The Separation of Powers in Turkish Tax Law[1]

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1. The Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Competence on Tax Matters

The Turkish Constitution[2] (TC) defines the Turkish Republic as "a democratic, secular and social state governed by the rule of law" (Art. 2, TC). 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 of the TC, "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 of the TC, "the judicial power shall be exercised by independent courts on behalf of the Turkish Nation".

The Fourth Chapter of the Constitution, which is titled as "Political Rights ad Duties", comprises a provision on the obligation to pay taxes as follows (Art.73, TC):

> "*Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditure.*
>
> *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 exemptions, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law*".

[1] This report covers only Section 1, 4 and 5 of the questionnaire on separation of powers provided by the EATLP.

[2] Official Gazette of 9.11.1982, No. 17863 (Rep.). Official translation published in the website of the Turkish Grand National Assembly , http://www.tbmm.gov.tr/english/english.htm

In accordance with the rule of law, Article 73 covers the universally accepted fundamental principles of taxation that (1) taxes can be levied only if a statute lawfully enacted so provides, (2) taxes must be applied generally and equally, (3) taxes must conform to the ability to pay principle, and (4) taxes can only be allocated to public expenditures[3]. 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 (Art.11, TC).

1.1.1. Primary Legislative Competence: The Parliament (Art 73(3),TC)

Article 73(3) of the TC allocating the power to make tax laws to the Parliament regulates the legality principle which historically means that "no tax can be imposed without representation"[4]. As regards the formal context (*ratione personae*), the article attributes the taxing authority to the elected legislators. In terms of the material context (*ratione materiae*), it states that not only "taxes" but also "fees", "duties" and "other similar financial impositions"[5] must be *imposed, amended or revoked* by *"law"*. In interpreting the constitutional power designed for taxation and the meaning of the terms "imposition by law", The Turkish Constitutional Court (TCC) states in its established case law:

" *.... 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...."*[6]

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[3] Kaneti, Selim, **Vergi Hukuku**, 2nd edition, Filiz Kitapevi, Istanbul, 1989, p.30.

[4] Oncel, M./Kumrulu, A./Cagan, N., **Vergi Hukuku**, 14th edition, Turhan Kitabevi, Ankara, 2006, p.7; Saban, Nihal, **Vergi Hukuku**, 4th edition, Beta Yayınlari, Istanbul, 2006, p.49; Gunes, Gulsen, **Verginin Yasalligi Ilkesi**, 2nd edition, 12 Levha Yayincilik, Istanbul, 2008, pp.13-14.

[5] In the literature, similar financial impositions are defined as impositions collected under public authority to finance special demands of special groups, Kaneti, p.7; See also, Basaran, Funda, "*Anayasa Temelinde Mali Yukumluluk Kavrami*", **Oguz Imregune'e Armagan**, İstanbul, 1998, pp.878-879.

[6] e.g. Constitutional Court, E.1977/109, K.1977/131, 29.11.1977 (Official Gazette of 8.3.1978, No.16222); Constitutional Court , E.1986/20, K.1987/9, 31.3.1987 (Official Gazette of 28.5.1987, No.19473).

1.1.2. Secondary Competence: The Council of Ministers

1.1.2.1.Competence on tax rates (Art 73(4), TC)

The Turkish Constitution allocates the power to tax primarily to the Parliament (Art 73(3)). In addition, under Article 91, which regulates the authorization of the Council of Ministers to enact decrees having the force of law by an empowering law defining the purpose, scope, principles and operative period thereof, it is stated that "the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency"[7]. Since the obligation to pay taxes is regulated under the political rights and duties, the Council of Ministers may not be empowered to release a decree having the force of law on tax issues. However, Art.73 (4) of the TC regulates the secondary competence of the Council of Ministers which may be empowered by the Parliament to amend only the percentages of exemptions, exceptions and reductions of taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law. The delegated power is always implemented by an ordinary decree of the Council.

The basic purpose of the delegation of power to determine tax rates or tax exemption, exception and reduction amounts is to enable governmental intervention in the economy easily and speedily where economic conditions or fluctuations necessitates an action to which the Parliament may not respond on time because of the detailed and complicated procedural rules of the legislative

[7] Article 91, TC: "The Turkish Grand National Assembly may empower the Council of Ministers to issue decrees having the force of law. However, the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency.
The empowering law shall define the purpose, scope, principles, and operative period of the decree having the force of law, and whether more than one decree will be issued within the same period.
...
Decrees are submitted to the Turkish Grand National Assembly on the day of their publication in the Official Gazette.
Laws of empowering and decrees having the force of law which are based on these, shall be discussed in the committees and in the plenary sessions of the Turkish Grand National Assembly with priority and urgency.
Decrees not submitted to the Turkish Grand National Assembly on the day of their publication shall cease to have effect on that day and decrees rejected by the Turkish Grand National Assembly shall cease to have effect on the day of publication of the decision in the Official Gazette. The amended provisions of the decrees which are approved as amended shall go into force on the day of their publication in the Official Gazette".

process. The TCC explains the motive behind the delegation of power as follows: "*In modern states, reducing or increasing tax rates is an effective instrument used to reach fundamental social-economic goals, such as to stimulate capital accumulation, to raise development pace, to prevent inflation and unemployment, to reduce balance of payments deficit, to refine consumption trends. .... The competence of the Council of Ministers is necessary to realize the very essence of the social-economic goals when existing economic conditions so requires…*"[8]

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[9]. 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" [10] authority[11].

On the basis of Article 73 (4), most of the tax laws released from the Parliament comprises a provision delegating the power to the Council of Ministers on tax rates or similar amounts. The Council of Ministers usually exercises its competence and set the rate structure under its discretion within a range prescribed in the law. For instance, under article 28 of the Value Added Tax Law (VATL)[12], the standard VAT rate on taxable transactions is 10%. However, the Council of Ministers is authorized (1) to increase the standard rate to 40% and reduce it to 1%; and (2) to fix a rate in between for various goods and services or for the retail stage of certain goods. The Council of Ministers has used this authority several times by issuing decrees. Currently, the standard VAT rate on taxable transactions is 18% and reduced rates of 1% and 8% is applied on certain goods and services enumerated in two lists issued by the Council of Ministers[13]. Between 1985 and 2008, for a

[8] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).

[9] Constitutional Court, E. 2005/73, K.2008/59, 21.2.2008 (Official Gazette of 7.11.2008, No.27047).

[10] Kaneti, p.38; See also, Ozbudun, Ergun, **Turk Anayasa Hukuku**, 7th edition, Yetkin Yayinlari, Ankara, 2002, pp.182-183.

[11] The TCC qualifies the power of the Council of Ministers as a "conditional and limited" authority; Constitutional Court, E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6.4.1990, 20484).

[12] Katma Deger Vergisi Kanunu, No.3065 (Official Gazette of 2.11.1984, No.18563).

[13] Bakanlar Kurulu Karari, No. 2007/13033 (Official Gazette of 30.12.2007, No.26742), most recently amended by Bakanlar Kurulu Karari, No. 2008/14092 (Official Gazette of 20.9.2008, No.27003).

period of 23 years, the delegated authority has been used by the Council of Ministers for 37 times meaning that the VAT rate structure for at least some goods or services has been amended semi-annually. The relevant VAT Decree No.2007/13033 issued in 2007 has been changed in 2008 for four times[14].

