

On the Decision No. 143/2024 of the Italian Constitutional Court

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09 August 2024

Non-Binary Gender Markers in Italy?

In [decision No. 143/2024](#), published on 23 July 2024, the Italian Constitutional Court recognises the existence of non-binary people for the first time in Italian history. Although the decision as such is a big step for queer rights in Italy, the Court stops halfway. In contrast to the German “Dritte Option” decision, the Court does not set clear instructions or deadlines for the Parliament. Italy’s current transphobic political climate likely means non-binary gender markers will not be introduced by the Italian Parliament anytime soon.

Legal gender recognition in Italy

In 1982, Italy was – after Sweden and Germany – the third country worldwide to adopt a law ([Law No. 163/1982](#)) allowing trans people to correct their gender markers in civil status registries, especially birth registries (see [here](#), p. 15). Two separate procedures were introduced: one to correct the gender marker in the civil status registries and one to get the authorisation for gender-affirming surgery. After a reform that upheld the dual procedure (see [here](#), p. 22), several decisions of the Supreme Court and the Constitutional Court found the legal procedure for legal gender recognition in need of change (see [here](#)). (just as with the German “Transsexuellengesetz”). As a consequence, the transition [no longer requires surgery](#), and it [is sufficient to have lived with one’s new gender identity](#). However, what remains is a rigorous assessment of the seriousness and unambiguousness of an individual’s intent and the “objective” transition to the new gender identity.

During all this time, Italian law has only ever recognised two legal gender markers, “maschile” (male) and “femminile (female).

The initial case

The claimant (N.) is a non-binary person who grew up in the majorly German-speaking province of South Tyrol in Italy and studies in Austria. The claimant was assigned female at birth, and their legal gender marker reads “femminile”. The claimant wants to correct the gender marker to “other”, change their name to I. and undergo a gender-affirming surgery (in particular, a mastectomy). N. has applied to the Court of Bolzano for the correction of their gender from “female” to “other” and to receive the Court’s authorisation for gender-affirming surgery, which is necessary under Italian law.

The Court of Bolzano referred to the Corte Costituzionale, inter alia, the following question: Does Art. 1 of Law No. 164/1982, the law containing the rules on the correction of gender markers, violate the Italian Constitution because it does not contain a non-binary gender marker in civil registers?

Recognising non-binary gender identities

The Constitutional Court declares this question of the Court of Bolzano inadmissible. Following the government’s line of argument, the Court states that the case poses a Constitutional problem that cannot be resolved by the review of the Constitutional Court for its wide-ranging consequences on the legal system (Considerato in Diritto, para. 5). While the government claims that the admissibility of the question took the existence of genders other than male and female for granted – which they seem to imply was dubious – the Court, however, cites various sources showing how widely accepted the existence of non-binary gender identities is. It thus clearly opposes the government’s position.

The Court cites, for instance, the International Classification of Diseases 11th Revision (ICD-11) by the WHO which recognises, inter alia, non-binary gender identities (para. 5.1) and – following the claimant’s line of argument (para 3.1.), refers to European legal sources recognising non-binary gender identity (para 5.2).

Especially notable is the reference to the recent German law on self-determination (Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag [SBGG]). It is uncommon for the Corte Costituzionale to cite national laws of other states that are not international or European law and hence not binding for Italy. The Constitutional Court taking inspiration from another legal order, shows the impact of the recognition of civil rights moves beyond borders. The Court citing the new German SBGG is also surprising because it does not change the number or type of – binary or non-binary – gender markers in Germany, but only the procedure of legal gender recognition. Even before the introduction of the SBGG, under German law, it was possible to recognize non-binary gender identities by having no gender marker at all (since 2013) or by correcting the gender marker to “diverse” (since 2018, after “Dritte Option”).

Constitutional dimension of non-binary gender markers

The claimant invoked that Art. 1 of the challenged Law N. 164/1982 from 1982 violates several constitutional norms, namely the protection of one's social identity (Art. 2), the principle of equality (Art. 3) and the right to health and psychological well-being (Art. 32). Moreover, they put forward that a European consensus on the protection of non-binary people had emerged under the right to respect for private and family life in Art. 8 of the European Convention of Human Rights (ECHR), referred to in Art. 17 para. 1 of the Italian Constitution (para 3.1.).

The Constitutional Court stops short of declaring a constitutional violation but acknowledges the significance of several constitutionally protected rights concerning non-binary gender identities (para. 5.4). The Court affirms that the exigency to be recognised in one's gender identity creates an unease that is important with regards to the right to expression of personality (Art. 2 of the Constitution). Moreover, the lack of recognition via a non-binary gender marker affects the right to equality (Art. 3) and the right to health (Art. 32).

The Constitutional Court agrees with the government, that while the ECHR protects transitions towards another binary gender identity, there is not sufficient European consensus on a positive obligation to introduce non-binary gender markers (para 5.3). Here the Court refers to a French case decided by the European Court of Human Rights (ECtHR) in 2023, similar to the Italian case (see here). Following its "margin of appreciation" doctrine, the ECtHR ruled that France is currently not required to introduce non-binary gender markers under the Convention. This doctrine can be criticised for emphasising compromises instead of securing human rights protection. However, the ECtHR emphasised this could change if there was a general trend towards recognising non-binary gender identities in Convention parties.

