

Italian Constitutional Court

Legal summary

Judgment No 143/2024

ECLI:IT:COST:2024:143

THIRD GENDER AND GENDER REASSIGNMENT: THE REFERRAL SEEKING TO INTRODUCE A THIRD GENDER IN CIVIL STATUS RECORDS IS INADMISSIBLE; JUDICIAL AUTHORISATION FOR SURGICAL REASSIGNMENT IS UNNECESSARY IF TRANSITION HAS ALREADY OCCURRED

In Judgment No 143/2024, the Constitutional Court (the “**Court**”) declared that the question as to the constitutionality of the binary nature of gender records in the civil status registry is inadmissible. However, it ruled that the requirement of court authorisation for gender reassignment surgery is unconstitutional, as it violates the principle of medical self-determination under **Articles 2, 3 and 32 IC**.

The binary structure of the civil status registry can affect the fundamental rights of non-binary people, who cannot have their records corrected so as to reflect their identity. Nevertheless, introducing a third option would require comprehensive legislative reforms across many areas of the legal system that can only be accomplished by the legislature. Thus, the question of constitutionality regarding this aspect of Italian law is deemed inadmissible.

In contrast, the obligation to obtain court authorisation for all cases of gender reassignment surgery was found to be unreasonable. This requirement unjustifiably hampered an individual’s right to affirm their gender identity and access necessary medical treatment. Once a court has confirmed an individual’s transition and granted rectification of gender records, subsequent reassignment surgeries should only require authorisation from medical professionals, not judges.

Main proceedings

L.N., who was assigned female at birth, is non-binary with a preference towards the masculine gender and has been medically diagnosed with gender dysphoria. They requested the Bolzano Ordinary Court (the “**referring court**”) to authorise a name change, correct their gender in the civil status registry (from “female” to “other”) and allow them to undergo female-to-male gender reassignment surgery, including a mastectomy.

The referring court noted that the applicable law does not permit the requested modification to the civil status registry. Specifically, Article 1 of Law No 164/1982 (the “**first challenged measure**”), which governs the rectification of gender records, operates on an implicitly binary framework, allowing only female-to-male and male-to-female corrections. Additionally, regarding the surgery request, Article 31(4) of Legislative Decree No 150/2011 (the “**second challenged measure**”) mandated that all gender reassignment treatments be authorised by a final court judgment.

The referring court argued that these provisions restrict the fundamental right of L.S. to have their gender identity recognised and affirmed. Given the clear language of the challenged measures, no interpretation was possible that aligns with the Italian Constitution (IC). Consequently, the referring court referred the matter to the Court, asserting that the challenged provisions violate the IC.

Complaints

The referring court first argued that the inability to record the applicant's gender as "other" under the first challenged measure violates **Articles 2 (Fundamental rights), 32 (Protection of health) and 117(1) (Compliance with international obligations) IC, the latter in connection with Article 8 (Right to private and family life) of the European Convention on Human Rights (ECHR)**. This restriction unjustifiably limits the applicant's right to their identity, health and private and family life. While the measure aims to promote legal clarity in public records, it fails to balance competing interests and completely sacrifices an individual's right to have their gender identity legally recognised.

Additionally, **the first challenged measure violates Article 3 IC (Principles of equality and non-discrimination)**, as it allows individuals with a binary gender identity to change their civil status records in order to reflect their gender but refuses this right to non-binary people.

Regarding the second challenged measure, which requires **gender reassignment surgery to be authorised by a final court decision, the referring court contended that it violated Articles 2, 3 and 32 IC**. The time and cost involved in obtaining a final court ruling create an undue burden on an individual's right to medical self-determination. Furthermore, the measure introduced discrimination by treating those seeking gender reassignment surgery differently from individuals undergoing other irreversible medical procedures, who only need the consent of healthcare professionals, not a court's authorisation.

Decision of the Court

The Court determined that the referral against the first challenged measure is inadmissible. While acknowledging that this measure might undermine the enjoyment of constitutionally protected rights, it noted that it is for the legislature only to introduce a third gender in the civil status registry.

Conversely, the Court held that the second challenged measure violated **Article 3 (Principles of equality and non-discrimination) IC**.

Reasons for the decision

The Court divided its analysis into two parts, reflecting the distinct issues raised by the referral order. The examination of the first challenged measure focused on the relatively new issue of affirming and legally recognising a non-binary gender identity. The second measure, by contrast, concerned the more established issue of transitioning from female to male (or *vice versa*) and the legal regulation of gender reassignment procedures.

The aim of the first challenged measure is to acknowledge the potential misalignment between the gender assigned at birth and an individual's gender identity. Although the referral raised an issue of constitutional tone ("*tono costituzionale*"), **the Court found that it touched upon broader systemic issues that exceeded its jurisdiction, and deemed the referral inadmissible.**

Undeniably, gender dysphoria experienced by non-binary people can cause significant distress and impede their enjoyment of personal rights under Article 2 IC. Furthermore, a legal system that does not formally acknowledge non-binary identities may lead to discrimination and harm individuals' well-being, which conflicts with Articles 3 and 32 IC. As such, the issue of non-binary gender recognition should be addressed by the legislature, which serves as the primary interpreter of evolving social sensibilities.

