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FOREWORD

READING OF THE CONSTITUTION FROM AN ECO-SYSTEM PERSPECTIVE

Turkey suffered seriously from natural disasters that occured in the form of fires and floods in July and August 2021. Turkish society has learned the hard way that life should be perceived as a union of flora, fauna, and homo sapiens. The public officials acting on behalf of the Republic of Turkey faced serious difficulties in providing inter-institutional coordination and effective intervention. The initiatives have mobilized around volunteer communities to contribute to the firefighting efforts.

Without going into the details on necessary measures and constitutional provisions for an effective and participatory public administration, I will limit this note to some observations and recommendations on the "*Reading of the Constitution from an eco-system perspective*".

The 1982 Constitution of the Republic of Turkey includes many articles that directly or indirectly protect the environment, covering an area stretching from coasts to forests. These articles, laid out in different parts and sections of the Constitution, can also be understood as the environmental and ecological (territorial) constitutional regulations.

Although many constitutional amendments have been made[1], the articles directly related to the environment and the territory have been left untouched. Nonethelless, it was possible that the changes-especially those reinforcing the rights and freedoms[2]-would on effect the advancement of the right to the environment. However, this was not the case, and in the practice the provisions protecting Turkey's natural, cultural, and historical values and assets were not sufficiently fulfilled.

In addition to the problem of deconstitutionalization in general[3], the problem of the ineffectiveness of the environmental-territorial constitutional

[1] The Constitution of the Republic of Turkey (Law no: 2709, Adopted 7/11/1982) was amended 20 times between 1987 and 2017

[2] Particularly the changes made between 1987-2004 may be noted in this context

[3] On deconstitutionalization, see Journal of Constitutional Law-9/2016, "Foreword", p. 9-10

provisions once again manifested itself with devastating consequences in the summer of 2021[4].

Relevant provisions of the Constitution may be characterized as the "*territorial provisions that pertain to public interest*".

I.- TERRITORIAL PROVISIONS THAT PERTAIN TO THE PUBLIC INTEREST

As a constitutional concept, "public interest", appears as the main title of the articles regulating and protecting the components of the ecological (territorial) element of the Republic of Turkey. [5] The right to a healthy and balanced environment, having the function of protecting values and assets that are qualified as public interest, is a right belonging to the future generations.

1) Constitutional foundations for a qualified territory

Although the term "environment" evokes Article 56 of the Constitution, the environmental rights finds theirs basis in the articles that refer to the territory of Turkey (or the territorial element of the Republic of Turkey) in its broadest sense. These range from articles that regulate urban and ecological balance to the articles on forest protection. These are, in fact, the constitutional guarantees for a "territory with quality" and can be briefly elucidated as follows:

"The territory of Turkey" appears as the general framework: The fundamental norm; "*The State of Turkey, with its territory and nation, is an indivisible entity"* (Art.3), refers to the whole country. Likewise, the "indivisibility of the territory" should be construed as the totality of the territory.

- **Public Interest:** Use of the coasts, land ownership Protection of agriculture, animal husbandry, and persons engaged in these activities are subsumed under the title "Public Interest".

Protection of historical, cultural and natural assets: The State shall ensure the protection of the historical, cultural and natural assets and wealth, and shall take supportive and promotive measures towards that end (Art.63)

Natural resources: Natural wealth and resources shall be under the authority and at the disposal of the State. (Art.168).

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[4] For an international research project report, which examines the issue in terms of human rights before/during/after natural disasters, see. Les catastrophes et les droits de l'homme/CADHOM, ANR, Décembre 2013

[5] See. Fundamental Rights and Duties (Part 2)/ "Social and Economic Rights and Duties" (Part 3)/ Public interest (Title III.): Utilization of the coasts, Land ownership, Protection of agriculture, animal husbandry, and persons engaged in these activities, Expropriation, Nationalization and privatization

Forests: The State shall enact the necessary legislation and take the measures required for the protection and extension of forests (Art. 169) To protect forests, this provision limits the lawmaking powers of the parliament substantially, as well as any sort of propaganda that might lead damaging forest.

Planning: It is the duty of the State to plan for economic, social and cultural development, and, in particular the rapid, balanced and harmonious development of industry and agriculture throughout the country and the efficient use of national resources by taking inventory of and evaluating them, and the establishing of necessary organization for such development (Art.166).

Urban Public Order: Freedom of residence may be limited by law in order to "achieve sound and orderly urbanization and protect public property." The State "shall take measures to meet the need for housing within the framework of a plan that takes into account the characteristics of cities and environmental conditions, and also support community housing projects "(Art.23 and 57).

As can be seen, the Constitution, with its different provisions, contains the necessary elements for an interpretation in favor of a holistic environmental perspective for a tripartite conception of the environment: rural, urban, cultural.

2) The Right to Health and Right to Environment.

According to Article 56 of the 1982 Constitution entitled "health services and protection of the environment":

"Everyone has the right to live in a healthy and balanced environment.

It is the duty of the State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution

The State shall regulate central planning and functioning of the health services to ensure that everyone leads a healthy life physically and mentally, and provide cooperation by saving and increasing productivity in human and material resources.

The State shall fulfil this task by utilizing and supervising the health and social assistance institutions, in both the public and private sectors. "

There is a direct and close relationship between the right to a healthy and balanced environment. Without, Article 56, without explicitly uttering the concept of "right to protection of the environment", Article 56 define the concept. The same article states the duties of the state regarding the right to health. However, it refrains from giving a definition on this issue.

3) Does the right to environment have constitutional limits?

In regulating the right to healthy environment includes guarantees rather than duties.

As per Article 13, rights and freedoms stipulated in the Constitution may be restricted only in conformity with the reasons mentioned in the relevant articles of the Constitution; there is no restriction clause in the Article 56. Therefore, the right to environment is not subject to limitation. Yet, by taking into account constitutional interpretation methodology, one may ask whether there are indirect restrictions regarding the right to a healthy environment.

The right to environment is regulated in the third chapter of the second part of the Constitution entitled "Social and Economic Rights and Freedoms" (Art. 41-65). According to the last article of this chapter, the State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties (Art. 65).

Can this provision be invoked as a restriction clause for the Article 56? Briefly, environmental protection consists of different elements such as preserving the existing environment (protection), its improvement, repair and restoration, and taking measures against destructive factors (prevention of harm). For this reason, it is difficult to assert the restrictive effect of Article 65 in terms of the duties of "improvement", "protection" and "prevention" listed in Article 56.

Moreover, according to Article 104/17 of the Constitution, *"The fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution shall not be regulated by a presidential decree…"*

Considering that the right to environment is regulated within the third chapter and is subsumed under the social and economic rights, one may ask whether a presidential decree can regulate this right. Even if it may be argued that a presidential decree can regulate this right according to Article 104, such a decree cannot restrict this right according to Article 13. Indeed, Article 104 uses the term "regulation", whereas the article 13 uses the term "restriction", prohibiting limitation of all rights by presidential decree.

From a perspective of the law of freedoms, not all regulations result in restriction. Since the Article 104 expressly articulates "regulation" instead of restriction, it may be argued that presidential decrees may be issued on the right to environment provided that they do not restrict the right.

However, one should discern the following: administration of environment and right to environment. As to the former, *"the establishment, abolition, the duties and powers, the organizational structure of the ministries, and the establishment of their central and provincial organizations shall be regulated by the presidential decree."* However, "*A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same*

matter (Art.104/17). So, if the Grand National Assembly of Turkey enacts a law on the Ministry of Environment, it replaces the relevant presidential decree. By contrast, regarding the right to environment, because there is already a Law on Environment since 1983, a presidential decree regulating this right would contravene Constitution.

II.- CONSTITUTIONAL DUTIES AND CRITERIA

The guarantees of the right to the environment in the Constitution can be addressed under three headings: institutional, normative and procedural rights.

- Positive duties theory,
- Rights and freedoms criteria,
- Procedural rights.

1- Triple Duty: To Prevent/Protect/Improve

The duty of the State to prevent environmental pollution, to protect and improve the environment (Art. 56) corresponds to the triple obligation of the Republic of Turkey to human rights: to respect, to protect and to improve (Art. 2 and Art.5).

"TO PREVENT": According to Article 56 "prevention of environmental pollution is the State's direct and primary obligation. Activities (planning, related decisions, and implementation) that degrade the environment or have a risk of adverse effects on the environment are subject to an environmental impact assessment (EIA) report. Under the Environment Law, institutions, organizations, and businesses that may produce environmental problems with their activities must prepare an "Environmental Impact Assessment Report". Considering all possible effects on the environment, this report should include the ways and measures for elimination of the negative effects of the wastes and residues that may cause environmental pollution. The EIA practice and its effectiveness is a tool of the State to be used for preventing the pollution, whether it is carried out by the private or public sector [6].

An EIA is not the only tool to fulfill the obligation to prevent damage to the environment. In this process, planning activities come to the fore and there are many tools for this at the constitutional level. In this regard, planning documents should be treated as legally binding regulations.

[6] In an EIA Report, the type of projects to be requested, the issues to be included and the issues to be approved by which authority are determined by a regulation (Environmental Law, art. 10)

On the other hand, a more general principle of obligation in the context of the main purposes and duties of the State is also noteworthy: "*To safeguard the indivisibility of the country and to promote human rights*". This provision sets forth the dual obligation regarding the country and society (Art. 5).

"TO PROTECT": According to Article 56, "to protect the environmental health" is the duty of the State, citizens and investors. The State's obligation to protect is not limited to environmental health, but also includes harmonious and balanced environmental protection, and " historical, cultural and natural assets and wealth". Undoubtedly, coasts, agricultural land, meadows, pastures and forests also fall within the scope of the "duty to protect".

The protection duties and obligations apply to the private sector as they do to the direct activities of the state: relevant State bodies should make the necessary regulations. State bodies should also check whether the organizations carry out their activities within the framework of the regulations and impose sanctions on those who violate the rules.

However, since the public authorities have not duly fulfilled these tripartite obligations, the environment of Turkey has been constantly pillaged, let alone a protected.

As for citizens: in addition to being the addressee of the "obligation to protect" pursuant to Article 56, they face a general obligation arising from being the subject of rights and freedoms: "*The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals."* (Art.12/2). According to this provision, duties and responsibilities inherently apply to the protection of the environment.

"TO IMPROVE": Improving the environment is the duty of State and citizens. The duty of the State to improve of the Article 56 may find its common basis in the Article 5: The State has to "*…strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence*." Since the subject of the environmental right is defined as "everyone", this general duty of the State includes the environmental right as well. The tripartite obligation to prevent, protect and improve applies not only to public authorities taking actions and making transactions on behalf of the State, but also to entrepreneurs and citizens operating under their control.

Article 12 of the Constitution reinforces this obligation in terms of horizontal relations. Undoubtedly, the duty-right dilemma not only strengthens the position of the individual in preventing environmental pollution, protecting the natural texture of the territory and improving the environment, but also pro-

vides a strong constitutional basis for the initiatives of non-governmental organizations.

Such a constitutional basis gives citizens and non-governmental organizations the right to directly intervene in activities that destroy nature. In the face of such an intervention, law enforcement forces cannot use force in the name of "public order".

The living spaces claimed by the citizens belong to the territory that falls under the concept of "environmental public order". In this respect, public interest is a meta concept that goes beyond the benefit of the actual society and includes national benefit, including the future generations. As a result, the tripartite obligation of the State creates a constitutional basis for the effective implementation of the EIA and the precautionary principle.

2) Application of the guarantee-criteria to the environmental right

The general guarantee criteria in Art.13 regarding constitutional rights and freedoms are also valid for the ecosystem.

-The Guarantee Criteria of Rights and Freedoms: *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality." (Art.13)*

Since these criteria are valid for all constitutional rights and freedoms, they also serve as a guarantee for the right to the environment. While the general criteria are used for (territorial) rights related to the environment and nature, specific connections should be established by taking into account the characteristics of this right. For this reason, as regards the regulations concerning the environment, it should be asked whether they infringe upon the essence of the environmental right, whether they are proportionate or not, and whether they will damage the ecological balance as well as the relationship between the democratic society and the right to the environment. Therefore, the propsals that my harm the ecosystem should be subject to the test of Article 13; particularly activities harmful to the environment should be put under the detailed scrutiny of the proportionality and "essence of rights" test. Article 56 should also be taken into account in determining whether a given regulation or decision violates the Constitution's protection of a "healthy and balanced environment".

The concepts of "balance and health" also include animals (fauna) and plants (flora) as species that transcend human existence.

On the other hand, constitutional rights and freedoms cannot be abused, and the “public order” clause provides a reason for the restriction for certain rights and freedoms. (Art.14) The general clause of public order also includes “environmental public order” with a teleological interpretation. However, environmental protection can be seen as a general reason for limitation. So all constitutional rights and freedoms may be limited in order to “protect the environment”.

“Ecologically balanced harmonious and healthy”: It is important to read these concepts in order to reinforce the constitutional right to environment. In this respect, the concept of “healthy and balanced environment" in Article 56 of the 1982 Constitution can be characterized as a criterion of guarantee.

3) Application of procedural constitutional rights to environmental right

It is necessary to highlight the constitutional regulations aimed at realizing the State's obligation to prevent, protect and improve. Following Article 2 of the Constitution, the principles of the “rule of law” and “democratic state” as the characteristics of the Republic should be applied as the general criteria for environmental regulations. Since the principle of legal security comes at the forefront of these, the application of the omnibus law, which is frequently applied for legal regulations related to the environment, is against the principle of the rule of law. Frequent changes in environmental legislation, especially in the EIA regulation, damage the stability of environmental legislation and the principle of legal security.

Likewise, participation, which is of great importance in the field of environmental protection, is among the requirements of the democratic state principle. Therefore, normative regulations regarding the environment should reflect the basic requirements of environmental democracy.

On the other hand, the provision “The State of Turkey is an indivisible whole with its territory and nation” (Art. 3) should be interpreted in a way that includes the need to preserve the integrity of the territory qualitatively.

The most important regulation that can be used in protecting the environment is the 5th article regarding the fundamental aims and duties of the State. Ensuring the welfare, peace, and happiness of the individual and society; and providing the conditions required for the development of the individual’s material and spiritual existence, may only be possible in a qualified country where it ensures its integrity.

The rule of non-delegability of legislative power (Art.7) also narrows the authority of the executive body to regulate the domain of environment, where environmental violations are intense. However, Article 169 also provides for

limitations on the powers of the legislature for the purpose of protecting forests.

The rule of supremacy and binding force of the Constitution (Art.11) acts as a protective function in terms of the environmental right that is recognized and guaranteed at the constitutional level.

The right to life (Art. 17), the right to respect for private and family life (Art. 20), and the right to property (Art. 35), regulated in the section on personal rights and duties, are the provisions that can be taken as a basis to protect the right to the environment.

The provision of Article 138 on the independence of the courts for the freedom of trial rights (art. 36)-and particularly the obligation to comply with the judicial decisions regarding the environment, are constitutional guarantees in the service of **"environmental justice"** (ecological justice).

In fact, all constitutional provisions regarding the rights and freedoms serve the right to environment in a chain of ideas, actions, and collective actions. Criticisms of the regulations and practices that harm and destroy the cultural, natural, and historical assets and wealth of the country may well enjoy the freedom of speech and thought. (Art. 25-26, 28 e.t.c) For this purpose, citizens may use their right to travel individually or collectively without any interference from public authorities (Art. 23). Likewise, freedoms of association, meetings and demonstration marches (Art.33-34) are in the service of ecological values. In summary, the freedoms of thought, collective action and association guaranteed by the Constitution provide strong protection of the right to the environment.

III.- CONSTITUTIONAL INTERPRETATION PRINCIPLES AND THE ENVIRONMENT

The need to interpret the Constitution as a whole in the light of both the rules in force and the amendments it has undergone is important in two respects: First, the 1982 Constitution should be interpreted in favor of rights and freedoms in general. Secondly, the 1982 Constitution should be interpreted in light of the amendments it has undergone, but also in the light of international conventions to which Turkey is a party in this period. All together demonstrate the importance of the principle of non-retrogression.

