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Transformative Constitutionalism and Gender Identity in Comparative Perspective

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Summary

1. Introduction – 2. Transformative constitutionalism and gender identity: an indissoluble relationship – 3. The role of international law in advancing the protection of gender identity – 4. Non-binarism and the law: a comparative overview – 5. Constitutional courts and the principle of non-discrimination: overcoming gender binarism in the law – 6. Analysis of the Italian Constitutional Court's decision no. 143/2024 – 7. Tentative conclusions.

Abstract

L'emersione nella società di istanze volte al superamento del binarismo di genere pone in discussione uno degli assiomi (spesso implicito) su cui sono stati costruiti i sistemi giuridici contemporanei. Dopo aver offerto un breve inquadramento dogmatico sul rapporto che lega costituzionalismo trasformatore e diritto all'identità di genere, il presente contributo intende esplorare, attraverso l'uso della comparazione, gli orientamenti assunti da alcune democrazie costituzionali in ordine al tema del non binarismo. Alla luce del quadro internazionale e comparato vigente, si propone una prima analisi della decisione n. 143 del 2024 della Corte costituzionale italiana.

The emergence of demands from society aimed at overcoming gender binarism challenges one of the foundational (often implicit) axioms upon which contemporary legal systems have been constructed. After providing a brief doctrinal overview of the relationship between transformative constitutionalism and the right to gender identity, this paper aims to explore, through comparative analysis, the approaches adopted by certain constitutional democracies regarding the issue of non-binarism. In light of the current international and comparative legal framework, a preliminary analysis of the Italian Constitutional Court's Decision No. 143 of 2024 is proposed.

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1. Introduction

Gender nonconformity remains a significant source of suffering, marginalization, discrimination, and even violence against non-binary individuals[1]. Since the 1970s, scholars have highlighted the political use of the law as a mechanism for the governance of bodies and sexualities, aimed at ensuring conformity to specific standards[2]. The law has historically been, and in some respects continues to be, instrumental in maintaining established gender norms and the associated social hierarchies[3]. The history of constitutional democracies has been marked by ongoing efforts to dismantle explicit and implicit discrimination embedded in legal frameworks, a process primarily driven by the application of the principle of equality[4]. Since the major civil movements of the 1970s, the effort to neutralize discrimination originating from the legal system has been largely carried out by constitutional courts, whose role is to uphold the supremacy of constitutional values within the legal order[5].

As society evolves, there is a growing recognition that gender identity is not a personal choice but rather an inherent characteristic of the human being. It is now understood that gender exists on a spectrum, encompassing more than just the binary categories of masculine and feminine[6]. The organization of society based on gender binarism is increasingly understood as an oversimplification that may be suitable for the majority, but it systematically excludes individuals whose identities do not fit within these narrowly defined categories.

2. Transformative constitutionalism and gender identity: an indissoluble relationship

After World War II, the collapse of Nazi-fascism catalyzed a global wave of constitutionalism. The transition from totalitarian regimes to constitutional democracies in liberated nations was swift, radically reshaping the foundational principles of their legal systems (this is why they were termed

1 UN Independent Expert on sexual orientation and gender identity, *The struggle of trans and gender-diverse persons*, available at this link. In the literature, please refer to: A.R. Gordon, I.H. Meyer, *Gender nonconformity as a target of prejudice, discrimination, and violence against LGB individuals*, in *J. LGBT Health. Res.*, 3(3), 2007, pp. 55-71.

2 E. Bermúdez Figueroa *et al.*, *Gender and Structural Inequalities from a Socio-Legal Perspective*, in *Gender-Competent Legal Education*, D. Vujadinović, M. Fröhlich, T. Giegerich (eds), Cham, Springer, 2023, pp. 95-142.

3 R. Rubio-Marin, *Global Gender Constitutionalism and Women's Citizenship*, Cambridge, CUP, 2022, in part. pp. 26-80.

4 R. Uitz, *The Shifting Canon of Constitutional Equality*, in *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights*, S. Choudhry, M. Hailbronner, M. Kumm (eds.), Oxford, OUP, 2024, pp. 362–381.

5 On lgbti+ rights, please refer particularly to: A. Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, Oxford, Hart Publishing, 2017.

6 M.V. Carrera, R. DePalma, M. Lameiras, *Sex/gender identity: Moving beyond fixed and 'natural' categories*, in *Sexualities*, 15(8), 2012, pp. 995-1016; E. Matsuno, S.L. Budge, *Non-binary/Genderqueer Identities: a Critical Review of the Literature*, in *Curr. Sex. Health Rep.*, 9, 2017, pp. 116–120; L.E. Kuper, L. Wright, B. Mustanski, *Gender identity development among transgender and gender nonconforming emerging adults: An intersectional approach*, in *International Journal of Transgenderism*, *19*(4), 2018, pp. 436–455; S. Monro, *Non-binary and genderqueer: An overview of the field*, in *International Journal of Transgenderism*, *20*(2–3), 2019, pp. 126–131; P. Eckert, R.J. Podesva, *Non-binary approaches to gender and sexuality*, in *The Routledge Handbook of Language, Gender, and Sexuality*, J. Angouri, J. Baxter (eds.), London, Routledge, 2021, pp. 23-35.

