Article

Constitutional Requirements for Substantive Tax Law in the Federal Republic of Germany

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political constitution; tax system; tax principles; taxpayer rights; constitutional jurisprudence.

ABSTRACT:

This article explains that the German constitutional regulatory framework on tax matters is not complete. Notwithstanding this, the Constitutional Court has built through its rulings a constitutional tax regime based on current constitutional norms, principles and values, fundamental rights and procedures described in the Constitution. The Constitutional Court review has been carried out through more than one hundred cases on various types of taxes and various aspects of the tax system. This work studies the guarantee of human dignity in taxation, the principle of tax generality and other tax foundations, non-discrimination in the tax field, the non-fiscal purposes of taxes, private property and fundamental freedoms, equality in the application of the law, the requirements of the law to establish taxes or the principle of tax legality, legal certainty, the requirements on the tax procedure.

PALABRAS CLAVES:

constitución política; Sistema de impuestos; principios fiscales; derechos de los contribuyentes; jurisprudencia constitucional.

RESUMEN:

Este artículo explica que el marco normativo constitucional alemán en materia tributaria no está completo. Sin perjuicio de ello, la Corte Constitucional ha construido a través de sus sentencias un régimen tributario constitucional basado en las normas, principios y valores constitucionales vigentes, los derechos fundamentales y los procedimientos descritos en la Constitución. La revisión de la Corte Constitucional se ha llevado a cabo a través de más de cien casos sobre varios tipos de impuestos y varios aspectos del sistema tributario. Este trabajo estudia la garantía de la dignidad humana en la tributación, el principio de generalidad tributaria y demás fundamentos de los impuestos, la no discriminación en el ámbito tributario, los fines extrafiscales de los impuestos, la propiedad privada y las libertades fundamentales, la igualdad en la aplicación de la ley, los requisitos de la ley para establecer tributos o el principio de legalidad tributaria, la seguridad jurídica, los requisitos sobre el procedimiento tributario.

MOTS CLES :

constitution politique ; régime fiscal; principes fiscaux; droits des contribuables; jurisprudence constitutionnelle.

RESUME :

Cet article explique que le cadre réglementaire constitutionnel allemand en matière fiscale n'est pas complet. Nonobstant cela, la Cour constitutionnelle a construit par ses arrêts un régime fiscal constitutionnel fondé sur les normes, principes et valeurs constitutionnels en vigueur, les droits fondamentaux et les procédures décrites dans la Constitution. L'examen de la Cour constitutionnelle a porté sur plus d'une centaine d'affaires concernant divers types d'impôts et divers aspects du système fiscal. Cet ouvrage étudie la garantie de la dignité humaine dans la fiscalité, le principe de généralité fiscale et autres fondements fiscaux, la non-discrimination dans le domaine fiscal, les finalités non fiscales des impôts, la propriété privée et les libertés fondamentales, l'égalité dans l'application de la loi , les exigences de la loi pour établir les impôts ou le principe de la légalité fiscale, la sécurité juridique, les exigences relatives à la procédure fiscale.

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1 INTRODUCTION

Unlike its predecessors, the Federal German constitution, the so-called Basic Law for the Federal Republic of Germany of 1949, does not contain any special requirements or guarantees for the structure of substantive tax law. In particular, there is a lack of explicit provisions on taxation based on ability to pay, the prohibition of confiscatory taxes and the legality and predictability of tax burdens, as they are enshrined in many modern constitutions around the world. A fortiori, there is no catalog of detailed specifications for individual types of taxes, namely taxes on income and consumption. Rather, the constitution only expressly addresses the federal division of taxation powers and revenue sovereignty between the federal, state and local governments.

Irrespective of this, the general catalog of fundamental rights, the basic principles of state structure – in particular the rule of law and the welfare state principle – and other principles of constitutional status naturally also apply to tax law. In its now more than seventy years of ruling, the Federal Constitutional Court has undertaken on this basis to develop specific constitutional guidelines for substantive tax law. The openness of the constitutional text has allowed the court to create precedents with a high orientation function for politicians and legal practitioners on the one hand on the basis of the basic values of the constitution, and on the other hand to remain receptive to new scientific findings, changed framework conditions and international legal developments. The character of the constitution as a "breathing framework" is thus continued in its implications for substantive tax law. Against this background, the Federal Constitutional Court has the responsible task of specifying, stabilizing and, where necessary, adapting area-specific constitutional behavioral expectations of the actors in tax policy and tax law, and at the same time embedding them harmoniously in the general constitutional value system.

The Federal Constitutional Court has increasingly assumed this responsibility, especially since the 1990s. Since then, it has pursued a comparatively active approach to fundamental rights control of substantive tax laws, which is actually practiced so intensively almost nowhere else in the world. In the past 30 years, the Federal Constitutional Court has reviewed tax laws on the basis of fundamental rights and general constitutional principles[1] in well over 100 reasoned decisions. In this context, it has declared tax regulations at federal, state and local level to be wholly or partially unconstitutional in around 40 cases.

This constitutional review focused on personal income tax, but also extended to corporate taxes, property and wealth taxes, inheritance taxes, value-added tax, and transit and excise taxes.

In accordance with the constitutional regulations regarding access to the Federal Constitutional Court, it primarily acts on submissions from specialist courts and on constitutional complaints from taxpayers. However, a qualified minority of members of the federal parliament as well as federal and state governments can also submit tax laws to the Federal Constitutional Court for review. It is therefore not surprising that fundamental rights issues in particular play an important role in parliamentary deliberations on tax laws as well as in tax science discourse. The high status of the judiciary of the Federal Constitutional Court also ensures that potential violations of the constitution through tax laws are usually recognized and avoided in the legislative process.

In accordance with the importance of the case law of the constitutional court, this also forms the essential basis of the following discussions on the effectuation of fundamental rights and constitutional principles in substantive tax law in Germany.

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[1] *All decisions of the BVerfG since January 1, 1998 can be found online on the court's official website (http://www.bverfg.de).*

2 IMPORTANCE OF THE GUARANTEE OF HUMAN DIGNITY FOR TAXATION

The crystallization point of all constitutional guarantees and principles regarding the relationship between state and citizen is the obligation of all state power to respect and protect human dignity. The guarantee of human dignity is accordingly mentioned first in Art. 1 Para. 1 of the Constitution. However, as an "inviolable" fundamental right that cannot be restricted, the Federal Constitutional Court only correctly positions this central guarantee where state action degrades people "by violating their social value and claim to being treated as mere objects"[2]. Such inhumane treatment threatens above all where the state intervenes in the core area of human existence in a serious way[3]. On the other hand, impairments of other characteristics of the citizens' personal right to respect are to be measured against more concrete guarantees of freedom and equality in the constitution, which are open to a weighing up of conflicting interests.

Accordingly, tax regulations only have to be measured directly against the guarantee of human dignity to a very limited extent, because they only cause existential impairments in exceptional cases. The Federal Constitutional Court has therefore developed the tax legislature's obligation to respect human dignity essentially only in the form of an obligation to tax exemption of the personal subsistence level[4]. For the purpose of specifying this requirement, the Federal Constitutional Court establishes a connection between tax law and social law: Tax ability to pay begins at the earliest where the need that entitles to social benefits ends. The subsistence level that is exempt from tax must therefore not fall below the amount that the state gives [5]to the poor and needy citizen in the form of transfer payments to ensure a dignified existence due to welfare state-contoured duties of care. The legislature must regularly adjust this subsistence level; due to the required connection to the welfare state principle and thus to the socio-economic conditions of the Federal Republic, it is currently typified in income tax at 9,400 euros, which is high in international comparison.

