

Separation of Powers

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National report: The Netherlands

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Introduction

A legal system is more than a set of laws which merely need to be applied by administration and judiciary. The legislature, administration and judiciary are all active in framing the legal system. The democratically legitimized legislature gains priority in view of the abstract, general and impartial character of the legislative process that guarantees a certain amount of rationality of law. The legislature determines the direction of society, and which policies should be implemented, while taking into account the general legal principles.

Because lawmaking is not the exclusive prerogative of the legislature, the doctrine of the separation of powers must not be conceived in a rigid way. In a positivist conception, the idea of the doctrine of the separation of powers is conceived as a strict separation of powers in a state, being the three main organs of government: the legislature, the executive, and the judiciary. Consequently each of these organs has its own exclusive function.² Instead of this strict version of the separation of powers doctrine, we should think more in terms of checks and balances of powers. Obviously, if the creation of law were entrusted to one power only, chances are that this 'relational' view of law would be doomed to remain pure theory. Montesquieu was aware of the fact that abuse of power should be prevented by creating an institutional structure in which power is distributed amongst various governmental institutions. Without a balance of power freedom will inevitably perish.³

This is the dynamic model of the separation of powers: an institutionalized balance of powers. Under the modern rule of law, arbitrariness and abuse of power are prevented by a system of checks and balances: an even distribution of competencies amongst various institutions and a duty of accountability of each and every institution. The creation of law is based on a balance between or co-operation of authorized powers. Neither of these powers can determine on its own what counts as law in a society. Various authorized institutions - legislature, administration, and judiciary - create law by co-operation. They are partners in the business of lawmaking.⁴ Of course, partners may quarrel and have

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² 'Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch'; M.J.C. Vile, *Constitution and the Separation of Powers*, Indianapolis: Liberty Fund, 1998, p. 14. Vile points out that it is possible to define four functions of government – rule-making, a discretionary function, rule-application and rule-adjudication – but 'quite impossible to allocate them exclusively to different branches of government' (p. 402).

³ Montesquieu, *The Spirit of Laws*, A.M. Cohler, B.C. Miller & H. Stone (eds.), Cambridge: Cambridge University Press, 1989. Cf. R. Bellamy, 'The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy', in R. Bellamy, D. Castiglione (eds.), *Constitutionalism in Transformation. European and Theoretical Perspectives*, Cambridge: Blackwell Publishers 1996, p. 25 ff.

⁴ H. Gribnau, 'General Introduction', in: G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation*, The Hague, London, Boston: Kluwer Law International, 1999, p. 23-24.

different views as to best way to serve the purpose of their business and achieve their common goal.

Legislatures creates statutes which cannot be implemented without being interpreted by the judge. The judge, therefore, is a partner in 'the legislature's creation and implementation of statutes, even if this partnership is a limited one.'⁵ The legislature which determines the purpose of the statutes is the senior partner in lawmaking, while the judge acts as a junior partner. The same goes for the (tax) administration which has to statutes apply tax statutes to concrete cases. Tax statutes cannot be implemented without being interpreted. Through his interpretation of the tax statute the tax administration must give effect to the purpose of the tax law. Thus the tax administration, acting as a junior partner, has to concretise, clarify, and specify the norms of the general and abstract tax statutes.

1 Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Government have legislative competence on tax matters?

Yes. According to Article 81 of the Constitution, the power to enact Acts of Parliament (*wetten in formele zin*; statute law) rests with the government and the States General jointly.⁶ This general procedure also applies to tax legislation. Both, government and the States General, may initiate towards legislation. The procedure for enacting Acts of Parliament varies depending on whether a bill is presented by the government or by the Lower House of Parliament.⁷ 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 (Article 120 Judiciary Organisation Act).⁸ 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 (Article 73 of the Constitution⁹). Following this, the bill is brought before parliament, i.e., the Lower House, together with the explanatory memorandum. At the same time

⁵ Cf. A. Barak, *The Judge in a Democracy*, Princeton: Princeton University Press, 2006, p. 17.

⁶ See K. Kraan, 'The Kingdom of the Netherlands', in: L. Prakke & C. Kortmann (eds.), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 621 ff

⁷ 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.

