Legislative Instrumentalism vs. Legal Principles in Tax Law

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Introduction

Tax legislation is an instrument which may be used to change the law and introduce new law. Western legislators increasingly interfere with the liberties of citizens in order to steer society. The interventionist state uses legislation to achieve all kind of objectives. The state tries to steer society and tax law is used as a device to influence and change people’s behaviour. Of course, the functioning and performing of the interventionist state is often questioned. Attempts are made to cut back bureaucratic regulations, and to put limits on the state in its role as the shaper of social and economic life. One could focus on concerns regarding the interventionist state’s efficiency and equity. Another approach could focus on the tension between liberty and paternalism. With regard to liberty in its turn, different conceptions or aspects of liberty are at stake - which I will only indirectly touch upon.

At this point another road is taken, the focus being the values and principles underlying the legal system and on the checks and balances at work in the legal order. This article’s point of departure is the observation that the interventionist state’s use of legislation is inherently risky. The ‘instrumentalist’ legislator evidently fails to implement fundamental legal principles sometimes. In these cases the courts may in exceptional cases react in the name of the rule of law. This so called judicial activism is sometimes criticised. However, we should keep in mind that ‘democracy is not just the law of rules and legislative supremacy’, as Barak rightly points out. He defends a conception of democracy that ‘is based on legislative supremacy and on the supremacy of values, principles and human rights.’ This position has great appeal to this author. This article will defend the view that a certain degree of judicial activism is conceivable – and even necessary - within a theory of law which assigns an important role to norms and values, and which views legal principles as the normative core of the law. Thus, legislative instrumentalism may be ‘contained’ by countervailing case law which itself is guided by legal principles. However, the judiciary should adopt a restrained, nonetheless ‘active’ attitude to preserve the dignity of legislation, in order to keep legislation, and more broadly, the whole body of law, worthy of respect.

In order to present this view the article will first explore some ethical aspects of the use of incentives and take a closer look at the related concepts of instrumentality and instrumentalism which refer to legitimate and illegitimate uses of incentives in law. Then the article will show that instrumentalism fits well in a command theory of law: the legislator rules society by its commands. Next, it will analyse the impact on the distribution of powers of the proliferation of legislation, as a consequence of this legislative instrumentalism and other factors. An important consequence is the courts’ recognition of the importance of legal principles for the legal protection of the citizen against illegitimate government interference. Then the author will present a value-oriented conception of law. This conception of law makes it possible to come to

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2 The focus is on the limits the law sets to legislative instrumentalism. Other perspectives on legal instrumentalism are discussed in Teubner, G. (ed.), Dilemmas of the Welfare State (Berlin [etc.]: Walter de Gruyter 1986); for instance, the apparent ineffectiveness of regulatory law because it overreaches the limitations which are built in the regulatory process and the disintegration of basic legal values and the unity of the legal system as a result of the political instrumentalization of law.
terms with the importance of legal principles. The legislator should respect these principles. However, as for remedies, legislation disregarding or even violating these principles will not immediately be invalidated by the courts. The legal protection offered by the courts depends on many factors, such as the degree of neglect or infringement, and the kind and the importance of the principle at play. Of course, the constitutional relationship between the - democratically legitimised – legislature and the judiciary will play a part as well. Therefore, a conception of the separation of powers and of checks and balances of powers will be a major influence on the outcome of this conflict between democracy and the rule of law. Finally, the framework of the article is provided by the legal relations between government and citizens, that is to say, public law. The article will mainly make use of examples from Dutch tax law but the scope of this article is broader. Therefore, it will also refer to literature from other countries.

**Incentives, instrumentality and instrumentalism**

**Incentives**

Increasingly, incentives are becoming the policy tool the interventionist state reaches for when it wishes to bring about change in people’s behaviour. The use of incentives to steer people’s choices in certain directions is a widespread phenomenon in the modern world. Incentives are offered to alter a person’s course of action, i.e., to make one choice more attractive to the person responding to the incentive than any other alternative. Thus, an ‘incentive is an offer of something of value, sometimes a cash equivalent and sometimes not, meant to influence the payoff structure of a utility calculation so as to alter a person’s course of action.’\(^3\) Incentives are considered an important policy tool, as an alternative to ‘command and control’ legislation, for as inducements in voluntary ‘transactions’ they guide people’s choices without exerting power by way of coercion.

