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**Table of Contents**  
**The Italian Law Journal**  
Vol. 11 – No. 02 (2025)

***Essays***

CLAUDIA AMODIO, <i>A Post-Normal Science Framework for Rethinking EU AI Governance</i> .....	1
PAOLO D'ANSEMI, <i>Questioning the Impartiality of Public Administration. The Uncertain Glory of Public Prosecutors</i> .....	31
LARRY A. DIMATTEO AND JAN HALBERDA, <i>Corrective Justice in Contract Law: A Comparative Law Analysis</i> .....	47
JORGE L. ESQUIROL, <i>The Limits of the Social in Law and Thought</i> .....	103
GABRIELLA GIMIGLIANO, <i>Money Governance: Accommodating Complementary Currencies in the European Legal Framework</i> .....	129
ANDREA MAZELLIU, LEDJA BURNAZI MITLLARI AND ERALDA METHASANI ÇANI, <i>Human Rights Risks in AI Regulation: A Comparative Study of Italy and Albania</i> .....	157
CAROLINA PERLINGIERI, <i>Content Moderation and Freedom of Expression Online</i> .....	181

***Short Symposium 'Revisiting the Commons: Law, Crisis and Social Struggle'***

MARIA FRANCESCA DE TULLIO, <i>Democracy and Spatial Justice in Times of Austerity. Creative Use of Law in Italian 'Emerging Commons'</i> ..	189
ALESSANDRA QUARTA, <i>The Commons Between Law, Space, and Belonging</i> .....	213
MICHELE SPANÒ, <i>The Persistence of the Positive: Reflections on Research into the Commons</i> .....	225

## ***Hard Cases***

GIOVANNA GILLERI AND MATTEO BASSETTI, <i>The Italian Constitutional Court's Decision no 143 of 23 July 2024: Institutional Pathologisation Through the Prism of Binary Normativity</i> .....	241
MATTEO M. WINKLER, <i>An Untold Legal History of Nonbinaries</i> .....	261

## ***Corporate and Financial Markets Law***

DOMINIK MIZERSKI, <i>The Regime of Related Party Transactions from the Perspective of Intra-group Transactions. A Comparative Approach</i>	281
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## ***Insights and Analyses\****

IVAN ALLEGRANTI, <i>Home, Territory, and Identity: The Legal Framework and Lessons Learned from the 2016-17 Seismic Events in the Marche Region</i> .....	295
EMANUELA ANDREOLA, <i>Digitization of Art, NFTs, and Tools for the Circulation of Creative Works</i> .....	309
LUCA CALCATERRA, <i>Reasonable Accommodations for People with Disabilities in Italian Legislation Today</i> .....	335
LUCIO CASALINI, <i>Towards Sustainability: The European Regulatory Framework for Green Finance in Real Estate</i> .....	369
ALBA CINQUE, <i>Environmental Sustainability and Misleading Practices in the Italian Jurisdiction</i> .....	385
BRUNELA KULLOLLI, <i>Prenuptial Agreements and Evidence in Civil Proceedings: The Albanian Experience in Comparative European Context (Germany, Italy, and France)</i> .....	399
ISABELLA MARTONE, <i>Notes on the Potential and Risks of Algorithmic Activity</i> .....	423
PAOLA PASQUALONE, <i>Impact Assessments and the Protection of Fundamental Rights in the Processing of Personal Data</i> .....	441

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## Hard Cases

# The Italian Constitutional Court's Decision no 143 of 23 July 2024: Institutional Pathologisation Through the Prism of Binary Normativity

Giovanna Gilleri\* and Matteo Bassetti\*\*

### Abstract

This article presents and criticises the Italian Constitutional Court's judgment no 143 of 23 July 2024 dealing with the judicial requirements for legal gender recognition. The judgment has declared Art 31, para 4 of decreto legislativo no 150 of 2011 unconstitutional in that it subjects to judicial authorisation medical and surgical treatments aimed at modifying sex characteristics. We explain that the judicial authorisation for legal gender recognition still applies in practice. Against optimistic readings on the Court's openness to non-binarism, we argue that in practice the decision is not revolutionary for the rights of trans people for at least two reasons. First, while the Court intervenes in procedural aspects of the legal gender recognition procedure, it maintains that seeking judicial authorisation for gender affirming surgical intervention is a requirement in line with Constitutional obligations. Second, it excludes that the registration of non-binary identities constitutes a state positive obligation, thereby reaffirming gender binary normativity via pathologisation of trans identities.

### I. Introduction

Legal gender recognition is one the main areas of trans lives whose protection remains uneven across Europe. Living with an inaccurate gender marker which does not correspond with one's deep sense of gender identity may limit the enjoyment of human rights, indeed. In countries where legal recognition follows a highly medicalised path, trans people are frequently victims of violence in those same health-care settings to which they should resort as a precondition to practice

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their right to recognition.<sup>1</sup> Against abusive and invasive preconditions, the UN Independent Expert on Sexual Orientation and Gender Identity has called on states to enact gender recognition laws ensuring quick, transparent and accessible procedures, respectful of trans persons' rights to personal integrity and to free and informed consent.<sup>2</sup>

Further, the Council of Europe Commissioner for Human Rights has repeatedly recommended that Member States 'consider the proportionality of requiring gender markers in public official documents,'<sup>3</sup> thereby echoing the UN Independent Expert on Sexual Orientation and Gender Identity, who had already expressed 'significant doubts as to the real need for the pervasive exhibition of gender markers in official and non-official documentation (...).'<sup>4</sup> Starting from *Christine Goodwin v United Kingdom*,<sup>5</sup> the European Court of Human Rights (ECtHR) has gradually set out obligations for Member States to provide legal gender recognition procedures complying with the above mentioned conditions of transparency and accessibility.<sup>6</sup> The Court has also condemned coercive surgeries<sup>7</sup> and sterilisation<sup>8</sup> as requirements to access legal gender recognition, declaring their incompatibility with Art 8 ECHR.<sup>9</sup>

The Court's consideration that Member States enjoy a wide margin of

<sup>1</sup> These include involuntary psychiatric evaluations, unwanted surgeries, and, in some cases, sterilisation and other coercive medical procedures. UN General Assembly, 'Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity', UN Doc A/HRC/38/43 (2018), para 44. See also United Nations High Commissioner for Human Rights, 'Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity', UN Doc A/HRC/29/23 (2015), para 54; United Nations High Commissioner for Human Rights, 'Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity', UN Doc A/HRC/19/41 (2011), para 57.

<sup>2</sup> UN General Assembly, 'Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity', UN Doc A/HRC/38/43 (2018), para 98. Similar recommendations could be found in the Inter-American Court of Human Rights' case law: see Inter-Am. Court H.R., *Opinión Consultiva Solicitada Por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, Opinion of 24 November 2017, para 129, available at [www.corteidh.or.cr](http://www.corteidh.or.cr).

<sup>3</sup> Council of Europe Commissioner for Human Rights, 'Human Rights and Gender Identity and Expression' (2024), available at <https://tinyurl.com/4m89nwe9> (last visited 31 January 2026).

<sup>4</sup> UN General Assembly, 'Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity', UN Doc A/HRC/38/43 (2018), para 37.

