



# Normas tributarias diferenciadas para la igualdad de género: fundamento constitucional del deber del Estado en el derecho turco

Differentiated tax rules for gender equality: constitutional foundation of the state's duty under Turkish law\*

Regras tributárias diferenciadas para a igualdade de gênero: fundamento constitucional do dever do Estado sob a lei turca

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\* This article is an extensively revised and updated version of several subchapters from my book *Toplumsal Cinsiyet Eşitliği Bakımından Vergilendirme* (On İki Levha, 2025), originally written in Turkish which is based on my master's dissertation. Rather than a mere translation, substantial structural modifications have been made, and text has been updated where necessary and enriched with additional literature on the European Convention on Human Rights.

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## Abstract

This article examines the state's positive obligations in the context of gender-sensitive taxation, with a particular focus on the state's duty to eliminate economic and social barriers that restrict individuals' fundamental rights and freedoms, as enshrined in Article 5 of the Turkish Constitution (the Constitution).

*Keywords:* equality in taxation, taxation and fundamental rights, taxation and realization of gender equality.

## Resumen

Este artículo examina las obligaciones positivas del Estado en el contexto de una tributación con perspectiva de género, con especial atención a su deber de eliminar las barreras económicas y sociales que restringen los derechos y libertades fundamentales de las personas, tal como se consagra en el artículo 5 de la Constitución turca.

*Palabras clave:* igualdad en la tributación, tributación y derechos fundamentales, tributación y realización de la igualdad de género.

## Resumo

Este artigo examina as obrigações positivas do estado no contexto da tributação sensível ao gênero, com foco particular no dever do estado de eliminar barreiras econômicas e sociais que restringem os direitos e liberdades fundamentais dos indivíduos, conforme consagrado no Artigo 5 da Constituição turca (a Constituição).

*Palavras-chave:* igualdade na tributação, tributação e direitos fundamentais, tributação e realização da igualdade de gênero.

## Introduction

This article examines the state's positive obligations in the context of gender-sensitive taxation, with a particular focus on the state's duty to eliminate economic and social barriers that restrict individuals' fundamental rights and freedoms, as enshrined in Article 5 of the Turkish Constitution (the Constitution). Gendered taxation – i.e. differentiated tax rules for women and men – can be analysed from multiple disciplinary perspectives. Within the legal scholarship, feminist legal theory and critical tax theory have already highlighted the necessity of questioning the ostensibly neutral structure of tax rules, which often fail to account for gendered disparities. In Turkish tax law literature, aforementioned theories do not have yet any systematic place. On the other hand, taxation and equality

has an extensive literature both in Turkish and European tax law scholarship. Taxation's implications on fundamental rights and freedoms have always been an interest of research. This study approaches the issue from a constitutional law perspective, aiming to assess the implications of the state's positive obligations for women within the tax law domain.

The novel contribution of this study lies in its integration of existing literature on the state's positive obligations with tax law regulations, while establishing a connection to the contemporary issue of gendered taxation, which has gained prominence in numerous national and international frameworks. This approach aims to provide a unique perspective on the intersection of constitutional law, tax law, and gender equality by going beyond of vertical-horizontal equality discourse on the issue of taxation. While vertical and horizontal equality can assess whether a different tax treatment constitutes a breach of the equality principle, they do not provide a comprehensive driving force for initiating such tax treatment. In other words, positive obligations can be seen as the driving force for implementing a non-existent tax treatment that deviates from the general rule.

In this context, the scope of the relevant constitutional provisions (Art. 5 and 10), along with the doctrine of the state's positive obligations, are analysed in light of the jurisprudence of both the European Court of Human Rights (ECtHR or the Court), to which Turkey is a party, and the Turkish Constitutional Court (the Constitutional Court). Building upon this analysis, specific instances of taxation within Turkish tax law that either fulfil or contravene the state's positive obligations are examined. Subsequently, tax regulations introduced specifically or mainly for women are scrutinized within the framework of the state's duty to eliminate economic and social barriers that restrict individuals' fundamental rights and freedoms. Ultimately, this study evaluates the overall legal landscape of tax regulations in relation to the state's duty to emancipate as a means of achieving substantive gender equality and ensuring its effective realization for women.

It must be acknowledged that taxation is neither the sole nor the primary instrument for the fulfilment of this duty. These state duties can manifest in various forms, often necessitating public financial resources, and addressing systemic discrimination requires a range of state actions and policies. However, this article argues that the doctrine of positive obligations can provide a legitimate legal basis for differentiated tax treatments based on gender. Also, considering the necessity for all legal regulations to be coherent with one another and aligned with contemporary developments, the extent to which tax law incorporates and addresses gender equality is a matter of significant importance.

## **I. Research architecture**

Following part of this article begins with statistical overview on women's participation to workforce in Turkey (Chapter III). Although this study does not have an empirical approach, and discrimination against women is a global issue; high-level information on the women's economic position as taxpayers must be conveyed to start advocating for differentiated tax rules.

Chapter IV discusses the doctrine of positive obligations and its reflection within Turkish law. It begins with an examination of the equality principle within the Turkish constitutional framework. The state's duties to ensure equality for women (Art. 10) and to eliminate economic and social barriers that restrict fundamental rights and freedoms (Art. 5) are analysed within the context of the state's positive obligations, as developed through the case law of the European Court of Human Rights (ECtHR). Additionally, the chapter reviews decisions from the Turkish Constitutional Court.

