

Reinforcing the binary and disciplining the subject: The constitutional right to gender recognition in the Italian case law

Stefano Osella*

The article addresses the reasons why the Italian Constitutional Court requires trans people to transform their physical, psychological, and behavioral characteristics in order to obtain the legal recognition of their gender identity. It discusses how such a doctrine is implemented. Examining the case law of the Constitutional Court and of the Court of Cassation in light of queer theory, the article argues that such requirements are intended to benefit the “certainty of legal relations,” which, in this context, is inextricably tied to the preservation of the heterosexual matrix of family law. Developing a Foucauldian analysis of a consistent sample of decisions by courts of first instance, the article reasons that the application of such requirements amounts to the exercise of disciplinary power, which defines and regulates binary gendered subjects. By focusing on the underexplored doctrine of the Italian Constitutional Court on gender recognition, the article offers a case study which innovatively contributes to the burgeoning debate on the right to gender recognition.

1. Introduction

The right to gender recognition is one of the most consequential demands for trans people.¹ This right is crucial not only to ensure them a better sense of inclusion and

* Postdoctoral Research Fellow, Max Planck Institute for Social Anthropology, Department of Law and Anthropology, Halle (Saale), Germany. Email: osella@eth.mpg.de.

¹ “Trans” can be understood as a political umbrella term that refers to all those whose gender identity is different from the gender assigned to them at birth on the basis of the cultural interpretation of their anatomy, see STEPHEN WHITTLE, RESPECT AND EQUALITY: TRANSSEXUAL AND TRANSGENDER RIGHTS at xxii (2002). The expression “gender recognition” is generally used to signify the change of gendered information in one’s public records. Gender self-determination is intended as the right to determine one’s own legal gender without the need to satisfy requirements and without being subjected to control or validations from external authorities. In the Italian context, “gender recognition” remains infrequently used; instead, Italian

belonging² but also to improve their safety, facility of legal interactions, as well as socioeconomic conditions.³ Yet, this demand has been met with mixed reactions: welcomed or debated in some jurisdictions, while opposed in others still, it has, in all instances, stimulated a heated discussion.⁴ Central in the advancement of the right to gender recognition has been constitutional litigation. Supreme and Constitutional Courts are being faced with the—doctrinally and practically—complex demands put forward by trans activists.⁵ Therefore, it is not surprising that this topic is increasingly explored in legal studies as well as, more recently, in constitutional and human rights scholarship.⁶

In 2015, the Italian Constitutional Court ruled that trans people applying for gender recognition are not required to undergo surgery on primary sexual

scholars and judges tend to speak of the “correction” (*rettificazione*) of public registries. For the sake of intelligibility, this article uses “gender recognition” also when referring to the Italian context.

For an example of the demand of gender recognition, see the 2006 Yogyakarta Principles and 2017 Yogyakarta Principles+10, the widely cited advocacy statement on LGBTI+ rights (in particular, Principles 3 and 31). See International Commission of Jurists (ICJ), Yogyakarta Principles—Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007), <https://yogyakartaprinciples.org>; Int’l Comm’n Jurists, *The Yogyakarta Principles Plus 10—Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (Nov. 10, 2017), <https://yogyakartaprinciples.org/principles-en/yp10/>. See also TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006); and discussion in Section 2.

² SALLY HINES, GENDER DIVERSITY, RECOGNITION, AND CITIZENSHIP: TOWARDS A POLITICS OF DIFFERENCE (2013).

³ Unrecognized trans people are more vulnerable to exclusion, violence, and poverty. See DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2d ed. 2015); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 759 (2008). See also Olivia Fiorilli & Stefania Voli, *De-patologizzazione Trans, tra Riconoscimento e Redistribuzione*, in IL GENERE TRA NEOLIBERISMO E NEOFONDAMENTALISMO 97 (Federico Zappino ed., 2016).

⁴ For the first group, see Loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d’une modification de l’enregistrement du sexe dans les actes de l’état civil et ses effets [Gender Identity Law], M.B., July 10, 2017 (Belg.), www.ejustice.just.fgov.be/mopdf/2017/07/10_1.pdf#Page11; for the second group, see Reform of the Gender Recognition Act 2004 (U.K.), www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004; for the third group, see Omnibus Bill T/9943, May 19, 2020, art. 33; *Hungary Rolls Back Legal Protections, Puts Trans and Intersex People at Risk*, INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N (June 10, 2020), <https://ilga-europe.org/resources/news/latest-news/hungary-rolls-back-legal-protections-puts-trans-and-intersex-people-risk>.

⁵ Ruth Rubio-Marín & Stefano Osella, *El Nuevo Derecho Constitucional a la Identidad de Género: Entre la Libertad de Elección, el Incremento de Categorías y la Subjetividad y Fluidez de los Contenidos—Un Análisis Comparado*, 40 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 45 (2020); Stefano Osella & Ruth Rubio-Marín, *The Right to Gender Recognition before the Colombian Constitutional Court: A Queer and Travesti Theory Analysis*, 40 BULL. LAT. AM. RES. 650 (2021).

⁶ See, e.g., Rubio-Marín & Osella, *supra* note 5; Osella & Rubio-Marín, *supra* note 5; PROTECTING TRANS RIGHTS IN THE AGE OF GENDER SELF-DETERMINATION (Eva Brems, Pieter Cannoot, & Tom Moeren eds., 2020); Holning Lau, *Gender Recognition as a Human Right*, in CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 191 (Andreas von Arnould, Kerstin von der Decken, & Mart Susi eds., 2020); Pieter Cannoot & Mattias Decoster, *The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis*, 21 INT’L J. GENDER, SEXUALITY L. (2020); Grietje Baars, *Queer Cases Unmake Gendered Law, or, Fucking Law’s Gendering Function*, 45(1) AUSTRALIAN FEMINIST L. J. 1, 15 (2019); THE LEGAL STATUS OF TRANSEXUAL AND TRANSGENDER PERSONS (Jens Scherpe ed., 2017).

characteristics.⁷ In the Italian legal context, this surgery was essentially meant to refer to the removal of gonads and, in the case of trans men, the uterus too. It had been generally demanded by most Italian courts, in compliance with Law n.164 of 1982 on gender recognition.⁸ This law allowed a change of one's legal gender in public registries only after the "modification of the sexual characteristics" (Article 1): an unclear precondition, which is open to a plurality of different interpretations. Without striking down the provision, the Court indeed established a constitutionally respectful reading of the law, in conformity with the rights to personal development, health, and with the general protection of fundamental rights granted under the Italian Constitution.⁹

The Court thus ruled out the surgical precondition, yet emphasized that, in order to obtain gender recognition, applicants must transform the "psychological, behavioral, and physical components of gender identity" and acquire those of the gender with which they identify.¹⁰ It goes without saying that this gender must be binary, since Italian law does not protect non-binary gender identities. In other words, the Court established that individuals must behave and appear in accordance with, and show the psychological traits of, the (binary) gender for which they claim a legal recognition; in other words, it stated the lived and legal genders need to correspond. This was deemed necessary to preserve the principle of "certainty of legal relations."¹¹ The Court strongly reaffirmed this doctrine in 2017.¹² Italian courts are called to implement this doctrine. A consistent case law has now been developed. These preconditions on gender recognition, as well as their implementation, raise rather problematic questions. To begin with, why does the Constitutional Court insist on such transformations? More precisely, in the Italian legal context, what is the meaning of the targeted principle of "certainty of legal relations"? Second, how are such requirements interpreted and enforced?

The article seeks to answer these questions by examining the Italian case law on the constitutional right to gender recognition, and the application thereof by lower courts that are in charge of assessing individual applications.¹³ Taking a point of view favorable to trans demands, this article seizes the opportunity offered by the 2015 Constitutional Court decision to elaborate a critical review of Italian jurisprudence

⁷ Corte Cost., 21 ottobre 2015, n.221, G.U. Nov. 11, 2015, n.45, ¶ 4.1. (legal grounds). All decisions of the Constitutional Court can be found at CORTE COSTITUZIONALE, www.cortecostituzionale.it (last visited Mar. 22, 2022).

⁸ Legge 14 aprile 1982, n.164, G.U. Apr. 19, 1982, n.106, art. 1. On surgical sterilization, see Ruth Rubio-Marin & Stefano Osella, *Le Precondizioni per il Riconoscimento dell'Identità Sessuale*, 36 QUADERNI COSTITUZIONALI 61 (2016).

⁹ Arts. 2, 32 COSTITUZIONE [Cost.]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

¹⁰ Corte Cost., 21 ottobre 2015, n.221, ¶ 4.1. (legal grounds).

¹¹ *Id.*

¹² Corte Cost., 20 giugno 2017, n.80, G.U. July 19, 2017, n.29, ¶¶ 4.1, 4.2, 5.2 (legal grounds); Corte Cost., 21 giugno 2017, n.185, G.U. Jul. 19, 2017, n.29.