According to the correct opinion of the Federal Constitutional Court, the legislature cannot justify taxing the subsistence level by saying that an emergency situation that arises as a result in individual cases would be compensated for by state transfer payments and aid programs[6]. Because according to the concept of man in the Basic Law, the personal responsibility of the individual has priority and state support is only to be granted on a subsidiary basis. This prohibits citizens from becoming dependent on state transfer payments through excessive tax payments (Lehner, 1993; Mellinghoff, 2005)[7]. This is where the constitution's assessments differ significantly from the utilitarian concepts of economics. However, the Federal Constitutional Court has also recognized that it may be different in the area of indirect taxes on consumption[8]. Because the taxation technique leaves the consuming citizen in the anonymity of the market here, his personal circumstances can at best be taken into account in a typified manner when assessing the tax burden.

The Federal Constitutional Court has extended the tax exemption of the minimum subsistence level to the family of the taxpayer on the basis of the guarantee of human dignity and the principle of the welfare state, with additional reference to Art. 6 Para. 1 of the

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[2] *See e.g. BVerfG of February 5, 2004 – 2 BvR 2029/01, BVerfGE 109, 133 (150).*

[3] *See Stern , Constitutional Law IV/1, 2006, p. 21.*

[4] *See BVerfG of February 13, 2008 – 2 BvL 1/06, BVerfGE 120, 125 (154); of June 8, 2004 – 2 BvL 5/00, BVerfGE 110, 412 (433 f.); of May 29, 1990 – 1 BvL 20/84, BVerfGE 82, 60 (84).*

[5] *See BVerfG of June 14, 1994 – 1 BvR 1022/88, BVerfGE 91, 93 (111 f.); of November 10, 1998 – 2 BvL 42/93, BVerfGE 99, 246 (260).*

[6] *See BVerfG of February 13, 2008 – 2 BvL 1/06, BVerfGE 120, 125 (155); of November 19, 2019 – 2 BvL 22/14, BVerfGE 152, 274, para. 105*

[7] *See BVerfG of December 17, 1975 – 1 BvR 63/68, BVerfGE 41, 29 (50); of September 24, 2003 – 2 BvR 1436/02, BVerfGE 108, 282 (300); of February 13, 2008 – 2 BvL 1/06, BVerfGE 120, 125 (154).*

[8] *See BVerfG of August 23, 1999 – 1 BvR 2164/98, Neue Juristische Wochenschrift 1999, 3478.*

Constitution (protection of marriage and family)[9]. The basic needs of children are therefore deducted from the taxable income of the parents (currently 4,194 euros per child/year for each parent).

3 UNIFORMITY OF TAXATION

3.1 BASIC EQUALITY OBLIGATION TO TAX JUSTICE

The general principle of equality in Art. 3 Para. 1 of the Constitution occupies a prominent position in the constitutional court's control of tax laws. The Federal Constitutional Court has always derived a requirement of tax justice from this fundamental right[10]. Any tax whose primary purpose is to generate revenue to meet the government's fiscal needs must ensure a fair distribution of the tax burden in accordance with an overriding standard of justice. The legislature then has to reflect this fundamental so-called reason to charge in the assessment basis and the level of taxation.

Especially with regard to taxes on income, the Federal Constitutional Court has always only accepted the ability to pay principle as an appropriate reason to charge the tax[11]. In the course of time, it then began to demand that all personal taxes and in particular inheritance and gift taxes be based on the ability to pay principle[12]. In the meantime, the Federal Constitutional Court is demanding that the tax burden is based on the respective economic capacity for any financial purpose tax[13]. This also applies in particular to taxes on consumption expenditure, insofar as the taxation technique allows it (M. Lang et al., 2009, p. 1)[14].

Nevertheless, the Federal Constitutional Court does not generally rule out the additional importance of further standards of justice. In the light of the historical development of the municipal trade tax, a tax on commercial income, it also has a supplementary alignment with the principle of equivalence or the principle of benefit principle considered legitimate[15]. This shows that a waiver of a monistic codification of the ability-to-pay principle in the constitution gives the legislature greater flexibility, especially when it comes to the structure of corporate taxes.

If the tax payment has to be based on the principle of ability to pay, this results in two basic postulates of justice: the so-called horizontal tax equality requires that people with the same high ability to pay are generally charged the same amount[16] and the so-called vertical tax equality requires that the tax burden on higher-performing individuals must be proportionately higher compared to the tax burden on lower-performing individuals[17]. The

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[9] *See BVerfG of May 29, 1990 – 1 BvL 20/84 et al., BVerfGE 82, 60 (85 f.), of September 25, 1992 – 2 BvL 5/91 et al., BVerfGE 87, 153 (169 f.), of November 10, 1998 – 2 BvL 42/93, BVerfGE 99, 246 (259).*

[10] *See e.g. BVerfG of January 17, 1957 – 1 BvL 4/54, BVerfGE 6, 55 (69); of July 3, 1973 – 1 BvR 368/65 et al., BVerfGE 35, 324 (335); of November 7th, 2006 – 1 BvL 10/02, BVerfGE 117, 1 (30); of October 13, 2009 – 2 BvL 3/05, BVerfGE 123, 111 (120).*

[11] *See e.g. BVerfG of March 6, 2002 – 2 BvL 17/99, BVerfGE 105, 73 (125); of October 13, 2009 – 2 BvL 3/05, BVerfGE 123, 111 (120).*

[12] *See e.g. BVerfG of June 22, 1995 – 2 BvR 552/91, BVerfGE 93, 165 (172); of November 7th, 2006 – 1 BvL 10/02, BVerfGE 117, 1 (30). See also BVerfG of 12.10.2010 - 1 BvL 12/07, BVerfGE 127, 224 (247) : "at least for direct taxes".*

[13] *See also BVerfG of November 19, 2019 – 2 BvL 22/14, BVerfGE 152, 274, para. 99; of April 10, 2018 – 1 BvR 1236/11, BVerfGE 148, 217, para. 106*

[14] *See BVerfG of May 7, 1998 – 2 BvR 1991/95, BVerfGE 98, 106 (125); of April 20, 2004 – 1 BvR 905/00, BVerfGE 110, 274 (297).*

[15] *See BVerfG of October 25, 1977 – 1 BvR 15/75, BVerfGE 46, 224 (236); of January 15, 2008 – 1 BvL 2/04, BVerfGE 120, 1 (37 et seq.).*

[16] *See e.g. BVerfG of March 6, 2002 – 2 BvL 17/99, BVerfGE 105, 73 (126); of June 21, 2006 – 2 BvL 2/99, BVerfGE 116, 164 (180); of March 29, 2017 – 2 BvL 6/11, BVerfGE 145, 106 (142 f.).*

[17] *See e.g. BVerfG of May 29, 1990 – 1 BvL 20/84, BVerfGE 82, 60 (89); of December 4, 2002 – 2 BvR 400/98, BVerfGE 107, 27 (46 f.); of December 9, 2008 – 2 BvL 1/07 et al., BVerfGE 122, 210 (231); of March 29, 2017 – 2 BvL 6/11, BVerfGE 145, 106, para. 99*

Federal Constitutional Court was originally of the opinion that, especially in the case of income tax, only a progressive tax rate would meet the requirements of vertical tax justice[18]. The Federal Constitutional Court has recently shown greater restraint in this regard[19], so that a proportional income tax rate should also be regarded as constitutional. On the other hand, the Federal Constitutional Court considered a degressive tax rate to be fundamentally incompatible with the ability to pay principle[20].

