

**EFFECTS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE  
TURKISH TAXATION POLICY AND MANAGEMENT**

**by**

**Ayşe Nil Tosun**

Assistant Professor PhD, Hacettepe University, Faculty of Economics and  
Administrative Sciences Department of Public Finance, 06800, Beytepe-Ankara

e-mail: [nilt@hacettepe.edu.tr](mailto:nilt@hacettepe.edu.tr), fax:03122992163

**Oytun Canyaş**

Research Assistant, Hacettepe University, Faculty of Economics and Administrative  
Sciences Department of Public Finance, 06800, Beytepe-Ankara

e-mail: [ocanyas@hacettepe.edu.tr](mailto:ocanyas@hacettepe.edu.tr), fax:03122992163

**INTRODUCTION**

In democratic countries taxation cannot be used without limit by the political powers; it should be executed in accordance with certain principles while avoiding undermining fundamental individual rights and freedoms. Excessive and immoderate taxation and the laws executed to maintain a sound taxation process may influence the most fundamental human rights of individuals, including personal freedom and security, right of privacy, freedom of movement and freedom to settle, property rights, freedom of labor and contract, the duty and right to work, which may be violated by disproportionate and immoderate taxation laws. Therefore, today it should be recognized that the taxation power of governments are limited by the boundaries of the fundamental human rights acknowledged by international conventions, although the taxation power of governments are extensively interpreted in international agreements. There are many sources for human rights such as the United Nations Conventions, agreements of the Council of Europe, Organization of American States and Africa, which are based on international treaties. Turkey is a signatory of several agreements, including the European Convention on Human Rights (ECHR), which has remarkable effects on Turkish taxation policy and management due to the judicial supervision incorporated in it. ECHR, and the verdicts of the European Court of Human Rights, have become a common source that binds domestic legislation of Turkey and other parties to the ECHR.

As one of the founders of the Council of Europe, Turkey undersigned the ECHR and its additional protocols excluding several documents. The ECHR was entered into on the 4<sup>th</sup> of November 1950 and executed on the 3<sup>rd</sup> of September 1953. It was legalized in our domestic legislation on the 10<sup>th</sup> of March 1954. On the 28<sup>th</sup> of January, 1987 Turkey vested its citizens with the right to file individual applications to the European Commission of Human Rights, and acknowledged the mandatory jurisdiction of the European Court of Human Rights on the 22<sup>nd</sup> of January, 1990. In Turkish law, ECHR supersedes the tax laws in the hierarchy of norms. In other words, any settlement of conflicts between the ECHR and the tax law should be based on the provisions of ECHR. Therefore, both the ECHR and the verdicts of the European Court of Human Rights have important effects on the Turkish taxation policies.

The subject of this study is the effects of ECHR on the Turkish taxation policies and management. In this context, the changes brought about by the laws and the Constitutional reforms of recent years will be handled. The amendments in Turkey during the recent years primarily relate to property rights, freedom to travel and lawsuit processes in taxation.

### **RELATION OF PROPERTY RIGHT, FREEDOM TO TRAVEL AND TAXATION ACCORDING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS**

Before moving on to the section of the study pertaining to Turkey, we should mention the approach of the ECHR and the European Court of Human Rights with respect to property rights and freedom to travel, which we will scrutinize in the scope of our subject matter.

#### *Relation of Property Right and Taxation in the European Convention on Human Rights*

The provisions of the ECHR relating to the property rights of individuals and the taxation power of the government on the said rights are sufficiently clear. The provision in protocol “Annex 1” to the ECHR which guarantees the property right reads as follows: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any

way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” This article ensures protection of the property rights of individuals, while acknowledging the taxation right of governments. It is known that the European Court of Human Rights exhaustively interprets the boundaries of taxation powers of governments<sup>1</sup>. Nevertheless, it is also impossible to implement unlimited taxation rights, which may be considered as exception to property rights. The court has issued numerous verdicts which limit the taxation power of governments, where the court assesses whether the interventions in question involve a legitimate objective, whether they are legal, whether the laws are accessible and understandable by everyone, whether they comply with the general qualifications of international law and whether they satisfy the proportionality and contenance principles,<sup>2</sup>.

#### *Relation of Freedom of Travel and Taxation in the European Convention on Human Rights*

The 2<sup>nd</sup> clause of Article 2 of Protocol 4 in the ECHR states that everyone can freely move within a country once lawfully there and have a right to leave any country. The 3<sup>rd</sup> clause of the Convention stipulates that the said right may be subject to limitations in order to maintain national security, public security, public order, or to prevent crime or to protect well-being, morals and the rights and freedoms of others. On this point, can traveling abroad be subject to prohibitions due to tax liabilities, and if so, what should be the conditions? The answers to these questions were given in the Reiner case, where the conclusion drawn from the interpretation by the court indicates that in order to prohibit a person from traveling abroad due to tax liability, such a prohibition should be based on applicable law, aimed at a legitimate end and be proportionate to the targeted objective. In other words, any prohibition on traveling

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<sup>1</sup> Aida Grgic et al., *The Right to Property under the European Convention on Human Rights-A Guide to the Implementation of the European Convention on Human Rights and its protocols* (Strasbourg Cedex:Council of Europe Human Rights Handbooks, 2007), 10, p.6.

