



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Restricting the Legislative Power to Tax

J.L.M. Gribnau & R.H. Happé*

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

Nothing of value – not life itself – could go without taxation¹

1. Introduction

While legal scholars often view taxation as a technical area of law reserved to the specialized scholars and practitioners, constitutional restrictions on taxing power offer an opportunity for more generalized theoretical debate in an area with broad practical impact. Clearly, constitutional and statutory restrictions may affect 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.² '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'.³ The basic principle of representative democracy – no 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.

The rule of law aims at protection against arbitrary interferences. Part of the ideal of the rule of law is the idea of government *per leges*. Government must function through laws, i.e., through general and abstract norms rather than specific and concrete decrees. Laws cannot refer to one particular person or case. The abstract, general, and impartial character of the legislative process attributes to a certain degree of rationality of law.

* J.L.M. Gribnau is Senior Lecturer in Tax Law at Tilburg University. R.H. Happé is Professor of Tax Law at Tilburg University. The authors wish to thank Ineke Sijtsma for patiently correcting the English spelling and grammar.

¹ Kateb 1992, p. 21.

² Cf. Article 1 of the First Protocol to the European Convention on Human Rights.

³ Sajó 1999, p. 159.

General and abstract laws, which set out the conditions of the encroachment upon the liberty of the citizens, are supposed to promote certainty and equality. By nature, the law must be general, and not any kind of individual command. The capacity of law to promote equality stems from this formal characteristic of law, viz., the nature of the general norm as one which applies not just to an individual but to a class of individuals and which can even be formed by all the members of a social group.⁴ Furthermore, 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. The legislator, therefore, cannot inject whatever content it supposes to be right into the positive law. Since taxation has become a very important instrument of national governments for large-scale social (redistributive), 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.

In Dutch tax law, the principle of equality has been developed into the most important instrument of judicial review. 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 to the principle of legality in restricting the legislative power to tax. Nowadays, tax legislation provides fewer safeguards as regards general principles of justice such as legal certainty, equality, impartiality and neutrality. 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 legitimized legislature. Thus, the indispensable concept of checks and balances is kept alive in tax law. Of course, parallel to national judgments is a growing body of decisional law from the European Court of Justice (ECJ) interpreting the Treaty of Europe and limiting the power of the member states to formulate their own tax rules, even if those rules apply to their own citizens only. However, here we do not focus on the decisions of the ECJ.

In this contribution, we will start with a description of the fundamental protections of individual rights that exist under Dutch national law and the courts and administrative agencies and systems that have primary responsibility for protecting those rights. Next, we will describe the process for enacting tax legislation. Here, we will pay attention to the possible intervention of those courts and agencies in the legislative process for tax law proposals. Then, we will turn to the taxing power of decentralised authorities. After the legislative process, we will turn to the question: who may challenge tax laws on the basis that they conflict with fundamental rights? We will give an outline of the objection and appeal procedures available. Next, we will analyse the way in which the principle of equality restricts the legislative power to tax. In this context, we will discuss the different sources of the principle of equality in Dutch constitutional law and the (still) existing ban on constitutional review. With regard to the actual testing of tax legislation, we will draw attention to the method of judicial interpretation. Then we will turn to the case law concerning the principle of equality in Dutch tax law, focusing on several issues the Dutch Supreme Court has dealt with. Here we will draw a parallel with the case law of the European Court of Human Rights. We will end with some conclusions.

⁴ Bobbio 1987, p. 143-144. Gribnau 1999, p. 3-8.

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.⁵ 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.⁶

The Constitution comprises a catalogue of classic and social fundamental rights, included in Chapter 1 (Arts. 1-23) entitled 'Fundamental Rights'.⁷ 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 safeguard 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, protection and co-determination of working persons (Art. 19) and means of subsistence and distribution of wealth (Art. 20). These provisions are instructions to 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 the 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.⁸ 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 with it. 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

⁵ Kortmann & Bovend'Eert 2000, p. 145.

⁶ EC legislation and ECJ rulings are a source of fundamental rights, because by virtue of their supra-national character, EC law automatically becomes 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.

⁷ Incidentally, there are provisions elsewhere in the Constitution which can be classified as fundamental rights. Article 114, for example, prohibits the imposition of the death penalty.

⁸ Van Dijk & Van Hoof 1998, p. 17.

generally binding rules.⁹ Consequently, the provisions relating to human rights in these treaties play a role in the judicial review 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 5).¹⁰

However, enforcing fundamental rights is not solely the task of the judiciary. In the Netherlands, because of the decentralised system of fundamental rights enforcement, all organs 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'.¹¹

Unfortunately, there is one exception to this principle. Acts of parliament may not be tested against the Constitution, for one of the legislature's prerogatives is to decide upon the question of whether a statute violates any fundamental right. 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 respect to the legal protection, therefore, treaty rights have added value.

Individual complaints about alleged violations of treaty rights may be lodged with the appropriate international bodies, in particular the European Court of Human Rights and the UN Commission on Human Rights.¹² However, an application may only be submitted after the individual has exhausted the domestic remedies (see section 4).

In passing, we draw attention to a fundamental element of the idea of the rule of law, i.e., the requirement to exercise power via general legislation. This requirement of general legislation serves as an important safeguard against arbitrary interferences with individual rights and liberties by the public authorities. As regards tax matters, the principle of legality is entrenched in the Dutch Constitution. Article 104 states that taxes imposed by the State must be levied pursuant to an Act of Parliament (*uit kracht van een wet*). Other levies imposed by the State must be regulated by an Act of Parliament. Article 104, therefore, does not cover taxation by lower legislative authorities.

Delegation or transfer of legislative power in the tax field is possible, but only to a limited extent. This is indicated by the use of the phrase 'pursuant to an Act of Parliament'.¹³ In case of delegation, the essential features of the tax, in particular who and what is liable to be taxed and the tax rate, must be laid down in an Act of Parliament.

3. Legislative Process

According to Article 81 of the Constitution, the power to enact Acts of parliament (*wetten in formele zin*) rests with the government and the States General jointly. Both may initiate towards legislation. The procedure for enacting Acts of parliament varies

⁹ The Netherlands has also ratified the UN Covenant on Economic, Social and Cultural Rights and the European Social Charter. It is assumed, however, that, with a few exceptions, these provisions are not binding on all persons. See Kraan 2004, p. 599.

¹⁰ See Gribnau & Saddiki 2003, p. 82 et seq.

¹¹ Kraan 2004, p. 601.

¹² In practice, though, the majority of the proposals are introduced by the government, while the percentage of success for government proposals is also considerably higher than that of the proposals presented by parliament.

¹³ Kortmann & Bovend'Eert 2000, p. 175.

depending on whether a bill is presented by the government or by the Lower House of Parliament.¹⁴ The general procedure is as follows.

A proposal initiated by the government is prepared by civil servants in a ministry or several ministries jointly. During the preparatory stage, the representatives of social groups, e.g., employers' organisations and trade unions and experts are usually consulted.

