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Equality, Legal Certainty and Tax Legislation in the Netherlands
Fundamental Legal Principles as Checks on Legislative Power: A Case Study

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1. Introduction

'Every tax system is an expression of a country's basic values – and its politics. It translates into hard cash what might otherwise be simple high-flown rhetoric.' Joseph Stiglitz' statement points out a fundamental tension between societal values and politics.[1] These values are partly translated in the legal system, e.g. in the form of legal equality and legal certainty.[2] These legal values may sometimes be at odds with political will as expressed by legislation. But politics is not the only determinant of the law. This also holds true for tax law. Many actors contribute to the tax system. A distinctive feature of the democratic state under the rule of law is the primacy of the legislature in law-making, or the primacy of politics in deciding major issues concerning the general interest. The legislature determines the general interest, and which policies should be implemented. 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 an important partner of the legislator.

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.

While legal scholars often view taxation as a technical area of the law which is reserved for specialist scholars and practitioners, constitutional restrictions on taxing power offer an opportunity for a more generalized theoretical debate in an area with a broad practical impact. Clearly, constitutional and statutory restrictions may affect the tax policy of national governments. In theory, the legislature's power to tax might seem to be its most uncontrolled power. Furthermore, the imposition of taxes is founded on the idea that the legislature is constitutionally authorized to disregard ownership rights.[3] 'After all, a tax is a form of expropriation without compensation, where not even the public purpose for which the tax was collected need be given.'[4] The basic principle of representative democracy – no

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1 J. Stiglitz, *The Roaring Nineties*, New York: W.W. Norton & Company, 2003, p. 177.

2 G. Radbruch, 'Legal Philosophy', in *The Legal Philosophies of Lask, Radbruch and Dabin*, Cambridge, Mass.: Harvard University Press, 1950, pp. 107-111.

3 Cf. Art. 1 of the First Protocol to the European Convention on Human Rights (see Section 4.3).

4 A. Sajó, *Limiting Government. An Introduction to Constitutionalism*, Budapest: Central European University Press, 1999, p. 159.

taxation without representation – requires only that taxpayers participate through their representatives authorising the legislature to impose taxes. The citizens authorise the legislature indirectly to expropriate without compensation. However, the principles of a state under the rule of law prevent the imposition of taxes being solely a matter of Government politics and wholly within the sphere of legislative freedom. As Barak rightly points out: 'democracy is not just the law of rules and legislative supremacy'. He defends a conception of democracy that 'is based on legislative supremacy and on the supremacy of values, principles and human rights'.[5] This fits in well with Montesquieu's plea for a distribution of power as safeguard of liberty. 'In order to prevent the abuse of power things must be arranged so that power checks power.'[6] Therefore, the legislature and the courts, as well as the administration, are partners in the business of law-making. Legislators create statutes which cannot be implemented without being interpreted by the courts – and the administration for that matter. The judge, therefore, is a partner in 'the legislature's creation and implementation of statutes, even if this partnership is a limited one'.[7] The legislature, which determines the purpose of statutes, is the senior partner in law- making, while the judge acts as a junior partner. Constitutional review puts a check on legislative power. Consequently, the judge is a mouthpiece of the legal values and principles underlying the constitution, rather than a mouthpiece of statute law.[8]

The rule of law aims to protect against arbitrary interferences. Here, I will focus on the principles of equality and of legal certainty which embody this protection against arbitrary interferences. Both fundamental legal principles reflect basic societal values. 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. Since taxation has become a very important instrument of national governments for large-scale (redistributive[9]) 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 forms of discrimination. In this way, the principle of equality may be violated. However, the other fundamental legal principle, the principle of legal certainty, may also run into problems. The rule of law (*rechtsstaat*) defined as the government not of men but of laws is credited with the virtue of general and stable laws.[10] The requirement of stability is 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, of course, in rapidly changing legislation, at the expense of consistency in time, and which often lacks clarity. 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 Dutch tax law, the principle of equality has been developed into the most 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 restricts the legislative power to tax. In doing so, it functions as a check on the democratically legitimised legislature. Thus, the indispensable concept of checks and balances is kept alive in tax law. The constitutional dialogue between the legislator and – the tax division of – the Dutch Supreme Court revolves around the principle of equality. Of course, parallel to national judgments is a growing body of case law from the Court of Justice of the European Union (CJEU) interpreting the Treaty of Europe (TEU) as well as the Treaty on the Functioning of the European Union (TFEU) and limiting

5 A. Barak, *The Judge in a Democracy*, Princeton: Princeton University Press, 2006, p. 33.

6 Montesquieu, *The Spirit of Laws*, A.M. Cohler et al. (eds.), Cambridge: Cambridge University Press, 1989, pp. 155-156.

7 Barak, supra note 5, p. 17.

8 For a refutation of the positivist misinterpretation of Montesquieu's '*la bouche de la loi*' metaphor, see K.M. Schönfeld, 'Rex, Lex et Judex: Montesquieu and la bouche de la loi revisited', 2008 *European Constitutional Law Review* 4, no. 2, pp. 274-301.

9 L. Murphy & T. Nagel, *The Myth of Ownership: Taxes and Justice*, Oxford: Oxford University Press, 2002, p. 3. Taxes are the most important instrument 'by which a political system puts into practice a conception of economic or distributive justice.' Levelling income by fiscal means is of course an important legitimacy test for the Government, because some will claim that for example progression rates are contrary to the principle of equality while others will strongly defend the opposite view.

10 M. Troper, 'Obedience and Obligation in the *Rechtsstaat*', in J.M. Maravall & A. Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge: Cambridge University Press, 2003, p. 95.

the power of the Member States to formulate their own tax rules, even if those rules apply to their own citizens only. However, here I do not focus on the decisions of the CJEU.

Much has been written on the subject of constitutional review. Sometimes pictures and theories are presented without much attention being paid to the details of the actual process of constitutional review. However, without these details there could be no larger picture. Here, I present an analysis of the testing of tax legislation against the principles of equality as a case study which provides a fair amount of subtle details, such as the differentiation between fundamental and technical distinctions and the idea of a *terme de grâce*. The resulting larger picture of constitutional review will be more complex, but more true to practice. Therefore, the primary goal of this part of my contribution is to offer an in-depth case study rather than a new theoretical perspective.[11]

The principle of legal certainty is 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. Legal certainty enables people to plan their future. Nonetheless, legal certainty is not an absolute desideratum. Even so, one kind of violation of legal certainty, retroactive law-making, often seems to frustrate people in completely 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. So there is not much communication, let alone a dialogue between these partners in the business of law-making with regard to retroactive tax laws. Nonetheless, retroactive tax laws have to meet certain conditions set out in a soft law instrument. The debate among the parties involved in the legislative process revolves around this soft law instrument. Thus, legal certainty is given considerable weight in the legislative process. Although the principle of retroactivity at first sight may seem quite powerless because the judiciary has less power to test Acts of Parliament against it, it is actually taken seriously and is part of a lively dialogue between the legislative partners.

In this contribution, I shall deal with some developments which account for the increasing amount of legislation and the resulting growth of the power of the tax administration to the detriment of fundamental legal principles. This is an important, but too easily neglected, detail of the larger picture.[12] These developments have led judges to adopt a somewhat more independent attitude than they used to do. This is reflected in their attaching increasing importance to legal principles and human rights. Next, I shall analyse the way in which the principle of equality restricts the legislative power to tax. I 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, I shall draw attention to the method of judicial interpretation. Then I 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 I shall 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 a very cautious position in the constitutional dialogue with the legislator. The Court does not want to step on the toes of a (senior) partner who takes part in the debate about just law.