Chapter V begins with an examination of the equality principle in Turkish tax law literature. It then analyses the various intersections between taxation interventions and fundamental rights and freedoms under Turkish law, considering whether these interventions fulfil or infringe upon the state's negative and positive obligations. This section is included to provide a general overview of state obligations within the domain of tax law.

Chapter VI examines specific provisions in Turkish tax law that primarily target women and mothers. Provisions in the Income Tax Law, such as those addressing women's participation in the workforce, and the Value Added Tax, are evaluated within the framework of positive obligations. The final part of this chapter discusses the absence of regulations, highlighting the potential to leverage the positive obligations doctrine as a basis for creating differentiated tax rules in favour of women taxpayers.

Chapter VII concludes the research, summarizing the essential findings and contributions of the previous chapters.

## **II. Brief overview of women's workforce participation in Turkey**

Before delving into the legal framework and doctrinal analysis, it is essential to understand the practical implications of the issue at hand. Specifically, what are the reasons for differentiated taxation for women in relation to the positive obligations' doctrine? The primary rationale for developing such a tax policy is the lower participation of women and mothers in the workforce, influenced by the disproportionate burden of domestic responsibilities arising from societal norms and practices, as well as various social pressures. The following statistics from Turkey provide a clear picture of the general situation for women concerning workforce participation.

According to the 2021 Household Labor Force Survey, the employment rate for individuals aged 15 and older was 45.2 %, with women representing 28.0 % and men 62.8 % of the employed population. When examining labour force participation by educational attainment, it was observed that women's participation was lower across all education levels. Notably, the gender gap was smallest among individuals with higher education (Türkiye İstatistik Kurumu [TÜİK], 2023).

When examining the participation of women with children in the workforce, specifically among individuals aged 25-49 with a child under the age of 3: the employment rate for women in this age group 26.1 %, whereas the employment rate for men was 89.1 %.

This disparity clearly reflects the burden of childcare that is disproportionately placed on women.

According to the 2021 data from the Turkey Family Structure Survey, it is observed that the overwhelming majority of household tasks such as cooking, childcare, washing dishes and clothes, and setting and clearing the table are predominantly undertaken by women (TÜİK, 2022).

### **III. The constitutional foundation of the state's (positive) duty**

In Turkish law and legal literature, there is no explicit or definitive description of positive obligations. Various definitions and approaches exist regarding this doctrine, but they all fundamentally recognize the state's duty to take action (Eltimur, 2018, pp.96-97). The concept of positive obligations in Turkish law is derived from Article 1 of the European Convention on Human Rights (ECHR), which mandates respect for human rights, and Article 5 of the Turkish Constitution, which outlines the fundamental aims and duties of the state. Additionally, Article 10 of the Constitution imposes a specific positive obligation concerning gender equality.

According to Article 90 of the Turkish Constitution, "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail". Although there are differing opinions in Turkish legal literature regarding the hierarchy of these international agreements, such as the ECHR, in relation to domestic law and the Constitution itself, it is clear that the norms protected by these agreements must be implemented by the state through its legislative, executive, and judicial branches (Eltimur, 2018, pp.368-370).

Given that the focus of this article is on achieving fairer taxation for women through differentiated rules within the framework of positive obligations, the principle of equality in the Turkish Constitution, specifically Articles 5 and 10, along with the decisions of the ECtHR and the Turkish Constitutional Court on positive obligations, are examined in detail below.

#### **A. Equality principle**

The principle of equality in Turkish legal literature is expressed in two dimensions: 'formal legal equality' and 'substantive legal equality'. Formal legal equality pertains to the general nature of laws, their applicability to everyone, and their equal enforcement on all individuals encompassed by them. However, the principle of equality cannot be fully understood through this formal aspect alone. Substantive legal equality requires that individuals in the same situation be granted the same rights, responsibilities, and obligations, and be provided with equal opportunities (Özbudun, 2021, p.155). Substantive equality can, in fact, embody a more profound concept, such as affirmative action, as it

involves recognizing the differences of individuals or groups and adopting measures accordingly (Yücel, 2012, p.226). When discussing the equality of two individuals or situations — whether alleged to be the same or different — what is actually being referred to is their equivalence in certain relevant aspects. These aspects must be directly related to the context and purpose of the comparison (İnceoğlu, 2006, p.49).

## **B. State's duty to realize equality for women**

article 10(2) of the Constitution states: “Women and men have equal rights. The state is responsible for ensuring the realization of this equality.” This provision encourages the state's positive actions toward women, thereby establishing a positive obligation on the part of the state to promote gender equality (İnceoğlu, 2006, p.49). However, in the event of non-implementation of the second paragraph of Article 10, it is not possible to impose sanctions on the state, which is the addressee of the provision, nor can the relevant judicial organs be compelled to enforce positive discrimination to fulfil this obligation. In this regard, the provision in question functions as a recommendatory norm (Keskin, 2020, p.441). The author refers to this recommendatory norm as the driving force for a differentiated tax regime in favour of women.

Furthermore, the state is obligated to ensure the realization of this equality within private law relationships as well (Güven, 1999, p.409). In this regard, it is possible to speak of the existence of horizontal effect<sup>1</sup>.

## **C. State's duty to remove political, economic and social obstacles that limit the fundamental rights and freedoms**

Article 5 of the Turkish Constitution reads as follows:

The main objectives and duties of the State are to protect the independence and integrity of the Turkish nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace and happiness of individuals and society; *to remove political, economic and social obstacles that limit the fundamental rights and freedoms of the person* in a way that is incompatible with the principles of social state of law and justice, and to prepare the necessary conditions for the development of the material and spiritual existence of people [italics added].