However, what specifically constitutes tax ability, how it is to be measured and when it is to be recorded, does not follow directly from the ability-to-pay principle. In this respect, the legislature must develop appropriate standards that specify the ability to pay principle accordingly. These can differ depending on the type of tax and in many cases also have to include the values of freedom under the Basic Law. For example, the legislature has specified the ability to pay principle in income tax law through the objective and subjective net principle. Accordingly, the taxpayer's income-related and subsistence-related expenses are to be deducted from the assessment basis for income tax. While the subjective net principle is at least within limits anchored in Art. 1(1) GG (human dignity),[21] the Federal Constitutional Court has so far left open whether the objective net principle is also mandatory under constitutional law[22]. Furthermore, taxation of increases in the value of assets may only start in relation to liquidity when the increase in value has been realized on the market. This is the only way to avoid excessive interference with the taxpayer's property rights in the form of being forced to sell the asset prematurely.

3.2 Reason to Charge, system-forming principles and extra-fiscal goals

As is well known, the effectiveness of a general principle of equal treatment in constitutional practice depends above all on how generously or strictly the respective constitutional court handles the requirements for breaking through fundamental principles of distribution or justice. For example, the US Supreme Court shows great judicial restraint when reviewing tax laws based on equality. According to the so-called rational basis test, only arbitrary tax differentiations are prohibited for which there is no apparent objective reason (Merriam Webster, Inc, 1996)[23]. The Federal Constitutional Court handled this in the same way in the early years (Eichberger, Michael, 2018, p. 503)[24], but then introduced a stricter proportionality test[25]. More recently, it postulates a flexible, stepless standard of control that has initially been developed outside of tax law case law.

First of all, the Federal Constitutional Court generally grants the legislature a very large tax policy discretion with regard to the question of which source of tax capacity it wants to exploit and which economic processes it spares from taxation. In this sense, "the legislature has far-reaching leeway when selecting the subject of the tax and determining the

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[18]See BVerfG of June 24, 1958 – 2 BvF 1/57, BVerfGE 8, 51 (68 f.).

[19]S. however, the obiter dictum in the BVerfG of October 12, 2010 – 1 BvL 12/07, BVerfGE 127, 224 (248).

[20]S. BVerfG of 15.1.2014 - 1 BvR 1656/09, BVerfGE 135, 126, para. 56; of 18.7.2019 - 1 BvR 807/12 et al., BeckRS 2019, 25317, margin no. 45

[21]See above II.

[22]S. BVerfG of December 9, 2008 – 2 BvL 1/07 et al., BVerfGE 122, 210 (234); of May 12, 2009 – 2 BvL 1/00, BVerfGE 123, 111 (121).

[23]See US Supreme Court of 3/26/1985, Metropolitan Life Insurance Co. v. Ward, 470 US 869 (1985), 874 f., and the case law cited there.

[24]See e.g. October 23, 1951 – 2 BvG 1/51, BVerfGE 1, 14 (52); of April 5, 1952 – 2 BvH, BVerfGE 1, 208 (247); of December 11, 1962 – 2 BvL 2 et al., BVerfGE 15, 167 (201); of February 4, 1969 – 2 BvL 20/63, BVerfGE 25, 198 (205). See also Hey, in: Tipke/Lang, Steuerrecht, 24th edition 2021, margin no. 3.124 f.;

[25]See e.g. BVerfG of October 7, 1980 – 1 BvL 50/79 et al., BVerfGE 55, 72 (88); of June 8, 1993 – 1 BvL 20/85, BVerfGE 89, 15 (22 f.); of December 17, 2014 – 1 BvL 21/12, BVerfGE 138/136; Hey, in: Tipke/Lang, Steuerrecht, 24th edition 2021, para. 3,124; (Eichberger, Michael, 2018, p. 503)

tax rate."[26] The state can levy a wealth tax but is not obliged to do so[27]; and he is also free to decide whether to charge inheritance and gift tax on a gratuitous transfer of assets[28]. The openness of the constitution thus allows the legislature to flexibly adapt the tax system to changed economic and socio-political framework conditions or political preferences.

When designing the initial circumstances, however, the legislature then has to implement the burdening decision, once it has been made, in the sense of equal burden (principle of consistency) (Tipke et al., 2011, p. 167)[29]. This means that the selection of the taxpayer and the tax base must always reflect the reason for the tax burden. In principle, it must be based on uniform principles that specify (and in this sense support the system) this reason for exposure in a personal, factual and temporal respect. The basis of assessment must appropriately record and realistically reflect the economic process or situation considered worthy of taxation[30]. Especially in the case of valuation-dependent taxes, the legislature must therefore choose a system of valuation rules that is able to realistically depict the value relation of the taxed assets to one another[31].

Individual regulations in the tax law that cannot be traced back to such a system-defining principle of appropriate taxation for the respective type of tax are not generally excluded. The Federal Constitutional Court rightly does not make the realization of tax justice absolute. However, such deviations require special justification in terms of equality law by "objective reasons that are appropriate to the aim and the extent of the unequal treatment". This applies both to tax concessions as well as to selective additional burdens on individual taxpayers, contrary to the general principles of taxation.

The simple fiscal needs of the state are not a suitable justification for individual regulations that deviate from the respective system-defining principle. Its coverage is precisely the subject of equality law requirements for a fair distribution of burdens, and it can therefore not be used to justify a selective additional burden on individual taxpayers[32]. However, in the case law of the highest court in tax matters (Federal Fiscal Court) and in parts of the literature, it is assumed that so-called "qualified fiscal purposes" could represent a suitable justification for special rules. First and foremost, tax regulations are being thought of that limit the offsetting of profits and losses in order to ensure budget stability and a stabilization of tax revenue[33]. However, measures to ensure taxation based on the principle of territoriality and to protect against tax base migrating abroad have also been cited as justifications in this context[34]. The Federal Constitutional Court has not yet made a final statement on this.

In any case, it is recognized that the legislature is in principle free to pursue non-fiscal objectives, despite the resulting selective deviation from system-constituting principles of taxation. In particular, the legislature may promote or direct the behavior of taxpayers for

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[26]S. BVerfG of June 27, 1991 – 2 BvR 1493/89, BVerfGE 84, 239 (271); of March 29, 2017 – 2 BvL 6/11, BVerfGE 145, 106, para. 102; of November 19, 2019 – 2 BvL 22/14, BVerfGE 152, 274, para. 100

[27]See the wealth tax decision BVerfG of June 22, 1995 – 2 BvL 37/91, BVerfGE 93, 121 (134 f.).

[28]See e.g. BVerfG of June 22, 1995 – 2 BvR 552/91, BVerfGE 93, 165 (172); s. however, also the dissenting opinion in BVerfG of December 17, 2014 – 1 BvL 21/12, BVerfGE 138, 136, para. 5.

[29]Settled case law; see e.g. BVerfG of May 7, 1968 – 1 BvR 420/64, BVerfGE 23, 242 (256); of February 9, 1982 – 2 BvL 6/78 et al., BVerfGE 60, 16 (40); of June 27, 1991 – 2 BvR 1493/89, BVerfGE 84, 239 (271); of March 6, 2002 – 2 BvL 17/99, BVerfGE 105, 73 (126); of November 7, 2006 – 1 BvL 10/02, BVerfGE 117, 1 (30 et seq.); of December 9, 2008 – 2 BvL 1/07 et al., BVerfGE 122, 210 (231); of October 12, 2010 – 1 BvL 12/07, German Tax Law 2010, 2393 (2394).

[30]See BVerfG of March 29, 2017 – 2 BvL 6/11, BVerfGE 145, 106, para. 104

[31]See BVerfG of June 23, 2015 – 1 BvL 13/11, BVerfGE 139, 285, para. 73; of April 10, 2018 – 1 BvL 11/14 et al., BVerfGE 148, 147, para. 98 and 131 ff.

[32]See BVerfG of May 29, 1990 – 1 BvL 20/84 et al., BVerfGE 82, 60 (89); of June 21, 2006 – 2 BvL 2/99, BVerfGE 116, 164 (182); of July 6, 2010 – 2 BvL 13/09, BVerfGE 126, 268 (281); of March 29, 2017 – 2 BvL 6/11, BVerfGE 145, 106, para. 104

[33]S. e.g. BFH of October 14, 2015 – I R 20/15, Bundessteuerblatt II 2017, 1240, margin no. 43; Desens, Finanz-Rundschau 2011, 745 (749); Kube, Deutsches Steuerrecht 2011, 1781 (1789).

