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EVALUATION OF EC'S AUTHORITY TO TAX IN VIEW OF THE PRINCIPLE OF LEGALITY OF TAXATION

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AYM	Anayasa Mahkemesi
AMKD	Anayasa Mahkemesi Kararları Dergisi
Art.	Article
Avr. Bir. Mah.	Avrupa Birliği Mahkemesi
Çev.	Çeviren
DB	Der Betrieb
CMLR	Common Market Law Reports
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
Euratom	European Atomic Energy Community
FG	Finanzgericht
İStR	Internationales Steuerrecht
Maas. Tr.	Maastricht Treaty
N.	Numara
OJ	Official Journal of the European Communities
p.	page
Rome Tr.	Rome Treaty
s.	sayfa
S.	Sayı
TBBD	Türkiye Barolar Birliği Dergisi
TC	Türkiye Cumhuriyeti

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INTRODUCTION

With the establishment of the European Community as a supranational organization, it becomes necessary for Member States to relinquish some of their sovereignty rights.

Turkey is not yet a member of the European Union. But upon becoming a member she will have to make certain concessions in her constitution with regard to the basic principles of the taxation law – the legality of taxation. Thus being a member Turkey will have to face the conflict between certain parts of her constitution and the European Unions general laws.

On my thesis I tried to point the issues that may cause a conflict and then explain how to resolve them.

On the first part of my thesis I discussed the institutional structure of the European Unions and its legislative instruments. Although these are not directly related to my subject of study, I started with them because without knowing them it would not be possible to understand the issues discussed in the following parts.

The second part of my thesis is about "the right to tax". This part is in two sections. In the first section I discussed the historical background of some of the Member States' "right to tax". In second section I tried to explain the European Union's "right to tax" concept to-day; and also mentioned some of the tax provisions in the treaties. However, by mentioning these provisions my intention was not to explain every single tax in

detail, but to bring out clearly the European Unions authority to tax.

Part three is about the meaning of the principle of the legality of taxation, its dimensions and sub-dimensions its exceptions and its place in the Turkish constitution.

Finally in part four I pointed out the provisions of the Turkish constitution which will cause a conflict about the "right to tax" with the European Union's "authority to tax" and the supremacy of the EU-law. For this part I studied how certain Member States made changes in their constitutions to comply with the European Union's general rules.

§ 1 THE GENERAL CONSTRACTION OF THE EUROPEAN UNION

I. IN GENERAL

The European union is a unique, treaty-based, organization work that defines and administers economic and political cooperation among its fifteen European member countries. The Union is the latest stage in a process of integration which began in the 1950s by six countries -France, Germany, Italy, The Netherlands, Belgium and Luxembourg- whose leaders signed treaties establishing various forms of European integration. These treaties gave life and substance to the novel concept that, by creating communities of shared sovereignty in matters of coal and steel production, trade and nuclear energy, another war in Europe would be unthinkable, While since then the EU has evolved common policies in a number of other sectors since then, the fundamental goal of the union remains the same; to crate an ever closer union among the peoples of Europe.[1]

Due largely to the success of European economic integration, there are now 15 EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom) and number of membership will probabely increase to more than twenty soon after 2000.

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[1] BOZKURT 1.

The European Union used to be called the European Community until 1993 when the Maastricht Treaty took effect and made a number of important revisions to the founding treaties[2] "Maastricht" made it constitutionally possible to achieve Economic and Monetary Union (EMU) and to develop the Union's inherent political dimension through the new Common Foreign and Security Policy (CFSP)[3].

There are five principal institutions mentioned in Article 4 of the EC Treaty, as amended by the Treaty of European Union (TEU): They are the Council, the Commission, the European parliament, the court of Auditors, and the Court of Justice.[4] They are responsible for carrying out the task of EU.

II. INSTITUTION OF THE EUROPEAN UNION

1. The European Parliament

The Parliament sees itself as the guardian of the European interest and the defender of the citizens' rights. Individually, or as a group, European citizens have the right to petition the Parliament and can seek redress of their grievances on matters that fall within the European Union's sphere of responsibility. The Parliament has also appointed an ombudsman to investigate allegations of maladministration brought by citizens.

The European Parliament attaches a high priority to maintaining links with national parliaments through regular

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2 EGE 51.

3 LASOK 3.

meetings between speakers and chairmen and between parliamentary committees. These contacts are further enlivened by discussions of the Unions policies in major conclaves known as "parliamentary assizes". The Parliament holds its sessions in Strasbourg. It has 18 Committees which prepare the work for plenary meeting and its political groups meet for the most part in Brussels. The Parliament's general secretariat is based in Luxembourg.[5]

The most important powers of the European Parliament fall under three categories;

a. Legislative Power

Originally, the Treaty of Rome (1957) gave the Parliament only a consultative role, allowing the Commission to propose and the Council of Ministers to decide legislation.

The consultation procedure requires an opinion from the Parliament before a legislative proposal from the Commission can be adopted by the Council. This applies, for example, to the agricultural price reviews.

The cooperation procedure allows Parliament to improve proposed legislation by amendment. It involves two readings in parliament, giving members ample opportunity to review and to

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4 CRAIG 57.

5 See: The Institutions of the European Community, Office for Official Publication of the European Communities, L-2985 Luxembourg, p. 7.

amend the commission's proposal and the Council's preliminary position on it.[6]

b. Power over the Budget

The European Parliament approves the union's budget each year. The budgetary procedure allows Parliament to propose modifications and amendments to the Commission's initial proposals and to the position taken by the Member States in Council. On agricultural spending and costs arising from international agreements the Council has the last word, but on other expenditure -for example, education, social programmes, regional funds, environmental and cultural projects- Parliament decides in close cooperation with the Council [7]

c. Supervision of the Executive

The Parliament exercises overall political supervision of the way the Union's policies are conducted. Executive power in the union is shared between the Commission and the Council of Ministers and their representatives appear regularly before Parliament.[8]

d. Organization

All of the EU's major political currents are represented in the Parliament, ranging from far left to far right, and numbering

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6 See: The Institutions of the European Community, Office for Official Publication of the European Communities, L-2985 Luxembourg, p. 8.

7 LASOK/ LASOK 21.

8 See: The Institutions of the European Community, Office for Official Publication of the European Communities, L-2985 Luxembourg, p. 8.

close to 100 political parties. These are organized in a limited number of political groups (presently eight).

Members of the European Parliament enjoy certain privileges and immunities.[9] These include freedom of movement when travelling to and from meetings of the parliament and freedom from legal process in respect of the opinions expressed or votes cast in the performance of their duties. During session of the European Parliament they are also entitled and immunities accorded to the members of parliament of that state and in other Member States immunity from detention and from legal proceeding[10].

2. The Council of the European Union

a. In General

The council of the European Union, usually known as the Council of Ministers, has no equivalent anywhere in the world. Here, the Member States through their representatives legislate for the Union, set it's political objectives, coordinate their national policies and resolve differences between themselves and with other institutions.

It is a body with the characteristics of both a supranational and inter-governmental organization, deciding some matters by qualified majority voting and others by unanimity. In its procedures, its customs and practices and even in its disputes,

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9 For the text of these proposals see: Bulletin of the European Communities (1975), Part 1, p. 95

10 LASOK/ LASOK 215.

the Council depends on a degree of solidarity and trust which is rare in relations between states.

Its democratic credentials should not be in doubt. Each meeting of the Council brings together Member States representatives, usually ministers, who are responsible to their national parliaments & public opinions. Nowadays, there are regular meetings of more than 25 different types of Council meeting; General Affairs (Foreign Affairs Ministers) Economy and Finance and Agriculture meet monthly others such as Transport, Environment and industry meet two to four times a year[11].

In 1994, the Council held around 100 formal ministerial sessions during which it adopted about 300 regulations 50 directives and 160 decisions.

b. The Presidency

The Presidency of the Council rotates between the Member States every six months; January until June, July until December.

The President's role has become increasingly important as the responsibilities of the Union have broadened and deepened. It must, arrange and preside over all meetings, elaborate acceptable compromises and find pragmatic solutions to problems submitted to the Council.

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[11] TEKİNALP/ TEKİNALP 158.

c. Organization

Each member state has a national delegation in Brussels known as the Permanent Representation. These delegations are headed by Permanent Representatives, who are generally senior diplomats and whose Committee, called *Coreper*, prepares ministerial sessions. Coreper meets weekly and its main task is to ensure that only the most difficult and sensitive issues are dealt with on a ministerial level.[12]

3. The European Commission

a. In General

The role and responsibilities of the European Commission place it firmly at the heart of the European union's policy-making process. In some respects, it acts as the heart of Europe, from which the other institutions derive much of their energy and purpose.

The Council and the European Parliament need a proposal from the Commission before they can pass legislation[13]. EU laws are mainly upheld by Commission's action. The integrity of the single market is preserved by Commission's policing, agricultural and regional development policies are sustained, managed and developed by the Commission. Research and technological development Programmes, vital for the future of Europe are orchestrated by the Commission.

