100 Years of Taxes as a Means of State Functioning

Marie Karfíková[1]

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Abstract

The article[2] is prepared for the International Scientific Conference "Currency, Taxes and Other Institutes of Financial Law in the Year of the 100th Anniversary of the Founding of Czechoslovakia". The chosen topic is up-to-date from the point of view of ongoing discussions on the tax obligations of both natural and legal persons. Taxes are accepted by law in the Parliament of the Czech Republic, but they are also the subject of decisions of the Supreme Administrative Court and the Constitutional Court. Especially, taxes are also a scientific and pedagogical subject at the Faculty of Law of the Charles University. In today's socio-economic and social order, in a society where there is no planned economy, taxes are significant in terms of their status as one of the few tools and instruments of managing and influencing the whole economy and the standard of living of the population. The aim of my article is to focus in detail on the provisions of constitutions related to taxes and finally on the subsection 11(5) of the Charter of Fundamental Rights and Liberties, especially in the context of its 100 years of historical development.

The framework for examination is the current concept of the rule of law and the concept of tax law as a tax law in a broad sense (not only taxes, but also fees and other similar payments). The interpretation of the text is complemented by a historical excursion. Finally, I deal with the future of tax laws. In conclusion, I try to evaluate the current tax legislation in the constitutional order of the Czech Republic.

Keywords

Charter of Fundamental Rights and Freedoms; tax law; budget; taxes, fees and other similar payments

[1] Prof. JUDr., CSc., Head of the Department of Financial Law and Financial Science at the Faculty of Law of the Charles University, the Czech Republic and President of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic. The author specialises in tax and insurance law. Contact email: karfikov@prf.cuni.cz. ORCID: 0000-0002-5655-7858.

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1 Introduction

The stems for this article are historical, general legal-theoretical and general economic foundations for imposing taxes and for legal regulation in the Czech Republic.

The original concept of a ruler functioning both as a governor and an owner of a whole state has evolved during the medieval era. In conclusion, the conflict between the ruler and his vassals lead to the distinguishing of property rights and state power. As early as this moment, the difficult process of the forming of terms of possible state interventions into private property ownership arose. The tax duty of the owner in a form of restraining of his ownership rights lead to the legitimisation of the first assemblies which constrained the ruler. This is not only the case of the "no taxation without representation" principle in the Magna Charta Libertatum. For example, the same principle was contained in the Great Privilege issued by the Bohemian King John the Blind in 1310. Even now, this principle is incorporated into the constitutional principle allowing to stipulate taxes only by an act of parliament. John Locke built his contractual concept of a state on the ownership liberty: *"From all which it is evident, that though the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniencies of life, was perfectly his own, and did not belong in common to others"* (Locke, 1764). The Declaration of the Rights of the Man and of the Citizen of 1789 (in French: *Déclaration des droits de l'homme et du citoyen de 1789*) was enacted by France's National Constituent Assembly on the 26th of August 1789. It was the first step towards the creation of the first constitution of France. The declaration consisted of 17 articles, which deeply influenced the concept of European thinking on these rights. According to Art. 17 of the declaration, the property is *"inviolable and sacred right, [and] no one can be deprived of [its] private usage"*.

Philosophers, lawyers, economists and politicians were concerned with the development, forming and effectiveness of taxes and taxation throughout the whole history of their respective fields.[3] The formation of taxation is influenced by existing conditions and it always arises from political decisions approved by a legislative body. This fact holds both in history and today. Naturally, history has certain development and its specifics. Historically, one can observe the development of taxes, such as transformation from tax in kind to tax in money, stipulation of new types of taxes or new approaches to assess and collect taxes.[4]

[3] For example, during Diocletian's reforms (3rd century AD), the following taxes were enacted: land tax (based on land value), poll tax, labour force tax and cattle tax.