<sup>2</sup>H.B. Gemalmaz, *Avrupa İnsan Hakları Sözleşmesinde Mülkiyet Hakkı* (İstanbul:Beta Yayınları,2009); Suat Şimşek, “Vergi Politikaları, Mülkiyet Hakkı ve Avrupa İnsan Hakları Mahkemesi” (2010) *Maliye Dergisi* 159, pp.12-20; B. Yaltı. *Vergi Yükümlüsünün Hakları* (İstanbul:Beta Basım Yayım Dağıtım A.Ş., 2006b) 1675,751 pp.174

abroad should be primarily for the public benefit. What is important here is the amount of liability; it would be inconvenient to implement a ban on leaving the country on someone with a small tax liability. Above all, any impact on the possibility of collecting the tax liability upon leaving the country or any causal link between leaving the country and impossibility of collection are also taken into consideration by the court<sup>3</sup>.

### **CERTAIN PROBLEMS DUE TO THE LACK OF RETROACTIVITY OF DECISIONS OF THE CONSTITUTIONAL COURT IN TURKISH LAW**

In Turkish law, the decisions of the Constitutional Court cannot be implemented retroactively, which has led to violations of several rights of individuals, particularly the property rights, in certain cases in the field of taxation,<sup>4</sup> (Kaboğlu 1991, Azrak 1984, Özay 1995, Öden 1999, Feyzioğlu 1951). The problems of the individuals who could not exercise their rights due to the principle of non-retroactivity of the decisions of the Constitutional Court were settled by acknowledging the right for individual application to the Constitutional Court in 2010. Below is an exemplary lawsuit process to demonstrate how the process shall progress before and after acknowledgement of the right to personal application to the Constitutional Court.

### **INDIVIDUAL APPLICATION-THE CASE BEFORE THE CONSTITUTIONAL AMENDMENT**

Step 1 -Person A applies to the tax court for an issue related to taxes.

Step 2 -The judge at the tax court refers the issue to the Constitutional Court believing that the case implemented on person A conflicts with the Constitution.

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<sup>3</sup>Robert Attard "The European Convention on Human Rights (ECHR) Tax Controversy and Tax Policy" (2011) *EU Direct Tax News, A bimonthly Review of EU Direct Tax Developments Affecting Business in Europe* 41, p.5; Metin Baykan "Temel Hak ve Hürriyetler Açısından Vergilendirme" (2010) p.3 [http://www.turkhukusitesi.com/makale\\_1172.htm](http://www.turkhukusitesi.com/makale_1172.htm) last accessed: 09 December 2010; Billur Yaltı. "ABD Yüksek Mahkemesinin Lipper Kararından İnsan Hakları Avrupa Mahkemesi'nin Reiner Kararına: Hukuk Standartları" (2006a) *Türkiye Barolar Birliği Dergisi* 66, pp.95-120.

<sup>4</sup> İ. Ö. Kaboğlu, "Hukukun Genel İlkeleri ve Anayasa Yargısı (Özgürlükler Hukuku Açısından Bir Yaklaşım)" (1991) *Anayasa Yargısı* 8, pp.291-322; Ülkü Azrak , "Anayasa Mahkemesi İptal Kararlarının Geriye Yürümezliği" (1989) *Anayasa Dergisi* 1, p.160; İl Han Özay, "Yeni Bir Düzendeki Anayasa Mahkemesinin Kuruluş Görev ve Yetkileri ile Yargılama Usulleri" (1995) *Anayasa Yargısı* 12,p.48; M. Öden , "Cumhuriyetin 75. Yıldönümünde Anayasa Yargısı" (1999) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 48, 1-4, p.36; T. Feyzioğlu, *Kanunların Anayasaya Uygunluğu'nun Kazai Murakabesi* (Ankara:Güney Matbaacılık, 1951) SBF Yayınları 19, pp.13-19.

Step 3 –If the Constitutional Court cannot render a verdict on the issue in 5 months the tax court, after 5 months of waiting, concludes the lawsuit to the detriment of person A.

Step 4 -Person A submits the issue to the State Council. The person A loses the case at the State Council, and the decision is finalized after all other legal means are exhausted.

Step 5 -After the verdict on person A is finalized, the Constitutional Court annuls the law in a later step in favor of person A.

Step 6 -The decision of the Constitutional Court cannot be applied to the case of person A according to the principle in effect. The decisions of the Constitutional Court cannot be implemented retroactively.

Step 7 -Person A may apply to the European Court of Human Rights.

#### **INDIVIDUAL APPLICATION-THE CASE AFTER THE CONSTITUTIONAL AMENDMENT**

Step 1 -Person A applies to the tax court for an issue related to taxes.

Step 2 -The judge at the tax court refers the issue to the Constitutional Court believing that the case implemented on person A conflicts with the Constitution.