"Revolutionary Constitutions"[7]). These new constitutions were not only committed to safeguarding fundamental freedoms previously denied under dictatorships, but they also embedded values such as equality, solidarity, and justice into their legal frameworks[8]. The social, economic, and political contexts in which these constitutions were drafted were marked by deeply entrenched inequalities. To dismantle these unjust systems, the role of public institutions was reconceived.

Whereas 19th-century constitutionalism (referred to here as constitutionalism 1.0) emphasized the strict separation of powers and the state's non-interference in citizens' lives (liberal constitutionalism), 20th-century constitutionalism (constitutionalism 2.0)[9] required a more proactive and collaborative approach by public authorities (post-liberal constitutionalism)[10]. This shift aimed to realize the ambitious ideal of human dignity, as promised by constitutional democracies. The implementation of social rights entailed not only significant financial costs but also an active duty on the part of the state to intervene and promote these rights.

The concept of *transformative constitutionalism*, coined in the 1990s by South African legal scholar Karl Klare, provides a valuable theoretical framework for understanding this new configuration of the state in constitutional democracies. Transformative constitutionalism is defined as "a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[11] In essence, transformative constitutionalism seeks to bring about large-scale social change through non-violent political processes grounded in law.

This constitutional vision of using law to drive social change is not limited to countries in the Global South; it is equally applicable to certain European nations, particularly those whose constitutions were drafted in response to the atrocities of dictatorship and the deep-rooted inequalities of that time[12]. In these post-war constitutions, principles such as solidarity and substantive equality imposed a duty of action on the state. Moreover, the development of human personality became a central concern, both in its individual and social dimensions[13]. Constitutional drafters recognized that the state must actively foster opportunities for individuals to realize their full potential.

Even when not explicitly stated, the right to personal identity emerged as a foundational principle of constitutional democracies[14]. The person and their dignity became the pillars of the constitutional state, and general principles like public order and legal certainty were subordinated to the pro-

7 B. Ackerman, *Revolutionary constitutions*, Cambridge (MA), Harvard University Press, 2019.

8 M. Dani, *The democratic and social constitutional state as the paradigm of the post-World War II European constitutional experience*, in *The Legitimacy of European Constitutional Orders. A Comparative Inquiry*, M. Dani, M. Goldoni, A.J. Menédez (eds.), Cheltenham, UK, Edward Elgar, 2023, pp. 19-42.

9 A. Somek, *The cosmopolitan constitution*, Oxford, OUP, 2014, pp. 36-133.

10 On the principle of collaboration among State powers, see recently: D. Bilchitz, D. Landau (eds.), *The evolution of the separation of powers: between the global north and the global south*, Elgar, Cheltenham, 2018; R. Dixon, *Responsive Judicial Review*, Oxford, OUP, 2023; A. Kavanagh, *The Collaborative Constitution*, Cambridge, CUP, 2023.

11 K.E. Klare, *Legal culture and transformative constitutionalism*, in *S. Afr. J. on Hum. Rts*., 14(1), 1998, p. 150.

12 M. Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, in *The American Journal of Comparative Law*, 65(3), 2017, pp. 527-565. For the Italian context, please refer to: G. Giorgini Pignatiello, *Transformative Constitutionalism and Constitutional Courts in the European Legal Space. Germany and Italy in a Comparative Perspective*, in *Framing and Diagnosing Constitutional Degradation: A Comparative Perspective,* T. Groppi, V. Carlino, G. Milani (eds.), ebook, Consulta Online, 2022, pp. 11-20.

13 G. Bognetti, *The concept of human dignity in European and US constitutionalism*, in *European and US Constitutionalism*, G. Nolte (ed.), Cambridge, CUP, 2005, pp. 85-107.

14 On the topic, see for example: J. Marshall, *Human Rights Law and Personal Identity*, London, Routledge, 2014.

tection and promotion of human dignity. These principles could no longer be implemented as they were under previous dictatorial regimes, where they were often manipulated for political gain.

Personal identity encompasses a range of characteristics that define an individual's uniqueness within society, and gender identity is one such essential feature. Gender identity refers to an individual's self-perception in relation to socially constructed categories such as male and female. Across the world, non-conforming gender identities continue to be the target of both explicit and implicit forms of discrimination and violence. Such discrimination represents a serious violation of individuals' rights to equality and human dignity, while also threatening the social fabric of constitutional democracies.

The connection between transformative constitutionalism and gender identity is unequivocal. Transformative constitutionalism promotes the expansion of rights and freedoms, rejecting the notion that these privileges are reserved for a select few. Post-liberal constitutions actively cultivate a society where diverse identities can flourish. The right to self-determination, of which gender identity is a key expression[15], is intrinsically linked to the right to health. Therefore, the recognition of one's gender identity is directly related to their fundamental right to health and well-being[16].

State institutions and societal structures cannot, in principle, be used to oppose an individual's right to self-determination, provided that exercising this right does not infringe upon the fundamental rights of others. Public authorities are obliged to organize society in such a way that fosters the development and realization of human personality.

The frequent invocation of the principle of legal certainty to limit gender self-determination beyond binary categories is thus subject to critique. Denying legal recognition of non-binary identities on the basis of legal certainty appears inconsistent. In fact, ensuring the legal system's alignment with individuals' lived expressions of gender identity is more consistent with the principle of legal certainty than maintaining outdated, restrictive definitions.