[4] To demonstrate, during the reign of Elizabeth I of England, taxes had the lowest rate in Europe, since the upper class laid down tax rates for themselves. In the 1330s, Edward III of England stipulated a new tax on movables which evolved to property tax. In 2011, 500 years elapsed since the first publishing of the book *Stultitiae Laus* [In Praise of Folly] by the Dutch philosopher and theologist

In the 16th century, most probably for the first time in history, the Italian economist Guetti Lodovico (Zubaľová, 2008) came with an idea and a proposition on the righteousness of tax collection. He claimed, that collection of taxes can be understood as a certain counter value of services which are provided by the state to its citizens, such as security or protection of private property. On the other hand, according to R. Pipes (Pipes, 2000), in the medieval era, the duty to regularly pay taxes is perceived as a loss of personal freedom.

In general, it can be documented that the stipulation of taxes, or their increase, was related in the past with an increased military danger or with a state of war. For instance, the enacting of direct income taxation[5] in the United States of America was historically related to financing of war, and the tax was revoked in 1872.[6]

Concepts explaining the substantial essence of taxes and taxation related to the functioning of the economy, but also to critical views on their existence and application, can be found in the works of famous classic economists, such as A. Smith,[7] D. Ricardo,[8] as well as in the works of other famous authors, including J. M. Keynes,[9] A. Laffer,[10] M. Friedman[11] and W. Eucken.[12] The abovementioned short historical excursus leads us to an opinion, that the perception of taxes developed in the past. However, this development is still an open issue (Bujňáková et al., 2015). In the perspective of the abovementioned facts, it can be concluded, that taxes and tax systems in their current form are the invention of the 19th century. In addition, I would like to mention here important domestic theorists, namely J. Kaizl (Kaizl, 1892), V. Funk[13] and his

Desiderius Erasmus of Rotterdam, who claimed, that not the tax rate, but the tax optimisation is what matters.

5 The tax was stipulated in 1861 with a progressive tax rate ranging from 3% to 10%.

6 The Supreme Court of the United States ruled in 1895, that an act stipulating a regular income tax is unconstitutional. However, this tax was afterwards reinstated in a permanent form under the 16th Amendment to the United States Constitution in 1913.

7 Adam Smith proposed, that state expenditures should be paid using exclusively tax revenues. Moreover, he formulated four principles, which should be applied to any tax: 1. equality – everybody should only pay taxes proportionate to their income; 2. certainty – taxes should be estimated precisely; 3. convenience – taxes should be collected in a time and manner, which is convenient to taxpayers; and 4. economy – costs related to the collection of taxes should be minimised (cf. Smith, 1958).

8 According to David Ricardo the fundamental task of economic theory is the formulation of rules which governs distribution in economics.

9 See Keynes, 1936.

10 A. Laffer is a supporter of tax reforms and lowering of taxes, which should endorse motivation to labour, to invest to save money. As a result, it should lead to the increase of work productivity and consecutive economic growth.

11 M. Friedman proposed the negative income tax, which should replace social security benefits and other similar state subsidies. The purpose of this tax is to eliminate costs related to the existence of the social welfare programs, which could be replaced by the reformed tax system.

12 According to W. Eucken, on the competitive market, the progressive tax has a social sense. Consequently, he found essential to set the limit for tax rate which will not lower the interest in investing.

13 V. Funk differentiated between a tax in objective sense and a tax in subjective sense. In the objective sense, tax is the right of a public body to a payment laid down and delimited by a legal norm. In the subjective sense, tax is a legal relation consisting in the state's objective legal claim to demand certain payment as a result of the emergence of particular facts.

work (Funk, 1934: 36) and K. Engliš (Engliš, 1929: 82), who defined tax as a subsidiary payment of public administration pursuant to the capability of taxpayers. In this context, it is worth reminding a theoretical conception of K. Engliš, who claimed, that individualistically managed state-owned enterprises are operating in accordance with the principles of private management – their profits are transferred to the state and their eventual losses are paid by the state as well. From all of the state revenues, taxes correspond to solidaristic principles of economy. K. Engliš characterises taxes as a price for certain state activity. This theoretical construction was novum in the then financial science. It was, in fact, a new formulation of the German school base, where this symbiosis lasted throughout the interwar period. Today's state budget revenues take the form of irreversible levying of a certain proportion of the income created by the entities involved in the process of social reproduction.