<sup>5</sup> Eur. Court H.R., *Christine Goodwin v United Kingdom*, Judgment of 11 July 2002, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>6</sup> Eur. Court H.R., *SV v Italy*, Judgment of 11 October 2011, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it); *A.D. and Others v Georgia*, Judgment of 1 December 2022, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>7</sup> Eur. Court H.R., *X and Y v Romania*, Judgment of 19 January 2002, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>8</sup> Eur. Court H.R., *AP, Garçon and Nicot v France*, Judgment of 6 April 2017, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>9</sup> The ECtHR has been widely criticised for stopping short of condemning the conditioning of legal gender recognition to other medical requirements. For a comprehensive analysis of the case law, see D. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (London: Hart, 2019).

appreciation with regards to legal gender recognition procedures and therefore may subordinate recognition to other medical requirements (ie psychiatric diagnoses) has been widely criticised.<sup>10</sup>

Italy is among the majority of those European states that continue to condition legal gender recognition to the fulfilment of medical treatments and mental health diagnoses, rather than trans people's own determination and declaration of their gender.<sup>11</sup> Unlike most of its European counterparts, the Italian legal gender recognition law further subjects access to gender affirming surgical procedures to judicial review, thus delaying for years trans people's access to gender affirming healthcare.<sup>12</sup>

It is in this context that on 23 July 2024 the Italian Constitutional Court issued judgment no 143 of 23 July 2024 ('143/2024' hereinafter) concerning the requirement to seek judicial authorisation to undergo gender-affirming surgical treatments modifying primary and secondary sex characteristics, and on the establishment of a legal sex category other than 'female' or 'male'.<sup>13</sup> The decision was briefly hailed as a turning point in public debates and legal circles as 'opening the law to the world of non-binary identities',<sup>14</sup> 'diversity'<sup>15</sup> and self-determination.<sup>16</sup>

Indeed, at a first glance, the judgment offers space for the first Italian Constitutional Court's reflection on non-binarism, calling on the legislator to address the issue of registration of non-binary identities, and improves access to gender affirming healthcare through a simplification of the judicial procedure.<sup>17</sup> In this

<sup>10</sup> The ECtHR eventually declared that Art 14 ECHR prohibits discrimination on the basis of gender identity, although it has not actually applied it in legal gender recognition cases: Eur. Court H.R., *PV v Spain*, Judgment of 30 November 2010, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it); Eur. Court H.R., *Identoba and others v Georgia*, Judgment of 12 May 2015, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>11</sup> P. Cannoot, 'The Pathologisation of Trans\* Persons in the ECtHR's Case Law on Legal Gender Recognition' 37 *Netherlands Quarterly of Human Rights*, 14-35 (2019).

<sup>12</sup> See M. Lorusso et al, 'Navigating the Gap: Unveiling the Hidden Minority Stressor Faced by Trans and Nonbinary Clients in Gender Affirming Pathways' 26 *International Journal of Transgender Health*, 330-350 (2024).

<sup>13</sup> Corte costituzionale 23 July 2024 no 143, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

<sup>14</sup> M. Winkler, 'Persone non binarie: la decisione della Corte Costituzionale' available at <https://tinyurl.com/4xrdz3jm> (last visited 31 January 2026).

<sup>15</sup> G. Sulpizi, 'Il diritto ad essere diversi: oltre il binarismo nella rettificazione di sesso?' *GenUs. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 1 (2025).

<sup>16</sup> R. Parigiani, 'Il diritto al compimento degli interventi chirurgici di affermazione di genere dopo la pronuncia n. 143/2024 della Corte costituzionale: Prime riflessioni alla luce delle pronunce di merito', in N. Posteraro et al eds, *Sul non binarismo di genere e sull'autorizzazione giudiziale a effettuare gli interventi chirurgici di affermazione di genere la sentenza della Corte Costituzionale n. 143 del 2024* (Napoli: Editoriale Scientifica, 2025), 213.

<sup>17</sup> N. Posteraro et al eds, n 16 above; G. Sulpizi, 'Il diritto ad essere diversi: oltre il binarismo nella rettificazione di sesso?' *GenUs. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 1 (2025); G. Mingardo, 'Il riconoscimento delle nuove soggettività e il limite del binarismo di genere nella prospettiva costituzionale' *GenUs. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 121 (2024); B. Liberali, 'Alla ricerca del fondamento costituzionale dell'identità di genere: il transessualismo e il non binarismo fra diritto alla salute, dignità umana e identità personale' *Bio-Law Journal - Rivista di BioDiritto*, 1-5 (2024); F. Dalla Balla, 'Cosa

paper, we tell a different story, one of missed opportunities and legitimisation of exclusionary and pathologizing laws.

What is key to understanding this judgment is the use by the Italian Constitutional Court of the term 'sex' in three legally distinct ways. The Court uses 'biological sex' ( *Sesso biologico*) to describe the multitude of physical and genotypic characteristics that shape an individual's primary and secondary sex characteristics, and on the basis of which a sex is 'assigned/registered at birth' (*attribuzione del sesso alla nascita*). The assignment and registration of an individual's sex on their birth certificate is the administrative procedure that first establishes their 'legal sex' ( *Sesso anagrafico*).<sup>18</sup> Rather than being innate, 'legal sex' is a by-product of the legal order, and amendable through administrative and judicial processes known as 'legal gender recognition.'<sup>19</sup> To be precise, the Constitutional Court's decision no 143/2024 concerns the law regulating the amendment of an individual's 'legal sex' due to their gender identity, and the number of legal sex categories available.<sup>20</sup>

After this Introduction, the paper presents the twofold content of the decision, dealing with the issues of the registration of non-binary legal gender and the judicial authorisation for surgical interventions (Section II). We then show the poor impact of the decision on trans lives (Section III), which both reiterates the surviving system of pathologisation (Section IV) and reinforces the gender binarism it fosters (Section V). Conclusions will oppose these anti-trans effects encouraging the registration for plural gendered possibilities.

resta della legge n. 164/1982? Diritti e fonti della transizione di genere?' *BioLaw Journal – Rivista di BioDiritto*, 57-86 (2024); R. Parigiani, 'Corpi, prassi e pratiche alla luce della sentenza 143/2024 della Corte Costituzionale' *BioLaw Journal – Rivista di BioDiritto*, 35-49 (2024).

<sup>18</sup> n 13 above, para 4.1 *Considerato in diritto*.

<sup>19</sup> The distinction between sex-biology and gender-culture is usually explained as a dichotomy between nature and nurture: while the former refers to the body, the latter comprises the social expectations concerning attributes, roles, and attitudes in relation to one's sex. This is the institutional approach embraced at the UN level, see for instance: UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', UN Doc CEDAW/C/GC/28 (2010), para 5; UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)', UN Doc HRI/GEN/1/Rev.9 (2004), fn 2. Yet, sex itself is a construct ('*construcción biológica*') as the Inter-American Court of Human Rights identified. Indeed, while genetic, hormonal, anatomical, and physiological characteristics are biological facts, the way in which these sex is categorised according to them and then assigned at birth follows the gender norms that are social in nature: Inter-Am Court HR, *Opinión Consultiva Solicitada Por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, para 32(a). Cf G. Gilleri, 'Gender as a Hyperconstruct in (Rare) Regional Human Rights Case Law' 12 *European Journal of Legal Studies*, 25, 25-42 (2020). On the concept of 'legal gender recognition' see E. Brems et al, 'Introduction', in E. Brems et al eds, *Protecting Trans Rights in the Age of Gender Self-Determination* (Antwerp: Intersentia, 2020), 2.

<sup>20</sup> The Court acknowledges that the expansion of legal sex categories would affect intersex individuals, but reiterates that the present judgment concerns the amendment of a person's legal sex, rather than its initial registration at birth: n 13 above, para 4.1 *Considerato in diritto*.

## II. The Content of the Decision

Decision no 143/2024 concentrates on two main questions. Although these are inherently connected, they require to be treated separately for the sake of conceptual clarity, at least at this preliminary stage. Therefore, this Section focuses on two main aspects: (1) the registration of non-binary legal sex; and (2) the authorisation for gender-affirming surgical interventions.

