Article

Constitutional Taxation in the Netherlands

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ABSTRACT:

In the Introduction, the authors mention the importance of the rule of law, democracy, human rights and constitutional rights, as elements of legitimacy and restriction of state power to impose taxes, because this power produces a limitation of rights and freedoms. However, the regulatory activity of the tax administration can also produce an attack against rights and liberties. The authors develop these issues, among others, consecutively explaining the follow: constitutional norms; constitutional bases of taxation; legislative and administrative functions related to taxation; constitutional framework of protection of individual rights and liberties; fundamental legal principles and the testing of tax legislation; the principle of equality: the method of judicial interpretation; the margin of appreciation for the tax legislator; fundamental rights and technical distinctions of a legal nature; judicial deference: right to property; legal certainty.

PALABRAS CLAVES:

principios tributarios, régimen jurídico tributario, derecho de los contribuyentes, control de constitucionalidad, derechos humanos.

RESUMEN:

En la Introducción, los autores mencionan la importancia del estado de derecho, la democracia, los derechos humanos y los derechos constitucionales, como elementos de legitimación y restricción de la potestad estatal de imponer impuestos, pues esta potestad produce una limitación de derechos y libertades. Sin embargo, la actividad normativa de la administración tributaria también puede producir un atentado contra los derechos y libertades. Los autores desarrollan estos temas, entre otros, explicando consecutivamente los siguientes: normas constitucionales; bases constitucionales de la tributación; funciones legislativas y administrativas relacionadas con la tributación; marco constitucional de protección de los derechos y libertades individuales; principios jurídicos fundamentales y la comprobación de la legislación fiscal; el principio de igualdad: el método de interpretación judicial; el margen de apreciación para el legislador fiscal; derechos fundamentales y distinciones técnicas de carácter jurídico; deferencia judicial: derecho a la propiedad; Certeza legal.

MOTS CLES :

principes fiscaux, système juridique fiscal, droit des contribuables, révision constitutionnelle, droits de l'homme.

RESUME :

Dans l'introduction, les auteurs mentionnent l'importance de l'État de droit, de la démocratie, des droits de l'homme et des droits constitutionnels, en tant qu'éléments de légitimité et de restriction du pouvoir de l'État d'imposer des impôts, car ce pouvoir produit une limitation des droits et des libertés. Cependant, l'activité régulatrice de l'administration fiscale peut aussi produire une atteinte aux droits et libertés. Les auteurs développent ces questions, entre autres, expliquant successivement les points suivants : normes constitutionnelles ; bases constitutionnelles d'imposition; fonctions législatives et administratives liées à la fiscalité; cadre constitutionnel de protection des droits et libertés individuels ; principes juridiques fondamentaux et mise à l'épreuve de la législation fiscale; le principe d'égalité : la méthode d'interprétation judiciaire ; la marge d'appréciation du législateur fiscal ; droits fondamentaux et distinctions techniques de nature juridique; déférence judiciaire : droit de propriété ; sécurité juridique.

CONTENTS:

1 INTRODUCTION

The rule of law aims to protect against arbitrary interferences with citizens' rights and liberties. A distinctive feature of the democratic state which is subject to the rule of law is the primacy of the legislature in law-making, or the primacy of politics in deciding major issues concerning the public interest. The legislature determines the actual specification of the public interest and which policies should be implemented to further the public interest. However, this primacy of the legislature does not entail a monopoly position. There are more partners involved in the business of law-making. The courts are for instance an important (junior) partner of the legislature.

This also goes for taxation. Democratic legitimacy is an important condition of voluntary compliance with tax laws. Taxation, therefore, needs democratic legitimacy, i.e., the consent of Parliament which represents the citizens: no taxation without representation. However, taxation is also a matter of law as, in a constitutional democracy, the Government is only allowed to interfere with the liberties of citizens by means of the law. The levying of taxes, therefore, is governed by specific constitutional rules. The legislation laid down according to these rules provides the basis and the limits of the tax administration's policies and actions.

Taxation clearly is an interference with citizens' rights and liberties. Some constitutional norms are crucial to prevent and challenge arbitrary taxation. Here, we will focus on the principle of equality, the right to property and the principle of legal certainty (which is not enshrined in the Dutch constitution itself), the latter in particular with regard to retroactive tax legislation.

With regard to the principle of equality, legislation providing a public duty or a benefit that affects only a small group of citizens may be deemed to violate equality, if it is discriminatory, that is, if implies an unjustified discrimination. Since taxation has become a very important instrument of national governments for large-scale (redistributive) social, economic, cultural, and even environmental policies in the regulatory welfare state, tension arises between the legislature's power to tax and the constitutional restrictions on taxing power. The legislator may be tempted to introduce unjustified discriminations.

However, tax legislation may also violate the right to property in case of arbitrary tax regulations. On the one hand, the right to property is evidently a fundamental human right, on the other hand, the state uses taxation to finance all kind of public goods to support society and the market and enhance individuals' well-being. The obligation to pay tax of course affects individual property rights. How then to strike a fair balance between the public interest and private fundamental rights?

Another fundamental legal principle, the principle of legal certainty, may also run into problems. The requirement of stability is but one aspect of the principle of legal certainty, but this principle comprises several other aspects, e.g., the promulgation, non-retroactivity, and clarity of laws. The use of tax legislation for non-fiscal goals as part of all kinds of regularly changing government policies results in rapidly changing legislation which often lacks clarity and goes at the expense of consistency in time. Sometimes the legislator even introduces retroactive tax legislation. The Dutch Constitution (*Grondwet*) contains no guarantees against these kinds of violations of the principle of legal certainty.

In this contribution, we shall deal with some developments which account for the increasing amount of legislation and the resulting growth of the power of the Dutch tax administration (formally: Netherlands Tax and Customs Administration (NCTA)) to the detriment of some fundamental legal principles. These developments have led courts to adopt a more independent attitude than they used to do. This is reflected in their attaching increasing importance to legal principles and human rights. However, as we will show, this increased attention regards the review of the actions of NTCA rather than the testing of tax legislation.

First, we shall analyse the way in which the principle of equality restricts the legislative power to tax. We shall discuss the different sources of the principle of equality in Dutch constitutional law and the (still) existing prohibition on constitutional review. With regard to the actual testing of tax legislation, we shall draw attention to the method of judicial interpretation. Then we shall turn to the case law concerning the principle of equality in Dutch tax law, focusing on several issues which the Dutch Supreme Court has dealt with. Here, we will draw a parallel with the case law of the European Court of Human Rights (ECtHR). It will appear that in most cases the Supreme Court takes an extremely cautious position in the constitutional dialogue with the legislator.

Next, we will focus on the right to property as taxpayers invoke Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR). The method of judicial interpretation, that is, the assessment scheme that the courts apply, will also be dealt with. Moreover, we will briefly discuss a hotly disputed provision in the Dutch personal income tax. Again, the judiciary will appear to apply much a restraint, hardly disciplining the legislature with regard to due respect for fundamental rights and principles.

Lastly, we will deal with the topic of retroactive tax legislation. It goes without saying that retroactive rulemaking may seriously compromise the ideal of legal certainty. Here, we will focus on a memorandum by the State Secretary (*staatssecretaris*) for Finance which sets out his transition law policy in tax matters. Thus, he offers the taxpayers some guidance with respect to the use of the instrument of retroactive tax legislation. We shall analyse this particularly interesting phenomenon to reduce legal uncertainty.

A caveat needs to be made here. It is impossible to do justice to the many nuances in case law in this relatively brief paper. We will therefore restrict ourselves to highlighting the most important strands and issues dealt with in case law.

2 MAIN (SEMI-)CONSTITUTIONAL NORMS

As said, we will focus on three constitutional norms. In Dutch tax case law, the principle of equality has been developed into an important instrument of the constitutional review of legislation. This principle enables the courts to offer taxpayers a certain degree of legal protection. As such, the principle of equality embodies an important additional protection for the principle of legality in restricting the legislative power to tax. By reviewing tax legislation, the Dutch Supreme Court (*Hoge Raad*) can restrict the legislative power to tax. In doing so, it functions as a check on the democratically legitimised legislature.[1]

The right to property is entrenched in Article 14 of the Dutch Constitution and Article 5:1 Dutch Civil Code. It is also codified in human rights treaties, such as Article 17 of the Universal Declaration of Human Rights, Article 1 of Protocol No. 1 ECHR, and Article 17 of the Charter of Fundamental Rights of the European Union. In principle, the obligation to pay tax inherently affects property rights. Article 1 of Protocol No. 1 ECHR states that this interference is generally justified since it expressly provides for an exception as regards the payment of taxes or other contributions. An interference must, however, achieve a "fair balance" between the public interest of the community and the protection of the individual's

[1] *Of course, parallel to national judgments is a growing body of case law from the European Court of Justice interpreting the Treaty of Europe as well as the Treaty on the Functioning of the European Union and limiting the power of the Member States to formulate their own tax rules, even if those rules apply to their own citizens only. EU legislation and ECJ rulings are a source of fundamental rights, by virtue of its supranational character, EU law is automatically part of the Dutch domestic legal system. These fundamental rights established or recognized at Union level are at the same time domestic fundamental rights. The fundamental right to property, for instance, is also a directly applicable general principle of EU law. In 2009, it was codified in the Charter of Fundamental Rights of the European Union. The scope of application of the Charter and of the general principles of EU law is the same as the scope of EU law as such. Consequently, whenever EU law is activated, the (Charter of) Fundamental Rights are also activated. However, they do not form the subject of this paper.*

fundamental rights. The balance is distorted if a provision imposes a disproportionate and excessive burden on taxpayers.

