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## **GENDER, GENDER IDENTITY, AND THE CHALLENGE OF INTEGRATING THEM INTO CROATIAN LEGISLATION <sup>1</sup>**

### **Abstract**

Over the last several decades, there has been a significant development in feminist legal theory, particularly regarding the distinction between concepts of "gender" and "sex" and the understanding of gender equality. This development has influenced the International, European and domestic law. Despite Croatia's accession to the European Union in 2013—a *sui generis* organisation recognised for its leadership in promoting gender equality—the country has yet to adopt a clear position on applying "gender" and "gender identity" in its legislation. The Constitution of the Republic of Croatia, established in 1990, exclusively uses the term "sex." It affirms that sex equality is among the highest values of the constitutional order and guarantees protection against discrimination based on "sex." Most Croatian laws also continue to reference "sex." In recent years, however, there has been a gradual incorporation of the terms "gender" and "gender identity" into the Croatian legislation. Notably, the Constitutional Court of the Republic of Croatia expressly stated in its case law that the Constitution protects sexual and gender diversity. This paper will address the main challenges associated with integrating concepts of gender and gender identity into the Croatian legal framework.

**Key words:** Croatia, gender, gender identity, gender equality, legislation, sex

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## I. Introduction

Even today, we live in a world where an individual's identity is largely shaped by their sexual and gender identity.<sup>2</sup> This influence is evident at all levels, from language to social (legal) institutions and academic discussions.<sup>3</sup> Sexual and gender identity is deeply embedded in people's actions, beliefs, and desires,<sup>4</sup> fundamentally shaping our understanding of ourselves and the world around us.<sup>5</sup> The concept that being "male" or "female" is a crucial aspect of one's identity continues to prevail.<sup>6</sup> This paper addresses the main challenges associated with integrating concepts of gender and gender identity into the Croatian legal framework.

In the first section of this paper, we will focus on the history and present of the relationship between the concepts of sex and gender. What is the difference between these two concepts?<sup>7</sup> Are they even two different concepts?<sup>8</sup> That is, what is the usefulness of this distinction?<sup>9</sup> Feminists usually make a distinction between the terms sex and gender, according to which the first concept indicates "biological differences" between women and men. In contrast, the second indicates culturally created differences.<sup>10</sup> Historically, feminists did not view the term "woman" as a sex concept, dependent on biological or anatomical characteristics, but as a gender concept based socially and culturally.<sup>11</sup> Sex indicates "being female or male", while gender determines "being a woman or a man".<sup>12</sup> To get an answer to the question from the title of the paper on the challenge of the integration of terms gender and gender identity into Croatian legislation, or whether gender and gender identity are desirable terms of Croatian legislation, in the third section of the paper we will focus on the regulations containing the mentioned terms, which have been adopted in Croatia in the last twenty years. Although gender and gender equality are not explicitly stated in the Constitution of the Republic of Croatia, the fourth section of the paper deals with the protection of gender diversity established in the practice of

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<sup>2</sup> Monro, S., *Gender Politics: Citizenship, Activism and Sexual Diversity*, Pluto Press, 2005, 10.

<sup>3</sup> Monro, "Gender Politics", 10.

<sup>4</sup> Eckert, P., McConnell-Ginet, S., *Language and Gender*, Cambridge University Press, 2003, 9.

<sup>5</sup> Eckert and McConnell-Ginet, "Language and Gender", 9.

<sup>6</sup> Monro, "Gender Politics", 10.

<sup>7</sup> Mikkola, M., "Feminist Perspectives on Sex and Gender", *The Stanford Encyclopedia of Philosophy* (Summer 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/sum2024/entries/feminism-gender/>>.

<sup>8</sup> Grenfell, L., Making Sex: Law's Narratives of Sex, Gender and Identity, *Legal Studies*, Vol. 23, No. 1, 2003, 67.

<sup>9</sup> Grenfell, "Making Sex: Law's Narratives of Sex, Gender and Identity", 91.

<sup>10</sup> Rhode, D. L., *Justice and Gender. Sex Discrimination and the Law*, Harvard University Press, Cambridge, Massachusetts, London, England, 1991, 5.

<sup>11</sup> Mikkola, "Feminist Perspectives on Sex and Gender".

<sup>12</sup> Mikkola, "Feminist Perspectives on Sex and Gender".

the Constitutional Court of the Republic of Croatia. Finally, the paper ends with an attempt to answer the question of whether Croatia has taken a clear position in integrating concepts of gender and gender identity in the legislation.