3. The role of international law in advancing the protection of gender identity

International law does not have any treaties or binding instruments that refer directly and specifically to lgbti+ rights[17]; despite this, it is not difficult to find recommendations, decisions, and opinions from international bodies where these rights have been analyzed and recognized. One of the earliest examples is the UN Human Rights Committee, established to monitor the implementation and application of the International Covenant on Civil and Political Rights during its periodic State reviews. In addition to that, the Committee can issue decisions on specific cases. In 1994, in *Toonen v. Australia*, the Committee ruled that an anti-homosexual criminal law in Australia was in conflict with the right to privacy and that discrimination on the basis of sexual orientation was a form of discrimination on the basis of "sex[18]". The European Court of Human Rights adopted a similar ruling some years earlier in

15 E. Brems, P. Cannoot, T. Moonen (eds.), *Protecting Trans Rights in the Age of Gender Self-Determination*, Cambridge, Intersentia, 2020.

16 M. Szydlowski, *Gender recognition and the rights to health and health care: Applying the principle of self-determination to transgender people*, in *International Journal of Transgenderism*, 17(3–4), 2016, pp. 199–211.

17 L. Holzer, *Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10* in *International Journal of Gender, Sexuality and Law*, 1(1), 2020, p. 101.

18 D. Sanders, *The role of the Yogyakarta Principles*, 2008, p. 2 - accessible at: https://sxpolitics.org/wp-

the *Dudgeon* case[19].

More recently, international bodies have begun to address not only the recognition and protection of rights related to sexual orientation but also those related to gender identity. Among many examples are the considerations of the Committee on Economic, Social, and Cultural Rights and the observations of the Committee on the Elimination of Discrimination against Women[20]. Similarly, gender identity has been addressed by the Inter-American Court of Human Rights and by extensive jurisprudence of the European Court of Human Rights under Article 8[21]. Although the European Convention on Human Rights does not explicitly mention gender identity, the Court has considered it a fundamental aspect of the right to respect for private life and one of the essential elements of self-determination. Nevertheless, in the landmark case *Christine Goodwin v. United Kingdom*[22], the Court, while recognizing that individuals have the right to define their gender identity under Article 8, declared that its legal recognition of this remains subject to the prerogatives of the State. In this regard, all subsequent ECtHR jurisprudence has been heavily criticized for the pathologizing approach to the issue of gender identity, reinforcing, on the one hand, States' demands for evidence of gender incongruence through medical diagnoses and assessments to verify such conditions, and on the other hand, a solely binary approach to this issue[23]. Although the binary approach characterizes most of the sources and instruments of international law that we can reference for the protection and recognition of gender identity, the Yogyakarta Principles might offer some responses and possible guidelines for conceptualizing gender identity in a depathologized and non-binary way, thereby addressing the needs that have more recently emerged among individuals[24].

The Yogyakarta Principles are the result of a meeting of academic experts, NGOs, and, indirectly, officials from international organizations in the eponymous location in Indonesia, initiated by the then UN High Commissioner for Human Rights, Louise Arbour. The objective was to make a statement on what international human rights law could say regarding lgbti+ issues "if we take the basic principle of universality and non-discrimination seriously.[25]" To an initial set of principles from 2006, another ten were added in a subsequent meeting held in 2017. The principles address the issues of gender identity and sexual orientation in a revolutionary and progressive manner compared to what has been achieved by any other single instrument of international law, thus overcoming both the medicalized approach to the topic and the binary framework. The document does not merely establish individual legal principles but also defines actions that States should implement to ensure full protection of the rights of lgbti+ individuals. For example, Principles 3 and 31 recognize that no person can be forced to undergo medical procedures—including sex reassignment surgery, sterilization, or hormone therapy—as a requirement for the legal recognition of their gender identity. Furthermore, States are called upon to ensure that no eligibility criteria—such as medical or psychological interventions, a minimum

content/uploads/2009/03/yogyakarta-principles-2-douglas-sanders.pdf.

19 ECtHR, 22 October 1981, *Dudgeon v. The United Kingdom*.

20 CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights*, Forty-sixth session Geneva, 2-20 May 2011; CEDAW, *Concluding observations on the combined fifth and sixth periodic reports of Slovakia*, 25 November 2015, CEDAW, *Concluding observations of the second periodic report of Montenegro*, 24 July 2017.

21 Inter-American Court of Human Rights, Advisory opinion OC-24/17 of November 24, 2017 requested by the Republic of Costa Rica.

22 ECtHR, 11 July 2002, *Christine Goodwin v. United Kingdom*.

23 P. Cannoot. *The pathologisation of trans* persons in the ECtHR's case law on legal gender recognition*, in *Netherlands Quarterly of Human Rights*, 37(1), 2019, p. 23.

24 Yogyakarta Principles 2006 and Yogyakarta Principles 2006 +10; https://yogyakartaprinciples.org/.

25 D. Sanders, *The role of the Yogyakarta Principles*, cit., p. 5.

or maximum age, economic status, or any other third-party opinion—are prerequisites for changing one's name, legal sex, or gender. Regarding non-binary individuals, Principle 31 advocates for the elimination of gender markers on identification documents, unconditional gender recognition laws, the introduction of non-binary legal gender categories, and the elimination of public gender registration.