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[12] LASOK/ LASOK 199.

[13] DOĞAN, Türk Anayasa Düzeni 93.

The Commission in close collaboration with the European Council frequently provides the impulse towards further integration at the crucial moments when it is needed. It has launched the strategy which culminated in the completion of the single market in 1993.

It is the 20 members of the Commission who provide its political leadership and direction. They bring a powerful mix of experience to their tasks having been members of their national parliaments or of the European Parliament and in many cases, after having held senior ministerial offices in their home countries.

The President is chosen by the heads of state or of Government meeting in the European Council after getting Parliaments vote of confidence. The other members of the Commission are nominated by the 15 Member government in consultation with the incoming President.

The Commission meets once a week to conduct its business, which may involve adopting proposals, finalizing policy papers and discussing the evolution of its priority policies. Commissioners are expected to give full support to all policies, even when they are adopted by a majority[14]

b. Commission's organization

With its staff of 15 000 the Commission is the largest of the Unions' institutions. The Commission is divided into 26

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[14] LASOK/ LASOK 207.

directorates general. Each DG is headed by a director - general reporting to a Commissioner who has the political and operational responsibility for the work of the DG.[15]

c. The work of the commission

The Commission is not an all-powerful institution. Its proposals, actions and decisions are in various ways scrutinized, checked and judged by the other institutions, with the exception of the European Investment Bank. Nor Does it take the main decisions on union policies and priorities. This is the prerogative of the council and in some cases of the European Parliament[16].

4. The European Court of Justice

The Union is governed by the rule of law. Its very existence is conditional on recognition by the Member States, by the institutions and by individuals of the binding nature of its rules.

The role of the Court is to provide the judicial safeguards necessary to ensure that the law is observed in the interpretation of the Treaties and generally in all of the activities of the EU.

The success of EU law in embedding itself so thoroughly in the legal life of the Member States is due to the fact that it has been perceived, interpreted and applied by the citizens, the administrative authorities and that it is a uniform body of rules upon which individuals may rely in their national courts[17]. The

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15 LASOK/ LASOK 208.

16 DOĞAN, Avrupa hukuku Haftası 9.

17 TEKİNALP/ TEKİNALP 190.

decisions of the Court have made EU law a reality for the citizens of Europe and often have important constitutional and economic consequences.[18]

The Court of Justice is composed of judges and advocates general appointed by common accord of the Member States for a renewable term of six years.[19] Their independence must be beyond doubt and they must be qualified for the highest judicial offices in their respective countries or be jurists of recognized competence. The judges elect the President of the court from among their number for a term of three years. The President directs the work of the Court and presides at hearings and deliberations. The Court is assisted by the advocates general whose task is to deliver independent and impartial opinions on cases brought before it.[20]

5. The European Court of Auditors

Since the coming into force by the second Budgetary Treaty on June 1 1977, the European Communities have been equipped with a court of Auditors[21]

The European Court of Auditors is the tax-payers' representative, responsible for checking that the European Union spends its money according to its budgetary rules and regulations and for the purposes for which it is intended.

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18 DOĞAN, Avrupa Hukuku Haftası 23.

19 LASOK/ LASOK 207.

20 See: The ABC of Community Law, European Documentation Series, 2/1984, 9-14

21 LAWAND 178.

Some see the court as the "financial conscience" of the Union, others as "watch dog" over its money. In either case, it is a guarantor that certain moral, administrative and accounting principles will be respected. The Court's reports are a rich source of information on the management of the Unions finances, and a source of pressure on the institutions and others with administrative responsibility to manage them soundly.

The Court's function, performed with complete independence is a vital contribution to transparency in the Union. Objective scrutiny reassures the tax-payers that the Union's money is being managed responsibly.

Primary responsibility for preventing, detecting and investigating irregularities lies with those responsible for managing and executing EU programmes. When the Court identifies errors, irregularities and potential cases of fraud, it makes them known to the revealed administrations and other bodies for action to be taken. It also points out any weaknesses in system and procedures which may have enabled the particular problems to occur.

6. Other Institutional Matters

a. The Economic and Social Committee of the Communities

The Economic and Social Committee was set up by the 1957 Rome Treaties in order to involve economic and social interest groups in the establishment of institutional machinery

briefing the European Commission and the Council of Minister on European union issues.

The Single European Act (1986) the Maastricht Treaty (1992) and the draft Amsterdam Treaty (1997) have reinforced the Economic and Social Committee's role.

The 222 members of the ESC are drawn from economic and social interest groups in Europe. Members are nominated by national governments and appointed by the Council of the European Union for a renewable 4 year term of office. They Belong to one of three groups; Employers (Group I) Workers (Group II) Various Interests (Groups III) Germany France, Italy and the United Kingdom have 24 members each, Spain has 21, Belgium, Greece, The Netherlands, Portugal, Austria and Sweden 12, Denmark, Ireland and Finland 9 an Luxemburg.

b. The European Investment Bank

The European Investment Bank, the European Unions financing institution, provides the Union's balanced economic development and integration. The European Investment Bank is a flexible and cost-effective source of finance whose ECU 20 billion volume of annual lending makes in the largest of the international financing institutions in the World.

In the European Union, European Investment Bank loans go to projects or such as strengthening improving trans-European

networks in transport, telecommunications and energy transfer and achieving secure energy supplies.[22]

c. The Committee of the Regions

Created as a consultative body by the Treaty on European Union, the Committee has emerged as a strong guardian of the principle of subsidiarity since its first session in March 1994.

Subsidiarity is enshrined in the Treaty and means that decisions should be taken by those public authorities which stand as close to the citizen as possible. It is a principle which resists unnecessarily remote, centralized decision-making. As regional presidents, mayors of cities or chairman of city and country councils, the 222 members of the Committee are elected officials from the levels of government closest to the citizen.

This means that they have a very direct experience of how the Union's policies and legislation affect the everyday life of their citizens. Therefore the Committee is able to bring powerful expertise and influence to bear on the Union's other institutions.

It has many opportunities to do so. The Treaty requires that it be consulted on matters relating to trans-European networks, public health, education, youth, culture and economic and social cohesion. But the Committee can also take the initiative and give its opinion on other policy matters that affect cities and regions such as agriculture and environmental protection.

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[22] LAWAND 179.

III. CHANGES IN THE EUROPEAN UNION INSTITUTIONS WITH AMSTERDAM TREATY

1. The European Parliament

The European Parliament made two major gains at the 1996 Conference to become a genuine co - legislator and a full arm of the European legislature alongside the Council;

Firstly, the co - decision procedure has been considerably extended, essentially along the lines of the principle suggested by the Commission in its report of July 1996, where by any instrument of a legislative nature should be adopted under the co- decision procedure between the European Parliament and the Council.

This means the disappearance of the co-operation procedure thus of simplifying legislative procedure.

Secondly, the co - decision procedure has itself been simplified with the deletion of the third reading. With the removal of this "unequal" reading. Parliament is on an equal footing with the Council. This means that where conciliation is unsuccessful the proposed text will be dropped.[23]

There are four other important points;

a. The number of Member of European Parliament's is to be Limited to a maximum of 700, even after enlargement;

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[23] See: European Commission, Intergovernmental Conference Task Fors, TEXTE E, Brussels, 1997.

b. The European Parliament is to draw up a proposal for elections by direct universal suffrage in accordance with "principles common to all Member States"

c. It is to lay down regulations and general conditions governing the performance of the duties of its members.

d. It is to approve the appointment of the President of the Commission.

2. The Council

Although there was some criticism at the Conference of the way the Council operates and it was stressed that enlargement would have a considerable impact on the Council's decision making procedures, few changes were made.

a. Limited extension of the use of qualified majority voting. Qualified majority voting will apply to most of the new Treaty provisions. However, the only major existing provisions to move to the qualified majority voting are those concerning the research framework programme. Implementing decisions under the common foreign and security policy may also be taken by qualified majority.

b. Several Member States prioritised the re-weighting of votes in the Council and this became rightly or wrongly, a political issue for the Conference.

It was linked to the question of the number of Commission members and a Protocol was drawn up deafening consideration of the whole matter until after the next enlargement, which is now

a pre-condition for any amendment of composition of the Commission. It was stated that any new weighting would take account of the situation of Member States who give up their second Commission Member.[24]

3. The Commission

a. Composition and operation

The role of the President has been up-graded in several respects;

aa. The members of the commission are to be appointed by the governments of the Member States "by Common accord" with the nominee for president.

bb. The Commission is to work "under the political guidance of its President".

cc. A conference declaration states that the President should have the power to allocate and reshuffle Commission portfolios and notes the Commission's intention to reorganise its departments.