1) Dimensions of constitutional interpretation

The principle of interpreting the Constitution in favor of freedoms also applies to territorial rights.

The metamorphosis of the Constitution through amendments also increases the importance of interpretation. As a result of the revisions that started from 1987 and continued until 2010, the 1982 Constitution underwent signifi-

cant changes, especially in favor of rights and freedoms, and transformed the Constitution as a whole. The metamorphosis is not limited to the amended articles but has dimensions that affect the entire Constitution. Article 13, which provides more guarantee-criteria by removing restrictions, is the pivotal provision of metamorphosis, as mentioned above.

In this framework, legality-causality and respect for the Constitution should be applied in the light of the public interest inherent in environmental rights:

The "prescribed by law" clause: The right to environment can only be restricted by "law".

The legitimate aim clause (constitutional cause): No reason for restriction is stipulated for the right to environment.

Respect for the Constitution*:* Regulations regarding the right to the environment must comply with the letter and spirit of the Constitution. The concepts of public interest and the integrity of the territory should be emphasized in the application of the quadruple guarantee criterion to the environment:

-*Democratic society*: Freedoms of thought and association used in the field of environment should benefit from a strong protection by combination with the criterion a democratic society, which will also take into account the "right to live in a safe environment" of future generations.

-*Proportionality*: In terms environmental rights, in the human-environment relationship, and in line with the principle of "environment is not subject to man, man is subject to the environment" interferences towards the environmental rights should be moderate (reasonable).

-*Secular republic*: The importance of the secular legal order in the protection of the historical, cultural and natural environment should be emphasized.

-*Essence of the right*: Limitations should not touch the essence of rights and freedoms, for any reason whatsoever. Then how may the essence of the environmental right reflected by the ecosystem components be damaged?

In short, when the balance between flora+fauna+homo sapiens (as major components of life) is disturbed, the essence of environmental right is infringed upon. If, for example, a mineral extraction is to take place in a forest area and disturbs the balance of the tripartite relationship (ecosystem) as the "life components" in the related forest, the essence of the right to the environment has been infringed upon.

In this framework, in legal regulations, restrictive clauses should be subject to a narrow interpretation, while the guarantee clauses should be interpreted broadly

In this regard, the "prescribed by law" clause should be understood as follows: From a qualitative point of view environmental and nature-related legal regulations should be "clear, predictable and accessible". Omnibus legislation is flawed from the outset in terms of transparency of environmental legislation, as it harms environmental rights and superior public interest.

These observations show that environmental constitutional law does not only consist of the rules written in the Constitution, but also constitutes a whole with their interpretation and application.

2) The effect of international law

As per the Article 90 of the Constitution, treaties regarding the right to environment becomes a part of national law after the adoption by the Grand National Assembly of Turkey by a law approving the ratification. *"International agreements duly put into effect have the force of law."*

Similarly, *"in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."* This provision is valid for the environmental rights.

But beyond these, international documents on the right to environment, to which Turkey is not a party yet, are also used as reviewing criteria, according to ECtHR decisions. For exemple, the Constitutional Court has started to use, the provisions of the Aarhus Convention, to which Turkey is not a party, in its constitutional reviews, in line with the case-law of the ECHR.

As can be seen, environmental constitutional law is three-fold:

- The Constitution, its articles and their interpretation,
- International agreements that Turkey has adopted as laws in its national legal system,
- Major international conventions on environmental protection that have not yet been ratified.

3) The constitutional meaning of the non-retrogression principle. [7]

The interpretation of the environmental provisions and the general principles of the Constitution in favor of freedoms is indispensable in terms of the non-retrogression principle. This is for two reasons:

[7] An example of the non-retrogression principle from 21st century constitutions: "No amendment may undermine the human rights and freedoms guaranteed in this Constitution." Tunisia's Constitution, art.49/3)

The first is to build a life with quality by preserving ecological balance of the coutry and by securing the achievements of environmental and natural rights at the highest threshold in the current constitutional order.

Second is to set the minimum threshold for the future: Awareness of current heritage is invaluable; because the "principle of non-retrogression" (*le principe de non-régression*) applies not only to legal regulations, but also to the constitutional amendments.

Accordingly, no new regulation may fall behind any current regulation in terms of right and freedoms. In environmental law, this principle is especially important for the benefit of future generations. For this reason, regarding the amendments made in the 1982 Constitution and especially those that improved the rights and freedoms, and reinforced the environmental rights guarantees, it should be emphasized that these cannot be taken back with the practices that emerged as a result of the 2017 Constitutional amendments.

The non-retrogression principle is also recognized in international law. RIO+20 is a typical example of this. Here one may note (see particularly paragraphs 19 and 22) the obligations of States at the regional, national, subnational and local level, the legal frameworks, institutions and international agreements for a "common future" and a sustainable development.

According to the RIO+20 document, "It is essential not to backtract from the obligations adopted at the 1992 Conference." This shows the aim of constant "improvement" of the environment and avoiding acts and actions that may be regressive for the environment.

The non-retrogression principles applies to three agreements adopted in in Rio 1992: The Rio Declaration, Agenda 21 and Forest Principles.

A holistic environmental perspective (with rural, urban and cultural environment) is the territory of Turkey. The basic constitutional norm (Art. 3), which states that "*the State of Turkey is an indivisible whole with its territory and nation*", should be understood as a provision prohibiting the reduction, damage and destruction of the natural, historical and cultural values of the territory as a part of the earth.

"Indivisible integrity", is regulated among the obligations of the State in the next articles of the Constitution: to protect the "indivisibility of the country" is the main purpose and duty of the State (Art. 5), and this obligation should be understood not only in political terms, but also in terms of natural and ecological balance.

In Lieu of Conclusion: Call for An Environmental State

By a holistic reading and interpretation of the Constitution and by considering the international conventions to which Turkey is a party, it can be con-

cluded that actions that harm “historical, cultural and natural assets and wealth” are impermissible.

It is also indisputable that there exist constitutional foundations for an urban/rural environmental law that provides effective protection. In addition, the tripartite constitutional duty (to prevent/to protect/to improve) of the State is noteworthy.

This tripartite environmental obligation of the State may be reinforced by the principles of rule of law and social State; and with the duty of the state to respect/protect/improve the human rights.

Having said this, is it possible to read the 1982 Constitution as setting up an environmental state? To answer this question, it is necessary to remember that the rights and freedoms include both “duties and responsibilities” in horizontal relations; and the duties and responsibilities of citizens: the duty to "prevent/protect/improve". These duties and responsibilities can be interpreted as the constitutional provisions go far beyond a mere moral duty towards the environment. To the extent that these are interpreted together with other relevant constitutional norms, the Republic of Turkey can be fairly described as an “environmental state”.

This reading is only possible to the extent that the effective realization of constitutional environmental rights is compatible with “human dignity”. In this context, the prohibition of "treatment incompatible with human dignity" (Art. 17) can be recorded as an important constitutional basis for the environmental State in fulfilling its obligation to provide ecologically balanced environmental conditions.

To conclude;

The fact that constitutional norms and improvements are not sufficiently reflected in laws and sub-constitutional regulations; and that,

The judicial authorities have not applied the provisions of the national constitution directly and holistically,

Does not justify the negligence of the doctrine in systemic and teleological interpretation of the Constitution and demnds resolutel highlighting of the environmental and territorial constitutional provisions.

Indeed, the doctrine must urgently embrace its position as the driving force for the legislative, judicial and executive organs in the formation of an “environmental constitutional law”.

İbrahim Ö. Kaboğlu

26 September 2021

ARTICLES

DOMESTIC IMPLEMENTATION OF INTERNATIONAL LAW UNDER ARTICLE 90 OF THE TURKISH CONSTITUTION: LEGAL RESPONSES TO POLITICAL OBJECTIONS

Tolga Şirin[**]
Necdet Umut Orcan[***]

ABSTRACT

Article 90/5 of the Turkish Constitution, one of the most well-known constitutional provisions to Turkish human rights defenders, lays down the reception process of international treaties into domestic law. Despite its fame, the debate on the legal meaning of that provision continues after seventeen years of its enactment. The first part of the article briefly presents our take on that debate. Contrary to the dominant discourse, we argue that the provision does not divulge a hierarchy of norms. But regardless of the outcome of this extensive theoretical debate, national bodies face various practical problems as to implementing international treaties in domestic proceedings.

The remainder of the article is devoted to these problems. Since international law is not in an absolute harmony within itself, practitioners

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may encounter multiple conflicting international norms, each applicable to the issue before them. Moreover, international norms may be in conflict with the Constitution, with rulings of national high courts or with domestic norms that are excluded from judicial review. In such cases, how will practitioners fulfill their duty to comply with international norms? The article argues that most of these problems can be solved by resorting to "pro homine" and "völkerrechtsfreundlichkeit" rules of interpretation.

Keywords: *International Treaties, International Agreements, Article 90, International Law, Völkerrechtsfreundlichkeit, International Court Decisions*

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[H] LEGAL PROTECTION OF DISPLACED PERSONS DUE TO DISASTERS[*]

Seda Yurtcanlı Duymaz[**]

ABSTRACT

Changes in vital environmental conditions have been an important determinant that triggered and shaped the migration movement throughout the human history. Indeed, they are an ongoing phenomenon for people to leave their permanent residence individually or collectively, compulsory or optionally, permanently or temporarily, and migrate to another place in their country or directly to another country. Remarkably, today, migration movements as a result of environmental disasters caused by human and/or nature, especially hydro-meteorological and climatological disasters triggered by climate change suddenly or over time, have tended to become systematic and have become the most fundamental reason for forced migration and is regarded as a vital issue.

The diversity of appearance of forced migrations due to environmental disasters reveals the necessity of making a conceptual definition but at the same time, the question of what kind of legal protection immigrants can benefit from should also be answered. This study aims to define the environmental forced migration phenomenon, which has emerged as the biggest ecological, humanitarian, security and sustainabi-

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lity crisis of the 21st century, to conceptualize those who have been displaced due to environmental reasons and to answer the question of how these people can benefit from effective and adequate legal protection.

Keywords: Disaster, Climate Change, Environmental Forced Migration, Environmentally Displaced Persons, Human Rights

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Introduction

In the face of changes in their environmental conditions, people tend to leave their permanent residence individually or collectively, compulsory or optionally, permanently or temporarily, and migrate to another place or directly to another country. In the case of a hard factor such as environmental disasters,[1] the migration movement appears as an aspect of survival anxiety, which is an extension of the right to live. It is a very old phenomenon that people have to leave their living spaces in order to secure their lives due to human and/or natural disasters. However, the increase in population density, the rate of urbanization and the risky living spaces associated with them, and the continuation of human-induced greenhouse gas emissions without slowing down cause the migration waves to become crowded, frequent and widespread. Organizations that monitor human mobility in the world, such as the Internal Displacement Monitoring Center (IDMC), International Organization for Migration (IOM), UN Office for Disaster Risk Reduction (UNISDR), United Nations High Commissioner for Refugees (UNHCR) draw attention to the determinant role of global climate change in these disasters.[2] As a matter of fact, since the mid-2000s, hydro-

[1] Sture Öberg, ′Spatial and Economic Factors in Future North-South Migration′, in W. Lutz (ed), The Future Population of the World, (Earthscan 1996), 371

[2] Sylvain Ponserre and Justin Ginnetti, Disaster Displacement: A Global Review 2008-2018, (IDMC 2019); IDMC, Global Report on Internal Displacement 2020, (IDMC 2021); IOM, Migration and Environment, (IOM and the Refugee Policy Group 1992); IOM, The State of Environmental Migration, (IOM 2010-2021); UNHCR, The Environment & Climate Change, (UNHCR 2015); UNHCR, Climate change, disaster and displacement in the Global Compacts: UNHCR's perspectives, (UNHCR 2017); UNHCR, Global Trends Forced Displacement in 2019, (UNHCR 2020); UNHCR, Global Trends Forced Displacement in 2010, (UNHCR 2021); UNISDR

meteorological and climatological disasters have become a major driver of population displacement all over the world. Moreover, the future scenarios reveal the danger that this human mobility, which is expressed as hundreds of millions of people today, will turn into a mass migration of billions of people in the coming decades.[3] Statistics and forecasts show us how accurate the IPCC's warning in the early 90s was,[4] that it could turn into a serious humanitarian crisis with the waves of migration triggered by the climate crisis.

According to the data of the IDMC and the UNISDR, more than 362 million people left their living spaces between 2008 and 2020. It is stated that approximately 90% of this mobility is experienced due to weather and climate-related disasters. Moreover, it has been concretely demonstrated that migrations caused by disasters create massive migrations. In 2020 alone, more than 30 million people forced to leave their settlements because of environmental disasters. It is emphasized that this number is the highest recorded since 2012 and triples the rate of displacement due to conflict and violence.

How to manage the waves of migration, whose numbers are expressed in tens of millions today and which are expected to reach hundreds of millions in the coming decades, how to protect the immigrants, how to ensure social peace and security, and how to prevent possible ecological destruction of migration waves are the questions that await answers before the international community. In this context, firstly, the question of how to define and conceptualize those who have

and CRED, The Human Cost of Weather Related Disasters 1995-2015, (UNISDR and CRED 2015); Nansen Initiative, Protection Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, (2015) <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf > Retrieved on 12.08.2021

[3] Norman Myers, ′Environmental Refugees in a Globally Warmed World′, (1993) 43, Bioscience, 752–761; Nicholas Stern, The Economics of Climate Change: the Stern Review, (Cambridge University Press 2006), 20, 77; IPCC, Summary for Policymakers In Climate Change 2007: Impacts, Adaptation and Vulnerability Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, (Cambridge University Press 2007), 10; Frank Laczko and Christine Aghazarm (eds), Migration, Environment and Climate Change: Assessing the Evidence, Cenevre, (IOM 2009)

[4] IPCC, W.J.McG. Tegart, G.W. Sheldon & D.C. Griffiths (eds), ′Policymakers' Summary′, Climate Change: The IPCC Impacts Assessment (1990), 20

to leave their habitats due to environmental disasters as a disadvantaged group will be answered **(1.)**. After mentioning the lack of an international protection regime that provides legal recognition and protection for those who had to leave their settlements due to environmental disasters **(2.)**, an answer will be sought to the question of how to fill the existing legal gap on this issue **(3.)**.

1- Those Displaced by Environmental Disasters as a Disadvantaged Group

Regardless of its source and time of occurrence, in the event of a disaster, women-men, children-adults-elderly, disabled-undisabled, citizen-foreigners, minority-majority, rich-poor, black-white, faithful-non-believer, regardless of the political-apolitical distinction, it affects the living conditions and livelihood opportunities of everyone, and contains a serious and widespread threat to the use and realization of fundamental rights. The survival anxiety that arises in the face of these vital threats compels individuals, families, groups of individuals and communities to leave their places.