The principle of legal certainty is quite a different affair. People value legal certainty. The predictability of law protects those who are subject to the law from arbitrary state interference with their lives. Nonetheless, legal certainty being a principle is not an absolute desideratum. Even so, one form of violation of legal certainty, retroactive law-making, often seems to frustrate people completely in planning their future. Important though it may be, the principle of certainty as such is not enshrined in the Dutch Constitution nor in any international treaty with provisions that are binding on all persons. The courts therefore cannot test Acts of Parliament against this fundamental legal principle. An exception is that if an Act of Parliament falls within the scope of European Union law, the retroactivity of such an act can be tested against the general principles of European Union law, e.g., the protection of legitimate expectations and legal certainty. However, the Courts are allowed to test tax measures against Article 1 of Protocol No. 1 ECHR which in some cases might allow the Courts to review the retroactivity of a tax rule. Furthermore, there are two frameworks set out in domestic soft law instruments which entail that retroactive tax laws have to meet certain conditions.

3 CONSTITUTIONAL BASIS FOR TAXATION

The principle of legality has special force in Dutch tax law. This rule of law requirement of general legislation, an important safeguard against arbitrary interferences with individual rights and liberties by the public authorities, is of special importance in tax law. The levying of taxes, therefore, is governed by specific constitutional rules. The principle of legality also relates to the principle of "no taxation without representation" which is fundamental in democracies. Although taxes are compulsory, in modern democratic states they cannot be levied without some kind of popular consent (democratic legitimization of taxes). Legislative authorization is a necessary condition for the government before it may impose charges, e.g., taxes on the citizens. As regards tax matters, therefore, the principle of legality is entrenched in the Dutch Constitution. Article 104, paragraph 1 states that taxes imposed by the State must be levied pursuant to Act of Parliament (*uit kracht van een wet*).[2] Examples are the Personal Income Tax Act 2001 (*Wet Inkomstenbelasting 2001*) and the Corporate Income Tax Act 1969 (*Wet op de Vennootschapsbelasting 1969*).

According to Article 81 of the Constitution, the power to enact Acts of Parliament (*wetten in formele zin;* statute law) rests jointly with the government and the States General (Besselink, 2014, 1219-1220). The Government is constituted by the King and the Ministers (Article 42 of the Constitution). In cases in which the Minister regards it as appropriate, the State Secretary can replace the Minister (Article 46 of the Constitution). Statutes are signed by the King and one or more Ministers or State Secretaries (Article 47 of the Constitution). This general procedure also applies to tax legislation.

Both government and the States General may initiate legislation. The procedure for enacting Acts of Parliament varies depending on whether a bill is presented by the government or by the Lower House (House of Representatives, *Tweede Kamer*) of parliament – the latter is quite exceptional in tax affairs. A proposal initiated by the government is prepared by civil servants in a ministry or several ministries jointly. During the preparatory stage the representatives of social groups, e.g., employers' organizations and trade unions, and experts are usually consulted.

[2] *Paragraph 2 states that other levies imposed by the State must be regulated by Act of Parliament. Article 104, therefore, does not cover taxation by lower legislative authorities.*

The special force of the principle of legality impacts the position of the tax administration. As a result of the primacy of the democratically legitimized legislator in making tax laws, the tax administration traditionally has hardly any discretionary power. From a constitutional point of view, it is the legislator who establishes the tax rules. It is the legislator's prerogative to determine the policy purposes and the essential features of the tax, in particular who and what is liable to be taxed and at what rate; the tax inspector has no discretion in this respect. Furthermore, because voluntary compliance is too small a basis for successful tax collecting in the long run, the tax inspector has extensive, unilateral (coercive) powers to enforce the tax laws such as the power to invoke disclosure requirements, audits and sanctions (like (administrative) penalties and reversal of the burden of the proof) and powers with respect to tax collection and fraud investigations. In the Netherlands, procedural tax law is part of administrative law, so the General Administrative Law Act (*Algemene wet bestuursrecht*) applies. Moreover, there are two Acts which apply to the levying and collection of taxes: the General Taxes Act (*Algemene wet inzake rijksbelastingen*) and the Tax Collection Act 1990 (*Invorderingswet 1990*) respectively.

The power of both the executive (tax authorities) and legislature has to be checked by the judiciary. The constitutional basis for the domestic courts is their competency to decide cases brought before them by taxpayers against the tax inspector – and thus, indirectly, against the legislature. Chapter 6 of the Constitution deals with the administration of justice. Article 112 of the Constitution attributes responsibility for judging disputes on civil rights and obligations to the judiciary. The judgment of administrative disputes, which do not arise from relations under civil law, may be granted by statute either to the judiciary or to tribunals which do not form part of the judiciary. It is determined by statute which courts form part of the judiciary. For tax procedures some provisions in the General Taxes Act contain exceptions to the *General Administrative Law Act* - in favor of the tax administration. These number of exceptions has decreased in the past fifteen years or so.

4 A SHIFT OF POWER

In practice, the Government plays a pre-eminent role in the legislative process. Most Acts of Parliament are the result of Government initiatives. This also holds true for tax legislation. Here, the State Secretary for Finance plays a pivotal role. He has two hats, for he is part of the legislature, introducing most of the tax bills, but is also head of the NTCA, and as such is politically responsible for its functioning. Unlike some other countries, he is not part of the civil service. In his capacity as a co-legislator, he is responsible for the continuous initiating activity of the Government in tax matters.

4.1 LEGISLATURE AND TAX ADMINISTRATION

The increasing amount of legislation is partly due to the efforts of the tax legislator striving for effective and timely control over the growing complexity of society. As a result, tax legislation is often amended in order to adapt it to the changing circumstances. Tax avoidance, for example, often leads to detailed legislation and may even lead to overkill in anti-abuse provisions. Furthermore, the Dutch legislator increasingly interferes with the liberties of citizens in order to steer society (Gribnau, 2012; Gribnau, 2013a). Through a wide range of activities, the social welfare state tries to create substantive freedom and equality for its citizens. In the Netherlands, the use of tax legislation for non- fiscal goals is "an integral part of Government policy" (Parliamentary Documents (*Kamerstukken*) II, 1997-1998, 25 810, no. 2, pp. 34-35). This instrumental view of tax law threatens to erode the integrity and legitimacy of tax law.

Paradoxically, the resulting proliferation of legislation has generated a growth in the power of the tax administration. An increasingly important role is assigned to NTCA which has

to apply and concretise – not just expose – the norms of general law. This concretisation of a general norm by the administration has an independent, formative component. The result is often a new type of legislation: statutes set out certain aims, leaving the implementation to subordinate legislation, e.g., ministerial decisions and administrative regulations. Furthermore, discretionary powers are assigned to the administration. Moreover, the use of open standards and the instrumentalist attitude of the legislator also increases the importance of the role of NTCA in determining the actual legal norms. Especially in the field of taxation, the legislator seems willing to confer new powers upon the tax administration too easily. After all, the tax administration's work concerns the state's budget. Consequently, the tax administration has acquired an autonomy of its own.

Here, it is important to note that the perspective of the tax administration often prevails in tax legislation. The content of the tax statutes is often largely shaped by the interests of the tax administration. This is not surprising as the legislative and executive function of government are blurred because of the two hats of State Secretary for Finance. As a result, the legislator usually adopts the perspective of the tax administration to advance the efficient implementation of legislation. Besides, the tax administration has an interest in legislation without many technically sophisticated provisions. This 'simple' legislation is a blessing for the tax inspector. In the Netherlands, the tax levied on income from savings and investments (*vermogensrendementsheffing*), for example, is based on the assumption that a certain taxable yield is made on the net assets, irrespective of the actual yield. The tax authorities are not required to check the actual income received from different sources such as interest, dividends, capital gains, and losses. However, on the basis of this provision (of tax law), relevant differences in the ability to pay between taxpayers are ignored. Thus, unequal cases are treated as if they were equal. Both efficiency and legal certainty are enhanced, but at the expense of equality. In some cases, even the right to property is violated (see section 11.2).

4.2 PRINCIPLES AND POLICY RULES

However, notwithstanding the State Secretary for Finance bias and focus on efficient tax collection, Dutch tax legislation has become more and more detailed and complicated. Legislation is constantly refined and supplemented, with exceptions and deviations often added during the legislative process itself. Tax complexity is a pervasive phenomenon. As a result, tax legislation provides fewer safeguards as regards fundamental legal principles like equality, property rights, legal certainty, impartiality, and neutrality. The failure of legislatures (parliaments) to exercise adequate controls over their tax administration has led to attempts by the judiciaries to fill this vacuum. Indeed, there has been a change in the attitude of the courts to the power of the tax authorities and their (administrative) decisions. In this respect, the courts are more willing to develop principles which restrain the exercise of administrative power, principles of proper administrative behaviour (*algemene beginselen van behoorlijk bestuur*) with regard to improper actions and decisions of the administration when applying and enforcing the law.

Most of these principles of proper administrative behaviour are developed in case law. In due course they are partly codified in the General Administrative Law Act, but partly they are still (unwritten) case law. The most important and well-developed principles of good proper administrative behaviour in tax law are the principle of honouring legitimate expectations and the principle of equality (these can in exceptional situations justify a deviation from the strict application of the legislation (the principle of legality, therefore). Thanks to these principles administrative rules (*beleidsregels*), a form of administrative guidance developed a status of their own in the hierarchy of legal sources. NTCA has to formulate policies containing standards on how to interpret and apply legislation. These policies are often laid down in rules and disseminated within the administration in order to

be applied by tax inspectors. These rules enable the tax inspectors apply the tax legislation in a uniform way – enhance consistent, equal treatment. To be sure, administrative rules (*beleidsregels*) are concerned here, not secondary legislation on the basis of some kind of delegated legislative power conferred by an Act of Parliament.

