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Editorial: A New Global Legal Tax Order

We are pleased to affirm our satisfaction with the publication of vol. 2, issue 3, February 2023, Review of International and European Economic Law.

Suppose the so-called Global Tax Legal Order revolves around international tax cooperation, human rights, and global tax governance. In this case, the RIEEL makes governance inclusive of multilateral cooperation.

This issue of the RIEEL offers the first section, "Review Articles", of remarkable ambition and impact. Some proposals are presented on codification and progressive law that directly affect the global legal order in some fundamental areas: international tax cooperation, human rights, and global tax governance.

Thus, the first issue includes **a global design of a new *Global Tax Legal Order* based on international tax cooperation, human rights and global tax governance**, through the codification and progressive development of International Tax Law, creating hard law and soft law normative instruments.

The world leadership role of the United Nations is assumed as an organization at the top of the pyramid of this new Order, as a priority leader in institutionalized international cooperation relations and global governance, and its commitment to cooperation with other organizations, internationals and interested parties. It also follows the new guidelines of General Assembly of UN: Resolution A/77/441 on promoting an effective and inclusive international tax cooperation.

The design of this new global architecture involves the creation of the following fiscal policy instruments (hard Law and Soft Law):

1. General Agreement or Instrument for International Tax Cooperation and Global Tax Governance.

2. Development Protocols of the Framework/Instrument mentioned above/instrument for international tax cooperation.

3 Global Code of International Tax Cooperation, Human Rights and Global Tax Governance.

4. Global Taxpayers Charter: Taxpayers' Bill of Rights at the national and international levels.

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In the Scientific Articles section, we are posing a general number about a **new Global Tax Legal Order inspired by human rights**.

This section contains the general bases of the comparative tax system concerning taxation and human rights to arrive a future global tax legal order inspired by human rights, making an incursion into the framework of human rights and tax constitutional rights, analysing the financial Constitutions of the constitutional regimes of countries of Anglo-Saxon countries tradition of the Commonwealth and the European constitutional systems.

Contributions of great scientific value are posted, including the best world models of constitutional systems in human rights constitutional guarantees of taxpayers in their relations with the tax administrations, towards a new design of the global architecture of the international tax governance. Thus, pioneering and protectionist world systems of human rights from Europe (Norway, Sweden, Denmark, Netherlands, Germany, France, Italy, Spain), Canada, New Zealand, and the United States are extensively studied.

Jeffrey Owens

Director of the W.U. Global Tax Policy Center (WU GTPC) at the Institute for Austrian and International Tax Law W.U. (Vienna University of Economics and Business) Vienna, Austria

Eva Andrés-Aucejo

Full Professor of Financial and Tax Law. University of Barcelona. Extraordinary award in both Ph.D. in Law and Law Degree. Economic Sciences and Business Degree. World Bank Consultant. United Nations Tax Committee stakeholder.

Antonio Remiro Brotons

Full Professor of Public International Law
Directive board member of the Review of International and European Economic Law

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GENERAL COORDINATOR: PATRICIO MASBERNAT

Professor of Financial and Tax Law at Autonomus University of Chile and

Santo Tomás de Aquino of Chile

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REVIEW ARTICLE (RIEEL.COM, ISSUE N.3, 2023)

AFRICA HAS SPOKEN: RESOLUTION A/C.2/77/L.11/REV.1 OF THE UNITED NATIONS GENERAL ASSEMBLY (SECOND COMMITTEE): "PROMOTING INCLUSIVE AND EFFECTIVE INTERNATIONAL TAX COOPERATION WITHIN THE UNITED NATIONS"

MACROECONOMIC POLICY ISSUES (77 SESSION, 2ND COMMISSION G.A.)

Replies to the amendment established by
The United States and 55 other countries (Canada, Australia, New Zealand, Korea, Japan, Norway, Singapore, Liechtenstein, and the Czech Republic...)

Eva Andrés Aucejo

UNIVERSITAT DE BARCELONA

Mezang Akamba
(CAMERÚN)
ECOSOC (2018-19-20)
UNDP: Delegated of the Economic and Financial Committee (United Nations)

Marco Nicoli *

WORLD BANK

Andreu Olesti-Rayo & Xavier Fernández Pons
Professors of Public International Law
UB

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Andrés-Aucejo, E., M. Akamba, Nicoli, M. ; Olesti-Rayo, A., Fernández-Pons, X., Remiro Brotons, A., Moreno Dobson, B., Roccatagliata, F., Byrnes, W., Calijuri Sionara, M., Bonet Pérez, J. – *Rieel.com* nº 03 February 2023

Review Article

Africa has spoken!. Resolution A/C.2/77/L.11/Rev.1 of the United Nations General Assembly: Promotion of inclusive and effective international tax cooperation at the United Nations. Macroeconomic Policy Issues (77th Session, 2nd Commission General Assembly, UNITED NATIONS).

Replies to the amendment formulated by the United States and countries are concurring in the vote to Resolution A/C.2/77/L.11/REV.1

Eva Andrés Aucejo

Professor of Financial and Tax Law. University of Barcelona. Extraordinary award in both Ph.D. in Law and in Law Degree. Economic Sciences and Business Degree. Researcher and consultant of the Global Forum on Law, Justice and Development of the World Bank. Tax Committee (2019-22). Email: eandres@ub.edu

Mezang Akamba

Delegate for the Economic and Financial Committee of the United Nations (UNDP). First Counselor of the Permanent Mission of Cameroon to the United Nations. Delegated of the United Nations, Second Committee ECOSOC (2018-20), New York, UNITED STATES.

Marco Nicoli

Legal Vice Presidency of the World Bank: former Senior Project Manager Global Forum on Law, Justice and Development Senior Knowledge Management Officer from the World Bank. Special officer of the Organization for Economic Cooperation and Development (OECD).

Antonio Remiro Brotons

Emeritus International Public Law in the Autonomous University of Madrid. Member of the Institut de Droit International. Counsel and Lawyer for many different American countries and Spain under the International Court of Justice and arbitral tribunals.

Blanca Moreno-Dobson

Director of the Center for Mediterranean Integration (CMI). United Nations Office for Project Services. Marseille. France. Former World Bank Lead Economist and Manager.

Julius Sen

Formerly Associate Director and Senior Programme Manager at London School of Economics (LSE) Enterprise and LSE IDEAS. Expert on governance, trade and public policy, and a member of the International Trade Policy Unit (ITPU) at the LSE.

William Byrnes

Professor of Texas A&M University School of Law. Tenured law professor in 2005 at St. Thomas University School of Law and in 2008 the rank of Associate Dean at Thomas Jefferson School of Law. Post Graduate Programs Director for Non-US Lawyers, and the Executive Committee of Graduate Programs for Non-US Lawyers

Amparo Peris Sala

President of the IVMED Mediation Institution Association, Ministry of Justice, Spain. Advisory Council of the Generalitat Valenciana Mediation. President of the Federation of Associations for Mediation-CV- FEPAMED-CV. President of the Criminology Professional Association of the Valencian Community (APCV).

Jordi Bonet-Pérez

Full Professor of Public International. Coordinator of the Ph. D. Program on Law and Political Science. Department director of International Law and Economics (UB 2012-16), Member of the board staff of the Catalonian Institute of Human Rights and the Economic, Social and Cultural Rights Observatory.

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KEYWORDS:

International tax cooperation framework or instrument; Global tax governance; sustainable development; International intergovernmental commission on international tax Cooperation

ABSTRACT:

On November 23th, 2022, the United Nations General Assembly approved -by consensus- the Resolution A/C.2/77/L.11/Rev. 1, entitled: "Promoting inclusive and effective international tax cooperation in the United Nations". On December 30th, 2022, the plenary of the United Nations approved -by consensus- the Resolution A 77/441 with the same title and the same text. Both resolutions include at least two possible proposals: a) initiate intergovernmental meetings in United Nations (UN) New York to strengthen inclusive and effective international tax cooperation, including the possibility of developing a framework or instrument on international tax cooperation in the UN (paragraph 2) and b) Consider future actions such as the establishment of an intergovernmental body for international tax cooperation within the framework of the United Nations (paragraph 3). In general, this Resolution promotes a more effective and inclusive international tax cooperation in the United Nations sphere.

Resolution A/C.2/77/L.11/Rev. 1 (presented by Commission II of General Assembly UN) was approved by consensus. United States did an emend reflect with 97 votes against, 55 in favour, and 13 abstentions.

In this paper replies to the emend made by the US and other 55 developed countries (countries with their vote against), regarding paragraph 2 (possible creation of a framework or instrument for international tax cooperation in the UN), are formulated. It also incorporates a comment about its paragraph 3, related to the construction of a government agency for international tax cooperation within the United Nations.

PALABRAS CLAVES:

Marco o Instrumento de Cooperación Fiscal Internacional, Desarrollo sostenible; Comisión intergubernamental de cooperación fiscal internacional en Naciones Unidas.

RESUMEN:

El 23 de noviembre de 2022, la Asamblea General de las Naciones Unidas aprobó la resolución de consenso A/C.2/77/L.11/Rev. 1, titulada: "Promoción de la cooperación fiscal internacional inclusiva y efectiva en las Naciones Unidas". El 30 de diciembre de 2022, el plenario de las Naciones Unidas aprobó consenso, la resolución A 77/441 con el mismo título y texto. Ambas resoluciones incorporan, al menos, dos propuestas posibles: a) iniciar reuniones intergubernamentales en las Naciones Unidas (ONU) Nueva York para fortalecer la cooperación fiscal internacional inclusiva y efectiva, incluida la posibilidad de desarrollar un marco o instrumento sobre cooperación fiscal internacional en la ONU (párrafo 2) y b) considerar acciones futuras como el establecimiento de un organismo intergubernamental para la cooperación fiscal internacional en el marco de las Naciones Unidas (párrafo 3). En general, esta resolución promueve una cooperación fiscal internacional más efectiva e inclusiva en la esfera de las Naciones Unidas.

La Resolución A/C.2/77/L.11/Rev. 1 (Presentado por la Comisión II de la Asamblea General UN) fue aprobada por consenso. Estados Unidos incluyó una enmienda que fue rechazada con 97 votos en contra, 55 a favor y 13 abstenciones.

En este artículo se ofrecen respuestas a la enmienda realizada por los Estados Unidos y otros 55 países desarrollados (países con su voto en contra), con respecto al párrafo 2 (posible creación de un marco o instrumento para la cooperación fiscal internacional en la ONU), amén de comentar su párrafo 3, relacionado con la construcción de una agencia gubernamental para la cooperación fiscal internacional dentro de las Naciones Unidas.

MOTS CLES :

CADRE OU INSTRUMENT DE COOPERATION FISCALE INTERNATIONALE, DEVELOPPEMENT DURABLE ; COMMISSION INTERGOUVERNEMENTALE DE COOPERATION FISCALE INTERNATIONALE DES NATIONS UNIES

RESUME :

Le 23 novembre 2022, l'Assemblée générale des Nations Unies a approuvé par consensus la résolution A/C.2/77/L.11/Rev. 1, intitulé : « Promouvoir une coopération fiscale internationale inclusive et efficace au sein des Nations Unies ».

Cette résolution intègre au moins deux propositions possibles : a) initier des réunions intergouvernementales à l'ONU NY pour renforcer une coopération fiscale internationale inclusive et efficace, y compris la possibilité d'élaborer un cadre ou un instrument sur la coopération fiscale internationale à l'ONU (paragraphe 2) et b) envisager de futures des actions telles que la création d'un organe intergouvernemental de coopération fiscale internationale dans le cadre des Nations unies (paragraphe 3).

Le texte a été approuvé par consensus de l'Assemblée générale des Nations Unies avec 97 voix pour, 55 contre et 13 abstentions.

L'objet de cet article de synthèse est de présenter des réponses aux réserves émises par les États-Unis et d'autres pays développés (pays ayant voté contre), concernant le paragraphe 2 (éventuelle création d'un cadre ou d'un instrument de coopération fiscale internationale à l'ONU) et certaines , moins, sur le paragraphe 3, relatif à la construction d'une agence gouvernementale de coopération fiscale internationale au sein des Nations Unies, arguant de l'origine de son adoption desdites propositions.

Review Article:

Africa has spoken! Resolution A/C.2/77/L.11/Rev.1 of the United Nations General Assembly: Promotion of inclusive and effective international tax cooperation at the United Nations. Macroeconomic Policy Issues (77th Session, 2nd Commission General Assembly, UNITED NATIONS).

Replies to the amendment made by the United States and countries agreeing in the vote.

1 MATTER STATE

On November 23, 2022, the United Nations General Assembly approved by consensus Resolution A/C.2/77/L.11/Rev.1 under "Promotion of inclusive and effective international tax cooperation in The United Nations".

This resolution has been possible thanks to an initiative presented by the Second Committee of the United Nations General Assembly. Nigeria is the rapporteur country of the previous solution, representing the Group of African States. Its approval has taken place within the framework of the seventy-seventh session of the General Assembly, Agenda item 16, within the package of macroeconomic proposals: Macroeconomic Policy Issues.

Resolution A/C.2/77/L.11/Rev.1, presented as a proposal of the Second Committee of the United Nations General Assembly, has been approved by all States on November 23, 2022. In This same session, the US delegation presented an amendment to paragraph 2 of said text, which was rejected for failing to obtain the votes of at least 2/3 of the States necessary for this proposal to prosper.

Undoubtedly, we are facing a milestone of historical significance that ventures as a spearhead in designing the new global architecture of international tax cooperation relations within the framework of good global tax governance.

We congratulate the initiative of Nigeria and the group of African countries that have brought to the table of the National Assembly a decisive, inclusive, effective and sustainable proposal to promote international tax cooperation as an instrument for financing the sustainability of the planet, within the framework of a new global approach that aims to design the general bases of tax cooperation between the states in an orderly, comprehensive and effective manner, which, without a doubt, constitutes an extraordinary advance and step forward in the global state of the matter.

In December 2022, the exact text of the proposal of General Assembly Commission II, which had already been presented and approved by Resolution A/C.2/77/L.11/Rev.1, was brought to the plenary of the United Nations General Assembly. On December 30, 2022, it was approved by consensus through Resolution A 77/441 of the United Nations General Assembly plenary session.

On December 30, 2022, Resolution A 77/441 was approved by consensus by the Plenary of the United Nations General Assembly, with the same text and title of the Resolution A/C.2/ 77/L.11/Rev.1: Promotion in the United Nations of the effective and inclusive cooperation of international tax cooperation.

2 RESOLUTION A/C.2/77/L.11/REV.1: "PROMOTION OF INCLUSIVE AND EFFECTIVE INTERNATIONAL TAX COOPERATION IN THE UNITED NATIONS".

In session number 25, held on November 23th, 2022, the Resolution above A/C.2/77/L.11/Rev.1 was approved unanimously in the Second Committee of the United Nations General Assembly. Nigeria presented the text on behalf of the African States that are part of the UN General Assembly.

2.1 REGARDING THE AMENDMENT PRESENTED BY THE UNITED STATES TO THE TEXT OF RESOLUTION A/C.2/77/L.11/REV.1: "PROMOTION OF INCLUSIVE AND EFFECTIVE INTERNATIONAL TAX COOPERATION IN THE UNITED NATIONS".

In this same session, the delegation of the United States presented an amendment to the draft resolution, by which the United States considered that paragraph n. 2 of the Resolution should be deleted.

The text of the amendment proposed by the United States against to Resolution A/C.2/77/L.11/Rev.1 was not accepted. It had 97 votes against, 55 in favour and 13 abstentions (see Annex 1)

The United States and 55 other countries concurring in voting supported the amendment presented by North America. Said States make an initial declaration reiterating their firm position consistently favouring international tax cooperation. However, the amendment is motivated by the fear that efforts and proposals already created fundamentally under the umbrella of the OECD will be repeated, duplicated and overlapping in matters under debate relating to international tax cooperation.

In this sense, the delegation of the United States and also the delegates of another 55 countries concurring in their vote consider that with the proposal presented in paragraph 2 of Resolution Rev.1 (relative to the creation of a framework or instrument regarding international tax cooperation), there would be duplication, repetition or parallel agendas between the work of the United Nations and the work already carried out up to now by the OECD.

Probably, that duplication (repetition, parallel agendas and redundant work) is a risk that depends on how the framework or instrument is developed. If said "Framework" or "Instrument" is used to regulate partial aspects of international economic cooperation, partially reiterating the regulation of matters that have already been previously held by other International Organizations such as the OECD or others, then, logically, it will be possible to speak of duplication and overlapping work.

On the contrary, we consider that if a correct design of a framework convention or multilateral instrument is carried out that includes the general principles and main bases of international tax cooperation with a broad, inclusive and integrating scope within the framework of good global tax governance, possibly there would be no duplication or redundancy or iterations. It would not have any reason to undermine the role of the OECD.

Explanatory notes:

a) The framework agreements (framework agreements, general agreement), once the States have obtained the necessary majorities (at least 2/3 of the votes of the countries in the United Nations General Assembly) and consequently ratification, it is specified

in actual multinational treaties that must be complied with by the States as they are authentic, challenging law norms. As a general rule, general treaties, as their name indicates, include the great principles or fundamental regulations of a specific matter.

b) Framework agreements are usually developed by protocols, which must also be approved by the majority of the United Nations General Assembly states to become burdensome law regulations. However, general treaties' development protocols tend to contain rules that generate obligations or commitments for the signatory States or parties. They serve, in general, to develop the main principles contained in the framework agreements.

c) In general, we always prefer to refer to the signatory parties to these framework agreements or protocols since the participants in signing a public treaty or development protocols never coincide with the States. Still, other signatory parties may be to said agreements or protocols.

3 PROPOSALS INCLUDED IN RESOLUTION A/C.2/77/L.11/REV.1

Resolution A/C.2/77/L.11/Rev.1 of the United Nations General Assembly welcomes two important proposals:

1. PARAGRAPH 2 of Resolution A/C.2/77/L.11/Rev.1, on creating a Framework or Instrument for International Tax Cooperation developed within the United Nations.

> Decides to begin intergovernmental discussions in New York at United Nations Headquarters on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through the evaluation of additional options, including the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process, taking into full consideration existing international and multilateral arrangements.

By Resolution A/C.2/77/L.11/Rev.1 of the United Nations General Assembly, it is approved to begin intergovernmental discussions at the United Nations (New York headquarters) to strengthen inclusive and effective international tax cooperation, including the possibility of developing a "Framework" or "Instrument" for international tax cooperation, through a process within the United Nations, taking into account existing international and multilateral agreements.

2. PARAGRAPH 3 of Resolution A/C.2/77/L.11/Rev.1, on potential next steps, such as the establishment of a member state-led, open-ended ad hoc intergovernmental committee on international tax cooperation under the auspices of the United Nations

> Requests the Secretary-General to prepare a report analysing all relevant international legal instruments, other documents and recommendations that address international tax cooperation, considering, inter alia, avoidance of double taxation model agreements and treaties, tax transparency and exchange of information agreements, mutual administrative assistance conventions, multilateral legal instruments, the work of the Committee of Experts on International Cooperation in Tax Matters, the work of the Organisation for Economic Co-operation and Development/Group of 20 Inclusive Framework on Base Erosion and Profit Shifting and other forms of international cooperation, as well as outlining potential next steps, such as the establishment of a Member State-led, open-ended ad hoc intergovernmental committee to recommend actions on the options for strengthening the inclusiveness and effectiveness of international tax cooperation

In addition of the request to the UN Secretary General to prepare a report analysing the legal instruments and documents in these matters (taking into account the work of all the international organizations, especially the UN, OECD, G-20), the General Secretariat the establishment of an ad hoc open-ended intergovernmental Committee, led by the Member States. to recommend actions to strengthen inclusive and effective international tax cooperation.

4 AMENDMENT MADE BY THE UNITED STATES AND 55 OTHER COUNTRIES

AMENDMENT: Without a doubt, paragraph 2 of the Resolution above is the one that has given rise to the most debate. In particular, the US has established an amendment that 55 countries have seconded, including Canada, Australia, the UK, Liechtenstein, Japan, Korea, New Zealand, Germany, France, the Czech Republic, Spain, etc. (see Annex I).

The formula amendment is based on a series of arguments defended by the United States delegation and seconded by those states. We group these arguments into the following thematic groups:

4.1 DUPLICATION OF REGULATIONS

On the part of the countries above, it is considered that the creation of a Framework or Instrument in matters of international tax cooperation would give rise to the following:

- Duplication of existing initiatives.
- Parallel schedules.
- Necessary overlaps.
- Duplication, fragmentation, and diversion of financial and human resources.
- Repetition of regulations.

4.2 RISK FOR THE FINAL ACHIEVEMENT OF PILLARS I AND II OF THE BEPS PLAN AND MILI CONVENTION

Some states consider Pillars I and II the most ambitious plan for international cooperation in the 21st century and that a framework or instrument on international cooperation could impair the work of the OECD, affecting the convention derived of Action n. 15 of the BEPS plan.

4.3 DANGER TO INTERNATIONAL TAX COOPERATION

4.4 NON-INCLUSIVE DISCUSSION

Because the proposals are raised at the United Nations headquarters. Lack of transparency and democracy.

5 REPLIES TO THE AMENDMENTS MADE BY THE UNITED STATES AND 55 OTHER COUNTRIES

5.1 DUPLICATION OF REGULATIONS

It has been the redundant and duplication, the most insistent criticism cited by all the countries that have voted to reserve against a framework or instrument for international

tax cooperation. The countries above insist that this would create repetition, parallel agendas, overlaps, fragmentation, and duplications.

We would like to stand out that, the risk above may exist if the framework or Instrument only regulates matters precisely the same as those previously held by other international organizations such as the OECD and its inclusive framework or others, and also does not contain regulations comprehensive, inclusive and practical information on the bases and principles of international tax cooperation.

However, to carry out the framework or instrument, for example, through a model of framework convention, the group of African States: Nigeria, Cameroon, and the rest of them, propose this measure thinking of a global model that regulates the principles and the general bases of international cooperation for the 21st century and following (not yet approved in the world today), which can be the channel to instrumentalize international tax cooperation relations as the main vector of the global tax governance.

On the design of a FRAMEWORK or INSTRUMENT of International Fiscal Cooperation: Towards a Framework Convention or Multilateral Instrument on International Fiscal Cooperation.

Regarding the Countries that have voted for Resolution A/C.2/77/L.11/Rev.1, positioning themselves for and against paragraph 2 (creation of a framework or instrument), perhaps a consensus solution for worldwide States, making some considerations, on the need to carry out a design of a framework or instrument, understood as a possible FRAMEWORK AGREEMENT or a MULTILATERAL INSTRUMENT (under the umbrella of the UN), but provided that said framework agreement or multilateral instrument is carried out correctly. To this end, the framework convention or multilateral instrument should be designed with the following features:

a) Inclusive, effective, and comprehensive character.
b) Include the principles, purposes and bases of international tax cooperation relations within a Global Tax Governance architecture framework.
c) Take into account existing international and multilateral agreements.
d) No duplication, redundancy, repetition and no reason to undermine the role of the OECD
e) Following a new generation holistic model that pursues economic interests and social, humanitarian, educational, etc.
f) Integrating into a single document or multilateral convention the set of principles, purposes and bases that should govern international tax cooperation, incorporating in an orderly, systematic and comprehensive manner the different dispersed regulations that have been created and that affect tax matters. In addition, international tax cooperation (whether complex or soft law) includes matters those that have not enjoyed as much code and that also affect international tax cooperation relations.

In line with the above:

1. Possibly, it would be considered to aspire to a framework convention on international tax cooperation, formulated as the set of principles, purposes and broad bases that should govern international tax cooperation within the framework of a new Global Tax Governance architecture.

2. Indeed, in the international taxation acquis, different specific or specific initiatives have already been created, which directly affect international tax cooperation (hard and soft law), such as the BEPS project (in particular, pillars I and II, but not only); the multilateral convention for mutual assistance, the model convention for the Exchange of tax information, the joint report standard for the automatic exchange of tax information of the OECD, OECD reports on compliance, tax risk management for tax administrations and digitization of administrations, and many others.

3. However, so far, **there is no a framework convention or multilateral instrument approved in the world on international tax cooperation and global tax governance**, designed as a framework convention or multilateral convention, which includes the main principles and bases that should govern international tax cooperation between States in an inclusive, effective and sustainable manner, within the framework of a new global tax governance architecture that serves as a financing instrument for global sustainability.

4. Said framework or instrument, correctly designed, could be a harmonious way of collecting all the bases of international tax cooperation, which **does not mean repetition or duplication** or overlapping, **nor could it result in undermining the margin of action of the OECD**, because **the scope** of this framework convention or multilateral instrument on international tax cooperation (according to Resolution General Assembly A/C.2/77/L.11/Rev.1), **would be much more significant in scope than partial instruments or points that up to now have already been developed on international tax cooperation matter.**

   Hence, it would be difficult to think of duplications and overlaps, about this framework convention (or multilateral instrument) because:

   a) Its scope, … would far exceed the capacity of pillars I and II of BEPS, which regulate "only" the taxation of the digital economy and "only" for multinational companies.

   b) Its scope... would also exceed the common area of the BEPS actions since the BEPS Plan is exclusively for business economic taxation, intended to prevent multinationals from diverting profits and tax bases (corporate taxation of financial activities for multinational companies). . These are fundamental aspects, but in no way, can they be understood as comparable to the set of matters included in international tax cooperation relations. These matters are only a part of international tax cooperation framework. In this sense, international tax cooperation relations related to the economic activities of multinational companies (BEPS) should be included, and the general rules of international tax cooperation generally apply to all international taxation (direct and indirect).

   c) Its scope, … would also exceed other specific instruments that the OECD has created, such as the Common report Standard (CRS), which regulates only one of the facets of international tax cooperation in the field of administrative tax cooperation and just one of the administrative tax cooperation ways, when there are also many other forms of information exchange and also many different ways of tax administrative cooperation.

d) Its scope, … would also exceed the OECD model conventions, the UN model, the US model and others to avoid international double taxation since these Convention Models do not contemplate, as is logical, many of the bases that regulate the international tax cooperation relations.

e) Its scope, ... would also exceed the model convention to exchange international tax information, although it is one of the matters included in this treaty and other model conventions, multilateral and bilateral treaties on international taxation that do not have the same purpose of last regulating the bases of international tax cooperation relations.

f) Its scope, … would even exceed the size of the multilateral mutual assistance convention since it would be about creating an all-encompassing framework convention that includes not only cooperation in tax management and collection matters but also the regulation of all the main bases that affect international tax cooperation from a holistic vision, in line with the latest free trade treaties (including issues of a social, environmental, educational, and humanitarian nature).

g) Its scope,... would exceed tax cooperation relations between States, also affecting their domestic and trans-border tax relations with taxpayers, intermediaries and stakeholders in general, about protecting their rights.

h) Its scope, therefore, should affect, not only economic issues, but also fundamental issues that affect the set of bases for international tax cooperation, such as the relationship between taxation and international trade; environmental taxation and global sustainability, tax regulation of extractive materials, tax cooperation in social, educational, cultural, humanitarian, gender matters, etc.

i) It should finally include a holistic concept in line with the latest generation treaties, of free trade, which is currently being approved. [1]

A proposal of a Framework Convention of similar characteristic has been published untitled *Framework Agreement on International Tax Cooperation, Trade and Global Tax Governance,* and can be consulted in the Review of International and European Economic Law, Vol. 1, Issue 2 (www.rieel.com): https://rieel.com/index.php/rieel/article/view/28/23)

5.2 RISK FOR THE FINAL ACHIEVEMENT OF PILLARS I AND II OF THE BEPS PLAN AND MILI CONVENTION

One of the arguments that have been repeated profusely about the possible creation of an international tax cooperation framework or instrument is that said framework could

[1] *Its scope, therefore, always taking into account the hard law and soft law instruments that have been created up to now, would extend to matters such as: Principles of International Tax Cooperation; Proposals of the International Tax Cooperation; Scope of International Tax Cooperation; International Administrative Cooperation in Tax Matters; International cooperation in administrative mutual assistance; Cooperation in international trade through commercial tax policies; Customs Cooperation; Cooperation in Environmental Taxation and extractive activities; Cooperation for the Resolution of Tax Disputes and Alternative Dispute Resolutions; Cooperation for Systems combating Tax Fraud; Cooperation on digital economy and global transfer pricing policies; Cooperation on taxpayers' rights in the domestic and international sphere; Cooperation on Tax education and tax compliance; Cooperation on digitization of tax administrations and cybersecurity of TTAA; Cooperation in Taxation and Gender; as well as all the aspect that could be a common denominator in international tax cooperation relations..*

entail a risk to achieving the success of Pillars I and II of BEPS and the multilateral convention. In this sense, we would like to make the following remarks:

1. Pillars I and II of BEPS regulate the taxation of the digital economy of multinationals, and that is not the complete framework of international tax cooperation matters. Besides, digital economy taxation should also include all digitized businesses (for all companies and not only multinational companies).

2. In general, the taxation of the digital economy is one of the bases that must be included in a framework convention or multilateral instrument of international tax cooperation. But, the scope of the global tax cooperation framework or instrument must be much more significant since it also includes other general bases in all the matters above.

3. Therefore, the framework convention on international tax cooperation should include among its bases, one dedicated to cooperation between states in the taxation of the digital economy, but this does would not means a risk for the achievement of pillars I and II of BEPS.

For example, in the proposal already created for the "Framework Agreement on International Tax Cooperation, trade and Global Tax Governance", a specific article is incorporated to regulate the bases of the taxation of the Digital Economy. In this line, to be assertive with the BEPS environment and its inclusive platform, the solutions proposed by PILLARS I and II of the BEPS plan are incorporated into said Framework Agreement on international tax cooperation, trade and global tax governance.

Ex.: General Agreement on International Tax Cooperation, Trade and Global Tax Governance: A Proposal (Part I & II). Authors: Owens, J., Andrés-Aucejo, E., Akamba S., Nicoli, M. *(www.rieel.com, vol 1, n.2).* https://rieel.com/index.php/rieel/article/view/28/23

12.3 Cooperation in taxation of the digital economy

1. In the development of the previous point, the parties agree to ***tax the profits derived from large multilateral companies and automated digital services and in general, the profits derived from digitized and highly digitized businesses.***

1.1. Regarding **multinational companies,** the parties could agree to tax the income derived from cross-border operations carried out by digital companies where the value is generated and to establish compensatory tax measures for the source country in which the company operates through international consensus strategies that minimize the risk of unilateral aggressive actions.
To be assertive with the new BEPS project (BEPs 2.0) and its inclusive forum for the taxation of multinationals, the parties could agree on their willingness to commit to tax the profits of multinational companies in the market country, following the criterion of the jurisdiction of use or consumption (for example, the Pillar I BEPs model) with the possibility of compensation in the country of residence of the multinationals (Pillar II BEPs), if the tax rates of the lower states are to a global minimum standard that the parties will set and that could be assessed at 15% (Globe), or agreed by consensus, which could be raised or lower.

4. In addition, the scope of the framework or instrument provided by the Resolution of the General Assembly of the UNITED NATIONS (Resolution A/C.2/77/L.11/Rev.1) would have a much greater scope than the multilateral convention of action 15 of the BEPs plan, since the framework or framework convention should include all the bases of international tax cooperation and not only the commands related to the taxation of the digital economy and concordant issues to apply BEPS plan.

5. Finally, far from causing interpretation issues of the applicable multilateral or bilateral convention or instrument, the creation of a framework convention on international tax cooperation would eliminate the issues interpretations treaties, since the framework convention should be applied in general, which would also make it possible to update the bilateral and multilaterals treaties network, not only of OECD but also from the rest of the international institutions regarding the signing parts.

> ***Ex.: General Agreement on International Tax Cooperation, Trade and Global Tax Governance: A Proposal (Part I & II). Authors: Owens, J., Andrés-Aucejo, E., Akamba S., Nicoli, M.*** *(www.rieel.com, vol 1, n.2).* https://rieel.com/index.php/rieel/article/view/28/23
>
> ***ARTICLE 12. 4* Cooperation in taxation of the digital economy**
>
> **6.** The signing of this *General Agreement on International Cooperation, Trade and Global Tax Governance*, by itself, would provide sufficient legal coverage so that:
>
> a. Consensus solutions on the taxation of digitalized businesses of multinational companies (5.1) could be applied by the signatory parties of this General Agreement, with legal coverage for the network of bilateral treaties already signed, without prejudice to the OECD regulatory acquis.
> b. Consensus solutions on the taxation of digitized and highly digitized companies get in the present General Agreement (5.2), could be incorporated into previously signed bilateral treaties and, where appropriate, into multilateral treaties. And the same, respect to any agreements that the parties adopt based in this General Agreement or the future Protocols.
> c. *The signing of this framework agreement and its development future protocols, in addition to providing legal coverage to adapt bilateral agreements, constitutes a legal certainty, transparency and generality source, preventing interpretation issues on the regulations applicable between multilateral conventions, multilateral instruments, domestic legislation and bilateral treaties.*

5.3 DANGER TO INTERNATIONAL TAX COOPERATION

We consider that the possibility of creating a framework convention on international tax cooperation, cannot be understood as a danger for international tax cooperation; on the contrary, we consider that it could be a decisive, advanced and essential step towards international tax cooperation.

It should be a remarkable historical milestone in the history of international taxation since the approval of the first global convention models to avoid international double taxation (OECD Model Convention 1963 and others), which, together with previous work of the League of Nations has been considered the most recent antecedents of international tax cooperation. From here, a series of treaties and multilateral and bilateral instruments (hard

and soft law) have succeeded in regulating matters that directly affect international tax cooperation.

Therefore, this framework or instrument would represent a historical advance and be adapted to the contemporary world's fundamental needs inherent in the second globalization. For this reason, the fact of creating a framework convention where some principles, purposes and bases of international tax cooperation are established, we humbly do not consider that it should be understood as a risk for international tax cooperation. Still, on the contrary, it would be the way and means to follow for the financing of a sustainable planet in line with what is established in all international agendas such as 2030 and others, especially in the Addis Ababa Action Agenda of 2015, in addition to other purposes already mentioned. [2]

Nowadays, it has not been carried out through a framework convention or instrument that regulates -with an inclusive character- the **set** of international tax cooperation principles, bases and matters.

5.4 NON-INCLUSIVE DISCUSSION

Some developed country argues that the proposals can lead to a non-inclusive debate, proposed to be created and produced at the United Nations headquarters. In addition to alluding to the fact that the role of the OECD may be undermined as well as a lack of transparency, democracy and simplistic debate between developed and developing countries.

We would like to point out that it is true that the two measures proposed in Resolution A/C.2/77/L.11/Rev.1, both the framework or instrument and the possibility of creating an intergovernmental body arise in the context of the United Nations, but the following arguments can be put forward:

1. In the preamble of Resolution A/C.2/77/L.11/Rev.1, a prominent mention is made about the recognition of the work of the different organizations in the field of international tax cooperation:

> Noting also the work of the Organisation for Economic Co-operation and Development/Group of 20 Inclusive Framework on Base Erosion and Profit Shifting,
>
> Noting further the implementation of the Standard for Automatic Exchange of Financial Account Information in Tax Matters under a common reporting standard developed by the Organisation for Economic Co-operation and Development, as well as the role of the Global Forum on Transparency and Exchange of Information for Tax Purposes,
>
> Recalling the work of the Platform for Collaboration on Tax, which is to intensify collaboration and coordination on tax issues between the United Nations, the International Monetary Fund, the World Bank Group and the Organisation for Economic Co-operation and Development,
>
> Noting the Group of 20 Ministerial Tax Symposium on Taxation and Development, which was held in Nusa Dua, Bali, Indonesia, on 14 July 2022, Noting also the work of the Addis Tax Initiative in fostering collective action to strengthen the capacities of developing countries for closing recognized gaps in development finance,

[2] *General Agreement on International Tax Cooperation, Trade and Global Tax Governance: A Proposal (Part I & II).* ***Owens,*** *J., Andrés-Aucejo, E., Akamba S., Nicoli, M. (www.rieel.com, vol 1, n.2).* https://rieel.com/index.php/rieel/article/view/28/23

> Taking note of resolution 990 (LIV) on curbing illicit financial flows and recovery of lost assets of 17 May 2022, adopted by the Conference of African Ministers of Finance, Planning and Economic Development, …

2. Paragraph 3 of Resolution A/C.2/77/L.11/Rev.1 establishes that the General Secretariat must prepare a report analysing all legal instruments, documents and other soft law instruments, … considering not only the work of the United Nations Committee of Experts on International Tax Cooperation but also "**the work of the Organization for Economic Co-operation and Development/Group of 20 Inclusive Framework** on Base Erosion and Profit Shifting and other forms of international cooperation.

3. In terms of international cooperation, difficult is forget the prominent role of the United Nations Organization as a world international organization that recognizes in its Charter (signed in San Francisco in 1945) as one of its bastions, the purpose institutionalized international cooperation (developed by Resolution 2625 XXV of the United Nations). In this regard, we refer to previous works in which the main legal reasons that support the previous theses are regulated.[3]

SUBJECT	PREVALENT POSITION	LEGAL FOUNDATION
NORMATIVE HIERARCHY Global	The United Nations Charter is the constitution in the material sense of the International Legal Order; therefore, it occupies the position of vertex of the world source system. The UN occupies the highest legal rank in the International Legal Order	Article 103 et alter *UN Charter*
UNIVERSALITY	The United Nations is constituted by almost all the States of the world (G-193) and is governed by the rule "Every Country, one vote"	Article 3, 18 *UN Charter*
INTERNATIONAL COOPERATION	The UN is the International Organization that constitutes the diametral axis in permanent International Cooperation, assuming international cooperation as purpose, beginning and end.	Articles 103, 1 & 2 UN *Charter* (Art. 1.3, art. 13.1, 55, 56 Charter and Resolution 2625 UN
INTERNATIONAL COORDINATION	The UN is the international body with responsibility for coordinating States and International Organizations.	Articles 1.4; 58, 60, 63.2, 64 and 70. *UN Charter*
INTERNATIONAL CODIFICATION	The UN is the International Organization with functions of codification and progressive development of International Law.	Article 13 *UN Charter*
INTERNATIONAL ORDER: global principles & purposes	The UN as an International Organization that constitutes the Principles and Purposes of the International Community.	ARTICLES 1 and 2 *UN Charter and Resolution 2625 UN*

6 FINAL REMARKS

I. Based on the considerations outlined in previous pages, we would like to highlight the relevance of the recently approved Resolution A/L.11/Rev.1, which we consider a historical milestone.

[3] *ANDRÉS-AUCEJO, E. The primary legal role of the United Nations on international Tax Cooperation and Global Tax Governance: Going on a new International Organization on Global Tax Cooperation and Governance under the UN "Family". Revista de Educación y Derecho. Education and Law Review (JCR/emerging & SCOPUS), num. 21, 2020 (Open access, English and Spanish versions);*

II. By the United Nations Resolution, negotiations are opened to undertake the project of creating a framework or instrument, which we understand should be understood in the sense of working towards a framework convention or multilateral Instrument on international tax cooperation. Furthermore, within the United Nations, the possibility of moving towards creating an intergovernmental committee for international tax cooperation within the United Nations has been approved.

III. We humbly believe that it could be seen from a cheerful, integrating and sustainable face, and could represent a golden opportunity for all worldwide States to participate in a framework convention on international tax cooperation that establishes the principles and broad bases in the matter. And to determine the guidelines governing international tax cooperation relations within a new global tax governance architecture. It could also be a *golden opportunity* to move us towards an intergovernmental body in cooperation relations and global tax governance, as we have already defended.

IV. That is why we honestly consider these initiatives could be endorsed with the surrender of the United States and other countries that have aligned their vote with the reserves created by the United States. This would undoubtedly be in line with a cooperation policy pursued in a very decisive manner by the Biden Government, who, from here, look optimistically, with hope and sincere desire for cooperation, also in matters of international taxation, to whom from here we make a humble appeal.

V. Hence, it is also a significant factor that, countries like the United States and its voting allies could consider the alternative of creating an international tax cooperation framework convention as a historic opportunity to reach a way of **maximums, principles and general rules** of international tax cooperation in favour of sustainable development financing that brings us closer to the objectives of the UN Agendas 2030/50, Addis Ababa Action Agenda, Monterrey Consensus, Doha Declaration, Africa Agenda 2063, among others.

VI. Undoubtedly, the understanding, support, help and backing of the United States of America and countries such as Canada, Australia, New Zealand, Japan, Norway, Korea and many others, are critical in this new framework that the group of African States is promoting, thinking with the support and collaboration of all countries, in a global and inclusive context of all nations, with all and for all, with the hope of a better world.

VII. Today more than ever (in the face of economic and humanitarian crises), it should be rescued the spirit that presided over the negotiations to reach institutionalized international cooperation through the United Nations and the approval of its CHARTER and other multinational treaties,[4] negotiations that were possible with the unconditional support of people like **Franklin D. Roosevelt (President of the United States of America);** with the total backing

[4] *Nowadays, more than ever, immersed in a post-COVID-19 economy and stunned by Russia's invasion of Ukraine, in Russia versus NATO struggle, the need to rescue the spirit of the San Francisco Charter emerges; we should go back over the residue left by Declarations such as the St. James Palace Declaration in June 1941 and the United Nations Declaration of January 1942, the Atlantic Charter of 1941 (the great principles that presidents signed in their day Roosevelt and Churchill), the Tehran and Yalta Conferences (1943 and 45 respectively), and the Dumbarton Oaks Summit in Bretton Woods, all signed in the development of the bloodiest and most massive war of all time and that brought times of prosperity, development and future. And even more, return to the European Agreement that prevailed for the redistribution of Europe where the principle of peaceful cooperation would be established without any fissure (Andrés-Aucejo, E.)*

of **Winston Churchill, John Maynard Keynes** and many other (Eva Andrés-Aucejo).

Hopefully, these words reach even one of the countries aligned with the reservations against the proposals of Nigeria and the rest of the African States.

Only "together" we will make international tax cooperation a reality towards constructing a fair and sustainable planet for this century, and the following ones . . .

ANNEX: The Committee rejected the amendment contained in A/C.2/77/CRP.2 by a recorded vot of 97 to 55, with 13 abstentions. The voting was as follows:

In favour: Albania, Andorra, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Japan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Micronesia (Federated States of), Monaco, Montenegro, Netherlands, New Zealand, North Macedonia, Panama, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, San Marino, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

Against: Algeria, Angola, Antigua and Barbuda, Bahamas, Bahrain, Barbados, Belize, Benin, Bolivia (Plurinational State of), Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, China, Comoros, Côte d'Ivoire, Cuba, Democratic People's Republic of Korea, Djibouti, Dominican Republic, Ecuador, Egypt, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea-Bissau, Guyana, India, Indonesia, Iran (Islamic Republic of), Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Nigeria, Oman, Pakistan, Papua New Guinea, Paraguay, Philippines, Qatar, Russian Federation, Rwanda, Saint Kitts and Nevis, Saudi Arabia, Senegal, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, Sri Lanka, Sudan, Syrian Arab Republic, Thailand, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, United Republic of Tanzania, Viet Nam, Yemen, Zambia, Zimbabwe. Abstaining: Argentina, Bangladesh, Bhutan, Chile, Colombia, Costa Rica, El Salvador, Mexico, Norway, Peru, Suriname, Türkiye, Uruguay.

Review Article

The constitutional framework for taxation in France

Philippe Marchessou

Honorary Professor at the University of Strasbourg; Former Professor at the College of Europe. Former Responsible for the European Tax Law programs at the College of Europe (Bruges). Former Chairman of the Department of Public Law at the University of Strasbourg. Member of the Scientific Council of the Doctorate in European Tax Law of the University of Bologna. Former visiting professor and lecturer at European, Canadian and Latin American universities. He has multiple publications of books and articles on tax law, especially international tax and European law.

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KEYWORDS:

tax good governance; social responsibility.

ABSTRACT:

Following the path of the requirements applicable to corporate governance, the need arose for good fiscal governance, based on increased legal certainty and reciprocal cooperation between tax administrations and citizens.

must inform it within the framework of the Rule of Law, and the attitude of the Spanish Tax Administration, occupied, in general, in obtaining of resources more than in tax justice, which does not favor the development of correct collaborative relationships with citizens

PALABRAS CLAVES:

buen gobierno fiscal agresiva; responsabilidad social corporativa

RESUMEN:

Siguiendo la senda de las exigencias aplicables al gobierno corporativo surgió la necesidad de
el adecuado desarrollo de unas relaciones de colaboración con los ciudadanos.

MOTS CLES :

bonne gouvernance fiscale; la administration; échange d'informations; planification fiscale agressive; responsabilité sociale des entreprises

RESUME :

Dans le sillage des exigences applicables au gouvernement d'entreprise, s'est fait sentir le besoin d'une bonne gouvernance fiscale, fondée sur une sécurité juridique accrue et une coopération réciproque entre les administrations fiscales et les
agressive, et
, ce qui entraîne une dégradation des concepts et des principes qui doivent l'informer dans le cadre de l'État de droit, et l'attitude de l'administration fiscale espagnole, occupée, en général, dans l'obtention de ressources plus que dans la justice fiscale, ce qui ne favorise pas le bon développement de relations de collaboration avec les citoyens.

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CONTENTS:

1 INTRODUCTION

The representative system is the keystone of democracy. The establishment of the first representative regimes in the United Kingdom and then in the United States (the "tea party" in Boston) was done for tax reasons. The French experience has not escaped this tradition. The monarch had not convened the States-General, that is, the assembly which brought together the representatives of the nobility, the clergy and the third estate since 1614. Louis XVI convened them in 1789 because he needed their consent to new taxes to fund state spending. Once united, the third estate proclaims itself a constituent assembly. Over the years – before and after the Napoleonic parenthesis – parliament votes on tax revenues, then it arrogates to itself the right to control the use made of it, that is to say, public expenditure, then it controls the action of the government, asks for the dismissal of the government and ends up obtaining it. Thus is established the filiation, which, from the fiscal power, leads to establishing a representative system.

The French political framework was substantially renovated by the Constitution of 1958, adopted by referendum under the aegis of General de Gaulle, which created the Fifth Republic. It put in place a rationalized parliamentarism, which would be upset by the adoption, in 1962, of the election of the President of the Republic by universal suffrage, in a two-round ballot. If a candidate does not obtain an absolute majority in the first round – this has never happened – only the two candidates who came first in the first round can participate in the second round after any withdrawals. The regime has become more presidentialist, but with a government that remains accountable to the lower house of parliament (the National Assembly).

The French regime practices a hierarchy of written law norms in accordance with Hans Kelsen's pyramid. At the top is the Constitution (1), whose texts with fiscal connotations are the subject of the abundant case law of the Constitutional Council (2).

2 THE FRENCH CONSTITUTION

The French Constitution comprises several texts, which form the "block of constitutionality", the supreme reference. It includes three founding provisions of the tax: articles 13 and 14 of the Declaration of August 26, 1789 (§ 1), and articles 34, paragraph 2 (§ 2) and 55 (§ 3) of the Constitution of October 4 1958. The Declaration of the Rights of Man of 1789 and the Preamble of the Constitution of 1946 are integrated into the block of constitutionality by express provision of the Constitution of 1958, which makes reference to them and expressly declares to incorporate them.

2.1 ARTICLES 13 AND 14 OF THE DECLARATION OF AUGUST 26, 1789

2.1.1 The context of their adoption

The States General were convened by the monarch to consent to the tax, and the first important text adopted by the National Assembly institutionalized this power of authorization in its article 14: "All citizens have the right to ascertain, through them -themselves or through their representatives, the need for the public contribution, to consent to it freely, to monitor its use, and to determine the proportion, the base, the recovery and the duration".

From now on, the representatives of the citizens-taxpayers will have the power to set the characteristics of the tax levy (its base, its quota and the methods of its recovery) but also to monitor the use made of it by the Executive, that is that is, to control public spending. This text serves as a basis for the development of the representative system in France since, strong in this competence, the parliamentarians of the Restoration (1815-1830) and the July Monarchy (1830-1848) will gradually manage to impose their control over the decisions of the Executive, then to censure the latter and thus establish the political responsibility of the government before the Lower House, according to a process comparable to that followed in Great Britain a century and a half earlier.

2.1.2 Section 13

It poses both the need for taxation, designed as a privileged instrument for financing public expenditure, but also the obligation to distribute its burden in an egalitarian manner while weighing it according to the contributory faculties of each citizen: "For the maintenance of the public force, and for the expenses of administration, a common contribution is essential: it must be equally distributed among all the citizens, by reason of their faculties".

If the choice of a pay-as-you-go tax reflects a bygone era with the generalized advent of quota taxes, on the other hand two fundamental principles of contemporary tax law have their roots in this text: equality before tax (1) and personalization of it (2).

2.2 EQUALITY BEFORE TAXES

Equality before taxes constitutes the fiscal component of one of the founding principles of the French Republic, but it is clear that its expression is too general to be used operationally: in a contemporary State with neoliberal coloring, the judge will be reluctant to censure in the name of this principle the application of an incentive standard which certainly breaks equality by means of tax incentives but which thus acts with the intention of directing the behavior of taxpayers towards actions which will coincide with the objectives of State policy, for example in terms of job creation, regional development or improvement of the quality of housing. The constitutional judge will take care to recall that equality simply means that two taxpayers in an identical situation must be treated in the same way, and he will only rarely refer to this principle, preferring to him that of equality before public charges, which is more vast and consequently allows him to appreciate with greater freedom the situation or the text submitted to him. The Constitutional Council came to give force to the principle of equality between taxpayers (in particular, Decision no . 2010-88 QPC of 21 Jan. 2011). However, its practical scope is limited, so that overall tax equality represents more of a philosophical principle and an ultimate bulwark than a true constitutional principle.

The discourse of contemporary rulers suggests that this principle does not only imply taxation of a comparable weight for income from capital and for income from work, but that in a finer way it should make it possible to tax the latter more lightly in the as they come from a source that wears out over time, unlike the former. This discourse is contradicted by many

rules of positive law that global economic tensions have dictated to States to retain or attract capital on their territory.

2.3 PERSONALIZATION OF TAX

The appeal to contributory faculties is analyzed as a celebration of the personalization of the tax. It will have practical implications for the system of so-called "personal" taxes , i.e. those whose structure takes into account the personal equation of the taxpayer and not only the economic base of the tax (tax on income and housing tax mainly). Indeed, such a tax respects the constitutional precept only if it reduces the burden of the contribution according to the family responsibilities of the taxpayer. In other words, it is the family nature of the tax which is prefigured here [the family quotient system in contemporary income tax]. However, this constitutional framework also admits in advance the possibility of reducing the tax burden for taxpayers who have incurred social utility expenses (in the form of donations, life insurance subscriptions or real estate investments, for example).

The practical impact of this principle is not negligible: any law claiming to contradict this provision would be manifestly unconstitutional, and some even consider that Article 13 requires the progressive nature of income tax. The debate is interesting but without a solution to date since it is clear that the actors of the time did not imagine such a mode of imposition (Condorcet in particular), and even if the scope of the standard can take on a contemporary meaning larger than the original one, the Constitutional Council has never had to intervene on this issue.

2.3.1 Article 34, paragraph 2, of the Constitution of October 4, 1958

It specifies that "the law establishes the rules...concerning the base, the rate and the methods of recovery of taxes of all kinds". In other words, it lays down the principle of the legality of the tax, in line with article 14 of the Declaration of 1789. If the constitutional provision does not mention tax law as such, it favours a broad conception of taxation, the definition of the regime which it reserves for Parliament. This attribution of competence is theoretically total since it intervenes under the paragraph of article 34, which entrusts to the law a complete normative competence and not under paragraph 3, which only gives the legislator the task of determining fundamental principles. Beyond the largely nominal nature of this distinction, the result is, in any case, an almost total impossibility for the autonomous regulatory power of Article 37 to intervene in the matter. The law will therefore constitute the basic tax text.

2.3.2 Article 55 of the Constitution of October 4, 1958

This provision gives treaties duly ratified, that is to say, incorporated into the internal legal order by a vote of Parliament, a legal value superior to that of laws provided that the other States parties to the treaty also apply it. International treaties in tax matters will therefore form the second level of the pyramid of standards. This superiority does not extend to international custom (CE, Ass ., June 6, 1997, Aquarone, req . n ° 148683, concl . G. Bachelier, Dr. fisc. 1997, comm . 836). This desire of the constituent reflects a concern for openness to the world since it integrates into the national legal order, at a high level, standards that have been the subject of concerted development with other sovereign States. It is, therefore, a monist system that is in force.

These transnational texts fall into three categories. There are, first of all, bilateral conventions tending to avoid double taxation, which uses the model developed by the OECD, such as the Franco-Chilean convention of 2004. Then there are two multilateral conventions: the January 25th, 1988 convention on the automatic exchange of information relating to

financial income (ratified to date by 141 States) and the BEPS convention of 7 June 2017 (of which 95 States are signatories at the end of 2020). Then there is European Union law, derived from the Treaty on the Functioning of the European Union (TFEU). On its basis, the Council of the Union adopts directives in its areas of competence, which oblige the States to comply with them by adopting the national laws necessary to achieve the goals set by each directive. In fiscal matters, the Union is competent to unify customs duties, harmonize taxes on consumption, and coordinate the architecture of taxation on income and profits. The Court of Justice of the Union interprets the provisions of the European treaties to verify the conformity of national legal provisions. In other words, the French Constitution, like that of its 26 partners, authorizes the submission of significant sections of national tax legislation to transnational rules which are superior to this legislation.

3 THE CASE LAW OF THE CONSTITUTIONAL COUNCIL

The Constitutional Council is often asked to rule on conforming tax laws with the Constitution. Its intervention is within the framework of examining the texts of law adopted but not yet promulgated (art. 61 al. 1 of the Constitution), exceptionally in that of the detection of texts of a regulatory nature taken in legislative form (art. 37(2) and many since 2010 in response to priority questions of constitutionality (QPC) referred to it by the Court of Cassation and the Council of State based on Article 62 of the Constitution. Concerned about the intelligibility of the norm (Dec. 29, 2013, 685 DC), it thus pronounced on the compliance of new tax laws with the principle of equality (1). It allows the enactment of discriminations on the condition that they are justified by the concern to fight against tax evasion (2); in the same spirit, it requires the proportionality of tax sanctions (3) and limits the possibilities of retroactivity of the law (4). It also had the opportunity to comment on the implications of the non bis in idem principle (5). Finally, its role is reinforced by the introduction of the QPC procedure (6).

3.1 THE SCOPE OF THE PRINCIPLE OF EQUALITY

The equality that taxpayers dream of is a guiding principle. Its meaning is imprecise since it is general. It is declined, over the decisions of the constitutional judge, in different variants, without the judge himself taking the trouble to explain the meaning and scope of each of them.

3.1.1 Equality before the law

It was invoked for the first time in the decision of December 27, 1973 (51 DC), to censure a provision of the finance law for 1974 which instituted discrimination between taxpayers by prohibiting holders of high incomes the possibility of providing evidence contrary to an official taxation decision of the administration concerning them. The Constitutional Council relied here on Article 13 of the Declaration of Human Rights and on the preamble of the Constitution. It is permissible to question the relevance of the reference to equality before the law to justify this decision. The judge's approach here is a little impregnated with the essence of tax law and is probably groping in search of the appropriate principle. But the plasticity of its content allows it to use again (Dec. 19, 2013, 682 DC; January 17, 2020, 2019-820 QPC).

3.1.2 Equality before public offices

It was invoked for the first time in a decision of July 12, 1979 (107 DC) and obliges the legislator to respect a general framework within which he can arrange differences,

provided that they do not entail a rupture characterized by status between taxpayers (200 DC, 16 Jan. 1986) but that they remain based on "objective and rational criteria according to the goals that he proposes" (453 DC, 27 Dec. 2001). In other words, different situations can be applied to different rules, provided that the resulting difference in regime is not exaggerated, even between different categories of citizens: "if the principle of equality is not an obstacle to a law establishing non-identical rules with regard to persons in different situations, this is only so when this non-identity is justified by the difference in the situation and is not incompatible with the purpose of this law" (209 DC, July 3, 1986). It thus validates the "tax shield" by considering that "the requirement resulting from article 13 of the Declaration of 1789 would not be respected if the tax were of a confiscatory nature or imposed an excessive burden on a category of taxpayers regard to their contributory faculties" (555 DC, August 16, 2007). The constitutional judge pushes his control to audacious limits, since he recognizes here the power to appreciate the threshold beyond which the differentiation operated by the law becomes too discriminatory to remain in conformity with the Constitution and does not hesitate not to verify in passing whether the provisions of a law already promulgated are constitutional (256 DC, July 25, 1989), this before the institution of the priority question of constitutionality. As part of this procedure, it validates the granting of tax advantages by the legislator to encourage the development of economic activities by applying objective and rational criteria according to the objectives sought (29 Apr. 2011, 121 QPC; 9 August 2012, 654 QPC).

3.1.3 Equality before taxes or before the tax law

It was invoked for the first time in a decision of December 30, 1981 (133 DC). It is obviously much more specific, endowed with a narrower meaning. This is probably the reason why the constitutional judge will resort to it so late and with so much circumspection. Its basis is, however, given by the aforementioned article 13 of the Declaration of the Rights of Man and of the Citizen. However, the judge knows too well that, in a neoliberal and developed State, it is essential to leave to the public authorities a faculty of the orientation of behaviour, particularly in the economic field, by means of tax incentives. Who says incentive says discrimination, thus induces a certain rupture in the equality of the citizens in front of the tax. In the name of the general interest, this break is considered more useful than the quasi-arithmetic respect imposed by a strict conception of equality before taxes. But the judge's approach then resembles the exploration of a narrow path traced in a sinuous way between these two pitfalls, which would constitute, respectively, the excess of tolerance for attacks on the principle and the excess of fundamentalism. However, he does not hesitate to justify setting the threshold for holding a company's capital at 25%, beyond which only this holding is qualified as professional property and consequently benefits from the exemption from tax on large corporations and fortunes. The threshold effect here is brutal, and the level of its fixation is debatable. But the Constitutional Council justifies them, considering that "the legislator based his assessment on objective and rational criteria in this matter; that, therefore, this tax is established in a regular manner with regard to the rules and principles of constitutional value and, in particular, taking into account the contributory faculties of citizens" (164 DC, 29 Dec. 1983; 405 DC, Dec. 29, 1998; 419 DC, Nov. 9, 1999 and 437 DC, Dec. 19, 2000).

This understanding of an orderly breach of equality before taxes also allows him to admit the inequality that will result from the adoption, by the legislator, of a provision removing a tax advantage with immediate effect: he thus validates the provision of the finance law for 1984 which reduces from twenty-five to fifteen years the duration of the exemption from property tax on built properties which benefited new dwellings. The constitutional judge pointed out that the difference in the legal regime between the taxpayers

results from their difference in the situation, that is, the date on which they built the dwelling (168 DC, 20 Jan. 1984).

On the other hand, the legislator violates the principle of equality before tax when he claims to discriminate against family quotient to the detriment of single or divorced taxpayers (385 DC, 30 Dec. 1996). This assessment is always carried out by examining "each tax taken separately" (285 DC, 28 Dec. 1990).

3.1.4 Equality among taxpayers

The Council invokes it in a decision of December 28, 1995 (369 DC), to stigmatize the attack that would bring to this principle a legislative provision partially exempting from transfer duties free of charge the transmission of professional assets to donees, "on the sole condition that they keep these assets for a period of five years, without requiring them to exercise any management function within the company... the law has established vis-à-vis the other donees and heirs of the differences in a situation which are not directly related to the objective of general interest... that under these conditions and having regard to the importance of the advantage granted, its benefit is likely to lead to a significant breach of equality between taxpayers. The concept of equality between taxpayers is an extension of equality before taxes but has the advantage for the judge of placing the provision examined in a more global, more political and less technical environment, thus loosening the straightjacket too strict arithmetic to be adequate for the exercise of his function by the constitutional judge. Recourse to one or the other version of the principle of equality remains erratic, however, since in December 1997 it was in the name of disregard of the principle of equality before tax that the Council declared unconstitutional the provision of the finance law for 1998 which purported to limit the reimbursement of the tax credit: the difference in treatment between its beneficiaries is not justified by any difference in situation in relation to the very purpose of the tax credit, intended to neutralize for the shareholder the taxation already suffered by the profits distributed (395 DC, 30 Dec. 1997). In other words, the Council allows the tax legislator to make differentiations only if these are based on objective and rational criteria "according to the goals that it proposes" (404 DC, 18 Dec. 1998). This approach can end up stigmatizing provisions as "contrary to the principle of equality before tax" (442 DC, 28 Dec. 2000). The development of priority questions of constitutionality (QPC) leads the Board to respond to each of the versions of equality raised by the person liable (eg May 24, 2019, No. 2019-784 QPC, Sté Cofibel Premium, Dr. Fisc 2019 n° 42 comm . 409, note A. Maitrot de la Motte).

3.2 THE POSSIBILITY OF DISCRIMINATION JUSTIFIED BY THE CONCERN TO FIGHT AGAINST TAX EVASION

Beyond the differences accepted for different situations or for different professional activities, the Constitutional Council relies on the need to repress tax evasion. In his first decision relating to tax searches (164 DC, 29 Dec. 1983) he bases this necessity on article 13 of the Declaration of 1789, and specifies that this fraud can in no way be excused by the exercise of the rights and individual freedoms (confirmed by 97-395 DC, prec .). In this perspective, it validates discrimination that the finance law establishes by requiring payment by check of any payment greater than €1,500 made by a non-commercial individual (184 DC, 29 Dec. 1984). The difference in tax regime based on the location of the domicile – depending on whether it is in France or outside France – is justified by the same concern to fight against fraud (ibid.), which is found in the difference in treatment instituted by article 168 of the CGI between taxpayers whose lifestyle is disproportionate to their declared income and other taxpayers (2010-88 QPC, 21 Jan. 2011). The fight against tax evasion

constitutes "an objective of constitutional value" (638 DC, 28 July 2011 and 2011-166 QPC, 23 Sept. 2011).

3.2.1 Verification of proportionality in tax penalties

The Constitutional Council has clearly set out the extent and the limits of its control in a matter that falls within the repressive sphere and has a partially criminal connotation: it will not replace the legislator to measure the "necessity" of the penalty. Within the meaning of Article 8 of the Declaration; he will nevertheless censure the manifest error of assessment. It extends this control to administrative penalties imposed in tax matters and will censure a legislative provision which imposes a tax penalty manifestly disproportionate to the seriousness of the omission or inaccuracy observed (237 DC, 30 Dec. 1987; 395 DC, prec .). In this last decision, his analysis is refined, and he outlines in advance the framework that will be imposed on the authorities:

"… When an administrative sanction is likely to be combined with a criminal sanction, the principle of proportionality implies that in any event the total amount of any sanctions imposed does not exceed the highest amount of one of the sanctions incurred; whereas it will therefore be for the competent administrative and judicial authorities to ensure compliance with this requirement; that, subject to this reservation, the V of article 85 is not contrary to the Constitution". On the other hand, an automatic penalty, such as the publication and posting of judgments of a criminal conviction for tax evasion provided for by article 1741, paragraph IV of the CGI, is contrary to the principle of individualization of penalties (n° 2010-72 /75/82 QPC). On the other hand, although comprising only one increase of 40%, the former article 1759 of the CGI is in conformity with the Constitution because the possibility of cumulating this increase with those provided for by article 1729 offers the judge the possibility of proportion the penalties according to the nature and seriousness of the acts committed by the taxpayer (Cons. const., 10 Feb. 2012, no. 2011-220 QPC). The message is imbued with pedagogy, like the lesson administered in 1983 (164 DC, prec .) but fits into the landscape initiated by the European Court and the Court of Cassation case law.