⁸ The Council for the Judiciary advises government and the States General in policy matters relating to the administration of justice (Article 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 (Article 105 of the Judiciary Organisation Act). See K. Kraan, 'The Kingdom of the Netherlands', in: L. Prakke & C. Kortmann (eds.), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 632.

⁹ Here, one should also read Article 15, Council of State Act (*Wet op de Raad van State*).

the advice of the Council of State is published. This advice, together with the ministers' answers, is laid down in a further report to the King.

The Lower House considers the bill in a committee before it is considered in 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 (Article 86 of the Constitution). After a bill has been passed by the Senate, the King must ratify it (Article 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.¹⁰

Parliamentary bills are treated in the same manner as government bills. Only the Lower House has the right to propose bills (Article 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.

1.2 Does your Government draft tax bills proposals and present them to Parliament?

Yes, see above.

1.3 In case your answer to 1.1. and 1.2. is positive:

1.3.1 Does your Government usually exercise that competence?

In practice, government, i.e. usually the State Secretary (*staatssecretaris*) of Finance, plays a pre-eminent role in the legislative process. Most Act of Parliaments are the result of government initiatives. Members of parliament generally lack (technical) know how and time to be able to draft bills, tax bills included. Members of parliament have hardly any staff members with expertise in the field of tax law who can deal with its intricate complexities.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

¹⁰ 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.

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 magnitude passed by parliament. 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.

The Lower House has the right of amendment. Often these amendments are introduced quite late; they are not sent to the Council of State for advice. These amendments accordingly suffer from lack of quality.

The Senate has no right of amendment; but often investigates the legal quality of (tax) bills in depth. The Senate may ask the State Secretary of Finance in his capacity of co-legislator to make voluntary changes in the bill or to introduce changes wished for next year.

1.2 How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3.[2] ?

Because most legislative proposals pass parliament without essentially being changed, government determines the content of Acts of Parliament to a large extent. This also holds for tax legislation. In the Netherlands, the use of tax legislation for non-fiscal goals is an integral part of government policy. Consequently, Dutch tax law contains all kinds of tax incentives mostly in the form of tax reductions.¹¹

Here, the State Secretary of Finance plays a pivotal role. In his capacity of co-legislator (he also head of tax administration), he is responsible for the continuous initiating activity of government in tax matters. Consequently, the legislator often adopts the perspective of the tax authorities to advance the efficient implementation of legislation.¹² The tax authorities have an interest in legislation without many technical sophisticated provisions. Simple legislation is a blessing for the tax inspector. Tax laws with fewer nuances are easier to apply. In the Netherlands, the tax levied on income from savings and investments, e.g., is based on the assumption that a taxable yield of 4% is made on the net assets, irrespective of the actual yield. The tax authorities are not required to check the actual income received from different sources such as interest, dividend, capital gains, and losses. This tax law runs the risk of neglecting relevant differences between taxpayers. In the same vein, the tax legislator puts too much stress on the budgetary consequences when introducing or changing tax legislation. The State Secretary of Finance often acts as guardian of the budget.

No wonder, the literature in the Netherlands is quite critical and sometimes suggests ways of reinforcing the capacity of parliament to counterbalance the factual power and superior power of State Secretary of Finance who is supported by many competent officials at the Ministry of Finance.¹³ Members of Parliament are not supported by many competent officials who are well at home in tax law. There is asymmetry of tax knowledge as well as factual knowledge with regard to the implementation of tax law.

¹¹ Cf. J.L.M. Gribnau, 'Equality, consistency, and impartiality in tax legislation', in: H. Gribnau (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague, London, Boston: Kluwer Law International, 2003, p. 7-32.

¹² Here one could point to the interpretation of Montesquieu's theory that judiciary power has real importance only in 'regimes where the legislative and executive power are confused'; P. Manent, *An Intellectual History of Liberalism*, Princeton University Press, Princeton, 1994, p. 56.

¹³ Cf. R.H. Happé & H. Gribnau, 'Constitutional limits to taxation in a democratic state: The Dutch experience', *Michigan State Journal of International Law*, 15 (2007) 2, p. 417-459, at 425-428.

