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**Gender, Equality and Discrimination  
The regulatory framework  
and the Constitutional case-law of Croatia**

**REPORT BY**

**Ms Mirjana STRESEC**  
**Senior Legal Advisor, Constitutional Court of the Republic of  
Croatia**

## Introduction

If today were 1900 in Croatia and you were a woman, you would neither be allowed to study nor would you have the right to vote.

Women in Croatia acquired the right to vote on 11 August 1945.

On 13 June 2016 the Venice Commission issued a compilation of its opinions and reports concerning gender equality.<sup>1</sup>

On 11 October 2017 the European Institute for Gender Equality (hereinafter: EIGE) launched the Gender Equality Index (hereinafter: GEX) for 2017. The GEX was developed by the EIGE. The GEX enables an assessment of the progress made towards achieving gender equality in the European Union. It covers six basic areas: work, money, knowledge, time, power and health. It provides a score between 1 and 100, with 100 marking the best situation.<sup>2</sup>

The GEX for Croatia is 53.1, i.e. Croatia takes the fifth place, but starting from the bottom. At the top of rankings is, Sweden (GEX 82.6), which is followed by Denmark, Finland and the Netherlands.

Croatia has scored good result when it comes to health (83.3 points), money (69.9 points) and work (69.4 points), but much worse when it comes to power (28.5 points).

On 2 May 2018 Council of Europe launched Gender Equality Strategy 2018-2023 starting with the following introduction:

*1. Achieving gender equality is central to the fulfilment of the Council of Europe's mission: safeguarding human rights, upholding democracy and preserving the rule of law.*

*(...)*

*3. Even if progress is visible (...) effective equality between women and men is far from being a reality. (...) Regular monitoring and research show that progress is very slow as regards women's political participation, access to justice and the elimination of harmful gender stereotypes and sexism. Violence against women remains one of the most pronounced expressions of the unequal power relations between women and men.<sup>3</sup>*

On 12 June 2018 the Office for Gender Equality of the Republic of Croatia organised the presentation and distribution of the Croatian edition of the Council of Europe Strategy for Gender Equality 2018-2023 in the national Parliament. On the same date Croatia ratified the Istanbul Convention.

Following the introductory information, let us have a look at the Croatian regulatory framework and jurisprudence of the Constitutional Court of the Republic of Croatia (hereinafter, the "CC") regarding gender and transgender equality.

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<sup>1</sup> European Commission for Democracy through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports on Gender Equality, CDL-PI(2016)007, available at: [www.venice.coe.int](http://www.venice.coe.int).

<sup>2</sup> The GEX provides information on both the gender gaps and the overall performance of Member States and the EU-28 on average.

<sup>3</sup> Council of Europe Strategy for Gender Equality (2018 to 2023), p 5, available at: [www.coe.int](http://www.coe.int).

## Regulatory framework

The principles of equality and non-discrimination are embedded in the Constitution of the Republic of Croatia<sup>4</sup> (hereinafter: Constitution), numerous international treaties ratified by Croatia, that form an integral part of the domestic legal system, and statutory law.

## Constitution

First of all, the Republic of Croatia is founded on a certain number of values. In accordance with Article 3<sup>5</sup> of the Constitution gender equality is one of the highest values of the constitutional order of the Republic of Croatia, accompanied by e.g. equal rights, respect for human rights, the rule of law and a democratic multiparty system. A regulative role *sui generis* is given to the highest values of the constitutional order because they are grounds for the interpretation of the Constitution.

The Constitution prohibits any discrimination, including the gender one. Article 14 embodies the principle of the prohibition of discrimination on any grounds, and equality of all before the law. Paragraph 1 of Article 14 stipulates that each person in Croatia shall enjoy all rights and freedoms regardless of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, education, social status or other characteristics. It is a non-exhausted enumeration of prohibited discriminatory grounds. Paragraph 2 prescribes that all persons are equal before the law.

Furthermore, pursuant to Article 17 individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of Croatia or in the event of any natural disasters. However, the extent of such restrictions must be proportional to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, sex, language, religion, and either national or social origin.<sup>6</sup>

Article 39<sup>7</sup> of the Constitution prohibits the incitement to use of violence to national, racial or religious hatred, or any form of intolerance.

Finally, pursuant to Article 62 the state protects maternity, children and young people, and creates social, cultural, educational, material and other conditions promoting the exercise of the right to a decent life. Young people, mothers and persons with disabilities are entitled to special protection at work under Article 64 paragraph 3 of the Constitution.