Next, I will deal with the topic of retroactive tax legislation. It goes without saying that retroactive rule-making may seriously compromise the ideal of legal certainty. Here, I 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. I shall analyse this particularly interesting phenomenon to reduce legal uncertainty. Though this memorandum is not binding like 'hard' legal rules, the State Secretary takes this framework very

11 For a critical analysis of existing justifications for constitutional review, see M. Troper, 'The Logic of Justification of Judicial Review', 2003 *International Journal of Constitutional Law* 1, no. 1, pp. 99-121.

12 M. Tushnet, 'Comparative Constitutional Law', in M. Reimann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2006, p. 1240 argues that without knowledge of the actual operations and features of a constitution's institutions the constitution (and its structures) remains a lifeless blueprint. The same holds true for constitutional review: in order to gain more insight into the way it actually operates (in the Netherlands) it is not enough to illuminate some general features of this constitutional element.

seriously just like Parliament which assesses a bill with retroactive effect in terms of this transition law policy. In this way the memorandum can be regarded as a self-binding commitment according to which the State Secretary commits himself to adhere to these rules of conduct with regard to different situations where he deems retroactive tax legislation to be justified. Thus, a soft law instrument facilitates a dialogue between different legislative partners – the State Secretary for Finance on the one hand, and the Second Chamber (*Tweede Kamer*) and the Senate (*Eerste Kamer*) on the other – and external stakeholders such as the Council of State (*Raad van State*) and tax scholars. I shall end with some conclusions.

2. Fundamental protection of individual liberties and rights

In Dutch constitutional law, the notion of fundamental rights (*grondrechten*) is generally used to refer to fundamental rights and liberties.[13] Here, 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.[14]

The Constitution comprises a catalogue of classic and social fundamental rights, included in Chapter 1 (Articles 1-23) entitled 'Fundamental Rights.'[15] Perhaps the most important classic fundamental right is provided by Article 1:

> '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. 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.

The other 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 European Convention for the Protection of Human Rights and Fundamental Freedoms (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.[16] 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.[17]

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13 C.A.J.M. Kortmann & P.P.T. Bovend'Eert, *Dutch Constitutional Law*, Deventer: Kluwer Law International, 2000, p. 145.

14 EC legislation and CJEU rulings are a source of fundamental rights, because by virtue of its supranational character, EU law is automatically part of the Dutch domestic legal system. The influence of these fundamental rights established or recognized at Community level are at the same time domestic fundamental rights. However, they do not form the subject of this paper.

15 Incidentally, there are provisions elsewhere in the Constitution which can be classified as fundamental rights. Art. 114, for example, prohibits the imposition of the death penalty.

16 P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights,* fourth edition, Antwerp/Oxford: Intersentia, 2006, pp. 27-28.

17 The Netherlands has also ratified the UN Covenant on Economic, Social and Cultural Rights and the European Social Charter. It is assumed,

Consequently, the provisions relating to human rights in these treaties play a role in the judicial 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 4).[18]

However, 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'.[19]

Unfortunately, there is one 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.

3. The legislative process in actual practice

In practice, the Government plays a pre-eminent role in the legislative process.[20] Most Acts of Parliament are the result of Government initiatives. Because many legislative proposals pass through Parliament without essentially being changed, the Government determines the content of Acts of Parliament to a large extent.[21] This also holds true for tax legislation. Here, the State Secretary for Finance plays a pivotal role. In his capacity as a co-legislator, he is responsible for the continuous initiating activity of the Government in tax matters.[22]

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. Tax avoidance, for example, often leads to detailed legislation and may even lead to overkill in anti-abuse provisions. As a result, tax legislation is often amended in order to adapt it to changing circumstances. Furthermore, the legislator increasingly interferes with the liberties of citizens in order to steer society.[23] 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'.[24] These instrumentalist incentives are introduced by 'politicians, who are too ready to sacrifice tax principles to political expediency'.[25]

This instrumental view of tax law threatens to erode the integrity of tax law. It becomes difficult for citizens to believe that tax law still shares a distinguishing characteristic with the law: 'a manifestation of public power that is to be wielded in furtherance of the public good'.[26] However, the legitimacy of tax

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however, that, with a few exceptions, these provisions are not binding on all persons. See K. Kraan, 'The Kingdom of the Netherlands', in L. Prakke & C. Kortmann (eds.), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 599.

18 See J.L.M. Gribnau & J. Saddiki, 'Protection of European Taxpayers by the Principle of Equality', in J.L.M. Gribnau (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague/London/Boston: Kluwer Law International:, 2003, pp. 82 et seq.

19 Kraan, supra note 17, p. 601.

20 In the Netherlands the enactment of a statute (Act of Parliament) is not solely the task of Parliament, but is the task of Parliament and the Government together (Art. 81 of the Dutch Constitution). The Government is constituted by the King and the Ministers (Art. 42 of the Constitution). In cases in which the Minister regards it as appropriate, the State Secretary can replace the Minister (Art. 46 of the Constitution). Statutes are signed by the King and one or more Ministers or State Secretaries (Art. 47 of the Constitution).

21 Cf. Kortmann & Bovend'Eert, supra note 13, p. 124.

22 The State Secretary for Finance introduces most of the tax bills. He is also head of the tax administration, and as such is politically responsible for its functioning. Unlike some other countries, he is not part of the civil service. See on the key role of the State Secretary for Finance in Dutch tax law, H. Gribnau, 'Separation of Powers in Taxation: The Quest for Balance in the Netherlands', in A.P. Dourado (ed.), *Separation of Powers in Tax Law*, EATLP International Tax Series vol. 7, Amsterdam: IBFD, 2010, and R. Happé & M. Pauwels, 'Balancing of Powers in Dutch Tax Law: General Overview and Recent Developments', in C. Evans et. al. (eds.), *The Delicate Balance. Tax, Discretion and the Rule of Law*, Amsterdam: IBFD, 2011, pp. 223-254.

23 H. Gribnau, 'The Dignity of Law: Fundamental Legal Principles Versus Legislative Instrumentalism', in M. de Visser & W. Witteveen (eds.), *The Jurisprudence of Aharon Barak: Views from Europe*, Nijmegen: Wolf Legal Publishers, 2011, pp. 147-162.

24 See, e.g., *Kamerstukken II* (Parliamentary Papers) 1997/98, 25 810, no. 2, pp. 34-35.

25 N. Brooks, 'The Responsibility of Judges in Interpreting Tax Legislation', in G. Cooper (ed.), *Tax Avoidance and the Rule of Law*, Amsterdam: IBFD Publications, 1997, p. 93.

26 B. Tamanaha, *The Perils of Pervasive Legal Instrumentalism*, Nijmegen: Schoordijk Instituut/Wolf Legal Publishers, 2006, pp. 66-67. Cf. B. Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, Cambridge: Cambridge University Press, 2006.

law, and thus the law's claim to obedience, is based upon the law's ambition to advance the public good. Without this characteristic, tax law is brute force, and, consequently, people will lose faith in tax law. The obligation to abide by the law will no longer be natural. As a result, tax law may lose the widespread, routine, voluntary compliance that is based upon this perceived obligation.