Within the framework of this article, the obligations of the state can be determined as obligations of protection, providing necessary conditions and emancipation—liberating individuals from constraints that prevent them from exercising their freedoms. Freedom

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1 Horizontal effect is explained in the following of this article.

is the autonomy, right, and capacity of an individual to cultivate their development across all facets and dimensions of life (Savci, 1980, p. 10).

Article 5 of the Constitution imposes on the state the duty to remove political, social and economic obstacles that limit the fundamental rights and freedoms of the individual in a manner incompatible with the principles of social state of law and justice. According to the explanatory memorandum of Article 5, the state is tasked with alleviating the individual's struggle for existence. As a matter of fact, the concept of emancipation is included alongside the freedoms protected in the social state. The state realises this as relative equality of opportunity (Özbudun, 2021, p. 140). It is therefore necessary for the state, which has positive obligations under Article 5, to take measures for the protection of rights, including in disputes between private persons (Kaya, 2022, p. 66).

#### **D. Positive obligations doctrine**

States have positive and negative obligations in terms of ensuring the realisation of the fundamental rights and freedoms that they have undertaken by becoming a party to international instruments and that they have stipulated in their domestic law, especially in the constitution (Akandji-Kombe, 2007, p. 5; Kaya, 2022, p. 58). The function of the State in terms of the exercise of negative rights is not to interfere (Boyar, 2012, p. 54). Therefore, it is possible to express the negative obligation as the obligation to respect. In terms of positive obligation, the state may be held responsible as a result of its inaction when it should have taken action (Boyar, 2012, p. 54). In other words, the state secures the rights of the individual by not hindering him/her (acting negatively) and ensures his/her material and moral development by removing the obstacles around him/her (acting positively) (Güneş, 2014, p. 62).

While it is possible to classify obligations in various ways and to different extents, the European Court of Human Rights (ECtHR) has adopted this binary distinction (Akandji-Kombe, 2007, p. 5; Kaya, 2022, p. 58). At this point, it is valuable to draw attention to Shue's opinion, a strict positive-negative distinction is insufficient for the full realization of human rights. Instead, there are three types of duties, all of which must be fulfilled to fully uphold a fundamental right, though not necessarily by the same individuals or institutions. The tripartite distinction, originally framed by Shue as 'to avoid depriving' (which he later reclassified as 'respect') (Mowbray, 2004, p. 223), 'to protect from deprivation', and 'to aid the deprived', was later reformulated by Asbjørn Eide into the widely used framework of 'respect', 'protect', and 'fulfil' (Koch, 2005, pp. 81-20, 84-85). The positive obligations under the Convention can be theoretically understood through Shue's analysis of the different forms of duties associated with fundamental rights, whereas from a more practical perspective, they can be justified by a combination of explicit requirements set forth in the text of the Convention (Mowbray, 2004, p. 225).

According to Turkish legal scholarship, positive obligations, both within the framework of constitutional law and the European Convention on Human Rights (ECHR),

impose duties on states to protect and fulfil fundamental rights (Kaya, 2022, p.52). Indeed, the state not only serves as the guarantor of rights (Boyar, 2012, p.54) but also assumes an active role in their implementation, thereby necessitating action (Kaya, 2022, p.56). The realization of social and economic rights depends on the state's financial resources (Akad *et al.*, 2016, p.292).

In the general preamble of the Turkish Constitution relating to fundamental rights and freedoms, it is stated that the “necessity for the state to assist in the realization of rights and freedoms” has been adopted and this refers to the concept of positive obligations (Özcan, 2010, p.75).

Pursuant to Article 1 of the European Convention on Human Rights (ECHR or the Convention), “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the first part of this Convention.” However, when the case law ECtHR case-law is examined, it is evident that positive obligations are recognized for nearly all rights protected by the Convention (Boyar, 2012, p.54).

Positive obligations require the state not only to refrain from intentional and unlawful actions but also to implement appropriate measures within its domestic legal system to safeguard the rights of individuals under its jurisdiction (Doğru, 2006, p.60). Defining positive obligations, however, is generally more complex than defining negative obligations (Bayra, 2023, p.74). Before assessing whether a violation of positive obligations has occurred, it must first be established that the state was under a duty to act and that its failure to do so constitutes an omission amounting to non-compliance with its obligations.

### *1. Horizontal effect and gender equality*

The theory of horizontal effect arises in the context of disputes between beneficiaries (individuals) of fundamental rights and freedoms (Boyar, 2012, p.56). Horizontal effect can also be referred to as the ‘impact on third parties’, as it involves entities other than the state as subjects and addressees of obligations. From a theoretical perspective, there are differing views on horizontal effect: one view holds that certain rights can directly influence private law relations, as the effective protection of fundamental rights is only possible in this manner, and fundamental rights reflect the value judgments that society as a whole is obligated to adhere to (Boyar, 2012, p.57). On the other hand, the view that completely rejects horizontal effect asserts that when the state fails to prevent a third party from interfering with a constitutional right, it is effectively permitting such interference. Alternatively, according to the theory of indirect horizontal effect, constitutional provisions and values are referenced when interpreting private relations. Fundamental rights considerations are integrated to private law relations via interpretations of the existing law (Boyar, 2012, pp.58-59). From the perspective of the Turkish Constitution and the ECHR system, the theory of indirect horizontal effect is the most suitable approach for delineating the scope of the state's obligations (Boyar, 2012, p.60).



