



# ERA Feedback on the Constitutional Reform

February 2020

Environment and Resources Authority



## 1. Introduction

The Environment and Resources Authority (ERA) welcomes the opportunity to contribute towards the Constitutional Reform, by providing tangible proposals for changes to address contemporary needs and reflect a modern state.

## 2. Recommendations for Consideration for the Constitutional Reform

### 2.1 Safeguarding of the environment

Malta's constitution has served the nation's political, social and cultural needs for a good number of years. Although it is acknowledged that the protection and conservation of the environment is already entrenched in the Constitution (Article 9(2)), this provision is unenforceable as per Article 21. In this regard, ERA recommends that Article 9 of the Constitution should become directly enforceable.

Furthermore, ERA suggests that this provision is elaborated as follows:

*“Art. 9(2) The State shall safeguard the environment for the benefit of the present and future generations. In this regard, the State shall take measures to protect, conserve and improve the environment and its resources and in particular shall take measures to:*

- (i) address any form of environment degradation in Malta including that of air, water, land and biodiversity, and combat all forms of pollution;*
- (ii) promote, nurture and take action to conserve the environment including by adopting preventative, remedial or restorative measures to protect the environment in accordance with the precautionary principle;*
- (iii) contribute towards safeguarding biodiversity through the conservation of natural habitats, and of fauna and flora; and*
- (iv) ensure sustainable development of land and marine areas, as well as sustainable use of natural resources.”*

ERA is currently in the process of preparing a National Strategy for the Environment (NSE) with a vision towards 2050 that will set the policy framework for plans, policies and programs issued for the protection and sustainable management of the environment. A scenario selection exercise concluded that we should work towards a wellbeing first scenario, where strategic alignment across government creates a robust policy framework that contributes to an improved quality of life that endorses environmental limits. This is reinforced by greater collaboration among government, citizens and stakeholder groups in decision making. ERA recommends including the concepts of wellbeing and quality of life in the constitution, so as to reinforce the goals of the NSE once published.

## 2.2 Duty of care for the environment

The concept that every person and entity, whether public or private, has a duty to protect the environment is included in the Environment Protection Act (Cap. 549). ERA recommends that this concept is also included in the Constitution, so as to act as a guiding principle for the behaviour and decisions taken by all persons and entities and for any legislation or policy.

## 2.3 Stronger commitment towards environmental sustainability

The [World Economic Forum Global Risks Report 2020](#) considered the top five global risks, in terms of likelihood, to all be environmental in nature. To combat the current global environmental crisis and the dire need to resolve the environmental issues that small island states such as ours are experiencing, the Constitution needs to be strong in its commitment to enshrine respect towards environmental sustainability. The following recommendations are being put forward in this regard:

- i. As indicated in the Constitution's synopsis for consultation, public administration has a direct impact on the development of a country and on the wellbeing of its citizens. This is key to environmental wellbeing, which cannot be achieved without strategic alignment of the policy framework across public administration. All the country's interests are to be duly and holistically considered in this strategic direction. Consequently, this direction spanning multiple political cycles, is in turn taken forward by the public administration in its sectorial policy making. This is crucial to ensure a wide encompassing notion of wellbeing of the citizens. Text in the constitution is to be included to ensure that all public policies emanating from the Constitution and the Acts thereunder are to include mechanisms which ensures environmental integration at source.
- ii. One way of ensuring that the long-term strategic direction for the country is achieved is to have key positions within Ministries and other entities filled by permanent official/s, who should be responsible for enshrining and achieving various long-term objectives, including those environmental, within their respective sectors, with the appropriate handover when this official is replaced. This allows for continuity over time.
- iii. The Constitution enables the setting up of independent institutions that oversee government's conduct and safeguard the individual's rights (e.g. National Audit Office, Ombudsman). Any existing or envisaged new independent institution must oversee that Malta's environment and its resources are being used in a manner that does not compromise environmental prosperity and overall wellbeing.

- iv. Environmental responsibility should not only be addressed at the national government level, but throughout all levels of society. In this respect, the Local Councils and their citizens are to be made directly responsible for their environmental footprint and the environment within their locality.

#### 2.4 The right to a healthy environment

The Constitution of Malta has a number of provisions which set out the fundamental rights of individuals. The United Nations Environment Programme (UNEP) and the UN Human Rights Office have recently signed a cooperation agreement to promote and protect both human and environmental rights. Although more than 150 countries recognise human rights to a healthy environment in their constitutions or national laws, the UN agrees that significantly more work is needed to inform policy-makers, justice institutions and the public on the various ways they can take action to uphold this right.