### 1. The Registration of Non-Binary Legal Gender

In decision no 143/2024, the Constitutional Court acknowledges that the clash between certain gender identities and the Italian sociolegal system triggers a situation of suffering which is in contrast with Arts 2 (inviolability of human rights and personalist principle), 3 (principle of equality) and 32 (right to health) of the Italian Constitution. The Court further addresses the impact of the binary structure of the Italian civil status registry on the existences of non-binary people, who cannot find their records amended as to mirror their identity. However, by underscoring that the introduction of a third option would require comprehensive legislative reforms in several areas of the legal system, the judgment concludes that such an effort could be accomplished by the legislature only.

Briefly, the Constitutional Court recognises the relevance of the issue, entrusts substantial questions on the right to gender identity to the Parliament's discretion,<sup>21</sup> and considers inadmissible the question of constitutionality on this aspect. Put in context, the lack of clear instructions or deadlines for the Parliament by the Constitutional Court translates in an almost certain inaction by lawmakers, with the Constitutional Court's call falling on deaf ears within Italy's current transphobic political climate.<sup>22</sup> While this stance might be promising on the long run, it finds no translation into any concrete legal action to improve trans people's lives, especially the bureaucratic pathologizing burden accompanying their legal transition.

The case originated from an application brought before the Bolzano Tribunal by I.N. – formerly L.N.<sup>23</sup> – a non-binary person assigned female at birth. Having received the diagnosis of gender dysphoria, as the preliminary step provided by Italian law, I.N. seized the Bolzano Tribunal to apply for the amendment of their legal gender from 'female' to 'other,' and to obtain the judicial authorisation for surgical interventions, including mastectomy.

The Bolzano Tribunal referred two questions of legitimacy to the Constitutional Court. The latter found the first question concerning gender categorisation inadmissible claiming that it falls under the legislator's discretionary power. In particular, the Bolzano Tribunal had asked the Court whether Art 1 of Law no

<sup>21</sup> F. Dalla Balla, n 17 above, 57, 59.

<sup>22</sup> A. Kompatscher et al, 'Non-Binary Gender Markers in Italy?: On the Decision no 143/2024 of the Italian Constitutional Court' *Verfassungsblog*, available at <https://tinyurl.com/2e4ehtt5> (last visited 31 January 2026).

<sup>23</sup> We refer to the applicant with their preferred name, 'I.N.'

164/1982,<sup>24</sup> which does not provide for 'other' among the possible genders in the rectification decision, would be in breach Arts 2 (inviolability of human rights), 3 (principle of equality), 32 (right to health), 117, para 1 (international obligations) of the Constitution, in relation to Art 8 (right to private and family life) of the European Convention on Human Rights (ECHR). The Constitutional Court underscored the absence a positive obligation for states to grant non-binary registration *ex Art 8 ECHR* due to the lack of European consensus on the matter, as found by the ECtHR.<sup>25</sup>

## 2. The Authorisation for Surgical Interventions

The Bolzano Tribunal raised also a second question of legitimacy, comparing gender affirming surgeries to any other irreversible surgical intervention, with the judicial authorisation being required to access the gender affirming surgeries only.<sup>26</sup> In order to understand the guidance sought by the Bolzano Tribunal, it is first necessary to provide an overview of the Italian legal gender recognition framework and its developments.

To date, the above-mentioned legge no 164/1982 has been the only substantial legislative intervention with regards to legal gender recognition of trans people in Italy. The framework required trans people to seek judicial authorisation twice. First, trans people had to resort to the judge to undergo gender affirming surgical treatments. In this instance, the tribunal had to assess medical documentation attesting to trans people's gender identity and provide authorisation to undergo surgical intervention to primary sex characteristics. Only following the tribunal's verification that surgical intervention to primary sex characteristics had happened, applicants could seek judicial authorisation to obtain legal gender recognition.

Between 1982 and 2024 other intermediate steps have occurred, all resulting from interventions by the Constitutional Court. In 2015, the Constitutional Court's decision no 221/2015 had declared that trans people enjoy the right to choose whether to undergo surgical interventions to primary and secondary sex characteristics as part of their transition.<sup>27</sup> In this decision the Court had determined that the requirement to amend one's sex characteristics established by law no 164/1982 could be fulfilled through a variety of medical treatments, and excluded the necessity of surgical interventions to establish that definitive and permanent changes had occurred.<sup>28</sup> This should not be interpreted as an endorsement by the Constitutional

<sup>24</sup> Legge 14 April 1982 no 164.

<sup>25</sup> Eur. Court H.R., *Y v France*, App no 76888/17, Judgment of 31 January 2023, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>26</sup> Most 'gender-affirming' surgeries are in fact performed by healthcare professionals for multiple purposes on both trans and cisgender people, but they require judicial authorisation only when performed for gender affirming purposes. See in particular partial or total removal of breast tissue, testicles, ovaries, and uterus.

<sup>27</sup> Corte costituzionale 21 October 2015 no 221, available at <https://tinyurl.com/2uappez8>.

<sup>28</sup> *ibid* para 4.1 *Considerato in diritto*.

Court of trans people's right to self-determine their gender, however. In decision no 221/2015, indeed, the Court maintained the necessity of a 'rigorous judicial assessment of the modalities through which the change has happened and of its permanent character.'<sup>29</sup> In 2015, the Court therefore had established that the (unchanged) requirement to demonstrate permanent modification of sex characteristics could be fulfilled through medical interventions that do not require prior judicial authorisation. The Court further recognised that – although no longer necessary for legal recognition – surgical interventions to primary and secondary sex characteristics may be instrumental for trans people's psychophysical wellbeing. Therefore, in line with the right to health, trans people had a right to *request judicial authorisation* to undergo surgical intervention to primary and secondary sex characteristics.<sup>30</sup>

In brief, following decision 221/2015, trans people still had to obtain judicial authorisation to both undergo gender affirming surgical interventions, and to amend their legal sex – but the two requests could be initiated simultaneously (or in any order).

Actually, few months before decision no 221/2015, the Court of Cassation had already excluded the mandatory nature of the surgical intervention upon primary sex characteristics as a prerequisite to access the change of legal gender in its judgment no 15138 of 20 July 2015.<sup>31</sup>

Going back to the decision at stake in this paper, the Constitutional Court's decision no 143/2024, the Bolzano Tribunal asked the Constitutional Court whether the judicial authorisation is needed in order to access gender affirming surgical treatments, owing to the fact that assessment of the necessity of surgical treatments is ordinarily competence of medical and psychological authorities.<sup>32</sup> While the Bolzano Tribunal sought guidance regarding the constitutionality of judicial authorities' involvement in the determination of the necessity of surgical treatment,<sup>33</sup> a significant and substantive matter, the Court limited its consideration to a procedural aspect of the authorisation process. The Constitutional Court reasoned that following several judicial interventions the authorising regime had become contradictory.<sup>34</sup> Eventually, the Constitutional Court declared Art 31, para. 4 of Legislative Decree no 150 of 2011<sup>35</sup> unconstitutional due to the unreasonable nature of the authorising regime requiring applicants to seek judicial authorisation for

<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

<sup>31</sup> Corte di Cassazione-Sezione civile I 20 July 2015 no 15138, available at <https://tinyurl.com/3x35tmb8> (last visited 31 January 2026).

<sup>32</sup> n 13 above, para 1.3.2 *Ritenuto in fatto*.

<sup>33</sup> *ibid*: 'Il tribunale di Bolzano dubita "della ragionevolezza del regime autorizzatorio previsto dalla norma censurata, nella quale impone un apprezzamento di natura giudiziale dell'intervento chirurgico che dovrebbe per conto essere demandato in via esclusiva ad una valutazione di natura medica e psicologica"'.  
<sup>34</sup> n 13 above, para 6.2.1.

