Recent developments in Tunisian Personal Status Law: Between Legislative Inertia and Judicial Dynamism

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1. Introduction

It is no longer news that democratic backsliding has a direct impact on family law, an essential arena for gender equality, thereby threatening hard-won rights and achievements in this field.[2] This article explores the effects of political change and instability in Tunisia on family and personal status law more broadly.

Tunisian family law holds a distinctive position among Muslim jurisdictions. Shortly after independence in 1956, Tunisia broke away from classical Islamic law, *fiqh,* in several fundamental respects—most notably through the abolition of polygyny and the establishment of equality between men and women in matters of divorce.[3] The pursuit of gender justice, the protection of children's rights, and the strengthening of the family have been key objectives of family law reform over the six decades since independence.[4]

Over the past decade—and indeed since the Arab Spring, which began in Tunisia—the country has been closely associated with debates over democratization. The status and freedoms of women have, over the years, become integral to Tunisia's national identity. This issue also represents a central axis around which political and social actors negotiate and renegotiate the country's cultural and religious future.[5]

Following the collapse of Tunisia's democratic experiment and the coup led by President Saied in July 2021, it is pertinent to examine whether the political and social turmoil of the past decade has had significant consequences for family law.

With the exception of the law on the elimination of violence against women,[6] the Tunisian legislature has remained largely stagnant regarding family law issues since the regime change that followed the end of the Ben Ali era. In several important areas, it has been the judiciary—rather than the legislature—

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[2] Izekovitch-Malka, Law, Gender Justice and the Dynamics of democratic Backsliding, *Laws* 2025, 77.
[3] Ben Jémia, Le projet de loi tunisien sur l'égalité dans l'héritage est-il mort-né? In: Bernard-Maugiron; Dupret (dir.), 181.
[4] Bin Maḥmūd, mağallat al-aḥwāl aš-šahṣīya, [Code of Personal Status]2024, 9.
[5] Gallala-Arndt, Women's Rights at Risk, in. Röder/Grote (Eds.), Constitutionalism, Human Rights and Islam after the Arab Spring 2016, 599-614.; Voorhoeve, Maaike, Women's Rights in Tunisia and the Democratic Renegotiation of an Authoritarian Legacy", New Middle Eastern Studies, 5 (2015), 1.
[6] Voorhoeve, The Tunisian Law on violence against women, Cahiers d' études africaines (2021) 242, 377 esq.

that has provided protection to the weaker party and upheld constitutional rights and values within this sensitive field of law.

2. Political and Constitutional Context under President Saied

This section seeks to shed light on the political choices of President Kaïs Saied, who has been the President of the Tunisian Republic since 2019. One might ask why the role of the President deserves such emphasis in an article on family law. The answer lies in the historical development of Tunisian family law and its particular form of state-led feminism.[7]

The Tunisian *Code of Personal Status* (CPS), with its groundbreaking reforms in gender equality and its subsequent amendments, did not emerge from grassroots activism or broad national debate. Rather, these reforms were primarily the result of the political will of a few charismatic male leaders at the apex of power—Presidents Bourguiba, Ben Ali, and Caïd Essebsi. The women-friendly reforms were often presented as trophies of their modernizing policies and served to divert attention from their lack of democratic governance. This phenomenon is often described as *state feminism* or *patriarchal feminism*, a model in which women are expected to show gratitude, refrain from demanding further reforms, and remain loyal to the political system that "granted" them these rights.[8]

Consequently, Tunisian family law and personal status reforms have historically been personality-driven rather than institution-driven—dependent on the political will of "well-intentioned male presidents." Scholars have described this model as "top-down" or "abrupt innovation from above."[9]

As a result, any meaningful reform in the field of family law must be at least endorsed—if not initiated—by the President himself in order to have a real chance of materializing. Thus, reform in this domain remains highly vulnerable to the personality and leadership style of Tunisia's presidents.

