

# Gender Equality in the Constitution of the Republic of Turkey

■ by Elif KÜZECİ\*

*“I do not wish them to have power over men,  
but over themselves.”*

*Mary Wollstonecraft,*

*A Vindication of the Rights of Women*

*(With Strictures on Political & Moral Subjects), 1792*

*Equality, included among the concepts of the “axle” of human rights,<sup>1</sup> is protected seemingly for its significance in the constitutions of contemporary democratic states. Such protection pronounces itself particularly in these constitutions as a form of determination of “general equality” as the main principle, and of the embodiment of the “ban on discrimination”. Furthermore, it is seen that “the principle that women and men must have equal rights” is arranged as in specific norms in these constitutions in quite a few of contemporary and democratic countries with the aim of ensuring gender equality.*

## GENDER EQUALITY

**I**t may be stated that the principle of entitlement to equal rights, of which the samples regarding their inclusion in the constitutions of various states are given below, is a reflection of the historical desire to the entitlement of equal rights continuing since past in respect of possession of equal rights of women. The goal which is desired by including such a principle in constitutions is the “*promotion of women who have been unjustly treated to date in legal contemplation to the level of men*”. According to such understanding, gender discrepancies that are against law should have no effect.<sup>2</sup> However, such principle should not be interpreted to mean that there

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<sup>1</sup> İbrahim Ö. KABOĞLU, *Özgürlükler Hukuku*, İmge, 6. ed. , Ankara 2002, p.18.

<sup>2</sup> Zafer GÖREN, *Farklı Cinslerin Eşit Haklara Sahip Olması*, (Genel Eşitlik İlkesinin Bir Uygulama Biçimi), Dokuz Eylül Üniversitesi Hukuk Fakültesi Döner Sermaye İşletmesi Yayınları No:83, 2. Addition, İzmir 1998, p. 9.

are no gender differences between women and men. If any event can be accomplished only by women or men, then the existence of different standards will be unavoidable. For instance, the introduction of some arrangements with respect to the protection of mothers or the women who are prospective mothers will not infringe the principle of having equal rights for women and men because, in such a case, the need for special consideration originates from the biological characteristics of motherhood that confronts us as a direct reason for protection of a mother.<sup>3</sup>

To put it differently, *“the principle of equality can only be applied where identical rights for women and men are in question. To defend an absolute equality will cause women to be treated unjustly due to biological differences of women.”*<sup>4</sup> After all, the understanding of equality, which also takes characteristics of being a woman into consideration, is needed in order to empower women in the economic and political fields.

Basically, it may be said that the principle of possession of equal rights is not anything other than emphasizing the contents of the general principles of equality. In other words, if provisions specifically with respect to the principle that women and men are equal had not been included in constitutions, it would have been necessary to take appropriate measures in countries where inequality and discrimination were accepted. Consequently, it can be also seen that the aforementioned principle, which has become a political slogan and a substantial meaning as a political demand rather than a meaning oriented to law, has been often asserted.<sup>5</sup>

Indeed, it may be said that such a provision alone will not introduce a great change in thinking. However, in our opinion the embodiment of such a principle separately will be a sign of the importance given to the era by the protector of a nation’s constitution. Thus, the necessity of ensuring such equality should be called to the attention of the legislature. However, the performance of the necessary arrangements will be inevitable in the management and community which assimilate understanding of such equality and apprehend the importance of the issue even though no such emphasis exists in a nation’s constitution.

### **Article 10 of the 1982 Constitution**

In the Republic of Turkey, the principle of equality is expressly stated in the 1982 Constitution in the section where *“General Principles”* are defined rather than in the section with the headline of *“Fundamental Rights and Freedoms”*, which was different from the one in 1961. This means that the principle of equality is one of the principles determining the basic structure of

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<sup>3</sup> Ibid, p.11.

<sup>4</sup> Bihterin Vural DİNÇKOL, *İnsan Hakları Hukuku ve Kadın*, İstanbul Ticaret Üniversitesi Yayınları No:6, İstanbul 2003, p. 17.