Two types of administrative rules can be distinguished. First, there are policy rules which contain NTCA's interpretation of the law. The lack of clarity of legislative provisions and case law is dispelled by the tax administration's indication of its view of the regulation's meaning. The second type concerns administrative rules in which NTCA approves a certain application of the legislation for example to provide more feasible solutions and appropriate applications (this approval may be based on Article 63 General Taxes Act). These deviate from the strict wording of the law. Both 'interpretative policy rules' and 'approving policy rules' are very important for taxpayers – providing certainty since they are NTCA's 'translations' of often very complex tax law (Gribnau, 2007, pp. 301-308; Happé and Pauwels, 2011, p. 240). Tax complexity gives rise to unintentional noncompliance, to intentional overcompliance, the willingness to comply voluntarily, and even intentional noncompliance (Gribnau and Dusarduijn, 2021, p. 80). Thus, taxpayers may pay less or more taxes than they should, which entails a violation of the principle of inequality.

In 1978, the Supreme Court decided in three landmark decisions that administrative policy rules inspire legitimate expectations in taxpayers that in raising the assessment, the inspector will take a certain position (Supreme Court 12 April 1978, *BNB* 1978/135-137). This offered the core of an appeal to the principle of legitimate expectations but was also the starting point for the development in case law of other principles of proper administrative behaviour. Twelve years later, the Supreme Court brought about a further change in the status of these rules. It decided that, under certain conditions, administrative policy rules can be considered 'law' in the sense that policy rules constitute grounds for cassation (Supreme Court 28 March 1990, *BNB* 1990/194). In 1994, the legislature understood the signs of the times and codified this case law in Article 4:84 of the General Administrative Law Act. It states that "the administrative authority shall act in accordance with the administrative policy rule unless, due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purposes of the policy rule". Thus, citizens may directly invoke the policy rule without the need to invoke principle of legitimate expectations; although he can still invoke the 'underlying' statute if he thinks the policy rule unfavourable (less advantageous), since policy rules are not binding like statutes.

4.3 RULINGS

Dutch tax legislation is very complex. The upshot of complexity of tax law is taxpayers lacking certainty as to the right interpretation. Thus, they have difficulties in tuning their life and plans to tax legislation. This also goes for corporate taxpayers. Moreover, high levels of complexity of the tax system also reduce the responsiveness to new policies. Tax complexity may also adversely impact taxpayers' compliance. Therefore, tax complexity is a fundamental concern for the NTCA, for the principles of (legal) certainty and equality are at stake.

NTCA can in a way compensate for the ensuing lack of certainty by providing certainty to taxpayers via e.g., policy rules, agreements and promises. Another instrument is the ruling. Rulings are agreements the tax administration makes with taxpayers, particularly (international) corporations, for example with regard to transfer pricing (advance pricing agreement). Transparency is an important issue; for example, the publication of (a summary of) anonymized rulings provides insight into the practical application of the ruling policy for tax policy makers, NGOs, academics, transfer pricing practitioners, corporate taxpayers, and

their advisers who envisage advising on or seeking to obtain such a ruling – thus enhancing certainty. Publications also allows third parties to ascertain which conditions apply and whether they meet them, after which they can invoke the principle of equal (consistent) treatment against NTCA if they are denied a similar ruling. Of course, transparency and the exchange of (information regarding) rulings is also important between states.

The so-called 'Dutch tax ruling practice' implies that taxpayers or future taxpayers (e.g., potential foreign investors) in the Netherlands can conclude agreements with the Dutch tax authorities in order to obtain certainty in advance on the tax consequences of their envisaged legal actions. After criticism of the Primarolo Group of the EU Code of Conduct Group and the OECD Report on harmful tax competition, NTCA revised its tax ruling practice. As of 1 April 2001, NTCA restricted the granting of tax rulings to those that are tailored to the specific facts of the taxpayer's case and are aligned with tax law, policy, and case law. A tax ruling should not lead to a different or more favourable tax outcome, that is, to a tax privilege for (corporate) taxpayers advised by very knowledgeable tax experts. This would imply a violation of the principle of equality.

Several factors played a part in the decision of the Dutch State Secretary of Finance to issue a new Ruling Decree that entered into force on 1 July 2019. For one thing, both Dutch Parliament and tax scholars repeatedly criticized the lack of openness and transparency in the ruling practice. There was also concern about the possibility that taxpayers with limited economic substance in the Netherlands could still obtain a tax ruling from NTCA. Other factors were the EU Code of Conduct Group recommendations for national tax ruling practices, the overall aim of banning letterbox companies from obtaining a tax ruling, and state aid procedures that are related to tax rulings provided by the NTCA (Bolink, 2021). An important feature of this new regulation is that it only concerns to the granting of tax rulings in cross-border situations. The implementation is done by a newly composed team of dedicated specialists within the NTCA: the College International Tax Certainty. Moreover, the new Decree contains several measures with regard to more stricter and extensive procedures and transparency: an anonymized summary of a ruling will be published on the NTCA's website. Moreover, tightened eligibility requirements are introduced concerning the content of rulings: economic nexus, saving Dutch or foreign taxes being not the only or decisive motive, and no involvement of entities established in low taxation countries or non-cooperative jurisdictions for tax purposes (Letter of State Secretary of Finance, 2018; for an evaluation of the revised ruling practice, see Bolink, 2021).

5 FUNDAMENTAL PROTECTION OF INDIVIDUAL LIBERTIES AND RIGHTS

In Dutch constitutional law, the notion of fundamental rights (*grondrechten*) is generally used to refer to both fundamental rights and liberties. Moreover, classic fundamental rights are conceptually distinguished from fundamental social and economic rights. The sources of fundamental rights are the Dutch Constitution, international conventions on human rights, and European Union law.

The Constitution comprises a catalogue of classic and social fundamental rights, included in Chapter 1 (Articles 1-23) entitled 'Fundamental Rights.'[3] Perhaps the most important classic fundamental right is provided by Article 1 stating the prohibition of discrimination and the right to equal treatment (Besselink, 2014, p. 1234):

[3] *Incidentally, there are provisions elsewhere in the Constitution which can be classified as fundamental rights. Article 114, for example, prohibits the imposition of the death penalty.*

> "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted."

The classic fundamental rights have the nature of self-executing safeguarding standards, and they can be invoked in court as such.[4] This cannot be said of the majority of the social and economic fundamental rights, which are not enforceable in court. These social and economic fundamental rights concern, for example, employment, legal status, the protection, and co-determination of working persons (Article 19) and means of subsistence and the distribution of wealth (Article 20). These provisions are instructions for the public authorities to take certain actions to enhance the economic, social, and cultural well-being of individuals, and they are, therefore, primarily programmatic provisions. These measures can be funded by taxes, but the tax law itself also contains many incentives to promote these goals (instrumental or regulatory function of taxation; Gribnau, 2010, p. 158).

Since the Netherlands is a Member State of the European Union the Charter of Fundamental Rights of the European Union offers also legal protection. This Charter codifies certain political, social, and economic rights for European Union (EU) citizens and residents in EU law. The Charter applies to the Institutions of the European Union and its member states when implementing European Union law. They must act and legislate consistently with the Charter.

A very important source of fundamental rights in Dutch constitutional law is provided by international conventions on human rights that have been ratified by the Netherlands. Particularly relevant in this context are the ECHR and the International Covenant on Civil and Political Rights (ICCPR). Here, it is important to note that the Netherlands adheres to a monist system for the relationship between international treaties and domestic law. In general, monism means that the various domestic legal systems are viewed as elements of the all-embracing international legal system, within which the national authorities are bound by international law in their relations with individuals, regardless of whether or not the rules of international law have been transformed into national law (Van Dijk et al., 2006, pp. 27-28). In this view, the individual derives rights and duties directly from international law, which must be applied by the national courts and to which the latter must give priority over any national law conflicting therewith. This is the case in the Netherlands. Furthermore, Article 94 of the Constitution provides that no national regulation may conflict with treaty provisions "that are binding on all persons." Most of the provisions relating to human rights in the ECHR and the ICCPR, according to the case law of the courts, are binding on all persons. Treaty provisions take precedence over Acts of Parliament as well as over other generally binding rules (whereas provisions on social and cultural rights "tend not to have a directly effective, self-executing character and complaints of their infringement are therefore not justiciable; Besselink, 2014, p. 1237). Consequently, the provisions relating to human rights in these treaties play a role in the judicial (or constitutional) review of legislation by national courts. If treaties contain general principles of law, the court can test provisions of Acts of Parliament against these fundamental legal principles (see Section 6).

In passing we note that enforcing fundamental rights is not solely the task of the judiciary. In the Netherlands, because of the decentralised system for enforcing fundamental rights, all public authorities responsible for applying the law, e.g., the tax administration, "may be confronted with the question whether an act of a public authority violates a fundamental right" (Kraan, 2004, p. 601). Therefore, NTCA is a kind of primary guardian of fundamental rights. The courts, of course, fulfil this protective role by nature.

[4] *In the Netherlands the judicial testing review of Acts of Parliament against these rights is performed in an indirect way, see section 6.*

There is one important exception to this principle. Acts of Parliament may not be tested against the Dutch Constitution, for one of the legislature's prerogatives is to decide upon the question of whether a statute violates any fundamental right (Article 120 of the Dutch Constitution). Responsibility for law in accordance with fundamental rights is one thing, accountability and the possibility of evaluation by the courts is another. Both statutes and the Constitution, however, may be tested against provisions of international treaties that are binding on all persons. With this aspect of legal protection, therefore, treaty rights have added value.