<sup>35</sup> Decreto legislativo 1 September 2011 no 150.

surgical intervention even in those instances where the competent tribunal has already reviewed medical documentation and deemed them sufficient for the purposes of granting legal gender recognition. The Court noted that since surgical intervention would in any case only happen following judicial authorisation to amend one's legal sex, a repetition of the authorisation procedure would be unreasonable.<sup>36</sup> The Court therefore avoided considering the substantive aspect questioned by the Bolzano Tribunal, ie the differential treatment of (adult, competent) trans people whose medical treatments continue to be subject to judicial authorisation.

Art 31, para 4 was found in violation of Arts 2 (inviolability of human rights), 3 (equality before the law) and 32 (right to health) of the Italian Constitution. Notably, the Court reaffirmed that the provision falls within the legislator's discretionary power and could not be considered manifestly unreasonable, although 'it is not devoid of paternalistic tones towards adults capable of self-determination.'<sup>37</sup>

In practice, considering the provision only *partially* unreasonable, the Constitutional Court's judgment does not eliminate but circumscribes<sup>38</sup> and eventually reaffirms the need for trans people to seek judicial authorisation for gender affirming surgical interventions. Rather than simplifying the process, the Constitutional Court's decision no 143/2024 amends a bureaucratic repetition by stating a tautology: 'if you have already obtained the judicial authorisation, you do not need to get another one.' Judicial authorisation for the purpose of gender affirming surgical interventions remain needed, thus leaving the gender recognition framework *de facto* unmodified.

Against optimistic interpretations, the remainder of this article will deconstruct the judgment, and characterise it as furthering the pathologisation of trans identities and perpetuating the prevalence and rigidity of binary gender in the Italian legal system.

### III. The Effects and Application of the Decision on Trans Lives

The decision of the Constitutional Court leaves the question of its effective impact on trans people's lives and shaping of the legal gender recognition procedure. The first issue to be considered – the remand of the consideration of a third

<sup>36</sup> 'Potendo questo percorso compiersi già mediante trattamenti ormonali e sostegno psicologico-comportamentale, quindi anche senza un intervento di adeguamento chirurgico, la prescrizione indistinta dell'autorizzazione giudiziale denuncia una palese irragionevolezza: in tal caso, infatti, un eventuale intervento chirurgico avverrebbe comunque dopo la già disposta rettificazione': n 13 above, para 6.2.1.

<sup>37</sup> *ibid* para 6.2.

<sup>38</sup> N. Posteraro, 'Sul "non binarismo" di genere e sull'autorizzazione a effettuare gli interventi chirurgici di affermazione di genere. Introduzione alla discussione della sentenza della Corte Costituzionale n. 143 del 2024' in *Id et al eds*, n 16 above, 17; N. Posteraro, 'La Corte costituzionale interviene sui diritti delle persone trans: cosa cambia?' *laCostituzione.info*, available at <https://tinyurl.com/bdcj7sht> (last visited 31 January 2026).

gender marker to the legislator, leaves the regulatory framework unmodified. The result of the Constitutional Court's decision is an effective closure of possible reforms in the medium and short term through judicial intervention.

With regards to the second instance considered by the Constitutional Court, the decision has some, albeit limited, impact on trans people's lives. The Bolzano Tribunal sought advice regarding the compatibility of Art 31, para 4 of Legislative Decree no 150 of 2011 with the Arts 2 (inviolability of human rights), 3 (principle of equality) and 32 (right to health) of the Constitution.<sup>39</sup> Significantly, the Bolzano Tribunal raised concerns that the judicial authorisation requirement impacts trans people's right to self-determination, interfering with medical and therapeutic decisions of an adult, and thus discriminating against trans people seeking gender affirming treatments compared to others who wish to undergo similarly irreversible surgical interventions.<sup>40</sup>

To appreciate the effects of the decision, it is essential to reiterate that the issue raised by the Bolzano Tribunal was of a substantive nature, and concerned the involvement of judicial authorities in the review of medical decisions undertaken by adults in accordance with their treating doctors.<sup>41</sup> The judicial authorisation requirement thus concerns not only the timeframe of trans people's access to gender affirming surgical procedures, but also the legal position of trans people as individuals who seek to exercise their decision-making capacity in a medical context. In their application before the Bolzano Tribunal, I.N. claimed that the requirement to seek judicial review of a medical decision made by an adult would unjustifiably interfere with their right to self-determination and health, and thus discriminated against them in comparison to individuals undergoing surgical interventions of a similarly irreversible nature for purposes other than gender affirmation.<sup>42</sup>

Yet the Constitutional Court determined that the subordination of gender affirming surgeries to judicial authorisation remains within the discretion of the legislative power.<sup>43</sup> The structure of the legal gender recognition process therefore remains fundamentally unmodified, and in the absence of judicial authorisation competent trans adults remain unable to undergo surgical treatments whose necessity has been established by medical professionals, owing to their gender affirming scope.<sup>44</sup> Following the brief dismissal of the central issue raised by the Bolzano Tribunal in its second question, the Constitutional Court then proceeded to express itself on the procedural streamlining of the judicial procedure.<sup>45</sup>

The practical changes apported to the legal gender recognition process by decision no 143/2024 therefore consist solely in a slight simplification of the instance

<sup>39</sup> n 13 above, para 1 *Considerato in diritto*.

<sup>40</sup> *ibid* para 1.3 *Considerato in diritto*.

<sup>41</sup> *ibid* para 1.3.2 *Ritenuto in fatto*.

<sup>42</sup> *ibid* para 1.3 *Considerato in diritto*.

<sup>43</sup> *ibid* para 6.2.2 *Considerato in diritto*.

<sup>44</sup> R. Parigiani, 'Il diritto' n 16 above, 221.

<sup>45</sup> n 13 above, para 6.2 *Considerato in diritto*.

presented by lawyers to the Court. Instead of presenting two separate instances requesting the authorisation to (1) amend the legal sex and (2) undergo gender affirming surgeries, following decision no 143/2024, the first authorisation serves both purposes. Abandoning the judicial green light for gender affirming surgery would have constituted a significant step forward in the recognition of trans adults' right to undertake decisions of a medical nature in equal and comparable measure to their cisgender peers, and to a timely access to gender affirming healthcare. Sections IV and V will now analyse the conceptual effects of the decision of inadmissibility of the first instance and of maintenance of the judicial authorisation requirement.

#### IV. The Perpetuation of Institutional Pathologisation

Although the decision by the Constitutional Court has had minor practical effects on the nature and temporality of trans people's access to gender affirming healthcare and legal gender recognition, perhaps one of its most significant consequences is the reinforcement and legitimisation of the institutional pathologisation of trans people and their differential treatment before the law. By reiterating the requirement to obtain judicial approval in order to undergo gender affirming surgeries, the Constitutional Court preserves a condition of inequality in which trans people's legal subjecthood is characterised by a form of partial 'incompetence' owing exclusively to their trans status.

In order to understand the effective impact of decision no 143/2024, it is important to note that the principal objective of the Italian legal gender recognition legal regime is to regulate the legal existence of trans people in a society and legal system that relies on binary legal sex, rather than just to grant trans and non-binary people the right to express and determine their own gender.<sup>46</sup>

The Italian legal gender recognition law relies on a pathologising understanding of trans people, meaning that it categorises trans people's gender identity as the cause or the result of a mental health disorder which ought to be *assessed* and *diagnosed* by medical authorities, rather than a personal characteristic that trans people have a right (and capacity) to express and realise.<sup>47</sup> Pathologising frameworks,

<sup>46</sup> S. Voli, '(Trans)gender Citizenship in Italy: A Contradiction in Terms? From the Parliamentary Debate about Law 164/1982 to the Present' 23 *Modern Italy*, 207, 201-241 (2018); F.R. Ammaturo, *European Sexual Citizenship: Human Rights, Bodies and Identities* (London: Springer, 2017), 70; J. Honkasalo, 'In the Shadow of Eugenics: Transgender Sterilisation Legislation and the Struggle for Self-Determination', in R. Pearce et al eds, *The Emergence of Trans: Cultures, Politics and Everyday Lives* (Oxford: Taylor and Francis, 2019), 25.

