

Separation of Powers

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-- TOPICS FOR THE SEMINAR DISCUSSION--

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

Discussion of separation of powers in tax law raises complex questions on democratic legitimacy of government and courts competence. These questions are common to every law field where the competence belongs in principle to the parliament – such as criminal legislation, fundamental rights.

Decision on the fundamental issues regarding taxation (as well as in other law fields) by the parliament distinguishes democratic from dictatorial regimes and arbitrary results.

However, I conclude from the national reports, that governments are the most significant player influencing tax regimes, either presenting bills, or even passing them or demanding their amendment according to their own idea of equality, ability to pay and ultimately, budget needs.

It is common to the current systems that have sent reports that governments emerge from parliamentary majorities and are therefore democratically legitimate. That is the reason why, in some reported countries, governments have legislative competence, even if delegated.

One fundamental question must however be raised:

Do governments, on behalf of the Minister of Finance, actually take the political decisions on tax regimes (tax reforms, amendments to the legislation in force, new regimes)?

Or, instead, is tax policy and drafting being basically decided by the tax administration and international players with no democratic legitimacy, such as the OECD, the IMF, the European Commission?

How can this phenomenon be justified?

The other fundamental issue relates to intrinsic constraints to legal language and drafting: legal language as human language is inevitably imprecise: only quantitative concepts are determined and in a certain context even these can lead to indeterminate results.

Thus, tax law will intentionally or unintentionally often be indeterminate, and the issue is whether discretion is given to the tax administration or the last word always belongs to the courts.

The role of the tax courts and of the European Court of Justice (hereinafter, ECJ) within this frame has to be discussed.

We can find 2 types of systems in the national reports:

- 1) The government only has the competence to present draft bills to the parliament.
- 2) The government also has delegated legislative competence (Finland, France (exceptionally), Greece (exceptionally, in respect of non-essential elements), Italy, Portugal, Japan, Russia, Sweden (exceptionally, in respect of non-essential elements), Spain (exceptionally, in cases of extraordinary and urgent need or in order to standardize laws in force).

In all reported systems, the government has competence to enact regulations and the tax administration has competence to enact rulings (except Serbia, for the latter case).

In both (1) and (2) systems the tax administration and the government either directly or indirectly have a big influence on the final result of the tax regime.

Even if interpretation followed by the tax administration is not confirmed by the courts, the tax administration will influence the government and the parliament, in order to change the law, according to its interpretation.

Discussion topic:

Is this influence of the tax administration and government on parliament inconsistent with the separation of powers (legislative competence belonging to the Parliament) or does legislative competence in tax law have to include the government's policy in respect of the tax regime?

To what extent are governments independent from the tax administration, OECD, European Commission and other high level bureaucrats?

Is political responsibility on managing the budget - a balanced budget - a legitimate element to be taken into account, in order to justify the government's influence on the drafting of tax bills and/or their regulation?

Is it uncontroversial that political responsibility on managing the budget should not be taken into account when courts are interpreting vagueness in law (Cf. the Japanese report)?

Some reporters mention that the tension between legal certainty and tax avoidance justify legal indeterminacy and government and tax administration discretion.

What other arguments justify vagueness in law?

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

As already reported, all Governments draft tax bills proposals. They are in most cases prepared by the tax administration and the Minister of Finance.

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 all reported countries except the USA, the Government drafts tax bills proposals with frequency (e.g., Austria, Belgium, Brasil, Canada, Denmark, Finland, France, Germany, Greece (exclusive competence), Israel, Italy, Japan, Poland, Portugal, Serbia, Spain. In the USA what is typically proposed is not a draft law but a policy proposal.

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?

The situation varies. In some countries the Parliament does not handle tax legislation since it is considered to be too technical. In others, it does (e.g. Denmark, Israel, Japan, USA). In most of them, specialized Parliamentary commissions discuss the draft bills in detail (e.g., Austria, Belgium, Canada, Denmark, Spain, Sweden).

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3. ?

In all countries, the courts have the final word, and in most countries the courts try to compensate the big influence of the government, actually exercising a control of legality).

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?

In all countries, both techniques are used. In Canada, tax acts are very detailed but accompanied by indeterminate clauses, e.g., relating to amounts of deduction (test of reasonableness) and a General Anti-Abuse Clause (GAAR). In France it is normally not very detailed. In Greece, Italy, Poland and Russia it is normally detailed. E.g., in

Canada, the UK, the USA and Sweden, the courts have given important contribution to determining vague concepts and developing tax principles.

In Spain, a distinction is in principle made between state taxes and regional and local taxes. In the latter case, discretion is given to local authorities.

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

Indeterminacy is associated by some reporters with the necessity of fighting tax abuse (e.g. Belgium, Denmark, USA), in some countries detailed statutory regimes are required (e.g. Greece and Russia); simplicity of tax law was not mentioned in the reports as a reason for indeterminate laws. However, complexity arising from a huge amount of regulations and rulings was mentioned (e.g. Japan).

In other countries such as Canada, the UK and USA legal indeterminacy is not seen as a problem, since it belongs to the courts to find the ultimate meaning of a statute (using all interpretation methods, regulations, administrative rulings, judicial decisions and general principles);

In Canada statutory indeterminacy would be unconstitutional if it infringed the “right to life, liberty and security” (if they lead to arbitrary results). And in the USA, if it is so unclear that will be arbitrary.