The government may also ask the Supreme Court to give advice or information, according to Article 74 Judiciary Organisation Act (*Wet op de Rechterlijke Organisatie*), which, however, does not occur very often. If government does so, the Supreme Court is obliged to give advice or information. The same holds for the Procurator-General, the head of the Public Prosecution Service (Art. 120 Judiciary Organisation Act).¹⁵ The proposal is discussed, together with the accompanying Explanatory Memorandum, in the Council of Ministers. Then the bill, together with the authorisation of the King, goes to the Council of State (*Raad van State*) for advice (Art. 73 of the Constitution).¹⁶ Following this, the bill is brought before parliament, i.e., the Lower House, together with the explanatory memorandum. At the same time, the advice of the Council of State is published. This advice, together with the ministers' answers to the Upper House's questions, is laid down in a further report to the King.

The Lower House considers the bill in a committee before it is discussed in a plenary session. The committee presents one or more reports, to which the Minister gives a written answer where necessary. In principle, the plenary discussion starts with two rounds of general deliberations, after which the individual sections and the preamble of the bill are debated. Amendments can be made, which are discussed with the bill and put to the vote. If the (amended) bill is rejected, that is the end of the bill. The ministers may amend the bill at any stage up to the moment of the vote. The members of parliament may also propose amendments.

If a bill is approved by the Lower House, it is sent to the Senate. Again, it is examined by the relevant committee before the Senate starts discussing it at a public plenary meeting. The Senate does not have the right of amendment nor can it send back the bill to the Lower House; it can only accept or reject a bill. The government may withdraw a bill as long as the Senate has not voted on it (Art. 86 of the Constitution). After a bill has been passed by the Senate, the King must ratify it (Art. 87). This ratification makes the bill an Act of Parliament. It is extremely rare for this ratification to be refused (the ministers bear responsibility for such a refusal). After its publication in the Official Gazette (*Staatsblad*), the Act enters into force at a time to be determined by or pursuant to the statute.¹⁷ 'The average time for getting a bill passed by parliament is fairly long, partly because of the unlimited validity of bills that have been introduced; it usually takes several years to get a bill of some

¹⁴ In some cases, the Constitution precludes the possibility of parliament taking the initiative, *viz.*, for certain decisions concerning the King and the General Budget Bills.

¹⁵ The Council for the Judiciary advises government and the States General in policy matters relating to the administration of justice (Art. 95 of the Judiciary Organisation Act). This council is an organisation for the operational and administrative managements of the courts and is responsible for the allocation of budgets. Furthermore, it may give the Minister of Justice, at his request, the information required for the exercise of his duties (Art. 105 of the Judiciary Organisation Act). See Kraan 2004, p. 632.

¹⁶ Here, one should also read Article 15, Council of State Act (*Wet op de Raad van State*).

¹⁷ Article 7 of the Publication Act (*Bekendmakingswet*) provides that an Act which does not contain a provision to the contrary shall enter into force on the first day of the second calendar month after the date of publication.

magnitude passed by parliament'.¹⁸ A notable exception was the Personal Income Tax Act 2001 (*Wet op de Inkomstenbelasting 2001*), which was adopted within a year. Apart from that, it seems that tax proposals take less time to be approved, one of the main reasons being the budgetary effect involved.

Parliamentary bills are treated in the same manner as government bills. Only the Lower House has the right to propose bills (Art. 82 of the Constitution). Every member of the Lower House can lodge an initiative. Government tends to involve itself only to a moderate extent in the discussion of parliamentary bills in parliament. After its approval by the Senate, the bill is considered in the Council of Ministers. After ratification by the King, the Act of Parliament is published.

In practice, government plays a pre-eminent role in the legislative process. Most Acts of Parliament are the result of government initiatives. Because most legislative proposals pass parliament without essentially being changed, government determines the content of Acts of parliament to a large extent.¹⁹ This also holds for tax legislation. Here, the State Secretary (*staatssecretaris*) of Finance plays a pivotal role. In his capacity of co-legislator, he is responsible for the continuous initiating activity of government in tax matters.

The increasing amount of legislation is partly due to the efforts of the tax legislator striving for effective and timely control of the growing complexity of society. Tax avoidance, for example, often leads to detailed legislation and may even lead to an 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.²⁰ 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'.²¹

The State Secretary of 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, the State Secretary of Finance is not only co-legislator but also head of the tax administration. 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.²² Besides, the tax administration has an interest in legislation without many technically sophisticated provisions. Simple legislation is a blessing for the tax inspector. As a result, tax legislation provides fewer safeguards with regard to general principles of justice like legal certainty, equality, impartiality and neutrality.²³

¹⁸ Kraan 2004, p. 623. See also Besselink 2004, p. 87 et seq.

¹⁹ Cf. Kortmann & Bovend'Eert 2000, p. 124.

²⁰ Gribnau 2003.

²¹ See, e.g., *Kamerstukken II* 1997/98, 25 810, nr. 2, p. 34-35.

²² Cf. Gearty 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'.

²³ Gribnau & Happé 2005, p. 131.

4. The Taxing Power of Decentralised Authorities

In the Netherlands, several layers of government exist in addition to central government.²⁴ There is no hierarchical relationship between central government, on the one hand, and the decentralised authorities, on the other hand. The lower public bodies are autonomous public institutions with their own legal personality. There are several kinds of decentralised authorities. Here, territorial decentralisation and functional decentralisation are to be distinguished. Like central government, territorial decentralised authorities, i.e., the provinces and municipalities, possess general rule-making and administrative powers. Conversely, functional decentralised authorities represent particular interests. As such, their administrative and rule-making powers are connected with particular matters. Here, with respect to taxation, we should mention the water boards (*waterschappen*), their historical tradition dating back to the Middle Ages.

With regard to legislative powers of decentralised authorities, the provinces and municipalities possess the competence to issue bye-laws (*verordeningen*). The Constitution attributes legislative power to the organs of lower public authorities: provincial states (*provincial staten*) and municipal councils (*gemeenteraden*); Article 127. With respect to taxes, the kind of tax and the competence of the administrative organs of provinces and municipalities to levy taxes are to be regulated by Act of Parliament (Art. 132, paragraph 6 of the Constitution). The Provinces Act (*Provinciewet*) and the Municipalities Act (*Gemeentewet*) contain the basic provision with regard to the (autonomous) authority to issue bye-laws. These bye-laws may not conflict with higher rules, e.g., the Constitution or Acts of parliament.

However, water board taxes are not explicitly mentioned in the Constitution.²⁵ The legislative power of water boards to levy taxes is based on Article 133 of the Constitution that deals with the powers of these boards in general. It goes without saying that the bye-laws of water boards may not conflict with the Constitution and Acts of parliament.

With regard to what is liable to be taxed, municipalities and provinces are not allowed to levy taxes according to individual financial capacity, be it income, profit or wealth (Art. 219, paragraph 2 of the Municipalities Act and Art. 221, paragraph 2 of the Provinces Act). According to the explanatory memorandum, this prohibition of municipal taxation, which is based on the ability to pay principle, not only regards the rate of the taxes, but also other elements, e.g., exemptions, in the tax bye-law which determine the amount of taxes.²⁶ The use of the ability to pay principle in municipal taxation would thwart the income policy of the central government.