Horizontal violations can emerge in various forms across different aspects of social life, often stemming from the imposition of the more dominant party on the weaker one. For instance, during a hiring process, when women are questioned about their marital status or plans for marriage and motherhood, leading to their less favourable treatment compared to male candidates, an inequality is created by the employer, the more powerful party. In many such cases, the victims of private relationships are typically those perceived as vulnerable, whether in terms of physical, economic, or other forms of power (Sunay, 2015, p.47).

The state's responsibility for horizontal violations is based on the failure to exercise due diligence, and this responsibility is broader than the concept of administrative liability. However, the scope of this responsibility is shaped by the characteristics of the rights and freedoms alleged to have been violated (Sunay, 2015, p.45). To address or reduce the inequality between men and women, it is not sufficient to merely grant equal rights. The state's obligation in this regard extends to ensuring this equality within private law relationships as well (Eltimur, 2018. p.410).

## 2. ECtHR case law on positive obligations

before delving into ECtHR case law on the issue, three fundamental characteristics of the ECHR system should be noted. Firstly, the decisions of the Court are binding. Secondly, states are required to secure the Convention rights for 'everyone'. Lastly, individual petition to the Court is guaranteed. These interdependent characteristics demonstrate that the Convention operates as an independent and autonomous legal instrument addressing human rights claims brought by individuals. Building upon this, the concept of positive obligations reflects the Court's engagement with societal transformations, as articulated through individual petitions, thereby evolving the Convention as a dynamic and responsive instrument.

When the decisions of the European Court of Human Rights are evaluated chronologically, there has been a general consensus that the obligations of states to refrain from interfering with the exercise of rights (negative obligations) stem from the fundamental principles of the Convention. However, the applicability of positive obligations has not always been consistently established.

The *Belgian Linguistic* case was brought by a group of Belgian citizens who claimed that their right to use their language was violated due to state regulations concerning the language of instruction. The French-speaking applicants argued that their rights related to language and education were being infringed upon in the Flemish region. The Court emphasized the obligation of authorities to take measures that protect individuals' rights. As expressed in numerous judgments by the Court, it was underscored that the Convention

must be interpreted as a whole, as the full realization and exercise of one right or freedom is closely linked to the safeguarding of other rights and freedoms in their entirety<sup>2</sup>.

In the *Marckx v. Belgium* case, the Court applied the positive obligations theory for the first time (Boyar, 2012, p.54). To this day, the Court has not established a definitive interpretation of positive obligations (Mowbray, 2004, p.2). In *Marckx* case, the applicant, Paula Marckx, argued that, as she was unmarried, she was required to undergo a legal process to be legally recognized as the mother of her child. She claimed that, as a result, children born out of wedlock were legally less protected than those born to married couples. The Court emphasized that the prohibition of discrimination outlined in Article 14 must be considered in conjunction with other safeguards provided in the Convention and its additional protocols. This approach underscores the necessity of interpreting the Convention in a manner that aligns with evolving circumstances, as the Convention is regarded as a living instrument<sup>3</sup>. The Court concluded that the term ‘respect’<sup>4</sup> in Article 8 imposes not only a duty on states to refrain from interference but also entails positive obligations (Akandji-Kombe, 2007, p.37).

On the other hand, in the case of *Plattform Ärzte für das Leben v. Austria*, the Court determined that formulating a general theory regarding positive obligations was not suitable<sup>5</sup>. In the matter at hand, the applicant association, comprised of doctors, was conducting an anti-abortion campaign, which led to physical altercations during their demonstration due to the involvement of opposing groups. The judgment noted that, while examining the freedom of assembly and association protected under Article 11, this provision primarily aims to shield individuals from potential state interference and thus cannot be directly applied to interpersonal relationships. However, it was emphasized that ensuring effective freedom of assembly cannot be confined solely to the state’s duty to refrain from interference. The ECHR concluded that the applicant association’s freedom of assembly and association was not violated, as the relevant authorities had taken the necessary measures.

As stated in the judgment of *Plattform Ärzte für das Leben v. Austria*, the refusal to adopt a general theory regarding positive obligations is consistent with and appropriate to the view of the ECHR as a living instrument. Indeed, the ECHR embraces a progressive interpretative approach (Boyar, 2012, p.55).

The primary objective of positive obligations, whether grounded in a specific provision or in the combination of this provision with the general principles of European law, is to ensure the effective implementation of the ECHR and to confer real effectiveness

2 ECtHR, *Belgian Linguistic case*.

3 ECtHR, *Tyrer v. United Kingdom*, 25 April 1978, Application No. 5856/72, para. 4.

4 Within the framework of the protection of private and family life (Article 8), it should be noted that the concept of ‘respect’ is not very clear in terms of limits of positive obligations, and the requirements of this concept can vary significantly from one case to another (Akandji-Kombe, 2007, p.37).

