

## **Bill # 4127**

*Submitted to President Office of Assemblée nationale on December 22<sup>nd</sup> 2011*

# ***Simplified legal proceeding enabling gender change in civil status***

*(For your information since this translation in English is only informative – translation performed by Non-Governmental Organization HES from original text :*

*<http://www.assemblee-nationale.fr/13/propositions/pion4127.asp> )*

Law proposal presented by :

Michèle DELAUNAY, Olivier DUSSOPT, Pascale CROZON, Martine FAURE, Marylise LEBRANCHU, Catherine LEMORTON, Jean MALLOT, Marisol TOURAINE, Sylvia PINEL, Jean-Michel CLÉMENT, Marie-Odile BOUILLÉ, Jean-Marc AYRAULT, Daniel BOISSERIE, Serge BLISKO, François BROTTES, Laurent CATHALA, Jean-Paul CHANTEGUET, Alain CLAEYS, Marie-Françoise CLERGEAU, Pierre COHEN, Catherine COUTELLE, Frédéric CUVILLIER, Pascal DEGUILHEM, François DELUGA, Bernard DEROSIER, Michel DESTOT, Julien DRAY, Jean-Pierre DUFAU, William DUMAS, Christian ECKERT, Henri EMMANUELLI, Hervé FÉRON, Geneviève GAILLARD, Guillaume GAROT, Jean GAUBERT, Jean-Patrick GILLE, Joël GIRAUD, Daniel GOLDBERG, Marc GOUA, Jean GRELLIER, Monique IBORRA, Michel ISSINDOU, Henri JIBRAYEL, Régis JUANICO, Marietta KARAMANLI, Colette LANGLADE, Jean LAUNAY, Annick LE LOCH, Patrick LEMASLE, Bernard LESTERLIN, Michel LIEBGOTT, Martine LIGNIÈRES-CASSOU, Jacqueline MAQUET, Marie-Lou MARCEL, Jean-René MARSAC, Martine MARTINEL, Frédérique MASSAT, Sandrine MAZETIER, Michel MÉNARD, Pierre-Alain MUET, Philippe NAUCHE, Marie-Renée OGET, Jean-Luc PÉRAT, Catherine QUÉRÉ, Marie-Line REYNAUD, Marcel ROGEMONT, Bernard ROMAN, René ROUQUET, Odile SAUGUES, Jean-Louis TOURAINE, Philippe TOURTELIER, Michel VERGNIER, Alain VIDALIES,  
and all MPs of Parliamentary Group « socialiste, radical, citoyen et diversGauche » and allied MPs.

## **GROUNDS**

Ladies and Gentlemen

Today, there are several ten thousands of “trans” people in France, transsexual when they underwent (or plan to undergo) a sex surgery reassignment, transgender when they don’t want (at least not immediately) to be sexually reassigned. ECtHR (European Court of Human Rights) has held that “the term ‘transsexual’ is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other.

The notion of gender identity is reported in statements of numbers of international and European bodies thus wording the diversity of transsexual and transgender identities as it has been similarly done for sexual orientation. Transsexuals and transgenders do experiment the gap between perception of their physiological sex and perception of their “psychological sex, and thus lead themselves to socialize in the opposite sex as the one biologically recognized at birth, and to change their appearance with the help of appropriate medical processes that may include hormonal treatments or surgeries, notably variable according to individuals.

When the new gender social role is adopted, its non-conformity with the official sex mentioned in civil registry emerges very quickly. French civil registry actually mentions the sex at birth which stands for his or her gender for life. Since transgenders or transsexuals aim at changing their social gender, they need to change their “official” gender and petition the judge for a rectification of legal sex in civil registry.

Generally speaking, drafting this law enabling gender change on civil status, invites the legislator to envisage in short or mid term the introduction of gender definition in French law. This reform would ease the conformity of French Civil Code with neighboring ones written in languages that specifically differentiate gender and sex.  
Gender mentioned in official papers (« Féminin « or « Masculin ») would be based on gender written in civil registry and not based on sex at birth written on birth certificate as (né le [...] de » or « née le [...] de )

While the ECtHR stated down what transsexualism is, France never ruled out anything to organize life and transition of transsexuals and transgenders, especially concerning the conditions to enable gender change in civil status. Even if a legal process to change forename exists, changing gender in civil status has remained very complex and not organized by "positive law".

French legal process is built from jurisprudence established in 1992 when France was found guilty by the ECtHR on 25 March (Botella. v. France) of violating Article 8 of the European Convention on Human Rights. Seized by a complaint by Miss B., a transsexual man who had become a woman, The European Court found that French law, by requiring constant revelation of her official sex, placed the complainant in a situation that was incompatible with her right to privacy.

