

The MENA Trans Archives Series: Understanding the Judicial Directions & Practices on Legal Gender Recognition in the Middle East and North Africa Case Law

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April 2024



القاهرة ٥٢

للأبحاث القانونية

CAIRO 52

LEGAL RESEARCH INSTITUTE

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Design and Layout: Omar Nouraldin

Publication Date: April 2024

Suggested Citation:

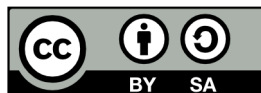
Nora Noralla, The MENA Trans Archives Series: Understanding the Judicial Directions & Practices on Legal Gender Recognition in the Middle East and North Africa Case Law, Cairo 52 Legal Research Institute, April 2024

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Abstract



There is a significant gap in Middle Eastern and North African (MENA) legal scholarship regarding legal gender recognition, which leads to a lack of understanding regarding how this issue is addressed by law and policy in the region. This study is overcoming this gap by providing the first comprehensive analysis of case law on legal gender recognition in the MENA region. The author investigates the human right of legal gender recognition for transgender individuals by analysing 22 judgments, encompassing 19 cases in 10 MENA countries. The aim is to establish a unified framework of legal arguments used in these judgments in support of and against granting legal gender recognition. Given the absence of legislation explicitly addressing legal gender recognition in the MENA region, civil status courts typically handle requests for legal gender recognition. Changing one's name and sex in civil registry entries is considered a civil status issue, and religious references, such as Islamic Sharia, are used as a guiding reference for judges when adjudicating cases where no specific law exists, such as legal gender recognition. Islamic scholars do not view transgender individuals as entitled to gender-affirming healthcare and subsequent legal gender recognition, as they believe it is only a mental disorder and not a biological illness. Therefore, transgender individuals are not considered to have the medical necessity required to justify an exception to the prohibition on altering Allah's creation. This, combined with other legal arguments related to morality, the validity of gender identity disorder, and family status, has led to the majority of cases (14 out of 19) resulting in unfavourable outcomes. Meanwhile, only four cases have had favourable outcomes, based on legal arguments that support a pathologisation narrative, recognising gender identity disorder as a valid reason for undergoing gender-affirming healthcare and subsequent legal gender recognition. Thus, it is evident that the right to legal gender recognition for transgender people is still absent in the region. This study aims to initiate a legal discourse within the legal community in the region regarding strategies for future legal advocacy. This discourse aims to bring about reforms in judicial positions on the issue and promote enhanced recognition of transgender individuals.

Introduction



The recognition of legal gender is widely regarded as a fundamental human right that should be afforded to all individuals, regardless of their nationality. This right holds particular significance for transgender individuals, who often perceive legal gender recognition as the culminating step in their transition process. However, implementing legal gender recognition policies and laws lacks consistency worldwide. Although transgender activists and their supporters advocate for a model that is based on the principle of self-determination, whereby medical diagnoses or surgical and hormonal interventions are not obligatory criteria, this approach remains a minority viewpoint globally.¹

Only a few countries, such as Argentina and Malta, have adopted such principles. In contrast, the majority of countries condition legal gender recognition upon the pathologisation of transgender individuals, considering them to have a mental disorder rather than an innate identity. Consequently, in these countries, transgender individuals must undergo extensive therapy, be diagnosed with Gender Identity Disorder (GID), and undergo complete hormonal and surgical interventions in order to attain legal gender recognition.²

The Middle East and North Africa region is predominantly characterised by a third category of countries that explicitly prohibit legal gender recognition through judicial precedent and practice. Only a few exceptions exist, such as in Lebanon, where transgender individuals can undergo legal gender recognition via a judicial process. Unlike regions with specific laws and policies governing legal gender recognition, the Middle East and North Africa rely on more general laws concerning correcting personal information in civil registry entries, requiring judicial approval in most cases.³

As legal gender recognition pertains to the alteration of essential personal identification information, it is considered a civil status matter. Consequently, decisions on legal gender recognition are heavily influenced by Sharia law, which significantly guides judges' judgments. Each country in the region applies some form of Sharia law, with countries like Egypt, Tunisia, and Jordan primarily employing it for civil status matters while adopting Western-style French or British positive law for other legal issues. Conversely, countries such as Saudi Arabia, Yemen, and Libya possess a Sharia-based legal system that extends beyond civil status matters into other legal domains.⁴

The dominion of Sharia as a legal source and practice for civil status matters in the region can be traced back to the Tanzimat period in the 19th century, during which the Ottoman Empire underwent significant transformations in its legal system⁵. These adjustments limited the role of religion—whether Islam, Christianity, or Judaism—to civil status matters while incorporating Western positive law to govern other issues. Similarly, throughout the 20th century, both during and after colonisation, numerous countries in the region adopted comparable legal systems, wherein religion predominantly served as a reference solely for civil status matters. Furthermore, all countries in the region adhere to a basic legal principle that judges should consult religious references to guide their rulings on civil status matters in the absence of specific positive law on an issue⁶.

Thus, the right of transgender individuals to legal gender recognition in the region is effectively governed by religious principles. Given that the majority of the population in the region identifies with Islam, particularly Sunni Islam, Islamic principles and interpretations regarding transgender identities

1 Castro-Peraza, Maria Elisa, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, Maria Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé, and Nieves Doria Lorenzo-Rocha. "Gender identity: The human right of depathologization." *International journal of environmental research and public health* 16, no. 6 (2019): 978.

2 Lau, Holning. "Gender recognition as a human right." *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (2020)., UNC Legal Studies Research Paper (2018).