When incentives are viewed from the perspective of market economics, incentives resemble the ideal model of a voluntary act. However, choices induced by incentives may nonetheless involve manipulation and control, as will be shown below. Grant points out those incentives were originally understood as a form of political and social control, rather than as an alternative to it.\(^4\) Incentives are also an alternative to the methods of persuasion in influencing people’s choices. ‘Incentives attempt to circumvent the need for persuasion by giving people extrinsic reasons to make the choices that the person or institution offering the incentive wishes them to make.’\(^5\) Thus incentives should be considered, along with coercion and persuasion, an alternative means of exerting power and influence. These forms of power - that is, as forms of control - may sometimes be legitimate and sometimes not.

In this subsection, we are concerned with the legitimacy and illegitimacy of one of the alternative forms of power, viz. incentives, from an ethical point of view. How is the use of incentives to be judged? Which conditions should be met, which standards should be applied? Grant argues that incentives, like any form of power, can be judged according ‘to three primary criteria.’\(^6\) First, the use of incentives should serve a legitimate, in other words,  

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3 Grant, R.W. ‘The Ethics of Incentives: Historical Origins and Contemporary Understandings’, *Economics and Philosophy*, 18 (2002) nr.1, page 111. She recovers the historical genesis of the idea of incentives within a framework of a mechanical theory of motivation and choice and a political context dominated by the idea of social engineering and control.


rationally defensible, purpose. Consequently, government’s use of incentives for an illegitimate purpose constitutes an abuse of power, which obviously conflicts with the rule of law’s objective of restraining political power in order to protect people against arbitrary interferences.\(^7\)

Furthermore, this form of power should allow for voluntary response, which is an important requirement of liberty, the protection of which is one of the major goals of a state under the rule of law; the relationship between incentives and liberty will be addressed later. Third, the use of incentives should be judged by its effect on the character of the parties involved. As Grant points out, certain forms of power may undermine character. Incentive systems are sometimes criticised because they may encourage people to ask only ‘what’s in it for me?’ The various ways power is used in order to influence people’s decisions may have an impact ‘both on people’s characteristic dispositions and on what good character is understood to be.’\(^8\) Therefore, the different ways in which people are governed have different impacts on their moral dispositions and on good character. In the same way, the excessive use of incentives brings about and strengthens a calculating attitude and encourages the view that this calculating disposition is good. This use of incentives, corroding character, lacks legitimacy.

The article will not elaborate on all three primary criteria; it will only briefly touch upon the criterion of liberty. Incentives can be viewed as inducements in voluntary choices. As such people exercise their liberty, by way of having alternatives and the capacity to choose among them. But this minimally construed conception of voluntariness is insufficient, as the political philosopher Berlin makes clear. In a totalitarian state someone may betray his friend under threat of torture, but he can reasonably say that he did not act freely. Nevertheless, he did, of course, make a choice, and could, at any rate in theory, have chosen to be killed or tortured or imprisoned. The mere existence of alternatives is not, therefore, enough to make my action free (although it may be voluntary) in the normal sense of the word.\(^9\) An ethical evaluation of choice situations should therefore take into account the power relations that structure this situation. In the same vein, rationality should not be reduced to the maximization of utility.

Consequently, the exercise of power in its various modes should respect human freedom and rationality more expansively, which implies that ‘incentives will be subjected to a stricter scrutiny.’\(^10\) We should move from liberty conceived of as voluntariness and calculation to liberty conceived of as autonomy. Two related but distinct qualities are involved here: the ability to reason and the independence to set one’s own ends or purposes. Conceived this way, man is autonomous when he/she is author of their own life. That is, his choices and actions are an expression of his own preferences and aspirations which not only exert a motivational force over his behaviour but are also ‘congenial to the personality of the person in question as a whole.’\(^11\)

