



# Trans sterilization in Finland

Implications of legal gender recognition discourse in Nordic countries

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**Abstract**

The Finnish legislation on legal gender recognition includes a prerequisite of being infertile. This practice not only differs from the legislation of the other Nordic countries but has also been found to be a violation of articles from human rights conventions. The practice has been found to be incompatible with the picture of Finland as a progressive Nordic country and it indeed creates an inconsistency between the regime of Nordic countries. The aim of the thesis is to analyze this problem from a governmental perspective and to find factors that could explain the difference between these countries. Theories of governmentality and governing gender will be applied in the analysis with the help of discourse analysis. From the perspective of the regime of Nordic countries, it is possible that the legislation in Finland would be developed into the same direction in the following years.

**Key words:** Governmentality, legal gender recognition, Nordic countries, bodily integrity

**Word count:** 13 558

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## Chapter 1 – Introduction

### 1.1 Introduction

The research problem presented in this thesis concerns transgender individuals' rights on bodily integrity and legal gender recognition in Finland in relation to other Nordic countries. Gaining the legal gender recognition (LGR) in different countries varies based on the state's legislation. Traditionally, prerequisites for this are that a person seeking to change their legal gender must be at least 18 years old, unmarried and sterilized or otherwise infertile. Many countries, including Sweden, Denmark and Norway have further developed their legislation concerning legal gender recognition of transgender persons, by abolishing the demand for sterilization. The compulsory sterilization as a prerequisite for legal gender recognition still exists in 14 European countries, including Finland.<sup>1</sup> Considering the Trans Law, Finland has been hesitant in following the trans rights development in Europe and especially in the Nordic states.

In recent years the sterilization has come to be seen as incompatible with Finland's image as a progressive Nordic country in the area of equality and human rights.<sup>2</sup>

Multiple LGBT-activists and human rights groups are campaigning to abolish the law's requirements for sterilization, psychiatric diagnosis and medical intervention.<sup>3</sup> Finland holding on to this practice is an interesting example because it belongs to Nordic countries. Being part of them, it seems that Finland is lacking behind in realization of rights of gender minorities. In this thesis, Finland will be presented in a Nordic framework, thus it will be compared to Sweden, Norway and Denmark and their developments concerning legislation on legal gender recognition. "The Act on the Confirmation of Gender of a Transsexual" (2002) in Finland has remained almost the same through the years, whereas the other Nordic countries have been acting as pioneers when it comes to LGR and realization of trans rights. At the same time other developments in these states have proceeded in a similar manner. In Finland, only slight amendments have been made to the Trans Act, considering the marriage status of a person changing their legal gender in 2015. This happened after the law for the marriage of same-sex couples was accepted in the government (which came into force 2017).<sup>4</sup> Additionally, it has been argued that the law on legal gender recognition currently creates an inconsistency with

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<sup>1</sup> Transgender Europe, 2019

<sup>2</sup> Holli, 2003

<sup>3</sup> Repo, 2018, p. 4

<sup>4</sup> Finlex, 2002; Finlex, 2019

the Finnish national constitution and with specific rights, such as bodily integrity and the right to private life.<sup>5</sup>

In April 2017, the European Court of Human rights (ECHR) ruled that the requirement of sterilization in the process of legal gender recognition violated the human rights law.<sup>6</sup> The compulsory sterilization of transgender individuals was recognized as a violation of human rights according to the ECHR article 8 which obligates the state to protect the privacy and the family life of individuals.<sup>7</sup> The article 8 is applicable to question of legal gender recognition of the gender identity of transsexuals who have gone through the gender reassignment surgery, conditions for access the surgery and the legal recognition of the gender identity of transgender person, who do not wish to go through the gender reassignment surgery.<sup>8</sup>

Convention on Economic, Social and Cultural Rights, (ICESCR)<sup>9</sup> Art. 12 the right to health was defined to include “the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation”.<sup>10</sup> The sterilization demand in LGR process has also been deemed to be a violation of the Art. 16 of the UN Convention Against Torture and Inhuman, Cruel or Degrading Treatment or Punishment (CAT) and the Art. 7 in the International Convention on Civil and Political Rights (ICCPR) which is the right to be free from inhuman treatment.<sup>11</sup>

Despite of the progress in trans rights in Europe and the court rulings, the trans individuals are subjected to problematization of recognition of rights such as bodily integrity, self-determination and private life, when it comes to their right to legal gender recognition.<sup>12</sup> In the case of LGR with prerequisites such as sterilization, they are forced to choose between the bodily integrity and right to private life.<sup>13</sup> Finland has also received criticism for this: Not only has the government been a target of campaigns of non-governmental organizations such as

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<sup>5</sup> Otava, 2018, pp. 32-33

<sup>6</sup> Transgender Europe, 2019

<sup>7</sup> European Court of Human Rights, 31 December 2018, p. 43/118; f:198

<sup>8</sup> ECHR, 1950

<sup>9</sup> ICESCR, 1966

<sup>10</sup> Committee on Economic Social and Cultural Rights, 2019

<sup>11</sup> CAT, 1984 Art 16, ICCPR 1976 art. 7

<sup>12</sup> Amnesty International, 2014

<sup>13</sup> Otava, 2018

Amnesty International and Trans organizations from Finland, such as Trasek<sup>14</sup> but the government has also received criticism from Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe.<sup>15</sup>

In 2006 an international expert group developed Yogyakarta principles which were made to reinforce the human rights conventions by the United Nations so that the sexual and gender minorities' rights are taken better into notice. The principles include, for instance, the right to equality, privacy and to be free from discrimination. The states should actively by legislation prevent and abolish discrimination based on sexuality or gender identity in public and private sphere.<sup>16</sup>

The right to privacy means that the state should protect the freedom of an individual to choose to who, when and how information regarding their sexuality or gender-identity is brought up. The state should protect all individuals on arbitrary and non-consensual exposures of such information. Additionally, the principles include the right to build a family and that no one should be forced to medical procedures in order to get their legal gender recognized. Furthermore, the principles include that being a parent or being in marriage cannot solely be an obstacle to a legal gender recognition.<sup>17</sup>

There are statistics that estimate how many transgender people there are but comparison between them are challenging because they are collected in different methods. Also the definitions on whether a person is transgender vary, for instance, on whether a person has received genital surgeries, started hormonal treatment or has come to the clinic to ask medical help to gender reassignment. The estimates on amount of transgender people in states primarily originate from the clinics that treat patients who fulfil the conditions of serious gender dysphoria and are getting treatment. The number often does not include people who do not want to receive the treatments. When only the people who receive certain treatment are counted, undefined number of individuals who experience gender dysphoria remain unseen. Thus, the statistics can at their best be seen as the minimum estimate on how large part of the population has transgender qualities.<sup>18</sup>

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<sup>14</sup> Trasek; Seta ry – LGBTI Rights in Finland, 2019, chap. 4

<sup>15</sup> Muižnieks, 2012, p. 4

<sup>16</sup> Yogyakarta Principles, 2019

<sup>17</sup> Yogyakarta Principles, 2019, p. 9

<sup>18</sup> World Professional Association for Transgender Health, 2012, p. 13

There are studies conducted that suggest and estimate prevalence of 1:11,900 to 1:45,000 for male-to-female individuals (MtF) and 1:30,400 to 1:200,000 for female-to-male (FtM) individuals that were experiencing gender dysphoria. However, it is suggested that the real prevalence is much higher, depending on the methodology used in the research and the reasons given above.<sup>19</sup>

In the Finnish case, there is no precise epistemological estimate of incidence of trans people. However, there is an unofficial estimate of 1000 people that have been sent forward to gender-identity clinics after the law on legal gender recognition came into force and the number is increasing year by year.<sup>20</sup> At the time the law was debated in the Finnish government in 2002 the representatives estimated that the law would affect approximately 300 persons in Finland, from which 10 % have already established own family and families with children was estimated being the highest one third of the total number.<sup>21</sup>

## 1.2. Trans terminology

*Transgender* is an umbrella term that refers to all identities or practices that cross over, cut across, move between or otherwise stretch the socially constructed sex/gender boundaries. It includes those whose gender identity differs from the sex they were assigned at birth. The term transgender has come to represent subsets of very different sorts of gender nonconforming people.<sup>22</sup> It includes not only specific identities and practices, such as male or female, but endlessly proliferating subsets of very specific and historically located ways of crossing the gender norms.<sup>23</sup> Not all trans people can fit into the binary gender roles of male and female.

