Restricting the Legislative Power to Tax: Intersections of Taxation and Constitutional Law*

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Whether or not a country has adopted a formal constitution, developed countries protect a substantially uniform group of basic rights, including freedom of speech, press, assembly, religion, and so forth. In addition, some form of the equality and non-discrimination principles is universal, although variants exist. Australia lacks express, constitutional protections of individual rights, Israel expanded constitutional protections in the 1990s and, at constitutional level, the United States fails to provide equal rights protection on the basis of sex or sexual orientation. In the United States, the equal rights amendment languishes as sufficient states have not adopted the proposed constitutional amendment that would provide equal rights without regard to sex. Nevertheless, citizens of each country participating in this project and, generally, legal residents as well, expect their governments to treat them fairly and substantially equally with each other citizen or resident.

Fair and equal treatment is both a substantive and procedural concept. Substantive equal treatment entails that laws permitting, restricting, and regulating individuals’ activities and behavior apply uniformly to all individuals. Procedural equal treatment means that enforcement of law is even-handed. Governmental representatives, including police and administrative officers, must not act arbitrarily. Exercise of discretion conforms to strict limits and often must be transparent, so that affected individuals may understand the reasons for an unfavorable, discretionary governmental decision. In addition, individuals expect to have recourse to impartial arbiters, when they suspect that governmental representatives did not

* Session IVE. National Reports received from: Australia, M Stewart & K. Walker; Belgium, S. Wyckaert; Croatia, N. Zunic Kovacevi; France, E. de Crouy-Channel; Greece, Th. Fortsakis; Hungary, I. Simon; Israel, D. Gliksberg; Italy, C. Garbarino; The Netherlands, H. Gribnau & R. Happé; Poland, W. Nykiel & Z. Kukulski; US, T. A. Kaye & S. Mazza. This report will also be published together with all the national reports in 15(2) Mich. St. U. J. International Law (2007).
adhere to either the substantive or the procedural equality principle. Customarily, one refers to this principle that requires governments to follow required legal procedures and for impartial courts or other arbiters to determine whether the state has followed the law as the rule of law.

Despite universality of both the equality and the rule of law principles throughout the western hemisphere, application of those principles from country to country is not uniform. While the constitutions of both Italy and Hungary require that tax burdens be a function of the taxpayer’s ability to pay, the supreme court of the Netherlands does not use ability to pay as a factor in applying equality principles. Nevertheless, presence of an ability to pay principle becomes largely irrelevant in all reporting countries where the tax at issue is a value added or similar “indirect” tax. Acceptance of the value added tax as internally manifesting an individual’s ability to pay – that is, if one buys something, he or she must pay for it and the price includes the tax – is a correct, but narrow view. Certainly consumers must have the ability to pay the tax if they consume, but that view misses the impact of embedded value added taxes insofar as they may limit consumers’ overall ability to consume.

Cultural determinants frequently generate differing outcomes as times and circumstances differ. For example, the current debate concerning same-sex marriage discloses a broad range of legal outcomes in western, democratic countries, all of which apply a basic equality principle. The United States, Poland, Germany, Italy, and Greece do not recognize same sex marriages. Poland, a strongly Roman Catholic country, defines marriage law in its constitution as opposite sex relationships. On the other hand, the Nordic countries have quasi-marriages in the form of registered partnerships, while the Netherlands, Belgium, and Spain apply their marriage laws without regard to the sex of the partners. Similarly, the South African constitutional court recently decided that South Africa’s equality principle requires that same sex partners have access to marriage.

Religious tradition does not account for all differences on same sex marriage although some correlations exist. Catholicism is overwhelmingly dominant in both Spain and Poland, yet Spain recently enacted legislation to recognize same sex marriage. Geographical proximity to more or less conservative states and historical events may account for Spain’s willingness to depart from its religious foundations and Poland’s adherence to its conservative, Catholic underpinnings. France, Belgium, and the Netherlands may wield

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1 The a judicial decision in the state of Massachusetts recognized the right of same sex partners to marry, but same sex marriage in Massachusetts will not provide the same sex union access to the marital treatment under the US federal tax law. See, generally, on taxes and same sex relationships, H. Ordower, Comparative Law Observations on Taxation of Same Sex Couples, 111 Tax Notes 229 (2006).

2 Germany has adopted legislation for life partnerships that resemble marriages but has not extended marital tax treatment to those partnerships.

3 In announcing the modifications to the Civil Code, the King expressed understanding of the opposition to the law but considered the law necessary for Spain to remain a full participant in modern Europe. Nevertheless, a constitutional challenge to the law by members of the legislature is pending before the Spanish Constitutional Court.
stronger influence over Spain than other countries, while Germany (and, incidentally, the United States) may exert greater influence on post-communist Poland than most other countries do. From an historical perspective, Poland modeled its constitution after the German Basic Law and, like Germany, included specific provisions protecting marriage. Shortly following World War II, the German constitutional court displayed hypersensitivity to the equality principle in tax matters when it decided that mandatory joint assessment and compressed rate schedules for married couples were impermissible. The Netherlands, on the other hand, permits combination of spousal incomes and assessment under a single rate schedule for married couples because there are economies that co-habitation in marriage yield – an argument the German constitutional court expressly rejected in 1961 as justification for a unfavorable rate differentials for married individuals vis à vis unmarried individuals, as did the Belgian constitutional court in 2001.