3 Noralla, Nora. 2022. '[Confused Judiciary & Transgender Rights: Inside the MENA Region's Case Law on Legal Gender Recognition](#)'.

4 Carlisle, Jessica, and Jessica Carlisle. "Muslim Divorce in the MENA: Shari'a, Codification, State Feminism, and the Courts." *Muslim Divorce in the Middle East: Contesting Gender in the Contemporary Courts* (2019): 1-31.A

5 Bozkurt, Gülnihal. «The reception of western European law in Turkey (From the Tanzimat to the Turkish Republic, 1839-1939).» (1998): 283-295.

6 Dupret, Baudouin, Adil Bouhya, Monika Lindbekk, and Ayang Utriza Yakin. 'Filling Gaps in Legislation: The Use of Fiqh by Contemporary Courts in Morocco, Egypt, and Indonesia'. *Islamic Law and Society* 26, no. 4 (2019): 405–36. <https://doi.org/10.1163/15685195-00264P03>.

play a significant role in how courts adjudicate on this matter. In the 1980s, Islamic scholars became concerned about the availability of gender-affirming healthcare, as they viewed it as a potential threat to their heteronormative binary concept of jurisprudence (Fiqh) unless it was regulated. Many Islamic Fiqh rules are based on the notion that Allah created individuals in pairs: female and male, each with distinct roles. As a result, prestigious Sunni Islamic authorities such as Al-Azhar in Egypt and the Islamic Fiqh Council, as well as Shia scholars like Ruhollah Khomeini of Iran, have issued and continue to issue religious rulings (Fatwas) on this matter since the 1980s⁷.

The argument presented by both parties is straightforward: Allah's creation is perfect, and as His servants, we must accept it without attempting to modify it in any way, as such changes are strictly prohibited. However, a crucial Fiqh rule stipulates that necessities allow what is otherwise prohibited.

Therefore, individuals with a medical necessity can undergo procedures to change their sex. When applying this to transgender individuals, both Sunni and Shia scholars agree that transgender individuals have a mental disorder, as the medical community commonly termed it in the 1980s. The proposed treatment options vary, with Khomeini advocating for transgender individuals to be allowed gender-affirming healthcare once a competent doctor confirms that it is necessary⁸.

The Sunni perspective, however, emphasises that a mental disorder can only be treated through therapy, not surgery. Therefore, transgender individuals are prohibited from undergoing any surgeries that may lead to a change in their sex, as they do not have a biological justification for it. Nevertheless, both parties seem to agree on one crucial point: transgender individuals cannot be recognised as a separate identity outside the binary framework. Rather, they are expected to undergo mental or surgical treatment in order to fit into the binary system and not undermine the heteronormative Fiqh adhered to by scholars. Given that most Arabic-speaking countries in the MENA region have a Sunni majority or rely on Sunni Islam as the reference for their civil status laws, it is unsurprising that the right to legal gender recognition is denied to transgender individuals based on Sunni logic⁹.

The present study investigates the argumentation utilised in case law concerning legal gender recognition, both in favour of and against it. This will be accomplished by analysing 22 judgments from diverse regional jurisdictions. The objective is establishing a cohesive theory and comprehend how courts engage with these requests, relying on civil, moral, social, and religious arguments to render judgments.

For more information on the Fiqh developed that is used by the Courts, please consult this publication's sister study: [“The MENA Trans Archives Series: Understanding Modern Fiqh on Intersex and Transgender People in the Middle East and North Africa Region.”](#)

7 Noralla, N., 2023. Gender Trouble in the Land of the Nile: Transgender Identities, the Judiciary and Islam in Egypt. *Yearbook of Islamic and Middle Eastern Law Online*, 1(aop), pp.1-37.

8 Tolino, Serena. "(g) Transgenderism, Transsexuality and Sex Reassignment Surgery in Contemporary Sunni Fatwas". *Journal of Arabic and Islamic Studies* 17 (2018):223-46. <https://doi.org/10.5617/jais.6116>.

9 Alipour, Mehrdad. 'The Nexus between Gender-Confirming Surgery and Illness: Legal-Hermeneutical Examinations of Four Islamic Fatwas'. *Journal of Middle East Women's Studies* 18, no. 3 (1 November 2022): 359–86. <https://doi.org/10.1215/15525864-10022132>.

1.1 Note On Language and Terminology

While the author has chosen to use more progressive language in this study regarding transgender issues, it is essential to note that this language does not reflect the actual language used in the case files by the judiciary, lawyers, or even the plaintiffs themselves. Given the fact that law and policy in the region are based on rigid socio-religious heteronormative structures, it should not be surprising that words such as gender, transgender, or gender-affirming healthcare do not actually exist within official circles. Instead, I will provide a brief glossary of key terms that exist in the case files examined for this study.

Sex Identity Disorder (*āḍṭrāb ālhwyṣ ālḡnsyṣ*): Instead of gender identity disorder, the word “gender” is replaced with “sex,” reflecting the desire of the judiciary and others in the region to prioritise biological sex over the notion of gender identity. In official circles, sex is seen as a fixed biological concept, while gender identity is considered fluid, a concept that is not accepted.

Sex Change/Transition (*tḡyr ālḡns/ thwl ālḡnsy*): These are the official terms used to refer to gender-affirming healthcare for transgender people in the case files. The term “change” is used to reflect the Fiqh rule that prohibits changing Allah’s creation. Therefore, when referring to someone as undergoing a “sex change,” it indicates that the procedures are not permissible from an Islamic Sharia perspective.