## Treaties

A monistic approach to treaties is accepted in the Croatian legal system. Treaties have stronger legal force than laws adopted by the Croatian Parliament.<sup>8</sup> If there is inconsistency between a national law and a treaty, the courts and other bodies vested with state and public authority are bound to apply the treaty.

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<sup>4</sup> Official Gazette Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14.

<sup>5</sup> Article 3 of the Constitution reads: "*Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution.*"

<sup>6</sup> Article 17 paragraphs 1 and 2 of the Constitution.

<sup>7</sup> Article 39 of the Constitution reads: "*Any call for or incitement to war or use of violence, to national, racial or religious hatred, or any form of intolerance shall be prohibited and punishable by law.*"

<sup>8</sup> Article 134 of the Constitution.

The Republic of Croatia has ratified a large number of treaties at universal and regional level that are important for the protection of gender equality, *inter alia*:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- United Nations Convention on the Elimination of All Forms of Discrimination against Women;
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; and
- Workers with Family Responsibilities Convention of the International Labour Organization No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers;
- European Convention for the Protection of Human Rights and Fundamental Freedoms, including Protocol 12;
- Council of Europe Convention on Action against Trafficking in Human Beings; and
- Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

Furthermore, Croatia is a Member State of the European Union, and a number of directives have been implemented such as:

- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security;
- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding;
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); and
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

## Equality Legislation

The intensive legal development of the Croatian anti-discrimination law started approximately ten years ago, and has been influenced by universal and regional international law and by the European Union law.

The Anti-Discrimination Act<sup>9</sup> as a general act (*lex generalis*) and the Gender Equality Act<sup>10</sup> as a specialised act (*lex specialis*) are part of special anti-discrimination legislation, and both have been enacted due to the harmonisation of the Croatian legislation with international legal instruments and with the *acquis communautaire*.

The Anti-Discrimination Act prohibits discrimination on the grounds of, *inter alia*, sex, gender identity, and sexual orientation. The Act prohibits indirect and direct discrimination, harassment and sexual harassment, segregation and more serious forms of discrimination

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<sup>9</sup> Official Gazette Nos. 85/08 and 112/12.

<sup>10</sup> Official Gazette Nos. 82/08, 125/11, 20/12, 138/12 and 69/17.

(i.e. multiple discrimination, repeated discrimination, continued discrimination and discrimination with consequences particularly harmful for the victim). The Act applies to the conduct of all state bodies, bodies of local and regional self-government, legal persons vested with public authority, and to the conduct of all legal and natural persons particularly in areas such as work and working conditions; access to self-employment and occupation, education, science and sports; social security, health protection; judiciary and administration; housing and public informing and the media.

The Anti-discrimination Act grants the Ombudsperson powers as the central body for the elimination of discrimination based on any grounds, with the exception of discrimination against children – which is dealt with by the Ombudsperson for Children – and gender, sex and sexual orientation, which is dealt with by the Gender Equality Ombudsperson.<sup>11</sup>

The Gender Equality Act prohibits direct and indirect discrimination on the basis of sex, sexual orientation, marital and family status, and also with regard to access to and supply of goods and services. An instruction to discriminate, if it is done intentionally, is also treated as discrimination.

Moreover, provisions guaranteeing the principles of gender equality and non-discrimination can be found in numerous specialised acts:

- Family Act<sup>12</sup>;
- Same-Sex Life Partnership Act<sup>13</sup>;
- Act on Elections of Members to the Croatian Parliament<sup>14</sup>
- Local Elections Act<sup>15</sup>;
- Labour Act<sup>16</sup>;
- Act on Maternity and Parental Benefits<sup>17</sup>;
- Safety-at-Work Act<sup>18</sup>;
- Media Act<sup>19</sup>;
- Electronic Media Act<sup>20</sup>;
- Croatian Radio Television Act<sup>21</sup>;
- Criminal Code<sup>22</sup>;
- Protection Against Family Violence Act<sup>23</sup>;
- Act on the Rights of Victims of Sexual Violence during Armed Aggression on the Republic Croatia in the Homeland War<sup>24</sup>;
- Personal Name Act<sup>25</sup>;
- General Tax Act<sup>26</sup>;
- etc.

Let us briefly look at some of the laws and their provisions.

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<sup>11</sup> Article 19 paragraph 1 of the Gender Equality Act.

<sup>12</sup> Official Gazette No. 103/2015.

<sup>13</sup> Official Gazette No. 92/14.