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[24] See: European Commission, Intergovernmental Conference Task Fors, TEXTE E, Brussels, 1997.

b. Commission's right of initiative

This was strengthened in three ways;

aa. Through the creation of new policies,

bb. Through a large-scale transfer of Power to the EU over matters relating to the free movement of persons; there is to be a joint right of initiative with the Member States for the first five years, after which the Commission will have its classic monopoly of initiative;

cc. Through a general extension of joint member state Commission initiative on matters, areas where until now the Commission had no right of initiative

4. The Court of Justice

There are two significant reforms to noted;

a. Under the new title in the EU title concerning the free movement of persons the Court has its traditional powers with the following restrictions;

b. In addition to jurisdiction to give preliminary rulings, there is also type of action "in the interests of the law" which may be brought by the Council, the Commission or a Member State.[25]

The Court's jurisdiction was extended to cover areas under the third pillar with the following arrangements:

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[25] See: European Commission, Intergovernmental Conference Task Fors, TEXTE E, Brussels, 1997.

a. Jurisdiction to give preliminary rulings is restricted to cases before courts in Member States which have made a declaration stating that they accept this jurisdiction. The courts then have the right but no obligation to request a preliminary ruling.

b. Actions for the legality of decisions may be brought only by the Member States.

c. The Court also has jurisdiction to rule on any dispute between Member States or between the Member States and the Commission regarding the interpretation or application of acts adopted under the third pillar.

5. Other Institutional Matters

a. The Court of Auditors

The Court of Auditors now has the right to bring actions before the Court of justice to protect its prerogatives. Its powers have been extended to cover auditing EU funds managed by outside bodies, including the European Investment Bank.

b. The Economic and Social Committee and the Committee of the Regions

These two bodies are to be administratively separate. The range of subjects on which they have to be consulted has been broadened (employment, social affairs and public health, environment, the social fund, vocational training, cross-border co-operation and transport in the case of the Committee of Regions).

IV. THE LEGISLATION INSTRUMENTS OF EUROPEAN UNION

1. Regulations

Regulations are instruments which are directly applicable and binding on to the Member State.[26] The purpose and effects of a regulation, or a general ECSC decision, can be illustrated by means of two examples. For the regulation we can take the fields which from the beginning has been dealt with mainly by means of regulations, namely agriculture, social and monetary. The common market extends to agriculture and traded in agricultural products. In the Community agricultural market goods have to be trade d not just inside one country in which the same rules apply but between buyers and sellers in different countries so that the market can operate smoothly only if common rules are in force throughout the territory of the European Union. This requires joint management centrally for the European Union as a whole and the measures needed for the operation of the market have to have direct force in all Member States. Only a regulation has these effects.

2. Directives

Directives are addressed to Member States. They lay down the result to be achieved, but leave Member States free in the form and methods.[27]

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[26] EEC Competition Rules, European Documentation, Manuscript completed, 1983, p. 12.

[27] See: EEC Competition rules, p. 12.

The second form of binding Community legislation is the directive which appears in the ECSC Treaty as the recommendation. Directives are addressed to Member States, sometimes to all Member States and sometimes only to specified ones; ECSC recommendations may only be addressed to firms in the EU. Unlike the regulation or general ECSC decision, this form does not create new uniform EU law binding throughout the whole Union; it requires the addressees to take such measures as may be necessary in order to achieve an aim desired by the EU. The directive or ECSC recommendation states an objective which the addressee must realize within a stated period. How this is to be done is a matter for domestic legal and economic structures to take a milder form, and in particular enables Member States implementing the EU -rules to take account of special domestic circumstances. The draftsmen of the Treaty here proceeded on the assumption that far-reaching changes in national arrangements needed to implement the treaties often made it advisable to leave it to each State, which is naturally in the best position to know its own circumstances, to judge how its own requirements could best be reconciled with the needs of the EU.

3. Decisions

A Third category of EU legislation is legal acts consisting of EEC or Euratom decisions and individual decisions. Decisions are binding on those to whom they are addressed. This can be a member State, a legal entity, or a private person.

In some cases the EU institutions may themselves be responsible for implementing the treaties or regulations and

general ECSC decisions and this will be possible only if they are in a position to take measures binding on particular individuals, firms or Member States. The situation in the Member States own system is the same. An Act of Parliament for example will be applied by the authorities in an individual case by means of an administrative measure. The EU institutions can thus require a Member State or an individual to perform or to refrain from some action or can confer rights or impose duties on them.

4. Recommendations and Opinions

Lastly there are opinions and EEC and Euratom recommendations. This category of legal measures is the last one explicitly provided for in the Treaties; it enables the Community institution to express a view to Member States and in some cases to individual citizens which is not binding and does not place any legal obligations on the addressees. In the EEC and Euratom Treaties on these non-binding legal measures are called recommendations or opinions but under the ECSC Treaty only the term opinions is used. While EEC and Euratom recommendations urge the addresses to adopt a particular form of behaviour, opinions are used where the EU institutions are called upon to state a view on a current situation or particular event in the Community or the Member State.[28]

The real significance of these recommendations and opinions is political and moral. In providing legal acts of this kind the draftsmen of the Treaty proceeded on the expectation that,

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[28] ÖZSUNAY, Avrupa Hukuku Haftası 70.

given the prestige of the EU institutions and their broader view and wide knowledge of conditions beyond the narrower national framework, those concerned would voluntarily comply with recommendations made to them and would draw the appropriate consequences from the EU institutions assessment of a particular situation.[29]

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[29] See: The ABC of Community Law, p. 28.

§ 2 EUROPEAN UNION'S RIGHT TO TAX

I. HISTORICAL DEVELOPMENT OF THE EUROPEAN UNION'S RIGHT TO TAX IN IT'S TODAY'S BORDERS (BOUNDRIES)

From historical perspective the way a society was administered and the legal rights of the people under this administration creates two important questions[30].

Generally, the earliest system of ruling the political societies were monarchies with unlimited power. Over time this system changed and two new concepts were introduced. The first was the concept of individual rights. It meant that people have certain natural and legal rights as human beings. The second concept was the right of individuals to have a voice in the administration of the state.

this system has changed and two concepts were introduced first, the concept of individual rights was accepted that people have natural, legal rights as human beings second, that individuals have the right to participate in the administration of the state[31].

The idea of the legality of taxation was introduced for the first time when the unlimited administrative power of the rule was

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[30] GÜNEŞ, Verginin Yasallığı İlkesi 31.

[31] OKANDAN, Amme Hukukunun Anahatları 3.

taken away from the members. The term "taxation" was in existence since ancient times under different names. However, the development of taxation within the common law system which began in England in the 17th,18th, 19th centuries limited the authority of the administrators right to tax. As a consequence of these historical developments the state gradually became a *taxation state* which taxed the incomes of its citizens within a legal system[32].

Parliamentary procedures did not prevent heavy taxation but prevented only arbitrary taxation[33]. The limitations to the state's authority to tax was in connection with democratic and legal developments. In reality the struggle for democracy first started as a reaction to the state's authority to tax arbitrarily. Efforts to establish a modern constitutional model were based on the theory that the state's authority to tax was to be restricted and in matters of taxation public opinion was to be sovereign.

Parliamentarism, which is fundamental to democracy was in the area of taxation taking into consideration the wishes of the public. Later on parliaments legislative procedures made it possible to continue this role.

Now we are going to discuss the historical events which aimed to restrict the states' authority to tax.

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[32] ÇAĞAN, Vergilendirme Yetkisi 13.

[33] JENINGS 20.

II. DEMOCRATIC DEVELOPMENTS IN EU – MEMBER STATES REGARDING TAXATION

1. England

In early 13th century King John in order to meet the expense of fighting France often taxed the barons and the public. When the war with France ended in defeat he had to make some concessions to the barons and to religious leaders in their favour. In 1215 he signed the Magna Carta. Although Magna Carta's qualifications were debated it's significance was that it was the first constitutional document which limited the King's authority.

In this document the king's authority versus the authority of the classes in parliament were enumerated and parliament was given the limited authority to tax[34]. This document states that the King can not arbitrarily impose fiscal obligations on individuals without consulting the lords and the religious leaders[35].

2. France

France, which was ruled by absolute monarchy until the late 18th century, the king formed, a committee called "Les Etats Generaux" in May 1789.

The King's main purpose in establishing this committee was to get a approval for assigning new taxes and to let of act as an adviser on significant state matters. But eventually this committee evolved in to a powerful organization and with the aid

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[34] GÜNEŞ 41.

[35] ÇAĞAN 15.

of enlightened political and intellectual persons became a notional assembly.

This assembly abolished class distinctions, ended the absolute monarchy, and declared the proclamations of human and citizenship rights[36].

After the French Revolution of August 26 1789 the principles of this proclamation were declared to be valid not only for the present but also for future generations[37]. The proclamation contained the following with regard to taxation:

Article 13 :

"The continuous strength of the public depend on the payment of the taxes by each citizen. Each citizen is to pay equal taxes accordance with his ability."

Article 14:

"Each citizen, through her or his own representative, can determine the amount and duration and the form of administration of the taxes."

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[36] GÜNEŞ 41.

[37] AKIN 292.

3. Germany

Feudalism continued in Germany more than other European states. Feudal lords did not have the right to tax. Feudal lords main income was coming from their properties. After the second half of 16th Century Princedom authority forced Feudal lords to accept its right to tax. Those taxes were approved by a council which was established by Feudal lords and religious authorities.