*Sex* is the classification of a person as male or female. At birth infants are assigned a sex based on the appearance of their external anatomy, which will be written to a birth certificate, and in Finland, a gendered identity code will be assigned by this assigned sex. However, a person's

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<sup>19</sup> World Professional Association for Transgender Health, 2012, p. 8

<sup>20</sup> Mattila & Tinkanen, 2015

<sup>21</sup> Täysistunnon pöytäkirja 46/2002 vp, 2019

<sup>22</sup> Currah, 2006, p. 4

<sup>23</sup> Currah, 2006, p. 5



sex is a combination of bodily characteristics, such as chromosomes, hormones, internal and external reproductive organs and secondary sex characteristics<sup>24</sup>

*Gender identity* is a person's internal, deeply held sense of their gender. For transgender people, their internal gender identity does not match with the sex they were assigned at birth. Most people have a gender identity of a man or a woman but for some their gender identity does not fit into one of those two choices. Gender expression of a person might be visible to others, but gender identity is not.<sup>25</sup>

*Transsexual* is an older term that originates from the medical and psychological communities. The term is still preferred by some people who have permanently changed their bodies through medical interventions, including hormones and/or surgeries. It is mostly used of people who want to change their physical appearance, including reproductive organs etc. Unlike transgender, transsexual is not an umbrella term.<sup>26</sup>

*Transgender* refers to an individual who perceives their gender identity to be either opposite or non-compatible to their assigned sex, but do not necessarily intend to go through full sex reassignments.<sup>27</sup>

The term *transsexual*, for example is, used in the legislation in Finland concerning trans persons although the current and more appropriate term would be transgender. When talking about the law, the term transsexual will occur, but mostly the term 'transgender' or 'trans' will be used though out the thesis.

*Legal gender* is often defined by states in their legislation, and by definition in Swedish, Danish and Norwegian law it is the gender that the person is marked as in the national files. In Denmark and Norway, the legal gender is dealt separately from the medical gender.<sup>28</sup>

*Legal gender recognition* refers to the change of name and gender in official documents and registries. In Finland the legal gender of a person is indicated by a gendered social security

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<sup>24</sup> GLAAD, 2019, p. 10

<sup>25</sup> mmt.org, 2019

<sup>26</sup> GLAAD, 2019, p. 10

<sup>27</sup> Trasek ry, 2019

<sup>28</sup> e.g. Prop 74 L (2015-2016) Proposition to the Storting (proposal for a legislative decision) The Legal Gender Amendment Act, 2019, On § 1

number that is marked on a person's ID card and is needed for all possible purposes ranging from applying for travel card for public transport, picking up a parcel from the post office, going to the doctor or applying to school or for job.<sup>29</sup>

### 1.3. Research problem and aim

The research problem in this thesis is concerned with the legislation on Legal Gender Recognition (LGR) in Finland, considering Finland as one of the Nordic countries. Especially the demand for sterilization to achieve LGR which has been recently recognized being a violation of articles of human rights conventions. Since these four states are similar societies, the fact that Finland has not abolished the demand for sterilization, creates an inconsistency. The aim is to look at the problem from the governmental perspective and to see how gender is governed in these four countries and what are the factors that might explain the difference between Finland and the rest of the countries.

### 1.4. Research question

Keeping in mind the research problem, this thesis intends to answer the following research questions:

1. How is gender governed in Finland and in other Nordic countries? What factors can explain the difference in the practices?
2. What discourses do the politicians for and against legal gender recognition utilize in the parliamentary debates?
3. Based on the regime of governmentality in Nordic countries, what are the possible developments that the Finnish legislation might entail in the current government term?

### 1.5. Review of the Previous research

On the topic of LGR globally and in the case of Finland previous research has indicators to many directions. Jemima Repo's work on biopolitics of gender and governmentality of LGR in Finland will be discussed in the analysis and applied to the Nordic scene. The sterilization of trans people can be associated<sup>30</sup> with what Michel Foucault calls the "eugenic ordering of

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<sup>29</sup> Trasek ry; Seta ry – LGBTI Rights in Finland, 2016

<sup>30</sup> Repo, 2018, p. 16

society”.<sup>31</sup> There are scholars that theorize trans sterilization coupled with the negative attitude towards transgender, and regard it as a form of passive eugenics.<sup>32</sup> However, in this thesis the practice will be discussed as a governmental way of making the trans people visible in the law, so that they can be governed and disciplined<sup>33</sup>. It was found that often the common feature between the literature on the matter of trans rights is the use of Queer theories or feminist theories, thriving from scholars Judith Butler and Michel Foucault.<sup>34</sup>

## 1.6. Relevance to Human Rights

Discrimination including prejudice and hate-motivated violence, towards lesbian, gay, bisexual, trans and intersex (LBTI) people persists in the European countries despite the improvement in their situation in recent years. Even in countries where same-sex relationships and a wider spectrum of gender are relatively accepted and where marriage has been granted to all couples irrespective of their gender or sexual orientation, discrimination remains as a problem. It is not rare that LGBTI individuals face violence in their day-to-day life, on the streets or even at home in some cases. These kinds of hate crimes have detrimental and long-term impact on the victims.<sup>35</sup> Hate crimes are criminal offences targeting persons because of their association with a group defined by a protected characteristic, such as sexual orientation or gender identity.<sup>36</sup>

Official identity documents such as ID cards and passports, in Finland include a gendered social security number which are used in a daily basis to prove identity. For trans people it means that their gender identity may have to be shared whether they want it or not. That might lead to situations where they have to explain their gender identity and pose them to uncomfortable situations such as being questioned, harassed or discriminated. It is argued that lack of legal gender recognition violates trans people’s right to privacy and endangers them to discrimination and threat of violence every time they have to present identity documents that do not match their gender identity.<sup>37</sup> The legal gender recognition would make an end to situations as explained but the struggles for gaining it are not fully realized in the current

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<sup>31</sup> Foucault, 1981, p. 149

<sup>32</sup> Honkasalo, 2018, p. 2

<sup>33</sup> Repo, 2018, p. 6

<sup>34</sup> Jagose, 1996

<sup>35</sup> Amnesty International, 2012, p. 2

<sup>36</sup> Amnesty International, 2012 p.3

<sup>37</sup> Trasek ry; Seta ry – LGBTI Rights in Finland, 2016

legislation because the sterilization demand and other medical interventions in the process sets the trans person in a situation where they have to choose between bodily integrity and right to privacy.<sup>38</sup>

In the Finnish case, the people aiming for LGR are also the only group of people that is sterilized and targeted to this kind of legislation. In other cases, sterilization for women is only accepted when they have turned 30 and have had three children.<sup>39</sup> This puts different groups of people in unequal positions. The history of forced sterilization also lays a questionable shadow over the practice<sup>40</sup>, because it has been used as a technology of power in order to, for example, manage the birth rates of certain groups of people.<sup>41</sup> However, the practice will not be analysed from this point of view.

According to a recent study by the EU Fundamental Rights Agency one in five transgender people report inappropriate curiosity by medical staff or having their specific needs ignored when seeking general health care. As a reaction the trans people might end up avoiding the health-care services which can lead to general problems with health.<sup>42</sup> In addition the study found that medical practitioners, even the ones specialized in trans health care, sometimes viewed trans people as mentally ill and associated them with sexually transmitted diseases and in some cases even refused to treat them. Finnish medical experts were also interviewed for the study.<sup>43</sup>

Recent court rulings from the human rights courts have developed the rights of trans persons to the direction where the forced sterilization in the LGR process is deemed as a violation of human rights.

Based on the European Court of Human Rights, the case of *Garçon and Nicot v. France* in April 2017, it was ruled that trans people should not be forced to choose between their gender identity and physical integrity.<sup>44</sup> Additionally, The Committee of the Social Charter has found that the legal requirement for transgender persons in Czech Republic to undergo medical sterilization to have their gender identity recognized impacts the persons health, physical and psychological

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<sup>38</sup> Butler, 2006, p. 288

<sup>39</sup> Finlex, 1970, §1

<sup>40</sup> Repo, 2018, p. 5

<sup>41</sup> Foucault, 1981, pp. 27-26

<sup>42</sup> European Union Agency For Fundamental Rights, 2016, p. 69

<sup>43</sup> European Union Agency For Fundamental Rights, 2016, p. 81

<sup>44</sup> Transgender Europe, 2019

integrity in serious ways. In the case it is emphasised that the guaranteeing of free consent is fundamental to the enjoyment of the right to health and that is integral to autonomy and human dignity on the obligation to protect the rights to health, as stated before of the conventions ICESCR and ICCPR .<sup>45</sup>

### 1.7. Material

The material used will be the legislation on legal gender recognition from the mentioned Nordic Countries supporting legal material on those, for example, preliminary debates. Additionally, reports from NGO's, statistics that they have produced and reports on campaigns, human rights conventions and literature on the matter will be analysed.

I chose the material based on the previous literature and it was found to be relevant for the purpose of analysing discourse. The materials from other Nordic countries is used to allow the comparison of practices and discourses between these countries. The material does limit the scope of this thesis to these certain countries and to the level of what has happened in the institutions in these countries.