In order for those who leave their living spaces to be considered as a separate disadvantaged group in the face of disasters that can be defined as an environmental problematique,[5] leaving the living space must be forced.[6] This is necessary so that those who are the subject of mass and irregular migration waves, triggered by hydro-meteorological and climatological disasters, whose number, severity and frequency have

[5] For an explanation of the concept of environmental problematique, see Nükhet Yılmaz Turgut, Çevre Politikası ve Hukuku, (2nd edn, İmaj Yayınevi 2017), 2 et al.; Ruşen Keleş, Can Hamamcı, Aykut Çoban, Çevre Politikası, 8nd edn, İmge Kitabevi 2015), 53 et al., 153 et al.; Ahmet Güneş, Çevre Hukuku, (2nd edn, Adalet Yayınevi 2019), 28-30

[6] Essam El-Hinnawi, Environmental Refugees, (United Nations Environment Programme 1985), 4; Susana Adamo, ′Environmentally Induced Population Displacements′, (2009) 1, IHDP Update, 16; Bonnie Docherty and Tyler Gianni, ′Confronting a Rising Tide: A Proposal for a Convention on Climate Refugees′, (2009) 33, Harvard Environmental Law Review, 361; Frank Biermann and Ingrid Boas, ′Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees′, (2010) 10, Global Environmental Politics, 67; Michel Prieur, ′Quel statut pour les déplacés environnementaux?′, in Anne-Marie Tournepiche (ed.), La Protection Internationale et Européenne des Réfugiés La Convention de Genève du 28 Juillet 1951 Relative au Statut des Réfugiés À l'Épreuve du Temps, (Pedone 2014)

increased and become widespread, can be protected effectively and without exception, especially with global climate change. Because when it comes to environmental factors, migrations show a variable continuity, ranging from a planned choice to improve socio-economic conditions to being the last resort for survival.[7]

At this point, it would be appropriate to define the criterion of necessity according to the subjective conditions of individuals and societies at risk or endangered, and the severity, proximity and reality of the deterioration in their vital environmental conditions that trigger their survival concerns. Subjective conditions of individuals and societies mean that the criterion of necessity may vary according to the vital importance of the threatened environmental values in every concrete situation for the persons and groups of persons concerned. To be concrete, the negative impact of climate change on biodiversity points to a decrease in the welfare level in ′Northern′ societies and therefore the optional migration to be experienced, while in ′Southern′ societies this depletion or decrease raises an existential threat and therefore changes the nature of migration to be experienced.[8]

The criteria of seriousness and reality are more objective and are shaped according to the disaster risk in a place, the fragility level of the relevant society, and their capacity to struggle and adapt. Adaptation capacity of societies shaped by variables such as the geographical characteristics of the affected place, the socio-economic level of the society, its social structure, knowledge, science and skills, technological development level and physical infrastructure play a decisive role in environmental disasters and in particular in the extent of climate change and the environmental negative effects it triggers.[9] Moreover, we can state

[7] Graeme Hugo, ′Environmental Concerns and International Migration′, (1996) 30(1), International Migration Review, 107

[8] Seda Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları: Çevresel Zorunlu Göç, (Adalet Yayınevi 2021), 77

[9] Rana İzci, ′İklim Değişikliği ve Uyum (Adaptasyon) Sorunu′, in Etem Karakaya (ed.), Küresel Isınma ve Kyoto Protokolü İklim Değişikliğinin Bilimsel, Ekonomik ve Politik Analizi, (Bağlam 2008), 93; Sandra Banholzer, James Kossin, Simon Donner, ′The Impact of Climate Change on Natural Disasters′, in Ashbindu Singh and Zinta Zommers (eds), Reducing Disaster: Early Warning Systems For Climate Change, (Springer 2014), 24-25; Alice Poncelet, ′Bangladesh, un pays fait de catastrophes: La

that this criterion has reached a spiral of fragility that is difficult for non-resilient societies in the context of the global climate crisis.[10] As a matter of fact, the primary effort of fragile states and societies to have the ability to combat climate disasters will be to reach the upper-income group in order to increase their combat capacity. However, despite being the most important cause of climate change, the global economic order still relies on the use of fossil resources. Moreover, the global climate regime accepts this reality and yet does not foresee an effective mechanism to prevent greenhouse gas emissions.[11] Therefore, when fragile societies seek to develop their coping capacities, they are in danger of being exposed to more severe, systematic and increasingly difficult hydro-meteorological and climatological disasters.

Proximity, on the other hand, is the criterion by which the debates on the necessity of migration can be experienced at the highest pitch. What is the ′proximity of danger′ situation that will legitimize the necessity of migration in disasters that occur over time, such as soil loss due to rising sea levels, pollution of fresh water and fertile agricultural lands

vulnérabilité environnementale et la migration forcée′, (2010) 1284, Hommes et migrations, 16 et al

[10] Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 59. In the context of the concept of environmental and climate justice, see Defne Gönenç, ′Çevresel Adalet′, in Zerrin Savaşan, Çağlar Söker, Fırat Harun Yılmaz (eds), Çevre Hukuku ve Politikaları Kavramlar, Teoriler ve Tartışmalar, (Seçkin 2021), 103. See also Merve Suzan Ilık Bilben, ′İklim Hareketliliği′, in Zerrin Savaşan, Çağlar Söker, Fırat Harun Yılmaz (eds), Çevre Hukuku ve Politikaları Kavramlar, Teoriler ve Tartışmalar, (Seçkin 2021), 282

[11] Global climate regime structured an order favoring the continuity of consumption, use and production of fossil resources by stressing that the rightful priorities of the developing counters are ending poverty and reaching sustainable development, and therefore the necessary standards and rules for combatting the climate should not bring an ′unjust′ burden on themselves economically and socially. Framework Convention on Climate Change (UNFCCC), Int., par. 3; par. 9; par. 20; par. 21, art. 4§10 and 4§1(f). This is because the global climate regime accepted expressly that the obligation to decrease emission should not block the economic, social and cultural improvement and development capacity, or otherwise this would constitute intervention to human rights in other ways. Jean-Jacque Gouguet, ′Réfugiés écologiques: un débat controversé′, (2006) 4, Revue Européenne de Droit de l'Environnement, 32; Dinah Shelton, ′Equitable utilization of the atmosphere: a rights-based approach to climate change?′, in Stephen Humphreys (ed.), Human Rights and Climate Change, (Cambridge University Press 2010), 112

that meet vital needs, continuous flooding due to the melting of glaciers, and desertification? It is important to determine from when to start. At this point, reducing migration to a survival strategy and waiting for fragile societies to completely lose their safe living conditions in order to be forced to migrate, together with the fact of the fragility spiral above, would mean adding climate injustice to the existing climate inequality.[12] Therefore, Ioane Teitiota, who applied for the recognition of ′climate refugee′ status for the first time in the world, said that although his hometown of Kiribati, which has been a small island state since 2005, has not been lost under water to a degree that makes it impossible to live, and despite the systematized hydro-meteorological disasters. Even if a large part of the island's population still has not left their settlements, it should be considered as a serious potential victim at the point of emergence of survival anxiety and migration movement should be considered necessary.

The process of occurrence of disasters, their incidence and severity, and the variations in their impact areas and results increase the diversity of appearance of the environmental forced migration movement. This leads to the formation of a ′heterogeneous′ group[13] that has to leave their residence due to environmental disasters. This heterogeneous nature causes differentiation of the timing, direction, duration and subjects of the environmental forced migration movement.[14]

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[12] Rupert Colville, ′Réfugié ou migrant?′, (2007) 18(4), Réfugiés, 2; Prieur, ′Quel statut′ (n 6) 127; Patrick Gonin and Véronique Lassailly-Jacob, ′Les réfugiés de l'environnement, une nouvelle catégorie de migrants forcés?′, (2002) 18, Revue Européenne des Migrations Internationales, 2; Véronique Lassailly-Jacob, ′Une nouvelle catégorie de réfugiés en débat′, (2006) 4, Revue Européenne de Droit de l'Environnement, 374 vd.; Seda Yurtcanlı Duymaz, ′Çevresel Nedenlerle Yerinden Olanlar′, in Zerrin Savaşan, Çağlar Söker, Fırat Harun Yılmaz (eds), Çevre Hukuku ve Politikaları Kavramlar, Teoriler ve Tartışmalar, (Seçkin 2021), 233

[13] Christel Cournil and Pierre Mazzega, ′Catastrophes Écologiques et Flux Migratoires: Comment Proteger Les Réfugiés Écologiques?′, (2006) 4, Revue Européenne de Droit de l'Environnement, 418

[14] See Koko Warner and Tamer Afifi (eds), Environmental Change and Forced Migration Scenarios (EACH-FOR), (UNU-EHS 2009); Laczko and Aghazarm, (n 3); The Government Office for Science, Foresight: Migration and Global Environmental Change, (2011); Chloé Vlassopoulou and François Mancebo (eds), Rapport Scientifique Exclim, Exil climatique: Gérer les déplacements des population, Gestion et Impacts du Changement Climatique, (2013); Etienne Piguet and Frank Laczko (eds),

In sudden disasters, vital environmental conditions deteriorate predominantly at the local level, in reparable dimensions and for everyone in the affected area. For this reason, migrations with the aim of survival are mostly of a collective nature, and the masses tend to migrate temporarily[15] to the peripheries of the city they live in, to a neighboring city or to another region in the country they live in. At this point, it should be stated that there should be no other reasonable settlement alternative in the country of origin in order for the movement of out-of-country migration to be considered within the scope of forced migration.[16] Since the deterioration of vital environmental conditions in disasters that develop over time, the necessity of migration differs according to the subjective conditions and individual adaptation capacities of the affected people. For this reason, migrations can be collective as well as individual. In the face of disasters that develop over time due to the deterioration of vital environmental conditions on a larger scale, serious and often irreversible, individuals tend to migrate to other countries' lands permanently and predominantly with the urge to survive.

On the other hand, although the relationship between disaster and migration comes to the fore mainly in the context of climatic disasters, as stated above, there is no difference between disaster types in terms of the aim of establishing a dignified life and the emergence of basic and special needs. In other words, if an extreme weather event is not caused by climate change, a volcanic eruption, a hydro-meteorological disaster or a nuclear power plant accident can displace millions of people, even if

People on the Move in a Changing Climate, (Springer 2014); Dina Ionesco, Daria Mokhnacheva, François Gemenne, Atlas Des Migrations Environnementales, (IOM and SciencesPo 2016)

[15] Extreme weather events, which have increased significantly in recent years, tend to turn into recurring crises from being isolated in some places. In this case, people who have to leave their homes chronically in the face of sudden but systematized disasters push them to seek safer living areas in the long run and may make their migration permanent. Angela Williams, ′Turning the Tide: Recognizing Climate Change Refugees in International Law′, (2008) 30, Law and Policy, 522; Michelle Yonetani, ′Disaster-related displacement in a changing climate′, (2016) 65(1), World Meteorological Organization Bulletin

[16] Benoit Mayer, ′Critical Perspective on the Identification of 'Environmental Refugees' as a Category of Human Rights Concern′, in Dimitra Manou, Andrew Baldwin, Dug Cubie, Anja Mihr, Teresa Thorp (eds), Climate Change, Migration and Human Rights: Law and Policy Perspectives, (Routledge, 2017), 31

it is not a natural disaster. In the search for solutions, it is essential to define a comprehensive new disadvantaged group in order not to create new inequalities and injustices and not to allow arbitrariness in the obligation to protect in practice.[17]

In this context, those who are displaced due to environmental reasons: ′Individuals who are forced to leave their habitats to another place within the country or to another country for a justified or temporary reason, urgently or in the process, due to a human and/or natural disaster that endanger their survival conditions suddenly or over time, refers to families, groups of individuals and local communities′.[18] Within the scope of this definition, ′disaster′ is the environmental degradation process that causes an inevitable turmoil in living conditions, either suddenly or gradually, with the contribution of an environmental phenomenon originating from human and/or nature.′[19] The answer to the question of whether this disadvantaged group, which is expressed in tens of millions today, benefits from an effective and sufficient protection in the international legal order should be sought.

2- The Silence of the Law Against the Environmentally Displaced

[17] François Gemenne, Géopolitique du changement climatique, (Armand Colin 2009), 78; Christel Cournil and Pierre Mazzega, ′Réflexions prospectives sur une protection juridique des réfufiés écologiques′, (2007) 23(1), Revue européenne des migrations internationales, 22; Véronique Magniny, ′Des victimes de l'environnement aux réfugiés de l'environnement′, (2008) 6, Revue Asylon(s), 18; Walter Kalin, ′Disaster Displaced Persons in the Age of Climate Change: the Nansen Initiative's Protection Agenda′, in Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, Giulio Bartolini (eds), Routledge Handbook of Human Rights and Disasters, (Routhledge 2018), 352; Jane McAdam, ′Swimming against the tide: why a climate change displacement treaty is not the answer′, (2011) 23, International Journal of Refugee Law, 13; Benoit Mayer, ′Climate Migration Governance′, in Walter Leal Filho (ed), Handbook of Climate Change Adaptation, (Springer 2014), 835

[18] Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 301

A similar comprehensive definition is envisaged in the Draft Convention on the Status of Environmentally Displaced Persons prepared by french academics. According to art. 3 of this Draft, "Environmentally Displaced Persons′ means individuals, families, groups and populations facing a sudden or insidious upheaval in their environment that inevitably endangers their living conditions, forcing them to leave, urgently or in the long term, their usual places of life."

[19] Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 302

The international legal order has foreseen some special protection regimes for those who have left their residence forcibly. These protection regimes are basically diversified according to the direction of the forced migration movement. In this context, the 1951 Geneva Convention Relating to the Status of Refugees and the 1998 Guiding Principles Regarding Internally Displaced Persons appear as special protection arrangements at the international level.

The 1951 Geneva Convention on refugee status deals with the forced migration of a person to other countries who have a justified fear of being persecuted because of their race, religion, nationality, membership of a particular social group or political opinion, not wanting to benefit from the protection of the country in which they reside.[20] Refugee status provides individual protection and covers only out-of-country migration movements. Although the phenomenon of disaster is considered a justified fear of persecution;[21] and the idea of recognizing the status of ′climate refugee′ has been put forward in the context of proposals such as broad interpretation of membership of a particular social group on the axis of disaster victims,[22] it should not be forgotten that such a concept will appeal to a group of forced migrants for a limited environmental reason.

Undoubtedly, the use of the concept of refugee has an important contribution in embodying the grievances, vulnerable conditions and struggle for survival that arise with the environmental forced migration phenomenon, and in perceiving the issue as a serious human rights issue. Moreover, some authors state that the use of the word refugee is politically remarkable in terms of emphasizing the responsibilities of the developed countries, which are the main culprits of the global climate cri-

[20] 1951 Convention relating to the Status of refugees, art. 1

[21] Fabienne Quillere Majzoub, ′Le droit international des réfugiés et les changements climatiques: vers une acceptation de l'ecoprofugus?′, (2009) 86(4), Revue de droit international et de droit comparé, 629; Christopher Kozoll, ′Poisoning the Well: Persecution, the Environment, and Refugee Status′, (2004) 15(2), Colorado Journal of International Environmental law and Policy, 297; Jessica Cooper, ′Environmental refugees: meeting the requirements of the refugee definition′, (1998) 6, New York University Environmental Law Journal, 486-487

[22] Cooper, (n 21) 522 et al.; Laura Westra, Environmental Justice and the Rights of Ecological Refugees, (Eathscan 2010), 32

sis, in the migration waves.[23] But it is not legally and technically appropriate to use the concept of refugee, which also expresses a legal status, for those who have to leave their living spaces due to disasters.

