes of Law* (n 122) 86.

⁵⁷⁵ Thomas F Gieryn, 'Boundary-work and the Demarcation of Science from Non-science: Strains and Interests in the Professional Interests of Scientists' (1983) 48 American Sociological Review 781.

⁵⁷⁶ Sheelagh McGuinness and Michael Thomson, 'Medicine and Abortion Law: Complicating the Reforming Profession' (2015) 23(2) Medical Law Review 177.

The chapter is split into five parts. The first begins with some theoretical context; wherein I briefly review both the jurisdictional literature, and the literature on gender recognition, outlining how I intend to use some of the key insights of these literatures in the analysis of the medical regulation of gendered embodiment that I present in this chapter. In the second part, I describe the regulatory background, explaining how the jurisdiction of the medical authorities had slowly expanded in the run up to the 2014 reforms. In the third part, I complement this analysis with an illustration of how jurisdictional divisions were made and policed during the 2014 reforms, drawing upon insights of interviewees from across the governance spectrum; from civil servants and policymakers involved in drafting and implementing the reforms, to the people directly affected by them.

Having demonstrated how jurisdiction was mobilised to sort and separate the reform processes of civil and medical regulations, I go on, in the fourth and fifth parts of this chapter, to detail the effects of this particular jurisdictional settlement - outlining the responsibilities that different authorities have been allocated in terms of what Valverde would consider the more 'qualitative' aspects of governance. These concern exactly 'how' governance happens in practice; and involves me delineating the 'governing rationalities' and 'capacities of governance', evidenced within legislative materials and described by testimonies of 'elite' interviewees. ⁵⁷⁸ Again, the accounts of those regulators professionally involved in the reform process will be contrasted with the legal consciousness of embodied subjects of these regulations. Having interrogated the supposed functionality of this regime, this chapter, like Chapter 4, concludes that practical limitations – this time in the capacities of the institutions expected to do the practical work of governing - appear to be undermining the reported intentions of legislators and other policymakers.

⁵⁷⁷ Valverde, Chronotopes of Law (n 122) 84.

⁵⁷⁸ Valverde, *Chronotopes of Law* (n 122) 84.

Recognising jurisdiction

As I demonstrated in Chapter 4, the utility of the legal mechanism of jurisdiction rests upon its practical functions. Beyond allowing state institutions to govern on their own terms, jurisdiction also enables the state to *authorise* the governance of other authorities and institutions. And, moreover, jurisdiction also *sorts* and *separates* these different types and levels of authority into (in Valverde's terms) ready-made, clearly separate pigeon-holes; ensuring that strict boundaries can be drawn between them. Yet, unlike jurisdiction's authorising function, this sorting function is not particularly visible. By illuminating this practical jurisdictional work — in the previous chapter, as well as this — this thesis demonstrates how jurisdictional divisions were constructed and respected throughout the 2014 reforms.

An understanding has been developed that Valverde's work could be usefully employed in feminist and other critiques of medical law. To date, however, no concerted attempt has been made to analyse how governing power-knowledges have been sorted and separated within the field of trans legal studies. This thesis demonstrates that numerous insights into the civil regulation of gender (in the previous chapter), and medical regulation of access to body modification technologies considered to be constitutive of sex/gender modification treatments (in this chapter) are offered by jurisdictional analysis; which could inform both trans legal studies and feminist legal studies more broadly. However, as I noted in Chapter 3, if feminist legal scholars wish to mine Valverde's research agenda, they will first have to break down abstract concepts if they are to develop deeper understandings of how regulation is enacted, in practice, on an everyday basis.

⁵⁷⁹ Valverde, *Chronotopes of Law* (n 122) 83, citing Valverde, 'Authorizing the Production of Urban Moral Order' (n 310) 419.

⁵⁸⁰ Valverde, *Chronotopes of Law* (n 122) 85.

⁵⁸¹ Valverde, *Chronotopes of Law* (n 122) 85.

⁵⁸² John Harrington, 'Time and Space in Medical Law: Building on Valverde's *Chronotopes of Law*' (2015) 23 Feminist Legal Studies 361.

Grounding such an investigation requires an acknowledgement that processes of governance, and experiences of regulation, are contextually interdependent. Within trans legal studies, this involves noting that while being granted access to legal gender recognition – even in a limited, binary-oriented way – may be valued on a symbolic level, it will come with no guarantee that this legal status will be recognised at all times, and in all spaces. An element of Butler's theory of gender performativity which tends to get lost among uncritical celebrations of gender fluidity is the less glamorous insight that as gendered power relations are dispersed and de-centralised, so gender recognition becomes an ongoing and repetitive process. Seas Actions are not just performed, but repeated, as gender is constantly negotiated in accordance with shifting norms and expectations, and between subjects and institutions shaped by unequal power relations.

This 'repetitive' dimension of gender performativity is acknowledged within trans studies literature. In the UK, the question of how the possibility of legal gender recognition has affected trans embodiment has been subjected to sustained critical analysis. While the GRA 2004 has been welcomed in various ways, particularly on a symbolic level, 584 the legal protections that it has offered have been shown to have had little impact on how trans people experience their intimate lives, 585 and their bodily aesthetics. 586 Its impact has also been shown to have limitations in other difficult contexts such as the labour market, 587 and the clinical setting. 588 How civil and medical regulations relate to one another becomes a particularly important question as interest groups develop strategies for reforming gender recognition legislation and accessing body modification technologies.

⁵⁸³ Butler, Gender Trouble (n 2) 34.

⁵⁸⁴ Hines, Gender Diversity (n 10) 22-23.

⁵⁸⁵ Sanger (n 9).

⁵⁸⁶ Davy, Recognizing Transsexuals (n 11).

⁵⁸⁷ Sally Hines, 'Recognising Diversity: The Gender Recognition Act and Transgender Citizenship', in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 98.
588 Davy, 'Transsexual Agents' (n 22) 107-110; Grabham, 'Governing Permanence' (n 37) 107; and Ellis, Bailey, and McNeil (n 270) 4.

In Chapter 2, I cited numerous critiques of the GRA 2004; including that it relies upon psychiatric understandings of trans phenomena. 589 Drawing upon Butler's invocation of the term 'medicolegal', 590 Davy suggests this created an 'alliance' between medical and legal authorities.⁵⁹¹ While, as I suggested in Chapter 1, this term might be useful for exploring points at which medical and civil regulatory norms coincide, such conceptions may also end up over-stating the consensus which exists between civil and medical law, under-playing points of dissonance or even conflict. This is true whether it is applied in a UK context or elsewhere. In contrast, Valverde's work, and the wider governance literature on professional boundaries, accepts that contention will invariably exist, however obliquely, between different power-knowledges within governance projects. Jurisdictional analysis thus enables scholars to tease out and assess points of dissonance; where civil and medical regulations may be working in different directions, and potentially even conflicting with one another. 592 Having considered the contrasting objectives of civil and medical governing projects in Chapter 4, I address points of dissonance in this chapter; analysing the 'qualitative' 593 aspects of how access to body modification technologies is regulated following the 2014 reforms.

This approach offers important insights into the processes regulating gendered embodiment; and should enrich debates about reforming regulatory systems such as the GRA 2004. In the UK context, Hines has been one of many to suggest that the deconstruction of the binary forms of gender regulation could be achieved through the 'uncoupling of law and medical discourse and practice'. ⁵⁹⁴ But even those advocating the de-pathologisation of trans embodiment admit that unpinning civil and medical regulatory norms could place even more barriers between trans people and body modification technologies. ⁵⁹⁵

⁵⁸⁹ Cowan, 'Looking Back (To)wards the Body' (n 31).

⁵⁹⁰ Butler, *Bodies that Matter* (n 3).

⁵⁹¹ Davy, 'Transsexual Agents' (n 22) 119.

⁵⁹² Valverde, 'Jurisdiction and Scale' (n 287) 145.

⁵⁹³ Valverde, *Chronotopes of Law* (n 122) 84.

⁵⁹⁴ Hines, *Gender Diversity* (n 10) 103.

⁵⁹⁵ Davy, 'The DSM-5' (n 536) 1165; Bornstein (n 530) 119.

This issue is assumed to be particularly marked in countries where trans people are reliant on receiving a quantifiable diagnosis to gain access to financial support through personal health insurance plans, such as the US.596 My analysis suggests that uncoupling civil and medical regulatory frameworks could also have an adverse effect even in countries that provide public healthcare. In Denmark, the uncoupling of civil and medical law – which had required trans people to undergo castration before they could amend their legal status prior to the 2014 reforms - involved separating out civil and medical governing regimes, enabling them to proceed in quite different directions (as was discussed in Chapter 4). This chapter builds upon this earlier analysis to consider the effects of this strategy in more detail. It begins by providing a summary of the regulatory background which demonstrates how the medical jurisdiction of the DHMA has expanded from 2006 to present. The Caspian case is highlighted as a key point for this jurisdictional expansion.

Expanding jurisdiction

Since Christine Jorgensen became the first trans person to publicly undergo surgical castration in Denmark in 1951,⁵⁹⁷ permission has had to be sought from the Ministry of Justice.⁵⁹⁸ Then, in 2005, castration was included in a consolidated Health Act for the first time, and the responsibility to regulate access shifted to the Ministry of the

⁵⁹⁶ Jack Drescher, Peggy Cohen-Kettenis, and Sam Winter, 'Minding the body: Situating gender identity diagnoses in the ICD-11' (2012) 24(6) International Review of Psychiatry 568, 571-572; Cowan (n 31) 252 fn 6, citing Patricia Elliot, 'Engaging Trans Debates on Gender Variance: A Feminist Analysis' (2009) 12(1) Sexualties 5, 16 and Judith Butler, Undoing Gender (Routledge 2004) 82. ⁵⁹⁷ As 5940 legal sterilisations were performed between 1929 and 1950 as part of Denmark's active eugenics programme, it is possible Jorgenson was not the first 'trans' person to be sterilised in Denmark; Bent Sigurd Hansen, 'Something Rotten in the State of Denmark: Eugenics and the Ascent of the Welfare State' in Gunnar Broberg and Nils Roll-Hansen (eds), Eugenics and the Welfare State: Sterilization Policy in Denmark, Sweden, Norway and Finland (East Lansing 1996) 60. ⁵⁹⁸ Order on sterilisation and castration (12 July 1994) (Bekendtgørelse af lov om sterilisation og kastration) (DK), s 14. The Ministry of Justice would base their decision upon evidence provided by the Danish Medico-Legal Council (Retslægerådet); T Sørensen and P Hertoft, 'Sexmodifying operations on transsexuals in Denmark in the period 1950-1977' (1980) 61 Acta Psychiatrica Scandinavica 56.

Interior and the Ministry of Health. 599 This Health Act was amended as part of the 2014 reforms, 600 and permission must now be sought from the DHMA.601 Yet the DHMA became involved in governing access to surgical castration almost a decade before they were granted this exclusive formal jurisdiction; publishing an official guideline concerning 'surgical castration for the purposes of sex/gender modification' in 2006 ('the 2006 guidelines'). 602 These stated that an applicant for castration must have been diagnosed with 'transsexualism'; 603 and, as the granting of this diagnosis is designated as a 'highly specialised' form of treatment, it can be undertaken only in institutions with specific clearance to do so. 604 As I noted in Chapter 1, such clearance has, to date, only been granted to the Sexological Clinic of the National Hospital in Copenhagen. 605 If the Sexological Clinic deems a patient's desire for castration to have remained 'stable and persistent' for the duration of its observation programme, 606 they may be authorised to seek permission to undergo this procedure from the DHMA and the Medico-Legal Council. 607

Between 2007 and 2013, castration surgery was performed upon 25 trans men and four trans women at the National Hospital. Yet the DHMA also permitted 61 people to have their legal gender status amended over the same period, which suggests that over half of those who had been granted legal gender recognition had undergone castration surgery outside the National Hospital. Since the 2006 quidelines are binding upon Danish clinicians working in both the

⁵⁹⁹ L 546 Health Act (24 June 2005) (*Sundhedsloven*) (DK), s 116.

⁶⁰⁰ L 189 (n 115). This amends s 116 of the previous Health Act (13 July 2010) (Bekendtgørelse af sundhedsloven) (DK).

Health Act (19 November 2014) (Bekendtgørelse af sundhedsloven) (DK), s 116.

⁶⁰² Guideline no 10077 on surgical castration for the purposes of sex/gender modification (27 November 2006) (*Vejledning nr 10077 om kastration med henblik på kønsskifte*) (DK).

⁶⁰³ Guideline no 10077 (n 602), s 1. The current definition of 'transsexualism' can be found in the WHO's ICD-10 (n 78) F64.0.

⁶⁰⁴ Guideline no 10077 (n 602), s 3.

⁶⁰⁵ Ministry of Justice, Rapport (n 72) 8.

⁶⁰⁶ Ministry of Justice, Rapport (n 72) 13.

⁶⁰⁷ Guideline no 10353 (n 110), s 4.1.

⁶⁰⁸ Ministry of Justice, Rapport (n 72) 15.

⁶⁰⁹ Ministry of Justice, Rapport (n 72) 20.

public *and* the private sector, ⁶¹⁰ this discrepancy cannot be explained by the existence of any other clinic performing surgical castrations within Danish borders. Instead, it is explained by the fact that the possibility of gaining legal gender recognition was not limited to applicants who had undergone this procedure in Denmark. Those who had undergone surgical castration abroad were eligible to apply to amend their legal gender status directly to the DHMA – and could therefore bypass assessment at the Sexological Clinic – provided their application was supported by a statement from the operating surgeon, and another from a specialist gynaecologist practising in Denmark, confirming the castration was performed on the basis of a diagnosis of 'transsexualism' and as a 'sex/gender modification treatment'. ⁶¹¹ The DHMA would inform the CPR Office at the Ministry of the Economy and the Internal Affairs to assign a new social security number. ⁶¹²

Following the introduction of the 2006 guidelines, the jurisdiction of the DHMA significantly expanded, as it took on responsibility for prescribing the formal conditions under which access to surgical castration for the purposes of sex/gender modification (and, by implication, the possibility of legal gender recognition) would be determined. In an interview, the author of these guidelines described how this jurisdictional expansion had occurred:

we took that over in 2006 [...]. That meant that we had a more medical focus on what happened. So, the first thing we did was to make a guideline on what you had to have to get a sex change; because before that it was a black box. Anybody – the people, or the patients – who applied for a sex change wouldn't know what criteria they had to meet. They were either just accepted or not accepted; and we thought that was a very bad situation – for people not to know what they actually had to go through. So, we made the first guideline saying what it was that they schematically had to go through. [...] that was the first point where there was a little more transparency.

(Anne Mette Dons, (formerly) DHMA)

⁶¹⁰ Order on the Authorisation of Medical Professionals and Healthcare Provision (4 August 2011) (*Bekendtgørelse af lov om autorisation af sundhedspersoner og om sundhedsfaglig virksomhed*) (DK), s 26.

⁶¹¹ Ministry of Justice, Rapport (n 72) 20.

⁶¹² Ministry of Justice, Rapport (n 72) 46.

In the literature on the professional organisations, sociologist Andrew Abbott suggests that professions are defined by the boundaries that they draw between themselves and other groups. 613 Such boundaries are practically useful in that they help create and then delimit professional jurisdiction. 614 However, they are also under perpetual dispute. 615 Regulatory bodies must constantly engage in 'boundarywork' to maintain or expand jurisdiction over contested domains. 616 The introduction of the 2006 guidelines could be construed as an example of this type of boundary-work, as the DHMA sought to claim jurisdiction to govern access to surgical castration, even though this was not formally re-allocated to them until the reforms of 2014. The literature on the professions adds that such displays of professional autonomy are often justified by 'claims to special expertise and 'ethicality'.'617 Both are apparent in Dons's testimony; expertise, in the more "medical focus" that the DHMA's guidelines could provide; and ethicality, in that they would increase "transparency" by doing so.

When read alongside Valverde's research agenda, the 2006 guidelines designate several authorities, a clearly delineated territory, and a specific object of governance ('who' governs 'what' and 'where'). The DHMA, the Sexological Clinic, and (to a lesser extent) other institutions – such as the Medico-Legal Council – determine access to surgical castration within Danish borders. But by being so specific – particularly with regards to the object that they govern – the 2006 guidelines unwittingly established a regulatory grey area whereby healthcare providers outside the Sexological Clinic were not formally prohibited from performing body modifications other than surgical castration. As I noted in Chapter 1, within this regulatory

⁶¹³ Abbott, 'Things of boundaries' (n 319) 860.

⁶¹⁴ McGuinness and Thomson (n 576) 180.

⁶¹⁵ Abbott, The System of Professions (n 322) 2.

⁶¹⁶ McGuinness and Thomson (n 576) 181, citing Gieryn (n 575) 783.

⁶¹⁷ McGuinness and Thomson (n 576) 180, citing Eliot Friedson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (University of Chicago Press 1988).

⁶¹⁸ Valverde, 'Jurisdiction and Scale' (n 287) 144.

loophole, a small number of private-sector gynaecologists and endocrinologists had been willing to authorise and administer hormone replacement treatment on an informed consent basis during this period. These practitioners became well-known among Danish trans communities; ensuring that many trans people could access hormones on this basis. It was also formally possible to perform surgeries other than surgical castration – including 'top surgeries' such as mastectomies and breast augmentation procedures – within this legal loophole.

Interviews indicate that this practice was less widespread – as none of the fifteen interviewees personally affected by the 2014 reforms had undergone such procedures in a Danish clinic (although several had done so abroad). Yet the Caspian case, which led to a surgeon being reprimanded for performing a mastectomy on a trans person (as I described in Chapter 1), confirms such procedures had taken place.⁶¹⁹ The Caspian case marks an important turning point; away from this informal system of treatment based on informed consent, toward the jurisdictional settlement that governs trans embodiment in Denmark today. For this reason, it ought to be contextualised in relation to how the story was initially reported in Danish media in October 2011.620 Raun identifies how print media focused on the more 'sensational' aspects of Caspian's mastectomy; asking whether body modification ought to be available for trans people under the age of 18 without contextualising this in relation to the healthcare needs of trans people more generally. 621 This question was framed in a particularly polarising way – as readers were asked to position themselves either 'for' or 'against' the possibility of trans minors accessing body modification technologies – discouraging discussion of particularities and nuances. 622

⁶¹⁹ Patients' Ombudsman (n 88).

⁶²⁰ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).621 Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

⁶²² Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

Building upon Raun's work, I suggest that this highly normative and sensationalised media controversy might usefully be read alongside older media studies literature concerning the concept of a 'moral panic'.623 As Stanley Cohen, who coined this term, has noted, once a phenomenon – in this instance, a trans teenager accessing body modification - has been presented as a threat to social values, it demands a response from 'socially accredited experts' such as official authorities or policymakers. 624 And, sure enough, Raun notes that the reaction of the Government Minster of Health at the time was to demand that the DHMA investigate the existing healthcare practices and regulations regarding trans people, and decide whether the private hospital had 'acted responsibly'. 625 If the authorities' response is proportionate, Cohen suggests it can help assuage the public, allowing panic to recede. 626 If, on the other hand, it is not proportionate, it may lead to 'more serious and long-lasting repercussions'. 627 Raun's analysis suggests the DHMA's response was not proportionate, as it went above and beyond what had been demanded by print media. While media debates largely concerned the ethics of performing surgery on a trans person below the age of 18, the DHMA Disciplinary Committee focused upon Caspian's gender more than his age. 628

As in Cohen's original formulation of moral panic, this led to the DHMA's intervention having 'more serious and long-lasting repercussions'. ⁶²⁹ One immediate repercussion of the DHMA's judgement was that it would restrict access to body modification technologies for all trans people, irrespective of their age. ⁶³⁰ Interim guidelines, issued in the immediate aftermath of the Disciplinary Committee's decision, would state that while the DHMA was working

⁶²³ Stanley Cohen, Folk Devils and Moral Panics (3rd edn, Routledge 2002) ix.

⁶²⁴ Cohen (n 623) 9.

⁶²⁵ Raun, 'The "Caspian Case" and Its Aftermath' (n 86), citing 'Minister går nu ind i Caspian-sag' (*TV2 Nyhederne*, 15 October 2011)

http://nyhederne.tv2.dk/article.php/id-44674432:minister-går-nu-ind-i-caspiansag.html.

⁶²⁶ Cohen (n 623) 9.

⁶²⁷ Cohen (n 623) 9.

⁶²⁸ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

⁶²⁹ Cohen (n 623) 9.

⁶³⁰ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

on a review of how trans people ought to be treated, private practitioners were to refer all new patients, and all existing patients below the age of 18, to the Sexological Clinic. The only concession to the importance of Caspian's age in media debate was that private practitioners would be permitted to continue treating existing adult patients, provided they could meet the minimum standards of the seventh edition of the World Professional Association for Transgender Health 'Standards of Care'. All other trans people would have to be assessed at the Sexological Clinic; establishing, in effect, a state monopoly on treatment at the clinic, and closing off the only route to both hormone and surgical treatment on an informed consent basis — irrespective of whether they are above or below the age of 18.633

In Valverde's terms, the effect of this response was to broadly expand the regulatory 'objects of governance'; 634 from surgical castration to any technology that could be understood as constitutive of sex/gender modification treatment. This constitutes an important shift, as Danish medical law moves from a position where procedures conducted upon specific body parts must be authorised by the DHMA, to a point where sex/gender modification – in general, and anything deemed to be relating to it – becomes something exceptional, and worthy of the DHMA's authoritative oversight. In the literature on professional boundaries, Sheelagh McGuinness and Thomson have noted:

Professions need to be able to define the borders of their professional jurisdiction with 'utmost clarity', leaving no ambiguity regarding their 'claimed universe of tasks'. In pursuing this, professions are policing the boundaries between themselves and the public as well as defending their 'task areas' from encroachment by other professions. Crucially, a lack of clarity here creates jurisdictional vulnerability. 635

⁶³¹ Danish Health and Medicines Authority (n 89).

⁶³² Danish Health and Medicines Authority (n 89).

⁶³³ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

⁶³⁴ Valverde, 'Jurisdiction and Scale' (n 287) 144.

⁶³⁵ McGuinness and Thomson (n 576) 191, citing Abbott, *The System of Professions* (n 322) 56.

The Caspian case constitutes an example of such boundary-work in practice between different professional specialisms. Before 2012, a lack of clarity – in relation to how access to body modification technologies other than surgical castration ought to be authorised and administered – had created a jurisdictional vulnerability. This was exploited by the gynaecologists, endocrinologists, and surgeons willing to offer trans people access to such technologies on an informed consent basis without the authorisation of the Sexological Clinic. Following the Caspian case this loophole was closed, with boundaries established between medical authorities, psychiatrists, gynaecologists, endocrinologists, surgeons, and the Danish public. Having described the process through which the jurisdiction of the DHMA expanded, I now consider how this jurisdictional expansion was maintained during, and consolidated by, the 2014 reforms.

Maintaining jurisdictional divisions

While a commitment to review 'the rules concerning sex/gender modification treatment, including opportunities to have a legal sex/gender change without the need for surgical intervention' had been included in the 2011 coalition Government's policy agreement, 636 this did not gain traction until after the Caspian case. As I discussed in Chapter 4, in the original formulation, medical and legal reform were positioned alongside one another - giving the impression that they should be reviewed together. Yet, after the Caspian judgement, the two were disentangled; and in December 2014 – only months after the CPR law introduced the possibility of self-declaring legal gender status the DHMA replaced its interim guidelines with the 2014 guidelines. These codify that 'sex/gender modification' treatments can only be administered by a 'multidisciplinary team of collaborating specialists in psychiatry, obstetrics/gynaecology and plastic surgery, who have special knowledge of transgender patients'. 637 While the de jure monopoly established by the interim guidelines was formally abolished,

⁶³⁶ Prime Minister's Office (n 84).

⁶³⁷ Guideline no 10353 (n 110), s 2.

a *de facto* state monopoly – as the Sexological Clinic is the only clinic with the capacity to meet these requirements – is effectively retained.

When read alongside the wider 2014 reforms, the result of the overall jurisdictional settlement is that while barriers to legal gender recognition have been reduced – as the need to seek approval from the DHMA before being assigned new legal gender status has been removed – the *de facto* centralisation of access to body modification technologies at the Sexological Clinic has, in effect, closed off the only route to such technologies that did not involve a sustained process of psychiatric assessment. And, as I noted in Chapter 4, the process of psychiatric diagnosis is not accessible for many interviewees. This led to the different constituent parts of the 2014 reforms being interpreted as working in different directions by many interviewees:

you need recognition by the health authorities to get access to the treatment and that is also today way too restrictive in our opinion — way too restrictive. Whereas we got this wonderful, great access to the legal gender change, the physical, the health, part of it has really gone the wrong way. And that's really a calamity — that's annoying — and I'm sad that this Government don't put down their foot and say: "Stop, we have to do something better than this."

(Søren Laursen, LGBT Denmark)

As Chair of LGBT Denmark, Laursen had lobbied on behalf of trans people for more accessible civil and medical regulations. His complaint – that the Government did not "put down their foot" to stop the DHMA's jurisdictional expansion in the aftermath of the Caspian case – suggests that they might have done so, and yet chose not to. Munkholm's doctrinal analysis of the hierarchical structure of Danish law appears to corroborate Laursen's claim. She notes that rules around accessing body modification technologies are covered by the Health Act, and through orders and guidelines issued in accordance with that Act. 638 When it establishes statutory laws via Acts of Parliament (*lov*) such as this one, the Danish Parliament delegates

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⁶³⁸ Munkholm (n 76) 151.

jurisdiction to the relevant ministries. 639 Ministries issue administrative orders (bekendtgørelser), in accordance with the delegated mandate, which are legally binding for both institutions and individual citizens.⁶⁴⁰ They also develop administrative guidelines (*cirkulærer* or *vejledning*) - such as the 2014 guidelines - in accordance with the administrative orders; and these are binding only upon public institutions.⁶⁴¹ This is a distinctly hierarchical regulatory system, as lower level rules – such as the 2006 and 2014 guidelines - cannot expand upon or derogate from upper level rules - such as Acts of Parliament. 642 In terms of legal doctrine, then, the 2014 guidelines must be authorised by, and thus subject to the will of, the Government in Parliament. interviews suggest that this is not how such guidelines are viewed in practice. When asked about his party's position on the matter, the healthcare spokesperson for the Social Democrats (who led the coalition Government in the period when the 2014 reforms were introduced) deemed it necessary to stress the limited influence of Government ministries when it came to drafting the 2014 guidelines:

We have to put some arm's-length principles into this. It's not the Ministry [of Health] at all doing this — it's made by some organisations under the Minister. And they will be in contact with all groups.

(Flemming Møller Mortensen, Social Democrats)

Mortensen's claims were echoed by a representative from the Ministry of Health, who was also keen to stress the importance of the DHMA's professional expertise:

The Health and Medicines Authority is an agency under the Department of Health, in a hierarchical sort of way. But they have the expertise – doctors and so on and so forth – which we do not have in the Department. So their assessments, and judgements, on medical issues we do not have the expertise here to overrule. So we do not do that.