Another example can be found in the Individual Income Tax Law (ITL)[15]. The income withholding tax rate is 25%, except in the case of employment income (Art.94). However, the Council of Ministers is authorized to fix a new rate between 0% and 50% for each separate item of income (e.g. dividends, royalties, interest, agricultural income, and professional income etc.) and differentiate between residents and non-residents. The rates applied by the Council of Ministers for different income items vary currently between 2% and 20%[16]. Between 1986 and 2008, for a period of 22 years, the delegated authority has been used by the Council of Ministers for 22 times meaning that the income withholding tax rate structure for at least some income items has been amended annually. The above data displays the frequency of the exercise of competence by the Council of Ministers.

In Turkish constitutional jurisprudence, so many tax law provisions delegating the power to increase or reduce the tax rates have been discussed by the TCC. The most important case law produced was on tax provisions authorizing the Council of Ministers to reduce the tax rates to "zero" arguing whether such a delegated power was in effect leading to the "revocation" of a tax which constitutionally vested only on the Parliament. The TCC has not endorsed the opinion expressed in the literature[17] that reducing a tax rate to zero is in fact similar to decide to discontinue the collection of that tax, and the actual meaning of which is the annulment of the tax itself. On the contrary, the TC has declared: "The power to reduce a tax rate to zero does not mean revoking the tax, since the relevant tax itself continues to exist in the legal order and under the relevant economic conditions the Council of Ministers may re-increase that tax whenever it considers it necessary"[18]. In another case relating to the Vehicle Tax Law, the TC considered the controversial provision regulating that the tax amounts written in the Law shall be re-valued by the re-valuation rate at the end of each year,

[14] Bakanlar Kurulu Karari, No. 2008/13234, No. 2008/13426, No. 2008/13902, No. 2008/14092.

[15] Gelir Vergisi Kanunu, No.193 (Official Gazette of 6.1.1961, No. 10700)

[16] Bakanlar Kurulu Karari, No. 2009/14592 (Official Gazette of 3.2.2009, No.27130).

[17] Dogrusoz, Bumin, "*Vergilendirme Yetkisinin Yasama ve Yurutme Organlari Arasında Bolusumu*", **Vergi Dunyasi**, No.43, March 1985; Gunes, p.165. For an opposite opinion, see, Cagan, Nami, "*Turk Anayasasi Acisindan Vergileme Yetkisi*", **Anayasa Yargisi**, vol.1, Ankara, 1984, p.174.

[18] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632); Constitutional Court, E. 2005/73, K.2008/59, 21.2.2008 (Official Gazette of 7.11.2008, No.27047);

and further delegating the power to the Council of Ministers to increase the so called re-valuation rate announced by the Ministry of Finance by 50% or decreasing it by 20%; and authorizing the Council of Ministers to re-increase twenty times further the tax amounts so-revalued under the previous calculation. The TCC concluded that such a multiplex power could not be acceptable in terms of the constitutional principles, since it was "uncertain" and "disproportional"[19].

In authorizing provisions of the Turkish tax legislation, the Parliament has never set further conditions, such as timing or period or the acceleration of the tax burden. Therefore, the power of the executive organs seems to be absolute and infinite and may give rise to instantaneous daily increases. In terms of legality and legal certainty principles, such a wide margin of appreciation having the possibility of arbitrary discretion of the Council of Ministers -as it has been exercised in the VAT practice by increasing VAT rates on financial leasing suddenly from 1% to 18%, or in the Special Consumption Tax practice by rising the tax rate on luxury goods from 6.7% to 20%- has always been criticized in the literature asserting that such an exercise might create unforeseeable results and the legality principle necessitated the empowering law to define the purpose, scope, principles (such as the maximum rate jump possibility at once) and operative period of a Decree[20]. The current understanding and the application of the power of the Council of Ministers in tax law, however, provides less certainty and guarantee than the power to release decree having force of law[21], since the exercise of the delegated power is never controlled by the Parliament ex post, and the Decrees released by the Council of Ministers are out of the scope of the TCC's supervision. This also creates, especially for cases of zero rate taxation, a loophole for the control whether the final rate structure set by the Council of Ministers accords with the ability to pay principle explicitly stated in Art.73 of the TC[22]. Nevertheless, the power exercised by the Council of Ministers is under the supervision of the Supreme Administrative Court (the Court), as has been seen in a case in which the Court repealed the Decree setting higher VAT rates for LPG then other petroleum products in terms of equality principle stated in Art.10 of the TC[23].

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[19] Constitutional Court, E.2001/36, K. 2003/3, 16.1.2003 (Official Gazette of 21.11.2003, No. 25296).

[20] Yalti, Billur "*Vergi Orani Dunden Bugune 18 Kat Artar mi?*", **Dunya Gazetesi**, 1 March 2008; Yalti, Billur, "*Son OTV Artisi Hukuksuz*", **Radikal Gazetesi**, 10 May 2006.

[21] See foot note 6.

[22] Yalti, Billur, "*1923'ten 2003'e "Kazandiklarimiz": "Cumhuriyet Hukuku", "Kazanamadıklarimiz": "Hukukun Cumhuriyeti", Vergi Hukukunda Geldigimiz Yere Yakin Tarihten Bakmak: Panaromik bir Calişma*", **Ankara Universitesi Hukuk Fakultesi, Cumhuriyetin Kurulusundan Bugune Turk Hukukunun 80 Yillik Gelisimi Sempozyumu**, A.U.Hukuk Fak.Yay. No.538, Ankara, 2003, pp.104-106.

[23] Supreme Administrative Court, 7th Section, E.2001/626, K.2002/1942, 20.5.2002 (Official website of the Supreme Administrative Court: http://www.danistay.gov.tr)

1.1.2.2.Competence on additional duties on foreign trade (Art.167(2), TC)

Article 167 of the TC on the "Supervision of Markets and Regulation of Foreign Trade", states that in order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce or revoke additional financial impositions on imports, exports and other foreign transactions in addition to taxes and similar impositions.

The legal context for the "additional impositions on foreign trade" is separately prescribed under the Constitution, although they can easily be qualified by character as similar to taxes or other financial impositions. The power which may be delegated by the Parliament to the Council of Ministers under Art.167(2) is more widely designed than the one regulated under Art.73(4); thus covering the power to "introduce" or "annul" any financial duties. As for the subject matter, however, it is less widely regulated; thus comprising only the duties imposed on "foreign trade".

By Act 2976, the Council of Ministers is generally authorized by the Parliament to regulate the kind, amount, collection, prosecution and refund procedure of the additional financial duties[24]. Regarding the indeterminate and wide context of the relevant law, and the constitutionality thereof, the TCC declared that the authority in Art. 167 (2) covered the Council of Ministers' power to freely determine the kind and amount of a financial duty whatever the economic conditions of the country necessitated in order to encounter the measures applied by other states or to take national measures for economic events occurred in the country[25]. The Council of Ministers used its authority on many occasions in order to apply various safeguarding measures on imports[26].