First of all, it should not be forgotten that the survival anxiety that arises in the face of the destructive effects of environmental disasters that ′persecute′ the person is not of a subjective nature as in the Geneva Convention. As a matter of fact, in the case of disasters, it is seen that situations that trigger survival anxiety occur according to objective criteria such as the risk of living spaces and the adaptability and struggle capacity of the state.[24] Even if the negligence of the competent national authorities in the disaster process management, their violation of the duty of care and even their violations trigger the migration movement, the tendency of the people not to leave the country they live in due to the disasters in practice or even if they migrated to other countries, the wounds are healed in the disaster area and the living conditions improve. It is seen that the bond of citizenship has not been broken due to the tendency of

It is useful to mention two supporting reasons that reveal the inconvenience of refugee status in the context of climate change. The first of these reasons is related to the understanding of the ′clearness of the

[23] Jane McAdam, Climate Change, Forced Migration, and International Law, (Oxford University Press 2012), 39; Anthony Richmond, ′The Environment and Refugee: Theoretical and Policy Issues′, (1995) 39, Bulletin Démographique des Nations Unies; François Gemenne, ′L'anthropocène et ses victimes: une réflexion terminologique′, in François Gemenne (ed.), L'enjeu mondial: l'environnement, (Presses de Sciences Po 2015). It is also interpreted that the concept of statelessness may be effective in the political protection of the island peoples who forced to migrate, especially in the face of the risk of the actual extinction of the small island states. See Benoit Mayer and Christel Cournil, ′Climate Change, Migration and Human Rights: Towards Group-Specific Protection?′, in Ottavio Quirico & Mouloud Boumghar (eds), Climate Change and Human Rights An International and Comparative Law Perspective, (Routledge 2016), 182

[24] The fact that the causality relationship between disaster and forced migration is based on such objective criteria eliminates the possibility of directly defining those who migrate due to disasters as a ′membership of a particular social group′. Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 99. As a matter of fact, the decision of the French Council of State that those who were affected by the Chernobyl nuclear disaster and had to leave their country cannot be accepted as a ′particular social group′ stipulated in the Geneva Convention supports this interpretation. Conseil d'État, Mme Drannikova, n°185837, 15 March 2000

persecutor′ and the ′personality of the persecutor′.[25] Climate change, which is a global environmental problem, is a climate disaster because it has emerged with the cumulative effect of historical and current greenhouse gas emissions of all states, especially industrialized states, and negatively affects the life, health, safety, access to vital basic needs, and livelihood of everyone within its sphere of influence. We cannot talk about a single responsible state and a single victim in the migration relationship.[26] Therefore, in a climatic disaster that triggers migration, there is no apparent cruel authority or oppression against the person. The second supporting reason is the incompatibility of the concept of ′tyrannical state′ that we encounter in refugee status with the migration movement due to climatic disasters.[27] In particular, the migrations of the small island peoples show us that there is a movement from the ′victim state′, which does not have an effective and sufficient adaptation capacity due to its limited role in global warming in climatic disasters, to the ′cruel states′, which are the main actors of global warming.[28] In other words, we are faced with the concept of a tyrannical state that receives immigrants, not immigrants. For all these reasons, it is not appropriate to use the concept of refugee for those who leave their living spaces due to disasters.

Another regulation dealing with forced migration in the international legal order is the Guiding Principles on Internal Displacements: *′internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.′*[29] The Guiding Principles on the

[25] Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 106

[26] Stephen Humphreys, ′Introduction: Human Rights and Climate Change′, in Stephen Humphreys (ed.), Human Rights and Climate Change, (Cambridge University Press 2010), 1; Aurelie Lopez, ′The protection of environmentally- displaced persons in international law′, (2007) 37, Environmental Law, 380; HRC, A/HRC/10/61, par. 70

[27] Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 105

[28] McAdam, Climate Change, Forced Migration, and International Law, (n 23) 45

[29] Guiding Principles on Internal Displacements, Introduction, par. 2

issue are important because they clearly include all disasters[30] that occur suddenly or over time among the causes of forced migration, and address the environmental forced migration movement not only with its individual but also with its collective dimension. The text also includes mandatory evacuation practices to prevent disaster risks.

However, these Principles only cover forced migration within the borders of the country of residence. Therefore, those who are displaced due to environmental reasons who have to leave their country of residence do not fall within the scope of the Guiding Principles. Although the relevant regulation covers a very large proportion of migration due to disasters,[31] it is difficult to say that it provides complete protection for those who are displaced due to environmental reasons. The main reason for this is that the Guiding Principles put forward by a group of independent experts have a limited effect, as they are accepted as the norm of support for the rights and needs-based management of internal forced migrations.[32] In other words, this text could not go beyond being a part of soft law.[33]

[30] The fact that displacement is not counted as a constraint in the definition and that the emphasis is placed on ′as a result of or in order to avoid the effects of′ makes it possible to argue that the Principles have a suitable meaning to cover both sudden and gradual disasters. Christel Cournil and Benoît Mayer, Les Migrations Environnementales Enjeux et gouvernance, (Presses de SciencePo 2014), 66

[31] According to data from IDMC, forced migration movement triggered by disasters in the world is basically experienced within the borders of the country. For detailed information, see <https://www.internal-displacement.org/> Retrieved on 01.08.2021

[32] Res. AG 60/1, AG NU, 24 October 2005, Doc. NU A/60/1 par. 132; Elizabeth Ferris, Climate Change and Internal Displacement: A Contribution to the Discussion, Brookings-Bern project on internal displacement, Brooking Institution, Washington DC, 2014, p. 9; Walter Kalin, ′L'avenir des Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays′, (2007) 4, Revue des migrations forcées, 5; Roberta Cohen and Francis Deng, ′The Genesis and the Challenges′, (2008), Forced Migration Review, 4

[33] Walter Kalin, How hard is soft Law? The guiding principles on internal displacement and the need for a normative framework, (2001), Ralph Bunche Institute Roundtable, City University of New York, 6; Christel Cournil, ′L'émergence d'un droit des personnes déplacées internes′, (2009) 22(1), Revue québécoise de droit international, 7, 11 et al.; Jane McAdam, Climate Change Displacement and International Law: Complementary Protection Standards, Legal and Protection Policy Research Series, (UNHCR 2011), 57

States are in a political reluctance to transform the said regulation into a binding legal norm in the context of the principles of sovereignty and non-intervention on which international law is based, due to their sensitivity to the fact that the phenomenon of migration within the borders of the country remains an internal matter of a state.[34] Although it has been in force for more than twenty years, the lack of regularity and unity in practice[35] has led to the notion that states have a legal obligation to implement these principles. It is seen that even the forced migrants, who are entitled in line with the Guidance Principles, do not have sufficient knowledge and awareness about the rights and freedoms envisaged here.[36] In the light of all these reasons, it should be stated that the Guiding Principles cannot be qualified as a rule of practice.

Solution proposals to strengthen the Guiding Principles and turn them into a strict legal norm[37] are not suitable for providing adequate protection and fair burden sharing. It excludes out-of-country migration in terms of immigrants. In terms of the responsibility to manage migration, there is a risk that the spirit of international solidarity will turn into a protection obligation that falls on the country of origin where the migration takes place. Despite the fact of collective responsibility in climate change, the issue of managing environmental forced migrations caused by disasters triggered by these crises has the potential to be reduced to

[34] Cohen and Deng, (n 32) 4

[35] For example, the US interprets internal displacement as limited only because of an armed conflict. For this reason, he described those who left New Orleans due to Hurricane Katrina in 2005 as ′victims′, ′survivors′, and ′survivors′. Thus, the USA did not feel the need to act under the guidance of the Guiding Principles and did not make it felt to the public. On the other hand, those who left their habitats after flood and earthquake disasters in Haiti and Pakistan are defined as displaced within the scope of the Guiding Principles. Stéphanie Millan, ′Construction du Droit des personnes déplacées internes, victimes de catastrophes naturelles′, in Christel Cournil and Chloé Vlassopoulos (eds), Mobilité humaine et environnement: du global au local, (Editions Quæ 2015), 55; Elizabeth Ferris, ′Assessing the impact of the Principles: an unfinished task′, (2010), Forced Migration Review,10; Shiva Dhungana, ′Time to apply the Guiding Principles in Nepal′, (2008), Forced Migration Review, 27

[36] Ferris, ′Assessing the impact of the Principles′ (n 35) 10

[37] In this context, Kalin states that a UN Convention on the rights of internally displaced persons can be adopted. Walter Kalin, ′The future of the Guiding Principles′, (2008), Forced Migration Review, 38-39

the issue of countries where disasters are frequent, whose share in disasters is limited and therefore already fragile.

In the current international legal order, none of the special protection regimes dealing with forced migrations fully define a comprehensive disadvantaged group such as those who are displaced due to environmental reasons, and do not foresee an effective and sufficient protection mechanism for these people. Thereupon, various opinions have been put forward on the feasibility of establishing a subject-oriented protection regime specific to the phenomenon of global climate change. This approach, which was developed on the basis of the statistical superiority of those fleeing from hydro-meteorological and climatological disasters and the prediction that this superiority will continue exponentially, proposes to seek answers to the problem of forced migration in the context of global climate change. In this context, foreseeing the status of ′climate refugee′ or ′climate change displaced persons′,[38] accepting climatic forced migration as direct loss and harm, [39] forming adaptation policies by considering migration risk,[40] developing regional corporations on the axis of climatic forced migration phenomenon,[41] adopting the principle

[38] Biermann and Boas, ′Preparing for a Warmer World′ (n 6) 60-88; Frank Biermann and Ingrid Boas, ′Protecting Climate Refugees: The Case for a Global Protocol′, (2008) 50(6), Environment: Science and Policy for Sustainable Development, 21-26; Docherty and Giannini (n 6) 349-403; David Hodgkinson and Lucy Young, ′In the Face of Looming Catastrophe: A Convention for Climate Change Displaced Persons′, in Threatened Island Nations, Michael B. Gerrard, Gregory E. Wannier (eds), (Cambridge University Press 2013), 299-336; David Hodgkinson, Tess Burton, Heather Anderson, Lucy Young, ′The Hour when the Ship Comes In: A Convention for Persons Displaced by Climate Change′, (2010) 36(1), Monash University Law Review, 69-120

[39] Doreen Stabinsky and Juan Hoffmaister, ′Establishing institutional arrangements on loss and damage under the UNFCCC: the Warsaw international mechanism for loss and damage′, (2015) 8(2), International Journal of Global Warming, 310, 312-313

[40] Williams, (n 15) 519-520; Koko Warner, Climate change induced displacement: adaptation policy in the context of the UNFCCC climate negotiations, UNHCR, Legal and Protections Research Series, (UNHCR 2011)

[41] Williams, (n 15) 503-504; Jane McAdam, Environmental Migration Governance, UNSW Law Research Paper No.1, (2009), 7-8

of common but differentiated responsibility in the protection of climate refugees and management of migration[42] were brought to the agenda.

Due to the heterogeneity and breadth of the disadvantaged group that needs to be protected, we believe that proposals limited to climate change cannot provide a fair and just solution.[43] On the other hand, it is possible that the secondary status of human rights[44] in the global climate regime and the protection of those from their environmental places in the axis of the global climate regime is a product of a security-based approach. In this context, the possible reflex of the States Parties in the face of the phenomenon of forced migration, which is expressed as the most destructive humanitarian consequence of global warming, is a global climate that focuses on managing the phenomenon of migration with the

[42] Peter Penz, ′International Ethical Responsibilities to ′Climate Change Refugees′, in Jane McAdam (ed.), Climate Change and Displacement Multidisciplinary Perspectives, (Oxford University Press, 2010), 151, 162

[43] Jean-Marc Lavieille, Julien Bétaille, Jean-Pierre Marguenaud, ′Présentation du Projet de Convention relative au statut international aux déplacés environnementaux′, (2008) 12(4), Revue Européenne de Droit de l'Environnement 380; Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 298

[44] The issue of protecting human rights against climate change and its effects has become a secondary issue of climate law. The regime focused on the economic consequences of global warming rather than its human and social consequences. As a matter of fact, the right to pollute the atmosphere has been granted to states and the private sector with the acceptance of various market mechanisms, despite the recognition and acceptance of the potential to cause serious destructive consequences. On the other hand, a regime has been designed to support the emission of the developing countries, where the dirty investments of the (multinational) companies, which are the main polluting actors, are predominantly on the grounds of the right to develop. The climate regime gave place to the discourse of rights for the first time with the Cancun Agreement adopted in 2010. Here, too, a limited understanding of respecting human rights has been put forward. As a matter of fact, the Paris Climate Agreement, which was adopted in 2015 and regulates the future of the climate regime, included the discourse of rights only in the introduction, although it coincided with a period when serious humanitarian crises were experienced and the sustainability of life was discussed. For detailed information, see Seda Yurtcanlı Duymaz, 25 Soruda İklim Değişikliği ve İnsan Hakları, (Haklar ve Araştırmalar Derneği 2021); Daniel A. Farber, ′Climate Change and Disaster Law′, in Kevin R. Gray, Richard Tarasofsky, Cinnamon Carlarne (eds), The Oxford Handbook of International Climate Change Law, (Oxford University Press 2016); Dorothée Lobry, ′Questions ′humanitiaires et sécuritaires′ et le cas particulier des ′réfugiés climatiques′′, (2010), in Dossier: Sommet de Copenhague, défi climatique, défi diplomatique

concern of ′safety of the North′ instead of reducing and limiting emissions with more realistic and effective targets to prevent climatic disasters.[45]

As a result, it should be stated that the solution proposals focused on people and issues at the international level are not suitable and sufficient to protect the displaced due to environmental reasons. The current legal gap reveals the necessity of establishing a new legal regime regarding environmental forced migration.[46]

3- Establishment of a New Protection Regime for Environmentally Displaced Persons

The new regime should be set up as a binding international agreement that supports bilateral or regional cooperation. Disasters, especially the global climate crisis, have different effects all over the world

[45] Benoit Mayer, ′Environmental Migration in the Asia-Pacific Region: Could We Hang Out Sometime?′, (2013) 3, Asian Journal of International Law, 120; Andrea Liverani, ′Environmental Migration in the Middle East and North Africa′, Centre for International Studies and Research, Sciences Po (2012); François Gemenne, ‘‘What’s in a Name: Social Vulnerabilities and the Refugee Controversy in the Wake of Hurricane Katrina’’ in Tamer Afifi and Jill Jager (eds), Environment, Forced Migration and Social Vulnerability, (Springer 2010), 29, 36

[46] Prieur, ′Quel statut′ (n 6) 126-157; Stéphane Doumbé-Billé, ′À la Recherche d’un Régime International pour les Déplacés Environnementaux′, in D’Urbanisme et d’environnement, Liber amicorum Francis Haumont, (Bruylant 2015), 571-572; Gonin and Lassailly-Jacop, ′Les réfugiés de l’environnement′, 6; Dana Zartner Falstrom, ′Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment′, (2002) 13, Colorado Journal of International Environmental Law and Policy, 1-30; Cournil and Mazzega, ′Réflexions prospectives′ (n 17) 35; Christel Cournil, ′Les réfugiés écologiques: quelle(s) protection(s), quel(s) statut(s)?′, (2006) 4, Revue du Droit Public, 1039 et al.; Gregory McCue, ′Environmental Refugees: Appliying International Environmental Law to Involuntary Migration′, (1993-1994) 6, Georgetown International Environmental Law, 151-190; Astrid Epiney, ′Réfugiés écologiques et droit international′, in C. Tomuschat, E. Lagrange, S. Oeter (eds), The right to life, (Martinus Nijihoff publishers 2010), 397; Véronique Magniny, Les réfugiés de l’environnement: hypothèse juridique à propos d’une menace écologique, (Université Panthéon Sorbonne, 1999), 491-504; Monique Chemillier-Gendreau, ′Faut-il un statut international de réfugié écologique ?′, (2006) 4, Revue Européenne de Droit de l’Environnement, 450; Agnes Michelot, ′Vers un statut de réfugié écologique?′, in Jean-Marc Lavieille, Julien Bétaille, Michel Prieur (eds), Les catastrophe écologique et le droit: échecs du droit, appels au droit, (Bruylant 2012), 527-530

due to the subjectivity of fragility conditions. For this reason, the coexistence of states with similar climatic destinies, disaster risks and vital concerns has the potential to produce fast, easy and effective solutions to manage environmental forced migrations, to protect those who were displaced due to environmental reasons, and to disseminate good management practices and experiences. However, a solution limited to bilateral agreements or regional cooperation carries the risk that the spirit of international solidarity in a humanitarian issue will turn into a protection obligation that falls on the relevant countries or neighboring countries in the region over time. However, embodying the spirit of shared responsibility in the face of the environmental forced migration phenomenon, which expresses a human condition in the Anthropocene era, would be a fair and equitable solution. In this context, the proposal of the ′International Convention on Environmental Forced Migration in the Context of Disasters′,[47] as a global solution supported by bilateral and regional cooperation that allows good practice examples to become widespread, is actually put forward as a result of this ′realist′ thinking.[48]

The new regime should define displacement for an inclusive environmental reason in a way that allows to internalize the culture of prevention and should reveal a holistic understanding of environmental forced migration management. Parallel to the disaster process ma-

[47] Yurtcanlı Duymaz, İklim Değişikliği, Afetler ve İnsan Hakları (n 8) 337 et al.