5 See Boyar (2012, p.55); ECtHR, *Plattform Ärzte Für Das Leben v. Avusturya*, Application No: 21 June 1988, 10126/82, para.31.

to rights. Indeed, in its judgment in *Airey v. Ireland*, the Court stated, “The Convention guarantees not theoretical or illusory rights, but rights that are practical and effective.”<sup>6</sup> Johanna Airey, a married woman, claimed that the lack of legal aid provided by the Irish courts prevented her from pursuing divorce proceedings, thereby violating Article 6 of the ECHR, which guarantees the right to a fair trial, as well as Article 8, which protects the right to respect for family life. Airey asserted that she had been subjected to physical and psychological abuse by her husband and was unable to afford the costs associated with legal proceedings. As a result, she was unable to obtain a judicial separation order from the High Court, which would have released her from the legal obligation to cohabit with her spouse (*Airey v. Ireland*, p.4). The judgment emphasized that the mere existence of legal remedies is not sufficient; individuals must also be provided with the necessary economic or social rights to effectively access these remedies. The Court underscored that the Convention must be interpreted in light of contemporary living conditions. Also, it also stated that “Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature” (para.26), which shows economic and social matters cannot be excluded from the scope of the Convention. Concerning practical and effective rights, the Court expects states to actively ensure the protection of Convention rights. Mere non-interference by authorities is insufficient for the full and effective safeguarding of these rights. This highlights the principle of effectiveness in relation to the development of positive obligations (Mowbray, 2004, p.221).

In *Storck v. Germany*,<sup>7</sup> the Court explicitly recognized the existence of indirect horizontal effect, affirming the state’s obligation to protect individuals from the actions of third parties. In this case, the applicant, an adult with a mental illness, claimed that she had been unlawfully detained in a private psychiatric clinic without her consent and had been unable to obtain redress through domestic legal proceedings. She argued that this constituted a violation of her right to liberty and security under Article 5 of the Convention. Rather than addressing state responsibility solely through the direct involvement of law enforcement or the judiciary’s interpretation of domestic law in a manner inconsistent with the ECHR, the Court grounded state responsibility in the relationship between private individuals and the horizontal effect of the Convention. This judgment reaffirmed that the application of Convention rights is not limited to public law relationships but may also extend to private interactions where the state has a duty to intervene to prevent rights violations (Boyar, 2012, pp.66-67).

In another case recognizing horizontal effect, the Court’s judgment in *Siliadin v. France* emphasized that the increasing standards for the protection of fundamental rights

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6 ECtHR, *Airey v. Ireland*, 9 October 1979, No: 6289/73, para.24.

7 ECtHR, *Storck v. Almany*, 16 June 2005, Application No: 61603/00.

and freedoms necessitate a stricter assessment of violations concerning core values in democratic societies.<sup>8</sup>

Although it does not explicitly rely on the positive obligations doctrine, *Thlimmenos v. Greece* judgment is also important for this study because it relates to non-discrimination under Article 14 of the Convention and The Court has developed an interpretation of Article 14 that imposes a positive obligation on states to treat individuals differently when circumstances warrant such differential treatment (Mowbray, 2004, p.202). In the case, the applicant, a Jehovah's Witness, was denied entry to the accountancy profession due to a military conviction related to his religious beliefs. He claimed discrimination under Article 14 and Article 9 of the ECHR, arguing that Greek authorities failed to distinguish between convictions based on religious beliefs and other motives. The Court stated that states have to treat differently persons whose situations are significantly different, and the Convention is violated if different treatment is failed without an objective and reasonable justification (para.44).

Expanding the scope of positive obligations to accommodate the legitimate needs of both complainants and the Court, evaluated within the context of contemporary European societies. Also, this reflects the dynamic interpretation of the Convention (Mowbray, 2004, p.229).

### 3. Turkish Constitutional Court case law on positive obligations

an analysis of the Constitutional Court's decisions within the framework of positive obligations leads to the following conclusions (Kaya, 2022, p.67): When Articles 2 and 5 of the Constitution are considered together, it becomes apparent that the state is entrusted with both negative and positive obligations. In this context, the state's duty to implement protective and corrective measures is established by the Constitution.

When examining applications related to alleged rights, the Constitutional Court conducts separate analyses of substantive and procedural aspects within the axis of negative and positive obligations. The scope of positive obligations can be determined according to the circumstances of each specific case. Additionally, considering the unpredictability of human behaviours, positive obligations should not be interpreted in a manner that imposes excessive burdens on authorities. Furthermore, in cases of alleged rights violations arising from relationships between private individuals, the discretion to determine which party prevails rests with the legislature and the courts.

At this point, it is worth noting that the state's relinquishment of certain aspects of its sovereign taxation authority for various public interests can be argued to play a role in mitigating issues arising from gender inequality without creating any conflict of rights. Indeed, without imposing any dictates on private individuals and institutions, the state's unilateral decision to forgo a portion of the tax on the income or added value generated by

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8 ECtHR, *Siliadin v. France*, 26 July 2005, 73316/01, para. 121.

economically and socially disadvantaged women would not result in any restriction on the rights and freedoms of any other group.

Positive obligations are often linked to economic, social, and cultural rights (Kaya, 2022, p. 58). In this context, when addressing the underrepresentation of women in the workforce, which stems from gender inequality, states are required to take necessary measures to ensure that women can effectively exercise their right to work. Since positive obligations necessitate the state's proactive intervention, a violation of the ECHR (or the Constitution) would occur through "inaction."

#### **IV. Taxation and fundamental rights: Where do positive obligations stand?**

In the field of tax law, particularly within the Turkish legal literature, a systematic analysis of the state's positive obligations has not been extensively undertaken. This article references the limited number of existing sources that have engaged with this issue. Meanwhile, the increasing public interest in taxation, the growing demand for transparency from multinational corporations, and states' prioritization of sustainable and green finance have intensified the pressure to formulate tax policies that are more equitable for the public. Given these developments, it is considered beneficial to examine this issue within the framework of taxation, in parallel with the evolving doctrine of positive obligations.