German union was founded in the 19th century first as a customs union in 1834 and as a German Empire in 1871. As an empire she was no longer a part of other European States. After World War II she temporarily lost her right to tax and some other sovereignty rights but later she gained these rights back.

III. THE PRESENT STATE OF THE EUROPEAN UNION'S RIGHT TO TAX

1. Subject

Even EU' authority is limited in the field of taxation today We consider that EU has its own taxation system which is a supranational one[38]. Right to tax is maybe the hardest sovereignty right to abnegate for states who joined the economic community to become a united whole. States are always very sensitive about restriction of their own right to tax. It is not something easy for states to change their tax system which they established according to their own economic, social, historical religious peculiarities[39].

The basic aim of the European Union was to qualify for the creation of Common Market and for the materialization of this function it was necessary to abolish tax as customs boundaries, along with the abolition of tax discrimination and other differences which existed in trade of goods.

We should not mix the European Union's abolition of the fiscal tax boundaries with the financement of European Union's and close to it, the authority of European Union to tax. These are two different responsibilities of European Union[40].

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38 ÇAĞAN, Avrupa Topluluğu 21.

39 ÇAĞAN, Avrupa Topluluğu 24.

40 OPPERMANN § 16 N.1152.

The authority to tax is the sovereignty right of every nation. A nation's fiscal rights, today as well as in the past are the major responsibility of the parliaments. For this reason the treaties for the establishment of the European Union were obliged to state the topics related to taxation only within necessary limits[41]. In this respect it is sufficient for EU policy if states do not have very serious differences that can cause problems for Common Market.[42] There are only three restrictions for Member States concerning EU law[43];

- A member state can not apply different taxes or tax rates to foreign individuals or companies than she applied to her own citizens or companies.
- The only aim of the taxation may be fiscal aspects. States can not levy new taxes which have equal effects to customs duties.
- Tax policies of Member States must be harmonized with the aspects of EU.

Also articles two and three of the EU- treaty *did not* mention the abolishing of tax differences as its major goal.

We can easily say that the Maastricht Treaty established a balance between its authority to tax and the nations rights to tax. Moreover these provisions (Maas. Tr. Art. 95- 99) did not only

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41 OPPERMANN § 16 N.1153.

42 KARLUK 317.

43 BENLİKKOL/ MÜFTÜOĞLU 10.

have a relatio with the fiscal function of the taxes. But also involved the policies of the distribution and stabilization of the taxes. These provision carry importance when hook at them within the European Union's politics of competitions[44]. This is evident from the place these provisions have in the Maastricht Treaty. The former section dealt with the putting the order of the provisions regarding laws of competitions. The, latter section will deal with the harmonization of legal norms.

On this part more weight is put to Rome Treaty because it contains fundamental principles of the authority to tax. Maastricht Treaty has inherited these principles from Rome Treaty.

The existence of different systems of taxation especially the different ratios of taxation create unjust competition. Nations which produce goods at lower costs and which also charge lower taxes naturally are able to sell these goods at a lower price than the nations which have higher ratio's of taxation[45].

Moreover these provisions not only have a connection with the fiscal functioning of the taxes but also involve the policies of distribution and stabilisation of taxes. These provisions carry importance when looked at them within the European Union's policies of competition. This is evident from the place these provisions have in the Maastricht Treaty.

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[44] See. FÖRSTER, N.1985.

[45] FÖRSTER, N.1986.

2. Evaluation Of The Provisions About Taxation In Treaties Which Established EU

a. In General

A nation's authority to tax contained all the aspects of taxation but the European Union's authority to tax is limited to few items. Even though we can consider European Union's provisions as a proper tax system[46].

Maastricht Treaty accepted in its exact form Rome Treaty's articles 95, 96, 97, 98, 145 and 220, but changed articles 99 and 100. These two articles dealt with indirect consumption taxes, nationally supported discrimination practices and the prevention of double taxation.

In these articles there were some measures regarding European Union's tax policies. The purpose of these measures were the protection of fundamental freedoms and fair competition. In this way measures related to European Union's taxation laws serve as an "intermediary" for the materialization of free movement of goods[47].

Fiscal provisions of Rome Treaty aimed to protect fair competition and so prevent discrimination between the Member States citizens at the same time these provisions tried to keep

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[46] See. YALTI SOYDAN, Katma Değer Vergisi 9.

[47] OPPERMANN § 16 N.1153.

different domestic processes in a harmonized way between each other[48].

The treaty's provisions related to tax laws are of two parts. The first part deals with the prohibition of discrimination and the second part with the harmonization of differences. The addresses of the prohibition of discrimination are directly the member states. In contrast the addresses in connection with tax harmonization are in the first place EU- organs[49].

In the above mentioned provisions there are almost always only indirect taxes. Taxes regarding goods were harmonized. The reason for this is that these indirect taxes could be directly included in the prices charged. In other words, if provisions about indirect taxes were not established by the Union, two of the main aims of Rome Treaty which are common market and free movement would be hard to materialize.

b. Provisions relevant to the customs duty

The foundational provision about customs duty is Article 9/I which states:

"The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having an equivalent effect, and

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[48] DOĞAN, Türk Anayasa Düzeni 66.

[49] FÖRSTER, N.1987.

the adoption of a common customs tariff in their relation with third countries."

It is important to understand the structure of the other provisions which make up this part of the Treaty. This is as follows. Article 12 is a standstill provision which imposes an obligation on states not to introduce new customs duties or charges equivalent thereto. This provision has direct effect, and it was indeed Article 12 which was in issue in the *van Gend en Loos* case[50] which laid down the foundations for the concept of direct effect within Community law. The European Court of Justice, in this area as in many others, has made a notable contribution to the interpretation of this Article.[51]

Article 13 complements Article 12. It provides that Member States shall progressively abolish existing customs duties and charges having an equivalent effect on imports during the transitional period.[52]

These provisions serve the aim of establishing the basic principles of a customs union; the prohibition of tariffs etc., in trade between Member States and the existence of a common customs tariff. The object is to ensure that goods themselves can move freely, with the consequence that those most favoured by

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[50] For the van Gend case see: ECR 1963, 1; CMLR 1963, 105.

[51] CRAIG/ DE BURCA 552.

[52] CRAIG/ DE BURCA 553.

consumers will be most successful, irrespective of the country in which they were made.[53]

The article 9 of the Rome Treaty abolishes the duty levied on products which are imported and exported. In order to put this into practice effectively article 11 of the Treaty states that if the parliament cannot accomplish this quickly then they must transfer the right to levy duty to their governments[54].

It can be thought that the provision of the article 11, can alter the permanent rules of states as well the balance of states' domestic authority with regard to levying duty.

To find out if there was a reduction or increase in the duties charged or equal practices in levying duties we have to refer to the practices of the member states prior to the Treaty of Rome. If there is an increase in the duties levied the reason for it can be due to its appearance in another section of the tariff.

c. The abolition of provisions regarding charges having equivalent effect

The text of Articles 9, 12 and 16, which are the key provisions in this area, prohibits not only customs duties but also charges having an equivalent effect. The reason is obvious. If this phrase had been omitted in the Treaty then it would have been open to those who were minded not to play the Community system fairly to comply with the abolition of customs duties *stricto sensu*, but to reach the same protectionist goal through

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[53] CRAIG/ DE BURCA 549.

measures which created, in economic terms, a similar barrier against imported goods.[55]

To establish a customs union among the members of the EU it is necessary not only to abolish narrow and technical duties levied but also other provisions related with them (art. 9, 12, 13, 16 Rome Tr.). Member States can use their public financial instruments to create similar functions that serve the same purpose.

Although the provisions have abolished the duties levied within the Union, obstacles do continue to exist on this issue. Although the stipulations of non-tariff barriers are dissimilar to customs duties nontheless they serve the same purpose. The non-tariff barriers are permitted only for the protection of the health, environments, customers and veterinary services. Which of these barriers are really indispensable and which are a different version of a measure to protect the domestic producers is a debatable question. But as a general principle we must mention that this equal practice to levying duties or taxes are lawful if they are charged for real and necessary expenses done by states[56].

EU- Court of justice has pointed out that equal obligation should not be the quality recognition or shape, but the real criteria was the addition to the cost of product which unnecessarily obstructed the free movement of goods. Another

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[54] ÇAĞAN, Avrupa Topluluğu 24.

[55] CRAIG/ DE BURCA 555.

[56] CEBECİ/ KAYA 40.

criteria was the practices which were equal to duty levied, established by the state unilaterally[57].

d. Assistance and encouragement of the state

As the duty levied on a product can be raised or lowered artificially thus effecting the cost of product articles 92 and 94 of Rome Treaty attempted to solve this problem by duty exemptions.

