SEX CHANGE IN TUNISIA

When Law confiscates identities

Summary by:
Dr. Habib NOUISER

تغيير الجنس في تونس
حين يصادر القانون الهويات

دراسة من اعداد :
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دكتور في القانون
تقديم الاستاذ وحيد الفريدي

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Summary of the study\(^1\)

To respond to the problem of sex change in Tunisia, which is a real confiscation of identities by the Tunisian legal system, this study was conducted in two consecutive phases. The first is observatory. Its purpose is to draw up an inventory of Tunisian law on the question at both legislative and jurisprudential levels. The second phase is exploratory. It attempts to propose solutions that would be able to overcome the deficiency of the Tunisian legal system on the issue of sex change.

The observatory phase

To take stock of Tunisian law on the issue of sex change, two aspects were explored in the first part of the study. The first covers an exclusively theoretical field, namely that of legislative texts. The second focuses on the purely practical part. It probes the position of Tunisian courts when they rule on cases relating to the issue of sex reassignment.

\(^1\) Summary translated by Ilef Kassab
The existent law is walled in silence

Regarding the legislative texts, it is mainly the law 1957-3 of 1957 regulating the civil status that was examined in the study. No other text has been identified as directly related to the issue. From the outset, Tunisian law reveals a real legislative shortcoming. Not only the 1957 law is the only one that decides on the question of the person’s identity, but in addition, it considers the question of the individuals’ sex only from an extremely restricted point of view. The law is limited to a simple logic of newborns’ classification in one of the traditionally recognized categories, namely male or female. It totally ignores the possibility of an eventual ambiguity of sex at birth. Just as it is also completely silent on the hypothesis of the occurrence of a change of the anatomical sex later than that found at birth, which requires an update of the mention of the sex in the acts of the civil status. The purpose of such an update is to match the biological truth with the legal fiction serving as identity to the person. The legislator, therefore, leaves to the margin of his considerations both the case of persons who have undergone an involuntary sexual mutation, and that of persons who voluntarily choose to surgically change their sex.

Admittedly, the 1957 law on civil status provides for the possibility of bringing an action for

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judicial rectification of civil status, but it does not concern the modification of the mention of the sex in the civil status. Such an action can only have the effect of correcting a material error that occurred at the time of the establishment of the civil status of the person at birth. In other words, it does not concern the case of a voluntary or involuntary change of the anatomical sex of the individual occurred after birth. In this case, there is no question of a material error concerning the initial birth certificate, since, at the beginning, it was validly and correctly established, it is rather a question of an action to change the civil status.

Its purpose is to replace an originally valid birth certificate, which, after the occurrence of the anatomical sex change, turns out to be different from the new biological truth of the persons concerned. As far as we know, neither the Civil Status Law of 1957 nor any other legal text of the Tunisian legal order provides for an action for the modification of civil status, as it is the case in certain comparative legislations.

By this silence, the Tunisian legislator therefore condemns all individuals who have undergone a sex change - whether voluntarily or involuntarily - to live in a legal situation that does not conform to anatomical truth. The situation is therefore

1. دعوى إصلاح رسم الحالة المدنية
2. الخطأ المادي
3. دعوى تغير رسم الحالة المدنية
4. قانون 1957 المتعلق بتنظيم الحالة المدنية
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From this silence, the Tunisian legislator therefore condemns all individuals who have undergone a sex change - whether voluntarily or involuntarily - to live in a legal situation that does not conform to anatomical truth. The situation is therefore...
أو عندمٍّا يصادر القانون التونسي:

أو عندما يصدر القانون الهويات

دستورية ويجب على السلطة التنفيذية والتشريعية والقضائية تكريسها.

إلا أنه في الواقع، لا وجود لهذا التكريس. والدليل على ذلك هو تأويل المحاكم التونسية لسكوت النصوص بطريقة مثيرة للجدل.

فتَّحَّص القرارات القضائية في هذا الشأن يعكس استنكاراً حقيقياً للقضاة لمسألة تغيير الجنس.