Sex Correction (*tṣhyḥ ālḡns*): In contrast to sex change, sex correction is mainly used to refer to sex reassignment surgeries undergone by intersex people. People in positions of power within law and policy in the region view intersex individuals as having a biological, medical necessity to undergo treatments that would result in changing their sex. In contrast, transgender people are considered to have only a mental illness that does not constitute a medical necessity for such procedures. The use of the term “correction” in opposition to “change” is also symbolic, as changing Allah’s creation is prohibited, but correcting it for medical reasons is accepted.

Transsexual (*mthwl ḡnsyā*): Similar to the case with gender identity disorder, the term “transgender” is not used. Instead, the term “transsexual” is employed to reflect a person transitioning from one binary sex to another rather than someone who will develop a gender identity outside the binary.

Methodology and Visualisation of Data

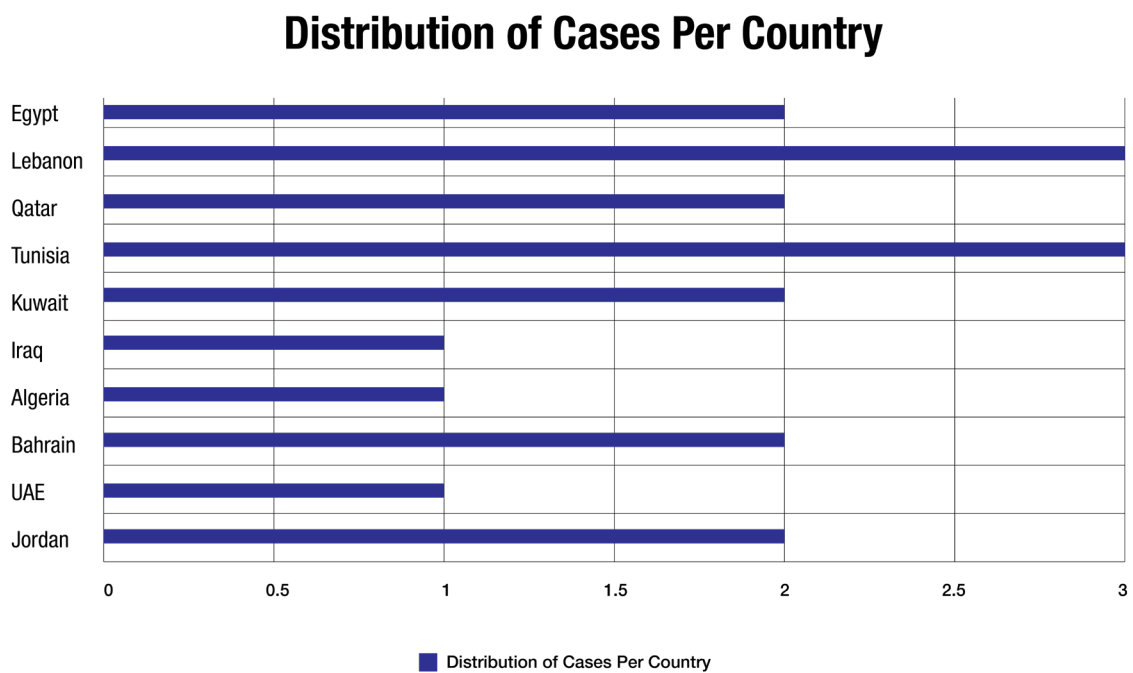


The research presented herein forms part of the MENA Trans Archive project, the first open-access database focusing on transgender law, Fatwas, policies, and case law within the Middle East and North Africa (MENA) region. All cases discussed in this research can be accessed via Cairo 52’s website. The author reviewed pertinent primary and secondary legal documents pertaining to legal gender recognition in the region. It should be noted that legal judgments are generally not openly accessible and are typically not published online in most countries within the region.

Consequently, the author collected information from secondary and primary sources to overcome the challenge of obtaining judgments for this research. In certain instances, direct communication with individuals involved in the cases, such as lawyers or plaintiffs, was necessary to obtain judgments. Alternatively, the author utilised media reports and legal commentary on cases as secondary data sources. The author identified a total of 28 judgments relating to legal gender recognition. Upon closer examination, it became evident that six of these judgments pertained to individuals who are intersex rather than transgender.

Consequently, these judgments were excluded from the study. The remaining 22 judgments represented 19 cases from 10 different countries. Notably, Lebanon and Tunisia had the highest number of cases, with three cases each, followed by Egypt, Qatar, Kuwait, Bahrain, and Jordan, each with two cases. Algeria, Iraq, and the UAE had one case each.

Figure 1: Distribution of Cases Per Country (N=19)



The litigation systems regarding civil status in the region vary from country to country. Some countries have a two-stage litigation process, while others have a three-stage process. The term “litigation degree” refers to the level of Court responsible for issuing a judgement and can be categorised as follows: First degree includes Courts of First Instance/Civil Status Courts, second degree includes Court of Appeals/High Courts/Supreme Courts, and third degree includes Court of Cassation. Of the 22 identified judgements, 45.5% (N=10) were issued by First Degree Courts, 36.3% (N=8) by Second Degree Courts, and 18.8% (N=4) by Third Degree Courts.