¹³ In Italy, ordinary courts for civil and criminal matters include *tribunali*, which usually act as courts of first instance, courts of appeal, and, at the top of the pyramid, the Court of Cassation. The Constitutional Court is outside this structure and is called on to decide on the conformity of laws with the constitution.

on gender recognition and of its definition of two distinct and mutually exclusive legal genders. The correlation between the gender binary and institutional heterosexuality, as theorized by Butler, seems therefore to offer a suitable framework to conceptualize this jurisprudence and to discuss *why* certain requirements were established.¹⁴ To clarify *how* the constitutional doctrine operates in practice, the article then relies on Foucault—in particular, on the notion of disciplinary power—to try to explain how individuals can be disciplined into adhering to certain corporeal and behavioral patterns.¹⁵ A two-pronged argument is presented. First, these preconditions are primarily motivated by the will to preserve the heterosexuality of family law, (arguably) enshrined in the Italian Constitution.¹⁶ Admittedly, the 2015 decision by Constitutional Court is not explicit in making this correlation. Yet, the analysis of the precedents of this Court, together with those of the Court of Cassation—which the Constitutional Court explicitly cites and endorses¹⁷—along with the legislative history of Law n.164 of 1982, strongly support this interpretation. Second, these requirements amount to an enforcement of stereotypical notions of trans identity, of “manhood” and “womanhood,” through what is a disciplinary exercise of power. This interpretation seems to find support in the analysis of case law of lower courts.

Relying on queer theory, political scientists and legal theorists have discussed how social and administrative organization is predicated on stable binary gender categories.¹⁸ Furthermore, scholars have investigated how gender subjects are defined through law and rights discourses.¹⁹ Yet, the question how constitutional courts define gender identities and translate the various interests that determine gender categories in a doctrinal—specifically, constitutional—discourse,

¹⁴ JUDITH BUTLER, *GENDER TROUBLE* 33 (2d ed. 1999). See also MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 135–59 (Robert Hurley trans., Vintage 1990) (1978); MONIQUE WITTIG, *THE STRAIGHT MIND* (1992).

¹⁵ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 137 (Alan Sheridan trans., Penguin Books 1991) (1975); FOUCAULT, *supra* note 14.

¹⁶ In Italy, marriage remains the purview of heterosexuals. Same-sex couples can access civil unions that entail different rights and duties. Whether heterosexual marriage is constitutionally permissible is up for debate. See Barbara Pezzini, *Il matrimonio same-sex si potrà fare: La qualificazione della discrezionalità del legislatore nella Sentenza n. 138 del 2010 della Corte Costituzionale*, GIURISPRUDENZA COSTITUZIONALE 2715 (2010), www.rivistaaic.it/images/rivista/pdf/Pezzini01.pdf. See contra Andrea Pugiotto, *Una lettura non reticente della Sentenza n. 138/2010: Il monopolio eterosessuale del matrimonio*, FORUM DI QUADERNI COSTITUZIONALI (2011), www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0226_pugiotto.pdf. Gender difference is central in reproductive law: see LA FILIAZIONE ED I MINORI (Andrea Sassi, Francesco Scaglione, & Stefania Stefanelli eds., 2019).

¹⁷ Corte Cost., 21 ottobre 2015, n.221, ¶ 4.1. (legal grounds). This correlation is evident in Cass., sez. un., 20 luglio 2015, n.15138, www.articolo29.it/wp-content/uploads/2015/08/Cass-civ-15-n.-15138-Rettifica-del-sesso-senza-intervento-chirurgico.pdf. See further Section 3.

¹⁸ SPADE, *supra* note 3; Paisley Currah & Lisa J. Moore, “We Won’t Know Who You Are”: *Contesting Sex Designations in New York City Birth Certificates*, 24 *HYPATIA* 113 (2009); see Section 2.

¹⁹ DAMIAN A. GONZALEZ-SALZBERG, *SEXUALITY AND TRANSEXUALITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A QUEER READING OF HUMAN RIGHTS LAW* (2019); QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS (Diane Otto ed., 2018); Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderlands*, 32 *HARV. J.L. & GENDER* 165 (2009).

has remained underexplored.²⁰ Furthermore, the concrete legal operation of the right to gender recognition, and the way in which requirements are applied to the applicants for gender recognition, are almost entirely neglected.²¹ The article explores both these aspects in tandem. It therefore contributes to the clarification of how what arguably is a disciplinary apparatus operates through the definition and application of a constitutional right.

The analysis of the Italian case study is particularly pertinent to this purpose. An Italian focus centers the debate on a constitutional jurisdiction which, despite its socio-legal and theoretical richness, has been less explored than others. This jurisdictional focus offers, first, an abundant constitutional case law where the interplay of rights and interests is explicit. Because it is anchored in the heterosexual matrix of family law, this jurisprudence is also suitable to showing how aspects of queer theory may be applied to constitutional law. Second, this case study is even more rewarding as the requirements established by the Constitutional Court have now been enacted by a considerable number of courts of first instance, with publicly available decisions. This critical mass of legal material allows an assessment of how the constitutional doctrine of gender identity practically works. Finally, the critique of Italian law—law which asks trans applicants to pass several tests (psychological, behavioral, and physical) that in some form or other are also deployed in other jurisdictions—may offer a useful guide to other contexts.²²

This investigation, which tackles a theoretically complex and socially significant right, is particularly needed at a time when trans identity rights are being increasingly claimed and contested. The contribution of this article is primarily theoretical. However, a clear account of the legal dynamics and the balancing at play in the definition of the constitutional right to gender identity, and of its impact on individuals, can offer doctrinal and strategic ammunition to develop an informed, normative argument for advancing the rights of trans people.

In order to present this two-pronged argument, the remainder of the article is structured as follows. Section 2 offers a brief background on the demand for gender recognition and the limits to such a demand. Section 3, drawing on Butler, articulates the first prong of the argument, and explains *why* the Italian legislator and courts have insisted on controlling gender identity. Section 4, relying on Foucault, presents the second prong of the argument and analyzes *how* this objective is achieved. It does so through a discussion of the case law of Italian lower courts in light of the notion of disciplinary power.

²⁰ See Osella & Rubio-Marín, *supra* note 5.

²¹ See Marie-Xaviere Catto, *Changer de Sexe à l'État Civil depuis de la Loi du 18 Novembre 2016 de Modernisation de la Justice du XXIe Siècle: Un Bilan d'Application*, 9 CAHIERS DROIT, SCIENCE, ET TECHNOLOGIE 107 (2019).

²² For instance, to French law, where the 2016 reform has established a behavioral-social test for gender recognition. See Loi no. 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle [Law no. 2016-1547 of 18 November 2016 on the modernization of justice in 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] NOV. 19, 2016, www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805/.

2. Trans people and the demand for gender recognition

The Italian jurisprudence is to be set against a wider backdrop, where we see the gradual affirmation of the identity demands of trans people clashing with the competing public interest in the preservation of control over gender identities in law.²³ Over the last decades, trans people have insistently demanded the right to the modification of one's gender status in all public records, such as public registries, birth certificates, and official IDs.²⁴

However, demands for gender recognition were met with varying degrees of resistance. Usually, gender recognition has only been granted upon the fulfillment of precise preconditions, such as a medical examination (including a diagnosis of gender dysphoria; sterilization; bodily transformation) and behavioral analysis (including a recognized belonging to a certain gender in one's community).²⁵ As scholars have highlighted, these preconditions are often motivated by the role that gender plays in social and administrative organizations,²⁶ such as gender segregation in sport or public facilities, identification of the individual, public administration, and affirmative actions aimed at gender equality.²⁷ Essentially, gender identity is important in family law, especially in those jurisdictions, such as Italy, where marriage can only take place between a man and a woman. From this perspective, an argument is made that if individuals could self-determine their legal gender identity, they could acquire rights or avoid obligations.²⁸

Unsurprisingly, preconditions on gender recognition have sparked criticisms. Such requirements tailor gender recognition to people willing to undergo medical transition and supervision, and whose identity and expression are intelligible within the frame of the male–female gender binary. Yet, trans identities are many and diverse. Trans people may be binary or non-binary, eager to undergo gender-confirming medical treatments or perfectly comfortable with their bodies; they may correspond to the standards of maleness and femaleness, or fall outside the regular framework of gender normativity. Scholars and activists have advocated that being trans should not be treated as a mental illness, but rather as an identity, and that pathologization, which underlies the medical preconditions, adds to the stigma and exclusion from which trans people often suffer.²⁹ The medicalization of gender recognition has been lamented, perceived as invasive and humiliating, and not genuinely consented to given its importance for trans people: “an offer you can't refuse.”³⁰

²³ Stefano Osella, “De-Gendering” the Civil Status? A Public Law Problem, 20 INT'L J. CONST. L. 471 (2020).

²⁴ THE LEGAL STATUS OF TRANSEXUAL AND TRANSGENDER PERSONS, *supra* note 6.

²⁵ Peter Dunne, *Legal Gender Recognition in Europe: Sterilisation, Diagnosis and Medical Examination Requirements*, 39 J. SOC. WELFARE & FAM. L. 497 (2017).

²⁶ Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747 (2015); HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER* (2016).

²⁷ SPADE, *supra* note 3.

²⁸ Currah & Moore, *supra* note 18, at 114.

²⁹ Jens Theilen, *Depathologisation of Transgenderism and International Human Rights Law*, 14 HUM. RTS. L. REV. 327 (2014).