3.3 LIMITS TO THE RETROACTIVITY OF TAX LAW

No constitutional provision precludes a tax law from being retroactive since the principle of non-retroactivity only has constitutional value in criminal matters by virtue of Article 8 of the Declaration (184 DC, Dec. 29, 1984; 391 DC, Nov. 7, 1997). Consequently, a new tax law can lengthen prescriptions (369 DC, Dec. 28, 1995), but also validate an administrative doctrine that the legislator has just put in place by subordinating legislative validation to five conditions. The validation must pursue a goal of sufficient general interest – which cannot be a simple financial interest – it must respect court decisions that have become final, within the meaning of article 500 of the Code of Civil Procedure, otherwise said even if they are the subject of an appeal in cassation. Validation must respect the principle of non-retroactivity of penalties and sanctions (Declaration of 1789, art. 8). The validated act must not disregard any rule or principle of constitutional value unless the aim of the general interest targeted by the validation is itself of constitutional value (2010-19/27 QPC, July 30, 2010). Finally, the scope of validation must be strictly defined.

The Council establishes a relationship of proportionality between the infringement of individual rights and the general interest put forward by the legislator. Along the way, the control carried out by the constitutional judge becomes more demanding. In a decision of December 19, 2013 (682 DC, pt 17), he agrees to recognize the validity of the legitimate expectation of a taxpayer to continue to benefit from a special tax regime linked to compliance with a legal duration , which the legislator could not therefore reduce for past life

insurance contracts. It is the beginning of an evolution. All in all, the Constitutional Council's approach here leaves the legislator a wider margin of appreciation than that attributed to it by the European Court of Human Rights, the interest for the aggrieved taxpayer to situate himself on the conventional ground rather than on the constitutional ground.

3.4 ADJUSTMENT OF THE NON BIS IN IDEM PRINCIPLE

This principle prevents the pronouncement of two condemnations of a citizen, and in this case of a taxpayer, on the basis of the same facts. As will be explained below, the question arose with particular intensity for taxpayers sentenced by the tax judge to pay a contested tax and be liable for the offence of tax evasion on the basis of the same facts before the tax judge repressive. The Council's position is set by two decisions of June 24, 2016 (2016-545 and 546 QPC), in the following terms: "The principle of the necessity of offences and penalties does not prevent the same acts committed by a same person may be subject to different prosecutions for administrative or criminal sanctions under different sets of rules. If the principle of proportionality implies that in any event the overall amount of any penalties imposed does not exceed the highest amount of one of the penalties incurred". This interpretation does not completely coincide with that developed by the European Court of Human Rights.

3.5 THE AMPLIFICATION OF ITS ROLE BY THE PRIORITY QUESTION OF CONSTITUTIONALITY (QPC)

The evolution is represented by the constitutional law n° 2008-724 of July 23, 2008, which introduces a new article 61-I in the Constitution. This text gives citizens the possibility of asking the judge to put a priority question to the Constitutional Council, with filtering at two levels, firstly that carried out by the judge questioned who will check whether the legislative provision in question has not already been declared constitutional by the Constitutional Council and if the question asked is not manifestly unfounded. He will then transmit, if necessary, the question to the Supreme Court of his Order (Council of State or Court of Cassation). The latter will then check whether the preliminary question is serious or new. If this is the case, it will forward it to the Constitutional Council. The latter will render a decision within two months, which will be notified to the interrogating Supreme Court. The new article 62 also provides that the Constitutional Council determines the conditions and the limits under which the effects produced by the provision thus repealed are likely to be called into question (Cons. const. 25 oct. 2013 n° 351 QPC). This new control system makes it possible to declare legislative provisions unconstitutional after their promulgation. The practice developed since 2010 shows that both the Council of State and the Court of Cassation rigorously assume their role of filter, and the control exercised by the Constitutional Council relates to the point of knowing whether a legislative provision infringes the rights and freedoms guaranteed by the Constitution. Consequently, the Council rejects the pleas based on the negative incompetence of the legislator when the applicant claims that the latter would not have used the competence attributed to him by article 34 of the Constitution (June 18, 2010, SNC Kimberly Clark, No. 5 QPC, RJF 10/10.940), unless the legislative provision in question infringes a constitutionally guaranteed right (for the property right: 22 Sept. 2010, No. 33 QPC). It should be noted that the Council of State contributes in particular to the establishment of the procedure - as befits the main tax judge - not hesitating to examine and then transmit a QPC to the Constitutional Council, even though it was incorrectly seized of an appeal in cassation in tax litigation (CE, 29 Apr. 2013, No. 364240, AJDA 2013. 953).

The introduction of the QPC procedure has changed the place of the Constitutional Council in the French jurisdictional structure. For the Council of State, these decisions are henceforth vested with the absolute authority of res judicata, as a result of which the

disregard of this authority by the trial judges is a means of public order for the cassation judge is responsible. office (CE, May 15, 2013, no. 340554, AJDA 2013. 1639, concl . A. Lallet).

The French Republic is a democracy, and it is a State of law practising the hierarchy of norms under the control of judges. Transposed to tax matters, these general characteristics imply that the taxpayer is endowed with a protective status. The hierarchy of norms of the French legal system establishes this status. This concern constitutes the tax aspect of the rights of the citizen, since the taxpayer is most often a national; if he is a foreigner, he will be called upon to pay his contribution because of the links he has with France, either as a tax resident or because of the exercise of economic activity or the possession of a heritage in this country. Assuming tax obligations and paying taxes has the counterpart of granting guarantees to the taxpayer. The thickness of this protective status is made necessary by the exorbitant nature of tax law, its despoiling nature in the eyes of classical doctrine and, correlatively, the risk of infringement of public freedoms that its very existence represents. The magnitude of the economic weight of taxation and the sprawling dimension of the tax administration in contemporary societies, the degree of awareness and requirement of citizens also militate for granting statutory guarantees.

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Article

Toward a "Global Tax Legal Order" based on international tax cooperation, human rights and global tax governance for global sustainability, under United Nations centripetal force. UN Tax policy proposals

(GLOVTAXORDER- UNTAXPOLICY)

With the cooperation of researcher's members of:

Eva Andrés Aucejo *Mezang Akamba* *Marco Nicoli* *

UNIVERSITAT DE BARCELONA

ECOSOC (2018-19-20)
UNDP: Delegated of the Economic and Financial Committee (United Nations)

WORLD BANK

Jeffrey Owens (Global Director). Global Tax Policy Center of Vienna

Institute for Austrian and International Tax Law Vienna

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Article

Toward a Global Tax Legal Order based on international tax cooperation, human rights and global tax governance for global sustainability, under United Nations centripetal force. UN Tax policy proposals (GLOVTAXORDER- UNTAXPOLICY)

Jeffrey Owens (GLOBAL DIRECTOR)

Director of the W.U. Global Tax Policy Center (WU GTPC) at the Institute for Austrian and International Tax Law W.U. (Vienna University of Economics and Business) Vienna, Austria. For over 20 years, Jeffrey led the OECD tax work, and now he is the Director of the WU Global Tax Policy Center (WU GTPC) at the Institute for Austrian and International Tax Law, Vienna University of Economics and Business (Wirtschaftsuniversität Wien, WU). He also serves as a Senior Policy Advisor to the Global Vice Chair of Tax at EY, and as a Senior Advisor to the United Nations Tax Committee, the Inter-American Development Bank (IDB) and UNCTAD and a number of regional tax administration organizations as well as being involved with a number of NGOs

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Eva Andrés Aucejo

Professor of Financial and Tax Law. University of Barcelona. Extraordinary award in both Ph.D. in Law and in Law Degree. Economic Sciences and Business Degree. Researcher and consultant of the Global Forum on Law, Justice and Development of the World Bank. Tax Committee (2019-22). Email: eandres@ub.edu

Mezang Akamba

Delegate for the Economic and Financial Committee of the United Nations (UNDP). First Counselor of the Permanent Mission of Cameroon to the United Nations. Delegated of the United Nations, Second Committee ECOSOC (2018-20), New York, UNITED STATES.

Marco Nicoli

Legal Vice Presidency of the World Bank: former Senior Project Manager Global Forum on Law, Justice and Development Senior Knowledge Management Officer from the World Bank. Special officer of the Organization for Economic Cooperation and Development (OECD).

KEYWORDS:

International tax cooperation, global tax governance, international trade, codification and progressive development, United Nations Charter, sustainable development

ABSTRACT:

This article includes **a global design of a new *Global Tax Legal Order* based on international tax cooperation, human rights and global tax governance**, through the codification and progressive development of International Tax Law, creating hard law and soft law normative instruments.

The world leadership role of the United Nations is assumed as an organization at the top of the pyramid of this new Order, as a priority leader in institutionalized international cooperation relations and global governance, and its commitment to cooperation with other organizations, internationals and interested parties. It also follows the new guidelines of General Assembly of UN: Resolution A/77/441 on promoting an effective and inclusive international tax cooperation.

The design of this new global architecture involves the creation of the following fiscal policy instruments (hard Law and Soft Law): 1. General Agreement or Instrument for International Fiscal Cooperation and Fiscal Governance. 2. Development protocols of the Framework/Instrument mentioned above/instrument for international tax cooperation. 3 Global Code of International Tax Cooperation, Human Rights and Global Tax Governance. 4. Taxpayer Global Charter: Global Bill of Rights for taxpayers at the national and international levels. Gender and Taxation Global Charter. 5. General Principle of International Fiscal Cooperation; 6. Mathematical model of a Global Fiscal Model. 7 Instrument on international tax cooperation and international trade

PALABRAS CLAVES:

Cooperación fiscal internacional, gobernanza fiscal global, comercio internacional, codificación y desarrollo progresivo, Carta de las Naciones Unidas, desarrollo sostenible

RESUMEN:

Este artículo incluye un diseño global de un nuevo Global Tax Legal Order basado en la cooperación tributaria internacional, en derechos humanos y en la gobernanza fiscal mundial, a través de un proceso de codificación y desarrollo progresivo del Derecho Internacional Tributario, mediante instrumentos normativos de hard law y soft law.

Se asume el rol de liderazgo mundial de las Naciones Unidas como organismo en el vértice de la pirámide de este nuevo Orden, siendo líder primario en las relaciones de cooperación internacional institucionalizadas y en la gobernanza global. Se apuesta por la cooperación con otros organismos internacionales y *stakeholders*, y se siguen las directrices de la nueva resolución de Naciones Unidas 77/441 sobre potenciación de una cooperación tributaria internacional efectiva e inclusiva.

El diseño de esta nueva arquitectura global pasa por la creación de los siguientes instrumentos de política fiscal (hard Law and Soft Law): 1. Acuerdo General o Instrumento de Cooperación tributaria internacional y gobernanza Fiscal. 2. Protocolos de desarrollo del citado Acuerdo/instrumento de cooperación fiscal internacional. 3 Código global de cooperación tributaria internacional, derechos humanos y gobernanza fiscal global. 4. Carta Global de los Derechos de los contribuyentes en las esferas doméstica e internacional. Carta global sobre género y tributación. 5. Principio General de Cooperación tributaria internacional; 6. Modelo matemático: *Global Tax Model*. 7 Instrumento sobre cooperación tributaria internacional y comercio internacional.

MOTS CLES :

Coopération fiscale internationale, gouvernance fiscale mondiale, commerce international, codification et développement progressif, Charte des Nations Unies, développement durable

RESUME :

Cet article comprend une conception globale d'un nouvel ordre juridique fiscal mondial basé sur la coopération fiscale internationale, les droits de l'homme et la gouvernance fiscale mondiale, à travers la codification et le développement progressif du droit fiscal international, à travers des instruments normatifs de droit dur et de droit souple.

Le rôle de leadership mondial des Nations Unies est assumé en tant qu'organisation au sommet de la pyramide de ce nouvel ordre, en tant que chef de file prioritaire dans les relations de coopération internationale institutionnalisées et la gouvernance mondiale, et son engagement à coopérer avec d'autres organisations, internationales et parties intéressées. .

La conception de cette nouvelle architecture globale implique la création des instruments de politique budgétaire suivants (Droit dur et Droit souple) : 1. Accord général ou Instrument de coopération fiscale internationale et de gouvernance budgétaire. 2. Protocoles d'élaboration de la Convention susmentionnée/instrument de coopération fiscale internationale. 3 Code mondial de coopération fiscale internationale, des droits de l'homme et de la gouvernance fiscale mondiale. 4. Charte mondiale des droits des contribuables aux niveaux national et international. 5. Principe général de coopération fiscale internationale ; 6. Modèle mathématique d'un modèle fiscal mondial. 7 Instrument de coopération fiscale internationale et de commerce international

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5. TAX **POLICY MAKING** AND TAX **RULEMAKING** PROPOSALS

I. Global Agreement on International Tax Cooperation and Global Tax Governance

II. Development Protocols of the future Globe Agreement on International Tax Cooperation.

III. International Tax Organization

IV. A Global Code of International tax cooperation, human rights and global tax governance

V. A principle of international tax cooperation

VI. “Global taxpayers’ charter and “Taxation and Gender global Charter”.

VII. Development of the Global Tax Model and mathematical matrix

VI. Instrument on international tax cooperation and international trade

4 THE CRUCIAL ROLE OF THE INTERNATIONAL TAX COOPERATION

Following our previous reflections, the last trends on international economic and tax governance highlight the relevance of the international tax cooperation tax policies to achieve a new social and economic global order. The Resolution 67/289, adopted by the General Assembly on the 9th of July 2013[1], refers to the role of the United Nations in global economic governance. In the recent years, both, intergovernmental and non-intergovernmental organizations are including the global tax issues in their action's agendas: International cooperation and global tax governance are becoming crucial vectors in the new global order (Andrés-Aucejo, E., 2018)[2].

Tax policy and international tax cooperation play a key role on financing the United Nations sustainable developing goals (SDG) (Owens, J., Lennard, M., Andrés-Aucejo, E., 2020)[3].

Taxation and international tax cooperation are crucial tools to developing countries can mobilize resources for investment, however, substantial gaps in raising tax revenues persist between developed and developing countries. Strengthening tax systems has emerged as a key development priority both in the 2030 Agenda and the Addis Agenda"(Andrés-Aucejo, E.)[4].

On the other hand, and as we have refereed about, cooperation between tax administrations is critical in the fight against tax evasion regarding worldwide earnings. Policy-making on the mobilization of internal resources, international tax cooperation policies, and the elimination of international tax fraud are vital pillars to achieve the return of economic and financial flows to developing countries and help reduce corruption and fraud. Fiscal (Owens, J., Lennard, M., Andrés-Aucejo, E., 2020). In a context marked by a fierce effort to clamp down on aggressive tax planning and tax evasion and to re-write the international tax scenario, administrative cooperation is afforded a significant role (Piergiorgio Valente).

We also defend that cooperation between tax administrations is critical in a global economic and humanitarian crisis environment for states to maintain their revenues.

An enabling international environment has been emerging to enhancing the International Tax Cooperation, as show the following sources:

a) The Economic and Social Council (ECOSOC) of the UN, Resolutions 2004/69 of 11 November 2004 and 2014/12 of 13 June 2014,
b) The UN General Assembly resolutions 68/1 of 20 September 2013, 69/313 of 27 July 2015 and 70/1 of 25 September 2015,
c) The Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus[5];
d) The paragraph 29 of the Addis Ababa Action Agenda (AAAA) of the Third International Conference on Financing for Development,[6] in which Member States emphasized the importance of inclusive cooperation and dialogue among

[1] *A/RES/67/289. Opinion*

[2] *https://www.un.org/development/desa/en/news/intergovernmental-coordination/intl-coop-tax-ecosoc.html*

[3] *OECD Secretary-General Report G20 Finance Ministers and Central Bank Governors, Buenos Aires, Argentina, March 2018, p. 17.United Nations. Department of Economic and Social Affairs (https://www.un.org/development/desa/es). The extraordinary meetin on international cooperation in tax matters held on April 7 by the ECOSOC.*

[4] *https://www.un.org/development/desa/en/news/intergovernmental-coordination/intl-coop-tax-ecosoc.html*

[5] *United Nations. General Assembly resolution 63/239, annex, para. 16.*

[6] *United Nations. General Assembly resolution 63/303, annex, para. 56 (c)*

national tax authorities on international tax matters, among others, enhancing the international tax cooperation priority. And the UN 2030 Agenda SDG 17, enhances the importance of foster wider relationships to make progress on the SDG 17 including convening governments, regional tax organizations, civil society, and the business sector. The General Assembly UN Resolution 44/221 deals on Promotion of inclusive and effective international tax cooperation at the United Nations.

5 THE (A 77/441) RESOLUTION OF THE GENERAL ASSEMBLY UNITED NATIONS

Last Resolutions of United Nations, General Assembly (2022):

Nowadays, international tax cooperation has entered a new era within the framework of a new architecture of global tax governance with the "Key Role" of the United Nations (Res A/77/441).

On December 30th, 2022, the General Assembly of the United Nations approved by consensus, the **Resolution A/77/441 (77th session, Macroeconomic Policy questions)** entitled ***Promotion of the United Nations of inclusive and effective international cooperation in matters of taxation.***

A month earlier, Commission II of the United Nations General Assembly approved -by consensus- Resolution A/C. 2/77 L.11/Rev.1.

From both Resolutions of the General Assembly of the United Nations, the United Nations emerges as the Organization in charge of promoting effective and inclusive international tax cooperation for global. Both acts grant a pivotal role to the United Nations towards an inclusive and forceful promotion of international tax cooperation.

This resolution represents a historic milestone in the modern history of international tax cooperation.

This resolution lays the foundations for a new ***Global Tax Legal Order*** under the umbrella of the United Nations, the most representative international organization in the world, which has institutionalized international cooperation among all the countries in the world under its responsibility.[7]

6 THE UNITED NATIONS IS IN CHARGE OF IMPROVING "EFFECTIVE" AND "INCLUSIVE" INTERNATIONAL TAX COOPERATION TOWARDS A NEW GLOBAL ECONOMIC/TAX LEGAL ORDER

On November 23th, 2022, the Second Committee of the United Nations General Assembly (Economic-Financial Committee) approved -by consensus- **Resolution A/C. 2/77 L.11/Rev.1** in the framework of the seventy-seventh session Second Committee, Agenda item 16, *Macroeconomic policy issues*, under the title: *Promotion of the United Nations of inclusive and effective international cooperation in taxation matter*. This resolution was

[7] This is in line with the pioneering thesis (in international and tax doctrine) that we have already defended. These were also the theses supported by Eva Andrés Aucejo (resolt of several studies on these matters), in the opposition contest for the body of University Professors, at the Faculty of Law of the University of Barcelona, which she successfully passed to obtain the title of Full Professor on February 14, 2019.

defended by the representative of Nigeria in Commission II of the UN General Assembly, representing the African States.

The same text was elevated to the General Assembly of the United Nations, finally being approved by consensus before the plenary commission on December 30th, 2022. **(Resolution A/77/441).**

The **Resolution A/77/441** represents a historic milestone in the modern history of international tax cooperation, assuming the most significant step in collaboration since the signing of the International convention models to avoid double taxation if we consider the global scope that to reach a framework agreement or multilateral instrument on international tax cooperation, beyond a standard of spontaneous international tax cooperation (CRS), beyond specific mechanisms or plans to prevent fraud due to the transfer of tax bases of multinational companies (BEP) and beyond the particular instruments that have been implemented so far, either through ***hard law rules*** (multilateral and bilateral treaties) and soft law instruments.

Nowadays, the United Nations is in charge of improving "effective" and "inclusive" international tax cooperation towards a new Global Economic and Legal Order through instruments and actions of significant impact and scope, such as:

1. In general terms, the General Assembly of the United Nations, recognizes the timeliness and importance of strengthening international tax cooperation to make it fully inclusive and more effective.
2. To make the above possible, the evaluation is foreseen of additional options, including the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process, taking into full consideration existing international and multilateral arrangements.

   Note: A proposal for a framework agreement on international tax cooperation, trade and international tax and international governance with a holistic nature can be consulted in the Review of International and European Economic Law (www.rieel.com), https://rieel.com/index.php/rieel/article/view/28/23 (J. Owens. (Dir).; Andrés-Aucejo, Eva; Mezang, Serge; Nicoli, Marco). This general agreement proposal includes an holistic view, with a global scope about international tax cooperation on economic and financial matters, as well as social, cultural, and humanitarian issues (gender, environment, tax education, morality, tax compliance, etc.).
3. Among the possibilities of international tax cooperation, the alternative of carrying out next steps is approved, such as the establishment of a Member State-led, open-ended ad hoc intergovernmental committee to recommend actions on the options for strengthening the inclusiveness and effectiveness of international tax cooperation.

It represents an extraordinary advance in the state of affairs. For many years, the possibility of creating a global body for global tax cooperation and governance has been unsuccessful. On the 2015 Addis Ababa Conference, this possibility was raised before the General Assembly without success.

Therefore, the approval of this resolution represents an unprecedented success in the history of international tax cooperation relations and will undoubtedly illustrate a turning point in the future and the past.

7 TAX POLICIES FOR A GLOBAL TAX LEGAL ORDER BASED ON INTERNATIONAL TAX COOPERATION, HUMAN RIGHTS AND GOOD GOVERNANCE FOR GLOBAL SUSTAINABILITY, UNDER UNITED NATIONS CENTRIPETAL FORCE. PROPOSALS

7.1 MAIN REMARKS

An enabling international tax cooperation environment is crucial to arrive to a global tax justice and a holistic and representative global tax governance architecture. It is, together

with the custom and trade international cooperation, probably some of the primary financing sources for sustainable development.

This study aims to promote effective and inclusive international tax cooperation under the centripetal force of the United Nations within the framework of a new global architecture of global tax governance (Resolution General Assembly United Nations A 77/441)

This article includes a **global design of a new Global Tax Legal Order based on international tax cooperation, human rights and global tax governance**, through the codification and progressive development of International Tax Law, creating hard law and soft law policy making instruments. It claims to create a significant global line by building a global tax legal order inspired by the International Tax Cooperation and the Global Tax Governance.

Current and future situation: Financing for sustainable development is essential after the 2099 crisis and subsequent economic and humanitarian crises.

In terms of international tax cooperation, up to now, there are several international organizations (such as the OECD, the United Nations, the International Monetary Fund, the World Bank), other corporations such as the Platform for the international Tax Cooperation, Associations such as IOTA, tax African forum, and other stakeholders, that have developed international tax cooperation performances with special prominence of the OECD.

However, there is no global design of cooperation relations and international tax governance. In this sense, for many years, we have proclaimed the need of different global tax policy and rulemaking proposal, as for instance the need for a multilateral general agreement or Instrument on International Tax Cooperation and Global Tax Governance,[8] and many others.

Specific OECD initiatives, such as the common report standard (CRS) of the OECD and the BEPs, Plan, have contributed to international tax collaboration. Still, they are not a general framework for the development of international tax cooperation and global tax governance (the CRS only regulates one form of international tax cooperation and both BEPS and the purpose of the MILI are to prevent the erosion of tax bases and transfer benefits, but they are not thinking to regulate the global relations, rules and policy making of the global tax legal order, that nevertheless we are do proposing to achieve a new global tax legal order inspired in international tax cooperation relations, human rights, and a global tax governance architecture).

So far, there is no a general instrument or agreement, specifically on international tax cooperation and global tax governance, there is not an Intergovernmental Organization for International Tax Cooperation or other instruments for promoting international tax cooperation, there is no a code on international tax cooperation and global tax governance, there is no a General principle on International tax Cooperation, there is no a global taxpayers' charter or a global taxation and gender charter, and there is no other global policy making proposal needed to create a Global Tax Legal Order. We already proposed all of these initiatives, that we consider are inside of the initiatives proposed by the United Nations Resolution A 77/441.

So far, there is the elaboration of global tax policies and regulations that we are proposing and about which we already have an essential collection of scientific articles, seminars, international congresses and international projects with doctrine from different universities around the world and also with the collaboration of members international organizations and international associations regulating tax matters.

That is, we consider making and an effective way different tax policy making proposals to constitution the global architecture of the new global tax legal order.

[8] Several general agreements have been approved on international trade cooperation as well as the development protocols. See Xavier Fernández Pons (2022) https://www.rieel.com/index.php/rieel/article/view/28/23 Annex I

Hence, we are formulating the global design of international tax cooperation relations and international tax governance architecture for a new Global Tax Legal Order, inspired by human rights, trough the tax policy and rulemaking, through which, the global coordinates inspired by international tax cooperation and global tax governance of this new Global Legal Order can be created.

We are proposing a holistic model of the new global tax governance architecture towards a Global Legal Tax Order.

This study is programmed in line with the latest international trends in Sustainable Development, which emphasize the relevance of financial issues to achieve global sustainable development of the planet (Addis Ababa Action Agenda, U.N. 2030 Agenda, Monterrey Consensus) and especially with the two latest resolutions of the United Nations General Assembly on the promotion of International Fiscal Cooperation (macroeconomic policy issues), Res. C.A. 2/77 L.11/Rev.1, November 23th, 2022 and Res. 77/441, December 30th, 2022.

This project includes proposals for elaborating United Nations tax policy making and rule making on international taxation, trade and global financial sustainability as critical points to achieve an inclusive, efficient and fair global tax system based on sustainable development.

Its objective is to investigate an enabling environment for international tax cooperation to achieve global tax justice and a holistic and representative global tax governance architecture at the United Nations in collaboration with other international organizations such as the OECD, the World Bank, the IMF and the different interested parties.

This is a pioneering international tax policy work in the world for constructing a new Global Tax Legal Order to achieve an efficient and fair global tax system within the framework of a worldwide and holistic tax governance architecture.

This study is part of a new global project[9] that follows the line of the scientific background and precedents that we have been publishing on this matter over the last decade.

7.2 MEMBERS COMPOSITION

Continuing in the wake of the pioneering work and global advances that we have already made in the matter, this study is proposed to be developed by a multidisciplinary profession (international organizations such as United Nations, the World Bank, the BID, etc.) and research team (Tax Law, International Economic Law, Engineering, Accounting), and international, promoting cooperation links with the Academy of Canada and the United States, Europe (Austria, Germany, Norway, Denmark, the Netherlands, Italy, Spain, France, etc.), Latin America and Oceania to become a pioneering global benchmark in strategic positioning and social, economic and international impact on international tax cooperation. World congresses, scientific meetings and research stays have been scheduled in other continents and countries such as Italy, Denmark, Norway, Belgium, Canada, Uruguay/Argentina and New Zealand, etc.

8 TAX POLICY MAKING AND RULE MAKING PROPOSALS

I. Global Agreement on International Tax Cooperation and Global Tax Governance (Owens, J., Andrés-Aucejo, E., Mezang Akamba, Nicoli, M., 2018).

[9] *With the collaboration of Academias of: New Zealand, Canada, United States, Denmark, Sweden, Norway, UK, Germany, India, Africa, Chile and Latinoamérica, Spain, France, Italy,etc, as well as with the collaboration of International Organizations and international tax associations.*

II. Development Protocols of the future Globe Agreement on International Tax Cooperation. Proposed in the present article.
III. International Tax Organization (Andrés-Aucejo, E., 2020, The primary …)
IV. A Global Code of International tax cooperation, human rights and global tax governance (Andrés-Aucejo E, 2018, Towards…).
V. A principle of international tax cooperation (Andrés-Aucejo, E., 2023, www.rieel.com, miscellany)
VI. "Global taxpayers' charter and "Taxation and Gender global Charter".
VII. Development of the Global Tax Model and mathematical matrix (Andrés-Aucejo, E., 2018)
VIII. Instrument on international tax cooperation and international trade.

8.1 A Global Agreement on International Tax Cooperation and Global Tax Governance

The **UN Resolution A 77/441(12/30/2022)**, approved by consensus, entitled Promotion of inclusive and effective international tax cooperation in the United Nations (following the Resolution A/C. 2/77 L.11/Rev.1, approved by Commission II, General Assembly, UN, 23th November 2023), provides for the creation of an instrument or agreement in the framework of the United Nations, as well as the development of an intergovernmental body for international tax cooperation, promoting the effective and inclusive policymaking international tax cooperation.

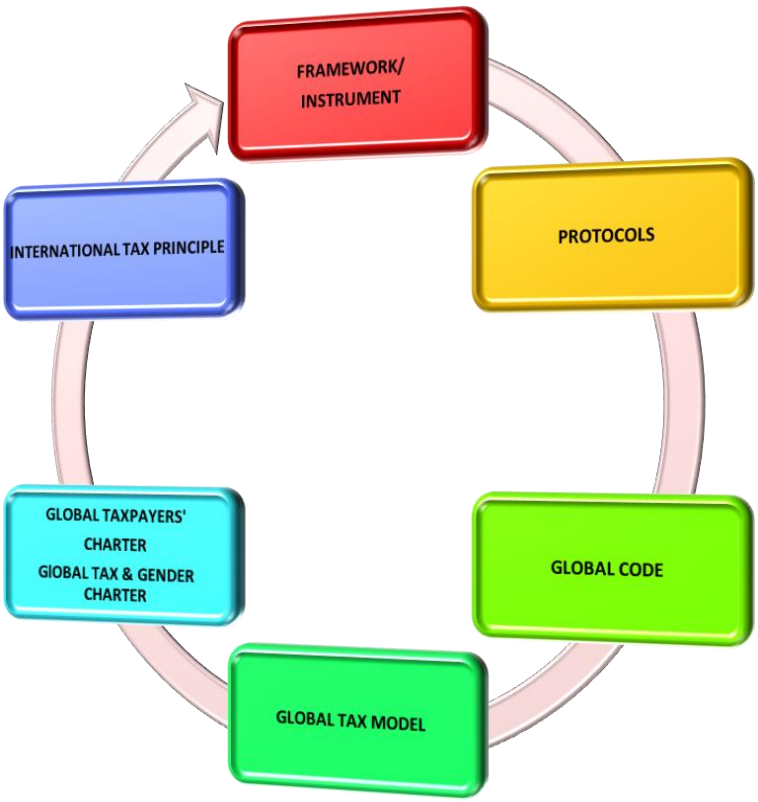
Note: United Nations resolution A 77/441 is in line with the proposal that we have already defended and that we have had the opportunity to publish in the Review of International and European Economic Law, n.2, vol. 2 of 2022, entitled: *Framework Agreement on International Tax Cooperation, Trade and Global Tax Governance* (www.rieel.com). It presents a proposal for a general agreement on international tax cooperation and global tax governance as support for a neural system of international tax cooperation relations to make effective the channels of tax cooperation between the States of the world in the coming centuries, in a new global tax governance architecture design.

A general agreement is a general framework or instrument, that the states must approve to be a real treaty – *hard law* (through at least 2/3 General Assembly UN votes and even better without a vote or by consensus). When the General Assembly approved and it is ratified by the countries, it becomes a mandatory rule (hard law regulation).

In our case, it includes the main rules and the main bases of international economic/tax cooperation.

Note: we made our proposal with holistic view, that includes not only economics affairs if not human, social, cultural interests too.

Note: it could be approved by different international organizations such as the world bank or the international monetary fund for ex. That they have a big representation (but it is not equitable because it is in function of the states quotes), or through OCDE but the members number is lower (without prejudice of inclusive platforms of the regulation that only some create). Anyway, we humbly defend the need to be approved by the United Nations because it is the most general and representative international organization and for the global arguments that we have exposed at our work entitle, "The Primary Legal Role of the United Nations in International tax cooperation…" (Andrés-Aucejo, E., 2020)



A GLOBAL TAX LEGAL ORDER

Under UNITED NATIONS framework

Resolution A 77/441

UNIT

ED-NATIONS

Agreement	•Framework/instrument on International Tax Cooperation and Global Tax Governance
Protocols	•Protocols of the future Globe Agreement on International Tax Cooperation
ITC Global Code	• Global Code of International Fiscal Cooperation and Governance
Global taxpayers' Charter	• Global Charter of Taxpayers rights (domestic and transborder rights tax matter) •Global Tax and Gender Charter
ITC Principle	•Principle of international tax cooperation
Math Model	•Global Tax Model and mathematical matrix
International body	•Global Tax Organization/International Tax Organization
Instrument	• Instrument on International tax Cooperation and International Trade

8.2 DEVELOPMENT PROTOCOLS OF THE FUTURE AGREEMENT ON INTERNATIONAL TAX COOPERATION

In international public Law, framework agreements are generally developed through protocols, which must be approved by most of the United Nations General Assembly states (at least 2/3 votes) to become binding rules or sources of international law (hard law). The development protocols of the treaties usually contain norms that generate obligations or commitments for the signatory States or parties. They serve, in general, to develop the fundamental principles contained in the framework agreements.

Generally, we prefer to refer to the signatories of these framework agreements or protocols since the participants in signing a development treaty or protocols may not coincide precisely with the States.

Hence, we are proposing the creation of eight big protocols for the future development of the Framework Agreement:

1. Protocol for INTERNATIONAL TAX COOPERATION ON TAX ADMINISTRATION 3.0, digitization of tax administrations, robotics and cybersecurity, risk management processes
2. Protocol for INTERNATIONAL TAX COOPERATION PROTOCOL ON DOMESTIC AND INTERNATIONAL TAXPAYERS' RIGHTS. Towards a new Global Charter on Global Taxpayers' Rights and Guarantees.
3. PROTOCOL FOR THE DEVELOPMENT OF INTERNATIONAL TAX COOPERATION ON TAXATION OF DIGITAL ECONOMY for highly digitized and non-digitized businesses and protocol for global transfer pricing regulation
4. PROTOCOL ON INTERNATIONAL TAX COOPERATION FOR A NEW SOCIAL CONTRACT ON TAXATION AND GENDER, considering gender tax policies as crucial to reduce social and economic disparities in gender discipline.
5. PROTOCOL FOR INTERNATIONAL TAX COOPERATION AND GLOBAL TAX GOVERNANCE, GOOD GOVERNMENT, GLOBAL TAX COMPLIANCE POLICIES, MORALITY AND TAX EDUCATION.
6. PROTOCOL FOR INTERNATIONAL JUDICIAL COOPERATION AND THE FIGHT AGAINST INTERNATIONAL TAX FRAUD and aggressive tax competition.
7. PROTOCOL FOR THE INTERNATIONAL TAX COOPERATION ON TAX LITIGATION TRANSBORDER MATTERS (MAPS/ SETTLMENTS & ADR).
8. PROTOCOL FOR THE INTERNATIONAL TAX COOPERATION ON ENVIRONMENTAL TAXATION AND EXTRACTIVE SECTOR.

8.3 AN INTERGOVERNMENTAL INTERNATIONAL ORGANIZATION ON ORGANIZATION ON INTERNATIONAL TAX COOPERATION AND GOVERNANCE UNDER UN FAMILY

Until now, we have developed the bases and legal foundations to create a world body for international tax cooperation within the framework of the United Nations. (https://revistes.ub.edu/index.php/RED/article/ view /31297/32159). A proposal of the effective constitution of the international tax organization will be defended the next month in an international meeting being the proposal paper in press.

8.4 A GLOBAL CODE OF INTERNATIONAL FISCAL COOPERATION AND GOVERNANCE

From the last decade we are proposing the need to create a “Global Code” that encodes the duty of cooperation between tax authorities and stakeholders, concerning the global tax system. That is, a general Global Code of Administrative Cooperation in tax matters and Global Tax Governance including both tax relations: between public sector (tax Administrations, International tax Organizations) and between the public sector (tax

administrations, international tax institutions, …) and private sector agents: the taxpayers (individuals and companies) and intermediary's agents. It follows a wide concept of tax governance.[10]

The Code of Cooperation that we are proposing is an articulated and consolidated text, that includes the best practices, standards, rules and regulations still created, in this case in international tax cooperation, human rights and global tax governance. It will be divided by titles and chapters. It is the purest sense of the French code.

In international tax law, the rules are scattered and scattered. We will considerer to create a general code that includes all the regulations on international tax cooperation and a code of good practice. This code could be not coercive.

In this way, we comply with the UN's requirement regarding compiling all existing instruments in the best way (Resolution A 77/441).

This instrument could be documented through a multilateral instrument (soft law), but if it is considerate, it could be signed by the states to become an international legal source (hard law).

Filling this Code as articulated text (form) could be very useful for the International community towards an international/global tax governance.

8.5 A New Principle of International Tax Cooperation

Until now, we have created the bases of a new principle of international cooperation and officiated a conference on the subject in the framework of an International Congress.

We are proposing the effective creation of this general principle within the framework of a General Theory of International Tax Cooperation, as a policymaking instrument of international tax cooperation, in line with the provisions of United Nations Res A 77/441.

See Andrés-Aucejo, Eva procedures book, international congress, Barcelona 2023, (www.rieel.com vo. 1. n.3, miscellany). In this procedures book presentation as well as in its scientific version (in press in a Scopus review), we propose:

1. The need to create an International Tax Co-operation principle as a policymaking proposal.
2. The International Tax Cooperation Principle is a policy making proposal to improve the common and general interests of the countries: both, developed and developing countries.
3. The International Tax Cooperation Principles is an essential tool to achieve/to get DOMESTIC PUBLIC RESOURCES in line with the prescriptions of the International Organizations Agendas. In particular, it is an important instrument to get a lot of the goals of the United Nations Agenda, such as: art. 10.4,
4. In general, the International Tax Cooperation Principle is a crucial tool in order to Achieve the sustainable development and to make possible welfare policies as well as other objectives of economic, social and political nature.
5. The International Tax Cooperation principle is also a best way to translate earns, economic resources and financial sources in favor to developing countries.
6. Enhancing performances such as the International Tax Cooperation Principle could a good tool to avoid tax fraud, fiscal evasion, no doble taxation, no taxation, and other irregularities in the digitalization era.

[10] *See: Eva Andrés-Aucejo, Towards an International Code for administrative cooperation in tax matter and international tax governance. Revista de Estado de Derecho. Externado de Colombia, n. 40, 2018 (http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-98932018000100045)*

7. The ITP principle is probably the main pillar of the Global tax Governance and it is an essential way to get a good global tax and economic governance.
8. One of the main goal of the International Tax Cooperation principle is to shift the people mentality towards to the international cooperation. We need to make and effort to change the general mentality/mind of peoples, cities, countries, continents. The International Tax cooperation has to be an exe of the International Community.

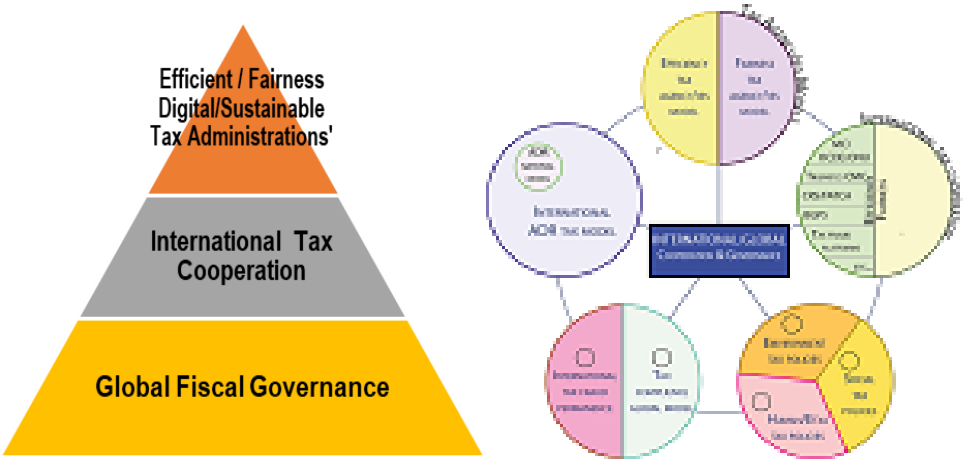
8.6 THE GLOBAL TAX MODEL, MATHEMATICAL MATRIX MODEL (ANDRÉS-AUCEJO, E., 2018)

The **Global Tax Model** project provides an applied research model based on researching and applying global tax policies to achieve efficiency, technologic, fairness/equity and sustainability tax administrations' (modernized tax systems); to improve the international tax cooperation and to develop global tax governance performances, in order to arrive at a stronger more inclusive and representative international architecture for a global sustainable development and fairness societies. have formulated a Global Tax Model including five work packages with descriptors, indicators and a chronology of national and international scientific working tasks throughout the validity of the same.

Math matrix:

It is a global mathematical model for the **efficiency, evaluation** and **fairness** of tax administrations. It is a very ambitious global model, that includes not only indicators and descriptor son domestic tax law if not indicators and descriptors on international and global tax law and accounting in both domestic and international arenas.

Question state: Within the Observatory of Global Tax Agencies (network of excellence and other projects: *Network DER 2017-90874-REDT -GOTA-INTAXCOOP & GOV*), the bases have been developed. At the same time, the premises have been established to construct a global taxation model with the countries' best practices. However, subsequent development of the mathematical matrix remains pending with the descriptors, indicators and quantification criteria.



According with the general objective of create a model to seek country insights on relevant challenges and using tax system to support sustainable development improving the tax capacity development; the following specific objectives are proposed:

a) Development of descriptors and Indicators on tax Policies to achieve efficiency, technologic, fairness/equity and sustainability tax administrations' (modernized tax systems)

b) Development of descriptors and Indicators on policy making on enhancing the international tax cooperation and global tax governance architecture
c) To take forward the global dialogue on the role of tax in achieving the sustainable development and human tax administrations.

The Global Tax Model follows a math matrix model on economy and social sciences.

The analytic-empiric math matrix model includes:

a) An empiric mathematic method in order to these general tax policies can be applied by the countries tax administrations The formulation of the general tax policies in order to achieve the main specific objectives described. The global tax policies will be inclusive, interdisciplinary and transversal, with the goal of developing efficient and sustainable economies inspired on the fundamental protection of the human and social rights of civil society and inspired on the cooperation principles and a good global tax governance architecture.

b) This matrix has ten performance areas (work packages), each one of them is divided in sections or parts, being assigned indicators to evaluate if the tax administrations have or follow these tax policies and the new deal tax governance, as well as if they could enhance incorporating some best tax policies practices.

EVA ANDRÉS-AUCEJO	*Director of the Excellence Network DER 2017-90874-* *REDT -GOTA-INTAXCOOP & GOV: The Global Observatory on Tax Agencies:* *Towards on the International Tax Cooperation and Global Governance*

8.7 INSTRUMENT ON INTERNATIONAL TAX COOPERATION AND INTERNATIONAL TRADE

a) Analysis of Tax treaties-commercial treaties. State of the Question: up to now we have carried out an analysis of the Commercial Treaties. Pending: interrelationships between tax treaties and commercial treaties,
b) Open framework to include any policy-making instrument not contemplated in the above in the framework of international tax cooperation for the design of a new architecture of international tax governance. The methodology will be the same as described in the previous objectives.

9 BACKGROUND

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- FRAMEWORK AGREEMENT- PREPARATORY WORK N. 3 (2022) "General Agreement on International Tax Cooperation, Trade and Global Tax Governance. A Proposal (Part I)". Owens, J.; Andrés-Aucejo, E., Mezang, S., Nicoli, M., Review of International and European Economic Law (www.rieel.com), Vol. 1, n. 1, 2021
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Article

Tax and the Canadian constitution

Allison Christians

The H. Heward Stikeman Chair in the Law of Taxation at the McGill University Faculty of Law. Associate member of the International Academy of Comparative Law since July 2021. Named among the International Tax Review's "Global Tax 50" in 2015, 2016 and 2020 for her influence and impact on taxation. Email: allison.christians@mcgill.ca

Kimia Towfigh

Corporate immigration lawyer trained in common and civil law. JD/BCL (2021) McGill University Faculty of Law. Former Editor-In-Chief (2019-2020) of McGill Journal of Sustainable Development Law.

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Taxation, Canada, Constitution, federalism, taxpayer rights, carbon taxes.

ABSTRACT:

This article surveys Canada's constitutional provisions and examines their role in mediating between federal and provincial taxation and related regulatory powers. Part I briefly explains Canada's governance structure and lays out the constitutional provisions concerning taxation and their application to the various levels of government. Part II examines taxpayer rights in connection with the constitutional authority to tax. Part III analyzes the interplay of taxation with other regulatory functions through the lens of recent changes to environmental taxation in Canada, with an emphasis on recent greenhouse gas (GHG) pricing mechanisms imposed by federal Parliament.

PALABRAS CLAVES:

Tributación, Canadá, Constitución, federalismo, derechos de los contribuyentes, impuestos al carbono.

RESUMEN:

Este artículo examina las disposiciones constitucionales de Canadá y examina su papel en la mediación entre los impuestos federales y provinciales y los poderes regulatorios relacionados. La Parte I explica brevemente la estructura de gobierno de Canadá y establece las disposiciones constitucionales relativas a los impuestos y su aplicación a los distintos niveles de gobierno. La Parte II examina los derechos de los contribuyentes en relación con la autoridad constitucional para gravar. La Parte III analiza la interacción de los impuestos con otras funciones regulatorias a través de la lente de los cambios recientes en los impuestos ambientales en Canadá, con énfasis en los recientes mecanismos de fijación de precios de los gases de efecto invernadero (GEI) impuestos por el Parlamento federal.

MOTS CLES :

Fiscalité, Canada, Constitution, fédéralisme, droits des contribuables, taxes sur le carbone.

RESUME :

Cet article passe en revue les dispositions constitutionnelles du Canada et examine leur rôle de médiateur entre la fiscalité fédérale et provinciale et les pouvoirs réglementaires connexes. La partie I explique brièvement la structure de gouvernance du Canada et expose les dispositions constitutionnelles concernant la fiscalité et leur application aux différents paliers de gouvernement. La partie II examine les droits des contribuables en rapport avec le pouvoir constitutionnel d'imposer. La partie III analyse l'interaction de la fiscalité avec d'autres fonctions de réglementation à la lumière des récents changements apportés à la fiscalité environnementale au Canada, en mettant l'accent sur les récents mécanismes de tarification des gaz à effet de serre (GES) imposés par le Parlement fédéral..

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CONTENTS:

1 INTRODUCTION

Most countries explicitly claim their authority to tax under formative documents such as constitutions and Canada is no exception: its Constitution authorizes the federal government to impose taxes of any kind, while it authorizes the provinces and territories to impose specified forms of taxation. This article surveys Canada's constitutional provisions and examines their role in mediating between federal and provincial taxation and related regulatory powers. Part I briefly explains Canada's governance structure and lays out the constitutional provisions concerning taxation and their application to the various levels of government. Part II examines taxpayer rights in connection with the constitutional authority to tax. Part III analyzes the interplay of taxation with other regulatory functions through the lens of recent changes to environmental taxation in Canada, with an emphasis on recent greenhouse gas (GHG) pricing mechanisms imposed by federal Parliament.

2 CANADA'S GOVERNMENTS AND THE POWER TO TAX

The primary function of taxation is to raise revenue to meet public needs.(Christians, 2018)[1] Canada raises revenue with a variety of mechanisms, including taxes on income, capital, and consumption. Central to the function of each of these tax regimes is the division of legislative powers. With distinctive elements of provincial autonomy and federal unity, Canada's constitutional landscape reflects a legal recognition of divergent identities and interests that pre-dated its confederation in 1867 and have continued to evolve since then. An overview of Canadian federalism provides a framework to examine constitutional issues that arise from Canada's tax structure.

2.1 THE DIVISION OF LEGISLATIVE POWERS

The *Constitution Act, 1867* divides federal and provincial jurisdiction between enumerated "heads of power."[2] In general, Parliament has jurisdiction over matters of national importance, whereas provincial legislatures have law-making authority regarding matters of a local nature. A law that is beyond the scope of a level of government's jurisdiction is considered *ultra vires* and thereby invalid, though there are some areas of law wherein both the provincial legislature and federal Parliament may legislate.[3]

This constitutional framework was adopted at the time of Confederation to accommodate diversity between provinces and foster cooperation between levels of government.[4] Modern Canadian federalism has evolved from approaching federal and provincial powers as separate, "watertight compartments", to a more flexible, cooperative model, making it possible for federal and provincial legislation to apply concurrently to different aspects of the same regulatory matter.[5] As such, the inevitability of overlap between legislative powers is acknowledged to avoid the creation of legal vacuums and legislative

[1] *See Allison Christians, Introduction to Tax Policy Theory, at https://ssrn.com/abstract=3186791.*

[2] *Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [Constitution Act, 1867].*

[3] *See Reference re Securities Act [2011] 3 S.C.R. 837, para. 66, 2011 SCC 66 [hereinafter, Reference re Securities Act]: "Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction. This concept, known as the double aspect doctrine, allows for the concurrent application of both federal and provincial legislation, but it does not create concurrent jurisdiction over a matter (in the way, for example, s. 95 of the Constitution Act, 1867 does for agriculture and immigration)." (internal citations omitted).*

[4] *See Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 35.*

[5] *See Reference re Securities Act at paras. 54-62, 2011 SCC 66; see also Canadian Western Bank v. Alberta [2007] 2 S.C.R. 3, para. 30, 2007 SCC 22 [hereinafter Canadian Western Bank].*

gaps that may arise from stringent constitutional interpretation and rigid formalism.[6] Constitutional interpretation is generally considered to evolve with the changing realities of Canadian society, as encapsulated by the "living tree" doctrine.[7] Moreover, the constitutional aspects of Canada's taxation structure must be viewed in light of jurisdictional claims of Indigenous peoples. As Professor Dayna Nadine Scott observes, the constitutional recognition of "Aboriginal and treaty rights" in section 35(1) "incorporates into our constitutional framework the affirmation and protection of Indigenous peoples' inherent right to govern themselves and their territories according to certain judicially-defined terms." (Scott, 2017)

2.1.1 Enumerated Powers

The federal legislative authority to tax is found in section 91 of the *Constitution Act, 1867* which states in part:

> "[T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …3. The raising of Money by any Mode or System of Taxation."

In contrast, section 92 of the *Constitution Act* provides more limited authority to provincial legislatures as follows:

> "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
>
> …9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes."

The distinction between indirect and direct taxes is central to the division of legislative powers. As section 92 stipulates, provinces are authorized to enact laws regarding matters of direct taxation within their respective borders. Otherwise, a charge with an indirect incidence would be beyond the scope of provincial powers and thereby invalid.[8] According to Justice La Forest, the *Constitution Act, 1987* "appears to contemplate that indirect taxation should be within the sole competence of the federal Parliament."[9] As such, indirect taxes are beyond the scope of provincial law-making authority.

In simplified terms, direct and indirect taxes are distinguished according to the traditional view presented by John Stuart Mill, who explained that a direct tax is collected directly from the person intended to bear it, while an indirect tax is imposed on a party who

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[6] *Reference re Securities Act at para. 58.*

[7] *Edwards v. Canada (Attorney General) 1929 CanLII 438 (UK JCPC) [1930] AC 124 (PC), 136 ("The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits...their Lordships do not conceive it to be the duty of this Board […] to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation...") See also Reference re Same Sex Marriage 2004 SCC 79 at para 23, whereby the Supreme Court supports a "large and liberal" constitutional interpretation to ensure the continued relevance and legitimacy of Canada's constitution.*

[8] *Lawson v. Interior Tree and Fruit and Vegetables Committee of Direction [1931] S.C.R. 357 at 363-64. For a detailed discussion on the distinction between taxation and regulatory fees, see (Farish & Tedds, 2014)*

[9] *Ontario Home Builders' Association v. York Region Board of Education [1996] 2 S.C.R. 929, para 52.*

is expected to pass the cost on to another.[10] Thus, a wage tax is characterized as a direct tax because it is imposed on a worker (regardless of who collects and remits it), while an excise tax (such as an ad valorem tax on fuel) is characterized as indirect because responsibility for its payment is imposed on a producer who is expected to pass the cost of the tax on to the consumer in the form of a higher price.[11] Taxes imposed on consumers at the point of sale are generally considered direct taxes in Canada.[12]

The combined impact of sections 91 and 92 of the Constitution is to provide provinces with the authority to impose taxes on land, property and income arising within their respective jurisdictions, thereby according a degree of independence and freedom from federal intervention. Additionally, jurisprudential development has limited provincial interference with interprovincial and international trade, as well as the taxation of subjects beyond provincial jurisdiction. (La Forest, 1967)

Within provinces, municipalities in Canada are creatures of provincial statutes and thus only have the taxation powers granted to them by the province within the limited scope of provincial authority. For example, the *City of Toronto Act, 2006* allows the City of Toronto to impose direct taxes by by-law but has extensive limits on what can and cannot be taxed.[13] Among other limitations, the City is forbidden from imposing "A poll tax imposed on an individual by reason only of his or her presence or residence in the City or in part of it" but must impose taxes on "The roadway or right-of-way of a railway company" if it meets certain conditions. Depending on the context, municipalities might also raise revenue through licensing schemes or user fees.[14]

In addition to ten provinces, Canada has three territories: Yukon, Northwest Territories, and Nunavut. A territory does not have either the federal legislative authority or the provincial legislative authority under the *Constitution Act, 1867*. Rather, each territorial legislature has devolved powers granted under a federal statute. For example, the *Yukon Act* allows the territory's legislature to make laws in relation to "direct taxation and licensing in order to raise revenue for territorial, municipal or local purposes" and "the levying of a tax on furs or any portions of fur-bearing animals to be shipped or taken from Yukon to any place outside Yukon".[15]

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[10] *See also Eurig Estate (Re), [1998] 2 S.C.R. 565 at para 25, citing Mill for the proposition that "a direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."; Canadian Industrial Gas & Oil Ltd. v Government of Saskatchewan et al, [1978] 2 S.C.R. 545 (adopting JS Mill's view to distinguish between federal and provincial powers).*

[11] *Thus, a leading case involving federal-provincial resource disputes struck down a Saskatchewan tax on oil producers, primarily on the ground that it constituted an indirect tax, thus exceeding the authority granted by section 92(2) of the Constitution. Ibid.*

[12] *See e.g. Sorbara v Canada (Attorney General), [2008] 93 O.R. (3d) 241, 2009 O.N.C.A. 506, citing Eurig Estate in finding that the federal general sales tax is a direct tax, even though the direct/indirect distinction is irrelevant for purposes of constitutional analysis at the federal level since only the provinces are limited to direct taxation.*

[13] *City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A, at section 267. Notably, the Act provides that the by-law must satisfy a number of criteria including, inter alia, stating "the subject of the tax to be imposed … the tax rate or the amount of tax payable [and] the manner in which the tax is to be collected, including the designation of any persons or entities who are authorized to collect the tax as agents for the City and any collection obligations of persons or entities who are required to collect the tax under subsection (5). 2006, c. 11, Sched. A, s. 267 (3); 2017, c. 8, Sched. 4, s. 4 (4)."*

[14] *For discussion, see Carson's Camp Ltd. v. Amabel, 1998 CanLII 14917 (ON SC).*

[15] *Yukon Act S.C. 2002, c.7; for similar provisions see the Nunavut Act, S.C. 1993, c. 28, and the Northwest Territories Act, S.C. 2014, c. 2, s. 2.*

2.2 NOTABLE LIMITATIONS

The Constitution was amended in 1982 to provide for clarity in relation to one specific subject of taxation, namely that related to the regulation of natural resources. A 1982 amendment added section 92A to the Constitution, stating in part that:

> "In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
>
> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
>
> (b) sites and facilities in the province for the generation of electrical energy and production therefrom, whether or not such production is exported in whole or in part from the province,
>
> but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province."[16]

Section 125 of the *Constitution Act, 1867* imposes additional limits on taxation powers. The provision states:

> "125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

Broadly speaking, this provision provides taxation immunity to federal and provincial Crown lands. In effect, the text precludes one government from taxing another, thereby ensuring a degree of autonomy or independence between levels of government.[17] However, courts have established that this does not prohibit the imposition of user fees or regulatory charges within a government's sphere of jurisdiction.[18]

2.2.1 The Treaty-Making Authority

While all tax laws are legislated by national, provincial, territorial, municipal, or Indigenous governments, Canada has also long been involved in international coordination of its tax regime, mainly via tax treaties with foreign sovereigns. These tax treaties involve the extension and curtailment of taxing powers across sovereign borders, and therefore they also touch upon the constitutional division of powers.

Following the principles of parliamentary supremacy and national sovereignty, Canada's treaty ratification process takes a so-called dualist or transformationist approach: while the negotiation and ratification of international agreements are initiated, carried out, and controlled exclusively by the federal government as its executive prerogative, treaties must be implemented by Parliament in the form of legislation to be given effect and enforceability under domestic law. (Mestral & Fox-Decent, 2008; Saunders & Currie, 2019)[19] Accordingly, implementing international law into Canadian law is not a self-executing process as it is in some other countries, such as the United States, where a treaty entered into by the Executive and consented to by the Senate stands with equal authority to domestic

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[16] *See Constitution Act, 1867, s. 92A(4).*

[17] *See Keyes and Mekkunnel, supra at 1054. In Reference as to Powers to Levy Rates on Foreign Legations [1943] SCR 208, the Supreme Court stipulated that the City of Ottawa could not impose property taxes on foreign embassies.*

[18] *Westbank First Nation at para. 42.*

[19] *Note that the province of Quebec has entered into a tax treaty with France, but the legal status of provincial agreements with foreign sovereigns is contested. (van Ert, 2001)*

U.S. law.[20] That being said, the federal Parliament has long played a perfunctory role in the implementation of tax treaties as domestic law, with detailed scrutiny of the goals, purposes, or substantive content of such texts a rare event in the tax treatymaking process.(Christians, 2016)

Treatymaking in the context of a federal system like Canada's is complicated by the fact that the federal government cannot enforce compliance of matters beyond its jurisdiction.[21] As Lord Atkins stated in the 1937 *Labour Conventions* reference concerning the distribution of legislative powers, "as a treaty deals with a particular class of subjects, so will the legislative power of performing it be ascertained."[22] In the same judgment, the Privy Council also noted that asserting compliance with international treaties is not a valid justification for encroaching provincial jurisdiction. (van Ert, 2001) Since then, the Supreme Court of Canada has maintained that the domestic implementation of treaty obligations is determined according to the distribution of legislative powers originally established in the *Constitution Act, 1867.*[23] The ultimate implication of these observations is that Canada cannot force the provinces to adhere to its international agenda. Nevertheless, the federal government "has a policy of consulting with the provinces before signing treaties that touch on matters of provincial jurisdiction."(Barnett, 2021, p. 8)

2.3 CONSTITUTIONAL PROCESS REQUIREMENTS IN TAX MATTERS

Beyond the constitutional grant of taxing authority in sections 91 and 92, other provisions of the *Constitution Act, 1867* relate to the powers of taxation in various ways. For instance, section 53 of the *Constitution Act, 1867* reflects the popular mantra "no taxation without representation" by requiring that tax legislation be initiated in an elected legislature. (Magnet, 1974) As the provision stipulates:

> "53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons. "

This provision highlights a core principle of representative democracy: that individuals being taxed have the right to have their elected public officials debate about how public money should be both appropriated and spent.[24] Currently, Canada has one unelected legislature: the appointed federal Upper House, that is, the Senate of Canada. All of Canada's provinces and territories have unicameral legislatures but at various times, certain assemblies were bicameral and had unelected upper houses.

Section 53's application is extended by virtue of section 90 of the *Constitution Act, 1867* to provincial legislatures.[25] As result, tax legislation would not be initiated in an unelected provincial upper house.

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[20] *Generalizing about tax treaty ratification in the United States is complicated by the availability of so-called "executive agreements", which offer an alternative method by which the U.S. executive may bind the nation, including potentially without any action by the legislative branch. For a discussion of the U.S. tax treaty ratification and executive agreement processes and the controversy surrounding their use in distinct circumstances, see (Christians, 2006)*

[21] *See Canada (AG) v. Ontario (AG) [1937] UKPC 6, [1937] A.C. 326.*

[22] *Ibid.*

[23] *See Johannesson v. Municipality of West St Paul, [1952] 1 S.C.R. 292; R. v. Hauser [1979] 1 S.C.R. 984; MacDonald et al. v. Vapor Canada Ltd., [1977] 2 S.C.R. 134.*

[24] *See Westbank First Nation v. British Columbia Hydro and Power Authority [1999] 3 S.C.R. 143, para. 19 [Westbank First Nation].*

[25] *Constitution Act, 1867, s. 90.*

The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here

Further, section 54 of the *Constitution Act, 1867* precludes the House of Commons from adopting a spending bill without a recommendation from the Governor General during the session in which the bill is proposed. The section stipulates:

> "54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed."

Section 54 is also extended to provincial legislatures by virtue of section 90, with the "Governor General" replaced by the Lieutenant Governor of the province. Some provincial assemblies have also codified this principle in rules, such as that in the Legislative Assembly of Manitoba:

> "66 Any vote, resolution, address or Bill introduced in the House for the appropriation of any part of the public revenue, or of any tax or impost to any purpose whatsoever, or to impose any new or additional charge upon the public revenue or upon the people, or to release or compound any sum of money due to the Crown, or to grant any property of the Crown, or to authorize any loan or any charge upon the credit of Her Majesty in right of the Province, shall be recommended to the House by a message from the Lieutenant Governor before it is considered by the House."(Legislative Assembly of Manitoba, 1980)

Legislation governing the territories also echoes this principle. For example, section 40 of the *Nunavut Act* states:

> "The Assembly may not adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue of Nunavut, or of any tax, for any purpose that has not been first recommended to the Assembly by message of the Commissioner in the session in which the vote, resolution, address or bill is proposed." [26]

Whereas provinces have a Lieutenant Governor, territories each have a Commissioner, appointed by the Governor General acting on the advice of Cabinet. Territorial Commissioners exercise similar functions as their provincial Lieutenant Governor counterparts, but they are not "representatives of Her Majesty." (The Governor General of Canada, 2016)[27]

Section 53 regulates taxation in Canada by ensuring parliamentary control over taxation powers while section 54 acts as a limit on parliamentary authority by requiring certain matters be advanced by the Executive. Case law and academic commentary suggest that these provisions were established with the purpose of ensuring control over the power of the purse, including by preventing the Senate or bodies other than the legislature from imposing tax legislation on their own accord.[28]

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re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

[26] *Nunavut Act, S.C. 1993, c. 28.*

[27] *For the list of current Territorial Commissioners, see The Governor General of Canada, Viceregal Representatives, https://www.gg.ca/en/crown/viceregal-representatives.*

[28] *See Eurig Estate (Re), para. 32; (Driedger, 1968). But see (Keyes & Mekkunnel, 2001, pp. 1038, 1045) examining the potential for conflict between courts and parliamentary bodies in making determinations about the validity of legislation on the basis of parliamentary procedure. For a discussion of the legislature's role in the budget process, see (Posner & Park, 2007)*

On this latter point, it is important to consider that initiatives to impose or increase taxation require a "ways and means" motion to be considered by the House of Commons. (Lukyniuk, 2011) Procedurally, such a motion can only be made a Minister of the Crown.[29]

The constitution does not provide for additional formalities with respect to tax legislation before a Canadian legislature. Each legislature therefore may develop its own rules and practices regarding how such legislation is considered. It should be noted that there are sometimes concerns raised about the process of fiscal legislation, particularly in the federal context where measures may be combined into omnibus bills coupled with 'time allocation' or other debate-limiting procedures.[30]

2.4 CONSTITUTIONAL QUESTIONS ON TAX MATTERS

While the division of powers outlined above might give the appearance that it is straightforward to determine the level of government is constitutionally capable of imposing a particular tax, the Canadian reality is far more complex. An imposed tax might raise constitutional questions to the extent that its principal purpose and effect is not to "raise money" but rather to achieve some other policy or regulatory goal. In *Reference re Firearms Act (Can),* the Supreme Court described the issue as one of colourability: "a law may say that it intends to do one thing and actually do something else."[31]

Contesting a federal tax on colourability would be difficult, given that the government routinely uses its taxing power to influence social and economic life in Canada. Otherwise, the government might turn to its power to regulate under the "peace, order and good government" or "POGG" power, which is also outlined in section 91 of the *Constitution Act, 1867*.[32]

In the leading case of *Crown v Zellerbach*, POGG was recognized as a valid authorization of federal legislation aimed at regulating the environment.[33] According to the Court, POGG was appropriately applied because the matter at issue addressed a national concern that had "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[34] The issue of national concern had to be defined narrowly enough to limit the impact on provincial jurisdiction. [35] POGG powers have evolved to include three branches of power: the emergency branch, the gap or purely residual branch, and the national concern branch. (Monahan et al., 2017)

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[29] *"The Crown, on the advice of its responsible Ministers, initiates all requests to impose or increase a tax on the public and the House either grants or withholds its consent. A Ways and Means motion may therefore only be moved by a Minister of the Crown." (Marleau & Montpetit, 2000)*

[30] *For discussion, see (Cockram, 2014)*

[31] *Reference re Firearms Act (Can.) [2000] 1 S.C.R. 783 at 18, 2000 SCC 31.*

[32] Constitution Act, 1867, s 91; see Peter W. Hogg, "Constitutional Authority over Greenhouse Gas Emissions," Alberta Law Review 46, no. 2 (2009): 507. *R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, 1988 CanLII 63 (SCC) para. 34 [Crown Zellerbach]. The other branch of the POGG power is the emergency branch.*

[33] *Ibid., para. 33.*

[34] *Ibid.*

[35] *Ibid., 37, 71.*

Determining the validity of a particular statute may turn on the distinction between a tax and a regulatory charge. Whereas taxation measures are subject to the limitations provided under section 125 of the *Constitution Act, 1867*,[36] regularly charges are not.