<sup>5</sup> Zafer GÖREN, p.14.

constitutional system such as the principles of republicanism, secularism, Kemalist nationalism, being of a social state, and the state being governed by the rule of law.<sup>6</sup> In other words, the principle dominates the whole constitution and the state, but this situation does not remove the reality that equality is certainly one of the basic rights.<sup>7</sup>

The principle of equality and the ban on discrimination are introduced in Subparagraph 1 of Article 10 of the 1982 Constitution. In accordance with this provision “*All individuals are equal without any discrimination before law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such consideration.*”<sup>8</sup>

And in Subparagraph 3 of Article 10, the ban on privilege is set forth in the provision of “*No privilege shall be granted to any individual, family, group or class.*” And the provision on the “*necessity of behavior in compliance with the principle of equality before law in all proceedings*” of the state bodies and administrative authorities is set forth in the last subparagraph. .

Subparagraph 2 of Article 10 was added to the Constitution through Article 1 of Law No. 4710 of May 7, 2004. In accordance with this provision “*Women and men have equal rights. The State shall have the obligation to ensure that this equality exists in practice.*” Thus, the “*principle of possession of equal rights of women and men*” gained a constitutional basis. It may be expressed that this amendment has a supplementary character to the amendments made in Articles 41<sup>9</sup> and 66<sup>10</sup> of the Constitution in 2001.

It may also be stated that the criticisms and proposals made for many years, to include the principle of absolute equality into the Constitution to entitle women to the same rights as men, have been affected by the work to harmonize Turkish law with that of the EU.

Thus, it may be stated that the creation of an active policy as a more powerful guarantee, than the ban on unequal process or discrimination, to remove inequalities has gained a constitutional character. However, this amendment is fairly limited in comparison with the proposals made. In fact, in our opinion, this new provision will not be satisfactory to meet the purposes of ensuring equality. The proposals with respect to Article 10 will be re-evaluated below by taking into consideration actual examples, following a

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<sup>6</sup> Kemal GÖZLER, *Türk Anayasa Hukuku*, Ekin, Bursa 2000, p.180-181.

<sup>7</sup> Bülent TANÖR, Nemci YÜZBAŞIOĞLU, *1982 Anayasasına göre Türk Anayasa Hukuku*, YKY, İstanbul 2001, p. 114.

<sup>8</sup> See English translation of Turkish Constitution: [http://www.anayasa.gov.tr/images/loaded/pdf\\_dosyaları/THE\\_CONSTITUTION\\_OF\\_THE\\_REPUBLIC\\_OF\\_TURKEY.pdf](http://www.anayasa.gov.tr/images/loaded/pdf_dosyaları/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf)

<sup>9</sup> As amended on October 17, 2001 the subparagraph 1 of the Article 41 set forth that provision: “The family is the foundation of the Turkish society and based on the equality between the spouses”.

<sup>10</sup> As amendend on October 17, 2001 the subparagraph 2 of the article 44 set forth that provision: “The child of a Turkish father or a Turkish mother is a Turk”.

general explanation relating how the issue is arranged in the constitutions of the member states of the EU.

### **Provisions relevant to the issue in the constitutions of the member states of the European Union**

The principle of general equality and the bans on discrimination are so routinely included in the constitutions of the member states and the candidate countries approved for European Union membership so as to be characterized as a mutual provision. However, the constitutional provisions with regards to the subject matter were observed first in the constitutions of the Federal Republic of Germany<sup>11</sup> and Switzerland<sup>12</sup> and then later in the other member countries – Finland,<sup>13</sup> France,<sup>14</sup> Spain,<sup>15</sup> Italy,<sup>16</sup> Hungary,<sup>17</sup> Malta,<sup>18</sup> Poland,<sup>19</sup> Portugal,<sup>20</sup>, Slovakia,<sup>21</sup>, Slovenia,<sup>22</sup> Greece<sup>23</sup> and Romania.<sup>24</sup>

Only the point that women and men are entitled to equal rights is set forth in one section of these provisions<sup>25</sup> while more powerful provisions than the embodiment in Article 10 of Turkish Constitution are contained in other sections. The assessment of these provisions would be beneficial as guidance for the evaluation of amendments made and proposed to the Turkish Constitution.

