Italian court upholds non-binary rights but limits legal recognition beyond binary system

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In a judgment published last week, the Italian Constitutional Court found that non-binary peoples' rights are protected by the Italian Constitution. The Court noted that not having a third legal gender option in the Italian system can lead to unequal treatment and/or can compromise a person's wellbeing. However, the Court did not recognise a right to be registered as non-binary in Italian civil registries. This is disappointing as introducing a third legal gender option protects the rights to self-determination, dignity and private life of many trans, non-binary and intersex people.

The Court also repealed the legislative provision requiring trans people to get court authorisation before accessing transition-related surgery. It stated that legal gender recognition can be based on hormonal treatment and psychological support, without the need for surgery.

Following this ruling, trans and non-binary people in Italy will be able to obtain surgeries as part of their trans-specific healthcare without court approval, which previously caused long delays and complications.

The following statement was prepared for a specialist audience by LGA-Europe and TGEU.

Joint statement on Italian Constitutional Court ruling concerning the protection of non-binary and trans persons' rights

ILGA-Europe and TGEU welcome a judgement of the Italian Constitutional Court finding that non-binary peoples' rights are protected under the Italian Constitution

In a judgment published last week, the Italian Constitutional Court found that non-binary peoples'' rights are protected under the principles of social identity, equality of citizens and the right to health as guaranteed by the Italian Constitution. The Court did not, however, recognise a right to be registered as non-binary in Italian civil registries. The Court also repealed the legislative provision requiring trans people to obtain a court's authorisation prior to accessing transition-related surgery.

ILGA-Europe and TGEU — Trans Europe and Central Asia welcome this decision but regret that the Court failed to recognise a right to a third legal gender option in Italian registries and identity documents. Our organisations submitted an *amicus curiae* in the case, expressing that the introduction of a third legal gender option protects the rights to self-determination, dignity and private life of many trans people, intersex people and people of other gender identities.

The decision follows a referral by a regional court on the case of a non-binary Italian citizen, raising two questions of constitutionality to the Constitutional Court.

Missed opportunity to recognise a third legal gender option in the Italian system

The first question concerned the current lack of a third legal gender option in Italian registries and identity

documents.

The applicant argued that the failure to recognise non-binary gender identity harms individuals' social identity (Article 2 of the Constitution) and equality before the law (Article 3 of the Constitution), since legal gender recognition is allowed only to those whose gender identity falls within the binary. The Court also examined a violation of the fundamental right to health under Article 32 of the Constitution, and whether the lack of recognition of non-binary gender identity compromises psychophysical wellbeing.

The Constitutional Court declared this question inadmissible, citing the wide repercussions that the introduction of a third legal gender option would have on various sectors of the legal system, which would necessitate a systemic legislative reform of the system and of the many institutions currently operating under the gender-binary logic.

However, the Court brought this question to the attention of the legislator. It noted that the lack of a third legal gender option in the Italian system can lead to unequal treatment and/or can compromise the psychophysical wellbeing of concerned individuals, which can in turn raise issues around the respect for social dignity and protection of health under Articles 3 and 32 of the Constitution.

The applicant, as well as ILGA-Europe and TGEU in their third-party intervention, recalled that non-binary gender identity has now been recognised in numerous legal systems across Europe. Iceland and Germany are leading the way and Denmark and Malta partially acknowledge non-binary identities).[1] A gender marker option in official registries and documents other than male or female (unspecified or third gender marker option) is an important issue for a growing number of people in trans and intersex communities. The EU Fundamental Rights Agency (FRA) found that nearly every second person in the trans community identifies outside of the gender binary, that is not (entirely) identifying as male or female. [2]

The Italian Constitutional Court ruling was highly anticipated in this respect, and it could have triggered legislative changes inspiring other countries to follow suit and potentially transforming the landscape of non-binary rights in Europe.

Unconstitutionality of the obligation for trans and non-binary people to obtain judicial authorisation to access transition-related surgeries

The second question concerned the obligation in Legislative Decree no. 150 of 2011 for trans and non-binary people to obtain a court decision to be authorised to access transition-related surgical interventions.

The applicant argued that such an obligation violates the fundamental right to self-determination (Article 2 of the Constitution) and the right to equality before the law (Article 3), since requiring judicial authorisation for a medical procedure that is lawful is unreasonable. Such a requirement is also discriminatory, because other similar interventions not linked to gender identity, are left exclusively to medical judgement and to the patient's consent.

The Court ruled that such a requirement was unconstitutional. It reiterated that for the purpose of legal gender recognition, it is necessary and sufficient to ascertain the "objective transition of gender identity" which can be accomplished through hormonal treatments and psychological-behavioural support, without a surgical intervention. As such, according to the Court, the blanket requirement for judicial authorisation before surgical interventions is manifestly unreasonable and unnecessary.

Notably, the Constitutional Court referenced the changing jurisprudential framework in Italy on this issue, highlighting the growing Italian case-law authorising surgery at the same time as ordering legal gender recognition.

Further to this ruling, trans and non-binary people in Italy will be able to obtain surgeries as part of their trans-specific healthcare without a judicial decision, a requirement that often led to arbitrary and lengthy procedures.

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1. As pointed out by the applicant, the EU itself provides standard forms containing three gender options Non-Binary gender identity is recognised under Regulation (EU) 2016/1191 of the European Parliament and the Council of 6 July 2016 on the free movement of citizens on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 ??
2. Russell, Sanders, Watkins, Diving into the FRA LGBTI II Survey Data: Trans and non-binary briefing', p. 3, available at: https://tgeu.org/intersecting-oppressions-trans-people-in-europe/ ??