[34]See about BFH of December 18, 2019 – IR 29/17, Bundessteuerblatt II 2020, 690, margin no. 24; Heuermann, Deutsches Steuerrecht, 2013, 1 (2 f.).

reasons of public interest[35] (steering tax) and for this purpose also break through the requirement of equal taxation according to ability to pay selectively in the case of fiscal purpose taxes, the primary aim of which is to cover financial needs.

In addition, the legislature may in principle order typification for reasons of administrative simplification[36]. A distinction must be made between the generality of the law on the one hand and the legal typification of actual circumstances on the other. Every law is general in the sense that it describes the standards for recording tax capacity in the facts of the case only abstractly and leaves the specifics in individual cases to the tax authorities and courts. This ensures equal taxation and requires no justification from the outset. The situation is different, however, if the law stipulates that the principle of ability to pay should not be implemented precisely in individual cases and that general assumptions are to be made instead. Such typifications can lead to over-taxation or under-taxation in individual cases and must therefore be justified by reasons of efficient tax collection.

3.3 Requirements for the implementation of extra-fiscal goals

Even if there is a suitable justification for a deviation from the taxation principles that constitute the system – and thus from uniform taxation in accordance with these principles – the legislature must also ensure that the type and extent as well as the detailed design of the respective deviation with a view to the associated impairment of equal taxation are appropriate. For this purpose, the Federal Constitutional Court has developed a flexible, case-specific standard of control. The review of the relevance and rationality of the factual reason cited for justification should "depending on the subject matter of the regulation and differentiating features, range from relaxed obligations limited to the prohibition of arbitrary action to strict requirements of proportionality"[37]. The requirements increase, the more the unequal treatment also affects freedom rights, the less the person concerned can evade them, and the more they are linked to highly personal characteristics similar to those of the special constitutional prohibitions on discrimination (more on this under IV.)[38]. In addition, the demands on the justification increase with the scope and extent of the deviation from the principle of ability to pay or from the standards that specify this principle[39].

The Federal Constitutional Court also requires the legislature to be clear about subsidies, especially for deviations with a funding or steering purpose. The respective purpose must be supported by "identifiable legislative decisions"[40]. This is partly criticized in the literature. According to the constitution, the legislature is only responsible for the law, not also for the reasons for the law[41]. In any case, tax concessions must be equal; in particular, they must not arbitrarily select the group of beneficiaries[42]. On the other hand, the Federal Constitutional Court did not object if the exceptions in a tax law are so numerous and

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[35] *See BVerfG of June 22, 1995 – 2 BvL 37/91, BVerfGE 93, 121 (147); of December 17, 2014 – 1 BvL 21/12, BVerfGE 138, 136, para. 124*

[36] *Settled case law; see e.g. BVerfG of May 31, 1988 – 1 BvR 520/83, BVerfGE 78, 214 (227); of December 9, 2008 – 2 BvL 1/07 et al., BVerfGE 122, 210 (232); of November 19, 2019 – 2 BvL 22/14, BVerfGE 152, 274, para. 101 f.*

[37] *See BVerfG of November 7th, 2006 – 1 BvL 10/02, BVerfGE 117, 1 (30); of June 21, 2011 – 1 BvR 2035/07, BVerfGE 129, 49 (68); of November 19, 2019 – 2 BvL 22/14, BVerfGE 152, 274, para. 96*

[38] *See e.g. BVerfG of January 26, 1993 – 1 BvL 38/92 et al., BVerfGE 88, 87 (96); of July 7, 2009 – 1 BvR 1164/07, BVerfGE 124, 199 (220); of June 21, 2011 – 1 BvR 2035/07, BVerfGE 129, 49 (69); of July 18, 2012 – 1 BvL 16/11, BVerfGE 132, 179 (188 f.); of March 29, 2017 – 2 BvL 6/11, BVerfGE 145, 106, para. 105*

[39] *See BVerfG of November 7th, 2006 – 1 BvL 10/02, BVerfGE 117, 1 (32); of December 17, 2014 – 1 BvL 21/12, BVerfGE 138, 136, para. 123; of April 10, 2018 – 1 BvR 1236/11, BVerfGE 148, 217, para. 105*

[40] *See e.g. BVerfG of March 6, 2002 – 2 BvL 17/99, BVerfGE 105, 73 (112 f.); see also BVerfG of April 20, 2004 – 1 BvR 1748/99 et al., BVerfGE 110, 274 (293); of June 21, 2006 – 2 BvL 2/99, BVerfGE 116, 164 (182).*

[41] *Tappe, Die Begründung von Steuergesetzen – Normatives Ermessen im Steuerrecht zwischen Gesetzmäßigkeit und Gestaltungsfreiheit, 2012.*

[42] *See BVerfG of June 22, 1995 – 2 BvL 37/91, BVerfGE 93, 121 (148); of November 11, 1998 – 2 BvL 10/95, BVerfGE 99, 280 (296); of April 20, 2004 – 1 BvR 1748/99 et al., BVerfGE 110, 274 (293); of November 7th, 2006 – 1 BvL 10/02, BVerfGE 117, 1 (32); of December 9, 2008 – 2 BvL 1/07, BVerfGE 122, 210 (231).*

significant that the payment of the standard tax burden becomes an exception[43]. The French constitutional court, for example, convincingly judged this differently[44].

In the conflict between individual justice on the one hand and simplification and efficient tax collection on the other hand, the Federal Constitutional Court regularly carries out a review of proportionality. The simplification measure must be appropriate and necessary to reduce the cost of tax collection. The associated deviations from a case-by-case implementation of the respective taxation principle must also be proportionate to the degree of simplification achieved[45]. This presupposes that it would be difficult to precisely determine the circumstances relevant to taxation in individual cases, that serious deviations only occur for a small number of people and that the violation of the principle of equality is not very intensive overall[46]. In addition, the Federal Constitutional Court requires a solid empirical basis for the generalization chosen by the legislature[47]; he must realistically orient himself to the "typical" case[48]. This also applies in particular to regulations that are intended to ensure a legally secure fight against abusive tax evasion through typification's[49].

4 NON-DISCRIMINATORY TAXATION

In addition to the general principle of equality, the German constitution also contains some special prohibitions on discrimination. They were mostly included in the constitution as a reaction to the persecution of certain minorities during the National Socialist dictatorship. According to this, differentiations based on gender, biological descent, race, language, homeland, social background, faith and religious or political views are prohibited.

In German substantive tax law, however, these criteria and thus also the prohibition of discrimination do not usually play a role in the assessment of the tax burden. In academia, however, it is sometimes asserted that indirect discrimination is also fundamentally prohibited, and that certain tax regulations and system decisions actually have a detrimental effect on women in everyday life (Gunnarsson et al., 2017; Sacksofsky, 2010, p. 356). However, the Federal Constitutional Court has not yet taken up this criticism.

However, the Federal Constitutional Court has demanded in a number of decisions that the tax laws should not discriminate against state-approved same-sex partnerships compared to married couples. It is true that sexual orientation is not one of the distinguishing features that are explicitly prohibited under constitutional law. However, since the state had structured registered same-sex partnerships to be similar to marriage under family law, it had to treat them equally in tax law, according to the Federal Constitutional Court[51]. The legislature then reacted and included legal equality for same-sex partners in a registered civil partnership with married couples in the Income Tax Act. Since the Federal Republic of Germany introduced full civil law marriage for same-sex partners, this tax equality problem has been put into perspective.