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nr.1, page 32.
\(^7\) In the case law of the European Court of Human Rights (ECtHR) and the Dutch Supreme Court concerning the principle of equality a legitimate aim of government policy is required. See below, sections 4.2 and 4.3.
Thus, power is legitimate only to the extent that the parties involved are treated as beings capable of moral agency on account of their rationality and capacity for freedom. Government ought to treat people as autonomous persons who are capable of making judgements and guiding their behaviour by them. Incentives must respect people’s autonomy.\textsuperscript{12} Recognizing that to have a choice is not the same as to act autonomously implies a stricter scrutiny which increases the likelihood that incentives will be judged illegitimate. They may be judged to be paternalist, manipulative or even exploitative. These are ‘grey areas’ between ‘total control and benign influence, and all of them considered assaults on autonomy.’\textsuperscript{13} Certainly, autonomy and the other primary criteria (legitimate objective and effects on character) are not simple ‘rules of thumb’ for ethical analysis of incentives. They cannot be mechanically applied to produce sounds ethical judgements of the legitimacy and illegitimacy of incentives in every case. In many cases there is more than one way in which the standards – which themselves may even conflict with another – can be applied. Moreover, when the use of an incentive is considered, it must also be compared to alternative available forms of power (coercion and persuasion) as means to meet a particular goal.

To conclude, framing the question of incentives as a question of the exercise of power and comparing incentives to other forms of power (coercion and persuasion) enables us to raise many ethical questions. A careful ethical analysis becomes all the more important as western governments increasingly employ incentives, as the preferred means to assert control, to bring about the change, and to steer citizens’ behaviour. Moreover, framing the question of incentives as a question of the exercise of power and control prepares the ground for a legal analysis of the uses of incentives, for after all the rule of law aims at restraining power in order to protect people against arbitrary interferences. However, law as an institutionalised system of public morality is not identical to ethics, which is not to deny that they have much in common. Nonetheless, a legal analysis will differ from an ethical analysis.

\textit{Instrumentality and instrumentalism}

Legislative instrumentalism is a pervasive phenomenon. Here, an analytical distinction between instrumentality and instrumentalism may be useful. These concepts point to two different relations between law and social, political and economic ends.

Let us start with instrumentality. Law should be directed to certain ends in order to be meaningful law. The law is not a self-sufficient system of norms. Law, therefore, is not immune to change. Indeed, deliberate change is a mark of law, as Waldron reminds us.\textsuperscript{14} However, the law increasingly not only articulates but sets the course for major social changes.\textsuperscript{15} Nowadays, law has become an instrument for government of wide-scale social and economic planning, for example to promote economic growth, increase employment, health, education, care for the environment.\textsuperscript{16} These are important goals of government policy, all the


\textsuperscript{14} Waldron, J. \textit{The Dignity of Legislation} (Cambridge: Cambridge University Press 1999), page 12. Friedmann, M. \textit{The Republic of Choice, Law, Authority and Culture} (Cambridge (Mass.)/London: Harvard University Press 1994, 2\textsuperscript{nd} ed), page 22. He continues: ‘Law is, therefore, open to the public and its representatives; it is ultimately, their instrument.’

\textsuperscript{15} Friedmann, W. \textit{Law in a Changing Society} (New York: Columbia University Press 1972, 2\textsuperscript{nd} ed), page 513.

more when we keep in mind that social and economic human rights urge government to take care of these matters. Thus, through a wide range of activities, the social welfare state tries to create substantive freedom and equality for its citizens. Here, legislation is used to enhance ‘positive liberty.’\(^\text{17}\) Positive liberty – or, referring to the capacity to make choices upon reflection, autonomy – can be conceived broadly as the possibility to self-development and to participation in shaping society and the state.\(^\text{18}\)

But the law is also more than just an instrument to achieve social and economic ends. The rule of law aims at protection against abuse of power, more specifically protection against arbitrary government interference. Here another aspect of liberty is at stake. The rule of law protects ‘negative liberty’, the liberty to choose between alternative courses of action without interference by others.\(^\text{19}\) Taxation is such an interference with the right to enjoyment of property. Taxes are an encroachment on ‘negative liberty.’ Therefore, the levying of taxes is governed by law. The law itself aims to realise a value, in other words, justice. The law establishes norms the tax legislation and the tax administration have to comply with, offering taxpayers a measure of protection against arbitrary interference. As such, the law is also a system which embodies values which cannot be understood solely as a means to direct society. These values are ‘essential determinants of the law’s content.’\(^\text{20}\)