Act 2976, and the interpretation of the TCC thereof, was criticized in the literature, since (1) the law only repeated the wording of the Constitution, then the power assigned to the Parliament to "empower" the Council of Ministers in Art.167(2) turned to be "meaningless"[27]; (2) additional financial duties were similar to taxes in nature and Art.167 (2) had to be interpreted under the same

[24] Dis Ticaretin Duzenlenmesi Hakkinda Kanun, No.2976 (Official Gazette of 15.2.1984, No.18313).

[25] Constitutional Court, E.1984/6, K.1985/1,T.11.1.1985 (**Anayasa Mahkemesi Kararlar Dergisi**, No.21, Ankara, 1996, p.1).

[26] e.g., Ithalatta Korunma Onlemleri Hakkinda Karar, No. 2004/7305 (Official Gazette of 29.5.2004, No. 25476).

[27] Tan, Turgut, "*Anayasa Mahkemesi Kararlari Isiginda Yurutmenin Duzenleme Yetkisi*", **Anayasa Yargisi,** Vol.3, Ankara, 1986, p.213.

principles arising from Art.73 of the TC[28]; (3) the exercise of the power to introduce additional duties was continuously exempt from the supervision and control of the Parliament and the TCC, they were only covered under the limited supervision of the administrative judiciary[29]; and (4) the TCC's interpretation on Art.167 displayed a contradiction to its previous jurisprudence produced for the meaning of Art.115 or 124 (see below)[30].

1.1.2.3.Regulatory competence (Art.115, TC)

Under Article 115 of the TC, it is stated that "the Council of Ministers may issue regulations governing the mode of implementation of laws or designating matters ordered by law, provided that they do not conflict with existing laws and are examined by the Council of State. Regulations shall be signed by the President of the Republic and promulgated in the same manner as laws". Accordingly, the Parliament may empower the Council of Ministers; i.e. may transfer a specific authority in a law to establish rules for the implementation of a law, or for the procedural details, and the Council of Ministers may only issue a regulation within the limits of a law; thus it may not alter or extend the scope prescribed by the law. The TCC qualifies the regulatory competence of the Council of Ministers as a "limited" and "complementary" competence, not an "autonomous" one. In its established case law, the Court declared that the Council of Ministers did not have regulatory competence if a law did not authorize it ex ante; even though a law ordered a regulation, the executive organs did not have the authority to issue any rules that might affect the subjective rights of individuals, and to go beyond what was regulated under that law[31]. However, in Turkish tax law, tax regulation has been rarely used, since the Council of Ministers has not been authorized by the Parliament in relevant tax laws, except in the Real Estate Tax Law[32].

1.1.3. Competence of the Ministry of Finance on Tax Rules (Art 124, TC)

The Constitution also regulates a specific delegation of power to the Ministries to issue by-laws (Art.124). Accordingly, "the Prime Ministry, the ministries, and public corporate bodies may issue by-laws in order to ensure the application of laws and regulations relating to their particular

[28] Saban, **Vergi Hukuku**, p.11, Gunes, pp.176-178. For an opposite opinion, see, Cagan, *Turk Anayasasi*, p.176.

[29] Duran, Lutfi, "*Anayasa Mahkemesine Gore Turkiyenin Hukuk Duzeni*", **Amme Idaresi Dergisi**, vol.19, No.1, March 1986, p.16.

[30] Tan, 212;

[31] For example, Constitutional Court, E. 1987/16, K.1988/8, 19.4.1988 (Official Gazette of 23.8.1988, No.19908).

[32] Emlak Vergisine Matrah Olacak Vergi Degerlerinin Takdirine Iliskin Tuzuk, Bakanlar Kurulu Karari, No. 7/3995, (Official Gazette of 15.03.1972, No.14129).

fields of operation, provided that they are not contrary to these laws and regulations. The law shall designate which by-laws are to be published in the Official Gazette". The power to issue by-laws for the implementation of laws is also a limited and complementary competence similar to the authority to release regulations as explained above.

In Turkish tax law by-laws have been rarely used by the Ministry of Finance, since the Parliament has not usually authorized the Ministry to release by-laws[33]; instead left the authority to regulate the procedural and material aspects of a tax provision in general terms without referring to any legal source of instrument, and that authority has always been implemented by general rulings. In Turkish tax law such general rulings are characterized as regulatory and have binding effect[34]. In a case regarding the power delegated by the TPL to the Ministry of Finance (Art.257 rep.) to define and introduce further obligatory documents other then those actually regulated under the TPL, of which the preparation by the taxpayers are compulsory, the TCC stated that the legislative organ has the right to regulate the general principles in a law and then leave the details relative to professional and administrative techniques to be regulated by the executive bodies. However, executive organs may use this regulatory power only within the framework of the law[35]. The Court reaffirmed this interpretation on various cases, such as the power to regulate the procedural obligations on cash registers[36], to introduce obligatory signature or approval of the tax returns by tax advisors[37], to regulate the prodecure for the announcement of debtor tax payers' names in the media[38], to regulate joint and several responsibility of withholding tax agents[39], to regulate the application of the penalty on the closure of business places[40], to regulate the material and procedural aspects of investment deduction in income taxes[41].

[33] In Turkish tax legislation there are four by-laws regarding the ITL on agricultural income and disabled persons, and the TPL on the procedural rules for the publication of official invoices and documents and on the reconciliation procedure between the payers and the tax administration.

[34] It must be stated that the interpretive rulings of the Ministry of Finance do not have any binding effect on taxpayers.

[35] Constitutional Court, E.1990/29, K.1991/37, 5.10.1991 (**Anayasa Mahkemesi Kararlar Dergisi**, No.27, Ankara 1993, p.609).

[36] Constitutional Court, E.1996/11, K.1997/4, 29.1.1997 (Official Gazette of 30.6.2001, No. 24448).

[37] Constitutional Court, E.1996/5, K.1996/26, T. 26.1.1996 (Official Gazette of 30.6.2001, No. 24448).

[38] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).

[39] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).

[40] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).

[41] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).

Beyond the interpretation of the TCC, in the light of the legality principle, the Parliament is criticized in literature that authorizing tax provisions on the "material" aspects of a tax rule are not constitutional; however the power to regulate procedural aspects of a tax provision may be delegated[42]. The Supreme Administrative Court controls such a general announcement whether (1) it relies on a legal authorizing provision; (2) it effects directly the taxpayers' rights; (3) it is applied generally throughout the country; (4) it is interpretive or regulatory in nature; and finally (5) it complies with the subject and the framework of the law.