<sup>47</sup> S. Voli, n 46 above; E. Garosi, 'The Politics of Gender Transitioning in Italy' 17 *Modern Italy*, 469, 465-478 (2012). See also B. Moron-Puech, 'From Assigning Sex to Affirming Gender: Remarks on an Ongoing Evolution Affecting Gender Identification', in E. Brems et al eds, *Protecting Trans Rights in the Age of Gender Self-Determination* (Antwerp: Intersentia, 2020), 56-58; L. Holzer, 'Legal Gender Recognition in Times of Change at the European Court of Human Rights' 23 *ERA Forum*, 170, 165-182 (2022).

including the Italian one, condition legal gender recognition on the basis of trans people's relinquish of their autonomy and acceptance to be subjected to extensive medical assessments and diagnostic procedures to determine their eligibility for legal recognition.<sup>48</sup>

As noted by both the Bolzano Tribunal and by the Constitutional Court, trans people are subjected to extensive assessments and diagnostic processes by medical authorities in order to access both gender affirming (non-surgical) healthcare *and* legal gender recognition.<sup>49</sup> Importantly, eligibility for legal gender recognition and access to gender affirming healthcare is not determined through an evaluation of trans and non-binary people's decision-making but on medical gatekeepers' assessment as to whether the applicants meet the requirements to obtain the mental health diagnosis of gender dysphoria or gender identity disorder.<sup>50</sup> Hence, medical professionals are granted the authority not only to establish which physical and psychological characteristics are attributable to each gender (and thus provide basis for determination of legal sex) but also to examine and determine each trans individual's gender – trumping the latter's understanding of their sense of self and gender.<sup>51</sup>

Trans researchers and advocates have analysed how the diagnostic process is employed to exclude from recognition those individuals whose understanding and expression of their own gender falls outside normative and binary expectations, irrespective of their capacity to consent to medical procedures.<sup>52</sup> When these mental health assessments are conducted by medical authorities in Italy, trans and non-binary people who do not comply with binary gender expectations experience assessments and diagnostic processes as administrative processes characterised by coercion and deprivation of autonomy.<sup>53</sup> Failure or refusal to undergo medical treatments or obtain a mental health diagnosis relating to one's trans identity results in the denial of recognition of legal gender recognition. Thus, accepting pathologisation is the only means for trans people to acquire rights.<sup>54</sup>

The deprivation of autonomy of trans people maintained and reinforced by the Court in decision no 143/2024 therefore characterises the entirety of the

<sup>48</sup> S. Voli, n 46 above; M. Lorusso et al, n 12 above.

<sup>49</sup> n 13 above, para 6.2.1.

<sup>50</sup> M. Lorusso et al, n 12 above, 12-14; B. Vincent, *Non-Binary Genders: Navigating Communities, Identities, and Healthcare* (Bristol: Policy Press, 2020), 202; see also D. Riggs et al, 'Transnormativity in the Psy Disciplines: Constructing Pathology in the Diagnostic and Statistical Manual of Mental Disorders and Standards of Care' 74 *American Psychologist*, 8, 912-924 (2019).

<sup>51</sup> Z. Davy et al, 'Democratising Diagnoses: The Role of the Depathologisation Perspective in Constructing Corporeal Trans Citizenship' 38 *Critical Social Policy*, 13-34 (2018); see also F. Ashley et al, 'Gatekeeping Gender Affirming Care Is Detrimental to Detrans People' 26 *International Journal of Transgender Health*, 235-252 (2025).

<sup>52</sup> S. Shuster, *Trans Medicine: The Emergence and Practice of Treating Gender* (New York: New York University Press, 2021), 3; C. Hansmann, *Care without Pathology: How Trans-Health Activists Are Changing Medicine* (Minneapolis: University of Minnesota Press, 2023), 8.

<sup>53</sup> M. Lorusso et al, n 12 above, 14.

<sup>54</sup> *ibid*; S. Voli, n 41 above, 207.

medicolegal process leading to legal gender recognition and regulating the lives and bodies of trans people. Although the medical requirements to access legal gender recognition have shifted over time, the Italian legal framework remains inherently coercive and continues to rely on trans people's willingness to relinquish agency and autonomy for the purpose of recognition and acquisition of some rights.

Under the current legal gender recognition framework, the fulfilment of medical requirements determining the permanence and irreversibility of an individual's gender identification shape the legal intelligibility of trans people, and relegate outside the protection of rights those deemed 'unintelligible' or 'not trans enough'.<sup>55</sup> Prior to decision 143/2024, the recognition of the unconstitutionality of the forced sterilisation of trans people in 2015 seemed to open an opportunity for recognition of trans people's autonomy and agency, only for the Court to reaffirm the necessity of conducting rigorous medical and judicial assessments prior to authorising trans people to affirm their gender and undertake medical decisions. Later, in 2017, the ECtHR recognised that while the sterilisation of trans people violated their right to private life, other requirements including to obtain a psychiatric diagnosis remained within States' discretion.<sup>56</sup> With this approach, the ECtHR has been criticised for conceptualising trans people's rights to autonomy and integrity to begin only *after* a mental health diagnosis, reinforcing the notion that trans people's identities are constituted through diagnoses, and that interferences with their physical or psychological integrity occurring prior to acquisition of legibility are justified irrespective of the severity of harm caused.<sup>57</sup> Similarly, in decision no 143/2024, the Italian Constitutional Court reaffirmed that trans people become intelligible subjects of rights only through submission to coercive pathologising processes.

The Italian Constitutional Court's decision is to be contextualised in a pathologising approach adopted by a large number of states throughout the world and by the ECtHR, which is characterised by the exclusion from considerations of legitimacy of those medical treatments and administrative procedures that determine the markers of legal legibility of trans people.<sup>58</sup> The adoption of this approach, within which the decision by the Italian Constitutional Court can be located, fosters a regime of exceptionality where compliance to gender normativity is rendered an indispensable condition to access rights and constitutional guarantees alike.

<sup>55</sup> S. Gassison, 'On the Limits of Trans Enough: Authenticating Trans Identity Narratives' 32 *Gender and Society*, 615, 613-637 (2018). For an analysis on queer intelligibility, see R. Kapur, 'The (Im)possibility of International Human Rights Law', in D. Otto ed, n 76 above; Id, 'Queering Gender [Identity] in International Law' 33 *Nordic Journal of Human Rights*, 299-318 (2015).

<sup>56</sup> Eur. Court H.R., *AP, Garçon and Nicot v France*, Judgment of 6 April 2017, para 137, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>57</sup> L. Holzer, n 47 above, 175-176.

<sup>58</sup> J. Scherpe et al, 'Comparative Analysis and Recommendations', in J. Scherpe eds, *The Legal Status of Transsexual and Transgender Persons* (Antwerp: Intersentia, 2015), 650-652; F.R. Ammaturo, n 46 above, 77; C. Dietz, *Self-Declaration in the Legal Recognition of Gender* (Oxford: Taylor and Francis, 2022), 68.