³⁰ Anne Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalization of Gender Identity*, 26 COLUM. J. GENDER & L. 488 (2013).

Therefore, gender self-determination has been demanded by trans activists and advocates, and now is representatively enshrined in Principle 31 of the 2017 Yogyakarta Principles (+10), the highly effective advocacy statement for LGBTI rights.³¹ Although still in minority, an increasing number of jurisdictions now ensure a right to gender self-determination, either through legislation or constitutional jurisprudence.³² Even when self-determination is not granted, legislators and courts—for example in Italy—are relaxing the barriers to legal transition, conscious of the severe implications that such limits may have.³³ In Italy, as in many other contexts, the trans community is asking for gender self-determination.³⁴ Yet, their claims currently face a standstill in the doctrine of the Constitutional Court whose reasoning and its implications will be explored in the following section.

3. Controlling gender identity to preserve the heterosexual family

We now have to decipher *why* the Court requires a medically supervised transformation of the psychological, physical, and behavioral characteristics to match those of the claimed gender. In doing so, the Italian Constitutional Court has arguably limited the right to gender recognition and “encumbered” it with a marked binary corporeality.³⁵ The Court has justified these requirements on the basis of the principle of “certainty of legal relations.”³⁶ Yet, in the Italian context, what are the—obviously gender-based—relations evoked by this principle?

To answer this question, the development of the right to gender recognition should be explored. This section shows that, in its official narrative, the Constitutional Court—but also the Court of Cassation and the legislature—has primarily referred to the heterosexual family as the main interest conflicting with gender recognition. Admittedly, the Constitutional Court may well be referring to multiple “legal relations” that rely on gender, well beyond the boundaries of family law.³⁷ However, in the reasoning of the Court and other bodies, the heterosexuality of family law takes center stage.

The correlation between the gender binary and institutional heterosexuality, a central tenet of queer studies, is useful to interpreting this evolution.³⁸ Butler has argued

³¹ Michael O’Flaherty, *The Yogyakarta Principles at Ten*, 33 NORDIC J. HUM. RTS. 280 (2015).

³² See PROTECTING TRANS RIGHTS IN THE AGE OF GENDER SELF-DETERMINATION, *supra* note 6; Osella & Rubio-Marín, *supra* note 5; ZHAN CHIAM ET AL., TRANS LEGAL MAPPING REPORT 2019: RECOGNITION BEFORE THE LAW (2020), https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf.

³³ See Loi no. 2016-1547, J.O. Nov. 19, 2016.

³⁴ See the work by the Movimento Identità Trans, a well-known Italian trans rights movement. *Una proposta di piattaforma per la riforma della Legge 164/82*, MOVIMENTO IDENTITÀ TRANS (Feb. 13, 2020), <https://mit-italia.it/una-proposta-di-piattaforma-per-la-riforma-della-legge-164-82/>.

³⁵ Marta Cartabia, *Le Avventure Giuridiche della Differenza Sessuale*, IUSTITIA 285, 293 (2011).

³⁶ Corte Cost., 21 ottobre 2015, n.221, ¶ 4.1.

³⁷ See, e.g., Cartabia, *supra* note 35; Corte Cost., 21 giugno 2017, n.185. On gender categorization and gender equality, see Osella, *supra* note 23.

³⁸ JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 136 (2006).

that the gender binary—the exclusive presence of maleness/masculinity and femaleness/femininity, with non-normative bodies or identities interpreted as pathological exceptions—manifests as the product of institutional (hetero)sexuality.³⁹ By this account, the myriad of different bodies are reinterpreted in binary terms to legitimize the regulation of relations deployed through heterosexuality.⁴⁰ Deviations from the binary are accordingly simply rejected as wrong or pathological. In Butler's terms, "the institution of a compulsory and naturalized heterosexuality requires and regulates gender as a binary relation in which the masculine term is differentiated from a feminine term, and this differentiation is accomplished through the practices of heterosexual desire."⁴¹

This association has been taken up in a variety of other disciplines. Indeed, the efforts to maintain the gender binary—and to inscribe it on the body of individuals through complex medico-legal apparatuses—can usually be traced to the effort to maintain the primacy of heterosexuality.⁴² The following section explores how this interaction manifests in the case-law defining the right to gender recognition, and in the parliamentary debates that preceded Law n.164 of 1982 on gender recognition. While already evident in the genesis of the right, this interrelation becomes very explicit in the more recent jurisprudence.

3.1. An encumbered right to gender recognition: Genesis

The link between the preservation of heterosexual family law and the maintenance of two stable and identifiable genders can already be noticed in the genesis of Law n. 164 of 1982 on gender recognition.⁴³ The law was Parliament's answer to a suggestion of the Constitutional Court. In 1979, the Court, ruling on the legitimacy of a law that did not allow gender recognition, established that there was no constitutional right to gender recognition.⁴⁴ Yet, it invited Parliament to provide for it by way of legislation. The Court, however, warned the legislator of the limits imposed by "marriage, which the Constitution defines as the foundation of family as a 'natural society'" (Article 29).⁴⁵

A bill was then put before Parliament in 1980. Throughout the debates on it, MPs insisted on requiring medical transformation and judicial supervision as preconditions to gender recognition. These measures were supposedly going to minimize the impact

³⁹ BUTLER, *supra* note 14, at 33.

⁴⁰ See also FOUCAULT, *supra* note 14, at 133–59.

⁴¹ BUTLER, *supra* note 14, at 22–3.

⁴² See, for example, ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000) (focusing on biology); ALICE DOMURAT-DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* (1998) (focusing on history); KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* (2008) (focusing on anthropology).

⁴³ See Legge 14 aprile 1982, n.164, art.1 (establishing that gender can be recognized after the modification of sexual characteristics, without providing details on what characteristics should be modified, or how).

⁴⁴ Corte Cost., 12 luglio 1979, n.98, (on the constitutionality of Regio decreto legge, 9 luglio 1939, n.1238, arts. 165, 167); Codice civile [C.C.], art. 454 (It.). www.cortecostituzionale.it.

⁴⁵ Corte Cost., 12 luglio 1979, n.98, ¶ 2 (legal grounds).

of the legal protection of trans identity on the “continuation of the species” and on “public morals.”⁴⁶ As Italian queer theorist Bernini has pointed out, “heterosexuality is traditionally associated with moral rectitude.”⁴⁷ As commonly agreed among scholars, Parliament passed a law that was attentive to avoiding conflict with the heterosexual paradigm of family law.⁴⁸ In a much later case, the Court of Cassation explicitly stated that Law n.164 of 1982 was “entirely aimed” at protecting the right to gender identity “without altering the preexisting system of conjugal [heterosexual] relationships.”⁴⁹

The conflict between gender recognition and the “institutional heterosexuality” of family law is also traceable in the subsequent constitutional litigation.⁵⁰ In 1985, the Constitutional Court was faced with a preliminary reference filed by the Court of Cassation.⁵¹ The referring Court had problematized the impact of gender recognition on social organization and, specifically, on family life.⁵² In the opinion of the Court of Cassation, gender recognition would create “bizarre” relationships, such as “a father who then becomes a mother.” Furthermore, the Court lamented that trans people marrying in the acquired gender (i.e. to people of the same birth-assigned gender) would be incapable of performing the “copulative and generative functions” that only “nature” can ensure.⁵³

The Constitutional Court rejected this preliminary reference. In doing so, it enunciated a right to “sexual identity”⁵⁴ predicated on the assumption that “transsexual” people would always—even frantically—long to transform their bodies.⁵⁵ The Court based this right on the principles of solidarity, dignity, and liberty,⁵⁶ and the right to health.⁵⁷ Health was seemingly given particular importance, since it related to the quest of the “transsexual” person to achieve their wellbeing by “aligning” their mind and body.⁵⁸ This doctrinal ground arguably defined a right where physical

⁴⁶ Stefania Voli, *Il Parlamento Può Fare Tutto, Tranne che Trasformare una Donna in un Uomo e un Uomo in una Donna: (Trans) Sessualità, Genere, e Politica nel Dibattito Parlamentare della Legge 164/1982*, 287 *ITALIA CONTEMPORANEA* 75, 94 (2018).

⁴⁷ LORENZO BERNINI, *QUEER APOCALYPSES: ELEMENTS OF ANTI-SOCIAL THEORY* 3–4 (2017).

⁴⁸ *Id.*; Francesco Bilotta, *Transsexualismo*, *DIGESTO DELLE DISCIPLINE PRIVATISTICHE* 732, 732–3 (2013); Barbara Pezzini, *Il Paradigma Eterosessuale del Matrimonio di Nuovo davanti alla Corte Costituzionale: La Questione del Divorzio Imposto Ex Lege a Seguito della Rettificazione di Sesso (Ordinanza n. 14329/13 Corte di Cassazione)*, *GenIUS* (2014), www.geniusreview.eu/2014/genius-1-2014/.

⁴⁹ Cass., sez. I, ord. 6 giugno 2013, n.14329, ¶¶ 3–4, *DIRITTO DI FAMIGLIA E DELLE PERSONE* 890 (2013).

⁵⁰ Cass., 15 aprile 1983, n.783, *G.U. Feb. 29, 1984*, n.60, p. 1755.

