

The Constitution from an Equality Perspective

The NCPE's Input to the Constitution Reform

The National Commission for the Promotion of Equality (NCPE)¹ is taking part in the consultation process about the Constitutional Reform by listing a number of points for consideration.

The below points are aimed at applying an equality perspective in the drafting of the Constitution from the initial stage.

Language

The language of the Constitution should be gender-inclusive since this is both legally and symbolically important.

Gender-inclusive language indicates a commitment to gender equality by specifically including both women and men. It also undermines stereotypes that political actors are male². For example, when discussing the powers of the President or Prime Minister, a Constitution that uses gender-inclusive language would not only refer to the President or Prime Minister as he/him, but would include she/her, clearly indicating that the position can be held by either a woman or a man.

Alternatively, whenever possible, the use of the plural can also enable inclusive language.

¹ The NCPE is the national equality body with a remit covering the following grounds of discrimination: sex and family responsibilities, age, race/ethnic origin, religion/belief, sexual orientation and gender identity, gender expression and sex characteristics, as well as the freedom of movements for workers in the EU.

² The Committee of Ministers (Council of Europe) recommends [CM/Rec(2019)] to the governments of member States to: *“Undertake a systematic review of all laws, regulations, policies, etc., for sexist language and reliance on gendered assumptions and stereotypes with a view to replacing them with gender-sensitive terminology. Good practice includes the preparation of practical guides for language and communication that are non-sexist and without gender stereotypes for use in public administration documents.”*

Principles

The Declaration of Principles should specifically recognize the social, cultural, political, civil and economic contribution and participation of both women and men from different social groups, as stated in international instruments

Moreover, it should express the state's commitment to equality and to inclusion of all members of society.

This will set an inclusive tone for the Constitution, providing a context for interpreting the Constitution in support of equality, and framing the future policy of the state on these lines.

Equality and Non-Discrimination

The Constitution should clearly enshrine a legally enforceable right to non-discrimination and outline a list of discrimination grounds. The listed grounds should be, at least, those included in the draft *Equality Bill/law* tabled in Parliament. Cognisance is also to be taken of the Constitutional amendments proposed by the *Human Rights and Equality Commission Bill/law*.

It is important that the language of the provisions prohibiting discrimination can be interpreted to be non-exclusive and open to including additional non-specified grounds (for example, by adding the word "including" before the list of grounds), since the nature of the Constitution entails adaptability to possible future developments, such as new grounds of discrimination.

In relation to gender-based discrimination, it is to be noted that the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)³ defines discrimination as: *'any distinction, exclusion or restriction made on the basis of sex which has the **effect or purpose** of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'*.

The words 'effect or purpose' should be included in the definition of discrimination i.e. a law is considered discriminatory if its outcome or impact negatively affects women's recognition, enjoyment, or exercise of rights and freedoms, irrespective of its intention. Thus, an apparently

³ Malta ratified the CEDAW in 1991.

neutral law or policy that has a discriminatory impact would be unconstitutional and can be legally challenged.

Gender-Balance

The Constitution should recognize the importance of and strive to achieve gender-balance in all spheres of life, in particular within the legislative and executive branches, the civil service and the judiciary, for the benefit of society in general.

It should establish mechanisms that promote, monitor and ensure the achievement of gender-balance.

With regards to gender-balance in politics, the Constitutional Reform should eventually include the relevant provisions resulting from the Gender Balance in Parliament Reform.

Gender-Based Violence

The Constitution should incorporate a specific obligation on the part of the State to strive to eliminate violence⁴ against women (also known as gender-based violence) as a form, cause and consequence of discrimination and inequality, and a violation of human rights and fundamental freedoms, including the rights to life, health, equal protection, security and liberty.

As recognized by the Istanbul Convention, violence against women is “... *a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women*”.

Legal Aid

The Constitution should state that there is a right to quality legal aid in both civil as well as criminal matters.

⁴ ‘Violence’ as defined in the Istanbul Convention

This is important in order to ensure that persons from social groups who are more likely to face economic and social disadvantages, such as women and persons from minority backgrounds, have equal access to the justice system.

Substantive Equality

Efforts to achieve substantive equality require that the differences between women and men, including the differences in their actual circumstances, are acknowledged and addressed.

As women face particular barriers in the political, economic and social life due to their gender, including past discrimination, the same treatment of women and men may not be sufficient to address inequality. Thus, the state should be able to implement laws, policies and programmes that aim to accelerate the achievement of substantive equality between women and men in order to address the unequal status quo.

Article 45(11) of the current Constitution should be strengthened to expressly state that special measures to accelerate substantive equality do not violate the principle of non-discrimination, as the purpose of non-discrimination provisions is to promote substantive equality of marginalized and underrepresented groups including, but not limited to, women.

Hate and Discriminatory Speech

Speech that incites hatred, hostility, discrimination, intolerance and/or violence should be prohibited by the Constitution since this violates the rights of others and contradicts the guiding principles of the state, such as those of building a democratic inclusive society and seeking social justice, equality and human dignity.

Basic Rights and Fundamental Freedoms

Basic rights and fundamental freedoms are inherent to all persons, independent of their citizenship status. The basic rights and fundamental freedoms in the Constitution should be updated to reflect developments since 1964 both in the national and international arena.



There should also be a provision that protects fundamental rights in both public and private life as this would impose greater responsibility on the state to prevent, impose sanctions, and remedy violations of rights by private persons, organisations and enterprises, including violations related to gender-based violence.