The water boards have the legislative power to levy taxes which are related to the task of the water board, notably the protection of the polder and the water management of it. The taxpayers have an interest in these activities of the water board. Consequently, also the measure of interest in or profit of the taxpayer is, to a certain extent, relevant for the amount of tax to be paid.

5. Challenging Tax Statutes: Objection and Appeal Procedures

Taxpayers can challenge tax statutes without being obliged to enlist the support of an administrator or administrative agency in order to advance the challenge. They have a

²⁴ Kortmann & Bovend'Eert 2000, p. 43 et seq.

²⁵ Kortmann & Bovend'Eert, 2000, p. 176.

²⁶ See Monsma 1999, p. 77-78; Van der Burg *et al.* 2002, p. 39 and 266.

right to appeal an assessment or an order (decision) in court. Therefore, in order to challenge tax statutes by filing a suit against the tax administration, taxpayers do not depend on any kind of permission of the tax administration. There is no constitutional court in the Netherlands. Every individual, therefore, can go to an ordinary court with respect to a claim based on the violation of an international treaty, for example, the European Convention on the Protection of Human Rights and Fundamental Freedoms, but not with respect to a claim based on the Constitution. This is the case, as we will see in the next section, because of the ban on constitutional review: Acts of parliament are not tested against the constitutional principle of equality, but against the principle of equality of Article 14 ECHR and Article 26 ICCPR. Before describing this system of indirect constitutional review (section 6), we will first turn to the appeal procedure.

With regard to the legal framework of the appeal procedure, it is important to note the applicability of general administrative law in the field of tax law. General administrative law is the *lex generalis* and administrative tax law is the *lex specialis*. Tax law is part of administrative law, so the General Administrative Law Act (*Algemene wet bestuursrecht*) applies. This statute contains the uniform law of administrative procedure which applies to tax procedure. However, for tax procedures some provisions in the General Taxes Act (*Algemene Wet inzake Rijksbelastingen*) contain exceptions – in favour of the tax administration.²⁷ These exceptions have decreased in the past ten years.

An important part of general administrative law are the general principles of proper administration. These general principles of proper administration, which have been developed in case law, protect people against illegitimate government intervention – in addition to the principle of legality. Government, including the tax administration, has to take these principles into account in applying tax legislation. Note that a taxpayer invoking a principle of proper administration, e.g., the principle of equality or the principle of legitimate expectations, does not challenge tax legislation itself, but the way the tax inspector applies a tax statute.

Taxpayers can appeal to an independent judge.²⁸ However, before lodging an appeal, the taxpayer has to object to the tax inspector.²⁹ Without an objection, no appeal is possible. The objection procedure is an ‘administrative phase’ which implies a possible revision of the assessment rule. Within six weeks of the date of the assessment, the taxpayer may file a notice of objection with the inspector. As a rule, if a taxpayer lodges an objection, tax collection is suspended. However, the financial consequences are limited because the taxpayer or the tax administration has to pay interest, depending on which of the two parties is successful. The objection must be sent to the tax administration that made the disputed assessment (itself). There is a regulation that provides for a hearing of the taxpayer at his request.³⁰ In most cases, the taxpayer will be heard. Unfortunately, there are no sanctions against the tax inspector if he refuses to apply the obligation to hear. Officially, a different person from the one who raised the assessment must treat the objection but, in practice, this regulation is often ignored.

The taxpayer may appeal to a District Court against a decision on an objection. The Dutch adjudication in tax law is conducted by independent and expert judges.

²⁷ Especially Articles 25 and 26 of the General Taxes Act.

²⁸ See also Sommerhalder & Pechler 1998, p. 310 et seq.

²⁹ Article 8:1 read in conjunction with Article 7:1 of the General Administrative Law Act.

³⁰ Article 25, paragraph 4 of the General Taxes Act read with Article 7:2 of the General Administrative Law Act.

The judges of the Tax Divisions of the courts have specific expertise in the field of taxation. The Tax Division is part of the Administrative Division in the District Courts (*rechtbanken*). All seventeen District Courts have a tax division, but only five of them are competent in matters relating to state taxes. All the courts are competent for the provincial, municipal, and water board taxes. They have territorial jurisdiction. These courts of first instance deal with questions of fact and law. The term for appeal is six weeks. Taxpayers have to pay court fees.

An important issue here is the equality of arms principle: the taxpayer and the tax inspector are in the same position in the trial. After the taxpayer has lodged his appeal, the tax inspector loses his power to request information.³¹

Judgments of the administrative court in first instance may be appealed to the Tax Division of the Courts of Appeal (*gerechtshoven* – there are five Courts of Appeal, which have territorial jurisdiction). Both the taxpayer and the tax inspector may appeal to the Court of Appeal. Like the courts of first instance, these courts deal with questions of fact and law.

Both the taxpayer and the tax inspector may appeal to the Supreme Court (*Hoge Raad*) against a decision of a Court of Appeal. This appeal in cassation may be lodged with the Tax Division of the Supreme Court. Note that the Supreme Court judges only the law; not the facts. Here, the Advocate General has a right to state his opinion on the case.

These ordinary provisions and procedures apply to taxpayers who challenge tax laws on the basis that they conflict with fundamental rights. The Dutch courts exercise *a posteriori* control *in concreto* with respect to the compatibility of the Acts of parliament with the constitutional equality principle. Therefore, the statutory rule is considered in the actual context of a specific case. The concrete judicial control procedure arises out of an ordinary law suit ('concrete norm control').³²

Thus, taxpayers can appeal to national judges to challenge a violation of the principle of equality, especially the principle of equality of Article 14 ECHR and Article 26 ICCPR. In the next section, we will elaborate on the ban on constitutional review, because of which Acts of parliament are not tested against the constitutional principle of equality, but against the principle of equality of Article 14 ECHR and Article 26 ICCPR.

6. Fundamental Legal Principles and the Testing of Tax Legislation

6.1. The Ban on Constitutional Review

In contrast to the idea of checks and balances, the Dutch Constitution contains a provision which prohibits judicial (constitutional) review: the courts are not allowed to test Acts of parliament and international treaties against the Constitution.³³ 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. Article 120 of the Constitution reads as follows: 'The constitutionality of Acts of parliament and treaties shall not be reviewed by the courts'.

However, in April 2002, a memorandum was sent to the two Houses of the States-General in which the issue of reviewing constitutionality was discussed. In the same month, MP Halsema put forward a bill in Parliament in order to mitigate the ban

³¹ HR (Dutch Supreme Court) 10 February 1988, *BNB* 1988/160.

³² Gribnau & Saddiki 2003, p. 85 et seq.

³³ For a dynamic model of the separation of powers (and checks and balances), see Gribnau 1999, p. 24 et seq.

on constitutional review. The bill proposes to add a paragraph to the present text which prescribes that ‘Acts of parliament will not be applied if application is not compatible with the classic fundamental right enshrined in the Constitution’. If this bill is passed, the courts will be allowed to test statutory (tax) laws against ‘classical’ constitutional rights. The social rights of Articles 16-23 will remain within the scope of Article 120. Consequently, the Dutch courts will then be able to test tax legislation against the constitutional principle of equality enshrined in Article 1 of the Constitution.