As for the lump-sum tax amounts or exemptions and reductions regulated in tax laws, the relevant law usually refers to the revaluation rate in order to adjust taxes annually for inflation. Revaluation rate is regulated under Art. 298(rep) of the TPL and based on the price increase in the production price index in October of each year as compared to the previous year's index in the same month. The rate is released by the Ministry of Finance in the Official Gazette at the end of the year. In some tax laws, however, the Council of Ministers is authorized to re-increase the final amounts so calculated by the revaluation rate within a limit. For instance, according to Art.123 (rep.) of the ITL, the lump-sum tax amounts and etc. regulated under various articles of the ITL is increased annually by the re-valuation rate and the Council of Ministers is authorized to further increase or decrease such re-calculated amounts by 50%. The tax base brackets designed for the progressive income tax tariff are also subject to this rule. In practice, the so called lump sum taxes, penalties, exemptions, reductions etc. that spread through out tax laws are yearly increased by the revaluation rate announced by the Ministry of Finance at the end of each year. In the view of the TCC, "the tax amounts regulated through out the tax laws may be increased by the re-valuation rate declared by the Ministry since the background information released from the State Statistic Institute is produced and released under scientific methods, and the Ministry obliged only to release the rate, therefore there is no opportunity for arbitrary discretion"[43]. In tax literature, it is criticized that the determination of the re-valuation rate by the Ministry of Finance is contrary to the legality principle, because the rate is indirectly determined by State Statistic Institute which is an administrative body[44]. A Contrary opinion is also expressed in the literature that the authority of the Ministry of Finance on the re-valuation rate is an adherent authority referring only to "releasing" the rate[45].

[42] Yalti, "*1923'ten 2003'e*", p.109.

[43] Constitutional Court, E.1996/49, K.1996/46, 11.12.1996 (Official Gazette of 2.12.2000, No.24248).

[44] Saban, **Vergi Hukuku**, p.37; Yalti, "*1923'ten 2003'e*", p. 105.

[45] Dogrusoz, Bumin, "*Yeniden Degerleme Oraninin Etkileri*", **Referans Gazetesi**, 6.11.2008.

1.2. Competence on draft tax bills

Under the TC, the Council of Ministers and deputies are empowered to introduce laws (Art.88 (1)). The constitutional authority to introduce tax laws vests on either the Council of Ministers (draft bills) or the deputies (proposals of law). According to the "Parliamentary Rules of Procedure"[46], the proposals of law introduced by the deputies have to be immediately sent to the Council of Ministers by the Presidency of the Parliament for information (Art.40).

In the tax law area, the usual practice is that the drafting process of tax laws vests on the Ministry of Finance. The "Decree Having Force of Law on the Foundation and Organization of the Ministry of Finance", No.178 authorizes the Ministry to establish tax policies of the State and to draft tax bills and other financial legislative instruments (Art.2 (h))[47]. The Tax Council, which was established in 1992, yet was effectively organized and began its activities in 2004, is designated as a supervisory independent board entrusted with a task to conduct research activities and give opinion to the Ministry of Finance on tax policies and implementing tax laws thereof[48]. The Tax Council formed by the representatives of both from the public and private sectors, including non-governmental organizations and academic circles is authorized to draft or give opinion on tax laws[49]. Since 2005, the Tax Council has actively participated in the drafting process of tax laws, especially for the re-writing of the fundamental tax laws, such as the corporate income tax law, individual income tax law and tax procedure law.

The draft tax bills prepared by the Ministry are submitted to the Council of Ministers, since the Council is one of the constitutionally authorized organs to introduce laws before the Parliament. According to the procedural rules of the Parliament, draft bills or proposals on taxation presented to the Presidency of the Parliament are sent directly to the related main commitee, namely Plan and Budgetary Committee, composed of deputies representing the political parties having seats in the parliament, proportional to the total number of the political party groups in the General Assembly (Arts. 21 and 73). The committee discusses and votes on the bill article by article. During discussions a committee member may propose to amend a part or the entire article of the bill. Dissenting opinions may also appear on the final report (Art.22 et seq.). In the General Assembly

[46] Official Gazette of 13.4.1973, No.14506.

[47] Maliye Bakanliginin Kurulus ve Gorevleri Hakkinda Kanun Hukmunde Kararname, No.178 (Official Gazette of 14.12.1983, No. 18251 (Rep.)).

[48] 5228 Sayili Kanun, Official Gazette of 31.7.2004, No.25539.

[49] Vergi Konseyi Yonetmeligi, Official Gazette of 22.3.2005, No.25763.

discussions, one or more articles of the draft bill or proposal may be amended, rejected or sent back to the committee (Art. 87). Further more, the President is authorized under the TC to promulgate laws, to return laws to the Parliament to be reconsidered, or to appeal to the Constitutional Court for the annulment in part or entirety of certain provisions of laws, and decrees having the force of law on the grounds that they are unconstitutional in form or in content (Art.104, TC).

For the legislative process, amendment or rejection of one or more articles of a draft tax bill before the Plan and Budgetary Committee or before the General Assembly is sometimes exercised. An example for this kind of practice was the legislative process regarding the new Corporate Income Tax Law (CITL) No.5520 dated 13 June 2006[50] which wholly revised and introduced substantial amendments to the former CITL No. 5422 dated 10 June 1949. The text of the draft bill has gone through some changes both in the Committee and the Grand Assembly. A recent example is Law No.5811 dated 13 November 2008, on the inclusion of assets into the national economy which aimed to encourage legitimization of domestic and foreign capital and income by way of taxing such assets transferred to or capitalized in Turkey at reduced rates. In the draft bill, a one-off tax was applied at 2% for foreign assets and 10% for domestic assets; however, the rate for the latter assets has been reduced in the Grand National Assembly to 5%[51]. The above examples that were experienced in the parliamentary legislative process of tax laws did not occur, however, actually as a result of the proposals introduced by the opposition parties. Although an opportunity to reflect the opinions or criticisms in a pluralistic way remains in the organization of the system, this does not mean that the opinions beyond the government's demands have effectively been reflected on enacted tax laws.

2. The Relationship between the Tax Administration and the Domestic Tax Courts

2.1. The domestic courts' control on the decisions of the tax administration

[50] Kurumlar Vergisi Kanunu, No.5520 (Official Gazette of 13.6.2006, No.26205).

[51] Bazi Varliklarin Milli Ekonomiye Kazandirilmasi Hakkinda Kanun, No.5811 (Official Gazette of 22.11.2008, No.27062).

In Turkish legal order, the TC states that, "[r]ecourse to judicial review shall be available against all actions and acts of administration" (Art. 125, TC). Under the law regulating the administrative judiciary, and remedies and procedure thereof[52], all individual tax assessments and decisions of the tax administration are subject to judicial review of tax courts which control whether a tax decision is in conformity with the law with respect to its subject matter, form, procedure, and competence. A taxpayer may appeal the tax office's assessment to the tax court within 30 days after notification of the assessment. A taxpayer may not challenge facts which he declared on the tax return, except for cases where a reservation has also been attached to the tax return. If the amount of taxes, penalties and charges subject to the trial exceeds a certain limit, the tax court consists of a three-judge tribunal. Decisions of the tribunal may be appealed to the Supreme Administrative Court within 30 days of notification of the court's decision. This Court is the final stage of jurisdiction. If the amount of taxes, penalties and charges does not exceed a certain limit a single judge hears the case. This decision may be appealed to the Regional Administration Court within 30 days. The decisions of this Court may not be further appealed. In Turkish literature, a special research project conducted in 2000 on the effectiveness of the judicial review on tax cases, displayed statistically that the trials against the tax administration's decisions had usually finalized in favor of the tax payers[53].

