

A Brief Remark on the Two Aspects of the Principle of Equality¹

(Draft only)

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Honourable Presidents and Justices,

Distinguished participants,

Ladies and gentlemen,

It is a great pleasure for me to speak at the joint conference of the AACC and CCJA.

I would like to thank President Mr. Anwar Usman and his colleagues for their warm hospitality. I am sure this joint conference will enhance and strengthen the cooperation among the constitutional courts of two continents.

Before I start my speech, I would also like to express my deep condolences to the Indonesian people for the tragic soccer stadium accident of the last weekend. I wish all those injured a speedy recovery.

I was required to speak on the principle of equality as prescribed in the Bandung Declaration of 1955, which emphasised the “*Recognition of the equality of all races and of the equality of all nations large and small.*”

There is no doubt that the principle of equality is a *sine qua non* condition for establishing a just political order at both national and international level. For sure, the principle of equality as prescribed by the Bandung Declaration refers to the equal status of every race and nation in the world. In other words, equality must prevail in international political order.

Therefore, the unequal structure of the United Nations (UN) system, which granted the five states the power of veto, must be re-evaluated in the light of the Bandung Declaration. The ultimate success in establishing an efficient and just international order depends largely on unanimous acceptance of the idea that some of the nations are not more equal than others.

¹ Speech prepared for the AACC – CCJA Joint Conference on “*Promoting Asian-African Cooperation for the Protection of People’s Fundamental Rights*”, Bali, October 4th, 2022.

Distinguished participants,

The principle of equality is also one of the basic constitutional principles at national level. Almost all constitutions enshrine this principle, even though they formulate it in different ways.

Indeed the principle of equality lies at the heart of modern idea of universal human rights. Equality is a fundamental human right, which affects the scope and exercise of almost all other rights. That is why Ronald Dworkin regarded so-called the “*right to equal concern and respect*” as the source of all other rights and freedoms.

Now I would like to say a few words about the protection of this significant right to equality in constitutional order of Türkiye.

Article 10 of the Turkish Constitution is the main provision drafted to protect the principle of equality. It stipulates that “*Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.*” The last paragraph of the Article 10 imposes positive and negative obligations on public authorities. Accordingly, the legislative, executive and judicial organs are required to act in line with the principle of equality.

I must note that this Article is not formulated in a way that cites the prohibition of discrimination in its wording. However, as the case in many jurisdictions of democratic countries, the principle of equality embodies the prohibition of discrimination as a standard norm. Therefore, the Constitutional Court of Türkiye has interpreted this article at the same time as a constitutional provision prohibiting discrimination on the above mentioned grounds.

The Turkish Constitutional Court has adopted a three level test in interpreting Article 10 of the Constitution and determining whether the principle of equality has been breached.

First of all, the Court decides whether there is a difference in treatment among the persons whose legal status are the same or similar. If there is a different treatment, next question is whether it has an objective and reasonable basis. Finally, if the difference has such legitimate ground, the Court applies the test of proportionality. In other words, it seeks for the balance between the restriction and legitimate aim of this different treatment.

The Court has developed and applied this test in the fields of both constitutionality review and individual application. Let me mention a few judgments in order to reveal the Court's case law concerning the principle of equality and non-discrimination.

In a constitutionality review case, the Court dismissed the request for annulment of the provisions allowing for an increase in penalties for offences committed against health-care professionals. The Court held that the principle of equality before law applies to the comparable cases. It is obvious that health-care professionals and the other public officials are in a comparably similar situation.

The Court found an objective and reasonable ground by referring to the diligent nature of health service and the increasing number of the crimes against health-care officials. According to the Court, the increase of the punishment by fifty percent was proportionate to the aim of protecting health-care staff against physical and mental assaults.²

In 2014, the Court examined a case of individual application, which concerned a female lawyer's expulsion from a courtroom for wearing a headscarf. The applicant claimed, *inter alia*, that she was discriminated against on account of her religious beliefs.

The Court held that no objective and reasonable ground was presented for preventing the applicant from taking part at the courtroom by wearing a headscarf for her religious convictions. Therefore, since the applicant was put in a disadvantageous situation compared to those female lawyers not wearing a headscarf, the prohibition of discrimination guaranteed by Article 10 of the Constitution was violated.³

The Constitutional Court has also dealt with gender-based discrimination issues. In all these cases, following the footsteps of the European Court of Human Rights, the Constitutional Court has stated that discrimination based on gender constitutes an explicit contradiction to the principle of equality. To give a vivid example, the Court has emphasized the importance of gender equality in the context of the change of the surname of the child under custody after divorce. The Court annulled the provision of the Surname Law, which stated that "*in cases of termination of marriage or divorce, the child shall adopt the surname to be chosen by the father even if the child's custody has been granted*

²AYM, E. 2020/91, K. 2021/73, 13/10/2021, §§ 40-42.

³ *Tuğba Arslan* [Plenary], no. 2014/256, 25/6/2014, § 108; and *Nurcan Yolcu* [Plenary], no. 2013/9880, 11/11/ 2015, § 34.

to the mother”. The Court held that the principle of equality requires man and woman to have equal rights before law, and any discrimination on the basis of gender would be contrary to this principle.⁴

In conclusion, the principle of equality alongside the human dignity is the core concept behind the idea of universal human rights. It is a right in itself and a basic principle for the exercise of the other human rights and freedoms. The primary duty of the constitutional courts is to protect the right to equality by interpreting and applying it to the concrete cases arising from various examples of discrimination.

We shall not forget that the precondition of protecting the principle of equality is to respect and recognise the ontological status of “the other” who is different from us.

In this regard, we should learn from Mawlana Jelaluddini Rumi who built a philosophy based on the equal dignity of human beings. Rumi said eight centuries ago that “*There is no servant or slave, all people are brothers!*”

I think this everlasting formulation is the starting point for the protection and promotion of the principle of equality at national and international political orders.

Thank you for your attention.

⁴ AYM, E.2010/119, K.2011/165, 08/12/2011; see also *Gülbu Özgüler* [Plenary], no. 2013/7979, 11/11/2015.