(John Erik Pedersen, Ministry of Health)

⁶³⁹ Munkholm (n 76) 149.

⁶⁴⁰ Munkholm (n 76) 149.

⁶⁴¹ Munkholm (n 76) 149.

⁶⁴² Munkholm (n 76) 149.

This assertion of "expertise" implies that doctrinal sovereignty has been inverted, with a hierarchy established between regulators with professional status and those that are without it. In the literature on the professions, it has been suggested that boundary-work can be mobilised 'to protect professional autonomy against outside powers who are attempting to encroach on or exploit scientists' epistemic authority.' A similar impression is given by interviewees: the 2014 guidelines fall within a professional medical jurisdiction.

Meanwhile, the fact that medicine is not a monolithic profession is actively ignored, 644 and divergences within medical opinion are underplayed throughout. Parallels can therefore be drawn again with McGuinness and Thomson's analysis of the intra-professional rivalries which shaped abortion law reform in England and Wales; as a number of professional specialisms respond to jurisdictional vulnerability by engaging in boundary-work to gain occupational terrain. 645 Before 2012, psychiatrists at the Sexological Clinic offered one route to body modification psychiatric diagnosis; while via private-sector gynaecologists, endocrinologists, and surgeons offered another based on informed consent. Yet during the process of the 2014 reforms, the claims of these latter groups are silenced within official accounts. They are instead prohibited from continuing to offer treatment by regulators spooked by the controversy which surrounded the Caspian case.

The reference to controversy and jurisdictional vulnerability also draws attention to several scandals that the DHMA had been embroiled in during the period between deciding the Caspian case and drafting the 2014 guidelines; which will have seen the DHMA come under significant political pressure to demonstrate that they were in control of the medical practitioners that they were tasked with professionally regulating. One scandal concerned the cases of two separate psychiatrists, who appeared to be implicated in the deaths of several

⁶⁴³ McGuinness and Thomson (n 576) 190, citing Gieryn (n 575).

⁶⁴⁴ McGuinness and Thomson (n 576) 195.

⁶⁴⁵ McGuinness and Thomson (n 576) 191, 195.

patients in spite of the DHMA being aware that they had both been subject to numerous complaints. 646 Another involved the unauthorised use of the drug Misoprostol to induce births in hospitals, resulting in a number of tragic deaths. 647 The timing of these controversies highlights how the DHMA, and the Department of Supervision and Patient Safety in particular, was under significant strain at the time of drafting the 2014 reforms.⁶⁴⁸ Within the governance literature, and social policy literature more generally, little attention has been paid to how institutions are themselves vulnerable to political and economic forces, and how this might factor into their judgements and decisions. 649 This could offer significant insight into what motivated the DHMA to stand by the judgement of their decision in the Caspian case, despite its apparently disproportionate effect. Yet the fact that the DHMA's policy of centralisation fits with wider tendencies in healthcare policy across the Nordic states also suggests that the importance of the Caspian case ought not to be over-stated. 650

646 One psychiatrist, Arne Mejlhede, had been allowed to continue his practice despite being reprimanded by the DHMA Disciplinary Committee on 11 separate occasions over the course of only three years; Louise Damløv, 'Overblik: Disse sager førte til kulegravning af Sundhedsstyrelsen' *DR* (11 June 2014) https://www.dr.dk/nyheder/indland/overblik-disse-sager-foerte-til-kulegravning-af-sundhedsstyrelsen accessed 7 December 2016. Another psychiatrist, who — having suffered brain damage in a car accident in 2002 — continued to practice for nine years before his certification was revoked by the DHMA in May 2013 following 20 serious complaints; Astrid Fischer, Line Gertsen, and Laura Marie Sørensen, 'Tidslinje få overblik over sagen om den hjerneskadede psykiater' *DR* (1 February 2015) hjerneskadede-psykiater accessed 7 December 2016.

⁶⁴⁷ Misoprostol causes frequent contractions during childbirth. 41 different cases saw cases of severe pain and heavy blood-loss, including seven ruptured wombs and five stillbirths; Ritzau, 'Sundhedsstyrelsen skal sørge for sikre fødsler' *Politiken* (18 May 2013) http://pol.dk/5447315> accessed 7 December 2016.

⁶⁴⁸ These scandals eventually led to Anne Mette Dons – as well as two consecutive Directors of the DHMA – leaving their posts between September 2014 and March 2015; Johan Moe Fejerskov, 'Portræt: Skandaleramt Sundhedstyrelse bløder tillid' *Politiken* (12 March 2015) https://pol.dk/5574126 accessed 7 December 2016. In August 2015, it was also announced that the DHMA would be divided up into three different organisations – the Danish Health Authority, the Danish Medicines Authority, and the Danish Patient Safety Authority; Lars Igum Rasmussen, 'Sundhedsstyrelsen splittes i tre - lægemidler og patientsikkerhed får egen styrelse' *Politiken* (10 August 2015) http://pol.dk/5585037 accessed 7 December 2016. 649 Recent work on institutional vulnerability is beginning to remedy this deficit; Benjamin Reiss, 'Madness after Virginia Tech: From Psychiatric Risk to Institutional Vulnerability' (2010) 28(4) Social Text 25; Martha Albertson Fineman, 'Social Justice and the Vulnerable Subject' (Inaugural public lecture for the Centre of Law & Social Justice, University of Leeds, 16 September 2015).

⁶⁵⁰ It is noted in the public health literature that while a centralisation of healthcare policy and finance was initially undertaken in Denmark and Norway, in Sweden and

Whether the controversy around these scandals may have contributed to the development of the DHMA's strict policy of centralisation, or the Caspian case may merely have presented a good excuse for expanding professional jurisdiction, is unclear. Yet the Caspian case clearly constituted the vehicle which made the eventual jurisdictional settlement possible. For this reason, it amounts to an important 'trigger', or 'nodal point', 651 for the developments affecting the accessibility of body modification technologies in Denmark. Whether it is better explained with reference to the vulnerability of the DHMA as an institution, or as part of a wider trend towards centralisation, becomes a moot point as the most prosaic effect of this example of intra-professional boundary-work is to expand the jurisdiction of the DHMA in 2012, and then construct a prospective defence of this jurisdictional competence from future encroachment by other institutions during the process of the 2014 reforms. 652 Civil and medical jurisdictions could therefore be extended and maintained throughout the 2014 reform process, enabling the respective reforms to develop in quite different ways, with apparently contrasting results.

Beyond understanding this process of sorting and ordering, Valverde's work also anticipates how such a mobilisation of jurisdiction will affect the actual practice of governance. She explains that 'by deciding the 'who governs' question, the game of jurisdiction simultaneously and implicitly determines *how* something is to be governed.'653 So, while the process of reforming civil legislation played out in a relatively transparent manner during the 2014 reforms – evidenced by the public availability of reports and documentation – reforms of medical guidelines took place in a different way entirely. Unlike the CPR law,

Finland a 'similar if somewhat slower process' is now underway; Richard B Saltman and others, 'Consolidating National Authority in Nordic Health Systems' (2012) 18(3) Eurohealth 21.

⁶⁵¹ A 'nodal point' marks a 'momentary frame of joint reference', wherein 'several different trends' in contemporary thought or policy might 'converge'; Nina Lykke, 'The Timeliness of Post-Constructionism' (2010) 18(2) NORA – Nordic Journal of Feminist and Gender Research 131, 132, 135.

⁶⁵² McGuinness and Thomson (n 576) 181.

⁶⁵³ Valverde, Chronotopes of Law (n 122) 84.

the 2014 guidelines were drawn up, almost exclusively, behind closed doors, with almost no documentation of the process released into the public domain. Furthermore, if the Caspian case had been heard in a civil or criminal court, the surgeon involved would have had a right to appeal. As it did not, the authority of the DHMA's Disciplinary Board is such that – irrespective of the particulars of an individual case – its decisions cannot be appealed to any other administrative authority. 655

Constructing distinct jurisdictions by selecting certain (medical) features of embodiment, while ignoring other (civil) aspects, has been presented as one way in which jurisdiction can be used to sort and separate different – and potentially contradictory – governing power-knowledges to prevent them from coming into conflict. It may also shield certain jurisdictions from the level of scrutiny usually targeted at others. Civil legislative reforms might rely on trans people's personal experience of gender and transition, but the particularities of medical reforms are left to medical regulators. When asked about why this might have been the case, Linda Thor Pederson, transgender spokesperson at LGBT Denmark, was particularly blunt:

the civil servants are keeping the politicians out of their domain. That's the main problem. They believe that only medically-educated people can have opinions about healthcare. [...] [T] he only the politician in the Ministry is the Minister. The rest are civil servants, and they don't care about the Minister – he's only temporary...

(Linda Thor Pedersen, LGBT Denmark)

Pedersen's testimony suggests that, in addition to wielding authority over their generalist colleagues, medical professionals working in a civil capacity can also protect their professional jurisdiction ("their domain") from the interference of politicians. While it might be assumed that a minister's democratic mandate might grant significant

⁶⁵⁴ Some campaigners interviewed about their role in the 2014 reform process had attended a private consultation hosted by the DHMA and the Ministry of Health.

Order regarding the law on complaints and compensation in health care (7 November 2011) (Bekendtgørelse af lov om klage- og erstatningsadgang inden for sundhedsvæsenet) (DK), s 13.

⁶⁵⁶ Valverde, Chronotopes of Law (n 122) 60-61.

influence over governance policy, Pederson's suggestion is that this mandate counts against them instead – denying the longevity and job security enjoyed by professional regulators. Reading Pedersen's claim through the literature on professional boundaries, it could be inferred that what medical authorities appear to be resisting are not only the demands of patients to be treated on the basis of informed consent, and the claims of medical practitioners willing to grant this to them, but also 'encroachment by the legislature on clinical discretion and decision-making.' ⁶⁵⁷ The Danish Government acquiesced to these demands, explaining the expansion of the DHMA's jurisdiction as a by-product of its decision to respect professional self-regulation.

Even if medical guidelines are understood as professional (self-)regulation, Valverde's work informs us that they are still dependent upon a mobilisation of state jurisdiction; which allows for authority to be delegated through both action and inaction, intervention or non-intervention. For, even 'independent' institutions – like the DHMA – do not regulate in a vacuum. On the contrary, they govern in accordance with the competence they are permitted by state law, which, if challenged, could be easily limited by state courts. 658 Valverde predicts that such a challenge would probably take the form of the state querying not the substance of an independent body's decision, but their authority to make such a decision in the first instance. 659 Yet the inverse is applicable here; as the Government decided not to intervene when the DHMA expanded its jurisdiction to fill the regulatory grey area which existed before the Caspian case. This policy of non-intervention equates to tacit certification that the expansion of the DHMA's professional jurisdiction is considered legitimate and politically acceptable. In so doing, the Government also condones the decision-making process of this top-down mode of regulation, rendering itself complicit in any failings or drawbacks that might be associated with this mode of governance.

⁶⁵⁷ McGuinness and Thomson (n 576) 190.

⁶⁵⁸ Valverde, Chronotopes of Law (n 122) 83.

⁶⁵⁹ Valverde, Chronotopes of Law (n 122) 83.

One result of the DHMA's jurisdictional expansion being certified by Government is that qualitative debate about processes of governance including questions about whether body modification technology should be as accessible as amending legal gender status, and whether making it less accessible might in turn limit the practicality of self-declaration – is effectively avoided. Instead, they seem to follow 'automatically' from the question of 'who' governs, as if 'by magic'. 660 Yet this expansion of the DHMA's jurisdiction to cover all body modification procedures understood as sex/gender modification treatments within Danish borders had a profound effect on how access to such technologies would be authorised and administered. In the final parts of this chapter, I undertake any analysis of these qualitative elements in order to de-naturalise and re-politicise questions about how and why access to body modification technologies is governed differently to the possibility of amending legal gender status. I develop a critical analysis of the practical functionality of the 2014 jurisdictional settlement by comparing the intentions of regulators involved in drafting the 2014 reforms with the experiences of those governed in accordance with them. As in Chapter 4, I identify a lack of coincidence between the testimonies of those holding these respective positions, which suggests that this jurisdictional settlement may be working against purported rationalities of governance.

Rationalities of governance

While the DHMA holds the responsibility for developing medical guidelines, and ensuring that these are put into practice by individual clinicians, it does not itself determine whether an individual patient is to be granted access to hormones and surgeries. It merely plans and polices the institutions that are permitted to perform this function. As I have established, the main result of its 2012 decision to standardise access to body modification technologies understood as constitutive

660 Valverde, 'Jurisdiction and Scale' (n 287) 145.

of sex/gender modification treatments is that access to such technologies is now centralised at the Sexological Clinic. It is, therefore, the Sexological Clinic that is tasked with doing the practical work of regulating access to such body modification technologies. In interviews conducted with representatives of various medical authorities – including the DHMA, the Ministry of Health, and the Sexological Clinic – this policy of centralisation was consistently justified as harm reduction; in accordance with the logic that, as the Sexological Clinic has the capacity to undertake a sustained psychiatric assessment of a patient before deciding whether to grant access to body modification technologies, ⁶⁶¹ this was the institution that was best-placed to mitigate against two risks which were said to have arisen in relation to the practices of some of the private sector practitioners that had been authorising and administering access to body modification technologies on an informed consent basis.

The first of these risks concerned how people had been granted access to body modification technologies on the basis of informed consent, even though accessing these technologies could result in more or less 'irreversible' changes to the patient's body. In contrast, by developing a cautious and sustained analysis of their patient's mental health before deciding upon whether to authorise their access to body modification technologies, the Sexological Clinic was understood to be reducing the risk of a trans person retrospectively regretting an 'irreversible' body modification. While such concerns did appear to relate on some level to the aesthetic aspects of transition, a more significant aspect seemed to link to functionality of different organs – particularly when considered from the perspective of the patient's sexual or reproductive capability. For example, when the operating surgeon in the Caspian case sought to justify performing the mastectomy without considering the gendered aspect of this treatment

⁶⁶¹ The length of these assessments will vary in practice. In our interview, Annamaria Giraldi noted that trans people who only wish to gain access to hormones but not undergo any surgeries may gain approval for this without being required to undergo the assessment programme (on the condition that their psychiatrist grants them the F65 diagnosis of 'unspecified transsexualism').

(as this type of procedure was akin to the breast reductions he had performed on cis women) this was roundly rejected by the DHMA Disciplinary Committee – in a manner which evidences this concern about diminished reproductive capacity quite clearly. The Committee decided that 'a breast reduction operation is clearly different from the total removal of the mammary gland' on the basis that while breast reduction is reversible, mastectomy is not; as a patient who had undergone a mastectomy would no longer be able to have 'a physiologically functioning breast, but only a certain prominence in the chest', unlike one who had undergone a breast reduction. 662 The implication is that if he had undergone sustained psychiatric assessment, the risk of Caspian regretting that operation – and not being able to breastfeed prospective children – would have lessened.

The second risk which regulators had identified related to the way in which certain body modification treatments had been administered by some private-sector practitioners. Concerns were expressed that the monitoring of the effects of these treatments was not being conducted with sufficient frequency and diligence to mitigate the risk of patients suffering from side-effects (such as those associated with hormone replacement treatment). Although this charge was not targeted at all private-sector practitioners (with the practices of those that had been permitted to retain their existing adult patients deemed adequate), the assumption was still that the endocrinologists formally affiliated with the Sexological Clinic would offer greater guarantees that patients would receive quality healthcare:

we also did supervision at my old department, and we saw a lot of back-street gynaecologists or psychiatrists that offered treatment for gender-specific purposes but didn't do it properly. They didn't do the proper blood tests; they didn't make sure that they didn't have any other illnesses, or psychiatric issues; and there were a lot of problems with their work. In my opinion, these patients didn't deserve such bad treatment.

(Anne Mette Dons, (formerly) DHMA)

⁶⁶² Patients' Ombudsman (n 88).

There is little to criticise in wanting to improve the quality of healthcare received by patients. Yet by referring to the practitioners willing to prescribe hormones on the basis of informed consent as "back-street" gynaecologists – with all of the implied associations to the practice of dangerous and often life-threatening illegal abortions discussed by McGuinness and Thomson – Dons could be said to be engaging in a paradigmatic form of boundary-work; drawing a clear line between the scientific practice of the Sexological Clinic and the 'less authoritative, residual non-science' of the gynaecologists and endocrinologists favoured by trans interviewees. 663 That the DHMA's claim to expand its jurisdiction over the regulation of body modification technologies is justified in this way is anticipated within the literature on the professions; where, as was stated above, 'claims to special expertise and 'ethicality' form the basis of professional autonomy. 664

When I first discussed the risk of regret in Chapter 4, I noted that this was marked by a future-orientated temporality which contrasts with the present-day concerns of the CPR law. These different temporalities were said to correspond with the different jurisdictions' distinctive governing rationalities. I will now critique the governing rationality employed within the medical jurisdiction on its own terms. For, while it is accepted that, within medical law, intertemporal struggles are very much political struggles, 665 both concerns held by medical authorities — about the risk of regret and the intention to improve the quality of treatment — should still have been read alongside the clinical literature. Numerous studies have demonstrated that trans people enjoy high rates of satisfaction with different types of body modification procedures. 666 In a UK context, the Royal College of Psychiatrists cites research evidencing dissatisfaction levels as falling below four

⁶⁶³ Gieryn (n 575) 783.

⁶⁶⁴ McGuinness and Thomson (n 576) 180, citing Friedson (n 617).

⁶⁶⁵ Harrington, 'Time as a dimension of medical law' (n 257) 512.

⁶⁶⁶ Carolin Klein and Boris B Gorzalka, 'Sexual Functioning in Transsexuals Following Hormone Therapy and Genital Surgery: A Review' (2009) 6(11) Journal of Sexual Medicine 2922; Katrien Wierckx and others, 'Quality of Life and Sexual Health after Sex Reassignment Surgery in Transsexual Men' (2011) 8(12) Journal of Sexual Medicine 3379.

per cent,⁶⁶⁷ basing its good practice guidelines on evidence that the most significant factor for regret is a poor outcome after genital reconstruction.⁶⁶⁸ Literature from trans studies has also questioned how 'regret' is framed even in these studies – as well as by those who seek to restrict access to body modifications – challenging the implication that the minority of patients who are dissatisfied with their new gender status would wish to 'go back' to the previous one (rather than claiming, for example, a non-binary or 'post-transsexual' position).⁶⁶⁹ Yet Danish medical authorities went against the advice offered by trans studies and clinical literature, favouring a paternalistic and risk-averse policy of restricting access to treatments.

When advising scholars to consider governing rationalities, Valverde has been clear that assessments of governing logics ought to include 'the affective and aesthetic dimensions of governance.' As I have noted elsewhere, his need to warn scholars away from overly-instrumental or -rationalistic conceptions of logic-as-*telos* may have motivated Valverde's decision to omit logic from a more recent publication of her research agenda. In the same vein, Valverde dismisses attempts to construe risk-averse rationalities of governance as 'lacking in passion, affect, and aesthetics'. For, 'the passion for technocracy and rational risk management is a passion too, and has its own (modernist) aesthetic.' Where public policy is driven by such

⁶⁶⁷ Royal College of Psychiatrists, *Good practice guidelines for the assessment and treatment of adults with gender dysphoria* (CR181, 2013) 19-20, citing M Landén and others, 'Factors predictive of regret in sex reassignment' (1998) 97 Acta Psychiatrica Scandinavica, 284; F Pfäfflin and A Junge, 'Sex reassignment. Thirty years of international follow-up studies after sex reassignment surgery: a comprehensive review, 1961–1991' (1998) International Journal of Transgenderism, and; YL Smith and others, 'Sex reassignment: outcomes and predictors of treatment for adolescent and adult transsexuals' (2005) 35 Psychological Medicine 89–99.

⁶⁶⁸ Royal College of Psychiatrists (n 667) 19, citing AA Lawrence, 'Factors associated with satisfaction or regret following male-to-female sex reassignment surgery' (2003) 32 Archives of Sexual Behavior 299.

⁶⁶⁹ Jillian St Jacques, 'Retrotranslations of Post-Transsexuality, Notions of Regret' (2007) 6(1) Journal of Visual Culture 77.

⁶⁷⁰ Valverde, 'Studying the governance of crime and security' (n 288) 384.

⁶⁷¹ Dietz (n 379) 127.

⁶⁷² Within this new formulation, affect and aesthetics were also relocated under an expanded notion of 'scale'; Valverde, *Chronotopes of Law* (n 122) 78.

⁶⁷³ Valverde, Chronotopes of Law (n 122) 78.

⁶⁷⁴ Valverde, Chronotopes of Law (n 122) 78.

a modernist aesthetic, it could be most likely to fail where it does not anticipate unintended consequences at the point where regulations constitute and saturate bodies, and where power meets resistance.

Sure enough, it emerged during interviews that the DHMA's policy of centralisation may not be compatible with its own purported governing rationality when put into practice. All fifteen interviewees asked about how they had been affected by the 2014 reforms reported that they had at least considered undergoing one form of body modification or another; yet around half were either unwilling or unable to undergo the proscribed process of psychiatric diagnosis. They reported various reasons for this; ranging from those who felt that gaining such a diagnosis would be impossible for them, to others for whom this was a matter of principle. Some had previously been rejected by the Sexological Clinic, or had a negative experience that would prevent them from returning. Non-binary trans people, and people in receipt of psychiatric diagnoses other than transsexualism, also expressed reluctance to undergo psychiatric assessment at the Sexological Clinic as they feared that they would face discrimination and not be approved for treatment. Others objected to the psychiatric assessment as they disagreed that trans phenomena was constitutive of mental illness, or something that could be located 'in the mind'. Certainly, this understanding had caused problems for interviewees; including one intersex woman who had been rejected from the Sexological Clinic:

they're not willing to give me oestrogen, because — in their opinion — it's cross-gender treatment, and therefore trans treatment. [...] I don't think it's cross-gender, but it's cross-gender from my assigned sex; and Denmark — just like any other country in the world — only operates with the female and male categories. It's a problem because there's more variations in the human sex anatomy than just male and female. I think that you should be able to get the treatment that is for you, and not for some social standard.

(Stephanie Stine Skaaning, Intersex woman, 29)

Denmark has no clear policy on how to regulate intersex people's access to body modification technologies, so the Sexological Clinic

was unable to refer Stephanie on to another institution. As her consultation took place before 2012, Stephanie managed to secure access to hormones through one of the private-sector practitioners who was permitted to continue treating their existing patients after the Caspian case. Had this consultation been conducted more recently, she would have been left with no viable access to hormone treatment.

As I discussed in Chapter 4, critiques of pathologisation have challenged the diagnostic process for reproducing out-dated, ⁶⁷⁵ middle-class, white, ⁶⁷⁶ gender norms prone to excluding anyone who fails to meet these highly subjective standards. ⁶⁷⁷ The diagnostic process also exhibits a clear affective dimension. Even interviewees who were confident that they could be afforded a diagnosis reported frustration with the number of consultations and long waiting times between appointments this required. ⁶⁷⁸ One interviewee described attempting to speed up her access to treatment:

They have great difficulty deciding that it is enough; when they have talked enough about this person. It's very hard for them to say: "This is enough." [...] But I'm giving them a lot of pressure: "Why should we just hold meetings for [the sake of] holding meetings – talking about the weather? Why?! I'm ready, and you know it." [...] I'm giving them a hard time, and putting a lot of pressure on them because it's not okay.

(Anita, Female, 46)

Comparing the testimonies of trans people to those of regulators seeking to justify the healthcare authorities' policy of centralisation identifies a divergence; where the cautious, risk-averse, process of psychiatric authorisation which is understood as a benefit by regulators keen to diminish the risk of regret is interpreted as a 'push'

⁶⁷⁵ Hird (n 534) 181.

⁶⁷⁶ de Young (n 535); Roberts (n 535); Metzl and Hansen (n 535).

⁶⁷⁷ Davy, 'The DSM-5' (n 536) 1165; SJ Kessler and W McKenna, *Gender: an ethnomethodological approach* (Wiley 1978).

⁶⁷⁸ Long waiting times before and between appointments are also reported in the UK context; Ellis, Bailey, and McNeil (n 270). The difference here is that, unlike in Denmark, they are officially viewed as a failing rather than an advantage of the diagnostic process; see Women and Equalities Committee (n 56) paras 186-253.

factor or 'driver of travel' by those required to undergo it. 679 As I demonstrated in Chapter 4, around two-thirds of interviewees reported having already travelled, or planned to travel, abroad to undergo specific surgeries as a result of their concerns. A similar number also reported having considered turning to the black market to ensure access to hormone treatments, with a minority reporting that they had already taken this step and begun a process of self-medication.

It is noted in the trans studies literature that self-medication is not uncommon among trans communities, allowing people to initiate their own transition without first having to seek approval from the medical profession.⁶⁸⁰ Unsurprisingly, it has also provoked anxieties in the clinical literature, which Davy notes could be interpreted as representing sincere concerns about the risks to patient health, or as a more cynical strategy concerned with maintaining the importance of the healthcare system to their client base. 681 In both cases, trans people are deterred from turning to alternative sources of body modifications, 682 which could be understood as constituting another form of boundary-work – with professional institutions seeking control of a disputed domain.⁶⁸³ Either way, interviews confirmed that such concerns were held by healthcare policymakers:

Yes, we are aware of this [...]; but we are convinced by the [Danish] Health and Medicines Authority's argument that the hormone treatment is also irreversible and should be administered with some care – which has not always been the case in the past.

(John Erik Pedersen, Ministry of Health)

And, reflecting her former role as Head of Supervision and Patient Safety at the DHMA, Dons responded similarly:

⁶⁷⁹ Ruth Holliday and others, 'Beautiful face, beautiful place: relational geographies and gender in cosmetic surgery tourism websites' (2015) 22(1) Gender, Place & Culture 90, 92-93.

⁶⁸⁰ Davy, 'Transsexual Agents' (n 22).

⁶⁸¹ Davy, 'Transsexual Agents' (n 22). 682 Davy, 'Transsexual Agents' (n 22).

⁶⁸³ McGuinness and Thomson (n 576) 182.

It's always a concern [...]. Of course it is. But I think that people know that they're undergoing a great risk if they, for example, go on the internet and buy hormones by postal order from Taiwan or whatever. It is a big risk to take. But you can't do much about that, because a lot of stuff is available on the internet.

(Anne Mette Dons, (formerly) DHMA)

The same concern was also raised in a clinical study published by psychiatrists at the Sexological Clinic.⁶⁸⁴ Yet in no instance is any credence given to the thought that restrictive gatekeeping may be pushing people towards self-medication. In the UK, similar concerns have led regulators to recommend that clinicians adopt a contrasting harm reduction strategy – possibly even providing what are called 'bridging' hormones before a patient has received a full diagnosis.⁶⁸⁵ By presenting themselves as resigned to the fact that it is unavoidable, regulators in Denmark shy away from confronting the reality that any rise in self-medication might be linked to the 2014 reforms.