Paradoxically, the resulting proliferation of legislation has generated a growth in the power of the administration. The growth in the range of the Government, achieved through the instrument of legislation, resulted in the emergence of the administrative state.[27] An increasingly important role is assigned to the administration which has to apply and concretise – not just expose – the norms of general law.[28] 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.[29] Consequently, the bulk of primary legislation is vastly exceeded by that of rules made by ministers, departments, and agencies.[30] Furthermore, discretionary powers are assigned to the administration. In many sectors of the Dutch Government, therefore, the instrumentalist attitude of the legislator increases the importance of the role of the administration in determining the actual legal norms. Consequently, in many fields, citizens are not governed by the provisions of statutes but by their concretization in administrative regulations. 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, also in tax matters, the administration has acquired an autonomy of its own. Thus, taxation is a fine example of a general development. The rule of law has become a rule by administrative regulation. The tax administration can often 'design such regulations to suit its own policy preferences and administrative convenience'.[31]

The Dutch State Secretary for Finance's tax bills mostly pass through Parliament essentially unchanged. 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 State Secretary for Finance is not only a co-legislator but is also head of the tax administration. These two functions of government are blurred.[32] As such, he is politically responsible to the Chambers. As a result, the legislator often adopts the perspective of the tax administration to advance the efficient implementation of legislation.[33] Besides, the tax administration has an interest in legislation without many technically sophisticated provisions. Simple legislation is a blessing for the tax inspector. In the Netherlands, the tax levied on income from savings and investments, for example, is based on the assumption that a taxable yield of 4% 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. On the basis of this provision (of tax law), relevant differences between taxpayers may be ignored. (But the reality is that Dutch tax legislation becomes more and more detailed and complicated.)

As a result, tax legislation provides fewer safeguards as regards fundamental legal principles like legal certainty, equality, impartiality, and neutrality.[34] The failure of legislatures (parliaments) to exercise adequate controls over governments and their tax administration has led to attempts by the judiciaries

27 M. Loughlin, *The Idea of Public Law*, Oxford: Oxford University Press, 2003, pp. 25-26.

28 In the same vein for the United States: K.E. Hickman, 'The Promise and Reality of the U.S. Tax Administration', in Evans et al., supra note 22, p. 41. See already W. Friedmann, *Law in a Changing Society*, Harmondsworth: Penguin Books 1964, p. 279: pointing out a decline in the relative power of both the judiciary and the legislature, accompanied by a corresponding growth of relative power in the executive branch of government (referring to Miller's 'Constitutional Law of the "Security State"'). Cf. K. Brooks, 'A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada', in Evans et al., supra note 22, pp. 64 et seq., who argues that the blurring of the (three) functions of government make good sense.

29 Cf. M. Zander, *A Matter of Justice. The Legal System in Ferment*, London: I.B. Tauris & Co Ltd, 1988, pp. 236-266.

30 R. Baldwin, *Rules and Government*, Oxford: Clarendon Press, 1995, p. 59. Cf. Loughlin, supra note 27, p. 25: 'The volume of executive legislation now greatly outstrips the amount of primary legislation.'

31 S. Gordon, *Controlling the State. Constitutionalism from Ancient Athens to Today*, Cambridge (Mass.)/London: Harvard University Press, 1999, p. 344.

32 Cf. K. Brooks, 'A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada', in Evans et al., supra note 22, pp. 64 et seq., who argues that the blurring of the (three) functions of government make good sense.

33 Cf. C. Gearty, *London Review of Books*, 29 November 2001, p. 12: 'The executive branch is voracious in its search for new powers, and it is always simpler to plan new legislation than to ask why the old powers have not achieved what they were designed to do.'

34 J.L.M. Gribnau & R.H. Happé, 'Equality and Tax Law: A Matter of Principle', in *L'année fiscale: Revue annuelle*, Paris: Presses Universitaires de France, 2005, p. 131.

to fill this vacuum.[35] Indeed, there has been a change in the attitude of the courts to the power of the tax authorities and their (administrative) decisions. The courts are more willing to develop principles which restrain the exercise of administrative power, principles of proper (good) administration with regard to improper actions and decisions of the administration when applying and enforcing the law. Moreover, the courts are even willing to protect fundamental rights against infringements by the tax legislature (see Section 4 et seq.)[36]; the minimal conditions of personal freedom against the state, needed to make the otherwise enormous extent of state power tolerable to everyone, depend on the institutional protection of human rights.[37]

4. Fundamental legal principles and the testing of tax legislation

4.1. The prohibition on constitutional review

In contrast to the idea of checks and balances, the Dutch Constitution contains a provision which prohibits any judicial (constitutional) review: the courts are not allowed to test Acts of Parliament and international treaties against the Constitution.[38] This special feature of the Dutch Constitution constitutes an exception in the international legal order; in most other countries, it is possible to test Acts of Parliament against the Constitution.[39] 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.[40] 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.[41] 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, the principle of equality is one of the 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 International Covenant on Civil and Political Rights 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 to the Convention in

35 Cf. M.J.C. Vile, *Constitutionalism and the Separation of Powers*, Indianapolis: Liberty Fund, 1998, p. 401 with regard to the United States and Great Britain.

36 The use and development of the principle of equality in this respect may also be seen from the perspective of principles of proper legislation which concern the quality of legislation – and are used within the framework of constitutional review.

37 T. Nagel, *Equality and Partiality*, New York/Oxford: Oxford University Press, 1991, p. 149.

38 For a dynamic model of the separation of powers (and checks and balances), see J.L.M. Gribnau, 'General Introduction', in G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law International, 1999, pp. 24 et seq. See also Barak, supra note 5.

39 For an international overview of the testing of statuses against the (constitutional) principle of equality, see Meussen, supra note 38, and the special issue of the 2007 *Michigan State Journal of International Law* 15, no. 2, which contains the written contributions to the Tax Law Session of the 17th Congress of the International Academy of Comparative Law, Utrecht, July 16-22, 2006.

40 See, for example, HR (Supreme Court) 21 March 1990, BNB 1990/179; and HR 23 December 1992, BNB 1993/104.

41 HR 7 October 1992, BNB 1993/4. Cf. L.F.M. Besselink (ed.), *Constitutional Law of the Netherlands*, Nijmegen: Ars Aequi, 2004, p. 118.

conjunction with Article 14 of the Convention gives the same opportunity by testing Acts of Parliament by the courts.[42]

Thus, the prohibition on the testing of Acts of Parliament against the Constitution does not apply in practice. Article 94 of the Constitution obliges the courts to test Acts of Parliament against the equality principle of these international human rights treaties.[43] 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.[44] As will be shown, this also holds true for the testing of tax legislation.

4.2. Article 26 of the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights 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.'

Tax law is not excluded from the scope of Article 26 of the Covenant. This Article has an independent character.[45] This means that it 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 in any other way. The decision of the United Nations Human Rights Committee[46] in *Broeks v. Netherlands* made this broad scope of Article 26 clear.[47]

In a decision of 27 September 1989, the *Dentist's Wife* judgment,[48] the Supreme Court endorsed this independent character as regards tax law.[49]

In the fiscal literature, criticism has regularly been expressed concerning the judgments of the Supreme Court Tax Division. The main point of this criticism is that the Court applies Article 26 of the Covenant in situations for which it is not meant. In other words, critics argue that Article 26 of the Covenant can only be invoked if one of the human rights has been violated, such as race, sex, religion, etc.[50] However, Article 26 of the Covenant offers considerably more scope, and it also includes issues of tax law.[51]

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

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42 ECtHR 23 October 1990, No. 17/1989/177/233, *Darby v. Sweden*, Series A, No. 187.

43 Because of the system of decentralised review in the Netherlands this obligation applies to both the Supreme Court and the lower courts.

44 T. Koopmans, *Courts and Political Institutions*, Cambridge: Cambridge University Press: 2003, p. 84. Although the techniques may seem the same, the Dutch Supreme Court however seems to apply a much more restrained position in comparison to, for instance, the German *Bundesverfassungsgericht*, cf. K. Vogel & Ch. Waldhoff, 'Germany', in Meussen, supra note 38, pp. 89 et seq.

