

Constitutional Limitations on the Legislative Power to Tax in Turkey

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Introduction

Tax power as a public law term not only give rights but also obligations to government and that kind of obligations constitute limits of tax power. (Çağan, p. 6). The qualification, features and content of tax power be determined with constitutional rules and the form of exercise authority mostly arranged within constitutions (Çağan, p.6) in other words "legal frame of taxation drawn by Constitution legal forms also take place is in the Constitution" (Saban, p. 3). The Turkish Constitution defines the Turkish Republic as "a democratic, secular and social state governed by the rule of law" in Article 2. Along the doctrine of separation of powers, the Constitution regulates the three independent branches of government as the legislative, executive and judicial. Article 7 of the Constitution states that the "legislative power is vested on the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated". Under Article 8, "the executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and the law". According to Article 9, "the judicial power shall be exercised by independent courts on behalf of the Turkish Nation". (Yaltı, <http://www.eatlp.org>) Tax power might be defined as a legal and practical force about impose which a government based upon sovereignty on the country and this power is one of the essential authorities (for ex: consumption, budgeting, borrowing...etc)that sovereignty government carry on fiscal area (Öncel, Kumrulu, Çağan, p. 33). The important rules about tax provided by The Constitution and it can be said that when analyzed Constitution many articles related to taxation even if indirect.(Kırbaş, p.22).

The Fourth Chapter of the Constitution, which is titled as "Political Rights and Duties", comprises a provision on the obligation to pay taxes. Article 73/ Obligation to pay taxes: "Everyone is under the obligation to pay taxes according to his financial resources, in order to meet public expenditures. An equitable and balanced distribution of the tax burden is the social objective of fiscal policy. Taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law. The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law". In accordance with the rule of law, Article 73 covers the universally accepted fundamental principles of taxation that taxes can be levied only if a statute lawfully enacted so provides, taxes must be applied generally and equally, taxes must conform to the ability to pay principle, and taxes can only be allocated to public expenditures. Since constitutional provisions have supremacy and binding force, tax laws shall not be in conflict with the above principles; and the legislative, executive and judicial organs, and administrative authorities and other institutions and individuals are bound with this legal framework. (Yaltı, <http://www.eatlp.org>)

Constitutional Principles of Taxation

As to the taxation the most important provisions take their roots from the constitution. Hence, it is obligatory that the legislations made in the field of taxation comply with the constitution. The limitations on the government's power have twodimensions: Legitimacy and equity taxation.

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Legitimacy

Rule: Tax Must Impose with Tax Codes

According to Article 73/3 "taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law" and it means taxes can be imposed only by statutes. This principle which allows tax imposition with representative's decisions and does not interfere with arbitrariness is part of the liberation struggle of humanity (Saban, p.48). This fundamental principle of legality expresses the supremacy of law. According to the Constitutional Court, tax imposed by law includes all elements of taxation like subject, basis, rate, assessment, accrual and limitation shall be stated. A legal regulation without these essential elements even though "tax law" bear the name couldn't be considered as a "tax law" (Saban, p.50). Tax legitimacy rule which aims to avoid arbitrary and limitless practices has some subtleties that make of this rule. Namely in order that tax legitimacy firstly tax code has been needed which shall be act of liberal and democratic congress (no taxation without representation) and precisely consider all options of tax (tax shall be definite rule) (Güneş, p. 14). Legitimacy principle plays a crucial role in assessment and collecting taxes of certain and precise taxpayers thus freedoms of people protect to government and prevent its arbitrary and limitless practices (Şenyüz, Yüce, Gerçek, p.23). Constitutional Court explains "legitimacy" principle as: "...While designing the legality principle for all kinds of financial impositions, the basic intent of the legislators of the Constitution is to prevent arbitrary and discretionary practices. Where a law imposing a financial duty determines only the subject matter of the duty, it is not enough to consider that that duty is imposed by law. There are many elements of the financial impositions, such as the tax base, rates, assessment, accrual and payment procedures, penalties, statute of limitations, minimum and maximum limits. If a law does not contain such a framework, it is possible for it to give rise to arbitrary practices that can affect the social and economic positions, even the fundamental rights of individuals. In this respect, in the law, the basic elements of financial impositions must be clarified and be framed in a determinant and concrete way..." (www.anayasa.gov.tr; Constitutional Court, E.1986/20, K.1987/9, 31.3.1987).

Exception: Empower to Council of Ministers

In Article of the Constitution 73/4: "The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law". This rule constitutes an exception to legitimacy and is called as a "delegation of authority". Its limits drawn by Constitution as a "change authority in maximum and minimum limits which is stated within the law" and it couldn't be widened. The change authority of Council of Ministers can be exercised only on some elements of taxation. These elements are exemptions, exceptions, reductions and rates which can't be widened with interpretation (Güneş, p.161). In accordance with Article 73/4 empower to change tax assessment and rates to Council of Ministers with Tax Codes and Council of Ministers often exercise this power (Bilici, p.40). Having said that this power should be given only to Council of Ministers. Law can't give authority to other office for example Finance Ministry, therefore it can't transference power. Moreover Council of Ministers use this power between minimum and maximum limits and can't exceed it (Kaneti, p.38).