<sup>14</sup> Official Gazette Nos. 116/99, 109/00, 53/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 19/15 and 104/15.

<sup>15</sup> Official Gazette Nos. 144/12 and 121/16.

<sup>16</sup> Official Gazette No. 93/14 and 127/17.

<sup>17</sup> Official Gazette Nos. 85/08, 110/08, 34/11, 54/13, 152/14 and 59/17.

<sup>18</sup> Official Gazette Nos. 71/14, 118/14 and 154/14.

<sup>19</sup> Official Gazette Nos. 59/04, 84/11 and 81/13.

<sup>20</sup> Official Gazette Nos. 153/09, 84/11, 94/13 and 136/13.

<sup>21</sup> Official Gazette Nos. 137/10, 76/12, 78/16, 46/17 and 73/17.

<sup>22</sup> Official Gazette Nos. 125/11, 144/12, 56/15, 61/15 and 101/17.

<sup>23</sup> Official Gazette No. 70/17.

<sup>24</sup> Official Gazette No. 64/15.

<sup>25</sup> Official Gazette No. 118/12 and 70/17.

<sup>26</sup> Official Gazette No. 115/16.

The Gender Equality Act provides that one sex is substantially under-represented if it accounts for less than 40% of representatives in political and public decision-making bodies (Article 12 paragraph 3). When drawing up and proposing lists of candidates for the election of representatives to the Croatian Parliament, for the election of members of representative bodies of units of local or regional self-government or for the elections to the European Parliament, political parties and other authorised entities submitting such lists shall observe the principle of gender equality and seek to achieve the balance in terms of the representation of women and men on such electoral lists (Article 15 paragraph 1). Almost the same provisions are repeated in Act on Elections of Members to the Croatian Parliament (Article 21.a). The Local Elections Act stipulates that the persons nominating the list of candidates have to act in conformity with the principle of gender equality in accordance with to the Gender Equality Act (Article 9 paragraph 3).

One of the basic principles of the Family Act, which regulates the marriage and the extramarital union between a man and a woman, is equality of women and men and the prohibition of discrimination on basis of sex and violence towards the partner.

The Same-sex Life Partnership Act regulates both registered and unregistered same-sex relationships that are based on the same principles as marriage. The Act prohibits all forms of discrimination, direct and indirect, based on same-sex life partnership, sexual orientation and gender identity, as well as all forms of violence in a family life relationship (Article 6).

Article 73 of the Same-sex Life Partnership Act prescribes the right to lodge a request for approval of temporary stay for family reunification for life partners in accordance with the special law, i.e. the International and Temporary Protection Act.<sup>27</sup> Moreover, under Article 22 paragraph 5 of the International and Temporary Protection Act, sexual orientation or gender identity falls within the notion of membership in a particular social group for asylum purposes.

According to the Personal Name Act everyone has the right to change the name (Article 6) without stating the reason, while returning to the last name before marriage or life partnership is equally regulated for spouses (Article 5) and for life partners (Article 5.a).

The provisions of General Tax Act and other tax regulations applicable to the spouse are applied to the extramarital partner, the life partner and the informal life partner in accordance with Article 15 paragraph 1 of the General Tax Act.

The Labour Act, prohibits direct and indirect discrimination in the field of work and working conditions, including criteria and conditions for recruitment and promotion, vocational training, advanced vocational training and retraining (Article 7 paragraph 4).

Family (or domestic) violence is treated as a misdemeanour and as a criminal offence.

Family violence includes, *inter alia*, physical and psychological violence, corporal punishment, sexual harassment and economic violence (Article 10 of the Protection against Family Violence Act).

Family violence is prescribed as a criminal offence in Article 179.a of the Criminal Code with up to three years' imprisonment.

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<sup>27</sup> Official Gazette Nos. 70/15 and 127/17.

Hate speech is covered by the criminal offence of incitement to violence and hatred. Article 325 paragraph 1 of the Criminal Code criminalises incitement to violence and hatred against a group of persons or a member of such a group on many grounds including gender, sexual orientation and gender identity, through press, radio, television, computer system or network or at a public gathering, with up to three years' imprisonment. Article 87 paragraph 21 also defines hate crime and considers it to be an aggravating circumstance unless the Criminal Code explicitly prescribes a heavier punishment for specific offences.

Both the Media Act (Article 3 paragraph 4) and the Electronic Media Act (Article 12 paragraph 2) have provisions prohibiting incitement to hatred based on several grounds, including sex and sexual orientation.