⁵¹ *Id.* at 1759.

⁵² *Id.* at 1759.

⁵³ *Id.* at 1760.

⁵⁴ Corte Cost., 6 maggio 1985, n.161, *Giur. It.* 1987, I, 1, 235 (defining “sexual” identity as “aspetto e fattore di svolgimento della personalità umana” [“an aspect and contributor to the development of human personality”]). See also Mario Dogliotti, *La Corte Costituzionale Riconosce il Diritto all’Identità Sessuale*, *GIUR. IT.* 235, 242 (1987).

⁵⁵ Corte Cost., 6 maggio 1985, n.161, *Giur. It.* 1987, I, 1, 235, ¶ 10 (legal grounds).

⁵⁶ Art. 2 COSTITUZIONE [COST.] (It.).

⁵⁷ *Id.* art. 32.

⁵⁸ ANNA LORENZETTI, *DIRITTI IN TRANSITO: LA CONDIZIONE GIURIDICA DELLE PERSONE TRANSESSUALI* 35–6 (2013).

transformation and gender identity were tied together, and favored an understanding of gender recognition within a medicalized framework.⁵⁹

As for the issues dreaded by the Court of Cassation, the Court followed the opinion of the *Avvocato dello Stato*, who argued that “no disturbance of social relations can follow [Law n. 164 of 1982], because [...] the applicants have acquired the appearance and the behavior of the *other sex*. [Therefore] the protection of legal relations is ensured by recognizing legal effects to the changes operated.”⁶⁰ The Court pragmatically held that ensuring “the coincidence between the gender recorded in public registries and physical appearance [favors] the clarity of social relations, and, hence, also the certainty of legal relations.”⁶¹ With specific reference to family law, the Court stated that “the natural order of the family is altered not by [legal recognition of one’s trans gender identity] but by the ‘transsexual syndrome,’ with the legislator limiting itself to regulate an existing reality.”⁶²

In other words, in addition to recognizing a constitutionally grounded right to “sexual identity,” the Court acknowledged that trans identity may represent a threat to social relations and to the “natural” family order. Yet, it also considered that the recognition, rather than denial, of “transsexual” identity might lead to greater clarity. The right to sexual identity guaranteed the correspondence between the legal and lived genders, and was hence seen as a safeguard of the “natural order of the family.”

3.2. Loosening the preconditions while entrenching medico-behavioral requirements

The doctrinal framing defined in the 1985 decision remained unaltered—and unchallenged—until 2015, when the Constitutional Court—preceded by a few months by the Court of Cassation—pronounced its decisions on the right to gender recognition.⁶³

Until 2015, Law n.162 of 1982 was consistently applied by lower courts, just with a few exceptions. The “modification of sexual characteristics” (Article 1) was generally interpreted as the removal of gonads or uterus and the transformation of secondary sexual characteristics and the individual’s behavior. This process had to be accompanied by psychological/psychiatric supervision.⁶⁴ The surgical removal of gonads started however to look untenable, especially in light of the supranational

⁵⁹ *Id.* at 32.

⁶⁰ Roberto Romboli, *Commentario all’Articolo 5 del Codice Civile*, in COMMENTARIO DEL CODICE CIVILE SCIALOJA BRANCA 225, 267 (Alessandro Pizzorusso, Roberto Romboli, Umberto Breccia, & Anna De Vita eds., 1988) (emphasis added).

⁶¹ Corte Cost., 6 maggio 1985, n.161, ¶ 10 (legal grounds).

⁶² *Id.* ¶ 12 (legal grounds).

⁶³ In a 2014 case on the automatic divorce of trans applicants for gender recognition, the Constitutional Court reiterated its explanation of the conflict between trans identity—in this case, with reference to the right of the trans person to remain in a legally recognized union with their spouse—and the heterosexual paradigm of marriage, as envisioned in the Constitution. Although related to the overall process of transformation required of the trans applicant, this article focuses on the interpretation of the medico-behavioral preconditions as established by decision 221 of 2015. Corte Cost., 11 giugno 2014, n.170, G.U. Jun. 18, 2014, n.26.

⁶⁴ See Rubio-Marín & Osella, *supra* note 8.

legal developments. In 2015, the European Court of Human Rights expressed a clear condemnation of the sterilization requirement, albeit in an *obiter dictum*.⁶⁵ Similarly, the Parliamentary Assembly of the Council of Europe called on the Member states to ensure a self-determination-based, de-medicalized right to gender recognition.⁶⁶

Consequently, when the case of a trans woman claiming gender recognition but refusing to undergo castration had to be decided by the Court of Cassation in the same year, the international trend looked favorable on, and proved advantageous for her demand.⁶⁷ The Court of Cassation cited the case law of the European Court of Human Rights (ECtHR), and furthermore insisted that the interpretation of Italian law must be guided by the jurisprudence of Strasbourg.⁶⁸ This appeal was welcomed. However, the Court's decision made the correlation between the control of individual identity and the heterosexual family law very explicit.

The Court ruled that interpreting Law n.162 of 1982 on gender recognition as requiring surgery on primary sexual characteristics would limit the right to gender recognition, grounded in self-determination⁶⁹ and health,⁷⁰ beyond what is necessary. Even though the Court stated that the right to gender recognition was functional to the individually determined wellbeing of the trans person, and despite the possibility of progressive interpretations, it repeatedly emphasized the need of a medically supervised transition, including hormonal treatments, aesthetic changes, and transformation of secondary sexual characteristics.⁷¹

The Cassation repeatedly stressed that the aim of such requirements was to prevent gender self-determination, and to ensure the “seriousness” and “irreversibility” of the transition.⁷² It explained that medical requirements have the purpose of preserving “a clear distinction between genders” and to avoid “a third gender composed of characteristics of [masculine and feminine ones].” The Court clarified that this neat division ensures the “certainty of social relations” and prevents “relationships not recognized by Italian family law especially in the area of marriage and parental rights.”⁷³ Finally, it underscored that the specific trans applicant was virtually sterile because of her protracted hormone therapy, and that she looked and behaved in a feminine manner. Therefore, the Court held, she could be recognized as female despite her rejection of surgery.

A few months later, in November 2015, the Constitutional Court adjudicated a similar case. As noted earlier, the decision clarified the correct interpretation of the law on gender recognition.⁷⁴ The Court reaffirmed its previous Decision n.161 of 1985. It

⁶⁵ Y.Y. v. Turkey, App. no. 14793/08, Eur. Ct. H.R., Mar. 10, 2015, <http://hudoc.echr.coe.int/eng?i=001-152779>.

⁶⁶ Parl. Assembly of the Council of Europe Res. 2048 on Discrimination against Transgender People in Europe (Apr. 22, 2015), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>.

⁶⁷ Cass., sez. un, 20 luglio 2015, n.15138.

⁶⁸ *Id.* at 21.

⁶⁹ *Id.* at 30. See Art. 2 COSTITUZIONE [COST.] (It.).

⁷⁰ Cass., sez. un, 20 luglio 2015, n.15138, p. 30. See Art. 32 COSTITUZIONE [COST.] (It.).

⁷¹ Cass., sez. un, 20 luglio 2015, n.15138, p. 29.

⁷² *Id.* at 35.

⁷³ *Id.* at 29–30.

⁷⁴ *Id.*

also cited, with approval, the July 2015 decision by the Court of Cassation, including its reading of the law.⁷⁵ The Constitutional Court emphasized the duty of solidarity enshrined in the Constitution (Article 2). It then balanced the fundamental rights to personal identity⁷⁶ and health,⁷⁷ on which it based the right to gender recognition, with the principle of “certainty of legal relations.”⁷⁸ Such a balance was struck by ruling out the surgical requirement, but insisting on the need of a complete transformation of the applicant’s behavioral, psychological, and physical characteristics.⁷⁹ As a result, the Court has declared that individuals can change legal gender registration, but they must have acquired the gendered characteristics associated with, and thus be immediately intelligible in, their (obviously, binary) legal gender.

In June 2017, the Constitutional Court confirmed this doctrine, and gender self-determination was again explicitly, and categorically, ruled out.⁸⁰ The Court stressed that the right to gender recognition without the precondition of surgery on primary sex characteristics did not entail gender self-determination. Quite the contrary, it reinforced the need of a rigorous assessment not only of the seriousness and univocity of the intent of the applicant, but also of their objective—and medical—transformation.⁸¹ The Court stressed that the right to gender recognition, as defined by the Court of Cassation and Constitutional Court in 2015, is indeed aimed at balancing the rights of trans people with the preservation of a gender binary. The clear distinction between genders was seen to be the guarantee of the certainty of a plurality of legal relations and “traditional values.”⁸²

In summary, the case law has granted recognition to trans identity, and recently has extended it to people who do not want to undergo surgery on primary sex characteristics. Yet, it has also strived to maintain two mutually exclusive, masculine and feminine, legal genders. It seems that courts, in imposing the overall transformation of applicants as a requirement on recognition, aimed to preserve,

⁷⁵ Corte Cost., 21 ottobre 2015, n.221, G.U. Nov. 11, 2015, n.45, ¶ 4.1 (legal grounds).

⁷⁶ Art. 2 COSTITUZIONE [COST.] (It.); ECHR, *supra* note 9, art. 8.