6 FUNDAMENTAL LEGAL PRINCIPLES AND THE TESTING OF TAX LEGISLATION

6.1 THE PROHIBITION ON CONSTITUTIONAL REVIEW

As said, the Dutch Constitution prohibits any judicial (constitutional) review: the courts are not allowed to test Acts of Parliament and international treaties against the Constitution. This is quite exceptional in the international legal order. Article 120 of the Constitution reads as follows:

> "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

This means that only the legislature can assess whether or not it has remained within the limits set by Article 1 of the Constitution (See, for example, Supreme Court 21 March 1990, *BNB* 1990/179 and 23 December 1992, *BNB* 1993/104). It should furthermore be noted that the Netherlands lacks a constitutional court.

This constitutional prohibition on testing only applies to Acts of Parliament and international treaties. Thus, the Supreme Court can test subordinate legislation, such as ministerial regulations and the bye-laws of lower government bodies, against the principle of equality which is enshrined in Article 1 of the Constitution, but also the unwritten principle of legal certainty (Supreme Court 7 October 1992, BNB 1993/4). Thus, the tax bye-laws of decentralised authorities, the provinces and municipalities, and water boards are subject to a judicial review (of administrative action).

As regards Acts of Parliament, the courts do not have this competence. The prohibition in Article 120 of the Dutch Constitution prevents this. However, both the principle of equality and the right to property are universal legal principles which are enshrined as fundamental rights in international conventions. Here, Article 94 of the Constitution plays an important role. This Article reads as follows:

> "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions."

Article 94 of the Constitution provides that no national regulations may conflict with treaty provisions. This applies to Acts of Parliament as well as to generally binding rules. If treaties contain principles of law, the courts can test provisions of Acts of Parliament against these fundamental legal principles. In this respect, Article 26 of the ICCPR is an important instrument. It contains the principle of equality, which enables the courts to test Acts of Parliament against the principle of equality. Since the *Darby* case, Article 1 of Protocol No. 1 ECHR in conjunction with Article 14 of the Convention gives the same opportunity by testing Acts of Parliament by the courts (ECtHR 23 October 1990, No. 17/1989/177/233, *Darby v. Sweden*, Series A, No. 187).

In conclusion, the prohibition on the testing of Acts of Parliament against the Constitution does not apply in practice in case of directly effective, self-executing

international human rights treaties. Article 94 of the Constitution obliges the courts to test Acts of Parliament against, for instance, the equality principle of these international human rights treaties. The result is an indirect constitutional review of tax legislation. This Dutch constitutional conception of the direct effect of international law means that the techniques operated by the Dutch courts are exactly the same as those developed by the constitutional courts of its continental neighbours in reviewing the constitutionality of statutes. As will be shown, this also holds true for the testing of tax legislation - though the Supreme Court, which is not a constitutional court, seems to apply much more a restraint (see section 8).

In the next section, we will first deal with Article 26 ICCPR which paved the way in the Netherland. We'll thus focus on the principle of equality – a paramount example of a fundamental legal principle.

6.2 ARTICLE 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR and the International Covenant on Economic, Social, and Cultural Rights (the ECOSOC Treaty) were adopted by the General Assembly of the United Nations on 19 December 1966. Human rights are laid down in both treaties. The Dutch Government's ratification of the ICCPR took place on 23 March 1976 and the ECOSOC Treaty was ratified on 3 January 1976. Both treaties came into effect in the Netherlands on 11 March 1979. Article 26 of the Covenant reads as follows:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Naturally, tax law is not excluded from the scope of Article 26 of the Covenant. This Article has an independent character (Happé, 1999, p. 130). This means that this fundamental right can be invoked not only if one of the other rights of the treaty has been violated, but also if there is a possible violation of Article 26 itself in any other way (United Nations Human Rights Committee 9 April 1987, *Broeks v. Netherlands*, No. 172/1984, RSV 1987/245). In a decision of 27 September 1989, the *Dentist's Wife* judgment, the Supreme Court endorsed this independent character as regards tax law (Supreme Court 27 September 1989, *BNB* 1990/61).

Another important characteristic of Article 26 is its direct effect. This means that "on the basis of its content, this treaty provision can be applied directly by a national court without first requiring further elaboration of that content by an international or internal body." The Supreme Court concluded in its judgment of 2 February 1982 (*NJ* 1982, 424) that Article 26 of the Covenant, because of its character, is suitable to be directly applied by the Court. Thus, in the *Dentist's Wife* judgment, for example, the Supreme Court could proceed to test against Article 26 without further ado, which made Article 26 the vehicle for testing of tax legislation against the principle of equality at the time. Only later Article 14 ECHR entered the 'testing of tax legislation' scene.

6.3 ARTICLE 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This Convention is of an earlier date than the ICCPR. The ECHR was adopted on 4 November 1950. The Netherlands ratified this treaty on 28 July 1954, and it came into effect on 31 August 1954. The text of Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In the *Darby* case, the ECtHR decided that Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1 ECHR, prohibits discrimination in matters of taxation (ECtHR 23 October 1990, No. 17/1989/177/233, *Darby v. Sweden*, Series A, No. 187).

Regarding tax law, Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1 ECHR (which also regards the protection of the right to property, see section 11), currently offers the same possibilities as Article 26 of the Covenant to bring an alleged violation of the principle of equality before a court. In a judgment of 12 November 1997 (*BNB* 1998/22), the Dutch Supreme Court formulated this as follows:

> "Unequal treatment of similar cases is prohibited by Article 14 of the Convention and Article 26 of the Covenant if there is no objective and reasonable justification, or to put it differently, if no justifiable purpose is pursued or if the unequal treatment is in no reasonable proportion to the intended purpose. The legislature is entitled to some latitude in this matter."

7 THE PRINCIPLE OF EQUALITY: THE METHOD OF JUDICIAL INTERPRETATION

It has become clear that the principle of equality has a fundamental position in the Dutch Constitution. Its main importance is that it requires the legislature to make law in accordance with the principle laid down in Article 1 of the Dutch Constitution. Article 26 of the Covenant and Article 14 of the Convention offer the Court an actual opportunity to test Acts of Parliament against the principle of equality. Three legal sources of the equality principle therefore exist but the judiciary can only use two of them to review tax legislation.

In what follows the focus rests on the case law of the Dutch Supreme Court concerning the principle of equality (section 7-10). The principle of equality has a long tradition in Dutch tax law. When the Constitution was amended in 1983, the then existing prohibition on tax privileges was removed. The Dutch legislator wanted to give the principle of equality a fundamental position in the Dutch legal order (in Article 1 of the Constitution). A separate principle of equality in taxation was no longer considered necessary. Article 1 of the Constitution, therefore, implies a prohibition on tax privileges.[5]

Turning to the case law of the Supreme Court, how does the Court determine whether a violation of the principle of equality has occurred? The standard judgment is expressed in the aforementioned *Dentist's Wife* case (Supreme Court 27 September 1989, BNB 1990/61). It contains all aspects of this method of judicial interpretation. This judgment shows that a violation of the principle of equality occurs when the two following requirements are met: the unequal treatment of equal cases and the absence of a reasonable and objective ground for this unequal treatment. Below, we shall deal with these in more detail.

[5] *Nonetheless, an important exception is to be found in Article 40, Para. 2 of the Dutch Constitution which states that the payments received by the King and other members of the Royal Family from the State, together with such assets as are of assistance to them in the exercise of their duties (the so-called civil list), is exempt from personal taxation.*

7.1 UNEQUAL TREATMENT OF EQUAL CASES[6]

The democratically legitimised legislature has the important task of determining 'rational' classifications in (tax) law. The legislature has to define a class by designating "a quality or characteristic or trait or relation, or any combination of these, the possession of which, by an individual, determines his membership in or inclusion within the class." (Tussman and tenBroek, 1949, p. 344). The principle of equality does not require that all persons, regardless of their circumstances, should be treated identically before the law, as though they were (exactly) the same. This fundamental principle, however, does require that those who are similarly situated be similarly treated. Consequently, a classification must be reasonably justified; the similarity of situations determines the reasonableness of a classification. This act of legislative classification, incidentally, must be distinguished from the act of determining whether an individual is a member of a particular class. In order to apply the law, the administration or the judiciary has to classify in this second sense, that is, to determine whether the individual possesses the traits which define the class.

> The legislature defines a class with respect to the purpose of the policy laid down in the law. Consequently, a reasonable classification is one which includes all persons who are similarly situated in respect of the purpose of the law. The principle of equality's focal point, therefore, is the purpose of a law or regulation. This purpose is the perspective from which it can be determined whether cases are equal on the basis of relevant aspects. The purpose of the legal regulation should not be conceived of as a static factor; the regulation's legislative history is important but later social developments should also be taken considered.

In Dutch case law, the Supreme Court always employs the same approach in all cases. The most famous case is that of the *Dentist's Wife* mentioned above. In this case, the question was whether the Personal Income Tax Act was in conflict with the principle of equality of Article 26 ICCPR because the provisions in that Act treated married couples less favourably than unmarried taxpayers having a joint household. In other words, was the unequal treatment that originated in the fact that the incomes of the spouses were added up, whereas the incomes of unmarried couples were not, justified?

The Supreme Court subsequently addressed the question whether married couples were treated less favourably, and unmarried taxpayers were treated equally in the light of the purposes of the regulation concerned. The Court held that there was no relevant feature for adding up the incomes of unmarried couples. In other words, there was no unequal treatment of equal cases.

7.2 THE ABSENCE OF REASONABLE AND OBJECTIVE GROUNDS FOR UNEQUAL TREATMENT

In the *Dentist's Wife* judgment, the Supreme Court stated that the ICCPR does not prohibit every unequal treatment of equal cases, but only the type of unequal treatment that must be considered to be discrimination because there is no objective and reasonable ground for unequal treatment.