On top of that, Croatian Radio and Television is obliged to inform and educate about democracy, civil society and the culture of public dialogue and to contribute to the suppression of discrimination on any grounds in accordance with the Constitution and laws (Article 9 paragraph 2, item 10 of the Croatian Radio Television Act).

Finally, with reference to sexual violence against girls and women and men after the fall of the Croatian City of Vukovar in 1991, and later on during detention or captivity in the enemy camps or prisons outside Croatia during the Homeland War (period from 5 August 1990 to 30 June 1995), Croatia enacted in 2015 the Act on the Rights of Victims of Sexual Violence during Armed Aggression on the Republic Croatia in the Homeland War. This legislative measure was passed 20 years too late due to the fact that the victims were ashamed and afraid of stigma. The Act has been based on a number of the United Nations' Resolutions, the Istanbul Convention and Directive 2012/29/EU of the European Parliament and Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. The Act regulates the status and rights of sexual violence victims who are entitled to, *inter alia*, psycho-social help, legal aid, health care and damages.

Obviously the Republic of Croatia has enacted comprehensive non-discriminatory legislation in order to fight against discrimination on any grounds, including gender. However, there is still room for improvement.

### **Constitutional Court's case law**

The next important step in the fight against gender and transgender discrimination is the Constitutional Court's case law.<sup>28</sup>

However, since 1991 not many cases have been raised before the Constitutional Court (hereinafter: CC) regarding gender equality. The legal issues concerned were connected to gender quotas in elections of Members to the Croatian Parliament, equal pension entitlements for men and women,<sup>29</sup> abortion, violence against women, referendum on marriage, name and gender data change in registers and certificates, and hate speech.

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<sup>28</sup> Pursuant to Article 2 paragraph 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette Nos. 99/99, 29/99 and 42/09 – consolidated text), the Constitutional Court guarantees compliance with and the application of the Constitution and bases its work on the provisions of the Constitution and the Constitutional Act on the Constitutional Court of the Republic of Croatia.

<sup>29</sup> In 2007 the CC reviewed constitutionality of a few Articles of the Pension Insurance Act that prescribed different age for men and women regarding the same pension entitlements. The CC rejected unequal treatment based merely on gender as being contrary to equal rights and gender equality as the highest value of the constitutional order, as well as to the prohibition of discrimination and equality of all before the law (Decision and ruling No: U-I-1152/2000 *et al.* of 18 April 2007, Official Gazette No. 43/07, Summary in English is available at: [www.usud.hr](http://www.usud.hr)). See Report "Constitutional protection of social rights in Republic of Croatia an overview of Mirjana Stresec", 7th meeting of the Joint Council on Constitutional Justice - "Mini-conference" on Social rights (Tirana, 27 June 2008) available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2008\)003-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2008)003-e).

Due to the fact that the GEX for Croatia in area of power is only 28.5 points (see Introduction), I will start with the case where the CC dealt with gender quotas on electoral lists for Members to the Croatian Parliament (hereinafter: MPs).

## **So, are women in Croatia powerless?**

### **The Gender Quotas for Elections of MPs Case<sup>30</sup>**

In 2015, the CC reviewed the constitutionality of certain Articles of the Act on Elections of Members to the Croatian Parliament, including the one regarding the mandatory gender quotas in electoral lists for MPs.<sup>31</sup>

The CC held that the legal measure, according to which electoral list must include a minimum of 40% of members of each gender, are in conformity with the Constitution, i.e. requirements stemming from the rule of law, as well as proportional limitation of freedom of candidacy in elections. Thus, this part of Article remained in force.

However, the CC repealed the part providing that lists that do not meet this legal requirement are not valid.<sup>32</sup>

The CC invoked the position of the European Court of Human Rights (hereinafter: ECtHR) that the list of candidates for the judge of the ECtHR, which meet all the requirements provided by Article 21 of the European Convention on Human Rights (hereinafter: ECHR) cannot be rejected by the Parliamentary Assembly only on the basis of gender-related issues,<sup>33</sup> as well as on the importance of ability of potential candidates.

Furthermore, one of the reasons was that the Gender Equality Act had already prescribed a high misdemeanour fine for failure to meet gender quota in the electoral lists for the Croatian Parliament. Therefore a double punishment or the existence of two sanctions in two different laws was neither justified nor proportional.

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<sup>30</sup> Decision and ruling No: U-I-1397/2015 *et al.* of 24 September 2015 (Official Gazette no. 104/2015), Summary in English is available at: [www.usud.hr](http://www.usud.hr).