To determine if an impugned levy constitutes a charge, courts assess the "pith and substance" of its purpose.[37] A charge is considered a tax if the purpose of the legislation is to raise revenue for general federal purposes.[38] In contrast, a charge is not considered a tax— and by consequence, sections 53 and 125 do not apply— if it is imposed for a specific regulatory purpose.[39] Examples of fees that have been interpreted by courts as regulatory charges include a disposal fee imposed on private waste disposal facilities in Greater Vancouver[40] and a levy on liquor licences for businesses operating in Jasper National Park, Alberta.[41]

In summary, the authority to tax in Canada is laid out in sections 91 and 92, together with the (generally accepted) exclusive authority of the federal government to bind the nation to international agreements, while sections 35, 53, 54, and 125 of the *Constitution Act, 1867* provide for oversight on taxation matters and ensure accountability of public authorities in the exercise of their authority. Overall, the division of powers achieved through the combination of the constitution, constitutionally-sanctioned statutes, historical practice, and jurisprudence reflects a balance between the federal Parliament and provincial legislatures, the three territories, and Canada's Indigenous nations.

Yet even where an authority to tax may be identified —be it federal, provincial, territorial, or Indigenous— no such authority has unfettered power within its legislative competence. Indeed, other provisions of the constitution and even other statutes —such as those of quasi-constitutional status— may bear upon how a taxation authority establishes and administers a taxation regime. Significant legal constraints on government authority of all kinds and at all levels can be found in the *Canadian Charter of Rights and Freedoms* (the *Charter*), which was embedded in Canada's Constitution in 1982. [42] Specific to the taxing power, many of the provisions of the Charter are reflected in a quasi-legal "Taxpayer Bill of Rights" which was developed by Canada's tax authority, the Canada Revenue Agency (CRA), in 2017. These two documents, discussed in the following part, seek a workable balance between the preservation of individual rights and the efficient and effective administration of the tax system at all levels of Canadian government.

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[36] *For instance, the Supreme Court in Westbank First Nation held that federal levies imposed on a provincial utility company constituted taxation measures. By virtue of section 125 of the Constitution Act, 1867, the company was thus immune from the disputed charges.*

[37] *Canadian Western Bank v. Alberta, 2007 SCC 22.*

[38] *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, para. 362-63 provides the starting point for characterizing a governmental levy as taxation: (1) enforceability by law; (2) imposition under the authority of the legislature; (3) imposition by a public body; and (4) intention for a public purpose. Eurig Estate added another possible factor to consider, at para. 21: a nexus between the quantum charged and the cost of service provided.*

[39] *The factors considered when identifying a regulatory scheme include: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of regulation; and (4) a relationship between the regulation and the person being regulated [Westbank at para. 24].*

[40] *Greater Vancouver Sewerage and Draining District v. Ecowaste Industries Ltd., 2008 B.C.C.A. 126.*

[41] *620 Connaught Ltd. v. Canada (Attorney General) [2008] 1 S.C.R. 131, 2008 SCC 7.*

[42] *Canadian Charter of Rights and Freedoms, s 8, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [hereinafter, the Charter]. This bill of rights is entrenched in the Canadian Constitution and guarantees enumerated rights and freedoms that are subject to reasonable limits within a free and democratic society.*

3 INDIVIDUAL RIGHTS AND THE CONSTITUTIONAL AUTHORITY TO TAX

Even when a tax law has been duly enacted according to a relevant jurisdictional head of authority, those subject to such laws retain their individual rights as outlined in the *Constitution Act, 1867.* It is therefore not uncommon for taxpayers to take issue with the constitutionality of Canadian tax laws. For example, in the seminal case of *Symes v Canada*, the taxpayer sought to deduct certain childcare expenses as a business expense, and argued that disallowance of such expenses amounted to a *Charter* violation of her right against discrimination on the basis of sex.[43]

Symes was unsuccessful in her appeal, but the fact remains that the tax laws must remain compatible with Charter rights. These include the principles that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," as found in section 7, and that "[e]veryone has the right to be secure against unreasonable search or seizure," as found in section 8. Provincial legal texts echo these sentiments. For example, Quebec's Civil Code opens with a declaration that "Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy."[44]

In 2017, the CRA sought to affirm some of these rights in a non-binding document called the Taxpayer Bill of Rights.(Canada Revenue Agency & Government of Canada, 2017) Like most of its counterparts in other countries, the Taxpayer Bill of Rights is not legislated. Rather, it consists of a set of articulations by the tax authority, each of which may be supported by rights protected in legal texts on a case-by-case basis.(Li, 1997)

3.1 PERSONAL AND ADMINISTRATIVE RIGHTS

The Taxpayer Bill of Rights is a set of 16 rights that "the taxpayer" has in relation to the CRA as the agency with responsibility for carrying out the tax laws in Canada. It reads as follows:

1. You have the right to receive entitlements and to pay no more and no less than what is required by law.
2. You have the right to service in both official languages.
3. You have the right to privacy and confidentiality.
4. You have the right to a formal review and a subsequent appeal.
5. You have the right to be treated professionally, courteously, and fairly.
6. You have the right to complete, accurate, clear, and timely information.
7. You have the right, unless otherwise provided by law, not to pay income tax amounts in dispute before you have had an impartial review.
8. You have the right to have the law applied consistently.
9. You have the right to lodge a service complaint and to be provided with an explanation of our findings.
10. You have the right to have the costs of compliance taken into account when administering tax legislation.
11. You have the right to expect us to be accountable.

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[43] *Symes v Canada [1993] 4 SCR 695. (at 750). Justice Iacobucci writing for the majority of the Court dismissed the appeal, noting that given a limited deduction for certain child care expenses in section 63 of the Income Tax Act, "It is clear that child care cannot be considered deductible under principles of income tax law applicable to business deductions". For discussion see Lisa Philipps, "The Supreme Court of Canada's Tax Jurisprudence: What's Wrong with the Rule of Law," Canadian Bar Review 79, no. 2 (2000): 120-144.*

[44] *Civil Code of Quebec, art. 3. Note that the doctrine of paramountcy dictates that in cases of conflicting federal and provincial legislation, the former prevails. See Rothmans, Bensons & Hedges Inc. v. Saskatchewan [2005] 1 SCR 188 para. 11, 2005 SCC 13 "…where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency."*

12. You have the right to relief from penalties and interest under tax legislation because of extraordinary circumstances.
13. You have the right to expect us to publish our service standards and report annually.
14. You have the right to expect us to warn you about questionable tax schemes in a timely manner.
15. You have the right to be represented by a person of your choice.
16. You have the right to lodge a service complaint and request a formal review without fear of reprisal.

These sixteen enumerated rights express something about the ideal relationship of the taxpayer to the government of Canada. It is notable that the Taxpayer Bill of Rights is general and abstract in nature, so it is not amenable to (and is not intended to elicit) detailed parsing in the same way as a statute. Nevertheless, some of its features raise important threshold questions. For instance, "the taxpayer" is an undefined category. It arguably applies on a global basis to anyone who is touched by the provisions of the *Income Tax Act* by virtue of economic or personal ties to Canada. The scope does not appear to have been tested by litigation.

The first right enumerated by the CRA, that it is the taxpayer's right to arrange their affairs in such a way as to avoid tax, remains a central tenet in Canada (as is elsewhere). However, the statement of this "right" does not capture the nuances and complexities of Canadian jurisprudence surrounding the limits of taxpayers' attempts to strategically plan around specific rules. For instance, Canada's adoption of a "general anti-avoidance rule" (GAAR) in 1987 brings additional principles to play. The GAAR appears in section 245 of the *Income Tax Act* and provides that if a transaction results in a reduction, deferral, or avoidance of tax that does not comply with tax policy objectives, the CRA may deny the tax benefit.

The GAAR currently involves three questions, which, if answered in the affirmative, allow the CRA to recharacterize a taxpayer's tax position, which could include denying deductions, re-assigning income to different taxpayers, or changing the nature of a payment. The three questions are:

1. Is there a tax benefit?
2. Is there an avoidance transaction?
3. Is the avoidance transaction abusive (i.e. is it consistent with the purpose of the ITA)?

This three-part inquiry seems straightforward enough in the abstract, but it falls to the Courts to ultimately decide whether the GAAR should apply to a transaction, and the Courts in Canada have not been consistent. (Li & Hwong, 2013)

The second right expressed in the Taxpayer Bill of Rights refers to service in both languages. The expression of this right accords with the *Official Languages Act*, which has recognized the equal status of English and French throughout the federal administration of Canada since 1969. (Office of the Commissioner of Official Languages & Government of Canada, 2021) As such, taxpayers have the right to receive services from the CRA in the official language of their choice. This type of right is obviously relevant to countries that have more than one official language and appears to be uncontroversial in terms of its rationale.[45]

The third right states that the taxpayer can expect the CRA to protect and manage the confidentiality of their personal and financial information. Confidentiality is a primary issue for every country that seeks to impose a tax on income. Measuring income inevitably requires knowing something about the taxpayer's assets and cash flows, but may also

[45] *For a historical perspective on the Official Languages Act by the Commissioner of Official Languages, see (Fraser, 2020)*

involves personal and family factors. As such, tax information inherently includes the sort of highly personal information for which individuals have a reasonable expectation of privacy,[46] such as family composition,[47] health circumstances,[48] and religious and political preferences.[49] Much of this information is sensitive and many individuals would feel vulnerable to embarrassment or harassment if others could view it, whether in an official capacity or otherwise. (Canada Revenue Agency, 2014)

Confidentiality is further stretched because the *Income Tax Act* imposes various information gathering and reporting obligations on persons other than the taxpayer. These obligations, which include third-party information reporting and tax withholding requirements, are necessary to make the tax system administrable. The CRA's information gathering powers are accordingly broad, including compelling third parties to provide books and records to the tax authority in specific cases. For example, section 231 of the *Income Tax Act* allows the Minister of National Revenue to authorize any person to compel a respective taxpayer to provide them with relevant records, once certain procedural measures are met.

Accordingly, it is no surprise that in the Taxpayer Bill of Rights, the taxpayer's right to privacy and confidentiality is not framed in respect of *the government's* collection and use of information. Rather, it is concerned with the use of taxpayer information by persons *other than* the government, including those tasked with gathering such information for purposes of giving it to the CRA. Thus, the CRA assures taxpayers that government-wide and internal policies are followed, with regular reviews of internal processes to ensure the security of information.[50] Individuals thus have virtually no choice but to share personal information with the government for a specific purpose, namely, the administration of the tax system.

Perhaps because it is practically inescapable, the taxpayer's acquiescence with the obligation to volunteer personal information on a regular basis is widely understood to create a trust relationship between the individual and the government.[51] Yet the level of trust in the relationship between a taxpayer and the government changes as between a standard tax reporting and filing matter, and one that concerns an inquiry into potentially unlawful behaviour by the taxpayer. Canadian jurisprudence has developed doctrines regarding the expectations of privacy and rights to due process when the use of information begins as a matter of tax administration and transforms into investigation of potentially criminal offenses. In the "regulatory sphere" of routine tax administration, taxpayers have a relatively low reasonable expectation of privacy, whereas taxpayers in the "penal sphere" of criminal investigation are provided more rigorous protections by virtue of the *Charter*.

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[46] *Privacy Act, RSC, 1985, c. P-21 (hereinafter Privacy Act of Canada) (providing inter alia that Canadian government institutions must protect personal information furnished to them by individuals).*

[47] *Family composition is typically required to establish support for various claims, including spousal or childcare tax credits or other credits that depend on family income, such as general sales tax rebates. "Tax information, which includes a taxpayer's income and an individual's personal circumstances (e.g. to support a claim for a disability tax credit), is a particularly sensitive form of personal information, and can be used to build a detailed profile of individual identity, including religious and political beliefs". (Cockfield, 2010, p. 420)*

[48] *This information may be indicated to support a claim for a disability or health-related tax credits.*

[49] *This information may be indicated in connection with claims related to charitable donations.*

[50] *Taxpayer Bill of Rights.*

[51] *Ellis, 29 (the non-tax use of tax information is widely held to be "a breach of trust"); see also R. v. Mckinlay Transport [1990] 1 S.C.R. 627, 648 ("A taxpayer's privacy interest with regard to [records which may be relevant to the filing of an income tax return] vis-à-vis the Minister is relatively low. The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them. At the same time, the taxpayer's privacy interest is protected as much as possible since s. 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies.").*

It is a generally accepted principle that "taxpayer information" deserves protection in law and in practice.[52] Moreover, taxpayers routinely assume and believe that government has a duty to protect taxpayer information. At the same time, taxpayer information forms a robust and comprehensive collection of data which is a constant temptation to administrators in a wide variety of regulatory areas. Governments therefore have not strictly protected the confidentiality of taxpayer information, instead routinely using such information for purposes other than the administration of the tax system ("non-tax purposes"), to varying degrees, and for various reasons.

Formative to contemporary thinking was the discovery in 1978, by a Royal Commission, of a secret agreement under which the Canada Revenue Agency (then Revenue Canada) regularly furnished tax information to the RCMP, which the RCMP used to detect and investigate non-tax crimes.[53] These events significantly increased public scrutiny regarding the use of tax information for non-tax purposes, prompted increased official concern for tax confidentiality, and led to the adoption of significant legislative reforms in Canada. That legacy continues to inform contemporary understanding of the importance of tax confidentiality in Canada.[54]

Nevertheless, the temptation to erode privacy in favour of administrative expediency persists, especially as tax information becomes increasingly voluminous and detailed, along with the available technology to collect, sort, use, and share it across agencies and with other countries. For example, in 2015, the Canadian Parliament broadly expanded the use of taxpayer information for investigations into terrorism-related offenses.[55] Further, it was revealed in a subsequent report that despite relaxed controls for the use of data in security-related matters, the Canadian Security Intelligence Service (CSIS) regularly obtained taxpayer information from the CRA without presenting a court-approved warrant as required by statute.[56]

A gradual extension of the use of tax information for non-tax purposes has also occurred in the province of Quebec. Since 2011, a number of new exceptions to taxpayer confidentiality were enacted that allow for the sharing of taxpayer information without judicial intervention to other provincial agencies that are capable of imposing financial penalties and other sanctions on the basis of that information.[57] Prior to these amendments, taxpayer

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[52] *The universality of this view has been confirmed by two separate multi-country studies in the past two years. (Kristoffersson et al., 2013) (hereinafter, Tax Secrecy Study 2013) 37-country study of tax secrecy and confidentiality rules; (Baker & Pistone, 2015) 41-country survey, national reports, and general report on taxpayer rights, including rights to privacy and confidentiality, and against self-incrimination. (hereinafter, Taxpayer Rights Study 2015)*

[53] *"Testimony before the McDonald Commission of Inquiry into the R.C.M.P. revealed that tax information was released to the R.C.M.P. on the basis of very remote and incidental "tax interests" relating to non-tax prosecutions. Furthermore, the Alberta Royal Commission headed by Mr Justice Laycraft which investigated Royal American Shows Inc., uncovered a secret agreement between Revenue Canada and the R.C.M.P. allowing release of tax information in any investigation of a violation of the Income Tax Act by members of organized crime. Although Mr. Justice Laycraft did not find this agreement to contain any breaches of the secrecy provisions in s. 241 of the Income Tax Act, publicity surrounding the McDonald Commission and the Laycraft Commission has raised questions about the adequacy of existing safeguards. Perhaps the most blatant example of the ineffectiveness of the secrecy provisions was the release of information about Progressive Conservative Leader Joe Clark's tax return to a private investigator who then gave the information to Toronto broadcasters Pierre Berton and Charles Templeton.".(Toope & Young, 1981, p. 479)*

[54] *Philip Baker and Pasquale Pistone, General Report at s. 3.14, in Taxpayer Rights Study 2015 (noting the "critical importance" of preventing use of tax information for political purposes" and concluding therefore that the survey of practices across 41 jurisdictions demonstrates a consensus that broad disclosure of tax information to lawmakers "is not a generally permissible exception" to confidentiality.)(Baker & Pistone, 2015)*

[55] *Anti-terrorism Act, 2015, S.C. 2015, c. 20 (amending section 295 of the Excise Tax Act and subsection 241(9) of the Income Tax Act to expand the list of circumstances under which tax information may be shared among tax and law enforcement agencies).*

Anti-terrorism Act, 2015, S.C. 2015, c. 20 (amending section 295 of the Excise Tax Act and subsection 241(9) of the Income Tax Act to expand the list of circumstances under which tax information may be shared among tax and law enforcement agencies). (Request by CSIS Director), http://www.sirc-csars.gc.ca/anrran/2014-2015/index-eng.html; see Jim Bonskill, "CSIS Obtained taxpayer info from Canada Revenue Agency without warrant," Canadian Press, 28 Jan 2016, http://ipolitics.ca/2016/01/28/csis-obtained-taxpayer-info-from-canada-revenue-agency-without-warrant/.

[57] *TAA s. 69.1(s),(x),(y),(z).*

information could only be shared amongst government agencies without judicial intervention for the purposes of ensuring the proper administration and application of a given act or regulation, without the possibility of punishment to the taxpayer whose confidence was breached.[58]

The erosion of tax confidentiality for purposes involving non-tax matters conflicts with international practice and policy consensus. The use of tax information for non-tax purposes is now widely understood to require special scrutiny and vigilance against misuse. In Canada, the principle was expressed in a 1993 case, in which the majority opined that the legislated uses of tax information:

> "involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the Income Tax Act and other federal statutes.... Only in exceptional or prescribed situations does the privacy interest give way to the interest of the state."[59]

The potential for misuse of tax information, and therefore the need for increasing attention to confidentiality, is further intensified in the context of increasing cross-border cooperation on information exchange, which states have used to significantly increased their information gathering powers.[60] Accordingly, lawmakers and jurists in Canada (and peer jurisdictions) have enacted domestic laws and forged international covenants to protect the confidentiality of tax information.

The next six provisions of the Taxpayer Bill of Rights, together with provisions 12 and 13, relate to a taxpayer's interaction with the CRA as an administrative function of the government. Most of these rights seem to flow from basic procedural fairness safeguards, while case law and commentary suggest that this is how they should be read.

Some of these provisions reflect a balance being struck between the taxpayer's procedural rights and the CRA's substantial power and discretion in making and enforcing tax assessments. Canada's courts have jurisdiction to determine the validity of assessments, but commentators suggest that they "have had relatively limited influence regarding the process by which assessments are issued."(Mirandola & Privato, 2015)

Further, despite the promises of consistency in article 8 of the Taxpayer Bill of Rights, the CRA has broad discretion to treat taxpayers inconsistently.[61] Courts have denied taxpayers "legitimate expectations" in these procedural rights, which are conditioned on rights expressed in law.

Accordingly, taxpayer's rights are those that individuals enjoy in Canada under general principles, legal rules and constitutionally entrenched rights; the Taxpayer Bill of Rights reflects but does not substitute for those principles and rules.[62]

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[58] *TAA s. 69.1(a)-(r),(t)*

[59] *Slattery (Trustee of) v. Slattery, [1993] 3 S.C.R. 430.*

[60] *See Tax Secrecy Study 2013 at 2 (discussing the rise of global tax information sharing networks and stating that "[s]tronger powers for tax authorities must be combined with stronger protection of taxpayer rights, since the taxpayer may not just be the object of mutual assistance on information concerning him but should also receive an effective and timely protection of his/her/its right to confidentiality.").*

[61] *See e.g, Hokhold v. The Queen, 93 DTC 5339 (Federal Court Trial Division) (rejecting taxpayer's appeal in an assessment on grounds other taxpayers had been treated more favourably by the CRA). But see Lee v. The Queen, 92 DTC 6067 (Federal Court-Trial Division) (the choice of two partners to report certain gain on income account was relevant and admissible in the case of a third partner's reporting).*

[62] *As Jinyan Li observes, the Declaration of Taxpayer Rights (predecessor to the Canadian Bill of Rights), "has no legal authority and provides no real protection for taxpayers." (Li, 1997, p. 85)*

3.2 RIGHTS TO ACCOUNTABILITY

Principles 11 and 16 of the Taxpayer Bill of Rights are related in that both speak to the obligations of the CRA as an instrument of government, and the accountability to taxpayers that is consequently required. The eleventh principle distinctly states that the taxpayer has "the right to expect [the CRA] to be accountable". CRA guidance states that this includes being informed of one's rights and obligations with accurate and understandable information.

The eleventh principle is somewhat oddly worded in that it reflects the taxpayers' right to *expect* accountability rather than expressing the taxpayer's right to accountability itself, followed by a statement in guidance to the Taxpayer Bill of Rights that the CRA "is" accountable. It is presumed that the provision is intended to express that the taxpayer has a right to accountability. However, this term is susceptible to wide variation in interpretation. The right expresses one interpretation by focusing on reason-giving in decision-making and reporting. It also repeats prior principles, notably principle 2 on language accessibility.

The sixteenth principle is less explicitly about accountability. It affirms that CRA employees are expected to act in accordance with the CRA Code of Conduct, and that upon formal review of a CRA decision, taxpayers are entitled to impartial treatment by the CRA. The obligations of the agency's employees to follow CRA guidelines during the formal review process are thereby outlined.

3.3 RIGHT TO BE INFORMED

Finally, principles 14 and 15 appear to support a general principle that the taxpayer has a right to know what the law is, and to have assistance in dealing with a complex legal regime that has material financial consequences. While principle 14 affirms that the taxpayer is entitled to timely information about questionable or potentially abusive tax schemes under scrutiny of the CRA, principle 15 stipulates that the taxpayer is entitled to the right to representation by a person of their own choosing.

While a more general right to be informed is not expressly defined in the Taxpayer Bill of Rights, it is the case that taxpayers have various means of participating in the development of tax policy and law in Canada. However, as is typically the case for legal participation, especially in more technical fields, stakeholder participation is proportionate to resources of both time and expertise.(de Londras & Tregidga, 2021) In practice, this is usually conditioned on having well-informed advisers. For example, proposed legal reforms are often released in draft form to the tax community before being tabled in Parliament, which gives tax professionals and interested observers a chance to comment. However, short timeframes and curtailed Parliamentary debate sometimes preclude meaningful participation from the general public. The taxpayer bill of rights does not address these issues and instead focuses on the individual's right to be advised by competent officials and professionals regarding the practical application of tax rules to their particular circumstances.

Overall, Canada's taxation structure entails information collection practices of individual taxpayers, which inherently implicate issues of confidentiality and privacy. Although not legally enforceable, the Taxpayer Bill of Rights provides a framework of administrative standards and statutory rights that taxpayers can expect when dealing with the CRA.

4 TAX AND THE CONSTITUTION IN ACTION: THE FEDERAL CARBON PRICING SCHEME

As part of Canada's pledge to reduce greenhouse gas emissions across all sectors of the economy and eventually achieve net-zero emissions by 2050, (Government of Canada, 2020) Canada's federal government recently introduced a carbon pricing scheme. The context that gave rise to this regime, its unique character as a backstop or minimum tax to any existing or future provincial alternatives, and the constitutional challenges that followed its implementation provide a pertinent case study of the taxing power and the constitution in Canada. Accordingly, this Part introduces the carbon pricing scheme and examines the range of constitutional issues that arose surrounding its adoption.

The scheme emerged in the context of the 2015 federal election in Canada, in which the Liberal Party of Canada under leader Justin Trudeau declared that it would "be putting a price on carbon" with a promise to work with provinces and territories to implement carbon pricing policies of their choice.(Leblanc & Woo, 2015) Having secured a majority government in that election, the Liberal Government released a "Pan-Canadian Framework on Clean Growth and Climate Change" to deliver on this promise and Parliament enacted the *Greenhouse Gas Pollution Pricing Act* (GGPPA) in 2018. The legislation required provinces and territories to implement carbon gas pricing systems by January 1, 2019. In effect, this was a backstop mechanism in which the federal government would impose a tax unless the provinces did so themselves (at the same or a higher level).(Christians et al., 2018; Christians & Jarda, 2015) In this respect, the GGPPA presents a longstanding tension of Canadian federalism: the division of legislative powers necessary to enable federal unity while also protecting provincial autonomy.

Prior to these events, some of Canada's provinces had already been laboratories for carbon tax innovation. For example, British Columbia had adopted a broad-based, revenue-neutral carbon tax in 2008,[63] and Quebec had a cap-and-trade system in effect since 2013, linked to its membership in the Western Climate Initiative.[64] When the federal government decided to step in with a national plan, the question quickly arose whether doing so actually fell within the enacting government's area of legislative competence.

Recently, the characterization of the GGPPA as a tax or a regulation was contested on the basis of division of powers by the provinces of Ontario, Alberta and Saskatchewan in the form of a reference question that was appealed to the Supreme Court. In Canadian law, a reference question is typically a submission from the provincial government to its highest court or from the federal government to the Supreme Court of Canada seeking guidance on a significant issue that does not directly implicate a legal dispute of the parties.[65] These submissions generally concern issues of constitutionality. (Feldman, 2015)

In a 6-3 majority ruling, the Supreme Court of Canada determined that the GGPPA was a constitutionally valid regulatory charge and *not* a tax, despite the popularity of the term "carbon tax" used to describe it and other similar pricing schemes.[66]

The Supreme Court determined that the subject matter of the national pricing scheme is to establish minimum national standards of GHG price stringency in order to

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[63] *Carbon Tax Act, SBC 2008, c 40.*

[64] *Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Quebec and California (27 September 2013).*

[65] *A survey of Canadian jurisprudence demonstrates a long history of provincial legislatures challenging the validity of federal statutes before their provincial courts on a reference. (Feldman, 2017, p. 18)*

[66] *Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, para. 215 [Reference re GGPPA]. This matter is analyzed in more detail in Part III, infra.*

reduce GHG emissions, which is of sufficient national concern to Canada as a whole. The majority found that the reduction of GHG emissions "is critical to our response to an existential threat to human life in Canada and around the world."[67]

By applying the test articulated in *Crown Zellerbach,* the Court determined that the backstop architecture of the GGPPA encompasses the requisite "singleness, distinctiveness and indivisibility" that is qualitatively different from provincial matters. In particular, the Court found that establishing minimum standards of GHG price stringency relate to a federal role in carbon pricing, thereby reflecting a distinctly national matter.

Provincial inability to deal with the matter was also established in this case: since GHG emissions are extra-provincial and international in their implications, provinces acting alone or together are incapable of establishing minimum GHG emission standards. Failure to reduce GHG emissions would have grave extra-provincial consequences by threatening the existence of human life and the environment, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. As Justice Chief Wagner warns, the effects of climate change have no boundaries and "[pose] a grave threat to humanity's future."[68]

As such, the Court found the federal carbon pricing scheme to be *intra vires* Parliament, that is, within the federal government's constitutionally authorised power on the basis of the national concern doctrine. Overall, this decision presents a significant development of the national concern branch and highlights that GHG emissions not only meet the provincial inability threshold, but also encapsulate the necessary distinctness to be regulated under the peace, order and good government clause of the *Constitution Act, 1867*.

5 CONCLUSION

An analysis of the taxation regime in Canada requires a nuanced understanding of the governance structure that shapes Canada's constitutional landscape. In particular, the division of legislative powers reflects a longstanding tension between levels of government: maintaining federal unity concerning matters of national concern, while also protecting provincial, territorial, and Indigenous peoples' independence and diversity. Canada's constitution, together with its Charter of Rights and Freedoms, mandate a balancing of interests among the various jurisdictions as well as between governments at all levels and the people they purport to regulate through taxation.

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[67] *Re GGPPA, para. 171.*

[68] *Re GGPPA, para. 4.*

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Article

Human rights in tax matters before the Chilean courts and its constitutional fundamentals

Patricio Masbernat

Full Professor of Tax Law & Economic Law, School of Law, University Saint Thomas of Chile. Lawyer, LLM by Universidad de Chile, LLD by Pontificia Universidad Católica de Chile, Ph..D. by Complutense University of Madrid. His main research line is focused on economic and tax problems in the global arena. E-mail: pmasbernat@santotomas.cl

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ABSTRACT:

This paper seeks to expose the theoretical and practical scope and effects that the Chilean courts of justice grant to the rules of human rights, in relation to tax lawsuits. To carry out this analysis, the author exposes the constitutional context related to the tax system, particularly the principles and rights, and the scope and effects of the incorporation of international human rights conventions into the Chilean legal system. The judicial decisions of the Chilean courts show that few norms of the American Convention on Human Rights are applied in tax disputes, they are generally the same norms in the same types of cases.

PALABRAS CLAVES:

Consejo de democráticas

RESUMEN:

El presente artículo busca exponer los alcances teóricos y prácticos que otorgan los tribunales de justicia chilenos a las reglas derivadas de los derechos humanos, en relación a los litigios tributarios. Para efectuar este análisis, el autor expone el contexto constitucional relativo al sistema tributario, particularmente los principios y los derechos, y los alcances de la incorporación al sistema jurídico de las convenciones internacionales de derechos humanos. Las decisiones judiciales de los tribunales chilenos muestran que se aplican escasas normas de la Convención Americana de Derechos Humanos en los litigios tributarios, generalmente son las mismas normas en los mismos tipos de casos.

MOTS CLES :

Conseil de Surveillance de la démocratique

RESUME :

Cet article vise à exposer la portée et les effets théoriques et pratiques que les cours de justice chiliennes accordent aux règles des droits de l'homme, en relation avec les poursuites fiscales. Pour mener à bien cette analyse, l'auteur expose le contexte constitutionnel lié au système fiscal, en particulier les principes et les droits, ainsi que la portée et les effets de l'incorporation des conventions internationales des droits de l'homme dans le système juridique chilien. Les décisions judiciaires des tribunaux chiliens montrent que peu de normes de la Convention américaine relative aux droits de l'homme sont appliquées dans les litiges fiscaux, ce sont généralement les mêmes normes dans les mêmes types d'affaires.

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CONTENTS:

1 INTRODUCTION

This article seeks to expose the theoretical and practical scope that the Chilean courts of justice grant to human rights concerning tax disputes.

Prior to said analysis, the constitutional context of the principles and rights linked to the tax-legal relationship will be exposed, and the model of incorporation of the rules on human rights in the Chilean legal system, coming basically from the International Conventions and particularly the Convention of American Human Rights.

It should be noted that there are multiple ways to address human rights in this area.

The most usual way of studying it has been from the fundamental rights and constitutional rights more related to the tax field.

At this point, and before continuing, it is necessary first to remember the difference between fundamental and human rights (Ruiz, 2016). By the way, constitutional rights have existed since the beginning of liberal democracies (universally spread since the beginning of the 19th century), while the modern understanding of human rights is much later (mid-20th century).

The subsequent evolution of human rights and constitutional rights generates a certain conceptual and technical convergence (both present characteristics of principles and norms). For this reason, Nogueira (2005) emphatically presents a perspective that I can only partially share (although I cannot elaborate on the point here): "Fundamental or human rights can be understood as the set of powers and institutions that specify the demands of freedom, equality and human security as an expression of the dignity of human beings, in a specific historical context, which must be ensured, promoted and guaranteed by legal systems at a national, supranational and international level, forming a true subsystem within these ." This author confuses, in my opinion, moral demands with legal norms and defends a totalizing and expansive theory of human rights as the first and last rule of the legal system in conditions that often cannot be transformed into rules but rather into principles. This author does not recognize structural or implicit limits to fundamental rights / human rights (which he understands have the same content). Other authors, such as Tortora (2010), on the contrary, understand that fundamental rights have structural limits (like any right of normative content, in my opinion): "Fundamental *rights, although they should not be conditioned in terms of their exercise, are subject to limits, explicit or not*"

But in a traditional sense, the constitutional rights of nineteenth-century liberal constitutions work well as rules, while human rights present a form of moral principles. Angulo (2015, page 132) describes it as follows: "Human Rights terminology refers to the existence of aspirations outside of the current legal regulation, together with the moral

criteria that serve to establish them, while fundamental rights have a primary referral printmaker".

Human rights, enshrined in the international conventions signed by Chile, are integrated into the Chilean constitutional order through article 5 of the Constitution.

The rights in the Chilean Political Constitution are expressed in numerals 21, 22, 23 and 24 of article 19. The Chilean legal doctrine has seen in these rights some limitations to the power (state) tax (in a similar sense as expressed by Christians, A., 2017).

On the other hand, constitutional rights have been seen (from an objective phase or perspective) as principles of constitutional rank. In a classification that is also useful in Chile, the Spanish doctrine, for example (Fernández, JA & Masbernat, P., 2013), has distinguished between material principles (contributive or economic capacity, equality in tax matters, the prohibition of the arbitrary discrimination, the principle of non-confiscation, progressivity...). and formal principles of taxation (reservation of law in tax matters, legal certainty, non-retroactivity...). In my opinion, this classification is useful for understanding the content and function of constitutional tax regulations in any country (Masbernat, P. et al., 2012).

Another relevant classification is between constitutional and legal rights, which in certain cases have multiple structural similarities, but are functionally different, for example, in the judicial forum in which they are defended, legal arguments or procedures (Andres, E. & Raventos-Calvo, S., 2009).

These categories have been influenced and have also influenced (in a continuous fluctuation) the idea of tax justice (Ortega, J., 2016).

Even more modernly, given that all these reflections have been carried out only in recent decades by comparative doctrine, the tax problem has been addressed from human rights, especially through the pronouncements of the European Court of Human Rights (Díaz, N., 2016) and the Inter-American Court of Human Rights (Ramos, G. & Masbernat, P., 2019).

Although there is rich jurisprudence in Europe, Latin America's activity of the Inter-American Court of Human Rights is very limited. The American Convention on Human Rights protects a wide range of rights, many of which taxpayers can use in their relationship with the State. However, the application of said Agreement in these matters is not very broad, being limited only to a case won by a taxpayer, the case "Cantos vs Argentina", regarding a matter of legal fees and judicial protection. Other pronouncements only refer to the tax treatment of compensation for damages that private plaintiffs have obtained from States that violate human rights (see the following cases of the Inter-American Court of Human Rights: "Suárez Rosero vs Ecuador", "Baena Ricardo and Others vs Panama", "Myrna Mack Chang vs Guatemala", "Loayza Tamayo vs Peru").

In Chile, tax disputes fall under the jurisdiction of the Tax and Customs Courts in the first instance; in the second instance of the Courts of Appeals; in cassation, of the Supreme Court. It is also convenient to consider the perspective of the Constitutional Court (notwithstanding its disputed judicial nature, as it is a court of constitutionality control).

2 THE CHILEAN LEGAL SYSTEM FOR THE PROTECTION OF FUNDAMENTAL RIGHTS IN TAX MATTERS

Since fundamental rights refer to constitutional rights, this field is dominated by the Constitutional Court (Masbernat. P., 2012; Evans de la Cuadra, E., 1999; Figueroa, JE, 1985; Massone, P., 2018).

The development (and evaluation) of specific Constitutional or Fundamental Rights in accordance with article 19 No. 20 of the Constitution can be called taxpayer rights

(subjective face) or constitutional principles that illuminate the legal system (objective face). We recognize the principle of reserve of law, the right to equality and non-arbitrary discrimination, and the right of non-confiscation of taxes (under the constitutional denomination of disproportionate taxes), as we have exposed in other studies (Masbernat, P., 2002). This field is also related to the tax system and the Constitutional Rights of other numerals of article 19 of the Constitution, and that applies to the relationship of taxpayers with State bodies: for example, the right to develop any economic activity (article 19 Nº21), the right to equal treatment by the State (article 19 Nº22), the right to due process (article 19 Nº3). This field has been designated the "economic public order" enshrined in the Constitution (Fermandois, A., 2012).

We could summarize the constitutional tax principles as follows.

(a) The principle of the legal reserve is summarized in the universally known phrase "there are no taxes without law or representation". It is contained in constitutional articles 19 No. 20 (principles and constitutional rights of a tax nature), 63 No. 14 (matters of law) and 65 subsections 2 and subsection 4 No. 1, which establishes the exclusive initiative in tax matters in the President of the Republic and the beginning of the legislative process in the Chamber of Deputies.

In this sense, the constitutional norm contained in article 65, subsection 4 No. 1, regarding the content of the taxing power of the President is interesting: "Impose, suppress, reduce or forgive taxes of any kind or nature, establish exemptions or modify existing ones, and determine its form, proportionality or progression."

It is worth asking if the tax legislation delegated through Decrees with the Force of Law would be possible. The doctrine in Chile, in general, is in favour of this possibility.

Another question that falls is whether the constitutional reserve would be absolute or relative. According to the first, all the elements of the tax must be established in the law, and according to the principle of relative legal reserve, only the most relevant elements must be established in the law, being able to leave the other elements to the regulatory or sub-legal development.

(b) Principle of equality before the law and generality, enshrined in article 19 Nº20. It is about applying the right of equality before the law to the tax field. This numeral has been treated as linked to the principle of non-arbitrary discrimination that the State must provide to people in economic matters, enshrined in article 19 Nº20. It is possible to cite the judgments RoI N°718 (November 26, 2007), which makes pronouncements similar to the Constitutional Court Judgments No. 759 and No. 773 (of the same date). In it, the Chilean Constitutional Court maintains that the regulation of taxes constitutes a matter reserved to the law, and the Constitution -in its articles 19 N°2 and N°22- prohibits any arbitrary discrimination and must be based on criteria of generality, that is, it can only be distinguished by categories of taxpayers or general situations in which they may find themselves.

Likewise, for the Constitutional Court, in the same way that the principle of reservation of law protects the principle of equality, it guarantees the principle of non-arbitrary discrimination, as expressed in Considering 81st of the ruling: "in accordance with the provisions of Article 19 No. 22 of the Constitution, only corresponds to the legislator to establish benefits or special taxes, bearing in mind that the reliable history of said constitutional norm demonstrates that its intention was to eliminate the possibility that the Administration established benefits for certain persons, entities or activities, and that in this case the benefits or encumbrances must be established by law'".

(c) Principle of protection of property rights or non-confiscation, expressed in Chile as a prohibition on establishing manifestly disproportionate and unfair taxes and enshrined in article 19 No. 20.

It is possible in this field to cite the Judgment of the Constitutional Court Case N°718 (November 26, 2007), partially estimated by the majority, and the Judgments of the Constitutional Court No. 759 and No. 773 (both of the same date). In it, the Constitutional Court relies on previous rulings to deliver the following arguments (Considering 43° and Considering 44th): The (theoretical) issue of tax justice is an eminently value-based matter, basically referring to the taxpayer's ability to pay taxpayer (Sentence of the Constitutional Court Case No. 203); The constitutional prohibition of disproportionate and unfair taxes has been established to avoid expropriation or confiscatory taxes or that impede the exercise of business freedom (Sentence of the Constitutional Court Case No. 219); The Constitution tries to prevent "unjustifiable or irrational disproportions or injustices, and they occur when they are manifest, that is, according to the definition of the Dictionary of the Royal Spanish Academy, when they are discovered, patent, clear" (Sentence of the Court Constitutional Role No. 219).

After the Constitutional Court, it is worth referring to the jurisdictional powers of the Supreme Court and the Courts of Appeals in matters of protection of constitutional rights, particularly through the so-called resource for the protection of constitutional rights (Ugalde, R. & Varela, J, 1993). This judicial action is enshrined in article 20 of the Constitution and orders a test to be carried out to substantiate the actions of the Tax Administration (to exclude arbitrariness) and its legal support (to exclude arbitrary actions. This mechanism has been widely used by part of some taxpayers.

The third body with powers of protection of fundamental rights (particularly numerals 21, 22 and 24 of article 19 of the Constitution) are the Tax and Customs Courts, through the procedure of protection of taxpayer rights enshrined in the Tax Code, Third Book (On the competence to hear contentious tax matters, procedures and prescription), Title III (Of Special Procedures), Paragraph 2 (Of the special procedure for claims for violation of rights), in its articles 155 to 157 (González, J., 2016). Property rights, freedom to develop economic (business) activities and equal treatment that the State must provide in economic matters are protected. The issues typically claimed are non-return of remainders; arbitrary exclusion from the tax regime; the refusal of the Documentation Delivery Service; unreasonable ringing restriction; requirement of the Service to terminate the business to choose to waive interest; failure to notify the Treasury of the change in tax amount; among others (Valenzuela, D. et al., 2015).

3 JUDICIAL RULINGS OF THE COURTS IN TAX MATTERS THAT CONTAIN EXPRESS MENTION OF HUMAN RIGHTS.

In this section, we exclusively analyse the pronouncements of the courts of justice (this time, we do not include the Constitutional Court) that expressly base the sentence on the American Convention on Human Rights. To do this, we use the database of tax matters of the publishing house Thomson Reuters of Chile called CheckPoint.

For reasons of space, for purposes of this presentation, we focus only on some sentences.

It must be reiterated that it has been understood that the international human rights conventions signed and ratified by Chile have constitutional rank and are incorporated as norms in the Chilean legal system per article 5 of the Political Constitution. By the way, this interpretation presents multiple technical problems, for example, the legal delimitation of the law, its coordination with the rest of the legal system in the context of a Democratic State of Law, and the specific judicial procedures to demand them in the Courts, among others.

3.1 SUPREME COURT (SENTENCES OF CASSATION)

(a) Case "Chilean Treasury with Lastra Parra Patricio Amadeo" (case 19375-2014 of the Supreme Court, the judgment of November 10, 2014, in appeal on the merits). The Court affirms that the appellant taxpayer must base his appeal on factual or legal circumstances that delayed or delayed the conduct of the procedure and specify whether they arose from acts or omissions of the counterparty, the court or third parties; the only way for the Court to rule on a possible undue delay in contravention of the violation of Article 8 of the American Convention on Human Rights (right to be tried within a reasonable time) concerning Article 5 of the Political Constitution of the Republic

(b) Case "Pedro Barría Pacheco with General Treasury of the Republic" (case 11105-2013 of the Supreme Court. Judgment of October 1, 2014, in appeal on the merits). The dissenting Opinion of the Ministers (judges) Künsemüller and Cisternas maintains that "considerations based on respect for constitutional norms and international law require that the action of justice be quick and timely, both in listening to the defendants and in resolving the problems raised, be they civil or criminal."

(c) Case "Industrial Molina Limitada con Servicio de Impuestos Internos" (case 5165-2013 of the Supreme Court, ruling dated April 14, 2014, appeal). This case is very interesting that it extensively uses the human rights category. It refers to the right to be heard within a reasonable time. For the Court, "the right to be tried within a reasonable time, which is part of the constitutional guarantee to receive a sentence based on a fair and rational procedure of article 19 No. 3, paragraph 6, of the Political Constitution." In Considering 2, it first addresses the problem of whether a legal person can invoke human rights since the American Convention on Human Rights defines it as every human being (Article 1 No. 2) and that, in general, the Court Inter-American Court of Human Rights has maintained that legal entities are excluded (he cites several cases: Banco de Lima, Report N°10/91; Tabacalera Boquerón, Report N°47/97; Mevopal, SA, Report N°39/99; Bernard Merens and Family, Report No. 103/99, Bendeck-COHDINSA, Report No. 106/99, and José Luis Forzanni Ballardo, Report No. 40/05).

For the Supreme Court, the appellant legal person (Industrial Molina Limitada): "is an expression of the free development of the commercial activity of the individuals that make it up as partners and are behind it, who, being entitled holders to invoke the guarantees enshrined in the aforementioned Convention, they would be violated if the proceeding initiated through the claim filed by the company they own, were to be extended indefinitely. In addition, the Inter-American Court of Human Rights itself has ruled that the rights and obligations attributed to the names of the legal persons are resolved in the rights and obligations of the natural persons that constitute them or who act in their name and representation and, in this way, even when the figure of legal persons has not been expressly recognized by the American Convention on Human Rights, This does not restrict the possibility that under certain circumstances the individual can go to l Inter-American System for the Protection of Human Rights to assert their fundamental rights, even when they are covered by a figure or legal fiction created by the same system of law (case of Cantos vs Argentina, the judgment of September 7, 2001; and, case of Perozo et al. Venezuela, the judgment of January 28, 2009).

Under this understanding, the Court continues, "legal persons are projections of the actions of individuals under complex forms made available to them by the legal system, as an instrument for the development of their own ends," and can "as the claimant of these orders invoke the infringement of the judicial guarantee to be judged within a reasonable time enshrined in the aforementioned Convention, even when it reserves this guardianship for the human person. "

In other cases, the Supreme Court has dealt with the right of the taxpayer to be heard by a competent court, with due guarantees, within a reasonable time, namely:

(a) Case "Sociedad Inversiones y Desarrollo SA with Internal Revenue Service" (Second Chamber Supreme Court, role 6303-2018, judgment dated October 6, 2020).

(b) Case "Ganadera y Forestal SA with Internal Revenue Service" (Second Chamber Supreme Court, case No. 2773-2018, judgment dated July 2, 2020). It is based on applying constitutional and international law rules that impose the trial within a reasonable time. It adds that the "suspension of the prescription cannot operate indefinitely".

(c) Case "General Treasury of the Republic with Javier Moya Cucurella" (Supreme Court Second Chamber, case No. 24160-2019, judgment dated January 13, 2020). The original procedure is a procedure for executive collection of tax obligations. It refers to the right to be tried within a reasonable time. It questions that an executive procedure extends for more than a decade and declares the inadmissibility that the prescription of the tax claim can be suspended indefinitely.

(d) Case "Checho Producciones Ltda. with Internal Revenue Service" (Second Chamber Supreme Court, case No. 9464-2019, judgment dated December 12, 2019). It maintains that it is appropriate to apply constitutional and international law rules that impose judgment within a reasonable time to the claim procedure. Declares the violation of due process and the right to be tried within a reasonable time. Criticizes that a claim procedure extends beyond six years from the timely filed claim

(e) Case "Margarita Fano Ruiz with the Internal Revenue Service" (Second Chamber Supreme Court, case No. 37597-2015, judgment dated January 16, 2017). It reiterates that the right to be tried within a reasonable time enshrined in the American Convention on Human Rights is part of domestic law.

(f) Case "Fernando Echavarri Borssotto with the Internal Revenue Service" (Second Chamber Supreme Court, case No. 15929-2016, judgment dated January 10, 2017). It reiterates that the right to be tried within a reasonable time enshrined in the American Convention on Human Rights is part of domestic law. It establishes some facts: the processing for an extended period of the tax claim, more than two decades; the suspension of the prescription cannot operate indefinitely; The lengthy processing of the claim due to the annulment of the procedure followed before a court lacking jurisdiction is not attributable to the taxpayer.

(g) Case "Hugo Hormazábal Calderón with the Internal Revenue Service" (Second Chamber Supreme Court, case No. 21647-2014, judgment dated June 10, 2015). It reiterates that the right to be tried within a reasonable time enshrined in the American Convention on Human Rights is part of domestic law and that applying this principle is left to the judge's determination.

(h) Case "Comercial Hual Limitada con Servicio de Impuestos Internos" (Supreme Court Second Chamber, case No. 13387-2014, ruling dated May 18, 2015). It maintains that the human rights protection system is limited, in principle, to the protection of natural persons; it is appropriate for a legal person to report the violation of the judicial guarantee to be judged within a reasonable period (almost 20 years in this case).

3.2 COURTS OF APPEALS (SECOND INSTANCE).

The Courts of Appeals have recognized the right to a natural judge in several cases, for example, in "Luis Zaldua Castillo against the Internal Revenue Service" (Court of Appeals of Concepción, case No. 1617-2003, judgment dated March 15, 2006).

Subsequently, it is reiterated in the case "Sociedad de Mantención Industriales Montajes y Obras Civiles Limitada v. Servicio de Impuestos Internos" before the Court of Appeals of Concepción (case 1754-2009, sentence dated January 25, 2010). The problem affects the delegation of jurisdictional functions to an official of the Internal Revenue Service, and a non-competent official pronounced the sentence, and public law suffers from nullity for violation of articles 6 and 7 of the Constitution. The sentence ("Consedering 5th") maintains that: "the delegation of jurisdictional functions is not permitted by the national legal system. On the contrary, it flows from article 73 of the Political Constitution of the Republic, which is prohibited, since said norm establishes that the faculty of Hearing civil and criminal cases, resolving them and having the judged executed, belongs exclusively to the courts established by law" (tacit derogation of the norms of articles 6, letter B and 116 of the Tax Code, which allowed it). The principles in articles Article 14 No. 1 of the International Covenant on Civil and Political Rights and Article 8 No. 1 American Convention on Human Rights are broken.

Next, the Court develops the matter in the recital: "10º.- That, although it is true that the Supreme Court, through the appeal of inapplicability due to unconstitutionality, has declared that article 116 of the Tax Code is contrary to the Constitution, such declaration is not an obstacle or incompatible with the annulment of public law that other courts can decide ex officio or at the request of a party. This is not annulment due to the infraction but due to its effects, which are the inapplicability of the case in particular. In nullity, the effects of the declaration are different, which are to take the cause back to its beginning in order for the legally competent Tax Judge to hear it and, more particularly, that the Regional Director of the Internal Revenue Service provide the claim filed and carry out the processing until the issuance of the final judgment [Aside] The determination of the current As a result of the law, all judges are competent; therefore, this Court is empowered to tacitly deem the legal powers of the Regional Director of the Internal Revenue Service to delegate jurisdiction to be tacitly repealed. Another thing is the appeal for inapplicability due to the unconstitutionality of laws, whose knowledge corresponds today to the Constitutional Court. Both procedural institutes rest on different assumptions, one constitutionality and the other repeal, and certainly the first does not result in the second."

In several other cases, the Court of Appeals of Santiago has applied the right of the taxpayer to be heard within a fair and reasonable term (Article 8 American Convention on Human Rights), with due guarantees, if this is not respected, the violation of due process :

(a) Case "Inversiones Santa Verónica Limita con Servicio de Impuestos Internos" (Court of Appeals of Santiago, case No. 46-2019, judgment dated April 2, 2020).

b) Case "Sociedad de Inversiones San Felipe Limitada con Servicio de Impuestos Internos" (case No. 23-2019 of the Court of Appeals of Santiago, judgment dated March 11, 2020).

(c) Case "París Administradora Limitada con Servicio de Impuestos Internos" (Court of Appeals of Santiago, case No. 572-2019, judgment dated January 30, 2020). The sentence maintains that the "*determination of the guarantee to be judged within a reasonable time is left to the interpreter who must weigh the facts and specific circumstances of the process.*"

(d) Case "Mónica Ananías Kuncar with the Internal Revenue Service" (Court of Appeals of Santiago, case No. 14223-2018, ruling dated January 14, 2020).

(e) Case "MIDAS SA with Internal Revenue Service" (Court of Appeals of Santiago, case No. 4860-2018, judgment dated January 2, 2020).

(f) Case "Productos Cave SA with Internal Revenue Service" (Court of Appeals of Santiago, case No. 256-2018, judgment dated November 20, 2019).

(g) Case "Muñoz with Treasury Service of the Republic" (Court of Appeals of Santiago, case No. 2405-2019, judgment dated October 10, 2019). In addition, it applies the *iura novit curia principle*, by virtue of which "the judge can apply the law, regardless of the law invoked by the parties, having as its only limitation, not being able to alter the factual framework delivered by the parties to the process, so penalty of incurring a violation of the principle of procedural consistency."

This cause has many reflections of relevance, so they are reproduced:

- Considering 6th: "That, regarding the law applicable to the allegation of prescription, this Court considers that in the sub judice case, Article 8.1 of the American Convention on Human Rights must be resorted to, which enshrines judicial guarantees and incorporates as such as "due process" in International Human Rights Law, understood as the set of requirements to be observed in the jurisdictional degrees in which the court hears a matter, with the power to know and resolve the facts the right that the parties are raised, whether the legal dispute takes place between individuals or between them and the State. That is, International Human Rights Law contemplates respect for "due process" so that people can adequately defend themselves against the activity of the State in this area (Ivcher Bronstein case).

- Considering 7th: "That, in order to safeguard this fundamental judicial guarantee of "due process", the American Convention on Human Rights considers the requirements that all judicial proceedings must comply with."

- Considering 8th: "That, consequently, it is currently considered that the "due process" is the fundamental basis of the human rights protection system, because it is reasoned that it formalizes the guarantees of all of them and is a requirement for the existence of a true rule of law; this is how the right to "due process" is also contemplated in article 6 of the European Convention on Human Rights and in article 14 of the International Covenant on Civil and Political Rights, respectively (op. cit.)."

- Considering 9th: "That Article 8.1 of the American Convention on Human Rights, cited above, is a general rule that establishes the requirements of "due process" and is applicable to all kinds of proceedings; in effect, the literal text and The spirit of this rule must be appreciated in accordance with the provision of letter c) of Article 29 of the same American Convention, according to which, no provision of it can be interpreted to the exclusion of other rights and guarantees inherent to the human being or derived from the representative democratic form of government (Blake Case, paragraph 96 and Durand and Ugarte Case, paragraph 128, op. cit.).

- Considering 11th. "That within the general requirements of "due process" the right to be heard is found in the first place, which means that, in addition to the right of every person to access the court, it also includes the obligation of the State to give the possibility that the right can be exercised by the person and the obligation to establish bodies and procedures that meet the requirements of the provision before Article 8 of the American Convention on Human Rights , and, finally, determines the requirement to provide to the interested party what is necessary with a minimum of means so that they can access them [Apart] In addition, the broad formulation of protection of the fundamental right established in the American Convention on Human Rights of "due guarantees" is related to the minimum requirements that a trial must contain, and agrees that the protection in accordance with the judicial guarantees of "due process" includes the determination of the rights and obligations civilians within the legal system, those who cannot be removed from such requirements, without prejudice to the fact that it is necessary to examine the factual background in each particular trial to assess whether it is before a "due" or "fair" process.

- Considering 12th: "That, consequently, in the particular analysis of "due process", in the case at hand, it should be considered whether the procedure conforms to Article 8.1 of the American Convention on Human Rights, in terms of the normative element which integrates the right of the person to be heard within a "reasonable period" (Cecilia Medina Quiroga op. cit.). These grounds for the termination of the process within a "reasonable period" mean that, given the circumstance of In the case of a civil trial, due to this aspect of "due guarantees" of it, is that the procedure must give the parties time to present the evidence, examine and discuss those of the opponent, and consider the necessary deadlines for the court to can study all the antecedents to be able to base the sentence, without it being able to extend for such a time that it means, even discounting the delay attributable to the part and complexity of the matter, or n Unjustified delay on the part of the State, represented by the court, that affects the fundamental right recognized by the Convention, considering the nature of the process. In relation to the notion "within a reasonable time" according to international treaties in force, our Court of Appeals of Santiago (Case No. 65.351 1997, Considering 13, Judgment of July 4, 2005) has considered: "That, On the other hand, this Court cannot fail to consider here the international treaties approved and ratified by Chile on the matter, thus, the American Convention on Human Rights, which in its Article 8(1) provides that Every person has the right to be heard, with due guarantees and within a reasonable time... or, in its article 7.5 that Every person detained or detained... shall have the right to be tried within a reasonable time.... Likewise, the International Covenant on Civil and Political Rights, which in its article 9.3, establishes that every person detained or imprisoned... will have the right to be tried within a reasonable time... or, in its article 14.3.c referring to the accused person, it indicates that they have the right to be judged without delay improperly. A reasonable time is, therefore, an integral part of the concept of due process, to which our Constitution alludes in article 19 No. 3, subparagraph 6, when it says Every sentence of a body that exercises jurisdiction must be based on a prior process legally processed. It will be up to the legislator to always establish the guarantees of a rational and fair procedure and investigation;" Further on, he adds that "...In this context, the excessive length of this process [19 years], [...]; "...the mere existence of the process, since it implies a series of restrictions and even deprivations to the exercise of such rights, for the same reason that if the uncertainty of the duration of its duration is added to the uncertainty inherent to any trial, and to this that of an undue, unreasonable or excessive extension, the constitutional rights they run the risk of becoming a dead letter and ceasing to be so, an effective guarantee of their respect".

(h) Case "Treasury General Treasury of the Republic with Hering" (Court of Appeals of Santiago, case No. 6537-2019, judgment dated August 5, 2019). It also makes application of the *iura novit curia*.

(i) Case "Pablo José Pérez Cruz with the Internal Revenue Service" (Court of Appeals of Santiago, case No. 14249-2017, judgment dated June 14, 2018).

Here, the Court of Appeals maintains that: "The process has never been paralyzed attributable to the Internal Revenue Service, since the main milestones show that the informal powers have been exercised to give progressive course to the cars and the delay caused, Mainly, it is related to the annulment by the Highest Court of everything that was done in the case file, given the defect that was detected. These circumstances cannot lead to a classification of undue delay since the exercise of the corrective powers of the courts of justice is intended, precisely, to adjust the processing of the procedure to the standards of due process in order to obtain a sentence handed down by a competent body, within the sphere of its powers and in accordance with the law. Although it could be considered that there is a tension between the guarantee of being tried within a reasonable time and the guarantee of due process, this Court It is considered that due process is essentially violated in the event that a sentence issued by an incompetent official has been validated, and this

made it absolutely necessary to adjust the processing in accordance with the guarantee of Article 19 No. 3, paragraph 6 of the Fundamental Charter. Otherwise, it would be validating a kind of justice at any cost, an issue that is inadmissible. Although the process has been delayed by the issuance of the judgments analysed above, the effects of said delay can be remedied by eliminating the interest and fines that have accrued, as will be indicated in the resolution of the ruling. Consequently, from the comprehensive analysis of the procedure, it is noted that it has not been paralyzed for the necessary time to apply as a sanction the ineffectiveness of the process, in accordance with the guarantees contained in Article 8.1 of the American Convention on Human Rights (Considering 4 ° to 7° of the judgment of the Court of Appeals)."

(j) Case "Miguel Asenjo Asenjo with the General Treasury of the Republic" (Court of Appeals of Santiago, case No. 11583-2017, ruling dated May 10, 2018).

3.3 Tax and Customs Courts (First Instance).

(a) Case "Internal Revenue Service with Jonathan Ormeño Moraga" (Tax and Customs Court of Santiago case file 16-9-0001592-9, ruling dated August 21, 2018). The judge addresses the right to the presumption of innocence and criminal rights.

In Considering 15, the Court maintains that: "This Court considers that, prior to evaluating the evidence, this magistracy must consider that the application of a sanction is the expression of the *ius puniendi* of the State, for which reason it is logical and necessary to apply the inspiring principles of the criminal order contemplated in the Political Constitution, specifically in numeral 3 of its article 19, and in International Treaties such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights, in such a way as to grant due jurisdictional protection to the rights of individuals. In this order of ideas, the claimant benefits from the presumption of innocence, so it will be the Internal Revenue Service that must prove the actual commission of the offence charged. [Apart] That, the Internal Revenue Service, in order to prove the concurrence of all the elements of the type of infraction sanctioned, provided and accompanied the denunciation record with a series of probative records. [Apart] That, in addition, the infraction, as an exercise of the sanctioning power of the State, must comply with another requirement of criminal law: criminality. As Professor Massone says, '...the first requirement for the action (or omission) to constitute a tax offence (crime or offence) is that this action has the quality of being typical.' "

(b) Case "German Valladares Bugueno with Internal Revenue Service" (Tax and Customs Court of Santiago, case No. 17-9-0000785-K, judgment dated May 30, 2019). The right to the presumption of innocence and criminal rights are applied.

The Court, in its 13th Considering Point, maintains that: "in addition, and prior to the evaluation of the evidence, this magistracy must consider that the application of a sanction is the expression of the *ius puniendi* of the State, for which reason it is logical and necessary to apply the inspiring principles of the criminal order contemplated in the Political Constitution of the Republic, specifically in numeral 3 of its article 19, and in International Treaties such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights, of such a way to grant due jurisdictional protection to the rights of individuals. In this order of ideas, the claimant benefits from the presumption of innocence, so it will be the Internal Revenue Service that must prove the actual commission of the offence. Notwithstanding the foregoing, the claimants, and also the Court, in accordance with the provisions of the final part of subparagraph 1 of No. 4 of Article 16 5 of the Tax Code, may add other evidence to the case."

(c) Case "Constructora OAS SA Agency in Chile with Internal Revenue Service" (Santiago Tax and Customs Court, case 17-9-0000369-2, ruling dated July 21, 2017).

The Court, in Recital 14 of its judgment, states that: "In addition, and prior to the assessment of the evidence, it must be considered by this magistracy that the application of a sanction is the expression of the *ius puniendi* of the State, for which reason it is logical and necessary to apply the inspiring principles of the criminal order contemplated in the Political Constitution, specifically in numeral 3 of its article 19, and in International Treaties such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights, in an to grant due jurisdictional protection to the rights of individuals. In this order of ideas, the claimant benefits from the presumption of innocence, so it will be the Internal Revenue Service that must prove the actual commission of the offence charged. [Apart] That the Internal Revenue Service, in order to prove the concurrence of all the elements of the sanctioned infraction type, contributed and accompanied the denunciation record with a series of probative records. [Apart] That, in addition, the infraction, as an exercise of the sanctioning power of the State, must comply with another requirement of criminal law: criminality. As Professor Massone says, '...the first requirement for the action (or omission) to constitute a tax offence (crime or offence) is that this action has the quality of being typical. '"

4 CONCLUSIONS.

Human rights (hand in hand, especially with the American Convention on Human Rights) in tax disputes, in particular, circumscribed to due process and protection, have progressed. Effective judicial process (especially the right to a trial without undue delay and within a reasonable time and the rights of proof) and, secondarily, guarantees of a criminal nature. It is not a very extensive judicial development, nor how it could be considered pertinent and opportune in light of the legal systems of the member countries of the European Union, for example. However, it represents an important advance beyond the application of constitutional rights by the Courts on the occasion of protection appeals, of the Tax and Customs Courts on the occasion of the rights protection procedure, or of the Constitutional Court itself.

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Article

Constitutional limits on taxation in Denmark

Mark Ørberg

Assistant professor at Copenhagen Business School LAW where he teaches corporate law, company law, and administrative law. His current research interests include foundation law, constitutional law and the intersection between public law and private law, statutory interpretation, and comparative law. E-mail: mo.bhl@cbs.dk

Peter Koerver Schmidt

Peter Koerver Schmidt is Professor at Copenhagen Business School with special responsibilities in Tax Law and particular emphasis on Danish and International Corporate Tax Law. E-mail: pks.bhl@cbs.dk

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Constitutional tax law, principle of legality, taxing powers, non-delegation doctrine, statutory interpretation of tax provisions, general anti-avoidance rules, GAAR

ABSTRACT:

The authors discuss the Danish legislator's taxing powers in a constitutional context. The principle of legality, particularly the non-delegation doctrine enshrined in the constitution, prescribes that no taxes shall be imposed, altered, or repealed except by statute. Section 43 of the Danish constitution thus provides a constitutional prohibition on legislative delegation in the tax area. In the view of the authors, the Danish Supreme Court has approached the non-delegation doctrine pragmatically, accepting important modifications regarding both the practical realities of lawmaking and the long-standing practice of delegation of certain taxing powers to the municipalities. In accordance with the prevailing view, the authors reject the notion that a particular requirement for a clear statutory basis for imposing tax follows from section 43 of the constitution. Finally, the authors assess the constitutionality of the recently adopted statutory general anti-avoidance rules and argue that these new provisions are not unconstitutional. This article is – with the kind permission of the publishers – to a large extent based on the authors' contribution to an international anthology on constitutional principles of taxation: The principle of legality in the context of Danish tax law, in Noções gerais e limitações formais ao poder de tributar (2020), p. 385-400. Belo Horizonte: Fórum.