The Court's acceptance of "alias careers"

A noteworthy paragraph concerns the practice of secondary schools and universities to give "alias careers": confidential procedures entering the chosen name of a student into the electronic register instead of the name used in civil registries. Alias careers allow non-binary and trans people, for instance, to use their chosen name and gender identity on their school's internal administrative documents or e-mail accounts. According to the Court, this practice testifies to an 'increasingly averted sensitivity' recognising these identities (para. 5.4). Rete Lenford commented that this reference of the Court is particularly important as it attributes legitimacy to this practice. In the current political climate school managements practicing "alias careers" are heavily under attack.

A strong signal to Parliament

The Court concludes that non-binary conditions must be brought to the attention of the legislator who is responsible for considering society's sensitivities and needs (para. 5.4).

Introducing a third option would need a holistic intervention of Parliament due to its wide-ranging consequences on a legal system still based on binary logic. Examples include family law, labour law, sports law, and privacy law with regard to prisons, hospitals, and other places structured by binary logic (para. 5.5). Finally, the law requiring names to correspond to genders would need to change if a third option were introduced, as “in Italian onomastics, gender-neutral names are very rare”.

Same, same, but different in Germany

The facts of the Italian case are quite similar to the “[Dritte Option](#)” decision of the German Federal Constitutional Court (FCC) from 2017 (see also [Verfassungsblog symposium](#) on this decision). In the German case, a non-binary and intersex person from Germany wanted not only the possibility of having a blank entry – this had already been possible under German law since 2013 – but also a positive non-binary gender marker. The FCC decided that it was unconstitutional for German law, on the one hand, to require a gender marker for everybody but, on the other hand, to only allow binary gender markers: “männlich” (male) and “weiblich” (female). In particular, the FCC found a violation of the general right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

As constitutional solution, the FCC proposed two options: either to abolish all gender markers or to introduce non-binary gender markers. While scholars have argued for the abolition of gender markers (see e.g. [here](#) or [here](#)), German Parliament chose the second option and introduced the non-binary gender marker “divers” (diverse) in 2018. Since then, non-binary persons in Germany can choose between a blank entry or “diverse”. When the [Selbstbestimmungsgesetz](#) enters into force in November 2024, a person’s decision can determine their gender marker for themselves. Psychological opinions or medical attestations are no longer necessary.

Unlike the Italian Constitutional Court, the FCC went one step further, compelling the German Parliament to choose between the two options and even setting a deadline of roughly 14 months.

International dimensions of the case

The Italian case demonstrates the importance of legal gender recognition in Europe. [Only Iceland](#) and Germany fully recognise non-binary gender identities. But debate is ongoing in other jurisdictions.

Finally, the private international law dimension of the case is worth mentioning. The claimant has Italian citizenship but lives in Austria. Even though, there is Austrian case law recognising non-binary identities, this jurisdiction is limited to Austrian citizens. Had the claimant lived in Germany instead, they were allowed to use the new procedure under the [Selbstbestimmungsgesetz](#) which is not limited to German citizens. Persons habitually

residing in Germany may choose German law (Art. 7a Einführungsgesetz zum Bürgerlichen Gesetzbuch) and thus use the new procedure under the Selbstbestimmungsgesetz. German authorities then have to address this person with their new name and chosen pronouns. It is mostly unclear whether their country of origin must also recognise such a correction in Germany. Citizens of EU Member States may benefit from prohibition of discrimination (Art. 18 TFEU, Art. 21 CHFR) and their right to free movement (Art. 21 TFEU).


Reforms on queer rights under a far-right government?

With its recent ruling, the Italian Constitutional Court clearly acknowledged the legitimacy of non-binary gender recognition via the introduction of a non-binary gender marker in civil registries. This is not the first time the Court has urged the legislature to take action on LGBTQI rights; the Court made similar calls for legislation prior to the introduction of same-sex civil unions in 2016. Now, the responsibility for this necessary and systemic reform lies with Parliament. Georgia Meloni's government is highly unlikely to initiate a timely reform. In May 2024, the Italian government refused to sign the Declaration on the continued advancement of the human rights of LGBTIQ persons in Europe of the Council of the EU. The Italian Family Minister Eugenia Roccella stated that "gender binarism should continue to apply", and linked "abolishing men and women" with "no more children being conceived". After limiting same-sex parental rights and making their battle against surrogacy an LGBTQI issue, the recognition of gender identity does not fit Meloni's far-right agenda. In this political landscape, the Constitutional Court's recognition of non-binary gender identities is a beacon of hope and inclusivity.

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SUGGESTED CITATION Kompatscher, Anna; Roßbach, Susanna: *Non-Binary Gender Markers in Italy?: On the Decision No. 143/2024 of the Italian Constitutional Court*, *VerfBlog*, 2024/8/09, <https://verfassungsblog.de/non-binary-gender-markers-italy/>, DOI: [10.59704/f6ad459f4eb39c1f](https://doi.org/10.59704/f6ad459f4eb39c1f) .

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