The view is that taxation on imports can only be abolished in practice when a sufficient harmonisation of tax rates has been attained.[58]

It should be noted that although Article 95 speaks only of the "the products of other Member States' the prohibition of discrimination also applies to products of third countries which are in free circulation in the Member States.[59] These two articles in order to reconcile these measures with the common market concept have set detailed limits for their function. The supports which are in opposition the concept of common market are those that cause unfair competition both for firms and individuals.

Article 92 provides that *"Save as otherwise provided in this Treaty any aid granted by a member state or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall in so far as it affects trade*

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57 ÇAĞAN, Avrupa Topluluğu 26.

58 LAWAND 374.

59 LAWAND 371.

between Member States be incompatible with the common market".

Item of the article 92 of the Rome Treaty from this point of view has given the "support term" a broad definition. The reduction of taxes, tax returns and facilities which the member sates themselves set in specific industry branches are all contained in this prohibition.

A separate problem is posed by the demarcation between Article 12 and the fiscal non-discrimination provisions of Articles 95-97 of Rome Treaty. The practical importance of this demarcation exists in the same situation; a charge falls under one heading or the other but not both[60]

At the other hand, according to this provision it is not allowed to obtain from States any tax exemptions, tax returns or tax reductions to corporations, individuals, sectors. But contradictorily, States are allowed to make aid for consumer's social benefits, natural disasters or similar situations, these provisions are mentioned in Article 92/II also. According to Article 92 we can consider that aid operations which are beneficial for all European Union are always tolerated.

Article 92 of the Rome Treaty sets limits to the Member States' right to tax.

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[60] LAWAND 368.

e. The prevention of tax discrimination by Member States

Article 7 of the Rome Treaty prohibits all tax discrimination based on nationality. However, this provision does not include every single difference in Member States' laws. For example a citizen of a member state can not claim that his being taxed higher than another Member States citizen is against art. 7.

Articles 95-99 of Rome Treaty Tends to prevent tax discrimination based on nationality. The goal is the elimination of the differences in Member States' tax laws which cause unfair competition[61].

The non-discrimination principle further strengthens the abolition of customs duties and charges having equivalent effect. Art. 95 and 96 mention the imposition of additional taxes on imports so that the non-discrimination principle is materialized. Art. 95 in opposition to discrimination of imported products prohibits the Member States to charge higher duties on these products. If a member state charges higher duties on an imported product than the domestic product of the same quality and standard is acting against art. 95.

Article 17 declares that the prohibition of Article 12 also applies to customs duties of fiscal nature. At the same time, however it makes possible their conversion into internal taxes, provided the latter comply with the non-discrimination provisions of Article 95. In this context a customs duty of a fiscal nature

implies a customs duty on products not produced in the country. In common with an ordinary (protective) customs duty, it is thus charged exclusively on imported products. Internal taxes on products according to Article 95 on the other hand, are charged in principle on home-produced as well as imported products. The principal taxes involved are turnover tax on imported products if no similar home-produced products exist. In this context attention should be paid to the requirement in article 95 that such taxation on imported products may not afford indirect protection to other domestic products which can be used for the same purpose. Thus a Member State which produces mineral, but not natural gas may not charge a special consumer on imported natural gas to protect its mineral oil production which is not subject to taxation. On the other hand this is permitted if the State also starts to produce natural gas itself and imposes the same taxation on this.[62]

Article 96 prohibits the Member States to engage in tax returns which are above the domestic tax charges for the encouragement of exports. This provision does not prohibit the tax returns on exports as long as Member States do not use it as an export bonus. If the tax returns on exports exceeds the taxes on products this may be considered discrimination for the protection of the domestic goods[63].

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[61] ÇAĞAN, Vergilendirme Yetkisi 35. Same opinion: BENLİKOL/ MÜFTÜOĞLU 17.

[62] LAWAND 369, 370.

[63] ÇAĞAN, Vergilendirme Yetkisi 38.

Source of tax discrimination can not be only by customs duty or tax returns on export trade but it can arise from different rates in domestic taxation. If a different rate exists between foreign and domestic origin goods only this difference is not enough to talk about tax discrimination. The foreign and domestic originated goods must be comparable to each other. Only in that case different rates can be accepted as a reflection of discrimination. If domestic and foreign originated goods are not comparative in an other word alternatives of each other's; states can practice different tax rates.[64]

f. The prevention of double taxation

In order to stop unfair competition and at the same time to secure just taxation is necessary to prevent double taxation. For the time being Member States are trying to prevent double taxation through negotiations with each other. These negotiations within the European Community are valid, therefore Member States can negotiate with each other for the prevention of double taxation. In fact Article 220 of the Rome Treaty had foreseen the fact that Member States would negotiate with each other for the prevention of double taxation.

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[64] CEBECİ/ KAYA 40.

3. The Effect of European Union's Taxation Procedures On Domestic Tax Laws

The supremacy of EU- law in general, as against domestic laws is also valid with regard to tax laws. In other words the concept that in case there is a conflict among the domestic laws of Member States then the EU's law prevail is also valid with regard to tax laws[65]. Art. 5 of the Rome Treaty sates that the Member States cannot resort to any action which would prevent the realization of the objectives of Treaty.

The priority of EU's laws against the national laws of Member States has a legal result that national law cannot apply if it conflicts with the Union's laws.[66]

In order to attain the goal of the art. 189/II of the Rome Treaty the courts of Member States are obliged to interpret their legal norms with that of EU's legal norms. If Member States do not make necessary changes in their codes mentioned in regulations on time every single EU- citizen can refer in their legal arguments directly to EU- legislation which is obvious and sufficient.

Art. 177 Rome Treaty gives European Court of Justice the right to interpret the Union's institutions activities and judge their validities. Because of this, the national judges have the authority to interpret domestic issues but the EU's judges have the right to

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[65] See: YALTI SOYDAN 12, 13.

[66] See: ECJ 15.12.1976, 35/76 [ECR (1976) 1871]; SPETZLER 553.

decide whether their judgements are in accordance with Union's laws.

The national courts can turn to EU- court of justice to see if their application of their domestic legal norms are in harmony with the regulations (art. 177/III).

§ 3 "LEGALITY OF TAXATION" PRINCIPLE

I. THE EXPLANATION OF "LEGALITY OF TAXATION" PRINCIPLE

The principle of legality of taxation requires that the order related to taxation, both in form and content be done by legal codes with regard to form, it is defined by the legal organs in accordance with the procedures pointed in the constitution. The legal content on the other hand is a procedure which deals with abstract non individual legal codes. In this content the principle of the legality of taxation means that the states use the right to tax, in accordance with the constitutional procedures which are generally abstract and impersonal[67]. From the point of view of personal rights and freedoms the carrying out of this principle in accordance with legal procedures provides the protection needed[68].

The principle of the legality of taxation established to abolish arbitrary and limitless taxation also has some dimensions and subprincipals. To be able to talk about the principle of legality of taxation, in the first place there must be a code or article.

To protect individuals these codes must be the product of the parliaments of liberal, democratic states (Principle of no taxation without representation). Also they must be in form of a

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[67] ÇAĞAN, Vergilendirme Yetkisi 103.

[68] KANETİ 136.

code article (no taxation without a code). Characteristics and main elements of these codes or articles must be clearly mentioned (understandability of taxation). On the other hand it is necessary for the state to levy taxes defined by law. These laws give the state the obligation and the right to collect taxes (the principle to levy taxes).

In addition there is another principle which supports the previous principle which gives the state the authority to administer what is necessary by force.

II. DIMENSIONS OF THE "LEGALITY OF TAXATION" PRINCIPLE

1. Dimensions of "Legality of Taxation" Principle According To The Individuals

a. "No taxation without representation" principle

To materialize the legality of the taxation principle it is not sufficient to only publish codes or articles in a proper way. This sub-principle's soul is the supposition that those who pay taxes must also be represented in the parliament.

The citizens representation also underlines the expression of "general vote" and of a "equal vote" meaning one equal vote per person[69]. Also a major foot of dimension of "no taxation without representation" is "the right of majority rule" and "the

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[69] SOYSAL 81.

protection of the minority and limitations of the power of the majority".

The right of the majority rule involves the management of the public affairs by the majority for a limited time period when they are elected to the power of administration[70].

The protection of minority and the limitation of the power of the majority are accomplished by the right to criticize administrative practices of the majority, by disseminating their points of view by preparing themselves for the possibility of gaining power one day[71]. According to this principle which is a democratic goal of democratic origin the people have the right to device which taxation they are willing to support[72]. This decision of how to distribute taxation among the individuals is based on the majority of the people.

However this subdimension does not mean that foreigners who are not represented in the parliament are exempt from tax payments[73]. This means that according to this dimension the principle of the legality of taxation in modern democratic states either in the form of the separation of powers or the balance of power principles the authority to tax belongs to the parliament.[74]

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70 SOYSAL 82.

71 SOYSAL 83.

72 GÜNEŞ, Verginin Yasallığı İlkesi 15.

73 ÇAĞAN, Vergilendirme Yetkisi 7.