PALABRAS CLAVES:

Derecho tributario constitucional, principio de legalidad, poder tributario, doctrina de la no delegación, interpretación legal de las disposiciones reglamentarias, normas antiabuso, GAAR

RESUMEN:

Los autores comentan los poderes impositivos del legislador danés en un contexto constitucional. El principio de legalidad, en particular la doctrina de no delegación consagrada en la Constitución, prescribe que no se impondrán, modificarán ni derogarán impuestos excepto por ley. El artículo 43 de la constitución danesa prevé, por tanto, una prohibición constitucional de la delegación legislativa en el ámbito fiscal. En opinión de los autores, el Tribunal Supremo danés ha abordado la doctrina de la no delegación de forma pragmática, aceptando importantes modificaciones en relación tanto con las realidades prácticas de la elaboración de leyes, como con la práctica de larga data de delegación de ciertos poderes impositivos a los municipios. De acuerdo con la opinión prevaleciente, los autores rechazan la noción de que un requisito particular para una base legal clara para imponer impuestos se deriva de la sección 43 de la constitución. Finalmente, los autores evalúan la constitucionalidad de las normas estatutarias generales contra la elusión recientemente adoptadas y argumentan que estas nuevas disposiciones no son inconstitucionales. Este artículo, con el amable permiso de los editores, se basa en gran medida en la contribución de los autores a una antología internacional sobre principios constitucionales de tributación: El principio de legalidad en el contexto de la ley tributaria danesa, en Noções gerais e limitações formais al poder de tributar (2020), pág. 385-400. Belo Horizonte: Foro.

MOTS CLES :

Droit fiscal constitutionnel, principe de légalité, pouvoirs d'imposition, doctrine de non-délégation, interprétation des dispositions fiscales, règles contre l'évasion fiscale, GAAR (French).

RESUME :

Les auteurs discutent des pouvoirs de taxation du législateur danois dans un contexte constitutionnel. Le principe de légalité, en particulier la doctrine de la non-délégation inscrite dans la constitution, prescrit que les impôts ne peuvent être imposés, modifiés ou abrogés que par la loi. L'article 43 de la constitution danoise prévoit donc une interdiction constitutionnelle de la délégation législative dans le domaine fiscal. De l'avis des auteurs, la Cour suprême danoise a abordé la doctrine de la non-délégation de manière pragmatique, acceptant d'importantes modifications par rapport à la fois aux réalités pratiques de l'élaboration des lois et à la pratique de longue date consistant à déléguer certains pouvoirs fiscaux aux municipalités. Conformément à l'opinion dominante, les auteurs rejettent l'idée qu'une exigence particulière d'une base juridique claire pour l'imposition des impôts découle de l'article 43 de la constitution. Enfin, les auteurs évaluent la constitutionnalité des règles légales générales anti-contournement récemment adoptées et soutiennent que ces nouvelles dispositions ne sont pas inconstitutionnelles. Cet article, avec l'aimable autorisation des éditeurs, est largement basé sur la contribution des auteurs à une anthologie internationale sur les principes constitutionnels de la fiscalité : Le principe de légalité dans le contexte du droit fiscal danois, dans Noções gerais e limitações vous formez le pouvoir payer des impôts (2020), p. 385-400. Belo Horizonte : Forum.

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1 TAX LAW AND THE PRINCIPLE OF LEGALITY

Already by the mid nineteenth century, the basic legal framework for raising taxes had been established in many jurisdictions across the globe, and still today this basic framework implicates that taxation should take place in accordance with the rule of law (Vanistendael, 1996, Chapter 2). According to notions on the rule of law, there must be limits on the powers of governments and bureaucracies. In the context of taxation, there is general agreement that imposition of taxes must follow a proper legislative approach, and that the government and administration must comply with the enacted tax laws. In addition the enacted tax legislation must have the characteristics that constitute law, e.g. facilitate a sufficient degree of certainty and predictability for taxpayers (Cooper, 1997, pp. 13–50; Hilling & Ostas, 2017, pp. 38–40). Accordingly, as it is widely accepted that taxation needs democratic legitimacy, any tax levied must have a firm basis in law (Gribnau, 2013).[1] Often this requirement is explicitly specified in the constitution (Vanistendael, 1996, p. 1) .

This is also the case in Denmark, as section 43 of the Constitutional Act of Denmark (hereinafter "the constitution") provides that no taxes shall be imposed, altered, or repealed except by statute.[2] This principle of legality – enshrined in section 43 of the constitution – can be seen to reflect three basic aspects for tax regulation in Denmark: 1) administrative tax regulation, such as executive orders and regulations, cannot be in conflict with statutory law, 2) executive orders cannot constitute an independent basis for taxation, and 3) the tax authorities are only allowed to impose taxes if a legal basis for taxation can be found in statute (Nielsen, 2013, p. 355).

These aspects of the Danish principle of legality and section 43 of the constitution are analyzed in more detail below. The taxing powers and non-delegation doctrine is touched upon in section 3, while interpretation of tax statutes is discussed in section 4. However, before the analysis of the scope and limits of section 43 of the constitution, a brief description of the general Danish constitutional context is provided in section 2.

2 THE DANISH CONSTITUTIONAL FRAMEWORK

Interpretation of the constitution follows the same principles as other statutory interpretation in Danish law. The text is the starting point, but the *travaux préparatoires* and the purpose of the specific sections may be significant for establishing the scope of the constitution. Case law and legislative practice may also hold importance for interpretation of the constitution (Christensen et al., 2020).[3]

Denmark is usually characterized as a constitutional monarchy, as section 3 of the constitution stipulates that legislative authority is vested in the King and the parliament (*Folketinget*). According to section 3, the government has the executive authority while the judicial authority belongs to the courts. Importantly, the King does not personally hold the legislative powers mentioned in the constitution as the government exercises the King's constitutional authority in this regard (Christensen et al., 2020, pp. 39-40,55,65,161). Danish parliament's legislative competence is limited only by express provisions in the constitution and by customary constitutional law. Unless the constitution provides that the parliament has the exclusive competence in a particular area, the parliament may by statute

[1] *A.P. Dourado argues that tax law receives is legitimacy from democratic procedures, public discussion and argumentation, disagreement and compromise in parliament in a context of political plurality. (Dourado, 2014, Chapter 10)*

[2] *Constitutional Act of Denmark (Danmarks Riges Grundlov), Law no. 169 of 5 June 1953.*

[3] *For a different view see the references in Christensen, p. 36-43.*

delegate specific legislative authority to the executive branch. This enables the executive branch to issue binding administrative regulation in most policy areas.

Executive regulations (*bekendtgørelser)* must have sufficient legal basis in the enabling statute, and the regulation may not be in conflict with statutory or constitutional law. In addition, executive regulations must be published in the electronic promulgation media of the Danish public authorities (*Lovtidende*) along with, inter alia, statutes.[4] Binding Danish rules are to a large extent issued administratively.

The Danish Supreme court has in practice assumed the right to perform a constitutional review of statutes passed by the legislator (Christensen, 2015). Until the *Tvind case* from 1999, the Supreme Court had not stricken down a statute as unconstitutional (Christensen et al., 2015, p. 29).[5] In cases regarding the constitution, the court will usually appoint an extended panel of seven, nine or eleven judges instead of the usual five-judge panel.[6]

3 TAXING POWERS AND THE NON-DELEGATION DOCTRINE

As mentioned above, section 43 of the constitution prescribes that no taxes shall be imposed, altered, or repealed except by statute. The phrase "except by statute" in section 43 is understood as a prohibition on legislative delegation in the tax area (Christensen et al., 2015, p. 178; Pedersen, 2006, pp. 320–321; Sørensen & Germer, 1973, p. 207).

Neither the constitution nor tax regulation defines the concept of a *tax*. Nevertheless, it is generally agreed that a tax is characterized as a mandatory payment to the administration. However, the payment is not a tax if it is reciprocal for a specific service or object (Christensen, 2015, p. 295). The Supreme Court dealt with the distinction between a tax and a service fee in the so-called *service fee case* from 1993.[7] An analysis of the case follows in section 3.1.

Despite the prohibition on legislative delegation in the tax area, delegation is indeed permissible in certain situations. Hence, executive regulations on the administration and enforcement of tax statutes are not precluded by section 43 (Christensen, 2015, p. 295; Pedersen, 2006, pp. 320–321). Conversely, on the question of the substantive tax claim, the possibility of delegation is quite limited. At least as a starting point, all essential elements must be provided for in the enabling tax statute. Essential elements – that pursuant to the principle of legality enshrined in section 43 require statutory basis – are, among others, the definition of the tax object and the tax rate. In short, the tax rules defining the tax claim must be present in the statute.(Christensen, 2015, p. 295). Consequently, in terms of limits on delegation of taxing power, Denmark holds what in Vanistendael's classification system probably may be characterized as an intermediate position compared to similar democracies (Vanistendael, 1996, p. 149).

However, there are two notable modifications to this starting point. One leading case is the *Scharla Nielsen case* from 2006 where the Danish Supreme Court provided guidelines for answering the question of to what extent the constitution's section 43 prohibits legislative delegation of the determination of tax rates.[8] An analysis of the *Scharla Nielsen case* follows

[4] *The official Danish statute regulating promulgation is consolidation act no. 1098 from August 10 2016 on udgivelsen af en Lovtidende (Lovtidendeloven). The promulgation requirement is laid down in section 2. Although section 22 of the Danish constitution only requires promulgation of statutes, executive regulations must too be published pursuant to the promulgation act.*

[5] *With reference to the Tvind case published in UfR 1999.841H.*

[6] *See inter alia the Tvind case published in UfR 1999.841H or the Iraq case published in UfR 2010.1547H.*

[7] *Danish Supreme Court verdict 29 June 1993 (Gebyr-sagen) published in UfR 1993.757H.*

[8] *Danish Supreme Court verdict 15 December 2006 (Scharla Nielsen) published in UfR 2007.788H.*

in section 3.2. The other important modification is the assumed less strict constitutional limits on delegation of taxing powers to municipalities, see section 3.3.

3.1 THE SERVICE FEE CASE AND THE TAX CONCEPT IN SECTION 43

In the *service fee case*, the Danish Ministry of Justice had charged a service fee for the issuance of passports, license plates and driver's licenses.[9] The amount of the service fee did not follow from the statute providing the legal basis for the executive regulation but was determined in the executive regulation itself. With reference to the fact that the legal basis for the fee was found in an executive regulation, two citizens argued that the administratively issued executive regulation establishing the size of the fee did in fact regulate a tax, thus violating the constitution's section 43. While two of eleven judges on the bench found the argument convincing, the majority held that neither the *travaux préparatoires* to section 43, the historical background for the provision, nor the subsequent constitutional practice supported an interpretation of section 43, according to which statutory legal basis is required for all service fees charged by authorities. Although there must be certain limitations for the administration's executive regulations in this regard, the majority at the same time acknowledged that the administration had the right to estimate a fee based on all relevant expenses with reasonable connection to the issuance of the concerned permissions. Inter alia, according to the majority's judgment, the administration may take into account more general enforcement measures related to the subject that the service fee is based on – and not only expenditures narrowly related to the service fee.

One scholar criticized the majority's reasoning in the *service fee case*. The scholar referred to the arguments formulated by the minority, amplifying that the effect of the fee was indeed similar to a tax. The argument that was put forward was that passports and license plates are practical necessities in a modern society. Accordingly, pursuant to the minority's opinion and the scholar, they are in effect not voluntary, and for this reason, the fees qualify as taxes covered by the prohibition in section 43 (Germer, 2012, pp. 109–110). The scholar's criticism did not introduce new arguments, and the view has not subsequently found support among other Danish scholars or the courts. The suggested strict constitutional limits on the legal basis for administrative fees would likely burden the already overburdened legislative assembly. Considering the specific historical background for the delegation limits in section 43 and the context of section 43 as well as the subsequent legislative practice applied in accordance with the *service fee case*, an overturn of the case today appears unlikely.[10]

3.2 THE SCHARLA NIELSEN CASE ON LEGISLATIVE DELEGATION IN THE TAXING AREA

In the *Scharla Nielsen case* from 2006, the legislator had authorized the administration to issue an executive regulation regulating a rate adjustment percentage that had consequences for all individual taxpayers' tax liabilities.[11] The question before the court was whether the constitution's section 43 permitted such delegation to the administration. Interpreted strictly section 43 would indeed not allow an executive determination of a tax rate.

Apparently, the legislator did not perceive the delegation clause in the enabling statute as a matter of tax law. The high court initially assessing the case agreed with this

[9] *Danish Supreme Court verdict 29 June 1993 (Gebyr-sagen) published in UfR 1993.757H.*

[10] *Reference is made to section 3.2 and the description of the historical background for the delegation limits in article 43 and the context of section 43.*

[11] *The case was published in UfR 2007.788H. The consequence for all individual's taxpayers'tax liabilities followed from a reference to another statute regarding individual taxpayers' (personskatteloven).(Christensen, 2015, pp. 297–299).*

viewpoint, but the Supreme Court viewed this differently, essentially defining the statute's effect as a matter of tax law within the meaning of section 43. As a starting point for its assessment, the Supreme Court looked into the scope and purpose of the specific statute and stated that the statute laid down the fundamental rules for the calculation of wages in the Danish labor market. At the same time, the calculation had an effect on individual taxpayers' tax liabilities. Importantly, the court emphasized that the statute itself did not specify in detail all information concerning the calculation and that the calculation inherently depended on a variety of statistical choices. However, although the statutory framework did not specify in detail all relevant prerequisites for the calculation, this fact did not raise concerns under the concrete circumstances in the view of the court. Against this background, the court found that the delegation clause of the statute was not in conflict the with non-delegability rule in section 43 of the constitution.

The *Scharla Nielsen case* shows that the legislator may delegate to the administration the power to issue executive regulations of implementing nature regarding statistical and technical areas of tax law, in accordance with the general view amongst Danish scholars (Germer, 2012, pp. 109–110). Although all essential elements must be provided for in the enabling tax statute, the *Scharla Nielsen case* established that – under certain circumstances concerning implementing measures – the tax rate itself does not necessarily need to be defined in the enabling statute. However, while case law permits delegation of the statistical-methodological choice, the basic calculation framework must surely follow from the statute in order to satisfy the requirement in section 43 (Christensen, 2015, p. 299).

As mentioned, a strict literal interpretation of the phrase "except by statute" in section 43 would indeed suggest that no delegation is permissible. Nonetheless, Danish scholars argue that under specific circumstances there might be a need for quite broad implementing measures. In this context, it is important to emphasize the weight in Danish constitutional law given to legislative practice and the practical needs in the tax area (Germer, 2012, pp. 109–110). Former constitutional law professor and judge in the *Scharla Nielsen case*, J.P. Christensen, commented the ruling, stating that the decision is in accordance with the notion that the legislator should decide fundamental tax matters. However, as Christensen argues, the extent of the non-delegability rule in section 43 should be determined with due regard to the practical realities of lawmaking (Christensen, 2011, p. 72) .

Additionally, the development in Denmark in the middle of the nineteenth century is of importance to the understanding of the constitution's stipulations on tax.[12] Preceded by an absolute monarchy, section 43 from 1849 intended to secure the legislator the taxing power. This power was highly relevant in the Danish constitutional system in the period before 1901, at a time where the legislator in Denmark did not enjoy the control functions and insight with the administration, e.g. the possibility of a no confidence vote, which the parliament has today (Christensen, 2011, pp. 64, 69) . The placement of section 43 indicates that not individuals but the parliament itself is the object of the protection provided in section 43 (Christensen, 2011, pp. 69–70).[13] Thus, neither the specific historical background for the non-delegation doctrine in section 43 nor the context of section 43 support a strict literal interpretation. It is true that a strict interpretation might provide a minority in parliament with the protection secured by the thorough legislative process that applies for adopting statutes

[12] *Section 43: »No taxes shall be imposed, altered, or repealed except by statute; nor shall any man be conscripted or any public loan be raised except by statute.« Section 46(1): (1) »Taxes shall not be levied before the Finance Act or a Provisional Appropriation Act has been passed by the [parliament].«*

[13] *Christensen points to, inter alia, the fact that section is placed in chapter 5 in the constitution, which contains provisions on parliament and the legislative process, and not chapter 8 on the protection of individuals. In addition, he points to restraint generally exercised by the Danish Supreme Court in cases on constitutional provisions regulating the relations between the parliament and the administration. This restraint supports the argument that legislator should enjoy a margin of appreciation when it comes to the determination of the extent of the prohibition of delegation.*

(Germer, 2012, p. 109). Although this view is sympathetic, it seems inadequate to justify a strict reading of section 43 (Christensen, 2011, p. 70). As pointed out by the lawyer representing the government in the *Scarla Nielsen case*, the constitution should not be understood as requiring a tax statute to be a textbook in statistics (Christensen, 2011, p. 72). In the light of the practical realities of lawmaking pointing to the same result as the background and context of section 43, it is thus difficult to see how a court could have found the statute in question incompatible with section 43.

3.3 MUNICIPALITY TAXES AND SECTION 43

The municipality tax area holds a special position in terms of the delegation of taxing powers. According to section 82, the right of the municipalities to manage their own affairs independently - under state supervision - shall be laid down by statute. With reference to section 82, some scholars have concluded that case law suggests that the non-delegability rule in section 43 does not apply to municipality taxes (Pedersen, 2006, p. 320; Sørensen & Germer, 1973, p. 207); others find that there is a particularly broad access for the legislator to delegate to the municipalities certain taxing powers regarding local municipality taxes (Germer, 2012, p. 110; Zahle, 2001, pp. 375–376) .

The Supreme Court has never explicitly touched upon the relationship between the non-delegability rule in section 43 and tax rates determined by the municipalities (Christensen, 2011, p. 67). However, due to section 82, it seems unlikely that the courts should overrule the long-standing practice of the delegation of taxing powers to the municipalities.

4 INTERPRETATION OF TAX PROVISIONS

As mentioned above, it can be deduced from section 43 of the constitution that the tax authorities are only allowed to impose taxes if a statutory basis for taxation can be found. Even though this is a common principle among most jurisdictions, it is not always clear what interpretational consequences the application of such a principle should have (if any) (Vanistendael, 1996). The principle could perhaps be seen to mean that the courts should not extend the wording of a tax statute to impose a tax in circumstances where the language of the law does not clearly prescribe that taxation should take place, i.e. the principle could be perceived to dictate that a literal or strict interpretation should be made instead of a teleological or analogical interpretation. However, if courts should always restrict themselves to a literal or strict interpretation of tax statutes, it may conflict with other principles or aims such as the principle of equality or the need to mitigate tax avoidance.[14]

This aspect of the principle of legality has also caused debate in a Danish context. The debate was particularly intense in the late 1990s after the Supreme Court had decided against the Danish Ministry of Taxation in a number of prominent cases.[15] As a consequence of the lost cases, the ministry published an announcement in which it was concluded that the Supreme Court by its decisions had underlined that a clear statutory legal basis is a precondition for imposing tax. The ministry also argued that the Supreme Court's decisions apparently showed – at least with respect to situations not involving avoidance and abuse – that the interpretation of tax statutes cannot be extended beyond what is actually stated in the wording of the statute and perhaps also in the *travaux préparatoires*. In continuation of

[14] *Ibid.*

[15] *See for example the Supreme Court's decision of 20 August 1996 (TfS 1996.642H), the Supreme Court's decision of 30 August 1996 (TfS 1996.653H) and the Supreme Court's decision of 14 August 1996 (TfS 1996.654H). See also P.K. Schmidt, Legal Pragmatism – A Useful and Adequate Explanatory Model for Danish Adjudication on Tax Avoidance, Nordic Tax Journal (2020 – ahead of print) and P.K. Schmidt, Retspragmatisme og skatteundgåelse, Kritisk Jus 3, 2020, p. 207-220.*

this, the ministry also deduced that uncertainty concerning the scope or reach of a provision normally should entail that the provision should be subject to an expansive interpretation, if this is in the interest of the taxpayer.[16]

That taxation presupposes a clear statutory basis has also been advocated in the Danish scholarly literature. *Jan Pedersen* has for example argued that section 43 of the constitution prescribes such a requirement. (Pedersen, 2006, pp. 319–326)[17] However, at the same time the author added that the requirement does not prevent interpretation based on analogy and that interpretation of tax legislation does not differ from the interpretation of other kinds of administrative law.[18] When these modifications are taken into account, it becomes quite hard to see what is actually left of the postulated requirement for a clear statutory basis.[19]

In a dissertation from 2003, *Jakob Graff Nielsen* initially classified section 43 of the constitution as belonging to a broader group of legal areas where a requirement of clear statutory basis has to be respected (e.g. criminal law and legislation interfering with citizens' private life). (Nielsen, 2013, p. 264). However, after a thorough examination of court cases related to taxation, he concluded that case law concerning this matter was nuanced and that the requirement of clear statutory basis was not absolute. Moreover, he argued that analogical interpretation is possible and that there is no maxim according to which tax legislation has to be interpreted in favor of the taxpayers or in favor of the tax authorities (Christensen, 2011, p. 354). Accordingly, with respect to Jacob Graff Nielsen's findings, it could be argued that it is difficult to see what is actually left of the postulated requirement of a clear statutory basis.[20]

Jens Peter Christensen has criticized the views originally presented by both Jan Pedersen and Jakob Graff Nielsen (Christensen, 2011, pp. 72–75, 2015, p. 297). Thus, Jens Peter Christensen argues that it would be more appropriate to state that section 43 of the constitution does not say anything about how clear the statutory basis should be. Secondly, the courts' assessments of the requirement for a clear statutory basis varies to such a degree that abstract assertions about the existence of such requirement do not make sense. What matters according to customary administrative law is the extent or intensity of the specific government interference and not the fact that the interference generally could be categorized as a matter of tax. Thus, tax legislation should be interpreted along the same lines as other kinds of legislation interfering with for example the citizens' private lives. Jens Peter Christensen places emphasis on the fact that the underlying aim of section 43 of the constitution historically was to regulate the power relationship between the parliament and the administration. Hence, the main idea behind article 43 was, as also mentioned in section 3.2, not to provide protection for the individual citizens but to regulate the relationship

[16] *For more about the case law of the Supreme Court in late 1990'ies see also I.A, Strobel, Skattevæsenets problemer med lovhjemmel, Skattepolitisk oversigt, p. 134 et seq. (1998), J. Pedersen, Virksomhed i selskabsform, Revision & Regnskabsvæsen SM, p. 307 et seq. (1998), N. Schiersing, Om hjemmelsspørgsmålet i skattesager, Skattepolitisk oversigt, p. 61 et seq. (1999), A. Michelsen, Legalitetsprincippets bæredygtighed over for transaktioner foretaget udelukkende eller hovedsagelig i skattebesparelsesøjemed, Revision & Regnskabsvæsen SM, p. 150 (1999), and Erik Werlauff, Let us pretend, Tidsskrift for skatter og afgifter 237 (1999).*

[17] *See also J. Pedersen, Grundlovens § 43: "Ingen skat kan pålægges, forandres eller ophæves uden ved lov" – pas, kørekort og nummerpladegebyrer, Tidsskrift for skatter og afgifter, p. 413 et seq. (1992).*

[18] *References were made to the Supreme Court's decision of 17 May 1940 (UfR 1940 644 H), the Supreme Court's decision of 20 December 1979 (UfR 1980 121 H) and the Supreme Court's decision of 19 March 1996 (UfR 1996 775 H).*

[19] *See the criticism by Jens Peter Christensen. (Christensen, 2011, pp. 72–75)*

[20] *In his review of the dissertation, Henrik Dam argues that the results of Jakob Graff Nielsen's analyses should have caused the author to reach the more bold conclusion that article 43 of the constitution does not say anything about how clear the statutory basis should be. See H. Dam, Legalitetskravet ved beskatning, Ugeskrift for retsvæsen B, p. 290-291 (2003).*

between the institutions of government.[21] In our view, the conclusions presented by Jens Peter Christensen appear convincing.[22]

4.1 ABUSE AND AVOIDANCE – THE DOCTRINE OF REALITY?

Until recently, no statutory general anti-avoidance rule (GAAR) existed in Danish tax law.[23] However, this did not mean that abuse of tax law could not be mitigated by the tax authorities as Danish case law contains several examples where courts have struck down the arrangements of a taxpayer, inter alia, by taking the substance of the transaction(s) into account when interpreting and applying the law (Madsen & Norgaard Laursen, 2018). In this context, the so-called *doctrine of reality* has been formulated in the academic literature to explain the longstanding inclination of the courts to place emphasis on the substance of the transaction when interpreting and applying tax provisions (Pedersen, 1989).[24] Briefly described, the doctrine states that fictitious or artificial transactions may be set aside for tax purposes if the formal private law basis of an arrangement has been manipulated to such an extent that the underlying substance of the transaction significantly deviates from the outer legal shell.[25]

However, not all scholars agree that an actual coherent doctrine of reality can be considered to exist in Danish tax law. Broadly speaking, these scholars instead argue that the inclination of the courts to place emphasis on the substance of an arrangement simply follows ordinary rules for interpretation of the law, according to which the existence of abusive behavior constitutes one of several elements that may be taken into account in the interpretation process, often with significant weight attached to it.[26] Accordingly, in the eyes of these scholars, the existence of a doctrine of reality would be hard to reconcile with the requirement for a statutory basis for taxation prescribed in article 43 of the constitution. (Madsen & Norgaard Laursen, 2018)[27]

Finally – and as a kind of an intermediary position – it has been argued that the Danish Supreme Court's interpretation and application of the law in cases on tax avoidance exhibit an inclination towards legal pragmatism, in particular because the Court has shown

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[21] *In the same vein see also N. Winther-Sørensen, Beskatning af international erhvervsindkomst (Thomson Gad Jura 2000), p. 52 et seq. and same author in Hjemmelsgrundlaget for Skats instruks om sagstilskæring, SR-Skat, p. 293 et seq. (2018).*

[22] *In this context, it is worth noting that Jan Pedersen seems to have abandoned his previous position. Accordingly, in an article from 2014 he has stated that it is a common misconception that article 43 of the constitution prescribes a stricter requirement for statutory basis within the area of tax law. See J. Pedersen, Domstolsprøvelse af skattesager – retssikkerhed, statistik og retsanvendelse, Ugeskrift for retsvidenskab B, p. 251 et seq. (2014).*

[23] *See also P.K. Schmidt, Abuse and Avoidance – a contemporary analysis of Danish tax law, Revue européenne et international de droit fiscal 4, p. 489-499 (2018) with references.*

[24] *See also J. Pedersen, Danish Branch Report in 87a Cahiers de droit fiscal international (International Fiscal Association ed., Kluwer Law International 2002).*

[25] *See also J. Pedersen, Omgåelse og misbrug i skatteretten – før, nu og i fremtiden, in Den Evige udfordring – omgåelse og misbrug i skatteretten (J. Bundgaard et al. eds., ExTuto 2015), p. 107-133.*

[26] *For critisism of the doctrine of reality see for example Isi Foighel, Anmeldelse af: "Skatteudnyttelse af Jan Pedersen", Revision & Regnskabsvæsen 5 (1990), p. 60-62 (1990), T. Nielsen, Den evige udfordring in Dansk Skattevidenskabelig Forening 1965-1990 (S. Askholt ed., at p. 46-69 (1990), Aa. Michelsen, Misbrug og omgåelse i dansk indkomstskatteret in Den Evige udfordring – omgåelse og misbrug i skatteretten, (J. Bundgaard et al. eds., ExTuto 2015), at p. 135-153, Nielsen, supra, n. 6, p. 347, H. Dam, Rette Indkomstmodtager – allokering og fiksering (Forlaget Thomson 2005), at p. 451 et seq. and S.F. Hansen, Realitetsgrundsætningens naturgivne retsusikkerhed, Ugeskrift for Retsvidenskab B 378 (2008). However, among others former Supreme Court Judge Jørgen Nørgaard has shown support for the doctrine of reality. See. J. Nørgaard, Højesterets rolle i skattesager, Juristen 2 (2001), p. 65-69. Also J. Bundgaard, Skatteret & civilret (Forlaget Thomson 2006), at. p. 558, has shown support for the doctrine of reality. Moreover, another Supreme Court judge, Jon Stokholm, has argued that it seems to be a matter of taste whether the doctrine of reality should be acknowledged or dismissed. See J. Stokholm, Højesterets funktion på skatteområdet siden ca. 1960 in Højesteret 350 år (P. Magid et al. eds., Gyldendal 2011), at p. 391.*

[27]. *In this regard Madsen & Laursen also highlights that the courts are careful not to exercise activities that may create law if the legislature has sought to exhaustively regulate an area, as for example seen in the Supreme Court's decision of 7 December 2006, SKM2006.749.HR. However, against the criticism Jan Pedersen has argued that the doctrine of reality only concerns the preceding determination of the facts and therefore that no statutory basis is needed in order to apply the doctrine. See J. Pedersen in J. Pedersen et al., Skatteretten 1 (Karnov Group 2019), p. 136-138.*

willingness to attach significant weight to features such as (lack of) commercial grounds, reality, economic risk and systemic consequences. This may be overlooked if the Court's approach to tax avoidance is trivialized as instances of ordinary interpretation, or oppositely placed on a pedestal and conceived as a consequent application of a court-developed general anti-avoidance rule (Schmidt, 2020a, 2020b).

Despite these disagreements in the literature, it appears to be a commonly accepted fact that the courts are willing to take abusive behavior into consideration when interpreting tax provisions and that this practice does not violate the principle of legality. In recent years, at least two decisions from the Supreme Court appear to illustrate this willingness of the courts to place emphasis on abusive behavior. In a decision from 2014, the Supreme Court thus concluded that losses "manufactured" for tax reasons could not be deducted because no *real* losses had been suffered.[28] Further, in a decision from 2015 concerning the tax rules applicable in the Faeroe Islands, the Supreme Court decided to set aside an arrangement involving a merger of two holding companies. [29]

4.2 THE NEW STATUTORY GENERAL ANTI-AVOIDANCE RULES

In 2015, Denmark introduced a general anti-avoidance rule (GAAR) aiming at mitigating corporate taxpayer abuse of certain EU directives as well as Danish tax treaties.[30] Additionally, in December 2018, Denmark implemented the GAAR prescribed in the EU Anti-Tax Avoidance Directive (ATAD).[31]

The scopes of the new GAARs are not particularly clear. Consequently, even though the new GAARs may assist the Danish tax authorities in their quest to mitigate abuse and avoidance, it should not be overlooked that the GAARs have brought additional complexity into Danish tax law and that the GAARs have deteriorated the possibility of taxpayers to predict the consequences of their transactions (Schmidt, 2018) . In this context, it seems appropriate to consider whether the new GAARs are in line with the principle of legality set out in section 43 of the constitution.[32]

However, this concern could be quickly rejected if it is correct to assume, as concluded above, that section 43 of the constitution does not say anything about how clear the statutory basis must be. Moreover, the new GAARs do in fact contain a number of conditions – objective as well as subjective – that should be fulfilled before the tax authorities can invoke the GAARs. In other words, the GAARs do not assign the tax authorities and the courts with an unlimited discretionary power to mitigate tax avoidance. Finally, if the court-developed practice (on taking abusive behavior into account in the interpretation process) is not in conflict with the principle of legality, it strongly suggests that a statutory GAAR adopted by the parliament should neither be seen as breaching this principle.

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[28] *Danish Supreme Court [Højesteret], 11 June 2014, SKM2014.422.HR (Topdanmark). See also A.R. Vang & T. Booker, Kapitalforhøjelse – realitet eller formalitet, Tidsskrift for Skatter og Afgifter 473 (2014).*

[29] *Danish Supreme Court [Højesteret], 31 March 2015, SKM2016.16.HR (Ferø-sagen). See also J. Bolander & P.K. Schmidt, Retssikkerhed og omgåelse i skatteretten in Den Evige udfordring – omgåelse og misbrug i skatteretten (J. Bundgaard et al. eds., ExTuto 2015.), at p. 23-52. It should be noted that there are significant differences between the level of detail of the tax legislation in Denmark and the Faroe Islands. Accordingly, it is not clear to what extent the decision can be relied on as a precedent in purely with respect to purely Danish tax law. (Bundgaard & Schmidt, 2017)*

[30] *Section 3 of the Tax Assessment Act. Law no. 540 of 29 April 2015. See also Bill no. L 167 (2014/2015).*

[31] *Law no. 1726 of 27 December 2018. See also Bill L 28 (2018/2019).*

[32] *During the legislative process, however, no such discussions appear to have taken place. Generally speaking, Jan Pedersen has argued that a GAAR may be given such a broad wording that the scope of the GAAR cannot be properly deduced. In such a case the principle of legality is in his view reduced to an empty formality. See J. Pedersen, supra, n. 53, p. 118. In addition, Aage Michelsen has from a constitutional perspective argued that it could be questioned whether it is appropriate to leave the job of assessing these often value-laden and politically sensitive situations to the tax authorities. See A. Michelsen, Er der behov for en generel omgåelsesklausul i skatteretten?, Skattepolitisk oversigt, p. 96 et seq. (1984).*

In the literature, *Peter Rose Bjare* and *Søren Sønderholm* has recently questioned whether the GAAR from December 2018 should be considered incompatible with the non-delegation doctrine in section 43 of the constitution interpreted in connection with the clause on separation of powers in section 3. The authors essentially argue that the GAAR adopted by the Parliament in 2018 may constitute a transfer of legislative power to the administration, as the provision contains such vague language that the tax administration may in effect exercise power equivalent to legislative power.[33]

However, because the 2018 GAAR does contain a number of conditions that should be fulfilled before the GAAR can be invoked, it seems quite unlikely that the Danish Supreme Court would find that the GAAR constitutes an unconstitutional transfer of legislative power to the tax authorities. Some of the conditions are indeed vague and subjective,[34] but similar critique applies to innumerable other legal standards in Danish legislation. While it remains difficult to define the acceptable limits of vagueness in tax law, vague statutory language does not itself amount to delegation of legislative power to the administration (Dourado, 2014, Chapter 10).

A general shortcoming in the argument put forward by *Bjare* and *Sønderholm* is that no support can be found for their argument in the wording or the *travaux préparatoires* to section 3 and 43 of the constitution. Indeed, neither the parliament nor the administration considered the 2018 GAAR to have constitutional implications.[35]

Nevertheless, during a debate in parliament in 1992, the Danish Minister of Taxation argued that a proposal from a Member of Parliament on a GAAR would in effect constitute taxation without sufficient statutory legal basis. According to the minister, the proposed GAAR would thus lead to an unconstitutional transfer of legislative power to the tax authorities.[36] However, while the explanation and assessment in the *travaux préparatoires* to a relevant act are highly significant in a Danish constitutional context,[37] a minister's remarks during a debate usually hold limited legal value.[38]

5 CONCLUDING REMARKS

Some tax law scholars have claimed that a particular requirement for a clear statutory basis for imposing tax follows from section 43 of the Danish constitution. Meanwhile, constitutional scholars have typically rejected the notion that a requirement for a clear statutory basis follows from the constitution. Instead, they argue that the general administrative law requirement for a clear statutory basis also applies with respect to Danish tax law. Thus, what matters according to customary administrative law is the extent or intensity of the specific government interference and not the fact that the interference generally could be categorized as a matter of tax law.

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[33] *P.R. Bjare, S. Sønderholm, Den nye generelle omgåelsesregel i ligningslovens § 3, SR-Skat 2019.110 referring to the transfer of power to The Tax Council (Skatterådet) with the purpose of closing 'loopholes' in Danish tax law.*

[34] *The most striking example of vagueness is the assessment regarding the question of to which extent the arrangement is opposed to the purpose and aim of statutory tax law.*

[35] *Law no. 1726 of 27 December 2018. See also Bill L 28 (2018/2019).*

[36] *See Debate in Parliament November 26 1992, Folketingstidende, Forhandlingerne 1992/1993, columns 2638-2640. The Minister of Taxation also found that the proposed GAAR would be incompliant with fundamental principles on legal certainty.*

[37] *In a Danish bill, the relevant ministry typically explains and assesses the potential impact of proposed statute. As mentioned, neither the Parliament nor the administration considered the 2018 GAAR to have constitutional implications.*

[38] *Notable in this context is the minister's explicit assumption that the specific GAAR proposal from 1992 de facto amounted to taxation without statutory legal basis, as the minister demonstrated no support for the notion that taxation based on a GAAR equates to taxation without statutory legal basis. The assumption appears mostly political and illustrates why arguments in the political debate generally are without significance in Danish constitutional law. Moreover, neither scholars nor the Ministry of Justice responsible for Danish constitutional law matters endorsed the minister's view expressed in the debate in 1992.*

Section 43 of the Danish constitution is the most important constitutional rule on tax. The provision is understood as a prohibition on legislative delegation in the tax area. However, the courts have approached the non-delegation doctrine pragmatically, accepting important modifications regarding both the practical realities of lawmaking and the long-standing practice of delegation of certain taxing powers to the municipalities.

Finally, in view of the authors the new GAARs introduced in Denmark in 2015 and 2018 should not be considered in breach of neither the principle of legality set out in section 43 of the constitution nor the non-delegation doctrine, although the new rules rightfully have received criticism for lacking an adequate level of predictability.

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Article

Constitutional Norms in French Tax Law

Bastien Lignereux

Maître des requêtes au Conseil d'Etat. Conseiller fiscalité chez Représentation Permanente de la France auprès de l'Union Européenne. Former Lecturer of public finance at Sciences Po Paris and Ecole Nationale d'Administration. Email: bastien.lignereux@gmail.com

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KEYWORDS:

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

ABSTRACT:

In France, a Constitutional Tax Law has been built from the activity of the Constitutional Council, during the last decades. The French Constitution does not offer an exhaustive statute of tax regulations, however the activity of this judicial body has allowed the development of a constitutional doctrine in the tax field, making use of the constitutional preamble. This paper seeks, first of all, to explain the scope of these different principles (equality, freedom rights, right to private life, right to legal defense, etc.) and their impact on tax reforms, both in terms of It refers to the substantive rules that govern the calculation of the tax, as well as the rules of tax procedure. Secondly, it tries to present the different ways in which, in France, tax provisions can be submitted to the control of the constitutional judge, and the scope of the decisions that he is called upon to issue.

PALABRAS CLAVES:

constitución política; sistema tributario; principios tributarios; derechos de los contribuyentes; jurisprudencia constitucional.

RESUMEN:

En Francia se ha ido construyendo un Derecho Constitucional Tributario a partir de la actividad del Consejo Constitucional, durante las últimas décadas. La Constitución francesa no ofrece un estatuto exhaustivo de normas tributarias, sin embargo la actividad de ese órgano judicial ha permitido desarrollar una doctrina constitucional en el ámbito tributario, haciendo uso del preámbulo constitucional. Este paper busca, en primer lugar, explicar el alcance de estos diferentes principios (igualdad, derechos de libertad, derecho a la vida privada, derecho a la defensa judicial, etc.) y su impacto en las reformas tributarias, tanto en lo que se refiere a las normas sustantivas que rigen el cálculo del impuesto, como a las normas de procedimiento tributario. En segundo lugar, intenta presenta las diferentes formas en que, en Francia, las disposiciones tributarias pueden someterse al control del juez constitucional, y el alcance de las decisiones que éste está llamado a dictar.

MOTS CLES :

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

RESUME :

En France, une loi fiscale constitutionnelle s'est construite à partir de l'activité du Conseil constitutionnel, au cours des dernières décennies. La Constitution française ne propose pas un statut exhaustif de la réglementation fiscale, cependant l'activité de cet organe juridictionnel a permis l'élaboration d'une doctrine constitutionnelle en matière fiscale, s'appuyant sur le préambule constitutionnel. Cet article cherche, dans un premier temps, à expliquer la portée de ces différents principes (égalité, liberté, droit à la vie privée, droit à la défense, etc.) et leur impact sur les réformes fiscales, tant du point de vue de la les règles de fond qui régissent le calcul de la taxe, ainsi que les règles de procédure fiscale. Dans un deuxième temps, il tente de présenter les différentes modalités selon lesquelles, en France, les dispositions fiscales peuvent être soumises au contrôle du juge constitutionnel, et la portée des décisions qu'il est appelé à rendre.

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1 INTRODUCTION

Since the 1970s and 80s, a “constitutional tax law” has emerged in France, resulting from the interpretation of the Constitution by the Constitutional Council and its comparison with the tax laws submitted to it.

At first reading, the text of the Constitution of October 4, 1958 may seem almost without impact on tax reforms, because most of its provisions govern the relationship between public authorities. It thus only mentions tax in its article 34, which gives the legislator exclusive competence to set the tax rules, in its article 47 relating to the procedure for adopting finance laws (which set the annual budget of the State) and, since a revision of 2003, in its article 72-2 under the terms of which the local authorities can collect all or part of the taxes.

However, the case law of the Constitutional Council has gradually led to the “discovery” of many constitutional principles governing tax rules – both substantive and procedural – for two reasons. On the one hand, from a founding decision of July 16, 1971, it conferred constitutional value on the various texts to which the Preamble of the Constitution of 1958 refers, beyond its very text. These are the Declaration of the Rights of Man and of the Citizen in 1789, a declaration of economic and social rights appearing in the preamble of the old Constitution of 1946 and, finally, the "fundamental principles recognized by the laws of the Republic”, which are the principles constantly observed by republican laws. On the other hand, the Constitutional Council has developed a dynamic and even constructive interpretation of these texts, by updating their reading in the light of changes in society. Thus, from article 16 of the Declaration of 1789 which lays down the principle of "guarantee of rights", he deduced respect for the right to recourse, the rights of the defense, and even recently a protection of " legitimate expectations” of litigants.

This contribution aims, firstly, to explain the scope of these different principles and their impact on tax reforms, both in terms of the substantive rules governing the calculation of tax, and the rules of tax procedure. Secondly, it presents the different ways in which, in France, tax provisions can be submitted to the control of the constitutional judge, and the scope of the decisions that the latter is called upon to render [1].

2 CONSTITUTIONAL NORMS GOVERNING TAX RULES

2.1 THE PRINCIPLE OF EQUALITY, THE MAIN STANDARD GOVERNING THE DETERMINATION OF THE AMOUNT OF TAX DUE

The principle of equality is, by far, the constitutional principle that constrains tax reforms the most. It is also the principle most often invoked by parliamentarians and taxpayers when they challenge the tax law, and frequently leads to its censorship. The other constitutional rights and freedoms are, in practice, irrelevant to the rules for determining the tax. For example, if case law agrees to control compliance with the right to property by tax law, it has rendered its invocation useless in relation to that of the principle of equality: either the law imposes an excessive burden on the taxpayer, and then it is censured for ignorance of equality (without any need to invoke the right of property); or it respects the contributory faculties, and then the invocation of the right of property is set aside as a consequence of that of equality [2].

In French constitutional law, the principle of equality has two branches that should be clearly distinguished. On the one hand, equality before the law precludes the legislator

[1] *For a more detailed account, cf. B. Lignereux, Summary of constitutional tax law , Lexisnexis, 2020.*

[2] *See e.g. cons. const., 29 dec. 1998, n° 98-405 DC, Finance Law for 1999 , considering. 23.*

from treating differently two categories of taxpayers placed in an identical situation with regard to the objective it pursues. This branch results from Article 6 of the Declaration of Rights of 1789, which provides that the law "must be the same for all, whether it protects or punishes". On the other hand, equality before public charges implies that the contributory faculties of those liable for tax be taken into account. Unlike equality before the law, this branch does not necessarily require a comparison between categories of taxpayers. It is deduced from article 13 of the Declaration of 1789, according to which the common contribution "must be equally distributed among all citizens, by reason of their faculties".

2.1.1 Equality before the law

Equality before the law leads to verifying whether any difference in tax treatment is justified by a difference in situation or by an objective of general interest in relation to the object of the law. The case law of the Constitutional Council thus retains that "The principle of equality does not preclude the legislator from regulating different situations differently, nor from derogating from equality for reasons of general interest, provided that, in either case, the resulting difference in treatment is directly related to the object of the law which establishes it [3].

This principle prohibits first of all treating differently, without justification, taxpayers who are in the same situation. Thus, the Constitutional Council did not allow the law to grant a tax reduction to salaried workers, to the exclusion of non-salaried workers, since this reduction was intended to promote the activity of all workers [4]. This principle also prohibits unjustified differences between base elements (categories of income, property, transactions, etc.). The Constitutional Council thus censured a law which exempted severance pay only when it was allocated by virtue of a judgment, whereas that which is paid in application of a transaction or an arbitration award, which is taxable, is not were not in a different situation [5].

On the other hand, the principle of equality before the law does not oblige different situations to be treated differently: it is open to the legislator to apply the same tax regime to taxpayers placed in different situations. The Constitutional Council has consistently held that although the principle of equality requires in principle that people who are in the same situation be treated in the same way, "it does not follow from this that the principle of equality requires treat people in different situations differently [6]. In this, French constitutional law differs from the law resulting from the European Convention on Human Rights: the requirement of non-discrimination [7] resulting from the combined stipulations of its Article 14 and Article 1st of its Additional Protocol may be usefully invoked to maintain that the tax law is the source of unjustified discrimination between taxpayers [8]. For example, seized in 1999 of the law relating to the civil pact of solidarity (PACS), the Constitutional Council rejected the challenge of the parliamentarians petitioners who saw a breach of

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[3] *See Cons. const., 7 Jan. 1988, no. 87-232 DC, Pooling of the national agricultural credit fund , consider. 10. The requirement of a "direct" relationship between the difference in treatment and the object of the law was only added in 1996 with the decision Cons. const., 9 Apr. 1996, no. 96-375 DC, Law containing various economic and financial provisions , recital. 8.*

[4] *cons. const., 29 dec. 2015, n° 2015-725 DC, Finance Law for 2016 , considering. 28: "the legislator has thus treated differently people who find themselves in identical situations since under article L. 841-1 of the Social Security Code are eligible for the activity bonus "workers in modest resources, whether salaried or self-employed".*

[5] *cons. const., Sept. 20, 2013, No. 2013-340 QPC, Mr. Alain G. , cons. 6. The official comment states that "On the constitutional level, the Constitutional Council considered that the fact of having or not having let the employment contract judge decide does not constitute a difference in situation in line with the difference in treatment with regard to tax law between the compensation received by employees whose employment contract is terminated".*

[6] *Decision no. 2003-489 DC of December 29, 2003, Finance Law for 2004 , considering. 37.*

[7] *See , for example, ECHR, 6 Apr. 2000, no. 34369/97, Thlimmenos v. Greece , para. 44, holding that a State cannot without justification refrain from applying different treatment to persons whose situations are significantly different.*

[8] *CE, ass., opinion, April 12, 2002, no. 239693, Labeyrie financial SA , concl. F. Seners.*

equality in the choice of the legislator to apply the same regime joint taxation for spouses and PACS partners when, according to their grievances, the former were in a different situation due to the recognition of marriage as the founding element of the family [9].

The control of compliance with equality before the law is particularly thorough when a behavioral tax measure is in question. Indeed, the requirement that tax differentiations be "directly related to the purpose of the law" leads the Constitutional Council to verify whether the scope of incentive tax benefits and dissuasive taxes is fully consistent with the objective they continue. Thus, in a resounding manner, in 2009 it censured a "carbon tax" project on the grounds that the legislator had exempted many economic sectors from it, without justification with regard to the objective of reducing CO2 emissions pursued:[10] to be consistent with its behavioral objective, a dissuasive tax must embrace all the harmful behaviors targeted. The tax should not be too broad either: hitting taxpayers who have not adopted the harmful behavior targeted would be inconsistent. For this reason, in 2000 the Constitutional Council censured the extension to electricity of a "general tax on polluting activities" since the objective of the tax was to "combat the greenhouse effect". and "that due to the nature of the sources of electricity production in France, the consumption of electricity contributes very little to the release of carbon dioxide and makes it possible, by replacing that of fossil energy products, to fight against "greenhouse effect" [11].

2.1.2 Equality before public offices

Equality before public office has, in the case law of the Constitutional Council, a different scope from equality before the law. Indeed, it leads to verifying whether the legislator has adequately taken into account the contributory faculties of taxpayers. Unlike equality before the law, it presupposes not a comparison between two categories of taxpayers, but an examination *per se* of the level of tax burden borne by a category of taxpayers.

The requirement to take contributory faculties into account, applicable to both personal and corporate taxation, first leads to a control of the type of base chosen by the legislator. The choice of base is in principle free, except for a manifest error of assessment: the Constitutional Council rules that "it is up to the legislator to determine, in compliance with constitutional principles and taking into account the characteristics of each tax, the rules according to which must be assessed the contributory faculties of taxpayers" [12]. To date, it has only once invalidated the base chosen by the legislator, by a decision which reminds us that the latter must be consistent with the nature of the activity or of the chargeable event imposed. Indeed, examining a law which intended to allow municipalities to introduce a tax on seasonal activities based on the surface in square meters used by them, applicable for the year from the first day of installation, the Council judges "that 'by not taking into account the duration of installation in the commune of non-sedentary commercial activities, the legislator disregarded, in this case, the principle of equality before public charges' [13].

However, the control of the base goes further since, when the legislator decides to tax income or property, the Constitutional Council verifies that the latter is indeed available to the taxpayer. It is a question of verifying the existence of a real contributory faculty: the

[9] *cons. const., Nov. 9, 1999, no. 99-419 DC, Law relating to the civil solidarity pact , recital. 41 and 42.*

[10] *cons. const., 29 dec. 2009, n° 2009-599 DC, Finance Law for 2010 , considering. 81 and 82.*

[11] *cons. const., 28 dec. 2000, n° 2000-441 DC, Amending Finance Law for 2000 , consider. 35 to 38.*

[12] *cons. const., 30 dec. 1981, n° 81-133 DC, Finance Law for 1982 , consider. 6.*

[13] *cons. const., 29 dec. 1999, no. 99-424 DC, Finance Law for 2000 , consider. 49.*

legislator cannot tax an income which is only latent, or uncertain. Thus, if the Council allowed the taxation of income from life insurance contracts at a date when they are not yet definitively acquired, it is because the law provided for the reimbursement to the taxpayer of any overpayment if , at the time of the effective realization of the income (that is to say in this case of the outcome or the repurchase of the contract), the tax due is lower than what has been paid; it also requires that the taxpayer can claim default interest in this case [14]. Moreover, for the taxation of capital gains from the sale of assets, it requires that monetary erosion be taken into account: the legislator cannot tax the gross capital gain, which is greater than the income actually realized taking into account of inflation [15].

The requirement to take into account the contributory faculties is not limited to the control of the tax base: it also involves a control of the rate which affects it. The Constitutional Council judges in fact "that this requirement would not be respected if the tax were of a confiscatory nature or placed an excessive burden on a category of taxpayers with regard to their ability to pay" [16]. In this respect, in 2012 it clarified its method of controlling the confiscatory nature of taxes weighing on income: it adds up all the taxes likely to affect the same income, considering each one at its maximum marginal rate. This is the so-called "millefeuille and marginal rate" method. When the maximum overall rate thus obtained exceeds approximately 66%-75% of the income, it deems the tax confiscatory [17], except if it is a tax intended to combat fraud or tax evasion [18].

Finally, when the legislator decides to apply a substantial rate for the taxation of assets, the Constitutional Council requires that the tax be capped according to the income of the person liable [19].

2.2 THE RIGHTS AND FREEDOMS THAT TAX PROCEDURES AND SANCTIONS MUST RESPECT

The rules of procedure and tax penalties are, of course, also subject to the principle of equality : it is here essentially equality before the law that applies. The Constitutional Council in fact infers from Article 6 of the Declaration of 1789 "that, if the legislator can provide for different rules of procedure according to the facts, the situations and the persons to whom they apply, it is on the condition that these differences do not arise from unjustified distinctions and that litigants are guaranteed equal guarantees" [20].

But tax procedures and penalties are above all subject to a set of specific principles, which have no impact on the rules for determining the amount of tax.

2.2.1 Respect for privacy, home, personal data

First deducted from individual freedom [21]that article 66 of the Constitution places under the protection of the judicial authority, then attached since 1999 to the principle of freedom protected by article 2 of the Declaration of 1789, [22]the right to respect of private life

[14]*cons. const., Sept. 17, 2015, No. 2015-483 QPC, Jean-Claude C. .*

[15]*cons. const., 29 dec. 2013, n° 2013-685 DC, Finance Law for 2014 , considering. 46.*

[16]*See, for example, Cons. const., September 19, 2014, n° 2014-417 QPC, Sté Red Bull On Premise et a. , considering 10.*

[17] *cons. const., 29 dec. 2012, n° 2012-662 DC, Finance Law for 2013 , considering. 19, 81, 101.*

[18] *cons. const., 28 June 2019, n° 2019-793 QPC, Épx C ., paragr. 11.*

[19]*cons. const., August 9, 2012, no. 2012-654 DC, Amending Finance Law for 2012 , considering. 33.*

[20]*cons. Const., July 23 2010, n° 2010-15/23 QPC, Languedoc-Roussillon Region and a. , considering 4. – Cons. const., July 31 2015, n° 2015-479 QPC, Sté Gecop , consider. 13.*

[21]*cons. const., 18 Jan. 1995, no. 94-352 DC, Orientation law relating to security , considering. 3.*

[22]*cons. Const., July 23 1999, no. 99-416 DC, Law establishing universal health coverage , consider. 45.*

must be respected by the legislator when he defines the rules of procedure, and in particular of tax control. The Constitutional Council thus rules that "it is up to the legislator to ensure the reconciliation between, on the one hand, the exercise of the constitutionally guaranteed freedoms, among which is the right to respect for private life which derives from Article 2 of the Declaration of 1789 (…), and, on the other hand, the prevention of breaches of public order and the fight against tax evasion which constitute objectives of constitutional value" [23]. However, it only censures disproportionate infringements of this right with regard to the objective pursued [24]. Respect for privacy has many facets, in particular respect for the home and the protection of personal data, frequently questioned in tax matters.

Thus, as early as 1983, he censured for ignorance of the inviolability of the home the first attempt by the legislator to define a system of tax search. It notes that the provisions referred "do not clearly limit (...) the field open to investigations", "that they do not explicitly assign to the judge having the power to authorize the investigations of the agents of the administration the task of concretely verifying the merits of the request submitted to it" and "that they ignore the possibilities of intervention and control by the judicial authority in the course of the authorized operations" [25].

The right to respect for private life also governs the obtaining of data by the tax administration in order to facilitate the checks it carries out. With regard to data files, the Constitutional Council rules that "the collection, recording, storage, consultation and communication of personal data must be justified by a reason of general interest and implemented in a manner adequate and proportionate to this objective" [26]. In this regard, it validated, in 2019, the experimental collection of data on social networks by the tax administration, while specifying that this data could not be collected on the pretext of establishing an offense of which the administration has already knowledge [27]. The requirement to regulate the conditions of access to tax data files also implies the prohibition, in principle, of making them public: thus, in 2016, it censored the creation of a public register of trusts, deemed manifestly disproportionate to the aim of combating tax evasion and evasion pursued [28]. Moreover, as well as respect for private life, freedom of enterprise is an obstacle to the publication by name of data transmitted by companies to the tax administration: it is for this reason that the Constitutional Council censured, in 2016, the publication of "country-by-country declarations" of multinational groups, on the grounds that "the obligation imposed on certain companies to publish economic and tax indicators corresponding to their activity country by country, is likely to allow the all operators operating in the markets where these activities are carried out, and in particular their competitors, to identify the essential elements of their industrial and commercial strategy", and that "such an obligation therefore entails the freedom to undertake an infringement that is manifestly disproportionate to the objective pursued" [29].

[23] *cons. const., 4 dec. 2013, n° 2013-679 DC, Law relating to the fight against tax evasion and serious economic and financial crime , recital. 32.*

[24] *See, for example, Cons. const., 29 dec. 2013, n° 2013-684 DC, Amending Finance Law for 2013 , considering. 14.*

[25] *cons. const., 29 dec. 1983, n° 83-164 DC, Finance Law for 1984 , consider. 29 and 30.*

[26] *cons. const., March 22, 2012, no. 2012-652 DC, Law relating to the protection of identity , recital. 8.*

[27] *cons. const., 27 dec. 2019, n° 2019-796 DC, Finance Law for 2020 , par. 94.*

[28] *cons. const. · Oct. 21, 2016, No. 2016-591 QPC, Ms. Hélène S. , para. 6.*

[29] *cons. const., 8 dec. 2016, n° 2016-741 DC, Law on transparency, the fight against corruption and the modernization of economic life, par. 103.*

2.2.2 Rights of defense and right to appeal

If they are not explicitly proclaimed by the constitutional text, the rights of the defense were elevated to constitutional rank in 1976 [30], first as a "fundamental principle recognized by the laws of the Republic", then attached from 2006 to the guarantee of rights proclaimed by article 16 of the Declaration of 1789 [31]. The Constitutional Council thus judges "that article 16 of the Declaration of 1789 implies in particular that no sanction having the character of a punishment can be inflicted on a person without that person having been given the opportunity to present his observations. on the facts with which he is charged [32]. In several decisions, the Constitutional Council has also applied this principle to non-repressive administrative decisions of a certain gravity taken into consideration of the person [33]: its scope is therefore not limited to sanctions. It implies that, as soon as the taxpayer is accused of not having complied with his tax obligations, he can present his observations to the administration, before being subject, if necessary, to a tax adjustment and sanctions.

Like the rights of defence, the right to appeal is not explicitly proclaimed by any provision of the Constitution; the Constitutional Council deduced its constitutional value, in the mid-1990s, from the guarantee of rights protected by article 16 of the 1789 Declaration [34]. It considers that “it follows from this provision that, in principle, there should be no substantial interference with the right of the persons concerned to exercise an effective remedy before a court”. Thus, the decision to collect a tax contribution must be able to be contested by the person liable for it [35]. The same applies to the decision to pronounce a tax penalty [36]. The right to appeal must be open to any taxpayer, whether the taxpayer or his joint and several co-debtor: Thus, with regard to the solidarity of the business manager for the payment of tax fines, the Constitutional Council ruled "that the managers (...) jointly and severally liable for the payment of the penalty imposed on the company must be able to challenge both their status as joint and several debtor and the merits and the exigibility of the penalty and oppose the proceedings” [37]. Furthermore, the Constitutional Council has developed case law according to which the persons directly targeted by certain inspection operations adversely affecting them – these are mainly searches – must be able to have a direct appeal, without waiting for the rest of the procedure.

2.2.3 Framework for tax penalties: necessity, proportionality, non-retroactivity, etc.

Constitutional case law consistently accepts that the administrative authorities may be authorized to pronounce sanctions without the prior intervention of the judge, provided that the latter are exclusive of any deprivation of liberty [38]. No constitutional rule therefore precludes the tax administration from imposing pecuniary penalties on taxpayers without prior judicial authorization.

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[30] *cons. const., 2 dec. 1976, n° 76-70 DC, Law relating to the development of the prevention of accidents at work , recital. 2. See also Cons. const., 2 feb. 1995, n° 95-360 DC, Law on the organization of courts and civil, criminal and administrative procedure, recital. 5.*

[31] *cons. const., March 30, 2006, no. 2006-535 DC, Law for equal opportunities , considering. 24.*

[32] *cons. const., 30 dec. 1997, n° 97-395 DC, Finance Law for 1998 , considering. 38. – Cons. const., Oct. 24, 2014, No. 2014-423 QPC, Mr. Stéphane R. and a. , considering 17.*

[33] *cons. const., 28 dec. 1990, n° 90-286 DC, Amending Finance Law for 1990 , consider. 23.*

[34] *cons. const., 9 Apr. 1996, n° 96-373 DC, Organic law on the statute of autonomy of French Polynesia , consider. 83.*

[35] *See, for example, Cons. const., July 31 2015, n° 2015-479 QPC, Sté Gecop , consider. 14.*

[36] *See, for example, Cons. const., Jan. 21, 2011, No. 2010-90 QPC, Mr. Jean-Claude C. , consider. 8.*

[37] *cons. const., Jan. 21, 2011, No. 2010-90 QPC, Mr. Jean-Claude C. , consider. 8.*

[38] *cons. const., July 28 1989, n° 89-260 DC, Law relating to the security and transparency of the financial market , recital. 6.*

Although they must comply with all the constitutional principles already mentioned, in particular the principle of equality before the law and the rights of the defence, administrative sanctions, and in particular fiscal sanctions, are also subject to a body of specific constitutional rules. Articles 8 and 9 of the Declaration of 1789 set out several principles governing the punishment of those who have violated the rule of law: from its article 8 [39] derive the principles of necessity, legality and non-retroactivity of offenses and penalties , to which case law has added those of proportionality and individualization, while Article 9 [40] enshrines the presumption of innocence, from which derive the principles of personal criminal responsibility and personality of sentences.

The principle of legality of offenses and penalties implies the requirement that the definition of the offense and that of the penalty be sufficiently precise so as not to leave the tax administration an excessive margin of appreciation in their application. For example, the Constitutional Council did not accept that the law punishes with an 80% tax increase the fact of having set up an operation which, seeking the benefit of a literal application of the law to contrary to the intention of its authors, was inspired by a "primarily" fiscal motive [41]. He considers this criterion of the "main" reason, which was intended to replace that of the exclusive reason previously applicable, to be too imprecise.

Explicitly stated in Article 8 of the Declaration of 1789 and enshrined in the case law of the Constitutional Council since 1980 [42], the principle that criminal law must have been enacted prior to the offense gives full scope to the principle of legality of offenses and penalties: no one can be penalized except in application of a prior text which he could not ignore on the date of the offence. Like the principle of legality, the principle of non-retroactivity applies both to the qualification of the offense and to the determination of the penalty: the legislator can neither penalize *a posteriori* behavior which, on the date in which they intervened, were legally admitted, nor increase the penalties for offenses committed previously.

However, non-retroactivity applies only to more severe penalties; when the legislator softens a tax penalty, it is on the contrary a mandatory retroactivity that applies. Although it does not appear explicitly in the Declaration of 1789, this so-called rule of retroactivity *in mitius* was raised to constitutional rank in 1981. The Constitutional Council in fact judges that "the fact of not applying to offenses committed under the influence of the old law the new criminal law, milder, amounts to allowing the judge to pronounce the penalties provided for by the old law and which, according to the very assessment of the legislator, are no longer necessary "and thus deduces from the principle of the necessity of the penalties "the rule according to which the new criminal law must, when it pronounces less severe penalties than the old law, apply to offenses committed before its entry into force and not having given rise to convictions which have become effective judged" [43].

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[39] "The law should only establish penalties that are strictly and obviously necessary, and no one can be punished except by virtue of a law established and promulgated prior to the offense, and legally applied. »

[40] *"Any man being presumed innocent until he has been declared guilty, if it is deemed essential to arrest him, any rigor which would not be necessary to ascertain his person must be severely punished by law. . »*

[41] *cons. const., 29 dec. 2013, n° 2013-685 DC, Finance Law for 2014 , considering. 112 to 119.*

[42] *cons. const., 9 Jan. 1980, no. 79-109 DC, Law on the prevention of illegal immigration , consider. 7. – Cons. Const., July 22 1980, n° 80-119 DC, Law on the validation of administrative acts , considering. 3. – Cons. const., 30 dec. 1980, n° 80-126 DC, Finance Law for 1981 , consider. 8.*

[43] *cons. const., 20 Jan. 1981, n° 80-127 DC, Law reinforcing the security and protecting the freedom of persons , considering. 75. See also Cons. const., July 28 1989, n° 89-260 DC, Law relating to the security and transparency of the financial market , recital. 40. – Cons. Const., July 25 1990, n° 90-277 DC, Law relating to the general revision of the assessments of buildings used for the determination of the bases of local direct taxes , consider. 26. – Cons. const., 21 Feb. 1992, n° 92-305 DC, Organic law amending ordinance n° 58-1270 of December 22, 1958 on the organic law relating to the status of the judiciary, consider. 112.*

From article 8 of the Declaration of 1789 which proclaims that: "The law must establish only strictly and obviously necessary penalties", the Constitutional Council has also deduced a requirement of proportionality of penalties in relation to the offenses they punish. . It is this principle of proportionality that most frequently leads him to censure tax penalties. Jurisprudence in particular regulates the application of proportional fines to sanction documentary obligations relating to elements intended to facilitate cross-checking in the context of tax audits, and not to establish the tax: proportional fines according to the turnover cases are considered disproportionate for this type of offence [44].