The general reporter began to explore cultural differences at the intersection of constitutional law and taxation with a project examining constitutional tax decisions in the United States of America and Germany. With the assistance of a group of excellent and engaged national reporters from Australia, Belgium, Croatia, France, Greece, Hungary, Israel, Italy, the Netherlands, Poland, and the United States, this project for the XVIIth Congress of the International Academy of Comparative Law broadens the reach of that earlier research project. Regretfully, pressing new professional obligations prevented the reporters from Japan (who would have offered an East Asian perspective) and Spain from preparing reports. Undoubtedly, the project would have benefited from broader geographical distribution of reporters.

Each national reporter, working from the outline that appears at the end of this report, explores the limitations that equality and other constitutional principles place on tax rules in the reporter’s home country. Each report was available on the XVIIth Congress’ website, several national reports have been published in their home countries. In addition to commenting on constitutional or quasi-constitutional challenges to tax law, the reports provide overviews of the various national systems for enacting tax legislation and describe the power of the judiciary to review tax legislation for compliance with constitutional principles.

While the project intentionally focuses on national, rather than transnational or international law, some reference to transnational or international law became inevitable in the national reports. For example, the Dutch reporter informs us that the Dutch courts lack the power of judicial review under the Dutch constitution but do apply judicial review under the European Convention on Human Rights. The project generally avoids the lively debate surrounding the role that the European Court of Justice (“ECJ”) has assumed in applying

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the Treaty of Europe to national tax structures. The ECJ treats the Treaty of Europe in many respects as a constitution that limits the flexibility of national legislatures to formulate their own tax rules. Participants in this project remain mindful of the ECJ’s importance in shaping the future of increasingly harmonized European tax rules.

While Germany (not a reporting country) may have the greatest volume of critical constitutional decisions in Europe, the constitutional courts of Poland, Hungary, and Italy regularly address tax issues and serve as a significant check on lawmakers structuring of tax law although the Hungarian constitutional court appears somewhat more deferential to national tax legislation than are the Polish and Italian courts. The Polish constitutional court has been active in reviewing tax legislation for constitutional compliance and has found tax provisions to be discriminatory in some cases and in other instances to violate rule of law principles if they are intended to be retroactive in effect. The Italian constitutional court regularly reviews income tax, but not value added tax, legislation under its constitutional requirement that taxes be a function of the taxpayer’s ability to pay. In Croatia, however, the courts have limited value added taxes on the grounds of the vertical equity requirement of the equality principle.

Israel’s parliament delegated express judicial review to its high court in the 1990s when it enacted new laws guaranteeing human dignity and liberty and freedom of occupation. Since then the high court has accepted several significant cases but decided most by deferring to the rational of the legislature. It has additional cases on its docket. In the US, a constitutional amendment was necessary to permit taxation of incomes, and constitutional law played a meaningful role early in the twentieth Century in shaping the definition of income and fixing the limits of retroactive or retrospective tax law changes. Later court decisions in the US have had little impact on the structure of federal taxation but, like the ECJ’s rulings under the Treaty of Rome, continue to shape the tax laws of the states as those laws impact commerce and movement of individuals and goods between or among states. The Constitutional Court in Germany has been less deferential to the decision-making of the German legislature than have the courts in other countries and has held that fundamental individual rights protections under the German Basic Law preclude mandatory joint assessment (with accompanying marriage penalties) of married couples and require that each individual enjoy a subsistence minimum free from income taxation. In other countries, France, where constitutional review precedes promulgation of law if review takes place at all, the Netherlands, where the constitution prohibits constitutionally-based judicial review but permits treaty-based judicial review, and

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5 The Croatian National Report mentions several extremely interesting decisions involving the issue of regressivity and the value added tax. The report does not provide great detail on those decisions.
Israel and Belgium, where the courts lack an interventionist history, but, have recently been confronted with constitutional challenges to tax legislation, the high or constitutional courts generally defer to the legislature with respect to tax legislation.

Many view taxation as a technical area of law characterized by complex, sometimes illogical and impenetrable rules that is suffused with intricate computations. Taxation often drives economic decision-making and controls the structure of transactions, as parties seek to minimize their tax costs. Most tax practitioners seldom link the field of constitutional law with taxation. But like all other areas of law, constitutional constraints within national tax systems do limit the legislatures’ discretion in shaping their taxation rules, and treaties that operate as fundamental international governing instruments, like the Treaty of Rome, may affect transnational fiscal and taxation policy. The interplay of the Treaty of Rome and tax harmonization in the EU certainly exemplifies this phenomenon. Some conflicts already exist. For example, does a Dutch same sex married couple that relocates to Poland have the right to the same tax treatment as do Polish married couples, even though the Polish constitution defines marriage as only involving partners of different sexes? This issue could become a barrier to harmonization, but it is also possible that the ECJ might find Poland’s failure to grant comparable tax status to same sex married couples to be discrimination that violates the Treaty of Rome.