### 1.8. Acknowledgements and the delimitations

As an acknowledgement I would like to point out that for a long time I was considering using the Queer theory to apply for the analysis, and it was the first obvious choice. However, for the means of studying the research problem with my material and to answer my research questions it made more sense to use the governmentality aspect to understand in those terms the different practices on LGR. However, the queer aspect is not absent because both Butler and Foucault are central persons in queer discourses and the queer theory thrives from both scholars.<sup>46</sup>

Additionally, the laws discussed in this thesis, especially comparing Finland to Norway were amended in very different times. The matters related to legal gender recognition and trans rights have been thought very differently and the development has been huge during the 14 years between the laws. At the same time that also reinforces the rapid and continuous change in the knowledge on this field.

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<sup>45</sup> Transgender Europe, 2019

<sup>46</sup> Jagose, 1996; Breen & Blumenfeld, 2016, p. 4

## 1.9. Chapter outline

The following chapter will briefly present the method used in analysing the material for this thesis. The third chapter will explain the theory of governing gender in the Finnish context and the aspects of governmentality in general that are applied in the analysis. The fourth and fifth chapter introduce the background of the topic, namely the relevant legislation in Nordic countries. Chapter six includes the analysis of the material and will be followed by final chapter, namely the conclusions.

## **Chapter 2 – Method**

### 2.1 Discourse analysis

This thesis will employ discourse analysis which will be applied to the preliminary debates that were followed by accepting “the law for conforming the gender of the transsexual” in Finland 2002 to analyze what discourse does the legal gender recognition utilize in the debate and to analyze the discourse as a productive power when setting laws. Furthermore, discourse analysis will be used to examine the changes and the discourses in other Nordic countries and in what way could that affect the development of the Finnish legislation?

Discourse analysis is a broad term for the study where discourse as an action and the ways in which people use language between each other in written and in spoken is analyzed. Such interaction in turn is embedded in various social and cultural contexts, such as informal gatherings with friends or professional and institutional encounters such as parliamentary debates, as in this thesis.<sup>47</sup> To analyze discourse it is also important to understand the context of the discourse, such as the country, the type of society and the era that the discourse takes place in.<sup>48</sup>

Discourse includes the ways in which arguments have abstract structures and involve mental

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<sup>47</sup> Van Dijk, 2004, p. 2

<sup>48</sup> Ibid., p.11

processes and representations (such as knowledge) but at the same time it includes a dimension of the communicative acts of arguing by language users in real situations, like in parliamentary debates<sup>49</sup> Themes, values and patterns can be found by using of discourse analysis. Discourse should be studied as a form, meaning and mental process but also as complex structures and hierarchies of interaction and social practice and their functions in context, society and culture.<sup>50</sup>

In this thesis, discourse is examined as relationship between language, representation (knowledge) and power. Power in the sense that power is productive in shaping of the society.<sup>51</sup> The difference between discourse and talk is that discourse produces something. The language used (e.g. in a preliminary debate) produces positions in the law, which humans will be filling. For example, the preliminary debate that will be analyzed has produced a position for specific trans persons in the Finnish context.<sup>52</sup>

During the debate, the representatives of political parties argue for and against Legal gender recognition in the parliamentary debate. The outcome of the debate is eventually the law grants as a right for transgender persons to achieve legal recognition, but by requiring some specific criteria.

The law that is considered as the language that discourse analysis examines dictates two genders but if the law provides more variation, as in other Nordic countries, individuals have more freedom to choose between the strict gender roles. It is also analyzed under which conditions can these new positions (the less strict gender roles) to be used. Keeping that in mind the method is also applied to the preliminary debates in the Nordic context taking into consideration the political parties represented that have allowed the trans people to achieve LGR without sterilization or medical intervention. Emphasis will be laid upon the determination of action by structures, social reproduction and ideological positioning of subjects.

While applying discourse analysis, it is important to know the context of the discourse. The

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<sup>49</sup> Ibid., p.11

<sup>50</sup> Ibid., p. 5

<sup>51</sup> Foucault, 2003, p. 33

<sup>52</sup> Fairclough, 1995, p. IX

debates held in the parliament are scientific, moral and legal in nature and the debates will be situated in different times in different Nordic countries. The base of the analysis will be the ways gender is governed in the Nordic countries.<sup>53</sup>

Weakness in using discourse analysis is the possible bias that the author might have which means that the treatment of the text must be trustworthy and transparent.<sup>54</sup> Especially in this thesis it is relevant because part of the material has been translated by the author from Finnish to English.

Besides that, discourse analysis was found to be fit well when using theory from Foucault and trying to understand certain patterns in a given society and in a text in question.

### **Chapter 3 – Theoretical framework**

#### 3.2 Governance of juridical sex

For the theoretical framework I chose to use Jemima Repo's analysis on the Trans law in Finland. Her work draws on feminist and queer debates on the entanglement of recognition with governmentalization and examines how struggles for legal gender recognition are bound up with the production and discipline of trans subjectivities, bodies and relationships.<sup>55</sup> As mentioned in the introduction, compulsory sterilization was and is often introduced as a part of a gender recognition law in states' jurisdiction, indicating that demands that are supposed to work in an emancipatory way for trans rights and recognition are easily entangled with disciplinary rationalities and practices.<sup>56</sup> The current sterilization requirement is justified by the Finnish state as a replacement for the former castration law which had been applied to male-to-female trans persons to access genital surgery. While it is a replacement of the castration law it also acts as a disciplinary technology to neutralize the alleged threats to normative forms on kinship that could be produced through gender recognition.<sup>57</sup>

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<sup>53</sup> Van Dijk, 2004 p.11

<sup>54</sup> Halperin & Health, 2017, p. 355

<sup>55</sup> Repo, 2018, p. 1

<sup>56</sup> Repo, 2018, p. 2

<sup>57</sup> Repo, 2018, p. 1



### 3.3. “True” gender by Foucault

In his *Herculine Barbin* volume, Foucault recounts the idea that everyone must have “one and only one” true and determinate sex is the gradual result of biological theories of sexuality, administrative control and juridical conceptions of the individual.<sup>58</sup> In this understanding the apparatus of sex is deployed and becomes translated into power, knowledge and government. Thus, rather than seeing law as an exclusionary form of power, it instead produces norms of gender by “regulating political life in negative terms – by limitation, prohibition, regulation, control and “protection” of individuals”.<sup>59</sup> Law may be invoked to respond to productions of truth elsewhere and it may impact other forms of power, such as psychiatric power, by sanctioning its role in public hygiene and order.<sup>60</sup>

In *Will to Knowledge* (History of Sexuality vol.1), Foucault elaborates that sex is both a product and a target of power. The gender recognition legislations and preliminary debates will be examined with this perspective.

For Foucault the emergence of sexuality as a discourse of truth gave rise to new forms of medical and psychological interventions and to new governmental techniques of assessment, surveillance and intervention designed to regulate a society’s power and strength.<sup>61</sup> By governing gender it becomes possible to manage the broader population patterns objectified by statistics as well as the reproductive behavior of individual bodies through the production of psychiatric, medical and moral knowledge.

Subjects such as the “homosexual”, “pervert”, “masturbating child” and “hysteric woman” were created as types that were requiring different forms of regulation and intervention.<sup>62</sup> Especially the nuclear family was adopted as the locus of power through which hygienic, psychological and pedagogical norms were transmitted ensuring the discipline.<sup>63</sup> The regulation of sexuality and sex through psychiatric and juridical practices was made possible through the production of subjects in possession of a “true” and “permanent” sexuality/sex that

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<sup>58</sup> Foucault, 1980, p. VIII

<sup>59</sup> Butler, 1999, p. 4

<sup>60</sup> Repo, 2018, p. 6

<sup>61</sup> Foucault, 1981, pp. 145-46

<sup>62</sup> Foucault, 1981, pp. 104-105

<sup>63</sup> Donzelot, 1979, p. 45

could be discovered, analyzed and controlled. That is why “gender identity” can be approached also as a biopolitical discourse.<sup>64</sup>

Within the government power produces subjects. Individual is one of power’s first effects. The effect of power allows bodies, discourses and desires to be identified and constituted as something individual: the individual is not only something power operates through, but it is also created by it. Techniques of power then again are, for example, mechanisms to exclude the individual from the reproductive life<sup>65</sup>

Thought within the regime of government is formed in relation to specific form of knowledge and expertise of variety of authorities; from medical authorities to social workers. Certain forms of thought (party political platforms, policies, programmes to reform of welfare systems, social planning etc.) seek to unify and rationalize these techniques and practices in relation to particular sets of objectives within the same regime of government.<sup>66</sup>

### 3.4. Governmentality

The Foucauldian concepts of governmentality, governing and governance often need further understanding and clearance. Foucault explains that the concept of “government” does not only refer to political structures of states or to the management of it. The government designates the way in which the conduct of individuals and groups might be directed; the government of children, families or the sick. The government does not only cover the constituted forms of political subjection but also modes of action that were destined to act upon the possibilities of action of other people. To govern or “governing” in this sense is to structure the possible field of action of others<sup>67</sup>. In other words, it is the act or process of creating policies and applying them. Government is defined as a right manner of assigning things, as to lead to an end that is “convenient” for each of the things/targets that will be governed, which leads to a plurality of specific aims: for example, the government will have to ensure that the greatest possible quantity of wealth and that the population is able to multiply.<sup>68</sup> Governance involves the

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<sup>64</sup> Repo, 2018, p. 7

<sup>65</sup> Foucault, 2003, p. 33

<sup>66</sup> Dean, 2010, p. 43

<sup>67</sup> Foucault, 2002, p. 402

<sup>68</sup> Foucault, 2002, p. 411

interaction between the institutions and the civil society. Governance includes policy making, rule of law, processes behind them and public affairs.