The textbook of Financial Law, namely the 6th revised edition (Bakeš et al., 2012: 88), summarises the remarks on the origin of taxes and fees, so that the name of the payment, whether it was a tax, fee or other similar payment, played only a secondary role. The decisive factor for the construction of state incomes is the choice of such a tool that would bring the necessary revenues to the fiscus and at the same time minimise the resistance of the obligated entities. The theory of financial law and financial science (Karfíková et al., 2018: 142) could not avoid the questions of tax law, which it defines as a set of legal norms and other rules governing taxes. Taxes are defined as irrecoverable, involuntary, non-equivalent, and non-sanctionary payments imposed by law and administered by the state or by other persons performing financial public administration, which are public revenues of public budgets, which are generally non-purposeful, proper, regular and planned.

The state needs enough resources to be functional and to fulfil all the functions that society expects from it. A tax is therefore a legitimate and necessary measure. Original "ad hoc" taxation has been gradually replaced by regular taxation, which we can perceive as "confiscation without cause" as a fair compensation for the services that citizens provide to the state, or as a contribution to those who are more capable of solidarity or fulfilment of social commitment to others. The modern democratic state should ensure not only equality before the law but also a more even distribution of material resources so that life aspirations can be fulfilled.

2 The Historical Excursus into Tax Stipulation

In this part of the article, I will focus on the 100 years long history of the existence of an independent Czechoslovak state. For the legal order of the newly established republic, the act of the National Committee of the Czechoslovak Republic of October 28, 1918 (Act No. 11/1918 Sb.) was fundamental, which stipulated in its Art. 2: *"All existing provincial and imperial laws and regulations remain* pro tempore *valid."* Surely, this proposition applied on tax rules as well, such as on Act No. 220/1896 ř. z.,

on personal direct taxes, which was derogated during the tax reform in 1927, namely by Act No. 76/1927 Sb. z. a n., on direct taxes. It is clear from the above that taxes have always been imposed by law. The Czechoslovak state was founded on October 28, 1918 and the necessary laws were adopted by the so-called National Committee, which later became the National Assembly. Officially, the state became a republic on November 14, 1918, based on the adoption of the Provisional Constitution (Act No. 37/1918 Sb.), which established the powers of the President, and established the powers of the executive and executive power. Legislation in the field of tax law has changed after the tax reform, whose mastermind was Karel Engliš. However, the tax reform was already based on the constitutional principle enshrined in the Constitutional Charter of the Czechoslovak Republic (Act No. 121/1920 Sb.), with subsection 111(1), which stated: *"Taxes and other public levies [dávky]*[14] *may be imposed only by an act of parliament"*. Basically, this text blended to other constitutions of our republic. Concerning financial theory, it is interesting that the concepts of "taxes" and "public levies [dávky]" are set equal (Funk, 1934: 37). The last day of February 1920 was a historical moment due to the passing of the first definitive Czechoslovakian Constitution. It has become another milestone in our history, as it has made a symbolic constitutional full-stop of the transition from the Austrian Monarchy to the First Republic of Czechoslovakia. The work can be evaluated positively, under the supervision of professor Jiří Hoetzel and Alfréd Maissner it was elaborated by a number of outstanding lawyers, such as František Weyr, Professor of Masaryk University in Brno. The Constitution was valid in Czechoslovakia until 1948, when the Constitution of 9 May was enacted. It is obvious that the Constitution of the First Republic, which has been published 98 years ago, has become an inspirational source for the authors of the current Czech Constitution.

The next constitution, the Constitution of 9 May (Constitutional Act No. 150/1948 Sb.) enacted in 1948, incorporated the principles of taxation in its section 33, the principle of taxation as follows: *"Taxes and public levies [dávky] may be imposed only by an act of parliament"*. By comparing the above texts, the text of 1948 is clearly more concise. The equality of the terms "taxes" and "public levies" [dávky] remained. However, the provision does not contain the word "other" anymore. In my opinion, the deletion of the word "other" leads to a substantial impact. Using the grammatical interpretation of the Constitutional Charter of 1920, it is possible to assert that taxes are one of the public levies [dávky]. On the contrary, it can be concluded, that taxes and public levies [dávky] are two different categories in the Constitution of 1948. It is interesting to compare these two constitutions regarding the systematic inclusion of the constitutional rules concerning the stipulation of taxes, fees and other similar payment. In the Constitutional Charter of 1920, the abovementioned provision is included under title V – Personal and Property Liberty. Thus, the stipulation of taxes was perceived as a restriction of property liberty regarding systematic interpretation.