[48] It is argued that dealing with environmental forced migrations, which are mainly within national borders, on an international level will be a waste of energy, time and resources and will not provide an effective solution; therefore, realism is based on bilateral and (or) regional cooperation. McAdam, ′Swimming Against the Tide′, (n 17) 26; Williams, (n 15) 518, 521; Benoît Mayer, ′The International Legal Challenges of Climate-induced Migration: Proposal for an International Legal Framework′, (2011) 22, Colorado Journal of Int. Env. Law and Pol., 408; François Gemenne, ′Créer un statut aux migrants environnementaux n'est pas une solution suffisante au problème", 7 Septembre 2011

However, this interpretation has been criticized for ignoring the heterogeneous nature of environmental displaced persons and the possibility of international migration. On the other hand, environmental forced migrations, which tend to become commonplace today, are not only a matter of those who have to leave their homes or the locals, but are closely related to the concepts of security, global peace and justice, human rights, poverty and development. Therefore, the global struggle against environmental disasters, which is the problem of humanity, and the phenomenon of forced migration triggered by them, is actually a result of realistic thinking

nagement, it should be designed as a holistic process management that covers the phenomenon of forced migration before, during and after. In this context, the disaster phenomenon that triggers environmental forced migration should be interpreted broadly to express the social paradigm[49] that reveals exposure to danger and vulnerability as well as the destructive event that causes damage. Defining the disaster phenomenon on the axis of the social paradigm will enable the prediction of a holistic process management mechanism in the form of preventing environmental forced migration risks, limiting their effects at the point where they cannot be prevented, and strengthening their capacity to cope with future risks.[50] As a matter of fact, projections for hydro-meteorological and climatological disasters, especially exacerbated, intensified and widespread by climate change, reveal the importance of eliminating this risk factor rather than managing the increasing risk of migration. Because the forced migrations, which are expected to increase in parallel with the disasters that are expected to increase, represent an issue that is more difficult to manage. Moreover, the irreversible consequences of ecological crises, especially climatic disasters, necessitate a preventive approach in terms of sustainability. Therefore, while establishing the legal framework for environmental forced migration, it should be ensured that not only those who are displaced but also those who are in danger of being displaced are protected.[51] In this way, the deepening of inequality

[49] As a matter of fact, if a community has organized its socio-economic conditions in accordance with its natural and structural living environment, it will be difficult for disasters to occur or for environmental phenomena to have devastating consequences. Anthony Oliver-Smith, ′What is a Disaster? Anthropological Perspectives on a Persistent Question′ in Anthony Oliver-Smith & Susanna Hoffman (eds), The Angry Earth: Disaster in Anthropological Perspective, (Psychology Press 1999), 25, 27

[50] In holistic process management, disasters are defined as a phenomenon arising from the weakness of the social system. Thus, an understanding of disaster management emerges, which is directed towards the elimination of deficiencies rather than discourses of fate and bad luck. The efforts of the international community on disaster management are parallel to this approach. Sendai Framework for Disaster Risk Reduction 2015–2030, A / CONF.224 / CRP.1, par. 6. Kristian Cedervall Lauta, Disaster Law, (Routledge 2015), 20

[51] Christel Cournil and Benoit Mayer, ′Opportunités et limites d'une protection catégorielle au bénéfice des migrants environnementaux′, in Liliana Lyra Jubilut and Fernando Cardozo Fernandes Rei (eds), Les minorités environnementales, (Université Catholique du Santos 2015), 69. Some authors emphasizes that the principle of ensuring material equality in human rights should be accepted as a basic reference at

against those who do not have the ability to migrate, who are in a more disadvantageous position in the face of disasters, is prevented.

The new regime should be established with an understanding that prioritizes the basic rights and needs of those who are at risk of environmental migration and those who migrate.[52] The security-based understanding, which dominates the official discourse and policies and focuses on the question of how migration can be managed safely in terms of states, and is based on the idea that the immigrant-receiving societies will lose more, is a paradigm far from the environmental and social realities that make it obligatory to delve into the causes of environmental forced migration.[53] As a matter of fact, the fact that environ-

this point. Benoit Mayer, The Concept of Climate Migration: Advocacy and its Prospects, (Edward Elgar Publishing, 2016), 57

[52] For the view on the necessity and the importance of human rights-based policing in the management of environmental threats and crises, see Shelton (n 11) 91-125; John Knox, ′Climate Change and Human Rights Law′, (2009-2010) 50, Virginia Journal of International Law, 163-218; Marlies Hesselman, ′Establishing a Full ′Cycle of Protection′ for Disaster Victims: Preparedness, Response and Recovery According to International Human Rights Supervisory Bodies′, (2013) 18(2), Tilburg Law Review, 106-132; Jean-Marc Lavieille and Fernanda De Salles Cavedon Capdeville, ′L'indispensable consécration des droits de l'homme au profit des déplacés environnementaux victimes de catastrophes′ in Projet de CADHOM, Les Catastrophes et les droits de l'homme, Tome 1, (ANR 2013), 459-473; Agence National de la Recherche, Les catastrophes et les droits de l'homme, Le projet ′Catastrophes et Droits de l'Homme – CADHOM′, Paris/Limoges, 2013

In order to be able to talk about a rights-based regime: 1) realizing human rights should be the main objective when developing policies, plans, programs and projects and determining measures. 2) Universal human rights texts, international and regional fundamental human rights conventions, principles and standards derived from international human rights law should guide all policies, planning and programming at all stages of the struggle process. 3) In order for the balance of rights and obligations to be effective, right holders and their rights, addressees and their obligations must be clearly defined. A/74/161, 15 July 2019, par. 62

We are of the opinion that the necessity of control mechanisms should be accepted as a fourth and important condition in order to secure a rights-based management approach in international regimes regarding environmental problems. Yurtcanlı Duymaz, 25 Soruda İklim Değişikliği ve İnsan Hakları, (n 44) 36

[53] However, despite this reality, it is likely that the primary preference for environmental forced migration is the security approach. For example, the issue of environmental forced migration is handled by the UN's Security Council more loudly than universal human rights institutions in the international arena. The Council discusses the forced

mental disasters have serious and irreversible consequences on the existence, health, dignity of human being, who is an element of the ecosystem, and his socio-economic and political life, and the prevalence of this destructive reality show us that the issue cannot be reduced to crisis management alone. For this reason, in the face of environmental risks that seriously threaten social functioning, potential victims of migration can also ensure that the rights of the migrating peoples to survive in the face of environmental disasters that seriously disrupt social functioning, the opportunity to be healthy and access health services, and the ordinary basic rights and needs of life such as water, food and shelter. A legal status that will guarantee their rights to be met under extraordinary and extraordinary conditions, their right to a healthy, safe, clean and sustainable environment, their freedom to determine their living space, their family unity, their legal and physical security, their cultural identity, to protect their assets, and to fulfill the related rights and freedoms should predict. In this context, the new regime should include a wide range of rights and freedoms to provide protection against environmental forced migration, during and after migration.[54]

In the axis of the prevention culture, it is essential to protect the individuals and individual communities against environmental forced migrations, and to protect the persons concerned against the risks of en-

migration movement caused by climate change as a threat to global peace and security. The first measures taken by the states in the fight against the Covid-19 epidemic, which has been described as another environmental crisis in the recent past, have focused on border security. The anxiety of the future created by the economic crisis conditions in the societies and xenophobia increased by populist discourses create the impression that an environmental migration management approach based on border security and military controls will be the priority choice

[54] Anthony Oliver-Smith, ′Climate Change and Population Displacement: Disasters and Diasporas in the Twenty-first Century′, in Susan A Crate and Mark Nuttall (eds), Anthropology and Climate Change: From Encounters to Actions, (Left Coast Press 2009), 116 et al.; Alice Sironi and Lorenzo Guadagno, ′The Protection of Migrants in Disasters′, in Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, Giulio Bartolini (eds), Routledge Handbook of Human Rights and Disasters, (Routhledge 2018), 309; Kalin, ′Disaster Displaced Persons′ (n 17) 348; Prieur, ′Quel statut′ (n 6); Lavieille, Bétaille, Marguenaud, ′Présentation du Projet′ (n 43); Fernanda De Salles Cavedon Capdeville, ′Les droits de l'homme concernés par les catastrophes′, in Projet de CADHOM,Les Catastrophes et les droits de l'homme, Tome 1, (ANR 2013), 30-109; Lavieille and De Salles Cavedon Capdeville, (n 52) 459-473

vironmental disasters.[55] At this point, the right of everyone at risk of displacement to live in an ecologically balanced, healthy, clean and safe environment must first be guaranteed. In other words, the importance of the right to the environment emerges in both its material and procedural dimensions.[56] As a matter of fact, in a regime that is envisaged to be established with a right and need-based approach, it is imperative that the right to the environment be guaranteed with the right to be informed,[57] to participate in the decision-making process, and to apply effectively to the judicial and administrative authorities against these processes. Thus, an international regime that will be created on the axis of disasters and the forced migrations they trigger will also enable environmental rights to be secured with a binding text at the global level.

In the axis of the reaction culture, the regime should envisage rights-based interventions against arbitrary refusals, especially against humanitarian aid offers encountered in practice. The current international legal order has given priority to the sovereignty of the political will in the country of origin, where the disaster and migration took place, against the humanitarian aid proposals that aim to meet vital basic needs such as clean water, healthy, nutritious and culturally acceptable food, shelter, hygiene materials and medicine during the crisis. Regarding humanitarian aid, the international legal order does not have a mechanism, a regulation of rights, a regime of responsibility that prioritizes the effective protection of victims. As a matter of fact, the UN International Law

[55] Michel Prieur, Principes éthiques pour la réduction des risques de catastrophe et la résilience des personnes, Council of Europe, EUR-OPA

[56] Michel Prieur, ′Le Conseil de l'Europe, les Catastrophes et les Droits de l'Homme′, (October 2010), VertigO - la Revue Électronique en Sciences de l'Environnement,; McCue, (n 46) 179; İbrahim Kaboğlu and Nihan Yancı Özalp, Çevre Hakkı, (Tekin Yayınları 2021), 138 et al..; Yılmaz Turgut, (n 5) 60; Ahmet Güneş, (n 5) 13; Selim Kılıç, ′Uluslararası Çevre Hukukunun Gelişimi Üzerine Bir İnceleme′, (2001) 2(2), Cumhuriyet Üniversitesi İktisadi ve İdari Bilimler Dergisi, 139; Mayer and Cournil, ′ Towards Group-Specific Protection?′ (n 23) 175, 185; Maria Stavropoulou, ′The Right Not to be Displaced′, (1994) 9(3), American University Journal of International Law and Policy, 692, 707, 742

[57] In the event of a disaster that gives rise to survival anxiety, the public's access to clear and complete information is seen as a fundamental human right. See ECHR, Grand Chamber, Öneryıldız/Turkey, Application no. 48939/99, 30 November 2004, par. 92

Commission has also mentioned this legal protection gap.[58] In this context, the right to benefit from humanitarian aid provided in accordance with the principles of humanity, impartiality and objectivity[59] should be envisaged for the displaced, as an individual right,[60] in the context of the responsibility to protect the individual that the sovereign authority imposes on the states.

Another issue that will come to the fore within the scope of forced migration is the protection of the rights and freedoms of individuals to determine their own destiny in their living spaces. In this context, the new regime should ensure that those at risk of disaster benefit from a strong protection against arbitrary evictions[61] due to the economic wheel turning over the transformation of their living spaces. At this point, forced evacuations, which should be realized with a transparent and participatory public management approach, should only be considered as a last resort in terms of the lives and safety of people at risk. Here, it should be accepted that people at risk have the right to leave their habitat, as well

[58] ILC, Draft Articles 10, 11, 12 and 14 on the Protection of People in Disaster; ILC, Report of the International Law Commission, Doc. A/71/10, 2016, p. 56

[59] These principles, which are the intersection point of the fields of international humanitarian law and human rights law, are the principles determined by the UN Humanitarian Aid Office (OCHA for short) regarding the benefit of humanitarian aid. The principle of humanity is to ensure the survival of the needy in accordance with the requirements of human dignity; the principle of impartiality is to help everyone in need, regardless of race, language, religion, gender, class or political opinion; The principle of impartiality requires humanitarian workers to continue their work without being a party to any conflict/conflict. See OCHA, Humanitarian Principles′ < https://ochanet.unocha.org/p/Documents/OOMhumanitarianprinciples_eng_June12.pdf > Retrieved on 09.08.2021

[60] CESCR General Comment No. 3,1990, The nature of States parties obligations, par. 1 ve 8; IASC, Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, B.1.1 ve B.1.2. Marlies Hesselman, ′A right to international (humanitarian) assistance in times of disaster: fresh perspectives from international human rights law′, in Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, Giulio Bartolini (eds), Routledge Handbook of Human Rights and Disasters, (Routhledge 2018), 65-83

[61] The term ′forced evictions′ is defined by CESCR ′as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.′ CESCR, General Comment No. 7: The right to adequate housing (Art.11.1), 1997, par. 3

as the right not to leave their residence by taking all risks.[62] On the axis of freedom of settlement and travel, the possibility of returning to the lands of origin that has become habitable for those who leave their living space safely should be given to those who have been displaced due to environmental reasons. Here, it is important that the right of return is voluntary and that the normalization process takes place with free will. In order for people to return voluntarily to their traditional lands or to prefer permanent settlement in the place of migration, it is essential that they be informed about the risks in their habitat and the information, predictions and assessments regarding living conditions.

The new regime should be structured together with institutional structures that will ensure the effective implementation of the regulations inherent in the rights and needs-based holistic process management covering before, during and after the environmental forced migration, financial mechanisms that will meet the resource needs, and supervisory bodies that will secure the status of the displaced due to environmental reasons.[63] In this context, the World Environmental Forced Migration Agency as an independent organization can be envisaged as responsible for the implementation and support of the regime. The Agency's Secretariat function can be fulfilled by the International Organization for Migration,[64] which has been working on the phenomenon of

[62] Michel Prieur, ′Projet de la Convention relative au statut international des déplacés environnementaux′, in Jean-Marc Lavieille, Julien Bétaille, Michel Prieur (eds),Les catastrophes écologiques et le droit: échecs du droit, appels au droit, (Bruylant 2012), 550-551

[63] The proposal ′Draft Convention On The International Status Of Environmentally Displaced Persons′, which was prepared under the leadership of French academics, proposes three basic institutional structure: ′World Agency for Environmentally Displaced Persons′ (article 21), ′High Authority′ (article 22) and ′Global Fund for Environmentally Displaced Persons′ (article 23). This proposal is a rights and need-based status arrangement that only addresses those who leave their habitats rather than forced migration

Since we propose the adoption of an international convention that will deal with the disaster and the forced migration it triggers with a process management-oriented approach, institutional characterizations focus on the phenomenon of environmental forced migration rather than environmentally displaced persons

[64] Draft Convention On The International Status Of Environmentally Displaced Persons, art. 21

migration triggered by disasters for a long time,[65] striving to disseminate examples of good practice, and which has the status of ′relevant organization′, which is currently a member of 172 states and has been collaborating with the UN system since 2016. In addition to the institutional structure, a Global Environmental Forced Migration Fund should be established to financially guarantee the functioning of the regime. This fund, which will be supported by compulsory contributions as well as voluntary contributions, should be based on the polluter pays principle. In this context, the fund will be fed with environmental taxes that will be collected not only from the states but also from private actors, who are today's primary polluters, in proportion to their role in the ecological crisis. In terms of contributing states, not only the polluting activities of developed states, but also the processes and activities of developing states that trigger ecological crises by ′dumping the environment′[66] should be evaluated within the scope of tax. Finally, it would be appropriate to envisage a High Authority to strengthen the binding nature of the regime and oversee the implementation and interpretation of the Convention. The existence of such a structure, whose decisions will be binding and final for the state parties, will allow the fear of being deceived,[67] which is among the biggest political reservations of states in the formation of international environmental regimes, to be overcome and the establishment of an international regime with broad participation.