عندما يستنطق القاضي القانون!

وبصفة عامة، فإن البحث في القرارات القضائية القليلة التي تترّطّق إلى مسألة تغيير الجنس يسمح لنا بتصنيفها إلى صنفين اثنين. فهناك من جهة القرارات التي تتعلق بالتغيير التلقائي للجنس، والتي حصلت بالطريقة الطبيعية بالنسبة للشخص المتغير جنسياً. وهناك من جهة أخرى القرارات التي تتعلّق بتغيير الجنس التي حصلت أو استكملت بواسطة عملية جراحية أو طبية.

The judge makes the law speak

In general, the examination of the rare court decisions on the question of sex change makes it possible to classify them in two categories. On the one hand, there is the issue of spontaneous sexual mutation that occurs “naturally” to the transgender person. On the other hand, there is the category that contains the cases relation to a sex change intervened or completed by the surgical or medical way.
The case of spontaneous sexual mutation occurred “naturally”

About the first category, the courts welcome requests to change the legal sex following the mutation of the biological sex. The judges nevertheless show the highest vigilance in this regard. In this sense, they seek to verify that the sex change has ended in a completely natural and autonomous manner in ways that escape the will of the individual. The surgical intervention or the medical accompaniment are in this respect appreciated with the most extreme mistrust. If the person concerned has resorted to it, it must be justified by a vital necessity, with a curative purpose and not with a view to modifying the initial sex.

The case of the sex change intervened or completed surgically or medically

On the other hand, regarding the second category, the one containing the decisions relating to a sex change made voluntarily or completed by surgery, the Tunisian judges display an infallible intransigence and systematically refuse any request of modification of the civil status certificate. The reasoning of the judges is remarkable. It stands out for its lack of coherence and weak legal arguments. In a sort of total confusion between the sources of Tunisian material law, the courts invoke the Qur'an, Sunnah, traditional values and cultural belonging to the Arab-Muslim
world. Invoking a kind of civilizational divergence, Tunisian judges oppose this cultural identity to the Western world, which is too liberal in their eyes when it is about the autonomy of the individual's will. In addition to their argumentation, the courts use vague notions with evasive contours that are difficult to define. In this sense, allusions to public morals and good mores jostle and intertwine without convincing.

Two major conclusions must be drawn from this whole mess. The first is that Tunisian judges experience a real legal discontent concerning the issue of sex change. This is explained by the lack of legislation on the subject on the one hand, and the incompetence of the judge to properly assume a creative role of the law on the other hand. The second conclusion, which is an extension of the first, is that it is urgent to find adequate solutions to this situation, which is legally unacceptable.

The exploratory phase

In this respect, a comparative and prospective look at foreign legislations is particularly rich in education. At the very least, it demonstrates that it is possible to reach a compromise between respect for individual freedoms and the protection of public order, between legal certainty and the autonomy of the will, between the non-

الثقافة للعالم الغربي، باعتباره مغال في التحرر خاصة من ناحية استقلالية إرادة الأفراد. ولدعم حججهم، تلجأ المحاكم إلى مفاهيم فضفاضة صعبة الحصر والتحديد. وعلى هذا الأساس، تتدافع هذه العبارات وتتدخَّل دون أن تقنع لتكون إشارات تحل إلى الآداب العامة والأخلاق الحميدة.

ويمكن أن نستمدّ نتائجتين اثنين من خلال هذا الخلط. أولها، أن القضاء التونسيين يعيشون مشكلا قانونيا حقيقيا بخصوص مسألة تغيير الجنس. ويمكن أن يفسّر هذا المشكل بالفراغ التشريعي فيما يتعلق بالمسألة من جهة وبعدم قدرة القاضي على لعب دور، كمصدر من مصادر القانون، كما ينبغي، من جهة أخرى. أما النتيجة الثانية التي نستمدّها، والتي تعتبر استمرارا للنتائج الأولى، هي أنه من المستعجل إيجاد حلول مناسبة لهذه الوضعية التي تعتبر قانونيا غير مقبولة.