All the countries this project includes utilize a dual tax system consisting of a combination of direct and indirect taxes, at least one income based tax as a direct tax and at least one indirect tax. In the United States and Australia, the indirect or consumption taxes fund the state governments rather than the federal government, and, in the United States, states independently enact and collect consumption taxes in the form of add-on sales taxes with complementary use taxes for out-of-state purchases.

The dependence of the government on different types of taxes varies widely. In Poland, the consumption taxes, including the goods and services tax and excise taxes, account for more than three-quarters of governmental receipts, while, in Australia, the income tax provides more than two-thirds of governmental receipts. Each country’s income tax is progressive with rates increasing with income although the range and rate of progression varies materially. Hungary provides no significant level of tax free income, while the other countries in this study, either as a constitutional requirement or a matter of statutory structure, have some substantial level of income that remains free from the income tax – that is – each country applies a zero rate to some income. Only in Germany, must the zero rate, by virtue of constitutional decisions, apply to all taxpayers, and the Greek reporter suggests that Greek constitution probably also requires an income tax free subsistence minimum.

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6 While there is disagreement among scholars as to whether consumption based taxes like value added taxes are truly indirect or not, scholars often assign value added to the indirect tax category.
Despite universal progressivity in the income tax, the value added taxes tend to be regressive. Exemptions for some goods and services, varying from country to country, may ameliorate, but do not eliminate, the regressivity in the value added tax. Where a country frees an amount from the income tax equal to the amount necessary to meet basic living needs, including value added taxes included in the prices of the necessities, and supplements the incomes of those who earn less than that amount, the regressivity may begin only with middle income individuals who consume more than basic necessities relative to higher income individuals who are able to save and invest. Only in Croatia have courts expressly limited the regressivity of the value added tax.

This general report consolidates and comments on the findings that the national reporters have made. The general report is not comprehensive but identifies some trends and features that interested the general reporter. This general report highlights some, but certainly not all, tax characteristics that the national reports identify. For additional detail with respect to a country for which there is a national report, readers should refer to the national report. In preparing the general report, the general reporter relied on the national reports and did not seek to verify independently the data those national reports include. Errors in interpretation of the national reports and comparisons are the general reporter’s responsibility. For the sake of simplicity and consistency in the presentation, the general report follows the outline questionnaire for the program.

1. Briefly describe the fundamental protections of individual liberties and rights that exist under your national law and the court and administrative agencies and systems that have primary responsibility for protecting those liberties and rights.

As noted briefly in the introduction to the report, with limited exceptions, the reporting countries guarantee a substantially uniform group of basic rights. Most reporting countries subscribe as well to the European Convention on Human Rights and other international rights treaties. Non-uniform protections include the constitutional protection of marriage in Poland, as constitutionally defined as the relationship between individuals of opposite sexes. The United States statutorily, but not constitutionally, has adopted a similar definition in its Defense of Marriage Act. The Australian constitution permits the federal parliament to make laws with respect to “people of any race for whom it is deemed necessary to make special laws …” Accordingly, the Australian constitution expressly authorizes racial discrimination, and, absence of any protections of basic freedoms, permits discrimination on the basis of sex, sexual orientation, ethnicity, etc. The constitution does prohibit discrimination on the basis of state (within Australia) of residence.

The Greek constitution does not prohibit discrimination against non-Greeks, but the Treaty of Rome would prohibit discrimination against citizens of other EU member states. The
Italian and Hungarian constitutions both require distribution of tax burdens based upon the ability to pay principle, and Greece seems to follow in its interpretation of constitutional tax equality. But even though Belgium has a progressive income tax, that progression seems not to be a direct function of the equality principle embedded in the Belgian constitution. The Belgian constitution requires only that the state treat like persons alike and unlike persons differently for tax purposes. Progressive income taxes would seem to follow from the ability to pay principle in Italy and Hungary.

With respect to enforcement of individual rights protections, the national reports manifest some contrasts between approaches to rights protection in the traditional western European communities and countries formerly under the Soviet sphere of influence. The eastern countries seem less trusting of their governments. France, Belgium, and the Netherlands assume that their legislatures perform careful constitutional review of proposed legislation in the course of lawmaking. Italy’s legislative process seems more politically charged, and the Italian national report implies that taxpayers regularly challenge tax legislation on constitutional grounds. The Polish report describes Poland’s constitutional court as rather activist. In Poland, anyone may initiate constitutional review. Poland also provides an ombudsman to initiate or assist with constitutional challenges. Australian, United States, and Belgian tax administration includes the office of the taxpayer advocate in the US and an ombudsman in Australia and Belgium also following the ombudsman model but without authority to initiate constitutional challenge. In these countries, the ombudsman’s function is as a mediator, even if advocating for the taxpayer’s position. Hungary has an ombudsman for ethnic matters – the Parliamentary Commissioner for the National and Ethnic Minorities, – but not for tax matters. Like Poland, anyone may initiate constitutional review in Hungary.

2. Describe the process for enacting tax legislation with emphasis on the intervention of the courts or agencies described in 1. above in the legislative process for tax law proposals.