In addition, the Federal Constitutional Court also derives a special ban on discrimination from the requirement to protect marriage and family in Art. 6 Para. 1 of the Constitution. The household taxation for married couples in the income tax was therefore

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[43] *BVerfG of December 17, 2014 – 1 BvL 21/12, Bundessteuerblatt II 2015, 50, BVerfGE 138, 136, margin no. 169*

[44] *See Conseil Constitutionnel, Judgment of December 29, 2009, 2009-599 DC, para. 82 f.*

[45] *BVerfG of 2.2.1999 – 1 BvL 8/97, BVerfGE 100, 195 (205); of 3.4.2001 – 1 BvR 81/98, BVerfGE 103, 225 (236).*

[46] *Cf. BVerfG of 8.2.1983 – 1 BvL 28/79, BVerfGE 63, 119 (128); of 8.10.1991 – 1 BvL 50/86, BVerfGE 84, 348 (360); of 6.7.2010 – 1 BvL 9/06 ua, BVerfGE 126, 233, (263 f.); of 19.11.2019 – 2 BvL 22/14, BVerfGE 152, 274, Rz. 103.*

[47] *BVerfG of 7.5.2013 – 2 BvR 909/06, BVerfGE 133, 377, Rz. 87.*

[48] *S. BVerfG of 21.6.2006 – 2 BvL 1/99, BVerfGE 116, 164 (182 f.); of 9.12.2008 – 2 BvL 1/07 ua, BVerfGE 122, 210 (232 f.); of 6.7.2010 – 2 BvL 13/09, BVerfGE 126, 268 (279); of 7.5.2013 – 2 BvR 909/06 etc., BVerfGE 133, 377, Rz. 87; of 5.11.2014 – 1 BvF 3/11, BVerfGE 137, 350, Rz. 66.*

[49] *S. BVerfG of 29.3.2017 – 2 BvL 6/11, Bundessteuerblatt II 2017, 1082, BVerfGE 145, 106, Rz. 127.*

[51] *S. BVerfG of July 21, 2010 – 1 BvR 611/07 et al., BVerfGE 126, 400; of July 18, 2012 – 1 BvL 16/11, BVerfGE 132, 179; of May 7, 2013 – 2 BvR 909/06 and others, BVerfGE 133, 377.*

unconstitutional because it resulted in a higher tax burden than for unmarried couples due to the tax progression[52]. Since then, the joint income of the spouses has been divided equally between both partners (so-called spouse splitting), so that the tax progression and the total burden are lower than with household taxation and in most cases also lower than with pure individual taxation. It is disputed whether the marriage splitting follows constitutionally from Article 6.1 of the Basic Law or whether it reinforces traditional role models.

5 FREEDOM-FRIENDLY TAXATION

The absolute level of taxation is also subject to constitutional limits, which are actually very wide. The Federal Constitutional Court – adopting a line of case law from the Prussian Higher Administrative Court[53] – decided early that so-called "strangulation taxes", which give the taxpayer no room to breathe, are abusive of form and therefore cannot be based on tax legislation competences; because, viewed in the light of day, they are administrative regulations with a prohibitive character[55]. So, the formal unconstitutionality of the strangling taxation was objected to.

However, the relevance of the absolute amount of the tax burden to freedom was also recognized just as early. Initially, the Federal Constitutional Court assumed that state-imposed payment obligations generally do not affect the fundamental right to property (Article 14(1) of the Constitution) from the outset[56]. Irrespective of this, however, excessively burdening taxes that fundamentally affect the financial situation should be able to constitute a violation of property rights[57].

It was only much later, in its 1995 decision on wealth tax, that the Federal Constitutional Court corrected this internal contradiction in its case law and stated that the income taxes, which in fact relate to the additional acquisition of a specific legal position of assets (income tax, corporation tax, trade tax, property tax as a so-called projected income tax), in any case interfere with the basic property right and therefore have to be constitutionally justified (Korinek et al., 1981, p. 213)[58]. The Federal Constitutional Court therefore carries out a proportionality test. In this examination, the court compares the part of the income remaining with the taxpayer on the one hand and the part of the income claimed for tax purposes on the other. From Art. 14 Para. 2 of the constitution ("Ownership obliges. Its use should also serve the public interest.") the court derived the requirement that the total tax burden on the income be at most "close to a equal division between the private and public sector" (the so-called 50-50 principle)[59].

A few years later, the Federal Constitutional Court distanced itself from the 50-50 principle[60]. At the same time, however, it expressly held that income taxes that are actually linked to the acquisition of additional assets in legal positions always interfere with the fundamental right to property and must therefore comply with the principle of proportionality[61]. The great challenge of specifying the proportionality test that dispenses

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[52]*S. BVerfG of January 17, 1957 – 1 BvL 4/54, BVerfGE 6, 55 (66 ff.).*

[53]*Prussian Higher Administrative Court, PreußVBl. Volume 38 (1916/17), 116.*

[55]*BVerfG of May 22, 1963 – 1 BvR 78/56, BVerfGE 16, 147 (161); then BVerfG of December 8, 1970 – 1 BvR 95/68, BVerfGE 29, 327 (331); of July 17, 1974 – 1 BvR 51/69 et al., BVerfGE 38, 61 (81); of May 7, 1998 – 2 BvR 1991/95 and others, BVerfGE 98, 106 (118).*

[56]*Since BVerfG of July 20, 1954 – 1 BvR 459/52, BVerfGE 4, 7 (17) and BVerfG of July 29, 1959 – 1 BvR 394/58, BVerfGE 10, 89 (116).*

[57]*Since BVerfG of July 24, 1962 – 2 BvL 15/61, BVerfGE 14, 221 (241).*

[58]*BVerfG of June 22, 1995 – 2 BvL 37/91, BVerfGE 93, 121 (137)*

[59]*BVerfG of June 22, 1995 – 2 BvL 37/91, BVerfGE 93, 121 (138).*

[60]*BVerfG of January 18, 2006 – 2 BvR 2194/99, BVerfGE 115, 97 (108 et seq., 114); critical of the 50-50 principle previously the Federal Fiscal Court, BFH of August 11, 1999 – XI R 77/97, Bundessteuerblatt II 1999, 771; of September 18, 2003 – X R 2/00, Bundessteuerblatt II 2004, 17; of March 1, 2005 – VIII R 92/03, Bundessteuerblatt II 2005, 398.*

[61]*BVerfG of January 18, 2006 – 2 BvR 2194/99, BVerfGE 115, 97 (110 et seq.).*

with the half-division principle can be seen in the statements made by the Federal Constitutional Court in this regard[62]. As a result, income taxes, as property interventions, are subject to the proportionality requirement. However, according to the current case law of the Federal Constitutional Court, there are hardly any substantial restrictions on the tax legislature beyond the prohibition of strangulating taxation.

With regard to taxes other than income taxes, in particular with regard to the indirectly levied consumption and expenditure taxes, the Federal Constitutional Court is even more cautious when naming the burden limits of fundamental freedom law. It assumes that the excise and expenditure taxes are also linked to a situation that reveals economic ability (Tipke & Lang, 2021)[63]. However, the Federal Constitutional Court considers it principally constitutionally unproblematic if the taxation exceeds the ability to pay in individual cases because of the anonymity of the market[64].

At present, German tax law scholars are discussing subjecting the cumulative burden of a taxpayer from various taxes in the multi-tax system to an examination based on fundamental freedoms (G. Kirchhof, 2009, p. 135; Kube, 2015, pp. 157–170; Seiler, 2016, pp. 333–362). However, this discussion has so far had no impact on taxation practice.