In a noteworthy passage, the Court reasoned that

‘although not devoid of paternalistic traits towards adult individuals capable of self-determination, this norm cannot be considered manifestly unreasonable and exceeding the legislative discretion, considering the entity and irreversibility of the consequences on the body of the patient resulting from similar surgical interventions.’<sup>59</sup>

The considerations of the Court, although framed as concerns regarding the irreversibility of the surgical treatments, reflect the adoption of a different (and unspecified) test to assess the validity of medical decisions concerning gender-affirming surgical interventions made by competent adults on the basis of their treating doctors’ assessment. Significantly, the Court does not examine the conditions and reasons that warrant a limitation of trans people’s decisional capacity and make judicial review both necessary and justified. Rather, it relies on the assumption that medical interventions which modify physical characteristics that are socially and culturally associated with a specific gender for the purposes of departing from or disrupting that gender ought to be subjected to a level and *type* of scrutiny that differs from surgical procedures that do not disrupt the cisgender norm.

The Italian Constitutional Court’s reasoning, thinly veiled as concern for irreversibility of gender affirming surgical procedures, reveals the conceptualisation of one’s disruption of gender normativity as causing harm to oneself and/or others.<sup>60</sup> By maintaining the judicial review requirement, the Court reinforces the narrative according to which a trans person’s desire to affirm their gender identity not only is a decision motivated by a disorder but it also carries an inherent risk of harm to oneself and/or others. The maintenance of the status quo, presented by the Court as the adoption of a cautious position, perpetuates the understanding that being trans and affirming one’s own gender identity medically, socially, and legally, is harmful and dangerous.<sup>61</sup>

Italy is not alone in its characterisation of transness as disruptive and dangerous. Examining arguments developed by pathologising states before the ECtHR, queer legal scholars have analysed how the establishment and maintenance of control over gender normativity is essential to also maintain hierarchical gender structures. The harmfulness of transness is implicit in the Constitutional Court’s words, which analyses the disciplinary, rather than rights-granting, purpose of the legal gender recognition regime enacted by Law no 164/1982 and concludes that the

<sup>59</sup> n 13 above, para 6.2.

<sup>60</sup> To date, the authors are not aware of other instances in the Italian legislation where medical interventions pursued by competent adults in accordance with their treating doctors are subject to judicial authorisation. Other instances regarding medical treatments of an experimental nature or characterised by the legislator as potentially provoking harm require further review by national or regional ethics committee.

<sup>61</sup> For an analysis on how the othering and pathologisation of transness shape cultural and legal discourses, see among others, J. Butler, *Who’s Afraid of Gender?* (London: Penguin, 2024).

law had been adopted to address 'the problematic issue of transsexuality.'<sup>62</sup> In the light of this, the next Section addresses the second instance advanced by the Bolzano Tribunal dealing with the expansion of gender categories.

## V. The Reaffirmation of Gender Binary Normativity

The request posed by I.N. is double: on the one hand, the (removal of the) judicial authorisation to undergo the mastectomy and, on the other, the change of their gender marker from 'female' to 'other'. Having addressed the pathologisation of transness via the former in the above sections, this section addresses the Constitutional Court's positioning in relation to non-binary gender markers in civil registers. The legislative reference is Art 1 of legge no 164/1982 providing for the rules on the correction of gender markers. According to the Tribunal, quoting the ECtHR's case law on Art 8 ECHR (right to private and family life), the impossibility of recognising via rectification a non-binary self-identification would violate the right to identity, to health and to private and family life.<sup>63</sup> By pursuing the certainty of legal relations, the interference would not meet the necessity and proportionality requirements under Art 8 ECHR being absolute in nature and devoid of any balancing.<sup>64</sup>

For the Constitutional Court the question is inadmissible because the connected decision would produce effects on the whole legal system and, as such, it should fall under the legislator's discretionary power.<sup>65</sup> Nevertheless, the Court's attitude towards non-binarism seems positive (albeit pathologising)<sup>66</sup> since it recalls a number of EU and national instruments protecting non-binary identities.<sup>67</sup> Relying on advancements in scientific literature and comparative cases, the Court considers the distress originating from the tension between sex assigned at birth and gender identity for people whose identity can be ascribed neither to the feminine nor the masculine, and acknowledges the failure of the current legal framework to provide redress through legal recognition for these reasons, some have described the judgment of 'pioneering importance.'<sup>68</sup>

<sup>62</sup> n 13 above, para 4.1.

<sup>63</sup> *ibid* para 1.3.1.

<sup>64</sup> *ibid* para 1.2.

<sup>65</sup> *ibid* para 5 *Considerato in diritto*.

<sup>66</sup> See above, Section III.

<sup>67</sup> n 13 above, para 5.4 *Considerato in diritto*. Yet it relies on international classifications of diseases (ICD and DSM-5) frequently considered inadequate as pathologising trans people. The DSM-5, in particular, by continuing to include the requirement to demonstrate 'clinical distress' as part of the diagnosis, equates *transness* with *distress*. In other words, one cannot be trans and happy but distressed to affirm their gender via the diagnosis. See D. Riggs et al, n 50 above.

<sup>68</sup> M. Chiricò, 'Patologizzazione delle persone trans+: unica via per il loro riconoscimento giuridico?', in N. Posteraro et al eds, *Sul non binarismo di genere e sull'autorizzazione giudiziale a effettuare gli interventi chirurgici di affermazione di genere la sentenza della Corte Costituzionale n. 143 del 2024* (Napoli: Editoriale Scientifica, 2025), 103.

According to the Court, the right to dignity, the right to health and the personalist principle<sup>69</sup> establishing the inherent value of the human being are therefore all relevant to this type of situation when unjustified differential treatment occurs or psychophysical wellbeing is compromised.<sup>70</sup> In fact, by focussing on the individual's distress, the Court mentions Art 2 of the Constitution in relation to the personalist principle rather than to the right to self-determination.<sup>71</sup> In addition, the Court provides evidence of increased sensitivity by society to the existence and legitimacy of non-binary genders, examining the inclusion of 'third gender' options in gender recognition policies increasingly adopted by Italian education institutions, public authorities and employers allowing students and employees to have their name and gender, including non-binary ones, recognised for internal administrative purposes. On the basis of this, the Court notes that the question of legal recognition of non-binary identities needs to be brought to the attention of the legislator, described as 'the first interpreter of social sensibilities (*primo interprete della sensibilità sociale*).'<sup>72</sup>

Notwithstanding these unprecedented considerations, the Court is not persuaded eventually by the request to introduce non-binary gender markers in the registration procedures. From the perspective of international law, the Court identifies a lack of homogeneity in the ECtHR's case law on Art 8 ECHR (right to private and family life) that excludes the existence of European consensus on the positive obligation to guarantee non-binary registration.<sup>73</sup> From the domestic perspective, the Court encourages a legislative intervention involving several areas of the legal system where binarism rules, including family law (marriage, civil partnership), labour law (temporary special measures addressed to women), sport law (categories in competitions), privacy law (spatial segregation in prisons and hospitals).<sup>74</sup>

The denial of the possibility of 'other' as a gender social marker, although for reasons of purported judicial overreaching, raises crucial issues in terms of the right to personal identification, the right to private and family life, the right to health and, of course, the principle of substantive equality.<sup>75</sup> Depending on the perspective one assumes, the 'other' option might not be the solution either. Indeed, if 'other' opens the registration system to a whole range of gender identifications beyond male/female, proposals of reforms introducing this inclusive category nevertheless

<sup>69</sup> E. Lamarque, 'The Italian Constitution: A Personalist Constitution' *Italian Journal of Public Law*, 398-425 (2022); G. Pino, 'The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights', in M. Van Hoecke et al eds, *The Harmonization of Private Law in Europe* (London: Hart Publishing, 2000), 225-237.

<sup>70</sup> n 13 above, para 5.4 *Considerato in diritto*.