President Saied's governing style is characterized by populist rhetoric and appeals to the lower classes, pledging to liberate the country from corruption and restore the stolen dignity of "the people" (*ash-shaʿb*). [10]

Over the past decade, Tunisia has experienced considerable turbulence. The so-called Jasmine Revolution marked a historic shift not only in Tunisia but across the broader MENA region. Its core aim

[7] Ben Achour, Sa., La féminisation de la magistrature en Tunisie entre emancipation feminine et autoritarisme politique (2007), rn. 7, available at La féminisation de la magistrature en Tunisie entre émancipation féminine et autoritarisme politique..
[8] Ben Achour, S., De la souffrance des femmes et de la politique de la pitié, Lart Rue 2021, available at De la souffrance des femmes et de la politique de la pitié - L'Art Rue
[9] Bostanji, Ombres et lumières autour du statut juridique des transsexuels, in. Ferchichi (Ed.), Les libertés au prétoire, les juridictions protectrices des libertés, 188.
[10] Camau, Le Phénomène Kais Said, in. Bernard-Maugiron/ Dupret (Eds.), Droit et sociétés du Maghreb et d'ailleurs, 2023, 269.

was to end the dictatorship and open democratic participation across all spheres of social and political life.[11] The democratic experiment in Tunisia lasted longer than in any other Arab country before it was ultimately brought to an end by the coup initiated by President Saied against his political opponents in Parliament.[12]

Saied was elected President in October 2019, initially with the support of the Islamist *Ennahda* party. However, institutional paralysis soon followed, fuelled by deep divisions among parliamentary factions and rivalry between Saied and *Ennahda*'s leader, Rached Ghannouchi. Invoking Article 80 of the 2014 Constitution, Saied suspended Parliament and assumed exceptional powers—an act widely regarded by constitutional scholars as unconstitutional, even though it was supported by a majority of Tunisians.[13]

A new Constitution, adopted in 2022, repealed the 2014 Constitution.[14]Many Tunisian constitutionalists have described the 2022 text as ambiguous regarding the role of Islam, warning that its provisions could pave the way for restrictions on freedom and equality before the law. For the first time in Tunisia's modern history, the new Constitution does not explicitly declare Islam as the religion of the state.[15]

Islam is mentioned only in the preamble, which affirms:

"We reaffirm our belonging to the Arab nation and our commitment to the human dimensions of the Islamic religion. We also affirm our belonging to the African continent, which bears the historic name of our beloved homeland."

Moreover, Article 5 provides that:

"Tunisia is part of the Islamic nation. The State alone shall work, within a democratic system, to achieve the aims of authentic Islam, which are to preserve life, honour, property, religion, and freedom."

The Arabic version of this article employs terms derived from *fiqh* (Islamic jurisprudence), such as *umma* (Islamic community) and *maqāṣid* (objectives of Islamic law).

The Maqāṣid theory holds that Islamic law serves to realize certain overarching objectives, which should guide its interpretation and evolution. Accordingly, Article 5 might be understood as referring not to premodern Islamic norms, but to an *ijtihād*-based (interpretive) understanding of Islamic texts.[16] Nevertheless, the provision remains ambiguous. It goes without saying that this ambiguity regarding the

[11] Ben Achour, Tunisie- Une révolution en pays d'islam, Genève 2018. 85 ff.
[12] Yerkes/Alhomoud, One year later, Tunisia's president reversed nearly a decade of democratic gains, Carnegie Endowment for International peace, July 22, 2022.
[13] Lotito, Tunisia's President launched a political crisis. Is it a coup?, Reivsta de Prensa July 29, 2021.
[14] Available in French under La Constitution de la République tunisienne du 25 juillet 2022 - Tunisie - Legal Databases
[15] Klibi: Le projet de constitution proposé au référendum du 25 juillet 2022 : la revanche de la constitution de 1959 ? Leaders, July 2, 2022.
[16] Sardar Ali, Modern Challenges to Islamic Law, 2016, 26.

status of Islam and Islamic law within Tunisia's legal and political system carries potential risks for future jurisprudence on personal status matters.[17]

Furthermore, President Saied's societal project is religiously conservative. He has used sub-Saharan African migrants and sexual minorities as scapegoats for Tunisia's social and economic challenges. He has claimed that the growing number of Black Africans in Tunisia is part of a conspiracy to alter the country's demography and undermine its Arab and Muslim identity.[18] He has also accused LGBTQ+ activists of being funded by foreign organizations to promote homosexuality in Tunisia.[19]

With regard to family-related legal issues, Saied made clear even before his election that he would not support the proposed reform to establish equality in inheritance law introduced by his predecessor.[20] In fact, none of the presidential candidates endorsed the reform, as it lacked popular support among Tunisians.