Although the legal status of these Principles in international law remains unclear[26], they have begun to serve as a reference point in recent jurisprudence and may thus provide a starting point for addressing the challenges inherent in the general approach to gender identity. For example, in the case of *F v. Bevándorlási és Állampolgársági Hivatal*, the European Court of Justice cited Principle 18, stating that no one can be compelled to undergo any form of psychological testing based on their sexual orientation or gender identity[27]. Principle No. 3 was similarly cited in the dissenting opinion of Judges Sajó, Keller, and Lemmens in the case of *Hämäläinen v. Finland* before the ECtHR, concerning the dissolution of marriage in cases of gender reassignment surgery[28], as well as in the opinions of the Inter-American Court of Human Rights to emphasize the non-necessity of medical documents as a prerequisite for legal gender recognition. More recently, in the Advisory Opinion OC-29/2022, the Court referenced and applied the Yogyakarta Principles as a fully-fledged instrument of international human rights law in matters related to the investigation of hate crimes based on sexual orientation and gender identity and access to gender-affirming therapies for incarcerated individuals[29]. These early examples of the application of the Yogyakarta Principles in judicial decisions demonstrate the potential contribution of this uncertainly positioned document to advancing gender identity rights, particularly in areas where the absence of a specific international legal instrument dedicated to the recognition of lgbti+ community rights has left a void, and where more recent demands fail to find any form of acknowledgment. In particular, regarding issues related to gender identity, the Yogyakarta Principles can serve as an effective reference point for analyzing and recognizing individual claims. For instance, Principle No. 31 provides a robust response to the demands of non-binary individuals by advocating for the removal of gender markers from identification documents, thereby reducing their use for identification purposes. Moreover, the unconditional recognition of gender identity by the State would fully satisfy the right to self-determination for transgender individuals.

4. Non-binarism and the law: a comparative overview

As noted, comparative law serves a "subversive" function[30]. By comparing different legal systems, it enables the deconstruction of certain myths and dogmas upon which a specific legal tradition may rely, demonstrating the potential for alternative solutions. In the present context, comparative law is particularly valuable as it encourages critical reflection on the persistence and justification of gender binarism in our legal system, challenging the status quo and exposing the power dynamics that sustain it.

A recent global comparative analysis classified the regulations on the recognition of gender iden-

26 M. Ferrara, *La Corte di giustizia dell'Unione europea e lo 'strano caso' dei Principi di Yogyakarta*, in *Diritti umani e diritto internazionale*, 2019, no. 1, pp. 175-196.

27 CJEU, 25 January 2018, Case C-473/16, *F c. Bevándorlási és Állampolgársági Hivatal.*

28 ECtHR, 16 July 2014, *Hämäläinen v. Finland.*

29 Inter-American Court of Human Rights, Advisory Opinion OC-29/22, May 30, 2022 requested by the Inter-american commission of Human Rights.

30 H. Muir-Watt, *La fonction subversive du droit comparé*, in *Revue internationale de droit comparé*, 52(3), 2000, pp. 503-527.

tity in constitutional democracies into four main models[31]. This classification can be conceptualized on a Cartesian plane (Fig. 1). On the X-axis, binary systems are positioned on one side, while systems recognizing non-binarism are on the opposite side. The Y-axis contrasts elective legal systems, on one side, with ascriptive legal systems, on the other. Legal orders that fall within the first quadrant tend to afford greater space for individual self-determination. Conversely, those located in the third quadrant reflect a greater degree of hetero-determination of gender identity.

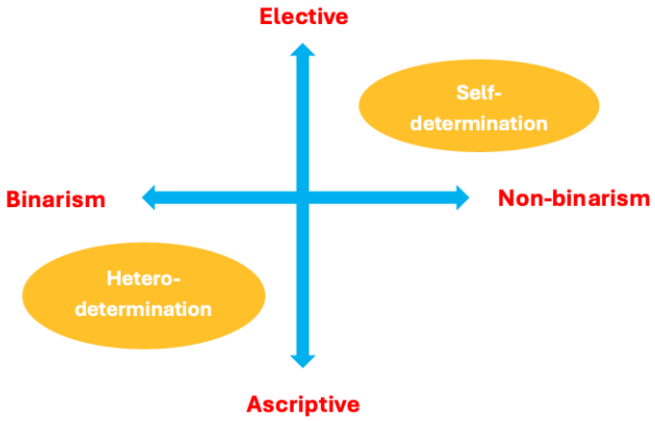

Figure 1

Limiting our analysis to the EU context reveals several noteworthy cases. It is important to emphasize the significant role played by constitutional courts in EU countries in advancing the right to self-determination, particularly concerning gender identity. From the relevant case law, it is apparent that most liberal and secularized countries, when balancing the competing values, do not hesitate to prioritize individual rights over the status quo and the vague principles of public order and legal certainty. These countries recognize the constitutional illegitimacy of regulations based on oversimplified views of human beings and their characteristics, and they have initiated efforts to reform fundamental aspects of the socio-legal structures within their jurisdictions. In some of these jurisdictions, policy-makers have been afforded no discretion regarding the dismantling of the gender binary, with rigid dualism in gender identity deemed discriminatory.

Starting from the hetero-determined model, Italy and France are considered examples of binary and ascriptive legal systems. Both Italian[32] and French[33] legal orders rely on binarism. Therefore, a person can be only male or female. Based on predetermined medical evidence or socio-behavioral elements a judge or a civil servant decides whether the individual belongs to a gender or to the other. This entails a recognition based on objective elements.