That all but one trans interviewee interpreted the 2014 guidelines as constitutive of greater restriction by medical authorities did not register as a concern for regulators also casts doubt as to how far the DHMA strategy of centralisation is compatible with its goal of harm reduction. However quickly hormones were prescribed before 2012, and however incompetently evidence of side-effects was being monitored, that this was all taking place within a clinical setting was surely more likely to reduce harm than the practices of self-medication. This suggests, in turn, that the medical authorities' strategy of centralisation could be failing on its own terms; by prohibiting informed consent, those who are unable or unwilling to undergo psychiatric diagnosis are pushed onto the black market, or abroad. Once they begin self-medicating, they become exposed to the very same risks – including the risk of regret, and poor-quality treatment – used to justify the DHMA's strategy of centralisation in the first place.

⁶⁸⁴ Simonsen and others (n 520).

⁶⁸⁵ Royal College of Psychiatrists (n 667) 21-22.

Capacities of governance

One explanation as to why the effects of the 2014 reforms appear to be working against purported governing rationalities relates to the limited capacities of the institution tasked with doing the practical work of governance. Since the Sexological Clinic has become responsible for directly determining an individual's access to body modification technologies, its patient roster has greatly increased. 686 In practice, the clinic is expected to perform three interrelated functions. The primary function is that of healthcare provider. In accordance with their training as medical practitioners, this requires clinicians to ensure that they enhance the health of patients. The secondary function involves assuming the role of the official state gatekeeper to body modification technologies deemed to be constitutive of sex/gender modification treatments. Here, the clinician's main concern is with assessing patient suitability for treatment. The tertiary function is that of the sole academic research institution on trans phenomena in Denmark. Here, staff become researchers; demanding that they produce accurate, valid, knowledge about patient experiences of treatment.

During interviews with respondents who had undergone, or were in the process of undergoing, the assessment programme at the Sexological Clinic, it became clear that these three functions might not be mutually compatible. Of the twelve interviewees who had attended the Sexological Clinic, only one described going there with an open mind:

I wasn't 100 percent sure what I needed when I went there; I was in a process of figuring out. [...] I wasn't sure – with feeling non-binary – whether it would be the right thing for me to change my body; I needed to figure some things out. So, I thought: "Well, they're the experts; they must be able to help me."

(Pippin, Non-binary, 42)

⁶⁸⁶ Annamaria Giraldi notes the Sexological Clinic has seen "more than a 200 or 300 percent increase [in the number of referrals it receives] in the last eight years."

All eleven other interviewees reported adopting an instrumental stance in relation to the Sexological Clinic, seeing medicine as a way of facilitating their transition. Some admitted approaching the clinic strategically. Sasha – who does not identify within the gender binary – described exaggerating masculine aspects of their aesthetic to maximise the chance of being offered testosterone treatment:

I feel like I'm lying. Well. I am kind of lying when I'm there. [...] I've been planning what sort of clothes to wear, not wearing tight pants; and I cut my hair short even though I want to have long hair. I don't know if it matters — what sort of hair I have — but, you know, just to be on the safe side I've put myself in this masculine box, or at least tried to.

(Sasha, Non-binary, 23)

The idea that trans people view the Sexological Clinic instrumentally – as somewhere to go to gain approval more than to undergo a process of supported self-discovery – accords with Davy's finding that trans people are accustomed to reproducing the stereotypical narratives to maximise their chances of being authorised for treatment. Of the three functions of the Sexological Clinic, this suggests that clinicians are perceived primarily within their secondary role – as gatekeepers to hormones and surgeries – rather than as healthcare providers or academic researchers. In turn, this appears to have affected the capacity of the clinic to perform the other functions it has assumed.

In terms of the primary function, questions can be asked about how far the quality of healthcare provision will be reduced once staff are perceived primarily as gatekeepers to material resources. Interviews suggest that this has had more serious repercussions for trans people with specific healthcare requirements. One interviewee explained how being rejected from the programme at the Sexological Clinic due to suffering from anxiety and depression motivated an (ultimately unsuccessful) attempt to wean herself off her medication:

⁶⁸⁷ Davy, 'Transsexual Agents' (n 22).

⁶⁸⁸ Davy, 'Transsexual Agents' (n 22) 123.

I was taking anti-depressants and anxiety medication [...]. [Yet] [i]n order to be assessed you have to be cured of all psychological ailments beforehand; which is really weird because any modern gender clinic would take into account that, if you have gender dysphoria then you would, most likely, be slightly depressed, or have anxiety. [...] [But] because of my medication I was rejected. I actually went home and talked with my doctor, and started getting off the medication – which was really hard and made me sick. [...] I was really, really depressed for a fortnight. I just couldn't get out of bed for two weeks.

(Freyja, Transwoman, 46)

Another interviewee, who also suffers from another psychiatric condition which requires both therapy and medication, explained how this requirement for gaining the Sexological Clinic's approval – being mentally 'stable' – impacted his mental health treatment:

every single appointment I went to, they asked: "Are you stable?" [...] and what I told myself is that, even if I'm not stable at all [...] I'm going to lie to them. If that's the requirement – to be stable – then of course I'm going to lie, and fake that I'm stable in order for them to be sure.

(Curtis, M, 25)

Curtis describes being placed in a double-bind where, on the one hand, being honest about his mental health might jeopardise his access to testosterone, while strategically prioritising access to body modifications might require him to cover up any problems he has had with his mental health on the other. This dilemma was compounded by the standard practice in the Danish healthcare system whereby all practitioners record patient notes on an online database, which are then accessible both to the patient and other medical professionals:

I also have to lie to my psychiatrist, because they can read her notes as well. [...] I wouldn't dare say: "I really had a bad week." (Curtis, M, 25)

This ensured that Curtis's decision to be strategic about what he disclosed to his caseworker at the Sexological Clinic would have to be replicated with his other psychiatrist as well – even if this meant hiding "a bad week" from both clinicians. Evidence that being admitted to the Sexological Clinic could lead to a patient's mental healthcare being

compromised in these ways casts doubt as to how far their secondary, gatekeeping, function is compatible with the clinic's primary function of providing the best possible healthcare for their patients.

The finding that trans people generally perceive staff at the Sexological Clinic as gatekeepers to body modification technologies also appeared to affect its capacity to perform the tertiary function of producing empirical academic research on trans phenomena in Denmark. One interviewee described how he got the impression that the progression of his caseworker's thesis was affecting his treatment:

He was so focused on my sexual behaviour, and my sexuality, [that] we barely even talked about my gender identity. He was really focused on trying to convince me that maybe I was just homosexual, or that maybe something bad happened with my parents, that I thought I had to be a guy to please my father or something like that [...]. He was writing this thesis or something, and I really felt like I was a case study to use in his thesis – and that was his focus more than getting me help.

(Peter, Male/FtM, 27)

Peter describes a caseworker exhibiting poor academic and clinical practice; trying to force his theory onto the patient, without paying attention to Peter's needs. Yet even where a clinician acts more professionally, epistemological concerns about the validity of their research findings remain. It is noted in the methods literature that validity concerns whether the research 'measures, explicates or illuminates whatever it claims to measure, explicate or illuminate.'689 Evidence that trans people do not describe the full complexity of their experiences of gender and transition within the clinical setting – imbued with unequal power relations – suggests similar questions could be asked of the research produced within the Sexological Clinic.

While it is generally accepted in the methods literature that overcoming unequal power relations will always be difficult, researchers are still required to account for the effect that this might have had on their

⁶⁸⁹ Mason (n 359) 132.

findings (as I discussed in Chapter 3).⁶⁹⁰ The ethicality of research conducted upon research subjects keen to gain the researcher's approval – based upon the understanding that that researcher holds the key to desirable resources – is also highly questionable. Such methodological limitations raise important epistemological questions about the quality and validity of research based on data gleaned inside the Sexological Clinic. Irrespective of how 'objectively' clinicians report their findings,⁶⁹¹ the validity of their insights will be compromised where power relations – including the formative role that institutional discourses can have on trans embodiment, particularly when these are interpreted as gatekeeping demands – are not reflexively considered.

Methodological failings will, in turn, have long-term consequences for the regulation of embodiment. As the Sexological Clinic is the only clinic permitted to authorise sex/gender modification treatments, no other research institution has access to trans research subjects within Danish borders. The research it conducts is the only empirical clinical research published on trans phenomena in the Danish context. Therefore, this research will almost certainly shape the development of future treatment frameworks in Denmark, as one activist lamented:

if I went there tomorrow, to get my hormones, I would of course do whatever I could to get the hormones – I would totally buy into their system. I don't think I have any choice [...] because I would be really afraid that if I didn't get in, I would never get any. And that's a really fucking big problem because I know so many people who do exactly the same and just say what they know that the Sexological Clinic wants us to say. And in that way, we will never get any different system, because that works.

(Elias Magnild, Trans Political Forum)

Wider concerns about how clinical stereotypes and psychiatric research practices are used to shape one another are not represented. ⁶⁹² A feedback loop is created; with trans people reporting narratives that they think their clinician needs to hear, and

⁶⁹⁰ Matthews and Ross (n 434) 76-77.

⁶⁹¹ Such as in the recent study of their patients' sexual preferences; Simonsen and others (n 520) 113.

⁶⁹² Davy, 'The DSM-5' (n 536) 1174.

that clinician reporting narratives that they assume to be accurate and truthful – and which they somehow keep happening to hear. Advice from the methods literature to be wary that consistency between different testimonies may indicate 'answers that are intended to conceal rather than clarify' either goes unheard, or is simply ignored. Instead, these stereotypical narratives are used to shape clinical practice, ensuring that they will be learned and repeated by trans people keen to gain access to body modification technologies.

Since it was established in 1986,694 the Sexological Clinic has been the sole institution publishing empirical academic research on trans phenomena in Denmark. This suggests that epistemological concerns are far from novel. Yet, along with the issue of ensuring trans people's mental and physical health, they may have been less pronounced before medical jurisdiction expanded in 2012. Previously, trans people had other places to go to access body modification technologies in Denmark if they were unable to gain the approval of the Sexological Clinic. That this option has since been removed may have reduced the likelihood of someone like Pippin presenting themselves at the Sexological Clinic undecided as to what they want but hoping "to figure some things out", and willing to undertake an honest and supported process of self-reflection. Even Pippin noted that the feelings of disappointment that they experienced upon being rejected from the Sexological Clinic would have been nothing in comparison to the devastation that they would have felt had this happened more recently:

I was disappointed of course that I'd been going there for two years and nothing came of it. Fortunately, at that point I had got the name of the gynaecologist who could also help, so I was not totally without options – if I'd been that, I would probably have been devastated.

(Pippin, Non-binary, 42)

⁶⁹³ Charlotte Aull Davies, *Reflexive Ethnography: A guide to researching selves and others* (Routledge 2005) 86.

⁶⁹⁴ Graugaard and others (n 106) 331.

Taken together, these findings suggest that the implementation of the medical authorities' policy of centralisation has exacerbated certain anxieties that trans people have developed around securing access to body modification technologies. These anxieties have been shown to produce barriers which prevent trans people from accessing physical and mental healthcare services. Those that are unable or unwilling to gain diagnostic authorisation at the Sexological Clinic are left with only the black market and foreign clinics through which to access body modification technologies – with the economic costs and associated health risks that that entails. As I described in Chapter 4, this jurisdictional arrangement will have a differential impact upon trans people depending upon their circumstances and backgrounds; and may risk exacerbating inequalities in access to health which run along intersections of age, class, disability, ethnicity, gender and sexuality.

Moreover, being construed mostly as gatekeepers to these technologies in the eyes of their patients, and having access to these patients' wider medical records, puts staff at the Sexological Clinic in the undesirable position where their clinical practice may become a barrier to their patients' good health. Meanwhile, the research that they produce risks being undermined by being based upon information that their patients strategically report; which, in turn, ensures the reproduction of homogenous knowledge about trans phenomena. This has consequences for academic knowledge production, and for those whose embodiment will be measured against these compromised standards at some point in the future.

Conclusion

Employing jurisdictional analysis to investigate the medical regulation of gendered embodiment, this chapter mapped developments in the governance of access to body modifications understood as constitutive of sex/gender modification treatments in Denmark. Having noted how the jurisdiction of the DHMA expanded from the moment that they claimed responsibility for authoring the 2006

guidelines, and again in the aftermath of the Caspian case, it demonstrated how jurisdiction was used to sort and separate civil and medical spheres during the reforms of 2014. These reforms consolidated the previous jurisdictional expansion, with the Government's deference condoning this expansion as legitimate. By developing a jurisdictional analysis that civil authorities were so wary of undertaking, this chapter illuminated various effects that the maintenance of these jurisdictional divisions has had on the way authorisation to body modifications is regulated in practice. And by supplementing Valverde's work with an analysis of jurisdiction as it is articulated in the literature on institutional vulnerability and the professions, it offered additional insights into how boundaries between institutional power-knowledges are developed and maintained.

By exploring the 'qualitative' aspects of governance along with the embodied effects that these appeared to have had in the testimonies of interviewees – interrogating governing capacities and rationalities in relation to the experiences of those at the other end of the governing arrangement – I was able to challenge the harm reduction policy of the medical authorities on its own terms. The medical authorities' policy of centralisation was shown to be undermining its stated intentions in practice; increasing exposure to risks, and reducing the quality of healthcare provision for large groups of trans people. This counterproductivity was also shown to have been exacerbated by recent developments, as centralisation was said to have increased trans people's anxieties about securing access to body modification technologies which many see as integral to their embodiment. Centralisation was also shown to have placed greater responsibility on the Sexological Clinic, augmenting the problems that they were already facing in terms of performing the three mutually incompatible functions that are asked of them. The policy also raises important questions about the specific arrangement of professional jurisdiction which has put them in this untenable position.

695 Valverde, Chronotopes of Law (n 122) 84.

My findings suggest that the way jurisdiction has been arranged to implement the centralisation policy of the Danish medical authorities is such that it may have become self-defeating. That this policy could even be implemented in Denmark at the same time as legal gender recognition was being reformed to become more accessible to trans people, accommodating them in accordance with self-declaration of legal gender status, also raises questions about how this reform process was organised and conducted. This analysis raises important insights that must be considered by activists and trans people as they try to develop strategic responses around calls to implement the self-declaration model in the UK, and elsewhere, in the near future.

In this chapter, I supplemented the work I began in Chapter 4, laying out how jurisdiction has been arranged in the medical part of the 2014 reform process, and demonstrating how jurisdictional analysis can illuminate the rationalities and capacities of medical, as well as civil governance. In both chapters (4 and 5), I discussed the effects of this jurisdictional arrangement on the regulation of legal embodiment. I also discussed the hypothesis that the way jurisdiction has been mobilised to sort and separate civil and medical reforms has led to them working in different directions - with civil law focused on liberalising technical administration and healthcare law focused on centralising access to body modification technologies – and examined these inconsistencies in detail. In Chapter 6, I consider the 2014 reforms from a slightly more theoretical perspective, stepping back from this hypothesis, and examining whether there is any way in which the 2014 reforms might be conceptualised as working together, as part of a coherent strategy governing legal embodiment.

6. Mind/body dualism

Introduction

After constructing a theoretical framework around a conception of legal embodiment, in Chapter 2, I identified jurisdictional analysis as wellsuited to the task of addressing the complexities of embodiment in the context of trans legal studies; and the moments where trans people seek to amend their legal gender status or access body modification technologies. In accordance with the methodological approach I laid out in Chapter 3, I began to investigate how jurisdiction had been allocated in the 2014 reforms in Chapters 4 and 5. This comprised an analysis of jurisdictional arrangements in the reform of civil legislation in Chapter 4, and medical regulations in Chapter 5. In these chapters, I considered how the separation of civil and medical reforms led to them being interpreted as working in different directions by most interviewees; with civil legislation focused on liberalising technical administration and medical law keen to centralise access to body modification technologies. This impression was shared by most activists, campaigners, and trans people. The only group of interviewees that did not share this interpretation of the 2014 reforms were the professional regulators – including politicians, civil servants, and representatives of the medical authorities. But rather than offering any suggestion as to how they might be construed as working in relation to one another, most of these interviewees would only comment that they saw civil and medical reforms as distinct from one another. The consequences of this jurisdictional settlement were then explored.

In this chapter, I approach the 2014 reforms from a slightly different angle. While still informed by the testimonies of interviewees, I draw a little more on doctrinal sources, including the parliamentary debates and legislative documents, to consider if there is any way in which the civil and medical approaches could be conceptually reconciled. If such a legislative strategy could be identified, this could, in turn, enable an

analysis of common failings to emerge. Offering a suggestion as to where the 2014 reforms went awry, such a critique would be of great interest to campaigners and policymakers in Denmark, and in countries expected to implement the self-declaration model of legal gender recognition at some point in the future.

I develop this critique from the embodiment perspective that was constructed in Chapter 2. As I stated here, legal embodiment concerns the ontological and epistemological processes through which bodies become legal subjects, at the intersection of discursive, material, and institutional realms. It concerns how bodies are produced, and then saturated with meaning, and the ways in which these processes are resisted. It rests upon experiences of material physicality, and relates to how these constitute subjectivity in relation to structural means and constraints. It is also wary of binary formulations, and particularly those - like sex/gender, male/female, matter/discourse - which could be charted back to a conceptual dualism drawn between mind and body. By reading the 2014 reforms through a lens of legal embodiment, this chapter argues that their main conceptual failing is that they seek to prioritise the recognition of trans people's minds over and above their embodied needs and desires. Mind/body dualism can be identified in almost all areas of the 2014 reforms, complicating the assumption that civil and medical reforms are working in completely different directions. By seeking to recognise trans people's minds, while dismissing embodied concerns – including both bodily aesthetics and other practicalities of trans embodiment the 2014 reforms again appear to work against their stated intentions. Just as the jurisdictional effect of sorting and separating civil and medical reform was shown to have made little sense when viewed from the perspective of trans people in previous chapters, so it seems unfeasible to try to split consideration of the legal subject's mind and body on a conceptual level; recognising one without considering how this would affect the other.

The chapter begins with a brief review of the embodiment literature, to recap on the ways in which dualistic framings have been promulgated by law, before constructing a framework through which similar questions could be asked of the 2014 reforms. Drawing on both documentary materials (including the legislation itself, explanatory comments, and the parliamentary debates) and interview responses (from both trans people personally affected by the reforms, and regulators professionally involved in the reform process), it discusses how mind/body dualism arises in these various sources. This first involves identifying occasions on which law seeks to avoid discussion of embodied concerns, seeking to regulate the mind instead. The second point of focus centres on the moments where law does engage with institutional discourse - including those emerging from the psychiatric and medical professions in Denmark – albeit passively, in a manner marked by a level of deference; for example, with regard to discourses such as the 'wrong body' narrative. Then, the third and fourth sections of this chapter consider instances where law not only engages with institutional discourses, but actively ensures that they are written into statutory regulations. Ultimately, all framings can be identified in the reform process; as mind/body dualism appears to have exhibited a strong influence over the eventual reforms.

Dualistic framings

As I explained in Chapter 2, feminist theorists are generally sceptical of conceptual dualisms drawn between the mind and the body. For a start, such dualisms bifurcate various constituent parts of subjectivity – by locating a particular experience as having taken place solely in the mind, or in the body, for example – without exploring how such phenomena might be mutually constitutive or indistinguishable. 697

⁶⁹⁶ Grosz (n 123).

⁶⁹⁷ On the precise positioning of mind and body, I identified no clear consensus. For example, Grosz was cited highlighting how Merleau-Ponty locates experience midway 'between mind and body'; Grosz (n 123) 95. Beasley and Bacchi, meanwhile, were cited noting that mind/body splits are irrelevant as we simply 'are our bodies'; Beasley and Bacchi, 'Citizen Bodies' (n 215) 344.

More problematically, I noted that the different poles in such binaries have often been valued unequally, with one privileged over the other. 698 By neglecting relationality, and promoting privilege, such dualisms are not well-suited to acknowledging the many complexities of embodiment. Feminist legal scholars have become particularly wary of legislation which reproduces mind/body dualisms. includes legislation and case law in healthcare and criminal law, but it extends to other spheres as well. Within the specific field of the regulation of gendered embodiment, medical norms around bodies and activities were shown to be paramount - as normative understandings of what types of bodies and embodied actions are normal or not normal, permissible or prohibited, have been profoundly shaped by medical discourses. 699 Medical practices – including the pathologisation of trans phenomena – are clearly premised upon mind/body dualism; as the 'wrong body' narrative, which positions trans people's bodies in opposition to their minds, has been shown to underscore diagnoses such as 'transsexualism' and 'gender dysphoria'. Whether a trans person is in receipt of such a diagnosis will determine the possibility of accessing body modification technologies in Denmark and elsewhere. In the UK, such a diagnosis is a pre-requisite for amending legal gender status as well. Hence why, in Chapter 2, the GRA 2004 was criticised for proceeding on the assumption that mind and body can be separated as they are within medical discourse. 700 After deferring to mind/body dualisms, UK legislation then reproduces them, granting the psychiatric diagnosis 'the stamp of statutory authority.'701

UK experience demonstrates that mind/body dualisms can therefore be reproduced through the drafting of legislation which actively construes mind and body as distinct from one another. Yet this could equally apply to the situation where law simply fails to address binary conceptions which are already present in pre-existing forms of

⁶⁹⁸ Grosz (n 123) 211 fn 1.

⁶⁹⁹ see Foucault, The Will to Knowledge (n 122).

⁷⁰⁰ Cowan, 'Looking Back (To)wards the Body' (n 31).

⁷⁰¹ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

regulation. In accordance with the pluralistic regulatory focus of this thesis, such forms of regulation include normative frameworks – in families, workplaces, and clinics – which go beyond those commonly understood as 'law'. Dualistic framings of mind and body cut across formal statute, affecting conditions of embodiment through governance projects undertaken by power-knowledges other than those commonly classified as law. To reiterate, it cannot be assumed that the complexities of embodiment will be acknowledged when dualistic understandings of mind and body are merely avoided by those drafting statutory legislation. On the contrary, excluding mind and body from a reform project will only make it more likely that embodied concerns will not be taken into account; as institutional power-knowledges other than law are effectively permitted to continue regulating embodiment in a dualistic manner.

Leaving the body out

As I noted in Chapters 1 and 5, legal gender recognition had, before 2014, been reserved for Danish residents who could demonstrate that they had undergone surgical castration for the purposes of sex/gender modification. To gain permission to undergo this procedure in Denmark, it was a requirement that an applicant must state their desire to receive legal gender recognition (in the form of a new CPR number) once they had done so. As civil and medical regulations were so interdependent, it was generally the case that trans people would have undergone surgical castration and received legal gender recognition, or neither one nor the other, prior to the 2014 reforms. It has long been necessary to have been diagnosed with 'transsexualism' in order to be granted permission to undergo surgical castration within Denmark. This psychiatric diagnosis can only be granted following a sustained period of observation and evaluation at the Sexological

⁷⁰² Ministry of Justice, Rapport (n 72) 20.

⁷⁰³ Guideline no 10077 (n 602).

⁷⁰⁴ It is formally possible for a trans person to undergo castration without being granted a new CPR number, but only if they had done so outside of Denmark and without informing the medical authorities that they had done so.

Clinic.⁷⁰⁵ However, as I also noted, it has only been necessary to be diagnosed with transsexualism to undergo body modifications other than castration since 2012. It was only in the aftermath of the Caspian case that this requirement was extended to cover trans people's access to any form of hormones or surgeries.

'Transsexualism' is defined in the tenth edition of the World Health Organization (WHO) 'International Statistical Classification of Diseases and Related Health Problems' (ICD-10) as

A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.⁷⁰⁶

When analysed from an embodiment perspective, the wording of this diagnosis exhibits a clear influence of dualistic thinking. References to 'one's body', and 'one's anatomic sex', are contrasted with the 'desire to live and be accepted' as a member of 'one's preferred sex' (also construed as the 'opposite sex'). And while, by referring only to sex and not gender, this definition avoids openly reproducing sex/gender dualism, the distinction that is drawn between 'one's preferred sex' and 'one's anatomic sex' suggests that this distinction is there in all but name. The reference to 'a sense of discomfort' with 'one's anatomic sex' also implies a purely psychiatric (or at least psychological) conception of gender. The same logic could be used to identify an element of mind/body dualism; for although the mind is not explicitly mentioned (unlike 'one's body'), its presence is also implied by reference to the 'desire', 'sense', and 'wish' to be acknowledged 'as a member of the opposite sex'. The terminology of 'the opposite sex' also indicates that a purely binary conception of gender – as male or female – marks the wording of the diagnosis.

⁷⁰⁵ Ministry of Justice, Rapport (n 72) 8.

⁷⁰⁶ WHO ICD-10 (n 78).

The diagnostic process also exhibits a concern with the trans people's minds when determining whether they can access body modification technologies in practice. Yet, before 2014, legal gender recognition used to privilege the status of the body over and above the mind. Under the previous legislative framework, the gender trans people identified with was of little consequence (at least for the purposes of civil administration) – legal gender status was always determined by genitalia. The same cannot be said of the CPR law, introduced in 2014, which includes no explicit discussion of body parts or embodied characteristics. Instead, its key provision simply states as follows:

Assigning a new CPR number is conditional upon the person concerned making a written declaration that the desire for a new personal identity is based on an experience of belonging to the other sex/gender.⁷⁰⁷

The various references that are made to trans people's 'desire', 'identity', and 'experience' in the text of the CPR law could be taken as evidencing that a clear shift in the regulatory focus has occurred. Whereas, before 2014, this largely centred on the body, it now apparently – like the diagnostic process – concerns itself with the contents of trans people's minds. As I noted in Chapter 2, feminist legal scholarship has addressed how law has long exhibited a tendency to focus on the contents of minds 'first and foremost', turning to the needs of bodies only as an after-thought. The CPR law could thus be understood as revising a historical anomaly; bringing the regulation of gendered embodiment back in line with other types of law.

Yet within gender recognition legislation, more specifically, the body has rarely been concealed to any great extent. And, indeed, where the body is not explicitly discussed – for example, in the text of the CPR law – this will not mean that it is irrelevant. As I highlighted in Chapter 2, and above, embodied concerns retain great significance for the regulatory consciousness of trans legal subjects. So, while it is

⁷⁰⁷ L 182 (n 13), s 1.

⁷⁰⁸ Naffine and Owens (n 132) 12.

notable that bodies do not constitute the central focus of the CPR law (with diagnostic requirements removed in favour of self-declaration of legal gender status and little mention of derogations or exceptions), 709 this could be read as a failure rather than a success of law – as legislation is left silent on issues of significance for trans embodiment.