The principle of the necessity of penalties, explicitly proclaimed by Article 8 of the Declaration, governs in particular the accumulation of different fiscal penalties, as well as the accumulation of a fiscal penalty with a criminal penalty. Indeed, if "the principle of necessity of offenses and penalties does not prevent the same acts committed by the same person from being the subject of different proceedings for the purposes of administrative or criminal [or disciplinary] sanctions in application of separate bodies of rules" [45], *conversely* the accumulation of identical proceedings is prohibited. The Council deduced from this that criminal penalties for tax evasion could only be combined with tax fines provided that they targeted the "most serious cases of fraudulent concealment of sums subject to tax" [46].

2.3 CONSTITUTIONAL NORMS APPLICABLE TO BOTH SUBSTANTIVE AND PROCEDURAL TAX RULES

2.3.1 The exclusive competence of the legislator

Article 34 of the Constitution of October 4, 1958, which limits the "domain of the law", provides in its fifth paragraph that: " *The law establishes the rules concerning (…) the base, the rate and the methods of recovery taxes of all kinds* ". Only the legislator thus has the power to create a tax and modify the tax rule. "Taxes of all kinds" are broadly defined by case law, including any compulsory levy paid without direct consideration. This exclusive competence of the legislator constitutes the legal translation of the principle of consent proclaimed by article 14 of the Declaration of the rights of 1789: "All the Citizens have the right to note, by themselves or by their representatives, the need for the public contribution, to consent to it freely, to monitor its use, and to determine the proportion, basis, recovery and duration".

It follows from article 34 of the Constitution, on the one hand, the unconstitutionality of any regulatory act which, without being taken for the application of the law, determines the base, the rate or the methods of recovery of taxation. Such an act incurs the cancellation for excess of power by the administrative judge [47]. The taxpayer can obtain discharge from the tax levied on the basis of regulatory provisions taken without jurisdiction, for example by making the benefit of an exemption subject to a condition that the law does not provide for [48].

On the other hand, if the legislator does not discharge the obligation to fix the base, the rate and the methods of collection of the tax, his law incurs the censure by the Constitutional Council for not having exhausted his competence: this is the so-called control of "negative incompetence". Admittedly, the principle of legality does not preclude certain

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[44] *See Decisions No. 2013-679 DC, considered. 43 and no. 2013-685 DC, consider. 97 and cons. 110.*

[45] *cons. const., 17 Jan. 2013, n° 2012-289 QPC, Mr. Laurent D. , consider. 3.*

[46] *cons. const., June 24, 2016, nos · 2016-545 QPC and 2016-546 QPC, M. Alec W. et a. and Mr. Jérôme C. , para. 20 to 23.*

[47] *See for example, CE, ass., 20 Dec. 1985, No. 28277, Synd. National Association of Animal Feed Manufacturers , Concl. P.-F. Racine, annulling a decree fixing the amount of a storage tax deemed to constitute a tax of any kind.*

[48] *Cf. e.g., CE, 9th and 8th ss -sect., 25 July. 1986, no. 44966, concl. Ph. Martin.*

details from being referred to the regulations [49]. But case law only accepts it if the law regulates this intervention, by fixing with sufficient precision the applicable rules. In 1985, the first censorship of a tax provision took place for disregard of article 34 of the Constitution, being a rule of base "susceptible to at least two interpretations" [50].

Negative incompetence often results from the imprecision of the terms used by the law, which leads to burdening other authorities, jurisdictional or administrative, with the task of specifying them. In this respect, the constitutional judge identified, in 1999 [51], an objective of constitutional value of accessibility and intelligibility of the law which, with the full exercise of the competence that the legislator derives from article 34, "impose on him to adopt sufficiently precise provisions and unequivocal formulas; it must indeed protect the subjects of law against an interpretation contrary to the Constitution or against the risk of arbitrariness, without deferring to administrative or judicial authorities the task of setting rules whose determination has been entrusted by the Constitution only 'to the law' [52]. For example, was censored on this basis a device for the reintegration of profits transferred abroad by the transfer of " one or more functions or one or more risks to a related company", terms deemed too imprecise [53].

2.3.2 The "guarantee of rights" and the temporal applicability of the tax rule

Apart from the principle of non-retroactivity of criminal law proclaimed in Article 8 of the Declaration of 1789 (see above), no provision in the Constitution seems to frame the modalities of application over time. of the law. However, by a constructive interpretation of the guarantee of rights proclaimed by article 16 of the Declaration ("Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution"), the Constitutional Council has gradually forged case law framing, first, the possibility for the legislator to make the tax law retroactive – that is to say, to apply it to triggering facts prior to its entry into force – , then even its modification for the future.

Firstly, from the 1980s to the 1990s, constitutional case law required, in order to admit the constitutionality of retroactive laws, that they be justified by an aim of general interest. For example, in 1998 the Constitutional Council censured a provision which retroactively modified the base and the rate of an exceptional contribution charged to pharmaceutical companies during 1995 alone, three years earlier. It notes "that the criticized provision would have the effect of increasing, for a significant number of undertakings, a contribution which was only due for the 1995 financial year and was collected during the 1996 financial year" and "that the concern to prevent the financial consequences of a court decision censoring the method of calculating the base of the contribution in question did not constitute a reason of general interest sufficient to retroactively modify the base, the rate and the terms of payment of a tax, when it was

[49] *cons. const., 4 Apr. 1968, no. 68-1 L; cons. const., March 18, 2009, no. 2009-578 DC, consider. 5.*

[50] *cons. const., July 10 1985, n° 85-191 DC, Law containing various economic and financial provisions , considering. 5: "that the criticized text submits to an annual taxation regime the proceeds of securities which will only be paid by the issuer at the end of the operation; that this text is susceptible to at least two interpretations, one favoring the simplicity of the basis rules by fixing equal annuities, the other favoring the adaptation of the base to economic reality by fixing progressive annuities taking compound interest into account; that the choice between these two interpretations is all the more uncertain as arguments in favor of one and the other can be found in the preparatory work; that, consequently, article 14-III, not having fixed the rules concerning the base of the tax, is not in conformity with article 34 of the Constitution".*

[51] *cons. const., 16 dec. 1999, no. 99-421 DC, Codification by ordinances , considering. 13.*

[52] *See Cons. const., 28 Apr. 2005, n° 2005-514 DC, Law relating to the creation of the French international register , recital. 14 then, for the current formulation no longer referring to a "principle of clarity of the law", Cons. Const., July 27 2006, n° 2006-540 DC, Law on copyright and related rights in the information society , recital. 9.*

[53] *cons. const., 29 dec. 2013, n° 2013-685 DC, Finance Law for 2014 , considering. 130.*

exceptional in nature, when it was collected two years ago and when it is open to the legislator to take non-retroactive measures to remedy the said consequences [54].

When this substantive condition is met, case law also adds four additional requirements of constitutionality [55]: respect for court decisions that have become final; respect for the principle of non-retroactivity of harsher penalties and sanctions; non-unconstitutional character of the validated or modified act; strict definition of the scope of validation or modification.

Secondly, more recently, the Constitutional Council derived from the guarantee of rights a protection of the "legitimate expectations" which the law may have given rise to in taxpayers, which constitutes the counterpart of the protection of "legitimate expectation" by the European Court of Human Rights. Thus, in 2013, it ruled that taxpayers who have respected the retention period of six or eight years for their life insurance contract, beyond which redemptions are subject to a favorable tax regime, “could legitimately expect the application of a special tax regime linked to compliance with this legal term” [56]. He then considers that in this case, the objective pursued by the legislator, "exclusively financial", "does not constitute an objective of general interest sufficient to justify that the proceeds of life insurance contracts acquired or recognized during the legal period necessary to benefit from the special tax regime for these products are subject to a modification of the rates of social security contributions applicable to them”.

3 CONTROL OF COMPLIANCE WITH CONSTITUTIONAL RULES BY THE TAX LEGISLATOR

3.1 WAYS OF ACCESS TO THE CONSTITUTIONAL COURT

If we set aside certain specific procedures (examination of the “laws of the country” of New Caledonia, procedure of “legislative downgrading”, etc.), the French Constitution organizes three procedures allowing a judge to examine the constitutionality of the rules tax. First, the Constitutional Council is competent to examine the conformity of tax laws with the Constitution and can be seized both directly during the adoption of the law, and a posteriori on the occasion of a *dispute*. Then, the rare regulatory texts adopted in tax matters are subject to the control of the administrative judge.

3.1.1 *A priori* control by the Constitutional Council

Article 61 of the Constitution confers on the President of the Republic, the Prime Minister, the presidents of the parliamentary assemblies and, since the constitutional revision of October 29, 1974, sixty deputies or sixty senators, the faculty to refer to the Constitutional Council the laws before their promulgation; the latter then has, in principle, one month to make a decision.

This referral is therefore not systematic: the review of tax laws before their entry into force only occurs if one of these authorities so decides. It should however be noted that in practice, the parliamentary oppositions have almost constantly challenged the initial finance law (law setting the budget for the year) before the Constitutional Council since 1973 (with the notable exception of the finance laws for 1989, for 1993, for 2007, 2008 and for 2009).

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[54] *cons. const., 18 dec. 1998, no. 98-404 DC, Social Security Financing Act for 1999 , consider. 6 and 7.*

[55] *Cf. , for a complete statement of these conditions, commentary to the notebooks on Cons. const., 29 dec. 1999, no. 99-425 DC, Amending Finance Law for 1999 , p. 2.*

[56] *cons. const., 19 dec. 2013, n° 2013-682 DC, Social Security Financing Act for 2014 , considering. 17.*

However, it should not be inferred from this practice that all of the provisions adopted by Parliament in tax matters would be subject to an a priori constitutional review : in addition to any ordinary law (i.e. other than a law of Finances) is likely to contain tax provisions, the Constitutional Council rarely takes up objections on its own initiative during the examination of finance laws – which the shortness of the time at its disposal suffices to explain.

The control of the conformity with the Constitution is in principle limited by article 61 of the Constitution to the examination of the laws before their promulgation. However, returning to its previous case law [57], the Constitutional Council has ruled since 1985, in application of its so-called "New Caledonian" case law, that the constitutionality of a law already promulgated can be usefully challenged when examining provisions legislative "which modify it, supplement it or affect its field" [58]. For example, during the examination of the finance law for 2013 which raised the maximum tax rate of the income tax scale, the Constitutional Council ruled that this increase had the effect, by its combination with the the application of the maximum rate of a contribution on "top pensions" provided for by the Social Security Code, not amended by the law referred, to modify the scope of the maximum rate of this tax with regard to the contributory faculties of taxpayers and that , consequently, the law referred should be regarded as affecting the scope of application of the provisions of the Social Security Code governing this contribution [59]. Considering the overall rate of taxation of "top hat pensions" to be confiscatory, he then censored the maximum rate of the contribution provided for by the Social Security Code.

3.1.2 The priority question of constitutionality

According to article 61-1 of the Constitution: "When, during a proceeding pending before a court, it is argued that a legislative provision infringes the rights and freedoms that the Constitution guarantees, the The Constitutional Council may be seized of this question on referral from the Council of State or the Court of Cassation, which decides within a specified period". The constitutional revision of July 23, 2008 which created this provision thus enabled any litigant to contest the conformity of the law with constitutional rights and freedoms (excluding their conformity with purely procedural rules). Its terms of application were specified by an organic law of December 10, 2009.

The invocation of priority questions of constitutionality is very frequent in tax matters; this procedure has led to about thirty censures of the tax law since its entry into force in 2010.

The QPC makes it possible to challenge any legislative provision that is or has been applicable. The fact that the contested law has been repealed or amended, removing its unconstitutionality, does not prevent the success of the QPC: the taxpayer retains the possibility of contesting the past unconstitutionality of a tax law which has been applied to him.

In addition to the text of the legislative provision, it is also the interpretation retained by the courts that the QPC procedure allows litigants to challenge. It is indeed a question of controlling the constitutionality of the legal rule as it is actually applied by the courts: this is the so-called doctrine of "living law". The Constitutional Council thus judges, since a decision of October 6, 2010, "that by asking a priority question of constitutionality, any litigant has the right to contest the constitutionality of the effective scope that a consistent jurisprudential

[57] *See Cons. Const., July 27 1978, n° 78-96 DC, Law supplementing law n° 74-696 of 7 August 1974 relating to radio broadcasting and television , consider. 4.*

[58] *cons. const., 25 Jan. 1985, no. 85-187 DC, State of emergency in New Caledonia (to the report by André Ségalat), consider. 10.*

[59] *cons. const., 29 dec. 2012, n° 2012-662 DC, Finance Law for 2013 , considering. 20 and 21. See also, regarding social contributions, Cons. const., 13 dec. 2012, n° 2012-659 DC, Amending Finance Law for 2013 , considering. 14 and 15.*

interpretation confers on this provision" [60]. A decision of November 15, 2019 illustrates these principles in tax matters: while the law requires obtaining ministerial approval for the benefit of a derogatory tax regime applicable to partial contributions of assets, the Council of State, drawing the consequences of the European "mergers" directive, considers that the requirement of an authorization is not applicable to the allocations of securities carried out by foreign companies established in an EU Member State. The QPC procedure enabled the taxpayer to challenge the constitutionality of the resulting difference in treatment between foreign companies, depending on whether these companies were established in an EU Member State or a third country, even though this difference stems not from the text of the law, but from its jurisprudential interpretation [61].

In terms of procedure, the QPC must be raised during a concrete dispute, by a separate memorandum. A double filter is then organized: when the QPC is raised in first instance or on appeal, the lower court must rule on the transmission of the question to the Council of State or the Court of Cassation. It must proceed to this transmission, "without delay", when three cumulative conditions are met: the contested provision is applicable to the dispute; it has not already been declared constitutional in the grounds and operative part of a decision of the Constitutional Council, unless circumstances change; the question "is not devoid of seriousness". When the question is transmitted [62], it is up to the Council of State or the Court of Cassation to decide within three months on its referral to the Constitutional Council. They proceed to this referral if, in addition to the first two conditions set out above, the question "is new or presents a serious nature".

3.1.3 Control of regulatory acts by the administrative judge

The inventory of existing procedures in matters of constitutional litigation would be incomplete without mentioning the control by the administrative judge of administrative acts taken in tax matters. Indeed, in addition to its QPC filter functions raised which it shares with the judicial judge (and in addition to its advisory functions which may lead it to rule on questions of constitutionality), it is solely competent to examine not [63]only the legality of these acts, but also their conformity with constitutional principles, unless the law constitutes a "screen", that is to say that the disputed rule results directly from the law.

Moreover, it is historically the decisions rendered by the Council of State on the acts taken by the overseas State authorities[64] or by the local authorities[65] in the field of local taxes which, even before the creation of the Constitutional Council in 1958, drew the first contours

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[60] *cons. const., Oct. 6, 2010, No. 2010-39 QPC, Ms. Isabelle D. and Isabelle B. , consider · 2. Cf. , a few days later in tax matters, Cons. const., Oct. 14, 2010, No. 2010-52 QPC, C [ie] agricole de la Crau , consider. 4.*

[61] *cons. const., Nov. 15, 2019, No. 2019-813 QPC, M. Calogero G .; in this case, the grievance was rejected on the merits. See also, for another example, Cass. com., Oct. 19, 2017, No. 17-15.023, regarding the challenge to the consistent case law rule that so-called lead holding companies are eligible for exemption from wealth tax on professional assets.*

[62] *The court seised must then in principle stay the proceedings until the end of the QPC proceedings.*

[63] *This is the case both when examining bills and draft decrees, whether they are stand-alone or law enforcement decrees.*

[64] *CE, May 5, 1922, No. 58355, Fontan , p. 386, which dismisses the challenge, under the "principle of fiscal equality", of the creation by the administrator of Hanoi of a tax on vehicles. – CE, 7 [th] ss-sect., Nov. 23, 1936, No. 25962, Sieurs Abdoulhoussen et a. : Rec. EC 1936, p. 1015, concluded. Chasserat, validating with regard to the principles of equality before taxes and freedom of trade and industry a decree providing for different treatment in terms of license between French and foreigners residing in Madagascar. – EC, sect., Feb. 4 1944, no. 62929, Sieur Guiyesse: Rec. EC 1944, p. 45, concluded. Chenot, validating with regard to the principle of equality before tax an order of the Governor General of the AOF which subjected, in terms of consumption tax, certain goods (in this case sea biscuits and candles) to a higher taxation when they are manufactured in AOF than when they are imported in AOF (and also validating the differences in the methods of recovery depending on whether the goods are produced in an industrial establishment or "come from village or family manufacture"). Cf. also CE, 7 [th] and 9 [th] ss-sect., 10 Nov. 1976, No. 98659 reviewing with regard to the principle of equality a deliberation of the Chamber of Deputies of the French territory of the Afars and the Issas which instituted a general solidarity tax on income and profits.*

[65] *CE, June 29, 1955, No. 4220, City of Montreuil-sous-Bois: Rec. EC 1955, p. 663, annulling for disregard of the principle of equality before public charges a municipal deliberation which instituted discrimination among those liable for the license.*

of the framework for tax law by the general principles of law with constitutional value, particularly with regard to the principle of equality before tax.

The administrative judge may be led in two ways to examine the constitutionality of administrative acts in tax matters. It can first be seized of direct appeals for abuse of power directed against regulatory acts, whether they are taken for the application of tax law or whether they fall within the autonomous field of regulation. He may also have to rule on an exception of illegality, targeting a regulatory text that has been applied to the taxpayer, raised during a tax dispute before the tax judge [66]. The taxpayer can thus argue, for example, that the tax was levied on the basis of regulatory provisions which encroach on the exclusive competence which the legislator holds under Article 34 of the Constitution in tax matters and are vitiated by incompetence [67]. When it comes to a dispute brought before the judicial judge (in matters of registration fees or wealth tax, for example), the latter must make a reference for a preliminary ruling to the administrative judge to assess the validity of the the disputed administrative act [68].

For example, the Conseil d'État annulled for abuse of power a decree which, to define the perimeter of an urban free zone benefiting from tax exemptions, only included in this perimeter only part of the businesses in a district, having the effect of inducing, within this homogeneous district, between companies that carry out identical activities within the same catchment area, discrimination unrelated to the objectives of the law [69]: the breach of equality in question did not result from the law, but from the exercise by the regulatory power of the margin of appreciation which the legislator entrusted to it.

3.2 THE AUTHORITY OF THE DECISIONS OF THE CONSTITUTIONAL COUNCIL

The question of the authority of the decisions of the Constitutional Council vis-à-vis the legislator and the tax administration is not settled with great precision by the French constitutional text, which has given rise to ongoing debates. still.

The Constitution (art. 62, last paragraph) limits itself to providing that: “The decisions of the Constitutional Council are not subject to any appeal. They are binding on public authorities and all administrative and jurisdictional authorities”. The principle according to which the decisions of the Constitutional Council are binding on public authorities and courts raises several questions to which it is up to case law to provide an answer. Is the authority of the matter decided by the Council limited to cases involving the legislative provisions on which it has ruled? On the contrary, does it extend to any dispute raising questions of constitutionality analogous to those which it has decided in its decisions, even though it may not have ruled on the legislative provisions in question? In other words, is the authority attached, according to the letter of the Constitution, to the "decisions" of the Council confined to their operative part (declaring a given legislative provision conforming to the Constitution or not), or does it extend it to their motives and to the interpretation of the Constitution which they enshrine?

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[66] *See e.g. CE, 10 th and 9 th ss-sect., Oct. 16, 2009, No. 305986, President of the Government of New Caledonia , concl. J. Burguburu, concerning a tax deliberation of the territorial assembly of New Caledonia.*

[67] *CE, 8th and 3rd ch ., Jan. 26, 2021, No. 439582, SELAS Biomnis , concl. R. Victor, granting the taxpayer's request because of the incompetence tainting the provisions of Appendix III to the CGI which were opposed to him*

[68] *Cf. for example, CE, 1 st and 6 th ch., 19 July. 2017, No. 407191, URSSAF Champagne-Ardenne , concl. C. Touboul, regarding the assessment of the validity of a decree fixing the rate of the contribution for housing allowance.*

[69] *CE, 9 th and 8 th ss-sect., 19 May 1999, n° 185765, concl. J. Courtial.*

3.2.1 The authority of the device of the decisions

The Constitutional Council affirmed, as early as 1962, that its decisions are vested with the absolute authority of res judicata: they must be respected by all, independently of the parties to the initial dispute (assuming moreover that one can always identify parties in the cases brought before him) [70]. This absolute authority distinguishes the decisions of the Constitutional Council from judgments not to refer priority questions of constitutionality delivered by the Court of Cassation and the Council of State in the exercise of their role of "filter": these judgments are only endorsed of the relative authority of res judicata, invoked only between the same parties [71].

If it is not subordinated to an identity of parties, the authority of the thing decided by the Constitutional Council supposes on the other hand that the object – the legislative provision in question – is the same as in the decision which it rendered. The Constitutional Council initially seemed to retain a strict conception of this condition of identity of object: in a decision of July 20, 1988 ruling on an amnesty law, it thus held that "the authority of res judicata attached to the decision of the Constitutional Council [revoked in this case] is limited to the declaration of unconstitutionality relating to certain provisions of the law which was then submitted to it; that it cannot usefully be invoked against another law designed, moreover, in different terms;»[72]. However, the following year, in an important decision of July 8, 1989, it relaxed the assessment of this condition by judging that "if the authority attached to a decision of the Constitutional Council declaring unconstitutional the provisions of a law cannot in principle be usefully invoked against another law framed in distinct terms, this is not the case when the provisions of that law, although drafted in a different form, have, in substance, a similar object to that of legislative provisions declared contrary to the Constitution" [73]. In this case, he censured an article of a new amnesty law for disregarding the authority of his censure decision taken the previous year.

The reception of this extension by the judicial and administrative jurisdictions was not immediate. Thus, the Court of Cassation ruled in 2001 that the "decisions [of the Constitutional Council] are binding on the public authorities and the administrative and judicial authorities only with regard to the text submitted for examination of the Council" [74]. In recent times, however, the courts have taken greater account of constitutional case law which extends the authority of res judicata to similar provisions. Thus, in a decision of January 16, 2015 [75], the Council of State ruled that the declaration of unconstitutionality of the provisions of the Cinema and Moving Image Code relating to the basis for a tax on publishers of television services television was to be regarded as applying to the articles of the General Tax Code previously applicable, from which these provisions had been transferred. On the other hand, the judges did not go so far as to extend the scope of the declaration of unconstitutionality to the provisions which were the subject of a substantial modification: thus, while the Constitutional Council had censured a provision of the General Code of taxes excluding the application of the "mother-daughter" tax system to securities without voting rights, the Council of State decided to send it a QPC relating to the same provision in its subsequent wording, since the legislator had modified to restrict its scope [76]. The

[70] *cons. const., 16 Jan. 1962, n° 62-18 L.*

[71] *CE, 7 th and 2 nd ss-sect., March 21, 2011, n° 345216, Synd. of Senate Officials , Concl. N. Boulouis.*

[72] *cons. const., July 20 1988, n° 88-244 DC, Amnesty Law , consider. 18.*

[73] *cons. Const., July 8 1989, n° 89-258 DC, Amnesty Law , consider. 13.*

[74] *Cas. ass. Plen., Oct. 10, 2001, Breisacher .*

[75] *CE, 9th and 10th ss -sect., Jan. 16, 2015, No. 386031, Sté Métropole Télévision , concl. MY. Nicolas de Barmon.*

[76] *EC, 9th and 10th c ., May 18, 2016, no. 397316, Sté Natixis , concl. E. Bokdam-Tognetti.*

Constitutional Council did not deny this analysis and examined the question, censuring these new provisions for the same substantive reason as that retained by its previous censure [77].

With the introduction of the QPC, this extensive conception of the authority of res judicata posed a problem, however, with regard to declarations of unconstitutionality: if it made it possible to speed up the trial for the applicant who challenges another version of a law already censured, by dismissing the contested legislative provision without there being any need to refer to the Constitutional Council again, it deprived the judge, on the other hand, of the possibility of modulating the effects over time of the censorship concerning this other version (see below). below). Only the Constitutional Council has the power, when it pronounces a declaration of unconstitutionality, to adjust its effects over time, either by postponing censorship, or on the contrary by applying it retroactively to situations already established. This concern led the Constitutional Council, by a decision of April 30, 2020, to review its case law by restricting the authority of its declarations of unconstitutionality. He henceforth judges that the authority of the censors is limited to the version of the law which has been censored: "The authority of the decisions (…) prevents the Council from being seized of a priority question of constitutionality relating to the same version of a provision declared unconstitutional, unless circumstances change" [78]. Thus, the previous or later versions of the censored law, even if they are strictly identical in their wording and their object, may be the subject of a QPC: it will be up to the Constitutional Council alone to pronounce their declaration of unconstitutionality, and to determine its effects over time.

3.2.2 The authority of the reasons for the decision

As early as 1962, the Constitutional Council judged "that the authority [of its] decisions (…) attaches not only to their operative part but also to the reasons which are the necessary support and constitute their very foundation" [79].

The administrative and judicial courts, initially reluctant to consider themselves bound by the reasoning given by the Constitutional Council, have gradually accepted to rely on the reasons for its decisions when the same legislative provision is at issue in the dispute brought before them. In particular, by a decision of December 20, 1985, the Council of State, seized of a dispute relating to the collection of water royalties, explicitly based itself on the decision of the Constitutional Council of June 23, 1982 which qualifies as taxes of all kinds, to then deduce that their dispute falls, by default, within the administrative jurisdiction [80].

The conception of the authority of the reasons for its decisions adopted by the Constitutional Council extends beyond the text on which it ruled: it considers the public authorities and courts bound by the reasoning it has adopted, including for the interpretation of other provisions. The Council of State and the Court of Cassation, however, did not agree to follow it so far [81]. For example, whereas the Constitutional Council had just affirmed by two decisions of 1984 and 1987 [82] the unconstitutionality of the tax advantages granted on the discretionary approval of the administration, the conditions for granting of which must always be framed by law, the Council of State, examining separate provisions providing for other tax

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[77] *cons. Const., July 8 2016, n° 2016-553 QPC, Natixis company . See also Cons. const., Jan. 14, 2016, n° 2015-513/514/526 QPC of Jan. 14, 2016, Mr. Alain D. et a ., cons. 10.*

[78] *cons. const., Apr. 30, 2020, No. 2020-836 QPC, Mr. Maxime O. , para. 6.*

[79] *cons. const., 16 Jan. 1962, n° 62-18 L, consider. 1.*

[80] *CE, ass., 20 Dec. 1985, no. 31927, SA És Outters , concl. Ph. Martin, to be compared with its previous decision CE, 3 rd and 5 th ss-sect., Nov. 21, 1973, No. 83046, Sté des papeteries de Gascogne , concl. G. Braibant, relating to these same "royalties".*

[81] *Cf. M. Guillaume, The authority of the decisions of the Constitutional Council: towards new balances? : New Cah. cons. const. Jan. 2011, No. 30.*

[82] *cons. const., 29 dec. 1984, n° 84-184 DC, Finance Law for 1985 , consider. 26. – Cons. const., 30 dec. 1987, n° 87-237 DC, Finance Law for 1988 , consider. 11.*

approval, could only find that it was purely discretionary [83]. Where the Constitutional Council itself had limited the Minister's margin of appreciation, subject to interpretation, the Council of State did not consider it possible to go that far in its role of interpreting the law.

3.3 THE TEMPORAL SCOPE OF THE CENSURES PRONOUNCED BY THE CONSTITUTIONAL COUNCIL

The question of the effects over time of the decisions of the Constitutional Council, and in particular of the censures that it pronounces when the law has already applied, is delicate. It requires in fact to reconcile two contradictory requirements: on the one hand, the restoration of constitutionality, which would imply in all rigor to make retroactively the violation of constitutional principles; on the other hand, the requirement of legal certainty, which prevents past situations from being called into question.

When the Constitutional Council censures a provision of a law as part of its *a priori control* , the question of the modulation over time of the effects of its decision does not in principle arise. By construction, censorship or reserve intervenes even before the promulgation of the law (thus the first paragraph of article 62 of the Constitution provides that "a provision declared unconstitutional on the basis of article 61 may be promulgated or implemented"), which therefore never produced any effects.

The question of the effects over time of pronounced censures arises in very different terms in the context of the QPC procedure. Here, the censored provision applied and produced effects, if necessary for several years. This question was settled by the constitutional revision of July 23, 2008, by laying down the principle, in the second paragraph of article 62 of the Constitution, according to which "a provision declared unconstitutional on the basis of article 61-1 is repealed from the publication of the decision of the Constitutional Council". This is the rule of immediate repealing effect: censorship does not in principle have retroactive effect – it remains, for reasons of legal certainty, without incidence on the effects that the censored law has produced in the past – but the censured provision can no longer, from the day after the publication of the decision, produce any effects in the future.

The constituent, however, combined this principle with two derogations which it is open to the Constitutional Council to handle by providing, on the one hand, that the censored provision is repealed as of the publication of the decision of the Constitutional Council "or of a later date fixed by this decision" and, on the other hand, that "the Constitutional Council determines the conditions and limits under which the effects that the provision has produced are likely to be called into question". The constitutional judge is thus authorized either to set aside the immediate nature of the repeal – by postponing the censure – or to give their decision a retroactive scope, and not purely abrogative, by postponing certain effects that the censored law has produced in the pass.

In practice, the Council very frequently uses these possibilities to modulate the effects over time of the QPC censures it issues in tax matters. Most often, it provides for immediate application of the censorship to "proceedings in progress" on the date of its decision (we then speak of "procedural" retroactivity), that is to say that taxpayers who have already contested their taxation may benefit from the declaration of unconstitutionality [84]. More rarely, it goes so far as to specify that the declaration of unconstitutionality of the tax law is "applicable to all cases not finally judged on [the] date [of its publication]", which means that all taxpayers can invoke censorship, even those who have not yet introduced any

[83] *CE, 8 th and 7 th ss-sect., 1 June 1988, n° 79550, SA Berto , concl. N. Chahid-Nouraï.*

[84] *See e.g. cons. const., Nov. 20, 2015, No. 2015-498 QPC, Sté SIACI Saint-Honoré SAS and a. , considering 9. – Cons. const., 11 dec. 2015, No. 2015-509 QPC, Mr. Christian B. , consider. 8.*

challenge (full retroactivity) [85]. He even recognizes the possibility of providing that his decision opens a new period of complaint for the benefit of the taxpayer: in this case, even foreclosed taxpayers can invoke the unconstitutionality found.

The exclusion of any retroactivity is infrequent: it is only when the retroactive disappearance of the censored tax law would entail "manifestly excessive" consequences that the Constitutional Council does not provide for any questioning of the effects produced in the past by the law. censored, which most often leads him to postpone his censorship. To date, it has decided nine times to defer the repeal of a tax provision which it has found to be unconstitutional [86]. As for the duration of the deferred repeal pronounced, it is generally about six months [87], except at the beginning of the finance law period (September or beginning of October) [88], during which it is in principle open to the legislator to take a rapid measure. coming to correct the unconstitutionality noted, which makes it possible to postpone the repeal only for a few months which separate the decision of the following January 1st.

The framing of tax reforms by constitutional law is, in France, an edifice that is constantly under construction. The introduction of the priority question of constitutionality in 2010, which allows all taxpayers to challenge the constitutionality of the tax law before a judge, has multiplied the opportunities offered to the constitutional judge to clarify his case law and the scope of rights and freedoms. In this context, the above statement must therefore be seen as a snapshot “at a moment t”: there is no doubt that the years to come will lead the constitutional judge to deepen and clarify the constitutional framework for taxation.

[85] *See e.g. cons. const. ' 15 Jan. 2015, n° 2014-436 QPC, Ms. Roxane S. , consider. 15. – Cons. const., Oct. 14, 2016, No. 2016-587 QPC, Épx F. , par. 9.*

[86] *cons. const., June 6, 2014, No. 2014-400 QPC, Sté Orange SA , para. 10. – Cons. const., 20 June 2014, n° 2014-404 QPC, Épx M. , consid. 13. – Cons. const., September 19, 2014, n° 2014-413 QPC, Sté PV-CP Distribution , consider. 8. – Cons. const., September 19, 2014, n° 2014-417 QPC, Sté Red Bull On Premise et a. , considering 16. – Cons. const., Sept. 30, 2016, No. 2016-571 QPC, Sté Layher SAS , para. 12. – Cons. const., Oct. 27, 2017, n° 2017-669 QPC, Sté EDI-TV , par. 10. – Cons. const., Sept. 21, 2018, No. 2018-733 QPC, Fairing means operating company , para. 13. - Cons. const., May 26, 2021, n° 2021-908 QPC, Sté KF3 Plus , para. 13.*

[87] *See Cons. const., 6 June 2014, n° 2014-400 QPC, Sté Orange SA , consider. 10. – Cons. const., 20 June 2014, n° 2014-404 QPC, Épx M. , consid. 13. – Cons. const., Oct. 27, 2017, n° 2017-669 QPC, Sté EDI-TV , par. 10 (up to eight months). - Cons. const., May 26, 2021, n° 2021-908 QPC, Sté KF3 Plus , para. 13.*

[88] *cons. const., September 19, 2014, n° 2014-413 QPC, Sté PV-CP Distribution , consider. 8. – Cons. const., September 19, 2014, n° 2014-417 QPC, Sté Red Bull On Premise et a. , considering 16. – Cons. const., Sept. 30, 2016, No. 2016-571 QPC, Sté Layher SAS , para. 12. – Cons. const., Sept. 21, 2018, No. 2018-733 QPC, Fairing means operating company , para. 13. – Cons. const., Oct. 12, 2018, No. 2018-739 QPC, Sté Dom Com Invest , para. 10.*

Article

Constitutional Requirements for Substantive Tax Law in Federal Republic of Germany

Joachim Englisch

Joachim Englisch holds the Chair for Public Law and Tax Law and is Director of the Institute for Tax Law at the Westfälische Wilhelms-Universität Münster. Joachim Englisch serves as appointed member of tax expert groups with the OECD and with the EU Commission, and advises national governments. He has held visiting positions in several universities both in Europe and overseas. Email: joachim.englisch@uni-muenster.de

Hanno Kube

Hanno Kube holds the Chair for Public Law with particular regard to Public Finance and Tax Law and is Director of the Institute for Public Finance and Tax Law at Ruprecht-Karls-Universität Heidelberg. He is a specialist in the areas of constitutional law, public finance law and German, European and international tax law. He advises the German government and serves as government representative at the European Court of Justice and other courts. Email: kube@uni-heidelberg.de

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KEYWORDS:

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

ABSTRACT:

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

PALABRAS CLAVES:

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

RESUMEN:

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

MOTS CLES :

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

RESUME :

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

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1 INTRODUCTION

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

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

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

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

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

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

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

2 IMPORTANCE OF THE GUARANTEE OF HUMAN DIGNITY FOR TAXATION

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

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

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

The Federal Constitutional Court has extended the tax exemption of the minimum subsistence level to the family of the taxpayer on the basis of the guarantee of human dignity

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

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

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

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

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

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

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

and the principle of the welfare state, with additional reference to Art. 6 Para. 1 of the Constitution (protection of marriage and family) [9]. The basic needs of children are therefore deducted from the taxable income of the parents (currently 4,194 euros per child/year for each parent).

3 UNIFORMITY OF TAXATION

3.1 BASIC EQUALITY OBLIGATION TO TAX JUSTICE

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

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

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

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

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

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

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

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

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

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

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

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

proportionately higher compared to the tax burden on lower-performing individuals[17]. The Federal Constitutional Court was originally of the opinion that, especially in the case of income tax, only a progressive tax rate would meet the requirements of vertical tax justice[18]. The Federal Constitutional Court has recently shown greater restraint in this regard[19], so that a proportional income tax rate should also be regarded as constitutional. On the other hand, the Federal Constitutional Court considered a degressive tax rate to be fundamentally incompatible with the ability to pay principle[20].

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

3.2 REASON TO CHARGE, SYSTEM-FORMING PRINCIPLES AND EXTRA-FISCAL GOALS

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

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

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

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

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

[21] *See above II.*

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

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

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

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

First of all, the Federal Constitutional Court generally grants the legislature a very large tax policy discretion with regard to the question of which source of tax capacity it wants to exploit and which economic processes it spares from taxation. In this sense, "the legislature has far-reaching leeway when selecting the subject of the tax and determining the tax rate."[26] The state can levy a wealth tax but is not obliged to do so[27]; and he is also free to decide whether to charge inheritance and gift tax on a gratuitous transfer of assets[28]. The openness of the constitution thus allows the legislature to flexibly adapt the tax system to changed economic and socio-political framework conditions or political preferences.

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

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

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

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

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

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

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

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

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

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

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

justifications in this context[34]. The Federal Constitutional Court has not yet made a final statement on this.

In any case, it is recognized that the legislature is in principle free to pursue non-fiscal objectives, despite the resulting selective deviation from system-constituting principles of taxation. In particular, the legislature may promote or direct the behavior of taxpayers for reasons of public interest[35] (steering tax) and for this purpose also break through the requirement of equal taxation according to ability to pay selectively in the case of fiscal purpose taxes, the primary aim of which is to cover financial needs.

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

3.3 REQUIREMENTS FOR THE IMPLEMENTATION OF EXTRA-FISCAL GOALS

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

The Federal Constitutional Court also requires the legislature to be clear about subsidies, especially for deviations with a funding or steering purpose. The respective

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

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

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

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

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

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

purpose must be supported by "identifiable legislative decisions"[40]. This is partly criticized in the literature. According to the constitution, the legislature is only responsible for the law, not also for the reasons for the law[41]. In any case, tax concessions must be equal; in particular, they must not arbitrarily select the group of beneficiaries[42]. On the other hand, the Federal Constitutional Court did not object if the exceptions in a tax law are so numerous and significant that the payment of the standard tax burden becomes an exception[43]. The French constitutional court, for example, convincingly judged this differently[44].

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

4 NON-DISCRIMINATORY TAXATION

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

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

However, the Federal Constitutional Court has demanded in a number of decisions that the tax laws should not discriminate against state-approved same-sex partnerships

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

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

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

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

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

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

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

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

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

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

compared to married couples. It is true that sexual orientation is not one of the distinguishing features that are explicitly prohibited under constitutional law. However, since the state had structured registered same-sex partnerships to be similar to marriage under family law, it had to treat them equally in tax law, according to the Federal Constitutional Court[50]. The legislature then reacted and included legal equality for same-sex partners in a registered civil partnership with married couples in the Income Tax Act. Since the Federal Republic of Germany introduced full civil law marriage for same-sex partners, this tax equality problem has been put into perspective.

In addition, the Federal Constitutional Court also derives a special ban on discrimination from the requirement to protect marriage and family in Art. 6 Para. 1 of the Constitution. The household taxation for married couples in the income tax was therefore unconstitutional because it resulted in a higher tax burden than for unmarried couples due to the tax progression[51]. Since then, the joint income of the spouses has been divided equally between both partners (so-called spouse splitting), so that the tax progression and the total burden are lower than with household taxation and in most cases also lower than with pure individual taxation. It is disputed whether the marriage splitting follows constitutionally from Article 6.1 of the Basic Law or whether it reinforces traditional role models.

5 FREEDOM-FRIENDLY TAXATION

The absolute level of taxation is also subject to constitutional limits, which are actually very wide. The Federal Constitutional Court – adopting a line of case law from the Prussian Higher Administrative Court[52] – decided early that so-called "strangulation taxes", which give the taxpayer no room to breathe, are abusive of form and therefore cannot be based on tax legislation competences; because, viewed in the light of day, they are administrative regulations with a prohibitive character[53]. So, the formal unconstitutionality of the strangling taxation was objected to.

However, the relevance of the absolute amount of the tax burden to freedom was also recognized just as early. Initially, the Federal Constitutional Court assumed that state-imposed payment obligations generally do not affect the fundamental right to property (Article 14(1) of the Constitution) from the outset[54]. Irrespective of this, however, excessively burdening taxes that fundamentally affect the financial situation should be able to constitute a violation of property rights[55].

It was only much later, in its 1995 decision on wealth tax, that the Federal Constitutional Court corrected this internal contradiction in its case law and stated that the income taxes, which in fact relate to the additional acquisition of a specific legal position of assets (income tax, corporation tax, trade tax, property tax as a so-called projected income tax), in any case interfere with the basic property right and therefore have to be constitutionally justified (Korinek et al., 1981, p. 213)[56]. The Federal Constitutional Court therefore carries out a proportionality test. In this examination, the court compares the part

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

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

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

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

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

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

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

of the income remaining with the taxpayer on the one hand and the part of the income claimed for tax purposes on the other. From Art. 14 Para. 2 of the constitution ("Ownership obliges. Its use should also serve the public interest.") the court derived the requirement that the total tax burden on the income be at most "close to a equal division between the private and public sector" (the so-called 50-50 principle)[57].

A few years later, the Federal Constitutional Court distanced itself from the 50-50 principle[58]. At the same time, however, it expressly held that income taxes that are actually linked to the acquisition of additional assets in legal positions always interfere with the fundamental right to property and must therefore comply with the principle of proportionality[59]. The great challenge of specifying the proportionality test that dispenses with the half-division principle can be seen in the statements made by the Federal Constitutional Court in this regard[60]. As a result, income taxes, as property interventions, are subject to the proportionality requirement. However, according to the current case law of the Federal Constitutional Court, there are hardly any substantial restrictions on the tax legislature beyond the prohibition of strangulating taxation.

With regard to taxes other than income taxes, in particular with regard to the indirectly levied consumption and expenditure taxes, the Federal Constitutional Court is even more cautious when naming the burden limits of fundamental freedom law. It assumes that the excise and expenditure taxes are also linked to a situation that reveals economic ability (Tipke & Lang, 2021)[61]. However, the Federal Constitutional Court considers it principally constitutionally unproblematic if the taxation exceeds the ability to pay in individual cases because of the anonymity of the market[62].

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

6 EQUALITY OF APPLICATION OF LAW

Fair taxation is only achieved when the tax is actually enforced. Ensuring equal, fair taxation is primarily a matter for the executive branch. If there are deficits in implementation, these are regularly to be attributed to the executive and to be rectified by it. At the same time, however, the Federal Constitutional Court drew attention to the legislature: The legislature has the constitutional obligation arising from the principle of equality to design the substantive tax laws in such a way that the equal burden can be achieved in actual implementation, in particular through appropriate typifications[63] and suitable procedural regulations. If there is already an implementation deficit in the legal foundations of taxation and in this sense of a structural nature, because the legislature does not provide any effective procedures for enforcing the taxation claim it postulates, this leads to the nullity of these legal

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

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

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

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

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

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

[63] *See above III.2. and 3.*

foundations[64]. In addition, tax laws can also be unconstitutional from the outset if, contrary to their intended purpose, they permit tax-reducing arrangements to a considerable extent[65].

Consequently, a taxpayer who was taxed in accordance with the law can object to his taxation by arguing that the underlying tax law is unconstitutional because of structurally applied implementation deficits or because of the approval of extensive, inappropriate tax-reducing arrangements[66].

7 PRESUMPTION OF LAW AND LEGALITY OF TAXATION

According to the democratically and constitutionally founded principle of the statutory reservation, taxes require a sufficiently specific basis in parliamentary law[67]. This precludes deriving taxing powers from customary law. Originally, therefore, the legal analogy in the area of burdening tax law was generally considered inadmissible. In the meantime, the Federal Constitutional Court has adopted a differentiated point of view[68]: for reasons of legal certainty and the lawfulness of taxation, high demands must be placed on the onerous legal analogy in tax law. In particular, the financial courts may not develop additional sources of tax efficiency beyond the possible literal meaning of the tax laws or close tax gaps that are contrary to the system if the legislature has deliberately refrained from doing so or it is just unclear whether the closing of the gaps is in accordance with their will. At best, the Federal Constitutional Court can then consider that the law violates the principle of equality. However, an unplanned legal loophole that clearly runs counter to the ideas and assessments of the legislature may also be closed selectively by analogy to the detriment of the taxpayer.

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

In addition to the administration, the judiciary, in particular the supreme judiciary of the Federal Fiscal Court, has a legally substantiating and developing effect, especially in tax law. This role also falls to case law due to the diversity of tax law issues. However, the administration sometimes relativizes the rule of law stabilizing effect of published decisions of the Federal Fiscal Court by so-called non-application decrees, which expressly limit the importance of the individual judgment for the implementation practice to the decided

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

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

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

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

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

individual case[69]. This creates legal uncertainty and calls into question the function of the judiciary as the final interpreter of the law. Constitutionally, therefore, the minimum requirement is that the administration justifies its refusal in a comprehensible manner. The Federal Constitutional Court has not yet dealt with this problem.

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

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

The constitutional principle of the rule of law requires legal certainty. An essential element of this legal certainty is the legal certainty and clarity of tax law (K. D. Drüen, 2009, p. 60; Papier, 1989, p. 61; Ruppe, 2008, p. 20). As a field of burdening provisions (Hey, 2002), tax law must be sufficiently foreseeable and therefore plannable for the citizen. This requires appropriate certainty and clarity[70]. Only a specific and clear tax law can also be enforced equally for the tax administration and enables it to meet the requirement of equality in the actual tax impact.

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

Legal security based on the rule of law also requires the protection of legitimate expectations. The rule of law therefore allows negative retroactive effects of tax laws only to a limited extent (Desens, 2011, p. 113; K.-D. Drüen, 2015, p. 210; Jachmann, 2006; P. Kirchhof, 2015, p. 717; Lehner, 2006, p. 67; Leisner-Egensperger, 2002, p. 27; Osterloh, 2015, p. 201; Schön, 2010, p. 221). A tax law that imposes a tax burden with effect for the past has an adverse effect, but so does a tax law that retrospectively restricts or revokes a benefit[71]. However, a constitutionally relevant retroactive effect only exists if the legal change that goes back into the past has a constitutive effect. The Federal Constitutional Court has decided that a change in the law already has a constitutive effect on the past if a provision allows for several justifiable interpretations and the legislature retrospectively stipulates an interpretation as binding[72].

Statutory retroactivity is not strictly prohibited in tax law. Rather, it is treated differently. The first senate of the Federal Constitutional Court distinguishes between genuine and spurious retroactivity[73], the second senate between the retroactive effect of

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

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

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

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

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

legal consequences and the factual retroactive connection[74]. In the case of genuine legal retroactivity (or retroactive effect of legal consequences), legal consequences that have already been triggered are subsequently exchanged. Genuine retroactivity is generally prohibited, subject to certain exceptions. Such an exception should exist if 1. the citizen had to reckon with the new regulation at the point in time to which the retroactivity refers, 2. the legal situation was so unclear and confused that a clarification had to be expected, 3. the previous law was contrary to the system and unfair to such an extent that there were serious doubts as to its constitutionality, 4. overriding concerns of the common good, which take precedence over the principle of legal certainty, require retrospective regulation (among other things, to prevent so-called announcement effects), 5. the citizen was not entitled to rely on the legal semblance created by an invalid provision, 6. no damage or only very insignificant damage is caused by the retroactive effect (reservation of minor claims)[75].

On the other hand, there is a spurious legal retroactive effect (or factual retrospective connection) if the change in the law affects a situation that has already been partially set in motion, but has not yet been completed and therefore not already resulted in any legal consequences. An example would be the statutory extension of a holding period during which profits from the sale of assets are taxable, also with effect for assets that have already been acquired but for which the previous shorter holding period has not yet expired. The spurious retroactivity must be examined constitutionally for its proportionality. It is permissible if the state's interest in the retroactive effect outweighs the public's disappointed trust in the reliability of the norm[76]. It should be noted that the special interest in retroactive effects must be strictly distinguished from the simple interest in change (improvement or political reassessment of the legal situation) and must be justified independently. In any case, a general interest in counter-financing[77], the interest in preventing the complication of tax law associated with a necessary transitional regulation[78] and the interest in closing a gap[79] cannot justify the retroactive effect.

The Federal Constitutional Court also uses the assessment periods to assess whether a legal change in the area of annual assessment taxes (such as income tax and corporation tax) that extends into the past is to be classified as genuine or spurious retroactive effect[80]. The court decides whether the statutory retroactive effect only affects the current assessment period or whether it changes the law in assessment periods that have already been completed. This line of jurisdiction has been criticized because economic dispositions, such as the sale of a property, which are made in reliance on the tax law situation during the assessment period, can often no longer be reversed afterwards[81]. The Federal Constitutional Court nevertheless adheres to the assessment period case law, but takes the protection of disposition into account more than before. In constellations of spurious tax retroactivity, the Federal Constitutional Court carefully examines the extent to which the law created trust[82].

The more recent jurisprudence of the Federal Constitutional Court now points to a further approximation of the dogmatics on spurious and genuine retroactivity from the

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

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

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

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

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

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

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

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

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

connecting point of view of the protection of legitimate expectations. In a decision from 2013, the court emphasized that the protection of legitimate expectations also establishes and at the same time limits the prohibition of retroactivity in the area of genuine retroactivity[83].

This is of particular importance for the constitutional classification of truly retroactive so-called non-application laws, which are comparatively often found in tax law. Non-application laws retrospectively restore the previous legal situation, which was based on a high court ruling, following a change in jurisdiction by the legislature, or react retrospectively to an initial supreme court clarification of an open legal question to restore the previous administrative practice (Tipke et al., 2021). In these cases, too, the assessment of the constitutionality of the retroactive effect must be based on the concrete, legally structured position of trust[84]. Correctly, this position of trust is justified by the previous administrative practice as well as by a line of jurisprudence from a specialist court. Because the protection of legitimate expectations under the rule of law is to be developed from the perspective of the citizen to be protected, whom the administration as a state authority encounters in a similar way to the judiciary[85]. A retroactive non-application law is permissible if legitimate trust in a new court judgment that deviates from the previous executive or judicial interpretation and application practice could not be formed before the enactment of the law confirming the previous practice[86].

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

9 CONSTITUTIONAL REQUIREMENTS FOR THE TAXATION PROCESS

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

The right to informational self-determination as an expression of the general right of personality is affected wherever the tax authorities – as is usually the case – collect and process personal data (P. Kirchhof, 1995; Pfisterer, 2017, p. 393)[87]. In the recent past, there has been a significant expansion of the information obligations of taxpayers in Germany. In addition, the possibilities that the European General Data Protection Regulation opens up for

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

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

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

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

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

the EU member states to create exceptions have been extensively used in the area of financial management[88]. Especially under the conditions of an electronic and highly networked financial administration, an appropriate balance between the legitimate interest of the state to collect data to ensure legal taxation on the one hand and the informational right of self-determination of the citizen on the other hand must be maintained in the future.

The principle of proportionality also applies to the taxation process. Measures that affect the taxpayer in his property, his freedom to practice his profession or at least in his general freedom of action must be suitable and necessary in order to achieve the goal of reliably determining the tax bases[89]. In addition, the reasonableness limit must be observed. The endeavor to ensure materially correct taxation must be weighed against the encroachment on fundamental rights at the expense of taxpayers (Tipke et al., 2021). This balancing may also include the taxpayer's greater or lesser ability to comply with procedural obligations. Large, internationally active companies will usually have greater "processing efficiency" than small, locally active sole proprietorships[90].

Last but not least, the protection of the right to informational self-determination and the guarantee of a proportionate taxation procedure are served by substantive legal typifications and generalizations, which relieve the administration of individual examinations and an excessively precise insight into the private sphere of the taxpayer[91]. The use of new types of risk management systems can work in the same direction, which only cause the financial authorities to examine the individual case more closely in suspicious cases. Insofar as algorithms and self-learning systems of artificial intelligence are used here or elsewhere in the tax procedure, transparency and control must be used to ensure that no unconstitutional discrimination is associated with them.

10 SUMMARY

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

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

The general principle of equality (Article 3(1) of the Basic Law) obliges the tax state to ensure that the burden is fair. The Federal Constitutional Court substantiates this requirement with the principle of taxation based on economic ability, which in turn is regarded as mandatory under constitutional law. The ability-to-pay principle is further specified by the tax legislature for the individual taxes, for example for income tax through the objective and the subjective net principle (deduction of acquisition-related and

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

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

[90] *See Schick, Besteuerungsverfahren und Verfahrensleistungsfähigkeit, 1980.*

[91] *See above 3.2 and 3.3.*

existence-related expenses from the assessment basis). The Federal Constitutional Court grants the legislature wide leeway when it comes to the question of which sources of tax capacity it wants to exploit. Once the decisions allocating the burdens have been made, however, they must then be implemented logically, i.e. consistently and conclusively, in order to ensure equal loads. Both a progressive and a proportional (but not a degressive) income tax rate are considered to be in line with ability to pay.

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

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

The fundamental rights to freedom restrict the tax legislator only slightly. According to the fundamental right to property (Art. 14 Para. 1 of the Constitution), strangulating taxation is prohibited. In addition, the taxes on the income must be proportionate. However, after the abandonment of the so-called 50-50 principle, the legislator has a lot of leeway in this respect. In the area of excise and expense taxes, the Federal Constitutional Court is even more reluctant to name upper limits on the burden of basic freedoms.

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

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

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

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

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

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

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

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Article

Parliamentary responsibilities in taxation and for taxation in Spain and Italy

Adriano Di Pietro

Professor of Tax Law at the University of Bologna. Visiting professor at the Autonomous Universities of Barcelona and Burgundy. PhD coordinator and director of the European School of Higher Tax Studies (Scuola Europea di Alti Studi Tributari) at the University of Bologna. Member of the Accademia delle Scienze of the Istituto de Bologna. Honorary doctorate from the University of Valladolid. Author of numerous publications, he is a specialist in European Tax Law and has been a member of the commissions of the Italian Ministry of Finance for tax reform, personal income tax reform and corporate tax reform. E-mail: adriano.dipietro@unibo.it

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ABSTRACT:

The author addresses a series of characteristics of the European constitutional tax tradition emphasizing two aspects: parliamentary consent to taxes as a constitutional foundation as a common European principle and parliamentary fiscal responsibility as a non-generalized provision in European constitutions. Regarding the principle of legality or reserve of law in tax matters, he mentions the code's relative and not absolute nature and comments on the different constitutional solutions of various European countries. On the other hand, he shows the points in common between them. Regarding fiscal responsibility, he describes it as a provision that is not generalized in European constitutions and again exposes the points of divergence and convergence of the various European countries.

PALABRAS CLAVES:

Desarrollo sostenible, transparencia fiscal, educación de las partes interesadas, evasión fiscal

RESUMEN:

El autor aborda una serie de características de la tradición constitucional tributaria europea, y enfatiza dos aspectos: el consentimiento parlamentario de los impuestos como fundamento constitucional como principio común europeo: la responsabilidad fiscal parlamentaria como una disposición no generalizada en las constituciones europeas. Respecto del principio de legalidad o de reserva de ley en materia tributaria, menciona el carácter relativo y no absoluto del principio, y comenta las diferentes soluciones constitucionales de diversos países europeos, y por otro lado muestra los puntos en común entre ellos. Respecto de la responsabilidad fiscal, la describe como una disposición no generalizada en las constituciones europeas, y nuevamente expone acerca de los puntos de divergencia y de convergencia de los diversos países europeos.

MOTS CLES :

constitution politique ; régime fiscal; principes fiscaux; Union européenne; responsabilité fiscale

RESUME :

L'auteur aborde une série de caractéristiques de la tradition fiscale constitutionnelle européenne en mettant l'accent sur deux aspects : le consentement parlementaire aux impôts en tant que fondement constitutionnel en tant que principe européen commun et la responsabilité fiscale parlementaire en tant que disposition non généralisée dans les constitutions européennes. Concernant le principe de légalité ou de réserve de droit en matière fiscale, il évoque le caractère relatif et non absolu du code et commente les différentes solutions constitutionnelles des différents pays européens. D'autre part, il montre les points communs entre eux. Concernant la responsabilité budgétaire, il la décrit comme une disposition non généralisée dans les constitutions européennes et expose à nouveau les points de divergence et de convergence des différents pays européens..

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1 THE NECESSARY PARLIAMENTARY ROLE FOR PUBLIC FINANCING AND THE CHOICE OF THE RELATIVE FISCAL MEANS

Public funding must find its source and its basis in a parliamentary consensus. This is a conviction shared by the vast majority of European states, which have different constitutional solutions. These refer to taxes or broader forms of public financing or include constituent elements as well. or even provide for its application.

This is the case of the Constitutions of Germany, Austria, Belgium, Bulgaria, Croatia, Denmark, Spain, Estonia, France, Greece, Finland, Italy, the Netherlands, Poland, Portugal, and Sweden.

Therefore, a future Chilean solution of establishing in the Constitution that it corresponds to Parliament to decide on public financing options seems to be in line with those adopted in almost all European States, despite the institutional, structural, and historical differences that distinguish their constitutional charters.

2 FORMAL EXCEPTIONS TO A CONSOLIDATED EUROPEAN EXPERIENCE: TRUST IN CONSTITUTIONAL LAW AND NOT IN THE CONSTITUTION: THE HUNGARIAN CASE

This option of constitutional recognition of the power and responsibility of Parliament in deciding the forms of public financing can be described as European. Of course, there is the Hungarian exception, which does not provide for in its Constitution the reservation of the law on forms of public financing. However, Hungary has entrusted the constitutional guarantee to a law that, due to its constitutional nature, binds parliamentary decisions with the same effectiveness as the Constitution. As such, it only allows Parliament to decide, through legislative forms, public financing solutions.

It is a system solution which, precisely because it does not clearly differ from the options in the Constitution of the vast majority of European countries, can in turn be justified by national needs. Like not limiting the legislative responsibility of the Hungarian Parliament to an essential provision of the Constitution. Thus, Hungary considered that it could better articulate this responsibility through legislative development. However, he wanted to guarantee the same constitutional effectiveness but with a more articulated law than a single constitutional precept. In the Magyar legislative options, however, the freedom of the Parliament to adopt, through its own laws, the tax solutions that are considered more effective and coherent, will always find the limitation, this is included in the Constitution, unlike the reservation of law in tax matters, respect for the proportion with the economic situations of individual taxpayers. As a consequence, the political confrontation between the Government and the Parliament will then have to face different opinions and visions. In these cases, solutions could be affirmed through parliamentary mediation, even beyond the balances entrusted to the defined majority of national governments.

With the constitutional law provided, the Hungarian Parliament was also able to define the scope of financial options subject to parliamentary consent. More specifically, it decided whether to limit the expected parliamentary consent to tax benefits or to adopt a broader financial dimension. In this case, it is capital benefits of various kinds but always characterized by their financing function.

The Hungarian option to give the tax law reservation a constitutional basis, but with a special law and not in the Constitution, seems to be more formal than a substantial solution. The legal effectiveness of Hungarian constitutional law is equal to that of the specific provision that other European states have adopted in the Constitution. In fact, by means of constitutional law, Hungary has tied national tax options to the necessary formalization of a law. Thus, it does not allow fiscal limitations to be introduced by other forms of legislation that do not involve Parliament.

At the same time, the presence of a constitutional law places an even greater restriction on the Hungarian tax legislator than is imposed in other states by the constitutional reservation of tax law. In fact, a piece of legislation lends itself better to a more articulate analysis: one that can be used to indicate the characteristics that the national legislator must always respect when adopting new forms of taxation.

This is a Hungarian solution that could well be left to the evaluation of the Chilean Constituent Assembly. The task of the Constituent Assembly will either be to adopt, like the vast majority of European states, a general reservation of law on tax matters, or to refer, following the Hungarian experience, to the options of a constitutional law that could certainly be more articulate. In fact, it could better outline the constitutive features of the forms of taxation that the Chilean Parliament will want to adopt in the application of the Constitution. (Deak, 1997)

3 THE EUROPEAN PREFERENCE FOR A "RELATIVE" RESERVE OF TAX LAWS: AN "ABSOLUTE" RESERVE WOULD HAVE REQUIRED A BROAD TECHNICAL RESPONSIBILITY OF PARLIAMENTS.

Faced with a certain, but generic, investiture of Parliaments in tax matters, a constitutional interpretation has prevailed in Europe that has allowed the primacy assigned to Parliaments by the Constitutions to be maintained. However, parliaments are not fully responsible for both fiscal and enforcement decisions involving the introduction of a new tax or the modification of existing ones. On the contrary, full and detailed regulatory responsibility would have required parliaments to have a degree of technical-legal and

economic knowledge that, by tradition, cannot form part of the political experience of parliamentary representatives.

In addition, full parliamentary responsibility over the tax system as a whole would have required not only a political debate on the tax models and a debate on the individual tax solutions to be adopted but also the approval of the legislative options necessary to fully regulate the regulatory text. and its application. This would have lengthened the time needed to pass new or innovative tax rules. This would clearly conflict with the national financial needs that had inspired the general policy options. This would also have reduced the timeframe for the entry into force of the new provisions. Therefore, it would also have been difficult to guarantee, for all tax legislation, whether new or innovative, the degree of detail that the new rules would have required to guarantee the full innovative effectiveness of all the provisions, and not only those that constitute the new tax.

Therefore, with a relative reserve, the Parliament can exercise the fullness of its political role in the regulatory options on the structure of the new taxes. The Government, for its part, can make use of its technical competence to regulate, respecting the legislative principles, the regulation of new taxes, or extensive modifications of the existing ones.

This solution is common to the European Constitutions, as confirmed by the constitutional formulas adopted. None provides for parliamentary consent on tax matters with the determination and regulatory precision that the absolute nature of the legal reserve would require.

Thus, the relative reserve of tax laws is an experience so widely shared in Europe that it can be considered a European solution: that of not assigning Parliament full and complete responsibility for regulating all tax disciplines, but only the constitutive and qualifying elements of the tax levy.

Future Chilean constitutional options could well be inspired by the European solution of adopting a relative fiscal law reservation in constitutions. However, it would remain the responsibility of the Chilean constituents to choose a formula that objectively defines the scope of the constitutional operation of the tax law reserve.

4 THE RELATIVE RESERVE IN TAX MATTERS AND EUROPEAN CONSTITUTIONAL DIFFERENCES

4.1 THE EFFECTIVENESS OF CONSTITUTIONAL SOLUTIONS THAT PROVIDE FOR THE PRESERVATION OF LAW BUT DO NOT EXPRESSLY MENTION TAX APPLICATION

4.1.1 The Italian experience and the role of tax benefits

Italy certainly offers an obvious constitutional innovation in the Constitutional Charter of 1948. Article 23 of the 1948 Constitution provides for the necessary consent of Parliament for a wide range of benefits of a patrimonial nature, which it calls imposed benefits (no personal or patrimonial benefit can be imposed but by law). This is a significant difference from the formula of the Constitution of the Kingdom of Italy, known as the Statuto Albertino. In effect, it established that taxes could not be imposed or collected without the authorization of the Houses of Parliament and the subsequent sanction of the King: a sovereign power to accept or reject parliamentary options in tax matters. A constitutional and political panorama very different from the one we have today in Italy. Here, the tax sovereignty of Parliament was explicitly regulated with reference not specifically to taxes, but to the much broader category of tax services. Hence the recurring interpretative effort of the Constitutional Court. In fact, over time, the Constitutional Court has dedicated itself to recognizing the constitutive

features of taxable benefits and, consequently, to defining the scope of the necessary intervention of Parliament in tax decisions.