The Foucauldian notion of government as a “conduct of conduct” means that government does not only entail relations of power and authority but also issues of the self and identity. The notion of government as the conduct of conduct presupposes the freedom of those who are governed entailed in the capacities of acting and thinking. It also presupposes the freedom and capacities on the part of those who govern. As a consequence, when we govern ourselves and others, we exercise our capacities of thinking. That opens a door to governmentality.<sup>69</sup>

The state is governed according to rational principles that are intrinsic to it and cannot be derived solely from natural or divine laws or the principles of wisdom and prudence. The state has its own proper form of rationality.<sup>70</sup> The population is the object that government must take into account in all its observations and knowledge in order to be able to govern effectively in a rational and conscious manner. Thus, governmentality is the discourse that produces gender and it includes knowledge to make claims to society and produce discourse (e.g. in the preliminary debate) and contributing to them. It includes more or less systematic ways of reasoning, thinking, calculating and responding to problems which might draw upon formal bodies and knowledge.<sup>71</sup> The modern government has a concern for the population and its optimization, and the forms of knowledge and practices that derive from it, are used to the optimization.<sup>72</sup> All practices of government presuppose some goal to be achieved.<sup>73</sup>

The biopolitics in the government, is politics concerning the administration of life, as it appears at the level of population: Biopower is to designate forms of power exercised over persons specifically in so far as they are thought of as living beings. It is politics concerned with subjects as members of a population in which issues of individual sexual and reproductive conduct interconnect with issues of national policy and power. This is not only because oppressive norms continue to circulate despite the legal recognition of protected characteristics but also because rights can also act as a means of normalization and control. According to Foucault, disciplinary practices in liberal societies tend to operate in a double bind with discourses of

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<sup>69</sup> Dean, 2010, p. 24

<sup>70</sup> Foucault, 2002, p. 213

<sup>71</sup> Dean, 2010, p. 24

<sup>72</sup> Dean, 2010, p. 30

<sup>73</sup> Dean, 2010, p. 27

freedom. Government cannot have a direct hold on things but so long as the interests of a particular individual or population are at stake the government can intervene.<sup>74</sup> Government is concerned with the human being and particularly in its economic, biological and psychological wellbeing. Government became tasked with managing populations as biological beings and their life processes in order to regulate an economically efficient and biologically re/productive and healthy population.<sup>75</sup>

## **Chapter 4 – Legal gender recognition in the Nordic jurisdictions**

### 4.1 Recent developments in the legislations concerning legal gender recognition

The development of legislation relating to transgender persons started in Sweden in 1972 when it became the first country in the world to allow unmarried citizens to legally change their gender.<sup>76</sup> The original Trans Law (Legal Gender Recognition Act 1972:119) and preconditions for legal change included that the person who applies for gender change has:

1. For a long time felt that they belong to the other gender,
2. For some time has lived and has an appearance in accordance to this gender identity
3. Must be assumed to live in this gender identity in the future and has turned 18
4. the person must be sterile or infertile for other reasons (1972:119 §1)<sup>77</sup>

The laws in Denmark, Norway and Finland concerning legal gender recognition were established according to the Swedish law and the preconditions remained the same until recent years in all of the countries.

In January 2013, the Swedish law was amended. Slight differences in wording considering the time that a person has been feeling to belong to another gender, which made it open to interpretations. The requirement for being unmarried was abolished and Swedish citizen was changed to “permanent resident in Sweden and not to be in a registered relationship”. The demand for sterilization was only abolished later in July 2013 after a legal case was made against the Swedish government which led the government to apologize for the policy and

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<sup>74</sup> Foucault, 2008, p. 45

<sup>75</sup> Repo, 2015, p. 12

<sup>76</sup> Wenzel, 2007

<sup>77</sup> Lagen.nu, 2019, 1972:119

admitting compensation for trans people who have gone through the forced sterilization.<sup>78</sup>

Denmark followed the development in 2014 by changing its law and becoming the first Nordic and European state to have made possible the juridical change of gender based on one's own notification.<sup>79</sup> With the new law the demand for sterilization as condition for legal gender recognition was abolished after the working group recommendation. Today, one still must be 18 years old to achieve the legal gender recognition after a reflection period of six months but it is possible without the need for surgical intervention.<sup>80</sup> At the time transgender/gender dysphoria was under World Health Organization's (WHO) list of mental illnesses. Denmark wanted to rush their national jurisdiction and to take the "transgender" away from the mental illness diagnosis even before WHO did in 2017.<sup>81</sup>

Norway has been the most recent Nordic country to make amendments to its Trans Law. The new law states that all above the age of 16 can change their legal gender at their own will and there is no reflection period, thus the procedure is possible when it is needed and it can be fast. The change of the legal gender will be on official documents, and the possibility to change one's name was lowered from 18 to 16. To achieve legal gender recognition there is no need for diagnosis, compulsory medical intervention or surgical requirements, nor compulsory sterilization.<sup>82</sup> Furthermore, in Norway children between the age of 6 and 16 can change their legal gender if both or at least one of the parents give their consent. In the cases of lacking consent or involvement from parents, the matter will be processed by the County Governor of Oslo and Akershus. The County Governor will in such cases assess what is in the best interest of the child. Factors in this review may be the child's age and maturity, what gender expression the child has practiced, in what way, how long and how consistently the child has expressed their gender identity, what are the reasons why one parent does not consent to amending the legal gender, the relationships between the child and the two parents and which of these must be presumed to know the child best.<sup>83</sup>

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<sup>78</sup> Lagen.nu, 2019 ,2013:405

<sup>79</sup> Transgender Europe, 2019b

<sup>80</sup> Folketinget, 2019, p. 2;2.

<sup>81</sup> Transgender Europe, 2019c

<sup>82</sup> Transgender Europe, 2019d; Stortinget, 2019

<sup>83</sup> Proposition to the Storting: The Legal Gender Amendment Act, 2019 §1-4

Additionally, it is stated in the Norwegian law text, that according to §2 of the proposal, there is no longer a requirement that a person must undergo a complete sex change and sterilization for their legal gender to be amended. As a consequence, one who is legally male may be able to bear children.<sup>84</sup> Additionally, this must be taken into consideration in terms of gender equality in other policies and legislation.

## 4.2 Political background on the LGR laws in Nordic countries

### 4.2.1 Sweden

The government in Sweden during the time the new Trans law was accepted consisted of the Moderate Coalition Party (Moderata samlingspartiet), Centre Party (Centerpartiet), Liberal People's Party (Folkpartiet liberalerna) and The Christian Democrats (Kristdemokraterna).<sup>85</sup> On January 26th 2006 the Government decided to summon a special investigator with the task of reviewing the Legal Gender Act (1972: 119) on the determination of gender in some cases. A special investigator, the court judge Lars Göran Abelson was appointed from February 1, 2006. On March 15th 2006 other experts were appointed to the investigation, e.g. the member of the Parliament Ingrid Andersson (Social democrats), Chief Physician Stig Andersson from Stockholm County Council and Professor Per-Anders Rydelius from Karolinska Institute (medical university in Stockholm) and The Secretary of State Johanna Lithman Sola from the Ministry of Health and Social Affairs.<sup>86</sup> The law was amended as proposed by the working group in the beginning of 2013, and at that time the sterilization requirement remained in the law. The political debate was first hesitant in abolishing the requirement and stated that it will not be changed. However, the legal case made against Sweden and the international pressure affected the parliament and the requirement was removed in June 2013.<sup>87</sup> From that on, the Swedish government also gave change for transgender people who had been sterilized in the past, to apply for compensation.<sup>88</sup>

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<sup>84</sup> *ibid* §6

<sup>85</sup> Lagen.nu, 2019

<sup>86</sup> Lagen.nu, 2019, p. 5

<sup>87</sup> Westerlund, 2017

<sup>88</sup> Transgender Europe, 2019

#### 4.2.2. Denmark

At the time of changes in the Trans law in Denmark the government from 2011 to 2014 was a coalition between Social Democrats, The Danish Social Liberal Party and the Socialist people's party. Furthermore, the following coalition government was between the Social Democrats and the Social Liberal Party from February 2014 to June 2015.<sup>89</sup>

In January 2013, the Government set up an inter-ministerial working group for legal gender change with representatives from the Ministry of Justice the Ministry of Social Affairs Child and Integration, the Ministry of Health and Prevention, the National Board of Health, the Ministry for Gender Equality, the Church and Ministry of Economic Affairs and the Ministry of Interior. The working group had completed its work on the submission a report on legal gender change in February 2014. On the basis of the report from the working, the government had decided to present bill that transgender people can in the future obtain legal change of sex without requiring surgical intervention or other treatment.