The domestic Courts do not consider it their task to comment on this situation; for them it is a fact of (fiscal) life. Nonetheless, the failure of parliament to exercise adequate control over government and the tax administration has led to attempts by the judiciaries to fill this vacuum. Indeed, there has been a change in the attitude of the courts to the power of the tax authorities and their (administrative) decisions.¹⁴ The courts are more willing to develop rules (e.g. principles of proper administration) which restrain the exercise of administrative power and even to protect fundamental rights against infringements by the tax legislature; the minimal conditions of personal freedom against the state, needed to make the otherwise enormous extent of state power tolerable to everyone, depend on the institutional protection of rights.¹⁵

2. The meaning of legal indeterminacy in tax matters

2.1 Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

Dutch tax legislation is detailed as well as vague. Increasingly, however vague concepts are introduced in domestic tax legislation, e.g. anti-abuse clauses, leaving a large margin for discretion for the tax administration to determine the law. This means that the precise normative content in a concrete instance is often determined by the tax administration. This application of the law inevitably means lawmaking. Consequently, the normative sovereignty assigned to the parliamentary legislators is usurped by the interpreters with serious effects for the principle of legality and the certainty of law. The modern administration exhibits such complexity of structure and such a proliferation of rules that the earlier conception of an 'executive' putting into effect, under the direction of ministers, the commands of the legislature is no longer tenable. The administration has assumed an autonomy of its own.

2.2 How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

Literature takes a critical stance towards the increasingly important role assigned to the administration, which has to concretise, clarify, and specify – not just state – the norms of the general and abstract statutes. Vague tax legislation implicitly confers discretionary powers to the tax administration. Of course, discretionary powers are often also explicitly conferred upon the administration. Therefore, vague tax legislation is part of a larger picture with important implications for the doctrine of separation of powers. On other hand, vague norms and indeterminate concepts have the advantage of a certain flexibility when applied in specific situations or in the future. The content of the norm may keep pace with societal, economic or technical developments, without too much interference by the legislature. Thus the constancy of the tax statutes through time, an aspect of legal certainty, is improved. However, the use of vague norms indeterminate concepts in tax law, results in a shift of power to the tax administration and the courts; for, this way, they get more (discretionary) power with regard to the concrete application of the law. Consequently, the predictability of tax law, another aspect of

¹⁴ H. Gribnau, 'General Introduction', in: G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation*, The Hague, London, Boston: Kluwer Law International, 1999, p. 18-20.

¹⁵ R.H. Happé, *Drie beginselen van fiscale rechtsbescherming*, Deventer: Kluwer, 1996.

legal certainty, may diminish. Furthermore, this shift of power might be seen as an abdication of the democratically legitimized legislature.

However, even in the absence of such implicit discretionary powers the administration inevitably has some lawmaking power, as is the case in tax matters. The tax administration often has to make a choice as to the specific meaning of a general norm. The same goes for judicial decisions, they have to be interpreted and the administration has to formulate policies containing standards on how to respond to them. These policies are often laid down in rules and disseminated within the administration in order to be applied by tax inspectors.¹⁶

2.3 Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

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 because of the ban on constitutional review: Acts of Parliaments are not tested against the constitutional principle of equality, but against the principle of equality of Article 14 ECHR and Article 26 ICCPR.

Actually, the ban on the testing of Acts of Parliaments against the Constitution does not apply in practice. Article 94 of the Constitution obliges the Court to test Acts of Parliaments 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.¹⁷

2.4 Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

No, legal indeterminacy is not considered to be unconstitutional.

No, because legal indeterminacy is not a norm enshrined in an international treaty; the Courts can not test (tax) laws against it.

3. The consequences of legal indeterminacy in tax matters

3.1 In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

The domestic Courts, especially the Supreme Court, have the final word regarding the interpretation of the rule. Of course, the tax legislator may overturn judicial rulings. In practice, with regard to the interpretation of the tax rules the tax administration takes the lead by deciding concrete cases and issuing policy rules (administrative rules).

¹⁶ H. Gribnau, 'Soft Law and Taxation: The Case of The Netherlands', 1 (2007) *Legisprudence* 3, p. 291-326, at p. 301-303.

¹⁷ Cf. R.H. Happé & H. Gribnau, 'Constitutional limits to taxation in a democratic state: The Dutch experience', *Michigan State Journal of International Law*, 15 (2007) 2, p. 417-459, at 433-458.

Many taxpayers will not contest these concretizations of vague laws. As a result, the concretization and interpretation of vague laws by tax administration is often decisive for the meaning of the statutory provision.