45 R.H. Happé, 'The Netherlands', in Meussen, supra note 38, p. 130.

46 The Committee was set up pursuant to Art. 28 of the Covenant. Its task is to deal with the complaints of individual persons concerning the alleged violation of rights laid down in the treaty (ICCPR).

47 United Nations Human Rights Committee 9 April 1987, *Broeks v. Netherlands*, No. 172/1984, RSV 1987/245.

48 HR 27 September 1989, BNB 1990/61.

49 This judgment concerns the old Personal Income Tax Act. Since 1 January 2001, the new Personal Income Tax Act 2001 has been in force in the Netherlands.

50 See P.J. Wattel, 'De reikwijdte van fundamentele rechten in belastingzaken', in *De reikwijdte van fundamentele rechten*, Zwolle: W.E.J. Tjeenk Willink, 1995.

51 Happé, supra note 45, p. 153.

judgment of 2 February 1982[52] 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.

4.3. Article 14 of the European Convention on Human Rights

This Convention is of an earlier date than the ICCPR. The EHCR 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 to the Convention, prohibits discrimination in matters of taxation.[53] Article 1 of Protocol No. 1 to the Convention 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.'

Regarding tax law, Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1 to the Convention, 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, 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.'[54]

Thus the principle of equality has a fundamental position in the Dutch Constitution. Its main importance is that it requires the legislator 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 check tax legislation.

4.4. Legal principles as a dialogical vehicle

The judiciary tests tax legislation against the principle of equality. This fundamental legal principle is a higher standard than legislative rules, and as such they constitute a kind of dialogical vehicle. Participants in the dialogue can use these principles as arguments expressing important requirements of justice or fairness or some other dimension of morality.[55] In their dialogue the legislature and the judiciary, being the senior partner and the junior partner respectively, may have different views on the weight and

52 HR 2 February 1982, NJ 1982, 424.
53 ECtHR 23 October 1990, No. 17/1989/177/233, *Darby v. Sweden*, Series A, No. 187.
54 HR 12 November 1997, BNB 1998/22.
55 R. Dworkin, *Taking Rights Seriously*, Duckworth: London, 1978, p. 22 defines a principle as a standard which is to be observed because it is 'a requirement of justice or fairness or some other dimension of morality'.

the impact of the principle of equality. The courts may use these fundamental legal principles to curb legislative power on behalf of the rule of law. To be sure, legislation is not just the exercise of state power, as Waldron reminds us; 'it is the exercise of state power in the context of articulate institutional relations, a context that has been structured with a view to rule-of-law considerations'.[56]

Thus, the legitimacy of judicial review is supported by the theory of 'institutional dialogue' according to which courts and legislatures participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies.[57] In the case of constitutional review this dialogue might be labelled 'constitutional dialogue.' Such a dialogue exists because people or institutions have something in common but also disagree on something because of diverging interests, points of view or arguments. The legislature and the judiciary have a common responsibility for the legal system, they are partners in the business of law-making, but they may differ in their view with regard to what the law should be. Participating in a constitutional dialogue does not mean 'total agreement, but instead commitment to share a communicative framework'.[58] Thus partners in law-making ideally share a willingness to participate in a dialogue and to take the other participants seriously. In this way, a court ruling may initiate a form of constitutional dialogue in which arguments should be seen as a form of cooperation. However, in the Netherlands the tax legislator sometimes flexes its muscles which accounts for tension in the dialogue. A case in point is the warning issued by the Minister and State Secretary for Finance in a governmental report. They argued that the judiciary used legal principles in a way which set limits on the use of tax legislation for non-fiscal goals to achieve governmental policy aims and thus constituted an encroachment upon the legislature's prerogative.[59] This way they definitely did not commit themselves to a shared communicative framework. As will be shown below, the judiciary seems to have taken this threatening statement very seriously, too seriously, in my view, by adopting a very restrained attitude. In my opinion, however, the judiciary's attitude should not be that restrained because it leaves the taxpayer out in the cold when the legislature consciously violates fundamental legal principles, which after all make up the (moral) core of the rule of law. But of course, that is not a descriptive but rather a normative approach to the right balance between the legislator and the courts.

5. The principle of equality: the method of judicial interpretation

In what follows the focus rests on the case law of the Dutch Supreme Court concerning the principle of equality.[60] The principle of equality has a long tradition in Dutch fiscal 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).[61] A separate principle of equality in taxation was no longer considered necessary.[62] Article 1 of the Constitution, therefore, implies a prohibition on tax privileges.[63]

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.[64] It contains all aspects of this method of judicial interpretation. This judgment shows

56 J. Waldron, 'Legislation and the Rule of Law', 2007 *Legisprudence* 1, no. 1, p. 106.

57 For example, see L. Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures', 2005 *International Journal of Constitutional Law* 3, no. 4, pp. 617-648.

58 M. Minow, *Making All the Difference. Inclusion, Exclusion and American Law*, Ithaca: Cornell University Press, 1990, p. 294.

59 See, e.g., *Kamerstukken II* (Parliamentary Papers) 1997/98, 25 810, no. 2, pp. 34-35. Unfortunately, they mixed up principles of proper legislation (which concern the quality of legislation, and are used within the framework of constitutional review) with the altogether different principles of proper administration (which concern not legislation itself, but improper actions and decisions by the administration, and are used within the framework of judicial review), which should have spoilt the effect of their claim somewhat.

60 See R.H. Happé & J.L.M. Gribnau, 'Constitutional Limits to Taxation in a Democratic State: The Dutch Experience', 2007 *Michigan State Journal of International Law* 15, no. 2, pp. 439 et seq.

61 The codification of this fundamental principle of equality fits in with the tendency in the twentieth century to place the protection of individual (and group) liberties in an increasingly important position within the hierarchy of constitutional norms needing institutional protection; J. Ferejohn & P. Pasquino, 'Rule of Democracy and Rule of Law', in Maravall & Przeworski, supra note 10, p. 251.

62 See Happé, supra note 45, p. 125.

63 Nonetheless, an important exception is to be found in Art. 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.

64 HR 27 September 1989, BNB 1990/61.

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 I shall deal with these in more detail.

5.1. Unequal treatment of equal cases[65]

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.'[66] 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. The principle of equality, 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 with respect to the purpose of the law.[67] 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.[68]

The purpose of the regulation concerned is therefore essential for assessing the equality of cases. It is from this perspective that we can determine whether cases are equal on the basis of relevant aspects. It should be borne in mind, however, that the purpose of the legal regulation should not be conceived of as a static factor. It cannot 'simply' be distilled from the regulation's legislative history. Later social developments should also be taken into account.[69]

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 (*Wet op de Inkomstenbelasting 1964*) 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. Unequal treatment originated in the fact that the incomes of the spouses were added up, whereas the incomes of unmarried couples were not.[70]

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.

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65 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, supra note 45, pp. 142 et seq.

66 J. Tussman & J. tenBroek, 'The Equal Protection of the Laws', 1949 *California Law Review* 37, no. 3, p. 344.

67 Tussman & tenBroek, , supra note 66, p. 346. Cf. J.L.M.Gribnau, 'Equality, Consistency, and Impartiality in Tax Legislation', in Gribnau, supra note 18, pp. 29 et seq.

68 Cf. Happé, supra note 45, p. 138.

69 See R.H. Happé, *Drie beginselen van fiscale rechtsbescherming. Over de weging van legaliteitsbeginsel, gelijkheidsbeginsel en vertrouwensbeginsel in het belastingrecht*, Deventer: Kluwer, 1996, pp. 41 et seq.