According to Constitutional Court: "...Council of Ministers change subjects which are stated in Article 73/4 and between minimum and maximum limits but can't exceed impose law these limits... This power given to Council of Ministers is exception of tax, fees, duties and other financial impositions shall be enacted, changed and repealed principle and it is impossible to give any other Office.... Reduction results in thereby making a deduction from tax assessment or from directly tax and relinquish or refund a part of tax. In this case 193 Number of Income Tax Code in Article 121 gave to Finance Ministry to practise tax deductions on employee and determine authority goods and services purchase which is subject to tax deduction and refund without limits that designated in same provision education, health, food, clothes and rent for resident home. Exercising this power results in effect to tax and deduction amount may increase or decrease. For this reason matter in dispute contrary to Article 73/4 and shall be repealed" (Constitutional Court, E. 2003/33, K.2004/101, 15.7.2004 (Official Gazette of 2.3.2005), Yalıtı, Özgenç, p.39-40). The authority may only be delegated by the Parliament to the Council of Ministers which does not have further authority to re-delegate this power to any other governmental organ. Further, the Council of Ministers may only be authorized to determine tax rates, or amounts of exemptions, exceptions and reductions within certain limits; no further authority may be delegated to the Council of Ministers on basic elements of taxes or similar financial impositions.

The Parliament must set in the law the maximum and minimum limits; thus set the framework where the Council of Ministers may reduce or increase the tax rates in between when it considers it necessary. Consequently, the power of the Council of Ministers on taxes emanating from the Parliament and originating from "a law" as such is qualified as an "adherent" and "subordinating" authority (Yaltı, www.eatlp.org).

Equality

Constitutional Equality

In a modern democratic community, legislation should respect and acknowledge the fundamental right to equal treatment under laws. Because it is in the nature of laws to classify or discriminate, the principle of equality demands 'treating likes alike'. This is also the case for tax legislation which, like all legislation, must conform to the demand of principles of equality. In modern thought, horizontal equity and vertical equity represent the Notion of Aristotelian formal justice used in tax law and tax policy (Edrey, p.1193; Musgrave, p.223; "horizontal equity is making people with equal capacity to pay the same amount in tax and vertical equity as making people with greater ability to pay more"). In Article 10 of the Constitution : "All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings". According to this rule all individuals shall be equal before law and the governmental bodies and administrative agencies shall not grant a privilege to any individual, family, category or class for any procedure, hence for tax procedure (Başpınar, p.5). The Constitutional Court consider equity as a person who is in same legal status subject to same rules and who is in different status subject to different rules but it says person who is in equal status subject to different rules because of "justification" is not contrary to equity (Saban, p. 53: "We have to emphasize while measure of "uniformity" or "difference" is "legal status" the measure of "different legal status" is "justification") and Constitutional Court seek "public interest" or "justification" shall be "comprehensible", "related to aim" and "fair" therefore any law which is not satisfy the conditions it deems against to equity.

Reading Tax Equality with Financial Power

Equity in taxation requires the fair distribution of the tax burdens among the tax payers in line with their ability to pay or fiscal capacity. According to this principle rich income group has to pay more taxes than low income group in a society. Income, wealth and consumption level represent ability to pay or tax paying capacity of a people. Accordingly three different taxes have been developed so far, these are personal income tax, personal wealth tax and personal expenditure tax. If a tax structure doesn't include these three taxes, ability to pay tax principle of equity in taxation can not be operational (Şener, p. 118). The Constitution doesn't include a specific rule about tax equality in Article 73 but we can read provision Article 73/1 "Everyone is under the obligation to pay taxes according to his financial resources, in order to meet public expenditures" with equality. The definition of financial power can't be found in Constitution however it use means as a ability to pay. As for that public finance criterions of financial power are income, wealth and consumption (Ateş, p.119). Financial power as a particular differentiation form, enable to overcome basic difficulty which interpreting constitutional equity principle in this context whilst government exercise the authority accordingly taxpayer who pay taxes are equal in compliance with financial power (Ateş, p.9). Taxation in compliance with financial power is collecting tax as regards economic and personal status of people and this principle determine a taxpayer who has more financial power than other have to pay more tax (Ateş, p.119). According to Constitutional Court violation of equity principle occurs when take unequal action to people who are equal status or equal action to unequal people who are equal but if there is a justification that actions can be accepted lawful (Ateş, p.122).

Right of Property

Although there is a specific tax rule in the Constitution Article 73 some tax professors including me argued that taxation is a intervention to property right and we have to deal with not only Article 73 but also Article 35 (Saban, p. 21; Yaltı, 2006). In Article 35 of Constitution: "Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to own property shall not be in contravention of the public interest". This provision stated second part of the Constitution which title is "fundamental rights and duties" and Article 13 indicate that general limits of the fundamental rules: "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". Consequently intervention which made with tax aim shall be proportionality and if we ask when it is against to proportionality the answer could be "remove to use that right" (Saban, p.22).

Conclusion

As we explain above parts tax law must also comply with the Constitution but not only Article 73 but also it shall be read with Article 35. Article 73 determines the legitimacy of paying taxes, because in accordance with the principle of legality of taxes, together with a number of other conditions, an intervention to the right of property through taxes can only find acceptance in state of law if it is done via a legitimate law (Yaltı, 2011, p. 210). Taxes should be scrutinized, via judicial review, like any other act of Congress. Any tax may be unconstitutional if it does not provide for the common defense and general welfare, or if it does not represent the collective consent. Furthermore, a tax should not violate any other constitutional rights or interests, e.g., property or equal protection rights (Edrey, p. 1192). When tax court judges and Constitutional Court judges consider "taxpayer rights" like property right Constitutional rights which every people have since firstly they are a "person" we can say that tax is justifiable. Because Article 73 –so as shall be changed as soon as possible- is far away to express importance of taxation and taxpayer rights.

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