3.2 Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

The constitutional basis for the domestic Courts is their competency to decide cases brought before them by taxpayers against the tax administration (tax inspector). Chapter 6 of the Constitution deals with the administration of justice Article 112 of the Constitution attributes responsibility for judging disputes on civil rights and obligations to the judiciary. The judgment of administrative disputes, which do not arise from relations under civil law may be granted by statute either to the judiciary or to tribunals which do not form part of the judiciary. It is determined by statute which Courts form part of the judiciary.

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. These exceptions have decreased in the past ten years.

Accordingly, different statutes regard the judicial competence in tax disputes. Article 8:1 General Administrative Law Act (*Algemene wet bestuursrecht*) states that the taxpayer may appeal to a District Court (*rechtbank*) against a decision on an objection by the tax administration. The Tax Division, part of the Administrative Division in the District Courts, will deal with his appeal. Judgments of the administrative court in first instance may be appealed to the Tax Division of the Courts of Appeal (*gerechtshoven*); Article 28 the General Taxes Act (*Algemene Wet inzake Rijksbelastingen*). Next, appeal in cassation may be lodged with the Tax Division of the Supreme Court (Article 78 Judiciary Organisation Act, *Wet op de Rechterlijke Organisatie*, in conjunction with Article 28 the General Taxes Act).

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

Courts decide on vague tax provisions (see above 3.1), case law, therefore is very important. Delegated law-making (regulations) by the secretary of Finance, frequently occurs, and may be tested by the courts to the constitution, if in an appeal to the court by taxpayers.

Administrative rules constitute a form of soft law (see above 2.2). This form of administrative regulation to a certain extent compensates for the loss of legal certainty and equality inherent to the growing complexities of tax laws. The amount of administrative rules is enormous. Administrative rules enable the tax inspectors to coordinate their behaviour with each other, secure a reduction in individual decision-making error, and a reduction in individual decision-making costs. To be sure, administrative rules (*beleidsregels*) are concerned here, not secondary (delegated)

legislation on the basis of some kind of delegated legislative power conferred by an Act of Parliament. These policy rules, sometimes also known as quasi-legislation, are laid down by an administrative body as a form of self-regulation over the exercise of its administrative powers. They enhance legal certainty and legal equality, but of course, suffer from a lack of democratic legitimacy, being issued by the tax administration and not by the tax legislator.

Two kinds of administrative rules can be distinguished. On the one hand, the policy rules which interpret the law. The lack of clarity of legislative provisions and case law is dispelled by the tax administration's indication of its view of the regulation's meaning. On the other hand, there are administrative rules which contain viewpoints of the tax administration that go further than a simple interpretation of the existing rule. In some situations, a strict, textual interpretation of the tax legislation is found to be too restrictive or unjust. The tax administration frequently takes a position which is not covered by a narrow, restricted reading (interpretation) of the tax statute, so as to enhance the aim and intent of the legal provisions. In these positions *praeter legem* (ie, beyond the letter of the law), which favour the taxpayer, the tax administration puts aside the text of the statute in order to do justice to its spirit.¹⁸

3.4 Are administrative rulings binding to the taxpayer and/or the Courts?

Article 4:84 General Administrative Law Act states that “the administrative authority shall act in accordance with the administrative policy rule unless, due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purposes of the policy rule”. The administrative authorities use policy rules to promote certainty, and because they are competent to establish these rules, they are bound by them. In order to improve administrative rule-making transparency, the contents of internal guidelines and procedures are often published. Consequently, they are of an external nature, providing the taxpayer with guidance as to the expected behaviour of the tax administration. Thus, the taxpayer may derive legal certainty from administrative rules. By way of (external) self-binding policy rules, they have legal consequences; they are enforceable.¹⁹

Consequently, administrative rules are legally binding on the tax inspector, but they are not binding like statutes. Consequently, though they legally bind the tax inspector, the courts are not bound by them. The tax administration may bind itself, but not the courts with regard to the interpretation of statutes.