For the time being, however, Article 120 contains a(n) (absolute) ban on constitutional review. This means that only the legislature can assess whether or not it has remained within the limits set by Article 1 of the Constitution.³⁴

The Supreme Court has reaffirmed this ban on judicial review in its case law. In its fundamental Harmonisation Act judgment, for example, the Supreme Court answered the question of whether courts of law were permitted to examine the Student Finance Act (*Harmonisatiewet*) of 7 July 1977, Bulletin of Acts and Decrees 334, for compatibility with fundamental principles of law in the negative. The Court argued that the ban on judicial review in Article 120 of the Constitution prohibited such examination of legislation.³⁵

This constitutional ban on testing only applies to Acts of parliament and international treaties. Thus, the Supreme Court can test subordinate legislation, such as ministerial regulations and bye-laws of lower government bodies, against the principle of equality. It can do so on the basis of the unwritten principle of equality, as well as on the basis of the principle of equality in Article 1 of the Constitution. The Court formulated its argument as follows:³⁶

‘No legal rule prohibits a court from considering a generally binding regulation, not promulgated by the government and the States General jointly ... non-binding in the event of a violation of the general principles of law, including the principle of equality’.

As a result, when administrative decisions based on bye-laws are disputed, the (Tax Divisions of) administrative courts may be called upon to adjudicate the binding nature of these bye-laws.³⁷ The courts may test decentralised tax legislation for compatibility with fundamental rights, especially, fundamental principles of law, such as the already mentioned principle of equality, but also the principle of legal certainty.³⁸ Thus, tax bye-laws of decentralised authorities, the provinces and municipalities, and water boards are subject to judicial review.

As regards Acts of parliament, the courts do not have this competence. The ban in Article 120 of the 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:

³⁴ See, for example, HR 21 March 1990, *BNB* 1990/179; and HR 23 December 1992, *BNB* 1993/104.

³⁵ HR 14 April 1989, *Harmonization Act Judgment (Harmonisatiewetarrest)*, *NJ* 1989, 469.

³⁶ HR 1 December 1993, *BNB* 1994/64.

³⁷ Cf. Besselink 2004, p. 118.

³⁸ HR 7 October 1992, *BNB* 1993/4.

‘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 goes for Acts of parliament as well as for generally binding rules. If treaties contain principles of law, the Court 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 Court to test Acts of parliament against the principle of equality. Since the Darby case, Article 1 of Protocol No. 1 to the Convention in conjunction with Article 14 of the Convention gives the same opportunity by testing Acts of parliament by the Court.

Thus, the ban on the testing of Acts of parliament against the Constitution does not apply in practice. Article 94 of the Constitution obliges the Court to test Acts of parliament against the equality principle of these international human rights treaties. The result is 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 constitutional courts of its continental neighbours in reviewing the constitutionality of statutes.³⁹ As we will see, this also holds for the testing of tax legislation.

6.2. *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 (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 ratification of the ICCPR was 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.⁴⁰ 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 Committee⁴¹ in *Broeks v Netherlands* made this broad scope of Article 26 clear.⁴²

³⁹ Koopmans 2003, p. 84.

⁴⁰ Happé 1999, p. 130.

⁴¹ The Committee was set up pursuant to Article 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).

⁴² United Nations Human Rights Committee 9 April 1987, No. 172/1984, RSV 1987, 245 (*Broeks v Netherlands*).

In a decision of 27 September 1989, the *Dentist's Wife* judgment,⁴³ the Supreme Court endorsed this independent character as regards tax law by dismissing the view of the Court of Appeal that Article 5 of the Personal Income Tax Act 1964 did not contain any provisions on issues regulated in the Covenant.⁴⁴

In 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.⁴⁵ However, Article 26 of the Covenant offers considerably more scope, and it also includes issues of tax law.⁴⁶

Another important characteristic of Article 26 is its direct effect. This means that 'on the basis of its content, this treaty provision can be applied directly by a national court without first requiring further elaboration of that content by an international or internal body'. The Supreme Court concluded in its judgment of 2 February 1982⁴⁷ 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.

6.3. *Article 14 of the European Convention on Human Rights*

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

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

An important difference can be seen between the text of Article 14 and that of Article 26 of the Covenant. The principle of equality formulated in Article 14 of the Convention has an accessory character. This means that it is restricted to the rights and liberties laid down in the treaty. This is shown by the words 'set forth in this Convention' in Article 14.

The Darby case of the European Court of Human Rights of 23 October 1990 put the accessory character of Article 14 of the Convention in perspective in the field of tax law.⁴⁸ In the Netherlands, this case did not become known until 1995 when it was published in the tax case journal 'BNB'. In this case, the European Court 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. Article 1 of Protocol No. 1 to the Convention states the following:

⁴³ HR 27 September 1989, *BNB* 1990/61.

⁴⁴ This judgment concerns the old Personal Income Tax Act. Since 1 January 2001, the new Personal Income 2001, came into force in the Netherlands.

⁴⁵ See Wattel 1995.

⁴⁶ Happé 1999, p. 153.

⁴⁷ HR 2 February 1982, *NJ* 1982, 424.

⁴⁸ ECtHR 23 October 1990, No. 17/1989/177/233, *Darby v Sweden*, Series A, No. 187.

‘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’.⁴⁹

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. Thus, there are three legal sources of the equality principle, but the judiciary can only use two of them to check tax legislation.

6.4. *The Principle of Ability to Pay*

The Dutch Supreme Court, however, does not use the principle of ability to pay to test the law. This court does not read the principle of ability to pay as a general rule of taxation in the non-discrimination principle of Article 14 of the European Convention on Human Rights.⁵⁰ As Van den Berge suggests, the reason for this decision might be that the ability to pay principle cannot be regarded as the one and only rule by which taxes should be levied, because it can only be applied to the taxation of individuals. Even then, the principle provides only a vague indication of how personal taxes should be levied.⁵¹ Compared to the four roots of the principle in Germany, derived from several codified legal principles, the Dutch ability to pay principle does not seem to be specific enough to test the law against, it is not anchored well enough in the Constitution or an international treaty. Van den Berge rightly regrets this point of view because the social and economic situation in the Netherlands is quite comparable to Germany. One wonders what the reasonable justification is for the difference of treatment in the levying of taxes on a point like this.

⁴⁹ HR 12 November 1997, *BNB* 1998/22.

⁵⁰ HR 29 September 1999, *BNB* 1999/423.

⁵¹ Van den Berge 2003, p. 58 et seq.

7. The Principle of Equality: The Method of Judicial Interpretation

Now we will focus on the case law of the Dutch Supreme Court concerning the principle of equality. The principle of equality has a long tradition in Dutch fiscal law. As early as 1815, the Dutch Constitution contained a provision that no privileges regarding taxes could be conferred (Art. 198 Dutch Constitution (1815), lastly Art. 198 Dutch Constitution (1963)). When the Constitution was amended in 1983, the ban on privileges was removed. The Dutch legislator wanted to give the principle of equality a fundamental position in the Dutch legal order (in Art. 1 of the Constitution). A separate principle of equality for taxation was no longer considered necessary.⁵² Article 1 of the Constitution, therefore, implies a ban on tax privileges. Nonetheless, an important exception is to be found in Article 40, paragraph 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. In addition, anything received by the King or his heir presumptive from a member of the Royal Family by inheritance or as a gift shall be exempt from inheritance tax, transfer tax, or gift tax. Of course, this tax privilege could be abolished. It is, however, a matter of expediency; if the King was obliged to pay tax on his personal income, government would approximately double his income. So, it is six of one or a half a dozen of the other.

