



Observations and recommendations on sex and gender
for the proposed Political Constitution of the Republic of Chile: For a constitution that protects
women's rights based on sex.
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Women's Declaration International is a group of volunteers from around the world who are
dedicated to protecting women's sex-based rights, including academics, writers, organizers,
journalists, activists and health professionals.

The Declaration on Women's Sex-Based Rights was created by WDI's founders to remind
nations of the need to maintain language that protects women and girls on the objective basis
of sex, not "gender" or "gender identity," and has been signed to date by more than 32,500
people from 159 countries, in collaboration with 454 organizations. This statement suggests
continuing to use the language agreed to in the Convention on the Elimination of All Forms of
Discrimination Against Women (CEDAW), which most countries in the world have ratified.

We salute the process of building the Chilean Constitution and the great achievement of having
a parity Constituent Convention. We celebrate the mention of women in 12 articles of the
proposal. However, despite the noble objective of drafting a new egalitarian and inclusive
Constitution, and even the fact that there is talk of a feminist Constitution, the concepts used
are far from the commitments made in international law and the conventions that the State of
Chile has signed and ratified.

In law, it is essential to establish general (non-discretionary) concepts that address structural,
objective and verifiable elements. Including a new category in order not to discriminate against
it implies a clear, concrete definition that is compatible with human rights. Otherwise, it is
impossible for the State to apply the rule in the short, medium or long term.

The emphasis of our analysis and recommendations is based on the need to work for
substantive equality for women, considering the other forms of discrimination that affect us.
We are particularly concerned about the ambiguous use of the concept of gender, the
incorporation of the terms sexual and gender diversity and dissidence; gender identity and
expression; and pregnant women.

1. AMBIVALENCE OF THE CONCEPT OF GENDER

Proposed articles in the Constitution:

- Article 6.1 The State promotes a society where women, men, sexual and gender diversities
and dissidences participate in conditions of substantive equality, recognizing that their effective

representation is a principle and minimum condition for the full and substantive exercise of democracy and citizenship.

- Article 6.3 The State shall promote parity integration in its other institutions and in all public and private spaces and shall adopt measures for the representation of persons of diverse gender through the mechanisms established by law.
- Article 6.4 The powers and bodies of the State shall adopt the necessary measures to adapt and promote legislation, institutions, regulatory frameworks and the provision of services, in order to achieve gender equality and parity. They shall mainstream a gender perspective in their institutional design, fiscal and budgetary policy and in the exercise of their functions.
- Article 25.3 The State ensures gender equality for women, girls, sexual and gender diversities and dissidences, both in the public and private spheres.
- Article 25. 4 All forms of discrimination are prohibited, especially when based on one or more grounds such as nationality or statelessness, age, sex, sexual characteristics, sexual or affective orientation, gender identity and expression, bodily diversity, religion or belief, race, membership in an indigenous or tribal people and nation, political or other opinions, social class, rurality, migratory or refugee status, disability, mental or physical health condition, marital status, affiliation or social status, and any other that has the purpose or result of nullifying or impairing human dignity, the enjoyment and exercise of rights.
- Article 27.1 All women, girls, adolescents, and persons of sexual and gender diversity and dissidence have the right to a life free of gender-based violence in all its manifestations, both in the public and private spheres, whether it comes from private individuals, institutions, or agents of the State.
- Article 40. Every person has the right to receive comprehensive sex education that promotes the full and free enjoyment of sexuality; sex-affective responsibility; autonomy, self-care and consent; recognition of the diverse identities and expressions of gender and sexuality; that eradicates gender stereotypes; and that prevents gender and sexual violence.
- Article 64.1 Every person has the right to the free development and full recognition of his or her identity, in all its dimensions and manifestations, including sexual characteristics, gender identities and expressions, name, and sex-affective orientations.
- Article 89.1 Every person has the right to participate in a digital space free of violence. The State shall develop actions for prevention, promotion, reparation and guarantee of this right, granting special protection to women, girls, boys, adolescents and sexual and gender diversities and dissidences.
- Article 161.1 For popular elections, the law shall create an electoral system in accordance with the principles of substantive equality, parity, gender alternation and the others contemplated in this Constitution and the laws. Said system shall guarantee that the collegiate bodies shall have a parity composition and shall promote parity in candidacies for unipersonal positions. Likewise, it shall ensure that electoral lists are always headed by a woman.
- Article 163.3 The law shall arbitrate the means to encourage the participation of persons of sexual and gender diversities and dissidences in electoral processes.
- Article 312.4 The justice systems must adopt all measures to prevent, punish and eradicate violence against women, sexual and gender diversities and dissidences, in all its manifestations and spheres.

