



On the Change of Marriage Relationship After Gender Change

Hui Han

School of Civil and Commercial Law, Northwest University of Political Science and Law,
Xi'an, China

huihan0415@163.com

Abstract. The change of sex after marriage will cause the instability of the marriage relationship, how to define the marriage validity state after the change of sex is a theoretical problem. Existing studies mainly focus on marriage and family law. Still, it is an innovative research idea to unify the measurement of civil law norms and compare the change of marriage validity caused by gender change with the change of property rights caused by non-legal acts, leading to the conclusion that marriage continues to be valid after gender change. At the same time, after all, post-marriage sex change is different from social ethics and public order and good customs, it can be properly restricted while respecting basic rights: relaxing the conditions of sex change operation and strictly controlling the registration of gender change.

Keywords: The change of sex, marriage validity, property rights change caused by non-legal acts, Gender identity

1 Introduction

Since the 21st century, with the progress of medical level and the change of social concepts, more and more people with "sexual identity disorder" choose to change their gender through surgery. However, the increasing number of transgender people has aroused social concern and brought legal problems. As one of the essential criteria of human identity, gender is closely related to the whole body, but the typical contradiction is marriage, a kind of unique social union. Consequently, the problem facing civil law is: since same-sex marriage is not recognized in China, how to determine the validity of the subsequent marriage after the married person has changed gender?

In 2009 and 2017, the Ministry of Health and the National Health Commission of China issued the "Technical Management Norms for Sex reassignment Surgery (Trial)" and "Technical Management Norms for Sex reassignment Surgery (2017 edition)" respectively, both of which stipulated that the objects of sex reassignment surgery should be "not in the state of marriage". Regardless of whether it is in accordance with the legal principle to restrict the fundamental rights of the Constitution by departmental regulations, quite a number of transgender people will choose to have the surgery

outside the country. At this time, the issue of the validity of the marriage of the married person after the sex change becomes prominent.

Domestic and foreign scholars' research on this issue is limited to the internal law of marriage and family. But this paper tries to solve this "small" problem systematically by longitudinally drawing on civil law norms, horizontally drawing on other similar systems, and flexibly applying basic principles under the background of China's marriage law returning to the Civil Code. The number of transsexuals after marriage indeed is few and far between, but for one thing, complexity is the best test of legal subtlety. For another, attention to minorities is a measure of civility.

2 Research Perspective: Refer to the Changes in Property Rights Not Based on Legal Acts

In the era of the Civil Code, legal dogma is undoubtedly the first place. In the case that the marriage and family law has not made explicit provisions on the transsexual issue after marriage, the interpretation of laws and regulations is naturally the first choice and is the research method of many previous scholars. However, until now, all parties are deadlocked. The solution to the problem is to go out of the legal interpretation and apply it by analogy.

Property law and creditor's rights law constitute the framework of civil norms and include the basic content of property law, and marriage has personal and property attributes which is different from and related to property right and creditor's right. To find the applicable norms, it is necessary first to determine which law to retrieve. From the perspective of autonomy of will, marriage is the expression of the free intention of the parties. Whether to marry or divorce, when and with whom to marry are decided by the parties themselves, these characteristics and creditor's rights are highly similar. At the same time, marriage is the union of a man and a woman as spouses recognized by the social system at that time. Without the confirmation of the marriage contracting agency, no one can claim the marital relationship between himself and others. [1] The effect of publicity and public trust is similar to property rights.

This requires us to think about the difference between property rights and creditor's rights. The most intuitive explanation of the difference between the two is undoubtedly the real right change mode. The causes of real right change include legal and non-legal acts, with the former accounting for an absolute majority. For a long time, Chinese legislation has not made a strict distinction between acts of natural right and acts of creditor's rights until the civil code formally applied the principle of distinction. To be specific, the change of real right based on legal act usually follows the mode of "the performance of real right after the performance of creditor's right can lead to the change of real right." It is common that the parties set obligations through the burden act such as contract, and then complete the change of real right by delivery or registration. In comparison, changes in property rights that are not based on legal acts do not require delivery or registration, but rather the acquisition or loss of property rights since the achievement of a fact, such as the legal construction or demolition of buildings and the inheritance of estates.

A similar situation applies in marital relationships. When entering into a marriage, the parties should not only reach the consent of marriage but also obtain the certification of the marriage registration authority; When one of the parties dies, the marriage relationship ends naturally, and there is no need to apply for a divorce certificate. This kind of "change of marriage validity caused by legal act and non-legal act" is similar to two types of real right change patterns. Since the change of gender itself does not imply the intention of changing the validity of marriage, it should be classified as a real act in the system of civil legal facts. Can such a factual act (non-legal act) cause the change of the validity of marriage?