In Serbia, legal indeterminacy does not seem to raise an issue of constitutionality.

However, most reporters highlight that in case of indeterminacy, regulations and rulings will complete the regime (differently, Greece).

In some countries the literature highlights the difference between discretion and indeterminacy (e.g. Austria, Germany, Greece, Portugal): discretion is often considered to be prohibited; in the case of legal indeterminacy, the final word belongs to the courts. In Greece interpretation seems to be near to a literal interpretation (on the opposite side, see eg Canada, Sweden).

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

All countries seem to have independent courts, which have the last word on the indeterminacy of tax legislation.

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

In all or most of the cases, legal indeterminacy has not been considered unconstitutional by the competent courts. In some, it has seldom or even only once been considered unconstitutional (e.g., Belgium, Brazil, Poland); In Japan the Supreme Court has declared tax rules unconstitutional due to indeterminacy in a few

cases. In Russia the Constitutional Court has declared some indeterminate tax rules unconstitutional, but case law is increasingly fulfilling legal indeterminacy.

3. The consequences of legal indeterminacy in tax matters

Moreover, the fact that the courts control application of indeterminate rules by the tax administration, is considered to create a balanced solution – any transfer of power conferred by the parliament to the tax administration by the use of legal indeterminacy is compensated by the judicial control of correct interpretation.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

Rulings enacted by the tax administration only bind the tax administration itself (in the USA, if interpretative regulations present a reasonable interpretation of legislative provisions, they must be followed by the courts).

However, rulings enacted by the tax administration are in some countries followed by the courts, as long as these rulings are not considered to be illegal (see, e.g. Canada, Italy, Japan, Poland). In other countries they are taken into account as facts of the case (Russia) or as relevant arguments (Spain). Thus, courts are in most countries not bound by the rulings, but in Poland the courts cannot deprive taxpayers of protection deriving from rulings even if these are illegal. In Serbia there are no interpretative rulings, and the Minister of Finance has competence to answer interpretation issues, but his opinions are not binding.

This implies that interpretation by the tax administration of indeterminate laws helps the courts in order to reach a possible meaning (e.g. Denmark, Spain).

The tax administration is in all countries bound by the court decision on the case, but in most countries not bound in respect of similar cases (e.g. in Serbia the tax administration has tried to circumvent domestic courts decisions) – unless they are common law systems. In some countries the tax administration follows the case law in similar cases, and in some others even pays special attention to it, and is even organized by the tax administration itself in order to be available and distributed to the competent departments and officials (e.g. France the Netherlands, Poland, Serbia).

It is worth to stress that, in all or almost all countries, when the courts reject the tax administration interpretation of the tax regime and support the taxpayer's viewpoint, the tax administration will try that the law is amended and will often manage to achieve it.

We can highlight two aspects that show a big influence of the tax administration in the tax legislation:

- 1) Legal indeterminacy is normally fulfilled by regulations and rulings and if the vagueness of the legislation is high, the solution found by the tax administration expresses a relevant margin of discretion or choice (relation Parliament/Government/Bureaucrats).
- 2) Even if the courts control the above mentioned choice, through the control of the legality of the regulations and rulings, if the vagueness is high, they will normally accept the tax administration solution.
- 3) And if the courts consider the tax administration interpretation of the law, very often the law will be amended, in order to reach the meaning proposed by the tax administration.

5. Relationship between different legal sources (legal pluralism):

In most countries, the tax administration is bound to tax treaties and EC secondary law (in the latter case, EU Member States), but it does not feel bound to the ECJ case law unless the ruling refers to its own legislation. On the contrary, in most countries, courts are constitutionally bound to international and EU law (in the latter case, EU Member States), including the ECJ rulings.

II

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

1. 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? yes – no

The Parliament control of tax authorities and draft bills presented by the Government is in most countries insufficient. Most reporters consider their parliaments do not discuss in detail bills presented by the Government, due to their technical nature. There are exceptions to this.

1.2. Do tax authorities influence tax legislation to a major degree? yes - no

In all countries, tax authorities seem to influence tax legislation.

1.3. Does your Parliament a) usually accept the bills provided by tax authorities?
yes - no

b) refuse the bills provided by tax authorities? never -
sometimes - often

c) improve the bills provided by tax authorities? never -
sometimes - often

The situation varies according to whether the parliament exercises or not an effective control of the draft bills presented by the Government.

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation?

Independent (tax) courts seem to exist in all reported countries.

2.2. If “yes”, do they control tax legislation: 0 ex ante or 0 ex post?

Control is in most cases ex-post, but in some cases, constitutional courts can exercise an ex-ante control.

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? yes - no

In most cases yes, but the effects are limited to the process.

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? yes - no

In most cases the answer is negative.

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?

There is a control of legality (illegal acts, regulations or rulings).

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

If "no", do the courts follow them in fact? never - sometimes – often - very often

They are not bound, but in some countries they follow them.

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)? never - sometimes - often - very often

There not statistics available but they are sometimes accepted in most countries.

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? never - sometimes - often - 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? never - sometimes - often - very often

b) Does it try in another similar case to convince the Court to decide in a different way? never - sometimes - often - very often

c) Does it try to influence the Parliament to change the law? never - sometimes - often - very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases? never - sometimes - often - very often

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

If possible, please add statistics to the answers!