## II. Distinction between sex and gender

The concept of gender is closely connected to feminist theory, where it has a crucial role.<sup>13</sup> However, it is essential to emphasise that the term feminism, which came into general use a little over a century ago, at the beginning of the 20th century,<sup>14</sup> is still not clearly defined. This section of the paper will explore this ambiguity and the ambiguity of the concept of gender itself. Feminist theory commonly “presents a theory of gender and challenges assertions and assumptions of gender neutrality and objectivity in received disciplinary knowledge”.<sup>15</sup> Feminism highlights “the societal inequalities resulting from values and assumptions based on gender”.<sup>16</sup> Feminist theory is highly diverse,<sup>17</sup> encompassing numerous disagreements regarding goals, approaches,<sup>18</sup> premises and conclusions,<sup>19</sup> which we cannot get into now. The following statement from post-structural feminist<sup>20</sup> Judith Butler further illustrates the connection between gender and feminism:

“Contemporary feminist debates over the meaning of gender lead time and again to a certain sense of trouble, as if indeterminacy of gender might eventually culminate in the failure of feminism”.<sup>21</sup>

Historically, we see attempts by feminist theory to “stabilise” the concept of gender almost “with religious piety”.<sup>22</sup> The difference between sex and gender has become crucial in feminist theory in efforts to overcome the “biological

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<sup>13</sup> Vasuki, N., *Sexy Dressing, Gender and Legal Theory: A Style of Political Engagement*, *Transnational Legal Theory*, Vol. 5, No. 4, 2014, 643.

<sup>14</sup> Rhode, “Justice and Gender”, 5.

<sup>15</sup> Fineman, M. A., *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, *Wisconsin Law Review*, No. 2, 2005, 406-407.

<sup>16</sup> Fineman, “Gender and Law”, 407.

<sup>17</sup> Bassham, G., *Feminist legal theory: liberal response*, *Notre Dame Journal of Law, Ethics & Public Policy*, Vol. 6, No. 2, 1992, 294.

<sup>18</sup> Fineman, “Gender and Law”, 406.

<sup>19</sup> Bassham, “Feminist legal theory”, 294.

<sup>20</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 93- 94.

<sup>21</sup> Butler, J., *Gender Trouble: Feminism and the Subversion of Identity*, Routledge, New York and London, 2002, XXVII; Vasuki, “Sexy Dressing, Gender and Legal Theory”, 643.

<sup>22</sup> Vasuki, “Sexy Dressing, Gender and Legal Theory”, 643.

determinist view of sex”<sup>23</sup> in which women are limited to “natural”<sup>24</sup> and the only possible biological role, i.e. to the private sphere of life.<sup>25</sup> Feminists have decided to use this distinction to establish the boundary between nature and culture; conventionally, it is considered that gender as a cultural phenomenon is separated from natural sex.<sup>26</sup> In this way, they try to overcome negative cultural characteristics traditionally identified as feminine.<sup>27</sup>

Feminist law theory, which is as diverse as feminist theory in general, is based, we can agree, on several fundamental claims: gender is a central category in the analysis of law; “mainstream legal theory” developed about “men's experience and interests” and thus cannot adequately respond to women's needs; significant legal reforms are necessary to achieve greater gender equality.<sup>28</sup>

The difference between sex, “the body/the physical/biology”, and gender “the mind/the social/psychology”, first appeared in medicine in the 1950s to explain the concept of transsexuality.<sup>29</sup> Sex reassignment surgery is then defined as “the harmonisation of sex and gender”.<sup>30</sup> Psychologists used this distinction to explain why some individuals feel “trapped in the wrong bodies”.<sup>31</sup> However, we must note that Swiss jurisprudence, as early as the 1930s, was the first in modern times to recognise the right to change the legal status of individuals who underwent sex reassignment surgery.<sup>32</sup> On the other hand, Sweden became the first country in the world to legislate this in 1972.<sup>33</sup>

Firstly, we will try to determine the meaning of the term sex. According to the conventional understanding, sex is a biological determinant that is primarily based on “reproductive potential”.<sup>34</sup> Females and males are determined based on “chromosomes, sex organs, hormones and other physical features”.<sup>35</sup> This dominant view of the concept of sex is the embodiment of “biological determinism” – “biology is destiny”.<sup>36</sup> Sex is a universal, apolitical and ahistorical phenomenon.<sup>37</sup> According to this approach, sex is based on biology, and gender is “an effect of

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<sup>23</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 68.

<sup>24</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 69.

<sup>25</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 91.

<sup>26</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 92.

<sup>27</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 92.

<sup>28</sup> Bassham, “Feminist legal theory”, 294.

<sup>29</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 91.

<sup>30</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 91.

<sup>31</sup> Mikkola, “Feminist Perspectives on Sex and Gender”.

<sup>32</sup> Holzer, L., Legal gender recognition in times of change at the European Court of Human Rights, *ERA Forum* 23, 2022,169.

<sup>33</sup> Holzer, “Legal gender recognition in times of change”, 169.

<sup>34</sup> Eckert and McConnell-Ginet, “Language and Gender”, 10.

<sup>35</sup> Mikkola, “Feminist Perspectives on Sex and Gender”.

<sup>36</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 67.