Gender dysphoria can stem from identifying with genders beyond male and female, and some legal systems have already made reforms to recognise them. For example, Germany has recently passed a law on gender self-determination that acknowledges non-binary identities,¹ and the Belgian Constitutional Court has ruled that the country's gender transition law is unconstitutional for discriminating against non-binary individuals.² EU law has also introduced a third gender option ("undetermined") in the template forms relating to the circulation of public documents within the EU.³ However, there is no European consensus on this issue. While the European Court of Human Rights (ECtHR) has affirmed the right to transition between binary genders,⁴ it has recently ruled that Article 8 ECHR does not require Member States to offer a non-binary option in civil status records.⁵ The UK Supreme Court reached the same conclusion in 2021.⁶

Introducing a third gender in the civil status registry would have far-reaching effects across multiple areas of the legal system, which are currently based on a binary gender structure. Such a change would require comprehensive legislative reform, affecting several legal fields: family law (since marriage is reserved for people of different genders, while civil unions are open to same-gender couples); labour law (which provides preferential treatment to female workers); sports law (which provides for competitions based on gender); and privacy law (as hospitals and prisons typically segregate individuals by gender). This reform would also impact gender equity legislation, which supports affirmative action for what domestic law refers to as the "underrepresented sex,"⁷ and the legal requirement that a person's name and gender align,⁸ given that most Italian names are gendered and follow a binary distinction.

¹ German Federal Law of 19 July 2024 on self-identification with regard to gender entry.

² Judgment No 99/2019 of 19 June 2019.

³ Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

⁴ ECtHR, judgment of 11 July 2002, *Christine Goodwin v. United Kingdom* (Application No 28957/95).

⁵ ECtHR, judgment of 31 January 2023, *Y v. France* (Application No 76888/17).

⁶ UK Supreme Court, judgment of 15 December 2021, *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

⁷ Legislative Decree No 198/2006 (Code of equal opportunities between women and men), Article 1.

⁸ Presidential Decree No 396/2000 (Regulation revising and simplifying the civil status registry), Article 35(1).

Due to these extensive systemic implications, the Court ruled the challenge to the first measure inadmissible, as addressing it would exceed its mandate and cause widespread disruption within the legal system.

Conversely, the challenge to the second measure under Articles 2, 3 and 32 IC was deemed admissible, and was addressed on the merits. The contested element of this measure was the requirement that gender reassignment surgery had to be authorised by a final court decision.

The requirement, introduced in 1982 and later incorporated into the second challenged measure, reflected a paternalistic and unique aspect of the Italian legal framework. In contrast, other countries emphasise individual self-determination, allowing reassignment treatments to proceed upon medical authorisation. **While the requirement was not inherently unreasonable, given the irreversible nature of the surgeries for which it was originally designed, it no longer aligned with contemporary understandings of gender transition.**

The requirement became outdated as gender transition was understood in more nuanced terms. While reassignment surgery remains one way to affirm gender identity, it is neither indispensable nor the only available method. Hormonal treatment and psychological-behavioural support can also be effective in affirming one's gender identity. **The Court had already found that the rectification of civil status records, which the law mandates "when the sexual traits have been modified",⁹ should be allowed even for individuals who have not undergone surgical procedures,¹⁰ provided that the court can confirm that "an objective transition of gender identity"¹¹ has occurred.**

As a result of these developments, competent courts regularly authorised both gender reassignment surgery and the rectification of civil records in a single decision. This marked a departure from the sequence implied by the second challenged measure, requiring courts to authorise the surgical procedure before confirming that the gender transition process has occurred, and warranting the rectification of civil status records only after such confirmation. In fact, since gender transition can take place – and can be ascertained – without surgical intervention, the blanket requirement for judicial authorisation of surgery in all cases was no longer aligned with the rationale behind the provision.

For these reasons, the Court found that the second challenged measure violates Article 3 IC. Specifically, it ruled that **the provision was unconstitutional to the extent that it required judicial authorisation for gender reassignment surgery** (as opposed to simple medical authorisation), **even in cases where the court can otherwise ascertain that the applicant has already undergone gender transition** and can therefore order the rectification of their gender identity in civil status records.

⁹ Law No 164/1982 (Provisions on the rectification of sexual attributes), Article 1. The original reads "*a seguito di intervenute modificazioni dei suoi caratteri sessuali*".

¹⁰ Constitutional Court, Judgment No 221/2015.

¹¹ Constitutional Court, Judgment No 180/2017. The original reads "*oggettiva transizione dell'identità di genere*".

Type of proceedings	Constitutional review by referral order
President of the Court	Augusto Antonio Barbera
Judge rapporteur	Stefano Petitti
Composition of the Court	Augusto Antonio Barbera (President), Franco Modugno, Giulio Prosperetti, Giovanni Amoroso, Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Emanuela Navarretta, Maria Rosaria San Giorgio, Filippo Patroni Griffi, Marco D'Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi
Delivery of the judgment	23 July 2024
Challenged measures	Article 1 of Law No 164 of 1982 Article 31(4) of Legislative Decree No 150 of 2011