In the first place, it is now clear that unequal treatment actuated by arbitrariness or prejudice cannot be justified. The text of Article 26, second sentence of the ICCPR mentions a number of factors such as race, colour, sex, etc., which immediately appear to be (unjustified) discriminatory (similarly, Article 14 ECHR lists a number of largely parallel

[6] *Other forms of possible violations of the principle of equality are (a) the unjustified equal treatment of unequal cases, (b) the unjustified unequal treatment of unequal cases, and (c) indirect discrimination. The latter form occurs when a regulation contains a feature that in itself cannot be considered discriminatory, but whose factual consequence it is that a number of citizens are affected who share a different (another) feature. The discriminatory character resides in the fact that it is precisely this group of citizens who are affected by the regulation. See Happé, 1999, pp. 142 et seq.*

factors). However, other distinctions made by the legislator can also constitute unjust discriminations and must be able to stand the test of the criterion of objective and reasonable justification.

In this context, the case law of the ECtHR is important (for instance ECtHR 23 July 1968, *Belgian languages*, Series A, no. 6, s. 10, p. 34). As regards Article 14 ECHR, the ECtHR also applies the requirement of objective and reasonable justification. According to the ECtHR, this requirement is met if the following two conditions are fulfilled:

a) a legitimate aim of Government policy is pursued,
b) there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized (the principle of proportionality).

In a 1997 judgment the Supreme Court stated that it had applied those conditions (12 November 1997, *BNB* 1998/22). The Court argued:

> "Unequal treatment of equal cases is prohibited on the basis of Article 14 ECHR and Article 26 ICCPR if no objective and reasonable justification exists or, to put it differently, if no legitimate aim of Government policy is pursued or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

The Supreme Court also held that there was an objective and reasonable justification for this inequality of treatment. According to the Court, the legislator was justified in reasonably selecting one of the spouses – the husband – as the taxpayer, for the sake of the simplicity and practicability of the law. The legislator's purpose of efficiency is considered a legitimate aim of Government policy.

In the *Dentist's Wife* case, the application of the (second) condition of a reasonable proportionality between the means and the aim of the regulation is in line with what has just been discussed. The fact that the Personal Income Tax Act 1964 classified certain parts of the wife's income as part of the husband's income resulted in the fact that the wife herself did not have the possibility of lodging a notice of objection and an appeal. Thus, certain categories of taxpayers were denied the right to object and appeal, even though tax was levied on parts of their income. According to the Supreme Court, this constituted unequal treatment of equal cases that could not be justified. This case involved a violation of the requirement of proportionality. The circle of those eligible to lodge an appeal or an objection under the General Tax Act was too small to serve the aim of the regulation on objections and appeals properly: the regulation was 'underinclusive'.

The Dutch Supreme Court always employs this method to decide whether a tax statute violates the principle of equality, which is in conformity with the method applied by the ECtHR (Supreme Court 26 March 2004, *BNB* 2004/201). Consequently, the Supreme Court followed the case law of the ECtHR in deciding the question of whether a justification existed for a distinction made by the legislator.[7] The next aspect of the judicial process of deciding this type of case shows the comparable influence of the Strasbourg Court.

8 A WIDE MARGIN OF APPRECIATION FOR THE TAX LEGISLATOR

The Dutch Supreme Court case law concerning the principle of equality has followed the case law of the ECtHR. In its 1999 *Della Ciaja* judgment the ECtHR permitted the Member States to have *a wide margin of appreciation* with respect to legislation in the fiscal field (ECtHR 22 June 1999, Appl. No. 46757/99, *Della Ciaja/Italy*, *BNB* 2002/398):

[7] *With regard to generally binding laws of municipal councils, the case law of the Supreme Court shows the same method of judicial interpretation.*

> "[I]n the field of taxation the Contracting States enjoy a wide margin of discretion in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (...) In particular, it is not sufficient for the applicants to complain merely that they have been taxed more than others, but they must show that the tax in question operates to distinguish between similar taxpayers on discriminatory grounds." (See Van den Berge, 2003, pp. 58-59.)

The ECtHR, therefore, does permit considerable room for deference by the courts to the views of the tax legislature when testing tax legislation against the fundamental rights of the ECHR.

This doctrine of the margin of appreciation is based on two grounds. The first element of this dual ratio relates to the subsidiary nature of the ECtHR. This subsidiarity is closely related to a 'temporal' aspect; the ECtHR can only hear a case after all national remedies have been exhausted (Article 35 ECTHR). In addition, the assessment framework of ECtHR is narrower than the framework of national courts as the Strasbourg Court only assesses within the range of the Treaty. National authorities have a much broader assessment framework. The second ground on which the margin of appreciation of the ECtHR is based (the better position argument) links to the fact that national authorities are often in a better position of assessment than the Strasbourg Court.

Both arguments in favour of the margin of appreciation point in the direction of a less cautious review on the national level. The subsidiary nature of the Strasbourg Court's review implies that the primary responsibility for effectively safeguarding the ECTHR rests with the Member States. That responsibility is not compatible with a restrained review by the national court. The second argument – the less appropriate assessment position of the Strasbourg Court – clearly does not apply to national courts. They are perfectly capable of taking account of the peculiarities of its national legal order in its balancing of interests. The dual ratio of the margin of appreciation therefore seems to preclude transposition of this margin to national level.

However, case law of the Supreme Court shows that the margin of appreciation doctrine is fully transposed. The doctrine that applies in the external vertical relationship between the ECtHR and the Member States is thus transposed to the national legal order, the internal horizontal (national) relationship between the judge and the administration/legislator. This implies a marginal review of the human rights restriction by Dutch Courts (See, for instance, Van der Hulle, 2015, pp. 291-292).

In answering the questions of the proportionality of the examined rule, the national court should indeed grant a margin of discretion to the legislature or the administration. When it comes to the rule in the abstract, this follows from the division of tasks between the judge and the legislator. This argument refers not only to the doctrine of the separation of powers but also to the argument of democracy. However, when a national court assesses the 'individual application' of the standard in the specific case, the court should not limit itself to marginal review. In that case, the national judge should fully assess all concrete and particular interests, not hindered by any margin of appreciation.

The Supreme Court, however, has adopted this formula without any limitations, thus indicating its reluctance to invalidate tax legislation on the basis of the principle of equality (Supreme Court 12 July 2002, *BNB* 2002/399-400). In 2005, the Supreme Court formulated this view in a slightly different wording. It stated that the Court will respect the legislature's assessment in tax matters unless it is *devoid of reasonable foundation* (Supreme Court 8 June 2005, *BNB* 2005/310). It derives this formula from a judgment of the ECtHR, the case of *M.A. and 34 others v. Finland* (ECtHR 10 June 2003, no. 27793/95; this judgment was not about the principle of equality, but about the applying of a retrospective tax law).

This 'translation' of the margin-doctrine has even become strict as in later years this criterion has evolved in the question whether or not the choice of the legislature is *manifestly* devoid of reasonable grounds. See for instance, Supreme Court 22 November 2013, *BNB* 2014/30 and 31 regarding a tax incentive to facilitate business succession in 2013. This regulation to facilitate business succession was partly introduced under pressure from a strong lobby. This regulation is based on the assumption of a major liquidity problem occurring in cases of (taxable) business succession and the premise that a (substantial) exemption from inheritance tax and gift tax would be an effective measure. However, several scientific studies showed that there was hardly a serious liquidity problem with regard to business succession. Moreover, the tax incentive did not provide a suitable solution the few businesses who actually faced liquidity problems in the context of succession. The incentive is therefore clearly ineffective. Actually, it was a wind fall gain. However, the Supreme Court ruled that the legislator's assumptions with regard to the necessity and effectiveness of the tax incentive were not devoid of reasonable foundation and therefore granted the legislator a (very) wide margin of appreciation. Six months after these judgments were handed down, the ECtHR has rendered a decision in proceedings: the Court ruled that the complaint of the interested parties is inadmissible because it is "manifestly illfounded" (27 May 2014, nr. 18485/14, *Berkvens and Berkvens*). This case law raises the question how long a legislature can continue to rely on an assumption against all knowledge? (Happé 2014)

9 FUNDAMENTAL RIGHTS AND TECHNICAL DISTINCTIONS

As mentioned above the Supreme Court allows the legislator a wide margin of appreciation in the tax field. As point of departure, we consider this to be a correct point of view on an abstract level as tax laws are characteristically technical.[8] They mostly concern business-like matters and are financial or economic in nature. Therefore, tax laws make all kinds of technical discriminations, which have nothing to do with substantial aspects, like race, religion, age, and so on. They concern issues such as being an employer or an employee (wage tax), such as having less than 5% of the shares of a company or more than 5% (participation exemption), such as costs which are deductible, and which are not. The nature of these kinds of discriminations justifies a wide margin of appreciation. No fundamental right is at stake.

Nonetheless, in its case law the Supreme Court shows such deference to the legislator that this wide margin of appreciation has become more of an abyss. The essence is that it is very reluctant to strike down a Dutch tax rule because of a violation of the principle of equality, as will be shown below.[9] The Court is far too reluctant in that respect.

Only a few cases touch upon a fundamental aspect, as will be shown by the following survey of these judgments.

9.1 THE TESTING OF FUNDAMENTAL ASPECTS

In Dutch tax case law, only a few fundamental aspects have been under discussion until now.[10] The first aspect concerns the fundamental right of access to a court. Not many cases touch upon this fundamental aspect. One of them is the previously described *Dentist's Wife* judgment. The fact that, as a result of the provisions of Article 5 of the at that time applicable Personal Income Tax Act, parts of the income of one spouse were added to the

[8] *For a more detailed and technical version of this part, see Happé and Gribnau, 2007, pp. 448-454.*

[9] *A similar conclusion applies to the right to property see section 11.*

[10] *To be sure, the fundamental aspects dealt with differ from the other fundamental aspects, for example the way taxation is used to get the ideal of equality – (re)distributive justice – to work. The same applies to the principle of legal certainty, which will be dealt with below, which expresses another important value which concerns the legitimacy of tax legislation.*

income of the other spouse, while the first spouse had no right to lodge an objection or an appeal, was considered to be discriminatory.[11] The statutory provisions was changed relatively quickly after the lawsuits.