This jurisprudence driven process is not acceptable any longer with regard to rights that should apply for transsexual and transgender persons and with regard to the evolution of international legal positions on that matter.

Therefore, here is how we motivate this draft law.

## I – Current jurisprudential solution totally inappropriate

Current proceeding consists for the transsexual or transgender applicant to start to petition "en matière gracieuse". Yet most of the time it turns into litigation process where prosecuting attorneys subordinate their decision to the certification by a medical examination appointed by the court and stating that the petitioner has undergone a sex reassignment surgery or a sterilization surgery.

"Most of the time", "notably", all adverbials that must be used to qualify what is going on in civil courts, since, indeed the answer given to request for sex rectification on civil status registry is not identical everywhere. This diversity of judgments is sometimes based on specific cases demonstrating the natural and positive action of personification proceedings. But today the reasons for heterogeneous decisions are mostly due to the spirit of civil court public prosecutors. A mapping of civil courts could be edited disclosing such heterogeneity, demonstrating that all being equal, rights facing courts are not identical on the French territory.

The French Equality Body, Haute Autorité de Lutte contre les Discriminations et pour l'Egalité (HALDE), issued deliberation #2008-190 on September 15<sup>th</sup> 2008 that confirmed this situation and thus recommended to the government "the establishment of a legal or regulatory process taking into account the adequacy between physical appearance of transitioning transgender people and their gender status written on official papers, on behalf of their fundamental rights to protect their private life when dealing with civil and state services and on behalf of the principles of non-discrimination at work; the ultimate goal being to harmonize decision practices by civil court (family court in France)".

The Equality body recommended also to Social Security agencies and statistical institution (INSEE) the making of an official internal note stating to pay attention to transgender social security/INSEE ID as soon as gender change has been judged in court.

HALDE underlines in this deliberation the impossibility to conciliate refuse or unreasonable postponing of rectification of sex on civil status certificates with rights to respect for private and family life as defined by article 9 of French Code Civil and article 8 of the European Convention on Human Rights, especially when this later article happened to be used to condemn France by ECtHR. France should not pursue ignoring any legal terms and conditions on that matter, with the consequences of betraying the fundamental rights to protect private life, while on the contrary such protection exists in international legal conventions.

The Ministry of Justice has listened to this deliberation, to numerous civil society calls too; and finally decided to take into account such difficulties focusing on the issue of those systematic medical examinations. On May 14<sup>th</sup> 2010, the "Chancellerie" issued a circular letter towards prosecuting attorneys, requesting to stop demands of medical examinations at the exception of serious doubt about the reality of the "transsexualism" condition of the suer. Notwithstanding this circular letter, the public prosecutor keeps on systematically demanding those medical examinations, serious doubt being there or not. This circular letter is obviously inefficient and proves that we must call upon a solution from legislator initiative

As a result, examinations mandated by the court, to prove that sex reassignment surgery or sterilization has been undergone, continue to be mostly requested, and seldomly when it is not the case the surgeon certificate becomes mandatory. Therefore, it proves that the medicalization of the proceedings is not appropriate, and will never be. Legal proceedings and medical transition standards cannot rely on each other. Rectification of legal sex in civil registry cannot depend on forced medical treatments. The gender change proceeding has been built to comply with the respect of the suer's private life, it finally opposes the principle and rights to get a free and informed consent on medical matters, as defined in articles L1111-4 and al of French public health Code (Code de la santé publique)<sup>1</sup>.

This situation manifestly forces the legislator to start moving ahead.

## II – When satisfactory solutions emerge from international institutions

By refusing to establish any legislation on that matter, France keeps isolated in the international scene, where transsexuals' and transgenders' claims for civil gender change got more and more supportive advocates.

