

FOREWORD

READING OF THE CONSTITUTION FROM AN ECO-SYSTEM PERSPECTIVE

Turkey suffered seriously from natural disasters that occurred 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 made¹, the articles directly related to the environment and the territory have been left untouched. Nonetheless, it was possible that the changes-especially those reinforcing the rights and freedoms²-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 general³, 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 2021⁴.

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 their 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).

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*

XII

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-

XIV

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 proposals that may 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

XVIII

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 example, 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 country 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 backtrack 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 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-

XX

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 demands resolutely 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