Therefore, priority has been given to the definition of the content of the capital that qualifies, in general terms, the area of necessary parliamentary consent. This patrimonial content undoubtedly characterizes taxes. In this case, the benefit is justified, in turn, by the financial responsibilities of the taxpayer, linked to economically relevant situations to the point of being considered expressions of taxable capacity. The same function of public financing is also present in the broader category of taxes that, like rates, are owed by taxpayers without obtaining a concrete utility, such as the one that, instead, inspires the logic of compensation. The latter, in turn, is clear from the interpretation of the Constitutional Court to extend parliamentary consensus, in addition to taxes, to those services with a patrimonial content that, although they are not functional to public spending, nevertheless impose an economic impoverishment on the users of public service, without them being able to interfere on the reasons and measures of the patrimonial service that is requested of them. Therefore, in this case, according to the Italian Constitutional Court, the legal reservation also operates with respect to pecuniary benefits that have neither the function of public financing nor that remuneration for the services rendered to the plaintiffs. That is, those that appear to be characteristics qualified as tax benefits.

The Italian solution, with the relative interpretative experience, could be used in Chilean constitutional options if the Constituent Assembly decided to submit all fiscal options to Parliament, but also wanted to extend, following the Italian interpretation, parliamentary consent to capital services. Those that, without the function of public financing, and with the corresponding character, however, continue to have a common base of authority, excluding, however, contractual participation of the users. However, this solution, unlike those found in other Constitutions, such as the French one, would not be accompanied by details on the constituent elements of taxes. Therefore, it would correspond to the Chilean Constitutional Court, the double interpretative responsibility that the Italian Constitutional Court assumed. On the one hand, to define the qualifying features of the taxes to differentiate them from the benefits imposed and, on the other hand, to qualify the latter in an original way to differentiate them from benefits of a merely retributive nature (Allorio, E, 1957; Antonini, L, 2006; Bartholini, 1957; Berliri, 1958; Boria, 2021; Cipollina et al., 2006; Di Pierto, A, 2015; Fedele, 1994; Fedele & De Siervo, Ugo, 1978; Fois, Sergio, 1963; Grippa Salvetti, Maria Antonietta, 1998; Marongiu, 1991; Morana, 2007).

4.1.2 The Spanish experience is similar to the Italian one

The Spanish Constitution establishes, in its article 31, last paragraph, that: "Personal or patrimonial benefits of a public nature can only be established in accordance with the law".

Spain, like Italy, renounces a specific provision on taxes, to which the Constitutions of other countries refer explicitly. This is an advantage for a broader reference to capital benefits.

The interpretive result of this original solution is quite similar to the Italian one. The constitutional restriction is broad: it, therefore, imposes the necessary parliamentary consent not only for tax benefits but also for those of a broader nature of the authority. Which, in the interpretive evolution of the Spanish Constitutional Court, implies, as in Italy, the coercive nature of benefits, with the relative lack of correspondence, and the function of public financing. It is an original horizon that, however, like Italy, is not limited to the complexity of the criteria set out that contribute to qualifying the tax benefit, according to the interpretation of the Spanish Constitutional Court. Spain, like Italy, is concerned with offering parliamentary coverage not only to taxes but also to those patrimonial options that, although

they do not have a natural financial vocation, maintain an authoritarian character towards users of public services, even if they are not taxpayers . Thus, even within the framework of the Spanish Constitution, the technical and political evaluations of the Government cannot prevail over the options that, in terms of general coherence of the legal system, corresponds to Parliament adopting. This is true not only for the variety of authoritarian options of a fiscal nature, but also for those that impose, in any case, patrimonial benefits on users in the different sectors of public services, even without a financial function.

The Spanish solution, like the Italian one, could be used in the Chilean constitutional options. This solution is coherent with the intention of offering, through the reservation of law, the broadest constitutional guarantee not only to all taxes but also to those patrimonial benefits that are imposed by the State not for economic purposes but for remuneration, which in turn is determined authoritatively. It would then correspond to the Chilean Constituent Assembly to choose the most appropriate formula to represent this requirement. You could also use the formulas from the Spanish or Italian constitutions. Whatever the choice, the full interpretive responsibility of the Chilean Constitutional Court would be maintained, like the Spanish and, before, the Italian. It is a question of defining the original and qualifying characteristics of both the tax and the patrimonial benefit imposed (Calvo Ortega, 2013; Cazorla L, 2005; *Derecho Tributario. Parte General*, 2007; Menendez Moreno A, 2021; Queralt et al., 2020; Yebra Martul-Ortega, 2004).

4.1.3 Taxation as part of a broader financial responsibility of the Parliament in the Swedish experience.

Fiscal responsibility is part of a more general financial responsibility that the Swedish Constitution wants to be supervised by parliamentary decisions. In fact, in Chapter VIII of the Swedish Constitution, Article 3(2) states: "Provisions relating to relations between individuals and the public administration that impose obligations on individuals or otherwise interfere with their personal and economic will be established by law." In this way, Sweden demonstrates that it wishes to generalize the guarantee function offered by parliamentary consent. Its constitution extends it to a particularly broad field of legal and economic relations. They are those that, according to article 3, impose obligations on individuals or interfere in their economic relations. This is a provision that undoubtedly shows that it does not want to be linked to tax benefits, as occurs in other Constitutions. A provision that confirms, on the other hand, that the interest in submitting fiscal options to parliamentary control is not unique or exclusive among those that are constitutionally guaranteed.

Of course, it is precisely the characteristics that, in the European constitutional experience, qualify tax benefits that allow them to fit into the broad categories that the Swedish constitutional provision has chosen. It is, in any case, the authoritarian nature of the provision, excluding the payment function but, nevertheless, with the decisive function of financing public spending. Thus identified, the tax benefit is undoubtedly the most important aspect of the pecuniary obligations imposed that the Swedish constitution refers to the necessary parliamentary consent. However, it is blurred in a broad constitutional provision, without having the exclusive character that it assumes, on the other hand, in the constitutional provisions of other European countries that promote the reserve of law only in tax matters. Therefore, compared to these, the interpretive effort of tax benefits in the Swedish Constitution is certainly less important. In fact, it does not seem necessary to define the characteristics of such services since, in any case, they would be included in the much broader category of "relationships with the public administration that impose obligations on individuals or otherwise interfere with their economic relations". ".

The Swedish option could be useful, therefore, for the future Chilean Constitution if it wanted to adopt a scope of application of the reserve of law that is broader than the fiscal

one. This solution could be even broader than the one adopted by the Italian and Spanish experiences. Unlike these Constitutions, which do not mention taxes, the Swedish Constitution lacks any specifically patrimonial connotation. Instead, it is replaced by a more generic reference to relative efficiency: that of the interference of profit in economic relations.

Such a solution would not require Chile to seek more demanding constitutional interpretations to guarantee the "presence" of tax benefits in the necessary constitutional provision. Certainly, those acquired in the European tradition may well be used in this case, with indisputable interpretative effects. On the other hand, the impact of taxes on the economy of individuals has a qualifying and original nature and, in any case, would be enough to guarantee respect for a broad constitutional option that Chile might want to adopt along the lines of the Swedish experience (Lodin, 2011)

4.2 THE EXPLICIT REFERENCE TO TAXES ONLY AS A SPECIFIC OBJECT OF THE LEGAL RESERVATION IN THE DUTCH AND BRITISH CONSTITUTIONAL PROVISIONS

There are numerous charters that simply give taxes the necessary legislative supremacy. These options acquire a general character, since they characterize various constitutional solutions, regardless of their more or less articulated formulation. In the Dutch Constitution (art. 104) state taxes are collected by law. The rest of the State taxes will be regulated by law) and in the laws of the Parliament of 1911 and 1949 of Great Britain the principle of reservation of law in tax matters was codified. In fact, these Constitutions explicitly mention taxes without further specification. Thus, they attribute the legislative power of taxes exclusively to Parliament in the Netherlands and to the House of Commons in Great Britain. In both cases, it is a solution explicitly oriented towards taxes, as can be seen from the specific constitutional provision on them. A specific choice that, as such, would not allow, from the textual point of view, a broader application. Consequently, other forms of taxation would be left out of the constitutional guarantee that, although they are functional to public financial needs, do not have the same structural and functional characteristics as those recognized as taxes. In particular, that of an economic duty linked to the occurrence of events that the legislator had judged as a measure of fiscal responsibility of taxpayers. It is precisely the authoritarian character and the lack of exchange function that characterize fiscal benefits that in turn would justify parliamentary control and decision. Only in this way can Parliament be prevented from being deprived of options that, like taxes, although they are not openly declared as such, snatch a part of their assets from individuals without them having any concrete benefit.

By adopting this broader interpretation, the constitutional guarantee of parliamentary consent extends beyond the textual data on taxes. In this way, all tax benefits are subject to parliamentary decisions, that is, those that are decided with authority and with a financing function. In this way, these services are not subject to the political evaluations of the government. At the same time, parliamentary options offer individuals a constitutional guarantee consistent with the effects of a reduction in their assets ordered by the authority, but to which no specific benefit corresponds.

Therefore, it will correspond to the constitutional interpretation to offer reasons and foundations to extend the constitutional guarantee to the broader sphere of taxes. It will be up to the Constitutional Court to underline the general effectiveness of parliamentary consent even beyond specific tax provisions. This is an interpretative commitment to enhance the constitutional textual data of taxes in a broader sense: the one that corresponds to the criteria traditionally used to qualify tax benefits. They are, precisely, the power, by virtue of which non- remuneration and the function of public financing are introduced into the system. However, even in this broader sense, the constitutional guarantee does not only

cover tax identification. It also extends to qualifying features for the entire category. It is, in effect, taxpayers, tax base and rates.

Thus, full political responsibility is left to the individual parliamentary choices of the Netherlands and Great Britain. Thanks to the broader interpretation of the Constitution, this responsibility extends to the legislative regulation of all taxes, even those that do not have the characteristics of a tax, without leaving them to the choice of the government.

Aware of these difficulties, therefore, the Chilean constituent might prefer to adopt the more general formula of taxes instead of taxes. In this way, the text would be sufficient to guarantee the broadest applicability of the legal reserve to the entire tax sector without having to resort to constitutional interpretation.

4.3 From the prediction of taxes to their consequences: the Danish and Irish experience

As a corollary to the extensive tax provision, the Danish and Irish Constitutions extend their scope of application. In fact, they also put under parliamentary control, although with different aspects, the phases after the establishment of the tax, such as future modifications and its extinction. Thus, in the case of Denmark (Art. 43 No tax can be instituted, modified or abolished except by virtue of a law; no loan of public money can be contracted or any army recruited except by virtue of a law). A finance bill is any bill that contains provisions relating to all or some of the following matters: the imposition, suppression, reinforcement, modification and regulation of taxes; the imposition of charges to the public treasury for the payment of debts or other financial charges, or the modification or elimination of such charges; approval of expenses; the consignment, entry, custody, exit or verification of public money loans; the issuance or guarantee of loans or the reimbursement thereof; issues incidental to or related to all or some of them).

These are textual options that further reinforce the constitutional vitality of taxes. In the Danish and Irish constitutional experience, parliamentary consent makes full legislative responsibility visible and therefore constitutionally effective. It is also about the very events of the fiscal elections that accompany the institution of a tax, until its repeal. This choice seems coherent with the legislative responsibility that guarantees the reserve. For the sake of consistency, the latter could not be limited solely to the institution of the tax, neglecting the equally important political responsibility of regulating its scope and effectiveness. Therefore, the responsibilities must go back to the same parliamentary political evaluations that were then entrusted with the choice to establish a tax.

The Irish and Danish options thus make clear in the constitutional text the full responsibility that the Constitution entrusts to Parliament. This is a result that the Constitutional Courts themselves had made consistent and well-founded in the case of the other Constitutions, which only provide for parliamentary consent to the tax. This was the case when events after the tax after its institution were placed under the law.

The Danish and Irish experiences offered the Chilean Constituent Assembly a useful opportunity for reflection: what is the best way to formalize full legislative responsibility in tax matters. The Chilean Constitution could be adapted to the options of the vast majority of European States. Therefore, it could be limited to only providing for the indication of taxes, leaving the responsibility of guaranteeing the full effectiveness of this broad provision to the Chilean Constitutional Court. A responsibility that the Court could assume with the interpretation that recognizes the full competence of the Parliament not only for the establishment but also for the subsequent acts of tax regulation until its final repeal.

Alternatively, the Chilean Constituent Assembly could make parliamentary sovereignty in fiscal matters clear and manifest. It could, therefore, extend in the Constitution

the provision of parliamentary sovereignty for the entire destination of taxes: from its institution to its extinction, thus accepting an indefinite number of amendments. In this case, the interpretative intervention of the Constitutional Court would no longer be necessary; which, on the other hand, in other European countries has required a constitutional formulation entrusted to the generic forecast of taxes.

4.4 THE BROADEST CONSTITUTIONAL GUARANTEE FRAMEWORK OF TAXES ONLY FOR ESTONIA AND SLOVENIA

There is no shortage of constitutional options that extend the legislative guarantee beyond the recognized and traditional scope of taxes. The need to textually guarantee the widest application of parliamentary options has inspired constitutional formulas which, like the Estonian or Slovenian constitutions, extend the legislative guarantee to a wide scope. This covers, as in the Slovenian Constitution, the entire scope of fiscal services, clearly in addition to the explicitly mentioned taxes (Art. 147. The State prescribes by law the taxes, customs duties and other charges. Local communities will establish taxes and other rights under the conditions established by the Constitution and the law). Or, as in the Estonian Constitution, an even wider scope of application is provided for. Which, in the rich textual forecast, mentions, in addition to taxes, a heterogeneous variety of patrimonial services, also characterized by non-financial functions. However, the authoritarian nature of the services continues to be common, justified either by a penalizing intention, or by the particular nature of the insurance contracts (Art.113 [Taxation] State taxes, rates, levies, sanctions and mandatory insurance payments will be determined by law).

For the Slovenian Constitution, the result of the interpretation could be consistent with the solutions adopted by other European constitutional courts to define and classify patrimonial benefits as fiscal. They are those in which authoritarian and financial aspects are combined.

For the Estonian Constitution, on the other hand, the scope of application of the reservation of law, precisely because it is envisaged as broader than that of taxes, allows the national legislator to go beyond the demarcation lines drawn for the latter. With such constitutional investiture, in fact, the national legislator is obliged to regulate, in addition to taxes, also the services provided by the authority but without financing functions. With such a broad responsibility, the Estonian Parliament will not have to face the difficulties of defining the scope of its necessary regulatory intervention. These difficulties, on the other hand, weigh on the interpretation and application of other European Constitutions that formally limit the reservation of law to taxes or duties only.

The constitutional solutions of Estonia and Slovenia could be a useful experience for future Chilean options. They offer, in fact, a broader constitutional guarantee than the one limited textually to taxes in other constitutional letters. Consequently, they explicitly commit the Estonian Parliament to carry out its legislative responsibilities in all fiscal matters, and the Slovenian Parliament to extend the constitutional guarantees of legal reserve also to authorized benefits other than public funding, such as taxes.

5 BEYOND THE CONSTITUTIONAL PROVISIONS OF TAXES: THE RELATIVE RESERVE OF THE LAW AND ITS CONSTITUTIVE FEATURES

5.1 UNIQUE FUNCTION AND VARIETY OF CONSTITUTIONAL SOLUTIONS ADOPTED

In many constitutional letters, the confidence in parliamentary consent does not stop at the mere mention of taxes but is enriched by the express provision of the elements that qualify them.

This is a useful solution to make the parliamentary function in tax matters clearer and more accountable, specifying the scope of the necessary regulatory intervention. It is, therefore, a corollary of the relative nature that the European States have firmly recognized to the reserve in tax matters, with a direct implication of the constituent elements of the tax. This constitutional solution is necessary to guarantee the reserve's full regulatory effectiveness and to eliminate the danger that the mere mention of taxes in the Constitution could limit its effectiveness, confining it to a mere programmatic scope.

Despite this common intention, the constitutional options are not homogeneous. This is so, both when defining the scope of application and the constituent elements of the tax, as well as when it also includes the scope of application and even that of administrative control and not only the traditional and consolidated substantive scope.

5.2 THE VARIETY OF CONSTITUENT ELEMENTS OF THE TAX

The national constitutional options continue to be divergent precisely in the choice and consequent strengthening of the constituent elements of the tax. Those that represent a culturally acquired fact, even if it is not always expressed in the legislation, for the constitutional experiences that are based on the reservation of law in fiscal matters.

5.2.1 The Portuguese constitutional provision to determine the scope of taxes

In the Portuguese Constitution, attention is focused on the constituent elements of taxation that continue to play the fundamental role of defining the amount of the tax benefit and, specifically, the tax base and the tax rate: article 103. - (Tax system) 1 The tax system will have as its objective the satisfaction of the financial needs of the State and other public entities and the fair distribution of income and wealth. 2. Taxes will be established by law, which will set the rates, the tax base, tax benefits and guarantees for taxpayers. No person will be obliged to pay taxes that are not set within the terms provided by the Constitution, that are retroactive, or that are not paid or collected in accordance with the law).

The Portuguese Constitutional Charter is, therefore, a guaranteed option. Useful, as such, to define more and better the characteristics considered essential of the relative reserve of law. In this way, governmental options are avoided for an election that, on the contrary, should reinforce the responsibility of Parliament, which is urged, in the name of the Constitution, to define the elements on which the financial participation of the taxpayers.

The Portuguese experience clearly highlights some of those constitutive elements of the tax that, according to the European tax culture, a law must identify in order to guarantee full respect of the constitutionally affirmed reserve. The Portuguese choice thus demonstrates a willingness to prioritize the tax base and rates. This, probably in the awareness that these are the characteristics in which the financial responsibility of taxpayers is measured. This is a substantial interest that seeks to explicitly highlight parliamentary responsibilities to the extent that they are decisive in determining fiscal outcomes in objective terms.

It is a conscious choice so that the legislative responsibility is manifested in the determination of the constitutive elements of the tax on which the sacrifice of the taxpayers is really measured.

This is a different option to what can be found in the constitutional experiences of most European states. There, parliamentary responsibility for taxes is provided for without further specification and then relies on constitutional interpretation to define its limits.

A conscious choice, the Portuguese one, to highlight, at the constitutional level, the importance of the tax base and the tax rate, that is, the elements necessary to settle the tax and thus determine the level of indebtedness of the taxpayers. In Portugal, therefore, the Constitutional Court has the specific task of identifying the criteria that serve to qualify the tax components that are essential to quantify the measure of the economic benefit of taxpayers. Those that, as such, are already constitutionally provided for.

These are options that the Chilean Constitution could then share. It could decide to integrate the broader provision of parliamentary consent on taxes with those constitutive features useful in determining its amount. Those that serve to affirm, with constitutional authority, the importance of the full execution of the tax debt. Therefore, with this specific objective, the Chilean option could be the best guarantee of a fully recognized parliamentary responsibility. It would therefore be the best demonstration of the substantial effectiveness of the fiscal sacrifice. In this way, Parliament's responsibility in determining and applying the criteria on which the tax benefit is based would be more directly understandable and coherent (Casalta Nabais J, 2005; Catarino, J., 1999; Gomes Ns, 1993; Pires, M, 1978) .

5.2.2 From the broad constitutional provision of the constituent elements of taxes to that of their application: the Greek experience

Common to the Portuguese experience is the concern of the Greek Constitution to make evident in the textual data the elements that qualify the reserve of law in tax matters. (Art. 78 1. No tax can be established or collected without the existence of a formal law that determines the taxpayers and income, types of goods, expenses, and categories of operations to which the tax refers).

The Greek Constitution thus favors the substantive elements that qualify the tax, such as taxpayers and the so-called presupposition in fact. In such analytical provision, on the other hand, the references to the tax base and the tax rate that characterize the Portuguese Constitution are not specifically mentioned. This is a clear sign of the Greek concern to highlight, at the constitutional level, the greater importance attributed to subjects and objects, as constitutive elements of taxation, rather than those that serve to determine its measure, such as the tax base and the tax rate.

Both the tax base and the tax rate have a substantial effect. This is necessary to contribute to the quantification of the tax debt and to make effective, and therefore implement, the fiscal responsibility that the subjective and objective conditions of the tax have helped to establish.

Furthermore, the Greek Constitution combines the institution and the collection of taxes. This is a broad formula that allows Parliament to be given a broader responsibility: that of regulating not only the structure of the new taxes or any modification thereof, but also their collection. Thus, it is recognized that the constitutional formula is necessary to guarantee effective and punctual compliance with taxes, thus defining a balanced relationship between the powers of the administration and the rights of taxpayers.

The Hellenic experience offers the future Chilean Constitution a different analytical alternative to the Portuguese one: that of privileging the substantial aspect of the distribution of the tax sacrifice in subjects and budgets, instead of promoting the elements that qualify

the tax according to its liquidation. In the Greek Constitution, therefore, the clarity and certainty of the application prevail over the need, although appreciable, to establish the essential elements for the calculation and liquidation of the tax, as in the Portuguese Constitution.

However, if in the end the Chilean Constitutional Council does not want to run the risk that the constitutional provisions clearly value only some of the constitutive elements of the tax, it could propose a text that manages to combine the Greek and Portuguese solutions. For this reason, the Chilean constitutional proposal could contemplate all the constituent elements of the tax instead of dividing them. Thus, both the taxpayers and the prior condition, provided for in the Greek constitution, and the base and type of the Portuguese.

If this solution is considered excessively complex for a constitutional text, another alternative would be to provide a formula inspired by the Greek that would bring together, in the legislative responsibility, both the institution and the collection. However, it should no longer refer only to the subjects and the factual basis, which are indicated analytically, but to a general provision that refers to the tax and its constitutive characteristics.

5.2.3 The broad legislative responsibility in the original tradition of the French Constitution: from the structure of taxes to their application

Like the Portuguese and Greek constitutions, the French one is also based on the constituent elements on which the tax is then measured, such as the tax base and rates. This solution is consistent with the inspiration of the Declaration of Human Rights and Fundamental Freedoms which, however, continues to constitute the very preamble of the Constitution.

The constitutive elements, in turn, retain a broad effect, consistent with the equally broad reference to the impositions indicated as of any nature, but which continue to be impositions.

In fact, Article 34 of the French Constitution states: "La loi fix the rules concerning l'assiette , le taux et les modalités de recouvrement des impositions de toutes nature . This choice is lexically justified by the intention of confirming, in the Constitution, the broad provision contained in the Declaration of Human Rights (article 14 of the DDHC: "... All citizens have the right to verify, by themselves or by their representatives, the need for public contribution, to consent freely to continue the employment, and to determine the quota, the amount, the collection and the duration... "

This constitutional solution required, in order to be effective, to combine a broad provision of taxation with the specificity of its structural elements, such as the tax base and rates. Basically, those that qualify the tax benefit and that, in turn, are essential to define the amount to be paid by taxpayers; that is, the amount that quantifies your financial responsibility.

This original French constitutional formula, however, required a lengthy process of judicial and administrative interpretation to better define the broad formula adopted by Article 34 of the Constitution.

It has been difficult, for the French jurisprudential and administrative experience, to define a precise line of demarcation to guarantee, with sufficient certainty, the obligation of legislative choice extended to impositions, generically indicated as of any nature. The result has been to include not only taxes, but also what are called fiscal taxes and what are called quasi-fiscal taxes.

The former is applied to the operation of a public service, but without being a counterpart. The latter, despite their wide application, are a borderline category with rates.

Thus, it can be understood how the same legislator can attribute to the Government a broad power to regulate the tax base, the rates and the collection procedures and can decide to remove the pertinent controversies from tax litigation, as occurs with the tax on lottery prizes and casinos.

In this way, it is confirmed, in conclusive terms, that the legislative obligation in France is not constitutionally enforceable for benefits that have a general nature of consideration, among which are those that constitute, unanimously, social security contributions and charity.

Therefore, legislative responsibility also extends to the tax base and tax rates. Both allow you to measure or assess taxable wealth and base the amount of the tax on it. With this specific function, they deserve a specific legislative responsibility: the one that France, like Portugal, has wanted to reserve for the tax base and the rates instead of entrusting them to the interpretation of the Constitutional Court. From this perspective, the subsequent constitutional choice to explicitly extend legislative responsibility to the realm of tax collection can be understood. In this way, the French Constitution shows that it also wants to guarantee parliamentary control of the rules governing the last stage of the application of taxes. It is the phase of tax collection in which, in the name of the final acquisition of financial resources, the responsibilities of the taxpayer and the functions of financial administration coexist. This importance justifies the explicit constitutional involvement of Parliament without deducing it from a more general constitutional precept, as occurs in the solutions adopted by other European States. On the other hand, the decision to extend the legal reserve to the collection of taxes and not only to their creation, equates the French solution to the Greek and Portuguese ones. However, the effectiveness of the French option is even greater than that adopted by Greece and Portugal. Actually, it refers to the application of forms of taxation that, by express constitutional provision, are of any nature. This is a solution that could also be proposed to the Chilean Constituent Assembly if it wanted, in turn, to entrust the law with the responsibility of regulating both the "creation" of taxes and their application and final collection. In addition, the French experience would offer the Chilean Constituent Assembly the possibility of making this widely applicable provision even more effective, referring it not only to taxes in the classical sense, but to all those forms of taxation that mark European experiences. Those in which the constitutive nature of taxes continues to be authoritarian but with an indisputable financial vocation. What seems to be the unequivocal sign of distinction with respect to services of an onerous nature, although they continue to be characterized by an authoritative source.(Barque, 2013; Beltrame, 2017; Beltrame & Mehl, 1997; Bienvenu & Lambert, 2010; Bourget, 2012; Bouvier, 2020; Bouvier et al., 1995; Casimir & Chadefaux, 2007; Dussart, 2014; Gest G & Tixier G, 1986; Grosclaude et al., 2019; Lamargue J. et al., 2016; Lignereux, 2020; Philip, 1995; Plagnet B. et al., 2006; Schmidt J., 1992)

6 THE HETEROGENEITY OF FISCAL SOLUTIONS IN FEDERAL CONSTITUTIONS

A global vision of the European constitutional experiences could not ignore that of the federal constitutions if the new Chilean constitutional configuration adopts its model.

In the experience of the European federal states, the competence in financial and fiscal matters between the federation and the states is always included in the constitutional provision, although it is distributed according to different criteria.

The models vary according to national traditions, the different roles and the legislative force recognized to the federation and the states in the construction and operation of the federal State.

6.1 CONSTITUTIONAL STABILITY AND VARIABILITY OF LEGISLATIVE SOLUTIONS IN FEDERAL AUTONOMY IN BELGIUM

Thus, in the Belgian experience, the constitutional provision guarantees a substantial division of powers in tax matters between the State, the regions and the Community. The Constitution continues to recognize the primacy of legislation to establish State taxes (Art. 170 1. No tax may be established in favor of the State except by virtue of a law). At the same time, the same Constitution entrusts the communities and local entities that participate in the federal structure of the Belgian State with the power to establish, through their own sources, taxes within their competence (Art. 170 2. No tax may be established tax in favor of the Community or the Region, except by virtue of a decree or a rule provided for in Article 134). However, this competence of the regional bodies can be attributed, in accordance with article 39 of the Constitution, by a law that, in turn, defines its scope of application (article 170 3. The law may totally or partially suppress the taxes provided for in the first paragraph).

In Belgium, an asymmetric system of tax powers has thus been created that continues to recognize a prominent role for the central State. At the same time, the Constitution allocates financial resources to federal entities, which, however, have profoundly different powers. In fact, the regions have ownership of some taxes and the share of federal income from personal income tax and VAT. In detail, the fiscal autonomy of the regions is now guaranteed by granting them a third of the personal tax, which becomes, for all intents and purposes, a regional tax. Basically, the State should continue to define this tax based on the amount of income of residents in each Region. The latter, for their part, should receive their share based on the amount of personal tax paid to the State.

The Communities, on the other hand, only benefit from the co-participation in State taxes. In fact, they maintain the financing of teaching expenses, with the allocation of a VAT quota , linked to the objective criterion of the real number of students. In addition, the Communities benefit from a part of the personal tax, calculated according to the principle of just compensation and, therefore, more favorable for the Flemish Community than for the Walloon Community.

Despite this constitutional distribution of financial powers, the Belgian financial system is characterized by an asymmetry of fiscal powers and powers, to which is added regulatory inconsistency. Over time, a succession of legislative solutions has repeatedly changed the financial structure of the regions and of the Community. In particular, they have modified the federal tax quotas, which continue to be a constant in the financing of regions and communities.

It seems difficult for the Chilean Constituent Assembly to decide to adopt the Belgian model. This financial experience reflects the particularities of the history of the formation of the Belgian state as a federal one. In particular, it would be difficult for Chile to adopt a model that would reflect, in financial terms, linguistic, cultural and economic differences such as those that still divide the two Belgian communities, the Walloon and the Flemish. The Belgian experience demonstrates the difference between the constitutional configuration, which seeks to guarantee a symmetrical distribution of regulatory powers in tax matters between the State, the regions and the Community, and its legislative application. The Belgian experience, on the contrary, is characterized by financial solutions that are not stable, since they are periodically subjected to political pressures that modify their reorganization.

It is precisely this inconsistency in the financial forecasts, with which Belgium has continued to apply the distribution of financial powers established by the Constitution, which constitutes the main difficulty for the future Chilean Constitution to be inspired by the Belgian model. This is a difficulty that the Chilean Constituent Assembly should take into account if it decides to adopt a federal model. It would have to be able to reconcile the constitutional

choice of the financial system with the tax enforcement laws. Those who would have to reconcile federal powers with the relative forms of territorial taxation. Those that are useful to combine the fiscal autonomy of the State with the specific territorial location of the fiscal requirements or with the territorial distribution of the financial resources of the Federation (Autenne J., 2006; Couturier JE. & Peeters B., 2004; Henneaut F., 2019; Tiberghien, 2022).

6.2 THE CONSTITUTIONAL STRUCTURE DIVIDED BETWEEN THE FOUNDATION AND THE LANDER DOES NOT GUARANTEE THE STABILITY OF FISCAL OPTIONS IN THE GERMAN FEDERAL EXPERIENCE.

6.2.1 The competence of the Federation in matters of customs duties and monopolies has become European

The German constitutional solution is essentially based on the competition of competences between the Federation and the Lander, since the evolution of the European Charters has reduced the effectiveness of the exclusive competence in matters of customs duties and monopolies that the German Constitution attributes to the Federation (Art.105 (1) The Federation has exclusive legislative competence in matters of customs duties and fiscal monopolies).

In fact, the Charter of Lisbon establishes the exclusive competence of the European Union in matters of customs duties, with a solution that is justified by the elimination, since 1993, of national fiscal frontiers and the application only of the fiscal frontier of the Union.

The same fate, though for different reasons, applies to monopolies. The full affirmation of freedoms in the European space does not allow the maintenance of national monopolies, not even for fiscal purposes.

Therefore, ultimately, the exclusive competence of the German Federation in matters of customs and monopolies has lost the original effectiveness that was constitutionally attributed to it. Now it faces the limits set by the rise of the European order. The one that, with the suppression of national customs, has regulated and continues to regulate European customs regulations, also including the classifications of merchandise and tax rates.

Even more evident is the European effect on the German federal jurisdiction over monopolies. In fact, the primacy of European law has excluded the German Federation, like other European States, from establishing new monopolies within the Union. These national options would be incompatible with the economic freedoms that the European space allows and guarantees.

6.2.2 The difficult relationship between the powers of the Federation and the Netherlands in tax matters

The European weakness of the Federation in the legislative options of customs and monopolies ends up concentrating the legislative relationship between the Federation and the States in matters of competition. However, over the years, this constitutionally guaranteed solution has shown a recurring uncertainty in the definition of the distribution of legislative powers with a direct impact on those in fiscal matters.

The constitutional solution has given individual laws the responsibility to define the functions and effectiveness of this competitive relationship between the Federation and the Lander. In fact, it is expected that:

Article 105 (2) The Federation will have concurrent legislative competence over other taxes if their collection corresponds totally or partially, or if the conditions established in the second paragraph of article 72 are met. Art. (2a) The Länder will have competence to

legislate on local consumption and luxury taxes, as long as they are not analogous to taxes regulated by federal law Art.3 (3) Federal laws relating to taxes whose revenues accrue wholly or partly to the Länder or to the municipalities (or associations of municipalities) will require the approval of the Bundesrat .

This broad distinction is followed by a more detailed list (art. 106) in which legislative competence is specifically divided into fiscal sectors divided between the Federation and the Länder . A textually clear constitutional solution, which, from a financial point of view, divides income tax and business tax revenue in half, while remitting the allocation of volume tax revenue of business to a specific legislative provision (art. 106, para. 3). The amount of taxes on income, on companies and on turnover will be divided between the Federation and the Länder (common taxes), insofar as the amount of income tax is not to be considered as belonging to the municipalities by virtue of section 5. The Federation and the Länder will each be entitled to half the amount of income and company taxes. The share of the Federation and the Länder in the turnover tax is determined by a federal law, which requires the consent of the Bundesrat).

Thus, the Constitution would have had to assign to a shared legislative election the responsibility of distinguishing the areas in which the normative competence of the Federation and of the Länder must be recognized. A law would then have to define the respective responsibilities of both in the application and collection of taxes.

Despite this rational and express constitutional division, the experience of the German application has revealed the difficulty for the Federation and the Lender to find objective criteria to distribute, as provided by the Constitution, the income of the most important taxes. Responsibility has been attributed, at the request of the Constitutional Court, to a federal law that would make it possible to establish the criteria on the basis of which to first decide the allocation of financial resources and then make the calculations. However, the Federation and the Lander have interpreted this responsibility in a primarily political sense. In fact, they first concerned themselves with establishing the calculations and then allocating the financial resources. This made it difficult to achieve a stable and effective financial effect.

Of course, the responsibility of the Federation remains central in the case of taxes whose collection must be shared with the landowners, but also when they must be assigned in full. However, this precludes the adoption of an objectively safer, albeit more radical, solution. That of distributing the main taxes, VAT, personal and business income between the Federation and the Lander with full financial responsibility for the two actors. This would mean that the Lander, whatever the tax assigned to it, would also have to guarantee, with the application, its autonomous control and collection. Only in this way could the Lander assume the complete financial autonomy that such a defined allocation, by fiscal categories, should guarantee. Only in this way would the Federation continue to guarantee the national uniformity of legislation. On the other hand, the EU countries would have to guarantee the full effectiveness of its application in their respective territories.

In conclusion, even the German financial model struggles to establish itself as an example for a future federal option of the new Chilean Constitution. For the latter, it would be difficult to reconcile the legislative centrality of a future Federation with the financial autonomy that would be granted to individual States. This balance depends, in fact, on the political agreements that in the German experience have ended up weighing more in the regulation of the financial effects for the Federation and the Lander than in the positive regulation of the respective fiscal powers.

Therefore, the German experience is a fiscal and financial experience that cannot easily be imported into Chile if it decides to adopt a federal constitution. Alternatively, in the future and conceivable Chilean financial framework, it would be preferable to adopt, like the

German constitutional experience, a division of tax legislative powers. To prevent the protracted difficulties of the Federation and the Lander from reproducing in Chile, it would be advisable to rely on a constitutional law that is in charge of establishing financial and not only legislative relations between the Federation and the States, to ensure clarity and consistency. certainty in the future constitutional options of Chile.

With this more precise competence, it would be easier to establish areas of fiscal regulation intervention with related responsibilities at the different levels of government in the future Chilean Federation. If the resulting tax diversification seems excessive, it could be limited to the rates that each State could adopt for the State taxes applicable in its territory. This choice would still represent a national fiscal responsibility, although within the limits established by a constitutional law (Birk, 2006b; Kruse HW, 1966; Nawiasky, 1982; Tipke, 1973, 2000, 2001, 2002).[1]

7 TOWARDS A SHARED EUROPEAN INTERPRETATIVE SOLUTION

Once the constitutional option of attributing regulatory responsibility for all fiscal discipline to national parliaments has been abandoned, the European solutions formally diverge precisely in the definition of the scope of the necessary parliamentary intervention. This is entrusted to broader financial options, or it is returned only to the fiscal sphere or, more specifically, it is destined to the provision of the constituent elements of the tax, although it is articulated in various ways.

The interpretation of national constitutional courts has focused on constitutional differences. Consistent with the variety of regulatory data, they have operated with respect to different formulations. However, the Courts have endeavored to enhance the role and function of taxation, even when no explicit reference is made to it, as is the case of the Italian and Spanish Constitutions. However, the Courts have been urged to classify the taxes when the constitutional provision is limited to referring to them. However, the Courts have taken care to reconcile the fiscal provision of parliamentary consent with the constitutive elements to which the national charters have explicitly referred. Now, the Courts have assumed the responsibility of reconciling the provision of the substantive discipline of taxes with that of its application, where the constitutional data explicitly unites them.

It is natural, then, that the interpretation responsibility of constitutional courts has differed in national experiences. Its responsibility has been broader when it comes to defining the characteristics of tax benefits in those constitutional letters in which these characteristics have not been mentioned. He has been more specific when he has had to qualify the distinctive features of the taxes that the letters had entrusted exclusively to parliamentary decisions. It has been most consistent when courts have had to reconcile the general qualifying characteristics of the taxes with the broader scope of the reservation of law. This has been done with a different responsibility depending on whether the reservation explicitly touches on the constituent elements of the taxes or also extends to their application. This difference between the different interpretative solutions does not weaken the effectiveness of the constitutional precept, but only affects its extension.

This is a responsibility that the Constitutional Courts have assumed with an interpretative commitment that has been effective. In the name of a unity of taxes to which all the Constitutions refer, this has made it possible to overcome the textual divergences

[1] *Kruse HW, Steuerrecht, Monaco 1966, edizione spagnola Derecho tributario Madrid 1978 a cura di Yebra Matul P. 1978; Naviasky H.,Steuerrechtliche Grundfragen, Monaco 1926, edizione spagnola a cura di Ramallo J.,Cuestiones fundamentales de dercho tributario, Madrid, 1983;*

present in the European Constitutions. Thus, after overcoming the variety of terminological meanings and linguistic differences, tax benefits have been understood in their specific and original meanings, as recognized in European constitutional interpretations. Such is the authoritarian character, referred exclusively to the services of patrimonial content. Such is the non-remunerative nature of the tax. This is the only way to guarantee the original function of the tax: that of ensuring the financing of public spending without any specific advantageous effect for the taxpayer. Therefore, based on these characteristics, the European constitutional experience has made it possible to establish a sufficiently precise dividing line. This is the line that today divides the taxes, thus qualified, from the pecuniary considerations that are used to remunerate the services rendered.

This result is consistent with the constitutional provisions that refer specifically to taxes. On the other hand, the result is more uncertain with those constitutional formulas that either do not mention them, as occurs with the Italian or Spanish Constitutions; or they are accompanied by a broad and general qualification, as is the case with the French. In these cases, then, the relative constitutional experiences have contributed to extending the parliamentary consensus, either to non-specific tax benefits, and therefore for purposes that are not typically financial, as has happened in the Italian and Spanish experiences, or to benefits fiscal, but defined in such a broad way, like those of any nature, that it is difficult to establish with precision the necessary line of demarcation with the benefits of consideration, as in the French experience.

In conclusion, this multiple European experience may allow Chilean constituents to choose between an explicitly tax solution and another more broadly aimed at benefits in which the authoritarian character is not, however, specifically aimed at imposing the financing of public spending. However, in the first case, the one that occurs most frequently in the European experience, it will be up to the Chilean Constitution to decide whether to mention not only the tax but also those characteristics that have been recognized as their own in the European constitutional experience. If the Chilean Constituent Assembly limits itself to pointing out only the tax as the object of necessary parliamentary consensus, then, as has happened in Europe, it will transfer the responsibility of pointing out and, above all, qualifying these characteristics to the Constitutional Court. In the second case, then, the Chilean constituent could propose to explicitly extend parliamentary consent to certain constitutive elements of the tax, or even include assessment or collection procedures.

If the Constituent Assembly prefers to adopt simpler formulas so as not to tax the constitutional provision, but at the same time wants to ensure, from the beginning, more precise characteristics of the tax benefits that require parliamentary consent, it could propose original formulas that would allow the memory of European experiences without burdening the future Chilean constitutional text. The Constituent Commission could, therefore, propose the introduction in the Preamble of the Constitution of an express mention that highlights the nature and function of the legal reserve in tax matters. Or it could foresee, when defining the powers and functions of the Constitutional Court, that in its interpretative function it could take into account the guidelines defined and consolidated in the European constitutional traditions for the principles related to the fiscal sector.

II. FROM PARLIAMENTARY FISCAL RESPONSIBILITY TO FOR PARLIAMENTARY FISCAL RESPONSIBILITY: A PROVISION NOT GENERALIZED IN EUROPEAN CONSTITUTIONS

Summary: 1. A limited provision of the fiscal responsibility of the States in the European Constitutions. 2. The experience of interpretation and application of fiscal responsibility without a constitutional provision: the example of Germany. 3. The interpretive and application experience of fiscal responsibility: the financial responsibility of public spending. 4. The interpretive and application experience of fiscal responsibility: the involvement of taxpayers. 5. The interpretative and application experience of the national constitutional options: the economic parameter of the responsibility of taxpayers in the financing of public spending.

1 LIMITATION OF THE FISCAL RESPONSIBILITY OF THE STATE IN THE EUROPEAN CONSTITUTIONS

Only in some European Constitutions does parliamentary responsibility not stop at legislative decisions on taxation. That is, those by which the elements that characterize taxation are established and on which, subsequently, the legislator makes his decisions to introduce new taxes or modify existing ones.

However, there is a minority of European States that have wanted to make explicit, already in their constitutions, the relationship between the generalized obligation to contribute financially and the relative graduation based on economic availability. These states wanted to assert a legally sound and constitutionally effective limitation from which parliaments cannot escape. A constitutional guarantee that will then correspond to the national courts to enforce in a responsible interpretation and effectiveness.

For the rest, without an express constitutional provision, parliamentary options are freer and, in any case, difficult to judge. Therefore, it will be up to the national courts to firstly identify the constitutional provisions that can support and justify a judgment on the coherence and rationality of the national fiscal options and, then, qualify them to allow a constitutionally founded judgment on the fiscal options adopted by national Parliaments.

2 THE EXPERIENCE OF INTERPRETING AND APPLYING FISCAL RESPONSIBILITY WITHOUT A CONSTITUTIONAL PROVISION: THE EXPERIENCE OF GERMANY

Germany is a significant example of how the lack of an explicit constitutional provision on fiscal responsibility does not preclude the effectiveness of this principle in the national tax system. In fact, the German Constitution does not make explicit reference to the principle of ability to pay, unlike what was established in the Weimar Constitution of 1919 in its article 134.

In Germany, both doctrine and jurisprudence, however, consider that this principle implicitly underlies others that, included in the Constitution, affect in any case the law that regulates the tax relationship. A result, this German, obtained through a broad and deep systematic analysis. This is the one used by the Constitutional Court and the doctrine to elaborate the qualifying features of the principle of taxable capacity, thus deducing it from other constitutionally affirmed principles. In particular, that of equality which, established by article 3 of the German Constitution, in turn guarantees substantial justice and equity. Respect for these principles constitutes, therefore, a limit to the exercise of the tax power of the State. It is a priority guarantee, coherent with the traditional vision of taxation as a limit of the economic resources of the taxpayer. It is a guarantee that serves to graduate the sacrifice of individual property in relation to the public financial needs that the tax burden must always ensure. A necessary guarantee to balance, in the name of substantial justice,

the effectiveness of taxation with social solidarity. This is what inspires the distribution of tax burdens, based on the economic availability of taxpayers, whose ability to pay is both an inspiration and a guarantee.

In the German constitutional experience, therefore, fiscal responsibility acquires a double meaning: on the one hand, it expresses the prohibition for the legislator to proceed in fiscal matters on the basis of broad discretion; on the other, it provides useful elements for the systematic interpretation of constitutional norms, which grant citizens, and therefore taxpayers, fundamental rights (Birk, 2006a; Kirchhof, 2011; Rivista di diritto tributario, 2000; Tipke et al., 2013; Tipke K, 1996; Tipke & Lang, 1994).

Among the options offered to the Chilean Constituent Assembly, one could also include not mentioning the principle of fiscal responsibility in the Constitution, without losing faith in the effectiveness that will be applied to the future fiscal options of the Chilean legislator.

This solution, however, would increase the responsibility of the Chilean Constitutional Court, as in Germany. The Chilean Constitutional Court, with the precise support of scholars, would have a double responsibility: that of identifying the general constitutional principles on which to base the recognition of the principle and that of elaborating the characteristics that should contribute to qualify such a concept of fiscal responsibility. effective and important to control and judge the legislative options. Indeed, such a concept would represent the economic basis of the facts taken as the basis of the different forms of taxation; the general nature of the tax obligation without distinguishing between taxpayers based on territoriality or residence.

However, as an alternative to the lack of constitutional provision, the Chilean Constituent could be offered the solution adopted by a minority of European Constitutions: that of making visible the relationship between the tax liability of taxpayers and the criteria to achieve it. A constitutional trust, this one, useful to make evident the financial relationship on which the same democratic participation of taxpayers is based. That is, the participation in the functioning of the administration and in the achievement of the political, economic and social objectives that a State intends to achieve.

3 THE EXPERIENCE OF INTERPRETING AND APPLYING NATIONAL CONSTITUTIONAL OPTIONS: THE FINANCIAL RESPONSIBILITY OF PUBLIC SPENDING

In the Constitutions that have provided for it, fiscal responsibility acquires a general character. It explicitly covers the need for and purpose of public funding. Both play a critical role in the balance needed to define financial responsibility. In constitutional provisions, this remains general, without specifying the fiscal instruments with which to achieve it. Without even mentioning the tax benefits, which, moreover, are provided for in various ways in the European Constitutions as the object of the legal reserve.

These are constitutional solutions common to the experiences of countries that have adopted this explicit constitutional option. Of course, the formulas adopted vary: now they are expressly intended to finance public spending, as in the Italian Constitution (Art.53 Everyone will contribute to public spending according to their economic capacities through a fair tax system inspired by the principles of equality and progressivity, which in no case will have an expropriatory purpose); in the Greek Constitution (Greek citizens will indistinctly contribute to public spending in proportion to their possibilities).

Now the elections are allocated to the financial needs of the State, as in the Portuguese Constitution (Art.103. - (Tax system) 1. The tax system is intended to satisfy the financial needs of the State and other public entities and fair distribution of income and

wealth). Now, with an even broader formula, justified by what is called common needs, in the new Hungarian Constitution (article XXX 1. Each one contributes to satisfy the needs of the community to the extent of his possibilities and in proportion to his participation In the economy).

The financial purpose, therefore, unites the constitutional options of the different European countries that have chosen to formalize graduated fiscal responsibility according to different parameters. Among them, the most original, which refers to the ability to pay, and other more general ones referring to economic means or consistency with public needs. In fact, the constitutional options link, although with different lexical accents, individual patrimonial responsibilities and public financial needs. A relationship that inspires notional legislative options, thus excluding arbitrary tax solutions because they favor public financial needs without consistency with the financial resources of taxpayers.

The recurrence of the formulas adopted in the European Constitutions can be a useful reference for future Chilean elections. Those with which Chile, like some significant European States, wishes to formalize in its Constitution the financial pact between the State and the taxpayers on the basis of which the financial responsibility of the taxpayers is graduated according to economically justified parameters. Consequently, this excludes fiscal options that, since they are not so proportionate, must be considered arbitrary and, therefore, constitutionally illegitimate.

This interpretation is based on an uninterrupted commitment of the Constitutional Courts in the definition of the objective parameters of the tax liability of taxpayers. Thus, the Italian and Spanish Constitutional Courts have had to combine the original constitutional reference to ability to pay with an effectiveness of tax options that is economically consistent with the fiscal responsibility of taxpayers.

For other States, the constitutional formulas are oriented towards more descriptive solutions, such as the proportion of own means, affirmed by the Greek Constitution. Otherwise, they are based on objectives that can be shared, certainly, but that are indicated in a generic way, such as the fair distribution of wealth, as established by the Portuguese Constitution. On the other hand, they shift the parameter of financial responsibility to a more generic participation in the economy, as in the Hungarian Constitution.

Thus, with a common economic parameter drawn from European experiences, the financial responsibility of taxpayers can be defined by the Chilean Constitution with more or less coherent and effective formulas depending on the European model in which it wants to be inspired. Certainly, for the Chilean Constituent Assembly, adopting the ability to pay would mean preferring a constitutional solution that is more consistent with the financial responsibilities of national taxpayers. However, to be equally effective, the future Chilean election should use the interpretative solutions that Italian and Spanish constitutional jurisprudence have adopted, not without difficulty. Alternatively, the Chilean Constitution could be based on the broader formula derived from the Portuguese experience, establishing a proportion of fiscal options with the fair distribution of wealth. Indeed, it would correspond to the future Chilean legislator to combine the two judgments about the fiscal options that he wishes to adopt: that of the redistributive efficacy of taxed wealth and that of justice that in objective terms should/can guarantee the choice.

Perhaps the Greek solution could be a useful compromise. Providing the financial responsibility of future Chilean taxpayers to their means ratio could ensure an easier and more direct interpretation for future legislative responsibility. The means of the taxpayers to which the Constitution could ask proportion is, in fact, an indication and not a legal category. As such, they could be the minimum guarantee of fiscal responsibility. Certainly, this interpretative flexibility would be accompanied by a greater possibility of political appreciation by Parliament when adopting its tax decisions. In fact, by adopting a non-

technical indication of financial availability, parliamentary options will have to mediate between the wide possibility of defining the financial responsibility of taxpayers and their ability to guarantee its effectiveness.

4 THE EXPERIENCE OF INTERPRETING AND APPLYING NATIONAL CONSTITUTIONAL OPTIONS: THE PARTICIPATION OF TAXPAYERS

The financial responsibility of taxpayers is a common part of the constitutional provisions of the countries that have adopted parameters of responsibility of the subjects involved.

Except for the Greek Constitution, which explicitly refers only to citizens, the constitutions of the other countries unanimously show a preference for general provisions. As such, those that refer to subjects not identified by a specific legal status. The alternation between a general provision, as occurs in the Italian and Spanish Constitutions, which refer to everyone, and the Polish and Hungarian Constitutions, which refer to individuals, does not call into question the result. The common result is to refer to financial responsibility in a subjectively broad and legally undifferentiated way.

In this way, constitutions offer national legislators a wide range of criteria to identify future taxpayers. Of course, the solutions are variable depending on the economically relevant facts, which are taken by the national tax legislation as an expression of the taxable capacity or of the broader responsibility of taxes. However, they always constitute a measure of financial sacrifice and therefore a necessary justification for individual taxation.

The alternative offered by the European experience to future Chilean options is, first of all, legal. It will be a matter of deciding if citizens are only involved in public financial responsibilities or if, on the contrary, a broader and more general provision is used for those responsible for paying taxes.

The solution for citizens, as adopted by Greece, is undoubtedly the most suitable from a legal point of view. As such, it makes it possible to identify with certainty the persons to whom financial responsibility should be attributed, but at the same time limits the constitutional obligation to a limited number of taxpayers. Consequently, it excludes the coherence and reasonableness of tax options that may affect other categories of people who do not enjoy the status of citizens but who, nevertheless, have significant economic and financial resources in the territories of national States.

For this reason, it seems preferable that the Chilean options be based on the general options that the Constitutions of other European countries have adopted and continue to apply. It matters little, in this case, to use the general provision that refers textually to all, as in the Italian and Spanish constitutions, or the specific one that mentions the responsibility of each one, as found in other constitutional texts.

5 THE EXPERIENCE OF INTERPRETING AND APPLYING NATIONAL CONSTITUTIONAL OPTIONS: THE ECONOMIC PARAMETER OF TAXPAYER RESPONSIBILITY IN THE FINANCING OF PUBLIC SPENDING

In national Constitutions, the availability of money naturally arises as a balancing element to legitimize the financial options that are acceptable, as constitutionally legitimate. This constitutional concern is evident in the reference to means and availability found in the Greek and Hungarian Constitutions, respectively. The a-legal formulas used in these national experiences have, in fact, facilitated the interpretation of the constitutional precept, but have made its application more complex. This has increased the responsibility of the Constitutional Courts to find an objectively differentiated criterion that makes it possible to draw up with certainty the constitutionality judgments on the tax options of the national

legislators. These are formulas that, in their concretion, guarantee a well-founded and economically appreciable relevance also in textual expressions.

The choice of interpretation becomes even more complex in the Italian and Spanish Constitutions. These establish as a comparison parameter for financial responsibility an economic category with specific characteristics in comparison with the general provisions, revealed in other constitutional texts. It is about the ability to pay, of which it has not been easy, without the authorized constitutional interpretation, to define the characteristics that qualify a constitutionally innovative category. The tools to make effective that economic availability that guarantees the correspondence with the national financial responsibility. Those functional also to identify both subjective and objective characteristics without which the ability to pay could not have played the essential constitutional role of legitimizing tax options. With the passage of time and the multiplication of new forms of taxation, the Italian and Spanish Constitutional Courts have also exceeded the traditional limit of effectiveness linked to the actuality of the wealth chosen as the object of taxation. In fact, they have proposed a relative expansion, justifying with economic potential the tax options that the national legislator had adopted to broaden the scope of taxation of existing taxes or to justify the introduction of new taxes.

This interpretative solution of the Italian Constitutional Court has been revealed to be consistent with a legislative experience in Europe that has progressively strengthened the discretion in the normative choices of the facts to which to link the tax obligation in accordance with the function of financing public spending.(Casalta Nabais J, 2005; Catarino, J., 1999; De Mita, 1991; Gomes Ns, 1993; Herrera Molina, 1998; Lasarte J., 1990; Moschetti F., 1994; Perez de Ayala Jl., 1979; Pires, M, 1978; Rodríguez Bereijo, 1994; Spagna Escribano F., 1988; Stevanato D, 2019)

With the framework of the different European experiences to define in the Constitution the proportion of the financial responsibilities of the taxpayers, the Chilean Constituent would certainly have an advantage. The options it decides to adopt may consciously take into account the interpretative evolution of the European Constitutional Courts. In this way, the Chilean Constituent Assembly could responsibly adopt the textual solutions used in the European Constitutions, but with awareness of the interpretative or application uncertainties that each of the two options has entailed, but also of the interpretative solutions offered by the Constitutional Courts. Europeans who have dealt with them.

It is therefore up to the Chilean constituent to confirm the objective effectiveness of financial responsibility in the face of the need for public financing: the one that affects the costs of administration and the effectiveness of financial guarantees of social rights. A responsibility that, in turn, must be based on economically qualified characteristics. The European experience thus offered the Chilean constituent the possibility of choosing two broad provisions, both of an objective nature. One, which graduates the tax obligation to a necessary financial relationship, either with the taxpayer's means or with their use. The other is based on a specific category, such as the ability to pay, to adjust the tax rate of taxpayers.

This is an option that Chile could take with clearly greater constitutional certainty than having to force the search for the foundations of the tax liability of taxpayers to a continuous and recurring "critical" liability on the part of the constitutional courts. Those on which to base the control of the conformity of future legislative options in tax matters.

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Article

Constitutional Taxation in the Netherlands

Hans Gribnau

Full Professor of tax law at the Fiscal Institute and the Center for Company Law, Tilburg University. His Research interests focus on Fiscal Methodology, Principles of Tax Law, Procedural Tax Law & Tax Ethics. Email: J.L.M.Gribnau@tilburguniversity.edu

Sonja Dusarduijn

Associate professor of tax law at the Fiscal Institute and the Center for Company Law, Tilburg University. Email: S.M.H.Dusarduijn@tilburguniversity.edu

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KEYWORDS:

tax principles, tax legal system, right of taxpayers, constitutional review, human rights.

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.

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1 INTRODUCTION

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.

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[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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Article

Fragile and Strong: The Oxymoron of Tax Administration and Constitutionality in New Zealand

Shelley Griffiths

Dean, Faculty of Law University of Otago, Dunedin, New Zealand. Prof. Griffiths currently teaches Taxation (including a paper on advanced issues in Taxation), Company Law and the Securities Market Regulation. Email: shelley.griffiths@otago.ac.nz

James Hartshorn

Faculty of Law University of Otago, Dunedin, New Zealand. Awared with Best 300-level Student in Politics in 2020.

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KEYWORDS:

political constitution; tax system; tax principles; Common Law System; constitutional jurisprudence.

ABSTRACT:

It is usually argued that in New Zealand there is no constitution, however, the political constitution of a state is related to who or what institutions should exercise power and how they should exercise it and in this sense the previous statement would not be correct since these rules exist . In the case of this country, the study of constitutional norms is different than the Civil Law System countries, and its sources must be studied in a different way, which the author explains in this work. The three basic pillars of the constitutional system would be the sovereignty of parliament, the idea of limited government and the separation of powers, and the rule of law. From these and other considerations, the author focuses on the study of the influence of the Constitution on the tax system, at the legislative and administrative level, in various aspects, including the rights of taxpayers.

PALABRAS CLAVES:

constitución política; sistema tributario; principios tributarios; Common Law System; jurisprudencia constitucional.

RESUMEN:

Se suele sostener que en Nueva Zelanda no existe una constitución, sin embargo, la constitución política de un estado dice relación con quién o qué instituciones deben ejercer el poder y cómo deben ejercerlo y en tal sentido la anterior afirmación no sería correcta pues existen esas normas. En el caso de este país, el estudio de las normas constitucionales es diferente que los países de Civil Law System, y debe estudiarse sus fuentes de un modo diferente, lo que la autora explica en este trabajo. Los tres pilares básicos del sistema constitucional serian la soberanía del parlamento, la idea del gobierno limitado y la separación de poderes, y el estado de derecho. Desde esas y otras consideraciones, la autora enfoca el estudio de la influencia de la Constitución en el sistema tributario, a nivel legislativo como administrativo, en diversos aspectos, incluido los derechos de los contribuyentes.

MOTS CLES :

constitution politique; régime fiscal; principes fiscaux; système de droit commun; jurisprudence constitutionnelle..

RESUME :

On prétend généralement qu'en Nouvelle-Zélande il n'y a pas de constitution, cependant, la constitution politique d'un État est liée à qui ou quelles institutions devraient exercer le pouvoir et comment elles devraient l'exercer et en ce sens, la déclaration précédente ne serait pas correcte puisque ces des règles existent. Dans le cas de ce pays, l'étude des normes constitutionnelles est différente de celle des pays du système de droit civil, et ses sources doivent être étudiées de manière différente, ce que l'auteur explique dans cet ouvrage. Les trois piliers fondamentaux du système constitutionnel seraient la souveraineté du parlement, l'idée d'un gouvernement limité et la séparation des pouvoirs, et l'État de droit. À partir de ces considérations et d'autres, l'auteur se concentre sur l'étude de l'influence de la Constitution sur le système fiscal, au niveau législatif et administratif, dans divers aspects, y compris les droits des contribuables.

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CONTENTS:

1 INTRODUCTION

1 THE NZ CONSTITUTION

> "A constitution is not the act of a government without a constitution, but of a people constituting a government, and government without a constitution, is a power without a right" - Thomas Paine[1]

It is sometimes said that New Zealand does not have a constitution. The constitution of a nation, however, is the set of rules that govern how a government can exercise public power. A constitution identifies who or what institutions should wield power, and how they should exercise it. Given the generally unmatched coercive force at the hands of a government, the rules about how a government ought to exercise its power warrant careful consideration and discussion. In particular, those rules play a very foundational role in a democracy such as New Zealand. Discussion, debate and recourse to these principles and rules are not limited to jurisdictions where those rules are neatly reduced to one document and in fact such discussions are often just as fiercely engaging and productive in a country such as New Zealand whose constitution is, at least superficially, built on foundations of flexibility. It is true that New Zealand does not have a document or documents labelled as 'Constitution'. Its constitution is in fact founded in a web of legal and extra legal sources. Together they are part of a web that shapes the fabric of the New Zealand constitution.[2]

New Zealand is a unitary state and parliamentary democracy. It has a unicameral parliament whose members are elected by a proportional voting system. New Zealand's constitutional framework has been described elsewhere as one which is designed to "facilitate all citizens being able to participate fully in the mechanics of government, all aspects of society, and for the acceptance of diversity."(Gupta, 2020)

Although New Zealand's 'constitution' is one of only three in the world not to have been reduced to a single document or statement, the constitutional landscape is undoubtedly robust; a web of legal and extra-legal sources including the Treaty of Waitangi, legislation, conventions, common law, doctrine and practice. (Griffiths, 2011b; Joseph, 2014, p. 1; Palmer, 2008) It may be described as 'unwritten', in the sense that none of these instruments exhibit the twin characteristics that constitute a written constitution, namely: 'fundamental' law (the law that establishes the organs of government and invests them with the requisite authorities) and 'higher' law (the law that protects the constitution from ordinary amendment or repeal) (Joseph, 2014, pp. 1–20). It also means that there is no one place where the relationship between tax and constitutional principles is clearly laid out. Although there are occasional calls for this constitutional 'web' to be distilled into a more 'written' form,[3] change of this type does not appear to be on the horizon, for now at least.

As a constitutional monarchy, New Zealand has been described as having the "closest adaptation of the Westminster system in the British Commonwealth"(Joseph, 2014, p. 1). New Zealand's parliamentary structure carries on the historical agitation by the people for representation in government which has ultimately shaped the development of the Westminster system. The level and type of taxation are among the most important decisions made by voters in democracies as part of that historical agitation, and those decisions provide an image of the society citizens prefer. Those decisions, and the principles and rules

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[1] *H Collins (ed)* Rights of Man *at 93 and 207, quoted by AW Bradley and KD Ewing* Constitutional and Administrative Law *(14th ed, Pearson Education, Harlow (Essex), 2007) at 5 and cited in Phillip A Joseph* Constitutional & Administrative Law in New Zealand *(4th ed, Thomson Reuters New Zealand Ltd, 2014) at 1. The extended quotation read: "A constitution is a thing antecedent to a government, and a government is only the creature of a constitution … A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right."*

[2] *On critiques of the current approach, see for example Geoffrey Palmer and Andrew Butler* Towards democratic renewal: ideas for constitutional change in New Zealand *(Victoria University Press, 2018)*

[3] *See, for example, Geoffrey Palmer and Andrew Butler* A Constitution for Aotearoa New Zealand *(Victoria University Press, Wellington, 2016).*

which govern them are deeply rooted in New Zealand's parliamentary system and constitution, despite the apparent lack of 'written' rules or a physical document to point to.

The study of a constitution has been described as traversing 'law, politics, history, and convention'.(Joseph, 2014, p. 2) Again, regardless of whether or not a jurisdiction reduces its constitution to a single written document, questions which could be described as 'constitutional' in nature cannot be answered by any simple application of the law. *Every* constitution is founded on the interaction of law, constitutional convention and what can be described as 'institutional morality'.(Joseph, 2014, pp. 1–2)

'Institutional morality' sits above both law and convention. As a concept, it addresses the moral dimension of public power and identifies closely with the substantive concept of the rule of law.(Joseph, 2008, pp. 249–261, 2014, p. 2; Joseph & Ekins, 2011, pp. 47–56) The rule of law used in this sense embraces not only the formal requirements of law (that it be prospective, certain, accessible etc) but also the higher-law ideals and values that identify the modern liberal democracy (personal liberty, freedom, autonomy etc, and the correct organisation of the State). (Bingham, 2010; Dicey, 1885; Fuller, 1969; HLA Hart, 1994; Kress, 1993, 1993; Raz, 1979, Chapter 11; Waldron, 2012) Institutional morality is the "weathervane that instils rationality and coherence in public affairs".(Joseph, 2014, pp. 1–2)

It represents "the road map of public law", operating in public life much as Adam Smith's "invisible hand" operates in the economic markets.(Joseph, 2008, pp. 248–258)

In New Zealand, this intersection of law, convention and a strong sense of institutional morality has produced an ever-emerging and shifting constitutional makeup, one which can be changed and developed comparatively easily but which also gives Parliament more power than those in other Westminster systems.(Palmer, 2006) It is worth briefly explicating the three most fundamental principles that underpin this landscape in order to found further discussion about New Zealand's constitutional landscape and in particular how it interacts with the context of taxation.