This case law is an illustration of the fact that the Supreme Court allows the legislator to have relatively little margin of appreciation when fundamental aspects are at stake. Both judgments affected the fundamental right of access to a court. In such cases, the Court has to undertake close scrutiny, just because of the right involved. From the point of view of the legal protection of the individual, we consider this case law to be appropriate. In our opinion the fundamental nature of these cases differs from cases concerning technical aspects. The 'wideness' of the margin of appreciation of the *Della Ciaja* judgment is not applicable to them.

The *Dentist's Wife* judgment is also an example of the second fundamental aspect. This aspect concerns the treatment of married people in comparison with unmarried people who cohabit. According to the Court these two groups of taxpayers were not similarly situated.

The Supreme Court has tested the legal provisions concerning the different treatment of married and unmarried people against the principle of equality on several occasions, and never held any of them to be discriminatory. Interestingly, the case law of the Court reflects the change in social views about marriage and cohabitation outside marriage, which have been laid down in legislation. In a landmark decision at the end of 1999, the Court indicated in an obiter dictum that taxpayers who have officially registered their partnership would be legally equated with married taxpayers as of 1998 (the year in which the Dutch tax legislator had equated the so-called registered partnership of non-married persons with marriage). As a result, according to the Court, this category of non-married taxpayers is treated completely equally for income tax (Supreme Court 15 December 1999, BNB 2000/57, see also Supreme Court 8 December 2017, *BNB* 2018/90).

9.2 TESTING TECHNICAL ASPECTS

As said before, most cases are related to technical distinctions in tax statutes. The Dutch Supreme Court acknowledges the (very) wide margin of appreciation of the legislator, especially with regard to these technical distinctions. It makes no difference whether the legislation which is under review is directed towards the essential goal of taxing, i.e., financing public expenditure, or is directed towards other, non-fiscal goals. Dutch tax law contains all kinds of tax incentives, mostly in the form of tax reductions, e.g., for mortgage interest, commuting by bike, employee training, day-care centres, and so on.

Only in evident cases the Court has decided that technical distinctions in a tax statute are discriminatory. The reason for that is the above-mentioned transposing of the ECtHR doctrine of the wide margin of appreciation (see Section 8). This margin not only applies to the question whether or not cases are equal, but also to the aspect of justification for the distinction made by the legislature. Notwithstanding this margin, it is important to realize that regulatory distinctions, also technical ones, always need an objective and reasonable justification. A distinction without any justification is arbitrary and cannot possibly fit in any legal system: it makes the legal system inconsistent. Usually, a court finds an adequate justification in the parliamentary history of the regulation. If this cannot be found, it will search for a justification elsewhere. If it finds one, it will relate it to the legal distinction (Supreme Court 14 June 1995, BNB 1995/252).

[11] The legislator amended the relevant provisions as a result of this judgment. Supreme Court 15 September 1993, BNB 1994/7 involved the same point with regard to levying income tax on married couples.

Broadly speaking, we can make the following categorization of discriminatory cases. In the first place, cases in which the legislator has no or only irrelevant reasons for a distinction (moreover the fact that only a small group is involved is not in itself a justification; Supreme Court 8 December 2017, *BNB* 2018/90). An important subcategory consists of cases in which the legislator has made a mistake in the legislative design, i.e., in the technique of formulating the law. The legislator adds a new provision to an existing regulation with its own specific and adequate justification. In some cases, this added provision has its own goal. However, this new goal functions as an anomaly in the regulation. Due to this *Fremdkörper*, the regulation has a legal consequence which is contrary to the main goal of the regulation with its original justification. As a result, the regulation with its two conflicting goals becomes discriminatory. A famous example is the judgment concerning the income tax provision regarding the private use of a company car which is regarded as salary. The employee needs to add a certain percentage of the catalogue value of this car to his income. At a certain moment, the legislator introduced an additional goal in the regulation, aimed at discouraging the use of these company cars. In the resulting regulation only one group of commuters had to pay the additional tax because of the new goal, while another group, which was identical in all relevant aspects, was not taxed. Since no justification could be found, the regulation was considered discriminatory (Supreme Court 15 July 1998, BNB 1998/293).

A second category of discriminatory cases is when the legislator deliberately favours a group of taxpayers compared to other taxpayers. By way of 'private legislation', the legislator grants a tax privilege. In one case, the regulation was undeniably influenced by the interference of pressure groups. This regarded a favourable transitional road tax provision for certain owners of cars, introduced by way of an amendment of some members of Parliament. During the legislative process, the Government even warned Parliament of the risk of unjustified discrimination, but Parliament persisted and amended the law. A couple of years later, the Court unsurprisingly recognized the discriminatory character of the regulation (Supreme Court 17 August 1998, *BNB* 1999/123. See also Supreme Court 14 July 2000, *BNB* 2000/306).

Finally, the third category covers the situation in which one group of taxpayers is taxed more than another group which is similar in all relevant aspects, the only reason being a budgetary one. According to the legislator, it simply costs too much to treat both groups equally. In a famous case, the legislation contained an unjustifiable unequal treatment of an owner-occupant concerning deductible costs of study at home compared to a tenant-occupant. The legislator decided to treat the two groups unequally because equal treatment would cost tens of millions of euros. The Supreme Court decided that the specific regulation was discriminatory (Supreme Court 17 November 1993, *BNB* 1994/36). A few years later stated explicitly: "Budgetary problems do not constitute grounds for the non-application of a regulation that is necessary to avoid discrimination as referred to in Art. 26 ICCPR" (Supreme Court 14 June 1995, *BNB* 1995/252).

10 MORE JUDICIAL DEFERENCE: A *TERME DE GRÂCE*

The next issue will be the remedy offered by the judiciary if it establishes an unjustified unequal treatment of equal cases (see also Happé and Gribnau, 2007, pp. 454-458). Having established unjustified discrimination, the judiciary has to face the question of how it should respect the primacy of the democratically legitimised legislature in law-making. As said, his primacy of the legislature is a result of the distribution of power in our democratic system. The judiciary, therefore, should certainly be very cautious in offering remedies for discriminatory regulations – which are a result of the political process.

The number of cases in which the Supreme Court has found discrimination is small, both in absolute terms and in relative terms. As shown, the Supreme Court regularly reasons its judgments with reference to the wide margin of appreciation as introduced by the ECtHR. Nonetheless, the Dutch Supreme Court has established unjustified discrimination in some cases.

However, it is rare for the Supreme Court to decide in favour of the taxpayer after having established that there is an unjustified unequal treatment of equal cases. Consequently, the Court's observation that a legal provision is discriminatory does not always mean that the taxpayer is restored in his rights.

The reason for this lies in the limited possibilities for the judiciary to develop law. If the Supreme Court establishes unjustified discrimination, it has to bring the legislative provision into conformity with the principle of equality. The Court may arrive at a point at which its judgment involves a choice that does not fall within the scope of its law-making role: the judiciary is not allowed to legislate. If the Court were to go beyond that point, it would usurp the function of the legislature. On the basis of the separation of powers and the system of checks and balances, the Court usually decides to leave the removal of the unjustified discrimination to the legislator. In the landmark case of the standard professional expense allowance, the Supreme Court argued that if the removal of the unjustified discrimination was simple and an obvious solution existed, it would decide in favour of the taxpayer. Nonetheless, the Court may decide to leave the removal of the unjustified discrimination to the legislature and at the same time decide not to apply the (discriminatory) law to the taxpayer at hand (see Supreme Court 8 December 2017, *BNB* 2018/90).

If there is no simple and obvious solution, the Court will decide not to restore the rights of the taxpayer, although it has declared the law to be discriminatory. However, at the same time the Court requires the legislator to solve the violation of the principle of equality. It does this if removing the discrimination exceeds the Court's task of developing new law. Especially politically sensitive issues, for which more than one solution is available, are left to the legislator (e.g., Supreme Court 12 May 1999, *BNB* 1999/271 and 11 August 2006, *BNB* 2006/322). In very exceptional cases the Dutch Supreme Court will decide immediately.

In practice, however, the Supreme Court shows too much restraint. In too many cases, the Court qualifies the decision it has to make – i.e., to remove the discriminatory element of the regulation – as a political one. The price to be paid is that the taxpayer does not actually win his case, although he is in the right. The Court communicates quite politely the violation of the principle of equality to the legislature at the expense of the protection of the individual taxpayer.

When the Supreme Court leaves it to the legislator how to resolve the unjustified discrimination, it expects the legislator to bring the legislation into line with the principle of equality in the short term (without mentioning a fixed term). Thus, it grants the legislator a *terme de grâce*. This may be labelled as 'conditional prospective overruling': the Court will invalidate and change (overrule) the existing provision which violates the principle of equality if the legislator itself does not remove this unjustified discrimination in the near future for a recent case, see Supreme Court 8 December 2017, *BNB* 2018/90). If the legislator energetically replaces the discriminatory legislation by new legislation which complies with the principle of equality, the statute may enter into force for the future (Supreme Court 24 January 2001, *BNB* 2001/291 and 292). In practice, though, the Court demonstrates a lenient attitude when it comes to the question of whether the legislator should resolve the unjustified discrimination in the short term.