Most of the national reports describe the legislative process similarly. The government or one or more members of parliament proposes tax legislation, legislative or executive committees review the legislation, and finally votes in both chambers of the national parliament approve the legislation. The legislation then passes to an executive, or, in the Dutch case, a monarch for signature. The executive may reject the legislation subject to the legislature’s override of the veto. In most parliamentary systems, the executive – prime minister – as a member of the ruling party, has been instrumental in initiating, or at the very least closely involved with, the legislative proposal and would not veto it. The legislation becomes effective on the prospective date stated in the legislation or following publication in the official journal.

7 The ombudsman model first appeared in the Scandinavian countries and radiated from there.
Hungary has a single chamber of parliament. As far as special rules go, there are several relating to tax legislation. Both the Australian and US constitutions require tax legislation to originate in their respective houses of representatives although, as a practical matter, much tax legislation in the US in fact originates in the Senate. The Australian senate may reject, but may not amend, tax legislation, but in order to safeguard the Senate’s non-tax powers, tax legislation may not address non-tax matters and may deal with only one subject of taxation at a time. The Netherlands similarly limits the power of its upper house to accepting or rejecting tax legislation. The Dutch Senate may neither amend a bill nor recommit it to the Lower House. In both the United States and, recently, Australia, tax legislation sometimes delegates legislative rule-making authority to the tax administrative agency, so that the agency in fact makes the specific tax rules especially with respect to complex and contentious definitional matters upon which the legislators cannot reach detailed agreements. The debt-equity distinction is one such matter.

Italy seems to have the most complicated array of tax legislative methodologies of any country. These include legislative decrees that parliament initiates and the government approves, law decrees the government initiates for a limited duration and parliament approves, as well as ordinary legislation. In addition, Italy and the United States have traditions of special tax legislation that benefits a single taxpayer or limited group of taxpayers with respect to an identifiable transaction or activity. Such bills are a matter of legislative committee consensus in Italy, while in the US, they often appear in the form of exceptions to changes in the tax law that will not apply to a specific transaction.

3. Who may challenge tax laws on the basis that they conflict with basic rights? If one believes a tax law to violate one’s basic rights, how might one pursue the challenge? Describe the available process for challenge, including whether one must enlist the support of an administrator or administrative agency in order to advance the challenge.

The range of responses to this question was wide. In the Netherlands, taxpayers may not challenge legislation on constitutional grounds as the constitution denies the courts judicial review on constitutional grounds. However, the Dutch reporter points out that any individual may challenge legislation in the lower courts for conflict with international treaties that guarantee substantially the same rights as the constitution does. In France, constitutional review takes place at the initiative of the constitutional court itself with respect to pending legislation only, but, as in the Netherlands, review may be possible in administrative or other courts for conflict with international treaties to which France is a signatory. Once pending legislation becomes law, constitutional challenge no longer is possible. In the United States and Greece, taxpayers generally combine constitutional claims with other grounds for their
positions, and courts of general jurisdiction may address the constitutional issue. However, courts of general jurisdictions tend, whenever possible, to decide cases on other than constitutional grounds.

Italy has an intermediate type procedure. Rather than direct challenge, lower courts may suspend their proceedings and refer a case to the constitutional court with respect to a specific constitutional issue necessary to ultimate resolution of the pending case. Compare this procedure to the German referral process. At the opposite end of the range, Poland permits anyone to challenge legislation on constitutional grounds and provides an ombudsman to facilitate and assist in the process. Similarly, in Belgium, anyone who can demonstrate that a law adversely affects his or her constitutionally protected interest may petition the constitutional court (Arbitragehof) within six months of publication of the law in question. In Hungary, similar opportunities exist but grounds and occasions are more limited than in Poland or Belgium.

4. Subsistence Minima and Vertical Equity. Most individual income tax systems include multiple rates of tax that are mildly or steeply progressive. Generally, some amount of income remains exempt from tax (a zero rate).

(a) Have there been challenges, whether or not successful, to the amount of that basic exemption from the income tax on the ground of conflict with basic rights? (For comparison, see the subsistence minima cases in Germany, for example, BVerGE 82, 60 (May 29, 1990), BVerGE 87, 153 (September 25, 1992)).

With respect to guaranteed subsistence minima free from income, but not value added, taxation, Germany is unique. In Italy, the constitutional court held that the zero rate amount was constitutional as based on a rational presumption that low income individuals lack ability to pay tax. Yet, despite Hungary’s application of the ability to pay principle, Hungary has no substantial income tax free minimum. A constitutional challenge to elimination of the zero rate bracket failed in the constitutional court. The French reporter suggests that the question could go either way in France, since ability to pay operates alongside the principle of universal and uniform taxation. There has been no challenge in France. The Greek reporter considers a tax free minimum to be a constitutional requirement, but the court has never confronted the issue. Other countries have a tax free minimum that has not become subject to challenge except in cases addressing unequal treatment of married and unmarried co-habitants.

Australia and the United States both have a negative income tax as well as a tax free minimum. Australia has a rebate for low income taxpayers, while the US bases its earned income credit solely on the combination of low income from services and family status.
The US credit supplements the very limited social welfare system. Australia also has a zero bracket for its medicare levy, but most other jurisdictions do not. In most countries social and medical contributions or taxes are a function of wages, and many, like the United States on social security but not medicare levies, have caps on the wages subject to the tax.