Saied frequently cites the Qur'an in his speeches and has compared himself to ʿUmar ibn al-Khaṭṭāb—one of Islam's first caliphs—asserting that he is accountable before God for ensuring the people's welfare and protecting them from their enemies. [21] The identity of these "enemies" varies according to context: they may be political opponents, corrupt elites, Western countries, or international institutions that "interfere" in Tunisian affairs and "lecture" the country on democracy.

He views international initiatives promoting gender equality or other human rights as intolerable, colonial-style intrusions into national sovereignty that disregard the will, culture, and religious roots of the Tunisian people. The political scientist Camau has described this attitude as *souverainisme* (radical sovereignty).[22]

Interestingly, Saied has argued that the realization of constitutional freedoms and equality applies only to the public sphere, not within the family, which he considers private. He is reported to have remarked sarcastically, "Do you call your siblings citizens?"—a reference to Article 21 of the 2014 Constitution, which guarantees equality among all citizens.[23]

In conclusion, no reforms in family law are likely to be introduced through Parliament in the near future. President Saied, who dominates all state institutions, remains focused on policies that bolster his popularity among the majority of Tunisians—particularly his anti-corruption campaign and his

[17] Klibi, Le projet de constitution proposé au référendum du 25 juillet 2022; Virgili, LGBT rights and freedom of conscience in Tunisia, mecam papers 2025.
[18] Ben Salah, Discours de Kais Saied: L'arme politique du dénigrement, Nawaat February 2024.
[19] Boukhayyattia, Tunisie : Les militants LGBT+ dans le collimateur de Saied – Nawaat September 2024
[2020] Ben Azouz, Le président Saied tourne en dérision les droits économiques et sociaux des Tunisiénnes, Human Rights Watch September 2022.
[21] Camau, 309-310.
[22] Camau, 315.
[23] Ben Jémia, Le projet de loi tunisien sur l'égalité dans l'héritage- est-il mort-né?, in. Bernard-Maugiron/Dupret, (2023), 190.

persecution of journalists and public figures accused of serving foreign interests, especially those of the West. [24]

While Tunisia continues to suffer from deep economic and social crises, Saied does not view family law reform as part of the solution. For all these reasons, the legislature has enacted no new reforms in this field in recent years—especially under Saied's rule, such as the advancement of economic accountability in the family and involving the fathers more in the upbringing of children after divorce[25]. Some progress has occurred through judicial decisions, though case law remains an unstable driver of legal evolution. In fact, Saied's regime has taken several measures that have weakened judicial independence.[26] Said has dissolved the High Judicial Council and dismissed dozens of judges and prosecutors for vague accusations and without transparent trials.[27]

Nevertheless, he has not challenged the gains already achieved in gender equality—such as the lifting of the prohibition on Muslim women marrying non-Muslim men in contrast to the pre-modern Islamic Law—and he has left intact the withdrawal of reservations and declarations related to international human rights treaties that Tunisia undertook after the Jasmine Revolution.

3. Judicial Developments in Tunisian Family Law

3.1. Case Law on Matters of Succession

The question of *difference in religion* as an impediment to marriage or inheritance has been extensively discussed by Tunisian scholars throughout the country's modern legal history.[28] Due to ambiguities in the relevant legal provisions, judicial interpretations have fluctuated over time. These two issues—marriage and succession—have frequently appeared together in Tunisian case law.

In September 2017, President Caïd Essebsi abrogated the administrative circular that prohibited marriage between a Muslim Tunisian woman and a non-Muslim man.[29] However, not all municipalities

[24] Camau, 318.

[25] Webmanagercenter, Pension alimentaire, divorce et garde partagée: Fault-il reformer le code de statut personnel en Tunisie, 22.08.2025, Pension alimentaire, divorce et garde partagée : faut-il réformer le Code du statut personnel en Tunisie ? - WMC

[26] Ben Achour, S. Le droit constitutionnel au service de l'homme people, in. Bernard-Maugiron/Dupret (Eds.), (2023), 348.