The proposal for the amendment was voted in the parliament resulting in 59 votes in favour of the proposal by Social democrats (Socialdemokratiet), Radical left (Radikale Venstre), Social People's party (Socialistisk Folkeparti), The Red-Green Alliance (Enhedslisten). It got 52 votes against the proposal by The Left (Venstre), Danish People's party (Dansk Folkeparti), Liberal Alliance and The Conservative People's Party (Det Konservative Folkeparti).<sup>90</sup>

#### 4.2.3. Norway

As the Norwegian law is the most recent that has been amended and the most developed one the preliminary debate of the law will be shortly elaborated. The current law came into force on March 18<sup>th</sup>, 2016. The final proposition of the law got a high agreement from most of the parties and representatives. In total, 78 votes in favour, from The Social Democrats, The Progress Party (FrP), the Socialist Left Party (SV), The Conservative Party of Norway (Høyre, H) and the Green (MdG) and 13 against from the Christian Democrats (KrF), Centre Party

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<sup>89</sup> Statsministeriet, 2019

<sup>90</sup> Folketinget, 2019

(SP), and one from a Social Democrat (AP). The biggest parties with the most votes available were The Social Democrats, The Progress Party and The Conservative party.<sup>91</sup>

The spokesperson of the proposition Kristin Ørmen Johnsen (H) started the hearing by establishing that the day the law is amended will be a fortunate day for many. She stated that the law until the amending had been criticized for a long time and due to the propositions for changes it will be less offensive and changing of legal gender easier in Norway. After the debates the majority of the parties, including Conservatist and Leftist parties, were already supporting the law amendment. Johnsen stated that they as a parliament, after the approving statements from the expert psychologists and representatives from Save the Children, believe that there will be no need for a reflecting period since they believe that the person who wants to change their gender at the time has already reflected the matter, possibly for years, and there is no reason to question the decision that they have already made. The statements that supported the full law proposal came from LBQT activists, the ombudsman of equality, the Committee of Biotechnology, Amnesty International and Norway's Medical Association.<sup>92</sup>

Ingvild Kjerkol (AP) stated that the law amendment will mean that the people who wish so get to choose how they are seen by the government through their identity number and the gender marker without being sterilized. Furthermore, she states that it is a matter of freedom and dignity and a person should be given the power and ability to do these changes.

Olaug V. Bollestad (KrF) argued that the Party of Christian Democrats agree that the process of LGR should be made more accessible and less offensive. The party was concerned whether all individuals are faced with respect, understanding and expertise. He adds that the Christian Democrats agree with other parties, on that no one would make the decision on changing the legal gender light heartedly, and that if the decision has been made, it has been thought through thoroughly. He continued that there had been questions on what the consequences for individuals, that are legally men but are allowed to give birth. The only difference it is making, he continued, is that it would make it easier for individuals to be met by the society in Norway.

What was agreed between the parties was that the practice as it was before the amendment, was

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<sup>91</sup> Stortinget a, 2019

<sup>92</sup> Stortinget b, 2019



colliding with the constitution of Norway by the principle of equality, in collision with the European Commission's recommendations and against human rights. What was considered problematic and what was criticized by the Christian Democrats, was the age limits and children wanting to change their legal gender. They argued that there is still not enough research on the topic. Other child-effects were deemed problematic also, such as how the gender change of a parent will effect on their child. The concern was especially showed by the Christian Democrats, and the party stated that because the child-effects of the law had not examined thoroughly enough, they could not vote for it.

Kirsti Bergstø (SV) pointed out that gender is more than the gender boxes which are not always clear for all the individuals, seemed to be clear to all representatives and did not raise any doubts. As the numbers of the votes showed, the law accomplished a high political support.<sup>93</sup> The politicians agreed that they were glad and proud for Norway that it gets to be a pioneer in this matter.

#### 4.3. WHO International Classification of Diseases

For years "transsexualism" was classified as a mental disease in the International Classification of Diseases (I.C.D) by the World Health Organization (WHO). This had an effect to the preliminary debate on making the amendments on the trans law in Finland. It was classified under I.C.D.-10 and I.C.D.-11. The transgender identity has changed under the classification too. It was under "sexual deviations" in 1968, "psychosexual disorders" in 1980 and "sexual and gender identity disorders" in 1994. In 2013 the designation changed to "gender dysphoria" and was defined to apply to transgender people who were experiencing distress or dysfunction.<sup>94</sup> The most recent change before the whole classification was taken away, was in 2016 when the classification was under I.C.D.- 11 and 10 F60-F69 "Disorders of adult personality and behaviour".<sup>95</sup>

Nevertheless, in 2018 with the new list of classification of illnesses WHO removed transgenderism from the list of mental illnesses. Instead, a new class was added to the ICD:

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<sup>93</sup> Stortinget b, 2019

<sup>94</sup> Belluck, 2019

<sup>95</sup> World Health Organization, 2019, F64.8

Conditions related to sexual health and the new diagnosis under the class is gender incongruence.<sup>96</sup>

## Chapter 5 – Legal gender recognition in Finland

### 5.1 “563/2002: The law for conforming the gender of the transsexual”

Today, Finland is the last Nordic country to have the law on legal gender recognition remaining as almost the same since 1970. According to the current Act on the Confirmation of Gender of a Transsexual in Finland a person can have their gender confirmed in the population information system if they:

- 1) Provide a medical statement by a doctor, that a person in question feels that they belong to opposite gender and that this person is permanently experiencing to belonging in this gender and living up to those standards. Additionally, a report from a doctor on the fact that they are sterilized or for other reasons unable to reproduce; 2) Has turned 18 years; 3) The person is not married or living in a registered partnership and 4) is a Finnish citizen or a permanent resident in Finland<sup>97</sup>
  - a. furthered with the change in 2015/16 if the person is in a registered partnership, the partner must have notified the city administrative court that they are willing to change their registered partnership into marriage<sup>98</sup>

In 2015 due the equal marriage law the requirement for being unmarried was abolished from the law. For the purpose to understand what is behind the law as it is today, the following section will describe the discourse in the parliament of Finland while forming the law.

#### 5.1.2 Preliminary debate for the law on legal gender recognition in 2002

At the time of the law change the government consisted of four parties: Christian Democrats, Coalition Party (kd), Social Democrats Party (sdp) and the Centre Party (kok).

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<sup>96</sup> World Health Organization b, 2019

<sup>97</sup> Finlex, 2002

<sup>98</sup> Ibid., 2 a § 8.4.2016/252

Parliament's plenary sessions in April 2002 addressed the government proposal 56/2001 on the law for "confirming gender in certain situations and the law linked to those situations" The debate was held between five parliament members from three parties; The Christian Democrats (kd), The National Coalition Party (kok), and The Left Alliance (vas).<sup>99</sup>

The proposal included regulation for the prerequisites that are the grounds for the changing the juridical gender of "transsexual" person so the new law meets the way transgender people understand their gender and the judicial requirements for changing gender.<sup>100</sup> Marjatta Vehkaoja (sdp) proposed in the beginning that the law should be named "The Law on confirming the gender of a transsexual" to be more precise.

According to the proposal the city administrative court can confirm the legal gender of a person by their application if they present a medical report on feeling permanently belonging to the opposite gender and that they will live according to this new gender role. The person shall also be sterilized or infertile for other reasons and they should not be in marriage or in registered partnership when they are applying for changing their gender.<sup>101</sup>

The floors held included a discussion on how permanent the gender dysphoria is and what is the "true" gender. Vehkaoja (sdp) mentioned in the beginning that the reason for changing gender originates from psychiatric disorder, and that transsexual belongs to international classification on mental illnesses, and according to that the act of changing gender is a way of treating the illness.<sup>102</sup>

Niilo Keränen (kok) suggested that the permanency of the new gender should be stated by a doctoral statement so that when the juridical gender is decided on, it does not depend on the subjective experience of the person seeking new juridical gender but it is diagnosed by a medical expert that the person belongs to the opposite gender. The speaker added that as it is a diagnosis it should be dependent only on medical expertise.

Päivi Räsänen from the Christian Democrats pointed out that if transgender person would be

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<sup>99</sup> Eduskunta 45/2002, 2019

<sup>100</sup> Eduskunta 45/2002, 2019

<sup>101</sup> Eduskunta 47/2002, 2019

<sup>102</sup> Eduskunta 47/2002, 2019

allowed to change name and juridical gender in the personal identity number without going through surgeries, they would be left with their original gender qualities in their body. Räsänen pointed out that this would stand out from the current laws at the time in many other countries.