Figure 2: Distribution of Judgements Per Litigation Degree (N=22)

Distribution of Judgements Per Litigation Degree



Regarding the outcome of the 19 cases, a favourable outcome is in the minority, with only 21.05% (N=4) of cases receiving a positive outcome granting legal gender recognition as the final outcome. 10.52% (N=2) of cases had a positive outcome in the First Degree, but the authorities appealed the judgment, resulting in it being overturned and legal recognition rejected. 5.2% (N=1) is the case that received an unfavourable judgment from the first-degree Court rejecting the plaintiff's legal gender recognition. An appeal by the plaintiff was filed, and a final judgment has yet to be received. The majority of cases, 63.15% (N=12), received outright rejection through all litigation degrees. Thus, a total of 73.67% (N=14) of the cases had an unfavourable outcome, with the plaintiffs' requests for legal gender recognition being rejected.

Figure 3: Distribution of Cases Per Outcome (N= 19)

Distribution of Cases Per Outcome



Interestingly, there are two noticeable trends when examining the years in which the judgments were issued. 18.8% (N=4) of judgments were issued by courts in the late 1980s and 1990s when gender-affirming healthcare was still emerging in the region. 68.18% (N=15) of judgments were issued post-2010, with all but one being issued in the past decade. Only 13.6% (N=3) were issued between those periods, all belonging to a single case in Kuwait that underwent three litigation stages. The gap between these periods can be explained by the moral panic towards LGBTQ+ identities that occurred in the 2000s. This decade saw many advances in LGBTQ+ rights globally and gender mainstreaming efforts. In the region, transgender people were quickly labelled as a Western invention, immoral crossdressers, and a threat to public and social order. This moral panic started to fade in the 2010s, only to resurface in recent years with conservative actors in the region recycling rhetoric familiar in the early 2000s, claiming that LGBTQ+ identities are a Western influence corrupting Arab youth¹⁰.

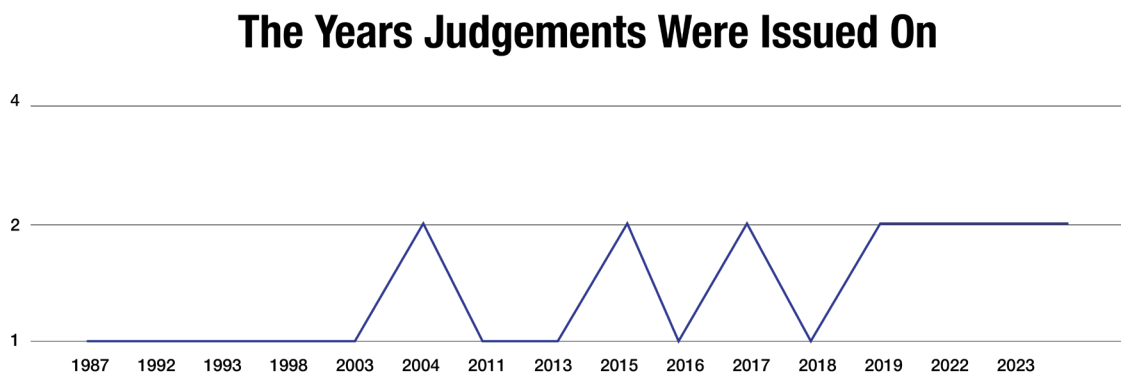
Moreover, gender-affirming healthcare was very limited in the region, meaning that only individuals with sufficient financial resources could access it in the 1980s, 90s, and early 2000s by travelling

¹⁰ Noralla, Nora. «Sexually Guilty: Custom Morality and the Prosecution of the LGBTQ Community in Egypt.» PhD diss., Central European University, 2021.

abroad. It is evident that given the negative outcome of some of the early cases (only one case was accepted in Lebanon) and the increasing anti-transgender atmosphere, many transgender people who were privileged enough to undergo gender-affirming healthcare abroad also chose to relocate instead of attempting to obtain legal gender recognition through an emotionally draining, expensive, and uncertain judicial process. The increase in judgments in the past decade can be attributed to the growing global accessibility of gender-affirming healthcare, allowing middle-class transgender individuals to access such services in countries like Thailand, Germany, Austria, and even locally in countries such as the UAE, Lebanon, and Egypt¹¹.

Thus, the relatively small number of judgments in the past decades can be attributed to the overall adverse outcomes in legal gender recognition cases, which deter transgender individuals from seeking recognition. Other factors include the absence of national gender-affirming healthcare and its financial burden to undergo treatment abroad, the growing anti-transgender legal and social atmosphere in the region, and the ongoing campaign to criminalise gender-affirming healthcare for transgender people. Currently, six countries - Egypt, Jordan, Oman, UAE, Saudi Arabia, and Kuwait - have passed laws or policies that prohibit healthcare providers from offering gender-affirming healthcare to transgender individuals. Since it is customary in the region for courts to only review cases of transgender people who have completed full medical transition, those who cannot or do not want to undergo the complete transition are left with limited options but to immigrate abroad in order to live everyday life in their true gender identity¹².

Figure 4: Years Judgements Were Issued On (N=22)



11 Noralla, Nora. «Tough territory for transgender people in the Middle East and North Africa.» Human Rights Watch 8 (2022).

12 Noralla, Nora. «Access Denied: A qualitative Study on transgender health policy in Egypt.» Social Science & Medicine (2024): 116867.

Legal Reasoning Discussion



As mentioned previously, the issue of legal gender recognition is not explicitly addressed in the positive law of any country in the region. Consequently, the responsibility for such matters typically falls within the purview of civil status codes, which have gradually developed distinct legal reasoning and practices to handle these cases. In this section, I present an analysis of the primary legal arguments supporting and opposing legal gender recognition in cases of gender recognition. The aim is to understand the commonalities among the various legal rationales employed by different courts in the region. Despite differences in their legal systems, courts in the region generally adhere to a unified legal logic and practice regarding these cases.