⁷⁷ Art. 32 COSTITUZIONE [COST.] (It.).

⁷⁸ Corte Cost., 21 ottobre 2015, n.221, G.U. Nov. 11, 2015, n.45, ¶ 4.1 (legal grounds).

⁷⁹ *Id.*

⁸⁰ Corte Cost., 20 giugno 2017, n. 180, ¶¶ 4.1, 4.2, 5.2 (legal grounds). *See also* Anna Lorenzetti, *Il Cambiamento di Sesso Secondo la Corte Costituzionale: Due Nuove Pronunce (180 e 185 del 2017)*, *STUDIUM IURIS* 446 (2018).

⁸¹ Corte Cost., 180/2017, *supra* note 12, at ¶5.2 (legal grounds).

⁸² Corte Cost., 21 giugno 2017, n.18 (legal grounds). The referring court of first instance (Tribunale di Avezzano) spoke of a confusion between genders and a tension with the “centuries-old tradition” of Italian society. Unwanted and awkward consequences of gender self-determination were envisioned. A mismatch between one’s identity and one’s physical characteristics was understood as, for example, causing embarrassment in gender-segregated facilities, police searches, and in public settings (e.g. “at the beach,” where people wear—so to speak—revealing swimming suits). *See* Trib. Avezzano, 12 gennaio 2017, ord. 58, G.U. 17/2017 (“prima serie speciale”). It must be noted that the Constitutional Court emphasized that tolerating “awkward” situations envisioned by the referring Court does not contradict the duty of social solidarity expressed in the Constitution (Article 2), but rather is part of it. Furthermore, the Court concluded, these events may happen in society regardless of the requirements on gender recognition: they are practical occurrences, independent of legal identity. Corte Cost., 21 giugno 2017, n.185.

in Butler's words, the "internal coherence of unity of either gender" and to limit the "gendered possibilities within an oppositional, binary gender system."⁸³ The narratives of courts and the legislator have primarily—crucially—seen these requirements as a guarantee of family "as a natural society,"⁸⁴ of the "continuation of the species,"⁸⁵ of "natural" marriages,⁸⁶ and of the "natural order of the family."⁸⁷ In 2015, the Court of Cassation has insisted that "a clear distinction between genders," supposedly guaranteed by these requirements, prevents the introduction of forms of marriage and filiation not recognized by Italian law.⁸⁸ While, in 2017, the Constitutional Court referred to a plurality of "traditional values,"⁸⁹ references to family law remain far more prominent in the legal narrative. The connection between "a compulsory and naturalized heterosexuality" and a binary in which "the masculine term is differentiated from a feminine term,"⁹⁰ seems most evident here. Thus, when, in 2015, the Constitutional Court explicitly recalled this jurisprudence and referred to the "certainty of legal relations,"⁹¹ this entire history resonates in it. The primary reference cannot be but the preservation of the heterosexuality of family law. As said, there may be further interests that predicate on binary gender categories. Yet, they were constantly overlooked in a four-decade official narrative.

4. Discipline and norms: The creation of the gender subject

We must now come to understand *how* this doctrine is enforced. As suggested by leading trans activist and theorist Porpora Marcasciano, this right, while conceding the possibility of changing legal gender on specific preconditions, in fact reinforces the gender binary on the bodies of trans applicants.⁹² To that end, we need to look at how judges interpret the criteria defined by the Constitutional Court. We need not only to uncover what gender norms they apply; we need to dig deeper and define the structural elements of the mechanism established by this Court and its doctrine. To do so, this section explores the case law of Italian lower courts which implemented it.⁹³ As noted earlier, general courts in Italy have the competence to decide on applications for

⁸³ BUTLER, *supra* note 14, at 30.

⁸⁴ Corte Cost., 12 luglio 1979, n. 98, ¶ 2.

⁸⁵ Voli, *supra* note 46, at 101.

⁸⁶ Cass., 15 aprile 1983, n. 783, pp. 1759–60.

⁸⁷ Corte Cost., 6 maggio 1985, n. 161, ¶ 12 (legal grounds).

⁸⁸ Cass., sez. un., 20 luglio 2015, n. 15138, pp. 29–30.

⁸⁹ Corte Cost., 21 giugno 2017, n. 185, (legal grounds).

⁹⁰ BUTLER, *supra* note 14, at 22–3.

⁹¹ Corte Cost., 21 ottobre 2015, n. 221, ¶ 4.1.

⁹² Voli, *supra* note 46, at 101–2.

⁹³ This section is based on the examination of sixty-eight decisions, available at: DeJURE, dejure.it (last visited Aug. 1, 2021) or LEGGI D'ITALIA, leggiditaliaprofessionale.it (last visited Aug. 1, 2021). The decisions vary in length, intrusiveness, and degree of examination. Yet, the three limbs of disciplinary power enumerated in the text (hierarchical observation; evaluation through norms; and punishments and rewards) can arguably be traced in virtually all of the decisions (see discussion for exceptions).

gender recognition⁹⁴ and assess the “modification of sexual characteristics.”⁹⁵ In fact, the overwhelming majority of such decisions are given by courts of first instance—*tribunali*—as they seem to be rarely appealed.

Through this analysis, we learn that the requirement of “psychological, behavioral, and physical” transformations makes courts more likely to enforce general and unsubstantiated assumptions on trans identity, masculinity, and femininity.⁹⁶ Cultural tropes that rely on and perpetuate existing gender-based social hierarchies and inequalities may be reiterated—and often are.⁹⁷ At the same time, these tropes, or stereotypes, are arguably enforced through a disciplinary power. Michel Foucault defined this notion as a special type of power which is creative in the way that it defines subjectivities. Discipline impacts on individual bodies and “moulds [them] into useful components

See Trib. Agrigento, 12 gennaio 2021, leggiditaliaprofessionale.it; Trib. Monza, 4 gennaio 2021, leggiditaliaprofessionale.it; Trib. Genova, 15 dicembre 2020, n. 2112, dejure.it; Trib. Perugia, 21 settembre 2020, n. 994, dejure.it; Trib. Vicenza, 7 agosto 2020, n.1342, dejure.it; Trib. Vicenza, 26 giugno 2020, leggiditaliaprofessionale.it; Trib. Civitavecchia, 25 giugno 2020, n.540, dejure.it; Trib. Busto Arsizio, 11 marzo 2020, leggiditaliaprofessionale.it; Trib. Milano, 17 febbraio 2020, n.1479, dejure.it; Trib. Pavia, 8 gennaio 2020, n.13, dejure.it; Trib. Milano, 5 dicembre 2019, n.11278, dejure.it; Trib. Milano, 11 luglio 2019, n.6914, dejure.it; Trib. Ancona, 17 maggio 2019, n.936, dejure.it; Trib. Milano, 10 maggio 2019, n.4538, dejure.it; Trib. Torino, 7 maggio 2019, n. 2156; Trib. Milano, 6 marzo 2019, n.2295; Trib. Milano, 1 marzo 2019, n.2081, dejure.it; Trib. Milano, 1 marzo 2019, n. 2072, dejure.it; Trib. Milano, 17 febbraio 2019, n.1477, dejure.it; Trib. Milano, 13 febbraio 2019, n.1431, dejure.it; Trib. Bari, 7 febbraio 2019, n.585, dejure.it; Trib. Lamezia Terme, 29 gennaio 2019, leggiditaliaprofessionale.it; Trib. Trani, 6 dicembre 2018, n.2461, dejure.it; Trib. Novara, 27 novembre 2018, n.1087, dejure.it; Trib. Frosinone, 19 luglio 2018, leggiditaliaprofessionale.it; Trib. Torino, 13 luglio 2018, leggiditaliaprofessionale.it; Trib. Nola, 4 maggio 2018, leggiditaliaprofessionale.it; App. Brescia, 30 marzo 2018, n. 593, unreported; App. Torino, 28 marzo 2018, n.569, dejure.it; Trib. Bari, 13 marzo 2018, n.1124, dejure.it; Trib. Bari, 12 marzo 2018, n.1091, dejure.it; Trib. Messina, 22 febbraio 2018, n. 424, dejure.it; Trib. Perugia, 23 gennaio 2018, n.1116, unreported; Trib. Pavia, 17 gennaio 2018, n.1116, dejure.it; Trib. Pavia, 16 gennaio 2018, dejure.it; Trib. Trento, 29 settembre 2017, leggiditaliaprofessionale.it; Trib. Roma, 4 agosto 2017, n.15902, dejure.it; Trib. Bologna, 3 agosto 2017, n.1753, dejure.it; Trib. Prato, 11 luglio 2017, n.2, dejure.it; Trib. Roma, 5 luglio 2017, n.13618, dejure.it; Trib. Roma, 7 giugno 2017, n.80, dejure.it; Trib. Bari, 16 giugno 2017, n.3140, dejure.it; Trib. Bologna, 7 giugno 2017, n.966, dejure.it; Trib. Genova, 23 maggio 2017, leggiditaliaprofessionale.it; Trib. Bari, 22 maggio 2017, n.2642, dejure.it; Trib. Pordenone, 18 maggio 2017; Trib. Santa Maria Capua Vetere, 12 maggio 2017, n.1617, dejure.it; Trib. Roma, 13 aprile 2017, n.7518, dejure.it; Trib. Milano, 10 aprile 2017, n.4090, unreported; Trib. Mantova, 21 April 2017, dejure.it; Trib. Roma, 4 aprile 2017, n.6734 dejure.it; Trib. Taranto, 10 marzo 2017, n.693, unreported; Trib. Pistoia, 9 febbraio 2017, n.133, dejure.it; Trib. Genova, 19 gennaio 2017, n.425, unreported; Trib. Verona, 19 novembre 2016, n.3043, unreported; Trib. Bari, 31 ottobre 2016, n.5577, dejure.it; Trib. Bari, 11 ottobre 2016, n.5079, dejure.it; Trib. Vicenza, 4 ottobre 2016, leggiditaliaprofessionale.it; Trib. Bari, 27 settembre 2016, n.4801, unreported; Trib. Salerno, 15 luglio 2016, n.4296, unreported; Trib. Reggio Emilia, 27 luglio 2016, leggiditaliaprofessionale.it; Trib. Cassino, 13 luglio 2016, n.976, dejure.it; Trib. Foggia, 6 luglio 2016, leggiditaliaprofessionale.it; Trib. Genova, 20 giugno 2016, n.2178, leggiditaliaprofessionale.it; Trib. Napoli, 6 giugno 2016, unreported; Trib. Bari, 24 maggio 2016, n.2829, dejure.it; Trib. Bari, 10 marzo 2016, n.1335, dejure.it; Trib. Bari, 14 dicembre 2015, n.5467, dejure.it.