(b) Have there been challenges, whether or not successful, to rate structures or underlying structures on the ground that they are not sufficiently progressive relative to income or wealth? Too progressive?

In Greece, the constitution requires something like a marginal bracket structure, so that progressive rates do not cause a higher income taxpayer to have a smaller income, net of taxes, than a lower income taxpayer. The Greek reporter also concludes that both progressive and proportional taxes would be acceptable in Greece, subject to the minimum exempt amount. A taxpayer’s full burden remains indeterminate since the value added tax a taxpayer pays is a function of the amount and nature of the taxpayer’s expenditures.

The Hungarian constitutional court rejected the argument that progressive taxation renders tax burdens disproportional in violation of constitutional anti-discrimination principles. Discrimination in taxation according to wealth is permissible but not required. Taxpayers in the US continue to challenge the US progressive rate structure at trial and appeals court levels without success. But the Supreme Court has held that a progressive tax on gross receipts is unconstitutional because gross receipts before expenses are not reasonably related to the taxpayer’s ability to pay. Despite the substantial leeway that the Italian constitutional court allows to the legislature in tax matters, it has held that costs and expenses of producing income must be deductible, because they truly diminish income. In the United States, progressive rates are generally acceptable, but not in the event of a tax on gross revenues rather than net income. Finally, judicial decisions in Croatia have required greater progressivity than the statute provided.

(c) Similarly, European and Asian democracies rely heavily on consumption taxes, including value added and turnover taxes, for their tax revenues. Consumption taxes tend to be regressive relative to income or wealth. Have there been challenges, whether or not successful, to consumption taxes on the basis that they violate notions of vertical equity?

Only Croatia has judicial decisions limiting value added taxes by reason of regressivity. Challenges to the value added tax in Italy on ability to pay grounds have failed. If one consumes, one can pay the tax. Belgium to a limited extent individualizes the value added tax by exempting handicapped individuals from it with respect to their automobiles. Reductions
in value added tax also encourage renovation of apartments. Many of the reporting countries apply lower rates to different basic necessities in order to ameliorate the regressive impact of the value added tax. Such distinctions in state sales taxes in the US also exist.

5. Horizontal Equity. Have there been challenges, whether or not successful, to tax laws on the basis that they treat taxpayers with similar income or wealth dissimilarly either because of the structure of the tax or failure to correct systemic flaws that afford opportunities for well-advised taxpayers to avoid taxes or diminish taxes? Or that the tax law favors specific conduct or business structures?

Section 6 below discusses several decisions from different jurisdictions that address distinctions between married and unmarried cohabitants. The existence of tax distinctions based upon transactional and business forms seems to be a tax characteristic acceptable in all jurisdictions as within the discretion of the legislature. Challenges to distinctions in the taxation of enterprise form between sole proprietors and entities withstood challenge in Hungary, as did a tax distinction between employed and self-employed individuals. Tax planning to choose business or transactional structures to limit tax liability is permissible behavior in all jurisdictions, but general tax anti-avoidance rules continue to proliferate in order to fend off inappropriate and illegal tax planning. In both the United States and Australia, the tax administrator, through various types of rulings, combats taxpayers’ exploitation of unintended statutory flaws, which the legislature is unable to address sufficiently quickly to prevent wide-scale losses of tax revenue. Nevertheless, tax planning to exploit even systemic flaws remains generally acceptable. See the Italian report, for example.

But systemic flaws that place an artificially defined group of taxpayers at a disadvantage may not withstand a constitutional challenge. The Italian constitutional court did rule unconstitutional a tax provision that doubled the taxes for a specific category of taxpayer but not similar groups of taxpayers. The court determined that there was no rational basis for the distinction.

While challenges to legislative distinctions rarely succeed in France, the constitutional court recently has viewed distinctions in categories of pollutants that environmental taxes burden as unacceptable. In Hungary, preferences in order to encourage foreign investment withstood constitutional scrutiny as unfair to Hungarian taxpayers. In Israel, a challenge to the rate differential between ordinary income and capital gain so that taxpayers with equal incomes pay differing amounts of tax failed. While the tax violated the equality principle, the high court held it valid because the distinction was consistent with the values of the State of Israel with respect to global competition, so that it serves the public interest. Also the Israeli court found a radio license tax on all automobile owners, without regard to whether or not their cars had radios, acceptable, not because it was consistent with the equality principle, but
because administratively collecting from all automobile owners was the only practical way to collect the tax. And pharmacies in international airports derived a competitive advantage from a value added tax exemption even for sales of products stored temporarily in Israel and repatriated by the traveler upon his or her return from abroad. The high court rejected the claim that the exemption denied a competitor property rights and equality, but the competitor did not challenge the exemption itself but only the storage arrangement. In the US, where the courts generally defer to law makers where a tax statute has a rational governmental purpose, the Supreme Court held under equal protection challenge that a state income tax provision allowing an exemption for widows but not widowers was permissible. An argument that widowers tend to have greater incomes than widows provided the necessary rationale for the statute.