Step 3 –If the Constitutional Court cannot render a verdict on the issue in 5 months, the tax court, after 5 months of waiting, concludes the lawsuit to the detriment of person A.

Step 4 -Person A submits the issue to the State Council and loses the case at the State Council.

Step 5 -Person A may submit an individual application to the Constitutional Court. The lawsuit process continues.

Step 6 -If the Constitutional Court annuls a law in favor of person A, the verdict is also applicable for person A.

Step 7 -If person A wins the case at the Constitutional Court, there is not any need to apply to the European Court of Human Rights.

Therefore, the problems arising out of non-retroactivity of the decisions of the Constitutional Court have been settled by acknowledging individual applications for violations of property right in this context.

Several authors have stated that one of the reasons for this change is increasing number of applications by Turkish citizens to the European Court of Human Rights. With the amendment, the process of searching for legal remedies by domestic means has been extended. Now individuals can continue with their lawsuit process by filing individual applications to the Constitutional Court. This has precluded the loss of rights due to the non-retroactivity principle of the decisions of the Constitutional Court while also decreasing the workload of the European Court of Human Rights.

### **BAN ON LEAVING THE COUNTRY-CASE BEFORE AND AFTER THE CONSTITUTIONAL AMENDMENT**

As stated above, the right to travel is considered as one of the fundamental human rights and freedoms. There have been long-standing discussions on the ban on leaving the country applied due to tax liabilities in Turkey. The law which forms the basis for the ban on leaving the country due to tax liability was annulled in 2007, and a new law was executed; however, with the last Constitutional amendment in 2010, the said law was invalidated.

It is understood that the entirety of this process has been influenced by the decisions of the European Court of Human Rights. Although the procedure for traveling abroad is regulated by the Passport Law no. 5682, it has been annulled for violating the Constitution, since it is unclear about the criteria for banning, with unclear and insufficient limitations, and lacks a reasonable relationship between the objective and its means, and the annulment decision made reference to the decision of the European Court of Human Rights for the Reiner vs. Bulgaria case,<sup>5</sup> on 27.05.2006. To fill in the gap emerging after the decision of the Constitutional Court, a new article (36/A) was incorporated into the law no. 5766 dated 04.06.2008 and to the law no 6183, which restored the ban on leaving the country. The law defines the conditions for the ban in detail, and clearly specifies the amounts which entitle the tax office to apply the ban. Nevertheless, the new legal regulations have drawn critics. One of

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<sup>5</sup> Reiner v. Bulgaria, Application no.28411/95

these criticisms questions banning a person's departure for another country upon the demand of the tax office,<sup>6</sup>.

The amendments in the new constitution, which was voted at the referendum on the 12<sup>th</sup> September 2010, annulled the bans on leaving the country on the basis of the demands of the tax office. The 5<sup>th</sup> clause of Article 23 in the former Constitution read as "The freedom of citizens to travel abroad can be limited by civic duties or criminal investigation or prosecution", while the new clause reads as "freedom of citizens to travel abroad can only be limited by a judge's verdict due to criminal investigation or prosecution." The Constitutional amendment has limited the ban on leaving the country to reasons of criminal investigation or prosecution and only by a judge's verdict. With the Constitutional amendment, Article 36 of law no. 6183 has become a violation of the 5<sup>th</sup> clause of Article 23 of the Constitution. Hereafter, the bans on traveling abroad due to tax liability can only be applied as a result of investigation or prosecution of tax evasion under Article 359 of Tax Procedure Law and only upon the decision of a judge. The amendment is in fact an approach well beyond the decisions of the European Court of Human Rights, and annihilates prohibition of freedom to travel due to only monetary tax liabilities.

## **CONCLUSION**

The ECHR and the decisions of the European Court of Human Rights influence the taxation policies of governments and consolidate the rights of taxpayers. The said influence on Turkey can be observed on the recent laws and on the verdicts of the Constitutional Court for tax-related lawsuits. The justifications for many lawsuits that have been settled in favor of the taxpayers make reference to the decisions of the European Court of Human Rights and the ECHR. In addition to this, the increasing number of lawsuits filed to the European Court of Human Rights from Turkey in the recent years has forced the country to seek more fundamental solutions for relevant issues. The recent Constitutional amendment has entitled citizens to the right to make personal applications to the European Court of Human Rights, and has precluded the possible violations of property rights (and violations of other rights may be in question) due to non-retroactivity principle of the decisions by the Constitutional

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<sup>6</sup> Billur Yaltı. "ABD Yüksek Mahkemesinin Lipper Kararından İnsan Hakları Avrupa Mahkemesi'nin Reiner Kararına: Hukuk Standartları" (2006a) *Türkiye Barolar Birliği Dergisi* 66, pp.95-120

Court. The amendment has also annulled the means by which the tax office implemented bans on leaving the country. Now, prohibition on traveling abroad can only be applied upon the decision of judges and only in cases that require criminal prosecution. This has extensively liberated the right to travel for individuals. In conclusion, it can be suggested that ECHR and the decisions of the European Court of Human Rights have undeniable effects on the Turkish tax law.

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