⁹⁴ Decreto legislativo [D.Lgs.] 1 settembre 2011, n.150, art. 31(2).

⁹⁵ Legge 14 aprile 1982, n.164, G.U. Apr. 19, 1982, n.106, art. 1.

⁹⁶ REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 25–9 (2010).

⁹⁷ Peter Glick & Laurie A. Rudman, *Sexism*, in THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 328 (John F. Dovidion, Miles Hewstone, Peter Glick, & Victoria M. Esses eds., 2010).

of larger social machines.”⁹⁸ It ensures that the body itself is capable of serving a more general purpose.

The disciplinary framework seems to be particularly useful in understanding the operation of Italian lower courts, as it has been with the study of gender relations in general.⁹⁹ This notion has helped to explain how gendered standards are enforced on cis men and women, as well as on trans people, in social and medical settings, and it has been central to understanding the process of normalization to which they are often subjected.¹⁰⁰ Disciplinary power, as commonly systematized by scholars, consists of three central components: hierarchical observation or surveillance, judgement through norms, and a system of penalties and rewards.¹⁰¹

All these elements can be identified when courts decide on gender recognition. (i) They operate a hierarchical observation of the trans applicant (ii) and routinely scrutinize them against (stereotyped) standards or norms. This scrutiny is characterized by an often-intrusive observation and minute examination, which help to define an ideal candidate for recognition. (iii) Finally, this assessment is carried out within a network of punishments and rewards, which, arguably, can include gender recognition or the denial thereof.¹⁰² Furthermore, disciplinary power can be articulated in legal terms and operate through judicial institutions.¹⁰³ Normalization can also take place through the functioning of rights, which, while expanding the entitlements of individuals, may also cast them within predetermined notions of subjectivity.¹⁰⁴

4.1. Hierarchical observation

The process for achieving gender recognition is obviously structured in hierarchical terms. A power imbalance is skewed in favor of the court called on to assess the application. The applicant merely undergoes the examination. Admittedly, sociological research—carried out in the United Kingdom—suggests that trans applicants should not be simply demeaned as helpless victims of the system; they are able to adopt strategic behaviors and narratives that influence the power dynamics with the examiner.¹⁰⁵ It is nonetheless true that, in the Italian case at least, the court will have the

⁹⁸ Devonya D. Havis, *Discipline*, in *THE CAMBRIDGE FOUCAULT LEXICON* 110, 110 (Leonard Lawlor & John Nale eds., 2014).

⁹⁹ JUDITH BUTLER, *UNDOING GENDER* 40 (2004).

¹⁰⁰ Sandra L. Bartky, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in *THE POLITICS OF WOMEN'S BODIES: SEXUALITY, APPEARANCE, AND BEHAVIOUR* 93, 97–100 (Rose Weitz & Samantha Kwan eds., 4th ed. 2013); ELLEN K. FEDER, *FAMILY BONDS: GENEALOGIES OF RACE AND GENDER* 48–50 (2007); Dean Spade, *Mutilating Gender*, in *THE TRANSGENDER STUDIES READER* 315 (Susan Stryker & Stephen Whittle eds., 2006).

¹⁰¹ FOUCAULT, *supra* note 14, at 170–94. For a systematic approach, see ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 21 (1994); HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* 153–60 (2d ed. 1983); Havis, *supra* note 98.

¹⁰² HUNT & WICKHAM, *supra* note 101, at 21.

¹⁰³ FOUCAULT, *supra* note 14, at 144; François Ewald, *Norms, Discipline, and the Law*, 30 *REPRESENTATIONS* 138, 138–9 (1990).

¹⁰⁴ BEN GOLDER, *FOUCAULT AND THE POLITICS OF RIGHTS* 89–113 (2015).

¹⁰⁵ Zowie Davy, *Transsexual Agent: Negotiating Authenticity and Embodiment Within the UK's Medicolegal System*, in *TRANSGENDER IDENTITIES: TOWARDS A SOCIAL ANALYSIS OF GENDER DIVERSITY* 106 (Sally Hines & Tam Sanger eds., 2010).

last word on whether the requirements have been met. Judges are also invariably assisted in their decision-making by one or more medical professionals, they too in a hierarchical relation to the applicant.¹⁰⁶ These professionals de facto have the power to terminate medical transition and, thereby, to stop, delay, or re-initiate the process of legal recognition. The opinion of medical professionals is a decisive factor in recognition in all cases, hence they might be viewed as gatekeepers of the entire procedure. In short, the applicant is faced with a plurality of authorities wielding the power to determine whether they are “fit” for recognition.¹⁰⁷

4.2. Assessing through (fussy and stereotyped) norms

Control over applicants’ bodies is carried out by courts applying specific standards, i.e. norms which “a subject must internalize or manifest in behavior—for example standards of tidiness, punctuality, or respectfulness.”¹⁰⁸ Through norms, individuals are observed, examined, compared, and “molded” into precise models.¹⁰⁹ Norms establish the average boundaries of acceptability, as well as social utility and intelligibility that are expected of trans applicants. Gender, including masculinity and femininity, has indeed been argued to be primarily a network of norms, regulating areas of life relating to one’s sexuality.¹¹⁰

Invoking some practical examples, Bartky has shown how femininity is imposed on women through an attentive, minute breakdown of norms establishing body shape, gestures, and ornamental standards. They regulate movements, the manner of sitting, looking, smiling, and holding one’s head while talking, hair style, nail polish, clothes, etcetera.¹¹¹ Similarly, Feder has discussed how gender—and, more precisely, masculinity—can be imprinted on boys.¹¹² Spade has argued how notions of transsexuality and of people being “trapped in the wrong body,” childhood narratives regarding toys, and feelings of inadequateness are expected from and affect trans people.¹¹³

Norms are arguably used by courts in the application of the doctrine of the Constitutional Court.¹¹⁴ In a quasi-bureaucratic fashion, courts routinely cite the jurisprudence of the Constitutional Court and the Court of Cassation to scrutinize how the applicant has modified their characteristics. The common thread running through court cases is the attention to details and the implicit comparison with predetermined, at times stereotyped, standards: the enforcement of an “average” understanding of masculinity/femininity, associated with a longing for physical transformation, is opposed to the more “anomalous” expressions.¹¹⁵

¹⁰⁶ Spade, *supra* note 100; Stefania Voli, *Modificazioni Corporee e Cittadinanza Transgender. Il Caso del Movimento Identità Transessuale (MIT) di Bologna* (June 10, 2016) (Unpublished Ph.D. Dissertation, University of Milano-Bicocca), <https://boa.unimib.it/handle/10281/111649>.

¹⁰⁷ LORENZETTI, *supra* note 58, at 63.

¹⁰⁸ Alan Hunt, *Foucault’s Expulsion of Law: Towards a Retrieval*, 17 *LAW & SOC. INQUIRY* 1, 21 (1992).

¹⁰⁹ Havis, *supra* note 98, at 110–11.

¹¹⁰ BUTLER, *supra* note 99, at 40.

¹¹¹ Bartky, *supra* note 100, at 98.

¹¹² FEDER, *supra* note 100, at 45.

¹¹³ Spade, *supra* note 100.

¹¹⁴ Norms can be expressed in legal terms. Ewald, *supra* note 103, at 138–9, 159.

¹¹⁵ Ewald, *supra* note 103, at 140.