Among binary and elective legal orders, both Spain, thanks to the very debated Ley Trans[34], and

31 S. Osella, R. Rubio-Marín, *Gender recognition at the crossroads: Four models and the compass of comparative law*, in *International Journal of Constitutional Law*, 21(2), 2023, pp. 574–602.

32 S. Osella, *Reinforcing the binary and disciplining the subject: The constitutional right to gender recognition in the Italian case law*, in *Int'l J. Const. Law*, 20(1), 2022, pp. 454–475.

33 M.-X. Catto, *Changer de sexe à l'état civil depuis la loi du 18 novembre 2016 de modernisation de la justice du XXIe siècle*, in *Cahiers Droit, Sciences & Technologies*, 9, 2019, pp. 107-129.

34 Ley 4/2023, de 28 de febrero, para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI (La ley 2336/2023). M. Heras Hernández, *El principio de autodeterminación de género. Apuntes prácticos sobre el procedimiento de rectificación de la mención registral relativa al sexo*, in *Actualidad Jurídica Iberoamericana*, 20 bis, 2024, pp. 524-

Malta[35] allows the transition from a gender to the other simply through a self-declaration. This represents a case of an attribution of gender identity based on subjective factors, that the state cannot question.

Examples of non binary ascriptive legal systems are now not present anymore in the EU, after the amendment of the civil code recently adopted by Germany[36]. A paradigmatic case can be India[37]. In this case, a third gender is officially recognized. However, the standards and characteristics to be identified as third gender are predetermined (objective model) and a third person decides whether the individual complies with them.

Non-binary and elective systems are countries that recognize a third gender and let individuals determine with a self-declaration what is their gender identity. This is the case both in Germany[38] and Belgium[39].

5. Constitutional courts and the principle of non-discrimination: overcoming gender binarism in the law

Focusing on countries that prioritize the highest standards of self-determination, it is notable that constitutional courts have been pivotal in advancing the rights of non-binary individuals in various legal systems. In Germany and Belgium, landmark decisions have compelled legislators to recognize a third gender.

In 2019, the Belgian Constitutional Court held that "As the European Court of Human Rights has ruled, society can reasonably be expected to accept certain inconveniences to allow individuals to live with dignity and respect, in line with their chosen sexual identity, even when this choice comes at the cost of significant personal suffering … Moreover, the fact that the Belgian Constitution, in Articles 10(3) and 11bis, places particular emphasis on the equality of men and women does not imply that the categories of 'man' and 'woman' constitute a foundational principle of the Belgian constitutional order. Nor does it preclude the adoption of measures aimed at addressing discrimination based on non-binary gender identities."[40] The Court further concluded: "It is not reasonably justifiable for individuals with a non-binary gender identity, unlike those with a binary gender identity, to be compelled to accept a registration on their birth certificate that does not align with their gender identity. Consequently, by restricting the modification of sex registration on birth certificates to a binary choice, the

553.

35 Malta, *Gender identity, gender expression and sex characteristics act*, 14th April 2015. N. Sciberras Debono, *Malta's gender identity, gender expression and sex characteristics act – a shift from a binary gender to a whole new spectrum?*, in *ELSA Malta Law Review*, 5, 2015, online.

36 P. Dunne, J. Mulder, *Beyond the Binary: Towards a Third Sex Category in Germany?*, in *German Law Journal*, 19(3), 2018, pp. 627-648.

37 S. Bhattacharya, D. Ghosh, B. Purkayastha, *Transgender Persons (Protection of Rights) Act' of India: An Analysis of Substantive Access to Rights of a Transgender Community*, in *J. Hum. Rights Pract.*, 14(2), 2022, pp. 676-697.

38 Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag (SBGG) und zur Änderung weiterer Vorschriften (Act on self-determination with regard to gender entry and amending other provisions), BGBl. 2024 I Nr. 206 vom 21.06.2024.

39 G. Willems, *Le genre non binaire et fluide consacré par la Cour constitutionnelle: faut-il flexibiliser ou abolir l'enregistrement civil du sexe?*, in *Revue trimestrielle des droits de l'Homme*, 124(4), 2020, pp. 895-920.

40 Belgian Constitutional Court, decision no. 99/2019, B.6.6.

contested law created a gap that infringes upon the principle of equality, particularly when considered alongside the right to self-determination."[41]

Similarly, the German Federal Constitutional Court in 2019 recognized that: "The general right of personality also protects one's gender identity … which is usually a constitutive aspect of an individual's personality"[42], and that "The official recognition of sex under civil status law has an identity-building and expressive effect. Civil status is not a marginal issue; rather, it is the 'position of a person within the legal system' … Thus, denying the recognition of felt gender identity under civil status law in itself … specifically jeopardises the self-determined development of and respect for one's personality."[43] It argued that: "The way a person is depicted and perceived in public and by others is significant for the free development of their personality and may result in specific risks [to fundamental rights] ... Civil status law requires a sex entry, but does not allow affected persons an entry in the birth register that is in line with their self-image. This contributes to the fact that their individual identity is not perceived and recognised in the same way and as naturally as that of female or male persons. The interference is not justified."[44]. In addition, it observed that: "Organisational interests of the state cannot justify the denial of a third standardised and positive entry option either"[45].

