

REPRESENTATIONS AND SUGGESTIONS REGARDING CONSTITUTIONAL REFORM

PRESENTED BY FUTUR AMBJENT WIEHED and on behalf of Dr. Claire Bonello

PREAMBLE

This initial 3 month consultation period should be regarded as a very, very preliminary scoping stage. There has been very little publicity given to this matter despite the launch of a website. Such an important matter should not be treated in this way. This cannot be a rushed affair.

As stated before - a 3 month period is totally inadequate for a consultation period regarding a law which fundamentally regulates the relationship between citizens and government.

Furthermore - there has to be some sort of thematic scoping exercise where experts and stakeholders in the relevant field are consulted.

All representations should be acknowledged, published and addressed.

Moreover the consultants, legal advisors and people working on this document should be identified to prevent suspicions of "insider lobbying".

A Constitutional Convention should be held and the resultant document subjected to a referendum - which is after all - an expression of popular will.

MAIN ASPECTS

A. Entrenching protection of the environment and public's right to health and free access to open spaces.

A1. Every person should be entitled to file an action for the safeguarding of such a right.

A mechanism for this is explained below:

Environmental Right of Action

1. The inclusion of a provision in the Constitution detailing what the right to an adequate environment entails, including the State's obligations in this regard.

This provision should be inserted in Chapter IV of the Constitution on Fundamental Rights and Freedoms of the Individual, which placing in itself emphasises the importance which this Government gives to environmental protection. Such clause could be based on the Portugese model and the European Landscape Convention, and could be drafted as follows:

XX. (1) All persons in Malta shall have the right to a healthy and ecologically balanced human environment.

(2) In order to guarantee the right to such an environment within the context of sustainable development, it is the duty of the State:

- (a) To protect the national landscape, including land, inland waters and marine areas, as well as all natural, rural, and urban areas, by conserving and maintaining their characteristic features;
- (b) To manage the national landscape by ensuring its regular upkeep, and enhancing and restoring it where necessary;
- (c) To classify and protect the countryside in order to guarantee nature conservation and the preservation of cultural assets of historic or artistic interest;
- (d) To establish, implement and regularly update environmental policies with the objectives of establishing proper locations for activities and a balance between economic and social development, while preserving national landscapes;
- (e) To establish, develop and maintain natural reserves, parks and recreational areas for the enjoyment of all persons in Malta;
- (f) To prevent and control pollution, and its effects, and the harmful forms of erosion;
- (g) To promote the rational use of natural resources, while safeguarding their capacity for renewal and ecological stability, respecting the principle of solidarity between generations;
- (h) To improve and preserve the environmental quality of populated areas and urban life, specifically with regard to architecture and the protection of historical zones;
- (i) To ensure the inclusion of environmental objectives in various sectors of policy, where appropriate; and
- (j) To promote environmental education and respect for environmental values.

2. The inclusion of a right to action in the Constitution.

The right of individual citizens or organisations to sue the State is essential if the above article is to be an enforceable right. There are a number of ways this may be inserted in the Constitution:

- (a) The amendment of Article 46(1) to remove the requirement of juridical interest in human rights proceedings, which would then allow citizens to take the State to court over a course of action, or omission, which led to a breach of the above article; or
- (b) The inclusion of an *ad hoc* provision specifically and exclusively for this right, modeled on article 116 of the Constitution, but extending beyond the validity or other of a law:

YY. (1) A right of action for a declaration that any law, course of action, and, or omission is invalid with the provisions of article XX of this Constitution, shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.

(2) Where the Court so declares, it may also give such directions and orders and to provide such redress and other remedies as it may deem appropriate, including non pecuniary remedies.

Now there have been some recent amendments to include a reference to environmental protection in the Declaration of Principles of the Constitution (article 9). However these are not enforceable.

Article 9.

(1) The State shall safeguard the landscape and the historical and artistic patrimony of the Nation.

(2) The State shall protect and conserve the environment and its resources for the benefit of the present and future generations and shall take measures to address any form of environmental degradation in Malta, including that of air, water and land, and any sort of pollution problem and to promote, nurture and support the right of action in favour of the environment.

This was an admirable move showing Government's commitment to environmental safeguarding.

However it does not give citizens a right of action as Article 21 of the Constitution states that no right of action exists in regard of declaratory principles.