If we examine the provisions in the constitutions of the Federal Republic of Germany and Switzerland, which we consider to have been the source for the amendment to Article 10 of our Constitution, it should be mentioned that ensuring equality between women and men in these countries is a task charged to the state by their constitutions. The provision set forth in Article 3 of the Constitution of the Federal Republic of Germany is quoted as follows:

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<sup>11</sup> Axel TSCHENTSCHER, *The Basic Law (Grundgesetz), The Constitution of Federal Republic of Germany*, (23 May 1949), Jurisprudencia Verlag Würzburg.

<sup>12</sup> <http://www.swissemb.org/legal/const.pdf>

<sup>13</sup> <http://www.oefre.nibe.ch/law/icl/fi00000.html>

<sup>14</sup> <http://www.assemblee-nationale.fr/english/8ab.asp>

<sup>15</sup> [http://www.oefre.unibe.ch/law/icl/sp00000\\_.html](http://www.oefre.unibe.ch/law/icl/sp00000_.html)

<sup>16</sup> [http://www.oefre.unibe.ch/law/icl/it00000\\_.html](http://www.oefre.unibe.ch/law/icl/it00000_.html)

<sup>17</sup> [http://www.oefre.unibe.ch/law/icl/hu00000\\_.html](http://www.oefre.unibe.ch/law/icl/hu00000_.html)

<sup>18</sup> [http://www.oefre.unibe.ch/law/icl/mt00000\\_.html](http://www.oefre.unibe.ch/law/icl/mt00000_.html)

<sup>19</sup> [http://www.oefre.unibe.ch/law/icl/pl00000\\_.html](http://www.oefre.unibe.ch/law/icl/pl00000_.html)

<sup>20</sup> [http://parlamento.pt/ingles/cons\\_leg/crp\\_ing](http://parlamento.pt/ingles/cons_leg/crp_ing)

<sup>21</sup> [http://www.oefre.unibe.ch/law/icl/lo00000\\_.html](http://www.oefre.unibe.ch/law/icl/lo00000_.html)

<sup>22</sup> [http://www.us-rs.si/en/index.php?sv\\_path=6,17&itlang=\\_L1](http://www.us-rs.si/en/index.php?sv_path=6,17&itlang=_L1)

<sup>23</sup> [http://confinder.richmond.edu/greek\\_2001.html](http://confinder.richmond.edu/greek_2001.html)

<sup>24</sup> <http://domino.kappa.ro/guvern/constitutia-e.html>

<sup>25</sup> For an example see the subparagraph 2 of the Article 4 of the Constitution of Greece: “Greek men and women have equal rights & equal obligations”.

*“(1) All humans are equal before the law.*

*(2) Men and women are equal. The state supports the effective realization of equality of women and men and works towards abolishing present disadvantages.<sup>26</sup>*

*(3) No one may be disadvantaged or favored because of his/her sex, parentage, race, language, homeland and origin, his/her faith, or religious or political opinions. No one may be disadvantaged because of his handicap.”<sup>27</sup>*

As to the Federal Constitution of Switzerland of 18 April 1999, some issues considered to which they had particular importance were also paid attention subsequent to the emphasis that women and men are entitled to equal rights; the legislature was instructed to eliminate problems relating thereto. Indeed, Article 8 sets forth the provisions:

*“(1) All human beings are equal before the law.*

*(2) Nobody shall suffer discrimination, particularly on the grounds of origin, race, sex, age, language, social position, lifestyle, religious, philosophical or political convictions, or because of a corporal or mental disability.*

*(3) Men and women have equal rights. Legislation shall ensure equality in law in fact, particularly in family, education, and work. Men and women shall have the right to equal pay for work of equal value.*

*(4) Legislation shall provide for measures to eliminate disadvantages affecting disabled people..*

According to the Hungarian Constitution, the state must provide for the equality of women and men with regards to civil, political, economic, social and cultural rights (§ 66). In Malta, ensuring equal rights of women, and, in particular, equal wages for equal work are the tasks from the constitution for the state to focus on (§ 14).