3.1 Cases with Favourable Outcome

Only three countries, namely Iraq, Tunisia, and Lebanon, have successfully granted legal gender recognition to individuals belonging to gender minority groups. Lebanon stands out as the only country where legal gender recognition has been granted in multiple cases. An in-depth analysis of the judgments in these cases reveals distinctive arguments the courts employ to justify their decisions.

A. The Rule of Irreversibility: One fundamental justification used by the courts in these cases is the fact that the plaintiffs have undergone complete hormonal and surgical interventions, rendering it impossible for them to “return” to their assigned sex. This rule is derived from early European case law on legal gender recognition, particularly from the French Court of Cassation, which established this condition for granting legal gender recognition.

B. The Rule of Adaptability: Another justification cited by the courts is that the plaintiffs have taken measures to conform to the socio-religious heteronormative standards of the gender to which they have transitioned. An excerpt from case No. 12304/2018, heard in the Tunis Court of First Instances, exemplifies this approach:

“The plaintiff has consistently maintained a masculine appearance by keeping short hair and wearing a binder. Additionally, the plaintiff is in a committed relationship with a woman and is engaged. The plaintiff reports engaging in sexual activity, with satisfactory functioning of their male reproductive organs.”

C. The Rule of Medical Necessity: Before considering legal gender recognition, courts in these cases require the establishment of the medical validity of gender identity disorder as a “mental disorder” warranting gender-affirming healthcare and subsequent legal gender recognition. Consequently, medical experts are called upon to provide medical examinations and extensive records demonstrating the plaintiff’s attempts to address their disorder through therapy. Only when therapy fails as a viable option, thereby leaving no alternative but to pursue gender-affirming healthcare in order to fit within the socio-religious heteronormative framework, does the Court consider legal gender recognition? An expert quoted in Appeal No. 1123/2015, heard in the Beirut Court of Appeals, accentuates this aspect:

“The plaintiff has provided documentary evidence indicating a longstanding history of gender identity disorder since childhood, during which intensive therapy proved ineffective. Consequently, gender-affirming healthcare was recommended as a treatment.”

D. Maintaining Social Morals & Order: One essential justification employed by the courts is the potential disruption of social morals and public order if legal gender recognition is not provided to individuals who have transitioned and now exhibit physical and social attributes of the opposite sex. According to the courts, a person’s physical reality must align with their documented reality in civil registry entries to avoid confusion and immorality. For instance, if two individuals with same-sex characteristics were to marry each other due to one individual being officially registered as the opposite sex, this would be contrary to societal norms. This approach also builds on a fair balance doctrine, a legal doctrine where the Court has to examine if the rights of individuals should be restricted for the greater good of society. In legal gender recognition cases, Courts argue that granting this right is actually for the greater good of the society, as it works to maintain its socio-religious heteronormative structures. Case No 934/2011 from the Kirkuk Court of First Instance highlights the significance placed on this issue, particularly about the plaintiff’s marital status:

“The plaintiff’s marriage must be declared null and void by the respective authorities, as after transitioning from male to female, she is no longer legally married to a person of the same sex. This violates Iraqi law and renders their marriage invalid.”

E. Religious Validity: As previously mentioned, civil status judges in the region must rely on religious references to guide their judgment in cases without codified law. It is worth noting that except in Lebanon, where the civil courts responsible for correcting civil registry entries operate more on a secular basis due to the sectarian nature of the country. In two cases from Tunisia and Iraq, religion was invoked to allow legal gender recognition for the plaintiffs. Interestingly, the Iraqi case involved the only Christian plaintiff identified by the author. Consequently, the Kirkuk Court consulted the high council of the Chaldean Catholic Church, to which the plaintiff belonged. The council stated that they did not object to the plaintiff's transition, and based on this, the Court granted legal gender recognition. In the Tunisia case, Sunni Islam was invoked, but the Court attempted a new interpretation to allow legal gender recognition and affirm healthcare rights. It emphasised that the plaintiff had a medical necessity and had even attempted suicide before undergoing gender-affirming healthcare. Thus, the plaintiff's medical condition necessitated an exception to the prohibition on altering Allah's creation. An excerpt from Case No 12304/2018 from the Tunis Court of First Instances illustrates this approach:

"When the conditions are met in a particular case, the prohibition can be lifted. The first condition is that the patient has attempted to adapt but failed. The second condition is that they have sought treatment. The third condition is that they face serious harm, potentially leading to death, due to treatment failure."

3.1.1. Case Study: Tunis Court of First Instance Case No 2304/2018

Case number 12304/2018, with the judgement issued on July 9 2018, is an anomaly within the Tunisian judiciary's stance on legal gender recognition. Previous cases, such as Appeal No 10298/1993, as well as subsequent cases, like No 36646/2023, have rejected legal gender recognition based on dominant Sunni interpretations that prohibit transgender individuals from accessing gender-affirming healthcare and subsequently obtaining legal gender recognition. In addition, this case represents the plaintiff's second attempt at securing legal gender recognition after their initial attempt was denied by the Court of First Instance in Sousse in 2010.