6. Family structure. Do your income, wealth or consumption taxes provide benefits for specific family structures, for example, income splitting through joint returns (for married individuals – whether or not cohabiting(?)) that are not available to other family structures (multiple generation families, same sex relationships, unmarried cohabitation)? Are the alternate family structures protected under basic laws? Have the tax laws been challenged?

The national reports for this project identify taxation of co-habitating individuals, whether or not married, as an almost universal source of complexity in the tax law. The constitutional court in Belgium and the high court in the Netherlands both have concluded that compressed rates for married individuals because of economies in living expenses are acceptable. The Dutch court distinguished married individuals from other co-habitants, because of potential obligations of one spouse to the other in the event of illness or divorce. Belgium has removed barriers to marital-like tax treatment for most co-habitants who enter into a contract to live together. Accordingly, unmarried co-habitants may elect into marital treatment or remain outside such treatment when it is to their advantage. A principal advantage to electing marital equivalence is that on death of a partner, the inheriting partner enjoys the lower inheritance tax rate applicable to married survivors.

France permits a form of income splitting within the family, treating the family, including children, as a taxable unit. The constitutional court has accepted the constitutionality of this structure. Civil unions of same sex individuals enjoy the family unit tax system of income splitting but only from their third year of union. Constitutional challenges to this three year limit have failed. Greece requires spouses to file tax returns jointly but separately measures tax for each spouse based upon his or her income. In Hungary, marriage or civil union is unavailable to same-sex partners, but a constitutional decision requires comparable tax treatment for same-sex couples as married couples in order to prevent discrimination. While
Australia generally taxes spouses separately, some concessions for families are available in both marital and quasi-marital opposite sex relationships (*de facto* marriages), but no such benefits are permitted to same sex couples.

In Israel, the high court concluded that certain assumptions concerning married individuals resulting in joint taxation at a combined income rate discriminated against women because the woman’s income is taxed at the husband’s rate. Accordingly, the court held that the spouses must have the right to rebut the assumptions. A case that might result in same-sex partners receiving marital tax status is pending before the high court. Constitutional decisions in Italy precluded, on equality grounds, joint assessment of spouses. Each must be able to compute income and taxation separately. Poland has joint filing and income splitting, an advantage for single earner families, and spouses and children are in a lower tax class for inheritance tax purposes. These tax benefits are not available to same sex couples, but a single individual with children gets the rate reduction of income splitting (that is, twice the tax computed on half the individual’s income). The United States permits income splitting between spouses on a joint return, but not unmarried co-habitants, and taxes the joint return and married individuals who file separately at compressed rates resulting in some cases in a marriage penalty. Constitutional challenges to marriage penalties have failed. In one case, however, where a state income tax attributed all a woman’s income to her husband to be taxed at his marginal rate of tax, the Supreme Court held the tax unconstitutional on equal protection grounds in that it taxed one person’s income to another. In addition, an unlimited marital deduction is available for the estate of a decedent spouse. Thus, no estate tax burdens the estate of a spouse if the decedent leaves all his or her property to the surviving spouse.

7. Separate Taxing Authorities. Are all taxes centralized or do different governmental units have independent taxing powers, municipalities, school districts, etc.? What is the source of the taxing power? derivative of national legislative enactment? protected by basic law? Have governmental units challenged the national government’s power to limit the units’ taxing authority? Are there conflicts among governmental units? Tax challenges to the power of a unit to impose a tax? discrimination against or in favor of residents of the unit? challenges to tax subsidies to encourage investment within the unit?

In most jurisdictions in this study, the central government assesses and collects the bulk of tax revenue and distributes part or all of the revenues from some taxes among local governments. Increasingly, the central government reduces local taxes in France, under its power to do so, and shifts to a centralized taxing system with revenue sharing. In Belgium, the central taxing authority is supreme with respect to those taxes it may impose, and most taxes are general and collected at federal level. A variety of other government units have independent taxing authority that they regularly exercise, the most significant of which
appears to be inheritance tax. The Belgian reporter identified no conflicts or competitions among the other units with respect to tax revenue or collection. Some taxing districts – water districts in the Netherlands – continue to operate wholly independent from the central government, but in order not to conflict with country-wide taxes, the tax is not progressive. In Hungary, enabling legislation giving local governments broad power on a limited group of taxes survived an ability to pay based challenge, since those local taxes tended toward regressivity. And discrimination in favor of residents or specific types of businesses in local taxes is permissible.

Australia and the United States have federal systems in which their states enjoy considerable autonomy to regulate matters within the state. Conflicts in Australia arise primarily in defining which areas of authority the federal government may occupy in taxation, and which belong to the states. The two principal taxes, income and goods and services, are federally assessed and collected, thereby avoiding most interstate conflicts that arise in the United States. However, historically the state of Queensland discriminated in its income tax against non-state residents, but a state court held that discrimination to violate the constitutional prohibition against discriminating against residents of another state. States in the US may impose any type of tax they choose other than duties on imports or exports. Most states have income taxes and some form of consumption tax. States may tax only those taxpayers and transactions that have a connection with the state, and the US Supreme Court regularly has rendered decisions with respect to controversies between taxpayers and state taxing authorities concerning the extent of the state’s power to tax in view of the taxpayer’s contacts with the state. The states have sought, albeit with limited success, to agree upon guidelines for allocating multiple state business income among the states for tax purposes. And the states often compete by offering tax holidays and subsidies in order to encourage businesses to locate in or relocate to the state. A recent challenge to those practices failed in the supreme court that held the challenging taxpayers to lack the necessary interest in the matter to bring the case before the court.