A working hypothesis would be that the introduction of the CPR law sees the regulatory focus of Danish gender recognition legislation shift from body to mind. In the UK, a similar development was said to have come about following the enactment of the GRA – as law's concern shifted from 'sex' to 'gender'. As Cowan's critical analysis suggests, 710 even if this had been realised, 711 a shift from sex to gender, or body to mind, is not incompatible with the reproduction of mind/body dualism. For while it might change the way in which the opposite poles of the binary are emphasised in relation to one another, the binary itself remains firmly in place. Within the analytical framework which I constructed in the previous section, I suggested that one way in which mind/body dualism could be identified in the 2014 reforms would be if legislators were to attempt to avoid discussion of embodied concerns as they drafted the CPR law. Even if concern had shifted from body to mind, this would not necessarily challenge mind/body dualism.

The analysis of the 2014 reforms that I conducted in Chapters 4 and 5 found that a clear attempt had been made to separate out these different regulatory systems. In addition to the various doctrinal and empirical sources that stress the need to separate civil and medical reforms, 712 it is also clear from the parliamentary debates that this imperative was understood by parliamentarians supportive of the centre-left coalition Government. This became particularly apparent when the Government's proposals came under attack from the Blue

⁷⁰⁹ cf The various exceptions in the GRA 2004, s 19-20.

⁷¹⁰ Cowan, "Gender is no substitute for sex" (n 70).

⁷¹¹ Sharpe (n 40) suggests that it was not.

⁷¹² Including the mandate for the working group (Ministry of Justice,

^{&#}x27;Kommissorium' (n 92)), the working group's report (Ministry of Justice, *Rapport* (n 72)), and interviews conducted with regulators involved in the reform process.

Bloc of opposition parliamentarians. So, when the spokesperson for the opposition Liberals expressed their party's preference that the new law include some form of medical assessment – potentially in the form of a 'regular appointment' 713 with 'one's own doctor' 714 - this was roundly dismissed by parliamentarians from the Red Bloc. Stine Brix, spokesperson for the Red-Green Alliance, responded that 'legal gender change has nothing to do with the health care system';⁷¹⁵ criticising the Liberals' proposal on the basis that to continue to include medical professionals in the reformed legal gender recognition process would be to undermine the stated intention of separating civil and medical regulations.⁷¹⁶ As in previous chapters, this attempt to sort and separate civil and medical reforms could be seen as pragmatic - allowing trans people to self-declare their legal status without the need to seek a gatekeeper's approval. It could also be construed as another form of 'boundary-work'. 717 However, conceptually at least, this strategy is marked by mind/body dualism; as seeking to introduce one reform which recognises trans people's minds, and another which regulates the modification of their bodies, hardly constitutes a holistic attempt to address the complexities of embodiment.

One effect – discussed in Chapters 4 – is that even though the CPR law is formally accessible to all, it has been rendered inaccessible for those trans people who are either unable or unwilling to gain access to body modification technologies through the Sexological Clinic or amend their legal gender status without material support. Here, attempts to liberalise the mind – by allowing for the self-declaration of legal gender status – are effectively undermined where access to body modification technologies is not reformed in kind. By separating civil and medical reforms, parliamentarians sympathetic to the demands of

⁷¹³ Fatma Øktem, Folketingstidende 20 May 2014, 91. møde, kl. 17:45.

⁷¹⁴ Øktem (n 713) 17:51.

⁷¹⁵ Stine Brix, Folketingstidende 20 May 2014, 91. møde, kl. 18:02.

⁷¹⁶ 'The thing that we are trying to do is to separate the legal sex/gender change from the health care system, so it is hard for me to understand why the Liberals want to have a doctor involved in the process'; Brix (n 715) 18:02.

⁷¹⁷ Gieryn (n 575).

LGBT organisations for a simpler civil registration system may also have missed an opportunity to foster bipartisan criticism of medical regulation, as they sought to ensure that the CPR Bill passed into law. This may not have been the case had the three reforms been presented to them as a comprehensive whole. As they were not, parliamentarians from the Red Bloc were not able to mount a concerted challenge to the Government's proposals for failing to acknowledge trans people's embodied concerns; in respect of their access to body modification technologies, amended gender status, or both. The effect of adopting this legislative and political strategy was to leave medical discourses around trans phenomena unchallenged, as parliamentarians supportive of the Government's proposals sought to avoid discussing them. One result of this reticence was that such discourses would be left unencumbered by statutory legislation.

Mind/body dualism can also be identified at the stage in the legislative process when a particular understanding of the body was written into the text of the CPR law. Just as conceptions of 'the opposite sex' are mobilised in the diagnosis of transsexualism discussed in the previous section, so medical norms around the male/female gender binary are reproduced in the CPR law. This is most apparent in the requirement that an applicant must declare an experience of belonging to 'the other sex/gender' if they are to be granted a new CPR number. 719 A binary conception of gender thus shaped the reforms of both civil and medical regulations. This is not to suggest that the two conceptions were completely indistinguishable; as it is at least deemed possible to have surgical and hormonal treatment 'to make one's body as congruent as possible with one's preferred sex' within the medical frame. 720 The same cannot be said of the CPR law. Within the explanatory comments written to accompany this law, a distinction is made between a trans person's identity and their biological sex/gender, as the law's intention is stated as follows:

⁷¹⁸ As in the GRA 2004, for example.

⁷¹⁹ L 182 (n 13), s 1.

⁷²⁰ WHO ICD-10 (n 78).

The purpose of the Bill is to make it possible that people who experience a mismatch between biological sex/gender and the sex/gender which they experience themselves as belonging to and identifying with can obtain a legal sex/gender change.⁷²¹

A conceptual distinction is drawn between mind and body; with 'the sex/gender which they experience themselves as belonging to and identifying with' positioned in opposition to the trans subject's 'biological sex/gender'. Unlike the transsexualism diagnosis, then, the CPR law fails to account for the possibility of any 'congruence' to be achieved between the two poles of mind and body. A particularly deterministic conception of the body – as 'mired in biology' and emerges instead. Parallels can be drawn here with critiques of the GRA. As Cowan has noted, a common drawback with dualistic conceptions of embodiment is that they leave one pole of the dichotomy 'undertheorised' in comparison with the other. So while conceptions of gender or the mind are deconstructed, reconstructed, and subjected to intensive critical analysis, sex and the body are left standing in what Cowan describes as the "natural' realm of biology."

A similar conception was also promoted within parliamentary debates, as representatives of the socially conservative Blue Bloc parties repeatedly raised deterministic arguments about the 'objective' 'reality' of 'biology'. The But rather than challenging such accounts, the Minister of the Economy and the Interior merely dismissed them as irrelevant; The noting that the intention of the Bill was simply to help 'a group of people to live the kind of life they wish to live. Again, a strategy apparently based around pragmatism ends up failing to

⁷²¹ Bill for amending the Act on the Central Person Registry (n 95).

⁷²² WHO ICD-10 (n 78).

⁷²³ Beasley and Bacchi, 'Citizen Bodies' (n 215) 350.

⁷²⁴ Cowan, "Gender is no substitute for sex" (n 70) 71.

⁷²⁵ Cowan, "Gender is no substitute for sex" (n 70) 71.

⁷²⁶ The spokesperson for the Danish People's Party argued 'if you are a man who feels like a woman, you will still be a man biologically'; Pia Adelsteen, Folketingstidende 20 May 2014, 91. møde, kl. 18:14. The spokesperson for the Conservative People's Party agreed that 'there is an objective link between one's physicality and what one is registered as'; Dyremose (n 524) 18:46.
⁷²⁷ Vestager (n 517) 19:07.

⁷²⁸ Vestager (n 517) 19:07.

challenge the received wisdom of biological determinism. Within the wider debate, there had been signs that a challenge against biological determinism may be mounted, such as when Brix formulated her party's objection to the Liberals' proposal to include a medical gatekeeper to legal gender recognition process as follows:

the Government is introducing this so-called declaration model, which involves the transgender person declaring that they belong to a different sex/gender than the biological sex that they were born with, after which there is a reflection period of six months until the application will be definitively approved. We think that this is very wise. This regards people's gender identity, which we think is a personal matter; not a matter for the health authorities.⁷²⁹

By formulating the intention of the CPR law in this manner, Brix both re-asserts a practical intention of separating medical and legal regulation of trans embodiment and leaves the possibility of a more dynamic conception of gendered embodiment open. A temporal qualifier – referring to the sex/gender 'that they [trans people] were born with' - implies an alternative to the logic that sex/gender is 'fixed at birth'. 730 Though this does not amount to a wholehearted argument for bodily diversity and plasticity, such possibilities are not excluded. Sex and gender may present themselves in ways which do not typically fit with the established gender binary. Flemming Møller Mortensen, healthcare spokesperson for the Social Democrats, went one step further towards a more explicitly dynamic conception of biology, stating: 'There are actually some people who feel a different biology than the one they were born with.'731 Yet as these more dynamic conceptions failed to gain traction, both politicians ended up giving in to the deterministic premises of the Blue Bloc's argument; relinquishing their challenge to a deterministic conception of the body in order to emphasise the importance of the citizen's mind instead. 732

⁷²⁹ Brix (n 715) 18:27.

⁷³⁰ cf *Corbett* (n 23).

⁷³¹ Flemming Møller Mortensen, Folketingstidende 20 May 2014, 91. møde, kl. 18·17

⁷³² For example, Brix asked: 'wouldn't it be possible to imagine that we organised the CPR number system in the future in a way so that instead of it reflecting the biological sex of the person it will be reflective of their gender identity?'; Brix (n

The only argument developed outside of the binary framework of mind (gender) *or* body (sex) from a Blue Bloc politician was offered by Merete Riisager, spokesperson for the Liberal Alliance; who raised the sole critique of medical regulation in the debates around the CPR law:

I will not place obstacles in the way of people who wish to change their sex/gender. They should be free to do that, and we should not have a state judge sitting and determining how people should organise their lives and which gender they should be. [...] it does not make any sense that Danish citizens who want to change their sex/gender have to go abroad because we are so rigid here in Denmark. I would very much like to change this and open up.⁷³³

Had it been raised in a context other than the oppositional parliamentary debates, parliamentarians from the Red Bloc may have been able to engage with this critique. Yet as the Liberal Alliance sought to oppose rather than amend the CPR law, parliamentarians who may have been critical of that system of regulation *and* still wished to push through civil reforms were left with little option but to shut it down. An exasperated Mortensen responded by stressing that medical regulation was not that to which the current debate referred:

The spokesperson is saying that Liberal Alliance will not put obstacles in the way of transgender people's opportunities to change gender. But for Christ's sake, what is at issue is that many do not want to get a sex change operation, but want to change their gender identity by getting a different CPR number! Have Liberal Alliance realised that that is what this is about? It is *not* about changing their physical gender.⁷³⁴

Red Bloc parliamentarians again end up doing boundary-work on the medical authorities' behalf, protecting the exclusive jurisdiction that they had acquired before the 2014 reforms. The intention may have been to ensure that the CPR law would make it through the parliamentary debates intact; yet this could still be considered a

^{715) 18:55;} while Mortenson castigated the Blue Bloc for holding on to 'an old-fashioned system based on biology'; Mortensen (n 731) 18:17.

⁷³³ Merete Riisager, Folketingstidende 20 May 2014, 91. møde, kl. 18:35.

⁷³⁴ Mortensen (n 731) 18:37.

paradigmatic example of a failure to engage with medical regulation of trans embodiment – unwittingly leaving them unchallenged by law.

One effect of this failure to challenge biological determinism was that parliamentary debate bifurcated around the relative benefits of developing, or retaining, a system based upon *either* identity *or* biology. No consideration was given to how the two might be contingent, or at least interrelated. For instance, Rasmus Horn Langhoff, the spokesperson for the Social Democrats, stated:

I am very happy that this Bill can help to solve a problem which the LGBT community in Denmark has long drawn attention to and wished to resolve. The solution is to have our laws updated so that it will become possible for those who feel like they are trapped in the wrong body to achieve legal sex/gender change.⁷³⁵

To suggest that legal recognition of a trans person's gender identity will suffice to ensure that they no longer feel 'trapped in the wrong body' is arguably to over-emphasise the relative value of civil and medical recognition – or the mind in relation to embodied concerns. As I have demonstrated in Chapters 4 and 5, the legal consciousness of trans interviewees indicated that being allocated a new CPR number alone would not be enough for them to avoid discrimination. Where access to body modification technologies was also restricted, legal recognition was in some cases inaccessible. But problems around embodiment and 'passing' were simply not anticipated within the parliamentary debates. And when opposition parliamentarians sought to challenge the likes of Langhoff's (over-)optimism, they did so from a biologically determinist perspective. Clear consensus was established across the Parliament that the 'wrong body' narrative – so clearly premised upon mind/body dualism – was both valid and legitimate. 736

⁷³⁵ Rasmus Horn Langhoff, Folketingstidende 20 May 2014, 91. møde, kl. 18:05. ⁷³⁶ Even the spokesperson of the socially conservative Danish People's Party stated: 'I acknowledge that it is possible for a person to feel like they belong to a different sex/gender, or to be born into the wrong body'; Adelsteen (n 726) 18:07.

Consensus around the wrong body narrative arguably constitutes the greatest point of convergence between the two blocs of the Danish Parliament, and within the 2014 reforms overall. As I noted in the previous section, the decision to require a diagnosis of transsexualism to be granted before a trans person can be authorised to access body modification technologies in the 2014 guidelines ensures that prospective applicants must engage in some way with the 'wrong body' narrative. The requirement that people must submit a declaration that the desire for a new personal identity is based on 'an experience of belonging to the other sex/gender', 737 adding that this 'other sex/gender' is the product of a 'mismatch between biological sex/gender and the sex/gender which they experience themselves as belonging to and identifying with', 738 also reproduces the 'wrong body' narrative in the CPR law. Relating to this narrative becomes a requirement for anyone who wishes to gain recognition from civil and medical regulatory systems. It appears that developing a pragmatic legislative strategy compromised by mind/body dualism had the effect of ensuring that the 'wrong body' narrative would be promulgated throughout the regulation of trans embodiment in Denmark.

The 'wrong body' narrative

As I explained in Chapter 2, it has been noted in the trans studies literature that reporting that one's mind and body are misaligned, or that one has been born into the 'wrong body', is a relatively common way for trans people to convey their experiences of trans embodiment. ⁷³⁹ Herein, however, such experiences were not considered as purely 'internal'. ⁷⁴⁰ Instead, Cowan has mooted:

⁷³⁷ L 182 (n 13), s 1.

⁷³⁸ Bill for amending the Act on the Central Person Registry (n 95).

⁷³⁹ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

⁷⁴⁰ Cowan, 'Looking Back (To)wards the Body' (n 31) 248, citing Hines, '(Trans)forming Gender' (n 744).

our sense of self does not develop in isolation from the development of the body, and both are profoundly subject to social processes and pressures.⁷⁴¹

The argument that being in the 'wrong body' is a relatively common way for trans people to describe their experience of embodiment was borne out in many interviews. Yet in recent years, critiques of this trope have become more widespread among trans scholars and activists. ⁷⁴² Evidence that this may be permeating into trans communities was offered by the minority of interviewees who were critical of the wrong body narrative. For example, by way of critiquing the results of the 2014 reforms, Mark noted as follows:

There is something bodily – there is something almost physical – about being trans, that other people cannot relate to if they're not trans themselves; which makes it extremely difficult when you want to transition, cause you need physical changes. [...] So there's a barrier there. But understanding is complicated because how can you understand being trans? I mean a lot of people say "born in the wrong body" but I wasn't born in the wrong body. A lot of people [...] tend to use that as an explanation: "Yeah, you were born in the wrong body." "Err, nope. This is the right body, it's just some minor details that need a bit of fine-tuning." [...] [P]eople try and understand, but when you don't live it, you don't have a chance of understanding. Even when you are trans, you might not get it.

(Mark, Transman, 38)

Mark begins by highlighting the importance of gaining access to body modifications, echoing Davy's argument that bodily aesthetics are 'intrinsic' to trans embodiment.⁷⁴³ That he does so while discussing the wrong body narrative also confirms Hines's finding that trans people are aware they might need to express their embodiment in terms of the mind and body if they are to be granted access to body

⁷⁴¹ Cowan, 'Looking Back (To)wards the Body' (n 31) 248, citing Hines, '(Trans)forming Gender' (n 744).

⁷⁴² Scott Turner Schofield, 'The Wrong Body' in Kate Bornstein and S Bear Bergman (eds), *Gender Outlaws: The Next Generation* (Seal Press 2010) 83; Talia Mae Bettcher, 'Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance' (2014) 39(2) Signs: Journal of Women in Culture and Society 383.

⁷⁴³ Davy, *Recognizing Transsexuals* (n 11) 45.

modification technologies. This critique also augments Davy's research; adding that while the 'wrong body' narrative may have been developed as a way of conveying the complexities of trans embodiment, this may have been for the benefit not only of medical gatekeepers to body modification but also to non-trans audiences more broadly. Mark adds an interesting epistemological caveat to this final point – that "Even when you are trans, you might not get it" – which implies that experiences of trans embodiment are so diverse and complex that even trans people cannot be relied upon to convey its many nuances in their totality. Later in the interview, almost as if to exemplify this final point, Mark went on to struggle to explain trans embodiment outside of a dualist mind/body framework, stating:

there is something – when you're a trans person – about body and mind. That's the exact problem; that body and mind don't fit together. And it's so hilarious, in a way, that it can be fixed with hormones and surgery – it's just difficult to get that. It is my body, and there's nothing wrong with it in that regard, because it can be fixed. But it's just difficult to fix it because of the legal situation.

(Mark, Transman, 38)

Mark falls back into the trap of mind/body dualism here, engaging in a discourse about 'fixing' the trans body which might be considered problematic by activists seeking to promote trans subject positions which are de-medicalised entirely. I raise this point not to criticise Mark's failure to develop a consistent and coherent narrative of trans embodiment which completely opposes the trope of being born in the 'wrong body'. On the contrary, as I discussed in Chapter 2, 'an adequate linguistic framework' through which the complexities of embodiment could be conveyed without recourse to mind/body dualisms has yet to be developed within our 'intellectual heritage'. The discussed in Chapter 2.

⁷⁴⁴ Cowan, 'Looking Back (To)wards the Body' (n 31) 248, citing Sally Hines,

^{&#}x27;(Trans)forming Gender: Social Change and Transgender Citizenship' (2007) 12(1) Sociological Research Online.

⁷⁴⁵ see Terre Thaemlitz, 'The Revolution Will Not Be Injected' (C*omatonse*, 19 June 2015)

http://comatonse.com/writings/2015_the_revolution_will_not_be_injected.html accessed 24 October 2016.

⁷⁴⁶ Lacey (n 137) 73-74.

⁷⁴⁷ Grosz (n 123) 21-22.

In Chapter 2, I cited various attempts to remedy this deficit, including Priaulx's conceptualisation of bodily integrity as providing a 'sense of self' more than an actual descriptor of physicality. And as Davy noted, some imagination may be necessary for crafting this sense of self. ⁷⁴⁹ As Cornell has also argued, a person has to imagine themselves as being whole, irrespective of the fact that they will never succeed in becoming 'whole' in a substantive sense. 750 But while the language of embodiment offers some suggestions as to how such a non-dualistic conception of embodiment could be constructed, such pointers are merely embryonic. Mark's testimony echoes their caution regarding the difficulties of construing the complexities of embodiment trans or otherwise – outside of a dualistic matrix. Yet trans subjects are still required to reproduce dualistic wrong body narratives to amend legal gender status and secure access to body modification technologies – despite, but also because of, the 2014 reforms.

Irrespective of its international reputation, then, the institutional regulation of trans embodiment in Denmark is such that it is hampering trans people's attempts to develop these new and potentially more inclusive languages. Trans people are required to repeat the old ones instead – as authentically as possible – if they are to be recognised as such. The bolstering of the wrong body narrative was lamented by activists who had become concerned as to how trans people's experiences and political consciousness might be affected:

We are getting worried about what it does to a person to repeat the lies they want you to tell [...]. Maybe at some point you start believing it yourself! If you keep saying: "I was born in the wrong body", and you don't buy into the wrong body narrative, then it can at some point be a problem for you. I think that's difficult for a person anyway: to sit and tell lies that I didn't believe in to get hormones from a system that I don't believe in, and criticise, as well.

(Elvin Pedersen-Nielsen, Trans Political Forum)

⁷⁴⁸ Priaulx (n 253) 185 (emphasis added).

⁷⁴⁹ Davy, Recognizing Transsexuals (n 11) 170.

⁷⁵⁰ Cornell (n 229) 4-5.

When read alongside Mark's attempt to describe trans embodiment outside of the 'wrong body' trope, and Hines's argument about how this narrative has developed in relation to institutional power-knowledges, Pedersen-Nielsen's critique strikes a pessimistic note. Davy's theory of trans people's 'reflexive agency' notwithstanding,⁷⁵¹ the process of psychiatric diagnosis is characterised as limiting and disciplinary. Trans people might wish to describe different realities, and tell different stories about their experiences; but what chance do they have of developing a new lexicon when they are required, by civil and medical regulators, to keep reproducing this one? How repeating this narrative will affect them, personally and politically, is difficult to calculate. But if they do not, they risk being excluded from medical, and potentially civil, recognition, as well.

Risky bodies

In the previous section, I suggested that a failure to challenge biological determinism contributed to the proliferation of the 'wrong body' narrative in the 2014 reforms. Within the embodiment framework that I constructed for the purposes of identifying mind/body dualism at the start of this chapter, this saw the first framing issue (as the Danish Government avoided engaging with embodied concerns) spill over into the second - as parliamentarians from across the Parliament engaged with medical discourses such as the 'wrong body' narrative, in a manner marked by deference; and, thus, augmenting their authority. In this section, I consider another instance in which this second framing issue can be said to have arisen in the legislative process. This involved legislators, including parliamentarians from the Red Bloc, adopting understandings of 'risky' and 'irreversible' body modification technologies which mirror those held by medical regulators.

⁷⁵¹ Davy, 'Transsexual Agents' (n 22) 123.

As I demonstrated in Chapter 5, such paternalistic and risk-averse discourses have been mobilised to justify restricting trans people's access to body modification technologies. That they also played a part in legislative reforms is evidenced by numerous sources. For a start, the Government Minister tasked with introducing the CPR law to Parliament suggested that one benefit of the CPR law was that it would offer legal gender recognition to trans people before they might undergo the 'more irreversible and risky steps' of surgery:

Not everyone who experiences themselves as transgender has the possibility or desire to go through a physical gender change, because it is comprehensive, and there can be risks connected to the process. [...] This Bill will give the individual the opportunity to go through the legal and social aspects before the more irreversible and risky steps, in the form of hormone treatment, surgery or such, if they should so wish.⁷⁵²

They were also relayed in empirical interviews conducted with those professionally involved in the process of the 2014 reforms:

You could, of course, if you wanted to do so, consider having your sex changed physically – but there are risks in doing so, and probably you are not even allowed to if you are old and you have health problems. [...] So, therefore, it was the wish that those people who felt they had another gender should have the possibility to have this change of their sex legally. Then, of course, some could go on to have surgery.

(Grethe Kongstad, CPR Office)

All kinds of treatment are irreversible, so the politicians who chose this model [...] had in mind that this administrative gender change is a very simple one when compared to the physical change; and that it might be easier for people to go through the physical change if they had the legal recognition first.

(Trine Ingemansen, Department for Gender Equality)

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⁷⁵² Vestager (n 517) 19:07.

Similar arguments were made in the working group's report, 753 and in the explanatory comments drawn up to accompany the CPR law. 754 Beyond justifying the paternalistic and potentially self-defeating rationalities of medical regulators, which I assessed in Chapter 5, what these conceptions also exhibit is a linear understanding of the process of transition; where legal gender recognition precedes body modification – and not vice versa. And, as I demonstrated in Chapter 4, the idea that legal gender recognition would constitute a "first" step of a transition contrasts with the path favoured by those interviewees who felt that it would be impractical to change their legal status without material technological support. For these interviewees, receiving a new CPR number which did not accord with how they are socially perceived gave rise to the prospect of facing further problems.

In response to concerns developed around gaps in this governing logic, activists and campaigners – from organisations such as Trans Political Forum, LGBT Denmark, the Red-Green Alliance, and Amnesty International – have begun to campaign for 'Informed consent now'. This aims to return to the regulatory situation, before 2012, when hormone replacement treatment could be offered on an informed consent basis. Amnesty's reasoning behind supporting this campaign was explained by their legal consultant as follows:

we spoke to two or three independent gynaecologists [...] who said: "It's really not difficult; what we do is, we pair up with psychologist, then we have a few sessions. And it doesn't take you more than a few sessions to determine whether people are mentally well; or whether they are suffering from

⁷⁵³ 'The absence of a requirement for sex/gender modification treatment involves the significant advantage that trans people will be able to fully implement the reversible (legal and social) aspects of sex/gender transition before the irreversible (hormones are partially irreversible and surgery is irreversible). This reduces the risk of them taking irreversible steps which cannot be undone'; Ministry of Justice, *Rapport* (n 72) 48.

⁷⁵⁴ 'The declaration model also provides an opportunity for individuals - without requiring medical evaluation or treatment - to complete the legal and social aspects of sex/gender reassignment in full before more irreversible and risky step in the form of hormone therapy, surgery, etc. might be made'; Bill for amending the Act on the Central Person Registry (n 95).

^{755 &#}x27;Informeret samtykke nu' (*Amnesty International*) http://amnesty.dk/emner/lighed/transrettigheder/informeret-samtykke-aktion=accessed 4 October 2016.

misconceptions of life, and themselves; and [...] if we find that if there's nothing 'wrong' with them, then there is no reason why we shouldn't start hormonal treatment.

(Claus Juul, Amnesty International)

When the Senior Registrar at the Sexological Clinic was asked to describe an ideal treatment model, she responded in a similar way:

what we would like to have is to have a room with therapies that are not connected to the Clinic, where you can have all the discussions about the choice you are making. Because what we would like to do is not say: "No-one should change their sex;" but we would like to say: "We discussed all of the pros and cons." Because very often there are some cons; it's not saying you shouldn't do it, but I think you prepare people better for the process if you are able to discuss them.

(Annamaria Giraldi, Sexological Clinic)

That a doctor in such a senior role at the Sexological Clinic sees value in a model where the clinician merely goes through the "pros and cons" of treatment with their patent suggests some understandings may be shared with those campaigning for treatment via informed consent. Yet whether such a vision is viable in practice will depend on other factors – including funding decisions and reforming clinical guidelines. For when Giraldi was asked why the Sexological Clinic was not already working on an informed consent basis, she responded – as I noted in Chapter 4 – that this was not permitted by the 2014 guidelines, which demand that "the healthcare system also needs to find the people for whom it [body modification] is not a good idea."