<sup>31</sup> Article 21.a of the Act on Elections of Members to the Croatian Parliament (Official Gazette Nos. 116/99, 109/00, 53/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11 and 19/15) read:

"Article 21.a

- (1) At the time of establishing and nominating party slates and independent slates for the election of representatives to the Parliament, the persons nominating the slates shall act in conformity with the principle of gender equality and bear in mind a balanced representation of women and men on such slates.
- (2) The slate for the election of representatives to the Parliament is in line with the principles referred to in paragraph 1 of this Article if the slate includes at least 40% of persons of each gender. A slate that does not include at least 40% of persons of each gender shall not be valid."

<sup>32</sup> The second sentence of Article 21.a paragraph 2 of the Act on Elections of Members to the Croatian Parliament.

<sup>33</sup> Paragraph 54 of the Advisory opinion of the ECtHR on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights of 12 February 2008 (available at: [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int)) reads: "54. In the light of the foregoing, the Court considers that the first question asked by the Committee of Ministers, couched as it is in general terms, does not lend itself to a straightforward "yes" or "no" answer. In any event it is clear that, in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidatures (see paragraph 22 above), the Assembly may not reject the list in question on the sole ground that no such candidate features on it. Accordingly, exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible."



Unfortunately, a wrong perception that the CC repealed the obligation to respect gender quotas in the electoral lists was created.

Moreover, responsibility for the extremely low number of elected women as MPs at the elections for the 8th convocation of the Croatian Parliament in 2015 was found in this decision of the CC.

On top of that, the State Attorney's Office of the Republic of Croatia concluded that it would not institute misdemeanour proceedings against political parties which did not place on their lists of candidates a minimum of 40% of members of each gender. The State Attorney's Office invoked its own interpretation of the Gender Equality Act whereby such an obligation does not concern the elections for the 8th convocation of the Croatian Parliament.<sup>34</sup> Since such legal obligation was in force, and which the CC clearly found in its decision, the sanctioning of political parties that did not meet the obligation had not happened.<sup>35</sup>

The disproportional distribution of political, but also social and economic, power among women and men causes unequal status of women in society that, consequently, leads to violence against women. Violence against women is one of frequent forms of discrimination that results in physical, sexual, psychological, social or economic suffering of women. It undermines women's dignity and integrity.

In the two following cases the CC has dealt with the protection of women against various forms of violence.

### **Access to Legal Termination of Pregnancy is an aspect of Women's Rights to Self-Determination, Integrity and Dignity that are inherent to Right to Privacy**

#### **The so called Abortion Case<sup>36</sup>**

The right to an abortion is usually classified within the category of women's reproductive rights. However, let us look at the Croatian case. Why here? Denying the legal termination of pregnancy is a form of gender-based violence, particularly if pregnancy is a result of violence, including family violence because this one tethers women to violent men. That is why.

The CC found that the legislative solution,<sup>37</sup> stating that termination of pregnancy may be performed at the request of a woman before the end of the 10<sup>th</sup> week of pregnancy (and afterwards only subject to an approval of a competent authority if it is established, on the basis of medical indications, that life cannot be saved or the deterioration of a woman's health during pregnancy, birth or post-partum cannot be resolved, if it can be expected that the child will be born with serious physical or mental defects, if conception was connected with the commission of certain criminal offences or in the event of immediate danger to the life or health of a pregnant woman and if termination of pregnancy had already started), was in conformity with the Constitution.

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<sup>34</sup> Written notification of the State Attorney's Office of the Republic of Croatia no: KR-DO-1673/2015 AŠM/AŠM of 8 February 2016 delivered to the State Election Commission of the Republic of Croatia, including the conclusion "that there are no legal grounds to institute misdemeanour proceedings against the proponents of the lists of candidates for the election of members to the Croatian Parliament, held on 8 November 2015, which did not include a minimum of 40% of members of each gender, and therefore, it will not deliver the said notification to the competent state attorney offices".

<sup>35</sup> See Foreword by the Editor-in-Chief, Selection of Decisions of the Constitutional Court of the Republic of Croatia 2015, *Narodne novine*, Zagreb, June 2016.

<sup>36</sup> Ruling No: U-I-60/1991 *et al.* of 21 February 2017 (Official Gazette no. 25/17), Summary in English is available at: [www.usud.hr](http://www.usud.hr).

<sup>37</sup> Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth (Official Gazette Nos. 18/78, 31/86, 47/89 and 88/09).