The general framework within which courts must assess the application is that of “seriousness” and “irreversibility” of the transition, as determined by the Constitutional Court and Court of Cassation. In practice, as can be observed in virtually all cases, “seriousness” and “irreversibility” mean medical involvement and (invasive) physical requirements. Medical interventions and supervision are seen by courts as a sign of the determination of the applicant, who has decided to undertake a long and complex transition process. This determination, in conjunction with the medical authority of the supervisors, is perceived by judges as a guarantee of the “seriousness and rigor” of the applicant’s motivation and of their “true” trans identity.¹¹⁶ “Serious” is also meant to imply one’s stable identification, often since childhood,¹¹⁷ with a well-defined binary gender,¹¹⁸ with an implicit bias against those who identify beyond the binary. Seriousness and medicalization are strictly related to the understanding of irreversibility, which is considered in a psychological and physical sense. The permanent identification of the applicant with one specific gender may prove the irreversibility of the transition. Yet, in a few cases, courts have found such proof in the bodily transformations that are unlikely to be reverted, such as the physical appearance¹¹⁹ or the loss of reproductive capacity.¹²⁰ The risk that sterilization will be asked for, not as a requirement in itself, but rather as evidence of irreversibility, is not insignificant.

Such intrusiveness can be noticed in the search for the psychological, physical, and behavioral transformations, as required by the Constitutional Court. As to the examination of *psychological traits*, courts normally value psychiatric or psychological supervision. Invariably, they have assigned a positive value to a diagnosis of gender dysphoria, that is, a psychiatric diagnosis of trans identity, in addition to the applicant’s stated condition of suffering and their voiced need to transform their body.¹²¹ Courts have thus confirmed the pathological understanding of gender identity, disregarding the widespread contestations of trans identity pathologization. Sometimes, courts have valued the exclusion of “other” mental illnesses.¹²² In one case, a court considered that the applicant had an “adequate IQ.”¹²³ One court of appeal stated that the “wellbeing in one’s own body” post-transition was considered to be a requirement to preserving the “gender binary” as a “foundation of the Italian legal

¹¹⁶ While this can be discerned in virtually all cases, it is particularly clear in: Trib. Perugia, 21 settembre 2020, n.994, dejure.it; Trib. Pavia, 16 gennaio 2018, dejure.it; Trib. Bari, 22 maggio 2017, n. 2642 dejure.it; Trib. Bologna, 7 giugno 2017, n.966, dejure.it.

¹¹⁷ Trib. Vicenza, 26 giugno 2020, leggiditaliaprofessionale.it; Trib. Lamezia Terme, 29 gennaio 2019, leggiditaliaprofessionale.it; Trib. Pistoia, 9 febbraio 2017, n.133, dejure.it.

¹¹⁸ In all cases found, the applicant was always binary in their identification.

¹¹⁹ Trib. Pavia, 16 gennaio 2018, dejure.it; Trib. Pistoia, 9 febbraio 2017, n.133, dejure.it.

¹²⁰ Trib. Milano, 10 aprile 2017, n.4090, unreported; Trib. Genova, 23 maggio 2017, leggiditaliaprofessionale.it.

¹²¹ Virtually in all cases, the applicant was diagnosed with gender dysphoria. There may be exceptions, but a thorough medical examination of the applicant personality seems to be carried out (Trib. Bari, 10 marzo 2016, n. 1335, dejure.it).

¹²² Trib. Ancona, 17 maggio 2019, n.936, dejure.it; Trib. Pistoia, 9 febbraio 2017, n.133, dejure.it.

¹²³ Trib. Ancona, 17 maggio 2019, n.936, dejure.it.

order.”¹²⁴ Interestingly, the wellbeing of the trans person was not seen as a right of the applicant, but rather as a precondition to be fulfilled.

Physical transformations are required, as well. The interpretation of this requirement varies from case to case. Yet, courts uniformly judge whether the appearance of the applicant, developed through hormonal therapies, conforms to the gender in which the applicant asks to be recognized.¹²⁵ In some instances, courts have favored further gender-confirming bodily changes. Such changes have included the applicant’s overall appearance or removal of body hair,¹²⁶ the flattening of the Adam’s apple,¹²⁷ breast augmentation or removal,¹²⁸ as well as the gendered conformation (in the specific case, feminization) of facial traits (for instance, through nasal surgery, remodeling of eyebrows, or lip surgery).¹²⁹ In a few instances, courts have also weighted the fact that the applicant was not physically intersex.¹³⁰ Although the consequences of being intersex for gender recognition are not clear, it is still essential to show how detailed the control over the body of the person can be. This physical-transformation requirement has understandably been described as restrictive, and potentially a violation of the freedom from torture and other cruel, inhuman, and degrading treatments.¹³¹

Finally, the Constitutional Court obliges the applicant to achieve a *behavioral* transformation to conform to the target gender norms. To this purpose, courts have assessed the attitude of applicants in light of commonsensical, and quite stereotyped, notions of gender. At times, courts have simply stated, without any justification, that the applicant behaves in accordance with their gender identity.¹³² At other times, courts may be more explicit. The assessed personal attributes may include the job of the applicant, evaluated for its supposedly masculine or feminine nature.¹³³ In a similar fashion, courts have judged many more aspects of personality and presentation, such

¹²⁴ Trib. Bari, 27 settembre 2016, n.4801, unreported.

¹²⁵ Virtually all cases include the evaluation of hormonal therapy. Exceptions: Trib. Torino, 7 maggio 2019, n.2156, dejure.it; Trib. Milano, 6 marzo 2019, n.2295, dejure.it; Trib. Roma, 13 aprile 2017, n.7518, dejure.it (in all these decisions, however, the transformation of secondary sex characteristics via surgery was considered); Trib. Bari, 11 ottobre 2016, n.5079, dejure.it.

¹²⁶ Trib. Pistoia, 9 febbraio 2017, n.133, dejure.it; Trib. Bari, 31 ottobre 2016, n.5577, dejure.it; Trib. Genova, 20 giugno 2016, n.2178, leggiditaliprofessionale.it.

¹²⁷ Trib. Bari, 22 maggio 2017, n.2642 dejure.it; Trib. Bari, 13 marzo 2018, n.1124, dejure.it; Trib., 12 marzo 2018, n.1091, dejure.it.

¹²⁸ Trib. Frosinone, 19 luglio 2018, leggiditaliprofessionale.it; Trib. Bari, 31 ottobre 2016, n.5577, dejure.it; Trib. Genova, 20 giugno 2016, n.2178, leggiditaliprofessionale.it.

¹²⁹ Trib. Trento, 29 settembre 2017, leggiditaliprofessionale.it; Trib. Genova, 23 maggio 2017, leggiditaliprofessionale.it; Trib. Pistoia, 9 febbraio 2017, n.133, dejure.it.

¹³⁰ Trib. Bari, 12 marzo 2018, n.1091, dejure.it; Trib. Bari, 22 maggio 2017, n.2642, dejure.it.

¹³¹ Salvatore Patti, *Trattamenti Medico-chirurgici e Autodeterminazione della Persona Transessuale. A Proposito di Cass., 20.7.2015, n. 15138*, NUOVA GIURISPRUDENZA CIVILE COMMENTATA 643, 647–8 (2015).

¹³² Trib. Novara, 27 novembre 2018, n.1087, dejure.it.

¹³³ Trib. Nola, 4 maggio 2018, leggiditaliprofessionale.it; Trib. Bari, 27 settembre 2016, n.4801, unreported; Trib. Perugia, 23 gennaio 2018, n.116, unreported. All these decisions do not specify the job of the applicant, but only the court’s evaluation—in gendered terms—of the job.

as the manners and attitude of the applicant,¹³⁴ clothes and jewelry,¹³⁵ hair style,¹³⁶ or makeup.¹³⁷ In other instances, courts have examined the voice of the applicant, high-pitched for feminine versus deep for masculine.¹³⁸ In several decisions, courts have considered the sexual orientation of the applicant *post-transition*.¹³⁹ Heterosexuality was deemed to be a sign of the applicant's "real" identification, which, along with other personal traits, confirmed their gender identity.¹⁴⁰ This obviously conflates the very distinct notions of gender identity and sexual orientation.

The result of this case law is arguably the definition of a, rather controversial, subject of gender recognition. This ideal applicant is defined as a "transsexual" person desiring a degree of physical transformation, which need not include genital gender-confirmation procedures, but which should include the transformation of secondary characteristics.¹⁴¹ The applicant must be medically supervised. They must conform to a narrative of a binary, irreversible, and fragile personality. Gender recognition here is not seen as an act of self-determination or empowerment, but rather as compelled by the presumed applicant's dire life conditions. Trans applicants must conform to commonly accepted masculine or feminine forms of behavior, manners, attitudes, and even job choices and sexual orientation (heterosexuality *post-transition* being obviously preferred). Altogether, these norms add up to a compendium of stereotypes. They amount to a broad-brush, and often simply assumed, representation of trans people, whose diversity and complexity is utterly disregarded.