70 In its considerations, the Supreme Court paid a great deal of attention to the legislative history of the legal provisions on which it was to judge, in order to accurately define the purpose of the provisions. This is a constant element in the method of the Court. It is characteristic of the scrupulous way in which the Supreme Court applies the principle of equality.

5.2. 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 discriminatory.[71] However, other distinctions made by the legislator must also 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.[72] 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.[73] 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 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 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 (*Algemene Wet inzake Rijksbelastingen*) was too small to serve the aim of the regulation on objections and appeals properly.[74] In terms of the US doctrine concerning the principle of equality, the regulation was 'underinclusive'.[75]

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.[76] 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.[77] The next aspect of the judicial process of deciding this type of case shows the comparable influence of the Strasbourg Court.

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71 Similarly, Art. 14 ECHR lists a number of largely parallel factors.
72 ECtHR 23 July 1968, *Belgian languages*, Series A, no. 6, s. 10, p. 34.
73 HR 12 November 1997, BNB 1998/22.
74 Arts. 23 and 26 of the General Taxes Act were amended by the Act of Parliament of 12 May 1993, in conformity with the Supreme Court's judgment in BNB 1990/61.
75 See Happé, supra note 69, pp. 362 et seq., and Gribnau, supra note 18, pp. 30 et seq.
76 HR 26 March 2004, BNB 2004/201.
77 With regard to generally binding laws of municipal councils, the case law of the Supreme Court shows the same method of judicial interpretation.

6. 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.

> '[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.'[78]

The ECHR, therefore, does permit considerable room for deference by the courts to the views of the tax legislator.

The Supreme Court has adopted this formula, thus indicating that it will not be too readily inclined to invalidate tax legislation on the basis of the principle of equality.[79] By following this line the Court explicitly underlines its attitude of judicial constraint. Here, we should bear in mind Ronald Dworkin's statement: 'The vast bulk of the laws which diminish my liberty are justified on utilitarian grounds, as being in the general interest or for the general welfare.' The legislator, therefore, 'needs no special justification – but only *a* justification – for this sort of legislation'.[80]

In 2005, the Supreme Court added a nuance. It stated that the Court will respect the legislature's assessment in tax matters unless it is *devoid of reasonable foundation*.[81] It derives this formula from a judgment of the ECtHR, the case of *M.A. and others v. Finland*.[82] This judgment of the ECtHR was not about the principle of equality, but about the applying of a retrospective tax law. Furthermore, I would have preferred it if the Court would have used the more accurate criterion of 'not manifestly illogical or arbitrary'. This criterion was used by the ECtHR in the *Della Ciaja* judgment. It fits better with the state of the case law of the Supreme Court concerning the equality principle.[83]

However, the Supreme Court also recognizes a threshold. In 2007, the Court decided that the principle of equality of Article 14 ECHR and Article 26 ICCPR does not require that the Dutch legislator elaborates the law in such a way that every inequality or disproportionality is avoided in every conceivable situation.[84] Especially considerations of feasibility or the desire to prevent any abuse of the law are relevant in this context. The Supreme Court has explicitly accepted these considerations as grounds which justify unequal treatment. Also in a few earlier judgments the Court decided that the 'roughness' of the law was acceptable, in some cases even without referring to the specific reason for the litigated classification. A certain measure of roughness had been a legitimate reason for the discrimination.[85]

The Supreme Court has also erected another barrier. This second category can be characterized by the expression '*de minimis non curat lex*', the law does not concern itself with trifling issues. In case the discrimination under review concerns a rather small financial amount of money, i.e. the tax to be paid, the Court decided that the legislator had no obligation to make the law too detailed in order to avoid the discrimination.[86]

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78 ECtHR 22 June, 1999, Appl. No. 46757/99, *Della Ciaja/Italy*, BNB 2002/398. See J. van den Berge, 'Equality; Applying the Principle of Non-Discrimination (Art. 14 ECHR, Art. 26 ICCPR', in Gribnau, supra note 18, pp. 58-59.

79 HR 12 July 2002, BNB 2002/399-400. Incidentally, in my opinion the Dutch courts have always adopted a very constrained attitude towards the legislator, in so far as the adapted formula does not actually imply a change of attitude by the courts.

80 Dworkin, supra note 55, p. 269.

81 HR 8 June 2005, BNB 2005/310.

82 ECtHR 19 June 2003, no. 27793/95, *Vakstudie Nieuws* 2003/52.2; cf. already the *Gasus* judgment, ECtHR 23 February 1995, no. 43/1993/438/517, BNB 1995/262.

83 In this last wording the notion 'illogically' has an added value, for example when the legislator combines two different, contradictory policy aims in one regulation (this is the first category of technical distinctions, as will be shown below).

84 HR 10 June 2005, BNB 2005/319.

85 HR 16 September 1992, BNB 1993/21, HR 15 December 1999, BNB 2000/57 and HR 10 June 2005, BNB 2005/319.

86 HR 17 November 1993, BNB 1994/36, HR 15 July 1998, BNB 1998/293 and HR 12 May 1999, BNB 1999/271.

7. Fundamental rights and technical distinctions

As mentioned above the Court allows the legislator to have a wide margin of appreciation in the fiscal field. On the whole, I consider this to be a correct point of view. Tax laws are characteristically technical.[87] They mostly concern businesslike matters and are financial or economic in nature. Therefore, tax laws make all kinds of technical discriminations, which have nothing to do with substantial issues, like race, religion 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 justify 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. 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.

7.1. The testing of fundamental aspects

In Dutch tax case law, only two fundamental aspects have been under discussion until now.[88] The first aspect concerns the fundamental right of access to a court. Two cases touch upon this fundamental aspect. One of them is the *Dentist's Wife* judgment. The fact that, as a result of the provisions of Article 5 of the Personal Income Tax Act 1964, parts of the income of one spouse were added to the income of the other spouse, while the first spouse had no right to lodge an objection or an appeal, was considered to be discriminatory.[89] The other case involved the regulation concerning court registry fees in Article 17b of the Administrative Justice (Taxes) Act (*Wet Administratieve rechtspraak belastingzaken*). If a Court of Appeal gave a verbal judgment, the costs of instituting an appeal to the Supreme Court were higher than the costs in a case in which a written judgment had been handed down. In the former situation, the taxpayer had to pay DFL 150 (about € 70) in additional court registry fees to obtain a written judgment as well. The Supreme Court held that this constituted unequal treatment without any objective or reasonable justification.[90] Both statutory provisions were changed relatively shortly 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, I consider this case law to be appropriate. In my 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 the beginning, married and unmarried people were not considered equal, the relationship between married people being financially and economically stronger.[91] Clearly, in later case law, the Court saw more resemblances

87 For a more detailed and technical version of this part, see Happé & Gribnau, supra note 60, pp. 448 et seq.

88 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.

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

90 HR 30 September 1992, BNB 1993/30.

91 HR 27 September 1989, BNB 1990/61.

apart from the differences. Consequently, the resemblances becoming more dominant, the difference in treatment by the law had to meet the principle of proportionality.[92] Evidently, the change in social views played an important role in these judgments. 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.[93] As a result, according to the Court, this category of non-married taxpayers is treated completely equally for income tax.[94]

7.2. Testing technical aspects

As said before, most cases are related to technical distinctions in tax statutes. The Dutch Supreme Court acknowledges the wide margin of appreciation of the legislator, especially with regard to this technical distinction. 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, daycare centres, and so on.[95]

Only in very evident cases has the Court decided that technical distinctions in a tax statute are discriminatory. The reason for that is the above-mentioned wide margin of appreciation (see Section 6). 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.[96]

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. 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 regulation on the standard deductible travelling allowance.[97] At a certain moment, the legislator introduced an additional goal in the regulation, aimed at discouraging the use of cars by commuters. 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.[98]

A second category of discriminatory cases is the one in which 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. During the legislative process, the Government even warned Parliament of the risk of discrimination, but Parliament persisted and amended the law. A couple of years later, the Court unsurprisingly recognized the discriminatory character of the regulation.[99]

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92 HR 15 December 1999, BNB 2000/57, and HR 21 February 2001, BNB 2001/176.