As in the Constitution of Malta, it is seen that the provisions targeting the economic empowerment of women in their working lives, by ensuring that they are provided with equal rights, are also included in the constitutions of other states. For instance, according to Article 6 of the Constitution of Finland, equality between genders must be ensured in social activities, working life, and particularly in assignment of wages, and in other sections of life. The detailed provisions relating to the subject matter shall be ensured by laws. The necessity of equal wages for equal work of women and men in Romania is a constitutional provision (§ 38).

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<sup>26</sup> Sentence inserted by 42nd Amendment (27.10.1994).

<sup>27</sup> Sentence inserted by 42nd Amendment (27.10.1994).

On the other hand, it is seen in some constitutions that increasing the political participation of women is emphasized rather than empowering their positions in working life. For instance, the provision ensuring equal access in duties and positions assigned through elections is contained in Article 3 of the French Constitution of 04 October 1958. The points that citizens can, under equal terms and conditions, be elected for public institutions and positions assigned through elections, and that special provisions necessary to increase the possession of equal opportunities for women and men should be made by the state, are contained in Article 51 of the Italian Constitution. Similar provisions (§ 109 and § 43) are also contained in the Portuguese and Slovenian Constitutions, respectively.

It should also be mentioned that ensuring equality between women and men in the Portuguese Constitution is deemed to be among the fundamental tasks of the state (§ 9). In our opinion, it is noticeable that respecting gender equality as described in line with equal rights in the Croatian Constitution, is among the constitutional order of the Republic of Croatia and the fundamental values of constitution (§ 3).

Lastly, it is essential to mention the provisions of the EU Constitution, which was adopted in June 2004. The provision of Article II-83 of the Constitution sets forth:

*“Equality between men and women must be ensured in all areas, including employment, work and pay.*

*The principle of equality shall not prevent maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.”*

## **5. Proposal for constitutional amendments oriented to provision of equality between genders**

The provision included in Article 10 of our Constitution is an important step on the way to ensuring gender equality in Turkey. In our opinion, it is however not satisfactory to deal with the problem in a shorter time and more effectively. Therefore, a new package of constitutional amendments relevant to the subject matter should be included in the agenda.

In this context, re-arrangement of Article 10 in particular is necessary. In our opinion, the following proposal presented in the report prepared in 1999 in respect to Article 10 is suitable:<sup>28</sup>

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<sup>28</sup> Aysel ÇELİKEL, Zafer GÖREN, “Anayasanın 10. Maddesinde Öngörülen Değişiklik ve Gerekçesi Hakkında Sempozyumda Sunulan Rapor”, *Hukukta Kadın Sempozyumu*, (20 Eylül-1 Ekim 1999, Ankara), T.C. Başbakanlık Kadının Statüsü ve Sorunları Genel Müdürlüğü, 2<sup>nd</sup> edition, Ankara 2000, p.203-209.

*“X. Principle of equality, possession of equal rights of women and men*

*All are equal before the law.*

*Women and men are entitled to equal rights and freedoms.*

*The legislature shall make the necessary arrangements to remove direct and indirect discrimination for unjustly treating women in any and all fields of public law, and to equalize the status of women and men.*

*The state is obliged to take any and all measures which will ensure actual attainment of the entitlement to equal rights for women and men and removing existing unjust treatment.*

*No one shall suffer wrongful or preferential treatment based on discrimination of any kind, such as sex, race, birth language, and religion, political or other opinion.*

*No one, family, group or class shall be privileged.”*

As mentioned in the proposal a “*temporary provision*” shall also be included in the constitution to bring in such amendment immediately. This provision may be stated as follows:<sup>29</sup>

*“The provisions contrary to the subparagraphs II, III and IV of Article 10 shall have to be complied with this provision until .....*