As such, the subject of gender recognition, whose standards serve as benchmark for recognition, is underinclusive and, in a way, results in the forcible imposition of a stereotyped notion of trans identity on trans people. Trans people, however, often fall outside these stringent definitions, and identify beyond the binary, have a fluid identity, or simply are perfectly comfortable with their body, without the need to transform it, even as they are in need of recognition. The gender narrative moreover offers a rather stereotypical representation of maleness and femaleness. Through this narrative, courts reiterate definitions of what men or women ought to look and be like, and how they are to behave, thereby undeniably contributing to the reinforcement of outdated, sexist, and homophobic expressions of gender in society.¹⁴²

¹³⁴ Trib. Messina, 22 febbraio 2018, n.424, *dejure.it*; Trib. Bologna, 7 giugno 2017, n.966, *dejure.it*; Trib. Salerno, 15 luglio 2016, n.4296, unreported; Trib. Genova, 19 gennaio 2017, n.425, unreported.

¹³⁵ Trib. Genova, 15 dicembre 2020, n.2112, *dejure.it*; Trib. Milano, 17 febbraio 2020, n.1479, *dejure.it*; Trib. Milano, 1 marzo 2019, n.2081, *dejure.it*; Trib. Bologna, 3 agosto 2017, n.1753, *dejure.it*; Trib. Genova, 19 gennaio 2017, n.425, unreported.

¹³⁶ Trib. Genova, 19 gennaio 2017, n.425, unreported.

¹³⁷ Trib. Monza, 4 gennaio 2021, *leggiditaliaprofessionale.it*; Trib. Cassino, 13 luglio 2016, n.976, *dejure.it*.

¹³⁸ Trib. Bologna, 7 giugno 2017, n.966, *dejure.it*; Trib. Genova, 19 gennaio 2017, n.425, unreported.

¹³⁹ Trib. Ancona, 17 maggio 2019, n.936, *dejure.it*; Trib. Milano, 1 marzo 2019, n.2072, *dejure.it*; Trib. Bari, 7 febbraio 2019, n.585, *dejure.it*; Trib. Bologna, 7 giugno 2017, n.966, *dejure.it*; Trib. Napoli, 6 giugno 2016, unreported; Trib. Salerno, 15 luglio 2016, n.4296, unreported; Trib. Bari, 27 settembre 2016, n.4801, unreported; Trib. Bari, 13 marzo 2018, n.1124, *dejure.it*.

¹⁴⁰ Trib. Ancona, 17 maggio 2019, n.936, *dejure.it*; Trib. Milano, 5 dicembre 2019, n.11278, *dejure.it*.

¹⁴¹ On the role of appearance, see GONZALEZ-SALZBERG, *supra* note 19, at 28–57.

¹⁴² Trib. Messina, 22 febbraio 2018, n.424, *dejure.it*; Trib. Pavia, 17 gennaio 2018, n.116, *dejure.it*; Trib. Pistoia, 9 febbraio 2017, n.133, *dejure.it*; Trib. Bari, 31 ottobre 2016, n.5577, *dejure.it*; Trib. Salerno, 15 luglio 2016, n.4296, unreported; Trib. Taranto, 10 marzo 2017, n.693, unreported.

4.3. Penalties and rewards

Finally, applicants who fail to prove on hierarchical observation that they conform to the minutely detailed and stereotyped gender regulation, are subjected to a specific system of penalties and rewards. In his analysis of disciplinary power, Foucault defined rewards as all those forms of recognition that improve the social status of individuals (“stars, prizes, badges, privileges, etc.”). The systems of penalties, on the other hand, seem to include an array of different forms of affliction, spanning from social humiliation to assignment of (repeatedly failed) tasks.¹⁴³ The disciplinary power does not entail the disappearance of law in doctrinal terms, and penalties and rewards may well be administered through law.¹⁴⁴ At the same time, they do not have to qualify as such in doctrinal terms. Broadly speaking, disciplinary punishments seem to center on the factual affliction of the disciplined person.

Gender scholars have provided insights into this system of rewards and penalties. Bartky has focused on beauty and behavioral standards so often expected of women. In this context, she has argued that rewards may include social appreciation and the pleasant feeling of satisfying the beauty canons. Similarly, social exclusion and the loss of male patronage may represent disciplinary penalties.¹⁴⁵ Feder has demonstrated how the “schoolyard tribunal” exercises the “microphysics of power” on gender non-conforming boys. Social rejection, peer judgement, repudiation, teasing, and name calling are the disciplinary penalties inflicted.¹⁴⁶ Focusing on the medical setting in the United States, Spade has identified a reward in the authorization to undergo the physical transformation desired by trans people, and a sanction in the exclusion from the process of medical transition.¹⁴⁷ In short, we see that the respect or violation of gender norms may be followed by atypical penalties and rewards, whose common trait is the affliction or the gratification of the subject and their desires.

A similar effect is at play in the context of gender recognition. The reward clearly lies in the successful outcome of the application. As mentioned, gender recognition has considerable positive consequences in terms of psychological wellbeing, social inclusion, safety, and socio-economic status. Conversely, the applicant who does not conform to the standards may see their application denied. If this happens, not only does the individual see their constitutional right to identity restricted—which, arguably, is in itself an affliction—but they may also continue to be exposed to many forms of administrative, social, and even economic challenges that the lack of gender recognition entails. This situation will prevail until they, so to speak, “have learned their lesson,” conformed to the norm, and are eligible to apply again.

¹⁴³ FOUCAULT, *supra* note 15; HUNT & WICKHAM, *supra* note 101, at 21; Havis, *supra* note 98, at 115; DREYFUS & RABINOW, *supra* note 101, at 157–9.

¹⁴⁴ Ewald, *supra* note 103, at 138–9.

¹⁴⁵ Bartky, *supra* note 100, at 104–8.

¹⁴⁶ FEDER, *supra* note 100, at 50.

¹⁴⁷ Spade, *supra* note 100, at 319.

5. Conclusions

The article has, first, explored the reasons *why* the overall transformation of a person is required to obtain gender recognition, conceptualized this mechanism, and showed how such a transformation is enforced. In short, the Italian Constitutional Court has imposed the transformation of the applicant in line with socially accepted definitions of masculinity and femininity, in order to preserve the principle of “certainty of legal relations.” In the specific Italian context, Parliament, the Constitutional Court, and the Court of Cassation have regularly made reference to the conflict between gender recognition and the family law: the preservation of the heterosexual matrix stands out as the objective prioritized by the courts. Of course, in Italy, as elsewhere, gender categories serve a plurality of interests.¹⁴⁸ However, references to family law recur overwhelmingly in the legal and constitutional narratives.

Second, in *examining how* gender identity is controlled, this article has determined it is preserved through the establishment of a disciplinary power that hierarchically observes the applicant, creates norms, and imposes rewards and penalties (by granting or denying recognition), and therefore confines individuals to intelligible binary gender models.

The Constitutional Court, along with the Court of Cassation, has created an apparatus that ultimately impacts individuals and their bodies. In assessing whether the trans applicant can be recognized in their gender identity, courts *de facto* define what men and women, as well as trans people, are, oftentimes perpetuating cliché conceptions of masculinity, femininity, and trans experience. However, focusing only on the obsolescence of these notions may overshadow the structural characteristics of this exercise of power. In addition to the actual content of the norms enforced, the primary feature of this power consists in its disciplining the individual, with an emphasis on the corporeal dimension. Individuals are disciplined into specific understandings of gendered subjectivity: nevertheless, it is the structure which defines such a subjectivity that is the key element.

The analysis of the Italian case study does not only offer a useful lesson, but also some hints for research. First, the constitutional analysis carried out here shows how, over gender recognition, various constitutional principles may converge and enter in tension. Transformations and advancement of trans rights must take all these aspects into consideration. It is not enough to claim trans rights: we must understand why gender is recorded and administered, and how public interests which build on gender categorization are articulated in a constitutional discourse. In particular, the connection between the preservation of the heterosexual family and the control over gender identity remains relevant and worthy of further exploration. Many jurisdictions do not allow same-sex marriage or filiation. Likewise, most jurisdictions, if they recognize gender identity at all, seldom do so unconditionally. A comparative analysis might be helpful to clarify the role of institutional heterosexuality in a broader context. At the same time, family law is evolving. Same-sex marriage and diverse forms of family are

¹⁴⁸ See Corte Cost., 21 giugno 2017, n.185.

increasingly recognized. Thus, it would also be important to clarify which constitutionally legitimate objectives may still justify the control over gender categories and identities *beyond* institutional heterosexuality, and thus clarify the role of such a categorization in a liberalizing legal landscape.

Second, more research is needed on *the way* gender identities are preserved and enforced. This article has analyzed the specificity of the Italian legal system. In other contexts, control may take different forms which may call for a different analytical framework. Be that as it may, clarifying how the law defines gender identities remains essential to develop informed strategies to protect gender diversity. Furthermore, while the abundance of decisions in the Italian context has allowed for a case law-based analysis, in other jurisdictions where such decisions may not be available, different forms of research may be needed. To this purpose, empirical research, an ethnography of the courts in charge of determining gender recognition, might be highly beneficial. Qualitative research might help to understand a further aspect of the problem: namely, how gender-recognition mechanisms impact the individual, whether gender norms are internalized, contested, reappropriated, and/or subverted. The socio-legal exploration of how trans applicants live and reenact the law would clear the way for intellectually engaging research on the operation of fundamental rights law. Third, and last, taken together, these two strands of research can contribute to the articulation of a better-informed normative argument for gender recognition: an argument urgently needed to grant protection to trans people, a minority that continues to be often neglected and widely discriminated against.