She added that by accepting the proposed law, Finland would become a pioneer with the liberal attitude towards the trans rights and questioned whether we actually should become pioneers in this matter. The Christian Democrats additionally were pointing out their concern and moral standpoint on God creating man and woman which should not be altered.<sup>103</sup>

What became a common concern between the debates is that the otherwise healthy body would be under surgeries and “cut” without any physical reasoning. Kari Kärkkäinen from Christian Democrats suggested that a person that “experiences transsexuality” should be offered psychiatric help, so that they could find the mental gender that matches their physical gender.<sup>104</sup>

The debate went on by a reflection on the permanence of transsexuality and what would happen if the person would after time want to change back to their original gender. It was debated further whether transsexualism is a feature of a person or a mental illness as it is classified by WHO. A shared opinion between the parties’ representatives was that the issue was complex and it demanded further investigation and research in the medical field and it caused worries between the representatives.

What stood out in the debate was the institution of marriage, registered partnership and children that the person changing the gender might have. It was admitted that the people seeking gender change rarely were in marriage or had already divorced, but it was seen that if the person was married, it would be unreasonable to break the unit of marriage by the law in the situation. In general, the unit of family and kinship was under concern, if transgender people would be part of them.

Christian Democrat member Päivi Räsänen stated that the best interest of a child had not been assessed enough and the effects of a parent changing their gender had not been researched enough. She suggested that a person changing their legal gender should not have custody over

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<sup>103</sup> Eduskunta 47/2002, 2019

<sup>104</sup> Eduskunta 45/2002, 2019

children younger than 16 years old. Another Christian Democrat stated that a person changing their legal gender should not have children at all and if they did, they should not be allowed to go through the gender changes.

Paula Kokkonen (kok) argued that a matter as such cannot be a question of individual freedom. She offered a historical background on the issue and stated that there had been multiple cases where a person had had a mental disorder and because of that had experienced belonging to the opposite gender but later did not feel that way. She stated that it is not reasonable that mental illness is treated by “mutilating” people and by performing surgeries targeted on genitals.<sup>105</sup>

The problem of sterilization of transgender persons was discussed only on the level that if trans people who want to change their gender are allowed to do it already after turning 18 would be sterilized, it would cause a problem of equality, because other groups of people are only allowed to get sterilized after they have turned 30. The problem of it being forced only on transsexuals was not addressed.<sup>106</sup>

## 5.2. Institutions’ positions in recent years

The Ministry of Social Affairs published a report from a working group in 2015. The report was the result on drafting a proposal for abolishing the LGR legislation requirements for infertility and status of being unmarried. The establishment of the working group happened shortly after Nils Muižnieks, the Commissioner for Human rights of Council of Europe, visited Finland and recommended the abolishment of the sterilization requirement.<sup>107</sup> In the report from the Ministry, the Swedish National Board of Health and Welfares (Socialstyrelse) standpoints on LGR were examined and it worked as an example for suggestions of changes for Finland. In the report, it was acknowledged that the law was contradicting the Finnish constitution according to which everyone has the right to individual freedom and bodily integrity.<sup>108</sup> As mentioned, in 2015, the unmarried requirement was abolished from the law but the other requirements stayed.

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<sup>105</sup> Eduskunta 46/2002, 2019

<sup>106</sup> Eduskunta 45/2002, 2019

<sup>107</sup> Muižnieks, 2012

<sup>108</sup> Eduskunta HE 56/2001, 2019; Finlex, 1999

When the WHO took the transgender diagnosis away from the mental illnesses list experts in Finland commented that the diagnoses will be amended in Finnish system when the ongoing reform for social-and welfare system's has been accomplished, which would happen the soonest in 2020.<sup>109</sup>

A Finnish medical database for doctors and nurses, DUODECIM, has treatment recommendations and details on correcting gender treatments. It is stated there that from the medical perspective the Finnish legislation on LGR which includes the demand for infertility does not have any medical grounds and being transgender does not in any way reduce the individual's ability in being a parent.<sup>110</sup>

There is also a recent recommendation from the Ministry of Social and Wealth Affairs on the legislation on LGR stating that the demand for sterilization must be removed from the legislation.<sup>111</sup> Besides these, the amendment of the LGR law was not taken to be amended during the latest government season.

## **Chapter 6 – Analysis**

### **6.1. Governmentality**

Studies of governmentality are concerned with how thought operates within our organized ways of doing things, our institutional practices and with the ambitions and effects the practices have.<sup>112</sup> Analytics of government is concerned with thought as it becomes linked to and is embedded in technical means for the shaping and reshaping of conduct, and in practices and institutions. Regime of state involves practices to produce truth and knowledge. The practices are forming multiple forms of practical, technical and calculative rationality, and are subject to programmes for their reform.<sup>113</sup>

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<sup>109</sup> El Kamel, 2018

<sup>110</sup> Kärnä, 2019

<sup>111</sup> Maarianvaara, 2019

<sup>112</sup> Dean, 2010, p. 31

<sup>113</sup> Ibid, pp. 27-28

Modern governmentality can be identified by a certain regime of government that takes the population as its object and a target. Government is meant for the whole population, indicating a concern for every individual and to the population as whole. In other words, government involves the health, welfare, prosperity and happiness of the population.<sup>114</sup>

The power in governmentality open through problematization and it's productive because it creates more subject positions. These subject positions are, for example; men, women and cis-subject, trans-subject. The positions are established by the regime of government which includes the practices of institutions. The practices then can work as technologies of discipline. The positions/targets are created within the governmentality: to render them governed and disciplined.<sup>115</sup>

One dimension of practices is concerned with the forms of individual and collective identity through which governing operates. They formed by specific practices and programmes of government.<sup>116</sup> This can be unit of family or men and women, or as in the Finnish case a certain kind of transgender subject, so it fits in either category of a man or a woman.

In any given society, there exists one dominant regime of government. Practices within the regime can be pointing on different directions, but despite of that, they need to be tuned with each other, because they are linked with each other. The regime of government needs to saturate the institutional practices. Different institutions can include contradicting practices, because there is difference in how institutions react. For example, law and its reform reacts/happens in a different way and phase than practices of social authorities. At some point, however, these must be reconciled if they are under the same institutional regime.<sup>117</sup>

The institutional practices within specific regime of government, come to one, by the routinized and ritualized ways people do certain things in certain places, at certain times. Values, knowledge and techniques become all part of governing. Within the institutions, the practices

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<sup>114</sup> Ibid, p. 28

<sup>115</sup> Repo, 2018, p. 20

<sup>116</sup> Dean, 2010, p. 43

<sup>117</sup> Dean, 2010, p. 43

are thought and are made into objects of knowledge. The institutions depend on particular forms of knowledge, and through the development of knowledge are under reform and change.<sup>118</sup> The exercise of power, which works through institutions, must have the specific knowledge that goes together with the institution. For example, medical authorities use medical research in justifying acts of theirs.

To elaborate the ‘link’ between the institutions: something that a social authority does, needs to be considered within the legal context from legal authorities, or as in Finland with the case of LGR law: the medical authorities do not necessarily think it is necessary that the transgender person is sterilized, but at the moment the legislation demands it.<sup>119</sup> In other words, at the moment, the two institutions are pointing on different directions. When the institutions exist in the regime government, it makes borrowings across the institutions possible. The institutions are informed and reshaped continuously by various forms of knowledge such as research from medicine and psychology. The forms of knowledge define the objects of such practices, for example, mentally ill or a cancer patient.<sup>120</sup>

## 6.2. Gender as a Product and Target of Power

In their early research on gender, John Money and his colleagues found that the physical sex and the gender of a person are two separated things. They found this by investigating and treating children with ambiguous genitalia. The treatment of the “hermaphroditic” children functioned in a way to normalize the child’s sex and reproductive life.<sup>121</sup> From the beginning and throughout the development of the discourse of gender, it remains as a product of multiple discourses that are produced by power and knowledge, that operate in different institutions.<sup>122</sup> The emergence of sexuality and gender as a discourse of “truth” gave rise to medical and psychological interventions and governmental surveillance. The production of subjects in the regime of government, allows their disciplining and the surveillance.<sup>123</sup>

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<sup>118</sup> Ibid, pp. 30-31

<sup>119</sup> Kärnä, 2019

<sup>120</sup> Dean, 2010, p. 32

<sup>121</sup> Repo, 2015, p. 37

<sup>122</sup> Ibid., p.37

<sup>123</sup> Repo, 2018, p. 7



Also, in the Finnish case, gender becomes the target of knowledge, power and regulation. By becoming that, it is simultaneously produced. The sterilization demand becomes a disciplinary technology, which is part of the power, which through they are both productive; by producing certain kind of trans subject that is disciplined and controlled.<sup>124</sup>

Finland and other Nordic countries use gendered identity numbers that are given to each citizen, which opens all the basic data in the state's electronical system, that can be found from a person. That is at the same time the main tool to keep the citizens calculable and governable.<sup>125</sup> Repo argues that the law itself on juridical gender produces certain kinds of genders which are made juridically visible, and are disciplined. Before deciding on the law, politicians were confused on who can define and what is the line when changing gender, when does one become the "opposite" sex. The way that the Finnish law works, Repo argues, is that the trans subject was made understandable and governable in the Finnish welfare state. The production of the trans subject to the Finnish legislation meant that it would entail limitations and controls, forms of coercion in order to ensure that the freedom of changing gender, would not endanger the wider population and the individuals or groups in question.<sup>126</sup>

### 6.3. Inconsistency in practices of Nordic Countries

As Nordic countries are welfare states, they are in that sense under a similar kind of regime of government, in most of the situations. In the particular case of legal gender recognition, however, there is a difference in practices.