Finally, although Colombia is not a member of the European Union, it is pertinent to consider the case law of its Constitutional Court. From a comparative perspective, Colombia is widely regarded as one of the most successful examples of transformative constitutionalism in the Global South. The commitment of its public institutions to uphold and realize constitutional values is well recognized globally[46]. A closer examination is therefore warranted.

Two landmark decisions by the Colombian Constitutional Court have transitioned the country from a binary ascriptive model to a non-binary elective system[47]. In 2015, the Colombian Constitutional Court affirmed that: "The right of each person to autonomously define their sexual and gender identity, and to ensure that the data recorded in the civil registry align with their self-definition, is constitutionally protected by provisions guaranteeing the free development of personality (Article 16 Const.), the recognition of legal personality (Article 14 Const.), and respect for human dignity. This respect is manifested in three key dimensions: (i) the right to live as one wishes; (ii) the right to live well; and (iii) the right to live without humiliation. In the present case, all three dimensions are relevant, particularly the first and third. The discrepancy between an individual's declared sexual and gender identity and what is recorded in their identification documents affects their fundamental personal autonomy (the right to live as one wishes), can lead to rejection and discrimination by others (the right to live without humiliation), and may impede access to employment opportunities necessary for a dignified life (the right to live well)."[48] While maintaining a binary gender framework within the Colombian legal system, the Constitutional Court established a significant legal principle: a person's gender is determined by their self-perception (subjective element). Consequently, to change one's gender in the civil registry, it is sufficient to appear before a notary and swear one's self-perceived gender.

41 Ibid.

42 German Federal Constitutional Court, 1 BvR 2019/16, 10th October 2017, para. 39.

43 Ibid., para. 45.

44 Ibid., para. 48-49.

45 Ibid., para. 53.

46 D. González, *Explaining the Institutional Role of the Colombian Constitutional Court*, in *From Parchment to Practice: Implementing New Constitutions*, T. Ginsburg, A.Z. Huq (eds.), Cambridge, CUP, 2020, pp. 189-207.

47 G. Lozano Villegas, A. Julio Estrada, *Los derechos políticos de las personas trans y las personas no binarias en la jurisprudencia: de la Corte Constitucional colombiana y del Sistema Interamericano de Derechos Humanos*, in *Revista Española de Derecho Constitucional*, 130, 2024, pp. 315-330.

48 Colombian Constitutional Court, decision no. T-063/15, para. 4.5.

In 2022, the Constitutional Court asserted that identity, defined as self-awareness, situates the individual within the social sphere and facilitates their participation in it. The failure to recognize this identity constitutes a form of institutionalized subordination and, therefore, a severe injustice. Such failure, regardless of its form, denies the subordinated party the ability to achieve full participation in social life and to interact with others on an equal footing. Recognition of identity by society and the state is thus essential for individuals to attain full participation in social interactions. The absence of recognition does not merely reflect contempt or distortion of group identity, but rather results in social subordination due to the inability to participate equally in social life[49]. Of significant interest is the point made by the Colombian Constitutional Court, which states that: "Gender identity cannot be conceived as static, either at the individual or societal level. Through social relations, gender categories, notions, and evaluations are subject to ongoing confrontation and redefinition. Consequently, constructions of gender are mediated by social regimes and the systems of rules that govern them". The Court posits that: "The sex/gender system of a society does not adhere to a predetermined 'natural' order but is a 'product of culture' and, therefore, is temporary and evolving. There are various 'sexual cultures' that shape the ways of being a man or a woman, and sex/gender systems are cultural representations that reflect historical and social relations. As a result, new paradigms emerge in the analysis of gender identities circulating in society, often including non-normative identities that are not typically recognized within the established gender relations framework. One such identity is the non-binary gender identity."[50] Finally, the Constitutional Court ruled that: "The norm that restricts sex markers to binary categories fails to acknowledge the plaintiff's gender experience, which exists outside these binary constraints. Consequently, it impedes their right to legal personality, human dignity, and the free development of their personality. Additionally, this limitation exposes them to various forms of discrimination due to the discrepancy between their self-perception and the imposed gender options."[51] The Constitutional Court thus introduced the recognition of non-binary gender into the Colombian legal system, allowing individuals to declare their gender identity through a sworn statement before a notary.

6. Remarks on the Italian Constitutional Court's decision no. 143/2024

The recognition of non-binary identities has recently come under the scrutiny of the Italian Constitutional Court following a legitimacy request initiated by the Bolzano court[52]. The request of constitutionality concerned two specific provisions related to gender rectification. In the first instance, the Court was asked to determine whether Article 1 of Law No. 164/1982, which governs the rectification of civil status records following a court ruling, violated Articles 2, 3, 31, and 117 of the Constitution by not allowing the modification of such records to reflect a gender other than male or female, thereby excluding non-binary identities. In the second instance, the Court was asked to consider whether Article 31 of Law No. 150 of 2011, which mandates judicial authorization for access to medical-surgical

49 Colombian Constitutional Court, decision no. T-033/22, para. 30.

50 Ibid., para. 43-44. The Constitutional Courts adds that at the supranational level in its Advisory Opinion no. 24 of 2017, the Inter-American Court of Human Rights (IACtHR) established a conceptual framework regarding gender identity. It recognized that among transgender or trans experiences are non-binary identities. The IACtHR emphasized that non-binary identities should be regarded as distinct gender identities, and as such, they are protected under the rights to sexual diversity and against discrimination based on gender as stipulated in the Inter-American Convention.