The plaintiff, a transgender man, reported experiencing gender dysphoria since the age of 12 and has been presenting as male while rejecting their assigned female characteristics since that time. The plaintiff pursued further education in Germany, where they began psychotherapy in 2004 for two years. Subsequently, in 2006, they underwent a mastectomy and, later, in 2009, a hysterectomy. The plaintiff has also obtained court orders from German courts to change their gender marker from female to male legally. Additionally, the plaintiff disclosed ongoing hormone replacement therapy, receiving testosterone injections every three months. While the plaintiff can engage in sexual relationships, it should be noted that they do not produce sperm due to the absence of testicles. Thus, the plaintiff emphasised that their desire to transition is authentic and not an artificial inclination, as it is grounded in years of suffering from gender dysphoria.

Given the absence of specific legislation on this matter, the courts attempted to establish a framework for examination. Firstly, the Court sought to evaluate the validity of gender dysphoria as a genuine condition that can lead to the expressed circumstances presented by the plaintiff. To accomplish this, the Court ordered expert evaluations from Razi Psychiatric Hospital and Charles Nicolle Hospital to thoroughly examine the plaintiff and review their medical history. The objective was to determine whether the plaintiff's condition warranted the necessity for gender-affirming healthcare. These experts diagnosed the plaintiff with "Transsexualism," characterising it not as a mental disorder but rather as a profound desire to live as the opposite sex. It was further clarified that this desire was not solely to imitate but rather to undergo a complete transition and acquire the corresponding physiological and social characteristics of the opposite sex. Secondly, the Court also sought to ascertain the potential reversibility of the changes undergone by the plaintiff, aiming to apply the principle of irreversibility to the case. The medical reports confirmed that the plaintiff had permanently lost their female characteristics as a result of the medical procedures they underwent, thus representing a typical case of "Transsexualism." In such cases, the original sex characteristics are substituted with new ones corresponding to the desired gender, as observed in the plaintiff's situation.

Thirdly, after receiving medical reports confirming the plaintiff's medical necessity for transitioning, the Court attempted to analyse the matter from an Islamic Law perspective. The Court applied the principle of "necessities allow what is otherwise prohibited" to the plaintiff's medical condition to establish the need for their treatment. It emphasised that the plaintiff turned to surgical and hormonal interventions for transitioning only after all other attempts at therapy had failed, leaving them with no alternative but to seek gender-affirming healthcare. The Court also highlighted that the plaintiff had attempted suicide on two separate occasions in 2009 and 2004 due to the mental distress caused by their female physical characteristics, which they strongly rejected. Therefore, the Court determined that there existed a genuine medical necessity for the plaintiff to undergo gender-affirming healthcare in order to protect them from harm, distress, and mental suffering.

Fourthly, the Court relied on international medical and legal standards about legal gender recognition and gender-affirming healthcare. It cited a judgment from the French Court of Cassation on December 11, 1992, which granted legal gender recognition to transgender individuals as long as the change was complete and irreversible. Additionally, the Court referred to the European Court of Human Rights

rulings in the cases of *Goodwin v. United Kingdom* (2002) and *B. v. France* (1992), underscoring that denying legal gender recognition to transgender individuals who had fully transitioned contravened Article 8 of the European Convention, safeguarding the right to privacy. Lastly, the Court associated gender-affirming healthcare with the right to privacy protected by international treaties that Tunisia had ratified, such as Article 17 of the International Covenant on Civil and Political Rights, along with similar safeguards outlined in Article 24 of the Tunisian Constitution.

Hence, in this case, the Tunis Court of First Instance employed all the arguments above to grant legal gender recognition. It concluded that the plaintiff had been living and presenting as male for a significant period, their transition was irreversible and complete, their condition necessitated medical intervention, Islamic law sanctioned it due to the necessity, and additional justifications were drawn from civil law, the Constitution, international human rights treaties, and jurisprudence from other jurisdictions.

3.2. Cases with Unfavourable Outcomes

Most cases analysed in this study concluded with an unfavourable outcome, with legal justifications primarily revolving around Sharia, public order, and morality. Common legal arguments often result in the rejection of legal gender recognition beyond Islamic Sharia.

A. Chromosome Trap: More of a method than a justification, the Courts typically employ this approach to determine whether an individual is intersex, i.e., having a biological condition that requires medical treatment and subsequent legal gender recognition to fit into the binary, or if they are a transgender person who is not permitted to undergo gender-affirming healthcare under Sharia. The Courts utilise the test in cases involving transgender individuals who have undergone complete physical, medical, and social transitions, as intersex and binary female and male chromosomes can be uniquely identified. A forensic report from Case No. 3867/66 J.Y. from Alexandria Administrative Court in Egypt states:

“We have found that while the plaintiff has obtained the outer physical characteristics of a female, they are biologically male, as they possess male (XY) chromosomes rather than female (XX) chromosomes.”

B. Medical Records: Courts often rely on the absence of documented medical records that showcase the plaintiff suffering from an incurable gender identity disorder (GID), thereby justifying their decision to deny gender-affirming healthcare and legal gender recognition. An excerpt from an expert at the Qatar Court of First Instance and Appeals in Case No. 690/2016 & Appeal No. 202/2017 reveals:

“Upon attempting to obtain the plaintiff’s medical records from the Hamad Medical Corporation in Doha, there was no recorded medical history of the plaintiff being treated for gender identity disorder, intersexuality, or any other conditions that would necessitate surgery.”