The regime of government that works as the Nordic countries do, entails politics concerning the maintenance of life, at the level of populations. It is concerned with matters of life and death, with birth, health and illness and with the processes that sustain the optimization of life of the population.<sup>127</sup> In that way, Nordic states as welfare states, are very biopolitical, by the amount of organized care and discipline that is indicated to the population.<sup>128</sup> Sweden,

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<sup>124</sup> Ibid., p. 20

<sup>125</sup> Ibid., p. 12

<sup>126</sup> Ibid., p. 13

<sup>127</sup> Dean, 2010, p. 118

<sup>128</sup> Dean, 2010, p. 177

Denmark and Norway have found that the trans gender subject is no longer a problem, because it has been examined also from the biopolitical and population component: The statistical fact, that there is a number of transgender people in every population, is acknowledged. In that sense, it would not make sense to try to fix these people, by therapy, for instance. In the means of the government sustaining the optimization of life of the population, it makes more sense to make use of these people too, since they are not posing a danger to the rest of the population. Those Nordic countries have created a subject position of a transgender person that is allowed to reproduce and is recognized by institutions. Given that one regime of government is refusing to create certain subject positions that in other countries with same regime of government have emerged, creates an inconsistency between the Nordic countries.

As Finland is refusing to create certain trans subject position, however, even within the same regime of government and power, the individuals possess a certain latitude in navigating into the governmental regime. For example, a Finnish transman had postponed his surgery for removing of his (female) reproductive organs and taken a break from the testosterone treatment, to become pregnant with his cis-male partner. As one can see, in that way it is not impossible for transgender person to reproduce, but the electronic ID systems in the health service did not recognize a legal man who was pregnant. That created a problem for the health of the baby and the pregnant, legally male person. In the case of an accident where the pregnant person would lose his consciousness, he could not inform the medical staff about the pregnancy, and thus would compromise the safety of both the baby and the pregnant person.<sup>129</sup> Even though within one government there are two sides, where one is governing and the other is subject of government, the one who is governed can step to the side of the governing in their own case, as the person from the Finnish example. This gives us a reason to consider, that people are already forming families that differ from the ones that the state is targeting.

From the point of view of the institutions in relation to gender and family, the governmental institutions are not governmental enough in that sense. The institutions are not learning from the practice, because whether it is allowed or not, all kinds of families and individuals exists. And from the point of view of keeping the citizens as healthy as possible, there is no sense in not allowing that.

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<sup>129</sup> Vasama, 2019

What becomes crucial here is that the institutions under the same governmental regime should be able to learn from each other. Why is the particular institutional practice of sterilization in LGR process not influenced by knowledge? Knowledge and technologies of power have a tendency to unify in the same regime of government, and there is both scientific and empirical knowledge available that argue against the sterilization requirement.<sup>130</sup>

As we have seen in the preliminary debate and the background, what is keeping the governing parties hesitant towards the law on LGR, is moral and legal in nature. Moral, because many conservatives in the parliament and society, were worried what kind of morally relevant implications would the LGR without sterilization produce. Legal, because in order to reach the legal process for the LGR, the morally opposing people should be convinced. For example, at the moment the medical institutions in Finland agree that the sterilization practice is unnecessary from the medical point of view, but under the law it is still a mandatory in order to achieve LGR.<sup>131</sup>

However, when transgender people find ways to reproduce despite the LGR law and the issue becomes visible, the government might be willing to learn from the examples, as it has been seen in other Nordic countries.

The passing of the gender recognition laws in these other countries demonstrate, that the governmentalization of gender identity discourse also has the ability to challenge the established subjects of juridical sex classification.<sup>132</sup> Thus, these different types of parenthood and families are allowed in other Nordic countries. Given that all these countries exist in the same kind of governmental regime (the welfare state), they are able to create the same knowledge power, since they learn from each other in terms of knowledge.

The morality, by representative parties, has not been absent in the other Nordic countries, when it comes to LGR legislation, but it has not been a dominant feature and has been overruled by

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<sup>130</sup> Dean, 2010, p. 43

<sup>131</sup> Kärnä, 2019; Lääkäriliitto, 2019

<sup>132</sup> Repo, 2018, p. 9

the knowledge. As presented in the previous chapters, the knowledge that was produced by different institutions, for example the report from the Biotechnological Institution in Norway, worked as one of the justifications for law amendments in changing juridical gender. Additionally, the medical professionals, psychologists and ombudsman of equality supported the law amendments. Thus, it was not scientifically problematic to allow an individual to make a choice on their own body. Different stages of gender dysphoria are also taken into notice, because it is not mandatory to go through medical and surgical processes in order to change the legal gender. Meaning, that a person can change towards the other gender as much or little they want to. In other words, in the case of Norway, no medical intervention is needed to achieve LGR.

With the knowledge that has been produced in the states institutions and the cases of the European Court of Human Rights, the other Nordic countries have managed to unlock the part of the discourse on morality. Meaning, that also the traditional units/roles of man and woman that have been assigned by the society are less strict. Additionally, the problems that would occur by the LGR without medical procedures, were not overwhelming anymore.

#### 6.4. Technologies of discipline as means of securing rights

The creation of targets is crucial for the process governmentalization. The targets are what are thought to be unproblematic categories (nuclear family, unit of family). In the Finnish parliamentary debate, the nuclear family and the unit of men and women are all present as unproblematic and ‘natural’ targets, that can have children in the natural ways. The law can be seen as a way for seeking to normalize the kinship and trans relationships, whereas it was thoroughly debated if transgender person should be allowed to get married.<sup>133</sup>

In the case of Norway, Sweden and Denmark, however, for a reason (e.g. social movements, production of knowledge) it is realized that the target (a trans person) is disconnected from the product (the nuclear family). When targeting ‘proper families’, it has been understood that it is not relevant which sex/gender or sexuality the parties of a relationship or the parents of the family belong. In other Nordic countries it has been conceived that despite the pressure that is

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<sup>133</sup> Repo, 2018 p.17

laid on the ideal of the binary system, there will be a portion of people who are unhappy in the traditional roles that have been assigned by the society.

In fact, the binary system and social roles that are taken for granted, causes uneasiness in the trans individuals, who statistically suffer more of anxiety and depression because of not fitting to the traditional roles in the society. They also face transphobia, discrimination and harassment which can reinforce the feeling of not-belonging. This has been presented e.g. by research conducted by Amnesty International on the hate crimes in Europe and depression level of transgender youth compared to average population.<sup>134</sup>

Thus, if these people feel secure, recognized and accepted with their sexual and gender identity, it would be more likely that they and their children will grow up in a healthier environment without psychological burden – irrespective of the gender identity of their parents.

Technologies of discipline, as means of securing rights and freedoms for all, therefore become integral for the realization of governmentality, as its goal is to produce individuals that are part of the society, living healthy physically and mentally.<sup>135</sup>

### 6.5. Bodily integrity

In the examples from Denmark and Norway, the legal and medical parts of the LGR process have been separated. The legal part is a lighter concern, as it is not as permanent than the medical procedures, and can in the example of Norway, be changed back and forth.<sup>136</sup>

The medical part of the discourse brings in the human rights perspective. There are studies that show that there is a percentage of cases after gender correction (e.g. from Sweden 3,8 % of people who had received gender correcting treatment) that regret the decision they had made on the correcting treatments. Often, however, the regret was related to the results of the

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<sup>134</sup> Amnesty International, 2012, p. 2

<sup>135</sup> Foucault 2008, p. 65

<sup>136</sup> Prop 74 L (2015-2016) Proposition to the Storting (proposal for a legislative decision) The Legal Gender Amendment Act, 2019, on § 2

treatments in correcting gender, not that they felt a change in gender identity they experienced.<sup>137</sup>

When the institution intervenes with the body, for example by re-assigning genital, with the consent of the person, the institution cannot be sure whether the person is ready/able to make the decision. That is also the point when in the preliminary debates the age of the person seeking to correct their gender becomes relevant. They are risking, that in years after the procedure, the person would be unhappy with the reassignment. Additionally, the state cannot be sure, whether the need to change their gender comes as a result of a mental illness, which could be treated in different ways than sex correcting treatments. However, all individuals are, in the constitution of Finland and in human rights conventions ratified by Finland, granted bodily integrity and they are allowed to make changes to their bodies.<sup>138</sup> The article 7§1 of the constitution secures the bodily integrity<sup>139</sup>, especially when it comes to physical integrity and inspections and medical procedures on an individual, if there is not a legal reason to intervene.<sup>140</sup>

As emphasised in the introduction chapter, human rights courts have taken steps to the direction, where the bodily integrity and family rights of an individual are violated by the requirement for sterilization in the LGR procedure. The moral concerns were clear in the preliminary debates, in presenting ideologies and values of the party or religion, but to go beyond the morality, they also wanted to be informed of the result of what would be happening practically after the law changes towards more liberal LGR law.