51 Ibid., para. 61.

52 Italian Constitutional Court, Judgement n. 143/2024, 18 June 2024.

procedures, violated Articles 2, 3, and 32 of the Italian Constitution.

As previously discussed, Constitutional Courts have played a pivotal role in advancing the rights of non-binary individuals in various legal systems. However, this cannot be said of the Italian legal system. Although the Court acknowledged the existence of a "clinical reality[53]" for non-binary individuals, and consequently recognized that the perception of not belonging to either the male or female gender is relevant for the purposes of the personalist principle enshrined in Article 2 of the Constitution, as well as for the social dignity and health protection guaranteed by Articles 3 and 32, it ultimately deferred the issue to the legislative body. The Court further noted that the identification of a third non-binary gender within the Italian legal system would constitute such a significant shift that legislative intervention would be necessary.

From a comparative perspective, the Court acknowledged the experiences of legal systems in Belgium and Germany, as well as the existence of "indeterminate" options in the gender field in systems derived from European law. However, it also recalled that the European Court of Human Rights (ECHR) in the case of *Y. v. France*[54] stated that there is no European consensus on the issue of non-binary individuals.

Despite recognizing the existence and the need for protection of non-binary individuals, informed by scientific evidence and comparative law, the Court ultimately declared inadmissible the question on constitutional legitimacy raised on Article 1 of Law No. 164/1982[55]. The potential for broader reformist implications within the Italian legal system – the Court recognized - entails its self restraint.

The second issue addressed the necessity of judicial authorization for access to gender reassignment surgeries, as required by Article 31 of Law No. 150/2011. The Court recognized that this requirement is entirely irrational when compared with its own jurisprudence and the practices of lower courts, where, since 2015, the necessity of surgical intervention has been deemed non-essential for the purpose of gender rectification[56]. Acknowledging this inconsistency, the Court declared Article 31,

53 Italian Constitutional Court, Judgement n. 143/2024, 18 June 2024, para. 5.1.

54 ECtHR, 31 January 2023, *Y. v. France.*

55 With particular regard to the right to gender identity, as a manifestation of the right to personal identity, the Italian Constitutional Court, since its landmark ruling No. 161 of 1985, established that the Italian Legislature had adopted: "A new and different concept of sexual identity compared to the past, in the sense that, for the purposes of such identification, attention is no longer placed exclusively on external genital organs, as determined at birth or 'naturally' evolved, even with the aid of appropriate medical-surgical therapies, but also on psychological and social elements." The constitutional order is therefore called upon to safeguard the right of each individual to: "Realize their own sexual identity in social life, which must be considered an aspect and factor in the development of their personality. In turn, the other members of the community are obliged to recognize it, out of a duty of social solidarity." In the same ruling, while commenting on Law No. 164 of 1982, the Court further emphasized the importance of a: "Legislation aimed at allowing the affirmation of [transsexual persons'] personality, thereby helping them overcome the isolation, hostility, and humiliation that too often accompany their existence [...] within the framework of an evolving legal civilization, increasingly attentive to the values of freedom and dignity of the human person, which it seeks to protect even in minority and anomalous situations.".

56 As clearly stated since the decision no. 221 of 2015 issued by the Italian Constitutional Court. By validating the previous case law established on the matter, the Court recognized that Article 1, paragraph 1, of Law No. 164/1982 constitutes: "The result of a cultural and legislative evolution aimed at recognizing the right to gender identity as a constituent element of the right to personal identity, fully included within the scope of fundamental human rights (Article 2 of the Constitution and Article 8 of the European Convention on Human Rights)." This conclusion is based on the premise that: "The absence of a textual reference to the methods (surgical, hormonal, or resulting from a congenital condition) through which the modification is achieved leads to the exclusion of the necessity of surgical treatment for accessing the judicial procedure for the rectification of civil status." Thus, surgical treatment assumes a merely optional character, and authorization for it is granted "as a guarantee of the right to health, that is, when it is aimed at allowing the individual to achieve a stable psy-

paragraph 4, unconstitutional.

The Court's decision gives rise to some preliminary critiques. Firstly, although the Italian Constitutional Court references the example of the German Constitutional Court in its ruling, it chooses not to replicate it. After emphasizing that the issue of non-binary identities should be brought to the attention of the legislature, it does not provide clear instructions or deadlines for Parliament[57]. Although the two cases are similar, in the German "Dritte Option" decision, the Court, after identifying a violation of the right to personality under Article 2(1) in conjunction with Article 1(1) of the Basic Law, required the German Parliament to decide within 14 months on one of two distinct options: either abolish all gender markers or introduce a non-binary gender marker[58]. The introduction of this new gender marker was the option chosen, with the *Selbstbestimmungsgesetz* law coming into effect. It is easy to imagine that the Italian Constitutional Court's decision to defer the recognition of non-binary individuals to the sensitivity of the legislature will not result in a prompt resolution, given the current political climate. For instance, in May 2024, the Italian government refused to sign the Declaration on the Continued Advancement of the Human Rights of LGBTIQ Persons in Europe by the Council of the EU[59]. Thus, while the Court affirms the need to recognize and protect non-binary identities, it refrains from taking any concrete steps to ensure this and instead delegates the entire task to the legislative body. Consequently, in the face of legislative inaction, non-binary individuals remain unprotected in terms of their fundamental rights enshrined in the Constitution.