[27] Amnesty International, 24 July 2023 Human rights under assault two years after President Saied's power grab - Amnesty International

[28] As examples: Ben Jémia, Non-discrimination religieuse et Code du Statut Personnel Tunisien, in. Mélanges Ben Achour, Tunis 2008, 261-276Elbalti, The Applicable Law in Succession Matters, RabelsZ 88 (2024), 734-759; *Gallala, Imen*, Religionsfreiheit und islamisch geprägtes Erbrecht: Gesetzliche Regelungen und Rechtsprechungsauslegung im heutigen Ägypten und Tunesien, in. Ellisie (Hg.), Beiträge zum Islamischen Recht VII – Islam und Menschenrechte, Frankfurt am Main 2010, 499-521.

[29] Gallala-Arndt, Eheschließung von Musliminnen mit Nichtmuslimen in Tunesien im Spannungsfeld zwischen staatlichem und religiösem Recht: Die Novelle vom 8. September 2017, Standesamt (2018), 143-149. *Šādlī, Lutfī*,

have implemented this change uniformly; acceptance often depends on the political or ideological orientation of the local mayor.[30] It is obvious that such a situation seriously undermines legal certainty.

After a period of oscillation between positions inspired by *sharīʿa* and those grounded in human rights and international conventions ratified by Tunisia, the issue now seems settled. The difference in religion is no longer considered a legal impediment to inheritance.[31]

In the *Zeineb* case, the Court of Cassation (CC) held that the legislator's approach "is oriented toward distinguishing citizenship from religion and toward the unification of laws regardless of differences of faith." This decision marks a decisive move toward the principle of equality among Tunisian citizens, irrespective of religious affiliation.[32]

3.2. Custody Matters

Tunisian law, case law, and doctrine in matters of child custody demonstrate a consistent commitment to the best interests of the child, in line with international standards, particularly the *Convention on the Rights of the Child* (CRC), which Tunisia has ratified.

The Custodial Parent's Right to Housing

The legislator has long recognized the economic dependence of many women in Tunisian society. Domestic responsibilities and childcare often prevent women from earning sufficient income to own or rent independent housing. A 2008 amendment to the *Code of Personal Status* (CSP) granted the custodial parent—typically the mother—the right to remain in the family home where the parents and children previously lived, provided that the father owns the property. If he does not, and the custodial mother lacks her own housing, the father is required to pay rent for alternative accommodation.[33] These provisions aim to ensure psychological and economic stability for both mother and children after divorce.

Recent case law has extended this protection. In a 2022 ruling, the Court of Cassation emphasized that the family judge must determine the housing stipend immediately after awarding custody. The Court overturned a judgment that allowed the father to delay payment until the mother submitted a rental contract.[34] Furthermore, in a 2019 decision, the Court clarified that the right to a housing allowance continues until custody ends—that is, when the child reaches the age of majority (18 years). [35]

Zawāğ al-Muslima bi-ġair al-muslim bain an-nuṣūṣ wa ta'wīlihā [Die Eheschließung einer Muslimin mit einem Nichtmuslim], Mélanges offerts à Yadh Ben Achour, Tunis 2008, 441-467.

[30] Boukhayatia, Mariage des tunisiennes à des non-musulmans: Le calvaire se poursuit, Nawaat August 13, 2023.

[31] Ben Achour, S., Qānūn al-Usrā [Family Law], 65, opposite position see ElBalti, The applicable Law,741.

[32] Cour de Cassation, Civil Nr. 28930/28984, 20 October 2021, cited by Ben Achour S., 65-66.

[33] Art. 56 CSP as amended by the Law of 4.3.2008. no. 2008-20.

[34] Cour of Cassation, civil Nr. 71373, 19.05.2022, available on the site of the Court of Cassation cassatio.tn.

[35] Court of Cassation, Civil Nr. 69576, 15.2.2019 available under www.cassation.tn.

Religion of the Child and the Mother's Remarriage

A landmark judgment delivered at the end of 2017 deserves special mention for its progressive and pedagogical reasoning. The case went beyond the immediate dispute and affirmed the judge's role as a defender of fundamental rights and freedoms enshrined in the Tunisian Constitution.[36]

In this case, the father sought to revoke the mother's custody because she had remarried a non-Muslim foreigner.[37] The *Tribunal of First Instance of El Kef* could have resolved the matter briefly under Article 58 CSP, which allows the judge to maintain custody with the remarried mother if this serves the child's best interests. However, the court went further, grounding its decision in constitutional freedoms, particularly the freedom of conscience and religion.