<sup>37</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 67.

sex”.<sup>38</sup> Social norms must be based on biological facts.<sup>39</sup> Social changes cannot impact “the fundamental biological nature of human beings”.<sup>40</sup> Biology is “fixed” and “unchanging”.<sup>41</sup> Such biological arguments were used against the emancipation of women as “proof of women's 'natural' inferiority”.<sup>42</sup>

Regarding the definition of gender, we will start with Simone de Beauvoir's renowned statement in *The Second Sex* that “one is not born a woman, but rather becomes one”.<sup>43</sup> One can add that the same applies to men.<sup>44</sup> “The ritual announcement at birth” instantly transforms “it” into “she” or “he”.<sup>45</sup> According to Butler,

“The mark of gender appears to ‘qualify’ bodies as human bodies; the moment in which an infant becomes humanized is when the question, ‘is it a boy or girl?’ is answered.”<sup>46</sup>

After birth, the child is thus destined “for a lifelong process of gendering, as the child becomes, and learns how to be, male or female”.<sup>47</sup> It is a never-ending process<sup>48</sup> in which numerous “symbolic resources” such as names and clothing are present.<sup>49</sup> Butler, in their book *Gender Trouble*, gives the following assessment of de Beauvoir's aforementioned statement:

“Beauvoir meant merely to suggest that the category of women is a variable cultural accomplishment, a set of meanings taken on or taken up within a cultural field, and that no one is born with a gender—gender is always acquired. On the other hand, Beauvoir was willing to affirm that one is born with a sex (...). But sex does not cause gender, and gender cannot be understood to reflect or express sex (...).”<sup>50</sup>

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<sup>38</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 68.

<sup>39</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 68.

<sup>40</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 68.

<sup>41</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 68.

<sup>42</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 68.

<sup>43</sup> Butler, “Gender Trouble”, 141.

<sup>44</sup> Eckert and McConnell-Ginet, “Language and Gender”, 15.

<sup>45</sup> Eckert and McConnell-Ginet, “Language and Gender”, 15.

<sup>46</sup> Butler, “Gender Trouble”, 141.

<sup>47</sup> Eckert and McConnell-Ginet, “Language and Gender”, 16.

<sup>48</sup> Eckert and McConnell-Ginet, “Language and Gender”, 15.

<sup>49</sup> Eckert and McConnell-Ginet, “Language and Gender”, 16.

<sup>50</sup> Butler, “Gender Trouble”, 142.

The prevailing opinion is that gender is “a social manifestation or construction”<sup>51</sup> or “a cultural construct”, therefore subject to social change.<sup>52</sup>

According to Butler, gender is not something we are born with but “something we perform”.<sup>53</sup> Butler agrees with Beauvoir’s assessment that gender is not a noun or a “static cultural marker” but an activity.<sup>54</sup> The concept of woman is “a term in process”, something that is under construction.<sup>55</sup> In this regard, Butler agrees with other post-structural feminists who believe that the concept of gender is not finally determined but is “an open site of contestation of meaning”.<sup>56</sup> Gender does not denote “a stable identity”; gender is an identity loosely established in time “instituted in an exterior space through a stylized repetition of acts”.<sup>57</sup> Post-structuralists generally do not view the subject as a place of stability but as fluidity and transformation.<sup>58</sup>

“The view that gender is performative sought to show that what we take to be an internal essence of gender is manufactured through a sustained set of acts, posited through the gendered stylization of the body”.<sup>59</sup>

Butler questions the very distinction between sex and gender as unintelligible.<sup>60</sup> Gender, like sex, is culturally/politically based,<sup>61</sup> it does not reflect the distinction between culture and nature.<sup>62</sup> What is the utility of such a distinction?<sup>63</sup>

“If the immutable character of sex is contested, perhaps this construct called ‘sex’ is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.”

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<sup>51</sup> Grenfell, “Making Sex: Law’s Narratives of Sex, Gender and Identity”, 90.

<sup>52</sup> Rhode, “Justice and Gender”, 3.

<sup>53</sup> Eckert and McConnell-Ginet, “Language and Gender”, 10.

<sup>54</sup> Butler, “Gender Trouble”, 143.

<sup>55</sup> Butler, “Gender Trouble”, 43.

<sup>56</sup> Grenfell, “Making Sex: Law’s Narratives of Sex, Gender and Identity”, 94.

<sup>57</sup> Butler, “Gender Trouble”, 179.

<sup>58</sup> Grenfell, “Making Sex: Law’s Narratives of Sex, Gender and Identity”, 95.

<sup>59</sup> Butler, “Gender Trouble”, XV.

<sup>60</sup> Mikkola, “Feminist Perspectives on Sex and Gender”.

<sup>61</sup> Grenfell, “Making Sex: Law’s Narratives of Sex, Gender and Identity”, 94.

<sup>62</sup> Grenfell, “Making Sex: Law’s Narratives of Sex, Gender and Identity”, 95.

<sup>63</sup> Grenfell, “Making Sex: Law’s Narratives of Sex, Gender and Identity”, 96.

<sup>64</sup> Butler, “Gender Trouble”, 10–11.