Some of these more specific legal values include legality, equality, predictability, transparency, (judicial) impartiality, a fair opportunity to be heard. It is by upholding these values that the law offers protection to the citizens against government. Equality, for instance, demands that equal cases are treated equally and unequal cases differently to the degree of inequality; legal certainty demands predictability of governmental actions, the value of official even-handedness prohibits arbitrary treatment of citizens. Therefore, the law contains a fundamental tension between the orientation to the ends which are external to the law on the one hand and the orientation to internal legal values on the other hand.\(^\text{21}\) This tension ought not to be ignored or removed (abolished) in favour of one of these poles. Instrumentality expresses the precarious, but necessary, balance between the regulating function of law and the internal legal values which offer legal protection to citizens. Certainly, the concept of instrumentality does not reflect a romantic longing for some (lost) purity of law, for it allows for the use of tax laws for policy ends. However, this use should be in balance with important legal values and principles.

Instrumentality should be distinguished from instrumentalism. Instrumentalism is the view of law as merely a technique or a means to implement policy goals. To the instrumentalist, law is no more than just a particular technique. It is a product of policy that is used in order to implement policy, in particular to achieve economic and social ends such as economic growth and employment. More recently, environmental policy has also gained popularity.

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\(^{20}\) Summers, R.S. *Instrumentalism and American Legal Theory* (Ithaca and London: Cornell University Press 1982), page 59. He rightly remarks (page 97): ‘It is misleading to represent the law of any given time as merely the accumulated handiwork of humans responding to the public’s ever-fluctuating perception of its needs.’

Consequently, the law can and must be changed at any moment to serve policy goals. Existing law constantly needs revision in response to perceived societal needs. The instrumentalist regards law as subservient to policy. Law, especially statute law, is merely a device to steer society. Central government uses legislation to determine the direction of society, and to implement policies.\(^\text{22}\) Partly in reaction to government’s instrumentalist stance towards the law, the attitude of citizens towards the law becomes more calculating: law is increasingly seen as an instrument to achieve their personal ends. As a result, Friedman notes, the law in Western societies is defined instrumentally, at least in part: as a tool, an artefact, which the constituent parts of society can manipulate deliberately and openly for personal or social ends.\(^\text{23}\)

Instrumentalism tends to underrate intrinsic values and principles of law, such as legal certainty, neutrality and equality before the law (besides those already mentioned above). Instrumentalism ignores that these values cannot be treated merely as matters of trial and error (however, ‘many of the values served by our law are structural or processual in nature’).\(^\text{24}\) Thereby it undermines the (old) ideal of legal protection against arbitrary government interference, in which these values are expressed. The rule of law’s objective of restraining political power should be realised by laws which promote certainty and equality with regard to the possible encroachments upon citizens’ liberty. On the basis of an instrumentalist view, the legislator might be tempted to risk a violation of equality, for instance, if that would help increasing economic growth and employment. In America instrumentalism is a very influential legal theory. Most American pragmatic instrumentalists believe that values in general, and the goals of rules and other legal precepts in particular, must derive from prevailing wants and interests. This instrumentalism ‘conceives of law essentially as a pragmatic instrument of social improvement’ rather than a received set of authoritative legal rules and principles.\(^\text{25}\)

Nowadays, the Dutch government advocates the view that the use of tax legislation for non-tax goals is ‘an integral part of government policy.’ This instrumentalist view of tax law, however, threatens to erode the integrity of tax law. The quintessential requirement for liberty - that law must be general, abstract rules are known and certain, and apply equally, - is undermined. The persuasiveness of the state under the rule of law diminishes when the general rule becomes an interweaving of preferential treatments and disadvantageous treatments.\(^\text{26}\) Moreover, the instrumentalist tax legislator often seriously neglects legal principles promoting to legal certainty such as clarity, non-retroactivity, compliability and constancy of laws, as will be shown below. It becomes hard for citizens to believe that tax law still shares a distinguishing characteristic with the law: ‘a manifestation of public power that is to be wielded in furtherance of the public good.’\(^\text{27}\) However, the legitimacy of tax law,\(^\text{28}\)


\(^{24}\) Summers, R.S., Instrumentalism and American Legal Theory (Ithaca and London: Cornell University Press, 1982), page 98.