However, the effective legal protection of the taxpayer is not always sacrificed. The Court draws the line where the legislator has consciously introduced or upheld unjustified discrimination. If that is the case, immediate justice is done to the taxpayer and the Court

removes the discrimination (see for instance Supreme Court 17 August 1998, BNB 1999/123). In such a case, a *terme de grâce* is out of the question. However, usually the Court communicates quite politely the violation of the principle of equality to the legislature at the expense of the protection of the individual taxpayer. The Court does not put its foot down. The result may be that the legislator takes the Supreme Court less seriously as a partner in a constitutional dialogue.

11 TAX AND THE RIGHT TO PROPERTY

Article 1 of Protocol No. 1 No. 1 ECHR states the following:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

More recently taxpayers started to invoke this Article. The obligation to pay tax inherently affects property rights. According to the second paragraph of this Article this interference is generally justified since it expressly provides for an exception as regards the payment of taxes or other contributions. An interference must, however, achieve a "fair balance" between the demands of the public interest of the community and the requirements of the protection of the individual's fundamental rights; that is, "a reasonable relationship of proportionality between the means employed and the aim pursued" (ECtHR no. 15375/89, 23 February 1995 (*Dosier- und Fördertechnik GmbH v. the Netherlands Gasus*), paragraph 62).

In tax matters the question may arise whether there the taxpayer has a sufficiently established right under national law to a reduction or a refund of tax. In these situations, the taxpayer should at least have a legitimate expectation of such favourable tax treatment. This is in particular the case if a tax refund is amended to the detriment of the taxpayer with retroactive effect; an entitlement to future loss relief which is limited in time is for instance not qualified as property (Gerverdinck, 2020, pp. 40-43). Most case law, however, concerns the question whether there is sufficient justification for the infringement of property by taxation.

11.1 THE METHOD OF JUDICIAL INTERPRETATION

How does the Dutch Supreme Court assess complaints about tax measures to assess the alleged violations of the property right? The Supreme Court not only regularly refers to ECtHR case law but also follows the same assessment scheme as the ECtHR. This entails the determination whether (i) the citizen or other entity has a possession, (ii) there is an infringement, and (iii) there is (sufficient) justification for an infringement of property. This third requirement implies that judges must examine whether the tax legislation is lawful, has a legitimate aim and is proportionate and thus does not lead to an excessive, disproportionate burden.

The requirement of lawfulness is the first and most important condition to be met if an infringement of property is to be justified. No margin of appreciation is granted at this level. The infringement must be based on a published legal basis of sufficient quality. Statutory provisions must for example be sufficiently foreseeable, accessible, and precise, in order to enable taxpayers to assess the tax consequences of intended courses of action.

Absolute certainty, however, is by no means required and it is deemed impossible in view of the complexity of society and tax legislation.

Subsequently the regulation has to meet the requirement of a legitimate aim in the public interest. In principle, the ECtHR will accept the legitimacy of the aim stated by the State, since taxes contribute to the resources of the state. Then the Court applies the fair balance test, which implies a weighing of the general and individual's right. This proportionality test is according to the ECtHR embodied in the text of Article 1 of Protocol No. 1 ECHR, "the search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1)" (ECtHR 23 September 1982, no. 7151/75 (*Sporrong and Lönnroth v Sweden*), paragraph 69). There must be a reasonable relationship between the general interest that is served by a tax measure and the consequences suffered by individual taxpayers. However, measures imposed in social-economic areas, including taxation, are met with much restraint: only if a tax measure imposes a disproportionate and excessive burden on a taxpayer or if the measure is devoid of reasonable foundation, the fair balance is considered to be breached.

Many cases are decided under the proportionality test. Tax measures should not result in an individual and excessive burden (*Sporrong and Lönnroth*, paragraph 69) – though sometimes the ECtHR assesses only at the rule level (ECtHR 14 November 2017, no. 46184/16 (*P. Plaisier B.V., and others v. The Netherlands*). Unlike the ECtHR, the Supreme Court explicitly first applies the proportionality test at rule level and only thereafter at individual level. Reviewing at the rule level, the Supreme Court seems to attach particular importance to the intentions and assumptions laid down by the legislature in the Parliamentary history – unlike the ECtHR which ignores the intentions expressed by the State and takes account of the actual effects of legislation (Gerverdinck, 2020, p. 216).

The Supreme Court will assess whether a tax imposes an individual and excessive burden on a taxpayer only after it has been established that the fair balance at the regulatory level has not been violated.[12] According to the Supreme Court, this individual and excessive burden can only exist if a taxpayer is affected by a measure "more than in general', i.e., more than others" - a requirement that is lacking in the ECHR case law. According to this case law a disproportionate and excessive burden by no means has to be "more than with other affected parties" (Gerverdinck, 2020, p. 216).

11.2 BOX 3: TAX ON (FICTITIOUS) NOTIONAL INCOME FROM CAPITAL

Many cases in which taxpayers invoke Article 1 of Protocol No. 1 ECHR concern the tax on the notional income from capital (*vermogensrendementsheffing*) in 'box 3' of the Personal Income Tax Act 2001 (Article 5.1). The taxation on income from savings and investments is based on the (non-refutable) assumption that wealth owners will generate a certain return on investment on their capital. The taxable income from capital is determined by a number of fictions and lump sums (Dusarduijn, 2015). Though the legislature stated that this assumed return on investment approaches reality, this is definitely not the case. On the contrary. this legal fiction thus obscures the ability-to-pay principle which is a defining hallmark of an income tax (Dusarduijn 2015, pp. 316-317). In some cases, the effective tax rate of this levy is structurally far above 100% of the actual return, thus showing the confiscatory character of this legislation. One can hardly deny that this is an excessive tax for certain taxpayers

[12] *However, the judgment that tax regulation is an infringement of property rights on a regulatory level, is seldom passed.*

In 2019 the Supreme Court applied the proportionality test at rule level to box 3 regime (concerning 2013 and 2014). It ruled that the notional income tax could in certain circumstances (low risk investments, such as savings accounts) indeed violates Article 1 of Protocol No.1. Nonetheless, the Court would not be able offer a remedy: the judiciary should exercise restraint vis-à-vis the legislature at the regulatory level. Only in case of an individual and excessive burden the judiciary should intervene (Supreme Court 14 June 2019, nr. 17/05606, *BNB* 2019/161). Thus, the Court shows almost disproportionate restraint vis-à-vis the legislature in tax matters.

What about applying the proportionality test at individual level? A tax that structurally taxes more than 100% of the capital income and thus affects the existing capital does, according to the Supreme Court, would not lead to an 'individual and excessive burden' as long as the taxpayer has sufficient *other* capacity to pay the tax. The Supreme Court considers the whole financial position of the individual concerned, stating that the impact of the box 3 levy should be balanced against other sources of income although these sources are taxed in a different way within the Dutch analytical income tax system (Supreme Court 6 April 2018, *BNB* 2018/137).

It is really doubtful whether this judgment of the Court is in accordance with the case law of the ECtHR (Gerverdinck, 2020, p. 210-211). After all, as Advocate-General Niessen argues, those other sources of income is taxed in accordance with specific legal rules. With these rules the legislator has determined how heavy the relevant income, subject to, inter alia, the ability to pay principle, may be taxed. Those rules are no longer observed if the capital gains tax of box 3 is to be paid from that income in cases where the actual proceeds of the capital are insufficient to bear the tax (Advocate-General Niessen 27 February 2020; see also Dusarduijn, 2018, pp. 78-81).

Unfortunately, the Supreme Court persists in its position. Up till now only in one case the individual and excessive burden of this 'box 3' has been acknowledged by the Supreme Court. As a result of the levy the income of the taxpayer concerned fell below the poverty line. The levy clearly is not in a reasonable proportion to the (legitimate) objective pursued by the levy (Supreme Court 6 April 2018, *BNB* 2018/137).

Finally, both the Supreme Court and ECtHR observe a wide margin of appreciation vis-à-vis the legislature. In this respect, Gerverdinck prefers the way in which fundamental rights are protected in Germany. Formal (tax) legislation is strictly tested against fundamental constitutional rights. As such the fundamental right to property in Germany appears to play a more limited role in tax matters than in Strasbourg and the Netherlands. However, tax legislation is subject to more intensive scrutiny in the light of other fundamental rights, in particular, the principle of equality and the prohibition of tax discrimination (Gerverdinck, 2020, pp. 248-249).

12 LEGAL CERTAINTY

In general citizens should be able to rely on the legislation in force to plan their conduct and transactions. The Government, including the legislator, should respect the principle of legal certainty (Pauwels, 2009; Gribnau, 2013b). However, there is no doubt that the legislator should be able to change its legislation, including tax legislation. There are various justified reasons to change tax legislation, such as a change of tax policy and social, economic, and technical developments. A change in legislation could, however, infringe taxpayers' expectations raised by the existing legislation.

12.1 RETROACTIVE TAX LEGISLATION

An infringement of taxpayers' expectations could especially occur if the legislature decides that the amended legislation is applicable to past tax periods – the legislative change has 'retroactive effect'. But also, if the amended legislation has 'immediate effect' and therefore only applies to future taxable events or tax periods; taxpayers' expectations could be at stake. This would be the case if the legislator does not provide for grandfathering – that is, that the old rule remains (temporarily) applicable to certain situations. Then, the changed legislation also applies to the future effects of a situation that arose under the old legislation – the legislative change has 'retrospective effect'.