93 In 1998, the Dutch tax legislator had equated the so-called registered partnership of non-married persons with marriage.

94 HR 15 December 1999, BNB 2000/57.

95 Cf. Gribnau, supra note 67. The changing policy with regard to the production of Dutch feature films illuminates the lack of constancy of the law (temporal inconsistency) caused by tax incentives. There was a tax incentive which was abolished a few years ago. Now (in December 2012), there is again talk of introducing some kind of tax shelter for the production of Dutch feature films – mainly because at the moment the Belgian tax incentive is very successful, at the expense of the production of Dutch films in the Netherlands, or so it is felt.

96 HR 14 June 1995, BNB 1995/252.

97 HR 12 May 1999, BNB 1999/271.

98 HR 12 May 1999, BNB 1999/271. See also HR 15 July 1998, BNB 1998/293.

99 HR 17 August 1998, BNB 1999/123. See also HR 14 July 2000, BNB 2000/306. Another rather old example of private legislation is the agricultural exemption: the change (mostly an increase) in value of agricultural land is exempted from taxation (now Art. 3:12 of the Personal Income Tax Act 2001). This exemption, however, has so far gone unchallenged.

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.[100]

The fundamental question involved is whether the legislator is allowed to make a differentiation in its regime solely for budgetary reasons. This would mean that equal treatment of equal cases is ignored because the state would be deprived of too large a sum in revenues. The Supreme Court is quite clear on this matter. It has stated: '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.'[101]

8. 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.[102] Having established unjustified discrimination, the judiciary again has to face the question of how it should respect the primacy of the democratically legitimised legislature in law-making. This 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 reviewing Acts of Parliament – and *a fortiori* in offering remedies – which are a result of the political process. The political process is the legitimate forum for resolving disputes resulting from different views of the citizens on the relevant scheme of justice. It is important that citizens, losers in the political game, to a certain degree, abide by the outcome of the political process.[103] However, in case of a serious violation of a fundamental right, for example, the principle of equality, citizens may challenge the outcome of the legislative process. Does a judicial review of legislation, even in a very moderate form, thus constitute a violation of the principle of democracy? McLachlin points out that if it is accepted that democracy at its best reflects a tension between majoritarian will and individual rights, then it is far from evident that the transfer of a measure of power from the legislature to the courts weakens democracy. 'The guarantee of equality before and under the law' is an essential condition of democratic government.[104] The judiciary testing tax laws, therefore, is no threat to, but an enforcement of democracy. Of course, the Court should show restraint and respect the primacy of the democratically legitimised legislature in law-making. However, the Dutch Supreme Court sometimes seems to bow to the judgments of the legislature, as I shall now show.

The number of cases in which the Supreme Court has found discrimination is small, both in absolute terms and in relative terms.[105] The Supreme Court regularly reasons its judgments with reference to the wide margin of appreciation as introduced in the *Della Ciaja* case of the ECtHR. Especially in the case of a technical distinction, the taxpayer does not stand much chance of winning the case. Nonetheless, the Dutch Supreme Court has established unjustified discrimination in about fifteen cases.

If the Supreme Court establishes that there is an unjustified unequal treatment of equal cases, then, in theory, its judgment is obvious: it does not apply the statutory regulation in question. The Court gives priority to the principle of equality contained in Article 26 ICCPR or Article 14 ECHR over the Dutch regulation that is in conflict with it. Nevertheless, in practice, it is rare for the Court to decide in favour of the taxpayer. Consequently, the Court's observation that a legal provision is discriminatory does not always mean that the taxpayer is successful.

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100 HR 17 November 1993, BNB 1994/36.
101 HR 14 June, BNB 1995/252.
102 Cf. Happé & Gribnau, supra note 60, pp. 454 et seq.
103 D.P. Franklin & M.J. Baun, 'Introduction', in D.P. Franklin & M.J. Baun (eds.), *Political Culture and Constitutionalism: A Comparative Approach*, Armonk and London: M.E. Sharpe Inc., 1995, p. 7.
104 B. McLachlin, 'The Canadian Charter and the Democratic Process', in C. Gearty & A. Tomkins (eds.), *Understanding Human Rights*, London and New York: Pinter, 1999, p. 26.
105 See Gribnau & Happé, supra note 34, pp. 140-142.

The reason for this lies in the limits of the function of the judiciary to develop law. If the 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 task. 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 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.

If there is no simple and obvious solution, the Court will decide against 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.[106] However, in exceptional cases the Dutch Supreme Court will decide immediately.

In principle, I agree with the Supreme Court. In practice, however, the 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.[107] The price to be paid is that the taxpayer does not 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.

The Government, for example, may be too responsive to private pressure by lobbies and organised groups (special interests). Partly due to a lack of party discipline, legislative programmes may respond to the pressures of interest group coalitions which may result in ambiguous and badly drafted laws.[108] Special interest pressure may also lead to 'naked preferences' in legislation.[109] In the case of these deliberately introduced discriminatory 'naked preferences' or deliberately maintained discriminations caused by a lack of care in the legislative process, the Court may decide not to apply the discriminatory provision or to give the legislature a second chance. In tThis way, the Court strengthens and guards the integrity of the legislative process by the 'testing of legislation by higher standards than legislatures sometimes adopt for themselves' in order to drive out 'favouritism and partiality.'[110] However, case law shows the Court's reticent attitude even with regard to naked preferences. As shown above, the Court's bottom line is legislation which is *devoid of reasonable foundation*. This seems to constitute quite a weak version of the prohibition of naked preferences; it constitutes only a trivial restraint. Here I draw a parallel with the American Supreme Court's requirement that government action be 'rational': public measures must be a minimally reasonable effort to promote some public value. According to Sunstein's modern rationality, a review is characterized by two principal features. First, the category of legitimate ends is extremely broad. Second, the US Supreme Court demands only the weakest link between a public value and the measure in question, 'and it is sometimes willing to hypothesize legitimate ends not realistically motivating to the legislature.' As a result, few statutes fail a rationality review.[111] Unfortunately, this is exactly the case in the Netherlands. Most cases brought before the Dutch Supreme Court are dismissed. If the Supreme Court decides not to apply the discriminatory provision, the legislature may, of course, reject this judgment by overruling it through new legislation.

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106 HR 12 May 1999, BNB 1999/271; HR 11 August 2006, BNB 2006/322.

107 A partial explanation may be the Supreme Court's tacit apprehension that the legislator which has the power to determine the composition of the Supreme Court will appoint judges who are known to adopt an even more reserved attitude vis-à-vis the legislator.

108 Cf. G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, New York: New York University Press, 1994, pp. 189 et seq.

109 'Naked preferences' are obvious violations of the impartiality requirement in tax law: the distribution of resources or opportunities to one group rather than to another solely on the ground that 'those favored have exercised the raw political power to obtain what they want'; C.R. Sunstein, *The Partial Constitution*, Cambridge (Mass.), London: Harvard University Press, 1993, p. 25. Cf. Gribnau, supra note 67, pp. 28 et seq. For the impact of naked preferences introduced in the tax system in the United States, see Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future*, New York: W.W. Norton, 2012, pp. 71 et seq.