When the diagnostic process arose in the parliamentary debates around the CPR law, this was in the context of the opposition's suggestion that a medical professional could be included as a gatekeeper to legal recognition. Representatives of the Blue Bloc suggested a judgement of competency could be made following a 'normal appointment', ⁷⁵⁶ with 'one's own doctor'; ⁷⁵⁷ which, again, sounds a lot like the informed consent model. Yet, again, the

⁷⁵⁶ Øktem (n 713) 17:45.

⁷⁵⁷ Øktem (n 713) 17:51.

substance of this proposal was dismissed by Red Bloc parliamentarians echoing the same cautious and risk-averse discourses which are used to block the treatment via informed consent. For instance, the spokesperson for the Socialist People's party, Özlem Sara Cekic, dismissed the Liberals' proposal by suggesting it exhibited 'a complete misunderstanding' of the process that it would take for a doctor to rule out a mental disorder, 758 adding:

that is not how a psychiatric diagnosis is made. It actually takes a very long time, much more than just one meeting. If only it was that simple, there wouldn't be so many people on various waiting lists.⁷⁵⁹

While this intervention should be read in the context of opposing gatekeepers to civil recognition, its substance may again serve to inadvertently augment medical discourses, undermining subsequent campaigns for less restrictive access to body modification technologies. It also offers some indication as to how the CPR law could be passed at the same time as the 2014 guidelines, which pursue the medical authorities' policy of centralisation to the detriment of trans people's embodied experiences of civil and medical regulation.

As I noted in the previous section, the trans studies literature offers compelling reasons to suggest that the discursive exchange that has been developed between medical institutions and trans people is not coincidental. Perhaps the same might be said of convergences between civil and medical regulatory systems in Denmark. For, in the process of the 2014 reforms, representatives of the medical authorities – including the Ministry of Health and the DHMA – were included in the working group. And, from the outset, critiques of the previous regulatory framework opposed the legislative requirement of surgical castration as both invasive and 'irreversible'. ⁷⁶⁰ In this light, it is perhaps unsurprising that these medical discourses would be

⁷⁵⁸ Özlem Sara Cekic, Folketingstidende 20 May 2014, 91. møde, kl. 18:24.

⁷⁵⁹ Cekic (n 758) 18:26.

⁷⁶⁰ See, for example, how the requirement for 'irreversible sterilization' is presented in 'The state decides who I am' (n 93) 30.

bolstered by civil and medical reform processes. This raises questions as to what kind of legislative strategy would have to be developed by campaigners seeking to oppose legal requirements which may seem 'invasive' from the perspective of the bounded legal subject, but are valued from the embodied perspective of trans people and others. The immediate legal significance of including such discourses in documents such as the explanatory comments of the CPR law in the Danish context does not quite amount to granting them Cowan's 'stamp of statutory authority';761 as the explanatory comments are not directly included in the statute itself. Yet they remain legally significant given the importance of explanatory comments for aiding judicial interpretation within civil law jurisdictions. In the absence of any system of precedent (through which statutory legislation can be interpreted and amended), such comments are used by those applying law in practice to identify governmental intentions and logics behind it. This could amount to a serious obstacle for any trans person, activist, or campaigner seeking to argue, for example, that the logics of the CPR law and the 2014 guidelines are incompatible with one another.

The various examples of arguments underpinned by mind/body dualism that I have raised thus far in this chapter suggest that the pragmatic legislative strategy of separating civil and medical reforms was not without its limitations; as it failed to challenge paternalistic and risk-averse medical discourses, even reproducing them on occasion. While the logic of granting legal recognition before 'risky' and 'irreversible' treatment might have served the pragmatic goal of ensuring the safe passage of the CPR law through the legislative process, it could also be interpreted as justifying the corresponding developments in medical regulation. Such reforms have been criticised in previous chapters, not least for preventing certain groups of trans people from gaining access to the promised benefits of legal gender recognition. For these groups, at least, the enactment of the CPR law in this compromised form has been of little significance.

 $^{^{761}}$ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

Suffering souls

This chapter has, thus far, identified various ways in which mind/body dualism remains at the base of the regulation of gendered embodiment in Denmark. It has suggested that by echoing and reproducing certain tropes – including biological determinism, the 'wrong body' narrative, and ideas about 'risky' and 'irreversible' body modification technologies – politicians may have inadvertently justified exclusionary practices – including restrictive developments in medical regulations – which limit trans people's access to legal gender recognition even after the introduction of self-declaration. For much of this discussion, I have intimated that legislators and parliamentarians have, unwittingly, been complicit in justifying these contemporaneous developments.

It is against this background that the third and final framing issue included in this chapter's analytical framework could also be considered its most problematic. For – in addition to leaving medical discourses around trans corporeality unchallenged, or tacitly condoned during parliamentary debates – such discourses also appear to have been actively authorised in law, after being inserted into legal statute. This is what, in the UK context, Cowan refers to when she describes medical discourses as being granted full 'statutory force'. As well as increasing the weight of that discourse – granting it currency within civil institutions and legal courts in addition to the medical institutions and clinical context from which it emanated – this third framing issue could also have the additional effect of 'bootstrapping' regulatory practices; holding back future developments in medical practice by keeping practitioners subject to a static statutory law that future legislators may have no appetite to reform. The could be additional effort.

⁷⁶² Cowan, 'Looking Back (To)wards the Body' (n 31) 248.

⁷⁶³ Andrew Gilden, 'Toward a More Transformative Approach: The Limits of Transgender Formal Equality' (2008) 23 Berkeley Journal of Gender, Law & Justice 83, 99.

Evidence of statutory reproduction of mind/body dualism is most notably apparent in the amendment of the Health Act; passed immediately after the CPR law, in June 2014, to elaborate adjustments resulting from the introduction of the possibility to self-declare legal gender status. The majority of these amendments seek to introduce more gender-neutral terms into its text (replacing, for instance, references to 'the pregnant woman' with 'the pregnant person', and changing pronouns from 'her' to 'their' as required). Yet the amendment does also make a few substantive changes, most notably to section 115 of the Health Act, inserting a new paragraph as follows:

A person may apply to be allowed to be castrated as part of sex/gender change if the applicant has been diagnosed with transsexualism, has a persistent desire for castration and can foresee the consequences.⁷⁶⁵

Before 2014, section 115 stated that permission to undergo surgical castration could be granted only if it was decided that an 'applicant's sexual desire caused them significant emotional suffering or social deterioration.' ⁷⁶⁶ The way in which 'emotional suffering' was formulated in the Danish text – as 'sjælelige lidelser' – is uncommon in contemporary discourse. It translates most directly (and quite poetically) to 'suffering of the soul'. The decision to remove this 'suffering soul' requirement was interpreted differently by interviewees, depending upon how closely they were involved with the reform process. Anne Mette Dons, who represented the DHMA in the working group, described the intention behind reforming this section as follows:

it was really old-fashioned to a degree where [...] it was really difficult to say that that was the case with anybody today [...]. [...] it was much too old-fashioned – and it was very hard for the doctors to actually relate to it, or relate their patients to it.

(Anne Mette Dons, (formerly) DHMA)

The gist of the argument that the 'suffering souls' requirement was hindering medical practice was shared by Sofie Aviaja Bünger, who

⁷⁶⁴ L 189 (n 115).

⁷⁶⁵ L 189 (n 115) s 19.

⁷⁶⁶ Health Act (13 July 2010) (n 600) s 115.

drafted the Danish Institute for Human Rights response to the consultation on amending the Health Act:

it was very old wording before. And I think it's always good to change it so that it's actually more direct, because how do you assess whether or not your gender identity [...] should give you mental pain? [...] But of course if you find a definition of transsexual in the WHO's list, it also has this kind of wording. But still, it's more accurate, I think.

(Sofie Aviaja Bünger, Danish Institute for Human Rights)

While Bünger accepts that the previous wording may have made life difficult for doctors, unlike Dons, she also expresses a niggling doubt as to whether the diagnosis of 'transsexualism' is inherently clearer or easier to diagnose. Ole Møller Markussen, who was involved in drafting the consultation response submitted by the AIDS Foundation, took this line of argument further, asking questions about what it means to insert a diagnosis in statutory legislation:

you are actually putting a diagnosis into the law for the first time in Danish history [...]. So it's a quite a landslide in the way you make legislation concerning health [...]. [And] the diagnosis is so unclear [...], with all the debates on what transgender is, what gender is, [...] and what it means to be a woman and a man, in society [...].

(Ole Møller Markussen, AIDS-Foundation)

Markussen went on to stress how understanding the inclusion of this diagnosis as marking a break from the "old-fashioned" and "archaic" wording of 'suffering souls' might obscure the underlying premise it shares with the transsexualism diagnosis:

The diagnosis itself seems to be based on a very Cartesian body-soul religious understanding. And I keep having these images of angels dropping the wrong soul into the wrong body — a pink soul into a blue body — and that's basically the understanding people have of this: "Okay, you have these two genders and then ah! They've switched!" And when I look at the world, and when I think about how my body connects to my soul, it's like, I don't believe in the soul. And I think the conscience of the body is much more interesting than what is drafted in this diagnosis and in this understanding of what gender is.

(Ole Møller Markussen, AIDS-Foundation)

While, in theory, the "conscience of the body" could have formed an interesting point of focus for the 2014 reforms, in practice it did not. This much was made clear in Chapter 4. But when considered from an embodiment perspective, Markussen's testimony raises two more important points about the reform of section 115. The first concerns continuity; as the genealogy of the 'suffering soul' provision identifies a long-standing governmental concern with neglecting conscience in favour of civility. The second addresses evidence of change; as the diagnosis of transsexualism is written into statutory legislation for the first time. I will now discuss these two points, in turn.

In terms of continuity, there are important insights that may be obscured when the amendment of the 'suffering soul' requirement is understood as a purely functional updating of an "old-fashioned" and "archaic" provision - preventing analysis of how the term originally came to be included in the Health Act. The legislative history of this requirement does not have to be traced particularly far to gain insights which are interesting from a contemporary perspective. Before it had been inserted into the Health Act, 767 it appeared in a 1994 administrative order concerning how sterilisation and castration ought to be conducted. The language of this order is particularly strident; with terms such as sindsyg, and svag begavelse (which literally translate as 'mind-sick', 'weak of spirit', and 'of low intelligence') used to refer to the patients on which sterilisation and castration may be conducted. That disabilities are still portrayed in these ways in the mid-90s harks back further to the genesis of this legislation introduced to facilitate Denmark's eugenics programme, which was active for much of the 20th century. 770 Again, we are left with the impression of the ongoing consequences of being judged to have been hosting a failing mind or spirit within an over-functioning body. The 2014 reforms presented an opportunity to challenge this chequered

⁷⁶⁷ This first occurred in 2005; L 546 (n 599).

⁷⁶⁸ Order on sterilisation and castration (12 July 1994) (n 598), s 13.

⁷⁶⁹ Order on sterilisation and castration (12 July 1994) (n 598), s 7.

⁷⁷⁰ The possibility of compulsory sterilisation and castration was only removed from this law in 1967; Hansen (n 597) 63.

history; developing new regulations not premised upon mind/body dualism by acknowledging the embodied subject, or "the conscience of the body". Yet the wrong body narrative – via the formal diagnosis of 'transsexualism' – was written into statutory legislation for the first time instead; forming part of a governing assemblage whereby legislative pathologisation is met by increasing restrictions of access to body modification technologies at the level of the 2014 guidelines.

This brings discussion on to the second key insight from Markussen, concerning the possibility that including the transsexualism diagnosis in statutory legislation could constitute form legal 'bootstrapping'.771 The logic behind the argument that the 'suffering souls' requirement was making the work of medical practitioners more difficult could equally apply to the hypothetical scenario whereby a 'transsexualism' diagnosis falls out of favour in clinical practice. As the medical authorities are not formally permitted to revise statutory legislation – unlike the medical guidelines, for instance – this could lead to a situation wherein medical consensus has turned against the transsexualism diagnosis, and yet legislators in Parliament are unable or unwilling to pass the necessary legislation for amending it. Although it is unclear how, if at all, clinical practice will be affected, it does seem increasingly likely that the diagnosis of 'transsexualism' will fall out of favour in coming years. Many interviewees were highly critical of it, with some expressing a desire to see the Danish Government move beyond international standards to de-pathologise trans phenomena – as it did when it became the first nation to actively de-pathologise homosexuality in 1981 (ten years before the WHO followed suit):

being transgender – being considered transsexual – is still a mental disease in Denmark. They removed homosexuality about 30 years ago – 10 years before the WHO. That was 10 years before, but now we're horribly lacking because we still haven't changed it. [...] [T]hey're thinking about changing it next time – and that is 30 years too late.

(Anna, Female, 29)

⁷⁷¹ Gilden (n 763) 99.

Subsequent to the fieldwork visit, the Danish Parliament did pass a resolution to move 'transsexualism' out of the chapter on mental disorders in the Danish diagnosis code by January 2017, 772 irrespective of whether the WHO pursues its plan to do so in the forthcoming edition of its classification of diseases. 773 The passing of this resolution has - like the CPR law - been celebrated by international organisations⁷⁷⁴ and media,⁷⁷⁵ for signalling a movement away from the pathologisation of trans phenomena. However, the resolution has also come under criticism from domestic activists perhaps chastened by the limitations of the CPR law - for amounting to little more than a(nother) symbolic gesture.776 Their reasoning is that, at least on a formal level, transsexualism will be retained in the diagnosis code (albeit in its own distinct section); meaning that trans phenomena will still be subject to medical regulation. On a practical level, this means that it appears unlikely to alter the effect of the 2014 guidelines (which confirmed that the Sexological Clinic is the only clinic permitted to grant trans people access to hormones and surgeries), or section 115 of the Health Act (which formalises what has been required to access surgical castration since the 2006 guidelines).

⁷⁷² B7 Bill to debate removing transsexualism from the diagnosis code (26 May 2016) (*Forslag til folketingsbeslutning om fjernelse af transseksualisme fra sygdomsliste*) (DK).

⁷⁷³ The Beta Draft of the ICD-11, made available for consultation in May 2012, saw transsexualism replaced by 'gender incongruence', and re-classified from the chapter on 'Mental and behavioural disorders' to the one concerning 'Conditions related to sexual health'; WHO, ICD-11 Beta Draft, 'Gender incongruence' http://apps.who.int/classifications/icd11/browse/f/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f411470068 accessed 22 May 2015.

^{774 &#}x27;Denmark takes key step towards destigmatizing transgender people' (*Amnesty International*, 31 May 2016)

https://www.amnesty.org/en/latest/news/2016/05/denmark-transgender-decision accessed 25 September 2016.

transgender as a mental illness' (*The Independent*, 14 May 2016) http://www.independent.co.uk/news/world/europe/denmark-will-be-the-first-country-to-no-longer-define-being-transgender-as-a-mental-illness-a7029151.html accessed 25 September 2016; 'First in the world: Denmark MPs approve removing 'transgender' from mental illness list' (*RT*, 1 June 2016) http://on.rt.com/7e8b accessed 25 September 2016.

⁷⁷⁶ Alice Minor, 'Removing the diagnosis: Not the answer?' (*Killjoy.dk*, 1 March 2016) http://killjoy.dk/en/Opinion/Not-The-Answer accessed 25 September 2016; Laura Mølgaard Tams and Alice Minor, 'Danish Minister of Health To Push For De-Psychiatrization Of Transgender Persons' (*Killjoy.dk*, 12 May 2016) http://killjoy.dk/en/Report/Minister-Of-Health accessed 25 September 2016.

It appears, then, that the significance of including the transsexualism diagnosis in section 115 of the Health Act confirms the preceding analysis of the adoption, or deference to, medical discourses throughout the 2014 reforms. Taken together, the findings of this chapter suggest that all three of the anticipated framing issues theoretically associated with mind/body dualism can be identified in the recent developments in the regulation of trans embodiment in Denmark. This was at least partially understood as resulting from the legislative strategy employed by politicians keen to ensure that civil law could be reformed to exclude the influence of medical authorities. But while it was acknowledged that there is not anything inherently problematic in seeking to separate out legal and medical forms of regulation of trans embodiment, where this intention is put into action in a manner which fails to engage with - or tacitly, or even explicitly condones - medical discourses, it might enable these discourses to proliferate, and exert an even greater influence over the regulation of trans embodiment than they did before.

The effect on the regulation of legal embodiment has been clear; for while civil registration may be accessible to all following the enactment of the CPR law, it may not be experienced as such by those who are excluded from recognition by other institutional power-knowledges, including medical discourse. In all three anticipated framings, I identified a regulatory desire to recognise a trans person's self-defined gender identity (mind). But in all three cases, this led to legislators ignoring, legitimating, and ultimately augmenting, medical discourses around transsexualism. All three legislative strategies leave themselves open to accusations of lacking the capacity to regulate trans embodiment in all its complexity. The result is that trans people are left to be governed in accordance with a regulatory framework wherein law not only defers to psychiatric perspectives on trans phenomena, but also grants these understandings 'fundamental centrality' and 'statutory force'.777

⁷⁷⁷ Cowan, 'Looking Back (To)wards the Body' (n 31) 248.

Conclusion

This chapter comprised doctrinal and empirical analysis of various interviews and parliamentary materials, presenting further evidence that the intention behind the 2014 reforms was to separate legal and medical forms of regulation of trans embodiment in Denmark. As I noted in Chapter 4, this has been achieved in some respects, ceding positive results for interviewees who have already undergone, decided not to undergo, or been unable to undergo body modification. This finding was supplemented by reading these reforms through an embodiment lens attentive to the employment of mind/body dualism. Drawing upon the theoretical framework I constructed in Chapter 2, three potential framing issues associated with this legislative strategy were identified in this chapter that could give rise to practical issues at a later stage in the reform process. In all three framings, legislators seek to recognise a trans person's self-defined gender identity; yet by ignoring (in the first framing), authorising (in the second framing), or augmenting (in the third framing), medical discourses, each strategy avoids confronting the complexity of trans embodiment by failing to engage with, or even recognise, Cowan's 'problem of the body'. 778

Following the 2014 reforms, the regulation of gender identity – located in the mind – is liberalised in accordance with self-identity and personal experience. Trans people can self-declare that they experience themselves as belonging to the other gender to receive a new CPR number. Yet while there is a move away from the body in civil law, body modification is being actively restricted in medical practice. Such body modifications are also questioned, and even problematised, in medical discourse, parliamentary materials, and parliamentary debates. The 'wrong body' narrative is reproduced in medicine and law; and a related institutional effect is that the range of instances in which trans embodiment is pathologised has been expanded. For

⁷⁷⁸ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

trans people who are unable, or unwilling, to seek authorisation at the Sexological Clinic, access to body modification becomes impossible within Danish borders. For others, it is severely restricted. For those who would have preferred to undergo some body modifications before changing their gender status, legal gender recognition remains as inaccessible as it was prior to the recent reforms.

These findings work against the hypothesis that civil and medical reforms proceed in completely different directions - as they both reproduce and augment the mind/body dualism inherent in the 'wrong body' narrative. This invites the policy question of whether it is socially sustainable to claim that trans people have been offered the opportunity to achieve legal gender recognition - and suggest that legal status can accord with their personal experience – when access to the body modification technologies that many view as integral to their trans embodiment is effectively restricted in practice? chapter suggests that where it is deemed necessary to reproduce medical discourses around 'risky' and 'irreversible' body modifications simply to ensure the safe legislative passage of gender recognition legislation, such a strategy comes with a significant risk of becoming self-defeating – even if it is well-intentioned. If legislators and policymakers, activists and campaigners, are to meet their stated objectives of extending the instances in which trans embodiment is supported rather than encumbered or restricted, then they will have to consider how centrally access to healthcare and body modification technologies are positioned within their legislative strategies, and how these are framed within reform debates and campaigns, in future. Until they do, the embodied concerns of trans people are unlikely to be met by the self-declaration model, or any other model of civil law reform which fails to address the complexity of trans embodiment.

7. Conclusion

Introduction

This thesis has presented the first in-depth, empirically-based, and theoretically-informed critique of how the self-declaration model of legal gender recognition has been implemented in Denmark; the first European state to have adopted it. It described how self-declaration was designed during the process of the 2014 reforms, and detailed what its effects have been in practice. This critique has drawn upon numerous doctrinal sources; including the text of the legislation and the medical regulations themselves, the report of the working group that preceded the CPR law being drafted, and the explanatory comments and parliamentary debates that accompanied them upon their adoption. These doctrinal and documentary sources have been complemented by empirical insights offered from the perspectives of interviewees at both poles of the regulatory spectrum; from the legislators and policy-makers professionally involved in re-drafting regulations in the 2014 reform process, to the legal subjects whose status and behaviour is regulated in accordance with them.

The motivation behind testing the limitations of this legislation has been to offer insight into how far the self-declaration model could be considered an effective response to the critiques of how gendered embodiment has been regulated in other contexts; such as in Denmark before 2014, and in other states, such as the UK, which may consider adopting legislation based upon the principles of self-declaration at some point in the near future. The thesis employed a jurisdictional analysis of how boundaries were constructed and maintained between different institutional power-knowledges throughout the reform process in order to assess how jurisdiction was mobilised in the governance of embodiment, and how this was registered by embodied subjects.

Chapter 4 focused upon how this was evidenced during the legislative process; discussing the amendments made to civil regulations by the introduction of the CPR law. In Chapter 5, attention shifted to the medical regulations not included in this legislative process, but designed and implemented at the same point in time by medical authorities instead. Drawing upon literatures on jurisdiction and the professions, it described this process as one marked by professional jurisdictional expansion, and demonstrated the effects this had on experiences of gendered embodiment. Despite its strong international reputation, the CPR law was shown to be limited; both in relation to its consolidation of the binary-oriented odd/even rule, and in its failure to consider the importance of trans people's access to body modification technologies understood to be constitutive of sex/gender modification treatments. Chapter 5 also assessed the 2014 guidelines, which have yet to be acknowledged by international commentators. chapters, the effects of the 2014 reforms were shown to be working against their stated intentions.

In Chapter 6, the thesis broadened its perspective, developing a more theoretical analysis of the 2014 reform project as a whole. This required consideration of how the various constituent parts of these reforms could be conceptualised in relation to one another; and involved reading both civil and medical reform processes through a lens of embodiment, as formulated in Chapter 2. It concluded that one of the central conceptual and strategic failings of the 2014 reforms was that they were underscored, in various ways, by mind/body dualism. While primary legislation liberalised the registration of gender identity (located in the mind), it also underestimated the importance of embodied concerns in the everyday experience of trans embodiment. Where the body did appear, it was linked to psychiatric diagnoses or discourses around 'irreversible' and 'risky' body modifications; which were shown to have justified the subsequent restrictions to body modification technologies described in Chapter 5.

A critique of mind/body dualism offers one explanation for the limited effect that the CPR law has had on trans people's embodied experience of regulation, particularly on an affective level. Although self-declaration of legal gender status is now formally available to any Danish resident, it has not been experienced as a particularly viable option by trans people experiencing other intersections of discrimination. As Chapter 4 established, the opportunity to declare legal gender status was deemed unwise by some trans people; including those who do not identify within the gender binary, and those who are unable or unwilling to gain access to body modifications via the psychiatric diagnostic process centralised at the Sexological Clinic. The result is that, for practical reasons, gender recognition remains as inaccessible for these trans people as it was before the 2014 reforms.

Stable platform

The embodiment framework laid out in Chapter 2 has helped shape my thinking around these adverse effects, bringing together the various strands of critique that have emerged out of my analysis of the implementation of self-declaration in Denmark. However, like all theoretical perspectives, an embodiment framework has its limitations. For instance, it offers little indication as to why the implementation of the self-declaration model in Denmark failed in the ways that I have suggested it did. For this reason, I mobilised embodiment analysis alongside other literatures on institutions and organisations in previous chapters – notably concerning jurisdiction and professional boundaries. The perspectives of these literatures helped identify that the boundaries developed and maintained between institutional powerknowledges throughout the legislative process offered one explanation as to why the 2014 reforms failed to meet their stated objectives. As different professional regulators claimed more expansive jurisdiction in response to regulatory grey areas, the Government was unwilling to question the legitimacy of this expansion – or to advocate a concerted challenge to professional boundaries. As a result it is unsurprising that the various complexities of trans embodiment highlighted within the

testimonies of those interviewed about how they had been personally affected by the 2014 reforms were not adequately addressed in the CPR law or the 2014 guidelines.

On occasion, while formulating this critique, I suggested that the failings of the Danish reform project could be traced back to the way in which they were designed and implemented. Ultimately, the self-declaration model of legal gender recognition appears to have been introduced as part of a reform project which is premised upon a severely attenuated understanding of embodiment; particularly regarding how this is affected by institutional power-knowledges within governing assemblages. In Chapter 1, I also noted that this thesis positions itself to enrich debates around the reform of the GRA 2004 in the UK, and the implementation of self-declaration more generally. And from the perspective of legislators and other policymakers, the implication that the implementation of self-declaration in Denmark would have been more effective had it been built around a richer conception of embodiment is one that I would emphasise.

Turning to the embodiment literature, it would follow that what the 2014 reforms ultimately fail to do – because of their failure to acknowledge or address the complexity of embodiment – is to create anything akin to the 'stable platform' identified by Priaulx, ⁷⁷⁹ and discussed in Chapter 2 as one of the more pragmatic ideals to emerge from the literatures on legal embodiment. To recap, this involved legislative drafting which sought to take responsibility for various concerns of embodiment, with a view to enabling legal subjects to go about their everyday lives without having to worry about these concerns too much. Legal subjects would be able to take their body 'more or less for granted', instead of being 'conscious of and consumed by' their physicality for most of their lives. ⁷⁸⁰

779 Priaulx (n 253) 185.

⁷⁸⁰ Priaulx (n 253) 185.

Again, as I indicated in Chapter 4, it did appear in interviews conducted with those who had been personally affected by the 2014 reforms that at least some interviewees had been afforded something close to this stable platform following the introduction of self-declaration. This minority of interviewees were all coming towards the 'end' of their own self-defined transition trajectory – having been granted access to whatever combination of hormonal or surgical body modifications (if any) they deemed necessary. One interviewee described the effect of being granted legal status which accords with his identity tends to be 'read' in public as reducing the burden of explaining any discrepancy:

I'm legally male now, and identify as male, look male, have a male name [...]. [I]t's a lot easier. [...] I don't get funny looks, and no-one's questioning me because I am male; I've got a male social security number, and male diplomas, and everything [...]. [I]t's taken a lot of my time, [b]ut I'm on the other side now and I don't have to explain all the time, which is nice.

(Mark, Transman, 38)

For interviewees, like Mark, who had already gained sufficient recognition within the clinical setting, the CPR law grants recognition which is sufficiently accessible. Its intentions are not undermined by the changes in medical regulation which were subsequently confirmed by the 2014 guidelines. The result is that, when they are working in this manner, the Danish regulations of gendered embodiment combine to offer him something akin to a stable platform. Of course, even legal and medical recognition cannot offer Mark any guarantees of fair or equal treatment – as is made clear by the understanding of regulatory pluralism that shapes this thesis. However, where the two spheres of regulation are mutually affirmative, as they appear to be here, recognition from these influential institutional power-knowledges will put Mark in a position where he can spend less time and energy providing tedious and difficult explanations about his gender; which should mean that he is better placed to deal with everyday challenges as and when they arise, at different times and in various spaces.