The definition of gender as a “cultural interpretation of sex” then makes no sense since sex itself is already a “gender category”.<sup>65</sup> Thus, according to Butler, gender, which was initially intended to challenge the assumption that biology is destiny, turned out to be an unstable concept.<sup>66</sup>

Laura Grenfell also writes about the “social constructionist view of sex”.<sup>67</sup> This is an approach that she puts alongside the dominant view of sex as a biological category. A social constructionist view of sex emphasises that the term sex is not universal but historical and political since its meaning changes depending on the time and cultures in which it appears. Grenfell highlights Thomas Laqueur<sup>68</sup> among the authors who advocated this approach, according to whom the dominant meaning of sex only emerged in Europe in the 18th century<sup>69</sup> at the time of the emergence of the social contract theory as a way of explaining why women do not participate in political life.<sup>70</sup> Authors found support in the anatomical findings of the time, according to which women were inferior to men; the sexes were considered asymmetrical and belonged to opposing spheres: women in the private sphere and men in the public sphere.<sup>71</sup>

At the end of this section of the paper, we must point out that it is scientifically impossible to determine precise objective criteria for establishing the sex of a person.<sup>72</sup> Only based on our cultural beliefs can we determine the requirements that make an individual a member of a particular sex - a specific “combination of anatomical, endocrine and chromosomal features”.<sup>73</sup> Science can only help us decide, but only our beliefs define it.<sup>74</sup> In addition to the “dichotomous male and female prototypes”, science also knows numerous individuals who do not fit in. Science offers us dichotomous male and female prototypes but, at the same time, gives us numerous individuals who do not fit into these prototypes in various ways.<sup>75</sup> Thus, for example, one in a thousand children are born with bodies different from standard prototypes.<sup>76</sup>

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<sup>65</sup> Butler, “Gender Trouble”, 10–11.

<sup>66</sup> Butler, “Gender Trouble”, 9-10.

<sup>67</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 67.

<sup>68</sup> Laqueur, T., *Making Sex: Body and Gender from the Greeks to Freud*, Cambridge, Mass: Harvard University Press, 1990 according to Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 69.

<sup>69</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 69.

<sup>70</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 69.

<sup>71</sup> Grenfell, “Making Sex: Law's Narratives of Sex, Gender and Identity”, 69.

<sup>72</sup> Eckert and McConnell-Ginet, “Language and Gender”, 10.

<sup>73</sup> Eckert and McConnell-Ginet, “Language and Gender”, 10.

<sup>74</sup> Eckert and McConnell-Ginet, “Language and Gender”, 10.

<sup>75</sup> Eckert and McConnell-Ginet, “Language and Gender”, 11.

<sup>76</sup> Eckert and McConnell-Ginet, “Language and Gender”, 11.

At the end of this section of the paper, we can conclude that sex (biological, stable<sup>77</sup>) and gender (culturally constructed, the result of upbringing, fluid,<sup>78</sup> subjective<sup>79</sup>) are conventionally viewed today as different concepts.<sup>80</sup> However, as we have seen, there are already well-developed feminist critiques that question this dominant understanding, question existing definitions and the usefulness of the distinction itself. The distinction between the biological and the social is still unclear.<sup>81</sup>

### III. Gender and gender identity in Croatian legislation

To get an answer to the question from the title of the paper on the challenge of the integration of terms gender and gender identity into Croatian legislation, or whether gender and gender identity are desirable terms of Croatian legislation, we will focus on the regulations containing the mentioned terms, which have been adopted in Croatia in the last twenty years. Namely, in the last two decades, a relevant gender equality legal framework began to be built in Croatia. Until then, gender equality was not explicitly stated in the Constitution of the Republic of Croatia, nor was there a special legal framework for this area. This is not surprising, considering the social and political war and post-war circumstances during the period of the first ten years of Croatian independence, in which gender and gender equality were not considered as essential public issues.<sup>82</sup> However, even in this time some positive changes has been made, due to the mix of internal (strong women's organizations) and external factors (the 1995 UN Conference on Women, the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women).<sup>83</sup>

Croatia adopted its democratic Constitution in 1990 and its "Christmas" Constitution<sup>84</sup> does not explicitly mention the term gender. Instead, the

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<sup>77</sup> Grenfell, "Making Sex: Law's Narratives of Sex, Gender and Identity", 90.

<sup>78</sup> Eckert and McConnell-Ginet, "Language and Gender", 10.

<sup>79</sup> Grenfell, "Making Sex: Law's Narratives of Sex, Gender and Identity", 90.

<sup>80</sup> Grenfell, "Making Sex: Law's Narratives of Sex, Gender and Identity", 90.

<sup>81</sup> Eckert and McConnell-Ginet, "Language and Gender", 10.

<sup>82</sup> Dobrotić, I., Matković, T., Zrinščak, S., Gender Equality Policies and Practices in Croatia – The Interplay of Transition and Late Europeanization, *Social Policy & Administration*, Vol. 47, No. 2, 2013, 224.

<sup>83</sup> Blagojević, A., The impact of the process of Europeanization of Gender Equality in Croatia, *Iustinianus Primus Law Review*, Rev. 15, 1, 2024, 5.