The CC held that the impugned legislative solution did not undermine a fair balance between a woman's constitutional right to private life and to liberty and personality, on one hand, and the public interest of protecting the life of unborn beings guaranteed by the Constitution as a constitutionally protected value, on the other hand.

The CC pointed out that the right to private life guaranteed by the Constitution includes the right of each person to the freedom of decision-making, self-determination, and dignity. Therefore, the right to private life is an inherent right of a woman to her own spiritual and physical integrity, which includes her decision whether to conceive and how her pregnancy is to progress. By staying pregnant (either planned or unplanned, voluntarily or as a consequence of violence), a woman does not waive her right to self-determination. Any restriction to the right of a woman to decide in her autonomous self-realisation, including whether she wishes or does not wish to carry to term, represents interference in her constitutional right to private life.

The CC found that an unborn being, as a value protected by the Constitution, enjoys constitutional protection under the Constitution only to the extent that such protection is not in conflict with a woman's right to private life. The right to life of an unborn being within that meaning is not protected to have an advantage over or greater protection than a woman's right to a private life.

## **Removal of a Family Violence Perpetrator from the Family Home and Temporary Restriction of the Right of Ownership**

### **The Protective Measure against Family Violence Case<sup>38</sup>**

The Protection against Family Violence Act among others regulates the rights of victims of family violence, forms of family violence and misdemeanour sanctions for protection against family violence. These sanctions are for example protective measures, fines and imprisonment.<sup>39</sup> The protective measures include orders prohibiting the perpetrator from approaching the victim, prohibiting harassment or stalking of the victim and removal of a perpetrator from the family home.<sup>40</sup>

The constitutionality of the last mentioned protective measure, i.e. the protective measure of removal of the perpetrator of family violence from an apartment, house, or some other residential area for a period of one month to two years<sup>41</sup> has been reviewed by the CC.

The proponent in the case alleged that the protective measure restricts property rights unconstitutionally, because it may be issued against the perpetrator of family violence who is the sole owner of real property. Given that the protective measure may be issued for the duration of up to two years it suspends the right of ownership.

The aim of the Protection against Family Violence Act is the prevention, sanctioning, and suppression of family violence, a type of violence that generally happens within the confines of one's home, apartment, house, or some other residential area. The purpose of protective measures is to provide protection (of life and health, and safety) and assistance to the victims of family violence by eliminating the circumstances that are conducive to violence or that encourage recurring of violence.

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<sup>38</sup> Ruling no: U-I-4326/2012 of 7 March 2017.

<sup>39</sup> Article 11 paragraph 1 of the Protection against Family Violence Act.

<sup>40</sup> Article 13 of the Protection against Family Violence Act.

<sup>41</sup> Article 15 of the Prevention of Family Violence Act.

The CC held that the temporary restriction of the right of ownership *via* the protective measure of removal of a family violence perpetrator from the family home does not represent a disproportionate measure for the achievement of a legitimate aim in the public interest which is the prevention, sanctioning, and suppression of violence in the family.

In other words, the CC balanced the interests at stake, and ruled that protective measure does not disproportionately interfere with the individual's right to peaceful enjoyment of one's property. Thus, the protective measure remained in force.

Let me put forward another question. Is there a difference between physical violence and violent speech? No, there is not because they both hit hard.

## **Violence committed by Spoken Words against Homosexuals and Freedom of Expression**

### **The Football and Hate Speech Case<sup>42</sup>**

Z.M., the then executive manager of the most popular football club and Vice President of the Croatian Football Association, stated, in one daily newspaper, that 'gay people could not play in his national football team'. Finding these statements discriminatory, the Supreme Court of the Republic of Croatia prohibited him from making any similar public statements in the future, and ordered a public apology, and publishing the judgment in the same daily newspaper.

The Supreme Court found that Z.M. had such a reputation and public authority that his statement could encourage others to treat gay persons with prejudice. The Supreme Court ruled that his statement was an act that could place a person (a gay man) in a less favourable position than other persons (a heterosexual man) in a comparable situation and was therefore direct discrimination. The Supreme Court further held that statements can be acts of discrimination in spite of the constitutional freedom of expression.

Nonetheless, Z.M. lodged a constitutional complaint before the CC complaining that the Supreme Court judgment violates his freedom of expression guaranteed by the Constitution and the European Convention on Human Rights.

The CC upheld the legal position of the Supreme Court and ruled that there is no violation of the freedom of expression. Emphasizing that the freedom of expression carries with it duties and responsibilities, the CC held that the interference with the freedom of expression was prescribed by the Anti-Discrimination Act and was not disproportionate, but necessary in a democratic society.