##### **A. Equality in taxation**

The principle of equality in taxation can be analysed from two perspectives: (a) horizontal equity, which requires that individuals in equal or similar circumstances be subject to the same tax treatment, and (b) vertical equity, which justifies differential treatment based on the varying conditions of taxpayers. While horizontal equity is directly linked to the principle of equality before the law, vertical equity necessitates the active role of state policies in addressing disparities. Certain deviations from the equality principle may be considered legitimate, as the legislature has the authority to introduce exceptions, provided they serve a legitimate purpose and remain consistent with the broader constitutional framework (Öncel *et al.*, 2018, pp.43-45). The differential classification of individuals in similar circumstances without a legitimate justification constitutes a violation of the principle of equality (Saban, 2021, pp.52-53).

The obligation of individuals to pay taxes requires constitutional intervention in certain fundamental rights and freedoms. Consequently, tax law, by its very nature, is an area of law that impacts fundamental rights (Taylar, 2014, p.4951).

The rights most sensitive to taxation include the right to property and inheritance, as well as the freedom to work and enter into contracts (Çağan, 1980, p. 140). Furthermore, the impact of taxation on fundamental rights and freedoms can also be analysed in the context of privacy, freedom of residence and movement, the right to housing (Töralp, 2012,

pp. 167-180), freedom of religion and conscience, the right to education, and the right to social security (Taylar, 2014, pp. 4969-4978).

According to Article 35 of the Constitution, the right to property may be restricted in accordance with the principle of public interest. This restriction corresponds to the “obligation to cover public expenditures” in the context of taxation (Taylar, 2014, p. 4955). Under Article 49 of the Constitution, work is both a right and a duty for every individual, and the state is required to take necessary measures to raise the standard of living of workers, improve working conditions, protect workers, support employment, and create a favourable economic environment to prevent unemployment. Undoubtedly, the limitations and incentives introduced by tax laws significantly affect this area (Güneş, 2014, p. 66). Apart from psychological and social reasons, the primary purpose of work is to earn income, and individuals have the right to property over that income. Therefore, heavy taxation on certain professions may restrict the right to work in those fields, making the economic sustainability of those professions more difficult, which could constitute unconstitutional taxation. Conversely, disproportionate tax exemptions and exceptions introduced to incentivize specific jobs or sectors may disrupt competition and equality (Taylar, 2014, pp. 4973-4974).

In accordance with Article 55 of the Constitution, individuals must receive a fair wage for their labour. This provision aims to ensure the economic security and development of individuals. Considering that a significant portion of the tax burden in Turkey falls on salaried employees (Güneş, 2014, p. 67), the exemption of the minimum wage from income tax<sup>9</sup> aligns with not only the mentioned provisions of the Constitution but also with Article 5 and the principle of the welfare state.

The state must take measures to elevate the living standards of workers, protect employees, support employment, and create an economic environment conducive to preventing unemployment. Undoubtedly, various regulations have been incorporated within the framework of labour law legislation to improve workers’ conditions and provide them with safeguards. Additionally, tax law plays a significant role with its regulatory impact on the economy (Töralp, 2012, pp. 176-177).

As it is explained, positive obligations arise from state’s inaction when it should have taken action. The causal link between an omission and the resulting harm cannot serve as the sole criterion in assessing state responsibility. Policy considerations, such as the state’s knowledge and foreseeability of the harm, as well as the reasonableness of imposing a positive duty to act, also play a crucial role in this evaluation (Stoyanova, 2023, p. 8). Taxation itself constitutes an act of state intervention rather than a mere omission; therefore, it may not directly exemplify a failure to act. However, this analysis proposes that, in the

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9 With the enactment of Law No. 7349 dated 22/12/2021, an amendment was made to the Income Tax Law No. 193, introducing provisions applicable to the wage payments made by employers to employees starting from 1/1/2022. Under this amendment, the portion of the wage corresponding to the remaining amount after deducting the employee’s social security premium and unemployment insurance premium from the gross monthly minimum wage valid in the month of payment is exempted from income tax.

context of taxation, omission should be understood as the state's failure to ensure substantive equality within the design and implementation of a particular tax measure.

Tax interventions exhibit both alignment and dissonance with the state's positive and negative obligations concerning a range of fundamental rights and freedoms, extending beyond the traditional right to property. The following sections present examples of tax regulations within Turkish legislation, illustrating their connection to the state's positive and negative obligations.

## **B. Examples from Turkish tax regulations that uphold or breach negative obligations**

When taxation is examined within the framework of the state's negative obligation to refrain from interference and to respect individual rights, various examples can be found in Turkish tax law. One such example is Article 5 of the Tax Procedure Law, which prescribes penalties for certain individuals who disclose, or misuse confidential information related to taxpayers or their close associates due to their official duties. This provision safeguards tax confidentiality and, by extension, upholds the principle of privacy as enshrined in Article 20 of the Constitution and Article 8 of the ECHR (Taylar, 2014, p.4966).

Pursuant to Article 70 (2) of the Law on the Collection Procedure of Public Receivables, items and books designated for religious worship cannot be subject to seizure. This provision aligns with Article 24 of the Constitution, which safeguards freedom of religion and conscience.

Article 89 of the Income Tax Law allows for the full deduction of donations made to hospitals, schools, dormitories, orphanages, nursing homes, and rehabilitation centres from taxable income, aligning with the state's constitutional duties to protect youth, promote sports, and preserve historical, cultural, and natural assets (Yaltı, 2012, p.431). An amendment extended this deduction to all donations for places of worship in 2012. Although the term "place of worship" is not explicitly linked to a specific religion, its legal definition remains ambiguous and limited, raising concerns of discriminatory treatment. Notably, *cemevis*<sup>10</sup> are not officially recognized as places of worship, and the broader legal framework in Turkey predominantly references mosques. Consequently, Article 89(5) of the Income Tax Law may be considered discriminatory in terms of freedom of religion and conscience (Yaltı, 2012, pp.433-441), constituting a violation of the state's negative obligations.