[14] In this article, I differentiate between the Czech terms of "dávky" and "odvody". Unfortunately, both should be translated into English as "public levies". Therefore, I use for both the term public levies followed with a Czech term in square brackets.

On the other hand, in the Constitution of 1948, the provisions concerning taxation were in the first chapter Rights and Obligations of Citizens under the group title Basic Obligations of the Citizen to the State and to the Society. Therefore, direct correspondence of imposition of taxes and the restrictions of property liberty cannot be concluded (Boháč, 2015: 4–5).

The Constitution of the Czechoslovak Socialist Republic, which came into force on July 11, 1960, did not contain the provisions on taxation similarly to the provisions of the abovementioned constitutions. The term "tax and fees" is mentioned in the third sentence of subsection 86(2): *"The act of parliament determines which taxes and fees are the income of the municipality"*. Despite this absence, the principle that the taxes were imposed only by an act of parliament was still followed. However, the absence of a constitutional provision had its consequences. The tax procedure was enacted in Decree No. 16/1962 Sb., on tax and fees. Despite the fact, that the decree is a subordinate act, it regulated not only the procedural aspect of tax administration, but also, of course, lots of obligations of natural and legal persons. It is interesting to note that, according to the available decisions of the courts after 1960, no one referred to the absence of constitutional provisions limiting imposing taxes only to acts of parliament. The Decree was then derogated by Act No. 337/1992 Sb., on the administration of taxes and fees. Thus, the procedural regulation in the decretal form was valid for 30 years, without a single amendment.

In the next constitutional act, Constitutional Act on the Czechoslovak Federation (Constitutional Act No. 143/1968 Sb.), the cited principle was reinstated in subsection 12(1), which reads: *"Taxes and fees may be imposed only by an act of parliament"*. In this context, I point out that the term "public levies" [dávky] used by the Constitutional Charter of 1920 as well as the Constitution of 1948 has been replaced by the term "fees", which is narrower. Interestingly, subsection 2 introduces a new term "public levies" [odvody] which could be imposed by the Federal Assembly, while according to subsection 3, taxes and fees not mentioned in subsection 2 could be imposed by the national councils, i.e. the Czech National Council and the Slovak National Council. However, there was no constitutional rule stating, that public levies [odvody] can be imposed only by an act of parliament.

The issue of the above provisions in the current Constitution will be described in the following chapter, also because it is not a historical but a currently valid legal state.

3 The Constitutional Foundations of Taxes, Fees and Other Similar Payments

Taxes are constitutionally based in subsection 11(5) of The Charter of Fundamental Rights and Liberties (hereinafter: the Charter) (Resolution of the Presidium of the Czech National Council No. 2/1993 Sb.), which states: *"Taxes and charges may be imposed only by an act of parliament"*. *Nullum tributum sine lege* as a rule

of law principle. Historically, the principle of nulum tributum sine lege is related to the emergence of English parliamentarism, when one of the first prerogatives of parliament vis-à-vis the sovereign was approving of taxes (Svatoň, 1997: 10). This is the source of the English proverb "no taxation without representation".[15] With the rule of law principle, requirements for the quality of tax laws, regarding their certainty and predictability, are added to the requirement of representation, which are currently ensured with the democratically legitimate, directly elected legislative body. The same holds for the long time economic theory, as well.[16] The abovementioned is reflected in the constitutional order of the Czech Republic.