6 EQUALITY OF APPLICATION OF LAW

Fair taxation is only achieved when the tax is actually enforced. Ensuring equal, fair taxation is primarily a matter for the executive branch. If there are deficits in implementation, these are regularly to be attributed to the executive and to be rectified by it. At the same time, however, the Federal Constitutional Court drew attention to the legislature: The legislature has the constitutional obligation arising from the principle of equality to design the substantive tax laws in such a way that the equal burden can be achieved in actual implementation, in particular through appropriate typifications[65] and suitable procedural regulations. If there is already an implementation deficit in the legal foundations of taxation and in this sense of a structural nature, because the legislature does not provide any effective procedures for enforcing the taxation claim it postulates, this leads to the nullity of these legal foundations[66]. In addition, tax laws can also be unconstitutional from the outset if, contrary to their intended purpose, they permit tax-reducing arrangements to a considerable extent[67].

Consequently, a taxpayer who was taxed in accordance with the law can object to his taxation by arguing that the underlying tax law is unconstitutional because of structurally applied implementation deficits or because of the approval of extensive, inappropriate tax-reducing arrangements[68].

7 PRESUMPTION OF LAW AND LEGALITY OF TAXATION

According to the democratically and constitutionally founded principle of the statutory reservation, taxes require a sufficiently specific basis in parliamentary law[69]. This precludes deriving taxing powers from customary law. Originally, therefore, the legal analogy in the area of burdening tax law was generally considered inadmissible. In the meantime, the

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[62]BVerfG of January 18, 2006 – 2 BvR 2194/99, BVerfGE 115, 97 (115 et seq.).

[63]BVerfG of December 6, 1983 – 2 BvR 1275/79, BVerfGE 65, 325 (347)

[64]BVerfG of December 6, 1983 – 2 BvR 1275/79, BVerfGE 65, 325 (348).

[65]See above III.2. and 3.

[66]Basically BVerfG of June 27, 1991 – 2 BvR 1493/89, BVerfGE 84, 239 (268 et seq.); then BVerfG of March 9, 2004 – 2 BvL 17/02, BVerfGE 110, 94 (111 et seq.).

[67]BVerfG of December 17, 2014 – 1 BvL 21/12, BVerfGE 138, 136 (235 f.).

[68]See Kube, Steuer und Wirtschaft 2018, 314 (315).

[69] Papier, Die finanzrechtlichen Gesetzesvorbehalte und das grundgesetzliche Demokratieprinzip, 1973; Brink-mann, Tatbestandsmäßigkeit der Besteuerung und formeller Gesetzesbegriff, 1982; Osterloh, Gesetzesbindung und Typisierungsspielräume bei der Anwendung der Steuergesetze, 1992.

Federal Constitutional Court has adopted a differentiated point of view[70]: for reasons of legal certainty and the lawfulness of taxation, high demands must be placed on the onerous legal analogy in tax law. In particular, the financial courts may not develop additional sources of tax efficiency beyond the possible literal meaning of the tax laws or close tax gaps that are contrary to the system if the legislature has deliberately refrained from doing so or it is just unclear whether the closing of the gaps is in accordance with their will. At best, the Federal Constitutional Court can then consider that the law violates the principle of equality. However, an unplanned legal loophole that clearly runs counter to the ideas and assessments of the legislature may also be closed selectively by analogy to the detriment of the taxpayer.

If there is a basis in parliamentary law, the further specification of tax law can be based on delegated legislative power (legal ordinances of the executive) or municipal statutory power (statutes of the municipalities). In practice, however, ordinances in tax law have little meaning. Much more important is the practical effect of administrative regulations and decrees of the finance ministries of the federal and state governments as well as the subordinate financial administration. From a constitutional perspective, the constitutional principle of the statutory reservation must be coordinated with the actual implementation requirements in tax law. Because tax law affects a large number of different life situations and structures, the administration cannot execute the statutory provisions without a stabilizing control system that also guarantees equality in actual implementation through supplementary internal specifications. If this internal control is sufficiently transparent and also reliable over time, it is acceptable within limits.

In addition to the administration, the judiciary, in particular the supreme judiciary of the Federal Fiscal Court, has a legally substantiating and developing effect, especially in tax law. This role also falls to case law due to the diversity of tax law issues. However, the administration sometimes relativizes the rule of law stabilizing effect of published decisions of the Federal Fiscal Court by so-called non-application decrees, which expressly limit the importance of the individual judgment for the implementation practice to the decided individual case[71]. This creates legal uncertainty and calls into question the function of the judiciary as the final interpreter of the law. Constitutionally, therefore, the minimum requirement is that the administration justifies its refusal in a comprehensible manner. The Federal Constitutional Court has not yet dealt with this problem.

In addition to the principle of the proviso of the law, the principle of the precedence of the law or the legality of taxation applies (Art. 20 Para. 3 of the Constitution). It requires taxation according to the applicable statutory law and is closely related to the principle of equality of application. The principle of the primacy of the law prohibits individual agreements between taxpayers and the tax authorities that deviate from the law. In tax law doctrine, the reservation of the law and the precedence of the law also operate together as the principle of legality under tax law (Tipke & Lang, 2021).

8 LEGAL CERTAINTY, PROHIBITION OF RETROSPECTIVE TAX LAWS AND PROTECTION OF LEGITIMATE EXPECTATIONS

The constitutional principle of the rule of law requires legal certainty. An essential element of this legal certainty is the legal certainty and clarity of tax law (K. D. Drüen, 2009, p. 60; Papier, 1989, p. 61; Ruppe, 2008, p. 20). As a field of burdening provisions (Hey, 2002), tax law must be sufficiently foreseeable and therefore plannable for the citizen. This

[70] *BVerfG of February 16, 2012 – 1 BvR 127/10, supreme court ruling on finance 2012, 545 (545 et seq.); of 31.10.2016 - 1 BvR 871/13 et al., supreme court ruling on finance 2017, 172 (172ff.).*

[71] *In addition, in detail Desens, Bindung der Finanzverwaltung an die Rechtsprechung. Bedingungen und Grenzen für Nichtanwendungserlasse, 2011.*

requires appropriate certainty and clarity[72]. Only a specific and clear tax law can also be enforced equally for the tax administration and enables it to meet the requirement of equality in the actual tax impact.

At the same time, however, the constitutional requirement for certainty and clarity must be tailored to the actual diversity and extensive need for regulation of the situations to be taxed. In view of the complexity of the underlying economic circumstances, taxation that obeys the principles of freedom and equality can make demanding regulations in certain areas unavoidable.

Legal security based on the rule of law also requires the protection of legitimate expectations. The rule of law therefore allows negative retroactive effects of tax laws only to a limited extent (Desens, 2011, p. 113; K.-D. Drüen, 2015, p. 210; Jachmann, 2006; P. Kirchhof, 2015, p. 717; Lehner, 2006, p. 67; Leisner-Egensperger, 2002, p. 27; Osterloh, 2015, p. 201; Schön, 2010, p. 221). A tax law that imposes a tax burden with effect for the past has an adverse effect, but so does a tax law that retrospectively restricts or revokes a benefit[73]. However, a constitutionally relevant retroactive effect only exists if the legal change that goes back into the past has a constitutive effect. The Federal Constitutional Court has decided that a change in the law already has a constitutive effect on the past if a provision allows for several justifiable interpretations and the legislature retrospectively stipulates an interpretation as binding[74].

Statutory retroactivity is not strictly prohibited in tax law. Rather, it is treated differently. The first senate of the Federal Constitutional Court distinguishes between genuine and spurious retroactivity[75], the second senate between the retroactive effect of legal consequences and the factual retroactive connection[76]. In the case of genuine legal retroactivity (or retroactive effect of legal consequences), legal consequences that have already been triggered are subsequently exchanged. Genuine retroactivity is generally prohibited, subject to certain exceptions. Such an exception should exist if 1. the citizen had to reckon with the new regulation at the point in time to which the retroactivity refers, 2. the legal situation was so unclear and confused that a clarification had to be expected, 3. the previous law was contrary to the system and unfair to such an extent that there were serious doubts as to its constitutionality, 4. overriding concerns of the common good, which take precedence over the principle of legal certainty, require retrospective regulation (among other things, to prevent so-called announcement effects), 5. the citizen was not entitled to rely on the legal semblance created by an invalid provision, 6. no damage or only very insignificant damage is caused by the retroactive effect (reservation of minor claims)[77].