A taxpayer may also bring regulations, by-laws or general rulings before the Supreme Administrative Court claiming that such instruments are contrary to a tax law. In Turkish literature, it was asserted that such cases have usually finalized in favor of taxpayers; thus the Supreme Administrative Court often cancelled general rulings of the Ministry of Finance which was regulatory in nature[54] on grounds that the power delegated to it by the law has been overridden[55]. However, in cases where a regulatory general ruling did not go beyond the empowering tax law, the lower tax courts and the Supreme Administrative Court qualified the information emerging from the Ministry of Finance as a binding rule and took it into account in its judicial review[56]. On the

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[52] Danistay Kanunu, No.2575 (Official Gazette of 20.01.1982,No.17580); Bolge Idare Mahkemeleri, Idare Mahkemeleri ve Vergi Mahkemelerinin Kurulusu ve Gorevleri Hakkinda Kanun, No.2576 (Official Gazette of 20.1.1982, No.17580); Idari Yargilama Usulu Kanunu, No.2576 (Official Gazete of 20.1.1982, No. 17580).

[53] Saban, Nihal, **Turk Yargi Sisteminin Etkinligi Arastirma Projesi, Vergi Yargisinin Etkinligi**, TESEV, Istanbul, 2000, pp.78-79.

[54] See above

[55] Yalti, "*1923'ten 2003'e*", p. 111.

[56] See for example, Supreme Administrative Court, 4th Section, E.2006/130, K.2006/99, 7.2.2006; e.g. Supreme Administrative Court, 4th Section, E.2004/1263, K.2005/156, 7.12.2005; Supreme Administrative Court, 7th Section, E.1986/342, K.1986/2391, 22.10.1986; Supreme Administrative Court, General Council, E.1999/51, K.2000/87, 25.2.2000 (http://www.danistay.gov.tr) .

contrary, if a general ruling was qualified as an interpretive one, the courts did not refer to the interpretation of the Ministry and directly applied a tax provision under its own interpretation[57].

2.2. Tax administration's response to the case law

Article 138 of the TC states: "Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming to the law. ... Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution". Accordingly, the Turkish tax administration is constitutionally obliged to apply the judicial decisions of the courts. In individual cases where a tax court abolishes an individual tax decision, the tax administration executes the court's decision as it has binding effect. However, the administration usually applies the same tax rule in similar cases along its own interpretation until a series of judicial decisions canceling such administrative decisions is produced by tax courts. When applying the law, the tax administration usually considers itself bound by the law under its own understanding. A controversial application of the penalty of infraction of rules regulated under article 353 of the TPL, which is applied on actions of non-producing invoices or similar documents, can be regarded as a good example for this approach. Although the judiciary interpreted that where a document or invoice did not contain small formal obligations (such as dates or tax payer identification numbers), this had no effect on the fact that the document "produced", the tax administration continued to apply the penalty arising from the law on so many occasions[58].

The Ministry of Finance sometimes initiates the parliamentary process when the outcome of the supreme courts decisions turns out to be jurisprudence. For this practice, we may give as an example the controversial application of tax responsibilities of legal representatives by their own

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[57] e.g. Supreme Administrative Court, 3rd Section, E.2005/1149, K.2005/1925, 20.9.2005 (http://www.danistay.gov.tr) .

[58] Supreme Administrative Court, General Council, E.1995/435, K.1997/83, 24.1.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.342); Supreme Administrative Court, General Council, E.1995/434, K.1997/84, 24.1.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.343); Supreme Administrative Court, General Council, E.1996/73, K.1997/342, 20.6.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.349); Supreme Administrative Court, General Council, E.1996/212, K.1997/508, 28.11.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.352); Supreme Administrative Court, 3rd Section, E.1998/4530, K.1998/4609, 16.12.1998 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.340); Supreme Administrative Court, 3rd Section, E.1999/1497, K.1999/2415, 10.6.1999 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.411); Supreme Administrative Court, 4th Section, E.1999/620, K.2000/4277, 23.10.2000 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.413); Supreme Administrative Court, 3rd Section, E.1999/257, K.2000/3903, 28.11.2000 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.419);

assets for the companies' tax debts (Art.10, TPL). Although the judiciary has decided on so many occasions that tax debts arose under the responsibility of the predecessor can not be recovered from a successor tax representative[59], by a recent amendment to the law a joint and several responsibility has been explicitly introduced[60]. A similar practice is also experienced on the responsibility of tax representatives regulated under different laws, i.e. Art.10 of the TPL and Art.35 rep. of the Procedural Law on Public Receivables[61]; where the former regulates a limited responsibility of a tax representative necessitating several conditions to be realized, and the latter a wider and easier way to collect companies' debts from a representative. The judiciary held that Art.10 was a special rule (*lex specialis)* for tax debts, where Art.35 rep. was a general provision (*lex generali*) for public debts other then taxes, and as long as Art.10 explicitly or implicitly not repealed, the latter article could not be applied to tax cases[62]. However, a recent amendment has introduced a provision stating that Art.10 would not prevent the application of Art.35 rep[63].

Although Art.153 of the TC states that "the decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies", experience has shown that the Ministry of Finance may try to reach the same effect of an annulled law in the taxation area. For example, Law No.4837[64] introducing a one-off additional motor vehicle tax in 2003 with a rationale to encounter the effects of public deficits was cancelled by the TCC on grounds that the burden arising from public deficits had to be distributed in a general manner to public as a whole; however the relevant law, contrary to the equality, generality and the ability to pay principles, discriminated against the people who owned a car, and did not burden other taxpayers with respect to other taxes, such as taxes on individual income or corporate income, and extraordinary conditions arising from economic stability would not be considered as a

[59] e.g. Supreme Administrative Court, 9th Section, E.1997/469, K.1998/1348, 25.3.1998 (in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.402); Supreme Administrative Court, 9th Section, E.1997/1732, K.1998/1367, 25.3.1998 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.403); Supreme Administrative Court, 3rd Section, E.1999/4600, K.2000/3832, 22.11.200 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.416);

[60] 5766 Sayili Kanun (Official Gazette of 6.6.2008, No.26898(Rep.)).

[61] Amme Alacaklarinin Tahsil Usulu Hakkinda Kanun, No.6183, Official Journal of 28.7.1953, No.8469.

[62] e.g. Supreme Administrative Court, 4th Section, E.2001/2547, K.2001/3219,27.6.2001 (in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.425); Supreme Administrative Court, General Council, E.2001/218, K.2001/379, 26.10.2001; Supreme Administrative Court, General Council, E.2001/79, K.2001/208, 18.5.2001; Supreme Administrative Court, General Council, E.2000/261, K.2001/31, 26.01.2001 (http://www.danistay.gov.tr) .

[63] 5766 Sayili Kanun (Official Gazette of 6.6.2008, No.26898(Rep.)).