However, as Chapters 4 and 5 demonstrated, this positive experience put Mark in the minority of those interviewed about how they had been personally affected by the adoption of self-declaration. For others who were either yet to receive or unable to receive recognition within the medical system, new restrictions resulting from the medical authorities' policy of centralisation would ensure that recognition would be unlikely to be as mutually affirmative as they were for Mark. Though any legal subject is permitted to amend their legal gender status, this was not always experienced as a particularly viable option. To change legal status without 'passing' in accordance with that status was deemed by some interviewees as more likely to generate instability in sensitive spaces by inviting further demands and challenges.

A related consequence was that interviewees who were not adversely affected by the 2014 reforms did not necessarily value this impact. Several felt the need to qualify their positive experiences with caveats acknowledging how privileged they had been instead:

I see people and friends getting caught in the system [...]. Although my own journey has not been as complicated as I worried about [...], most people are caught in a pretty bad situation if they are interested in starting or continuing their own hormone treatment.

(Jon, Male, 40)

Even though Jon's experience of recognition processes had not been particularly challenging – or, at least not "as complicated" as he had feared – he felt unable to celebrate this without considering the other trans people "caught in the system" "in a pretty bad situation". Another interviewee adopted a similarly structural perspective:

I'm extremely lucky; I'm one of the last lucky people. I got into this private clinic, right before they closed, which means I've had access to completely legal hormone treatment for the whole time. And I still have. A lot of people have issues with that so I'm very lucky. I don't know what I would have done if I hadn't had that.

(Adam, Male, 30)

Adam felt that he had been so fortunate that he could not even contemplate what others who have not been so "lucky" must be going through. Similarly, when I asked Mark if he felt relieved that he did not have to reveal or explain the history of his transition so often, he responded:

In a way, but I feel selfish that I don't have to, and yet others have to [explain all of the time]. [...] So in a way I've got a bad conscience about that. [...] It's just like: take one for the team!

(Mark, Transman, 38)

By adopting a similar qualitative interview technique to Hines (discussed in Chapter 2), I could probe interviewees' responses to questions about the impact of the CPR law to explore the feelings which lay behind even more positive experiences of recognition. This helped me uncover that the exclusion of others still appears to register at an affective level – tainting personal experiences of recognition. From an embodiment perspective, this suggests that the relational understanding of intersubjective embodiment discussed in Chapter 2 applies in practice; when ontological experiences are 'checked' by epistemological contingencies, as trans subjects refuse to present a purely individualised legal consciousness of the 2014 reforms.⁷⁸¹

As in the UK context, the exclusionary effects of purportedly inclusive legislative reforms appear to have fostered a sense of solidarity among trans people of different social positions. That the 2014 reforms have produced such a politicised and collective legal consciousness suggests that any governmental attempt to divide 'good' and 'bad' trans people, appeasing those who are relatively privileged, while forgetting those who are less so, has not been successful. On the contrary, I might even suggest that the differential effect of the 2014 reforms may have even had something akin to a 'Section 28 effect'

⁷⁸¹ Probyn (n 194) 30.

⁷⁸² Hines, *Gender Diversity* (n 10) 62.

⁷⁸³ Steven Seidman, 'From the Polluted Homosexual to the Normal Gay: Changing Patterns of Sexual Regulation in America' in Chrys Ingraham (ed), *Thinking Straight: The Power, the Promise, and the Paradox of Heterosexuality* (Routledge 2005).

instead, ⁷⁸⁴ politicising trans people with a critical and collective consciousness of how embodiment is regulated in unexpected ways. These findings themselves raise wider questions about whether the impact of established ideals in the legal embodiment literature – including the stable platform – will be felt on more political and affective levels, or whether activists and campaigners ought to target more collective and less individualised ways of supporting embodiment as they are tasked with responding to proposed law reforms.

While the possibility of amending gender status is now formally open to a quantitatively greater number of trans people following the implementation of the CPR law, this should not be allowed to obscure the assessment that qualitative change has been lacking – as evidenced by contemporaneous developments in medical regulation. This ensures that some groups of trans people continue to be excluded even after the introduction of self-declaration. As well as limiting the effectiveness of the CPR law when evaluated in accordance with its stated aims, the fact that the limitations of the 2014 reforms are well-known among trans communities also appears to have affected the legal consciousness of those trans people who have been able to gain recognition following the introduction of self-declaration. In this light, the failure of the 2014 reforms to address 'the problem of the body', ⁷⁸⁵ or acknowledge that bodily aesthetics are 'intrinsic' to trans embodiment, ⁷⁸⁶ constitute important critiques of the Danish reforms.

One possible conclusion which could be derived from this argument, as I stated above, is that the Danish legislation has been drafted so that it is incapable of acknowledging or addressing the complexities of trans embodiment. Yet an alternative understanding is offered by the

⁷⁸⁴ Section 28 of the UK Local Government Act 1988 banned local authorities from promoting homosexuality, publishing material 'with the intention of promoting homosexuality', or promoting 'the teaching […] of the acceptability of homosexuality as a pretended family relationship'. Its enactment also inadvertently produced a queer political consciousness; see DJ Bell, 'In Bed with the State: Political Geography and Sexual Politics' (1994) 25(4) Geoforum 445.

⁷⁸⁵ Cowan, 'Looking Back (To)wards the Body' (n 31) 247.

⁷⁸⁶ Davy, Recognizing Transsexuals (n 11) 45.

suggestion that institutional power-knowledges may have been permitted to promote exclusionary discourses through a careful mobilisation of jurisdiction, shaping experiences and responses while producing different forms of embodied resistance. From this alternative perspective, it is harder to blame its failure on legislative drafters. In Chapter 4, I described various governmental advantages of avoiding conflict between civil and medical regulators; and, when they are assessed from this perspective, the 2014 reforms could be said to have been drafted perfectly - in that they only fail in ways in which they were expected to fail. As medical discourses around trans phenomena were respected throughout the reform process, their effects were always going to be limited and exclusionary - with recognition dependent upon how convincingly an individual legal subject is able to 'pass' in accordance with the 'wrong body' narrative, and associated psychiatric diagnoses such as 'transsexualism'. Yet, even with the benefit of this perspective, the impression lingers that for legislation to be more effective, it would need to be better drafted. The only difference here is that legislators ought to have been more assertive, as well as better-informed, when confronted with the prospect of conflict with medical institutions. At this point, additional insight is offered by the Foucauldian governmentality literature.

Discipline

When read alongside Foucault's typology of power, both of the aforementioned critiques of law being insufficiently drafted could be said to concern themselves primarily with the 'disciplinary' effects of the 2014 reforms – in terms of which norms, and subject positions, are permitted or excluded. What Foucault describes as 'disciplinary' controls promote norms of good behaviour by positioning modes of conduct in hierarchies of permissibility. These norms are then incorporated and reproduced at the level of the individual subject.⁷⁸⁸

⁷⁸⁷ I am grateful to Dean Spade for helping me formulate a critique of the disciplinary effect of the 2014 reforms in this way.

⁷⁸⁸ Foucault, *The Will to Knowledge* (n 122) 48.

As I noted in Chapter 2, disciplinary power is also constitutive of normative subject positions, exemplified by Foucault's analysis of the 19th century medicalisation of homosexuality. From a disciplinary perspective, the 2014 reforms could be criticised for promoting the norm of the 'wrong body' narrative; which, in turn, produces a normative trans subject. Trans people who find it harder to reproduce the norms required to access a transsexualism diagnosis – for personal and political reasons relating to their age, class, disability, ethnicity, gender, and sexuality – will find it more difficult to gain corresponding medical and legal recognition.

By proceeding in this vein, disciplinary critique has inspired a rich body of critical scholarship on the regulation of gendered embodiment. Drawing attention to the groups which are excluded from the scope of law, it constitutes a concerted challenge to such reforms on their own terms. However, as trans legal scholar Dean Spade has noted, this is not to suggest that disciplinary analysis is without conceptual limitations. While it has proven useful for identifying how law reforms are practically failing, and for which groups they appear to have failed, it offers only limited insight into the various broader reasons as to why this might have happened. For this reason, Spade notes that research which concentrates solely on identifying discrimination against behaviours and subject positions may also make itself liable to cooptation by those who wish to further a specific political agenda centred on law reform. Although disciplinary scholars rarely pursue an explicitly reformist agenda - often merely seeking to identify the limitations of certain legislative strategies (as I have done with the 2014 reforms, above) - the concern is that by raising instances of discriminatory application and unequal treatment, readers of a more reformist persuasion may be tempted to take such critiques out of their immediate context, and respond to them by constructing a blueprint for future reforms.

⁷⁸⁹ Foucault, *The Will to Knowledge* (n 122) 42-43.

In Chapter 5, I analysed the stated aims and objectives of the governing rationalities behind the Danish medical authorities' policy of centralisation. To do so, I mainly drew upon interviews conducted with those professionally involved in the 2014 reforms – including clinicians and representatives of medical authorities. Having discussed these interviewees' intentions, I then cross-examined their testimonies with those of the subjects governed in accordance with the regulations. This helped ascertain how these regulations are experienced, and what effects they might have in practice; which, in turn, enabled me to highlight inconsistencies and flaws in the logic of centralisation – notably where governing capacities appeared to work against its stated aims. In effect, this constituted a self-contained critique of healthcare policy in this area, which could be mobilised by those who might wish to reform and improve these regulations – to better equip the public healthcare system to meet its stated aims and objectives.

As this thesis seeks to inform debates around reforming gender recognition legislation, it is important to stress that while I believe that affirmative policy-work can be valuable - offering a detailed and sustained critique of a system which might otherwise be assumed to be functioning well – feminist and trans scholars and activists must be wary of giving the impression that reforming legal and medical systems will be the answer to the identified problems. And where disciplinary scholarship limits itself to a study of the so-called 'implementation gap', 790 it will present itself as a target ripe for co-optation by reformists. While there are, of course, well-intentioned policymakers and regulators (who might even have the interests of trans people and other patients at heart), the reformist logic is open to critique for appearing to over-emphasise the influence that such individuals have within governing assemblages. For this often leads to them taking the supposedly inclusive intentions of law 'at face value', 791 paying less attention to the structural dimensions of inequality and harm.

⁷⁹⁰ Cowan, 'Legal Consciousness' (n 381) 931.

⁷⁹¹ Dean Spade, 'Laws as Tactics' (2011) 21(2) Columbia Journal of Gender and Law 40, 54.

In this respect, reformists deploy a logic which is at odds with important strands of Foucault's work. Valverde suggests that an alternative Foucauldian conception is to understand governing practices as

pragmatically put together collections of governing techniques whose success or failure depends upon their usefulness not to 'society' but rather to contenders in particular battles or struggles.⁷⁹²

Spade also adopts this Foucauldian understanding of laws as 'tactics' or 'devices' which can re-arrange power relations in such a way to achieve certain ends.⁷⁹³ Unlike critiques which castigate law for failing to meet purported intentions, Spade notes that viewing laws as tactics

allows us to suspend expectations of a certain kind of rationality or consistency and suspend a belief that irrationality or incoherence are terribly helpful charges to make in opposition to various legal regimes, which are of course decentralized and full of contradiction. Instead, we might look for the broader patterns, beyond what law says it is doing, to see how it contributes to certain arrangements that concern us.⁷⁹⁴

When governing practices are read as accumulations of devices arranged to suit immediate governmental interests, the reformist understanding that a well-drafted piece of more formally inclusive legislation will significantly transform the lives of trans people and other marginalised groups seems to be misguided. Rather than simply highlighting governmental irrationality or inconsistency in the Danish reform project, and dwelling on the ways in which a governing rationality fails to meet its purported intentions, we might look beyond these stated aims, to see what other interests a governing rationality might have furthered. And although jurisdictional analysis has largely, to date, focused upon the way institutional power-knowledges are sorted and separated within specific governing arrangements, it is

⁷⁹² Valverde, 'Genealogies of European states' (n 278) 161.

⁷⁹³ Spade, 'Laws as Tactics' (n 791) 54, citing Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon, and Peter Miller (eds), *The Foucault Effect:* Studies in Governmentality: with two lectures by and an interview with Michel Foucault (University of Chicago Press 1991) 95.

⁷⁹⁴ Spade, 'Laws as Tactics' (n 791) 54.

possible that this could be augmented with investigations of how jurisdictional arrangements fit with broader political currents.⁷⁹⁵

For example, as well as being assessed in relation to how far they have met their stated goals, an important factor shaping governing rationalities will also be political economy. When viewed as a device or tactic in pursuit of governmental interests, the self-defeating and risk-averse strategy of centralisation pursued by the DHMA could also be considered in relation to broader trends in healthcare governance; including public healthcare funding deficits, and pressures from increasing private healthcare provision. Such tendencies may not be particularly noticeable in Denmark, but they are present, ⁷⁹⁶ as they are across many of the welfare states in Europe. These pressures have led to healthcare policymakers facing political questions about resource allocation for treatment and research, as was noted in Chapter 2,⁷⁹⁷ which must surely have been a factor in the Danish Evidence that the restrictions which resulted from the DHMA's policy of centralisation might be explained as an exercise in cost management was offered by one interviewee. Reflecting upon a discussion he had about his treatment priorities at the Sexological Clinic, Jakob described the impression he came away with as follows:

I have the feeling that they try to put off the operation as long as they can because they know that many of us will get the money and go to Germany or England. [...] At my first conversation, she [the clinician] asked me what was my goal with this, and I told her that the first goal was to get top surgery. I'm just taking the hormones because the top surgery means so much to me. And then she told me [...]: "The top surgery you can get anywhere in the world." So, when I went out of the room I had the feeling that they know [...] the operation is 30 thousand kroner; and that I can get anywhere. It's cost-saving. (Jakob, Male, 31)

⁷⁹⁵ This potential is demonstrated by a forthcoming critique of how the expansion of informal jurisdictions in UK family law plays into the Conservative Government's wider pursuit of privatisation; Jess Mant and Julie Wallbank, 'The shifting sands of family law's jurisdiction and the disappearing vulnerable subject' (forthcoming) Social & Legal Studies.

⁷⁹⁶ Private health insurance is said to be 'on the rise' in Denmark, jumping from 228,000 instances in 2003 to 1,850,000 in 2013; Munkholm (n 76) 162 fn 101. ⁷⁹⁷ Fox and Murphy (n 135) 259.

While Jakob's clinician did not spell it out explicitly, the understanding that he was being advised to travel is clearly implied in her advice. Another interviewee, Roi, also reported being advised to consider travelling overseas, but this time explicitly, by a therapist who had previously worked at the Sexological Clinic:

My therapist [...] says that, in my case, because I'm not public, because I have a diagnosis, it's going to be really difficult for me to get in there. But even if I got in there, because I'm non-binary transgender, there is a chance that I would get to the level of getting hormones in a couple of years, but that's it. [...] I'm a bit undecided about the hormones; my first thing is that I want top surgery, so [the therapist] was like: "They're never going to approve you for top surgery if you're not taking hormones." And I think it's been really real saying: "They're not going to help you. So instead of spending a lot of time and energy trying to make them help you, it's better to do it on your own."

(Roi, Non-binary transgender, 26)

Although it developed from different sources – one clinician working in the Sexological Clinic, and one who used to work there – both interviewees describe being given the impression that it would be easier and simpler for them to circumnavigate the restrictive diagnosis programme at the Sexological Clinic. Yet again trans people are individualised and required to finance their own treatment, as in Chapter 4. World trade law has been said to encourage 'health tourism' 'as a means of reducing the burden on domestic services and as an invisible export for the receiving nation'; whether the prospective patient is travelling from a relatively rich country to a poorer one, or between rich countries – as Jakob and Roi are here. When viewed in this light, the finding that the 2014 reforms maintain regulations which are driving trans people abroad can be re-framed as a benefit more than a criticism; easing healthcare regulators' concerns about resource allocation and privatising the responsibility for care.

⁷⁹⁸ John Harrington, 'Migration and access to health care in English medical law: a rhetorical critique' (2009) 4(4) International Journal of Law in Context 315, citing Patricia Arnold, 'Disciplining Domestic Regulation: The World Trade Organization and the Market for Professional Services' (2005) 30 Accounting, Organizations and Society 299.

Another way of viewing the 2014 reforms as tactical interventions which might be useful 'to contenders in particular battles or struggles',799 more than the public as a whole, is by viewing them through the lens of institutional vulnerability, as I did in Chapter 5. Again, this involved me looking beyond the stated intentions of professional regulators and medical practitioners, and assessing the effect of these reforms in relation to more pragmatic than altruistic motivations. As I noted, the Danish medical authorities have been subject to various pressures which have included, but also exceeded, political economy in recent years, not least in relation to the various scandals in which the DHMA has become increasingly embroiled. Reading the 2014 reforms through a lens of institutional vulnerability allowed me to contextualise the paternalistic, risk-averse, governing rationalities adopted by medical authorities as a pragmatic reaction to these scandals. While the policy of centralising access to body modification technologies understood to be constitutive of sex/gender modification treatments may have been challenged by trans communities, it might still have had the pragmatic effecting of relieving the immediate political pressure that had built up around the DHMA in the aftermath of the Caspian case. After implementing such a restrictive policy, that resistance was restricted to trans communities (and not linked to protests around the other scandals discussed in Chapter 5) suggests that the DHMA's policy of centralisation may have had the intended effect on a wider population level. The fact that trans people were not happy may even be construed as a benefit; giving a more general audience the impression that the DHMA had responded decisively, shielding the institution from wider public criticism.

In this sense, both political economy and institutional vulnerability offer perspectives highlighting how institutional regulations may be working in other directions than their stated aims – which, rather than 'failing', may be re-interpreted as having advantages in terms of 'broader

⁷⁹⁹ Valverde, 'Genealogies of European states' (n 278) 161.

patterns' and 'arrangements'. Yet, in his work, Spade also specifies that it may be worth focussing upon another set of 'regulatory' powers which relate to the political management of the population as a whole. Within Foucault's account of power, this would require a shift in focus from that of discipline to the question of bio-political 'regulation'.

Regulation

Rather than concerning individualised norms and subjectivities, regulatory power attempts to secure the health of the nation, intervening only at the aggregate level of 'the population'. The focus of governance shifts from the individual subject to the population as a whole; and is described by Foucault as 'an important substitution' or 'doubling'; 'since the subjects of rights on which political sovereignty is exercised appear as a population that a government must manage.' This explains his distinction between disciplinary controls as 'an anatomo-politics of the human body', and regulatory controls as 'a biopolitics of population'; 803 as a shift from disciplinary to regulatory analysis requires any critique of the reproduction of norms and subject positions to be contrasted with, or at least supplemented by, a population-level perspective.

In her discussion of Foucauldian regulation, Valverde suggests that bio-power ought to be understood literally – as 'the politics of life'; concerning the political methods through which some lives are cared for and valued while others are 'discontinued'.⁸⁰⁴ She adds that bio-politics can be conducted through waging wars against external enemies, or internal threats – provided that the rationale for choosing who lives and who dies is 'a biopolitical one.' Bio-politics thus distinguishes itself from political economy, or institutional vulnerability.

⁸⁰⁰ Spade, 'Laws as Tactics' (n 791) 54.

⁸⁰¹ Spade, 'Laws as Tactics' (n 791) 45.

⁸⁰² Foucault, The Birth of Biopolitics (n 142) 21 fn.

⁸⁰³ Foucault, The Will to Knowledge (n 122) 139.

⁸⁰⁴ Valverde, 'Genealogies of European states' (n 278) 175.

⁸⁰⁵ Valverde, 'Genealogies of European states' (n 278) 175.

Bio-political regulation may be mobilised through 'sorting technologies that produce structured security and insecurity for various populations in the distribution of life chances.'806 Spade refers to social welfare and immigration enforcement programmes as examples. Such interventions give contrasting impressions as to their benevolence or malevolence – such that they might be read as constituting examples of 'positive' and 'negative' bio-power, respectively.807 Yet one thing that unites them is that they both claim to serve a 'care-taking function' for the population at large.808 As Foucault noted:

Liberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etcetera. [...] [S]trategies of security, which are, in a way, both liberalism's other face and its very condition, must correspond to [...] the need to ensure that the mechanism of interests does not give rise to individual or collective dangers.⁸⁰⁹

Foucault's historical analysis identifies the age of freedoms offered by liberal government ('freedom of the market, freedom to buy and sell, the free exercise of property rights, freedom of discussion, possible freedom of expression, and so on')⁸¹⁰ as 'exactly contemporaneous' with the development of regulatory controls.⁸¹¹ These controls often rest upon similar legal and administrative technologies, and are mobilised 'in the name of promoting the life of the national population against perceived threats and drains and operate through sorting and producing regularities rather than individual targeting.'⁸¹²

Over the years, different methods of population management have been developed for the purposes of bio-political regulation. Within the trans studies literature, historian Susan Stryker describes how gender has been mobilised, as

⁸⁰⁶ Spade, 'Laws as Tactics' (n 791) 46.

⁸⁰⁷ Valverde, 'Genealogies of European states' (n 278) 176.

⁸⁰⁸ Spade, 'Laws as Tactics' (n 791) 45.

⁸⁰⁹ Foucault, The Birth of Biopolitics (n 142) 65.

⁸¹⁰ Foucault, The Birth of Biopolitics (n 142) 63.

⁸¹¹ Foucault, The Birth of Biopolitics (n 142) 67.

⁸¹² Spade, 'Laws as Tactics' (n 791) 45.

an apparatus within which all bodies are taken up, which creates material effects through bureaucratic tracking that begins with birth, ends with death, and traverses all manner of state-issued or state-sanctioned documentation practices in between. It is thus an integral part of the mechanism through which power settles a given population onto a given territory through a given set of administrative structures and practices. 813

When read alongside the substance of my thesis, Stryker could almost be referring to the CPR system – such is the degree of overlap between how gender has tended to be regulated generally and in the specific Danish context. And when the decision to offer gender recognition through an amendment of one of the most important population management technologies mobilised within the Danish context is read through a bio-political lens, the CPR law appears to have even more significant consequences than those that were detailed when it was analysed from an anatomo-political perspective.

In Chapter 4, when I discussed the governmental interests at stake in the process of civil reform, I suggested that the initiative of promoting Denmark's international reputation for liberalism was second only to the need to ensure that the CPR system would be retained in something as close as possible to its existing form. Although the CPR law has been criticised by Danish trans people and activists, the reception it received from international audiences suggests that these objectives have largely been met. One interviewee, who had migrated to Denmark from another European country, also exhibited an interesting legal consciousness in this respect:

in Denmark I can't really complain, because I'm always surprised because I get everything like the others — Danish people. So the only thing is that. Being a foreigner, only with a residence permit, I get the same — which is pretty amazing, I think.

(Curtis, M, 25)

⁸¹³ Susan Stryker, 'Biopolitics' (2014) 1(1-2) Transgender Studies Quarterly 38, 39.

When viewed from Curtis's perspective, 'the myth of liberal Denmark' seems quite convincing. As recognition is open to registered residents as well as permanent Danish citizens, Curtis can make a favourable comparison between the recognition he is offered in Denmark, and that which had been available at home. Yet for undocumented migrants, who – unlike Curtis – have not been granted formal residency status in Denmark, access to the CPR system remains as unattainable as it was before 2014. And without an official CPR number, accessing numerous other basic services – including healthcare and welfare support – will become almost impossible.

By granting gender recognition in this form, the Danish government includes trans people at the same time as consolidating identity surveillance and population management systems. Meanwhile, these systems are given the (at least international) impression of having facilitated equality, becoming more inclusive.814 The result is not so much that trans people who are naturalised as Danish are accommodated on the back of those who are racialised as migrants; but through a mechanism which could potentially exclude any migrant from basic services – irrespective of whether they are trans or not. A regulatory perspective offers insight here; considering how 'the nation' is discursively constructed through the production of different populations.815 Some groups of people are positioned as deserving of production and cultivation, while others are construed as potentially dangerous threats and drains. The valued are encouraged to maximise their lives, while surplus populations will be 'killed or abandoned'. 816 Which category a population falls into is said to depend upon blunt calculations based around the 'costs and benefits' of managing such populations 'for state or state-like ends'.817

⁸¹⁴ The decision of LGBT Denmark to award their 'Salmon of the Year' award (for 'swimming upstream' on LGBT rights) to the CPR Office at the 2015 Copenhagen Pride exemplifies this point; Rasmus Ingerslev, 'Årets laks går til CPR-kontoret' *Out and About* (Copenhagen, 17 August 2015) http://www.out-and-about.dk/visnyhed.asp?id=6270#.Vz3hMvl97IV accessed 19 May 2016.

⁸¹⁵ Spade, 'Laws as Tactics' (n 791) 53.

⁸¹⁶ Spade, 'Laws as Tactics' (n 791) 58.

⁸¹⁷ Stryker, 'Biopolitics' (n 813) 38.

At the heart of this governmental calculation is a particularly biopolitical conception of 'race', which goes beyond its commonplace association with ethnicity.818 'Race', in the bio-political sense, refers to blood, descent, and lineage.819 For although an understanding of 'race'-as-ethnicity is sufficient for identifying how black populations are rendered more killable by processes of population management, this is not quite the meaning of the term in the sense in which Foucault uses it. By disarticulating race and ethnicity, Foucault understands racialisation as the naturalisation of various social, cultural, linguistic, and economic differences within what is otherwise understood as a unitary population group.⁸²⁰ This shifting understanding of 'race' – as racialisation - suggests that subject positions within these power relations may shift as governmental priorities change over time. Hence the paradox, identified by Stryker, whereby some groups of trans people who have historically been excluded from protection and cultivation – and thus managed in directions which lead towards death rather than life – increasingly find themselves included within systems targeted towards the cultivation of life.821

This paradox forms an important point of reference when returning to previous analyses of the 2014 reforms to explore their bio-political significance. In Chapter 5, I suggested that one of the key rationalities behind the centralisation of access to body modification technologies was that, by subjecting trans people to a process of sustained psychiatric diagnosis, they would be less likely to 'regret' undergoing one form of treatment or another. I also added that the decision to condemn the removal of 'a physiologically functioning breast' in the Caspian case appeared to be linked to the reproductive capabilities associated with such organs.⁸²² In this respect, it appears that trans

⁸¹⁸ Stryker, 'Biopolitics' (n 813) 40, citing Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-1976* (St Martin's 1997) 254.

⁸¹⁹ Valverde, 'Genealogies of European states' (n 278) 166.

⁸²⁰ Stryker, 'Biopolitics' (n 813) 40, citing Foucault, *Society Must Be Defended* (n 818) 80.

⁸²¹ Stryker, 'Biopolitics' (n 813) 40.