C. Gender Identity Disorder Validity: A vital argument put forth by the Courts is the validity of GID as a medical condition that necessitates gender-affirming healthcare. The Courts often dismiss GID as a merely emotional and mental condition that can be easily cured through therapy, even when presented with evidence that therapy has failed. For the Courts, mental conditions are not a sufficient justification to change what is biologically apparent. Consequently, legal gender recognition is denied without a biological condition. An excerpt from Case No. 36646/2013, taken from the Tunis Court of First Instances, states:

“Judgments are based on the physical appearance rather than what cannot be observed through feelings and emotions. If we allow feelings to guide our judgment, it will inevitably lead to social disorder. What if a man desired to transition to a woman based solely on his feelings but then later decided to revert to being a man due to his feelings? This would undoubtedly result in significant confusion, disruption of public order, morality, and social cohesion.”

D. Social Order and Public Morality: Courts typically associate the violation of Islamic Sharia with the violation of public order and morality. Consequently, in cases involving legal gender recognition, these two factors are interconnected, resulting in the punishment of transgender individuals who undergo gender-affirming healthcare. It is important to note that courts only examine cases in which transgender individuals have fully and irreversibly transitioned medically. Therefore, denying legal gender recognition to such individuals can be viewed as a form of punishment, as it limits their ability to lead an everyday life and access essential services such as housing, employment, and education. This perspective is exemplified in an excerpt from Case No 1258812/2018 from Algeria’s Supreme Court, which states:

“The plaintiff’s desire to change their sex stems from their mental disorder. However, altering one’s sex through hormones or surgeries only based on mental desire is not in

line with public order. It represents a deviation from the natural order established by Allah.”

E. Family Status: In certain instances, the courts may exploit an individual’s family status and age to deny their legal gender recognition. The existence of previous marriages and the ability to bear children can serve as substantial grounds for withholding legal gender recognition so as not to disrupt established family relations. Additionally, the plaintiff’s age can be used as a rationale for denying their case, under the belief that they have lived significant portions of their life identifying with their assigned sex at birth, rendering their medical transition a matter of personal preference rather than medical necessity. This perspective is exemplified in an excerpt from Case No 61/1992 from Beirut’s Single Judge, which states:

“The plaintiff’s birth certificate indicates their male sex assigned at birth in 1929, and they have only recently commenced transitioning within a short period of only 15 years. Furthermore, the plaintiff has been married twice and has two daughters born in 1954 and 1968, indicating that they could lead a fully normal life as a male for most of their life span.”

F. Artificial Change: Courts commonly employ the term “artificial change” or “rushed change” to characterise the gender-affirming healthcare the plaintiffs undergo. The legal argument put forward is akin to the concept of the “pheromone trap,” asserting that the change experienced is artificial and not genuine, given that plaintiffs still possess biological attributes corresponding to their assigned sex at birth and are unable to procreate. The term “artificial change” also aligns with the perspectives of Islamic scholars on transgender individuals, who contend that even if they undergo transition, such changes are not authentic since their biology remains unaltered. They are unable to fulfil their obligation as Muslims to reproduce. An excerpt from Appeal No 10298/1993 from the Tunis Court of Appeals reads:

“This artificial alteration was expeditious, and it would have been prudent for the plaintiff to have pursued therapeutic intervention to address their affliction. The plaintiff’s conduct runs contrary to our nation’s longstanding customs and cultural legacy, which is evident in the jurisprudence underpinning our ethical principles and social equilibrium. The act of transitioning one’s gender purely based on personal desire constitutes a violation of Sharia, public order, and established scientific consensus.”

3.2.1. Case Study: Kuwait's Court of First Instance's Case No 861/2003, Court of Appeals Appeal No 1040/2014 & Court of Cassation Appeal No 674/2004:

The present case is among the most intricate cases identified by the author for this study. It underwent three stages of litigation and ultimately reached the Court of Cassation, which ultimately denied the plaintiff's request for legal gender recognition.

The case involves a transgender woman, born on October 3, 1975, who has displayed symptoms of GID since childhood and subsequently underwent gender-affirming surgeries in 2000. The plaintiff alleges experiencing social hardship and harassment due to her gender identity. In 2003, she petitioned the Kuwait Court of First Instance to seek legal gender recognition. The Court initially issued an interim order, directing her to be referred to the forensic authority for an examination to determine her condition. The forensic authority report concluded that while the plaintiff possesses biological male sex characteristics, her physical and mental characteristics align with the female sex.

Upon receiving the report, the Court of First Instance rendered its judgment on June 28, 2003, granting legal gender recognition to the plaintiff. The Court reasoned that Islamic Sharia allows for a "sex change" in cases of medical necessity, as demonstrated in the plaintiff's situation. Moreover, the Court asserted that granting legal gender recognition in the plaintiff's case is imperative since she has fully transitioned. Denying her request would give rise to a discrepancy between her physical reality and her official documents, which could lead to immoral conduct. Therefore, legal gender recognition must be granted to uphold social order.

The defendants, specifically the Ministry of Interior, Health, Education, Justice, Defence, and the General Civil Information Authority, have filed an appeal with the Kuwait Court of Appeals seeking the overturning of this judgment on the grounds that it violates Islamic Sharia and the plaintiff's GID condition is an invalid disorder that allows for the alteration of Allah's creation. On October 11, 2004, the Court of Appeals issued its judgment No 1040/2004, overturning the Court of First Instance judgment and rejecting the plaintiff's request for legal gender recognition. The Court of Appeals based its decision on five main arguments: 1. The plaintiff has male physical characteristics, and undergoing surgery to change her sex violates Islamic law as there is no urgent physical necessity. 2. The plaintiff did not demonstrate signs of gender identity disorder during childhood, puberty, or even after being admitted to a psychiatric hospital following a suicide attempt, ruling out other possible reasons. 3. The plaintiff failed to seek medical consultation regarding her gender identity disorder. 4. GID is still under investigation and subject to varying opinions rather than being based on necessary and urgent medical grounds. 5. Changing one's sex solely due to mental disorders contradicts Islamic law as it leads to obscenity.