The distinction between (formal) retroactivity and material retroactivity (also called retrospectivity) is an important one. The term 'retroactivity' means that the effective entrance date of (one or more provisions of) a statute is set at a date prior to the moment on which the statute enters into force (in Dutch tax literature, this is called 'formal retroactivity'), i.e. (one or more provisions of) the statute covers the period before the date of entry into force. For example, a statute enters into force on 1 February 2012, and provides that a certain tax exemption is repealed as from 1 January 2010. The term 'material retroactivity' or 'retrospectivity' on the other hand means that the statute has 'immediate effect' (i.e., the effective entrance date of a statute is the same date as the date on which the statute enters into force) without grandfathering. Consequently, the statute alters or affects the results of a past event for the future (in the Dutch tax literature, this is called 'material retroactivity'). For example, a statute enters into force on 1 January 2012, and provides that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealized gains, as a result of which gains that accrued prior to 1 January 2012 are not tax exempt although they accrued in a period when the exemption applied.

Although legal certainty is a fundamental legal principle, in some cases, certain interests could be served if the legislator were to grant retroactive effect to legislation. Thus, the case of retroactivity and retrospectivity is a balancing act for the legislature (Pauwels, 2013a).

As stated above, the principle of certainty as such is not enshrined in the Dutch Constitution nor in any international treaty with provisions that are binding on all persons. The Dutch courts cannot therefore test Acts of Parliament against this fundamental legal principle. However, the courts are allowed to examine subordinate legislation (i.e., not Acts of Parliament) for compatibility with legal principles, even if these principles are 'unwritten'. Therefore, the courts do examine the retroactivity of subordinate legislation for compatibility with the principle of legal certainty.

12.2 LIMITED PROTECTION BY THE COURTS

Retroactive effect of tax legislation seems clearly at odds with the requirement of lawfulness, in particular with the foreseeability requirement and the knowability requirement (Pauwels, 2013a). However, according to the ECtHR the requirement of lawfulness is a circumstance to be considered in the fair balance test between the public interest and the private right, rather than an obstacle to retroactivity. The key question is whether legitimate expectations of taxpayers are violated and, if so, whether there is sufficient justification for the violation. ECtHR considers tax legislation with retroactive effect justified in several types of situations in which. These are situations in which taxpayers could expect that the tax law would be amended retroactively in order to undo an (unintended and) unjustified advantage, such as (i) an announced legislative amendment, (ii) an unforeseen technical defect in the law, and (iii) aggressive tax planning.

The retroactivity should be announced in good time and communicated with sufficient precision and the date of any retroactive effect is not earlier than the date of its announcement. Thus, the ECtHR or the Dutch Supreme Court will generally only intervene if the tax legislature does precede the date of announcement and thereby affects taxpayers in good faith. Other situations are the legislature being suspected of having improper intentions, and/or of violating other fundamental rights, such as the prohibition of discrimination (Gerverdinck, 2020, pp. 129- 140; Pauwels, 2009, pp. 420-421).

In order to avoid announcement effects, the Dutch tax legislature regularly makes us of the instrument of 'legislation by press release'. This concerns the phenomenon that the government first announces by press release that a tax bill has been (or soon will be) submitted that provides for retroactive effect to the date of that press announcement, after which the law ultimately – after parliamentary debate and acceptance – enters into force and has retroactive effect to that date. In one case the Supreme Court ruled that the press release concerned was sufficiently clear to enable taxpayers to understand the consequences of the legislative proposal for the transactions concerned (Supreme Court December 14, 2007, no. 34 514, *BNB* 2008/37). Another case concerns the withdrawal of the so-called personal-computer-facility (concerning a (wage and income) tax free allowance to employees for the acquisition of a computer). This facility was withdrawn with retroactive effect till the moment of the press release - announcing the legislature's intention. The Supreme Court ruled that this retroactive effect did not violate Article 1 of Protocol No. 1 ECHR (Supreme Court October 2, 2009, no. 07/10481 and 07/13624, *BNB* 2011/47; see Gribnau and Pauwels, 2013, pp. 327-328)

12.3 TWO SOFT LAW FRAMEWORKS FOR RETROACTIVE TAX LEGISLATION

In his capacity as a co-legislator, the State Secretary published a memorandum which sets out the main lines of his 'transitional policy' with respect to the introduction of tax statutes. This memorandum is a soft law instrument, for it sets out a commitment to certain rules of conduct when considering the use of retroactive legislation without legally binding force (Gribnau and Pauwels, 2013).

The memorandum, dealing with legislative changes that are disadvantageous for taxpayers, sets out the starting points of tax transitional policy. It states that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect – without grandfathering. Two elements can be distinguished. The first element is called the 'substantive element': whether or not a justification exists for granting retroactive effect. The second element is called the 'timing element', which refers to the period of retroactivity and thus to the aspect of foreseeability. The memorandum mentions several circumstances which could justify retroactivity (the 'substantive element'): abuse or the improper use of tax rules, rectification of an obvious omission which clearly has unintended consequences; preventing announcement effects; and major budgetary impact and aspects regarding the implementation. In these circumstances in the field of view of the State Secretary there are no legitimate expectations.

Even more important than this memorandum is the advice from the Council of State. This High Councils of State provides government and Parliament with independent advice on legislative proposals, that is, bills submitted to Parliament (Articles 73-75 of the Constitution). In the Council's advice a general framework has been formulated for its assessment of tax bills with retroactive effect. This assessment framework is relatively unique in Europe. Perhaps this can be explained by the fact that constitutional review of retroactive effect by the courts in the Netherlands is prohibited.

The point of departure of the Council of State's advice is that tax measures that imply an increase in taxation for the taxpayer may not be given (formal) retroactive effect unless

there are exceptional circumstances. In addition, the Council notes that no retroactive effect is permitted for measures that are not sufficiently known to taxpayers at that point in time to which the retroactivity reaches back. According to the Council of State, special circumstances which could justify a retroactive effect can be found in significant announcement effects or extensive improper use or abuse of a statutory provision. In another advice the Council of State stated that in case a statute has 'material retroactive effect' (retrospective legislation) a balancing of interests is necessary: on the one hand the interest of grandfathering existing agreements and on the other hand the financial interest of the government. The Council notes that a relevant circumstance to be taken into account is whether or not the taxpayers could rely on their assumption that the transactions concerned are in line with aim and purpose of the law. And are apart from that, they should not be considered undesirable (Gribnau and Pauwels, 2013, pp. 326-327).

The State Secretary has promised to endorse the (stricter) view of the Council of State and said that his own memorandum has expired. Nevertheless, the memorandum is still important, because it is still regularly cited in the literature and because – strikingly enough – the State Secretary sometimes refers to it or apparently takes it as a starting point.

13 SUMMARY

Fundamental legal principles and rights may function as a check on legislative power protecting citizens against arbitrary interferences of tax legislation with their lives. This contribution started with a description of the fundamental protection of individual rights that exist under Dutch national law and the agencies that have primary responsibility for protecting those rights. Next, the process for enacting tax legislation was described.

The way in which the principle of equality restricts the legislative power to tax in the Netherlands was the next topic in this paper. The testing of tax law against this fundamental principle in the Netherlands acted as a case study to gain more insight into the topic of constitutional review. This principle of equality is an important judicial instrument to check seriously flawed tax legislation. Acts of Parliament are tested against international treaties (Article 14 ECHR, in conjunction with Article 1 of Protocol No. 1 ECHR, and Article 26 ICCPR). As with regard to the method of judicial interpretation, the Dutch Supreme Court always demands an objective and reasonable justification for any inequality of treatment. This is in conformity with the method applied by the ECtHR.

As for testing tax law against the principle of equality, the Supreme Court acknowledges the wide margin of appreciation of the legislator. If the Court establishes a violation of the principle of equality, it acts very cautious. If no unambiguous resolution is available to eliminate the unjustified unequal treatment of equal cases, the Court leaves the choice to the legislator, which subsequently has to bring the legislation into line with the principle of equality in the short term (*terme de grâce*). Here, a rather detailed analysis of the case law was necessary in order to provide the larger, though complex, picture of constitutional review.

Our analysis of several issues concerning the principle of equality in Dutch tax law shows that the Dutch Supreme Court has initially made a valuable contribution to the constitutional system of checks and balances. The Court underlines the significance of the principle of equality for fair tax legislation. After all, each violation of the principle of equality damages the integrity of the tax system. However, in our opinion, the room for deference by the Supreme Court to the policy views of the tax legislator should be more limited.

To conclude, the Supreme Court shows much deference to the legislature. As a result, tax law may become more and more a matter of political will instead of the result of a

cooperative effort by the law-making partners (the judiciary being the junior partner) to do justice to the principle of equality. If anything, this detailed analysis shows that constitutional review is in no way an all or nothing affair.

Nowadays, taxpayers also invoke Article 1 of Protocol No. 1 No. 1 ECHR to challenge tax legislation. This Article does not affect the right of Member States to levy taxes, provided that the rights guaranteed by the ECHR are respected. This is not the case if the legislation is not lawful or lacks a legitimate aim or is disproportionate. In the case of the public interest test and the proportionality test, both the Supreme Court and ECtHR observe a very wide margin of appreciation vis-à-vis the legislature. This 'wide margin of appreciation' is only exceeded if an individual has to bear an 'individual and excessive burden'. However, as we have seen, in the eyes of the Supreme Court this is rarely the case. In this area the room for deference by the Supreme Court to the tax legislator should be more limited.

With regard to the principle of certainty, another fundamental legal principle, no testing of statutory legislation is possible by the courts. Nonetheless, the legislator seems to take the principle of certainty quite seriously. With regard to retroactive tax legislation the State Secretary has committed himself in a memorandum to rules of conduct with regard to different situations where he deems retroactive tax legislation to be justified. In legislative practice, he will be called to account if he deviates from the policy set out in this document. Thus, a soft law instrument facilitates a dialogue between different legislative partners and external stakeholders. Here, the Government, continuously initiating new tax legislation, is more willing to take its partners seriously than in the case of the principle of equality and the right to property.

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