المرحلة الاستكشافية

حاولنا خلال هذه المرحلة، أن نستفي عدد الدروس من خلال نظرة مقارنة واستنباطية للتشريعات المقارنة. فيمكن، عن أقل تقدير، إيجاد حل وسط يوفق بين احترام الحريات الفردية وحماية النظام العام، بين السلمة القانونية واستقلالية الإرادة، بين عدم التصرف في وضعية الإنسان وحق تصرّف الإنسان بحرية في جسده، بين وجوه احترام جسد الإنسان والحق في اختيار الهوية الجندرية أو كذلك الحق بكل بصمة، في العيش بكرامة. فإذا كانت المثال الإسباني، الارجنتيني المالطي، الايرلندي، أو حتى الفرنسي، أمثلة قيمية في هذا الصدد، فإننا على وعي بأنها سوف
availability of civil status and the right to freely dispose of one’s body, between the obligation of respect for the human body and the right to choose one’s gender identity, or simply the right to live in dignity. If the Spanish, Argentine, Maltese, Irish or French examples are valuable sources in this respect, it must be admitted that they expose themselves to criticism of the civilizational conflict. The Iranian example has been called to the reinforcement. At the very least, it denotes that the barrier of religion is not an impassable obstacle if the political will is used in the effort of interpretation of the sacred texts.

In the light of all these elements, a draft of solutions adapted to the specificities of the Tunisian context has been proposed. It deals with the issue of sex change from two different angles.

The need to improve the minors’ legal framework

First, there is a proposal exclusively for the minor’s case. Then there is a suggestion of a solution specific to the case of the major. The two do not really face the same types of difficulties. In the case of the newborn, the problem mainly affects children born intersex or suffering from a sexual ambiguity, which would be likely to taint the identification of its true sex.
within the legal deadlines which follow the birth. These delays being relatively short, namely ten days from birth, it is therefore to be feared the occurrence of a material error of classification engendered by hurry. Such an error is more to be feared because it can manifest itself at a relatively advanced age of the minor following a spontaneous mutation of the anatomical sex. In either case, it is the best interest of the child that is sacrificed. The very one that the Constitution in its article 47 and the Code of Child Protection intends to consecrate and defend vigorously.

Therefore, two tracks inspired by comparative law were considered. The first, of Germanic origin, consists in not indicating the sex of the newborn in the register of births in case of doubt. The interested party can be classified as belonging to the neutral sex until he or she can choose thereafter by himself or herself. However, such a solution seems incompatible with the Tunisian context. Inevitably, it would come up against a multi-secular socio-legal system built entirely on the logic of the binarity of the sexes. For the sake of rationality, it is almost impossible to imagine that such a system could admit any exception to this dichotomy of the human race.

The track must be abandoned. The second track, inspired by the French example, is more promising. It consists in suspending the mention...
of the sex of the newborn in case of uncertainty of the doctor or when a sexual mutation is to be feared in the future. However, the solution remains to be perfected if only in the light of the principle of legal certainty. A numerical estimate of the lengthening of the deadline of the sex determination must indeed be established.

The need to create a legal framework for adults

For adults, the solution envisaged requires more active legislative intervention. In this case, it consists in consecrating a real recognition of the right to self-determination for the benefit of individuals as to the choice of their gender identity. A more extensive place must be granted to the autonomy of the will in the Tunisian legal order so that it opens to the possibility of a change of anatomical sex under certain conditions that the law would define. Such a change will therefore have to pave the way for updating the mention of legal sex. To do this, it is fundamental to overcome the logic of pathologizing developed by Tunisian judges. Instead, we need to consider the evolution of scientific knowledge on issues related to sexual indeterminacy. In this respect, spectacular advances in the world of medicine and psychiatry have been recorded in recent years. It would be wise to integrate them into the training of judges. In terms of legal assembling, the Tunisian legislator can draw inspiration from