<sup>71</sup> *ibid* para 5.4 *Considerato in diritto*. Cf A. Granato, 'L'altro esiste ma è diverso', in N. Posteraro et al eds, n 16 above, 162.

<sup>72</sup> n 13 above, para 5.4 *Considerato in diritto*.

<sup>73</sup> *ibid* para 5.3 *Considerato in diritto*. See also P. Cannoot, 'Y.v. Poland: ECtHR Case Law on Gender Recognition Remains Embedded in Cisnormativity' available at <https://tinyurl.com/yzvken8p> (last visited 31 January 2026).

<sup>74</sup> n 13 above, para 5.5 *Considerato in diritto*.

<sup>75</sup> M.V. Izzi, 'Identità di genere e genitorialità: un binomio da (ri)costruire' *BioLaw Journal - Rivista di BioDiritto*, 171-198 (2025).

legitimate the power of the state to regulate gender.

The institutionalisation of gender categories through registration is symptomatic of the fact that the state has a say on the way in which one wishes to be seen, perceived and recognised. Further, as argued above, the Court maintains that the legislator may continue to impose strict control and regulation over trans people's genders and bodies. Therefore, well beyond a mere organisational principle and a legal category, gender is a device through which power is allocated among individuals and exerted by individuals<sup>76</sup> as well as a disciplinary instrument to make individuals adhere to physical and behavioural patterns.<sup>77</sup>

Binarism, or, better, 'binary-normativity,' the imposed rule of binary constructions of sex and gender, informs the Italian socio-legal system. It is culturally contingent since it constitutes only one of the many conceptions on gender and sex existing throughout the world.<sup>78</sup> While the present decision concerns the possibilities for registered gender, the effects and implications of binary-normativity transcend that. As such, binary-normativity is the system of intertwined expectations according to which two sexes are put in relation with two genders.

First, it presupposes that there are two categories to which individuals could belong according to pre-established criteria as to which biological characteristics are typical and determinant of each of the two sexes.<sup>79</sup> Secondly, the roles, attitudes, behaviours, and responsibilities ascribed to individuals according to the two categorised genders. Sex and gender are separate yet intimately connected concepts: according to gender essentialist conceptions there is a relation of dependency between the two, because it is assumed that gender is biologically determined by sex. Gender essentialism goes hand in hand with cisnormativity, because the latter

<sup>76</sup> M. Foucault, *Histoire de la sexualité: La volonté de savoir* (Paris: Gallimard, 1976), 121, 207. This is the argument around which queer approaches to law develop: see D. Otto, 'Introduction: Embracing Queer Curiosity', in Id ed, *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Oxford: Routledge, 2018); J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006); V. Hamzić, 'The Case of "Queer Muslims": Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos' 11 *Human Rights Law Review*, 237-274 (2011); B. Cossman, 'Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)' 6 *Critical Analysis of Law*, 23-38 (2019); M. Fineman et al eds, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (London: Ashgate, 2009).

<sup>77</sup> M. Foucault, *Discipline and Punish* (London: Penguin Books, 1991), 137.

<sup>78</sup> T. Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge (US): Harvard University Press, 1990); J. Butler, *Undoing Gender* (Oxford: Routledge, 2004); M. De Leo, 'Storia LGBTQI+: sesso, genere, sessualità in prospettiva storica', in M. Pelissero et al eds, *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2022), 2.

<sup>79</sup> This is why the bodily component of binarism is sexual dimorphism, rather than what the Constitutional Court refers to in the decision as 'gender dimorphism' (*dimorfismo di genere*): n 13 above. The Court's linguistic choices are inexact elsewhere: it uses 'hermaphroditism' (*ermafroditismo*) to describe intersexuality, a term currently considered misleading and stigmatising that does not express the diversity of intersex variations: A. Dreger et al, 'Changing the Nomenclature/Taxonomy for Intersex: A Scientific and Clinical Rationale' 18 *Journal of Pediatric Endocrinology and Metabolism*, 729-733 (2005).

determines the unidirectional correspondence between sex and gender: the female sex makes a woman, and the male sex makes a man.<sup>80</sup> The communication by trans people of their intent to depart from adherence with expectation of cisgenderism, and wish to affirm their gender medically and legally are approached by the Italian state through the lenses of disorder and suspicion of harmful intents.

The Italian Constitutional Court develops a rather sophisticated reflection on non-binarism, which actually contrasts with the conservative approach adopted in the analysis of the involvement of judicial authorities in trans people's decision-making process. In order to avoid judicial overreaching, however, it does not translate such a reflection into a practical judicial-driven change for trans and non-binary people. The rather progressive reflections on non-binarism stand in stark contrast with the Court's reliance on pathologising narratives in its decision that the requirement to obtain judicial authorisation to undergo gender affirming surgeries is within the legislator's discretion, and decision pertaining the medical or legal affirmation of one's gender ought to be subjected to heightened scrutiny. While the Court remains cisnormative overall, it nevertheless adopts a constructive approach in that it engages with the possibility of recognising genders that are not binary. It is not a case that in the decision itself the Constitutional Court is asked to rule on both the registration system and the judicial authorisation. The two are the interconnected instruments of a state that polices gender.

Having one's decision to undergo gender affirming surgical interventions subjected to judicial review is the expression (or symptom) of a legal system where the regulation of its citizens' compliance with normative gender remains a public affair, object of enhanced scrutiny by judicial authorities, and in which the State's interest in the maintenance of the status quo is assumed rather than articulated.

What is puzzling of the Court's stance is the fact that it happens in a judicial world where its peers have already ruled on gender binarism, for instance in Germany,<sup>81</sup> Belgium,<sup>82</sup> and Austria.<sup>83</sup> Models of self-determination, independent

<sup>80</sup> On the functioning of binary-normativity, also in relation to sexual orientation, see G. Gilleri, *Sex, Gender, and International Human Rights Law: Contesting Binaries* (Oxford: Routledge, 2024), 74-77. Cf A. Rich, 'Compulsory Heterosexuality and Lesbian Existence' 5 *Signs*, 11-48 (1980); M. Mieli, *Elementi di critica omosessuale* (Milano: Feltrinelli, 2017), 17; F. Valdes, 'Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins' 8 *Yale Journal of Law & the Humanities*, 168-169, 161-211 (1996); M. Warner, 'Introduction: Fear of a Queer Planet' 29 *Social Text*, 3, 14-16, 3-17 (1991); K. Schilt et al, 'Doing Gender, Doing Heteronormativity: "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality' 23 *Gender & Society*, 440-441, 440-464 (2009); J. Knouse, 'Intersexuality and the Social Construction of Anatomical Sex' 12 *Cardozo Journal of Law & Gender*, 135-136, 135-154 (2005); M. Hird, 'Gender's Nature: Intersexuality, Transsexualism and the "Sex"/"Gender" Binary' 1 *Feminist Theory*, 347, 353, 347-364 (2000).

<sup>81</sup> Bundesverfassungsgericht 10 October 2017 no 1 BvR 2019/16.

<sup>82</sup> Cour constitutionnelle de Belgique 19 June 2019 no 99.

<sup>83</sup> Verfassungsgerichtshof 15 June 2018 no G 77/2018. On some ways to regulate legal gender recognition, see S. Osella and R. Rubio-Marín, 'Gender Recognition at the Crossroads: Four Models and the Compass of Comparative Law' 21(2) *International Journal of Constitutional*

from judgements and medical certificates, have already entered the legal scene in countries such as Spain<sup>84</sup> and Germany<sup>85</sup> – just to stay in Europe.<sup>86</sup> The Court's deference to the (unwilling) legislator is further in contrast with its recent reference to comparative cases and international instruments in the recognition of LGBTQI+ people's rights in other instances in which the Italian legislator has not provided recognition.