Thus the partial shift of lawmaking power from the legislature to the tax administration is in a way compensated for by the judiciary. In this respect it is important to mention the check on the tax administration's power, viz. its behaviour towards the taxpayer, exercised by the courts. They not only use the statutes which confer competencies to the tax administration but also the so-called general principles of proper administration. The major principles of proper administration are the principle of legitimate expectations and the principle of equality, which demands consistency in the application of tax law.²⁰ These general principles of proper administration protect people against illegitimate

¹⁸ R.H. Happé, *Drie beginselen van fiscale rechtsbescherming*, Deventer: Kluwer, 1996, p. 36-38.

¹⁹ H. Gribnau, 'Soft Law and Taxation: The Case of The Netherlands', 1 (2007) *Legisprudence* 3, p. 291-326, at 307-308.

²⁰ See R.H. Happé, *Drie beginselen van fiscale rechtsbescherming*, Deventer: Kluwer, 1996, part II and III.

government intervention – in addition to the principle of legality. Thus, the courts keep checks and balances in place to compensate growing power of the tax administration.

Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

Yes, the independent judicial review on the legality of the executive power.²¹ The most important dispute settlement power of the (administrative) judge is the annulment of the decision of the tax administration (Article 8:72 General Administrative Law Act). As a result of the annulment, the tax administration will be obliged under the law to take a new decision. If the court holds that the administrative organ is not prepared to observe the judicial decision, it may set a term for the (new) decision to be taken by the administration. In addition, the court may decide that, where the administrative organ fails to comply, and for so long as it fails to comply, it will forfeit a penalty for each day of non-compliance (Article 8:72, para. 7 General Administrative Law Act). The judge can therefore force the administration to take a new decision.

Usually, however, in tax matters the judge determines that his/her judgment will replace the decision annulled by him/her, instead of ordering the tax administration to take a new decision. Thus, the judge takes a administrative decision. Strange though this may seem, in tax matters this is long standing practice. The legislature may have conferred the administration discretionary powers (discretionary freedom), and therefore more than one decision may be (legally) correct, so judicial settlement is precluded, since the judge must respect the administration's discretionary powers. However, the tax administration hardly possesses any discretionary powers. Therefore, the tax judge's decision will usually replace the tax administration's decision.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

Yes, see above 3.4. The tax administration may also bind itself (even unwillingly) by other actions than such policy rules (administrative rulings), for example, a commitment (promise), with which the tax administration declares itself bound to a certain position, and even an implicit positioning that may be deemed to endorse a certain viewpoint of the taxpayer. On the basis of the principle of legitimate expectations the tax administration may be bound to this information / position.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

²¹ Cf. R.J.G.H. Seerden & F Stroink, *Administrative Law in the Netherlands*, in: R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, Antwerpen/Oxford: Intersentia, 2007, p. 196-199 and R. Sommerhalder and E. Pechler, *Protection of Taxpayers' Rights in The Netherlands*, in: D. Bentley (ed.), *Taxpayers' Rights: An International Perspective*, Gold Coast: The Revenue Law Journal (Bond University) 1998, p. 310-330.

Yes, the tax administration usually takes into account the decisions of the Supreme Court and the European Court of Justice. The tax administration is bound by decisions of the judiciary, though sometimes it willingly deviates from it.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

No, in the Netherlands such principle is not known. The Courts are not bound by the interpretation given by the tax administration, because it is not binding on others. The tax administration, however, is bound by the interpretation given in the final decision in a specific case. In similar cases the tax administration may not be obliged to follow the Court's case law, but, in practice, the tax administration follows established case law, once it is developed. In these cases, the tax administration frequently issues an administrative rule concerning the interpretation and application of the case law.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

Yes, the tax administration is bound by decisions of the judiciary.

4.6. Does your Tax Administration circumvent your domestic courts' case law?

The tax administration sometimes willingly deviates from decisions of the judiciary, although the tax administration is bound by its case law.

5. Relationship between different legal sources (legal pluralism)

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

The Netherlands adheres to a monist system for the relationship between international treaties and domestic law. In general, (legal) 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.²² 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.

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

²² P. van Dijk, F. van Hoof, A. van Rijn & L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, fourth edition, Antwerp, Oxford: Intersentia: 2006, p. 27-28.

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 (statute law) as well as over other generally binding rules.

The rule that ‘provisions that are binding on all persons’ prevail over domestic law (Art. 94) applies likewise to the decisions of international organisations. These decisions are published in the Treaties Series, in the Office Journal of the European Communities, or in other sources.²³

Consequently, the Courts have to respect European Community case-law, because of the primacy of international and EC Law.