[64] Official Gazette of 11.4.2003, No.25076.

reasonable justification for such a differentiation[65]. Law No.4962[66], which was introduced upon cancellation but prior to the publication of the TCC's decision on Law 4837 in the Official Gazette, regulating again a one-off additional motor vehicle tax with minor changes, was also annulled by the TCC on the same grounds[67]. The Ministry of Finance, however, decided to change the system related to, and increase the amount of, motor vehicle tax[68] in 2004, the final effect of which was the collection of the same amount aimed to be collected by the additional taxes.

3. The Relationship between different legal sources (legal pluralism)

3.1. The position of the State organs before international treaties

Article 90 of the TC regulates the ratification of international treaties and their legal nature and effect. Accordingly, "the ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification" (Art. 90(1)). Under Art.104 of the Constitution, the President is empowered to ratify and promulgate international treaties. According to the Law No. 244 on the international agreements[69], treaties approved by the Parliament are ratified by the Council of Ministers and the President. International conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (EcHr)[70], agreements such as the Association Agreement between Turkey and the European Communities[71], and seventy tax treaties concluded by Turkey with several countries around the world are subject to the legal framework set by Art.90.

Turkey's tax treaties generally follow the provisions of the OECD Model Convention. Deviations concern especially withholding taxes and capital gains. The basic motive to conclude a tax treaty with a foreign country may be different at specific instances; however, the general aim is to create a new investment environment or to promote the conditions of an existing investment relationship with a State by eliminating double taxation that may occur for taxpayers as a result of

[65] Constitutional Court, E. 2003/48, K. 2003/7623, 23.7.2003 (Official Gazette of 11.9.2004, No. 25580).

[66] Official Gazette of 7.8.2003, No.25192.

[67] Constitutional Court, E. 2003/73, K. 2003/86, 7.10.2003 (Official Gazette of 20.12.2005, No. 26029).

[68] 5035 Sayili Kanun (Official Gazette of 2.1.2004, No. 25334 (Rep.)).

[69] 244 Sayili Kanun (Official Gazette of 11.6.1963, No.11425).

[70] 6366 Sayili Kanun (Official Gazette of 19.3.1954, No.8662).

[71] 397 Sayili Kanun (Official Gazette of 12.2.1964, No.11631); Bakanlar Kurulu Karari, No.6/3820 (Official Gazette of 17.11.1964, No.11858).

paying taxes in both the State of residence and the State of source. The explanatory memorandums of tax treaties generally refer to tax conditions to be foreseeable for tax taxpayers of both contracting States[72]. The Parliament always gives its consent to such treaties prepared by the Ministry of Foreign Relations and submitted by the Council of Ministers.

For the application of tax treaties, the Ministry of Finance has twice released explanatory general rulings[73] and an explanatory booklet[74]. Furthermore, advanced rulings issued by the Ministry on double tax treaties are also published on the official website of the Ministry. Although limited in number, they are considered to be as sources of useful information on the application of tax treaties. A certificate of residence is required for the application of a tax treaty.

On the jurisprudence on tax treaties, it must be stated that the case law on tax treaties is very limited. In such rare cases, the Supreme Administrative Court has interpreted whether a treaty provision attributes the taxing right to Turkey[75], or whether a reduced treaty rate has to be applied instead of the domestic rate[76] and applied such treaty provisions when the conditions are met in specific cases. On the other hand, with respect to customs union provisions, the Association

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[72] See for example, "*Turkiye Cumhuriyeti Hukumeti ile Tayland Krallıgı Hukumeti Arasinda Gelir Uzerinden Alinan Vergilerde Cifte Vergilendirmeyi Onleme ve Vergi Kacakciligina Engel Olma Anlasması ile Eki Protokolun Onaylanmasinin Uygun Bulunduguna Dair Kanun Tasarisi ve Disisleri Komisyonu Raporu"*, No. 1/696, Donem: 22, Yasama Yili : 2, S. Sayisi : 420 (http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss420m.htm) .

[73] Cifte Vergilendirmeyi Onleme Anlasmalari Genel Tebligi, Seri No.1 (Official Gazette of 15.5.1996, No. 22637); Cifte Vergilendirmeyi Onleme Anlasmalari Genel Tebligi, Seri No.2 (Official Gazette of 14.3.1998, No. 23286)

[74] Cifte Vergilendirmeyi Onleme Anlasmalari Cercevesinde Vergilendirme Esaslari; http://www.gib.gov.tr/index.php?id=1055

[75] "Article 3 of the protocol of the tax treaty between Turkey and China empowers Turkey to apply branch tax on profits of a permanent establishment. ...", Supreme Administrative Court, 3rd Section, E. 2005/ 3264, K. 2006/2899, 14.11.2006 (http://www.danistay.gov.tr). "The article 22(1)(b) of the treaty between Turkey and Cyprus prevents Turkey to apply corporate income tax on dividends received from Cyprus. …", Supreme Administrative Court, 4th Section, E.2000/3101, K.2001/4120, 6.11.2001 (http://www.danistay.gov.tr).

[76] "The treaty between Turkey and Belgium prevents Turkey to apply income withholding tax on income from leasing of aircrafts, since the income must be qualified as business income. ...", Supreme Administrative Court, 4th Section, E.2000/4141, K. 2001/4613, 28.11.2001 (http://www.danistay.gov.tr). "The 10% income withholding tax applied on royalties according to article 10 of the treaty between Turkey and United Kingdom includes also the funds calculated on income taxes, since such funds must be qualified as "Turkish taxes" with regard to article 2 of the treaty. …", Supreme Administrative Court, 4th Section, E.2001/2866, K.2002 / 2208, 23/05/2002 ; Supreme Administrative Court, 4th Section, E.2000/1965, K.2001/2088, 16.5.2001 (Database: http://www.hukukturk.com)

Agreement between Turkey and the European Communities has also been applied in a very limited number of cases held before the Supreme Administrative Court[77].

3.2. The Hierarchy of Different Legal Sources Under the Constitution

3.2.1. International Human Rights Conventions

In the Turkish legal system, Article 90(5) of the TC provides that the treaties enacted with other countries are regarded as laws, but their unconstitutionality cannot be asserted before the Constitutional Court. The most recent amendment to the Constitution[78] introduced a provision, according to which in situations where domestic legislation conflicts with international treaties regarding human rights, international treaties prevail[79]. Thus, the human rights conventions hierarchically supersede domestic laws; however, such treaties are not treated on the same level with, or above, the Constitution[80].

Under the procedural rules of the Parliament[81], the parliamentary committees are under the obligation in the first instance to review whether draft bills and proposals are in conformity with the TC. In cases where a committee considers that a draft bill or a proposal conflicts with the Constitution, it is obliged to produce a reasoning memorandum and reject the draft bill or the proposal as a whole without negotiating its provisions (Art.38). In the view of the author of this report, however, under the combined effect of Art.90 and several articles conferring the State organs a duty in special cases not to violate the obligations arising from international law (Arts. 15 and 16 and 42 etc.), the Parliament is obliged during its legislative process to take into account the international human rights treaties, which upon ratification integrated with the national legal order and have binding effect[82].

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[77] Supreme Administrative Court, 7th Section, E. 2001/4650, K. 2005/1507, 30.6.2005; Supreme Administrative Court, 7th Section, E.1997/3991,K. 1998/680, 25.2.1998 (http://www.danistay.gov.tr).