It was the first time a Tunisian court explicitly invoked the child's freedom of religion. The father's counsel argued that the mother's remarriage would expose the children to a non-Muslim environment and risk their departure from Islam. In response, the court addressed two key issues: freedom of conscience and religious upbringing and the best interests of the child**.**

First, the court affirmed that the mother had committed no wrong by remarrying but was simply exercising her constitutional right to freedom of belief, guaranteed by Article 6 of the 2014 Constitution and international human rights treaties.

Second, the court held that parents do not have the right to impose their own religion on their children. It rejected the presumption that children of a Muslim father must automatically be raised as Muslims, thereby recognizing the child's individual freedom of religion. The court further decoupled the "best interests of the child" from religious upbringing, focusing instead on social and psychological well-being.

The decision cited the findings of the social services report: the children were performing well in school, expressed a desire to remain with their mother, and were psychologically balanced with all material needs met. While the court did not explicitly reference Article 14 of the *Convention on the Rights of the Child* (CRC) or Article 47 of the 2014 Tunisian Constitution, its reasoning clearly aligned with them.

Article 47 of the 2014 Constitution provides:

"The State shall provide all forms of protection to all children without discrimination and in accordance with their best interests."

[36] Gallala-Arndt, Tunisia, in. Schoeller-Schletter (Eds.), 2021, 46.
[37] See for more about the removal of custody in Islam and in Muslim jurisdictions, Gallala-Arndt, The Impact of Religion in Interreligious Disputes, AJCL 20215, 834; also the socio-legal analysis of Shahar, When Mixed Marriages fall apart: A socio-legal perspective, Journal of Israeli History 36 (2017), 318.

Tunisia has been a party to the CRC since 1991. Although it initially entered reservations, these were withdrawn in 2008, thereby recognizing the child's freedom of thought and religion.[38] Consequently, there is no longer a legal obligation to raise the child in the religion of the father.

Interestingly, the *Tribunal of El Kef* appears to have granted a broader interpretation of the child's freedom of religion than that suggested by the *Committee on the Rights of the Child*, which maintains that parents retain a guiding role in the child's exercise of that freedom. Under international law, the child's right to freedom of religion does not necessarily entail being raised in a religiously neutral environment.[39] Nevertheless, the El Kef ruling represents a bold and rights-based interpretation of family law in Tunisia, demonstrating judicial dynamism in the face of legislative inertia.

4. Case Law on Sex Reassignment

Gender is one of the most fundamental components of personal identity and among the most significant legal categories, as numerous legal effects depend directly on gender classification.[40] In recent decades, questions concerning gender and the binary construction of legal norms have sparked intense debate worldwide—particularly in the Global North, where gendered legal provisions are increasingly viewed as discriminatory, and the binary conception of gender is under challenge.[41]

These issues have also begun to surface in Muslim jurisdictions, where they generate even more heated debate, given that personal status law is profoundly gendered. In Tunisia, courts have had several opportunities to address the permissibility and legal recognition of sex reassignment. Jurisprudence, however, remains unstable, oscillating between liberal and conservative interpretations [42] This inconsistency reflects, in part, the centrality of heterosexuality and binary gender norms in Arab and Muslim societies.[43]

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[38] Before withdrawal of the reservations, The Government of the Republic of Tunisia declares that it shall not, in implementation of this convention, adopt any legislative or statutory decision that conflicts with the Tunisian Constitution". Even more explicit the declaration of the government of Algeria: " Interpretative declarations Art-14: This article shall be interpreted in accordance with " The family code, which stipulates that a child's education is to take place in accordance with the religion of his father" See for more at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec .

[39] Langlaude, The Right of the child to religious freedom in international law, 2007, Brill,110.

[40] Carapezzi Figlia/ Kocavic/Kristofferson, Gender Perspectives in Private Law 2023, vi.

[41] Just as an example see: Michelle Cottier, in: Gender und Recht- Perspektiven aus den Legal Gender Studies, Bielefeld 2023, 7 esq.

[42] Ben Achour, S. Qānūn al-usrā, 53.