Note with regard to EC Law, that the law of the European Community forms an independent legal order which has been received into the legal orders of the Member States. The law of the European Communities is supranational law which constitutes what is known as the First Pillar of the European Union. EC Law has direct legal consequences for the Member States and their citizens. Community law is an integral part of the internal law of each Member State. and is to be applied throughout the Community; and the national courts of the Member States can also be regarded as Community courts. This is the phenomenon of an integrated legal order: EC law lays down the rule, national law and national organs must ensure that the Community rule is actually applied and obligations arising under Community law are complied with – when necessary after transposition of EC law into national law.

One of the key notions here is the notion of direct effect, laid down for the first time in a judgment delivered by the ECJ in 1963 *Van Gend & Loos* (ECJ 5 February 1963, Case 26/62 [1963] ECR 1) . Here the Court held that the Community constituted a new legal order of international law for the benefit of which the States limited their sovereign rights. So, at its core, the European Union is based on the restriction of sovereignty for the benefit of the Union itself. Furthermore, the subjects of this new legal order comprised not only Member States, but also their nationals. Thus, according to the ECJ The Treaty created individual rights which national courts must protect.²⁴ This principle of direct effect has the effect that individuals may secure recognition and enforcement of their rights in the national courts, whereas, the national courts are the principal instruments for the effective application of EC law. Consequently, EC law prevails over conflicting national law; this is the primacy of EC law.

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

²³ See K. Kraan, ‘The Kingdom of the Netherlands’, in: L. Prakke & C. Kortmann (eds.), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 627; cf. L.F.M. Besselink (ed.), *Constitutional Law of the Netherlands*, Nijmegen: Ars Aequi, 2004, p. 127-145.

²⁴ According to the former Advocate General at the ECJ F.G. Jacobs, *The Sovereignty of Law: The European Way*, Cambridge: Cambridge University Press, 2007p. 39: The *Van Gend & Loos* ruling, ‘although at the time controversial, was crucial to the effectiveness of Community law and indeed to the very existence of the rule of law.’

The principle of effective remedies in national Courts applies in the Netherlands. The effective enforcement of Community law in national Courts is guaranteed: as far as we know there are no different legal remedies for EC law or domestic law. Taxpayers may appeal to the Courts against a decision by the tax administration (see 3.2).

II

Please answer the following questionnaire, which aims at confirming your answers in I

Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

- 1.1. Does your Parliament control tax authorities in an efficient way? no
- 1.2. Do tax authorities influence tax legislation to a major degree? yes
- 1.3. Does your Parliament
- a) usually accept the bills provided by tax authorities? yes
 - b) refuse the bills provided by tax authorities? almost never
 - c) improve the bills provided by tax authorities? sometimes
- 1.4. Is your Parliament able to discuss the bills thoroughly? no, not really
- 1.5. Is there sufficient knowledge of tax law in Parliament? no
- 1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? often
- 1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never - sometimes - often

Formally not, but in fact Parliament is hardly able to effectively control the tax authorities, lacking time and expertise. Occasionally, they are informed by organisations of tax payers, but that is just the case in

2. Relationship between the Parliament and the Domestic Tax Courts

- 2.1. Are there independent (Tax) Courts in your country entitled to control legislation? Yes
- 2.2. If “yes”, do they control tax legislation: 0 ex ante or ex post?
- 2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? yes

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law [Act of parliament./ statue law]? yes

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

Yes, their task is to control the tax Administration's interpretation of the law and its application of the law to the facts.

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? no

If "no", do the courts follow them in fact? Often, except when these administrative rules are successfully challenged by taxpayer's in an appeal procedures or are found incompatible with higher law, e.g., international treaties.

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? sometimes

Please report statistics if available!

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? very often

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? sometimes, because it is a 'unique' not related to other taxpayers; there are of will be no similar cases, eg. because the statute law has been changed in the mean time.

b) Does it try in another similar case to convince the Court to decide in a different way? very often

c) Does it try to influence the Parliament to change the law? very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases? sometimes

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? never - sometimes - often - very often This is hardly possible in the Netherlands because many tax decisions are published on the internet by the Courts and in tax journals.

If possible, please add statistics to the answers!