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 that is expressed in the *Dentist's Wife* case.⁵³ It contains all aspects of this method of judicial interpretation. This judgment shows that a violation of the principle of equality occurs when the two following requirements are met: the unequal treatment of equal cases and the absence of a reasonable and objective ground for unequal treatment. Below we will deal with these in more detail.

7.1. Unequal Treatment of Equal Cases⁵⁴

To be able to qualify discrimination in tax legislation, we should first turn to the matter, or rather the necessity, of classifications in law. To legislate is to discriminate: the legislature imposes special burdens upon or grants special benefits to special groups or classes (categories) of persons. These classifications imply inequality, because these special burdens or benefits of a law do not apply to all individuals. Here, the demand for equality is confronted with the right to classify. 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.

⁵² See Happé 1999, p. 125.

⁵³ HR 27 September 1989, *BNB* 1990/61.

⁵⁴ 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 (another) different feature. The discriminatory character resides in the fact that it is precisely this group of citizens who are affected by the regulation. See Happé 1999, p. 142 et seq.

The democratically legitimized legislature has this 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'.⁵⁵ 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.⁵⁶ 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.

Of course, cases are never completely equal. The occurrence of two completely identical cases is impossible in our world, if only because each case is situated at a different point in the coordinate system of time and space. Still, also in a legal context, it is practical to speak of equal cases. Equality, therefore, exists from a certain perspective.⁵⁷ In the case of tax legislation, the perspective is shaped by the purpose of that legislation or, more specifically, of a provision. The legal regulation propounds the equality of cases by attaching the same legal consequence to cases that share particular relevant features. They are relevant from the perspective of the legal regulation.

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.⁵⁸

In Dutch case law, the Dutch Supreme Court always has the same approach. The most famous case is the *Dentist's Wife* mentioned above. In this case, the question was whether the Dutch 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 from the fact that the incomes of the spouses were added up, whereas the incomes of the unmarried couples were not.

It is remarkable that, in a separate part of its considerations, the Dutch Supreme Court paid a great deal of attention to the legislative history of the legal provisions on which it was to judge. The intentions of the legislator are described in great detail. The Court accurately defines the purpose of the provisions. In later decisions, it has become clear that this is a constant element of the method of the Court. It is characteristic of the scrupulous way in which the Dutch Supreme Court applies the principle of equality.

⁵⁵ Tussman & tenBroek 1949, p. 344.

⁵⁶ Tussman & tenBroek 1949, p. 346. Cf. Gribnau 2003, p. 29 et seq.

⁵⁷ Cf. Happé 1999, p. 138.

⁵⁸ See Happé 1996, p. 41 et seq.

When the Dutch Supreme Court subsequently addressed the above-mentioned question, it stated that the legislator had been particularly aware of the fact that married people constitute an economic unit from a fiscal point of view and that adding up their incomes is justified by the circumstance that the financial capacity of a married couple is determined by the joint income. Further, the financial capacity of unmarried couples that actually have a long-lasting, non-marital relationship is also enhanced by their having a joint household. However, there are financial differences for married couples, for example, the obligation to pay maintenance in the event of a divorce. According to the Court, the legislator could reasonably have argued that married taxpayers and unmarried cohabitating taxpayers could not be considered to be in a similar situation in every way, and therefore it continued the system of adding up the incomes of spouses that had been in force since 1973 without being in conflict with the principle of equality. In short, in the light of the purposes of the regulation concerned the Dutch Supreme Court held that there was no relevant feature for adding up the incomes of unmarried couples. In other words, there was no unequal treatment of equal cases.

7.2. The Absence of Reasonable and Objective Grounds for Unequal Treatment

In the *Dentist's Wife* judgment, the Dutch 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.⁵⁹ 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 European Court of Human Rights (ECtHR) is important.⁶⁰ 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 reasonable relationship of proportionality between the means employed and the aim sought to be realized (principle of proportionality).

In a 1997 judgment, the Dutch Supreme Court stated that it had applied those conditions.⁶¹ 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’.

⁵⁹ Similarly, Article 14 ECHR lists a number of largely parallel factors.

⁶⁰ ECtHR 23 July 1968, *Belgian language issue*, Series A, no. 6, s. 10, p. 34.

⁶¹ HR 12 November 1997, *BNB* 1998/22.

The Dutch 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 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, application of the (second) condition of reasonable proportionality between the means and the aim is in line with what has been discussed just now. 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 Dutch 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.⁶² In terms of the U.S. doctrine concerning the principle of equality, the regulation was 'underinclusive'.⁶³

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.⁶⁴ Consequently, the Dutch Supreme Court followed the case law of the European Court in deciding the question of whether a justification existed for a distinction made by the legislator. The next aspect of the judicial process of deciding this type of cases shows a comparable influence of the Strasbourg court.

7.3. *Testing Tax Legislation of Decentralised Authorities, Municipal Councils and Water Boards*

With regard to generally binding laws of municipal councils, the case law of the Supreme Court shows the same method of judicial interpretation. It is worth mentioning that the Court also checks whether the municipal council did not violate its municipal power of levying taxes. The council must respect the boundaries of the attributed power, which are laid down in the Municipalities Act (see section 4).

This aspect of testing the boundaries also emerges in connection with the Water Boards. With regard to the testing against the principle of equality, the Supreme Court has stated that the division of the polder area in different classes is in conformity with the principle if it happens in a reasonable way.⁶⁵ This implies a considerable discretion for the Water Boards.

8. A Wide Margin of Appreciation for the Tax Legislator

Right from the start, the Dutch Supreme Court case law concerning the principle of equality has followed the case law of the ECtHR. In one of its first judgments, the Supreme Court explicitly stated that one of its points of departure is:

⁶² Articles 23 and 26 of the General Taxes Act were amended by Act of Parliament of 12 May 1993, in conformity with the Supreme Court judgment in *BNB* 1990/61.

⁶³ See Happé 1996, p. 362 et seq., and Gribnau 2003a, p. 30 et seq.

⁶⁴ Recently, HR 26 March 2004, *BNB* 2004/201.

⁶⁵ HR 15 December 1999, *BNB* 2000/112, and HR 22 October 2004, *BNB* 2005/25.

‘that the legislator is entitled to some latitude in answering the question of whether cases must be considered similar for the application of the treaty, and, if so, whether an objective and reasonable justification exists to nevertheless regulate those cases differently’.