<sup>84</sup> The Constitution of the Republic of Croatia, Official Gazette (*Narodne novine*), 56/1990, 135/1997, 8/1998 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001, 76/2010, 85/2010 – consolidated text, 5/2014 – Decision of the Constitutional Court of the Republic of Croatia

constitutional terminology refers to "sex" (*spol*); it emphasizes the principle of equality of all before the law and protection from discrimination, among other things, regardless of sex (Art. 14). The Constitution is founded on a certain number of the highest values of the constitutional order, and the list of the highest values from the Art. 3. of the Constitution,<sup>85</sup> which are the grounds for the interpretation of the Constitution, has been expanded with the value of sex equality in the context of the Change of the Constitution in 2000.<sup>86</sup> In addition, it should be emphasized that all translations of the mentioned constitutional provisions into English properly include the term "gender".

The beginning of 2000 was also marked by the left-oriented coalition coming to power, with the EU membership as an important political goal, that opened the door for the gender equality area. As a consequence, Croatia started to create the relevant legal and institutional gender equality framework. The umbrella law for this area, adopted in 2003<sup>87</sup> in the context of the process of Europeanisation - then repealed by the Constitutional Court due to formal unconstitutionality,<sup>88</sup> and then adopted and further improved in accordance with European standards in 2008,<sup>89</sup> is called the "Sex Equality Act", and the umbrella independent institution for monitoring the law's implementation is called the "ombudsperson for sex equality". Similarly, most other laws use the terms "sex" and "sex equality", although, as we mentioned, in the translation into English the terms gender and gender equality are regularly used.

Nevertheless, in the last few years, the gradual entry terms "gender" and "gender identity" into Croatian legislation is visible, and it is especially important to emphasise that the Constitutional Court of the Republic of Croatia has expressly established in its practice that both sex and gender diversity are under the protection of the Constitution.

Everything started in 2003 with the adoption of the Sex Equality Act, which states, in Art. 14. paragraph 3 dealing with the field of education, that contents related to the field of education should encourage the elimination of sex inequality

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<sup>85</sup> The highest values (prior 2000 Change of the Constitution) included: "Freedom, equal rights, national equality, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system." Art. 3 of the 1990 Constitution of the Republic of Croatia.

<sup>86</sup> According to the prominent constitution-makers, the argument why Art. 3 of the 1990 Constitution didn't entailed the value of sex equality was that "sex equality was implicitly included in the principles of equality before law", and that the development showed that it was not enough and that additional special guarantees were needed. Smerdel, B., *Ustavno uređenje europske Hrvatske*, Narodne novine, Zagreb, 2013, 292.

<sup>87</sup> Sex Equality Act, Official Gazette (*Narodne novine*), 116/2003.

<sup>88</sup> Constitutional Court of the Republic of Croatia, Decision U-I-2696/2003 from 16 January 2008, Official Gazette (*Narodne novine*), 14/2008. As a organic law, the 2003 Sex Equality Act was not adopted with the required majority (majority vote of all MPs) in the Croatian Parliament.

<sup>89</sup> Sex Equality Act, Official Gazette (*Narodne novine*), 82/2008, 69/2017.

and *gender stereotypes* in education, as well as respect for *gender aspects* in all educational and teaching areas.

In Croatian legislation, several laws use the term “gender” to remove discriminatory elements. The provision on gender neutrality, usually placed in the introductory part of the regulation, is widely applied, as well as the note that the terms used, with gender meaning, relate equally to the female and male genders.<sup>90</sup>

In the context of the negotiation process and acceptance of the corresponding EU gender equality *acquis*, special antidiscrimination legislative framework has been enacted with the leading role of the 2008 Anti-discrimination Act.<sup>91</sup> The term “gender identity” is explicitly mentioned in Art. 1 of the Anti-discrimination Act, stating that this Act’s purpose is to ensure the protection and promotion of equality as one of the highest values of the Croatian constitutional order, to create prerequisites for the realisation of equal rights opportunities, and to regulate protection against discrimination based on several grounds, including *gender identity*.<sup>92</sup> At this point it is necessary to mention that the announcement of the adoption of this Act resulted in criticism and even resistance from the Catholic Church, under the pretext that this Act introduces the gender ideology into Croatian society. Still, the government’s main argument was that the law must be adopted in order “to buy” EU membership.<sup>93</sup>

In 2011, the term gender identity has been incorporated in the corpus of the Criminal Code,<sup>94</sup> in the provisions on the violation of equality (Art. 125) and on the public incitement to violence and hatred (Art. 325).

The term gender identity is also part of the State Registry Act since its amendments of 2013.<sup>95</sup> Following Art. 9(a), a change of sex as a change of data in the basic registration is entered in the register of births, following the decision of the competent office. The decision to register a change of sex in the birth registry is made following the opinion of the competent authority on the change of sex or on living in a different *gender identity*, in accordance with the medical documentation of the competent doctor or health institution. As we will see later, this legal amendment had its epilogue before the Constitutional Court in the form of confirmation of its constitutionality.