Again, by analogy, this requires us to explore the reasons and justifications for the change of real rights caused by non-legal acts. Civil law is the domain of will autonomy, and natural right is the right to the world, so the mode of "the performance of real right after the performance of creditor's right can lead to the change of real right" is the natural rationality of real right change mode based on legal act. Then what is the justification of the change of real rights not based on a legal act? There are three academic views:

The first view holds that its legitimacy comes from legal provisions, and the law plays the role of public notice of fundamental right changes instead of registration. "Legal provisions have a stronger publicity effect than registration, so it is unnecessary to take registration as the practical requirement for acquiring rights based on the legal conditions on the change of real property rights not caused by legal acts." [2] Some views hold that "the real right acquired by the parties according to the court's judgment, the government's decision and the direct provisions of the law are more powerful than and even more priority to the real right acquired through the publicity of the real right." [3] But the public notice stipulated by law and the public notice of real right change are different in essence. The openness and clarity of legal provisions are to break the limitation caused by the non-disclosure of laws, and show the progress of legislation. It is a kind of prior adjustment in the normative sense rather than the realistic sense. The publicity of the change of fundamental right means that the parties make the internal expression of their intention through discernable external way through a specific way. The act of relying on the third party's publicity is protected by law, which is the change of rights and obligations in one particular social life. Of course, we can say that the law defines the scope of fundamental right changes not based on legal acts. Still, it is not credible to directly equate "knowledge of legal provisions themselves" with "knowledge of real right ownership changes."

The second view holds that this is a policy choice that conforms to the social reality and protects the actual right holder. "Therefore, the principle of superior disclosure of changes in real property rights not based on legal acts is not the requirement of. . . Has the same or even more vital publicity function as registration. Still, it is a legal policy choice made by legislators based on the reality of social life and to protect the interests of those who acquire real rights in this way." [4] This view goes further, pointing out that the change of real right is through the participation, memory and dissemination of the transaction by specific individuals, which gradually transforms the individual memory into the group memory (such as prescription acquisition). Publicity confirms and endorses the legitimacy of the parties' rights and plays a role in maintaining social

memory. Therefore, no matter what kind of real right change mode is adopted, whether using the method of public announcement or legal provisions, there is legitimacy as long as the social facts can be strengthened. This view is quite convincing.

There is a third view, insofar as events and acts of fact cause changes in the law. The reason why the change of real property rights not based on legal actions occurs without relying on registration is to avoid the "title gap" during the transition of property rights. In the case of inheritance, the natural property right enjoyed by the decedent is extinguished due to death. If the law stipulates that the inheritor can obtain the real right only after registration, there will be a period of blank property right, and the estate will be reduced to ownerless property. [5] This view has a certain enlightening significance, a survey of events and facts caused by the change of real right, inheritance, bequest because the original civil legal relationship of the main body is lost, construction, demolition is the creation or elimination of the object. In this case, the basis for the existence of the original legal relationship is lost, and the law has to deny the original legal relationship and give legal recognition to the new fact.

The second and third views above can be referred to when discussing whether a change in gender can cause a change in marital validity. If transsexuality undermines the very foundation of marriage, then the legal recognition of subsequent marriage status has to change, typically by identifying it as a domestic partnership; If transsexual does not shake the foundation of marriage, it is not necessary for the law to forcibly interfere with it, and it is the best choice to maintain its continuous effectiveness. The key question, then, becomes what the basis of marriage is and whether transgender undermines that basis.

3 Research Results and Suggestions for System Improvement

3.1 Research results: Marriage is continuously effective

The basis of marriage remains unchanged despite sex change.

Exploring the basis of marriage is inseparable from investigating marital attributes. The difference between marriage and family relations and other social relations lies in the natural and social attributes of marriage and family. Firstly, natural attributes are the natural factors on which marriage and family are formed, including the physiological differences between men and women, the inherent sexual instinct of human beings, and the blood ties created through their reproduction. The emphasis on natural attributes is reflected in all aspects of the legislation. For example, the legal age of marriage must consider the maturity of the physiological development of both sexes and considering eugenics, marriage between close relatives is forbidden. The social attribute of marriage refers to that marriage is determined by certain social material production relations and is affected and restricted by the superstructure. The social attribute is the essential attribute of marriage. [6]