A similar acknowledgement can be found in the case law of the ECtHR. In the *Lithgow* judgment of 8 July 1986, the Court observed:

‘The contracting states enjoy *a certain margin of appreciation* (our italics, RH/HG) in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law’.⁶⁶

However, more recently, in its 1999 *Della Ciaja* judgment the European Court of Human Rights permitted the member states *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’.⁶⁷

The European Convention on the Protection of Human Rights and Fundamental Freedoms, therefore, does permit considerable room for deference by the courts to the views of the tax legislator.

The Dutch 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.⁶⁸ By following this line, the Court underlines its attitude of judicial constraint explicitly. Recently, the Supreme Court has added a nuance. It has stated that the Court will respect the legislature’s assessment in tax matters unless it is *devoid of reasonable foundation*. It derives this formula from a judgment of the ECtHR, the case *M.A. and others against Finland*.⁶⁹ This judgment of the ECtHR was not about the principle of equality, but about the applying of a retrospective tax law. Furthermore, we prefer the Dutch Court should use the more accurate criterion ‘not manifestly illogical or arbitrary’. This one was used by the European Court in the *Della Ciaja* judgment. It fits better to the state of the case law of the Dutch Supreme Court concerning the equality principle. 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.

However, the Supreme Court also recognizes a threshold. Recently, 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

⁶⁶ ECtHR 8 July 1986, *Lithgow*, Series A, nr. 102, p. 66, par. 176.

⁶⁷ ECtHR 22 June, 1999, Appl. No. 46757/99, *Della Ciaja/Italy*, BNB 2002/398. See Van den Berge 2003, p. 58-59.

⁶⁸ HR 12 July 2002, BNB 2002/399-400. Incidentally, in our opinion the Dutch Court always adopted a very constraint attitude towards the legislator; in so far, the adapted formula does not actually imply a change of attitude by the Court.

⁶⁹ ECtHR 19 June 2003, no. 27793/95, V-N 2003, 52.2.

inequality or disproportionality is avoided in every thinkable situation.⁷⁰ Especially considerations of feasibility or the wish to prevent abuse of the law are relevant in this context. The Supreme Court has explicitly accepted these considerations as grounds justifying an unequal treatment. Also, in a few earlier judgments, the Court has 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.⁷¹

The Supreme Court has also put up another barrier. This second category can be characterized by the expression '*de minimis non curat lex*', the law does not concern itself with trifles. In case the discrimination under review concerns a rather little 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.⁷²

9. Fundamental Rights and Technical Distinctions

As mentioned above, the Court allows the legislator a wide margin of appreciation in the fiscal field. On the whole, we consider this is a correct point of view. Tax laws are characteristically technical. 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) and 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.

Only a few cases touch upon a fundamental aspect. Before giving a survey of these judgments, we have to make an important preliminary remark. One should be aware that the Dutch Supreme Court can not test laws, being Acts of parliament, against the principle of ability to pay. The ban in Article 120 of the Constitution prevents this. Because the principle of ability to pay is not laid down in an international treaty, the Court is not allowed to test statutes against this principle.⁷³ The Court also decided that the relationship between the principle of ability to pay and the principle of equality was not as strict such that causing a discrimination forbidden by Article 26 ICCPR had to be concluded to. This case concerned an interesting element of the income tax. In the structure of the tax rates, the necessary costs of living of children had not been adequately taken into account. As a result, there are no cases of the income tax being tested against specific aspects of the principle of ability to pay in Dutch tax law. This brings us to the notion of vertical equality, which implies that taxable subjects with a different financial or economic capacity must be taxed differently.⁷⁴ Because the Dutch Supreme Court does not test statutes against the principle of ability to pay, it also cannot test against the principle of vertical equality, which is an element of the former.

⁷⁰ HR 10 June 2005, *BNB* 2005/319.

⁷¹ HR 16 September 1992, *BNB* 1993/21, HR 15 December 1999, *BNB* 2000/57 and HR 10 June 2005, *BNB* 2005/319.

⁷² HR 17 November 1993, *BNB* 1994/36, HR 15 July 1998, *BNB* 1998/293 and HR 12 May 1999, *BNB* 1999/271.

⁷³ HR 29 September 1999, *BNB* 1999/423.

⁷⁴ See, e.g., Birk 2003, p. 45.

Mutatis mutandis, with regard to Dutch Value Added Tax, there have been no challenges on the basis that it violates notions of vertical equality. Consequently, the degressive effect of the proportional rates of VAT, especially with regard to very low incomes, is not within the reach of the Supreme Court.

9.1. *Testing of Fundamental Aspects*

In Dutch tax case law, only two fundamental aspects have been under discussion until now. 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.⁷⁵ The other case involved the regulation regarding 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.⁷⁶ Both statutory provisions have been changed relatively shortly after the lawsuits.

This case law is an illustration of the fact that the Supreme Court allows the legislator relatively little margin of appreciation. Both judgments affected the fundamental right of access to court. In such cases, the Court has to do a close scrutiny, just because of the right involved. From the point of view of the legal protection of the individual, we consider this case law appropriate. In our opinion, the fundamental nature of these cases differ 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 live together. Married people experienced certain financial disadvantages. In the *Dentist's Wife* judgment the court decided that the income tax was not discriminatory, because the two cases, being married and not being married, were not equal. Married people formed a stronger social and economic unity. Like in many other democratic countries, the social views about marriage and not being married, but living together, have fundamentally changed in the Netherlands. The Dutch tax legislator has followed these changes in social views. For example, in 1998, the so-called registered partnership of non-married people had been equated with marriage.

The Personal Income Tax Act 2001 goes even further.⁷⁷ People who have not registered their partnership, but who live together, can also opt to be treated like

⁷⁵ 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 from married couples.

⁷⁶ HR 30 September 1992, *BNB* 1993/30.

⁷⁷ When the Personal Income Tax Act was introduced in 2001, the wealth tax was abolished. The latter was replaced by a fictitious income of 4% on private property, i.e., savings and investments, in the new income tax (taxed at a rate of 30%).

married people and registered partners.⁷⁸ These partners are permitted to share joint income (e.g., their taxable income from an owner-occupied dwelling, splitting mortgage interest deduction, child care expenses, taxable income from substantial participation, and the personal allowance) between them for their tax return. Of course, the law demands some conditions to be fulfilled, which must guarantee that the situations are more or less comparable in the relevant aspects. The most important conditions are having a joint household and having lived together for at least six months. As a result, these conditions being fulfilled, e.g., same sex (homosexual) couples enjoy the same tax benefits available to married couples or heterosexual unmarried couples. The same holds for a parent and an adult child or for other siblings or non-siblings who share one household. They can opt to be partners for tax purposes.