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<sup>90</sup> See, for example, Art. 3 of the Labour Act, Official Gazette (*Narodne novine*), 93/2014, 127/2017, 98/2019, 151/2022, 46/2023, 64/2023), Art. 1 para. 2 of the Family Act, Official Gazette (*Narodne novine*), 103/2015, 98/2019, 49/2023, 156/2023).

<sup>91</sup> The Anti-discrimination Act, Official Gazette (*Narodne novine*), 85/2008, 112/2012.

<sup>92</sup> Other grounds include, for example, age, health condition, race or ethnicity, religion, political or other belief, language, national or social origin, property status, union membership, education, social position, etc.

<sup>93</sup> Dobrotić, Matković, and Zrinščak, “Gender Equality Policies and Practices in Croatia”, 226.

<sup>94</sup> Criminal Code, Official Gazette (*Narodne novine*), 125/2011, 114/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024.

<sup>95</sup> State Registry Act, Official Gazette (*Narodne novine*), 96/1993, 76/2013, 98/2019, 132/2022.

The term ‘gender groups’ is mentioned in the Rules of Procedure of the Croatian Parliament (2013),<sup>96</sup> which in Art. 240, paragraph 4 envisages the possibility of issuing a reprimand with the deprivation of the floor to a representative who insults, among other things, sexual, *gender*, and other groups.

The provisions on gender and gender identity are also parts of the Electronic Media Act,<sup>97</sup> related to the prohibition of discrimination based on, *inter alia*, gender identity,<sup>98</sup> but also in the context of allocating funds to projects and programs that promote awareness of equality of gender identities and sexual orientation.<sup>99</sup>

Furthermore, the phrase ‘gender identity’ can also be found in the the Act on International and Temporary Protection (related to the nondiscrimination, support, and protection for applicants given their particular circumstances, including gender identity; Art. 5, Art. 15 and Art. 22),<sup>100</sup> as well in the Act on the Civil Protection System (related to the prohibition of discrimination in providing the necessary assistance regardless of, among other things, gender identity; Art. 7 para. 3).<sup>101</sup>

Following the legal framework, the vision of establishing gender equality is part of the key strategic documents. Following the National Development Strategy of the Republic of Croatia until 2030,<sup>102</sup> which contains the vision of establishing a society of equal opportunities for all,<sup>103</sup> the National Plan for Gender Equality for the period until 2027<sup>104</sup> states that the promotion of women's rights and gender equality is a permanent task that requires the implementation of systematic campaigns and many other measures and actions aimed at raising the awareness and knowledge of the public and other relevant participants about the

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<sup>96</sup> Rules of Procedure of the Croatian Parliament, Official Gazette (*Narodne novine*), 81/2013, 113/2016, 69/2017, 29/2018, 53/2020, 119/2020, 123/2020, 86/2023.

<sup>97</sup> Electronic Media Act, Official Gazette (*Narodne novine*), 111/2012, 114/2022. The previous 2013 Electronic Media Act had almost identical provisions on gender and gender identity.

<sup>98</sup> Art. 14. para. 2. of the Electronic Media Act

<sup>99</sup> Art. 71. para. 2 of the Electronic Media Act

<sup>100</sup> Act on International and Temporary Protection, Official Gazette (*Narodne novine*), 70/2015, 127/2017, 33/2023.

<sup>101</sup> Act on the Civil Protection System, Official Gazette (*Narodne novine*), 82/2015, 118/2018, 31/2020, 20/2021, 114/2022.

<sup>102</sup> National Development Strategy of the Republic of Croatia until 2030, Official Gazette (*Narodne novine*), 13/2021.

<sup>103</sup> Part I of the Strategy states that the vision of Croatia in 2030 is a competitive, innovative and safe country with a recognizable identity and culture, a country with preserved resources, quality living conditions, and equal opportunities for all.

<sup>104</sup> National Plan for Gender Equality for the period until 2027, available at: <https://mup.gov.hr/UserDocsImages/2023/7/Nacionalni%20plan%20za%20ravnopravnost%20spolova%2C%20za%20razdoblje%20do%202027..pdf> [accessed 15 January 2024]

unacceptability of any form of gender discrimination.<sup>105</sup> Bearing in mind this vision and task, it may not be out of place to mention that work on the adoption of this strategic document began in 2015, and practically until the adoption of the plan at the beginning of 2023 we had a multi-year period of silence in this area.

#### IV. PROTECTION OF GENDER DIVERSITY IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

As we already outlined, although gender and gender equality are not explicitly stated in the Constitution of the Republic of Croatia, the Constitutional Court established in its practice that both sexual and gender diversity are under the protection of the Constitution. Although the Constitutional Court's practice in this regard is not rich, it is certainly sufficient for the conclusion on the constitutional protection of gender equality and gender identity.