The first of (arguably) three fundamental constitutional pillars in New Zealand is the familiar concept of Parliamentary sovereignty. Put simply, this principle denotes that Parliament is the supreme and final source of law and its statutes the expression of that supremacy.[4] The law as expressed by Parliament is the overarching authority in the land to which all persons are subject, no matter their rank.[5] New Zealand's adaptation of the Westminster system has notably transposed a particularly strong version of this principle. When Parliament decided to legislate to affirm, protect and promote human rights in the New Zealand Bill of Rights Act 1990 (NZBORA), for example, it judged at the time in line with New Zealand's strong expression of Parliamentary sovereignty that it should not give that law any greater force than any other Act.[6] It has no status greater than any other piece of legislation and courts are unable to strike down legislation as incompatible with it. It is predicated on statutory construction as a means of protecting underlying rights and ensuring legislative consistency with human rights norms.[7] Although courts in New Zealand are denied the power to strike down any legislation, they are directed by section 6 of NZBORA to give meaning to

[4] *Constitution Act 1986 (NZ), s 15. A founding explication of this principle is set out in A.V. Dicey* An Introduction to the Study of the Law of the Constitution *(Macmillan and Company, New York, 1889).*

[5] *Una Jagose "Remedies against the commissioner: revenue through a public law lens" (paper presented to NZLS Tax Conference, September 2013) at 4.2.*

[6] *New Zealand Bill of Rights Act 1990, s 4. See also Geoffrey Palmer "What the New Zealand Bill of Rights Act aimed to do, why it did not succeed and how it can be repaired" (2016) 14(2) New Zealand Journal of Public and International Law 169-208; Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2008) 23 NZULR 465-488.*

[7] *Claudia Geiringer 'Shaping the Interpretation of Statutes: Where are we now in the S 6 debate?' in: NZLS* Using the Bill of Rights in Civil and Criminal Litigation *(Wellington: July 2008) at 1; NZSC (Supreme Court of New Zealand) 20 February 2007,* R v. Hansen *[2007] NZSC 7, [2007] 3 NZLR 1.*

legislation that as far as is possible is consistent with the rights and freedoms in NZBORA. Section 5 permits limits on rights and freedoms where those limits can be "demonstrably justified in a free and democratic society". While a sovereign Parliament is able to legislate in a manner that is inconsistent with fundamental rights there is an additional safeguard in the New Zealand system. The Attorney General is required to report to Parliament whenever a legislative proposal is in the Attorney's opinion inconsistent with NZBORA. (New Zealand Ministry of Justice, 2022)[8] Parliament may disagree that the particular right or freedom is limited by the proposed legislation or it might consider a limit is justified in terms of section 5. What the process does, is ensure that Parliament makes such decisions with full knowledge and proper consideration of the issues.

The second and third of the pillars of New Zealand's constitution both relate to the idea of limited government. Under the doctrine of separation of powers, powers of government are separated in order to limit them.(Joseph, 2014, pp. 1–199). The doctrine identifies the executive, legislative and judicial functions of government, and their corresponding organs – the executive (the government), legislature (Parliament), and judiciary (the courts). The Westminster system adapts the doctrine in order to meld the legislative and executive organs. New Zealand, again, has transposed a particular version of the Westminster model where the separation of powers is notably dilute and incomplete, because of the power of Parliament and the model of cabinet government.[9] It leaves a comparatively centralised executive (each member of which is a member of Parliament) with broad, flexible decision-making and legislative powers.[10]

The most salient aspect of the doctrine in New Zealand relates to judicial separation and independence.(Joseph, 2014, pp. 1–197) Judicial independence is an indispensable principle of a liberal democracy and the rule of law.[11] For Sir Robin Cooke, it was one of two "unalterable" fundamentals that might arguably lie beyond legislative reach in New Zealand's constitutional landscape which is so often strongly refracted through the lens of parliamentary sovereignty.[12] All citizens of New Zealand – politicians and officials included – must be answerable to the law as administered in a system of independent and impartial courts (Joseph, 2014, pp. 1–197). Judicial review, part of the court's inherent jurisdiction and given statutory force in New Zealand through the Judicial Review Procedure Act 2016,[13] is the process whereby courts can, within certain established "heads of review", review the actions of government agencies. This gives to the judiciary an important role in the review of actions by government agencies. Equally, the courts and the courts alone hold the task of interpreting statutory provisions.

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[8] *New Zealand Bill of Rights Act 1990, s 7.*

[9] *At 209.*

[10] *Constitution Act 1986 (NZ), s 6 outlines that ministers of the Crown must be members of Parliament. The particular expression of the doctrine led Professor Leslie Zines to famously label New Zealand an "executive paradise". (Zines, 1991, p. 47)*

[11] *At 797. For further writing that examines aspects of judicial independence in New Zealand, see generally Phillip A Joseph "Appointment, discipline and removal of judges in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 66-95; G Hammond "Judges and free speech in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 195– 216; G McCoy "Judicial Recusal in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 322– 345; G Palmer "Judges and the non-judicial function in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 452– 473.*

[12] *Sir Robin Cooke "Fundamentals" (1988) NZLJ 158 at 164, quoted in Joseph* Constitutional and Administrative Law, *above n 1, at 797. There are a number of mechanisms in New Zealand, both legal and convention-based, to protect judicial independence. Although Judges are appointed based on a recommendation of the Attorney-General (a member of the executive), there is a strong convention that the Attorney-General acts independently of party-political considerations when making such recommendations in New Zealand. The other two pillars of judicial independence are security of tenure and financial security, enshrined in s 23 and s 24 of the Constitution Act 1986 respectively.*

[13] *See Judicial Review Procedure Act 2016 (NZ) and Senior Courts Act 2016 (NZ). The latter constitutes and sets out the rules of the High Court, Court of Appeal and Supreme Court of New Zealand.*

This leads nicely to the third and final pillar of New Zealand's constitutional landscape - the 'rule of law', or collection of 'rule of law' ideas. The rule of law has been described as the "sentinel of constitutional government", the concept that reconciles 'organised state power and individual autonomy'(Joseph, 2014, pp. 1–153). It prescribes the formal requirements of legal norms, operates as a principle of institutional morality and it imposes discipline upon decision makers in the public sphere. (Joseph, 2014, pp. 1–153; Joseph & Ekins, 2011, p. 9) Therefore, although there is no one settled conception of the idea, the rule of law not only underpins the Diceyan principle that government should govern by known rules,(Dourado, 2011a, p. 152) it also arguably holds more substantive aspects which set out the vague boundaries of institutional morality guiding limited, representative government even where there may not be prescribed legal rules.(Fuller, 1969; Raz, 1979, Chapter 11; Waldron, 2002). These more subtle, substantive aspects of the rule of law hold particular explanatory power in New Zealand's flexible and unwritten constitutional context.

The sum of these principles, and their particular transposition to the New Zealand context has seen a constitution which has been sensitive to broad shifts in culture, both in a social and legal sense. The status of the Treaty of Waitangi is a clear example of this sensitivity.[14] The Treaty of Waitangi is not directly enforceable unless and until there has been some form of legislative incorporation.[15] Until the end of the 20th century the Treaty of Waitangi was virtually invisible to New Zealand law (Rishworth, 2016, pp. 137–141; Ruru & Kohu-Morris, 2020, pp. 556–569). However, its meaning and significance were reinterpreted by official institutions between 1973 and 1993, made possible by the strength of Parliamentary sovereignty as a principle in New Zealand and the emergence of a political will to incorporate the principles of the Treaty into New Zealand's constitutional landscape.[16] Parliament created the Waitangi Tribunal in 1975 and gave it the task of resolving the meaning of the Treaty,[17] and issuing reports on Treaty-related matters which are not binding on the Government, but in practice carry a high level of persuasiveness (Joseph, 2014, pp. 1–185; Ruru & Kohu-Morris, 2020, p. 560). Parliament referred to the Treaty for the first time in 1986,[18] and since then both the Courts and executive have recognised the meaning of the Treaty set out by the Waitangi Tribunal (Cabinet Office & New Zealand Department of the Prime Minister and Cabinet, 2017; Ruru, 2016, pp. 425–458). Despite this evolution, the Treaty still occupies an uneasy position in New Zealand's constitutional landscape. Its general meaning, as interpreted by official institutions and the courts, restricts requirements mostly to principles surrounding relationships and procedural fairness (Ruru, 2018, pp. 111–126). For all the revitalisation it has seen, the weight to be given to the Treaty and the implications of its meaning in particular cases often remain uncertain (Palmer, 2008, p. 3).

This again returns us to the spectre of flexibility and development. The informality of extra-legal rules in New Zealand's constitutional makeup enables the constitution to evolve organically, with the benefit of inherited wisdom and experience. The cabinet system evolved over a period of 200 years and is almost entirely conventional in character (Joseph, 2014, pp. 1–2). The Monarch's personal prerogatives and discretions became progressively

[14] *For a seminal work on the role of the Treaty in the colonisation of New Zealand, see Paul Mchugh* The Maori Magna Carta *(Oxford University Press, Auckland, 1991).*

[15] Te Heuheu Tukino v Aotea District Māori Land Board *[1941] NZLR 590 (Privy Council). See also Alex Frame, 'Hoani Te Heuheu's Case in London 1940–41: An Explosive Story' (2006) 22(1) New Zealand Universities Law Review 148.*

[16] *The Waitangi Tribunal commented on the meaning of the Treaty in a series of reports in the early 1980s; see Waitangi Tribunal* Motunui-Waitara Report *(Wai 6, 1983); Waitangi Tribunal* Kaituna River Report *(Wai 4, 1984); Waitangi Tribunal* Manukau Report *(Wai 8, 1985). The principles of the Treaty were first defined and explained, based on the meaning set out in the Waitangi Tribunal, by the Court of Appeal in* New Zealand Māori Council v Attorney-General *[1987] 1 NZLR 641 (NZCA).*

[17] *Treaty of Waitangi Act 1975 (NZ), s 5(2).*

[18] *State Owned Enterprises Act 1986 (NZ), s 9.*

diluted as cabinet government developed, resulting in a constitutional monarchy that was founded on representative democracy (Joseph, 2014, pp. 643–721).

Often it is these very vagaries of New Zealand's cabinet government which are themselves a reason why some rules ought not to be given legal precision. Not every eventuality can be anticipated, as when the Governor-General may be required to refuse ministerial advice or dismiss a government (Joseph, 2014, p. 261). Flexibility is a gift of the conventions defining the relationships between the organs of government, and not only allows for development, but is malleable in the face of shock and crisis.

Equally, flexibility, on the surface, may in fact deceive in New Zealand. It would require extraordinary circumstances for Parliament to legislate against the independence of the judiciary or to sever the British monarchy (Joseph, 2014, p. 21). Adoption of a republican form of government would, it is widely presumed, only follow after a referendum. There is however, no 'rule' that says as much. Change in the legal doctrines may also conspire against flexibility. There are suggestions that constitutional statutes, even where unprotected by entrenching procedures, are immune to implied repeal by general statutes.[19] Under the principle of legality, express or dedicated parliamentary legislation is required in order to abrogate basic rights,[20] and rights are fenced in practice by strong and active statutory interpretation in favour of their protection.[21]

And yet - there is always a looming sense that the pillars of New Zealand's constitution, although they remain watertight for now, are ultimately frail and fragile if and when they are challenged or ignored. The uneasy position and future of the Treaty of Waitangi is testament to this sense. This feeling also permeates through the taxation context, and will be returned to in the third part of the article. The challenge for New Zealand is to strike the balance between malleability in the name of evolution and efficiency, and the proper maintenance and supervision of a core of fundamental constitutional principles, ideas and processes which ought not be able to simply be ignored. It is indeed a fine balance.

2 TAX AND THE CONSTITUTION

What role does tax play in New Zealand's constitutional landscape? How do the two areas of tax and constitutional law combine? Taxation collection is a point of contact between the state and the individual. Across the history of the Westminster model of government, tax has been at the heart of the historical working out of the relationship between King and Parliament, between the sovereign power and the people. The "no taxation without representation" principle can be found in those landmarks of the British constitution, the Magna Carta and the Bill of Rights 1688 (Joseph, 2014, pp. 493–495). These principles were brought to New Zealand through the colonisation process.[22] In New Zealand, it is an enshrined constitutional principle that there can be no taxation by executive decree.

As with all actions of the New Zealand parliament and government, then, constitutionality in taxation, including all the processes around assessment and collection of tax, fall into several formal and informal processes that work together to ensure legality. As noted above, the power to levy tax belongs to Parliament alone. This is deeply entrenched within the whole concept of parliamentary sovereignty. However, no modern state can survive without taxation revenue. The collection of that revenue is by its very nature the exercise of governmental power. The constitutional significance of taxation almost goes

[19] Thoburn v Sunderland City Council *[2002] EWHC 195 (Admin), [2003] QB 151 at [60]–[69] per Laws LJ.*

[20] R v Secretary of State for the Home Department, ex parte Simms *[2000] 2 AC 115 (HL) at 131 per Lord Hoffmann.*

[21] *Geiringer, above n 17, at 1. See also* R v. Hansen *[2007] 3 NZLR 1 (NZSC).*

[22] *English Laws Act 1908, repealed in 1988, thereafter Imperial Laws Application Act 1988, s 7. See also New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72.*

without saying (Griffiths, 2011b, p. 216).[23] The nature of that constitutional significance, and indeed the very legitimacy of taxation, will be a function of the particular constitutional principles and structures of the state in question (Elias, 2019).

It cannot be forgotten that the administration of the tax system is also fundamentally connected to constitutional concern (Ginsburg, 2017, p. 60). Often, in bringing the clearly grand and constitutional ideas that sit beneath tax 'onto the ground', so to speak, the more technical and regulatory strands of thought naturally dominate; ensuring that the 'mundane miracle' that is our tax system functions efficiently and fairly as possible within the inevitable resource constraints of the modern neoliberal state.[24] However, that ought not dilute the importance of constitutional and public law concern in this sphere.

The administration of the tax system rests with one body, the Inland Revenue Department under the direction of the Commissioner of Inland Revenue (Commissioner).[25] There is only one tax authority in New Zealand. Tax is levied by central government and as a non-federal nation there is no other tax collection function. The substantive taxing provisions that establish liability are organised in the Income Tax Act 2007, whilst the Tax Administration Act 1994 is the major piece of legislation that addresses the issues of tax administration. That split emerged out of a series of major reports on various aspects of the New Zealand income tax system from the late 1980s and through the 1990s. Along the way there was a major report on the organisation of the Inland Revenue Department itself,[26] and in the administration of taxation there was the introduction of a comprehensive penalties regime, the introduction of binding rulings and the enactment of a disputes resolution process.[27] This reform project was also the catalyst for a legislative re-write project. The re-write project, which took more than a decade to complete, recast the income tax legislation into a structure to "more clearly" reflect "a coherent scheme and purpose."[28]

There was also the transition to a self-assessment system that was completed in 2002. By the late 1990s, it was a fiction that the Commissioner assessed income tax; the notion of Commissioner assessment did not reflect what really happened.[29] In 2002, the reality of self-assessment was recognised in statute, and section 92 of the TAA confirms the fact of taxpayer assessment. However, there is also clear recognition that there remains a residual need for the Commissioner to be able to assess tax liabilities. For example, where the taxpayer does not comply with the obligation to self-assess, the Commissioner can make a default assessment.[30] Equally, the disputes or challenge procedure may end up in a result that requires the completion of a re-assessment. Similarly, the Commissioner and the

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[23] *See also Sir Ivor Richardson "Foreword" in Adrian Sawyer (ed)* Taxation Issues in the Twenty-First Century *(Centre for Commercial and Corporate Law University of Canterbury, Christchurch, 2006).*

[24] *Dominic De Cogan "A Changing Role for the Administrative Law of Taxation" (2015) 24 S.& L.S. 251 at 266.*

[25] *Tax Administration Act 1994 (NZ), ss 5, 6, 6A and 6B.*

[26] *See Organisational Review Committee* Organisational Review of the Inland Revenue Department, *Report to the Minister of Revenue and the Minister of Finance (April 1994).*

[27] Legislating for self-assessment of tax liability A Government discussion document, *(Wellington: 1998), at 2.7; on introduction of penalties see Shelley Griffiths "The 'Abusive Tax Position' in the Tax Administration Act 1994: An Unstable Standard for a 'Penal Provision'" (2009) 15 NZJTLP 159 at 161-164 and on the disputes resolution process see Mark Keating "New Zealand's Tax Dispute Procedure – Time for a Change" (2008) 14 NZJTLP 425 and on the binding rulings see Adrian Sawyer "Binding Rulings in New Zealand - an assessment of the first ten years" (2006) 12 Canterbury Law Review 273.*

[28] Rewriting the Income Tax Act Objectives, process, guidelines A discussion document, *Wellington 1994; the end product is the Income Tax Act 2007; generally on the re-write project see John Prebble "Evaluation of the New Zealand Income Tax Law Rewrite Project for a Compliance Cost Perspective (2000) 54 Journal for International Fiscal Documentation 290 and Adrian Sawyer "Rewriting tax legislation: Reflections on the New Zealand's experience" (2003) 57 Bulletin for International Fiscal Documentation 578.*

[29] Legislating for self-assessment of tax liability A Government discussion document, *(Wellington: 1998).*

[30] *Tax Administration Act 1994 (NZ), s 106.*

taxpayer may reach a settlement of a dispute between them.[31] There may also be situations where there has been some mistake in the original self-assessment and that needs to be remedied. For all these reasons, the decision was made to retain the discretion for the Commissioner to amend assessments.[32]

As part of the rewrite project and the move to self-assessment, the decision was made to remove all similar 'discretions' held by the Commissioner but that related to substantive tax legislation - discretions exercised in order for liabilities to be determined (Birch, 1998, Chapter 4.3) .[33] This former aspect of the Commissioner's role was to be replaced by 'objective rules' which would govern the imposition of tax liability in the self-assessment context (Birch, 1998, Chapter 4.4).[34] Those discretions relating to administration of the tax system and the huge infrastructure of persons and technology to support that administration, however, were to remain and be organised in the TAA.

Sitting at the heart of these two pieces of legislation and holding them together, therefore, is the operation of two roles held by the Commissioner of Inland Revenue in New Zealand. The explication and functioning of these two roles, and their intersection, engage fundamental constitutional tensions and trade-offs that are necessary in order to allow for the efficient functioning of the 'mundane miracle' that is a tax system, albeit in a robust constitutional landscape.[35] The first of those roles, which can be called the "assessment" function, relates to determining the liability of taxpayers in a self-assessment context. It involves the application of substantive tax laws to transactions, ranging from the mundane to the complex, entered into by taxpayers.[36] This involves the interpretation of the law. It is a delicate balance, however. For, as was noted earlier, there can be no taxation by executive decree. Parliament has delegated powers to the Commissioner to assist in the *collection* of taxes. Naturally, part of that assistance has to include policing the assessment of when a tax is due, and its quantum. Yet, the Commissioner, as a member of the executive, cannot disregard or overrule legislation, for that would be repugnant to the rule of law.[37] Neither can the Commissioner misapply the law. It remains the proper role of the courts to have the final word on the meaning of statutory ambiguity, and the Commissioner must apply that meaning as decided by the Courts to the transactions of taxpayers.

Yet, it is impossible for the Commissioner to collect *all* taxes due as a matter of fact. This introduces the second role of the Commissioner set out in the legislation - that of the proper administration of the tax system. The Commissioner must manage the administration of the tax system in a way that best employs the resources of the Inland Revenue, and that allows for the system to remain efficient and effective, particularly given the importance of the voluntary compliance of taxpayers.[38] As such, the Commissioner is charged with the "care and management" of the tax system in s 6A of the TAA. This is the source of the Commissioner's discretion to use their 'best endeavours' to balance the 'integrity of the tax system' with an obligation to 'collect the highest net revenue over time' that is 'practicable'

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[31] *See Inland Revenue Department "Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act" (Tax Information Bulletin, Vol 22, No 10) IS 10/07 [Inland Revenue Department "Care and Management"] at [152]. See also Mark Keating "The Settlement of Tax Disputes: The Commissioner is Able but not Willing" (2009) 15 NZJTLP 323.*

[32] *Tax Administration Act 1994 (NZ), s 113..*

[33] Legislating for self-assessment of tax liability: A Government discussion document *(Wellington: 1998) at 4.3.*

[34] *At 4.4.*

[35] *Shelley Griffiths "Is tax administration "ectopic"? Assessment, interpretation, adjudication and application: the roles of the Commissioner of Inland Revenue and the Courts" (2021) 52(4) VUWLR (forthcoming).*

[36] *Shelley Griffiths "Is tax administration "ectopic"? Assessment, interpretation, adjudication and application: the roles of the Commissioner of Inland Revenue and the Courts" (2021) 52(4) VUWLR (forthcoming).*

[37] Commissioners of Inland Revenue v Clifforia Investments Ltd *[1963] 1 WLR 396 (Ch) at 402.*

[38] *State Sector Act 1988 (NZ), s 32. See also Public Finance Act 1989 (NZ), s 34.*

having regard to available resource and compliance costs. This seems sensible. Discretion is required in the administering of the revenue Acts as a 'sheer, hard practical matter' in order to assist the Commissioner in their duty to be a good administrator by ensuring the system is legitimate, efficient and effective.[39] However, these provisions also provide the authority for the Commissioner to exercise administrative discretions such as a power in s113 to depart from the 'correct' position in relation to the liability of a taxpayer, or whether to recognise an agreement with a taxpayer to settle a tax dispute that represents a position other than the 'correct' position according to law.[40] The Commissioner can of course also decide not to pursue a re-assessment of an 'incorrect' tax position for reasons relating to resourcing constraints.

It is worth pausing to reflect upon how those administrative aspects of the Commissioner's role interact with the notion that the Commissioner cannot misapply the law and that it is the Courts who have the final word on the meaning of a statutory provision. These ideas are crucial in the history of taxation - they allow for a traceable link from a tax liability directly to Parliament, the representative body through which the people exert their democratic rights. Parliamentary sovereignty is arguably the most fundamental principle in New Zealand's constitutional landscape. However, taxation draws out circumstances whereby these very fundamental constitutional principles are eroded in favour other goals which are not strictly 'legal', such as efficiency and the 'integrity of the tax system' (Dourado, 2011a, pp. 15–17).

It is not the fact of these principles being eroded in themselves that ought to be cause for concern necessarily. More so, the point is that in a complex, modern neoliberal state such as New Zealand, constitutional principles are never the *only* concern, and nor do they operate in an absolute fashion (Joseph, 2014, p. 151).[41] In fact, it is a strength of New Zealand's constitutional landscape that these fundamental principles can be eroded in certain circumstances to allow for the effective and efficient operation of the tax system. However, there must be good reason. There must also be direct engagement with questions such as 'what role ought the rule of law play in a tax system where efficiency and clarity are so important?'; or 'when might these constitutional ideas be eroded in order to pursue some other desirable goal in taxation?'. All these questions are fundamentally constitutional in their nature, even though they do not refer to a single written document. Direct engagement with these often inchoate and malleable principles can undoubtedly produce good outcomes from both a public law perspective, and a raft of other perspectives. And as was noted in the first part, these truly constitutional questions can never be answered through a simple application of the law. It also reminds us that taxation in New Zealand is not only 'constitutional' in the obvious historical sense of tracing a link from the levying of a tax back to Parliament. The entire operation of the tax system, from the levying of tax to the administration and enforcement of the entire tax system engages constitutional principles, trade-offs and debate.

The final part of this piece will return to the conclusions of part one to reflect upon how the outcomes of these constitutional debates in the New Zealand tax context have tended to reflect our broader constitutional culture and landscape of malleability and sensitivity to change without necessarily the existence of concrete, impervious foundations.

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[39] *Shelley Griffiths "'No discretion should be unconstrained': considering the "care and management" of taxes and the settlement of tax disputes in New Zealand and the UK" (2012) 2 BTR 167 at 186.*

[40] *The Court of Appeal found that the Commissioner is entitled, based on the care and management provisions, to make an assessment that reflects an 'agreement' rather than the 'correct' position in* Accent Management Ltd v Commissioner of Inland Revenue (No2) *[2007] NZCA 231, (2007) 23 NZTC 21,366. For further discussion on the settlement of tax disputes in New Zealand, see Keating "The Settlement of Tax disputes: The Commissioner is able but not willing", above n 60.*

[41] *See also Paul Daly "Administrative Law: A Values-based approach" in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray (eds)* Public Law Adjudication in Common Law Systems: Process and Substance *(Hart, Oxford, 2016) 23.*

3 TWO EXAMPLES – TAXPAYER RIGHTS AND GTPP

The first part of this article sketched, at a high level, the nature of the constitutional landscape in New Zealand, before the second part studied in a more detailed way how those flexible constitutional principles contribute to and shape New Zealand's tax system. This final part will use the examples of taxpayer rights and the 'Generic Tax Policy Process' (GTPP) in New Zealand to suggest that public law questions and debates in the tax context have tended to be resolved in a way that reflects New Zealand's broad approach to constitutionalism - informal, malleable and principled methods without a concrete, robust set of rules to point to if these are challenged or ignored.

3.1 TAXPAYER RIGHTS

First, with regard to taxpayer rights, New Zealand does not have a taxpayer charter, a specific bill of rights, nor a designated role to deal with the protection of taxpayer rights, such as a Tax Ombudsman. This does not mean New Zealand taxpayers are entirely without rights, as there are other instruments, such as NZBORA and general rules of law that apply. There is an Ombudsman, but without a special designation of someone within that structure to have a particular role in relation to taxpayer rights (Ombudsman New Zealand, 2023).[42] Inland Revenue does have a document called "Inland Revenue's Charter", the content of which is somewhat similar to taxpayer charters elsewhere (Inland Revenue Department, 2009). This charter sets out rights of professional interaction, reliable advice and information, confidentiality, consistency and equity, as well as a right to 'question' the revenue authority. As currently cast, it is directed more to the 'rights' of what we might style the 'taxpayer as customer' rather than 'taxpayer as citizen'. The IR Charter sets out how the Department will "deal with people". It will, inter alia, be courteous, prompt and professional, respect cultural and special needs, give reliable and correct advice and apply the law consistently. While these are entirely laudable and valuable, they do not address the constitutional rights discussed above.

There are also certain substantive provisions in the TAA that set out rights of challenge and appeal,[43] a right to privacy,[44] and to the protection of confidentiality.[45] Section 6 of the TAA also set out a number of 'rights' of taxpayers as part of the 'integrity of the tax system', as well as obligations on both the taxpayer and the revenue authority. Section 6 requires that every official who has some obligation in relation to the collection of tax must use "their best endeavours to protect the integrity of the tax system." The section goes to non-exhaustively define the meaning of "integrity of the tax system" by reference to taxpayer rights and responsibilities and highlighting the significance of 'taxpayer perceptions of that integrity". The rights and responsibilities of the taxpayer are:

- the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
- the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
- the responsibilities of taxpayers to comply with the law.

[42] *Ombudsman Act 1975 (NZ): on the role and activites of the Ombudsman generally, see https://www.ombudsman.parliament.nz*

[43] *Tax Administration Act 1994 (NZ), Part 8A.*

[44] *Section 81.*

[45] *Section 18.*

The section also sets out the co-relative responsibilities of those administering the law. Those are to maintain the "confidentiality of the affairs of taxpayers" and to administer the law "fairly, impartially, and according to law".

However, the role and impact of this section are somewhat unclear. The section non-exhaustively defines the 'integrity of the tax system' as a value that all tax officials are required to use their best endeavours to protect as including 'the rights of taxpayers to have their liability determined fairly, impartially and according to law' and the 'rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser fervour than [those] of other taxpayers'. Section 6 has not proved a fertile ground for litigation. It has been held to be non-justiciable and, unlike NZBORA, does not create a series of enforceable rights and obligations.[46] The requirement upon tax officials to use their 'best endeavours' to protect the integrity of the tax system is overshadowed by the parallel *obligation* in section 6A to 'collect the highest net revenue over time' that is 'practicable' having regard to available resource and compliance costs.[47] In *Russell v TRA*, the Court of Appeal emphasised both the primacy of the statutory challenge procedures and the overarching importance of correctness in assessment.[48] New Zealand courts have consistently held that the section 6 duties are owed to the 'public at large' and not to individual taxpayers.[49]

In recent times, proposed amendments to the TAA which may be breaches of NZBORA have been subjected to an Attorney General's report as required by section 7 of that Act. Applying this scrutiny to tax legislation is a comparatively recent change and is to be welcomed. In 2019 amendments to the Commissioner's information gathering and access to property powers were subject to a NZBORA consistency report.[50] There is thus some engagement between the rights as explicated in NZBORA and tax administration.[51] So while the 'rights' in the TAA itself have proved to have extremely limited protective force for individual taxpayers, there has been some recognition of the role of NZBORA in the protection of rights in that more specific manner. In a sense, this flexibility is entirely consistent with the overall manner in which constitutional principles operate in New Zealand.

Ultimately, the substance of the rights outlined across the various instruments that we have briefly sketched are not categorically different from those set out in other jurisdictions with more robust protections for those rights, often set out in the form of a taxpayer charter. What is different, however, is the primacy and power given to the individual rights in a context where the New Zealand government and revenue authority are more focused on the protection of that indeterminate and malleable idea - the 'integrity of the tax system' *as a whole* - possibly at the expense of individual taxpayers having to endure sacrifices for the 'greater good' of that system, so to speak.[52]

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[46] Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd *[2016] NZCA 276 at [78].*

[47] *See Jeremy Beckham "With Great Power Comes No Responsibility: The Commissioner's Assessment Function and Discretionary Adherence to the Law" (2018) 24 NZJTLP 83.*

[48] Russel v TRA *(2003) 21 NZTC 18,255 (CA).*

[49] Commissioner of Inland Revenue v BNZ Investments Limited *(2001) 20 NZTC 17,103 (CA);* Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd *[2016] NZCA 276.*

[50] *Shelley Griffiths 'The New Zealand Bill of Rights Act 1990 and the Commissioner of Inland Revenue's information gathering powers' [2020] NZLJ 141: see also Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Taxation (Income Tax Rate and Other Amendments) Bill (New Zealand House of Representatives, Wellington, 2020)*

[51] See also *Avowal Administrative Attorneys v DC at North Shore* [2010] NZCA 183 and *Tauber v CIR* (2011) 25 NZTC 20,071 for application of NZBORA to tax administration cases by the courts.

[52] *Adrian Sawyer "Enhancing taxpayers' rights in New Zealand – an opportunity missed?" (2020) 18(2) eJournal of Tax Research 441 at 443.*

While New Zealand often prides itself in the integrity and lack of corruption inherent in our tax system, we should not be complacent.[53] Fortunately, in most instances, this system generally works. The small size of our tax profession and the churn of individuals working for private practice and Inland Revenue engenders a level of personal cooperation and trust, and a mutual expectation and desire for the system to function properly.[54] Furthermore, despite delays in access to the courts, an independent judiciary ensures any aberrations of conduct by the Commissioner (or individual officers) are effectively reigned in.[55] Although some of Inland Revenue's decision-making lacks transparency, most issues of concern to taxpayers or their advisers are nevertheless brought to light at regular conferences or in practitioner or academic papers.[56]

The informality of our regime, which requires taxpayers to rely upon the discretion or good graces of Inland Revenue officers to protect their unwritten rights, is broadly consistent with the manner in which other rights are protected and with the scattered nature of New Zealand's constitutional arrangements. It is not suggested that this is a weakness in and of itself, it being a reflection of the prevailing legal culture which has been set out in the rest of this article. It has been argued elsewhere, however, that in any other advanced economy, the New Zealand approach to taxpayer rights would not be tolerated and unlikely to operate for long.[57] It places taxpayers at the whim of unelected officials, who hold a vast level of 'tax power' with very few clear rights and remedies if that power does happen to be abused. Poor taxpayers' rights protection, accompanied by increased powers for the revenue authority, can lead to a reduction in trust in government and in levels of compliance, which in turn can lead to a downward spiral.[58]

It therefore does remain important that the possibility of certain stronger measures to ensure the protection of taxpayer rights remains squarely in the contemplation of New Zealand's legal discourse and policy design. Even in a country which prides itself on integrity and operates across the legal landscape in a flexible and principled manner, we must also recognise that there must be some contexts where malleable and scattered protections are not necessarily the best approach in all the circumstances. Given the fundamental constitutional importance of taxpayer rights, and the important role that the taxpayer perception of fairness plays in maintaining both the integrity of the tax system and the spectre of voluntary compliance, it may be that this is one of those constitutional circumstances where New Zealand's fervour for scattered and inchoate protections ought to be re-examined.

3.2 THE GENERIC TAX POLICY PROCESS

The tax policy process in New Zealand is another interesting example of an approach across our political, legal and constitutional culture where flexibility and adaptability are championed without necessarily the clear grounding of concrete foundations to rely upon for certainty or redress where the process is ignored.

Tax policy is an often under-valued area of taxation research. The intricacies of tax policy act as the conduit between political will and the legislation itself which actually *levies*

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[53] *Mark Keating "Protection of Taxpayer Rights in New Zealand: A Mixed Bag" (2018) 24(2) New Zealand Journal of Taxation Law and Policy 147 at 169, quoted in Sawyer "Enhancing taxpayers' rights in New Zealand", above n 83, at 449.*

[54] *Keating "Protection of Taxpayer Rights in New Zealand", above n 84, at 169.*

[55] *At 169.*

[56] *At 169.*

[57] *Sawyer "Enhancing taxpayers' rights in New Zealand", above n 83, at 449.*

[58] *At 463. See also Sol Piccioto "Constructing Compliance: Game Playing, Tax Law, and the Regulatory State" (2007) 29 Law & Policy 11; Valerie Braithwaite (ed.)* Taxing Democracy, Tax Compliance and the Psychology of Justice *(Ashgate Publishing, Ashenden, 2003) at 45.*

the tax.[59] In this sense, all aspects of tax law and practice build upon the foundations of tax policy as reflected in the words of a taxing Act and subsequently as interpreted by the courts.

The review of the Inland Revenue Department in the mid 1990s engendered a shift to a new and innovative 'Generic Tax Policy Process' (GTPP) in New Zealand.[60] The initial brief for that review included a directive to determine best practice for how taxation policy advice should be provided to government. The Richardson Committee, which undertook the review, identified a number of problems with the previous tax policy development process, noting that:[61]

> ... the subject matter is complex, and tax legislation is very complex and difficult to understand. The tax policy process was not clear, neither were the accountabilities for each stage of the process. There was insufficient external consultation in the process

The report recommended the adoption of a new policy process, called the 'GTPP', as a form of administrative or customary practice, rather than by way of legislation or regulation. The GTPP has three main objectives which provided stimulus for the Government's decision to adopt the process. It encourages earlier and explicit consideration of key tax policy elements and trade-offs, provides greater opportunity for consultation and external input into the policy formation process and is designed to clarify the responsibilities of the two main departments involved in the process (Inland Revenue and Treasury).[62] Prior to the introduction of the GTPP, the responsibility for the development of tax policy lay principally with the New Zealand Treasury.[63] At that stage, the role of Inland Revenue was largely that of the administration of the tax system.[64] Tax policy was characterised by an absence of clarity and ascertainable accountabilities at the different stages of the process.[65] It also lacked external consultation throughout the formation process – which was recognised as particularly problematic given the oft-discussed complexity of taxation policy and legislation. The GTPP transformed this process to provide a clear structure whereby policy officials are able to draw upon the technical and practical expertise of the business community at each stage, and much of the policy-making responsibility became centralised in Inland Revenue in order to provide accountability.

The GTPP has five core stages, each with several phases.[66] Throughout the GTPP, there are linkages and feedback loops which are intended to reflect a flexible process, while recognising that some activities may occur simultaneously or in a modified order, such as the timing of legislative drafting.

It is generally considered that the GTPP represented a major step forward in tax policy development in New Zealand. Sawyer, for example, wrote in 1996 that "the GTPP represents a significant advance for New Zealand from the traditional secrecy of tax policy formulation and the associated budgetary process".[67] Commentary from both Australia and the United Kingdom since that time has generally cast New Zealand's GTPP as "international best

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[59] *Sawyer "Enhancing taxpayers' rights in New Zealand", above n 83, at 402.*

[60] *Organisational Review Committee, above n 55.*

[61] *Organisational Review Committee, above n 55, at 5.*

[62] *Adrian Sawyer "Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of Law and Politics" (2013) 28 Australian Tax Forum 401 at 404; Peter Vial "The Generic Tax Policy Process: A "Jewel in Our Policy Formation Crown"?" (2012) 25 NZULR 318 at 319.*

[63] *Adrian Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand" (2017) 27(4) NZULR 995 at 1015.*

[64] *At 1015.*

[65] *At 999.*

[66] *See Sawyer "Reviewing Tax Policy Development in New Zealand", above n 93, at 405.*

[67] *Adrian Sawyer "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation - Some Recent Developments" (1996) 2(1) New Zealand Journal of Taxation Law and Policy 17 at 39*

practice" in the sense that it provides a clear structure to the development of tax policy, and champions transparency and accountability which enhances the responsiveness of the tax system.[68] The openness of the process, the breadth of the policy put out for consultation and the willingness of the government to change its position (both policy and detail) have been said to make the GTPP a "jewel" in New Zealand's "policy formation crown".[69]

Given the apparent consensus as to the effectiveness and value of the GTPP, one would have thought it would be founded upon solid legal or constitutional grounding. Yet, the decision to engage in GTPP is no more than a *political decision* to engage in each of the various stages and phases it prescribes. It does not have its source in statute and therefore has no legislative force. It is a policy adopted by the Executive and therefore can be adapted, ignored or terminated without reference to Parliament. That is not to say necessarily that the lack of statutory grounding necessarily erodes its usefulness, however. In fact, flexibility and adaptability are both explicitly championed throughout the process.

Successive governments have recognised that the GTPP is a "generic process", that is to say it is open for the government to adapt the process to suit individual circumstances, and it is generally recognised that each phase is not independent.[70] Moreover, it has also been recognised that there are circumstances where it is most appropriate to not follow all the different steps of the GTPP in a rigid way. In particular, the extra time involved in the consultation and accountability mechanisms prescribed by the process is not always conducive to satisfactory outcomes regarding changes that require immediate action to protect the revenue base.[71] It would not be possible to move quickly and, at the same time, to engage in wide consultation on changes to close a recently identified loophole, for example, or to block a scheme that is losing the country hundreds of millions of dollars in revenue (Revenue, 2011) .

There have been certain times in the history of the process where the Government's commitment to the process has been questioned.[72] Most governments have, at times, made decisions to effectively ignore certain aspects of the GTPP in order to push through particular policies without full consultation and exhaustive examination by the tax community. The purely political nature of the process renders it weak in these such circumstances. However, it is also the case that suspending or bypassing the GTPP has been the exception as opposed to the rule, and although the framework is not linear or prescriptive or concrete, stakeholders have come to expect certain key elements.[73] Therefore, when these particular elements are not forthcoming, it is controversial.

Broadly, then, although there will be occasions where the Government needs or wants to act quickly, the clear preference of successive governments in New Zealand has been to make the entirely political decision to work through the GTPP process. This process enhances transparency, accountability and engagement with the tax community to ultimately land on better tax policy. It also, however, has some unique characteristics

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[68] *See for example A Ryan* Tax Policy to Tax Law: Processes to Improve our Tax Legislation, *(CPA Australia, 1999); M. Dirkis and B. Bondfield "At the Extremes of a "Good Tax Policy Process": A Case Study*

Contrasting the Role Accorded to Consultation in Tax Policy Development in Australia and New Zealand" (2005) 11(2) New Zealand Journal of Taxation Law and Policy, 250.

[69] *Vial, above n 93.*

[70] *Dirkis and Bondfield, above n 99, at 264.*

[71] *Hon Peter Dunne* Speech to Deloitte tax conference *(June 14, 2006); available at: http://www.scoop. co.nz/stories/PA0606/S00240.html, quoted in Sawyer "Reviewing Tax Policy Development in New Zealand", above n 93, at 416.*

[72] *See for example Hansard,* In Committee on the Taxation (GST and Remedial Matters) Bill 2010 *(December 9,*

2010), and in particular the comments of David Cunliffe, Stuart Nash and Dr Russell Norman at 16,192, 16,113 and 16,196 respectively. These comments were all made after the Bill was introduced to bring in an 'Look Through Company' regime despite not having passed through GTPP process.

[73] *Vial, above n 93, at 337.*

reflecting the social and legal culture of New Zealand such that the flexible, indefinite and shaky foundations of the process are not necessarily a weakness. We are a small country, allowing our policy and administrative responses to remain fast and flexible with such a process in ways that larger jurisdictions could never expect to achieve.

4 CONCLUSION

We began this piece by suggesting that every jurisdiction has its own particular expression of constitutional culture at the intersection of law, politics, history, and convention. Moreover, we charted how the concerns surrounding taxation often sit at the very heart of these constitutional ideas and processes, and the debates that surround them. For, tax is inherently political in its nature. But tax is also deeply *legal* in its nature, and the ideas that it elicits.

In New Zealand, the intersection of those different areas has produced a constitution that is ever-emerging and shifting. It can be changed and developed comparatively easily. The ever familiar calls for strong constitutional foundations, checks and balances and barriers for change in many jurisdictions across the globe do not necessarily ring with the same urgency or gravity in New Zealand. That intersection, however, has also produced a constitutional culture that is quite content with the more nuanced, flexible and adaptable checks on the Government and taxation authorities.

An approach that espouses trust, values adaptability and prioritises the 'carrot' over the 'stick', so to speak, permeates across the organs of Government in New Zealand. In this sense, the levying of tax and the administration of the tax system in New Zealand does not operate in a constitutional vacuum. It does not exist in its own bubble, but is very much an expression of that general constitutional culture. Nonetheless, there are some concerns about the monopoly the revenue authority, Inland Revenue and its Commissioner, have over policy development, legislative drafting, and administration. The complexity of the system, the Commissioner's intertwined roles of interpretation and administration, the paucity of external review agencies, and the reduced role of the Courts in the context of disputes and challenge processes designed to keep disputes out of the Court mean there is, however, no cause for complacency. Like all societies, Aotearoa New Zealand should always be reminded of the sentiment attributed to Thomas Jefferson that eternal vigilance is the price of liberty.

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Article

Constitutional issues in tax law (Norway)

Frederik Zimmer

Norwegian legal expert. In 1970, he graduated with the degree of cand.jur. From 1970 to 1971, he served as a deputy judge before becoming a lecturer and research fellow at the University of Oslo. In 1978, he earned his doctorate in law, and in 1987, he was elevated to professor specialized in tax law. From 1995 to 2000, he served as dean of the Faculty of Law, and he has also served as an acting Supreme Court justice. He received an honorary degree at Stockholm University in 2007, and is an Academy of Science and Letters member.

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KEYWORDS:

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

ABSTRACT:

In Norway, constitutional issues play a rather modest role in tax policy and praxis. There are few and rather insignificant procedural rules for tax rules, the most important being that rules on state taxes are valid only for one year. Judicial review is important, primarily concerning whether a tax assessment is within the tax laws. Courts can also decide on whether tax rules are within the Constitution. Such constitutional review is particularly important concerning the issue of retroactive tax rules; therefore, this is dealt with in some detail. Court can also decide on whether tax rules are in harmony with tax treaties, the European Economic Area Agreement and the European Convention on Human Rights.

PALABRAS CLAVES:

constitución política; sistema tributario; principios tributarios; derechos humanos; jurisprudencia constitucional.

RESUMEN:

En Noruega, las cuestiones constitucionales juegan un papel más bien modesto en la política y praxis tributaria. Hay pocas y bastante insignificantes reglas de procedimiento para las reglas tributarias, siendo la más importante que las reglas sobre impuestos estatales son válidas solo por un año. La revisión judicial es importante, principalmente con respecto a si una determinación de impuestos está dentro de las leyes fiscales. Los tribunales también pueden decidir si las normas fiscales están dentro de la Constitución. Tal revisión constitucional es particularmente importante en relación con el tema de las normas tributarias retroactivas; por lo tanto, esto se trata con cierto detalle. El tribunal también puede decidir si las normas fiscales están en armonía con los tratados fiscales, el Acuerdo sobre el Espacio Económico Europeo y el Convenio Europeo de Derechos Humanos.

MOTS CLES :

constitution politique; régime fiscal; principes fiscaux; droits humains; jurisprudence constitutionnelle.

RESUME :

En Norvège, les questions constitutionnelles jouent un rôle plutôt modeste dans la politique et la pratique fiscales. Il existe peu de règles de procédure et plutôt insignifiantes pour les règles fiscales, la plus importante étant que les règles sur les impôts d'État ne sont valables que pour un an. Le contrôle judiciaire est important, principalement pour déterminer si une cotisation fiscale est conforme aux lois fiscales. Les tribunaux peuvent également décider si les règles fiscales sont conformes à la Constitution. Cette révision constitutionnelle est particulièrement importante en ce qui concerne la question des règles fiscales rétroactives ; par conséquent, cela est traité en détail. Le tribunal peut également décider si les règles fiscales sont en harmonie avec les conventions fiscales, l'accord sur l'Espace économique européen et la convention européenne des droits de l'homme.

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1 INTRODUCTION

1 INTRODUCTION

The Kingdom of Norway is a constitutional monarchy. The King, however, has only ceremonial functions. The executive power is with the Government and the legislative power is with the Parliament ("Stortinget"). Norway has a parliamentary system, which means that the Government has to have a certain degree of support in the Parliament.

The Norwegian Constitution is from 1814, which means that it is one of the oldest constitutions still in force. Of course, it has been amended several times.

Legislation and the levying of taxes have to be decided by the Parliament, under an ordinary majority rule.

Norway does not have administrative courts and no special constitutional court. Therefore, all tax cases are decided by the ordinary courts where the judges are legal all-rounders and not specialists in tax law or in constitutional law.

Generally, there is little tradition for Norwegian courts to discuss constitutional issues in their decisions in tax cases and, consequently, taxpayers seldom invoke arguments based on constitutional rules. There are a few exceptions to this; thus, the principle of legality is often invoked and in particular, the issue of retroactive tax legislation has been dealt with in several Supreme Court cases.

2 BASIC PRINCIPLES OF TAXATION

Basic principles of the Norwegian tax rules are the ability-to-pay principle, the principle of equality and the principle of economic efficiency.

The ability to pay principle applies primarily to individuals and is mainly taken care of by the income tax and the net wealth tax (the inheritance tax was abolished as from 1. January 2014). The income tax is progressive with a top marginal tax rate of 46.4 percent (2021). This marginal rate is applicable for income exceeding approximately one million NOKs (2021) (10 NOK equals approximately 1 US dollar). The net wealth tax is proportional but there is a tax-free amount of 1.5 million NOK. The tax rate is 0.85 percent.

For income taxation of companies, the principle of economic efficiency dominates. For this reason, the tax base is broad. The company tax rate is 22 percent (2021). In addition, also for other taxes (in particular the value added tax, a payroll tax, special turnover taxes) the principle of economic efficiency dominates.

The principle of equality requires that income should be taxed the same way regardless of its form. Therefore, income in kind is in principal taxed in the same way as income in cash and different kinds of capital income are generally taxed according to similar rules. One important feature is that the combined tax on company income and tax on distributed income in combination is at the same level as the highest marginal tax rate for income from labour. Therefore, there is not much tax to save by incorporating a business activity.

However, the principle of equality is severely challenged by the so-called Nordic dual income tax system, which is still generally applicable in Norway. Individuals' capital income is generally taxed at a rate of 22 percent (there are special rules for dividends and capital gains from shares), whereas earned income is taxed progressively with rates up to 46.4 percent as explained above.

3 PROCEDURAL CONSTITUTIONAL ISSUES

There are three rather insignificant special procedural rules for the levying of taxes compared with ordinary legislation. Firstly, the levying of state taxes requires only one decision in the Parliament whereas other legislation (including legislation concerning other taxes than state taxes) requires two (with three days between the decisions).

Secondly, ordinary legislation requires the consent of the King whereas decisions on taxes do not; but the King's consent is today a pure formality.

Thirdly, and somewhat more important, decisions on the levying of state taxes is valid only for the coming year, which means that the Parliament has to decide on the levying of each tax, tax rates etc. every year (the Constitution sec. 75 litra a). In practice, this is done in connection with the budget process, taking place right before the income year starts (normally in December with effect from the following January 1).

These rules, however, applies, as already indicated, only to state taxes, not taxes to the municipality and not for the social security contribution (which is often regarded as part of the income tax).

4 TAX TREATIES, THE EEA AGREEMENT

Treaties are entered into by the Government. However, the consent of the Parliament is required for treaties of special importance and for treaties, which requires new legislation. Tax treaties are incorporated into Norwegian law and as *lex specialis* they shall be applied by courts and tax authorities when they make exceptions from domestic law. Therefore, the Parliament has to give its consent to the entering into of tax treaties. A simple majority is sufficient; in practice, these consents are almost always unanimous and very seldom triggers a debate.

Because tax treaties are incorporated into Norwegian law at the same level as legislation enacted by the Parliament treaty override is in principle possible but does not happen in practice.

Norway has tax treaties with some 90 countries. By far most of them are based on the OECD tax treaty model or – for treaties with developing countries – the UN model.

The Agreement on the European Economic Area (the EEA Agreement) includes the EU Member States and three EFTA countries: Iceland, Liechtenstein and Norway; the fourth EFTA country, Switzerland, opted to stay outside (EFTA: the European Free Trade Area). The EEA Agreement extends the internal market of the EU to include also the three EFTA countries, except for agriculture and fisheries. This means that the so-called four freedoms –free movement of goods, persons (including the freedom of establishment), services and capital – apply also in the three EFTA countries and so do rules on the ban on state aid. The EEA Agreement does however, not cover taxation. Nevertheless, Norwegian tax legislation has to comply with the rules on the four freedoms and the state aid rules, because they are embedded in the EEA Agreement itself. This means that the case law of the Court of Justice of the European Union (CJEU) is directly relevant in Norway. Both the CJEU and EFTA Court (which interprets the EEA Agreement with effect for Norway, Iceland and Liechtenstein) have decided that the four freedoms in the EEA Agreement shall be interpreted in the same way as these freedoms in the EU treaties are interpreted. On the other hand, EU regulations and directives on taxes are not binding for Norway; thus, the Norwegian VAT is not harmonized with the EU VAT rules and the directives on company tax (for instance the Parent-Subsidiary and Merger directives) are not binding.

The EEA Agreement has had considerable impact on Norwegian tax law. The most well-known example internationally is probably the Focus Bank case (2004) in which the

EFTA Court struck down the Norwegian rules on withholding tax on dividends in force at that time.

5 LEGALITY, EQUALITY, JUDICIAL REVIEW

The Constitution contains some rules with general applicability but which are also important in tax law. The most important is the ban on retroactive legislation, which is dealt with separately in the next section.

Of course, the principle of *legality* applies in tax law. All taxation have to have its basis in tax rules enacted by the Parliament. However, this is not understood as a prohibition on the delegation of the power to enact tax rules, typically to the Government or, more often, the Ministry of Finance. Most often, such delegation concerns rather technical or insignificant rules but there are also examples of substantial tax rules enacted by delegation. One example is the rules concerning the incorporation of a business with so-called tax continuity (meaning that the incorporation does not trigger income tax). There is no prohibition in the constitution against enacting substantial and important rules by delegation but such practice is sometimes criticized.

In connection with the principle of legality, it should be mentioned that Norwegian courts apply a rather pragmatic and purpose-oriented interpretation style. Of course, in accordance with the principle of legality the wording of the tax rules in question is the point of the departure and have great weight in the interpretation process. However, important are also the preparatory works, the context of the rules, what can be induced from the purpose of the rules, and even the quality of the results are taken into account. This rather pragmatic approach made it possible for the courts (the Supreme Court in particular) to deal with tax avoidance schemes even without the support of a statute based general anti avoidance rule (a GAAR) (a statutory GAAR was introduced as from 1. January 2020).

The principle of *equality* has recently been written into the Constitution. As already mentioned, equality in taxation must be regarded as a basic principle in tax law. Nevertheless, it is very seldom that the argument of equality is successfully invoked in court cases. For instance, rather unequal value assessments for wealth tax purposes have not been successfully challenged and the Supreme Court has accepted very unequal valuations of dwelling houses for income tax purposes (Supreme Court case 2001). It remains to be seen whether the inclusion of the equality principle in the Constitution will have an impact on this.

The principle of *judicial review*, which applies to all fields of administrative law, is very important in tax law and is considered as a corner stone of taxpayers' rights. The judicial review applies on two levels. The courts can, as part of decisions in concrete cases, decide whether a rule in a tax statute is contrary to the Constitution, the European Convention of Human rights or the EEA Agreement. Further, and that is more important in practice, the courts can decide whether a tax assessment is consistent with the tax statutes (including whether the assessment has sufficient basis in a tax rule) or rules in the tax treaties.

There is a restriction in the principle of judicial review as regards concrete assessments, which are based more on economic, technical etc. than legal considerations. Thus, in a heavily criticized decision some years ago the Supreme Court decided that the tax administration's concrete valuation in transfer pricing could not be tried by the courts (Supreme Court case 2012). Later Supreme Court cases indicate, however, that the courts can try not only the administration's general interpretation of the transfer pricing rules but also whether the OECD Guidelines on transfer pricing have been correctly applied (Supreme Court case 2020).

6 RETROACTIVITY

The most important constitutional issue in tax law in Norway is probably the question of retroactivity of tax legislation. The Constitution sec. 97 contains a general rule, which according to its letter forbids all kinds of retroactivity in all fields of law. The doctrine agree that the rule cannot be understood literally. Thus, it is clear that the rule does not prohibit retroactivity that is favorable for the citizens. Even for legislation that is unfavorable for the citizens the rule is understood literally only in criminal law. There is also an issue what retroactivity actually means.

In tax law, several Supreme Court cases have dealt with retroactivity, starting early in the 20. Century. The Court early established that taxes, which are levied in connection with a transaction – or more generally a particular action or incident – could in general not be levied on incidents which occurred before the tax rule in question was enacted. Already in 1910 the Supreme Court made this clear concerning inheritance tax: Inheritance rules enacted on 27. April in one year could not be applied for calculating inheritance tax on the inheritance after a person who died on 14. April that same year (Supreme Court case 2010) (the inheritance tax is abolished in Norway as from 1. January 2014).

Much later, in 2006, the Supreme Court, in a plenary session, made a similar reasoning for the value added tax: As from 1. July 2001 driving schools became taxable for VAT. After a change of political majority in a general election, the taxability for VAT for driving schools was repealed as from 1. January 2002. Of course, during these six months some schools had acquired new cars, and they had obtained a deduction for input VAT on these cars in due course. When the tax was repealed, these deductions were partly reversed in a transitory rule (based on an assumption that the cars would be in use for three years). The Supreme Court turned down this rule. The reversal of the deduction for input tax was regarded as similar to levying of a new tax burden and it found the transitory rule to run against the prohibition of retroactive legislation in the Constitution sec. 97 (Supreme Court case 2006).

In 1925, the Supreme Court, also in a plenary session, had taken another view regarding income taxes. In the leading case, the taxpayer had sold shares with a capital gain in February on year. Under the rules at that time, the capital gain was tax-free. However, in May that same year a new rule made such gains taxable, and that rule should apply as from 1. January of that year. Therefore, the capital gain was taxed and the taxpayer lost the court case (Supreme Court case 1925). The core of the reasoning of the Supreme Court was that the income tax is at tax on the net income of the taxpayer each year and not a tax on income of each transaction or incident, even if such transaction or incident actually triggers the taxable income. Therefore, the taxpayer has to be prepared that changes in the tax rules during the year can be applicable for the whole year. The reasoning can certainly be questioned.

Over the years, in non-tax cases, the Supreme Court developed its view on what should amount to a retroactivity in conflict with sec. 97 of the Constitution. A distinction was drawn between what was referred to as direct or real retroactivity on the one side and indirect or non-real retroactivity on the other. Direct or real retroactivity refers to cases where new legislation levies heavier burdens on transaction carried out or incidents having taken place before the rule was enacted (as in the cases concerning inheritance tax and value added tax mentioned above). Such retroactivity can, however, be accepted (outside criminal law) but only if strong public interest reasons support it.

Indirect or non-real retroactivity refers to cases where the new rule restricts an established position, without directly levying heavier burdens on earlier incidents. In such cases, according to the Supreme Court, the rule would be unconstitutional only if the

application of the new rule amounted to a clearly unreasonable or inequitable retroactivity. For instance, stricter rules on depreciation allowances on fixed assets can normally be applied also to assets that are acquired before those stricter rules were enacted. It turned out in practice that the test of unreasonable or inequitable retroactivity is almost impossible to pass.

In the VAT case from 2006, the Court picked up the differences between "action taxes" (as inheritance tax and VAT) and income taxes. Adhering to the development in non-tax cases, the Court was of the view that in general the application on new unfavorable rules on action taxes would be unconstitutional unless strong public interest reasons supported applying the rules. As for income taxes, however, the application of a new unfavorable rule would be acceptable unless that would amount to a clearly unreasonable and inequitable retroactivity. This view had, in fact, been applied in Supreme Court case from 1976. There the taxpayer had sold assets in September 1970 with a capital gain, which at that time was tax free. Parts of the price should be paid in 1971 and according to rules applicable at that time this amount should be taxed in 1971 if it was at all taxable. Such capital gains were made taxably by a law enacted in June 1971 and the new rules should apply as from the beginning of the income year of 1971. The Supreme Court accepted the taxation of that part of the price that was paid in 1971 and i.a. argued that the new rule had been long expected and for that and other reasons it was not unreasonable to apply it.

In the VAT case of 2006, the Court stated that there was no sharp dichotomy between the two groups of tax rules and that tax law was not in the core of the retroactivity prohibition in the same way as criminal law. Nevertheless, the majority of the Court found that the new VAT rule, reversing parts of the deduction for input VAT, could be accepted only if strong public interest reasons supported it, and the majority found that this was not the case. The minority (four of 15 judges) pointed out that action taxes could be rather different and, therefore, that strong public interest reasons could not always be required. The minority pointed out i.a. that the damage to the taxpayers was small and that the rule in question was essentially reasonable.

This set the scene for the for the most well-known Norwegian retroactivity tax case in recent years – the shipowner case from 2010, which was also decided in a plenary session of the Supreme Court. In 1996, Norway introduced a tonnage tax regime for taxing shipping business. Shipping income should not be taxed under the ordinary tax rules; instead, a very modest so-called tonnage tax was levied. However, the shipping income was not tax free; instead, the tax liability was postponed as long as the income was kept within the shipping company and the company was part of the tonnage tax regime. Thus, the company would be taxed if and when the profits were distributed to the shareholders or if and when the company the left the tonnage tax regime. No time limit applied as to how long this postponement could last and in principle the taxpayer had control of when, if ever, the tax liability should be triggered.

However, most tonnage tax regimes in other countries were based not a postponement of the tax liability but on a definitive tax freedom for shipping income. The shipping companies lobbied for introduction of a similar system in Norway and in 2006 they eventually succeeded. A transitory rule dealt with the profits from shipping earned but not yet taxed since 1996: Two thirds of this income should be taxed over ten years (one tenth each year); the remaining one third of the income would be tax free provided that an amount equal to the tax on that income (calculated at the corporate income tax rate at that time: 28 percent) was used for environmental purposes. These rules implied that the taxpayers lost control of if and when tax liability on income earned since 1996 should be taxed and they contended that this was unconstitutional retroactivity (Zimmer, F., 2016, 583).

In a deeply split Supreme Court, a majority of six out of 11 judges stated that this was not a clear-cut case of either direct/real or indirect/non-real retroactivity but something in between. Nevertheless, the majority found that the case had much in common with the VAT case on driving schools of 2006. In this case, as well, the rules in question implied that earlier incidents and actions were taxed more heavily because of the new rules. Therefore, accepting the rules should require strong public interest reasons, and such reasons were not found.

A minority of five judges were of the opinion that this was a case of indirect or non-real retroactivity and found that the retroactivity was not clearly unreasonable or inequitable. The minority also invoked the importance of freedom for the Parliament to legislate in tax matters and the fact that the majority of the Parliament had clearly stated that the rules were not unconstitutional.

The majority's emphasis on the parallel to the VAT case can be discussed. However, the result of the majority can be defended with reference to the fact that the main purpose of the postponement rules of 1996, which was the postponement of the tax liability and that the taxpayer had control of the length of the postponement. In addition, future losses in the company would reduce or eliminate the tax liability. Thus, the transitory rules in effect removed these effects and therefore undermined the core of the 1996 rules.

The shipowner case could, of course, not be decided with reference the old Supreme Court cases concerning income tax rules enacted during the year but applicable the whole year. In the shipowner case the retroactivity applied to income earned up to 11 years before the new rules were enacted. At the same time, the shipowner case did set not aside this old practice. However, both the VAT case and the shipowner case seems to play down the difference between action taxes and income taxes. Therefore, the question has been raised as to whether the Supreme Court would now be prepared to set aside its practice from the 1920s regarding retroactivity within the same year and consider this as possible unconstitutional retroactivity.

7 CONSTITUTIONAL LIMITS TO TOTAL TAXATION?

The question of whether there are limits to the total amount a taxpayer may have to pay in taxes and, in case, where that limit goes, has not been tested before the Supreme Court.

Some decades ago, there was a "roof" as to the total effect of a taxpayer's income and wealth taxes: the sum of these taxes for a given year, as a main rule, could not exceed 80 or 90 percent of the net income of the taxpayer. These rules were controversial, and with the lowering of tax rates in recent years, this issue is now not very practical. Consequently, there is not discussion of reintroducing such rules for the time being.

Oil and gas producing companies pay up to 78 per cent of their income in income taxes. The companies have not challenged this taxation under the constitution.

Further, as a point of departure there is no constitutional limits as to what kind of taxes that can be levied. However, taxes may treat taxpayers so unequally that it conflicts with the Constitution's requirement of equal treatment of subjects.

Taxes have to be levied according to general rules. Otherwise, it may amount to an expropriation, which as a main rule trigger a right to compensation.

8 RIGHTS AND DUTIES FOR TAXPAYERS

Most rights and duties of the taxpayer is embedded in administrative law rather than the Constitution. Thus, the duty to file a tax return and to answer questions from the tax office

is regulated in a special tax administrative act. The same applies for instance to rules on professional secrecy, the right to obtain an advance ruling, the right to be informed of planned deviations from the tax return and the right to appeal the case to a special appeals body. In addition, this act contains rules on additional taxes (a penalty tax) in cases where the taxpayer has not fulfilled his reporting obligations. Criminal punishment for tax fraud is embedded the criminal act.

9 INTERNATIONAL HUMAN RIGHTS

The European Convention on Human Rights has been incorporated into Norwegian law. The Convention has had some impact on tax law. Admittedly, the important rule on fair trial in Art. 6 does not apply to substantial tax cases, according to case law by the European Court of Human Rights. However, it applies when there is a criminal charge. The Supreme Court has decided that additional tax (the penalty tax) levied by the tax administration when taxpayers do not fulfill their reporting duties amounts to a criminal charge under the Convention, and therefore Art. 6 applies. This has raised several cases in Norwegian law. In many decisions, the penalty for tax fraud has been reduced due to the tax administration and/or the police having used too long time in handling the case. In addition, the burden of proof has been sharpened for additional taxes, in particular in cases of serious information neglect. In the last-mentioned cases, the burden of proof is similar to the burden of proof in ordinary criminal cases.

In particular, the right not to be tried or punished twice for the same offence (the so-called double jeopardy), which is embedded in Protocol no. 7 to the Convention, Art. 4, has had an impact on Norwegian law. Under domestic law a tax offence can be sanctioned both by additional taxes according to rules in the tax administrative act and punishment levied by the courts under rules in the criminal act. Through several cases the Norwegian Supreme Court has decided that the subsequent use of both these remedies are against the right embedded in Protocol 7 Art. 4, regardless of the order of the administrative and criminal reaction. However, the European Court of Human Rights has decided, in a case from Norway, that this prohibition does not apply in case of parallel application in time of the levying of an administrative additional tax and the court sentence in a criminal case concerning the same offence (A and B v. Norway, 2016).