The plaintiff has filed an appeal with the Court of Cassation, the highest Court in Kuwait, requesting an overturning of the Court of Appeal's judgment. The plaintiff argues that the Court of Appeals mischaracterised her GID as a desire to imitate the opposite sex rather than a genuine mental disorder that resulted in her complete rejection of her male body and the development of physical female characteristics, making it impossible for her to live as a male and necessitating urgent gender-affirming surgeries. The Court of Cassation rejected this argument, questioning the validity of a mental disorder as a medical necessity that would justify overruling the prohibition on changing Allah's creation. The Court stated in its judgment:

"It is a fundamental principle in Islamic jurisprudence that changing one's gender from male to female or vice versa in an absurd manner is prohibited..... It should be noted that in certain circumstances, necessities may render forbidden actions permissible. This means that actions prohibited by law can be considered lawful when a compelling need arises and one fears harm to oneself or others. However, such necessity must be urgent and threaten one's physical or psychological well-being."

When assessing the medical necessity of the plaintiff's condition, the Court disputed their medical history and documentation provided. It was noted that the plaintiff never obtained an official GID diagnosis, never consulted a therapist regarding the condition, and only sought treatment in psychiatric hospitals for unrelated reasons to GID.

“The judgment of the Court of Appeals was based on the forensic medical report, which stated that the plaintiff has a chromosomal structure corresponding to the male sex, the sex assigned to her at birth. Moreover, the report observed that her psychological status aligns with a female’s. It was further noted that the plaintiff underwent surgeries solely to modify her external male organs without any changes made to her internal reproductive organs. Additionally, the plaintiff’s account indicated that she first sought treatment at a psychiatric clinic on January 15, 1994, but only remained there for one day and received no diagnosis of Gender Identity Disorder (GID). The plaintiff did not revisit the psychiatric clinic until December 11, 2002, after already having undergone surgery on June 29, 2000. Notably, the plaintiff’s medical records did not demonstrate any referrals to a psychiatrist or receipt of any prior treatment or guidance, which is customary in medical practice before undergoing such surgeries. Consequently, the Medical Committee was unable to establish a medical necessity for the plaintiff to undergo a sex change procedure. Based on these findings, the judgment concluded that the plaintiff’s claim of necessity was unfounded and deemed the surgical procedure of removing male organs and changing sex to be contrary to Islamic law. Therefore, the judgment rejected the plaintiff’s argument. The contested judgment’s findings were comprehensive and supported by evidence, thereby upholding the judgment and dismissing the unfounded objection.”

Therefore, the Court of Cassation and Appeals, in this particular case, employed legal arguments that were similar to those discussed earlier. Notably, these included the lack of medical documentation supporting the diagnosis of Gender Identity Disorder (GID), the absence of medical necessity to justify gender-affirming healthcare, the invalidity of overruling the prohibition on altering Allah’s creation, the artificial nature of the change as the plaintiff’s biological characteristics remained associated with their assigned sex at birth, the presence of a chromosomal inconsistency as highlighted in the forensic report indicating a male chromosomal structure instead of a female one, and finally, the violation of Islamic Sharia, which is interconnected with the infringement upon public order, social cohesion, and morality.

Conclusion



The study presented 22 judgments across 19 cases and ten countries from the MENA region, making it the most comprehensive study to date that examined in-depth the judicial directions on legal gender recognition and the different arguments that are used for and against it. It is evident from the presented study that the judiciary in the MENA region has a long way to go when it comes to a positive discussion of issues related to transgender identities. The current dominant position of the judiciary in the region, which rejects legal gender recognition based on the lack of medical necessity in GID, is not odd. When examining early case law from the 1990s and 80s from the European Court of Human Rights, the French Court of Cassation, and other courts from countries where the policy has developed more favourably to allow legal gender recognition for transgender individuals, there are similarities in the reasonings. Therefore, it is most likely that accepting GID as a valid reason to undergo gender-affirming healthcare and subsequent legal gender recognition will eventually gain more momentum within the judiciary in the region.

However, the biggest challenge remains changing the Islamic stance on the issue. Even if the judiciary may start to accept GID, the fact that the dominant Islamic Sharia interpretation from most scholars is against it will impose a challenge for judges who wish to disagree, given how socially sensitive the issue is and the possible backlash from religious entities. Therefore, it is essential in future advocacy on the human rights for transgender rights to tackle the presented issue from three distinct methods: the passage of positive law and policy that would codify legal gender recognition for transgender individuals, expecting more pressure on the judiciary to issue favourable judgments through strategic litigation that would strategise counterarguments to rejecting legal gender recognition; and lobbying esteemed Islamic institutions in the region such as Al-Azhar and the Islamic Fiqh Council to issue updated fatwas that would accept GID as a medical necessity, allowing gender-affirming healthcare and subsequent legal gender recognition for transgender people.

While those methods will initially rely on the ideas of pathologisation of transgender identities and not the right to self-determination, they are more practical to engage within the region. The region is still in the initial steps of establishing a working advocacy for the human rights of transgender people through reforming law and policy. It should not be expected to reach overarching goals without a basis. It is important to note that while cases that resulted in favourable outcomes are in the minority, they can still form a base to establish more effective strategic litigation strategies in the region that could result in future positive change.



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