Observations

- In the constitutional proposal the word gender is used 46 times, but is not defined as a concept.
- The use of the expressions gender approach; gender parity and gender alternability in the constitutional proposal suggests that gender is a desirable figure to be incorporated and promoted by the State.
- On the contrary, the expressions gender violence and gender stereotypes connote an undesirable character of gender, which the State should eradicate.
- Additionally, in the expressions sexual and gender diversity and dissidence, gender identity and gender expression, gender acquires the quality of a category protected by the State, repeatedly as an extension of the rights recognized to women.

In sum, the lack of definition of gender as a concept leads to contradictory uses and interpretations that are impossible to disambiguate, creating obstacles to the possible implementation of the proposed constitutional norm.

1.1 If it is a matter of achieving equality between men and women:

It is evident that for the Constituent Convention equality for women and girls was a priority, this is the largest and most globally violated human group.

In order to address this problem, it is recommended that the provisions of CEDAW on equality between men and women and the difference between sex and gender be taken into account. The use in the constitutional project of the expressions substantive equality, life free of gender-based violence or violence against women, shows that the social problem to be combated is the inequality between men and women, developed extensively by the CEDAW Committee. Discrimination based on sex was defined in Art 1: The term "discrimination against women" shall mean 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.

Furthermore, in Article 5: States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The CEDAW Committee then explained the difference between sex and gender in General Recommendation No. 28 of 2010:

(a) Paragraph 5: The term "sex" refers to the biological differences between men and women. The term "gender" refers to the socially constructed identities, roles and attributes of women and men and the social and cultural meaning that society attributes to these biological differences, resulting in hierarchical relations between men and women and the distribution of power and rights in favor of men and to the detriment of women.

(b) Paragraph 9: The obligation to protect requires States parties to protect women against discrimination by private actors and to take measures directly aimed at eliminating customary and all other practices that fuel prejudice and perpetuate notions of inferiority or superiority of either sex and stereotyped roles for men and women..... States Parties should bear in mind that they must fulfill their legal obligations to all women by formulating public policies, programs and institutional frameworks aimed at meeting the specific needs of women in order to achieve the full development of their potential on equal terms with men. The place of women and men in society depends on political, economic, cultural, social, religious, ideological and environmental factors that can be modified by culture, society and community. ...Identical or neutral treatment of women and men may constitute discrimination against women when it has the result or effect of depriving them of the exercise of a right because pre-existing gender-based disadvantage and inequality have not been taken into account.

The only original definition in international law related to the word gender refers to sociocultural patterns and stereotyped roles that imply the subordination of one sex to the other (CEDAW) and that must be abolished.

In view of the new uses of gender promoted internationally, which seek to erase the original analysis and meaning of this term as a relationship of unequal power, it is recommended to avoid its use and prefer clear and consistent terms of international law referring to human rights.

After diagnosing the problems of assimilation between the terms sex and gender and the denial of the existence of sex, some organizations have proposed concrete definitions:

(a) The terms "woman" and "girl" refer to human females, and the terms "man" and "boy" refer to human males; the word "mother" is defined as a female sex parent and "father" is defined as a male sex parent; when it comes to sex, "equal" does not mean "equal" or "identical"; when it comes to sex, separate is not inherently unequal.

b) There are legitimate reasons to differentiate people according to sex, for example in sports, prisons or other detention centers, domestic violence shelters, sexual violence redress centers, locker rooms, bathrooms, and other areas where biology, safety, and/or privacy are involved.

In short, when we talk about women we mean human females. And we speak of gender to refer to the roles and stereotypes that are imposed on people because of their sex, with the aim of organizing the subordination of women.

Recommendations

- Replace gender equality with equality between men and women, or equality between women and men alternately in Articles 6.4 and 25.3.
- Replace gender violence with violence against women, to clarify which is the subject protected by the norm and that its objective is to eradicate the subordination of women to men

and all the socio-cultural mechanisms that sustain it, in articles 27.1 and 40. For example, in article 312.4 violence against women is correctly used.

- Replace the use of gender approach, gender parity and gender alternability, and change it to approach based on equality between women and men, gender parity and alternability between men and women, in Articles 6.4, 61.2 and 161.1.

1.2 If it is a matter of protecting the freedom to feel, dress or interact in different ways, the following is repeatedly mentioned

Repeated reference is made to a human group classified as sexual and gender diversity and dissidence, which is not defined or delimited.