74 ÇAĞAN, Vergilendirme Yetkisi 8.

b. "No taxation without codes" principle

According to this dimension of the principle of the legality of taxation, taxation as a legal practice can only be stipulated both formally and in content codes. To levy a tax in accordance with a code or article is the formal aspect of the legality of taxation principle.

The codes are written legal rules which are based upon procedure and form stated by the articles 88 and 89 of the Turkish constitution. The legal texts contain general abstract and continuous norms which the society is obliged to obey.

There is no clear definition in the constitution of tax codes which are the main source for tax laws after the constitution. Along with this article 73 of the constitution clearly sates that levying taxes can, only be done in accordance with codes.

Even if this article is not clearly stated. Article 73 is part of the section of "fundamental rights and obligations". Thus as a general constitutional principle the norms of this section can only be applied by articles and codes and nothing else. When levying taxes or when changing them as a rule no legal articles, other than codes will be acceptable. As a consequence parliaments authority to tax can not be transferred to another government organ[75].

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[75] GÜNEŞ 16.

c. "Clarity of Taxation" principle

According to the principle of the clarity of taxation, the tax norms have to contain all fundamental elements. In other words this principle reflects the objective criteria of a tax norm. The junction of this dimension is to add to the legality of the taxation principle the role of predictability. There is the obligation to define taxation by lams[76]

The principle of the clarity of taxation contains information for the benefit of administrators and the tax payers, the amount, the dates of collections and the ways of the collection of taxes.[77] The principle of the clarity of taxation provides a sense of security to the tax payers on one hand, and the stability of tax administration on the other.[78]

When the rules and their application are clearly defined and understood the calculation and the estimation of individual taxes has to be done before levying them. The legal norms should not have double meaning or be vague or implicit.[79] Otherwise, it will inatigate the violation of the principle of equality and give rise to the differences of its interpretation and application.

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[76] KANATİ 37

[77] ÇAĞAN 172

[78] ÇAĞAN 172

[79] ÖNCEL/ KUMRULU/ ÇAĞAN 46

The dimension of clarity not only ensures that the payment of taxes be in accordance with law but also the duties and the methods in connection with it must also be defined by law[80].

The tax norms which are not prepared according to this sub-dimension, may be provocative for taw payers about, not paying the tax amount that they should pay. The natural result of this practice by tax-payers is, intensive tax inspections. This kind of norms can also cause arbitrary and illegal activities of administration officers.[81]

2. The Dimensions Of The "Legality of Taxation" Principle According To The State

a. "Necessity of levying taxes" principle

While the legality of taxation principle protects the individuals by establishing limitations it also provides rules of administration. This means that the necessity of levying taxes principle is a command which must be obeyed and the state does not to give up its right to collect taxes[82]. As a result the administrators of taxes can not engage in any transaction which will special benefits of individuals or groups or which will counteract tax obligations.

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80 GÜNEŞ 19.

81 ÖZER 73.

82 GÜNEŞ 19.

b. "Levying of taxes by enforcement" principle

The taxes not paid by tax payers can be collected by force. Because the levying of taxes by enforcement principle is a sub-dimension of the legality of taxation principle, although the concept of enforcement principle seems to contradict with the principle of no tax without representation, in reality both are harmonious. This means that the enforcement of taxation principle can exist only with the approval of tax-payer. No taxation without assent is a concept which maintains that if the citizens do not give consent to the[83]. In reality the legal source of the authority to tax is the consent of the citizens.[84]

[83] GÜNEŞ 19.

[84] GÜNEŞ 20.

III. THE PROHIBITION OF COMPARISON IN TAXATION LAW AND ITS NARROW INTERPRETATION

Different legal disciplines handled this problem in ways which were most suitable to them.

The most striking way of handling it belongs to civil law. A judge can not dismiss a case which comes before him by saying it has no place in law. He first refers to the customs and mores of the country for the solution, if he cannot find then he puts himself in place as a law maker and declares his decision[85]. This means that the judge can not only refer to the existing customs and mores but also to the interpretation of doctrines and comparisons. The judge has to use this freedom of decision given to him by the civil code within the framework of "justice and fairness"[86]. The criminal law, on the other hand rejects the use of comparison when dealing with crime and punishment.[87] On this matter the private international law prefers to apply the adopted laws current provisions. Consequently in legal cases where foreign or Turkish legal disciplines have adopted the method of comparison the judge has to abide by it.[88]

Comparison is a way of thinking which involves the interpretation of a current provision to create a new norm which the code did not incorporate.

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85 BİRSEN 90.

86 BİRSEN 91.

87 İÇEL/ DONAY 84.

88 NOMER 98.

To assume the method of comparison causes a direct conflict to the legality of taxation and tax security of both state and individuals.[89] On the contrary private law disciplines comparison method can not practiced in taxation law and it is not allowed to extend taxation norms by interpretation[90].

It is wrong to give jurisdiction power the ability of changing the main elements of a tax norm in a state where supremacy of law is a constitutional principle.[91]

To prevent comparison in tax law it is necessary not to use abstract and unclear concepts. It is essential for the legislative organ to prefer as much as possible technical and specific terms and try to use the terms in its statements whether they belong to tax law or not so that there will be no need for any interpretation.

Rejection of comparison method does not mean that tax law refuses interpretation at all.

Interpretation is allowed if it is done by pointing out the norm's connection with other norms. This method is called systematic interpretation

Interpretation is also allowed by considering the existence reasons of the norm.

There is a certain difference between comparison method and the interpretation which is done by considering the existence

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89 ÖNCEL/ KUMRULU/ ÇAĞAN 29

90 AKSOY 28.

91 GÜNEŞ 143

reasons of the norm. The aim of comparison methods is to create a new norm by taking another norm as reference. On the other hand the aim of interpretation which is done by considering the existence reason of the norm is pointing out to find the ratio legis of the norm.[92]

Apart from these two interpretation method that are allowed, there is an other interpretation method which called "Economic Aspect" defined.

This concept gives priority to the real meaning of economic activities and transactions and not to their formal appearance.[93] In other words even economic activities or transactions which are contrary to correct procedure or are completely illegal must be taxed if they accomplish economic results.

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[92] İÇEL/ DONAY 83.

[93] ÖNCEL/ KUMRILI/ ÇAĞAN 24.

IV. EXEMPTIONS OF "LEGALITY OF TAXATION" PRINCIPLE IN TURKISH LAW

However the general rule that all norms about taxation can be binding only if they are prepared in the legal form of a code or article has some exeptions exist.

1. The Authority In This Field That Is Given To The Council Of Ministers

We already mentioned that executive power does not have any right to create a binding tax norm by legal instruments like regulations or governing statutes, on the other hand Article 73/IV gives authority to Turkish Council of Ministers to determine some fundamental elements of tax norms such as rates, tax exemptions, exceptions. But there is no hesitation that council of ministers does not have right to make any changes in the definition of the event that causes the tax.[94]

The validity of this authority depends on existence of an act which is prepared by T.N.G.A. On other reservation for the validity of this authority is, that minimum and maximum limits of rates, exemptions and exceptions must be certainly determined by the legislature.

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[94] GÜNEŞ 160.

1. Right To Tax Of Executive Power In The Periods Of Martial Law

Even the most notable constitutions provide for some special measures in case of serious treats to the general security of the state. Constitutions may prefer different methods but they all endowed their governments with additional rights.[95]

The natural result of these periods are limitations in the fundamental rights and freedoms, of the individuals. Because of that the conditions of these periods must be clearly defined in the constitutions.

In cases of natural disasters, dangerous epidemic diseases, intensive economic crises or increase in the terrorist activities according Article 121 and 122 Turkish Council of Ministers may bring out some additional tax obligations to tax payers by a decree having equivalent effect to an act. Actually the martial law periods may result not only in fiscal obligations but also proprietorship sacrifices and free labour activities.

This decree can be enacted only in a Council of Ministers meeting under the presidency of President of Republic.

It is obvious that this situation constitutes an exception to the principle of legality of taxation because Article 73 states that levying ta can not be done by decrees. Even though this was not mentioned in Article 73, because the Article 73 takes place in the "Fundamental Rights and Obligations" within the systematic of

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[95] GÜNEŞ 165

Turkish Constitution, any topic governed by this part can not be stipulated by decrees.

3. Regulation Of Foreign Commerce

The second part of the Constitution regulates the economic provisions. Article 167 II of this part states that, for the benefit of national economy Council of Ministers may declare additional fiscal obligations in import and export transactions. This exceptional authority can arise only from a legal act.

However as it is mentioned in the article there are two conditions of this authority. One of them is the subjective one; the benefit of the national economy and the second one is the objective condition; existence of a legal act.

We can consider the "additional obligations" concept.[96] This exception was added to the constitution just to encourage export. State levied tax from import transactions and collect this amount in a fiscal pool then later distributed it to the exporters as tax return.

The reason for this exception is to ensure that the State and citizens have harmony with the conditions of international commerce.[97]

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[96] KANETİ 8

[97] GÜNEŞ 171

4. Tax Conciliation

Tax conciliation practice became a part of Turkish law in 19.2.1963 with a Legal Act. Number 205. Tax conciliation concept is based on an agreement between tax administration and tax payer. The subject of this agreement is the tax amount which is determined by the tax office[98].