## **Outcome of Marriage Definition Referendum has not jeopardised the Gender Equality due to the Comprehensive Regulatory Framework (including Article 61 of the Constitution)**

### **The "Redundant" Amendment to the Constitution Case**

On 1 December 2013 the first popular referendum to amend the Constitution was held in Croatia. The referendum question put to citizens was: 'Do you support the provision defining marriage as a union of a woman and a man to be included in the text of the

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<sup>42</sup> Decision No: U-III-872/2016 of 22 March 2017.

Constitution of the Republic of Croatia?' Following the outcome of the referendum, the Constitution was amended by adding the definition of marriage as a union of a woman and a man.<sup>43</sup>

Unfortunately, the CC had no opportunity to decide on the constitutionality of the referendum question, since the Croatian Parliament did not submit that question to the CC for review.<sup>44</sup>

Nevertheless, the CC reacted and rendered the Communication on the Citizens' Constitutional Referendum on the definition of marriage<sup>45</sup> *stating, inter alia*, that from the substantive law aspect, it is relevant that the Republic of Croatia legally recognises both marriage and common-law marriage, and same-sex unions<sup>46</sup>, and that Croatian law is aligned with the European legal standards regarding the institutions of marriage and family life.

Sexual and gender diversity are protected by the Constitution. The rights of all persons are also protected, regardless of gender and sex, the respect for and legal protection of their personal and family life and their human dignity<sup>47</sup>. These legal facts are considered to be the permanent values of the constitutional state.

The CC emphasised that any supplementation of the Constitution by provisions according to which marriage is the union for life of a woman and a man may not have any influence on the further development of the legal framework of the institution of common-law marriage and same-sex unions, in line with the constitutional requirements that everyone has the right to respect, and legal protection of their personal and family life, and their human dignity.

The CC has also dealt with a few transgender equality cases. Let me present two of those cases to you.

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<sup>43</sup> The Fifth Amendment of the Constitution was adopted at a national constitutional referendum where people within the meaning of Article 1.3 of the Constitution for the first time directly decided on a specific proposal to amend the Constitution based on a popular initiative to amend the Constitution, that is, based on a proposal to amend the Constitution submitted by voters (Decision of the Constitutional Court of the Republic of Croatia No: SuP-O-1/2014 of 14 January 2014 on the completion of the proceedings of supervision of the constitutionality and legality in implementing the national referendum held on 1 December 2013, where Article 61 of the Constitution of the Republic of Croatia was supplemented with a new paragraph 2, Official Gazette No. 5/14). Consequently, Article 61 of the Constitution reads:

"Article 61

The family shall enjoy special protection of the state.

Marriage is a living union between a woman and a man.

Marriage and legal relations in marriage, common-law marriage and the family shall be regulated by law."

<sup>44</sup> Article 95 of the Constitutional Act on the Constitutional Court of the Republic of Croatia reads:

"Article 95

(1) At the request of the Croatian Parliament, the Constitutional Court shall, in the case when ten percent of the total number of voters in the Republic of Croatia request calling a referendum, establish whether the question of the referendum is in accordance with the Constitution and whether the requirements in Article 86, paragraphs 1-3, of the Constitution of the Republic of Croatia for calling a referendum have been met.

(2) The Constitutional Court shall pass the decision in paragraph 1 of this Article within a term of 30 days after the request is filed."

<sup>45</sup> SuS-1/2013 of 14 November 2013 (Official Gazette No. 138/13), full text in English is available at: [www.usud.hr](http://www.usud.hr) and CODICES database of the Venice Commission.

<sup>46</sup> In Croatia the Act on Same-sex Civil Unions (Official Gazette No. 116/03 and 92/14) had been in force from 2003 to 2014 when the Same-Sex Life Partnership Act entered into force.

<sup>47</sup> Article 35 of the Constitution.

## **Violation of Reasonable Time Requirement in conjunction with the Right to Respect for Private Life**

### **The first transgender case<sup>48</sup>**

The applicant lodged a constitutional complaint before the CC stating that the duration of administrative proceedings and the administrative dispute initiated on the basis of his request for a change of data on gender and name in the civil registry was unreasonably long, and such a long duration of the proceedings, violated his right to a private life, thus placing him in an uncertain position in relation to his personal (gender) identity.