[78] Official Gazette of 22.5.2004, No.25469.

[79] Article 90(5) of the TC: "International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".

[80] Yalti, Billur, **Vergi Yukumlusunun Haklari**, Beta, Istanbul, 2006, p.28 et seq.

[81] See footnote 45.

[82] Yalti, Billur, **Uluslararasi Vergi Anlasmalari**, Beta, Istanbul, 1995, pp.79-80.

Nevertheless, in cases where a domestic tax law released by the Parliament conflicts with the EcHr, whether the duty to determine the inconsistency between the "law" and the "Convention" vests on the TCC is a controversial question, because according to Art.148 of the TC, the TCC has the power to examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the procedural rules of the Parliament. Thus, the TCC would not deal with such a conflict between the domestic law and another "law" in nature, namely the EcHr, since under the legislation regulating the Court's function; it is not its duty to examine the consistency of laws[83] and to abolish a domestic law in terms of an international human rights convention[84]. Consequently, the relative amendment on Art.90 (5) would not cause any difference as it has always been with the constitutional jurisprudence, i.e. the TCC would only examine the consistency of a law with the constitution itself; however in interpreting the provisions of the TC it might refer to the EcHr, and the case law of the EcrtHr thereof, as an ancillary and supportive source[85] as occurred only once in tax cases. In the relevant case[86] on the travel ban applied to taxpayers who owed the Treasury un-paid tax debts over a certain amount, the TCC interpreted the constitutional freedom of movement and establishment (Art.23, TC) referring explicitly to the Reiner judgment of the EcrtHr[87] and cancelled the law as found to be disproportional[88].

In the light of the literal meaning of Art.90(5), it might be asserted that, in tax cases, the determination of the inconsistency of a tax law and the EcHr vests primarily on the lower tax courts,

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[83] The TCC has previously expressed this view in so many instances, although they were not tax cases. See for example, Constitutional Court, E.1966/9, K. 1968/25, 19.6.1968 (Official Gazette of 29.1.1970, No. 13412); Constitutional Court, E. 1969/37, K.1971/8, 21.1.1971 (Official Gazette of 31.8.1971, No.13942)

[84] Yalti, **Vergi Yukumlusunun Haklari**, pp.28-29.

[85] Yalti, **Vergi Yukumlusunun Haklari,** pp.28-29.

[86] Constitutional Court, E.2007/4, K.2007/81, 18.10.2007(Official Gazette of 8.12.2007, No. 26724). It must be stated that prior the TCC's decision, the relevant national provision was criticized in the tax literature under the standards set in the Reiner case. See, Yalti, Billur, "*Vergi Borcu Nedeniyle Yurtdisina Çikis Yasagi: ABD Yuksek Mahkemesinin Lipper Kararindan IHAM'in Riener Kararina: Hukuk Standartlari*", **Barolar Birliği Dergisi**, No. 66, September/October 2006.

[87] European Court of Human Rights, Riener v. Bulgaria, No. 46343/99, 23.5.006 (Hudoc Database: http://cmiskp.echr.coe.int)

[88] The case on the taxpayer's right to remain silent appears to be an opposite one where the TCC found the imprisonment penalty applied on taxpayers who did not submit their documents and books to the tax auditors (Art.359, TPL) constitutional without referring to the jurisprudence of the EcrtHr (eg. JB v. Switzerland, No. 31827/96, 3.8.2001 final) although the lower referring court asserted that there has been a conflict between the TPL and the EcHr (Constitutional Court, E.2004/31, K.2007/11, 31.1.2007(Official Gazette of 18.5.2007, No. 26526). For a previous criticism of Art.359 of the TPL under the standards produced by the EcrtHr, See Yalti, Billur, "*Vergi Hukukunda Susma Hakki: VUK, 359(a)(2)'nin Anayasaya Aykiriligi Sorunu*", **Vergi Dunyasi**, No. 285, May 2005.

or regional administrative Court, or the Supreme Administrative Court, wherever the hearing is held before. Since the EcHr have superiority over a conflicting national tax law, this would produce the result for a lower tax court or the higher courts, to neglect a national tax rule and apply the relevant provision of the EcHr; meaning that the administrative judiciary would cancel an administrative tax decision relating to an individual taxpayer on grounds that the tax decision conflicts with the EcHr. However this outcome may also give rise to various controversial and problematic discussions, including whether such a judicial decision intrinsically refer to a determination of a constitutional conflict between the national tax law and the TC; whether the administrative judiciary would find itself competent to determine such a constitutional problem, or on the contrary would regard its duty and function as only to measure the consistency between decisions of the tax administration and national laws[89]. In the view of the author of this report, the supervision of the legal consistency of an administrative tax decision by the judiciary also includes an evaluation of consistency to the EcHr, and Art.90 (5) of the TC requires the administrative judges to "pierce the legal-veil"[90], otherwise the rule designed in Art.90(5) would be meaningless. However, keeping in mind that the Supreme Administrative Court has so far directly applied the international human rights conventions only in a few non-tax cases[91], the judiciary may not explicitly neglect a national tax law and only interpret it in conformity with the Constitution and the EcHr considering it a supportive instrument, as it has been occurred in the tax jurisprudence of the Supreme Administrative Court referring to the right to a fair trial regulated both under Art.36 of the TC and Art.6 of the EcHr[92]. In cases where the conflict between the law and the EcHr is clear and obvious, the lower courts may only refer the case to the TCC, as it has been so in the case concerning taxpayer's right to remain silent[93].

Finally, the wording of the Article 90(5) of the TC contains the term "disputes", which refers only to the judicial process; thus it does not confer any duty to the tax administration to measure the consistency of a national tax law and the EcHr[94].

3.2.2. International Treaties

[89] Yalti, **Vergi Yukumlusunun Haklari**, p.35 et.seq.

[90] Azrak,Ulku, "*Idari Yargida Anayasaya Uygunluk Sorunu*", **Anayasa Yargisi**, No.9, Ankara, 1992, pp.323-324.

[91] See, Erkut, Celal, **Kamu Kudreti Ayricaliklari ve Tutuk Adalet Anlayisi**, Yenilik Basımevi, Istanbul, 2004, p.181 et.seq.

[92] e.g. Supreme Administrative Court, 7th Section, E.2003/1463, K.2004/3651, 30.12.2004 (in Lebib Yalkin Yayinlari, KDV Mevzuati, vol.B, No.152).

[93] See footnote 87.

[94] Yalti, **Vergi Yukumlusunun Haklari**, p.24.