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Article

Swedish (Tax) Constitutionalism. Through the Lens of Equality and Fairness

Åsa Gunnarsson

Åsa Gunnarsson is professor of law at Umeå University. She has devoted herself to research with a problem-oriented legal theory and gender studies orientation within, above all, tax and social law. Email: asa.gunnarsson@umu.se

Yvette Lind

Professor of Law at the Department of Law and Governance in addition to being a Member of the Centre or Business History at BI Norwegian Business School. She main expertise concerns taxation and fiscal policy, but I also research and teach in other areas of law, such as comparative law, EU law, state aid law, social insurance law, and constitutional law. Email: yvette.lind@bi.no

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KEYWORDS:

political constitution; tax system; tax principles; taxpayer rights; tax justice

ABSTRACT:

Like any other country, Sweden has constitutional rules that affect the tax system. According to the authors, said constitutional norms focus on a certain tradition that must be evaluated on the basis of a new understanding of the function of tax constitutional law, and the formal and legal aspects of the constitution must be studied in the context of the political and economic objectives of these regulations. For the authors, this approach is particularly important since modern tax systems seem to increase the structural problems of fair and sustainable taxation. Likewise, they emphasize the relevance of human rights to frame tax policies and how they can serve as a bridge between tax policies and issues related to social and economic justice.

PALABRAS CLAVES:

constitución política; sistema tributario; principios tributarios; derechos de los contribuyentes; justicia tributaria.

RESUMEN:

Como cualquier otro país, Suecia posee unas normas constitucionales que inciden en el sistema tributario. De acuerdo a los autores, dichas normas constitucionales se enfocan en una cierta tradición que debe ser evaluada sobre la base de una nueva comprensión de la función del derecho constitucional tributario, y deben estudiarse los aspectos formal y legal de la constitución en el contexto de los objetivos políticos y económicos de estas regulaciones. Para las autoras, este enfoque es particularmente importante ya que los sistemas tributarios modernos parecen aumentar los problemas estructurales de una tributación justa y sostenible. Asimismo, enfatizan la relevancia de los derechos humanos para enmarcar las políticas tributarias y cómo pueden servir de puente entre las políticas tributarias y las cuestiones relativas a la justicia social y económica.

MOTS CLES :

constitution politique ; régime fiscal; principes fiscaux; droits des contribuables; justice fiscale.

RESUME :

Comme tout autre pays, la Suède a des règles constitutionnelles qui affectent le système fiscal. Selon les auteurs, lesdites normes constitutionnelles se concentrent sur une certaine tradition qui doit être évaluée sur la base d'une nouvelle compréhension de la fonction du droit constitutionnel fiscal, et les aspects formels et juridiques de la constitution doivent être étudiés dans le contexte du contexte politique. et les objectifs économiques de ces réglementations. Pour les auteurs, cette approche est d'autant plus importante que les systèmes fiscaux modernes semblent accroître les problèmes structurels d'une fiscalité juste et durable. De même, ils soulignent la pertinence des droits de l'homme pour encadrer les politiques fiscales et comment ils peuvent servir de pont entre les politiques fiscales et les questions liées à la justice sociale et économique..

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CONTENTS:

1 INTRODUCTION

1 INTRODUCTION

Since many decades, the dominant international tax reform pattern has neither been fair nor sustainable. Institutionalized on a global scale, a certain form of tax law reform design has emerged, following a pattern in which efficiency-oriented tax policies are introduced as a one-path model, promoting the idea of "taxing for economic growth" (Gunnarsson, 2021; Schmelzer, 2016). This type of international influence over national tax jurisdictions collides with the strongly rooted idea, within tax law scholarship, of the formal (de jure) tax sovereignty of nation states.(Emblad, 2021)

In this paper, we approach this development with a critical eye, questioning this often-constricted view on how to carry out the compulsory transfer of resources among members of society. When doing so we rely on common tax principles which are firmly entrenched in most constitutions. This is done through the stance that tax systems and tax laws need to, directly or indirectly, connect to constitutional law that regulates the structure and functions of government institutions and their relationship with the citizens. And when doing so, consider more broader goals linked to the human rights dimension, such as equality and fairness. Our ambition is to capture the ongoing change to tax policy discourses that are of importance when understanding the role and impact of constitutionalism in relation to the fiscal role of the state. The empirical basis for this study is the Swedish constitution.[1]

This study is premised on those existing constitutional concepts related to taxation and tax policies should not be taken for granted. Inspired by Kaarlo Tuori, we base our approach on the view that the constitutional function of tax laws is a relational concept. As Tuori, we want to study the formal, legal side of the constitution in the context of the political and economic objects of these regulations (Tuori, 2015). This approach is particularly important as modern tax systems seems to increase structural problems on fair and sustainable taxation.[2] We also agree with Philip Alston and Nikki Riesch that important task is to show how human rights ought to frame tax policies and how it can make a bridge between tax policies and issues regarding social and economic justice. Revenue, redistribution, regulation, and representation all affect the realization of human rights, and serve well as a starting point for incorporating tax issues into the study of human rights and poverty (Alston & Reisch, 2019; Avi-Yonah, 2006).

In response to their view, we will discuss directions for how to advance tax reforms to mobilize resources and redistributive mechanisms that are regarded as a human right approach. The relational concept approach allows us to discuss the structural taxation problems that are contra-productive to the resource mobilization and redistribution that are necessary for the realization of human rights.

2 A RIGHT-BASED APPROACH TO TAX CONSTITUTIONALISM AS A WAY OF INTEGRATING THE HUMAN RIGHTS DIMENSION

There exist several theories on the fundamental functions of tax laws. Taxes are relevant when considering the funding of a state. Joseph Schumpeter claimed revenue as fundamental to the establishment of a state, but once established as law and an ordinary instrumental part of the legal system, taxes become subordinated to constitutional restrictions (Schumpeter, Joseph, A, 1991). This is a central part of the discussions of this

[1] *For support of the role of the constitution and taxes when considering state-building see for instance: de Cogan, Dominic. 2020.* Tax Law, State-building and the Constitution. *Oxford: Hart Publishing.*

[2] *The European Union's Horizon 2020 research and innovation programme 2014-2020. "Revisioning the 'Fiscal EU': Fair and Sustainable, and Coordinated Tax and Social Policies, given the acronym FairTax, (649439).*

paper. To what extent are we capable to fulfill human rights goals, for instance to enact equal and fair taxes, when considering these constitutional restrictions?

Inspired by feminist scholarship on how to pursue human rights ambitions when examining the outcome of tax laws and policies from a gender perspective, we employ a right-based approach. This is an approach that examines the impact of taxation beyond the taken-for-granted neutrality of tax laws and the economic theory claiming that different tax payment patterns result from preferences based on free choices. Instead, such a gender perspective on taxation shows that formally gender-neutral systems and the allocative impact of taxation is closely linked to socioeconomic realities of inequalities between men and women. Learning from feminist tax scholars, a way of criticizing the discriminatory practices of national tax laws is to apply a critical approach, based on right-based tax policies. It opens up for connecting the reality of inequality outcomes of tax laws to the formal neutrality of tax policies, tax law and economic theories (Gunnarsson et al., 2017; Hodgson & Sadiq, 2017)

A condensed description of this approach is that equality under the law is not always sufficient to create equity or fair outcomes beyond the law. Jane Stotsky was one of the first to make a distinction between explicit and implicit forms of gender bias in tax provisions. The distinction corresponds basically to the legal concept direct and indirect discrimination, stipulated in national and international law (Stotsky, 1996). Indirect discrimination is a legal concept about equality in substance. For substantial and transformative gender equality the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), implemented and ratified by many jurisdictions, has been an important driver. It is generally understood as a "bill of rights" for women, and as explained by UN Women[3], the concept of substantive equality considers the applications of laws and subsequent results and outcome of these laws (Hodgson & Sadiq, 2017; UN Women, 2015).Therefore, a consolidated concept of fair and sustainable tax bases is a key issue in a human rights-driven transformation of society to end poverty.

3 SWEDISH CONSTITUTIONALISM

In general, the constitutional tradition in Sweden is weak. It is only in the last decades that an increased interest in constitutional issues has become visible among scholars and the media (Nergelius, 2015).

Swedish tax law is a part of public law, governed by the 1974 Instrument of Government (IG)[4], which is the most important one of the constitutional acts. The act contains the central provisions of the administration of justice and general administration, primarily aimed at protecting the independence of judicial and administrative bodies. According to these provisions, the public power emanates from the law.[5] No public authority, including the Riksdag (the Swedish Parliament), may determine how a court of law is to adjudicate an individual case or otherwise apply a rule of law in a particular case. Nor may any public authority decide how judicial responsibilities are to be distributed amongst the judges of a court of law. Similarly, no public authority may determine how an administrative

[3] United Nations entity dedicated to gender equality and the empowerment of women.

[4] Sweden has not just one constitutional law but four pieces of constitutional legislation. The other three are; 1810 Act of Succession, the 1949 Freedom of the Press Act, and the 1991 Fundamental Law on Freedom of Expression.

[5] *Chapter 1 para 1 Instrument of Government.*

authority is to decide in a particular case involving the exercise of public authority vis-à-vis a private subject or a local authority, or the application of law.

The Swedish way of separating power constitutes the legality principle which is similar to the widely accepted and in many constitutions worldwide enshrined principle of "nullum tributum sine lege". What should be regarded as legal norms sanctioned by the constitution is defined in Chapter 8 of the Instrument of Government. The chapter also provides a hierarchy of norms. Laws are decided by Parliament, regulations by the Government. Additive to the hierarchy of norms is the generality principle. Law should be general (universal). The motive to the Instrument of Government, argue that a state under the rule of law is characterized by the generality principle, including all citizens, of the legal rule.[6]

The principle of legality is justified by the parliaments' ultimate sovereignty of legislative power. From the sovereignty follows that the executive branches of government should merely clarify tax laws enacted by the parliament and only when the parliament recognizes the need to grant it the authority to do so.[7] The legality principle finds support in constitutional praxis and has since long been applied in Swedish tax law.[8] Closely associated with the legality principle is the foreseeability demand, which means that taxpayers should be allowed to predict the consequences of their actions with the help of law and court judgements.(Dourado, 2010b, pp. 969–970)

In addition to the principle of legality the demand for equal treatment is regarded as an important part of the rule of law. Chapter 8 of the Instrument of Government stipulates that Swedish courts and administrative authorities shall respect everyone's equality before the law and exercise objectivity and impartiality. It should be noted that the principle of equality before the law can in certain cases be circumvented by the Parliament (Riksdag). For instance, the implementation of discrimination laws to improve or protect the situation for vulnerable groups.

A number of important basic human rights are covered both by the Instrument of Government and by the European Convention of Human Rights (ECHR). ECHR was signed in 1952, but not implemented in Swedish domestic law until 1995 (SFS 1994:1219). Under chapter 2, section 19 of the IG, law or other provisions cannot be prescribed in violation of the ECHR. The ECHR shall apply in the same way as Swedish law. The proportionality principle in article 5.4 of the Treaty on European Union (TEU) entails that the legislation and measures used by the EU institutions may not be more burdensome than what is considered necessary for achieving the desired goal. This EU constitutional principle has its counterpart in Swedish Tax Procedure Act.[9] In chapter 2 section 5 of the Act the Tax Agency is always obligated to choose the measure of least infringement to achieve the intended result.

The convention has had a quite significant influence on Swedish tax laws, that particularly has been manifested in the administrative sanction constituted as a tax surcharge. Chapter 6 of the convention convert the penalty to fall under criminal law, which applies more strict criteria on the legal process.[10]

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[6] *Prop. 1973:90, s. 203.*

[7] *Påhlsson, Robert. 2012.* Konstitutionell skatterätt. *Uppsala: Iustus Förlag.*

[8] *Hultqvist, Anders. 1995.* Legalitetsprincipen vid inkomstbeskattningen. *Stockholm: Juristförlaget.*

[9] *Skatteförfarandelagen 2011:1244 (SFL).*

[10] *Påhlsson. 2018.*

4 SWEDISH (TAX) CONSTITUTIONALISM

The concept tax constitutionalism defines the separation of powers in Swedish tax law. The concept defines who decides on tax regulations, the demarcations of the content of tax laws, the relations between tax regulations and the way they should be interpretated and applied.[11] In line with the principle of legality, taxes and tax payer obligations must be based in law and should be regulated by statutes (Dourado, 2010a; Popović & Kostić, 2018) . The principle is closely related to what has been described as a slogan for the American Revolution "No taxation without representation".[12] to call it a founding principle for the constitutional setting of the rule state-building, as it points out the separation of powers and the democratic protection of the taxpayer versus the state. A couple of specific regulations concerning taxation are stipulated in the IG. The first concerns a limitation of the Parliaments right to authorize the Government to issue tax regulations, except for custom on import of goods.[13] The second is a prohibition on the issuing of retroactive tax regulations.[14] This retroactivity-prohibition has been highly debated, which we will discuss in relation to the doctrine of tax principles and policies.

The Tax Agency must comply with the principles of equal treatment and objectivity, both in the application of law in individual cases and regarding general statements. The demand for equal treatment and objectivity is assumed to be constitutionally subordinated to the demand of legality.[15] A consequence of the right to access official documents, some personal information about taxpayers, that in many other jurisdictions normally are secrecy information, are accessible for the public in Sweden.

Scholars have long debated the twilight zone between legal and tax policy normativity. In the dogmatic position, policy normativity has long been regarded as outside the scope of law. To incorporate the policy background, tax principles have served as important instruments in the drafting of tax law and have played a central role in the long history of a broad political representation in Government committees, which have carried out the most important part of the preparatory work for a proposed law reform. Preparatory work is published and well elaborated and recognized in doctrine as a source of interpretation for legal practice. Courts and public administration frequently use preparatory works as sources for interpretation.[16] Even though domestic Swedish tax doctrines are challenged by the influences of globalization and supranational treaties; the self-image and the history of tax law drafting should be understood in the light of the influence of preparatory work in Swedish legal culture

In the Swedish doctrine of tax law, four legal principles have become central and have, as a result, been given a particularly dominant influence in the design of Swedish tax law:

1. the ability to pay
2. the principle of legality
3. tax neutrality

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[11] *Påhlsson, 2012, s. 15.*

[12] The slogan first appeared some years before the beginning of the American Revolutionary War (1775–1783) and was used in regard to the introduction of the 1765 Stamp Act (repealed by the British Parliament after much protest in the American Colonies, in 1766).

[13] *Chapter 8, §2 Instrument of Government*

[14] *Chapter 2, §10, para. 2 Instrument of Government*

[15] Höglund. 2010, 970.

[16] Persson Österman, Roger.1997. *Kontinuitetsprincipen i den svenska inkomstbeskattningen*. Juristförlaget, 65; Gunnarsson 1999; Lindencrona, Gustaf. 2007. 164–167.

4. tax uniformity

The ability to pay principle has historically had the longest and strongest position. It has two interpretations. One is an equality-oriented interpretation, implying horizontal equality of treatment. The other is an interpretation oriented towards the welfare state, using the concept of ability to pay for the purpose of levelling incomes and net wealth. The basic idea is that the measurement of the individual taxpaying capacity should be equal to the amount or degree of private needs satisfaction that the taxpaying citizen can achieve. The ability to pay is the funding principle of the modern Swedish income tax system in the function of defining the sustainability of income sources and the income tax base. In tax theory, it is generally accepted that income is practically the best indicator of what represents a person's opportunities for private needs satisfaction. The best method of assessing the real satisfaction of needs, however, is to measure the individual's consumption of monetary and other resources. In a Swedish context, the individual is the preferred unit for measuring observed income representing the capacity to pay. The ability to pay principle has also influenced the tax base for the wealth tax, given the interpretation that accumulation of wealth contains an untaxed resource (Gunnarsson, 1995, pp. 115-124,215) . This principle has been important for the compliance of principle of legality as it advocates for both for equity/fairness and equality in taxation.

Swedish tax law relies on the principle "no taxation without legislation" (nullum tributum sine lege), an outcome of *the principle of legality*. The principle of legality therefore states, expressly through the constitution, that the collection of taxes must be based on a legal act, i.e. every form of taxation must have legal support. The legislative power in the area must therefore remain with the Parliament and cannot be delegated to any other body other than the Parliament, such as the tax authority or the government. Furthermore, Courts and other official authorities are required to base their decisions on legal rules in accordance with the principle. Clarification through case law is generally not recommended yet not expressively forbidden. A legal tradition which is in line with Sweden belonging to the civil law tradition and not the common law tradition. The principle arguably comprises four aspects: (1) taxation based upon legislation (*lex scripta*), (2) a prohibition against interpretation or ruling by analogy, (3) a prohibition against retroactivity (*lex praevia*) and (4) a prohibition against uncertainty, or as it can also be viewed – a certainty criterion. The principle is considered a cornerstone for taxpayer protection. However, it does not have the potential to uphold or enforce social justice unlike some other tax principles such as the ability to pay principle.[17]

A *principle of tax neutrality*, both formal and substantial, has shaped the Swedish tax system. Formal neutrality should not be mixed up with the formal, constitutional principle of equality should be treated equally, as it has not the same theoretical origin. Neutrality is aiming for a non-intervening function of taxes in the economy. In Sweden, tax neutrality was crucial when introducing the value-added tax in the end of the 1960s. The principle assisted in upholding competition neutrality. Uniform tax rates and broad tax bases on goods and services were regarded as the optimal VAT design when attempting to avoid market distortions. Redistributive neutrality and revenues are two other directions of the principle, based on optimal tax theory. Economic interventions, such as tax regulations with redistributive and social justice motives, are regarded to create excess burdens or welfare losses, which can be restricting for economic growth. The idea of a neutral taxation supports taxes that are in the risk of distorting the economic efficiency of market processes to a minimum, implying a trade-off between efficiency and equity. Taxes that deviate from assumption are defined as tax expenditures. By making a distinction between fiscal and non-

[17] *For a more extensive elaboration of the principle see Lind, Yvette. 2017.* **Crossing a Border - a** Comparative Tax Law Study on Consequences of Cross-Border Work in the Öresund- and the Meuse-Rhine Regions. *Jure.*

fiscal taxation, a normative standard for a good tax system is constituted. The neoliberal aspect of the ideology of fiscal taxation, preserving distributional neutrality and status quo, is that it does not provide any incentive for social justice. Hereby, a line between fiscal purposes and social justice has been drawn, meaning that tax regulations with redistributive intentions are seen as political interventions in the market economy.[18]

When the Swedish income tax system was comprehensively restructured in 1991, the *uniformity principle* replaced the vertical-oriented part of the ability-to-pay principle and also complemented the neutrality principle. Uniform taxation refers to a concept that equal income should be taxed equally. The principle has also been applied on the VAT, with the definition that various types of consumption should be taxed at the same tax rate. The principle is also used both as a benchmark in defining tax expenditures in the Government budget, and in auditing reports performed by the Swedish National Audit Office. The ambition, both in the budget work and in the auditing control, has been to keep the deviations from the principle of uniform taxation to a minimum. However, this ambition has failed. The level of tax expenditures, defined as deviations from the uniformity principle, have increased significantly and eroded the tax bases for personal income taxes, particularly on capital, corporate taxation and the VAT.[19]

5 THE DOCTRINE OF TAX PRINCIPLES AS BOTH AN INHIBITOR AND A VEHICLE FOR EQUALITY AND FAIRNESS

The theoretical base for tax law is mainly expressed by hierarchies of principles with various functions and origins. A traditional way of defining these principles is to subordinate the analysis under legal and economic tax doctrines that separate tax law from underlying values and a political-economic discourses. The theoretical argument is that these principles should have the function of upholding an internal normative coherence in order to protect the legality and autonomy of tax law. The internal logic is to keep the normative coherence constrained.[20] Still, even though the internal logic is to make a firm demarcation between what is a doctrine of principles and politics, tax policies have to be taken seriously.

An equitable distribution of the tax burden is a fundamental value in the justification of the tax law. That's the reason why fundamental principles of justice operate as guiding principles in the tax system. The position and importance of this types of legal principles raise the question of what the properties of a legal system are. On a global scale, much contemporary tax law research still defines its theoretical base against the first set of tax principles formulated by Adam Smith in the 18th century, in which he sets out guidelines on what should constitute a good tax system in a liberal political economy (Boucoyannis, 2013).[21] Even though these canons were written in the context of a society totally different from our own, they are still influential because they present a normative statement about the justification of the tax burden in the relation between the state and its citizens, of which the first canon is the tax equity principle. Nevertheless, this position gives argument for the

[18] *Gunnarsson, Åsa. 2009. The Use of Taxation for Non-fiscal Purposes. In Bolander, Jane (ed.). The non-fiscal purposes of taxation. Yearbook for Nordic tax research, Copenhagen: DJÖF, 2009; Gunnarsson, Å*sa. 2013. *Tax Law Directions for Erasing the Public/Private Divide in Everyday-Life Economy. In Gunnarsson, Åsa (ed.). Tracing the women-friendly welfare state: gendered politics of everyday life in Sweden*. Göteborg: Makadam Förlag.

[19] Prop. 2020/21:1, Budgetpropositonen för 2021; Riksrevisionen. 2010. *Enhetlig beskattning?* RiR 2010:11.

[20] Gunnarsson, Åsa. 2019.

[21] A Smith and J R McCulloch, *An Inquiry into the Nature and Causes of the Wealth of Nations* (A. and C. Black and W. Tait, 1838).

existence of an underlying recognition in tax law research, that principles on tax justice are vitally important for democracy, government and political discourse.

After Smith, liberalism and utilitarianism have produced tax theories based on the idea of a voluntary exchange and an individualistic view of the relation to the state. A fair distribution of a tax is regarded as the equitable exchange between the tax paid by the individual taxpayer and the public performance of the state. Two Swedish scholars, Knut Wicksell and Lars Lindahl, became widely recognized for their view that a decisive factor in the willingness of the individual taxpayer to pay, when weighing private against public consumption, is that the marginal tax for each individual citizen must not exceed his or her marginal benefit from government expenditure. The equitable exchange theory was given concrete form in the so-called Lindahl solution, which defines the willingness to pay for public services and goods in a way similar to market pricing (Lindahl, 1919; Musgrave & Peacock, 1967; Wicksell, Knut, 1896).

A tax fairness principle, called the benefit principle, was developed on the basis of this theoretical thinking, but it never played a directly significant role in the development of the modern income tax system in the 20th century. Instead, the ability to pay principle, which originally emerged from the philosophical idea of the state as a social organism built on a mutual dependency between state and individual, was afforded a position of strong general validity. It is regarded as the best expression of the ethical idea of distributive equity in tax law, particularly in the definition of income. The so-called Haig-Simons theoretical concept of income as the net accretion of a spending-unit power to consume over some period of time without distinctions as to source or use, is one theoretical element in the substance of the ability to pay principle. (Gunnarsson, 1995). Later, the ability to pay principle was used to express an egalitarian fiscal tax policy, which was in line with the aim of levelling incomes and net wealth, during the first stages of welfare state reforms. A weak spot, however, is that the egalitarian fiscal tax policy lacks a theory about social justice in the context of rights and obligations in a welfare state. Instead, it has been designed and legitimized under solidarity principles, to fulfil welfare state ideals concerning social justice, which is expressed in vertical equity (Gunnarsson, 2013). This is probably the reason why tax equity has been transformed into a concept under the paradigm" taxing for economic growth – there is no other way", and given the meaning of horizontal equity.

Politics of the welfare state draws on social justice to legitimize state intervention for the common good within the welfare state. The structures of revenue and social transfers are obviously intertwined in welfare state policies. However, in welfare state research, in which law scholarship has had very little, if any, influence, not much attention has been paid to the financing of welfare states as a whole (Sainsbury, 1999). In fiscal research on the other hand, the expenditure side of the public budget regarding social transfers has not been a concern. Consequently, the social dimension of taxation is a quite underdeveloped field of research. By detaching tax law from the politics of welfare state law and from a social dimension, tax law research seems to be captured in denial regarding political realities. One central part of fiscal systems has always been potentially decisive for redistributive policies, and tax reforms have very often been used as vehicles to promote social and equality policies.

This knowledge gap reveals a need for a context regarding tax principles for a fair distribution of the tax burden. One point of departure in arguing for a relation between social rights and the underlying fiscal structure, is recognizing that the income side and the expenditure side of public budgets are blueprints of a government's political priorities. The analysis adheres to the idea that fiscal needs constitute fiscal citizenships characterized by styles of national governance, levels of tax compliance and differing concepts of the obligations, which in a way constitute national states and identities (Levi, 1989) . Social contract theory has a long tradition in moral and political philosophy. Liberal philosophers

such as John Rawls have recognized this approach by placing tax justice in a quasi-constitutional setting of a social contract theory (Rawls, 1990).

The manifestation of distributive principles through law is based on the dominant political conception of social justice. From a theoretical standpoint, these principles are the main source of social constructions in welfare-state law. Legal concepts are reflections of these assumptions, but the underlying values and modes of life shaping the assumptions are removed in the dogmatic position. This illusion of neutrality in tax laws makes it difficult to see the links between the levels of equality achieved through welfare-state arrangements and the discriminatory boundaries of normality in the politics of social justice. Contextualizing tax fairness, tax equity, and tax justice principles is not a positivist approach, instead the approach recognizes the social power of tax law, with the ambition of questioning hegemonic tax policy discourses and producing a more inclusive and useful set of tax principles.

One way of contesting traditional and dogmatic perspectives on tax policies is provided by the political interpretive approach applied as a methodological concept. This approach is partly based on an interpretation of Ronald Dworkin made by the tax scholar Edward McCaffrey. McCaffrey wants to open for broader theoretical considerations of the normative justification of tax laws than that normally provided by a judge-centric distinction between law and politics. His frame consists of a mixture of liberal, social contract theory about what would form a shared idea of what constitutes a good tax system; jurisprudence views on the politics and principles of tax law; and finally, democratic ideals of equality (McCaffery, 1996) .

From a Swedish perspective a social contract model needs to be more rooted in the Swedish context of a comprehensive welfare state. It also gives a socio-legal recognition of how tax systems are shaped in competition or co-operation between political actors and organized interests, with historical and comparative ambitions, to study institutional contexts, deep layers of legal cultures and path-dependent large-scale processes that have accompanied changes in fiscal regimes (Gunnarsson, 2013) . Using this perspective, makes it possible to ask tax law questions that recognize the power dimensions of tax politics, and the potential sources of inequalities and injustice in the design of tax law. One such interesting question could be why the tax policy lobby, tax scholars and ministries of finance, worldwide adopted a" there is no other way" tax policy that promoted economic growth by creating an efficient tax system that had no redistributive elements or social dimensions.

In order to discuss tax fairness and tax equity principles it is necessary to have a platform for an impartial perspective. Impartiality is an essential feature in the quasi-constitutional setting of thinking in contracts with the aim to elaborate on the nature of the relationship between the state and its citizen. For me the social contract model serves to target the historical phases of large-scale, institutional processes that explain both welfare state regulations governing how resources should be distributed and agency between capital and labour. Social justice is a basic political issue for every welfare state, incorporating democratic issues and the interest of social stability in welfare capitalism. Instead of making tax law into a technical, de-humanized issue, detached from moral or welfare state responsibilities, we adhere to those few scholars who highlight the recognition of citizens' social rights and the protection against social risks ought to correlate with an obligatory common responsibility to generate the public funding needed to pay for them. In that way, the obligation of the citizens is based on the legitimate demand that they support certain social needs. From this perspective social justice, on an aggregated collective level, is related to a fair and just connection between social burdens and benefits (Head, John G., 1993; Lacey, 1998; Sjöberg, Ola, 2001; Young, 2000).

In conclusion, the interpretation of tax laws should embrace the democratically determined reasons to tax, which is what most tax systems have in common (Hilling & Ostas, 2017) .

A right-based approach to taxation pinpoints a basic ethical precondition for mobilizing revenue. In theory, the recognition of citizens' social rights and the protection against social risks ought to correlate with the obligatory common responsibility to generate the public funding needed to pay for them. In that way, the obligation of the citizen is based on the legitimate demand that they support certain social needs. By detaching tax law from the politics of the well-being of the citizens and from a social dimension, present tax law research seems to be captured in denial regarding political realities. One central part of fiscal systems has always been potentially decisive for redistributive policies, and tax reforms have very often been used as vehicles to promote social and equality policies. Tax fairness is also an important precondition for fiscal sustainability.

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Article

Fiscal federalism in the United States of America

William M. Berenson

William M. Berenson is a lawyer with the law firm of Jeffrey M. Lepon, SL in the Washington, D.C. area. Since 1984, he has served as an adjunct law professor at American University's Washington College of Law in the Master of International Law program for foreign jurists. He held various positions in the General Secretariat of the Organization of American States "OAS" ("OAS") from 1980 to 2012, including Legal Counsel and Director of the Department of Legal Counsel. The OAS Staff Committee awarded him the Terry Woods Memorial Award for his "unwavering sense of justice and for respecting and defending the rights of OAS staff," and the OAS General Secretariat awarded him the Leo S. Rowe Memorial Award in 2011. He has lectured on legal topics throughout Latin America and has held visiting professor positions at the Central University of Venezuela in Caracas and the Autonomous University of Chile. He has written numerous articles on international organizations and other legal matters of interest to the international community.

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KEYWORDS:

political constitution; tax system; tax principles; fiscal federalism; constitutional jurisprudence.

ABSTRACT:

The author explains the functioning of the decentralized system of the United States of America and its legal bases in the concept of federalism. He emphasizes that the tax authority is one of the most formidable powers of government. Such power is shared among the Federal government, the states, and local communities, as described in the federal constitution and the constitutions of each state. The article begins with a general discussion of the tax authority, its nature, its purposes, and its use. This follows with an explanation of the legal bases of Federalism in the Federal Constitution and the jurisprudence of the federal courts. Later, the author exposes about the tax system of the Federal government and the legal bases for the distribution of the resources collected among the states. He ends with some general observations. These include observations on aspects of the system that have generated critical comment and observations on the factors responsible for the well-functioning of the US tax system..

PALABRAS CLAVES:

constitución política; sistema tributario; principios tributarios; federalismo fiscal; jurisprudencia constitucional.

RESUMEN:

El autor explica el funcionamiento del sistema descentralizado de los Estados Unidos de América y sus bases jurídicas en el concepto de federalismo. Pone de relieve que la potestad tributaria es uno de los poderes más formidables del gobierno. Dicho poder se comparte entre el gobierno Federal, los estados, y las comunidades locales, según se describe en la constitución federal y las constituciones de cada estado. El articulo comienza con una discusión general de la autoridad tributaria, su naturaleza, sus fines, y su uso. Este sigue con una explicación de las bases jurídicas del Federalismo en la Constitución Federal y la jurisprudencia de los tribunales federales. Después, el autor expone sobre el sistema impositivo del gobierno Federal y las bases jurídicas para la repartición de los recursos recaudados entre los estados. Finaliza con algunas observaciones generales. Entre ellos, se incluyen observaciones sobre los aspectos del sistema que han generado comentarios críticos y observaciones sobre los factores responsables por el bien funcionamiento del sistema tributaría estadounidense.

MOTS CLES :

constitution politique; régime fiscal; principes fiscaux; fédéralisme fiscal; jurisprudence constitutionnelle.

RESUME :

L'auteur explique le fonctionnement du système décentralisé des États-Unis d'Amérique et ses bases juridiques dans le concept de fédéralisme. Il souligne que l'administration fiscale est l'un des pouvoirs les plus redoutables du gouvernement. Ce pouvoir est partagé entre le gouvernement fédéral, les États et les communautés locales, comme décrit dans la constitution fédérale et les constitutions de chaque État. L'article commence par une discussion générale sur l'administration fiscale, sa nature, ses objectifs et son utilisation. Suit une explication des bases juridiques du fédéralisme dans la Constitution fédérale et la jurisprudence des tribunaux fédéraux. Plus tard, l'auteur expose le système fiscal du gouvernement fédéral et les bases juridiques de la répartition des ressources collectées entre les États. Il se termine par quelques observations générales. Il s'agit notamment d'observations sur des aspects du système qui ont suscité des commentaires critiques et des observations sur les facteurs responsables du bon fonctionnement du système fiscal américain.

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1 INTRODUCTION

1.1 ORGANIZATION OF THE PRESENTATION

The purpose of this presentation is to explain the functioning of the decentralized system of the United States of America and its legal bases in the concept of federalism. It is estimated that within the US experience, there are some elements that other countries may use in the effort to decentralize the taxation process.

The tax authority is one of the most formidable powers of government. Through this authority, a government can create and it can destroy.

In the United States of America, tax authority is shared between the Federal government, the states, and local communities. This separation of authority between these governments is called "Federalism", what is enshrined in the Federal Constitution and the individual constitutions of the fifty states.

We begin with a general discussion of the tax authority – its nature, its purposes, and its use. We continue with an explanation of the legal bases of Federalism in the Federal Constitution, how taxation competence is divided between the Federal government and the states. We end with some general thoughts. These include observations on aspects of the system that have generated critical comment and observations on the factors responsible for the well-functioning of the US tax system.

1.2 BASIC CONCEPTS

1.2.1 Nature of a tax:

It is defined as a mandatory payment to a government authority by persons within the authority's jurisdiction. (A mandatory financial social charge imposed by a government authority.) Oliver Wendall Holmes [1]commented that the obligation to pay taxes is "the price we pay for a civilized society"

The tax is an economic charge on individuals or property in order to support the government. It should not be confused with the power of eminent domain (which is the government's power to seize property for public purposes) (*See: New Jersey v. Anderson,* 1906); *Houck v. Little River Drainage,* 1915). It is not a fee paid in exchange for specific benefits, but rather a modality for the distribution of the burden of government costs. The only benefit that the taxpayer enjoys from paying taxes is the privilege of living in an organized society, established and secured by the dedication of taxes to public purposes (*Cotton Petroleum Corp v. New Mexico,* 1989).

1.2.2 Tax Authority

In a democracy, the government's taxing authority derives from the people. In other words, it is the people who train their governments with the tax power. By their nature, taxes can only be used for public purposes.

Limitations on the power to tax are provided in the United States Constitution (the "Constitution") and in the constitutions of all 50 states (the "Constitutions"), both in the text of the clauses that specifically enshrine this power in the government authorities as in the other provisions, as well as those that pertain to the rights of substantive due process, due process, and equal protection under the laws.

[1] *A highly respected former Supreme Court Justice during the first third of the twentieth century.*

1.2.3 Purpose of Taxes

The main objective of a tax system is simply to finance the cost of government and the corresponding services. But, it is used for other purposes as well. They include:

(a) *Implement social policy.* Examples: redistribution of wealth – social leveling through a system of progressive rates. Well, in theory, those with more resources not only pay more but they pay a higher percentage of what they have than the percentage paid by the less fortunate; encourage marriage – more favorable rates and deductions for married couples; stimulate the number of children – deductions and credits based on number of children; encourage a homeowners association; stimulate investment in housing for the less fortunate; discourage gambling: gains taxed, but losses are not deductible; Historic Preservation: Credits and Exemptions; support charities, scientific institutions, amateur sports associations, religious institutions, and private educational institutions – special NGOs, except political and commercial ones; support a retirement and private social security system through deductions for contributions from the employer and employee, and from professionals and independent businessmen (own account); high rates on cigarettes, alcohol, to discourage these activities; encourage higher education with credits and deductions for expenses incurred.

(b) *Implement economic policy.* For example: lower rates or suspend them to put more money in the consumer's pocket to stimulate the economy: stimulate some industries: credits for investment; tax exemptions for businessmen and industrialists who establish or invest in some specialized areas; interest exemption from taxes accrued on special bonds for industrial development

(c) *Implement environmental policy.* For example: Credits and deductions with respect to investments in equipment to eliminate emissions of carbon, sewage, etc.; Lower rates for properties left in their natural state; High rates on the use of some fuels, cars that eat a lot of gasoline, etc.; Forest conservation: credits and deductions.

(d) *Implement Policy for Policy System.* For example: Fundraising for political parties; Fundraising for causes (Salvation of the Chesapeake Bay); Vote use tax (now illegal as a result of the 24th Amendment); Deductions and credits for special industries provided by relevant politicians (often disguised as economic policy); Exemption from interest earned on state bonds sold to the public to strengthen state and municipal governments

1.2.4 Tax Types

The main categories of taxes are the following:

(a) *On income:* What a person -- individual and entity -- earns from his work in a year, from his investments, and from his other work activities (buying and selling his residence, etc.);

(b) *On the value of the property of the Taxpayer:* Property of the deceased that passes to others in successions; Donor property given away or donated to others; he; Estate; Personal property, such as -- cars, boats, other equipment, luxuries; Intangibles (sometimes called "Excise Tax"; the value of imported products (generally federal, with limited exceptions for states authorized by Federal Congress); Real Estate (mainly imposed by local governments)

(c) *On the Use* [2]*or Sale* of goods based on the sale price paid (mainly taxed by states and local jurisdictions): "Excise Tax" instead of or in addition to the regular use or consumption taxes that are imposed on the sale of specific items, which include – tires, alcohol, cigarettes, restaurant food, fuel, hotel services (federal, state , and local) [3];;

(d) *On Government Transactions:* Examples are: registration of titles of real estate and personal property; Professional and business licensing (mainly state and local.

2 THE LEGAL BASIS OF FEDERALISM

2.1 BASIC CONCEPTS

A Constitution is an agreement between the people by means of which a government is established and these powers are assigned to it. Within the Constitution, the people define the breadth or scope of these powers, as well as their limitations.

In the United States, there are various governmental authorities established in accordance with the United States Constitution (Constitution) and state constitutions. The most significant are: The Federal Government, also known as the "United States Government," the governments of the fifty states and the District of Columbia and the Commonwealth of Puerto Rico (hereinafter the states); and local governments, which typically include counties, municipalities, incorporated towns, and special districts. The authority of the Federal Government to Tax is found specifically in Article 1, Section 8 cl.1, and the XVI amendment. Its place as the first of the 18 powers delegated to Congress in Section 8 of Article I attests to its importance.

It is widely known that the US Constitution provides for a system of checks and balances. The Constitution, of 1787, together with its 27 amendments adopted since then, is the Federal Constitution. The challenge for the framers of the Constitution in 1787 was to find a formula that would give the government sufficient power to govern without unduly limiting the fundamental rights and liberties of the people and the powers of state governments. Therefore, the Constitution divides powers among various actors through a system of checks and balances. In this way, the accumulation of excessive power in a single person or institution is avoided. Well, there are three main themes in this Constitution:

(a) *Federalism* -- The nature of states; the relationship between the states, and more importantly, the relationship between the states and the Federal government.

(b) *Separation of Powers:* The distribution of authority and functions between a legislative power, an executive power, and a judicial power.

(c) *Civil Rights:* The fundamental rights of the people against their government and the balance between these rights and the needs of governance.

Like the Federal government, each state is governed by its own constitution. State constitutions address the issues of separation of powers and civil rights. They also contain provisions on the decentralization of authority between the central government of the state and the subdivisions of the state, that is, the local governments.

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[2] *Use tax is imposed by a state on the sale price of a product purchased in a state where a sales tax was not imposed and used in the taxing state.*

[3] *VAT – Value Added Tax for each phase of product production is not very common. Only one state is known to have adopted it, Michigan in 1989.*

2.2 THE FEDERAL CONSTITUTION -- FEDERALISM: AN OVERVIEW

2.2.1 The Nature of States.

According to Article IV of the Constitution, the states must be republics. That is, they are democratic governments -- of the people, for the people, and by the people. They all have their own governor and legislature elected by their citizens, and their own court system with judges elected by the citizens or appointed by the governor and/or legislature. Most laws in the United States are state laws, not Federal. In fact, states retain many of the characteristics of sovereign countries. However, their sovereignty is a sovereignty limited by specific provisions of the Constitution.

2.2.2 Relations between States:

Article IV, Section 1 provides that each state must grant "full faith and credit" to the legal orders and administrative acts of the other. That is, for example, they must recognize marriages and divorces granted by others; they must recognize and participate in the execution or fulfillment of sentences of the courts of the other states; must recognize driver's licenses from other states; and must recognize corporations established under the laws of other states.

Likewise, Article IV, Section 2, requires that each state grant to the citizens of the others the same privileges and immunities that it grants to its own citizens. This provision does not prohibit, for example, a state from charging citizens of other states a special fee for studies at its state universities, but requires that the state discriminating in such a way have a justifiable reason – OR have a substantial objective or purpose within the scope of its legitimate powers and that the measure imposed is substantially related to the legitimate objective.[4]

2.2.3 Relationship between Federal Government and State Government

The initial scheme as explained in *Federalist Papers* N° 45 and N°46, drafted by Alexander Hamilton and James Madison. The purpose of these “papers” was to serve as the social media of the time. In other words, propaganda to sell the concept of a federal government to the people in 1787. They provide: "The powers enshrined in the federal government by the Constitution are few and well defined. Those that replace in the states are many and indefinite. Principally, the powers of the federal government are directed to external objects -- war, peace, international negotiation, and commerce The powers reserved for the states extend to all ordinary objects of daily life -- liberty, property, public order, improvement and prosperity of the people (police powers)".

2.2.4 Dual Sovereignty Concept

According to *Federalist Paper* 46: The federal and state governments are not adversaries. They are simply different agents or trustees of the people, constituted with different powers and designed for different purposes... By its nature, it is true that the town will be more tied to its own state government. However, if this were to change, there would be no reason to perceive dominance by the federal government because its jurisdiction is well circumscribed."

[4] In the case of assistance to universities, the justification is that outsiders do not pay all the taxes paid by citizens of the state that are allocated to state support for the institution. Therefore, the higher rate is a way to ensure that students from abroad support the university in a more or less equal way.

2.2.5 Supremacy of Federal Law in When the Faculties Overlap

There are areas in which the powers of the Federal Government and those of the states overlap. The General rule, enshrined in the second clause of Article VI of the Constitution, known as the "Supremacy Clause", is that in case of conflict of powers, federal law is supreme. The judges of the courts, both those of the Federal Government like those of the states, they are obliged to recognize the supremacy of federal law in these cases (*Martin v. Hunter Lessee*, 1816).

2.2.6 Structural Tensions Over the Division of Authority Between the Federal Government and the States: The Commerce Clause

Notwithstanding Madison's words, beginning in the third decade of the twentieth century, the intervention of the federal government in daily life became quite widespread through a legislative and judicial interpretation of the so-called commerce clause. This Clause, found in clause 3 of Article I Section 8 of the Constitution, assigns to the Federal government, through Congress, the power to regulate trade between states, with foreign states, and with indigenous tribes. Pursuant to Supreme Court case law, any economic activity within a state that has a substantial impact on or substantially affects interstate commerce may be regulated by the Federal Government *(Wickard v. Filburn*, 1942). Based on this interpretation, Congress adopted, and the courts approved, federal laws that prohibit discrimination and violation of civil rights by individuals in all states, laws (KatzenBach v. McClung, 1964) that regulate employment relationships within the States, as well as security conditions, hours maximums, minimum wage, and relations between unions and employers (*United States v. Darby*, 1941). By virtue of this expansion of federal power into these areas previously reserved for the states in accordance with Madison's and Hamilton's initial design of federalism, dual sovereignty was all but over. But due to changes in the composition of the Supreme Court in the 1980s, this expansion of Federal power was halted with the *United States v. Lopez* (1995).[5] Since then, the Supreme Court has issued a series of rulings that recognize and strengthen the sovereignty of states. Today the concept of "dual sovereignty" is well revived.

2.2.7 Concurrent Powers

In practice, the line between what is the responsibility of the state and what is the responsibility of the Federal Government is not always very clear. What is certain is that during the last 233 years, the courts have handed down hundreds of sentences in order to clarify it. History proves that the definition changes according to the political/legal philosophy of the members of the Supreme Court, and it will continue to change.

There are concurrent competitions that muddy the waters. For example, today, a state decision to regulate trade within its territory or adopt an environmental or public health measure may have an impact on interstate commerce. In these cases, if the state interest in the measure is substantial and legitimate and the impact of the state action is not substantial on federal interest or policy, it is highly likely that a court will not find it unconstitutional. But if a state takes an intentional act to impede interstate commerce in order to favor its

[5] *In* Lopez, *the Court ruled that a federal law that made it a federal offense to carry weapons in a local school was not justified in the Commerce Clause because what happens in schools is within the exclusive purview of state and local governments pursuant to the design of Federalism contemplated by Madison, Hamilton, and the other founders of the United States. (*National Federation of Independent Business v. Sebelius, *2012) (The imposition of a federally imposed penalty for failing to purchase health insurance was not supported by the commerce clause because a decision not to purchase is not engaging in commerce or an economic act). (*United States v. Morrison, 2000) *(a federal law making rape of women a civil offense does not rely on the commerce clause because rape is not an economic activity, nor was rape proven to impede interstate commerce, and more importantly, development of tort law for application in the states is traditionally a power left to the states under the X Amendment of the Constitution.).*

producers and merchants within its territory, it is very likely that a court will declare this act unconstitutional and strike it down, unless the state can prove that it has a legitimate and substantial interest in implementing the act and has used the least discriminatory measure with respect to interstate commerce to achieve that interest.[6]

3 THE TAX FACULTY WITHIN THE CONTEXT OF FEDERALISM

3.1 THE FEDERAL FACULTY:

As previously explained, the federal government's power to tax is established in Section (8)(i) of Article I of the Constitution and in the XVI Amendment. The power to legislate the tax is the responsibility of Congress.[7]

The power to collect is within the powers of the executive branch in Article II of the Constitution. That is, the power to execute and enforce the laws of the United States to execute the laws the power to establish and collect resources pursuant to section 8(1), Article I and the XVI Amendment. This power is fulfilled mainly through the Internal Revenue Service (IRS), which is a dependency of the Department of the Treasurer, and other dependencies of the same Department, the Department of Justice, and the Department of Homeland Security.[8]

3.2 LIMITATIONS ON THE FEDERAL TAX FACULTY

The power to tax is not without limitations. Some of these limitations are expressly found in the text of the Constitution. Others derive from the application of the general principles of due process and equality, application and protection of the laws enshrined in the Constitution. More specifically:

(a) *Article 1, Section 9:* Cannot impose exports; may not impose direct taxes per capita, unless they are allocated among the states with kisses in their proportional population, and except for the exception that allows a direct tax without this restriction on income pursuant to the XVI amendment of the Constitution.

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[6] See Granholm v. Heald, *(2005);* West Lynn Creamery v. Healy, *(1994);* See, for example, Geier v. American Honda Motor Co., (2000) *(District of Columbia courts cannot compel manufacturers of used automobiles in the District of Columbia to equip those automobiles with airbags because this requirement will preclude a policy on matter approved in a Federal law*.) Minnesota v. Clover Leaf Creamery Co., *(1981) (state law requiring the sale of milk in cartons instead of plastic for environmental reasons affects interstate commerce but the impact is very minor -- that is, not substantial; therefore, the law does not infringe on federal jurisdiction and is sustainable.*

[7] Pursuant to this power, Congress has established about 41 different taxes in the IRC. Those that generate the most revenue are the income tax (individuals the furthest) and entities (less than 10% of individuals) and the social security tax, followed by the inheritance and gift tax. Others include, among others, taxes on the sale of expensive luxury cars; of airplanes; of jewels; of skins, of fuels; of heavy trucks and trailers; of cars that consume a lot of fuel; of tires; coal; of inoculations; of sports equipment, bows, and arrows; of weapons; telecommunication; of alcoholic beverages; of some chemicals; of cigarettes and other tobacco products; of submachine guns and other weapons and destructive instruments. There are also taxes on gambling, shipping, imports of ozone-depleting chemicals; excessive expenses for political management, private foundations, and the use of planes and any port.

[8] *It should be noted that there are other agencies of the Federal government that have the authority and responsibility to collect taxes that are not on income or estate value, as well as the Alcohol Tobacco Tax and Trade Bureau of the Treasurer's Department, which collects taxes on alcohol and tobacco, and US Customs and Border Protection of the Department of Homeland Security (Homeland Security), which collects the fees.*

(b) *Equal Protection of Laws.* They cannot impose a tax based on the taxpayer's race, religion, gender, or national origin. Likewise, it cannot implement an arbitrary and capricious tax – that is, one that is not reasonable by virtue of its purpose.

(c) *Substantive Due Process.* It must not hinder the exercise of fundamental rights, as well as the rights of free expression, suffrage (to vote), exercise of religion, and civic action. This does not imply that the government cannot tax the press, churches, or pressure groups, but rather that it cannot impose them in a way that destroys them or with the purpose of hindering their free expression or, in the case of religious institutions, with the intention to prevent the exercise of religion.

(d) *May Not Confiscate.* The taxing power shall not completely seize the property of the taxpayer. If you seize all of most of the property, it constitutes an exercise of "eminent domain" by the government. Pursuant to the V Amendment to the Constitution, the exercise of eminent domain requires just compensation from the owner of property expropriated by the state. Unless a tax seizes all or a large portion of an owner's property, the courts do not consider it an act of eminent domain.

(i) Double taxation (taxation of the same property by two or more taxes) is allowed, as long as the tax levied does not result in forfeiture). Examples are the taxation of income with taxes on social security and the general treasury of the nation.

(ii) Likewise, the imposition of a federal tax on an asset does not prohibit the imposition of a state tax on the same, as long as it does not result in a total forfeiture of the asset. For example, the states and the Federal Government tax income. Also, both impose consumption and use taxes on the same merchandise.

(e) *Suffrage.* The XXIV Amendment prohibits a tax on the exercise of the right to vote.

(g) *Uniformity of Application in All States:* Federal rates in one state cannot be higher than those imposed in another; the Federal government cannot impose a tax in one state and not in another However, the uniformity does not prohibit the imposition of different tax rates for different groups or classes of activities or companies, as long as the rates within the groups or classes are uniform and reasonable and as long as there is no discrimination based on race, religion, gender, and national origin.

(h) *Reasonableness:* There is a presumption that all taxes are reasonable, provided they do not exceed the limitations already stated -- that is, they do not result in an exercise of eminent domain, they do not discriminate on the basis of race, religion, and national origin, and they are not arbitrary and capricious.

(i) *Due Process:* In compliance with tax law, the Federal government may not seize a taxpayer's property for failure to pay taxes due without observing due process requirements. The Constitution, through the V and XIV Amendments, prohibits the seizure of property by governmental authorities without due process, which requires the opportunity for a prior hearing in some sufficient way.

3.3 THE STATES TAX COLLEGE: THE EXAMPLE OF THE COMMONWEALTH OF VIRGINIA

The states' power to tax is enshrined in their respective constitutions. The state of Virginia is used as an example of the typical state below.[9]

[9] *Under Virginia law, there are 30 separate taxes administered by the Virginia Department of Taxation. The taxes that produce the most revenue for the state are the income tax and the retail sales tax.*

The power to pay taxes rests with the legislature. Article IV, Section 14, of the Virginia constitution states: "The authority of the Virginia General Assembly shall extend to all subjects of legislation not expressly prohibited by this constitution."[10]

The power to collect taxes is that of the Executive branch, which is the Governor. The Governor exercises this power primarily through the Virginia Department of Taxation (VDT). Likewise, there are 95 counties, and 223 municipalities and towns, and 193 special districts within Virginia. They are all state agencies. They participate in the collection of state taxes and have the authority to establish and collect other "local taxes" to finance their operations, in accordance with the state constitution. [11] State courts assist VDT and local governments in enforcing the collection of taxes from those who do not voluntarily pay.[12]

3.4 LIMITATIONS OF THE STATE TAXING POWER

Just as there are limitations on the federal government's power to tax, there are similar restrictions on the states' taxing authority. Some are specifically expressed in the text of the Constitution and the Virginia constitution; others derive from more general provisions on due process and equal protection and application of the law. They include:

(a) *Article I, section 10.* You may not impose exports not imports; however, with respect to imports, you may charge a fee to defray the cost of the inspection. If the fee exceeds this cost, it violates this provision of the Federal Constitution and is illegal.

(b) *Equal Protection of Laws:* Same with Federal limitation.

(c) *Substantive Due Process:* Same with federal limitation.

(d) *No Confiscate.* Same with the federal limitation, based on the 14th amendment and the state constitution.

(e) *Suffrage:* Same with federal limitation.

(f) *Uniformity:* Article X.1 of the Virginia constitution provides:

i) "All taxes... will be uniform with respect to the same class of objects within the territorial limits of the authority that imposes the tax..." except for some very specific exceptions. Just like the Federal case, it does not allow differences in tax rates based on race, religion, gender and national origin.

ii) "The General Assembly is empowered to define and classify objects of taxation. Except for object classifications already made by means of this Constitution, the General Assembly may segregate some categories of property in order to specify and determine which will be objects of state taxation and which will be subject to local taxation."

(g) *Reasonableness:* Same with federal limitation.

(h) *Due Process:* Same with federal limitation.

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[10] *The taxes that generate the lion's share of Virginia's revenue are the individual income tax and the general sales and use tax. There is a tax on the income of entities called* Corporate Franchise Tax), *but compared to these other taxes, it generates relatively little. There is no estate value tax in Virginia, but most other states impose this tax in addition to the Federal government's estate tax. In addition, there are more than 30 more specific taxes on specific sales and uses. They include, among others, taxes on the sale of peanuts, soybeans, eggs, slaughter of hogs, corn, tires, planes, fuel, personal property, mechanical vending machines, boats; cotton, grain, lamb, grain: use tax on products purchased out of state; the use of airplanes, the use of ships; taxes on fees for operating public utilities, on insurance premiums; on performance and payment bonds, on highways.*

[11] *For those dependencies, the tax that yields the most by far is the property tax, followed by the tax on certain pieces of furniture, such as vehicles, tools, and desktop machines and other for-profit businesses. Among others, some counties, such as Arlington County, also impose a tax of between .002 and .0036% on the gross income of professional entrepreneurs and other businesses.*

[12] *Also, there are some taxes collected directly by the Department of Transportation and the Department of Labor.*

(i) *Other specific limitations provided in the state constitution.* The General Assembly cannot:[13]

i) Adopt a private law that exempts a person from tax liability.

ii) Tax the property of the state itself and its subdivisions and dependencies (departments, counties, municipalities, special districts);

iii) Tax real estate used for religious purposes, intangibles, cemeteries, property of non-profit educational institutions, etc.

iv) Pay taxes on the automobile of a disabled veteran due to his military service;

iv) Pay taxes and collect, through the VDT, more than the amount necessary to pay government expenses and the public debt.[14]

(j) *Federalism* (*Federal Institutions.* A state cannot tax an institution or activity of the Federal Government, based on *McCulluch v. Maryland,* 1819).

ii) Interstate Commerce: A state shall not tax in order to hinder commerce between the states. That is, companies from outside the state (foreign) cannot be taxed more than those from within the state to give a material advantage to those that are within the state.

iii) Sovereignty of other states: A state may not tax objects that are not within the state (as well as real estate and tangible furniture), and objects that pass through the state but have a greater presence in other states must be taxed in in a manner proportional to their presence in the taxing state to avoid the imposition of a confiscating tax and to avoid undue discrimination against interstate commerce.

It should be noted that the Virginia constitution gives the General Assembly the authority to limit the taxation of local governments from taxing through legislated exemptions on certain classes of property and activities. Examples are equipment and tools used in agricultural production and equipment used to combat climate change and to clean up the environment.[15]

3.5 TAX FACULTY AND TAX LIMITATIONS OF COUNTIES AND MUNICIPALITIES

Because counties are divisions of the state, [16]their power to tax is enshrined in the state constitution. The Virginia constitution gives municipalities exclusive authority to tax real estate, tangible personal property, coal, and other mineral lands. Because counties are divisions of the state, the limitations on their taxing power are the same as those that apply to the state. The General Assembly has also adopted additional limitations on the taxing powers of counties and other local government divisions.[17]

[13] See, for example, *VA Constitution, Article X.6.*

[14] *VA Constitution, Article X.8*

[15] *See VA Constitution, Art. X.6(d)-(e)*

[16] *Although they are operating divisions of the state, their officers, which in the case of Arlington, are the members of the County Council (Council), the sheriff, the prosecutor, the Treasurer, the Commissioner of Taxation, and the local Clerk of Courts they are appointed through popular elections of the residents of the same county.*

[17] *In Arlington County, VA, for example, the main local taxes are property, vehicle, and business equipment taxes. There are also specific taxes on hotels, food sold in restaurants in addition to the state sales tax, the gross income of each company, the sale of cigarettes; short-term rentals, and the consumption of utilities – gas, electricity, telecommunications.*

3.6 EXEMPLARY CASES OF THE LIMITATIONS OF FEDERALISM ON THE STATE POWER TO TAX PROPERTY AND FOREIGN PERSONS[18]

(a) *Complete Auto Transit v. Brady* (1977).

The State of Mississippi imposed a 5% tax on the gross receipts of each person who operates a commercial transportation vehicle in the State for the privilege of doing business in the State. Tax is added to state sales tax. The appellant, who was headquartered in Illinois, transported with his expensive new GM trucks that he had moved in interstate trade from the railroad terminal in Jackson, Mississippi, to retailers in the same state. The appellant stated that the tax was illegal because it affected the goods that had moved in commerce between states and because it was a foreign company.

The Court stated that the fact that the appellant was a foreign company and the tax was assessed in relation to its activities in interstate commerce were not sufficient considerations to declare the tax unfounded and illegal. In reaching this conclusion the Court developed and applied a new standard (assessment methodology or "test") to be used in determining the legality of state taxes of this nature against the "latent commerce clause" doctrine -- that is, , the principle that a state may not take measures that unduly hinder or discriminate against commerce between states. According to the test established in the judgment, a state, in order to defend the constitutionality of its tax in response to a claim of unconstitutionality based on the latent commerce clause, must demonstrate to the satisfaction of the Court that (there is a significant link between the taxed activity or object and the taxing state):

ii). The tax is allocated on the activity so as not to tax the activities of the company outside the state;

iii). The tax does not discriminate against foreign trade. In other words, the company abroad does not charge more proportionally than the company domiciled in the taxing state; and

iv). The amount of the tax has a fair relationship to the services provided by the state.

This “test” is called *the Complete Auto-Transit Test.*

(b) *American Trucking Association v. Sheiner* (1987).

The state of Pennsylvania imposed special annual fees on trucks from out of state (foreign trucks). He charged the same rates for trucks registered in the state (domestic trucks) but lowered the price of the annual license fee for domestic trucks. These actions had the impact of significantly increasing the cost per mile of foreign trucks operating in Pennsylvania compared to the cost per mile of domestic trucks.

The Court found that the tax violates the latent commerce clause because it does not satisfy all the requirements for legality set forth in the *Complete Auto Transit Test.* Although there are “ties,” the measure discriminates against foreign trucks because the rebate granted to state-registered trucks imposed a heavier burden on foreign trucks. Also, the Court concluded, the discrimination against foreign trucks was unfair because it charged foreigners more because the state failed to prove a reasonable relationship between the higher charge and the services provided by the state to foreign roads.

(c) *Goldberg v. Sweet* (1989).

[18] *The term “foreign persons” refers to persons – individuals and entities that are residents of other states of the United States and of foreign countries.*

Illinois has adopted an excise tax of 5% of the amount charged for a telephone call that originates or terminates in Illinois and is also billed to an Illinois address (two requirements). The plaintiffs in this class action, all Illinois citizens, challenged the tax on the basis of the latent commerce clause. He argued that the tax, by its nature, taxed activity in other states because many calls that appear to be intra-state actually go through out-of-state routes before returning to the state, and inter-state calls have a long out-of-state component. Illinois granted users a credit for taxes paid to other states for the same call. However, the appellants claimed that the state did not have the right to enforce the part of the telephone transmission that happened outside the state.

The tax was constitutional. In applying the *Complete Auto Transit Test,* the Court determined. (I) that there was a sufficient nexus - the billed address and the initiation and termination of the call; (ii) it was impossible to measure discrimination, if any; (iii) that the tax did not discriminate between calls from other states and was fair because the state offered the credit, and (iv) that the tax was well related to the statutory service provided by the state with respect to the calls, as well as "all the benefits provided by the state that affect commerce between the states, which include public highways, fire services, public transportation, and all the other advantages of a civilized society".

(d) *Trinova Corp. v. Michigan Dept. of Transportation* (1991)

Michigan adopted a VAT and applied it to the appellant, which is a company based in Toledo, Ohio, on the Michigan border. The appellant challenged the formula through which the VAT was allocated between his businesses in Ohio and his businesses in Michigan, where he maintained 14 employees and made 26.5% of his sales.

Based on the *Complete Auto Transit Test,* the Court dismissed and dismissed the claim. It concluded that there was a substantial link between the taxing state and the taxpayer; that the tax was applied in a fair manner; that it did not discriminate against interstate commerce; and that it was related to the services provided to the appellant by the state. In addition, in the jurisprudence, the Court established that the role of the courts is to defend "against state taxes that, by their nature or inadvertence, result in double taxation that confiscates or captures tax resources that, by law, correspond to another state." He noted that his role in the judicial review was to ensure that each state only levies the taxes that it is entitled to with respect to interstate commerce.

4 FINAL THOUGHTS

This summary essay has addressed only the issue of the distribution of taxing authority and the corresponding limitations in the context of Federalism. He has not touched perhaps more difficult and interesting topics, as well as:

(a) Equity in establishing property, income, transaction, and income tax rates. Should they be uniform for all, rich and poor? Or should they be progressive – that is, people with more income and property pay a higher percentage than people with less? And if so, up to what percentage can you tax until it becomes an impermissible forfeiture without compensation from the confiscator?

(b) The effectiveness and equity in the system of collecting and paying taxes. In other words, is a more regulated system for the payment and declaration of taxes equitable for people who work as employees of others, which is the current case in the US? Is it effective to count and trust that those who operate their own businesses will honestly declare all their income and pay the corresponding taxes on their business income, investments, and/or income from other countries? What is the reasonable balance between the privacy right of the citizen to be free from frequent and intrusive tax audits and the government's need to establish an intrusive system that ensures that everyone pays their fair share?

These issues are well discussed in political forums, in the press, and in academia. However, they are beyond the limited scope of this writing.

Regarding the exercise of the authority to tax within the framework of the Constitution of the United States, the conclusions and reflections are presented:

(a) The system is complicated due to the number of various taxes and the various levels and government institutions that collect them.

(b) The various instances of taxation result in double, and sometimes triple taxation of income, inheritance, transactions, and property.

(c) Multiple instances and double taxation results in duplication of administration and compliance costs.

(d) In general, the system works because the majority of citizens comply with the obligation to declare and pay their taxes. The reasons are various. They include, but are not limited to, civic culture along with the well-publicized and well-known application of onerous penalties on non-coverers, including imprisonment for intentional non-payers.

(e) The system requires simplification. Because it is used to promote certain social and economic policies, the statements are very complicated and cumbersome. While it promotes welcome work for lawyers and accountants, it can be incomprehensible to the common citizen who does not specialize in the matter.

There are a multitude of exemptions, deductions, and numerous credits, each tied to a different policy, including: encouraging home buying; buying electric cars instead of fuel-guzzling ones; encourage investment in various areas of the economy, such as alternative energy sources, oil production, agricultural products; support families with children; encouraging higher education and the families that take advantage of it, the purchase of health insurance, the restoration of historic buildings; support for veterans and others in the civil service. These exemptions, credits, and deductions manifest themselves in various forms at the Federal, state, and local levels. But because each of these deductions, exemptions, and credits responds to political interests, some broader and or more powerful than others, simplification is eluded.

If there is something positive in the maze of preferences for categories of people and diverse interests reflected in the credits, deductions, and exemptions of the Code, it is this. There is something for almost everyone. And this is one reason why the system is so resistant to change.

(f) Despite the complications, the system is very transparent. Authorities, the Federal Government, states like Virginia, and counties like Arlington, Virginia, annually publish reports that detail the funds collected by tax category and their distribution or allocation to various government programs. This transparency provides the public with a measure of confidence in the integrity of the system and promotes the belief that the taxes they pay are used to pay the legitimate costs of government.[19]

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