The proof resides on statements about transsexualism and gender identity written by bodies France belongs to:

- On March 26<sup>th</sup> 2007, a panel of international experts, mandated by United Nations, officially disclosed the so called "Jokarkata Principles" that demonstrate how international rights derived from the Universal Declaration of Human Rights apply on matters of sexual orientation and gender identity. Principle #3 states that: *"Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. (...) No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity"*

- On July 31<sup>st</sup> 2009, Commissioner for Human Rights at the Council of Europe published a thematic report on Human Rights and Gender Identity with recommendations such as : *"Member states of the Council of Europe should (...) Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change;"*

- On April 29<sup>th</sup> 2010, the Parliament Assembly of Council of Europe voted resolution 1728 based on discriminations grounded on sexual orientation and gender identity. Its article 16.11.2 *addresses the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to (...) official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy.*

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<sup>1</sup> See in particular : art. L1111-4 alinéa 3 du Code de la santé publique : « *Aucun acte médical ni aucun traitement ne peut être pratiqué sans le consentement libre et éclairé de la personne et ce consentement peut être retiré à tout moment.* »

Inspired by those statements, several national legislations in Europe have been changed in order to evolve in the directions mentioned by those international and European institutions: Spain which is the most progressive with its current enforced law on Gender identity, Germany which discussed a similar draft law proposed at the Bundestag in 2010.

In Spain, "Ley de Identidad de Genero" dating from March 15<sup>th</sup> 2007 enforces officers for civil matters to accept gender change request as soon as applicant shows a medical certificate proving gender "dysphoria" and another one delivered by a college of practitioners certifying the reality of at least 2 years of medical treatments without mandatory sexual reassignment or sterilization. Some dispensations are even accepted to diminish this period of 2 years in case of specific health or age conditions. Even though this law had been promulgated since 4 years, several Spanish organisations on LGBT rights hope to amend the law by promoting a guide on best practices. The guide calls on Spanish health authorities and on practitioners to promote standards of care dedicated to primarily support transsexual and transgender medical treatments and to avoid psychiatric approach that focuses on the certification of "gender dysphoria", aimed at fitting current legal conditions determined by the law. If those evolutions are applied, a breach will be opened in the organic link legally institutionalized between medical expertise and individual rights to change gender civil status in Spain.<sup>2</sup>

In Germany, a draft law on forenames change and determination of Gender Identity has been proposed by the Green party (Grünen) on June 2010 in the Bundestag (Entwurf eines Gesetzes über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit - ÄVFGG). The proposition seeks a significant proceeding simplification: transsexual applicant must declare, on his/her own or with the intermediation of a legal representative (in case of legal incapacity), that the gender stated in the registration of birth does not conform with his or her own perceived gender. The application may be rejected only if it is manifestly abusive.

An existing marriage or registered partnership shall remain unaffected by the amendment of the civil status. Upon the application of both spouses/registered partners, an existing marriage may be converted into a registered partnership or vice versa. The decision shall not affect the legal relationship between the applicant and their parents or the relationship between the applicant and their children. The same shall apply in relation to the descendants of these children. The prohibition of disclosure shall extend to the details concerning gender identity contained in the documents to be amended and to combinations of letters or numerals that are derived from gender; such details and combinations of letters or numerals shall also be amended.

This model of legislation is all the more respectful of the individuals and their fundamental rights. It must totally inspire the French legislator from now on.

In addition, such progressive legal moves are isolating France a little more on that matter, exposing more accurately the country to near future condemnation from ECtHR. The French legislator is manifestly urged to bring solutions in that area.

### III – Draftlaw hereby released

This draft law aims to enable gender change in civil status registry regardless of any mandatory medical process. This proceeding is inspired by the French symbolic Republican baptism (« baptême républicain »), but also by the proceeding to change one's name in civil status codified under article 60 of the civil code, and finally by the use of affidavits (« actes de notoriétés ») toward authorities responsible for civil status matters (« officiers publics »)<sup>3</sup>. It is therefore proposed to codify this law as article 99-2 under article 99-1 with following indents:

#### Indent 2 & 3:

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2 Homosexualités et socialisme (HES), *Proposition sur les questions d'identité de genre*, adoptée le 9 juin 2010

3 Grounds of this procedure described in : Homosexualités et socialisme, *Propositions sur les questions d'identité de Genre* - [http://www.hes-france.org/IMG/pdf/propositions\\_trans\\_2010-2.pdf](http://www.hes-france.org/IMG/pdf/propositions_trans_2010-2.pdf).

They state that proceedings will start by a petition. Gender change will only affect future events. Past events registered under the previous gender will remain unaffected (see indent 4). Petition will not be disputed. The suer is to be accompanied by two witnesses, chosen by him or her. The witnesses must both be of full age and capacity, and must not be ascendant or descendant of the suer. However, they might be relatives. Witnesses must disclose their identity, bonds to the suer and certify in good faith and the legitimacy of the petition.

Nevertheless, gender change hurts another legal principle, however today diminished: principle according to which one may not dispose of his or her civil status. Notwithstanding, this draft law doesn't propose to change the biological sex as witnessed at birth and endorsed in civil status. The purpose of this draft law is to change one's gender in case it appears not to match one's biological sex. Civil status disposal is therefore diminished and justifies simplified proceedings for gender change.