Under the current constitutional system, superiority is attributed only to human rights treaties; thus ordinary treaties are treated on the same footing with national laws. Prior the constitutional amendment on the superiority of human rights treaties, the TCC has held that international treaties can be overridden by a subsequent domestic law. According to the Court, any conflict between domestic law and an international treaty could be solved under the principles established as *"lex posterior derogate legi priori"* and *"lex specialis derogat legi generali"*[95]. Within this legal background and the terminological meaning of the constitutional amendments, the judiciary may be expected to come to a conclusion that the ordinary treaties –such as tax treaties- do not supersede the domestic law. However, in the opinion of the author of this report, overriding a treaty which has created international obligations as such is not acceptable in the light of the *pacta sund servanda* principle[96] arising from Art.26 of the Vienna Convention on the Law of Treaties (1969)[97]. Although the Parliament's practice on tax treaties do not contain any controversial or conflicting national legislation effecting tax treaties, in theory, it might be asserted that in cases of conflict between domestic tax rules and a tax treaty, the treaty has to be construed as *lex specialis*. Further, there is room for another interpretation, i.e. a tax treaty may be construed as a source not only limiting the taxing power of the States but also conferring rights on taxpayers; thus affecting their property rights; and independent from its title may be characterized in nature as a treaty relating to human rights having superiority over domestic law. In the jurisprudence of the Supreme Administrative Court no conflict cases between a national law and a tax treaty as such have been held so far.

3.3.Legal Remedies for Effective Protection

[95] Constitutional Court, E.1996/55, K.1997/33, 27.2.1997 (Official Gazette of 24.3.2001, No. 24352)

[96] Yalti, **Uluslararasi Vergi Anlasmalari**, pp.84-85.

[97] United Nations, Treaty Series, vol. 1155, p. 331. Turkey has not participated in the Vienna Convention, however, the principles regulated under it may be considered as customary international law and so have legal effect.

In Turkish constitutional review system, either the parliamentarians[98] or the lower courts may apply to the TCC for the annulment of a law. Thus, taxpayers do not have the right to apply individually and directly to the Court. Article 152 of the TC, however, regulates the contention of unconstitutionality of a law before other courts; i.e. taxpayers may claim the unconstitutionality of a tax law which is applicable in the relevant case. Accordingly, "[i]f a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be decided upon by the competent authority of appeal". In Turkish literature, it has always been criticized that the constitutional complaint procedure has not been recognized to individuals, and such an individual access, comprising both opportunity of challenging a legal provision and a remedy against the violation of constitutional rights by administrative acts must be granted for better protection of individual rights[99].

On the other hand, since Turkey has recognized by Decree No. 87/11439 the right of individual petition to the EcrtHr[100], individuals claiming to be the victim of a violation by Turkey of her/his rights set forth in the EcHr or a protocol thereto, may also apply to the EcrtHr after all domestic remedies have been exhausted. In theory, Turkish taxpayers have the opportunity to apply to EcrtHr in cases where she/he thinks that a tax law or an administrative decision thereof has infringed her/his rights arising from the Convention. However, at least within the knowledge of the author of this report, the two tax cases that have so far been brought before the EcHr by Turkish taxpayers were found by the Court to be inadmissible[101].

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[98] Article 150 of the TC states: The President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly shall have the right to apply for annulment action to the Constitutional Court, based on the assertion of the unconstitutionality of laws in form and in substance, of decrees having the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles or provisions thereof.

[99] In tax law area see for example, Saban, Nihal, "*Turk Vergi Sisteminin Uluslararasi Boyutlari-Yorum*" - Turkiye III. Vergi Kongresi, 23-24 Mayis 1996, **Istanbul Yuksek Ticaret ve Marmara Universitesi Iktisadi Idari Bilimler Fakultesi Mezunlar Dernegi Yayini**, p.98; Yalti, Billur, "*Vergi Adaleti Kavraminda Soyuttan Somuta: AYM Kararlarini Esitlik, Ozgurluk ve Sosyal Devlet Kavramlari ile Okumak*", **Vergi Sorunları Dergisi**, No. 119, August 1998).

[100] Official Gazette of 21.4.1987, No.19438.

[101] Zekeriya Kurtça v. Turkey, Application No. 24834/94, 15 May 1996 ; Özgür Akgöçmen v. Turkey, Application no. 43840/02, 4th Section, 3 June 2008 (http://cmiskp.echr.coe.int) .

In Turkish legal order[102], the judicial remedies granted to a taxpayer are organized within administrative judiciary; i.e. there are no independent and separate tax courts. However, there are specialized subordinating tax courts within the administrative judicial organization (see above). In theory, the judicial remedies accessible for a taxpayer cover not only to the protection of rights granted by domestic law, but also those rights arising from treaties. As for the tax treaties, a taxpayer may practically discuss and demand his/her rights granted in a tax treaty to be applied in a tax case; however, in cases of rights arising from EcHr, such effectiveness is controversial due to the uncertainty of the hierarchic position of the convention and the legal order regarding the duties of lower courts, as stated above in the previous section of this report.

Finally, under article 116 of the TPL, substantial errors may be corrected by the tax office. In cases where a claim is lodged within 30 days and the tax office rejects the correction demand, the case may be brought before the tax court or before the Ministry of Finance. If the Ministry also rejects the claim, the matter may be brought before the tax court as a judicial conflict. Since this administrative remedy is limited to "errors" and not applied in cases of interpretive disputes arising from a specific tax law which may only be brought before a tax court, it is hard to qualify it as an effective remedy for the application of a tax treaty or a convention from which usually legal interpretive conflicts may arise.

[102] Danistay Kanunu, No.2575 (Official Gazette of 20.01.1982,No.17580); Bolge Idare Mahkemeleri, Idare Mahkemeleri ve Vergi Mahkemelerinin Kurulusu ve Gorevleri Hakkinda Kanun, No.2576 (Official Gazette of 20.1.1982, No.17580); Idari Yargilama Usulu Kanunu, No.2577 (Official Gazette of 20.1.1982, No. 17580).

QUESTIONAIRRE

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way? Yes – **no X**

1.2. Do tax authorities influence tax legislation to a major degree? **Yes X** - no

1.3. Does your Parliament a) usually accept the bills provided by tax authorities? **Yes X** - no
b) refuse the bills provided by tax authorities? never – **Sometimes X** - often
c) improve the bills provided by tax authorities? never - **Sometimes X**- often

1.4. Is your Parliament able to discuss the bills thoroughly? **yes X** - no

1.5. Is there sufficient knowledge of tax law in Parliament? yes – **no X**

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never - sometimes – **often X (when authorized by the Parliament to do so)**

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? **never X**- sometimes - often

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation? **Only Constitutional Court**

2.2. If "yes", do they control tax legislation: 0 ex ante or **0 X ex post**?

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards**? Yes X (Constitutional Court)** - no

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? yes – **no X (allowed to ignore a law, however, on grounds that it conflicts with the ECHR)**

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax - Administration? **Yes (specialized under administrative judiciary)**

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? yes – **No X**

If "no", do the courts follow them in fact? never – **sometimes X** – often - very often

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? **Never X** - sometimes - often - very often

Please report statistics if available!

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? Never - **sometimes X (when it turns out to be a jurisprudence)**- often - very often

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? Never - **sometimes X** - often - very often

b) Does it try in another similar case to convince the Court to decide in a different way?

never - sometimes - often - **very often X**

c) Does it try to influence the Parliament to change the law? never - sometimes - **oftenX** - very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?

never X (not authorized to do so) - sometimes - often - very often

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? Never - sometimes - often - very often **(Hard to reply. No information available)**

If possible, please add statistics to the answers!