\(^{26}\) Kirchhof, P. Der Staat als Garant und Gegner der Freiheit (Paderborn [etc.]: Ferdinand Schöningh 2004), page 37.

\(^{27}\) Tamanaha, B.Z. The Perils of Pervasive Legal Instrumentalism, (Schoordijk Institut/Wolf Legal Publishers: Nijmegen 2006), pages 66-67; cf. Tamanaha, B.Z. Law as a Means to an End: Threat to the Rule of Law
its claim to obedience, is based upon this assertion. Without this characteristic, tax law is brute force, and, consequently, people will lose faith in it. Without sufficient respect for fundamental legal values and principles, tax legislation’s legitimacy will diminish - with adverse effects on taxpayers’ compliance. The obligation to abide by the law will no longer be natural. As a result, tax law may lose the widespread, routine, voluntary compliance that is based upon this perceived obligation.

**Instrumentalism and ‘command-theory’ of law**²⁸

This article is confined to legislative instrumentalism (in Western countries). Again, instrumentalism is a denaturation of the instrumentality of law. Instrumentalism stands for the disregard of the internal morality of law. This point is reflected in the way instrumentalists perceive the legislature and its ‘product’ legislation. First, therefore, we must have a look at the legislature.

Government under the rule of law is to exercise power via general legislation (*per leges*).²⁹ In a public law model, government is only allowed to interfere with the liberties of the citizens by law; thus any interference by the executive must be reducible to enacted laws. This fundamental principle of legality expresses the supremacy of law; but of a certain type of law, viz. general laws. The relation between the executive and the citizen must be determined in advance ‘by formal rational law.’³⁰ Rational law is meant to prevent voluntarism; law is not to be reduced to the will of the legislature. The rule of law is understood as rule-governance to avoid the rule of men. The law is made by legislative bodies in the form of general and abstract rules. The executive has to interpret, implement and apply these rules. The task of the judiciary is traditionally restricted to adjudicating conflicts. The executive, according to this strict version of the doctrine of the separation of powers, is only bound by the rules promulgated by the legislature (principle of legality). This legislation itself is considered to be clear and complete and normatively speaking perfect. Therefore, the laws are immune from judicial review.

Given this central position of legislation, however, law is often identified with the will of the legislature. In this conception, law is a set of commands issued by the legislator. In the famous words of Austin which echo the ideas of Hobbes: ‘laws or rules, properly so called are a species of a command.’³¹ The addressees of the commands, the citizens, are seen as passive subjects who should mechanically apply and obey the law. Lawmaking in this command-theory of law is often exclusively allocated to the legislator.³² The legislator, therefore, has the exclusive prerogative to determine the contents of what should count as law. According to this view, there is no law outside or beyond the laws issued by the legislator. Statute law is exhaustive of ‘the law.’³³ This idea of the legislator as the highest authority can be found in Dicey’s theory of

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²⁹ On the meaning of the concept of the rule of law as government *sub lege*, i.e., government in accordance with the existing basic norms of the legal system, and as to government *per leges*, see Bobbio, N. ‘The Rule of Men or the Rule of Law’, in: Bobbio, N. *The Future of Democracy* (Minneapolis: University of Minnesota Press 1987), page 142.
³³ Cf. Dworkin’s presentation of the second key tenet of legal positivism: Dworkin, R. *Taking Rights Seriously*
parliamentary sovereignty towards the end of the 19th century, which embodied the ideas of representative government and legislative omnipotence.\textsuperscript{34} According to this conception of law, the legislator was not bound by higher legal norms or values. Substantive requirements to be met by law are lacking in this voluntarist view of law.