Conclusion

[65] For detailed information, see <https://environmentalmigration.iom.int/fr/iom-publications> Retrieved on 05.08.2021

[66] Aykut Çoban, ′Çok Uluslu Şirketler – Ekolojik Zarar İlişkisinin Ekonomi-Politiği′, in Mehmet C. Marin ve Uğur Yıldırım (eds), Çevre Sorunlarına Çağdaş Yaklaşımlar – Ekolojik, Ekonomik, Politik ve Yönetsel Perspektifler′, (Beta 2004), 273 et al.; McCue, (n 46) 184-185

[67] There is a concern that there may be parties that can benefit by avoiding the cost or burden of cooperation envisaged in international environmental regimes. In the face of this phenomenon, which is also called the ′problem of free will′, states remain hesitant to undertake binding obligations and choose not to be a party to the agreements. Gökhan Orhan, Yasemin Kaya, Semra Cerit Mazlum, ′Uluslararası Çevre Rejimleri: Oluşturulmaları, İşleyişleri ve Özellikleri′, in Gökhan Orhan, Semra Cerit Mazlum, Yasemin Kaya (eds),Uluslararası Çevre Rejimleri, (Dora 2017), 6

As an issue at the crossroads of human rights law and environmental law, it seems that those displaced by environmental reasons cannot benefit from adequate protection in the current international legal order. In the Anthropocene era, in which we are living and where human-induced risks threaten sustainability, it is aimed to establish a new international regime, which is not limited to the management of the phenomenon of forced migration, which is a vital risk factor of disasters, which considers embodying the prevention culture among its main objectives, and in this context, combines environmental law and human rights law. The need is increasing day by day. For this purpose, the proposal of ′International Convention on Environmental Forced Migration in the Context of Disasters′ has been put forward.[68]

As a requirement of the prevention culture it has adopted, the aforementioned proposal imposes the obligation on states to internalize a sustainability approach that prioritizes the environment in the prevention of environmental forced migration and protection against future migration risks in political, social, cultural and economic life. On the other hand, it also includes right and need-based interventions against the evacuation practices of national authorities and the discretionary powers it has in the migration process management for humanitarian aid. The institutional structure envisaged by the contract proposal also envisages legal and diplomatic supervision of the actions, transactions and decisions of the parties in the environmental forced migration process management and the decisions to be made regarding the status of the displaced due to environmental reasons. Therefore, the proposal in question will result in stretching in favor of the protection of human rights in the principles of respect for sovereignty and non-interference in internal affairs on which international law is based. For this reason, it is possible to raise doubts about the realism and applicability of the Convention proposal and to criticize this proposal.

It is now being discussed loudly in societies that the legal norms and institutional structures developed on the neoliberal ground are the triggers and supporters of human-induced ecological crises that threaten

[68] ′Draft Convention On The International Status Of Environmentally Displaced Persons′, expressed as a ′turn-key′ text that has been worked on since 2008, has been an important guide for the proposal of the ′International Convention on Environmental Forced Migration in the Context of Disasters′

vital sustainability. Solutions aimed at transforming the economic and social order in line with environmental requirements against the ecological threats to existence are finding more and more support every day. In addition, the global nature of the ecological crisis shows us the fact that no society, rich or poor, is free from the effects and consequences of this vital problem. Therefore, internalizing a legal solution that requires a ′radical′ transformation in the current international legal order is not as impossible as one might think. Moreover, humanity is rapidly moving towards the necessity of accepting such a radical solution in the face of disaster projections, especially the climate crisis, where we have reached the point of no return.

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MECHANISMS FOR PROTECTING RIGHTS OF PERSONS WITH DISABILITIES: THE INTERNATIONAL FRAMEWORK AND THE CASES OF BRAZIL AND PORTUGAL

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MECHANISMS FOR PROTECTING RIGHTS OF PERSONS WITH DISABILITIES: THE INTERNATIONAL FRAMEWORK AND THE CASES OF BRAZIL AND PORTUGAL[*]

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ABSTRACT

Persons with disabilities have historically occupied a vulnerable position in society. However, it was only after the Second World War that a sense of responsibility became stronger in the international community in order to prevent their rights from violations.

This article aims to present both a brief analysis of the international legal framework on the rights of persons with disabilities, focused on the CRPD, and a case study with legal, historical and practical aspects focused on the Brazilian and the Portuguese contexts. Besides the introduction and the final remarks, the text is divided into two main parts: one focused on the protection of persons with disabilities in an international law perspective and the other presenting the case study. The case study, in its turn, is divided into a description of the legal framework in Brazil and in Portugal and an empirical case-law study focused on the approach to the civil capacity of persons with disabilities.

Keywords: Disability, Constitutional Court, CRPD, Brazil, Portugal

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1. Introduction

Persons with disabilities have historically occupied a vulnerable position in society. However, it was only after the Second World War that a sense of responsibility became stronger in the international community in order to prevent their rights from violations.

Since then, legislation on persons with disabilities rights, for example in the areas of social welfare, social security, and mental health, started being adopted by an increasing number of countries. As a result, many people with disabilities began to have the possibility of being provided with rehabilitation, institutionalisation, and labour benefits. Following the course of the evolution of disability rights, subsequently, the welfare policy based on the medical paradigm was gradually shifted to a human rights model of disability, which focuses on equality rights of individuals and creates anti-discrimination laws. The leading international legal instrument to illustrate this new policy is the United Nations Convention on the Rights of People with Disabilities (henceforth CRPD), signed in New York on the 30th of March of 2007 and aimed at all disabilities.

This article aims to present both a brief analysis of the international legal framework on the rights of persons with disabilities, focused on the CRPD, and a case study with legal, historical and practical aspects focused on the Brazilian and the Portuguese contexts.

Brazil and Portugal are interesting case studies in this topic not only for being both State Parties in the United Nations' CRPD but also for having recently issued legal norms on the civil capacity of persons with disabilities, profoundly changing the approach to disability rights in their national framework in accordance with the CRPD.

Hence, besides the introduction and the final remarks, the text is divided into two main parts: one focused on the protection of persons with disabilities in an international law perspective and the other presenting the case study. The case study, in its turn, is divided into a description of the legal framework in Brazil and in Portugal and an empirical case-law study focused on the approach to the civil capacity of persons with disabilities.

2. The protection to persons with disabilities in an international law perspective

In the United Nations (UN) context, the shift from a medical model of disability[3] to a social and a human-rights one began in the '70s and was endorsed in the following decade (1983-1992), the UN decade of disabled persons.[4] At first, the main focus of the UN with regard to disability policies was the prevention, the rehabilitation and the definition of disability.[5] Afterwards, they were complemented with equality policies through the adoption of the World Programme of Action Concerning Disabled Persons of 1982.[6]

During the Decade of Disabled Persons, a wide range of studies on the human rights field was carried out in the UN by the Commission of Human Rights and its sub-commission. As a result, the General Assem-

[3] This model focusedon the clinical feature of disability, seeing it as an illness that needs to be treated, healed, or, at least, rehabilitated. In other words, such a model perceives disability solely as a personal problem from those who have got it. Not surprisingly, disability remained invisible for many years. As emphasised by Theresia Degener and Andrew Begg in "From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations", The United Nations Convention on the Rights of Persons with Disabilities (ed. Valentina Della Fina, Rachele Cera, Giuseppe Palmisano), Springer, 1. 2017, there was a long process before disability started being considered a human-rights issue in this context. The authors highlight four phases: from 1945 to 1970, issues related to disability were invisible in the UN policy, from 1970 to 1980, persons with disabilities started being considered subjects of rehabilitation, from 1980 to 2002, they became objects of human rights, and in the new millennium they were finally recognised as subjects entitled to human rights. On the medical model, see also, Theresia Degener, "Disability in a Human Rights Context", Laws, No 5 (available on: <https://www.mdpi.com/2075-471X/5/3/35>, 2016, Accessed 04 Sept 2021)

[4] On this normative evolution, see Filipe Venade de Sousa. A Convenção das Nações Unidas sobre os Direitos das Pessoas com Deficiência no Ordenamento Jurídico Português - Contributo para a Compreensão do Estatuto Jusfundamental, Coimbra: Almedina. 2018

[5] See, for instance, the "Declaration on the rights of the mentally retarded persons"

[6] The programme's disability policy was structured in 3 specific pillars: prevention, rehabilitation and equity of opportunities. Such a programme alerted that the social barriers sharped disability by preventing persons with disabilities from having the same opportunities as their peers in society. See the General Assembly Resolution n.º 37/52, of the 3rd of December, 1982: "United Nations Decade of Disabled Persons"

bly issued a soft law instrument of human rights in 1990, the "Tallinn Guidelines for Action on Human Resources Development in the Field of Disability".[7] This resolution established that persons with disabilities were entitled to the right to live independently and, as such, they should not be considered an object of guardianship. Therefore, their participation in mainstream society should be promoted by the signatory states.[8]

In 2000, the World Conference of NGOs of persons with disabilities was held in Beijing, resulting in the adoption of the Declaration on the Rights of Persons with Disabilities in the New Millennium. This document has as an aim, among others, the creation of a legal binding convention concerning disability rights.[9] This appeal, claimed on various occasions by the States Parties and by NGOs from across the world, culminated in the approval of the CRPD on the 13th of December, 2006[10]. The participation of the civil society was a standout feature in the process of creating the Convention.

The CRPD defines as "persons with disabilities" those who have a permanent form of physical, intellectual or sensory impairment that prevents participation as a peer in society. In addition, the CRPD expressly determines in its article 12 that States Parties must recognise the equality

[7] General Assembly Resolution n.º 44/70, of the 8th of December, 1989

[8] In the following year, on the 17th of December, 1991, the General Assembly adopted Resolution n.º 46/119, concerning the principles for protection of persons with mental illness and the improvement of mental health care. This document incorporated the social model of disability, establishing the right to autonomy and dignity of persons with disabilities, as well as the necessary support for the enjoyment of these rights.

[9] This initiative would be strengthened at the World Conference in Durban in 2001

[10] The CRPD was approved through Resolution A/RES/61/106 and opened to signature by States on the 30th of March 2007, in New York. Also on this date, an Optional Protocol to the CRPD was approved, giving the Committee on the Rights of Persons with Disabilities the competence to examine individual complaints regarding alleged violations of the CRPD by States Parties to the Protocol. However, it is important to note that the Protocol may be used only when all national claims have been previously used. The UN Mexican Delegation played a relevant role in boosting an official Resolution (n.º 56/168) on the 19th of December, 2001, which created the ad hoc committee responsible for the CRPD's negotiation process. This process took only five years, representing a record compared to the term of approval of other Human Rights treaties. See Carlos Parra-Dussan. "Convención sobre los Derechos de las Personas con Discapacidad: antecedentes y sus nuevos enfoques", Revista Colombiana de Derecho Internacional, 16, 347. 2010

of conditions between persons with disabilities and other people to enjoy legal capacity in all aspects of their lives, as well as take steps to ensure the necessary support for people with disabilities exercise their legal capacity and prevent possible abuses.

The bare concept of "person with a disability" established by the UN in the CRPD, drawn up with the collaboration of hundreds of representatives of NGOs, innovates by overcoming the merely medical understanding of the term disability, leading to focus on social and attitudinal barriers that prevent this group from fully participating in society. Thus, the concept as a combination of these factors leads to the inference that the disability is in society, and, when barriers to access are broken down, citizenship is guaranteed to persons with disabilities.[11]

In other words, it is not the person with a disability who needs to be "cured" in order to adapt to society, but rather society and the State that must adopt public policies for inclusion. This approach involves seeing the person with a disability first as a human being and then using medical data only to define needs.[12]

Throughout the CRPD, this concept involves the recognition of the person with a disability as capable of contributing to the common well-being and diversity, and it is a necessary duty for human and social development to act so that the disadvantages faced by this group are reduced, and their full social participation is encouraged.[13] For this conception, it is central to perceive people with disabilities not as objects of compassion but as holders of rights that they should exercise without any discrimination.[14]

As it can be inferred, the CRPD[15] represents not only a civilisational conquer but also one step forward in International Law in relation

[11] Ricardo Tadeu Marques da Fonseca. "A ONU e seu conceito revolucionário de pessoa com deficiência", Revista do Tribunal Regional do Trabalho da 14.ª Região, Jan/Jun, 121. 2010

[12] André de Carvalho Ramos. Curso de Direitos Humanos. (5ª ed.). São Paulo: Saraiva. 2018

[13] Ricardo Tadeu Marques da Fonseca, 2010

[14] André de Carvalho Ramos, 2018, p. 270

[15] For further debates on the CRPD, see: Macario Alemany. "Should We Say 'Functional Diversity' To Refer To 'Disability'?", Undecidabilities and Law The Coimbra Journal for Legal Studies. 2021; Joaquim Correia Gomes / Luísa Neto / Paula Távora

to the fight for the implementation of the rights of persons with disabilities, as it translates the first international document that regulates the guaranties of them.[16] Similar to the UN legal order in favour of other marginalised groups, the CRPD is a hard law instrument in the disability context.[17]

The CRPD's general principles are provided in Article 3 as follows: I. respect for inherent dignity, individual autonomy including the freedom to make one's choices, and independence of persons; II. Non-discrimination; III. Full and effective participation and inclusion in society; IV. Respect for difference and acceptance of persons with disabili-

Vitor (Eds.). Convenção sobre os direitos das pessoas com deficiência. Comentário, Centro de Investigação Jurídico Económica. 2020; Jennifer W. Reiss. "Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities", European Law Journal, Vol. 20, No. 1, 107. 2014; Filipe Venade de Sousa. "The Charter of Fundamental Rights of the European Union» and the United Nations Convention on the Rights of Persons with Disabilities: a dynamic pro unione and pro homine with particular reference to the CJEU case-law", UNIO - EU Law Journal. Vol. 5, No. 1, 109. 2019; Eve Hill / Peter Blanck. "Future of Disability Rights Advocacy and 'The Right to Live in the World'", Texas Journal on Civil Liberties and Civil Rights, 15, 29. 2009; Paul Harpur. "Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change", Valparaiso University Law Review, 45, 1271. 2011; Michael Ashley Stein / Janet E. Lord. "Future Prospects for The United Nations Convention On The Rights Of Persons With Disabilities", The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives (ed. Oddný Mjöll Arnardóttir and Gerard Quinn), Leiden-Boston: Martinus Nijhoff Publishers, 17. 2009; Gerard Quinn. "Resisting the "Temptation of Elegance: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?", The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives (ed. Oddný Mjöll Arnardóttir and Gerard Quinn), Leiden-Boston: Martinus Nijhoff Publishers, 215. 2009; Isa Elisabeth Koch. "From Invisibility to Indivisibility: The International Convention On The Rights Of Persons With Disabilities", The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives (ed. Oddný Mjöll Arnardóttir and Gerard Quinn), Leiden-Boston: Martinus Nijhoff Publishers, 67. 2009

[16] Amparo San José Gil. "El primer tratado de derechos humanos del siglo XXI: la Convención sobre los derechos de las personas con discapacidad", Revista Electrónica de Estudios Internacionales, 13, 5. (available on: http://www.reei.org/index.php/revista/num13/articulos/primer-tratado-derechos-humanos-siglo-xxi-convencion-sobre-derechospersonas-con-discapacidad). 2007

[17] For a comparative analysis between the CRPD and other soft law documents regarding the rights of persons with disabilities, see Carlos Parra-Dussan, 2010

ties as part of human diversity and humanity; V. equality of opportunities; VI. Accessibility; VII. Equality between men and women; VIII. Respect for the evolving capacity of children with disabilities and respect for the right of children with disabilities to preserve their identities.