The Supreme Court has tested the legal provisions concerning the different treatment of married and unmarried people against the principle of equality several times, and never held any of them discriminatory. Interestingly, the case law of the Court reflects the above-mentioned social development, which had 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.⁷⁹ Clearly, in later case law, the Court saw more resemblances apart from the differences. Consequently, the resemblances becoming more dominant, the difference in treatment by the law had to meet the principle of proportionality.⁸⁰ 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 to married taxpayers as of 1998. As a result, according to the Court, this category of non-married taxpayers is treated completely equally for income tax.⁸¹

9.2. *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 to the essential goal of taxing, i.e., financing public expenditure, or is directed to other, non-fiscal goals. Dutch tax law contains all kinds of tax incentives, mostly in the form of tax reductions, e.g., for commuting by bike, employee training, day-care centres, the productions of Dutch movies, and so on.⁸²

Only in very evident cases has the Court decided technical distinctions in a tax statute to be discriminatory. The reason for that is the above-mentioned wide margin of appreciation (see section 8). It is important to realize that regulatory distinctions, also technical ones, always need an objective and reasonable justification. A distinction without justification is arbitrary and could not 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 can not be found, it

⁷⁸ For a comparison of the fiscal treatment of married and unmarried couples in several European countries, see Gribnau & Saddiki 2003, p. 96-98.

⁷⁹ HR 27 September 1989, *BNB* 1990/61.

⁸⁰ HR 15 December 1999, *BNB* 2000/57, and HR 21 February 2001, *BNB* 2001/176.

⁸¹ HR 15 December 1999, *BNB* 2000/57.

⁸² Cf. Gribnau 2003a.

will search for a justification elsewhere. If it finds one, it will relate it to the legal distinction.⁸³

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 made a mistake in 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 a *Fremdkörper* 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. 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.⁸⁴

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.⁸⁵

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.⁸⁶

The fundamental question involved is whether the legislator is allowed to make differentiation in its regime solely for budgetary reasons. Is it acceptable for taxation, encroaching upon citizens' property rights, to have a different impact on different categories of taxpayers without there being any justification, except for the budgetary aspect? This would mean that equal treatment of equal cases is ignored because the state would be deprived of too large a sum in revenues. In our opinion, the legislator does not have that freedom: it must choose between application of a regulation which is in conformity with the principle of equality and non-application of a regulation. The Supreme Court, too, appears to hold this opinion. The Court has stated:

⁸³ HR 14 June 1995, *BNB* 1995/252.

⁸⁴ HR 12 May 1999, *BNB* 1999/271. See also HR 15 July 1998, *BNB* 1998/293.

⁸⁵ 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 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.

⁸⁶ HR 17 November 1993, *BNB* 1994/36.

‘Budgetary problems do not constitute grounds for non-application of a regulation that is necessary to avoid discrimination as referred to in Art. 26 ICCPR’.⁸⁷

Naturally, the legislation of lower tax authorities has a technical character. The case law of the Supreme Court concerning these bye-laws has the same characteristics as described before, so there is no need for a separate description. However, in a few situations, the case law shows a specific aspect. An example is the case law concerning bye-laws of water boards. The Supreme Court has stated that both the division of taxpayers in categories (classes) and the division of the areas of the water board in these categories must be made in a reasonable way. If this is done, the principle of equality does not demand further equal treatment.⁸⁸ It exemplifies that the Supreme Court respects a very wide margin of appreciation concerning the water boards.

10. More Judicial Deference: A *Terme de Grâce*

The famous Aristotelian formulation that things that are alike should be treated alike while things that are unlike should be treated unlike in proportion to their unalikehood is a good starting point, but, as we have seen, it certainly does not resolve all the complex issues that arise. The next issue will be the remedy offered by the judiciary if it establishes a unjustified unequal treatment of equal cases. However, things will become even more complicated. For, having established unjustified discrimination, the judiciary again has to face the question of how it should respect the primacy of the democratically legitimized legislature in lawmaking. 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.⁸⁹ 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 judicial review, 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.⁹⁰ A restrained attitude of the judiciary in testing tax laws, therefore, is no threat to, but an enforcement of, democracy.

Here, we should draw attention to the fact that, in Dutch constitutional law, no provision exists like the famous ‘notwithstanding’ or legislative ‘override’ clause of section 33 of the Canadian Charter of Rights. This provision enables the Canadian legislatures to override specified sections of the Charter and the rights they protect, although only for a renewable period of five years.⁹¹ The absence of such a clause in

⁸⁷ HR 14 June 1995, *BNB* 1995/252.

⁸⁸ HR 15 December 1999, *BNB* 2000/112 and HR 22 October 2004, *BNB* 2005/25.

⁸⁹ Franklin & Baun 1995, p. 7.

⁹⁰ McLachlin 1999, p. 26.

⁹¹ See, e.g., Goldsworthy 2003, p. 263 et seq.

Dutch constitutional law may have contributed to the considerable restraint the courts show in offering the taxpayer a remedy at law once (unjustified) discrimination is established. As we will see in a moment, it is rare for the Dutch Supreme Court to decide in favour of the taxpayer. Without a legislative override clause as part of a broader constitutional scheme that encourages a ‘dialogue’ between legislatures and courts, the Court may see striking down laws because of violation with international treaties as an incompatibility of the principle of democracy. On the other hand, there is no provision in the Dutch constitutional system which enables the Court to postpone the effects of a nullification of a statute. Even so, there is no constitutional possibility to modulate the temporal effects of its judgments that strike down statutes that conflict with international treaties.⁹² As a result, the Dutch Supreme Court sometimes seems to bow to the judgments of the legislature, as we will now show.

The number of cases in which the Dutch Supreme Court has found discrimination is small, both absolutely and relatively.⁹³ The Supreme Court regularly motivates 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 technical distinction, the taxpayer does not stand much chance of winning the case. Nonetheless, the Dutch Supreme Court established unjustified discriminations in about fifteen cases.

If the Supreme Court establishes that there is 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 of Article 26 ICCPR or Article 14 ECHR over 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.

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 in 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 lawmaking 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 Dutch 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 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.⁹⁴ However, in exceptional cases the Dutch Supreme Court will decide immediately.

In the case of deliberately introduced discriminatory ‘naked preferences’⁹⁵ or deliberately maintained discriminations caused by lack of care in the legislative

⁹² On the Italian constitutional practice, see Rolla, & Groppi 2002, p. 152-153, also referring to the practice of the Austrian Constitutional Court and the German Federal Constitutional Court.

⁹³ See Gribnau & Happé 2005, p. 140-142.

⁹⁴ HR 12 May 1999, *BNB* 1999/271.

⁹⁵ ‘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 →

process, the Court may decide not to apply the discriminatory provision or to give a second chance to the legislature. The legislature may, of course, reject this judgment by overruling it through new legislation.

When the Dutch Supreme Court leaves it to the legislator how to resolve the unjustified discrimination, it expects the legislator to bring the legislation in accordance with the principle of equality in the short term (without mentioning a fixed term). Thus it grants the legislator a *terme de grâce*. The legislator is not obliged to introduce new legislation retroactively. 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.⁹⁶ 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. The importance of the effective legal protection of the taxpayer is sacrificed to the constitutional relationship between legislature and judiciary.

However, effective legal protection of the taxpayer is not always sacrificed. The Court draws the line where the legislator 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.

11. Conclusion

In this contribution, we 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, we described the process for enacting tax legislation, including the intervention of the courts and the Council of State and intermediary organisations in the legislative process for tax law proposals. Then we analysed the independent taxing powers of decentralised authorities. With regard to the outline of the procedure to challenge tax laws that conflict with fundamental rights, it was shown that the taxpayer has a right to advance the challenge. He can do so without the support of the tax administration.