As a general principle tax conciliation can be materialised only in the situations that tax amount is determined by tax office but not tax-payers. This determination can be also in the form of a tax penalty.[99]

Tax conciliation may be defined as an unfair practice regarding legality of taxation principle and equality principle.[100] More specifically tax conciliation is in direct conflict with necessity of levying taxes principle which is a sub-dimension of legality of taxation principle.

Tax conciliation abolishes a tax obligation by a legal act rule. On the other hand, according equality principle this practice contains some problems too, because some tax payers may come on an agreement but some may not who are in the same position.[101]

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98 ÖNCEL/KUMRULU/ÇAĞAN 170

99 AKSOY 114.

100 ÇAĞAN VERGİLENDİRME YETKİSİ 139

101 ÖNCEL KUMRULU ÇAĞAN 170

However even though there are complications, it is a reality that tax conciliation has some beneficial results too such as saving money, time and energy of the tax administration.

5. International Agreements and Treaties

Tax laws of a state are only valid generally in her own borders. But this may cause different problems in a global world where economic relations became intensive.

The main sources of these problems are tax harmonisation. Double taxation, information transfer in taxation, information transfer in taxation field and prevention of tax evasion.[102]

According the Article 90 of the Turkish Constitution international agreement and treaties may only come into force by affirmation of T.N.G.A.

Article 90 also mentions two exceptions. One of them is the international agreements and treaties which last less than one year, do not cause any additional obligation to the state budget and the ones do not limit the property rights of Turks abroad. But also these agreements and treaties must be in the commercial, economic and technical fields.

The second exception is about the international agreements and treaties which are signed as a branch of an other International agreement or treaty. These ones must be in the field of administration, commerce and technical. Also to sign

these ones a legal act that gives authority to council of Ministers is necessary.

All the international tax agreements and treaties last more than one year and cause extra obligations to the state budget so they must be ratified by T.N.G.A. Theoretically there may be some agreements or treaties which last less than one year and create no additional obligation for the state budget. In such cases this kind of agreements and treaties escape from the audition of TNGA. I will study this subject in a more detailed way in the following part.

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[102] ÖNCEL/KUMRULU/ÇAĞAN 61

§ 4 CONFLICT BETWEEN EU-LAW AND TURKISH CONSTITUTION REGARDING THE PRINCIPLE OF LEGALITY OF TAXATION

I. SUBJECT

Regarding legality of taxation principle there are some articles in Turkish constitution which are already in conflict witth EU norms and have to be harmonized in future in the possibility of being a member to EU. These articles are Art. 6, 7, 73 and 90.

II. ARTICLE 6 - 7 OF TURKISH CONSTITUTION

I want to handle Article 6 and 7 together because they are both in the part of "General Principles" and Article 6 covers Article 7 and because sovereignty naturally includes the concept of legislation, the conflict and the solutions are quite same.

Turkish constitution Article 6 states that:

"Sovereignty is vested in the nation without reservation or condition.

The Turkish Nation shall exercise its sovereignty through their authorized organs as prescribed principle laid down in the constitution.

The right to exercise sovereignty shall not be delegated to any individual group or class. No person or agency shall exercise any state authority which does not emanate from the constitution."

Article 7 of Turkish constitution states that:

"Legislative power is vested in the Turkish Grand National Assembly on behalf of Turkish Nation. This power can not be delegated."

Article 6 and 7 clearly mention that apart from Turkish Nation and Turkish Grand National Assembly no organisation authority or person can use sovereignty rights and legislative power on behalf of Turkey and Turkish Grand National Assembly can not transfer them.

In contrast the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, although within limited fields and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of member states, Community –Law not only imposes obligations on individuals but also is intended to confer upon them rights which become part of their legal heritage.[103]

In this point it is necessary to consider Turkish Constitution as a whole and to come back to the constitution's preface. The preamble of the constitution mentions that "Turkey belongs to world nations' family and an equal honourable member of it. Also aimed to reach modern wealth civilization".According Article 176/I there is no hesitation that the preamble is a part of constitution like others so that we can accept a supranational treaty which is based on equality and reciprocity if this treaty aims at

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[103] CRAIG/ DE BURCA 153.

supranational cooperation and getting closer[104]. This preamble only proves that the soul of Turkish constitution is available for supranational treaties but article 6 and 7 is a barrier because it is not possible to eliminate clear provisions of these articles by abstract provisions in the preface.

As an example the Member States constitutions can be useful because conflict between national constitutions and EU law is general problem.

Germany added a new title in her constitution in 1995 without amending chancing the other articles which are about sovereignty rights.

Article 23 (European Union)

"To realize a unified Europe, Germany participates in development of the European Union which is bound to democratic ,rule of law ,social ,and federal principles and provides a protection of fundamental rights essentially equivalent to that of this constitution. The federation can, for this purpose and with the consent of the Senate, delegate sovereign powers."

It is defiantly clear that Germany passes her sovereignty rights to EU but this article also adds a conditional clause. Germany passes her sovereignty rights just because EU is such a supranational organization that has the same level with Germany in the fields of democracy, fundamental rights, rule of law and other federal principles that are not mentioned. So we

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[104] GÜNEŞ 190.

can consider that abnegation valid only in the condition of EU's success about keeping herself in the same level in the mentioned fields.

In *French* constitution's Title I about sovereignty Article 3 mentions that

"National sovereignty belongs to the people who shall exercise it through their representatives and by referendum"

Additional title (Title XV) was added in 1992 with the name "On the European Communities and the European Union" in the French constitution:

Article 88-3:

"On condition of reciprocity, and according to the procedures laid down in the treaty on European Union signed on 7 February 1992, France shall agree to the transfer of powers necessary for the establishment of the European economic and monetary union as well as for the determination of rules relative to the crossing of the external borders of the member States of the European Community."

This Article is a very limited one and it carries certain reservations. France only accepts to transfer necessary powers but not all. Secondly it contains no provision for the transfer of sovereignty rights. Finally the concept of EU is not limited to European Economic and Monetary Union but several other aspects.

So we can accept that Franch constitution is quite conservative about abandoning her sovereignty rights.

Irish constitution states in *Article 29/4* that

"No provision of this constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevent laws enacted, acts done or measures adapted by the European Union or by the Communities or by the institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State."

Irish constitution according to this Article more open and liberal about transferring her powers. Even this article does not mention transfer of the sovereignty rights. It completely accepts the supremacy of Treaties over the Irish constitution. Every provision regarding sovereignty rights and legislation is valid in accordance with EU law.

A part from legislation power the concept of sovereignty includes some authorities about Executive Power and Jurisdiction Power. In these fields Turkey has to make some sacrifices too.

Rome Treaty Article 11 provides that member states are obliged to give their administration authorities necessary powers to materialize the common aims of EU. The aim of this article is to accelerate slow procedures of the States but the main point is here that in this way Legislation power of Turkey has to give

authorities to Executive power that are not mentioned in Turkish Constitution.[105] This will surely cause a change about the balance of powers in Turkish Constitution. Furthermore the Commission has the right to practice on a very large scaled authority about fair competition. As a result of this large scaled authority Commission can give penalties, discipline fines without feeling the need to ask national executive or administration officials. This also can be considered as a direct limitation to Executive Power.

There are also certain limitations to sovereignty with regard to Jurisdiction Power. In respect of EU law the right to evaluate the validity of the regulations, directives and the practices based on them belongs to European Court of Justice. Besides the right to interpret the Treaties also solely belongs to ECJ. The reason of this arrangement is the necessity of keeping a uniform, fair and general application. If we consider that EU law carries also characteristics of "Case Law" ECJ decisions will be binding for our domestic courts.[106] These circumstances cause a clear contradiction with Article 5 of Turkish Constitution which says "Jurisdiction Power on behalf of Turkish nation is exercised by independent courts". There is no hesitation that in this article the term of "independent courts" reflects not any independent court but only Turkish courts.

As a conclusion Turkish constitution is not compatible with EU norms because of Article 6 and 7[107].

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[105] DOĞAN 213.

[106] DOĞAN 217.

[107] ÖNCEL/ KUMRULU/ ÇAĞAN 68.

III. ARTICLE 73 OF TURKISH CONSTITUTION

Article 73 of Turkish constitution states that

"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 exemptions, exceptions, and reductions in taxes, fees, duties, and other such financial impositions within the minimum and maximum limits prescribed by law."

When Turkey becomes a member of EU there will be without any doubt a great limitation in her right to tax. This limitation has a meaning. Firstly, because of Treaties and other Union practices Turkey will not be able to act freely on her own current legal norms or she will not be able to put new ones or make revisions on the old ones. This results that after being a member the only source of taxes, fees, duties, and other such financial impositions will not be national law but also EU law.[108]

If we handle the matter from the point of view of legality principle of taxation we can see more specific conflicts such as "no tax without representation" and "no tax without codes."[109]

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[108] GÜNEŞ 191.