[43] A tribunal in Marocco confirmed the condemnation of a feminist activist: Allah is lesbian to a 30-month sentence, Legal Agenda. استئناف الرباط تؤيد الحكم بحق ناشطة نسوية بالسجن 30 شهرًا | Legal Agenda; Virgili, Islam, constitutional law and Human Rights- Sexual Minorities and Freethinkers in Egypt and Tunisia, Routlegde 2022, 1-4.

4.1. First Stage: Denial of Legal Recognition of Gender Reassignment

Tunisian law contains no explicit provision addressing the possibility of gender reassignment—neither in general nor specifically for transgender individuals.[44] Transgender or transsexual persons experience a dissonance between their anatomical sex and their psychological or internal sense of gender identity.

The evolution of medical techniques and increasing transnational mobility have brought new questions before Tunisian courts concerning the relationship between the person and their body. In an initial phase, Tunisian tribunals consistently refused to recognize sex changes in civil status records unless such changes were necessitated by physical ambiguity. Relying on traditional Islamic jurisprudence, they rejected claims based on psychological suffering or gender identity, disregarding constitutional principles that could have supported recognition.[45]

For example, the Tunis Court of Appeal denied a petitioner's request, holding that gender reassignment was incompatible with "the civilizational and ethical heritage of the Muslim *Umma* (community)" and permissible only in cases of "necessity." Such necessity was found only where there existed a congenital or anatomical ambiguity in the claimant's sex. Similarly, the Tribunal of Ben Arous emphasized that the applicant's sexual ambiguity "was not provoked—as in Western societies—through surgery or medication but rather constituted a natural condition." [46]

4.2. Second Stage: Judicial Recognition of Gender Reassignment

The Tribunal of First Instance of Tunis became the first Tunisian court to recognize a gender transition when, on 9 July 2018, it ruled in favour of a transgender person's request to amend the civil register from female to male in the *Lina/Rayan* case.[47]

The applicant, Lina, had undergone gender reassignment surgery in Germany and obtained a German court ruling recognizing the change. When Tunisian authorities refused to transcribe that judgment into the national civil register,[48] he initiated a substantive action before the Tunis court, which ultimately granted her request. This was the second such ruling in the Arab world, following Judge Jeannette Hanna's precedent in Lebanon.[49]

[44] Jelassi M.A., Choisir son corps, in. Ferchichi (Ed.), Le corps dans toutes ses libertés, Tunis 2017, 66, available at https://tn.boell.org/fr/2017/03/10/le-corps-dans-toutes-ses-libertés.

[45] Court of Appeal, Civil Nr. 10298, 22.12.1993, Revue Tunisienne de Droit (1995), 6.
[46] Tribunal of first instance of Ben Arous, Civil Nr. 621 28.3.1990, Revue de jurisdiction et de législation (1991), 131.
[47] Tribunal of First Instance Nr. 12304, available in English at Gallala-Arndt, in: Schoeller-Schletter (Eds.), 49.
[48] Boustanji, Ombres et lumières autour du statut des transexuels, in. Les libertés au prétoire, 189
[49] Issa, Transgender Court Ruling erases Barrier to Legal Recognition, The Daily Star 16.1.2016; Dabash, The Egyptian Constitution and Transgender Rights: Judicial Interpretation of Islamic Norms, Journal of Law and Emerging Technologies, Vol 3/1 (2023), 33-58.

Despite the groundbreaking nature of the judgment, it is noteworthy that the Tunis tribunal justified its decision by invoking two sources generally viewed as contradictory in Tunisian judicial practice: comparative law and Islamic law. From a comparative perspective, the tribunal referred to Western and international human rights standards, including national legislation such as Argentina's and case law of the European Court of Human Rights (ECHR). The ECHR has grounded the right to legal recognition of gender reassignment in the right to respect for private life, a principle the tribunal found consistent with Tunisia's international obligations and constitutional guarantees. Article 20 of the 2014 Constitution accords international treaties a higher rank than domestic legislation, and Article 24 explicitly protects the right to privacy. The tribunal observed that, through its ratification of international conventions, Tunisia had committed itself to upholding individual rights, including respect for personal autonomy and private life.