110 Tussman & tenBroek, supra note 66, p. 351 and 358.

111 Sunstein, supra note 109, pp. 28-29.

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.[112] 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.[113] 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.

The separation of powers in combination with a system of checks and balances thus implies that the Dutch Supreme Court carefully considers when it has to adopt a reticent attitude. The inevitable implication of this case law is that the taxpayer may be right but will not win. This does not fit in well with the view of the judiciary's role in a democracy as 'defending the rights of citizens against political majorities.'[114] Here, we see that the importance of the effective legal protection of the taxpayer is sacrificed to the constitutional relationship between the legislature and the judiciary.[115] The dialogue between the legislature and the judiciary is not interrupted at the cost of effective legal protection for the taxpayer.[116] Of course, the judiciary's attitude should be restrained in testing statutes, but legal protection should not be rendered toothless. From my normative point of view, in this way the legislature almost gains a monopoly in determining the law. Consequently, too often privileges in tax law are taken for granted because the courts allow the political balance between the legislator and the courts to (almost) completely prevail over the protection of the principle of equality, although it is one of the core principles of the rule of law.

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. In such a case, a *terme de grâce* is out of the question.

Consequently, the Supreme Court is sometimes engaged in quasi-legislative and, therefore, political work. Inevitably, a political element is at work.[117] However, the sole power of the judge is the power of argument. There is no denying that judges communicate by means of their judgments. However, the Court does not make an issue of the principle of equality. 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, but 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. Consequently, legislation becomes just a matter of political will. Legislative voluntarism drives out partnership.

9. Legal certainty

9.1. Introduction

As the German lawyer and legal philosopher Gustav Radbruch argued, legal certainty is definitely one of the most fundamental legal values.[118] This also applies to taxation. Here, Adam Smith's second maxim regarding taxation in general springs to mind: 'The tax which each individual is bound to pay ought to be certain, and not arbitrary.'[119] For Smith, arbitrariness is the greatest threat to liberty. Although legal

112 The legislator is not obliged to introduce new legislation retroactively.

113 HR 24 January 2001, BNB 2001/291 and 292.

114 C. Guarnieri & P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford: Oxford University Press, 2002, p. 159. At p. 189 they argue that since the Second World War, continental judges have maintained a bureaucratic profile, which may offer a partial explanation for the Supreme Court's reserved attitude.

115 The Court's ruling has neither an *intra partes* nor an *erga omnes* effect. Cf. Tushnet, supra note 12, p. 1246.

116 The Supreme Court judges possibly fear that the political background of new candidates for the Supreme Court will become more important at the cost of their legal expertise.

117 G. Smith, *Politics in Western Europe*, Aldershot: Dartmouth Publishing, 1993, p. 143.

118 Radbruch, supra note 2, pp. 107-111. For Radbruch's conception of values as standards of evaluation, see S. Taekema, *The Concept of Ideals in Legal Theory*, The Hague/London/New York: Kluwer Law International, 2003, pp. 69-93 and Gribnau, supra note 38, pp. 20-21.

119 A. Smith, *The Wealth of Nations* [1776], Book V, Ch. II, Part II, (Indianapolis: Liberty Fund, 1981), p. 825. S. Fleischacker, *On Adam Smith's*

certainty is of fundamental importance in a state under the rule of law, the concept of legal certainty is not an easy one. 'Legal certainty is by its nature diffuse, perhaps more so than any other general principle, and its precise content is difficult to pin down.'[120] Indeed, legal certainty may be promoted in several ways. Here, the well-known desiderata formulated by Lon Fuller spring to mind. These eight conditions are 'the sort ideals which articulate the law in the rule of law.'[121] These desiderata, embodying the 'inner morality of law', may serve as a handle to operationalize the value of legal certainty.

According to Fuller, law is the enterprise of subjecting human behaviour to rules.[122] With regard to taxation, these rules concern the individual's fair share of taxes to pay for the costs of society. Although Fuller deals with requirements in the light of the principle of legality, these are all also aspects of legal certainty.[123] Actually, in my view these aspects are primarily principles which serve legal certainty, for the principle of legality is instrumental to the principle of legal certainty (and equality, for that matter).

First, Fuller mentions the generality of law, i.e., 'there must be rules.' General rules promote legal certainty. In a state under the rule of law it is hardly possible to control and direct human conduct without rules applying to general classes of people.[124] A second demand is the promulgation of laws. Legal rules ought to be published. Citizens are entitled to know the law in advance, which enables them to predict the legal consequences of their behaviour and it also allows for public criticism. Thirdly, Fuller criticizes retroactivity: in itself 'a retroactive law is truly a monstrosity'. Note, however, that also in Fuller's view there is no absolute prohibition on retroactivity. According to Fuller, situations may arise in which granting retroactive effect to legal rules, 'not only becomes tolerable, but may actually be essential to advance the cause of legality.' Fourth, Fuller argues that the clarity of laws is essential to control and direct human conduct. A further desideratum is rather obvious: rules must not require contradictory actions.[125] A sixth desideratum is that laws should not require the impossible; it must be possible for people to comply with the laws. A last requirement which regards the law itself holds that laws should not be changed too frequently. Frequent changes make it harder for people to gear their activities to the law. This demand for the constancy of the law directly serves the predictability of legislation and the legislator's reliability. As Fuller points out, there is a close affinity between the harm resulting from too frequent changes in the law and the harm done by retroactive legislation. Both are caused by legislative inconstancy.[126]

9.2. Retroactive tax legislation

The different aspects of legal certainty having been introduced, I will focus on retroactivity, because that seems to be a severe way in which legal certainty may be violated. Citizens should in general 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. 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.

Wealth of Nations*: A Philosophical Companion*, Princeton: Princeton University Press, 2004, pp. 242-244. Interestingly, the economist Stiglitz – the 2001 Nobel Prize laureate – argues that the traditional measurement in GDP (Gross Domestic Product) is not adequate, as it fails to take into account values that are important for social welfare. In this respect, Stiglitz explicitly refers to the values of security and certainty; J.E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy*, New York/London: W.W. Norton & Company, 2010, p. 275 et seq.

120 T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 243.

121 I. Sánchez-Cuenca, 'Power, Rules, and Compliance', in Maravall & Przeworski, supra note 10, p. 68.

122 L.L. Fuller, *The Morality of Law* [1964], New Haven/London: Yale University Press, 1977, pp. 124-125. Cf. P. Popelier, *Rechtszekerheid als beginsel van behoorlijke regelgeving*, Antwerp/Groningen: Intersentia, 1997, pp. 194 et seq.

123 For legal certainty conceptualized as an 'aspects concept', see M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen*, Amersfoort: Sdu Uitgevers, 2009, pp. 1-322. He offers a comprehensive theory of retroactive tax legislation. See also M. Schuver-Bravenboer, *Fiscaal Overgangsbeleid*, Deventer: Kluwer, 2009.

124 C. Sunstein, *Legal Reasoning and Political Conflict*, Oxford: University Press, 1996, p. 114: 'Rules promote predictability and planning for private actors, legislators, and others.'

125 Already Alexander Hamilton wrote that it 'not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression'; J. Madison, A. Hamilton & J. Jay, *The Federalist Papers* (1788), London etc.: Penguin Books, 1987, p. 439 (No. 78).

126 Fuller's last demand is for congruence between the declared rules and the acts of the administration. This aspect concerns the application of legislation, not – as the other desiderata do – the quality of legislation itself.

This could especially be the case if the legislator 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. 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'. I shall explain these two different kinds of retroactivity.

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,[127] as a result of which 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.