In this context, the first important moment happened in 2013, marked by the national constitutional referendum on the definition of marriage. Namely, since the 2000 Change of the Constitution, the citizens' initiative referendum implies that when so requested by 10 per cent of the total electorate the Parliament can call a referendum.<sup>106</sup> The referendum can be initiated on any issue the Parliament chooses to call on.<sup>107</sup> Since its constitutionalization, only one citizens' initiative has been successful in amending the Constitution. It was an initiative that detected many problems in the legal framework of a referendum.<sup>108</sup> The referendum was proposed by the citizens' initiative "In the Name of the Family" (*U ime obitelji*),<sup>109</sup> which collected a sufficient number of voter's signatures. The referendum was held on 1 December 2013,<sup>110</sup> and the definition of marriage as being the union of a woman and a man became a part of the Constitution.<sup>111</sup> One of very important<sup>112</sup> decisions

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<sup>105</sup> Part I of the National Plan (Medium-term Vision of Development)

<sup>106</sup> Art. 87 para 3 of the Constitution of the Republic of Croatia

<sup>107</sup> Art. 87 para 1 of the Constitution of the Republic of Croatia

<sup>108</sup> Blagojević, A., Constitutionalization of the Citizen's Initiatives Referendum in Croatia: One Step Forward, Many Steps Back, in *Iustinianus Primus Law Review*, Special Issue, 15, 2020, 13, available at: <http://pf.ukim.edu.mk/wp-content/uploads/2020/05/3.-Anita-Blagojevic.pdf>.

<sup>109</sup> More about the 2013 marriage referendum and the role of the citizen's initiative "In the Name of the Family", in: Vučković Juroš, T., Dobrotić, I., Flego, S., The Rise of the Anti-Gender Movement in Croatia and the 2013 Marriage Referendum, *Europe-Asia Studies*, Vol. 70, Issue 9, 2020, available at: <https://www.tandfonline.com/doi/abs/10.1080/09668136.2020.1820956> [accessed January 20, 2025]

<sup>110</sup> The referendum was marked with a relatively modest voters' turnout of almost 38 per cent of voters, of which 66 per cent voted for the proposal to amend the Constitution.

<sup>111</sup> Art. 62 para 2 of the Constitution of the Republic of Croatia

<sup>112</sup> More about this: <sup>112</sup> Gardašević, Đ., Constitutional Interpretation of Direct Democracy in Croatia, *Iustinianus Primus Law Review*, 12 (7), 2015.

of the Constitutional Court related to this referendum is its Communication on the citizen's referendum on the definition on marriage.<sup>113</sup> What is important for our topic is that the Court has concluded that in the Republic of Croatia sexual and gender diversity is protected by the Constitution, i.e., that the rights of all persons, regardless of sex and gender, to respect and legal protection of their personal and family life and their human dignity are protected. According to the Courts' view, "these legal facts are today considered a permanent value of the Croatian constitutional state."<sup>114</sup>

This position of the Constitutional Court was clearly repeated in its Ruling from December of 2023,<sup>115</sup> when the Court rejected the proposals<sup>116</sup> to start the procedure for assessing the constitutionality of the disputed provisions of the Act on Life Partnerships of Persons of the Same Sex. The Constitutional Court reiterates that, in accordance with Articles 3, 14 and 35 of the Constitution, the protection of sexual and gender diversity, as well as the right of all persons, regardless of sex and sexual orientation, to respect and legal protection of their personal and family life and their dignity, is "a permanent value of the Croatian constitutional state."<sup>117</sup>

Three years earlier, the Constitutional Court protected the constitutional right to gender identity in its Ruling when it rejected the proposal<sup>118</sup> for the assessment of the constitutionality of the 2013 amendments to the State Registry Act (with a dissenting opinion of the Constitutional Court's judge Miroslav Šumanović).<sup>119</sup> Recalling the case from 2014,<sup>120</sup> in which, considering the issue of the violation of the constitutional rights of a minor whose request for a gender change was rejected in the administrative procedure, the Court adopted the applicant's constitutional complaint, stating that "it is an indisputable fact that in the Republic of Croatia there is a legal right to register a change of sex in the birth register and in in the case of 'life in another gender identity'. At the end of such a state of affairs, the Constitutional Court remains to conclude that this legal right, after the Croatian Parliament has recognized it, entails the obligation of the state to ensure its effective implementation in practice",<sup>121</sup> the Court rejected the proposal

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<sup>113</sup> Constitutional Court of the Republic of Croatia, Communication on the Citizens' Constitutional Referendum on the Definition of Marriage, 14 November 2013, Official Gazette (*Narodne novine*), 138/2013.

<sup>114</sup> Point 7.2 of the Communication on the Citizens' Constitutional Referendum on the Definition of Marriage

<sup>115</sup> Constitutional Court of the Republic of Croatia, Ruling U-I-4639/2014, U-I-5245/2014, U-I-7660/2014, December 19, 2023

<sup>116</sup> There were three proposals – two of them were submitted to the Constitutional Court in July of 2014, and one in December of 2014.