⁸²² Patients' Ombudsman (n 88).

people's 'natural' reproductive capacities are now deemed valuable by the Danish state, to the extent that they cannot be permitted to limit these on an informed consent basis. This marks a point of contrast with the historical mobilisation of some of the same body modification technologies to which access is now restricted – as part of a eugenics programme that was in practice through much of the 20th century.

From eugenics to border controls

In Chapter 6, I considered the implications of the historical context of sterilisation and castration in relation to the mind/body split. Yet this link to eugenics also raises important questions about how these procedures have been mobilised as part of political agendas regarding reproduction, sexuality, desire, and bodily control. In Chapter 2, I introduced the suggestion that the main benefit of 'propertied or sovereigntist' conceptions of the body (as subject to ownership or control)823 rests on the extent to which they lend themselves to political struggles for the right for subjects 'to craft their own sense of identity'.824 The fact that, within eugenics policy, surgical sterilisation and castration has been used to target poor and unmarried women, deemed incapable of raising children due to their 'troublesome' sexual appetite, 825 and conducted in a manner which will in most cases have been at least indirectly coercive, 826 casts doubt on the idea that it might have been used in order to construct any 'stable platform' for the subject to pursue their plans.827 From a bio-political perspective, the fact that both social and eugenic justifications were permitted for enforcing sterilisation and castration also demonstrates how historical subjects who expressed gender and sexuality in non-normative ways

⁸²³ Grabham, 'Bodily Integrity' (n 129) 3.

⁸²⁴ Priaulx (n 253) 183.

⁸²⁵ 73% of those legally sterilised in Denmark between 1929 to 1950 were women; Hansen (n 597) 18, 60, citing Tage Kemp, *Arvehygiejne, Københavns Universitets Årsskrift* (Copenhagen University 1951) 45.

⁸²⁶ Although direct compulsion was permitted by Danish law until 1967, authorities have suggested that it was never used. Yet compulsion would not need to be used to be effective, where, for example, permission to be released from an institution was conditional upon having undergone sterilisation or castration; Hansen (n 597).
⁸²⁷ of Priaulx (n 253) 185.

have been viewed as both potential threats *and* drains to the Danish state – threats to the 'quality' of the population stock, and drains on the resources of the nascent welfare state.⁸²⁸

Throughout modern history, healthcare policy has been tied to the idea of the nation-state. This is well-illustrated by literary critic Susan Sontag's analysis of the various cultural representations of the syphilis epidemic; as the 'French pox', 'morbus Germanicus', and 'the Chinese disease' – depending on whether it was viewed from England, France, or Japan, respectively.829 The same could be said of reproduction more specifically.⁸³⁰ Where reproductive policy has not been explicitly bio-politically motivated, it has always had bio-political consequences. In the feminist legal studies literature, one example is offered by the prohibition of abortion in Ireland. As this requires Irish women to travel to England to access abortion services, it associates the practice of abortion with Englishness; ensuring, as Fletcher has noted, that the ban can operate as 'a symbol of Irish post-coloniality'. 831 protection of the fetal right to life is presented as an Irish national interest, irrespective of the consequences on the woman's reproductive rights. 832 Another moment of coincidence between reproductive policy and the nation-state can be identified in the disproportionate targeting of black families by the US child welfare system, which has been read as suggesting that black motherhood is valued quite differently than the white motherhood which is presented as central to the reproduction of the American nation.833

⁸²⁸ Hansen (n 597) 35.

⁸²⁹ Susan Sontag, *Illness as Metaphor and AIDS and Its Metaphors* (Penguin 1991) 133.

⁸³⁰ This is not to suggest that reproductive agendas passively respond to nation imperatives. Nationalist discourses have themselves been shaped by reproductive activities, as Fletcher's analysis of the relationship between reproductive rights and nationalist agendas in the Republic of Ireland aptly demonstrates; Ruth Fletcher, 'Reproducing Irishness: Race, Gender, and Abortion Law' (2005) 17 Canadian Journal of Women and the Law 365.

Ruth Fletcher, 'Post-colonial Fragments: Representations of Abortion in Irish Law and Politics' (2001) 28(4) Journal of Law and Society 568, 569.

⁸³² Fletcher, 'Post-colonial Fragments' (n 831) 579.

⁸³³ Dean Spade, 'Intersectional Resistance and Law Reform' (2013) 38(4) Signs: Journal of Women in Culture and Society 1031, 1043, citing Dorothy E Roberts, 'Racism and Patriarchy in the Meaning of Motherhood' (1993) 1(1) American University Journal of Gender and Law 1.

In the Danish context, a shift similar to the paradox identified by Stryker sees the historically anti-natal agenda targeted at promiscuous women and others construed as exhibiting non-normative expressions of gender and sexuality (including the sexually 'troublesome' or mentally 'lacking') has developed to a point where trans people are subject to the same pro-natal agenda as the rest of the Danish population irrespective of the fact that they are demanding permission to have their reproductive organs (along with other gendered signifiers) removed. That links between reproductive and national agendas have been developed in numerous other contexts in the post-war period is arguably no coincidence. As Foucault has suggested, the development of the interventionist ideas which spawned the welfare state should not be taken out of the wartime context in which they developed.834 Harrington concurs that, in the specific UK context, medical law has been shaped by the broader 'plausabilities of welfarism' in Britain (citing 'professional discretion, the passive client, the male-breadwinner family model and so on'). 835 This raises questions as to whether the shift in perception of bodies exhibiting nonnormative genders and sexualities might reflect the broader institutional vulnerability of the Danish welfare state.

With an ageing population and higher social security expenses, 836 an increased birth rate offers one solution to the problem of covering the rising cost of Danish welfare. 837 It could also ensure that the Danish Government does not have to resort to the unpopular measure of

⁸³⁴ Foucault goes as far as to describe the job security, healthcare, and pension provisions of the welfare state as resulting from promises made in 'pacts of war', which involved governments saying to people: 'Now we are asking you to get yourselves killed, but we promise you that when you have done this, you will keep your jobs until the end of your lives'; Foucault, *The Birth of Biopolitics* (n 142) 216.
⁸³⁵ Harrington, 'Time and Space in Medical Law' (n 582) 363

⁸³⁶ Denmark has the fifth highest rate of social expenditure as a percentage of GDP (28.7% in 2016) among the OECD countries; OECD, 'Social Expenditure' https://stats.oecd.org/Index.aspx?DataSetCode=SOCX_AGG accessed 10 December 2016.

⁸³⁷ The fertility rate in Denmark fell from 2.6 births per woman in 1960, to 1.7 births per woman in 2014; World Bank, 'Fertility rate, total' http://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=DK accessed 10 December 2016.

expanding its population to include racialised migrant workers. And, at present, maintaining the cultural homogeneity of the Danish population through strict border controls remains high on the political agenda in Denmark, even following the adoption of a string of punitive migration policies by the current Parliament (which included cutting welfare payments available to refugees by 45 percent, increasing the threshold requirements for applying for permanent residency, delaying the opportunity to apply for family reunification for up to three years, and – infamously – permitting police to confiscate cash and valuables from those seeking asylum).⁸³⁸

In this context, it might be worth returning to a discussion that began in Chapter 4, as I read the implementation of self-declaration law alongside Grabham's work on the 'permanence provision' in the GRA 2004. Herein, Grabham notes that the requirement to declare gender status to the state

does very little to hide its conceptual connections with racialized citizenship oaths. Even for race- and class-privileged trans subjects, the requirement of self-declaration (proving one's identity and proving one's gender) form part of a complex governmental terrain in which 'inclusion' begins (and arguably ends) with the assumption that one is an outsider, a potential fraud.⁸³⁹

In Chapter 4, I noted that this failure to distinguish the CPR law from the oaths migrants are required to take to access citizenship in many western states, offered 'inclusion' only with an air of scepticism.⁸⁴⁰ I added that the inclusion of the safeguarding provision in the CPR law could imply that while trans people are offered recognition, this too comes with the assumption that they are 'a potential fraud.'⁸⁴¹

⁸³⁸ Hugh Eakin, 'Liberal, Harsh Denmark' *New York Review of Books* (New York, 10 March 2016) http://www.nybooks.com/articles/2016/03/10/liberal-harsh-denmark accessed 18 May 2016.

⁸³⁹ Grabham, 'Governing Permanence' (n 37) 121.

⁸⁴⁰ Grabham, 'Governing Permanence' (n 37) 121.

⁸⁴¹ Grabham, 'Governing Permanence' (n 37) 121.

While this finding is clearly interesting on a disciplinary, anatomopolitical, level, it also fails to interrogate the bio-political dimension of Grabham's intervention; neglecting Spade's advice to think beyond the immediate and internal power relations of specific legislation, and towards external structures and developments. In the context of Danish (anti-)migration policy, the same analogy between gender and national citizenship could be greatly illustrative; as the requirement to declare 'an experience of belonging to the other sex/gender' to amend legal gender status in the CPR law immerses trans people – who merely wish to gain gender recognition – in processes of Danish nation-building. Not only are they required to align themselves with a gender with which they may not completely identify, but also with a state which – like all others – reserves citizenship for the racialised few.

This critique highlights how it is not only apparent that trans people naturalised as Danish will benefit from inclusion more than trans migrants, but they are likely to do so on the back of an entire population of migrants – trans or otherwise. For, as I demonstrated in Chapters 4 and 5, attempts to resist the inclusion of a requirement to declare legal gender status – by holding out for a jurisdiction of conscience that challenged systems of identity surveillance and diagnostic assessments which restrict access to body modification technologies were foiled during the legislative process. Legislative reform was instead restricted to a purely administrative amendment of civil regulation; which was cheap and easy to implement, contained no new rights (other than the right to engage in the process of self-declaration), and deferred to existing jurisdictional divisions between administrative and medical regulation (civility and conscience). Meanwhile, systems of population management based upon identity surveillance are bolstered by giving the impression of being more 'inclusive'. At the same time as citizenship is becoming more inclusive of certain trans populations, it becomes increasingly hostile towards racialised others. The boundaries between natural and surplus populations merely shift while processes of racialisation are consolidated and repeated.

In order to be granted recognition, trans people must engage in exclusionary practices of nation-building; making a citizenship-like oath to a gender with which they may or may not personally define, offered to them as part of a public relations management campaign to bolster 'the myth of liberal Denmark'. 842 On a practical level, jurisdiction is mobilised to sort and separate issues at hand in the name of civility, mystifying and de-politicising governance processes in order to render reforms quietly uncontroversial, limiting the possibilities for residence built around issues of consciousness or conscience. However, as this thesis has demonstrated, jurisdictional analysis works in the opposite direction, making links between conceptually analogous processes, identifying common intentions, and laying the ground for collective strategies of resistance. supplement these findings, bio-political analysis centres on the extent to which this inclusion has come at the continuing expense of the exclusion of racialised others - irrespective of the empirical pigmentation of their skin. So while disciplinary analysis, conducted at the level of the individual, has drawn attention to the ways in which certain sub-populations of trans people will benefit from inclusion more than others (for example, depending on intersections such as age, class, disability, ethnicity, gender, and sexuality); bio-political analysis, focused at the population level, expands this insight further highlighting how trans populations are included at the expense of entire populations of non-Danish others (refugees and other migrants), and not just sub-populations (such as non-binary trans subjects).

In accordance with the range of contexts I have cited as examples of bio-political techniques of population management that I have raised here, it may be worth re-iterating that I am not suggesting that Denmark is an exceptional case. Processes of nation-building have been central to the creation of public healthcare systems and the welfare state in other countries, including the UK. As Valverde notes, many of the European states that have excelled in enacting what we

⁸⁴² Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

may now conceive of as 'negative' bio-power have also been highly proficient in their use of more 'positive' forms of bio-power. Highly so happens that Denmark corroborates this point; as its eugenics programme was introduced and implemented by the very same politicians involved in designing its much-envied welfare state. He contemporary context, the fact that the 'myth of liberal Denmark' could be promulgated at the same point in time as access to body modification technologies was effectively restricted, and strict anti-immigration policies were passed by the Danish Parliament, stands as another case in point. But rather than being specific to the Danish context, bio-political techniques of nation-building and population management are common among the states across the Global North, and may even be inherent in the form of the nation-state itself.

Consequences for legal studies

At the point where bio-political critique begins to take aim at the form of the nation-state, a genealogical link can be made between critical trans scholarship against reformism and critical legal scholarship against rights. Both express clear concerns about the costs of compromise that must be made by activists when engaging with institutions of the state; emphasising the exclusions inherent in every 'inclusion' project, and illustrating how law colonises new forms of knowledge by couching them in legal terminology (such as 'rights'). Meanwhile, the potential for a social movement is lost once activists accept 'meliorist reforms that tinker at the edges of inequality' in lieu of struggles for greater resistance or material change.

⁸⁴³ Valverde, 'Genealogies of European states' (n 278) 176.

⁸⁴⁴ One prominent eugenicist, KK Steincke, who served as Social Democrat Minister of Justice and Minister of Health and Welfare during his parliamentary career, produced a monograph on 'Social relief of the future' in 1920. This has been described as 'a general outline for the coming welfare state'. 28 of the 200 pages of the book were 'devoted' to eugenics; Hansen (n 597) 28.

⁸⁴⁵ Raun, 'The "Caspian Case" and Its Aftermath' (n 86).

⁸⁴⁶ Spade, 'Intersectional Resistance and Law Reform' (n 833) 1032.

⁸⁴⁷ Carol Smart, Feminism and the Power of Law (Routledge 1989).

⁸⁴⁸ Beasley and Bacchi, 'Envisaging a new politics' (n 217) 280.

Spade cites the critical race theory term 'preservation-throughtransformation' to describe the process whereby law reform provides 'just enough' transformation to stabilise and preserve existing conditions.⁸⁴⁹ However, just as attempts to move 'beyond the rights debate' required scholars to avoid making unhelpful generalisations about 'law', 'rights', and 'the state', 850 so critical legal scholars largely accept the impracticality of an absolutist position against legal activism. With the benefit of Foucault's insights, the top-down implementation of 'laws as tactics' can be inverted, and mobilised by both scholars and activists to pursue law reforms only as one part of a wider range of resistance and mobilisation strategies. So, while critical of activism that seeks to reform gender classification policies, Spade does not dismiss the potential possibilities of such a strategy outright; noting that law reform tactics merely 'shift', but 'do not disappear', when broader demands emerge.851 He describes the substance of this shift as resting upon the understanding that when law reform is engaged, this will be with a 'tactical understanding of law' as opposed to 'a belief that changing what the law says about us is the end goal.'852

Within such an understanding, Spade notes, resistance is theorised by activists and scholars who pay attention to the impact of legal systems – and 'particularly administrative rules' – on the 'survival and political participation' of the population groups that are subject to heightened targeting within bio-political regulations.⁸⁵³ More concretely, he adds that this 'tactical' form of resistance will

center on the material concerns of those who are perpetually cast as undeserving, because their demands aim to produce material change in terms of life chances rather than symbolic declarations of equality, and because they conceptualize gender and sexual justice and freedom through the experiences

⁸⁴⁹ Spade, 'Intersectional Resistance and Law Reform' (n 833) 1035, citing Reva Siegel, 'Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action' (1997) 49(5) Stanford Law Review 1111, 1119; and Angela P Harris, 'From Stonewall to the Suburbs? Toward a Political Economy of Sexuality' (2006) 14(4) William and Mary Bill of Rights Journal 1539

⁸⁵⁰ Didi Herman, 'Beyond the rights debate' (1993) 2 Social & Legal Studies 25.

⁸⁵¹ Spade, 'Intersectional Resistance and Law Reform' (n 833) 1032.

⁸⁵² Spade, 'Laws as Tactics' (n 791) 60.

⁸⁵³ Spade, 'Laws as Tactics' (n 791) 60-61.

of those who are intersectionally targeted by purportedly raceand gender-neutral systems.⁸⁵⁴

In the Danish context, the self-declaration model was implemented in a cheap and jurisdictionally-limited manner, reducing state responsibilities while ignoring the material concerns of these 'intersectionally targeted' populations. Moreover, the form in which it was adopted – as a purely technical amendment of the CPR system – ensured the consolidation of a technology of population management which both surveys and excludes racialised others deemed threatening or parasitic to the health of the Danish nation. This was made possible by a careful deployment of jurisdiction; mobilised to sort and separate different concerns, while depoliticising the issues at hand, and thus working hard to balance reform and inclusion with the maintenance of the status quo. Such critiques make the Danish adoption of self-declaration seem completely incompatible with the strategies of resistance proposed by theorists including Spade, above.

Furthermore, the fact that the international reception of the CPR law may have served to consolidate the myth of liberal Denmark in spite of concurrent developments in the regulation of access to hormones and surgeries and immigration enforcement also raises questions as to whether this particular legal equality 'victory' can be exposed as a primarily symbolic declaration which seeks to consolidate and stabilise the legal status quo.⁸⁵⁵ The fact that the same activists who had been criticising the 2014 reforms have dismissed the more recent development, discussed in Chapter 6 – which saw the diagnosis of 'transsexualism' moved to its own section of the Danish diagnosis code – as mere symbolism suggests that a political consciousness around resisting 'preservation-through-transformation' and biopolitical co-optation are being developed in the Danish context.⁸⁵⁶

⁸⁵⁴ Spade, 'Intersectional Resistance and Law Reform' (n 833) 1033.

⁸⁵⁵ Spade, 'Intersectional Resistance and Law Reform' (n 833) 1047.

⁸⁵⁶ See Minor (n 776); and Tams and Minor (n 776).

As the refugee crisis deepens, and hostility towards migrants abounds, this type of intersectional activism may have to broaden among and beyond feminist activists and scholars if an effort is to be made to ensure that the political gains sought by one marginalised constituency are not made on the back of increasingly marginalised others. This thesis has demonstrated that jurisdictional analysis of the governing assemblages regulating legal embodiment can offer great insights into how gender is affected by institutional power-knowledges. When combined with a governmentality perspective attentive to the biopolitical mobilisation of these forms of regulation at the population level, this framework could offer significant insights to this project. For, as I have demonstrated in this chapter, a regulatory perspective enables a form of critique which goes beyond the problems related to individual discrimination and the exclusion of specific sub-populations. It draws attention to limitations and counter-currents, situating law reform projects in relation to wider contexts and developments.

Conclusion

At first glance, the affirmative implication of the findings of my embodiment analysis – that those unwilling or unable to gain authorisation for body modifications at the Sexological Clinic continue to be excluded from legal gender recognition even after law was formally reformed to grant the opportunity to self-designate legal gender status to any Danish resident – might be that future legislation ought to do more to include this underprivileged trans constituency. As well as summarising the findings of this thesis, this chapter included theoretical reflections upon several bio-political insights which were shown to have emerged out of that analysis. This has involved me working at a slightly more abstract and theoretical level than I have done previously, and my justification for making this shift was that I felt that it could be useful to supplement this grounded analysis by at least touching upon some of the political implications that the limited implementation of self-declaration had brought about.

Bringing literatures on legal embodiment and legal consciousness together, this thesis noted that – as (inter)subjective experience is an important aspect of embodiment – the two are mutually compatible; and could offer insight into the regulation of gender following the introduction of self-declaration in Denmark. It also demonstrated that institutional aspects of embodiment could be illuminated by jurisdictional analysis. Drawing from governance studies literature, this analysis was mobilised to test the limitations of self-declaration in the Danish context; for the benefit of scholars, activists and policymakers involved in responding to proposals to reform gender recognition law. It found that civil and medical reforms had been separated to the detriment of trans people's embodied concerns. The jurisdictional literature was then supplemented with insights from the literature on the professions, and institutional vulnerability, to offer broader perspectives on why these boundaries were drawn between institutional power/knowledges, and what effects this had in practice.

While, in the main body of this thesis, a disciplinary perspective has proven perfectly viable for detailing self-contained critiques of civil and medical regulations of legal embodiment, a regulatory perspective attentive to bio-political population management has been shown, in this conclusion, to demand broader contextualisation, and more careful thought. In the context of the migrant crisis, and the Danish Government's hostile response to this, a governmental-embodiment perspective casts doubt onto whether any form of self-declaration or gender re-classification could be positioned alongside, and not in opposition to, wider strategies of resistance to existing power structures engaged in the production of 'killable populations'.⁸⁵⁷ It is certainly difficult for trans people and activists to stand in solidarity with marginalised and killable populations when, in order to access gender recognition, they must align themselves with a state reserving residency and citizenship for the naturalised and lucky few.

857 Spade, 'Laws as Tactics' (n 791) 70.

By supplementing disciplinary critique of how the CPR law promotes certain types of conduct and subject positions with a bio-political critique of how it contributes to wider concerns about population management, I cast further doubt over how 'optimal' 858 the self-declaration model of gender recognition can be. Looking beyond structures internal to the legislation, I argue that requiring trans people to undertake a declaration of citizenship to amend their legal gender status sees them becoming entangled in processes of nation-building. My intention in doing so is not to criticise, or judge in any way, the individual trans people who undertake such a declaration for personal or strategic reasons. I merely wish to draw attention to the fact that they are required to do so – by purportedly 'progressive' legislation – or face the consequences of exclusion from legal recognition.

By bringing disciplinary and bio-political critique together, I have demonstrated how trans people are positioned in a manner which puts them at another disadvantage in relation to cis people as they seek to formulate grounds to resist complicity in the bio-political reproduction of populations which are surplus to the requirements of the nation. On the other hand, jurisdictional limitation has been shown to have been highly useful for micro-managing the production of boundaries between life and death; as concentrating on matters of civility rather than conscience allowed regulators to pre-empt controversy by restricting change to one particular area of reform. Broader contexts and developments external to the structures of the CPR law were left unchallenged; notably including the reforms of the medical guidelines, which I described in Chapter 5. This analysis raises critical questions that must be answered by trans activists in the UK and elsewhere, particularly when they are confronted with reform proposals from a Government committed to reducing both migration and public expenditure. Activists, and trans people generally, are advised to be wary of a model of gender recognition that can be implemented at so little expense, and in such a limited and compromised manner.

858 Dunne (n 60) 539.

Bibliography

Abbott A, The System of Professions: An Essay on the Division of Expert Labor (University of Chicago Press 1988) ——, 'Things of boundaries: defining the boundaries of social inquiry' (1995) 62 Social Research 957 Ammaturo FR, 'Intersexuality and the 'Right to Bodily Integrity': Critical Reflections on Female Genital Cutting, Circumcision, and Intersex 'Normalizing Surgeries' in Europe' (2016) 25(5) Social & Legal Studies 591 Amnesty International, 'The state decides who I am: Lack of legal gender recognition for transgender people in Europe' (4 February 2014) https://www.amnesty.org/en/documents/EUR01/001/2014/en , 'Denmark takes key step towards destigmatizing transgender people' (31 May 2016) https://www.amnesty.org/en/latest/news/2016/05/denmark- transgender-decision> —, 'Briefing: Transkønnedes adgang til sundhed i Danmark' (2016) http://amnesty.dk/media/2263/amnesty-transkoennedes-adgang-til- sundhed.pdf> ——, 'World must follow Denmark's example after landmark transgender law' (12 June 2014) https://www.amnesty.org/en/latest/news/2014/06/denmark- transgender-law> ----, 'Informeret samtykke nu' http://amnesty.dk/emner/lighed/transrettigheder/informeret- samtykke-aktion>

Anderson W, 'Pronoun Round Etiquette' (*The Body is not an Apology*, 22 December 2015)
https://thebodyisnotanapology.com/magazine/pronoun-round-etiquette

Arksey H and Knight P, *Interviewing for Social Scientists* (Sage 1999)

Aultman B, 'Cisgender' (2014) 1(1-2) Transgender Studies Quarterly 61

Bar On BA, 'Marginality and Epistemic Privilege' in Alcoff L and Potter E (eds), *Feminist Epistemologies* (Routledge 1993)

Barad K, 'Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter' (2003) 28(3) Signs: Journal of Women in Culture and Society 801

Beasley C and Bacchi C, 'Citizen Bodies: embodying citizens – a feminist analysis' (2000) 2(3) International Feminist Journal of Politics 337

——, 'Envisaging a new politics for an ethical future: Beyond trust, care and generosity – towards an ethic of 'social flesh'' (2007) 8(3) Feminist Theory 279

——, 'Making politics fleshy: The ethic of social flesh' in Bletsas A and Beasley C (eds), *Engaging with Carol Bacchi: strategic interventions and exchanges* (University of Adelaide Press 2012)

Bell DJ, 'In Bed with the State: Political Geography and Sexual Politics' (1994) 25(4) Geoforum 445

Bettcher TM, 'Trapped in the Wrong Theory: Rethinking Trans
Oppression and Resistance' (2014) 39(2) Signs: Journal of Women
in Culture and Society 383

Bornstein K, Gender Outlaw: on men, women, and the rest of us (Vintage 1995)

Bryman A, Social Research Methods (4th edn, Oxford University Press 2012) 433

Butler J, Gender Trouble: Feminism and the subversion of identity (first published 1990, Routledge 2008)

——, Bodies That Matter: On the discursive limits of 'sex' (first published 1993, Routledge 2011)

——, *Undoing Gender* (Routledge 2004)

Carter J, 'Transition' (2014) 1(1-2) Transgender Studies Quarterly 235

Cohen S, Folk Devils and Moral Panics (3rd edn, Routledge 2002)

Connell R, 'Transsexual Women and Feminist Thought: Toward New Understanding and New Politics' (2012) 37(4) Signs: Journal of Women in Culture and Society 857

Conrad R (ed), Against Equality: Prisons Will Not Protect You (AE Press 2012)

Cooper D and Renz F, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43(4) Journal of Law and Society 483

Corbin J and Strauss A, *Basics of Qualitative Research* (3rd edn, Sage 2008)

Cornell D, The Imaginary Domain: Abortion, Pornography & Sexual Harassment (Routledge 1995)

Cowan D, 'Legal Consciousness: Some Observations' (2004) 67(6) Modern Law Review 928 Cowan S, 'Gender Is No Substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 Feminist Legal Studies 67

——, 'Looking Back (To)wards the Body: Medicalization and the GRA' (2009) 18 Social & Legal Studies 247

Damløv L, 'Overblik: Disse sager førte til kulegravning af Sundhedsstyrelsen' *DR* (11 June 2014) https://www.dr.dk/nyheder/indland/overblik-disse-sager-foerte-til-kulegravning-af-sundhedsstyrelsen

Danish Health and Medicines Authority, 'Behandling af transseksuelle' (23 November 2012)
https://sundhedsstyrelsen.dk/da/nyheder/2012/behandling-aftransseksuelle

Davies CA, Reflexive Ethnography: A guide to researching selves and others (Routledge 2005)

Davy Z, 'Transsexual recognition: embodiment, bodily aesthetics and the medicolegal system' (PhD thesis, University of Leeds 2008)

——, 'Transsexual Agents: Negotiating Authenticity and Embodiment within the UK's Medicolegal System', in Hines S and Sanger T (eds), Transgender Identities: Towards a Social Analysis of Gender Diversity (Routledge 2010)