Additionally, visible in the personal identity number and consequently ID cards is a gender marker. Hence, it is unavoidable to express one's legal gender to others on a daily basis on occasions where ID verification is required, such as applying for a library card or picking up a parcel. Thus, correcting the gender marker can be crucial in protecting the individual as most countries have certain expectations on appropriate appearance and behaviour for different gender. Falling in between these expectations may lead to discrimination, harassment or in

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<sup>137</sup> Kärnä, 2019

<sup>138</sup> Finlex, 1999

<sup>139</sup> Otava, 2018, p. 44

<sup>140</sup> Ibid. p.32

extreme situations, even death.<sup>141</sup> The Yogyakarta principles reinforce this, where it is emphasised that the revealing of gender identity should be on the basis of persons choice and state should protect individuals of non-consensual exposure of such information.<sup>142</sup>

Besides these, the possibility on the person seeking LGR having a mental illness and the permanency of their decision on changing their gender, is problematized. In practice it means that the right for bodily integrity is compromised when making the surgeries on reproductive organs mandatory in the LGR process. It means for the trans person, that in aiming for one kind of freedom, other is taken away.<sup>143</sup> On the other hand, the state has the responsibility of the best health of the individual and if they were to be mentally ill and feel gender dysphoria because of that, the state also has responsibility on the best health of those people, which would be giving another kind of treatment than sex correcting treatments. In that way the “positive” technologies of power produce the trans subject, but also disciplines the subject by the sterilization and other medical demands. While the trans subject is produced and made visible to the legislation and given right to correct their gender, the struggles to achieve the recognition are not examined.<sup>144</sup>

## 6.6. Knowledge is power

Foucauldian understanding separates what has been said at the level of institutions – the law and the state are their own units, whereas psychology and medicine are separate discourses.<sup>145</sup> Psychology and medicine has produced knowledge and then the legal institution intends to fix the situation according to the new knowledge, as in the case of LGR law amendments.

Thus, the medical institution produces the knowledge and holds the power in the LGR procedure, where the legal is using the knowledge it has produced. For a long time, as presented in the chapter before, transgender/sexual was understood, by the knowledge point of view by WHO, as an abnormal situation. However, the more the “transgender person” as subject starts to be understood, in other words statistically some people are going to have that quality and

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<sup>141</sup> Amnesty International, 2014, pp. 47-48

<sup>142</sup> Yogyakarta Principles, 2019

<sup>143</sup> Butler, 2006, p. 288

<sup>144</sup> Repo, 2018, p. 2

<sup>145</sup> Foucault, 2003, p. 250

there is not any specific biological, psychological or social factor that would explain where the quality comes from, it is reasonable to let them be the way they were born.

If transgender people were to let decide their own legal gender, the government wants to know what problems that produces, as emphasised in the preliminary debate from Finland. The possible occurrence of the problems is when institutions start to argue, for instance, why these people need to be sterilized. The status, box where they would be fitted, would be uncertain and they want to make sure that it does not produce problems in the future.

However, if the knowledge produced in institutions informs that there is no medical or psychological reasons for sterilizing transgender people who aim for LGR, then the legal part normally would not have a problem with the fact. Unless it has to confront a morality that is overwhelming, as in the Finnish case where a group of Christian Democrats and right-wing politicians were strongly against even the allowance of the LGR for transgender people. However, the knowledge that is used derives from scientific research and the moral claims, for example God creating a man and a woman, do not have similar scientific research behind them. There are trans people that go to doctors and clinics to tell about their experience, which produces the background for the statistics and research that already exists. Thus, often when the research is well founded, despite the resistance and moralist claims, the change in the law would be likely to happen in the future.<sup>146</sup>

When taking decision on the legal level, the more knowledge, from for instance medicine and psychology, gets engaged, the more knowledge is produced. New researches provide new statistics continuously. As the changes on the legislation for LGR in Nordic countries, aside from Finland, happened a fairly short time ago, the research on the success of the changes are now to be researched and examined. Thus, the long-term effects on the changes, are yet to be seen. In those terms, it is not impossible that the other Nordic countries would at some point go (back) to the system and practices that Finland has.

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<sup>146</sup> e.g. in the case of equal marriage law in Finland



Knowledge and power are interrelated in the sense that they overlap in a regime of government that produces targets. In the case of the Finnish preliminary debate the knowledge from WHO; at the time was interpreted as transsexuality was a dysphoria and a mental illness. This was used as a tool in the interplay between knowledge and power in the governmental debates, where for example, the members of conservatist parties argued that instead gender correcting treatment, transgender person should receive therapy instead. The party's that used the mental illness argument against the LGR used that to change where the proposition was going, thus interacted in scientific terms and tried to find out which facet's knowledge is the most accurate.

The interplay of knowledge and power have in this case been played in different times in Nordic countries. However, in the case of Finland, it is likely that the issue will be brought back to the list of issues in the newly elected government's term, because of the international pressure on Finland to recognize trans rights. The government during the years 2015-2019 was right-wing coalition<sup>147</sup>, and after the new parliamentary elections and coalitions, it seems that the new government will be a coalition of RKP, SDP, The Green party, the Left Alliance and the Central Party.<sup>148</sup> The value base of the assumed ruling parties would predict a success of following the Nordic development in the case of LGR, based on the knowledge that has been produced by now. On one hand, because of the comparison of the knowledge from other Nordic countries and what has been said by the human rights institutions, it is likely that it will be debated again in the recent years. On the other hand, the research on the effects of the changes in other Nordic countries is being produced continuously, and results will be seen in the following decades.

## **Chapter 7 – Conclusion**

The research problem stated in this thesis concerned the legislation on Legal Gender Recognition in Finland as part of the Nordic countries. Especially the demand for sterilization to achieve LGR which has been recently recognized being a violation of articles of human rights conventions.

Sweden, Denmark and Norway have all developed their legislation towards giving more self-determination to trans people when it comes to legal gender recognition. Because of the similar

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<sup>147</sup> Honkasalo, 2018 , p. 7

<sup>148</sup> Heima, Kaskinen, Hanhinen, & Natri, 2019

kind of regime of government these four countries have, the fact that Finnish legislation still demands sterilization creates an inconsistency. The factors that might explain the inconsistency were found to be the knowledge about transgender people available at the time the Finnish law was created and amended and the specific way that the government needed to make the trans subject governable and understandable.

The aim was also to examine the problem from the governmental perspective, by the theory of governmentality and theoretical framework by Foucault, and what does it mean in those terms, that Finland has not (yet) followed the Nordic development. By applying the theory to the legislation and preliminary debates, it seems that the Finnish LGR law was made to create the trans subject, which allowed the control of the subject as well. The problem, that other Nordic countries have created different kind of trans subjects, which are not disciplined in a same way, shows that those governments have learned from the knowledge point of view and by that have managed to unlock the conventional subject positions, and opening more freedom to transgender people.

As the legislation remains today, it shows that the knowledge produced by institutions and by the empirical fact of statistics on trans people has not yet been internalised in the governmental system, and the moral claims have stood in the way of the law changing. The discourse utilized in the governmental debates included moralist claims and worries that were not exactly always found from scientific research. When the conservatist parties had points from the scientific research at that time, it was interpreted to lead the amendment to a direction that served their interest and morality.

However, based on the regime of governmentality in Nordic countries, the developments in other countries and the knowledge that is already accepted in medical institutions in Finland, point to a direction of pressuring the current legislation to change eventually. It was found that within the same regime of government the knowledge and techniques of discipline have attendance to unify because they are parts of each other.

For the further research, the development could be observed, as the changes are quite early in the amendments in other countries, we do not know the exact effects on the individuals. It will be interesting to see how it has in fact affected, and whether the development will be positive for trans people. Whether there will be a change in the LGR legislation in Finland remains to

be seen in the following years. There exists research and statements on institutions that support the law amendment, and the political parties in this governmental season, are mostly supporting the changes as well.

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