Before I continue it still needs to be remarked on the weight of the principle of legal certainty: principles are not absolute. Hence, notwithstanding that the principle of legal certainty, including the principle of honouring legitimate expectations, provides strong arguments against retroactivity, this does not imply that there is an absolute prohibition on retroactivity. In a certain case, certain interests could be served if the legislator were to grant retroactive effect to legislation. In that case the competing interests and principles should be weighed. The same applies *mutatis mutandis* for the subject of retrospectivity. Thus, the case of retroactivity and retrospectivity is a balancing act for the legislator.[128]

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.[129] Consequently, the principle of legal certainty may seem rather toothless with regard to Acts of Parliament.

Nonetheless, Parliament itself is concerned with the principle of legal certainty, in particular with retroactive tax legislation. Retroactivity is an important topic in the ongoing institutional dialogue between Parliament and the Government. Parliament often questions the State Secretary for Finance about a concrete bill with retroactive effect. In 1982, Parliament adopted a motion in which serious concerns with regard to the use of retroactive tax laws were expressed.[130] A few years later Parliament expressed the need for a policy document with general points of departure with respect to the use of retroactivity.[131] The State Secretary plays a leading role in the enacting of tax legislation, so it is his task to establish a general policy. Within the framework of an institutional dialogue, this move may be qualified as an invitation to the State Secretary to communicate his views to Parliament, therefore, to give more insight in his reasoning and motives in cases of retroactivity.

127 Grandfathering means, in short, that the old rule remains (temporarily) applicable to certain situations.

128 Cf. M. Pauwels, 'Retroactive and retrospective tax legislation: a principle-based approach; a theory of "priority principles of transitional law" and "the method of the catalogue of circumstances"', in H. Gribnau & M. Pauwels (eds.), *Retroactivity of tax legislation*, Amsterdam: IBFD, 2013 (forthcoming).

129 In contrast to Acts of Parliament, the courts are allowed to examine subordinate legislation (i.e. not Acts of Parliament; thus, e.g., local legislation) 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.

130 *Kamerstukken I* (Parliamentary Papers) 1979/80, 15 516, no. 42g.

131 *Kamerstukken II* (Parliamentary Papers) 1988/89, 20 648, no. 7, p. 8.

9.3. The Government's commitment to legal certainty

In his capacity as a co-legislator, the State Secretary seriously engaged in this dialogue by publishing – and discussing with Parliament – a memorandum.[132] This memorandum sets out the main lines of his 'transitional policy' with respect to the introduction of tax statutes. This memorandum is a kind of soft law instrument, for it sets out a commitment without legally binding force.[133] The State Secretary commits himself to certain rules of conduct when considering the use of retroactive legislation. The memorandum is a self-binding commitment according to which the State Secretary commits himself to these rules of conduct. He can be called by Members of Parliament and external stakeholders – such as the Council of State and tax scholars – to account for his deviation from the policy set out in this document. Thus this memorandum aims at, and may lead to, some practical effect or impact on the tax legislature's behaviour. Indeed, although the memorandum is not legally binding, it is influential in the parliamentary debate, for example, in the event that a bill includes retroactive effect. The State Secretary and Parliament discuss the temporal effects of the bill in terms of this memorandum. Furthermore, lower courts and Advocates General at the Supreme Court sometimes refer to the memorandum when testing the transitional rules of a statute for compatibility with Article 1 First Protocol ECHR. Also, in the tax literature the memorandum is used to discuss the fairness of the transitional rules included in a bill.

The memorandum sets out as the starting points of tax transitional policy that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect – without grandfathering. The memorandum consists of two parts. The first deals with (formal) retroactivity. The second part deals with immediate effect and grandfathering – thus, also with the issue of material retroactivity (retrospectivity).

The memorandum is especially focussed on changes in legislation that are disadvantageous for taxpayers. It pays no attention to the topic of granting retroactive effect to tax statutes that are favourable to taxpayers.

In the first part of the memorandum it is stated that the question whether or not retroactivity is justified is a matter of balancing the interests involved: on the one hand, the legal certainty of the individual taxpayers concerned and, on the other, the interests of society as a whole that are served by granting retroactive effect to the statute concerned. Whether or not retroactivity in a concrete case is justified cannot be answered in general but depends on the circumstances of the case. However, 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.

With respect to the 'substantive element' the memorandum mentions several relevant circumstances and factors that could justify retroactivity and/or that should be taken into account. Most of these circumstances have in common the absence of legitimate expectations. Therefore, a change of tax legislation is foreseeable, i.e. there is no violation of legal certainty. In brief, these circumstances are:

- the new statute targets abuse or the improper use of tax rules;
- there is an obvious omission in the existing legislation;
- announcement effects would occur after the publication of the bill if no retroactive effect is granted;
- the Government's budgetary interest;
- practical aspects regarding the implementation and execution of the tax legislation by the tax authorities.

With respect to the 'timing element' the memorandum states that the retroactive effect should in principle not reach further back in time than the moment at which the taxpayers have been informed about the intention to introduce a new statute. This latter moment is, e.g., the moment at which a bill is submitted to Parliament or the moment at which a press release is issued in which the intention to introduce a new statute with retroactive effect is announced. However, retroactivity could also be

132 Cf. H. Gribnau & M. Pauwels, 'Netherlands: National report', in Gribnau & Pauwels , supra note 128.
133 Cf. L. Senden, *Soft Law in European Community Law: Its Relationship to Legislation*, Oxford: Hart Publishing, 2004.

justified if the amendment concerned is 'otherwise' foreseeable, e.g. in the case of an obvious omission. Furthermore, if there are very weighty arguments, the retroactive effect could even reach further back in time than the moment on which the regulation concerned was foreseeable for taxpayers. According to the memorandum, such arguments could be very big budgetary interests of the Government or avoiding a small group of taxpayers from obtaining an unintended and unjustified advantage.

The second part of the memorandum points out that the question whether a statute should have immediate effect (without grandfathering), or should provide for grandfathering, is (also) a case of the balancing of interests. These interests are the legitimate expectations of the taxpayers and the interest that is served by the statute concerned. In comparison with the first part (regarding retroactivity), the second part gives less guidance with respect to the circumstances and factors that should be taken into account when balancing the interests concerned.[134] It is particularly regretful that little attention is given to the question when expectations raised by the existing law can be considered 'legitimate'. Furthermore, it would have been helpful if the memorandum had provided examples of situations in which grandfathering is considered appropriate. Most of the examples provided refer to situations in which grandfathering is not regarded as appropriate (according to the memorandum), which is obviously less informative as it is in line with the transition's starting point of immediate effect without grandfathering.

10. Summary

Fundamental legal principles may function as a check on legislative power protecting citizens against arbitrary interferences 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 the most important judicial instrument to check seriously flawed tax legislation. Acts of Parliament are tested against international treaties (Art. 14 ECHR, in conjunction with Art. 1 of Protocol No. 1, and Art. 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 carefully. 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.

My analysis of several issues concerning the principle of equality in Dutch tax law which the Court has dealt with shows that the Dutch Supreme Court has 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 my 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. The constitutional dialogue between the legislator and – the tax division of – the Dutch Supreme Court revolving around the principle of equality thus shows a fair amount of subtle details, such as the differentiation between fundamental and technical distinctions and the idea of a *terme de grâce*. Thus, the Court tries to convince the legislator to take the principle of equality more seriously, but its dialogical steps are very cautious and

134 The memorandum mentions factors that are relatively abstract, such as the nature of the new regulations, the nature of the old regulations, the degree of reality of the expectations, the extent of the breach with the old law by the new regulations, whether the change to the statutes was foreseeable, and whether positions taken up under, and relying on, the old law can be changed.

for the greater part negated by the legislator. The legislator does not seem to be really interested in any dialogue. 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 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.

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.