The recently published [First Global Report on Environmental Rule of Law](#) places great emphasis on the importance of enshrining environmental rights within national constitutions and distinguishes between substantive rights (e.g. healthy environment, life, water) and procedural rights (e.g. access to information, public participation, access to justice).

A 2013 study found that environmental laws were strengthened after adopting constitutional right to a healthy environment in 78 out of 95 nations. Although Article 9(2) of the Maltese constitution makes reference to the environment, there is no specific right to a healthy environment included. This places Malta in the minority of countries, since most have a constitutionally protected right to a healthy environment.

Some examples of countries which include the “right to a healthy environment” in their national constitutions are the following:

1. **Belgium:** The Belgian Constitution, as updated following the constitutional revision of 24 October 2017, in Article 23: “Everyone has the right to lead a life in keeping with human dignity.” These rights include amongst others “the right to the protection of a healthy environment”;
2. **Norway:** The Constitution of the Kingdom of Norway as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll, with subsequent amendments, the most recent being of 19 June 1992 in Article 110b: “Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long term considerations whereby this right will be safeguarded for future generations as well. In order to safeguard their right in accordance with the

foregoing paragraph, citizens are entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced. The State authorities shall issue further provisions for the implementation of these principles.”

3. **Finland:** The Finnish Constitution of 11 June 1999, 731/1999, amendments up to 817/2018 included in Section 20: Responsibility for the environment: “Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.”

The Aarhus Convention also recognises this substantive right in Article 1: *“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”* Malta ratified the Convention in 2002 and is therefore bound to adhere to its provisions. Whilst all other articles have been integrated into various pieces of national legislation, the human right recognised in Article 1 of the Convention is not yet reflected in legislation.

Consequently, ERA recommends that the Maltese Constitution is amended so as to include the substantive human right to a healthy environment within Chapter IV (Fundamental Rights and Freedoms of the Individual). Drawing upon the examples outlined above, ERA is recommending the inclusion of a new article 33A or article 45A<sup>1</sup> as follows:

*“Protection of right to a healthy environment.*

*XXA. (1) All persons in Malta shall have the right to live in an environment which shows due respect for health and well-being, and every person and public authority shall endeavour to protect and conserve the environment in accordance with article 9(2) of this Constitution.*

*(2) All persons shall be entitled to lawfully and peacefully participate in decision making processes that may affect the environment, and to receive information held by the State pertaining to the environment.”*

Similarly, although there is legislation in place which broadly guarantees public participation in environmental decision-making, it is recommended that provisions in this regard are also included in the constitution, as is the case for several other countries. Furthermore, although

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<sup>1</sup> In the latter case, an amendment to article 46(1) would also be required in order to encompass the new article within its provision (i.e. “...articles 33 to 45A (inclusive)...”)

an environmental tribunal is already in place, it is recommended that the constitution also includes provisions for the setting up of a specialised environmental court.

## 2.5 Rights of Nature

Another phenomenon that is also gathering momentum globally, is one where nature itself is being granted legal rights of its own. Some countries and regions are seeking this as a new legal route to protect nature from destruction and exploitation, and protect it for future generations. Some examples of this include:

1. Ecuador: Ecuador was the first country to recognise the rights of nature in its constitution in 2008. Rather than treating nature as property under the law, the Rights for Nature articles acknowledge that nature in all its life forms has the right to exist, persist, maintain and regenerate its vital cycles. Citizens have the legal authority to enforce these rights on behalf of ecosystems. The ecosystem itself can be named as the defendant.
2. Colombia: The top court ordered the Colombian government to protect the Amazon forest falling within its territory. This landmark case stemmed from the need to protect the forest against damaging deforestation, and was pushed by a group of young plaintiffs who filed a lawsuit against the government who was jeopardizing their rights to a healthy environment. Colombia's Amazon forest is now an "entity subject of rights" that has the same rights as humans.
3. New Zealand: The Whanganui River and the Te Urewera National Park have been recognised as living beings and have thus been granted legal personhood with all rights, powers, duties and liabilities.
4. Bangladesh: All rivers have been afforded legal rights.

In Europe, there is a drive for the rights of nature concept to be implemented through an EU Directive. As an EU member state, it is recommended that Malta should take a proactive stand where the Constitution should give the environment the same rights at par with those given to humans.

## **3. Conclusion**

ERA looks forward towards this and further national debate on the Constitutional Reform, and remains available for any clarification, or further consultations via: [era.policy@era.org.mt](mailto:era.policy@era.org.mt).