Subsection 11(5) of the Charter – a formal reservation of the law – is on the other hand primarily a formal reservation of the law (Filip, 2011: 181). The institute of the formal reservation of the law is linked to the protection of certain institutes from the intervention of the executive power, and thus also relates to the division of power. Imposing of taxes is constitutionally entrusted to the Parliament of the Czech Republic which is the exclusive holder of legislative power (Gerloch and Maršálek, 2005: 153–170; Kysela, 2006), which is not entitled to transfer this power to another component of state power. The legislator is therefore required to set directly in the tax law a specific arrangement, which enables to reconstruct the entire content of the tax liability. In decision ref. no. Pl. ÚS 3/95, the Constitutional Court ruled that it is against subsection 79(3) Act No. 1/1993 Sb., (hereinafter: the Constitution) of the Constitution, if a term which delimits an object of protection is determined in a legal act with lower legislative power. This ruling is reflected in the theory of financial law as a requirement, to set all basic elements of a tax in an act of parliament. However, other aspects of the tax can be set in an act with lower power (Bakeš and Boháč, 2009: 257). The tax object, which is a subjective obligation of a person to the state, is an action, an activity or a behaviour set by a legal norm. The legal reason (title) of the tax is determined by a special law, which is a base for the person's obligation to the state. The tax (charge) obligation arises from the fulfilment of certain statutory legal conditions, conditions which on the part of the state (municipalities) create a legal right to tax (a fee) and a tax (fee) obligation on the part of the person.

The tax has an enforceable character (collection of taxes is based on a law), the law precisely defines the facts establishing the tax liability, the amount and the due date. In contrast to a fee, a tax is a payment which is not collected as compensation for an individual advantage (Decision of the Constitutional Court ref no. Pl. ÚS 14/2000). The Supreme Administrative Court ruled: *"Taxes can be determined only by an act of parliament under the procedure set by an act of parliament. Only after the conditions set by the law are met, the determination of a tax object can be found as legitimate. Therefore, it is completely unacceptable to set the object of taxation, that is, what is to be taxed and withdrawn from the individual's sphere of property, in any other way, moreover not by legislative power but by executive power (i.e. by an implementation decree or*

[15] For fiscal context see Antoš, 2013: 94.

[16] The so-called second canon of taxation by Adam Smith is well known in this context.

'Accounting procedures' issued by an administrative body, here by the Ministry of Finance). In such a case, there is a violation of the constitutional principle of the division of power" (Judgement of the Supreme Administrative Court ref. no. 5 Afs 45/2011-94). In this context, I note that the tax system is an essential mean of material existence of the state, but also a test of the legitimacy of the institution of the state. The tax scheme must be transparent, predictable and proportionate in terms of its design and application. Otherwise, the legitimation function mentioned cannot be fulfilled and, in the end, it casts doubt on the very meaning and function of the state (Judgement of the Supreme Administrative Court ref. no. 2 Afs 62/2004).

4 The Future of Tax Laws

In the Czech Republic, it holds *de constitutione lata* that taxes can be set by an act of parliament, as I have stated several times before. At the constitutional level, it is not only the requirement of legality (emphasising the necessity of rules that will be general, accessible and predictable), but also the requirement of legitimacy, which is fulfilled by the decision of the democratically elected and thus legitimate legislator on the distribution of the tax burden. The Constitutional Court is, during the constitutional review of taxes, bounded with the principle stating that taxation is primarily a political issue and the Constitutional Court can interfere to taxation only if it is extremely disproportional. That means, that apart extreme moments, taxation is a matter of political consensus or discretion of the legislator. In this context, it is impossible not to mention a somewhat "sarcastic" comment by the Constitutional Court, which stated that a concept of taxable income consisting of taxes, fees or other mandatory payment is original, but according to the majority of the members of the Constitutional Court it is constitutionally conforming (Decision of the Constitutional Court ref no. Pl. ÚS 24/07).

However, this so-called domination of the legislator over the content of tax laws must have an opposite side as well, which is a legitimate expectation of a taxpayer that the legislator enacted a law, which he actually wanted to enact, and that his intention is thus covered by the words of the law. In other words, if a taxpayer acts in accordance with the law, he must not be disappointed in his trust and exposed to the situation in which the state authorities will tell him, that he could assume that his actions would have tax consequences, so he should accordingly quantify his tax liability, even if it is not clearly stated in the law.