8. Retroactivity. Have there been challenges, whether or not successful, to changes in the tax law on the basis that they adversely impact completed or non-alterable transactions to the detriment of the taxpayers?

Australia has no constitutional barrier to retroactive tax legislation and France and Italy constitutionally prohibit retroactive legislation only with respect to criminal law. Elsewhere, retroactivity in tax legislation is unconstitutional as a violation of the rule of law principle, but the contours of that limitation differ. Greece permits tax legislation to reach back to the previous tax year. In Poland, tax laws may not be retroactive even to the beginning of the year in which they become law. Hungary’s constitutional court distinguishes between short term
reliance on a tax rule and long term. Taxpayers should be able to rely on no change in the law short term but economic conditions in the long term may change and the legislature should be able to change the long term tax impact on a transaction. This approach vests short term interests but long term interests do not vest completely.

The national reports as a whole generate the impression that the practical rules on retroactivity are not significantly different from country to country. All seem to recognize the need to change law or confirm administrative interpretation of law in order to fend off tax abuse or correct legislative errors yet, in order to compete in a global market, governments recognize that their tax laws must be predictable and stable, so that taxpayers may engage in appropriate and legal tax planning. The Israeli report, for example, discusses high court decisions confirming both these observations. Most governments offer sufficient transparency that taxpayers know when specific rules are likely to change. The governments give advance notice of proposals to alter tax legislation in order to prevent arguments that the new legislation affects the tax result of a completed transaction adversely.

9. Private Legislation. May and does the legislature enact tax legislation to benefit one or several taxpayers or to make the tax outcome for a specific transaction certain (and beneficial)?

The national reports disclose three different views of this question:

1) Non-revenue use of tax legislation. Tax laws of general application may promote or discourage non-tax activities. For example, a tax on alcohol or certain types of alcoholic beverages might not raise significant revenue but might encourage or discourage the production of all or certain types of alcoholic beverages. Such laws on a broader basis may subsidize specific business activities, and, while purportedly general in nature, in effect may apply to a very narrow group of taxpayers and may promote specific types of investments. In the Netherlands, use of tax law for non-tax purposes is a fundamental part of governmental policy. But while not stated so directly by other reporters, each country uses its tax system – some more than others – for such purposes. Tax planning often exploits those tax transactional opportunities that the legislature has created to encourage specific activities. While such tax advantages would seem to violate equality principles by altering the fair distribution of tax burdens, courts in none of the reporting countries find them unconstitutional.

2) Special legislation for particular taxpayers. Italy and the United States have traditions of private tax legislation for the benefit of a single or a narrow group of taxpayers. In the United States, such private legislation often takes the form of an exception to a change in law in order to protect certain taxpayers from adverse law changes even though they are in the early planning stages of a transaction that the change in law otherwise would impact. In Italy, private tax bills are a matter for negotiation within legislative committees and not the subject of general tax laws.

3) Advance rulings from the tax administrator. Several countries permit taxpayers to seek advance rulings on the tax impact of transactions they are planning or in which they are engaged. The rulings process enables the taxpayer to negotiate the tax impact on the taxpayer of a specific transaction. The administrator generally has sufficient discretion to interpret the tax laws in a way favorable to the transaction making the administrative decision a form of private legislation through interpretation. The process would seem a questionable practice under equality principles. Nevertheless, Australia, Belgium, and the United States permit taxpayers to apply to the taxing authority for private rulings. Administratively, these ruling procedures avoid potential litigation and thus are efficient. In the United States, third party litigation compelled the tax administrator to make private rulings publicly
available, so that the tax administrator was compelled to apply consistent rules to similar situations in the ruling process.

10. Other. Are there other characteristics of your national tax system that protect it from challenge when it conflicts with basic rights? Other decisions of courts or agencies that have limited the legislature’s power to define tax structures, rates or types of tax?

Without the Belgian courts finding the legislation to violate equality principles, Belgium has enacted tax amnesties to facilitate repatriation of moneys invested abroad following information sharing agreements with other countries. The Polish constitutional court, on the other hand, held a tax amnesty to be unconstitutional.

If finding a tax law to violate treaty-based rights, the Netherlands high court would have to involve itself in restructuring the legislation, it will defer to the legislature. The court limits its role to striking down legislation, rather than modifying it.

Both Greek and Hungarian courts have struck legislation where they deemed a tax to be confiscatory.

Official, published interpretations of tax laws in France are binding and not subject to taxpayer challenge.