With regards to the legal nature of this desideratum, it conjugates two facets, one based on social development; another one based on the human rights[18]. During the discussion concerning the Convention's content, there were divergences within the *ad hoc* Committee between some States and Organisations. The European Union, for instance, defended the adoption of the human rights model, which is based on equality and non-discrimination values, and feared that the social model could lead to the assistance paradigm reappearance. On the other hand, China defended the incorporation of the social model.[19] As a consequence, the incorporation of both facets was implemented.

Moreover, it can be said that the CRPD content is mixed since it provides first-generation human rights (civil and political rights), as well

[18] According to Theresia Degener. "Disability in a Human Rights Context", Laws, No 5 (available on: <https://www.mdpi.com/2075-471X/5/3/35>). 2016. p. 19: "the CRPD was initially drafted as a human rights convention that replaces the medical model of disability with the social model of disability. However, the drafters went beyond the social model of disability and codified a treaty that is based on the human rights model of disability. While the medical model of disability reduces the disabled individual to her impairment, the social model dissects disability as a social construct and debunks exclusion and denial of rights on the basis of impairment as ideological constructions of disability. The human rights model builds on the social model in that it is built on the premise that disability is a social construct, but it develops it further. There are six propositions for this assertion. First, the human rights model can vindicate that human rights do not require a certain health or body status, whereas the social model can merely explain that disability is a social construct. Secondly, the human rights model encompasses both sets of human rights, civil and political as well as economic, social and cultural rights and thus not only demands anti-discrimination rights for disabled persons. Thirdly, the human rights model embraces impairment as a condition which might reduce the quality of life but which belongs to humanity and thus must be valued as part of human variation. Fourthly, the human rights model values different layers of identity and acknowledges intersectional discrimination. The fifth proposition is that unlike the social model, the human rights model clarifies that impairment prevention policy can be human rights sensitive. Lastly, it is opined that the human rights model not only explains why 2/3 of the world's disabled population live in developing countries, but that it also contains a roadmap for change"

[19] See Filipe Venade de Sousa, 2019

as the second-generation ones (economic, social and cultural rights). It is worth mentioning that the CRPD was not intended to create new rights in favour of persons with disabilities but to guarantee to them the exercise of existing human rights. Nonetheless, it introduced new formulations of rights, such as the right to accessibility (article 9)[20] and the right to live independently and to be included in the community (Article 19).[21]

Other examples of rights addressed in the CRPD are the right to life (Article 10), the right to liberty and security (Article 14), the freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15), the freedom from exploitation, violence or abuse (Article 16), the liberty of movement and nationality (Article 18), the right to personal mobility (Article 20), the freedom of expression and opinion, and access to information (Article 21), the right to respect for privacy (Article 22), the right to respect for home and the family (Article 23), the right to equal recognition before the law (Article 12), the access to justice (Article 13), the right to education (Article 24), the right to health (Article 25), the right to habilitation and rehabilitation (Article 26), the right to work and employment (Article 27), the right to adequate standard of living and social protection (Article 28), the right to participation

[20] This provision determines: 1. "To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas"

[21] According to this norm, "States Parties to the present Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that: a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community»; c) community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs"

in political and public life (Article 29), and the right to participation in culture life, recreation, leisure and sport (Article 30).

Since disability as a legal issue is a vast subject, the adoption of other international documents was also needed to safeguard the rights of specific groups. One example is blind and visually impaired individuals. This group is constantly confronted with barriers that make things such as architecture and communication inaccessible and exclude them from full participation in mainstream society. In addition, they are disproportionally faced with a significant number of obstacles in terms of exercising fundamental rights, particularly the right to education, information, and culture, due to the lack of accessible format books. Therefore, on the 28th of June 2013, the Treaty of Marrakesh outlined a goal to end the so-called «book famine» faced by these persons. The treaty provisions are designed to facilitate their access to books and other printed materials, consequently limiting domestic copyright laws.

Furthermore, the application of the CPDP is complemented by other existing international documents, both on human rights in a general sense - i.e., the International Declaration of Human Rights (1948) -, and focused on persons with disabilities but in a regional context - i.e., Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999).

3. The cases of Brazil and Portugal

3.1. The legal framework

Since the 30th of March of 2007, Brazil and Portugal are signatories of the CRPD. Since then, both countries have been adopting measures to materialise the rights arising from the CRPD, ratified in 2008 in Brazil and in 2009 in Portugal.

The approach to disability issues has evolved with time in both countries. The first explicit references to disability or persons with a disability appeared in the Portuguese Constitution in 1976 and in the Brazilian Constitution in 1978 (through a constitutional amendment to the Constitution issued in 1973). As the years went by, the terms used on legislation to refer to disability changed, and the amount and the content

of rights guaranteed grew in both countries. Nowadays, the Portuguese Constitution includes educational rights and support to the families of persons with disabilities and organisations that defend their rights. The Brazilian Constitution of 1988, in its turn, explicitly mentions persons with disabilities rights with regards to, among others, health, equal pay, employment, education and accessibility.

Before 1988, Brazilian legislation on persons with disabilities was limited to scarce references about education. One year after the Brazilian Federal Constitution of 1988 was issued, nonetheless, was enacted a legal norm that dealt with the creation of the National Coordination for the Integration of Persons with Disabilities – CORDE and the support for people with disabilities and their social integration. In the following years, other legal norms linked to the theme emerged. Examples of issues addressed in the Brazilian legislation are employment quotas, social security benefits, access to education, accessibility and access to information, Brazilian sign language, and guide dogs.[22]

In the Portuguese legislation, the rights of people with disabilities are also addressed at various levels of the legal system. The Basic Law for the Prevention and Rehabilitation and Integration of Persons with Disabilities, for example, is a relevant legal instrument in this regard and addresses the equalisation of opportunities, accessibility and mobility.

Even before the aforementioned norm, there was legislation aimed at people with disabilities in Portugal dealing with issues such as rehabilitation, special education, housing, special placement regime for teachers with disabilities, employment, and income subsidy. Moreover, in the years that followed the norm, the Portuguese legislation in this regard multiplied. There are now legal diplomas aimed at education, employability, social security benefits, accessibility, communication, quotas, the care of minors with disabilities, among others.[23]

Notably, the issue of the civil capacity of persons with disabilities has recently received special attention in both the Brazilian and the Por-

[22] Izabel Madeira de Loureiro Maior. "Movimento político das pessoas com deficiência: reflexões sobre a conquista de direitos". Revista Inclusão Social, Brasília, v. 10, n. 2, p. 28-36. 2017

[23] António de Araújo. Cidadãos Portadores De Deficiência (O Seu Lugar Na Constituição Da República). Coimbra: Coimbra Editora. 2001

tuguese legal frameworks. These legislative changes make these countries even more interesting cases to study.

The Brazilian Law of Inclusion (Lei Brasileira de Inclusão), also known as the Statute of Persons with Disabilities, played a double role of innovation in the Brazilian legal framework: while it expanded the protection of people with disabilities, it also addressed the expansion of autonomy, freedom and independence of this group of people, adapting Brazilian legislation to the CRPD with regards to civil capacity.

The change in legislation regarding civil capacity is one of the most relevant brought by the 2015 law. Until then, persons with mental or intellectual disabilities were considered relatively or absolutely incapable, and, with the advent of the Brazilian Law of Inclusion, they now have the right to exercise their civil capacity on equal terms with other persons.[24]

The Brazilian Law of Inclusion revoked the provisions of the Brazilian Civil Code of 2002 that treated persons with disabilities as absolutely incapable. With the new law, only minors under 16 years of age are considered absolutely incapable. Moreover, the mentions to "those who have a mental disability with reduced judgment"[25] and "exceptional persons, without complete mental development" were eliminated from the article of the Civil Code that addresses relative capacity. The habitual drunkards, drug addicts and those who, for a temporary or permanent reason, cannot express their will are still considered relatively capable.

Therefore, what matters for civil capacity now is the possibility of expressing one's will, so that the expression “reduced discernment” is no longer used to rule out the capacity of persons with mental or intellectual disabilities, and the general rule is the establishment of full civil capacity. In short, the person with a disability will, as a rule, have full civil ca-

[24] The exercise of civil capacity includes the possibility of getting married, forming a stable union, exercising sexual and reproductive rights, having access to adequate information on reproduction and family planning, preserving their fertility, exercising the right to custody, guardianship, trusteeship and adoption

[25] When necessary, the terms in the Brazilian and the Portuguese legislation were translated into English by the authors

pacity and only not being able to express one's will makes one relatively incapable.[26]

Since the new legislation was issued, thus, the concept of disability is disconnected from that of incapacity. However, as mentioned, the law does not set aside the protection of persons with disabilities. It also provides procedures to assist the exercise of civil capacity of those persons, such as supported decision-making and curatorship. The former being less invasive and, thus, preferential, and the latter being the exception to the rule of full civil capacity.

Supported decision-making exists on the own initiative of the interested person with a disability, who seeks the help of third parties to carry out civil acts of their life when they deem it necessary. Once defined, supporters have the duty to fight for the interests of the supported person and must notify a judge in case of situations that threaten those interests.

It is essential to keep in mind that the will of the person assisted, and not of the person who assists, must always prevail. That is why the law requires that the supporters be two and that they be reputable persons, trusted by the person supported, chosen by this person and with links to this person. The term, occasions and limits of support are not defined by law and must be delimited in the request by the supported person who, still being fully capable, may request the termination of the support at any time.[27]

The curatorship, on the other hand, is provided for exceptional cases in which full civil capacity is compromised. The law also provides that the curatorship must be restricted to persons who cannot express their will, last as short as possible and be proportional to the circumstances of the case. The first difference in relation to supported decision-making is the legitimacy, which does not belong to the interested person, but to, as provided for in the Brazilian Code of Civil Procedure, spouses or partners, family members, the institution in which they are sheltered, or, in the absence of those, the Public Prosecutor's Office (*Ministério Público*).

[26] André de Carvalho Ramos, 2018, p. 823 and 824

[27] Ibid, p. 823 and 825

Once one of the legitimised ones has filed the suit, with the help of a multidisciplinary team of specialists, an inspection will be carried out with the objective of delimiting for which acts the curatorship will be necessary. The decision on those cases, which can be reviewed, will make explicit the limits of the curatorship (applicable only to property and business issues), as well as the duration. Moreover, the curators have an obligation to report annually to a judge with the balance of the year in question. The curatorship will not reach the right to one's own body, sexuality, marriage, privacy, education, health, work and vote. [28]

As for the situation in Portugal, the legislation previously provided as sources of incapacity to exercise rights for adults: interdiction and disqualification. Those should be decreed in a court decision in the interest of the interested person, having as possible grounds, provided for in Portuguese Civil Code, psychic anomaly, deafness and blindness, depending on gravity. In any case, these causes would only justify interdiction or disqualification if one proved to be incapable of governing oneself and one's goods. [29]

There was a latent need for new legislation on the issue because, in accordance with the CRPD, mechanisms to assist persons with disabilities should be created without taking away their civil capacity. It is always preferable, whenever possible, to offer assistance. It is necessary that people with disabilities be supported when needed, but while maintaining their capacity to exercise their rights, with a flexible regime that allows a case-by-case analysis and measures that only do not maintain capacity in exceptional cases, for those who really need it.[30]

The Legal instrument to safeguard vulnerable adults (*Regime do Maior Acompanhado*), issued in 2018 in Portugal, does not entirely replace the incapacity regimes. Instead, it modifies the institutes of interdiction and disqualification and the incapacities that result from them. In the new regime, these incapacities still exist, but they are measures to be taken exceptionally by courts according to the specificity of the case. The changes are deeply linked to the issue of civil capacity, and the in-

[28] Ibid, p. 823 and 824

[29] António Pinto Monteiro. "O Código Civil Português entre o elogio do passado e um olhar sobre o futuro". Revista de Legislação e de Jurisprudência. Nº 4002. 148. 2017

[30] Ibid, p. 151 and 152

stitutes of interdiction and disqualification are replaced (in a legislator's choice due to the negative stigma carried by the institutes) by the regime of the *Maior Acompanhado.* One of the biggest problems with the previous legislation was the need for one to be declared incapable before receiving protection and assistance in the exercise of one's capacity. In this sense, the regime of the *Maior Acompanhado* presents a satisfactory solution. With the reform, the articles of the Portuguese Civil Code that regulated interdiction and disqualification, now eliminated, deal with the new regime.[31]

The accompaniment measures provided in the new law are aimed at adult persons who, due to health, disability or behaviour, are unable to fully and consciously exercise their rights and fulfil their duties. These measures may be required by the person who needs them or, with their permission, by a spouse, *de facto* partner or a relative. The need for authorisation highlights the appreciation of autonomy. The only possibilities in which this authorisation is not necessary occur when the requisition comes from the *Ministério Público* or when a duly substantiated court decision fulfils it.[32]

The Court defines whether there will be accompaniment as well as the appropriate measures for each specific situation. However, according to the new legislation, the interested person must be heard personally and directly before the decision. The definition of measures on a case-by-case basis pushes the new regime away from incapacity and considers the interests and self-determination of the beneficiary. [33]

In general terms, the choice of the accompanying person will be up to the person concerned or his/her legal representative. If this choice has not been made, the law provides a list of possible companions, always keeping in mind the best interest of the person accompanied. The new

[31] António Pinto Monteiro. "Das incapacidades ao maior acompanhado. Breve apresentação da lei n.º 49/2018", O Novo Regime Jurídico do Maior Acompanhado, CEJ, Coleção de Formação Contínua, Jurisdição Civil e Processual Civil, fevereiro 2019, disponível em: <www.cej.mj.pt>. 2019

[32] Mafalda Miranda Barbosa. "Maiores Acompanhados: da incapacidade à capacidade?", Revista da Ordem dos Advogados, Ano 78, Lisboa. 2018. p. 239

[33] Mafalda Miranda Barbosa. "Fundamentos, conteúdo e consequências do acompanhamento de maiores", O Novo Regime Jurídico do Maior Acompanhado, CEJ, Coleção de Formação Contínua, Jurisdição Civil e Processual Civil, fevereiro 2019, available on: <www.cej.mj.pt>. 2019

regime is characterised by flexibility and case-by-case analysis, as opposed to the previous regime of duality between interdiction and non-interdiction. It is possible, therefore, that the Court finds necessary different interventions, always justifiably and in exceptional cases. Hospitalisation also depends on authorisation from the Court and may be requested in urgent cases, subject to ratification by the judge.[34]

The accompanied person maintains the exercise of his/her personal rights and the possibility of conducting business in everyday life, unless otherwise stated. However, in the event of the conclusion of transactions that do not respect the accompaniment measures enacted, the acts will be annullable if subsequent to the registration of the accompaniment or if performed after the start of the process is announced. After the establishment and if they prove harmful to the accompanied, accidental incapacity applies to previous acts. The accompaniment will be subject to periodic review and will cease or be modified with a court decision based on the causes that motivated its initiation. [35]

The collation of information shows that, in both countries, the most recent legal norms on the rights of persons with disabilities changed mechanisms previously provided in the respective civil codes in order to safeguard the civil capacity of these persons and guarantee their autonomy. However, it did not mean leaving those persons unprotected. For guaranteeing protection, new and more flexible mechanisms were created.

3.2. Case law

Aiming to illustrate how this theoretical debate translates into judicial decisions - that is to say, how Brazilian and Portuguese legal frameworks with regards to civil capacity of persons with disability is applied in case law - we conducted an empirical study with the Brazilian Superior Court of Justice and the Portuguese Supreme Court of Justice. This section will be introduced by the methodological notes that enable to better comprehend it.[36]

The courts were chosen because they play comparable roles in their countries. They both have national jurisdiction and handle civil

[34] António Pinto Monteiro, 2019, p. 36

[35] Ibid, p. 33 and 37

[36] Machado, (2017)

matters as part of their remit. In Brazil, the Superior Court of Justice has among its functions the attribution of judging, in a special appeal (*Recurso Especial* - REsp), cases in which federal laws (such as the Civil Code and the Brazilian Law of Inclusion) are contradicted, or their interpretation is contested.[37] In the Portuguese system, in its turn, it is the responsibility of the Supreme Court of Justice to head the courts of ordinary jurisdiction, which are responsible for judging matters connected to, among others, the central Portuguese legal norms on disability rights.