Tax laws have internally encoded a certain degree of effort by their recipients to bypass the rules. This stems from the very phenomenon of tax optimisation, i.e. the planning of business transactions in a way, which leads to the lowest possible burden on the taxpayer. Thus, the principles of tax justice and equality, on the one hand, and the predictability of law and legal certainty, on the other, come to a state of constant tension. Already this conflict itself is a serious problem. Nothing but updating of this

tension is the concrete manifestation of the undesirable behaviour that the present state has to deal with. There may be more and more frequent use of tax havens that threaten the budget resources of many European states, as well as carousel frauds, which are criminal actions, that exploit the specificities of the European value added tax system.

Therefore, the tendency to weaken the status of the law in favour of other legal regulation techniques that are more resilient to circumvention is not surprising. In general, a higher probability of circumvention lies in casuistic laws, i.e. one that describes the individual predicted situations and then assigns a solution to them. It is obvious that sooner or later a situation will be identified that was not intended. We see a lower risk in this respect in a general law, while defining in a sufficiently understandable way the purpose – thus opens the possibility of filling the gap with completion of the law, in a reviewable process.

It is necessary to warn against the effort to replace the unambiguous provisions of a law with the internal instructions of the tax administration bodies. Although they have the potential to provide law enforcement recipients with information on how tax administration will interpret adopted tax laws, this does not mean that these instructions can operate in a normative way, as is the case law.

Subsection 11(5) of the Charter can be read not only as the constitutional power of the legislator to enact tax law (and thus interfere with the right to property protection), but also as the constitutionally guaranteed right of an individual to the existence of known tax rules accepted by a body of political legitimacy.

If the assumption that the distribution of the tax burden is primarily a political issue that the Constitutional Court has little to say holds, it is necessary to add that democratic legitimacy cannot be replaced by case law or normative acts of executive bodies. If taxes are to continue to be the subject of political struggle, it is imperative that the political representation be aware of this responsibility during the legislative process, and not only from the moment, when the minority files an action to the Constitutional Court. The primary objective of tax administration is not an easily manageable tax, but a distribution of the tax burden corresponding to the social consensus. The analysed case law suggests that abuses of normative activities are turning against public budgets.

Currently, an act of parliament enacted by a democratically legitimised legislator is irreplaceable, as it is the determination of rules based on political will and not based on a technocratic discussion of finding objectively correct solutions. Replacing the law with other sources of law would mean nothing less than abandoning the principle of "no taxation without representation".

5 Conclusion

As the past one hundred years of the existence of the Czechoslovak state have shown us, the tax policy pursued by the tax policy plays a significant role because it can motivate individuals to make their financial decisions, both natural persons and legal

entities. Regarding the reasonable objectives to which these tax incentives are directed, the legislators usually state them. However, if the objective is only increasing of revenues, the legislators usually do not state this objective. Tax incentives are combined with many other factors, especially motivational and dissuasive ones. In any case, tax policy is not just an economic policy but is also a hidden social policy. Progressive tax is an economic factor with a strong egalitarian effect, as it eliminates many unpleasant consequences of stratification. For example, in the field of inheritance taxation, radical solutions have already been applied several times. Extremely high taxation of inheritance may, for example, imply that the legislature favours wealth earned rather than inherited. However, defining a policy on tax policy is by no means a simple and straightforward decision-making process. This policy is part of the whole set of economic decisions, largely based on the redistribution of resources, that is, the social order of society.

The complexity and the lack of clarity of the legal system becomes an obstacle to its applicability, and tax laws are becoming one of the examples of regulation so complicated that the legal practice gradually creates some strange fiction of alternate laws. Especially in the field of tax law, these phenomena are particularly numerous and, in addition to the written legislation, not used by both taxpayers and tax administrators, there is a kind of parallel and unwritten customary law. I am not able to judge this situation from the point of view of legal sociology and it is not something that could attract readers. From the point of view of legal practice, these phenomena, where both tax administrators and tax subjects have for years a different course of action than the law, seem to indicate a mutual (up to touching) agreement, can be pointed out in the relevant administrative (tax) or court proceedings, and claimed to be used as valid rules and wait for the final decision to be made by the higher courts and the Constitutional Court.

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