

Taxation from the Viewpoint of Limitation of Fundamental Rights and Freedoms in Turkey

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Abstract

The states may intervene by using the taxation powers, which should rely on the legally gained sovereignty, into personal freedom and safety, domestic immunity, confidentiality of private life, freedom of settlement and traveling, right of ownership, protection of the family, freedom of working and covenants and rights and duties of working. Nowadays it is not acceptable that the powers of taxation are absolute and unlimited whereby the state has to avoid limitations that would violate fundamental rights and freedoms, when practising their powers of taxation. The study titled "Taxation from the Viewpoint of Limitation of Fundamental Rights and Freedoms in Turkey" the evaluation of the constitutional provision for limiting the fundamental rights and freedoms will be followed by stating the connection of taxation with fundamental rights and freedoms and by the approach of the European Union on this matter.

Key words: taxation power, fundamental rights and freedoms, principle of continence

I- Introduction

In the constitution of the Republic of Turkey, the state was burdened with duties for guaranteeing of fundamental rights, by introducing detailed regulations on fundamental rights and obligations. In case of regulations that burden the state with negative duties, the state has the obligation of not interfering with the borne rights and freedoms of persons; whereas in case of regulations that burden the state with positive duties, the state has the obligation of legal regulations for realizing the rights and freedoms concerned. In this connection, according to Article 12th of our constitution which regulates the fundamental rights and freedoms relying to the human value of persons¹: "Everyone is in possession of rights and freedoms in connection with his/her personality, that are untouchable, inalienable and indispensable. Fundamental rights and freedoms also include the duties and responsibilities the persons have towards the society, their families as well as towards other persons".

II-Limitation of Fundamental Rights and Freedoms

Our constitution regards the fundamental rights and freedoms as the main intent whereas limitations would constitute an exemption and therefore it becomes necessary the measure for limiting the fundamental rights and freedoms has to be determined by the constitutions itself². The causes for limitation as in Article 13th of the constitution are to be mentioned, whereas it is clearly regulated that the limitations should rely on the causes as written in the mentioned article. In accordance with the provisions of the related article: "Fundamental rights and freedoms may be limited by laws, for the protection of the unity of the state with its land and its people, of the national sovereignty, of the republic, of national security, of the public order, of general safety, of public interest, of general morality and general health, by particular reasons as foreseen in related articles of the constitution, in accordance with the wording and spirit of the constitution. General and particular limitations of fundamental rights and freedoms may not be against the requirements of the public order and may not be practiced otherwise, then for their own purposes. The causes for general limitations as written in this article apply to all fundamental rights and freedoms".

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¹Orhan ALDIKAÇTI, **Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası**, Fakülteler Matbaası, İstanbul, 1978, p. 207; Eser KARAKAŞ, Elif SONSUZUOĞLU, "Çeşitli Ülkelerde Anayasal ilkeler ve Türk Vergi Sisteminin Bu Açıdan Değerlendirilmesi", XIII. Türkiye Maliye Sempozyumu Anayasal Mali Düzen, **Marmara Üniversitesi Maliye Araştırma ve Uygulama Merkezi Yayın**, No:12, İstanbul, 2000, p.220.

²Billur YALTI, "Vergi Adaleti Kavramında Soyuttan Somuta: Türk Anayasa Mahkemesi Kararlarını Eşitlik, Özgürlük ve Sosyal Devlet Kavramlarıyla Okumak", **Vergi Sorunları**, Sayı: 119, Ağustos 1998, p. 115.

When we aim at a common explanation, the limitation of fundamental rights and freedoms can only be done, without touching their substance³, by means of law, only in connection with the causes as mentioned at the related article of the constitution. Moreover, at the mentioned Article it is regulated that the limitation of rights and freedoms cannot be against the wording and spirit of the constitution⁴, against the democratic public order, against the requirements of the secular republic and against the principle of continence⁵. In this context, limitations can be introduced by the aim of protecting the unity of the state with its land and its people, of national sovereignty, of national security, of public order, of general safety, of public interest, of general morality and general health.

III- Limitation of Fundamental Rights and Freedoms by Means of Taxation

As stated above, in our day, the hypothesis that the taxation authority is absolute and unlimited has been neglected. Regulations in taxation that were introduced by using the taxation authority in a way as to violate the fundamental rights and freedoms were aimed at the prevention or deterrence of the tax creating incidence, while the fundamental rights and freedoms are negatively affected from such an intervention⁶.

In accordance a verdict by the Constitutional Court relating to the close connection of taxation with fundamental rights and freedoms stated: *“Taxation regulations are legislative transactions that are related to and affect almost all rights and freedoms. Taxes are the most important ones among the monetary instruments of the state and render the usage of these rights and freedoms totally or partially possible or impossible. While the state is empowered by authority of taxation and effects the necessary tax regulations, it has to protect the rights and freedoms meticulously and should not be insensitive against the violation and destruction of legal principles just in order to create funds and resources for the state. The principles of the legal state may not be forsaken by the objective of gaining proceeds”*⁷.