——, Recognizing Transsexuals: Personal, Political and Medicolegal Embodiment (Ashgate 2011)

——, 'The DSM-5 and the Politics of Diagnosing Transpeople' (2015) 44 Archives of Sexual Behavior 1165

de Certeau M, *The Practice of Everyday Life* (Rendall S tr, University of California Press 1988)

de Young M, *Madness: An American History of Mental Illness and Its Treatment* (McFarland 2010)

Dietz C, 'Book Review: Mariana Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance' (2016) 25(1) Social & Legal Studies 126

Dolowitz DP and Marsh D, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) 13(1) Governance: An International Journal of Policy and Administration 5

Dorsett S and McVeigh S, Jurisdiction (Routledge 2012) 14

Drescher J, Cohen-Kettenis P, and Winter S, 'Minding the body: Situating gender identity diagnoses in the ICD-11' (2012) 24(6) International Review of Psychiatry 568

Duffy N and Cohen B, 'Maria Miller: The law, the NHS and public services are all letting trans people down' *Pink News* (London, 14 January 2016) http://www.pinknews.co.uk/2016/01/14/maria-miller-the-law-the-nhs-and-public-services-are-all-letting-trans-people-down>

Dunne P, 'Ten years of gender recognition in the United Kingdom: still a "model for reform"?' [2015] Public Law 530

Eakin H, 'Liberal, Harsh Denmark' New York Review of Books (New York, 10 March 2016)

http://www.nybooks.com/articles/2016/03/10/liberal-harsh-denmark

Ebbesen AV, 'The Creation of the Central Person Registry in Denmark' in Gram C, Rasmussen P, and Østergaard SD (eds), *History of Nordic Computing 4* (Springer 2015)

Education First English Proficiency Index 2015, 'The world's largest ranking of countries by English skills' (*Education First*, 2015) http://www.ef.edu/epi

Ellis SJ, Bailey L, and McNeil J, 'Trans People's Experiences of Mental Health and Gender Identity Services: A UK Study' (2015) 19 Journal of Gay & Lesbian Mental Health 4

Enke AF, 'Introduction' in Enke AF (ed), *Transfeminist Perspectives:* in and beyond *Transgender and Gender Studies* (Temple University Press 2012)

——, 'The Education of Little Cis: Cisgender and the Discipline of Opposing Bodies' in Enke AF (ed), *Transfeminist Perspectives: in and beyond Transgender and Gender Studies* (Temple University Press 2012)

Ewick P and Silbey S, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998)

Fejerskov JM, 'Portræt: Skandaleramt Sundhedstyrelse bløder tillid' *Politiken* (12 March 2015) http://pol.dk/5574126>

Fine GA and Deegan JG, 'Three principles of Serendip: insight, chance, and discovery in qualitative research' (1996) 9(4)
International Journal of Qualitative Studies in Education 434

Fineman MA, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004)

——, 'Social Justice and the Vulnerable Subject' (Inaugural public lecture for the Centre of Law & Social Justice, University of Leeds, 16 September 2015)

Fischer A, Gertsen L, and Sørensen LM, 'Tidslinje få overblik over sagen om den hjerneskadede psykiater' *DR* (1 February 2015) http://www.dr.dk/nyheder/indland/tidslinje-faa-overblik-over-sagenom-den-hjerneskadede-psykiater

Fletcher R, 'Post-colonial Fragments: Representations of Abortion in Irish Law and Politics' (2001) 28(4) Journal of Law and Society 568—, 'Reproducing Irishness: Race, Gender, and Abortion Law' (2005) 17 Canadian Journal of Women and the Law 365—, 'Embodied Practices' (2009) 17 Feminist Legal Studies 315—, Fox M and McCandless J, 'Legal Embodiment: Analysing The Body of Healthcare Law' (2008) 16 Medical Law Review 321

Flynn T, 'The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families' in Currah P, Juang RM, and Minter SP (eds), *Transgender Rights* (University of Minnesota Press 2006)

Flyvbjerg B, Making Social Science Matter: Why social inquiry fails and how it can succeed again (Sampson S tr, Cambridge University Press 2002)

——, 'Case Study' in Denzin NK and Lincoln YS, *The Sage Handbook of Qualitative Research* (4th edn, Sage 2011)

Foucault M, *Discipline and Punish: The Birth of the Prison* (first published 1975, Sheridan A tr, Penguin 1991)

——, The Will to Knowledge: The History of Sexuality Volume One (first published 1976, Hurley R tr, Penguin 1998)

——, The Birth of Biopolitics: Lectures at the Collège de France 1978-1979 (Senellart M ed, Burchell G tr, Picador 2008)

Fox M and Murphy T, 'The Body, Bodies, Embodiment: Feminist Legal Engagement with Health' in Davies M and Munro VE (eds), The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2013)

Fox M and Thomson M, 'Interrogating Bodily Integrity' (forthcoming)

Journal of Law and Society

Fraser N, Justice Interruptus: Rethinking Key concepts of a Post-Socialist Age (Routledge 1997)

Gale N, 'Denmark Leads Europe on Gender Recognition' (*Scottish Trans*, 18 June 2014) http://www.scottishtrans.org/denmark-leads-europe-on-gender-recognition>

Gieryn TF, 'Boundary-work and the Demarcation of Science from Non-science: Strains and Interests in the Professional Interests of Scientists' (1983) 48 American Sociological Review 781

Gilden A, 'Toward a More Transformative Approach: The Limits of Transgender Formal Equality' (2008) 23 Berkeley Journal of Gender, Law & Justice 83

Government Equalities Office (UK), Government Response to the Women and Equalities Committee Report on Transgender Equality (Cm 9301, 2016) 11.

Grabham E, 'Citizen Bodies, Intersex Citizenship' (2007) 10(1) Sexualities 29

—, 'Governing Permanence: Trans Subjects, Time, and the
Gender Recognition Act' (2010) 19(1) Social & Legal Studies 107.
—, 'Bodily Integrity and the Surgical Management of Intersex'

(2012) 18(2) Body & Society 1

Graugaard C, Eplov LF, Giraldi A, Kristensen E, Munck E, Møhl B, Owens AF, Risør H, and Winther G, 'Denmark' in Francoeur RT and Noonan RJ (eds), *The Continuum Complete International Encyclopaedia of Sexuality* (Continuum 2004)

Grosz E, Volatile Bodies: Toward a Corporeal Feminism (Indiana University Press 1994)

Hammersley M and Atkinson P, *Ethnography: Principles in Practice* (3rd edn, Routledge 2009) 41

Hansen BS, 'Something Rotten in the State of Denmark: Eugenics and the Ascent of the Welfare State' in Broberg G and Roll-Hansen N (eds), Eugenics and the Welfare State: Sterilization Policy in Denmark, Sweden, Norway and Finland (East Lansing 1996)

Haraway D, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14(3) Feminist Studies 575

Harding R, Regulating Sexuality: Legal consciousness in lesbian and gay lives (Routledge 2011)

Hardy K, 'Dissonant emotions, divergent outcomes: Constructing space for emotional methodologies in development' (2012) 5 Emotion, Space & Society 113.

Harrington J, 'Migration and access to health care in English medical law: a rhetorical critique' (2009) 4(4) International Journal of Law in Context 315

——, 'Time as a dimension of medical law' (2012) 20 Medical Law Review 491

——, 'Time and Space in Medical Law: Building on Valverde's Chronotopes of Law' (2015) 23 Feminist Legal Studies 361

Hemmings C, 'Affective solidarity: Feminist reflexivity and political transformation' (2012) 13(2) Feminist Theory 147

Herman D, 'Beyond the rights debate' (1993) 2 Social & Legal Studies 25



Hird MJ, 'A typical gender identity conference? Some disturbing reports from the therapeutic front lines' (2003) 13 Feminism & Psychology 181

Hobbes T, 'A Dialogue of the Common Law', in Molesworth W (ed), The English Works of Thomas Hobbes, vol 6 (Bohn 1839)

Holliday R, Bell D, Jones M, Hardy K, Hunter E, Probyn E, and Taylor JS, 'Beautiful face, beautiful place: relational geographies and gender in cosmetic surgery tourism websites' (2015) 22(1) Gender, Place & Culture 90

Hunter R, 'Would You Like Theory with that? Bridging the Divide between Policy-Oriented Empirical Legal Research, Critical Theory and Politics' (2008) 41 Studies in Law, Politics, and Society 121

ILGA-Europe, 'Denmark becomes the first European country to allow legal change of gender without clinical diagnosis' (11 June 2014) http://www.ilga-

europe.org/home/news/for_media/media_releases/denmark_become s_the_first_european_country_to_allow_legal_change_of_gender_wi thout_clinical_diagnosis> Ingerslev R, 'Årets laks går til CPR-kontoret' *Out and About* (Copenhagen, 17 August 2015) ">http://www.out-and-about.dk/visnyhed.asp?id=6270#.dk/visnyhed.asp?id=6270#.dk/visnyhed.asp?id=6270#.dk/visnyhed.asp?id=6270#.dk/visnyhed.asp?id=6270#.dk/

Irving D, 'Normalized Transgressions: Legitimizing the Transsexual Body as Productive' (2008) 100(1) Radical History Review 38

Järviluoma H, Moisala P and Vilkko A, *Gender and Qualitative Methods* (Johnson B tr, Sage 2003)

Klein C and Gorzalka BB, 'Sexual Functioning in Transsexuals Following Hormone Therapy and Genital Surgery: A Review' (2009) 6(11) Journal of Sexual Medicine 2922

Lacey N, 'on the subject of sexing the subject' in Naffine N and Owens RJ (eds), Sexing the subject of law (LBC 1997)

Lamble S, 'Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment' (2013) 24(3) Law and Critique 229

Laursen S, 'Denmark: landmark gender recognition act' (*ILGA-Europe*, 27 June 2014) http://old.ilga-europe.org/home/guide_europe/country_by_country/denmark/denmark_landmark_gender_recognition_act

Lennon E and Mistler BJ, 'Cisgenderism' (2014) 1(1-2) Transgender Studies Quarterly 63

Letherby G, Feminist research in theory and practice (Open University Press 2003)

Lewis S and Thomson M, 'Corporeal or Embodied Humanisms' (Law & Society Association Annual Meeting, New Orleans, June 2016)

LGBT Press Network, 'Denmark becomes Europe's leading country on legal gender recognition' (*GayAsUs.com*, 14 June 2014) http://gayasus.com/pub/2014/06/14/denmark-becomes-europes-leading-country-legal-gender-recognition/17>

Locke J, Second Treatise of Government (first published 1690, Hackett 1980).

Loizidou E, 'The Body Figural and Material in the work of Judith Butler' (2008) 28 Australian Feminist Legal Journal 29

Lorde A, 'The Master's Tools Will Never Dismantle the Master's House' in *Sister Outsider: Essays and Speeches* (Crossing Press 2007)

Lykke N, 'The Timeliness of Post-Constructionism' (2010) 18(2) NORA – Nordic Journal of Feminist and Gender Research 131

Mackenzie C, 'Conceptions of the Body and Conceptions of Autonomy in Bioethics' in Scully J, Baldwin-Ragaven L, and Fitzpatrick P (eds) *Feminist Bioethics: At the Center, On the Margins* (Johns Hopkins University Press 2010)

Madden R, Being Ethnographic: A Guide to the Theory and Practice of Ethnography (Sage 2011)

Mant J and Wallbank J, 'The shifting sands of family law's jurisdiction and the disappearing vulnerable subject' (forthcoming) Social & Legal Studies

Mason J, Qualitative Researching (2nd edn, Sage 2002)

Matthews B and Ross L, Research Methods: A practical guide for the social sciences (Pearson 2010)

McArdle D, 'Swallows and Amazons, or the Sporting Exception to the Gender Recognition Act' (2008) 17(1) Social & Legal Studies 39

McGuinness S and Thomson M, 'Medicine and Abortion Law:
Complicating the Reforming Profession' (2015) 23(2) Medical Law
Review 177

Metzl JM and Hansen H, 'Structural competency: Theorizing a new medical engagement with stigma and inequality' (2014) 103 Social Science & Medicine 126

Ministry of Justice (DK), 'Kommissorium for tværministeriel arbejdsgruppe om udmøntning af regeringsgrundlagets afsnit om kønsskifte' (17 May 2013)

<a href="https://panbloggen.files.wordpress.com/2013/05/kc3b8nsskifte-kommissorium-jm.pdf&usg=ALkJrhjLszn-kommissorium-jm.pdf&usg=ALkJrhjL

4IJPOaQMon8NdRzCGtYKSA>

——, Rapport fra arbejdsgruppen om juridisk kønsskifte (27 February 2014)

http://justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2014/Rapport%20om%20juridisk%20k%C3%B8nsskifte.pdf

Minor A, 'Removing the diagnosis: Not the answer?' (*Killjoy.dk*, 1 March 2016) http://killjoy.dk/en/Opinion/Not-The-Answer

Munkholm NV, 'Legal Status of Transsexual and Transgender Persons in Denmark' in Scherpe JM (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Naffine N and Owens RJ, 'sexing law' in Naffine N and Owens RJ (eds), Sexing the subject of law (LBC 1997)

Neave M, 'foreword' in Naffine N and Owens RJ (eds), Sexing the subject of law (LBC 1997)

Newsnight, 'Is transgender the new civil rights frontier?' *BBC* (London, 5 January 2016).

O'Reilly K, Key Concepts in Ethnography (Sage 2009)

Oakley A, 'Interviewing women: a contradiction in terms' in Roberts H (ed), *Doing Feminist Research* (Routledge 1981)

Organisation for Economic Co-operation and Development,
Education at a Glance 2012: OECD Indicators (OECD 2012)

http://www.oecd.org/edu/EAG 2012_e-book_EN_200912.pdf

——, 'Social Expenditure'

https://stats.oecd.org/Index.aspx?DataSetCode=SOCX_AGG

Patients' Ombudsman (DK), 'Kritik for behandling – speciallæge i plastikkirurgi Jens Pilegaard Bjarnesen' (1 November 2012) https://www.patientombuddet.dk/Afgoerelser_og_domme/Afgoerelser_med_navn/2012/1294528.aspx

Perraudin F, 'Woman jailed for impersonating man to trick friend into sex faces retrial' (*The Guardian*, 12 October 2016) https://www.theguardian.com/uk-news/2016/oct/12/woman-jailed-for-impersonating-man-to-trick-friend-into-sex-faces-re-trial-gayle-newland>

Phipps A, 'Whose personal is more political? Experience in contemporary feminist politics' (2016) 17(3) Feminist Theory 303

Priaulx N, 'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) 16 Medical Law Review 169

Prime Minister's Office (DK), 'Et Danmark, Der Står Sammen' (October 2011)

http://www.stm.dk/publikationer/Et_Danmark_der_staar_sammen_1
1/Regeringsgrundlag_okt_2011.pdf>

Prior L, 'Repositioning Documents in Social Research' (2008) 42(5) Sociology 821

Probyn E, Sexing the self: gendered positions in cultural studies (Routledge 1993)

Ramazanoğlu C with Holland J, Feminist Methodology: Challenges and Choices (Sage 2002)

Rasmussen LI, 'Sundhedsstyrelsen splittes i tre - lægemidler og patientsikkerhed får egen styrelse' *Politiken* (10 August 2015) http://pol.dk/5585037>

Raun T, 'Screen-births: Exploring the transformative potential in trans video blogs on YouTube' (2010) 7(2) Graduate Journal of Social Science 113

——, 'Trans as Contested Intelligibility: Interrogating how to Conduct Trans Analysis with Respectful Curiosity' [2014] (1) Lambda Nordica 13.

——, 'The "Caspian Case" and Its Aftermath: Transgender People's use of Facebook to Engage Discriminatory Mainstream News Coverage in Denmark' in Björklund J and Lindqvist U (eds), New Dimensions of Diversity in Nordic Culture and Society (Cambridge Scholars Publishing 2016)

Reed R, 'Transsexuals and European Human Rights Law' in Graupner H and Tahmindjis P (eds), Sexuality and Human Rights: A Global Overview (Harrington Park Press 2005)

Reiss B, 'Madness after Virginia Tech: From Psychiatric Risk to Institutional Vulnerability' (2010) 28(4) Social Text 25

Renz F, 'Consenting to gender? Trans spouses after same-sex marriage', in Barker N and Monk D (eds) *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015)

Ritzau, 'Sundhedsstyrelsen skal sørge for sikre fødsler' *Politiken* (18 May 2013) http://pol.dk/5447315>

Roberts DE, 'Race, gender, and the political conflation of biological and social issues' (2012) 9(1) Du Bois Review 235

Royal College of Psychiatrists, *Good practice guidelines for the* assessment and treatment of adults with gender dysphoria (CR181, 2013)

RT, 'First in the world: Denmark MPs approve removing 'transgender' from mental illness list' (1 June 2016) http://on.rt.com/7e8b>

Saltman RB, Vrangbaek K, Lehto J, and Winblad U, 'Consolidating National Authority in Nordic Health Systems' (2012) 18(3) Eurohealth 21

Sandford S, 'Thinking Sex Politically: Rethinking "Sex" in Plato's Republic' (2005) 104(4) South Atlantic Quarterly 613
——, 'Philosophy and Gender' (Public Lecture, University of Copenhagen, May 2015)

Sandland R, 'Running to Stand Still' (2009) 18 Social & Legal Studies 253

Sanger T, Trans People's Partnerships: Towards an Ethics of Intimacy (Palgrave Macmillan 2010)

Schofield ST, 'The Wrong Body' in Bornstein K and Bergman SB (eds), *Gender Outlaws: The Next Generation* (Seal Press 2010) 83

Scott J, A Matter of Record: Documentary Sources in Social Research (Polity Press 1990)

Scott JW, 'The Evidence of Experience' (1991) 17 Critical Inquiry 773

Seidman S, 'From the Polluted Homosexual to the Normal Gay: Changing Patterns of Sexual Regulation in America' in Ingraham C (ed), *Thinking Straight: The Power, the Promise, and the Paradox of Heterosexuality* (Routledge 2005)

Sharpe A, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish 2002)

—, 'Gender Recognition in the UK: a Great Leap Forward' (2009)

18 Social & Legal Studies 241

—, 'A Return to the 'Truth' of the Past' (2009) 18 Social & Legal Studies 259

—, *Foucault's Monsters and the Challenge of Law* (Routledge 2010)

—, 'Transgender Marriage and the Legal Obligation to Disclose Gender History' (2012) 75(1) Modern Law Review 33

—, 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent' [2014] Criminal Law Review 207

—, 'Expanding Liability for Sexual Fraud through the Concept of 'Active Deception': A Flawed Approach' (2016) 80(1) Journal of Criminal Law 28

Shildrick M, "Why Should Our Bodies End at the Skin?": Embodiment, Boundaries, and Somatechnics' (2015) 30(1) Hypatia 20 Simonsen R, Hald GM, Giraldi A, and Kristensen E, 'Sociodemographic Study of Danish Individuals Diagnosed with Transsexualism' [2015] 3 Sexual Medicine 109

Smart C, Feminism and the Power of Law (Routledge 1989)

Sontag S, *Illness as Metaphor and AIDS and Its Metaphors* (Penguin 1991)

Spade D, 'Laws as Tactics' (2011) 21(2) Columbia Journal of Gender and Law 40

——, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law (South End Press 2011)

——, 'Intersectional Resistance and Law Reform' (2013) 38(4) Signs: Journal of Women in Culture and Society 1031

St Jacques J, 'Retrotranslations of Post-Transsexuality, Notions of Regret' (2007) 6(1) Journal of Visual Culture 77

Stanley EA, 'Gender Self-Determination' (2014) 1(1-2) Transgender Studies Quarterly 89

Statistics Denmark, 'Population at the first day of the quarter by region, sex, age and marital status' <www.statbank.dk/FOLK1A>

Stryker S, '(De)Subjugated Knowledges: An Introduction to Transgender Studies' in Stryker S and Whittle S (eds), *The Transgender Studies Reader* (Routledge 2006)

—— Transgender History (Seal Press 2008) 36

—, Transgender History (Seal Press 2008) 36—, 'Biopolitics' (2014) 1(1-2) Transgender Studies Quarterly 38

Stychin C, A Nation by Rights: National Cultures, Sexual Identity
Politics and the Discourse of Rights (Temple University Press 1998)

Sullivan N, 'The somatechnics of perception and the matter of the non/human: A critical response to the new materialism' (2012) 19(3) European Journal of Women's Studies 299

——, 'Somatechnics' (2014) 1(1-2) Transgender Studies Quarterly 187

Sørensen T and Hertoft P, 'Sexmodifying operations on transsexuals in Denmark in the period 1950-1977' (1980) 61 Acta Psychiatrica Scandinavica 56

Tams LM and Minor A, 'Danish Minister of Health To Push For De-Psychiatrization Of Transgender Persons' (*Killjoy.dk*, 12 May 2016) http://killjoy.dk/en/Report/Minister-Of-Health>

TGEU, 'Denmark goes Argentina! Denmark passes best legal gender recognition law in Europe' (11 June 2014) http://tgeu.org/denmark-goes-argentina

——, 'Historic Danish Gender Recognition Law comes into Force' (1 September 2014)

http://www.tgeu.org/TGEU_statement_Historic_Danish_Gender_Recognition_Law_comes_into_Force>

Theilen JT, 'Depathologisation of Transgenderism and International Human Rights Law' (2014) 14 Human Rights Law Review 327

Thomson M, 'Abortion Law and Professional Boundaries' (2013) 22 Social & Legal Studies 191

Thranesen T, 'Knowledge database on gender identity' http://www.thranesen.dk>

Tirohl B and Bowers IR, 'Opposite Sex – A Discussion of Rights Under the Gender Recognition Act' (2006) 15(1) Journal of Gender Studies 83



Waldby C, 'Destruction: Boundary erotics and refigurations of the heterosexual male body' in Grosz E and Probyn E (eds), *Sexy Bodies: The strange carnalities of feminism* (Routledge 1996)

Wallbank J, 'Returning the subject to the subject of women's poverty: An essay on the importance of subjectivity for the feminist research project' (1995) 3(2) Feminist Legal Studies 207

Waller V, Farquharson K, and Dempsey D, *Qualitative Social*Research: Contemporary Methods for the Digital Age (Sage 2016)

Webster S, Lewis J, and Brown A, 'Ethical Considerations in Qualitative Research' in Ritchie J, Lewis J, Nicholls CM, and Ormston R (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2nd edn, Sage 2014)

West C and Zimmerman D, 'Doing Gender' (1987) 1(2) Gender and Society 125.

Whittle S, Respect and Equality: transsexual and transgender rights (Cavendish 2002)

——, 'The Opposite of Sex is Politics – the UK Gender Recognition Act and Why it is Not Perfect, Just Like You and Me' (2006) 15(3) Journal of Gender Studies 267

Wierckx K, Van Caenegem E, Elaut E, Dedecker D, Van de Peer F, Toye K, Weyers S, Hoebeke P, Monstrey S, De Cuypere G, and T'Sjoen G, 'Quality of Life and Sexual Health after Sex Reassignment Surgery in Transsexual Men' (2011) 8(12) Journal of Sexual Medicine 3379

Wilkinson W, 'Cultural Competency' (2014) 1(1-2) Transgender Studies Quarterly 68

Williams SJ and Bendelow G, *The Lived Body: Sociological Themes, Embodied Issues* (Routledge 1998)

Women and Equalities Committee (UK), 'Transgender equality inquiry launched' (Parliament UK, 27 July 2015)
http://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2015/inquiry-into-transgender-equality>

_______, Transgender Equality (HC 2015-16, 390)

World Health Organization, International Statistical Classification of Diseases and Related Health Problems-10, 'F64.0 Transsexualism' http://apps.who.int/classifications/icd10/browse/2015/en#/F64

Worley W, 'Denmark will become first country to no longer define being transgender as a mental illness' (*The Independent*, 14 May 2016) http://www.independent.co.uk/news/world/europe/denmark-will-be-the-first-country-to-no-longer-define-being-transgender-as-a-mental-illness-a7029151.html>

Appendix 1. Call for Participants

Do you identify with the gender you were assigned at birth?

If **not**, you are invited to participate in a project that helps a researcher from the UK understand how gender identity is recognised in Denmark

This involves you taking part in a one-to-one interview, in English, at a time that suits you in May 2015

For further information, or to express an interest in taking part, please email c.p.dietz@leeds.ac.uk

Do you identify with the gender you were assigned at birth?

If **not**, you are invited to participate in a project that helps a researcher from the UK understand how gender identity is recognised in Denmark

This may involve you taking part in a one-to-one interview, in English, at a time that suits you in May 2015



For further information, or to express an interest in taking part, please email c.p.dietz@leeds.ac.uk



Figure 6: Flyer 1



Figure 7: Flyer 2

Appendix 2. Participant Information Sheet

All of the following questions are optional and all information given will be held in strict confidence.

Once completed please return to: c.p.dietz@leeds.ac.uk

Contact Details	
Name (of choice)	
Address	
Email	
Telephone Number	
Identity (self-defined)	
Gender	
Sexuality	
Ethnicity	
Age	
Employment	
What best describes your curr the relevant box)	ent employment situation? (Write X in
In paid employment (full- or part-time) Unemployed Self-employed Retired On leave Looking after family or home Student Long-term sick or disabled On a training scheme Other	Please specify:

Thank you very much for your co-operation and your offer of participation in my research.

Please add any further information, which you think is important and has not been covered, below:

Appendix 3. Consent Form

Information

This research project is being conducted by Chris Dietz, a doctoral researcher based at the Law & Social Justice Research Group, School of Law, University of Leeds, UK. The project examines how gender identity is recognised and regulated in Denmark. The aim of the interviews is to understand recent changes in the law, and how these have affected people's everyday lives.

This project has received ethical approval from the University of Leeds (Ethics Reference: AREA 14-086). Any confidential questions or concerns can be directed to Chris's supervisors:

Dr Julie Wallbank (<u>i.a.wallbank@leeds.ac.uk</u>) or Professor Michael Thomson (<u>m.a.thomson@leeds.ac.uk</u>).

Participant Consent (Yes or No)

- 1. I confirm that I have read and understood the above information about the research and have had chance to ask any questions
- 2. I voluntarily agree to participate in the research on gender recognition in Denmark
- 3. I agree that my interview with Chris can be recorded and transcribed
- 4. I agree that my interview responses may to be used in Chris's doctoral thesis and research publications or reports which are related to the project
- 5. I confirm that I would like to participate anonymously, and have my responses attributed to a different name of my choosing
- 6. I understand that my participation is voluntary and that I am free to withdraw at any point before the thesis is submitted
- 7. I understand that should I not wish to answer any particular question or questions, I am free to decline

Signature of participant	
Printed name	
Email	
Date (dd/mm/yyyy)	
Signature of researcher	
Printed name	CHRIS DIETZ
Email	c.p.dietz@leeds.ac.uk
Date (dd/mm/yyyy)	