This dichotomy of attributes echoes the previous point that marriage continues to be valid after sex change. Banning same-sex marriage is a respect for natural characteris-

tics, and once one steps into this "emotional template" as a man and a woman, the pursuit of social attributes becomes the first priority of marriage. Therefore, after the wedding is concluded, the parties live stably in the social union recognized by the law, jointly purchase houses, invest and manage, raise children and support the elderly. At this time, the main basis of marriage is probably no longer gender but emotional basis, common rights, and obligations, etc. Thus, it is thought to be the marriage only needs to review the form of the elements, divorce but needs to prove that "husband and wife feelings have broken down." From this point of view, the simple change of gender will not lead to the dissolution of the marriage relationship, but if because of the sex change cause the breakdown of the couple's feelings, it can become the legal cause of divorce.

In line with the guidelines for preventing rash divorce.

For many years, China's divorce legislation has been guided by protecting the freedom of divorce and opposing hasty divorce. The Civil Code changed "opposing hasty divorce" to "preventing hasty divorce" and added a cooling-off period system in Article 1077. (Article 1077 of the Civil Code: "If either party is unwilling to divorce within 30 days after the marriage registration authority receives the application for divorce registration, it may withdraw the application for divorce registration from the marriage registration authority. Within 30 days after the expiration of the time limit prescribed in the preceding paragraph, both parties shall personally apply to the marriage registration office for the issuance of a divorce certificate. Those who fail to apply shall be deemed to have withdrawn their application for divorce registration.") While the provision is highly controversial, it has actually led to a sharp drop in the number of agreed divorces in the year since it was introduced. [7] According to statistics released by the Ministry of Civil Affairs, 29.6 divorces were registered in the first quarter of last year, down 72.15 percent from the previous year's fourth quarter. [8]

A divorce cooling-off period is a practical institutional construction to prevent rash divorce. According to this guiding ideology, society and law are more inclined to maintain the marriage relationship rather than overturn the marriage after some twists and turns. After the gender change, although the marriage relationship is bound to have some fluctuations if the husband and wife can repair this rift by themselves, if the marriage relationship can restore to a stable state by itself, the law is entirely unnecessary arbitrarily "sentenced it to death." The marriage relationship's continuance, stability, and harmony are also important indicators of social harmony.

It is fundamentally different from homosexual marriage.

The most important criticism of the validity of marriage after the transsexual is the de facto same-sex marriage status formed by the transsexual. Since the 21st century, the voice for the legalization of same-sex marriage has been rising. Nearly 20 years ago, some scholars argued that: "Relative to property law, the reform of family law has been lagging behind the concept of freedom and equality of modernism." . . . Should human beings handle their affairs with tolerance, respect others' choices and tolerate their differences as long as they do not form social 'evils'? " [9] In recent years, some scholars

have even used the term "unstoppable" to describe the trend toward legalizing same-sex marriage. [10]

In fact, a de facto same-sex marriage formed by a post-marriage transition is different from marriage between homosexuals. Transgender people do not equal homosexuals, and transsexual marriage does not similar to homosexual marriage because gender identity and sexual orientation are two very different issues. (Gender Identity refers to a person's emotional and physical belief that they belong to a certain Gender. Sex Orientation refers to a person's persistent sexual and emotional attraction to people of a certain gender, including heterosexual, homosexual, pansexual, asexual, etc. Gender identity and sexual orientation can be freely combined, such as cisgender heterosexuality, trans heterosexuality, trans homosexuality, cisgender pansexuality, etc.) Gay marriage (usually cisgender gay marriage) is a marriage between gay people, which is a matter of sexual orientation and is not recognized by our law. However, same-sex marriage formed by transsexual marriage after marriage is the result of transgender people's pursuit of the consistency between biological sex and gender identity, which is a problem of gender identity. Although "same-sex marriage" appears in appearance, it is fundamentally different from homosexual marriage.

Of course, the legislation doesn't go that far, and the above discussion of nuances remains theoretical. "Marriage is essentially an ethical institution. The legislator should see himself as a natural scientist. He is not creating the law. He is not inventing the law, but merely expressing the law." [11] No matter what kind of explanation is given to the marital status after transsexual, transsexual after marriage is undoubtedly inconsistent with the human order, public order, and good customs. Most people still can't treat transsexual people around them entirely with different eyes, especially after marriage. As a social norm, the law should adequately regulate and guide the behavior and results of transsexual after marriage.