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10 *Cemevi* is a Turkish word which means "cem house" in English for worship place of Alevis which constitutes Turkey's largest religious minority.

### **C. Examples from Turkish tax regulations that uphold or breach positive obligations**

Pursuant to Article 41 of the Constitution, the state is obligated to take necessary measures to ensure the welfare and stability of the family. In line with this duty, Article 16 of the Inheritance and Transfer Tax Law provides for a reduced tax rate (half of the standard rate) for inheritances or transfers received from parents, spouses, or children, thereby aligning with the constitutional protection of the family unit. Similarly, under Article 73 of the Income Tax Law, the deemed rental income rule does not apply when a property owner allocates a home for the use of their ascendants, descendants, or siblings. Additionally, Article 70 of the Law on the Collection of Public Receivables exempts certain essential assets and income sources necessary for family subsistence from seizure. These provisions constitute positive tax measures that support the state's constitutional duty to protect the family (Yaltı, 2012, p.4972).

Pursuant to Article 20 of the Income Tax Law and Article 5(1) of the Corporate Tax Law, individuals and entities engaged in private daycare, preschool, primary, special, and secondary education activities are granted a five-year exemption from income and corporate tax. This provision is directly linked to the right to education as enshrined in Article 42 of the Constitution. Additionally, under Article 89(2) of the Income Tax Law, individuals are permitted to deduct a portion of their education expenses—including those incurred for their spouse and minor children—from taxable income. These measures represent positive steps taken by the state to facilitate the constitutional right to education (Yaltı, 2013, p.4973).

On the other hand, despite the fact that Article 56 of the Constitution guarantees everyone the right to live in a healthy and balanced environment, there are no systematic tax regulations in place to promote environmental protection or foster environmental awareness (Yaltı, 2013, pp.4976-4977; Göker, 2011, pp.64-70).

### **V. Taxation and realization of gender equality: Analysis of regulations via positive obligations lense**

#### **A. Exemption for nursery and daycare services provided to women employees**

Benefits provided by employers to women employees in the form of nursery and daycare services are exempt from income tax. According to Article 23(16) of the Income Tax Law, in cases where these services are not provided directly by the employer, the exemption applies if the payment is made directly to the income or corporate tax liable entities providing these services, provided that the monthly payment for each child does not exceed 15% of the gross monthly minimum wage.



Payments made to providers of nursery and daycare services that exceed the specified exemption amount, as well as cash payments and benefits provided to employees for this purpose, are subject to taxation as wages.

Therefore, for a women employee with a child in the preschool age group:

a) If the employer provides nursery and daycare services at the workplace, these services are exempt from tax. The exemption also applies if the employer provides these services at another location owned or rented by the employer.

b) If the employer does not provide these services but makes payments to a tax-liable entity that provides them, a portion of the payment is exempt from tax.

c) If the employer does not provide these services and makes cash payments to the employee for these services, the exemption does not apply.

This regulation aligns with the state's positive obligations, serving as a form of positive discrimination and a gender-sensitive tax policy. However, considering its narrow scope of application, it must be acknowledged that it lacks sufficient effectiveness.

## **B. Exemption for income from homemade products**

Article 9(6) of the Income Tax Law provides a tax exemption for individuals who sell homemade products such as towels, sheets, carpets, and food items without employing external workers, provided that the total sales amount does not exceed the annual gross minimum wage. These products can be sold through personal efforts, including online platforms, but not through commercial or professional activities.

The word *woman* is not explicitly mentioned in the legal text, and the language of the regulation can be considered gender-neutral. However, the production of the specified items is predominantly carried out by women in their homes. This highlights the fact that the exemption is, in effect, sensitive to gender considerations. From this perspective, the regulation facilitates women's empowerment by enabling them to contribute to both their own and their families' economies within their available means, thereby fulfilling the state's positive obligations.

## **C. Income from family-run business**

According to Article 41(2) of the Income Tax Law, payments made to a person's spouse and minor children for their work in a business, including wages, salaries, bonuses, commissions, and compensations, cannot be deducted as business expenses from the tax base. Given the widespread practice of spouses and children working in family businesses in Turkey, this regulation, despite its intention to prevent fraudulent intra-family transactions, conflicts with the principles of contractual freedom and the right to work. Furthermore, at first glance, the rule does not appear to contain gender-based discrimination, however it implicitly reinforces traditional gender roles. While women's labour in household and family businesses should be compensated and protected by law, this regulation

excludes the women's experience from taxation practices, thereby not aligning with positive obligations of the state.

#### **D. Taxation of alimony payments**

According to Article 25, paragraph 8 of the Income Tax Law, alimony payments are exempt from income tax regardless of the amount. As regulated under the Turkish Civil Code, there are four types of alimony: precautionary alimony, contributory alimony, alimony for poverty, and support alimony. None of these alimony types are specifically tailored to women or men. Given that, in general, women are more likely to leave the workforce due to marriage and childcare responsibilities and consequently face a higher risk of falling into poverty after divorce, it can be argued that this regulation aligns with gender equality considerations and the state's positive obligations.