Competent authorities decided on the applicant's request on several occasions, and the applicant requested the proceedings to be completed as soon as possible. Bering in mind all of the above, and in particular the importance of the outcome of the proceedings for the applicant as a minor, the CC found that the duration of the administrative proceedings and of the administrative dispute (more than 4 years) that were still pending was not in compliance with the requirement of reasonable time.

One of the reasons that contributed to the duration of the proceedings was the lack of clarity of the Ordinance on the manner of gathering medical records on gender change. The Act on Amendments to the Act on Civil Registries which entered into force on 29 June 2013 prescribes the right to the entry of a gender change into the birth records even in the case of a person living in a different gender identity, i.e. gender identity can be changed without gender reassignment surgery.

After that, the competent minister still had not adopted the special sub-regulation regarding gathering medical records on gender change, and the shortcomings in the Ordinance still have not been eliminated.

The CC held that the applicant's request referring to the exercise of the right to his private life had not been decided upon efficiently, which resulted in prolonged uncertainty in relation to his personal (gender) identity and represented a violation of the right to a fair trial in conjunction with the right to private life.

In addition, due to the obvious failure of the state to fulfil its legal obligation, under Article 125.a of the Constitution and Article 105 paragraphs 1 and 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia,<sup>49</sup> the CC notified<sup>50</sup> the Government about the spotted failure of the minister of health to render a piece of legislation on manner of collecting the medical documentation and determination of the conditions and requirements for change of sex and life in other gender identity.

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<sup>48</sup> Decision No: U-IIIB-3173/2012 of 18 March 2014 (Official Gazette No. 46/14).

<sup>49</sup> Under Article 125.a of the Constitution and Article 105 paragraph 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, if the CC finds that a competent body charged with enacting a regulation needed for the application of the Constitution, law or other regulation has failed to do so, it shall notify the Government thereof. Under Article 105 paragraph 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia the report is delivered in written form to the Prime Minister of the Republic of Croatia.

<sup>50</sup> Notification No: U-XA-1367/2014 of 9 April 2014.

## Refusal to Change Name and Gender Data on a University Diploma

### The second transgender case<sup>51</sup>

The case concerned rejection of a certain Faculty of the University of Zagreb to issue a new diploma with a female name and gender to the applicant, who is a transgender person whose sex assignment at birth was male, but after having the sex reassignment surgery changed his sex to female. The Faculty rejected the request with the explanation that following the issuing of a diploma the faculty, as an educational institution, does not have any legal grounds to include changes in an issued diploma, because, *inter alia*, it does not keep a record of the changes to personal status of its graduates. The Administrative Court in Zagreb rejected the applicant's complaint with the explanation that the impugned decision of the Faculty was issued in conformity with the relevant law.<sup>52</sup>

The applicant lodged a constitutional complaint before the CC and invoked, *inter alia*, violation of her right to respect for personal and family life.

A different approach in practice had already existed. Namely, other Faculty, on the basis of the same legal provisions accepted the request of another transgender person who requested a change of data on a diploma, changes related to name and sex, issued before her sex reassignment.

The CC stated that the refusal to issue a new diploma with the data changes concerning applicant's sex and name created doubts in relation to her identity and occupation. It mutually affected the applicant and private and public persons with whom the applicant has contacts in the realisation of her academic and business activities. Furthermore, the applicant was consequently prevented from choosing when, to whom, and how to reveal the information that relates to her gender identity and from obtaining protection against the arbitrary or unwanted revelation of such information to others.

The CC held that by refusing to issue a new University diploma with new data concerning gender and name of the applicant, the applicant's right to a fair trial in conjunction with the right to respect for personal life, after having changed the aforementioned data in the main entry in the register of birth and obtaining a new personal identity card and a new certificate of citizenship, was violated.

## Conclusion

In conclusion, Croatia has comprehensive non-discriminatory regulatory framework regarding gender equality, and institutional mechanisms for its implementation, including the Constitutional Court of the Republic of Croatia as one of the mechanisms, based on universal and European legal standards. A lot has been done in Croatia, and I hope that even more will be done in the near future.

The Venice Commission, the Council of Europe, the European Union, as well as the United Nations, have paved the way which all national institutions, including constitutional courts, should follow in order to achieve gender equality in reality.

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<sup>51</sup> Decision No: U-III-361/2014 of 21 November 2017.

<sup>52</sup> Article 84 of the Science and Higher Education Act (Official Gazette Nos. 123/03, 105/04, 174/04, 2/07, 46/07 and 45/09) and Article 159 of the General Administrative Procedure Act (Official Gazette No. 47/09).