The way in which the principle of equality restricts the legislative power to tax in the Netherlands was the subject of the rest of this paper. This fundamental principle is the most important judicial instrument to check seriously flawed tax legislation. The judiciary has the task to ensure the legislature's compliance with the principle of equality. Because of the (still) existing ban on constitutional review, Acts of parliament are tested against Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (in conjunction with Article 1 of Protocol No. 1 to the Convention) and Article 26 of the International Covenant on Civil and Political Rights.

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 method to decide whether a tax statute violates the principle of

that 'those favored have exercised the raw political power to obtain what they want'; Cass. Sunstein 1993, p. 25. Cf. Gribnau 2003, p. 30 et seq.

⁹⁶ HR 24 January 2001, *BNB* 2001/291 and 292.

equality is in conformity with the method applied by the European Court of Human Rights.

As for testing tax law against the principle of equality, the Dutch Supreme Court acknowledges the primary (wide) margin of appreciation of the legislator. This holds for judging the equality of cases as well as for judging whether there is an objective and reasonable justification for any inequality of treatment.

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 in line with the principle of equality in the short term.

Our analysis of several issues concerning the principle of equality in Dutch tax law which the Court has dealt with show 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 quality of the tax system. However, in our opinion, the room for deference by the Supreme Court to the policy views of the tax legislator should be more limited.

To conclude, the Supreme Court shows much deference with regard to the question of whether legislative discrimination is unjustified (wide margin of appreciation). This is also the case with respect to the elimination of the unjustified discrimination (*terme de grâce*).

References

Van den Berge 2003

Van den Berge, J.W., 'Equality; Applying the Principle of Non-Discrimination (Article 14 ECHR, Article 26 ICCPR)', in: Gribnau, J.L.M. (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague/London/Boston: Kluwer Law International, 2003, p. 55-64.

Besselink 2004

Besselink, L.F.M. (ed.), *Constitutional Law of the Netherlands*, Nijmegen: Ars Aequi, 2004.

Birk 2003

Birk, D., 'The Limited Impact of the Principle of Equality on Tax Law', in: Gribnau, J.L.M. (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague/London/Boston: Kluwer Law International, 2003, p. 45-54.

Bobbio 1987

Bobbio, N., 'The Rule of Men or the Rule of Law', in: Bobbio, N., *The Future of Democracy*, Minneapolis: University of Minnesota Press, 1987, p. 138-150.

Van der Burg et al. 2002

Van der Burg, M.P. et al., *Compendium Gemeentelijke belastingen* Deventer: Kluwer, 2002.

Van Dijk & Van Hoof 1998

Van Dijk, P. & Van Hoof, G.J.H., *Theory and Practice of the European Convention on Human Rights*, 3rd edition, The Hague/London/Boston: Kluwer Law International, 1998.

Franklin & Baun 1995

Franklin, D.P. & Baun, M.J., 'Introduction', in: Franklin, D.P. & Baun, M.J. (eds.), *Political Culture and Constitutionalism: A Comparative Approach*, Armonk/London: M.E. Sharpe Inc., 1995, p. 1-10.

Gearty 2001

Gearty, C., *London Review of Books*, London: Basil Blackwell, 2001.

Goldsworthy 2003

Goldsworthy, J., 'Judicial Review, Legislative Override, and Democracy', in: Campbell, T., Goldsworthy, J. & Stone, A. (eds.), *Protecting Human Rights: Instruments and Institutions*, Oxford: Oxford University Press, 2003, p. 263-279.

Gribnau 1999

Gribnau, J.L.M., 'General Introduction', in: G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law International, 1999, p. 1-33.

Gribnau 2003

Gribnau, J.L.M., 'Legal Principles and Legislative Instrumentalism', in: Soeteman, A. (ed.), *Pluralism and Law, Volume 2: State, Nation, Community, Civil Society, Archiv für Rechts- und Sozialphilosophie, Beiheft 89*, Wiesbaden: Franz Steiner Verlag, 2003, p. 33-43.

Gribnau 2003a

Gribnau, J.L.M., 'Equality, Consistency, and Impartiality in Tax Legislation', in: Gribnau, J.L.M. (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague/London/Boston: Kluwer Law International, 2003, p. 7-32.

Gribnau & Happé 2005

Gribnau, J.L.M. & Happé, R.H., 'Equality and Tax Law: A Matter of Principle', in: *L'année fiscale: Revue annuelle*, Paris: Presses Universitaires de France, 2005, p. 127-143.

Gribnau & Saddiki 2003

Gribnau, J.L.M. & Saddiki, J., 'Protection of European Taxpayers by the Principle of Equality', in: Gribnau, J.L.M. (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague/London/Boston: Kluwer Law International, 2003, p. 65-99.

Happé 1996

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

Happé 1999

Happé, R.H., 'The Netherlands', in: Meussen, G. (ed.), *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law International, 1999, p. 125-155.

Kateb 1992

Kateb, G., *The Inner Ocean: Individualism and Democratic Culture*, Ithaca/London: Cornell University Press, 1992.

Koopmans 2003

Koopmans, T., *Courts and Political Institutions*, Cambridge: Cambridge University Press, 2003.

Kortmann & Bovend'Eert 2000

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

Kraan 2004

Kraan, K., 'The Kingdom of the Netherlands', in: Prakke, L. & Kortmann, C. (eds.), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 591-650.

McLachlin 1999

McLachlin, B., 'The Canadian Charter and the Democratic Process', in: Gearty, C. & Tomkins, A. (eds.), *Understanding Human Rights*, London/New York: Pinter 1999, p. 20-39.

Monsma 1999

Monsma, J.A., *De toetsing van belastingverordeningen en gemeentelijke autonomie*, Deventer: Kluwer, 1999.

Rolla, & Groppi 2002

Rolla, G. & Groppi, T., 'Between Politics and the Law: The Developments of Constitutional review', in: Sadurski, W. (ed.), *Constitutional Justice: East and West*, The Hague/London/New York: Kluwer Law International, 2002, p. 143-159.

Sajó 1999

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

Sommerhalder & Pechler 1998

Sommerhalder, R. & Pechler, E., 'Protection of Taxpayers' Rights in the Netherlands', in: Bentley, D. (ed.), *Taxpayers' Rights: An International Perspective*, Gold Coast: The Revenue Law Journal (Bond University), 1998, p. 310-330.

Sunstein 2003

Sunstein, R., *The Partial Constitution*, Cambridge (Mass.)/London: Harvard University Press, 1993.

Tussman & tenBroek 1949

Tussman, J. & tenBroek, J., 'The Equal Protection of the Laws', *California Law Review* (37), p. 341-381.

Wattel 1995

Wattel, P.J., 'De reikwijdte van fundamentele rechten in belastingzaken', in: Alkema, E.A. (red.), *De reikwijdte van fundamentele rechten*, Zwolle: W.E.J. Tjeenk Willink, 1995, p. 209-210.

Cite as: J.L.M. Gribnau & R.H. Happé, *Restricting the Legislative Power to Tax*, vol. 11.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (May 2007), <<http://www.ejcl.org/111/article111-11pdf>>.