"Article 21. *The provisions of this Chapter shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws."*

But in order to clarify the position and create a right of action, a simple amendment to Article 46 of the Constitution, with the insertion of Article 9 where indicated, could be an option.

So - these are some suggestions which may be considered

OPTION 1.

Transfer Article 9 to another section of the Constitution which is not the Chapter relating to Declaration of Principles. Then amend Article 46 to include the (renumbered) Article 9 as follows.

OPTION 2

Again - Transfer Article 9 to another section of the Constitution which is not the Chapter relating to Declaration of Principles. Renumber it as Article XX. Then introduce the following provision of law:

"YY. (1) A right of action for a declaration that any law, course of action, and, or omission is invalid with the provisions of article XX of this Constitution, shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.

(2) Where the Court so declares, it may also give such directions and orders and to provide such redress and other remedies as it may deem appropriate, including non pecuniary remedies"

As you may observe, this is the inclusion of an *ad hoc* provision specifically and exclusively for the right, of action in regards of environmental breaches, modelled on article 116 of the Constitution, but extending beyond the validity or other only of laws- now extending even to actions or omissions:

I favour this option - it's a question of neatness.

A. 2. Constitutional entrenchment of reserving a certain percentage of land cover as afforested/shrub-covered/open spaces or a mixture of all three.

This suggestion emanates from the desperate need to limit the country's carbon footprint and promote a healthy environment. It is inspired by the Constitutional

inclusion of such a provision in Bhutan which is the only carbon-negative country in the world. A minimum 60 percent forest cover commitment is enshrined in the Constitution of Bhutan for which the country is lauded by the international community as an example to follow. Article 5 Section 3 reads:

The Government shall ensure that, in order to conserve the country's natural resources and to prevent degradation of the ecosystem, a minimum of sixty percent of Bhutan's total land shall be maintained under forest cover for all time.

In Malta's case - since we do not have such large tracts available for afforestation, this could be amended to include shrub, garigue and *maquis* areas as well as afforested areas and open uncommercialised spaces. This naturally refers to PUBLIC land.

In addition to this, the Public Domain Act which is constantly ignored and dismissed should be incorporated in the Constitution.

B. An effective right of action against Public Authorities

What happens when public authorities do not enforce laws and conditions which they are statutorily enjoined to safeguard? What remedies does a citizen have in such cases? For example, if a planning permit is issued with conditions relating to a specific use and these are not adhered to, what remedy does a citizen have when he reports such breaches of conditions and enforcement action is not carried out within a reasonable time frame? A right of action/remedy should be introduced in this regard. This is also applicable to other public authorities.

C. Constitutional Right to Privacy

It is felt that this right should be enshrined in the Constitution due to the fact that technology now provides for widespread possibilities of surveillance. This form of surveillance - may be used to disrupt and entrap social movements, activists, and members of vulnerable communities. This could undermine and fundamentally reorient our democratic institutions and eventually allow for the introduction of a social credit system. In view of this the right to privacy should be elevated to a fundamental human right with a right of action attached. A possible starting point for elaborating on is the Constitution of South Africa.

The Constitution of the Republic of South Africa of 1996 protects privacy in Section 14:

Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched; (b) their property searched; (c) their possessions seized; or **(d) the privacy of their communications infringed.**

D. Introducing provisions clarifying role and regulating entities founded by Government

In recent years and months we have witnessed the proliferation of a slew of entities founded by Government and/or controlled by it. Some of these entities are governed by persons of trust or in conjunction with the private sector. The precise status of these entities is nebulous. The notion of public accountability has been utterly discarded in

regard to these entities. There is need for the beefing up of accountability (legal, accounting and administrative).

At present there is absolutely no control of the why these entities are being set up, who is appointed to serve on them, how they are remunerated, which conflicts of interest there may be, and which kind of contracts they are entering into - sometimes in breach of competition laws. This has to be changed.

E. Changes to the electoral system allowing for the parliamentary representation of parties enjoying 3% of the popular vote.

F. Recognition of the Ombudsman's findings.

G. Regulating Lobbying

H. Promoting Gender Parity in Parliament by requiring Balanced Party Lists

I. Introducing term limits for Prime Ministerial and ministerial roles