Many soft sources of international law encourage states to recognise non-binary identities. For example, at the regional level, the Council of Europe's Parliamentary Assembly Resolution no 2048/2015<sup>87</sup> and Resolution no 2191/2017<sup>88</sup> on trans rights and intersex rights, respectively. Most importantly, at international level, the Yogyakarta Principles and the Yogyakarta Principles plus 10<sup>89</sup> have become increasingly authoritative. Although they are considered soft sources of law, they nevertheless constitute a significant international development of the understanding of sex- and gender-related concepts.<sup>90</sup> The Principles reflect the application of

*Law*, 574, 574-602 (2023).

<sup>84</sup> Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI 28 February 2023 no 4/2023, art 43, para 3.

<sup>85</sup> Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag 12 April 2024 no 20/9049: this law provides for the registration of non-binary gender. The Italian Constitutional Court recognises this law at para 5.2 *Considerato in diritto* but recalls the voluntaristic approach at para 4.4 *Considerato in diritto*.

<sup>86</sup> The paradigmatic example comes from Argentina: Ley 'Identidad de género' 9 May 2012 no 26.743. See S. Sirigu, 'Genere "X": traguardi e sfide nell'analisi del caso argentino', in N. Posteraro et al eds, n 16 above, 271.

<sup>87</sup> Council of Europe Parliamentary Assembly 22 April 2015 Resolution no 2048/2015 'Discrimination against Transgender People in Europe.'

<sup>88</sup> Council of Europe Parliamentary Assembly 12 October 2017 Resolution no 2191/2017 'Promoting the Human Rights of and Eliminating Discrimination against Intersex People.'

<sup>89</sup> International Commission of Jurists, 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (2007) available at <https://tinyurl.com/hjxh4ht2> (last visited 31 January 2026); International Commission of Jurists, 'Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles', available at <https://tinyurl.com/mu36wmp6> (last visited 31 January 2026).

<sup>90</sup> Just to quote some examples, the UN Committee on Economic, Social and Cultural Rights (CESCR) drew on the Yogyakarta Principles and the Yogyakarta Principles for the definition of gender identity in its General Comment 20. The same applies to the UN High Commissioner for Refugees (UNHCR), the Joint UN Programme for AIDS (UNAIDS), and the Council of Europe Commissioner for Human Rights. As to the international human rights courts, the Inter-American Court of Human Rights' advisory opinion OC-24/17 defines gender identity by relying largely on the Principles: UNHCR, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (2008) fn 1; CESCR, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, Para 2)' E/C.12/GC/20 (2009) fn 25, para 32; CoE Commissioner for Human Rights, 'Human Rights and Gender Identity' - Issue Paper 23, available at <https://rm.coe.int/16806da753> (last visited 31 January 2026); C. F. Cáceres et al, 'Review of Legal Frameworks and the Situation of Human Rights Related to Sexual Diversity in Low and Middle Income Countries', UNAIDS (2009), 44-46 available at <https://tinyurl.com/jsppz87t> (last visited 31 January 2026); Corte Interam. de D.H., *Opinión Consultiva Solicitada Por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*

binding international human right law protecting individuals from violations based on sexual orientation, gender identity, gender expression and sex characteristics. Principle 31 ensures the right to legal recognition ‘without reference to, or requiring assignment or disclosure of, sex, gender [...]’. It also urges states to ‘make available a multiplicity of gender marker options’ while sex or gender continues to be registered.<sup>91</sup>

Against this backdrop, the Constitutional Court missed a vital opportunity to fully recognise registration for the myriads of gendered existences. As stressed above, since the adoption of Law no 164/1982, the Court has been instrumental for the progression of the rights of trans people. However, there are two major shortcomings in the Court’s approach concerning the continued reliance on modification of sex characteristics as indicator of permanency of a person’s gender identification, and adoption of a standardised, binary direction of gender affirmation processes. Both limitations are rooted in conceptual premises with patent practical effects. Indeed, transition is seen to be possible within the binary only: from man to woman or from woman to man – notwithstanding its progressive reflection on non-binary identities, through its reiteration of a pathologising approach, the Court does not envision the realisation of *other* forms of gender affirmation.

In this way, instead of embracing a broader understanding of gender, answering both questions raised by the Bolzano Tribunal, in decision no 143/2024 the Court reiterates the boundaries of the binary-normativity. While it is true that the Court recognises transition as an individual need to affirm and live in accordance to one’s own identity, thereby striving to enter the vocabulary of trans rights, the Court continues to characterise affirmation of trans and non-binary people’s gender through the spectre of harm to oneself, others or the social order. Following the Constitutional Court’s decision no 143/2024, legal gender recognition therefore remains something other than a full right, a concession conditional to compliance with binary gender categories and willingness forego agency and autonomy.

When legal gender recognition is framed as ‘admission’ to a pre-defined legal sex category, transition is allowed only to those who transgress gender ‘the right way’ and through the creation of a category of ‘others’, whose gender remains illegible and unrecognisable. Gender as an apparatus of power, as sketched at above, determines the hierarchies between and within gendered groups: trans people are granted a different treatment than cisgender people, but even within the group of trans individuals, some people enjoy more rights than others. Who are these ‘others among others’? These are all those trans people who transcend the binary. Non-binary identities are not alone in the exclusionary judicial narrative on gender, as binary normativity enforces the preconception that transition always happens in a specific order and through medical intervention.<sup>92</sup> Actually, there

OC-24/17, Advisory Opinion of 24 November 2017, para 32(f).

<sup>91</sup> Yogyakarta Principles, n 89 above, Principle 31.

<sup>92</sup> S. Duffy, ‘Those Lucky Enough to Transcend Gender: Travis Alabanza, Radical Transfeminism,

is no one-size-fits-all when it comes to transitioning. The decision upholds the imposition of pre-established forms and chronological orders of transition. Although the Italian Constitutional Court states that 'this path may be completed with hormonal treatments and psychological-behavioural support,'<sup>93</sup> the idea of intervention-based transition still monopolises the institutional imaginary on gender affirmation. Not all trans people undergo medical interventions, and those who do differ in the types of hormonal and surgical interventions they need and desire. Equally, as more trans people are able to affirm their gender on the basis of self-determination, the importance of tailoring medical interventions to each individual's needs and wishes is increasingly clear.<sup>94</sup>

Overall, the Italian Constitutional Court's call – not a real warning<sup>95</sup> – on the legislator on the urgent need to rethink the registration system is theoretically significant but practically ineffective if seen from the point of view of those whose rights the Court should protect – trans people, only some of whom are actually protected. In any case, pathologisation concerns *all* trans people, and persists in the Court's discursive narratives and, more generally, in the Italian way of dealing with change of legal gender.

## VI. Conclusion

The Italian Constitutional Court decision no 143/2024 is promising but not innovative. The promise is a country where people could apply for a gender which is 'other' than 'male' or 'female'. The missed opportunity for a broader approach to gender (transition) materialises in the reaffirmation of a pathologising approach where trans people's decisions regarding their bodies and lives remains subjected to a heightened scrutiny by judicial authorities.

Overall, the strength of the message transmitted by the Constitutional Court to the legislator regarding its responsibility to ensure trans people's right to self-determination is weakened by its failure to take a significant step towards the recognition of all gendered identities, regardless of their binary or non-binary auto-identifications, and their personal way of living their own gender(s).

and the Law' 33 *Feminist Legal Studies*, 155, 155-173 (2025).

<sup>93</sup> n 13 above, para 6.2.1 *Considerato in diritto*.

<sup>94</sup> F. Ashley et al, n 51 above.

<sup>95</sup> N. Posteraro, n 16 above, 13.