However simplified the proceedings shall be, it must not enable abuse, even though abuses could not be frequently arising. Indeed, social consequences of such a change are important enough to discourage attempts to abuse the proceedings. Facing a manifest abusive petition, if and only in this case, family court judge may dispute the petition. In case of non manifest but lately revealed abuse, article 2 gives the means for it to be remedied.

Family court is of competent jurisdiction.

**Indent 4 & 5 :**

They specify that the judge will agree on the gender change, unless facing a manifestly abusive petition, once more, only in this case is he entitled to reject the petition. From this day, gender change is final, meaning it has to be taken into account.

However, a change of circumstances would justify to petition for a new gender change, following the hereby presented proceedings. Such a new petition would in fact make the former null and void.

**Indent 6 :**

It makes it mandatory to take into account the gender change when one applies for official identification documents providing his or her civil status. This disposal targets both official authors of such documents and the suer who is not to claim his or her previous gender status unless waiving the right to his or her gender change. Once more, abuse of the proceedings is therefore prevented. The suer is to take the gender change into account on a daily basis at the risk of not fulfilling requirements asserted by previous indents and the family court agreement not being enforced. Meanwhile, when the suer claims his or her gender change, officials will have no choice but to acknowledge it.

**Indent 7 to 9 :**

They deal with the effects of family court agreement on gender change in civil status. Even though from the day on which the person concerned is to be considered as belonging to the other gender, the obligations arisen from previous gender status remain while rights arisen from previous gender status and bound to this former gender status extinguish. Indeed, rights allocated to members of a particular gender may not be pursued under another gender status.

On civil status, marriage contracted under previous gender status and still existing when petition addressed cannot pursue as long as French law will not legalize same-sex marriage. Spouses are therefore to divorce. At-fault divorce cannot be solely based on gender change of one of the spouses. Indeed, according to majority doctrine<sup>4</sup>, one may not be charged with his or her transsexualism. In any case, pre-existent marriage may not remain under new gender status and must therefore be dissolved when petitioning for gender change in civil status according to proceedings stated in Indents 2 & 3.

This subsection will be outdated as soon as same-sex marriage is legalized.

Lineage established under previous gender status toward the suer is not affected by the gender change, same as establishing later lineage of a descendant born before the gender change in civil status.

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4 See FRANÇOIS TERRE ET DOMINIQUE FENOUILLET, *Les personnes la famille les incapacités – précis Dalloz 7e édition* 2005, p. 151 ; J. HAUSER, RTD Civ 2001.335 ou RTD Civ 2002.274 ; LAURENCE MAUGER-VIELPEAU, D.2002.124 ; JACQUES MASSIP, LPA 12 avr. 2001 p. 20 ; HERVE LECUYER, Dr. fam. 2002, comm. n° 42 ; FREDERIQUE GRANET, AJ Famille 2002.413

**PROPOSITION DE LOI (as proposed in French)**

**Article unique**

1. Après l'article 99-1 du code civil, il est inséré un article 99-2 ainsi rédigé :
2. « *Art. 99-2* .La requête en rectification de la mention du sexe est présentée par l'intéressé devant le Juge aux Affaires familiales en présence d'au moins trois témoins capables, sans lien ni d'ascendance ni de descendance avec l'intéressé. Ils témoignent de la bonne foi du fondement de la requête.
3. L'abus manifeste du requérant fonde l'intervention du Ministère public.
4. Le tribunal ordonne, sauf abus manifeste, la rectification de la mention du sexe.
5. La rectification est définitive, sous réserve de la non introduction d'une nouvelle requête de l'intéressé au titre de l'alinéa premier de l'article 99-2 du présent Code.
6. Sans préjudice des dispositions de l'article 101 du présent Code, les actes reposant sur l'acte d'état civil doivent, à peine de l'amende édictée à l'article 50 du Code civil, intégrer la rectification ordonnée à la date de la rectification.
7. La rectification de la mention du sexe confère les droits et obligations du nouveau sexe à l'intéressé sans préjudice des obligations contractées sous l'empire de l'ancien à l'égard des tiers et sous réserve des droits liés au sexe antérieur.
8. Le mariage préexistant doit être dissout au jour de l'introduction de la requête en rectification.
9. La filiation établie avant la rectification ne subit aucune modification. Après la rectification, la filiation peut être établie à l'égard de l'intéressé conformément aux dispositions du titre septième du présent Code. »