<sup>117</sup> Point 33 of the Ruling U-I-4639/2014, U-I-5245/2014, U-I-7660/2014

<sup>118</sup> The proposal was submitted to the Constitutional Court in October of 2018.

<sup>119</sup> Constitutional Court of the Republic of Croatia, Ruling U-I-3594/2018, July 13, 2021

<sup>120</sup> Constitutional Court of the Republic of Croatia, Decision U-III B-3173/2012, March 18, 2014

<sup>121</sup> Point 14.1 of the Decision U U-III B-3173/2012

for the assessment of the constitutionality of Art. 9(a) of the State Registry Act. The proponent claimed that the Act introduces a new constitutional right, which right is neither established nor developed by the Constitution, nor by any other organic law because "the Constitution of the Republic of Croatia does not recognize gender identity, but only sex identity."<sup>122</sup> The Court found that the proponent's thesis is only partially correct, because, although the concept of gender does not explicitly exist in the Constitution, the Constitution prohibits discrimination on the basis of a series of exhaustively listed possible discriminatory grounds (including discrimination on the basis of sex), but it also prohibits discrimination on the basis of "other characteristics" (Art 14, para 1). The Constitution also requires equality of all before the law (Art 14, para 2), and in addition, in Article 35, it guarantees everyone respect for and legal protection of their personal and family life, dignity, reputation and honor - so this undoubtedly also refers to the personality and privacy of those whose sex has not been irreversibly and completely changed, but who live as if it has (in a "different gender identity").<sup>123</sup> We may conclude that the Constitutional Court derived the right to gender identity from the constitutional rights to personal and family life and the right to non-discrimination.

## V. CONCLUSION

With this paper, we have tried to prove that despite the adoption of relevant EU gender equality *acquis* and the development of a relatively good legislative framework during the last two decades, a clear position has not yet been taken in Croatia in the context of the application of the term "gender" and "gender identity" in the legislation. The Constitution of the Republic of Croatia uses the term "sex" and states that sex equality is one of the highest values of the constitutional order, and guarantees equality and protection from discrimination, among other things, based on "sex". The majority of laws also use the term "sex". Nevertheless, as we have shown, in the last few years the gradual entry of term "gender" and "gender identity" into Croatian legislation is visible, and it is especially important to emphasize that the Constitutional Court of the Republic of Croatia has expressly established in its practice that both sexual and gender diversity are protected by the Constitution.

Unfortunately, it turned out that one of the problems in Croatia is the occasional manipulation of the terminology. One of the sad moments connected with the manipulations with 'gender ideology agenda' is related to the institution of the citizens' initiative referendum, which marked the spring (May) of 2018 - it

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<sup>122</sup> Point 9 of the Ruling U-I-3594/2018

<sup>123</sup> Point 16 of the Ruling U-I-3594/2018

was the initiative to abolish the so-called Istanbul Convention<sup>124</sup> (Council of Europe Convention on preventing and combating violence against women and domestic violence), which Croatia ratified in April 2018.<sup>125</sup> The initiative failed to collect sufficient signatures (although it was close to the required 10% of the total number of voters!). However, although the entire campaign was based on the spread of false information about gender ideology as the main leitmotif of the ratification of that international document, it should be noted that precisely under the pressure of the conservative part of the public, the document on the ratification of the Convention included the Government's interpretive statement stating that the provisions of the Convention do not contain the obligation to introduce gender ideology into the Croatian legal and educational system, as well as the obligation to change the constitutional definition of marriage.

This brief overview leads us to conclude that terminology is, of course, very important, but the content and consistent application of that content is much more important. The main question that we can and should ask ourselves at the end is why in Croatia, despite a relatively high-quality legal and institutional framework, there is still a whole series of challenges in the field of implementation of that framework, especially in the areas of work and employment, political participation of women, gender stereotypes, violence, sexism, sexual and reproductive health? Why has Croatia been at the bottom of the EU in terms of indicators of gender equality, for a number of years,<sup>126</sup> with particularly devastating data in the field of political participation and power? It is not enough to change the legal framework and to adopt proper terminology. Still, it is necessary to accept the spirit of those regulations, and to work on promoting awareness and knowledge about gender equality and the non-acceptance and intolerance of any forms of gender discrimination.

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<sup>124</sup> More about the Initiative "The Truth About Istanbul" (Istina o Istanbulskoj), see: <https://istinaoistanbulskoj.info/neprihvatljivo-u-istanbulskoj-konvenciji> [accessed January 15, 2025]

<sup>125</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Official Gazette (*Narodne novine*) – International Documents, 27/2018.

<sup>126</sup> For example, see the newest gender equality score for Croatia, made by EIGE (European Institute for Gender Equality) – in 2024 Croatia scores 59.7 points out of 100, ranking 24th in the EU (!), with the biggest step backwards in the domain of power (48.6 points out of 100). European Institute for Gender Equality, Gender Equality Index - Croatia, 2024, available at: <https://eige.europa.eu/gender-equality-index/2024/country/HR> [accessed 20 January 2025]

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