

**THE PATH TO CONSTITUTIONALIZING GENDER EQUALITY
IN UKRAINE: A LONG JOURNEY TOWARDS EUROPEAN
UNION ACCESSION**

Reminska Yuliia Yuriivna¹

PhD in law,

Postdoctoral researcher at Malaga University (Spain),

Secretariat of the Constitutional Court of Ukraine

Kyiv, Ukraine

The process of Ukraine's accession to the European Union presents the national legal order with numerous challenges and opportunities, particularly in terms of gender equality constitutionalization. Gender equality is a fundamental human right and a key principle of a state's democratic development². The presented topic is thus critical enough.

Ukraine has made significant progress toward gender equality in recent years, but significant barriers remain in fully implementing and enforcing gender equality laws and policies. The purpose of these theses is not to analyze domestic legislation in the field of detailing the concept of gender equality. In contrast, it should be noted that the formation of a constitutional jurisprudential line expressing long-term and coherent European practice is the main condition for the effectiveness of the national legislative framework.

As a slight theoretical digression, an examination of academic ideas on how gender equality can be conceptualized from a constitutional perspective should be done. Traditionally, the legal foundation of gender equality has been conceptualized on the cusp of two central theories – formal and substantive.

¹ The proposed conference abstracts were written as part of a research project funded by the University of Malaga within the support program for Ukrainian scientists «La UMA con Ucrania».

² Gender equality is a fundamental pillar of a just and harmonious society that acknowledges the inherent dignity and worth of all people, regardless of gender. It is a constitutional tenet which provides that everyone has the right to pursue his\her dreams and aspirations without fear of discrimination or prejudice because of their gender identity or expression. Gender equality ensures that all people have equal access to opportunities, resources, and power, and that their contributions are respected and valued. In recent decades, equal treatment of men and women has become a universally recognized legal principle, as acknowledged in a number of international human rights texts, most notably the Convention on the Elimination of All Forms of Discrimination Against Women, which was adopted by the United Nations General Assembly in December 1979 and ratified by Ukraine in 1980.

Formal theory of gender equality emphasizes the significance of formal legal equality, or treating men and women equally under the law. This means that the laws and policies should not explicitly discriminate on the basis of gender, and both men and women should be afforded equal protection. Formal theory emphasizes the importance of constitutional provisions that prohibit gender discrimination and guarantee equal rights and opportunities for men and women in the context of constitutionalization.

Substantive theory, on the other hand, recognizes that formal legal equality may not be sufficient to achieve substantive equality, *i.e.* equal outcomes and opportunities in practice. The importance of addressing structural and systemic barriers to gender equality, such as gender-based violence, unequal access to education and employment, and traditional gender roles and stereotypes, is indicated by substantive theory³.

Although the wording «gender equality» is quite new for the modern European constitutional discourse, hundreds of its definitions can currently be found in specialized literature, and it is interpreted in quite open-textured terms. All existing approaches, admittedly, can be classically generalized into two main groups of approaches – broad and narrow – they according to their teleological purpose refer to different interpretations of what constitutes gender equality and how it should be constitutionally achieved.

Gender equality is defined broadly as the equal treatment of all individuals, regardless of gender, in all aspects of life, such as employment, education, politics, and social relations. It aims to eliminate gender discrimination and promote gender balance and diversity⁴. This perspective recognizes that gender equality entails not only ensuring that women have equal rights and opportunities as men, but also challenging patriarchal norms and structures that perpetuate gender inequality.

The narrow approach, or sometimes it is coined as the «frame analysis approach», on the other hand, defines gender equality primarily in terms of development of equal treatment policies for women. It focuses on launching legislative strategies eliminating gender discrimination and ensuring that women have the same rights and opportunities as men⁵. While this approach

³ Forrell, C. (2006). Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia. *American University Journal of Gender, Social Policy & the Law*, 14(1), 27-71. Retrieved from <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1275&context=jgspl>

⁴ For example, Becker, M. (1999). Patriarchy and Inequality: Towards a Substantive Feminism. *University of Chicago Legal Forum*, 1, 21-88. Retrieved from <http://chicagounbound.uchicago.edu/uclf/vol1999/iss1/3>

⁵ Lombardo, E., & Meier P. (2008). Framing Gender Equality in the European Union Political Discourse. *Social Politics, International Studies in Gender, State & Society*, 15(1), 101-129. doi: 10.1093/sp/jxn001

recognizes the importance of combating gender discrimination, it may fall short of addressing the underlying structural causes of gender inequality.