#### **E. Women's consumption in terms of value added tax**

When examining the systematic operation of value-added tax (VAT) and the classification of needs, it is evident that the exempted products are generally those essential for human survival. Additionally, products considered basic necessities are subject to a reduced VAT rate. Therefore, certain products necessary for an individual's well-being should be accessible without tax (Crawford & Spivack, 2019, pp.450-451). In this context, reduced VAT rates and exemptions are methods employed to serve vertical equity (De La Feria & Walpole, 2020, p.640).

On March 29, 2022, with the publication of Presidential Decree No. 5359, the VAT rate on sanitary pads and tampons was reduced from 18% to 8%. While this change is undoubtedly a significant achievement, it is crucial that the tax reduction applies not only to disposable sanitary pads and tampons but to all menstrual products (Aldanmaz & Ekşi-taşcıoğlu, 2022, p.26). On the other hand, with Presidential Decree No. 7346 published on July 7, 2023, increased VAT rates.<sup>11</sup> As a result, the VAT rate for products such as soap, shampoo, detergents, disinfectants, wet wipes, toilet paper, paper towels, paper tissues, and napkins was raised from 8% to 20%. In light of this recent regulation, the VAT rate on sanitary pads and tampons has increased to 10%, and the VAT rate on other cleaning products has been raised to 20%.

The taxation of menstrual products is not only a matter of tax law but also relates to the right to health, public health, as well as the rights to education and employment, particularly in terms of menstrual hygiene and health.<sup>12</sup> Therefore, the taxation of these products

11 Thus, the rate previously applied at 8% has increased to 10%, and the rate previously applied at 18% has increased to 20%.

12 For details on studies showing how the lack of menstrual products affects women's education and working life, see Crawford & Spivack (2019, pp.454-456).

not only violates positive obligations related to gender equality but also infringes upon the right to health and state's positive obligations. The removal of VAT on menstrual products would undoubtedly constitute a significant human rights achievement (Crawford & Spivack, 2019, p.452).

## **F. What about non-existent regulations?**

Despite the presence of certain positive examples mentioned above, it is quite difficult to speak of a systematic, gender-conscious tax practice within the Turkish tax system. Consequently, it is also challenging to assert that tax law fulfils the state's positive obligations in this regard. At this point, it is worth emphasizing that tax regulations are not the sole instrument for implementing positive obligations.

On the other hand, as demonstrated in the previous sections, neither the case law of the ECtHR nor that of the Turkish Constitutional Court on positive obligations establishes a direct obligation to introduce tax regulations incorporating affirmative action. Indeed, there has been no specific case before these courts that has examined a tax provision in connection with the state's positive obligations. Nevertheless, it should be underlined that the doctrine of positive obligations is still evolving, and the Convention, as a dynamic legal instrument, continues to develop in parallel with this evolution.

Furthermore, Article 10 of the Turkish Constitution is explicit in imposing a positive obligation on the state to achieve substantive equality for women. Thus, this constitutional provision alone is sufficient to question and critique the absence of tax rules aimed at fulfilling this obligation.

## **Conclusion**

Gendered taxation, which entails the differentiation of tax rules based on gender, can be analysed from various disciplinary perspectives, such as critical tax theory and feminist legal theory. This study examines the issue from a constitutional law standpoint, integrating the existing literature on the state's positive obligations with tax law regulations while establishing a connection to the contemporary discourse on gendered taxation.

In Turkish law and legal scholarship, the concept of positive obligations does not have an explicit definition. However, its foundation is derived from Article 1 of the ECHR, which mandates respect for human rights, and Article 5 of the Turkish Constitution, which outlines the fundamental aims and duties of the state. Furthermore, Article 10 of the Turkish Constitution imposes a specific positive obligation concerning realizing the equality between men and women. These provisions collectively form the legal basis for the state's duty to actively promote and ensure substantive gender equality.

Within Turkish legal literature, positive obligations, both in the framework of constitutional law and under the ECHR, impose duties on the state to protect and fulfil fundamental rights. Before determining whether a violation of these obligations has occurred,

it must first be established that the state was under a duty to act. In the context of this research, this duty comes as ensuring that regulations do not create or perpetuate gender-based disparities and the state does not only acknowledge formal equality but also to implement measures that eliminate economic barriers preventing individuals from fully enjoying their fundamental rights. In line with the theory of indirect horizontal effect, positive obligations also apply to private law relationships. As emphasized by the European Court of Human Rights, fundamental rights must be practical and effective in their application. Accordingly, the manner in which states fulfil their positive obligations plays a crucial role in determining the extent to which these rights are realized.

Taxation, by its very nature, constitutes a constitutional intervention in certain fundamental rights and freedoms. Consequently, tax rules must be carefully examined to determine their compliance with both the state's negative and positive obligations. This assessment is particularly significant in the context of gender, as taxation has the potential to mitigate gender-based economic disparities.

An analysis of tax rules that primarily affect women in Turkish law reveals that, while certain provisions align with positive obligations, there is no systematic implementation of gender-sensitive tax policies. In the author's view, this absence should serve as a justification for leveraging the doctrine of positive obligations, along with the specific requirements of Articles 5 and 10 of the Turkish Constitution, to introduce tax regulations that account for gender differences. While vertical and horizontal equality frameworks may determine whether a differential tax treatment constitutes a violation of the equality principle, they do not provide a compelling legal basis for actively implementing such measures. Positive obligations, in contrast, offer a substantive justification for the introduction of gender-responsive taxation, ensuring that fiscal policies contribute to the broader goal of substantive gender equality.

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