It was clearly stated at the verdict, freedoms should not be limited immeasurably in order to meet the public revenues. In this context, according to the principle of moderation which foresees a balance between the limitation of freedoms and the public interest whereas the instruments of limitation have to be convenient with the objective and have to be equitable with the purpose of limitation and the instruments and objectives may not constitute an immoderate proportion⁸.

In resemblance, the European Court of Justice shares the view that the fundamental freedoms and regulations that were guaranteed by the Agreement on the European Union may be limited not in a discriminated manner; whereas the practice should constitute a necessity for protecting general interest, it should reach required objectives and not contain any more limitations than necessary for this purpose. In this context the European Union no regulations should be imposed over the limit of required moderation in connection with unnecessary interventions whereby the least intervening method at the appreciation and operational capacity of member states should be determined and applied⁹.

³ALDIKAÇTI stated that the freedoms as contained by the constitution are not created but only have to be regulated by the state and therefore the essence of rights and freedoms may not be affected in their essence. See. ALDIKAÇTI, p. 208.

⁴The wording of the constitution means the rules as contained in the text of the constitution and the spirit of the constitution means the conformity with the particular issues as stated in the preamble of the constitution. See. KARAKAŞ/SONSUZOĞLU, p. 237.

⁶Rights and freedoms that may be subject to intervention in consequence of using the taxation authority are personal freedom and safety, domestic immunity, confidentiality of private life, freedom of settlement and travelling, rights of ownership, protection of the family, freedom of working and covenant, rights and duties of working. See. Mualla ÖNCEL; Ahmet KUMRULU; Nami ÇAĞAN; **Vergi Hukuku**, 19. Bası, Turhan Kitabevi, Ankara, 2010, p. 43.

⁷Constitutional Court Decision 7.11.1989, 6/42, RG.T.6.4.1990, RG No 20484. See. YALTI, **“Vergi Adaleti Kavramında Soyuttan Somuta: Türk Anayasa Mahkemesi Kararlarını Eşitlik, Özgürlük ve Sosyal Devlet Kavramlarıyla Okumak”**, p. 114.

⁸Ergun Özbudun, **Türk Anayasa Hukuku**, 11. Baskı, Yetkin Yayınları, Ankara, 2010, p. 114; YALTI, **“Vergi Adaleti Kavramında Soyuttan Somuta: Türk Anayasa Mahkemesi Kararlarını Eşitlik, Özgürlük ve Sosyal Devlet Kavramlarıyla Okumak”**, p. 115; Nami ÇAĞAN, **Vergilendirme Yetkisi**, Kazancı Hukuk Yayınları, İstanbul, 1982, p. 164-170.

⁹Gülören TEKİNALP, Ünal TEKİNALP, **AB Hukuku**, 2. Bası, Beta Basım Yayım Dağıtım A.Ş., İstanbul, 2000, p. 101-102.

Within the Union when a full harmonization could not be achieved between the countries and a national regulation shows a deviation from fundamental freedoms that were guaranteed by the Agreement on the European Union or is in contradiction to these or violates fundamental freedoms, the European Court of Justice will not automatically evaluate the regulation as a violation of fundamental rights. ECJ has in a verdict taken into consideration the causes relying on public interest as “legitimate causes” and has developed the “Gebhard Test” by deciding that the fundamental freedoms that were regulated by the covenant could be limited or permitted to be less favorable within the explained circumstances¹⁰.

IV- Conclusion

In our constitution the causes for limitations of fundamental rights and freedoms are mentioned in detail, as it was explained at the related chapter. In other words, a limitation of fundamental rights and freedoms has to rely on one of the mentioned causes as contained by the consecutive provision. By this reason, a limitation of fundamental rights and freedoms may only be effected without touching its essence, in connection with the causes as contained by the consecutive provision of the constitution and by means of a law, being not against the wording and spirit of the constitution or against the democratic public order, against the requirements of the secular republic and the principles of moderation.

The view of the European Court of Justice on the matter concludes that fundamental rights and freedoms as guaranteed by the Agreement on the European Union could be limited when the respective regulations are not practiced in a discriminatory manner and they are mandatory for the protection of general interests, aiming at reaching the necessary objectives being consistent with principles of moderation.

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¹⁰EuGH Urteil v. 30.10.1995, Rs. C-55/94, Gebhard. See. Meltem Sağlam, **Kontrol Edilen Yabancı Kurum Kazançlarının Vergilendirilmesi**, Yaklaşım Yayıncılık, İstanbul, 2011, p. 429; Marjaana Helminen, “Is There a Future for CFC-Regimes in the EU?”, **Intertax International Tax Review**, Vol:33, Issue 3, 2005, p. 120.