[109] GÜNEŞ 191.

"no tax without representation" and "no tax without codes or articles."[109]

Especially as a sub dimension of legality principle of taxation "no tax without representation principle" may include some details. If the EU follows the procedure of unanimity vote during the practice of legislative function it can be considered that no EU norm can come into force as long as Turkey accepts it so no tax without representation principle continues but from an other view the procedure of unanimity vote can cause violations of "no tax without representation" principle too because in spite of positive decree of Turkish citizens some norms can never come into force. If EU follows the procedure of majority vote the possibility of coming into force of the norms, that Turkey does not approve is always reserved.

Current Member States of EU have the almost same provisions in their constitutions with Article 73 of Turkish Constitution. I will mention as example Finland, Spanish and Greek constitutions' relevant articles:

Finland Constitution:
Chapter VI (State Finance)
Section 61

"Provisions on state taxation shall be prescribed by an Act of Parliament containing provisions on the basis of tax liability and its extent as well as on the legal safeguards of the tax payer."

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[109] GÜNEŞ 191.

Greek Constitution

Chapter VI (Tax and Fiscal Administration)

Article 78

"No tax shall be levied without a statute enacted by Parliament, specifying the subject of taxation and the income, the type of property the expenses and the transactions or categories thee of to which the tax pertains.

A tax or any other financial charge may not be imposed by a retroactive statut effective prior to the fiscal year preceding the imposition of the tax."

Spanish Constitution:

Article 31 (Taxes)

"Everyone shall contribute to the sustenance of public expenditures according to their economic capacity through a just tax system based on principles of equality and progressive taxation which in no case shall be of a confiscatory scope.

Public expenditure shall realize an equitable allocation of public resources and its programming and execution shall be in keeping with criteria for efficiency and economy.

Personal or property contributions of a public nature may only be made in accordance with the law."

Like many other constitutional principles, legality of taxation principle is a sub-dimension of sovereignty right and legislation power. So member states preferred only to add reservations to the main articles sovereignty and legislation rights and not to other provisions of their constitutions.

IV. ARTICLE 90 OF TURKISH CONSTITUTION

Article 90 (Ratification of International Treaties) of Turkish Constitution states that:

"The ratification of Treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption by the Turkish Grand National assembly by a law approving the ratification Agreements regulating economic, commercial, and technical relations and covering a period of no more then one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the state, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these agreements must be brought to the knowledge of the T.G.N.A. within two months of their promulgation.

Agreements in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative agreements which are concluded depending on an authorisation given by lax shall not require approval by the T.G.N.A. However, agreements concluded under the provision of this paragraph and affecting the economic, or commercial relations and private rights of individuals shall not be put into effect unless promulgated.

Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph.

International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements on the ground that they are unconstitutional."

About this Article of Turkish constitution there are two points that I want to study regarding the principle of legality of taxation. As I mentioned in the third paragraph[110] Article 90 brings about a clear exception to the principle of legality of taxation because of the provision that lets Council of Ministers to sign treaties or agreements without a cloth of power. The Treaties and agreements come in to force directly when they are published in the official gazette. Even though this power can be practice in certain conditions that are counted in Article 90 it still does not change the fact that supervision function of the Parliament can be eliminated

Almost always the treaties or agreements which include provisions about tax last more than one year and cause extra obligations to the budget so that Council of Ministers has to take approval of the Parliament. On the other hand, theoretically it is possible to accept that there can be taxation treaties or agreements which last less than one year and do not cause any additional obligation to the budget.

However according to some authors violation of principle of taxation by article 90 can never become fact because of the existence of Article 73. According to these authors when the

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[110] See: § 3 IV 5.

Article 73 and article 90 are interpreted simultaneously all the treaties and agreements which include provisions related to tax must be approved by Parliament.[111] In other words even if these treaties or agreements are on commercial, economic and technical issues and do not last more than one year and do not cause additional obligations to State budget, they can not be binding without affirmation of Parliament.

On the other hand neither Article 73 nor Article 90 have direct attribution to each other so we do not have any reference to consider article 73 is superior or able to automatically abolish Article 90. On the contrary Article 73 reflects general norms but exceptions of these norms take place in different articles of constitution such as Article 167 or 121 so we can ponder Article 73 is an article which mentions the frame stipulations but Article 90 is a more specific one which notices all exemptions. In this conditions from my point of view there is no objective reason to give a priority to Article 73 against Article 90.

Regarding the principle of taxation there is an other statement in Article 90 which says *"International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements on the ground that they are unconstitutional."* This statement also must be attached importance. Article 90 declares that the international agreement and treaties which are the most important function of international law have direct effect on our

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[111] GÜNEŞ 187; ÖNCEL/ KUMRULU/ ÇAĞAN 62.

law regime.[112] As well there are other Articles that take international law as a reference like Article 15 which referred to martial law and emergency conditions, Article 16 which is about limitation of fundamental freedoms and rights for foreigners, Article 42 that mentions education right and finally Article 92 about war declaration and using military power.

The main point is the status as a legal norm of international treaties and agreements. According to literal interpretation Article 90 of the constitution it is clear that they are equal to articles of codes but less powerful than constitution. Anyhow it is an order of logic that if constitution would wish the status of international treaties or agreements to be superior than codes she would express her will precisely.[113] On the other hand there are some authors who claim the supremacy of international treaties and agreements according to Article 90. Their main reference is the provision of article 90 which mentions that; no appeal to the Constitutional Court can be made with regard to agreements on the ground that they are unconstitutional. According to this conception being exempted supervision of Constitutional Court, gives a natural supremacy to international agreements and treaties against codes.[114] However in respect of Article 148 even amendments made by T.N.G.A in the articles of constitution may be evaluated in Constitutional Court so according to this opinion status of the treaties and international agreements may have supremacy against constitution. My

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[112] PAZARCI 24.

[113] PAZARCI 33.

[114] TEZİÇ 9.

opinion is to prefer a literal interpretation instead of pushing the meaning of Article by indirect statements so to accept that they got a equal statue with legal codes. However which opinion is authoritative it does not change the reality that one of the most remarkable features of European Union law is the impact it has had on the legal and political integration of Member States. By way of contrast with other international organizations of states such as the Council of Europe or the united Nations, The European union has created an organization of states with an autonomous legal system, a system of norms which bind each of the states and which have been introduced into domestic systems of different states as a uniform body of law.[115]

In other words as far as Article 90 does not include a phrase which reflects the supremacy of supranational treaties, even if these treaties are equal statues with codes or even constitution the conflict exists.

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[115] CRAIG/ DE BURCA 151.

CONCLUSION

In this thesis I tried to examine my subject in four parts. The main aim of this theses is to evaluate the legality of taxation principle from the point of EU law.

In the first part I explained the formation of European Union, for without the knowledge of the EU concept, it would not be possible to focus on the following issues.

In the second part I studied the important historical developments about the right to tax within the democratic frame in the countries that are members of EU today. This study also included the understands of the meanings of provisions about taxation in the Treaties. But in this part my major objective to point out that in the matter of taxation EU has the right to tax and the practice of this right is binding.

In the third part stated the principle of the legality of taxation and its place in the Turkish Constitution. In doing this I benefited from the constitutions of EU Member States to confirm that this principle is valid in today's EU.

My conclusion regarding the above mentioned three parts is that EU is a supranational organization independent of its establishes and superior to them. This organization is also active in the area of taxation requiring member states to act in harmony with the system

The Turkish constitution accepts the principle of the legality a taxation, and aside from the exceptions this principle mentioned in this thesis, taxes can be levied only by legal act.

Finally, in the last part of my thesis I pointed out the provisions of EU law and the Turkish constitution.

Which are the basis of conflict regarding the principle of the legality of taxation.

My determinations and suggestions are like this.

Regarding the principle of the legality of taxation there are four articles in the Turkish constitution which may cause conflict with EU law. Articles 6 and 7 are about sovereignty rights and the power to legislate. Article 73 is about the legality of the principle of taxation. Article 90 is about the legal statute af international agreements and treaties.

In this thesis I tried point out the reasons of this conflict. In this conclusions I shall try to explain how the, in my opinion, this conflict can may be resolved.

The major conflict between the Turkish constitution and EU Law involves Articles 6 and 7. If Turkey inserts to the end these two articles a provision that in accordance with the principle of reciprocity Turkey may transfer her sovereignty and legislation powers to the supranational Organization, that is EU.

As mentioned in my thesis in the draft of the Turkish Constitution in 1982 a similar provision appeared in Article 5, but was rejected by the National Security Council.

As for article 73, if the above mentioned provision is inserted, it may not be very essential to make any changes in this

article. However, it is also possible to insert a provision which states that EU taxation laws are binding and superior.

Article 90 is also a problem, because it involves giving equal status to domestic laws and to international agreements and treaties. Where as there is no doubt that EU law has supremacy even over national constitutions. This means that there must be a provision in this article which gives supremacy to EU law.