On the other hand, there is a spurious legal retroactive effect (or factual retrospective connection) if the change in the law affects a situation that has already been partially set in motion, but has not yet been completed and therefore not already resulted in any legal consequences. An example would be the statutory extension of a holding period during which profits from the sale of assets are taxable, also with effect for assets that have already been acquired but for which the previous shorter holding period has not yet expired. The spurious retroactivity must be examined constitutionally for its proportionality. It is permissible if the state's interest in the retroactive effect outweighs the public's disappointed

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[72] *BVerfG of November 11, 1998 – 2 BvL 10/9, BVerfGE 99, 280 (290); of December 7, 1999 – 2 BvR 301/98, BVerfGE 101, 297 (309 f.); of July 27, 2005 – 1 BvR 668/04, BVerfGE 113, 348 (375); of June 13, 2007 – 1 BvR 1550/03, BVerfGE 118, 168 (186 f.).*

[73] *BVerfG of February 5, 2002 – 2 BvR 305/93, BVerfGE 105, 17 (37).*

[74] *BVerfG of December 17, 2013 – 1 BvL 5/08, BVerfGE 135, 1 (14 f.); already before BVerfG of May 2, 2012 – 2 BvL 5/10, BVerfGE 131, 20 (37 f.).*

[75] *Basically BVerfG of May 31, 1960 – 2 BvL 4/59, BVerfGE 11, 139 (145 f.).*

[76] *So expressly for the first time in BVerfG of May 14, 1986 – 2 BvL 2/83, BVerfGE 72, 200 (242).*

[77] *BVerfG of December 17, 2013 – 1 BvL 5/08, BVerfGE 135, 1 (22 f.).*

trust in the reliability of the norm[78]. It should be noted that the special interest in retroactive effects must be strictly distinguished from the simple interest in change (improvement or political reassessment of the legal situation) and must be justified independently. In any case, a general interest in counter-financing[79], the interest in preventing the complication of tax law associated with a necessary transitional regulation[80] and the interest in closing a gap[81] cannot justify the retroactive effect.

The Federal Constitutional Court also uses the assessment periods to assess whether a legal change in the area of annual assessment taxes (such as income tax and corporation tax) that extends into the past is to be classified as genuine or spurious retroactive effect[82]. The court decides whether the statutory retroactive effect only affects the current assessment period or whether it changes the law in assessment periods that have already been completed. This line of jurisdiction has been criticized because economic dispositions, such as the sale of a property, which are made in reliance on the tax law situation during the assessment period, can often no longer be reversed afterwards[83]. The Federal Constitutional Court nevertheless adheres to the assessment period case law, but takes the protection of disposition into account more than before. In constellations of spurious tax retroactivity, the Federal Constitutional Court carefully examines the extent to which the law created trust[84].

The more recent jurisprudence of the Federal Constitutional Court now points to a further approximation of the dogmatics on spurious and genuine retroactivity from the connecting point of view of the protection of legitimate expectations. In a decision from 2013, the court emphasized that the protection of legitimate expectations also establishes and at the same time limits the prohibition of retroactivity in the area of genuine retroactivity[85].

This is of particular importance for the constitutional classification of truly retroactive so-called non-application laws, which are comparatively often found in tax law. Non-application laws retrospectively restore the previous legal situation, which was based on a high court ruling, following a change in jurisdiction by the legislature, or react retrospectively to an initial supreme court clarification of an open legal question to restore the previous administrative practice (Tipke et al., 2021). In these cases, too, the assessment of the constitutionality of the retroactive effect must be based on the concrete, legally structured position of trust[86]. Correctly, this position of trust is justified by the previous administrative practice as well as by a line of jurisprudence from a specialist court. Because the protection of legitimate expectations under the rule of law is to be developed from the perspective of the citizen to be protected, whom the administration as a state authority encounters in a similar way to the judiciary[87]. A retroactive non-application law is permissible if legitimate trust in a new court judgment that deviates from the previous executive or judicial

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[78]*BVerfG of July 7, 2010 – 2 BvL 14/02, BVerfGE 127, 1; 127, 31 (61); cf. most recently BVerfG of January 15, 2019 – 2 BvL 1/09, BVerfGE 150, 345 (373).*

[79]*BVerfG of July 7, 2010 – 2 BvL 14/02, BVerfGE 127, 1 (26 f.).*

[80]*BVerfG of July 7, 2010 – 2 BvL 14/02, BVerfGE 127, 1 (27).*

[81]*BVerfG of January 15, 2019 – 2 BvL 1/09, BVerfGE 150, 345 (373).*

[82]*See already BVerfG of December 19, 1961 – 2 BvL 6/59, BVerfGE 13, 261 (272).*

[83]*For example Friauf , Betriebsberater 1972, 669 ff.; Vogel, Juristenzeitung 1988, 833 ff.; Tipke, Die Steuerrechtsordnung, Volume 1, 2nd edition 2000, p. 156 f.*

[84]*Also BVerfG of October 10, 2012 – 1 BvL 6/07, BVerfGE 132, 302 (319 f.).*

[85]*BVerfG of December 17, 2013 – 1 BvL 5/08, BVerfGE 135, 1 (21 f.); previously similar BVerfG of May 2, 2012 – 2 BvL 5/10, BVerfGE 131, 20 (39).*

[86]*For relevant cases, see BVerfG of July 21, 2010 – 1 BvR 2530/05, BVerfGE 126, 369 (394 f.); of May 2, 2012 – 2 BvL 5/10, BVerfGE 131, 20 (40 ff.).*

[87]*On this horizon of expectations constituted by legal practice, Osterloh, Steuer und Wirtschaft 2015, 201 (204); also G. Kirchhof, in: Herrmann/Heuer/Raupach, EStG/KStG, Einf. ESt Rz. 340*

interpretation and application practice could not be formed before the enactment of the law confirming the previous practice[88].

In the context of the executive tax enforcement, the protection of legitimate expectations is manifested above all by the fact that tax assessments become final and can only be changed again later under very specific, narrowly defined conditions. In addition, tax procedural law stipulates a period of four years after the tax-relevant event, within which a tax can be assessed. Once this period has expired, the tax authorities may no longer determine and levy the tax. However, the situation is different if the taxpayer intentionally evades a tax. In this case, the deadlines for tax collection and criminal prosecution are much longer.

9 CONSTITUTIONAL REQUIREMENTS FOR THE TAXATION PROCESS

The taxation procedure, which can affect the taxpayer intensively and in many different ways, must also meet constitutional requirements. In addition to the principle of the precedence of the law, i. e. the legality of the activities of the financial administration in the investigation, assessment and enforcement proceedings (see VII above), there is in particular the constitutional protection of the general right of personality from Art. 2 Para. 1 in connection with Art. 1 Paragraph 1 of the constitution and the principle of proportionality in the foreground.

The right to informational self-determination as an expression of the general right of personality is affected wherever the tax authorities – as is usually the case – collect and process personal data (P. Kirchhof, 1995; Pfisterer, 2017, p. 393)[89]. In the recent past, there has been a significant expansion of the information obligations of taxpayers in Germany. In addition, the possibilities that the European General Data Protection Regulation opens up for the EU member states to create exceptions have been extensively used in the area of financial management[90]. Especially under the conditions of an electronic and highly networked financial administration, an appropriate balance between the legitimate interest of the state to collect data to ensure legal taxation on the one hand and the informational right of self-determination of the citizen on the other hand must be maintained in the future.