3.2 Suggestions on the improvement of sex change surgery and change registration

As mentioned above, legislators should "discover" laws rather than "create" them, not to mention the institution of marriage in the field of private law. On the one hand, the content of law should be revised according to the time and the purpose of life pursued by the public in different places; On the other hand, traditional ethics, the way of life of the civil society and the concept and system of civil law should be respected. [12] While respecting fundamental rights, sex change after marriage should be limited to some extent because problems still exist under the current system.

To give an example: Fei 'er (pseudonym) (biological sex male, self-identified as lesbian) underwent gender reassignment surgery (male to female) overseas with the support of her partner Xiaoyu (pseudonym) (biological sex female, self-identified as lesbian). As Fei 'er did not apply to the police station to change her hukou register, she was still identified as a man despite her biological identity as a woman. Fei and Xiaoyu first obtained a marriage certificate from the civil affairs department after returning to China, and then registered their gender change to have a legally recognized relationship with her partner. The woman graphically called the move "a time-lapse."

To avoid similar problems, the existing regulations can be amended as follows.

First, the requirement to register a change of household registration after a sex change operation could be added as "not in a married state." The Health and Family Planning Commission and the Ministry of Public Security strictly regulate sex change surgery and stipulate that the registration of household registration only needs formal examination because they mistake the time of gender change for the completion of sex change surgery. However, the legal gender change begins with the registration of household registration rather than the completion of sex change surgery. As seen in the above cases, many sex change surgeries are performed overseas, and the current regulations of the National Health and Family Planning Commission do not cover transgender people comprehensively. If "not in marriage" is added as a condition in the household registration of gender change, many problems can be avoided predictably.

Secondly, the condition of gender reassignment surgery can be changed from "not in marital status" to "informed consent of the spouse." The Legal Standards for the Medical Treatment of Transgender Persons, unanimously adopted at the second conference in Houston, Texas, in August 1993, does not require a married person to undergo gender reassignment as a prerequisite for divorce but requires the spouse to sign an informed consent form. Some Chinese scholars hold similar views: "From the perspective of respecting the rights of one spouse, the obligation to inform or to seek the opinions of one spouse should be fulfilled, but this cannot be considered as a prerequisite for gender reassignment surgery. If one spouse can accept it and is willing to continue living together, the marriage relationship can continue to be maintained." [13] The Guidelines for Technical Management of Sex reassignment Surgery (Trial) in 2009 and 2017, and the Guidelines for Technical Management of Gender reassignment (2017 edition), both require sex reassignment surgery to be "not in the state of marriage," which is to ensure the stability of the marital relationship. However, not all people choose to change their registration after transsexual surgery. According to the 2017 Report on the Survival Status of Transgender People in China, only 50% of transgender people who have completed gender reassignment surgery have completed the registration of household registration. The reasons may be that the application was rejected, the family was obstructed, or the surgery alone was enough to alleviate their extreme gender discomfort. Suppose surgery alone can solve a long-standing problem for transgender people. Is it really necessary for such a purely personal sanction of physical rights to be strictly regulated by law? It is thought that the most direct and significant impact is on the spouse. At this time, if the spouse can give informed consent, they can allow the surgery. If the spouse cannot accept the surgery, the two can solve the problem through a divorce.

On the one hand, the above set of supporting measures relax the restrictions on gender reassignment surgery, reflecting the humanistic care for transgender people. On the other hand, these measures impose stricter regulations on the registration of household registration change, and try to avoid the appearance of legal difficulties. At the level of effectiveness, the restriction on the basic rights of citizens is originally a matter reserved by law, which should be regulated by the NPC Standing Committee. However, since the Civil Code has just been introduced, it is unlikely to be amended in a short time. Separate legislation is certainly feasible, but the problem is actually rela-

tively single, there is no need for separate legislation. Secondly, the research on the legal issues of transgender and transgender people is not a distinguished study after all. In the initial legislative practice, it is advisable to adopt, revise or abolish more flexible administrative regulations and departmental rules, etc. , and then fix the law to a higher level of effectiveness when the time is ripe.

4 Conclusion

Since the COVID-19 pandemic, many transgender people have been forced to "come out" and have been unprepared to face ununderstanding and even overreaction from their families. From the perspective of civil law, this article has no intention to comment on the struggle and resistance of transgender de-disease. It only hopes to arouse the attention of the public, especially legal workers, on transgender people from the perspective of post-marriage transsexuals. Individual life is so fragile and short, but it is also brilliant and precious. We sincerely hope to change the wheel of history without blood and life. Listening, talking, and thinking rationally is the basic attitudes we should maintain.

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