Linguistically, these considerations are articulated in a ruling where the Court consistently conflates the terms and concepts of "gender" and "sex", neglecting the crucial distinction between them, which is particularly important for non-binary individuals.

Concerning the requirement for judicial authorization for surgeries, the Court leaves unresolved what should happen in cases where an individual seeks authorization solely for medical procedures. In this regard, the institution of judicial authorization for surgical procedures has been considered outdated and no longer relevant[60]. It has been argued that the three conditions underlying such authorization (the public interest preventing the exercise of the right, the potential for unlawful conduct, and the codification of the conditions and requirements for issuing authorization) are increasingly absent in situations governed by Law no. 164 of 1982 and Legislative Decree no. 150 of 2011. In this context, there are examples of acts involving the disposition of one's body that could potentially violate Article 5 of the Civil Code but, in pursuit of constitutionally significant interests, do not constitute unlawful acts. These include consensual sterilization for therapeutic or contraceptive purposes. In practice, the true significance of judicial authorization is not about granting access to surgical medical treatment but rather about granting access to surgical medical treatment covered by the national healthcare system. By addressing the necessity of judicial authorization, the Court misses an opportunity to examine the value of informed consent and the doctor-patient relationship, which could have provided a pathway to abandoning the need for authorization.

The system of judicial authorization is further complicated and rendered uncertain by the reasoning

chophysical balance, particularly in those cases where the divergence between anatomical sex and psychosexual identity leads to a conflictual attitude and rejection of one's anatomical morphology."

57 A. Kompatscher, S. Roßbach, *Non-Binary GenderMarkers in Italy?: On the Decision No. 143/2024 of the Italian Constitutional Court*, in *VerfBlog*, 9.8.2024.

58 German Constitutional Court, Judgement 1 BvR 2019/16, accessible at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html.

59 Council of Europe, *Joint ministerial declaration on the occasion of the International Day Against Homophobia, Lesbophobia, Biphobia, Transphobia and Intersexphobia*, 15.05.2024.

60 F. Dalla Balla, *Cosa resta della legge n. 164/1982? Diritti e fonti della transizione di genere*, in *BioLaw Journal*, 3, 2024, pp. 57-86.

presented in the final paragraph of the judgment before the ruling section[61]. The Court, in fact, reopens the possibility for judicial discretion regarding which modifications to sexual characteristics may be deemed sufficient by judges to accept requests for gender rectification. Such discretion poses a risk, particularly in light of the differing practices among Italian courts. For example, some courts grant authorization for surgeries based on the presentation of psychological and endocrinological documentation, regardless of whether it comes from private institutions or the public healthcare system. Others insist on the necessity of a pathway conducted through the national healthcare system or require the appointment of a court-appointed expert for a second evaluation by a mental health professional.

7. Tentative conclusions

The principle of equality has historically proven to be a powerful legal driver of social transformation. The advancement of rights, underpinned by the actions of constitutional justice bodies operating within a framework of loyal cooperation with other branches of government, has led to significant progress for lgbti+ rights.

In response to the growing demand from nonbinary individuals for the recognition of their right to gender identity and self-determination, comparative legal analyses reveal that various constitutional democracies, particularly their constitutional courts, have regarded the entrenched binary structure of legal systems as no impediment to the acknowledgment of nonbinary identities. Through their decisions, they have thus introduced the concept of a third gender in the legal system, affirming the primacy of the individual's right to self-determination and personal identity.

The right to full self-determination of individuals, particularly for the comprehensive recognition of the needs of gender non-conforming persons, including non-binary individuals, is a guiding principle in the Yogyakarta Principles. Although the legal status of these principles remains somewhat ambiguous, as discussed, they have gradually begun to serve as a reference point for some regional and constitutional courts and could potentially become a standard towards which states can aspire through their legal frameworks to ensure the full recognition of non-binary persons.

The recent ruling by the Italian Constitutional Court, as examined, also acknowledges the existence of non-binary individuals (supported primarily by clinical and scientific evidence) and emphasized that this situation warrants recognition in accordance with the principles of personalism, respect for social dignity, and the protection of health. Nevertheless, the Italian Court, unlike its German and Belgian counterparts, highlighted the lack of a European consensus on the issue and deferred the matter to the national legislature, thereby missing the opportunity to affirm the primacy of the individual's right to self-determination and personal identity.

In the second part of its decision, the Court, despite acknowledging the non-necessity of authorization for procedures in cases of gender rectification, has created interpretative uncertainty in all instances where individuals wish to undergo only gender-affirming procedures. Furthermore, the Court has raised doubts about the criteria for the assessment conducted by judges to determine whether the "modifications to sexual characteristics that have occurred" are sufficient for the acceptance of rectification requests.

The hope, therefore, is that the Italian Constitutional Court will demonstrate greater courage in the future, as legislative discretion cannot result in a lack of protection for the fundamental rights of individuals in situations of vulnerability. Ultimately, it is a matter of ensuring the supremacy of the Constitution.

61 Italian Constitutional Court, Judgement n. 143/2024, 18 June 2024, para. 6.2.4.