Some Conclusions

Despite the often technical nature of tax legislation in all jurisdictions, broad constitutional principles frequently compete with revenue raising efficiencies, both at parliamentary and judicial levels, to limit the discretion of the law making authority. One may conclude that tax legislation writers are not constitutionally unfettered. They must remain mindful at least of constitutional principles as they prepare tax proposals. The constitution in each reporting jurisdiction plays a tax role.

For a variety of reasons, including lack of authority to conduct judicial review, courts of general jurisdiction in Australia, Israel, the Netherlands, and the United States tend to defer to the law makers on constitutional compliance issues when they address tax matters. Specialized constitutional courts appear to scrutinize tax legislation for constitutional compliance, but no court in the reporting jurisdictions, whether or not specialized, seems to require more than a rational basis for the taxing structure to withstand constitutional challenge.

While decisions differ from jurisdiction to jurisdiction, all conclude that progressive income taxes are acceptable, and, in some cases, a constitutionally mandated, tax model. At the same time, however, the courts do not object to the fundamental regressivity of the value
added taxes that provide a substantial proportion of governmental revenues, often because on
an ability to pay basis, the consumer must pay the tax – indicating an ability to pay – in order
to consume.
Tax planning to minimize one’s tax burden is permissible everywhere. Most countries use
their tax systems to accomplish both revenue raising and non-revenue objectives. Special tax
regimes encourage specific business activities, yet courts defer to legislatures in most cases
on such matters, even though the tax will violate the principle of equality in distribution of tax
burdens.

Outline Structure for National Reporters

While Constitutional law has played only an incidental role to the development of tax law in the US (for example, the federal
government may not tax state revenues) and has had little impact on the structure of taxation, in Germany, the Constitutional
Court has held that fundamental individual rights protections under the German Constitution (Basic Law) preclude mandatory
joint assessment of married couples (with accompanying marriage penalties) and require that each individual enjoy a
subsistence minimum free from income taxation. It is constitutional and similar constraints on taxation in other jurisdictions
that this project seeks to identify and compare. Such constraints may affect transnational
discrimination against or in favor of residents of the unit? challenges to tax subsidies to encourage investment within the
unit?

1. Briefly describe the fundamental protections of individual liberties and rights that exist under your national law and the
court and administrative agencies and systems that have primary responsibility for protecting those liberties and rights.
2. Describe the process for enacting tax legislation with emphasis on the intervention of the courts or agencies described in
1. above in the legislative process for tax law proposals.
3. Who may challenge tax laws on the basis that they conflict with basic rights? If one believes a tax law to violate one’s
basic rights, how might one pursue the challenge? Describe the available process for challenge, including whether one
must enlist the support of an administrator or administrative agency in order to advance the challenge.
4. Subsistence Minima and Vertical Equity. Most individual income tax systems include multiple rates of tax that are mildly
or steeply progressive. Generally, some amount of income remains exempt from tax (a zero rate).
(a) Have there been challenges, whether or not successful, to the amount of that basic exemption from the income tax on
the ground of conflict with basic rights? (For comparison, see the subsistence minima cases in Germany, for example,
BVerGE 82, 60 (May 29, 1990), BVerGE 87, 153 (September 25, 1992)).
(b) Have there been challenges, whether or not successful, to rate structures or underlying structures on the ground that they
are not sufficiently progressive relative to income or wealth? Too progressive?
(c) Similarly, European and Asian democracies rely heavily on consumption taxes, including value added and turnover taxes,
for their tax revenues. Consumption taxes tend to be regressive relative to income or wealth. Have there been challenges,
whether or not successful, to consumption taxes on the basis that they violate notions of vertical equity?
5. Horizontal Equity. Have there been challenges, whether or not successful, to tax laws on the basis that they treat
taxpayers with similar income or wealth dissimilarly either because of the structure of the tax or failure to correct
systemic flaws that afford opportunities for well-advised taxpayers to avoid taxes or diminish taxes? Or that the tax law
favors specific conduct or business structures?
6. Family structure. Do your income, wealth or consumption taxes provide benefits for specific family structures, for
example, income splitting through joint returns (for married individuals – whether or not cohabiting(?)) that are not
available to other family structures (multiple generation families, same sex relationships, unmarried cohabitation)? Are
the alternate family structures protected under basic laws? Have the tax laws been challenged?
7. Separate Taxing Authorities. Are all taxes centralized or do different governmental units have independent taxing powers,
municipalities, school districts, etc.? What is the source of the taxing power? derivative of national legislative enactment?
protected by basic law? Have governmental units challenged the national government’s power to limit the units’ taxing
authority? Are there conflicts among governmental units? Tax challenges to the power of a unit to impose a tax?
discrimination against or in favor of residents of the unit? challenges to tax subsidies to encourage investment within the
unit?
8. Retroactivity. Have there been challenges, whether or not successful, to changes in the tax law on the basis that they
adversely impact completed or non-alterable transactions to the detriment of the taxpayers?
9. Private Legislation. May and does the legislature enact tax legislation to benefit one or several taxpayers or to make the tax outcome for a specific transaction certain (and beneficial)?
10. Other. Are there other characteristics of your national tax system that protect it from challenge when it conflicts with basic rights? Other decisions of courts or agencies that have limited the legislature’s power to define tax structures, rates or types of tax?