The search was carried out in 2021, considering decisions until the 31st of December of 2020. We used the online search engine each of the courts made available online[38], and we carried out a free search with the parameters ("person with a disability" OR "disabled person")[39] AND capacity AND civil. Bearing in mind the aim to illustrate and present examples of the countries' case law regarding the mentioned matter, we selected relevant decisions after excluding from the results decisions that, despite mentioning the parameters, dealt with unrelated issues (for example cases that do not deal with people with disabilities or that do not discuss civil capacity, but rather another type of capacity[40]).

Through the described process, we were able to select two decisions from each of the courts to further explore in this section. It should also be noted that the research is in a way hampered in terms of Portuguese case law, considering how recent the Law of the *Maior Acompanhado* is.[41]

The first case of the Portuguese Supreme Court of Justice[42] involves a claim for compensation, denied by the Lisbon Court of Appeal because the victim was supposedly not able to express his feelings. The

[37] Masson, (2018)

[38] For the Brazilian Superior Court of Justice: <https://scon.stj.jus.br/SCON/>; and for the Portuguese Supreme Court of Justice: <http://www.dgsi.pt/>

[39] For the search, we used the terms in Portuguese. And we are both native speakers of Portuguese

[40] Such as work capacity or other issues, like health and education

[41] The Law is from 2018 and the Supreme Court of Justice decides appeals of decisions from appeal courts, it can, therefore, be considered a 3rd instance of ruling

[42] Portuguese Supreme Court of Justice (Supremo Tribunal de Justiça), case reference 191/09.5PEPDL.L4.S1, 14th of March 2018

denial was considered unconstitutional and consequently reversed for violating the Constitution of the Portuguese Republic.

Indeed, in understanding that compensation for non-pecuniary damage would not be due to the victim - as a result of her, due to physical and mental incapacity, not being able to express or make visible her suffering - the versed appealed decision violates the provisions of the article 1 and the number 1 of article 71 of the Constitution of the Portugues Republic.[43]

Throughout this decision, not only Portuguese legislation was used to substantiate the case but also the CRPD. All reasoning with regards to the subject at hand converged to the defence that it is not allowed to, motivated by reasons linked to disability, deprive of rights or restrict rights.

The other decision from the Portuguese Supreme Court of Justice[44] debates one request for intervention and, although it is from 2019, does not apply the law which introduces the *Maior Acompanhado* regime because the appealed decision was before the issue of the law[45]. Even so, the Court decides for the less burdensome possible regime in the Portuguese Civil Code: the disqualification instead of the intervention. The reasoning is based on recognising the civil capacity even in cases of mental disability and on searching for support mechanisms instead of simply making one civil incapable.

With reference to the psychic anomaly, which is the reasoning invoked in this action, it must be borne in mind that this disabling cause covers all deficiencies, not only of the intellect, but also of the will, affectivity and sensitivity and must be *current* (*ie, not past or future*) and *permanent* (*and not merely accidental or transitory*) and assume a *seve-*

[43] Portuguese Supreme Court of Justice, 2018. Our translation. Original text: "Com efeito, ao entender que não seria devida indemnização por danos não patrimoniais à ofendida, em consequência de esta, em virtude da sua incapacidade física e mental, não ser capaz de exprimir ou tornar visível o seu sofrimento, o douto acórdão recorrido, viola o disposto no artigo 1º e no nº 1 do artigo 71º da Constituição da República Portuguesa."

[44] Portuguese Supreme Court of Justice (Supremo Tribunal de Justiça), case reference 909/16.0T8CLD.C1.S1, 21th of March 2019

[45] See footnote 39

rity such that it interferes with the one's faculties, in such a way as to restrict one's ability to govern one's person and goods.

In turn, the **disqualification** is to be applied when the pathologies, although permanent, are not serious enough to allow the **interdiction** to be decreed (cf. art. 152 of the CC). That is to say: even if it is found that the person's capacities are diminished, the interference in one's discernment, will and want does not make one completely unfit to govern one's person and goods, as required for the **interdiction**.

In the case of the case file, it is clear from the proven fact that the defendant presents deterioration of some cognitive aspects, which make him dependent on the help of third parties to perform certain tasks that require higher levels of abstraction and complexity.

Nevertheless, the accurate clinical picture (*of slow and gradual evolution - as stated in the expert report*) does not currently prevent him from carrying out the daily management of his person and assets, only the most complex or demanding activities or tasks being compromised.[46]

The decisions show that even before the advent of specific legislation, it was possible to use the existing – national and international - le-

[46] Portuguese Supreme Court of Justice, 2019. Our translation. Highlights from the original. Original text: "Com referência à anomalia psíquica, que é o fundamento invocado nesta ação, há que ter presente que essa causa incapacitante abrange todas as deficiências, não apenas do intelecto, mas também da vontade, afetividade e sensibilidade e deve ser atual (ou seja, não passada ou futura) e permanente (e não meramente acidental ou transitória) e assumir uma gravidade tal que interfira com as faculdades do indivíduo, de modo a tolher-se a sua capacidade de reger a sua pessoa e bens.

Por sua vez, a inabilitação é de aplicar quando as patologias, embora permanentes, não revistam gravidade que permita decretar a interdição (cf. art. 152º, do CC). Quer dizer: ainda que se constate que as capacidades da pessoa se encontram diminuídas, a interferência no seu discernimento, vontade e querer não torna o portador completamente inapto para governar a sua pessoa e bens, como exigido para a interdição.

Ora, no caso dos autos, resulta da factualidade provada que o requerido apresenta deterioração de alguns aspetos cognitivos, que o tornam dependente da ajuda de terceiros para realizar certas tarefas que exijam níveis de abstração e complexidade superiores."

Não obstante, o quadro clínico apurado (de evolução lenta e paulatina - como se afirma no relatório pericial) não o impede, atualmente, de fazer a gestão diária da sua pessoa e bens, ficando apenas comprometidas as atividades ou tarefas mais complexas ou exigentes

gal framework to value the capacity of persons with disabilities, what should be expanded with the new legislation. Prior to the 2018 legislation, the CRPD, the Constitution of the Portuguese Republic and the Portuguese Civil Code were used in defence of the interests of persons with disabilities.

In the Brazilian Court's sample, there is one decision prior to the Brazilian Inclusion Law[47] and one subsequent to it[48]. Whereas the decision prior to the 2015 law discusses interdiction possibilities and the role of the *Ministério Público* in cases involving people with disabilities, the one subsequent decision is focused on affirming the capacity of people with disabilities.

Despite the difference in thematic, Brazilian decision prior to 2015 should not be read as contrary to the rights of people with disabilities. On the contrary, it already reflected the evolution of a concept that came to be crystallised in the Brazilian Law of Inclusion. The previous decision state, for example, that under a reputed allegation of protection of the interests of people with disabilities, the *Ministério Público* cannot prevent the free expression of will. Also, that interdiction cases should already be highly casuistic. This decision, as well as the decisions of the Portuguese Court, show jurisprudential practices of paying attention to the rights and capacity of people with disabilities.

In other words: the disabled person, in full enjoyment of his mental faculties, in an act of free will, decided to enter into the agreement under the terms contained therein. There is no element in the process that indicates a reduction, on the part of the defendant, of his judgment. He is thus, from the point of view of civil capacity, a complete person, capable, like any other, of acquiring rights and assuming obligations without any assistance. In this circumstance, it cannot be admitted that the *Ministério Público*, acting in the supposed help of the disabled person, refuses to guarantee him the basic right to freely express his will.[49]

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[47] Brazilian Superior Court of Justice (Superior Tribunal de Justiça). Case reference REsp 1105663, 4th of September 2012

[48] Brazilian Superior Court of Justice (Superior Tribunal de Justiça). Case reference REsp 1694984, 14th of November 2017

[49] Brazilian Superior Court of Justice, 2012. Our translation. Original text: "Ou seja: a pessoa deficiente, no pleno gozo de suas faculdades mentais, em um ato de manifes-

Prior to the Brazilian Law of Inclusion, the referred legal norms in defence of persons with disabilities' rights were, besides the Brazilian civil code, laws on the protection and rights of persons with mental disorders, on support for people with disabilities and their social integration, and on the National Coordination for the Integration of People with Disabilities.

The decision subsequent to the Brazilian Law of Inclusion, in its turn, focuses on the defence that disability, by itself, does not imply incapacity. This decision is in agreement with what is stated in the recent Brazilian Law of Inclusion and in the CRPD. There is to say, that it is necessary to move away from the definition of lack of capacity from that of disability.

Under the terms of the novel Statute of Persons with Disabilities, Law n. 13,146 of 2015, a person with a disability is a person with a long-term hindrance, of a physical, mental, intellectual or sensory nature (art. 2), and should no longer be technically considered civilly incapable, as the disability does not affect the full civil capacity of the person (according to articles 6 and 84). With the new regulation, there is a necessary and absolute dissociation between mental disorder and the recognition of incapacity. That is to say, the automatic definition that a mental weakness of any nature would imply in the limitation of one's civil capacity does not exist any longer.[50]

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tação livre de vontade, decidiu celebrar o acordo pelos termos nele contidos. Não há, no processo, qualquer elemento que indique redução, por parte do recorrido, de seu discernimento. Ele é, assim, do ponto de vista da capacidade civil, uma pessoa completa, capaz, como outra qualquer, de adquirir direitos e assumir obrigações sem qualquer assistência. Nessa circunstância, não se pode admitir que o MP, atuando no suposto auxílio da pessoa deficiente, negue-se a lhe garantir o direito básico de manifestar livremente sua vontade."

[50] Brazilian Superior Court of Justice, 2017. Our translation. Original text: "Nos termos do novel Estatuto da Pessoa com Deficiência, Lei n. 13.146 de 2015, pessoa com deficiência é a que possui impedimento de longo prazo, de natureza física, mental, intelectual ou sensorial (art. 2º), não devendo ser mais tecnicamente considerada civilmente incapaz, na medida em que a deficiência não afeta a plena capacidade civil da pessoa (conforme os arts. 6º e 84). A partir do novo regramento, observa-se uma dissociação necessária e absoluta entre o transtorno mental e o reconhecimento da incapacidade, ou seja, a definição automática de que a pessoa portadora de debilidade mental, de qualquer natureza, implicaria na constatação da limitação de sua capacidade civil deixou de existir."

Although this section did not mean to establish quantitative inferences or causal links between the new legislation in Portugal and Brazil and the application in practice, the selected decisions from courts that have national jurisdiction and deal with the rights of persons with disability can illustrate well the legal and theoretical debate.

The new legislation issued in Brazil and even more recently in Portugal is influenced by numerous aspects including history, practice, civil society mobilization and the development of the rights of persons with disabilities in an international law perspective. In the application of law, case law shows that it was possible to value the civil capacity of persons with disabilities even before the most recent norms, considering other national and international legal diplomas. However, it is also possible to see that the new legislation comes with a fundamental role of securing rights, adapting national legal frameworks to the CRPD and creating more flexible mechanisms for offering assistance without harming civil capacity.

4. Final remarks

This article addressed the international legal framework for the rights of persons with disabilities with a focus on the CRPD and sought to illustrate the adaptations to it through a case study of two State Parties: Brazil and Portugal.

The CRPD constitutes a landmark approach to the rights of persons with disabilities in the international law field. As a hard law mechanism, it had and should continue to have a significant impact on the way the State Parties deal with some current vital issues, namely the approach to the civil capacity regime.

In order to provide persons with disabilities with more independence and autonomy, such a regime has been modified in Brazil and in Portugal by creating new and more flexible legal tools. The modifications maintained, however, the possibility for these persons to access special protection regimes, since they still face barriers concerning not only the exercise of civil capacity but also several other aspects of life.

The change in the understanding of the concepts involves moving the concept of disability away from the concept of incapacity. These are not synonymous, as the countries' case law corroborates. Even though persons with disabilities have certain vulnerabilities and may need spe-

cial support and protection to live fully, they should not have their autonomy limited as a rule.

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PERMISSION REQUIREMENT IN THE INVESTIGATION OF PUBLIC OFFICIALS AND RELEVANT CONSTITUTIONAL COURT JURISPRUDENCE

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ABSTRACT

The permission procedure in the investigation phase that is based on the lawsuit on the right to criminal cases in the criminal procedures, the conflicted approach of the Constitutional Court that is based on the conflicting approach of the Constitutional Court, and how the judicial audit made in this framework is carried out on the conflicting approach of public officials and how this approch will encounter the investigation to be enabled and secured will be examined in this study.

Keywords: *Permission, Investigation, Trail, Right to Life*

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AN ANALYSIS OF INDIVIDUAL APPLICATIONS TO THE CONSTITUTIONAL COURT REGARDING TRADE UNION RIGHTS BY MACHINE LEARNING TECHNIQUES

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ABSTRACT

This article aims to predict whether an individual application regarding the Turkish Constitutional Court's (TCC) trade union cases results in a "violation" or a "non-violation" decision by using machine learning, an artificial intelligence (AI) technique. It gives an outline of the Court's trade union case law in order to provide legal background and context for the research. We have predicted the court's decisions on these cases with the high success rates (average accuracy of 90%) by using the subject of texts of the cases as data. The article has shown that a basic machine learning technique can be successful in realizing accurate predictions even with relatively small data sets derived from well-structured court rulings.

Keywords: *Constitutional Court, Individual Application, Trade Union Rights, Machine Learning, Artificial Intelligence*

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IS THE TURKISH CONSTITUTIONAL COURT'S DECISION QUALIFIED AS A CONTRIBUTION TO THE TRANSITION FROM DIGITAL DISCIPLINE SOCIETY TO THE DIGITAL SURVEILLANCE SOCIETY?

An Analysis on the Constitutionality Review of the Presidential Decree Nr. 14 on the Competences of the Presidential Directorate of Communications

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ABSTRACT

This review of judgment of the Turkish Constitutional Court on Presidential Decree nr.14 which regulates the Presidency of the Republic of Turkey Directorate of Communications (Directorate), focuses on the norm control decision about the aforesaid decree. TCC Judgment promulgated on 16 July 2021 and TCC did not annulled the competence of the Directorate which authorize the Directorate to inquire about all citizens if it required. However, fundamental rights and liberties are closed areas for making regulation with presidential decrees. The fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution shall not be regulated by a presidential decree. In addition to it, fundamental rights and freedoms may be restricted only by law, not with presidential decree. Moreover, no presidential decree shall be issued on the matters explicitly regulated

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by law and in this case, personal data which have been regulated in this presidential decree, is under the protection of constitution and its own special law which is Personal Data Protection Law nr. 6698. Everyone has the right to request the protection of his/her personal data in a Constitutional sense. In this review, judgment of the TCC will be analyzed based on how fundamental rights and freedoms will be left to the mercy of the executive power although all the protection mechanisms foreseen of the Turkish Constitution. This review finally tries to denote the way what the competence of the Directorate would be at an end, it means that this kind of competence that makes the executive power more authorized about the fundamental rights and freedoms will inevitably give rise to digital surveillance society which is more than digital discipline through exceeding-executive power.

Keywords: *Fundamental Rights, Presidential Decree, Human Rights, Rights of Privacy, Personal Data*

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CONSTITUTIONAL NEWS

** TWO INTERVIEWS WITH PROF. YADH BEN ACHOUR ON THE CONSTITUTIONAL CRISIS IN TUNISIA, BY HÉLA LAHBIB

***Translated by*: İlker Gökhan Şen[**]**

** THE ASSOCIATION OF RESEARCHS ON CONSTITUTIONAL LAW (ARCL) 10TH YEAR GENERAL ASSEMBLY

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Articles that will be sent to the editor should not be published elsewhere nor be submitted to other journals simultaneously.

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ree copies of the published issue will be sent both to the author(s) and to the reviewer(s).