The principle of proportionality also applies to the taxation process. Measures that affect the taxpayer in his property, his freedom to practice his profession or at least in his general freedom of action must be suitable and necessary in order to achieve the goal of reliably determining the tax bases[91]. In addition, the reasonableness limit must be observed. The endeavor to ensure materially correct taxation must be weighed against the encroachment on fundamental rights at the expense of taxpayers (Tipke et al., 2021). This balancing may also include the taxpayer's greater or lesser ability to comply with procedural obligations. Large, internationally active companies will usually have greater "processing efficiency" than small, locally active sole proprietorships[92].

Last but not least, the protection of the right to informational self-determination and the guarantee of a proportionate taxation procedure are served by substantive legal typifications and generalizations, which relieve the administration of individual examinations and an excessively precise insight into the private sphere of the taxpayer[93]. The use of new types of risk management systems can work in the same direction, which only cause the

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[88]BVerfG of July 21, 2010 – 1 BvR 2530/05, BVerfGE 126, 369 (393 et seq.); of May 2, 2012 – 2 BvL 5/10, BVerfGE 131, 20 (41 et seq.); see also BVerfG of December 17, 2013 – 1 BvL 5/08, BVerfGE 135, 1 (27 f.).

[89]BVerfG of March 10, 2008 – 1 BvR 2388/03, BVerfGE 120, 351 (359 et seq.) (on data collection by the Federal Central Tax Office)

[90]For an overview see Myßen/Kraus, Finanz-Rundschau 2019, 58 ff.

[91] See, in: Tipke/Kruse (ed.), AO/FGO, AO § 92 para. 7.

[92]See Schick, Besteuerungsverfahren und Verfahrensleistungsfähigkeit, 1980.

[93]See above 3.2 and 3.3.

financial authorities to examine the individual case more closely in suspicious cases. Insofar as algorithms and self-learning systems of artificial intelligence are used here or elsewhere in the tax procedure, transparency and control must be used to ensure that no unconstitutional discrimination is associated with them.

10 SUMMARY

The Federal German constitution, the Basic Law of 1949, does not contain any explicit specifications for the structure of substantive tax law. However, the Federal Constitutional Court has specified the general constitutional requirements, in particular fundamental rights and the rule of law, for the area of tax law. This results in considerable constitutional requirements for the tax legislature – also in an international comparison – which ensure freedom, equality and the rule of law.

The crystallization point of all constitutional guarantees and principles is the guarantee of human dignity (Art. 1 Para. 1 of the Basic Law). The obligation of the tax legislator is derived from this fundamental right to leave the part of the income tax-free that the taxpayer needs for the existence of himself and his family. It would not be compatible with fundamental freedom to tax the subsistence level in the first step and then to support the citizen with social assistance in the second step. The individual's own care and thus self-responsibility has priority.

The general principle of equality (Article 3(1) of the Basic Law) obliges the tax state to ensure that the burden is fair. The Federal Constitutional Court substantiates this requirement with the principle of taxation based on economic ability, which in turn is regarded as mandatory under constitutional law. The ability-to-pay principle is further specified by the tax legislature for the individual taxes, for example for income tax through the objective and the subjective net principle (deduction of acquisition-related and existence-related expenses from the assessment basis). The Federal Constitutional Court grants the legislature wide leeway when it comes to the question of which sources of tax capacity it wants to exploit. Once the decisions allocating the burdens have been made, however, they must then be implemented logically, i.e. consistently and conclusively, in order to ensure equal loads. Both a progressive and a proportional (but not a degressive) income tax rate are considered to be in line with ability to pay.

The legislature may only deviate from these principles if there are good reasons. Simple fiscal needs are not such a reason. On the other hand, it is recognized that the legislature may deviate from efficiency-based taxation in order to steer the behavior of citizens. However, the importance of the steering purpose must always be in reasonable proportion to the deviation from the equal burden. In this context, the Federal Constitutional Court also requires that the legislature must clearly state the steering objective. In addition, the legislature is allowed to typify and generalize within limits in order to simplify administration and thus ensure the result. However, the typification must always remain realistic, i.e. based on the "typical" case.

The special bans on discrimination in the Federal German Constitution (Article 3 (2) and (3) of the Basic Law) have no particular significance for taxation. Following a ruling by the Federal Constitutional Court, same-sex registered partnerships have been given the same income tax status by the legislature. Since civil marriage was opened to same-sex couples, all marriage-related provisions of tax law also apply to them. In income tax law, the splitting of spouses is of particular importance; after that, the income of the spouses is divided equally between both, which entails progression advantages.

The fundamental rights to freedom restrict the tax legislator only slightly. According to the fundamental right to property (Art. 14 Para. 1 of the Constitution), strangulating taxation is prohibited. In addition, the taxes on the income must be proportionate. However, after the abandonment of the so-called 50-50 principle, the legislator has a lot of leeway in

this respect. In the area of excise and expense taxes, the Federal Constitutional Court is even more reluctant to name upper limits on the burden of basic freedoms.

Equal burdens can only be realized in an equal, i. e. complete, tax enforcement. This execution is the task of the financial administration. If, however, the tax law is already so deficient that a complete tax enforcement cannot succeed, then the law is considered unconstitutional. The same applies if the tax law, contrary to its purpose, permits tax-reducing arrangements to a considerable extent. Therefore, a taxpayer can claim in court that he is burdened by a law that is unconstitutional because the law leaves room for tax avoidance for other taxpayers.

According to the democratic and constitutional principle of the proviso of the law, taxes must be based on a sufficiently specific parliamentary law basis. Legal analogies to the detriment of the taxpayer are only permissible to a very limited extent. Statutory law in Germany is supplemented by many internal administrative regulations because enforcement can be very complicated in individual cases. This promotes equality-based implementation; at the same time, however, the enforcement requirements must remain in line with the principle of the statutory reservation.

Case law, in particular the case law of the Federal Fiscal Court, is also of great importance in practice when it comes to interpreting and specifying tax law. The administration and the taxpayers are strongly guided by the judgments. In some cases, however, the administration deliberately deviates from the judgments of the Federal Fiscal Court because these formally only apply to individual cases. This is constitutionally problematic.

According to the constitutional principle of the rule of law, the administration must observe the existing tax laws. If a tax law provides for taxation, the administration may not waive taxation for other reasons or in consultation with the taxpayer. German tax law prohibits agreements on the amount of taxation.

The rule of law requires legal certainty. From this follows the requirement of a sufficiently specific and clear tax law. In addition, legal certainty also requires the protection of legitimate expectations. Onerous retrospective tax laws are therefore only compatible with the constitution to a limited extent. The genuine retroactivity (subsequent replacement of the legal consequence) is fundamentally unconstitutional. The spurious retroactivity (connection to an ongoing situation) requires a very careful proportionality test. In the area of periodically assessed taxes, the end of the assessment period (usually the calendar year) is decisive for the distinction between spurious and genuine retroactive effect, because the legal consequences of the tax occur at the end of the year. However, the Federal Constitutional Court is also increasingly protecting dispositions made during the current assessment period. In the context of tax enforcement by the tax authorities, protection of legitimate expectations manifests itself through the validity of tax assessments and through the fact that the tax can only be assessed within a period of time.

The taxation procedure must also meet constitutional requirements. The focus here is on adequate protection of the private sphere guaranteed by fundamental rights and on maintaining proportionality.

Overall, this results in the picture of a comprehensive substantive tax constitutional law in Germany. Care must always be taken to ensure that the tax legislature is not overly restricted by the constitution in its democratic freedom of design. In conclusion, however, one can state that the constitutional guarantees in Germany have provided and continue to provide taxation that is based on freedom and equality in a very fortunate manner.

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