Concerning Islamic law, the court acknowledged that it remains a "material source" of Tunisian personal status law. It referred to two positions within Islamic jurisprudence: one that prohibits gender reassignment altogether, and another that allows it in cases of necessity (*ḍarūra*).[50]

The tribunal adopted the latter view, emphasizing that the claimant's transition was not the result of "perversity or homosexuality," but of genuine psychological suffering, medically characterized as gender dysphoria. The court noted that the claimant's brain produced signals identifying as male, creating severe distress that had even led to suicide attempts—thus constituting an exigency.

From a legal perspective, the court's reference to Islamic law was arguably superfluous. Although the *Code du Statut Personnel* (CSP) drew inspiration from Islamic sources, it has also diverged from them on essential issues such as the prohibition of polygamy and gender equality in divorce.[51] The constitutional and international arguments alone would have sufficed to justify the ruling.

The inclusion of Islamic law in the court's reasoning appears to have been political rather than juridical—an attempt to secure broader social and political acceptance of a progressive decision in a conservative legal and cultural environment. This strategy can be understood as an *extra-juridical argument*, used to legitimize judicial innovation within Tunisia's hybrid legal culture.

4.3. Third Stage: Judicial Reversal and Refusal of Recognition

In a subsequent and factually similar case, the Tribunal of First Instance of Tunis refused the application of another transgender man, *Salha*, to amend his gender in the civil status register.[52]

[50] Tolino, Transgenderism, Transsexuality and Sex-Reassignment Surgery in Contemporary Sunni Fatwas, Journal of Arabic and Islamic Studies, 17 (2017), 223-246.
[51] Bostanji, 196.
[52] Tribunal of First Instance of Tunis, Civil Nr. 36646, 24.4.2023, Not published mentioned by Ben Achour, Qānūn al-usrā, 55.

Salha was born female and registered as such, but experienced profound gender identity distress. He underwent several surgeries—including mastectomy and hysterectomy—to align his physical characteristics with his gender identity. Despite this, the court rejected his request, reasoning that there was no "necessity" justifying the change. It held that neither a physical nor a psychological exigency existed, since the surgeries were "not medically indicated" and the psychological suffering was "insufficiently grave." [53]

However, the judgment failed to specify the criteria used to assess psychological necessity. It remains unclear whether the court's threshold for "necessity" requires proof of extreme distress, such as suicide attempts.

As previously noted, Islamic jurisprudence (*fiqh*) offers multiple opinions on this issue. In this case, the tribunal relied on the doctrine of necessity (*ḍarūra*), as articulated in the fatwas issued by Egypt's *Dār al-Iftā'*.[54] These opinions recognize gender reassignment only when it responds to a genuine medical condition—specifically, an intersex or morphologically ambiguous case—not when motivated by psychological factors alone.

This ruling represents a return to conservatism and illustrates the fragility of progressive judicial reasoning in Tunisia. It highlights the absence of legislative clarity on gender identity, as well as the ongoing tension between constitutional principles, international human rights commitments, and traditional interpretations of Islamic law.

5. Case Law on the Recognition of French Extra-Judicial Divorce

In 2017, France enacted legislation amending the *Code civil* and introducing a new form of divorce regulated under Articles 229-1 and following articles. This out-of-court divorce by mutual consent allows spouses to dissolve their marriage without judicial intervention. The divorce is formalized through a private agreement countersigned by the parties' lawyers and subsequently filed in the notarial register. The *opinio juris* underlying this reform was to modernize twenty-first-century justice and enhance its efficiency.[55] Nevertheless, some French scholars expressed scepticism regarding the implications of this new procedure for France's private international law (PIL) relations.[56]

A key question soon emerged: Would this form of divorce be recognized in other jurisdictions, particularly in non-European countries? Given the significant migratory ties between France and

[53] Ben Achour, S. Qānūn al-usra, 55.
[54] More about this fatwa: Alipour, M., Transgender Identity, the Sex-Reassignment Surgery fatwas and Islamic Theology of a Third Gender, Religion and Gender, Vol 7/2 (2017), 169 esq.
[55] De Saint-Pern Le divorce sans juge en droit compare, Droit de la famille no. 9 2018, 1.
[56] Bourdelois, Divorce sans juge en droit international privé- Font-ils bon ménage? In. Mélanges en l'honneur d'Annick Batteur, 237.

Tunisia, Tunisian courts were among the first to confront this issue and determine whether to recognize such French extra-judicial divorces.