إعداد إطار قانوني بالنسبة للأشخاص الراشدين

إعداد إطار قانوني بالنسبة للأشخاص الراشدين، فالحل المقترح هو إزالة إجراء تعديل تشريعي، ويقتضي هذا التعديل تكريس اعتراف قانوني حقيقي لحق الأشخاص في تحديد هويتهم الجنسية. ولذلك يجب إتاحة مجال أوسع لاستقلال الإرادة صلب النظام القانوني التونسي بطريقة تعطي إمكانية تغيير الجنس البشري وذلك بعد الاستجابة لبعض الشروط التي يضبطها القانون، يجب أن يفتح هذا الخيار لإمكانية تغيير الهوية الجنسية القانونية.

وفيما يتعلق بعامة الأشخاص، فإنه من الممكن وضع شرطين وهما: قدرة وعزوبية طالب التغيير، فعلى المستوى الطبي، يمكن للمعني طلب الحصول على إثبات عدم مطابقة الجنس البيولوجي عند الولادة للجنس الذي تم اكتسابه لاحقًا. وعلى هذا الأساس، يمكن أن يتم العمل أولاً على بتعليق عملية تغيير الجنس وذلك شريطة تقديم فحص طبي يؤكد وجود عدم
his French counterpart to develop a solution specific to the Tunisian context. In this sense, he may require the meeting of a whole series of conditions to grant the possibility of a change of sex.

Regarding the conditions relating to the person’s status, the legislator may impose the dual condition of the applicant’s capacity and celibacy. From the medical point of view, he can demand proof of a discrepancy between the initial biological sex and the sex acquired by the person concerned. In this sense, he could first suspend sex reassignment on the condition of providing a medical diagnosis of the existence of a persistent dissonance between the morphological sex under which the applicant was originally enrolled and the identity of gender he feels. In other words, it is necessary that the person concerned is really suffering from a gender dysphoria. Cumulatively, he could then suspend the change of legal sex on the condition of the applicant’s submission to a process of irreversible transformation of his physical appearance. Without going so far as to require sterilization or removal of the genitals to reassign the anatomical sex surgically, this condition would simply require the applicant to seriously initiate the process of sex reassignment through hormone therapy.
Finally, the whole procedure could be under the control of the judge. A posteriori, by requiring a judicial authorization of sex change and by making the new biological truth agree with the corresponding legal fiction. Furthermore, in order for this whole arrangement not to run counter to the imperative of preserving legal certainty, it should be limited by the principle of the irreversibility of the change of legal sex. Any request subsequent to the modification of the assigned sex to cover the original sex is to be proscribed.

Such a solution is otherwise tenable considering the benefits it entails. First, regarding constitutional law, it would adjust national law to the new Constitution. In that sense, it would guarantee individual freedoms and help to abolish discrimination against intersex people. Secondly, under international private law, it will have the advantage of preventing mass production of lame statutes. Incidentally, it would harmonize the Tunisian legal system with comparative legislations consecrating a policy clearly marked by respect for individual freedoms and resolutely turned towards scientific progress. Finally, from the point of view of family law, such a solution will have the advantage of helping to preserve the heterosexual nature of marriage.

It would thereby help to make the entire Tunisian
legal system more coherent.

It remains to emphasize that such a proposal, although attractive, cannot be achieved in the immediate future.

It will undoubtedly require a period of maturation and elaboration that may be relatively long. However, the situation of transgender people living in Tunisia being a real humanitarian tragedy, it is more than urgent to offer them a backup solution that would be able to guarantee them access to their most basic rights. That is why it was proposed to resort to a solution whose implementation does not require a major upheaval of the current legislative system, nor a questioning of the current scheduling of the rules relating to civil status. It simply consists in the partial erasure of the mention of the sex of the documents of immediate identification of the individuals. This mention remains otherwise beautiful and well preserved in the documents of identification on the acts of civil status to which the access is restricted to the administrative acts of greater scale.