Despite the doctrinal convergence in the understanding of gender equality, it is self-evident that practical implementation of this concept requires a close examination of the constitutional and legal text and an attempt to analyze its design, specifically the features of the normative construction of the formulas used to constitutionalize the concept of gender equality.

The question of how the idea of gender equality can be entrenched in the constitutional provisions of the EU Member States is no less doctrinal and at the same time practically significant. The contextual review of the basic laws of European states made it abundantly evident that Ukraine's constitutional protection of gender equality is very similar to that of European Community. Among these «constitutionalizing convergence points» are reflected in the following normative construction: «*an explicit recognition of gender equality as a **fundamental value** + a constitutional **prohibition** of gender discrimination*»⁶.

The Constitution of Ukraine like other EU Member States provides a relatively solid basis for the protection and promotion of gender equality, and it prohibits gender discrimination. Thus, Articles 24.2 and 24.3 of the Constitution of Ukraine⁷ serve as a kind of constitutional yardstick for eradicating existing social inequalities in Ukrainian society. They seek to fundamentally transform the gender biases and inequalities that frequently arise as a result of the implementation of relevant legislation.

A careful reading and analysis of the above norms gives rise to the following reflections. These constitutional provisions mean that the state shall take proactive measures to promote gender equality and eliminate discrimination on the basis of gender. To this end, the state shall adopt and implement policies and programs aimed at ensuring equal opportunities for women and men, promoting women's participation in decision-making processes, addressing gender-based discrimination and violence. The state shall also take affirmative action measures, including quotas and targeted programs, to promote gender equality and ensure that women have equal

⁶ As an illustration, the Constitution of Germany guarantees gender equality and prohibits discrimination on the basis of gender. Specifically, Article 3.2 reads as «Men and women have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist». At the same time, Article 3.3 establishes a constitutional prohibition on the establishment of any privileges or, conversely, obstacles and barriers for a person in connection with his/her sex. See: Basic law for the Federal Republic of Germany of 23 May, 1949 as last amended by the Act of 28 June 2022 (Federal Law Gazette I p. 968). Retrieved from https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026

⁷ Constitution of Ukraine adopted at the Fifth Session of the Verkhovna Rada of Ukraine on June 28, 1996. Last amended on February 7, 2019. Retrieved from <https://www.refworld.org/pdfid/44a280124.pdf>

access to education, employment, healthcare, and other areas of social and economic life.

Furthermore, in case of a fairly broad interpretation of these constitutional provisions set out in Article 24.3 (which refers to the provision of special health care measures to women) in a systemic relationship, for example, with Article 49.1 of the Constitution, it is possible to conclude that Ukrainian Basic Law constitutionally recognizes and guarantees women to have the right to make decisions about their own bodies and have access to reproductive healthcare services. Consequently, every woman is endowed with the right to make decisions concerning her own body and reproductive health. The state shall ensure the availability and accessibility of comprehensive reproductive healthcare services, including family planning and contraception, maternal health services, and safe and legal abortion services. No one shall be subjected to coercion or discrimination on the basis of their reproductive choices or health status.

However, as with any constitutional provision, the effective implementation of the gender equality principles is dependent on the practical application of the law and, more importantly, on the interpretation of this value by the constitutional review bodies. A constitutional judge, in particular, must use a systematic approach when interpreting the concept of gender equality. It is necessary to examine how gender equality is linked to other constitutional provisions and interacts with other fundamental rights and freedoms. This approach recognizes that gender equality is intertwined with other constitutional principles such as human dignity, liberty, equality, and non-discrimination. In addition, using this method would also require taking into account the evolving social and cultural context in which the Constitution is applied. This means recognizing the dynamic nature of gender roles and gender-based discrimination, and the need for the interpretation of the Constitution to adapt to changing social and cultural norms over time.

Consequently, Ukrainian constitutional law should be responsive to the changing social and cultural contexts in which it operates, as well as sensitive to how gender shapes individuals' experiences and opportunities. This includes a variety of measures such as ensuring equal access to education and employment opportunities, promoting gender-sensitive policies in areas such as healthcare and social security, and safeguarding the rights of marginalized groups. Gender equality must be considered a feature of constitutional law, which means that it must be a part of the fundamental principles and values that underpin a constitutional order.