There is talk of sexual characteristics, gender identity and expression, terms that are not defined either in the constitutional proposal or in international law, but have been promoted by the Yogyakarta Principles, a document that has not been discussed internationally⁶.

Said Principles promote an interchangeable use of the concepts sex and gender, as if there were no distinction between them, and conceal the substantial hierarchical factor between the sexes already mentioned. Furthermore, they propose the multiplicity of sexes/genders in an unlimited manner.

The word gender is not defined in the documents, instead it appeals to a subjective, individual and unverifiable criterion, contained in the expression "how each person feels deeply". And it denies the observable and genetically verifiable reality of sex, installing the idea that it is arbitrarily "assigned at birth".

The attempt to constitutionally enshrine the concept of "gender identity", which refers directly to the stereotypes and hierarchical roles between the sexes that the same proposal seeks to eradicate and that the CEDAW recommends to abolish, is worrying.

On the contrary, the understanding of gender as a personal identity validates and promotes them, also assigning the character of human right to the stereotypes of woman and man, which each person interprets as more appropriate to his or her individual experience, completely obviating the biological existence of sex.

However, the right to be called, to dress, to feel, in a certain or any way, has already been protected as the free development of personality and does not need an additional category because it is something absolutely individual and unique, not a social condition.

In the expression "any other social condition used" in Art. 2 of the Universal Declaration of Human Rights and in Article 25.4 of the proposed Constitution, any other (non-personal) social characteristic or specificity not clearly defined is already included. All persons have the right to equality of opportunity and before the law.

In conclusion, when there is a lack of clear, universal and verifiable definitions, which allow the protection of legal categories, it is recommended to simplify the language for its correct application.

Recommendations

- Eliminate the terms sexual and gender diversities and dissidences; sexual characteristics; gender identities and expressions; gender diverse persons; in Articles 6.1, 25.3, 25.4, 27.1, 40, 64.1, 89.1, 163.3 and 312.3, due to the confusion they generate.
- Eliminate Article 6.3 and 163.3 for being an undefined group and already included in male or female, in men and women.

2. USE OF THE TERM "PREGNANT WOMEN

Proposed articles in the Constitution:

- o Article 30.3 Women and pregnant women have the right, before, during and after childbirth, to have access to the health services they require, to breastfeed and to have a direct and permanent link with their daughter or son, taking into consideration the best interests of children and adolescents.
- o Article 61.2 The State guarantees its exercise without discrimination, with a focus on gender, inclusion and cultural relevance; as well as access to information, education, health, and the services and benefits required for this purpose, ensuring all women and persons with the capacity to bear children the conditions for a pregnancy, a voluntary interruption of pregnancy, a voluntary and protected childbirth and maternity. It also guarantees its exercise free of violence and interference by third parties, whether individuals or institutions.
- o Article 338.3 In the case of women and pregnant and nursing mothers, the State shall adopt the necessary measures, such as infrastructure and equipment, in closed, open and postpenitentiary control regimes.

Observations

The only human beings with the capacity to gestate are women, however, the constitutional text insinuates that this capacity is also possessed by an apparently different and indeterminate human group, which it calls pregnant persons or persons with the capacity to gestate.

This language hinders women's self-determination in matters that by nature are exclusive to the female sex and that the State has the duty to safeguard because historically they have been used as an occasion for violence and discrimination against women, such as gestation, childbirth, breastfeeding, maternity, interruption of pregnancy and menstruation, among others.

Although there is an inclusive intention in the wording of the norm, no legal creation is capable of altering the biological reality. The term women is sufficiently inclusive and adequate to refer

to the subject of the rights to be enshrined, so the use of these concepts is also fruitless and redundant.

Again, by resorting to international law, the CEDAW Convention protects the social role of women in maternity and develops their rights in articles 4.2, 5b, 11a and 11b.

Recommendation

- Eliminate the concept of pregnant person and person with gestational capacity in Articles 30.3, 61.2, 338.3.

In conclusion, ambiguous, counterproductive and confusing language should not be used, nor should women be treated as a minority. Women are a group that makes up 50% of the population and this in itself encompasses a great diversity in terms of age, ethnicity, culture and other aspects.

Yours sincerely,

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CC. Citizens, Constituents, Congressmen, Political Parties, National and Local State Entities in the Republic of Chile, Women's and Feminist Organizations and Networks in Chile and Regional Latin America, United Nations Agencies in Chile and Regional Latin America, Inter-American Human Rights System, Academia, Media in Chile and the Region.