*Subparagraphs II, III and IV of Article 10 of Constitution shall be connected with jurisdiction as directly valid constitutional norms until the date determined.”*

An important discussion with respect to the provision to be included in Article 10 of the Constitution by Law No. 5170 shall have been ended by means of such an arrangement. Attention was already drawn to the fact that legal provisions which could be made to the Constitution in this direction may create the problem of discrimination due to the reprobation of proposals with respect to acceptance of positive discrimination from the opposition party during the work regarding the amendments to Article 10 of the Constitution. In fact, Subparagraph 2 of Article 10 of the Constitution contains the provision “*No one, family, category or class shall be privileged.*” and no provision, or the exception of this provision regarding that positive discrimination oriented towards women, shall be involved in our Constitution.

Notwithstanding the point expressed that “*the discrimination and application of different status for different groups to stabilize or eliminate some actual*

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<sup>29</sup> ÇELİKEL/GÖREN, p.207.

*disparities*” may not be contrary to the concept of equality and may not be deemed arbitrary discrimination;<sup>30</sup> this discussion may easily be ended in favor of gender equality by means of a similar provision in Subparagraph 2 of the proposal.

Moreover, the amendment to be brought in should not be limited to the provisions of Article 10. Arrangement of the constitutional provisions, which will guide the legal corrections, to be made to ensure progress in fields such as education, working life and political participation, and to prevent violation oriented to women will also positively affect the results positively.

Some provisions increasing the participation of women in political life rank first among the amendments to be attained in this context. As in the French and Italian Constitutions, Article 67 stipulating that the *“Rights for electing, to be elected and acting in political activities”* may be added with a provision ensuring equal access of women and men to the tasks and positions assigned through elections. For this purpose, we propose the following text to be added subsequent to the Subparagraph 1 of Article 67:

*“The State shall make the special arrangements necessary for the possession of equal opportunities to benefit such rights for women and men”.*

In addition, a gender quota may be brought in by means of an amendment to be made in Article 35 of the Constitution detailing the foundation of the Grand National Assembly of Turkey. Such provisions supporting the involvement of women in political parties in greater ratios may be achieved by amendments to Articles 68 and 69 of the Constitution.

Paragraph 1 of Article 55, with the subtitle of *“Provision of justice in wages”* may be added, with the following provision to remove unjust treatment encountered in the working lives of women:

*“Working women are entitled to equal rights and, for comparable jobs, equal pay as for men. Working conditions have to be such as to allow women to fulfill their essential family duties and to ensure adequate protection of mother and children.”*

## CONCLUSION

As seen, even though the provision included in Article 10 of the Turkish Constitution is an important step to eliminate the problem of gender inequality for our nation, other provisions indicating removal of inequalities in economic, social and political fields should also be included as well in the Turkish Constitution, as we have seen in some member countries of the EU. However, effective work oriented to eliminate inequalities can and must be conducted until such provisions are made.

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<sup>30</sup> TANÖR/YÜZBAŞIOĞLU, p.114.



In fact, the constitution obliges the state to ensure the attainment of such equality. The issues we mentioned above should be taken at first into consideration during determination into which fields this obligation should particularly be accomplished. Moreover, it should be kept in mind that the provisions regarding gender equality are included in the conventions to which Turkey is a party. It may be said that the most important one among them is the CEDAW.<sup>31</sup> Our country is a party to both of this convention and of the selective annexed Protocol.

Our country has accepted a number of obligations with this convention. The provision added by Law No. 5170 to the last paragraph of Article 90 of the Turkish Constitution should be taken into account:

*“International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect, and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”*

In this case, the legislature must introduce provisions of law to eliminate situations contrary to the fundamental principles set forth in the convention of the CEDAW, and must act in line with the obligations therein.

Introduction of these problems and solutions thereof shall mean ensuring a great development on the way to membership in the EU. However, the more significant thing is that an important necessity of being a contemporary democratic state shall have been fulfilled.

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<sup>31</sup> “The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination”. See, <http://www.un.org/womenwatch/daw/cedaw/>