Obviously, the view that statute law, especially Acts of Parliament, is the sole source of law is a form of legal positivism. The judge, as a mouthpiece of that law, is denied any creative role. Neither is such a role assigned to the administration. Both judiciary and administration are conceived of as mechanically applying the legislator’s commands. Positive law is what the legislator declares to be law; it is the will of the legislator, issued by command. This conception of law and law making fits in the doctrine of the separation of powers, one of the central elements of the rule of law, because it entails a strict division of powers.\textsuperscript{35} The doctrine of the separation of powers as such serves to protect the liberty of the citizens by distributing the power of government among several branches of government. In this 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.\textsuperscript{36} Therefore, the legislature, for example, should not get involved in executive or judicial affairs.

In the traditional vision on the separation of powers, the legislator determines what counts as law in the state. Is this voluntarist idea of the rule of law as the rule of statute law compatible with the idea of democracy? Answering this question requires a short look at the democratic state under the rule of law. The rule of law conceived as government \textit{per leges} seems to be capable of meeting the requirements of a democratic system. In a democracy, citizens have the right to participate directly or indirectly in the making of important collective decisions. The representative bodies are designed to reflect democratic society. The citizens are represented in the legislative body. Democracy means that parliament representing the people is part of the legislature. In the lawmaking process, the democratically legitimised legislator has a monopoly in view of the abstract, general, and impartial character of the legislative process that guarantees a certain amount of rationality of law. The legislator determines the direction of society, and determines which policies should be implemented. According to this view, only democratic politics and therefore democratic legislation, can respond adequately to the pressures emanating from the demands of a complex and differentiated society.

In this way, law is conceived of as a set of commands issued by the legislator. Lawmaking by the democratically legitimised legislator yields laws that furthermore guarantee equality and legal certainty.\textsuperscript{37} However, this ideal picture of law and legislator is liable to deterioration, not in the least because of the instrumentalist attitude of the legislator, as will be seen when we discuss the next issue. This means that there is a need to reconsider the concept of law and the current relationship between the governmental powers.

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\textsuperscript{35} This strict separation of powers is not a matter of principle. For example, the American instrumentalists insisted on the reality and propriety of judicial lawmaking; R.S. Summers, \textit{Instrumentalism and American Legal Theory} (Ithaca and London: Cornell University Press 1982), page 86.


\textsuperscript{37} Law is one of the domains developed in societies through which we try to defend ourselves against uncertainties in the behavior of others, which function can only be fulfilled if the law itself provides legal certainty. For this distinction between certainty through law and certainty of law, see von Arnauld, A. \textit{Rechtssicherheit. Perspektivische Annäherungen an eine idée directrice des Rechts} (Tübingen: Mohr Siebeck 2006), pages 89-97.
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Changing positions in the legal order: legislator, tax administration and taxpayers

Instrumentalist legislator

The instrumentalist legislator increasingly interferes with the liberties of citizens in order to steer society. Legislation is thick with regulation. Through a wide range of activities, the social welfare state tries to create substantive freedom and equality for its citizens. The welfare state is facing a variety of challenges that include demographic aging, the changing role of families, increased opportunism, economic integration and declining job security, which call for a drastic reform of the welfare state.\(^{38}\) One might expect a decrease in governments’ use of incentives, but this is not the case. On the contrary, for governments’ seems to be addicted to incentives. However, law has a limited capacity to effect desired social and economic changes, as socio-legal scholars have repeatedly pointed out. Legal institutions, such as legislation, exist ‘within an environment composed of other (social, economic, political) institutions, entrenched customs and social practices, and material conditions, which constrain the efficacy of legal output.’\(^{39}\)

Furthermore, legal rules are by no means the only means of influencing people’s behaviour. There are many institutions that can all produce norms that shape conduct, for example, ‘voluntary associations, the family, smaller urban communities, the school, and churches.’\(^{40}\) Law is only one, and not necessarily the most powerful one, form of normative regulation. Furthermore, legislation often has unanticipated consequences, social actors altering their behaviour to avoid the dictates of the law.