Contrary to the concerns of parts of the French doctrine, Tunisian courts have recognized this new form of divorce. Interestingly, the tribunals of first instance did not base their recognition on clear statutory provisions. Rather, they employed a teleological (purpose-oriented) interpretation of the relevant legal norms, enabling recognition where a literal reading would have required refusal.

Indeed, under the 1972 Convention on Judicial Cooperation between Tunisia and France, decisions concerning personal status and capacity—including divorce—are to be transcribed by the civil status authorities (*autorités de l'état civil*). The condition for such recognition is that the decisions must have been rendered by a judicial authority. Clearly, this condition is not met in the case of the French out-of-court divorce, which is concluded privately and notarized rather than judicially pronounced.

Nevertheless, the Tribunal of First Instance of Tunis authorized the transcription of such divorces, reasoning that at the time the 1972 Convention was concluded, this type of divorce did not exist in either contracting state. The tribunal further held that Article 11 of the Tunisian Code of Private International Law (CPIL)—concerning the recognition of foreign judgments—should not be interpreted strictly as referring only to decisions rendered by judicial authorities. Rather, the term "judicial decision" should be understood functionall**y**, encompassing foreign acts that perform an equivalent legal function. [57]

Moreover, Tunisian courts emphasized that, like judicial decisions, extra-judicial divorces may be recognized provided that: the subject matter does not fall within the exclusive jurisdiction of Tunisian courts; the act does not contradict Tunisian public policy (*ordre public*) in the sense of PIL; the rights of defense are respected; and the act does not conflict with a prior Tunisian judicial decision.[58]

At first glance, one might assume that judicial divorce itself forms part of Tunisian *ordre public*, given its central role in promoting gender equality under the 1956 *Code du Statut Personnel* (CSP), alongside the abolition of polygamy. However, what has historically troubled Tunisian judges regarding *talaq* divorces rendered in other Muslim countries is not the absence of judicial intervention *per se*, but rather their incompatibility with Tunisia's fundamental legislative choices—namely, the principles of gender equality and the best interests of the child.[59]

Tunisian tribunals of first instance have held that these values are adequately safeguarded in the French framework governing out-of-court divorce. Consequently, recognizing such divorces does not violate Tunisian *ordre public*.

[57] Hasan, Qabūl al-qādī at-tunisī liṭ-ṭalāq ġair al-qadā'ī al faransī [Recognition of the French extra-judicial divorce by the Tunisian judge], Tunis 2023, 138; Judgement of the Tribunal of first instance of Bizerta Nr. 70661, 18.2.2019 (in the Annex, n7).
[58] Ben Achour, Le divorce extrajudiciaire, 221.
[59] Expedient judgement Tribunal of first instance in Tunis Nr. 92634 24.04. 2018, I. the Annex of Hasan, P. 146.

The Tunisian case law has justified recognition by reference to the specific objectives of private international law, particularly the harmonization of decisions and the continuity of civil status. This approach serves the overarching principle of legal certainty.[60] Legal certainty is even more critical in transnational contexts, where inconsistencies in civil status can create significant personal and economic hardships.

While Tunisian jurisprudence on the recognition of extra-judicial divorces has remained relatively stable, a legislative amendment to the CPIL—or the issuance of administrative guidelines for the civil registry, as in Morocco—would facilitate the process and provide clearer guidance for litigants and the civil registrars.[61]

Until such reforms are enacted and given the ongoing legislative inertia and lack of political will to adapt family law and related statutes, the task of ensuring coherence and justice in this evolving field continues to fall to the Tunisian judiciary.

In conclusion, the recognition of French extra-judicial divorces illustrates the dynamic role of the Tunisian judiciary in filling the gaps left by legislative inaction. While the legislature remains largely inert—failing to adapt family law to evolving social realities and transnational legal developments—the courts have assumed the responsibility of ensuring legal continuity, protecting individual rights, and maintaining harmony in civil status records. This case exemplifies how judicial pragmatism and purposive interpretation allow Tunisian courts to reconcile foreign legal innovations with domestic constitutional principles, thereby sustaining the delicate balance between human rights and religious and cultural heritage.

[60] Triki, Le principe de sécurité juridique en droit international privé de la famille, Journal du droit international, 4 (2017), 1263.
[61] Memorandum of the ministry of interior 18. 1.2019, cited by Hssan, available Annex 11, 215-216.

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