Nonetheless, the instrumentalist legislator is a true believer in regulation. However, the overuse of the law to achieve disparate goals and objectives has resulted in an excessive complexity of the laws.\(^{41}\) Legislation is often hampered by reasons of political opportunity and the need to reconcile disparate interests. The legislator’s instrumentalism often takes the shape of tax expenditures. The function and effect of tax expenditure provisions is ‘to implement government spending programs.’\(^{42}\) These expenditures are deviations from the normal tax structure designed to favour a particular industry, activity, or class of persons. Tax expenditures result in lower tax payments by taxpayers than would be due under the normal tax rules. ‘They partake of many forms such as permanent exclusions from income, deductions, deferral of tax liabilities, credits against tax or special rates.’\(^{43}\)

A good example is Dutch tax law which contains all kind of tax incentives mostly in the form of tax reductions, for example, for commuting by bike, employee’s training, day-care centres, production of Dutch movies, research and development, ecologically sound investments or letting of rooms by private persons. These instrumentalist incentives are introduced by

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\(^{39}\) Tamanaha, B.Z *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006), page 165.


`politicians, who are too ready to sacrifice tax principles to political expediency.'

As a result, the instrumentalist legislator sometimes evidently fails to respect fundamental legal principles. No wonder, if legislators come to believe that good law is whatever the majority in parliament wants, they will be less inclined to subject actual and proposed law to an independent rational scrutiny based on values as justice, liberty, and equality.

**Tax administration’s growing power**

Paradoxically, the resulting proliferation of legislation generates a growth of the power of the administration. An increasingly important role is assigned to the administration which has to apply and concretise - not just expose - the norms of the general law. This concretisation of a general norm by the administration has an independent, formative component. The legislator may even deliberately formulate rules too broadly, leaving it up to the courts or the tax authorities, acting as junior partners, to tailor the rule more precisely. In practice, the tax administration takes the lead in to concretising and specifying these indeterminate rules. To be sure, the courts are not bound by the tax administration’s specification and interpretation. Nonetheless, the tax administration’s interpretation is often very influential, even sometimes at the cost of the legal protection and interests of the taxpayer. Consequently, there is a shift of power from the legislator to the tax administration in the Netherlands. The result is often a new type of legislation: statutes set out certain aims, leaving the implementation to subordinate legislation, decisions of ministers.

Furthermore, discretionary powers are assigned to the administration. For example, a taxpayer is under penalty to file a tax return before the time limit fixed by the tax inspector. The statute mentions a maximum fine for taxpayers not meeting this double obligation, but the tax inspector has discretionary power: he may stipulate a lower fine. To guarantee uniformity, the tax administration has set (administrative) rules concerning the imposition of fines. The same goes for all kinds of tax incentives: the specific conditions to be fulfilled by the taxpayers are stipulated by the tax inspector (within the statutory boundaries). So, notwithstanding profound changes brought about by deregulation, commercialisation, public sector downsizing, privatisation (reducing the size of government) and globalisation which directly influenced government, in many sectors of government the instrumentalist attitude of the legislator increases the importance of the role of the administration in determining the actual

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46 The tax administration’s dominant part in the legislative process accounts for the tax legislator’s lack of impartiality while parliament fails to exercise adequate control over government and the tax administration in tax matters; Gribnau, H. ‘Separation of Powers in Taxation: The Quest for Balance in the Netherlands’, in A. Dourado, A.P. (ed.), *Separation of Powers in Tax Law* (Amsterdam: IBFD 2010), pages 145-175 (other chapters show a comparable shift of power in other countries) .
legal norms. Consequently, in many fields, the citizens are not governed by the terms of statutes except by the administration. They will feel more dependent on the (tax) administration with all its powers.

**Liberty, certainty, equality and character risk**

Thus, the administration’s power goes at the expense of a particular aspect of liberty, the absence of dependence, which is conceptualised in the republican ideal of liberty. Republican political liberty consists not only of the absence of interference from other individuals or institutions but also of the absence of domination – or dependence. Certainly, restricting liberty through the law is not necessarily perceived as interference with people’s liberty. On the contrary: ‘Action regulated by law is free, in other words not when the law is accepted voluntarily, or when it corresponds to the desires of the citizens, but when the law is not arbitrary.’ Republican writers consider the law not arbitrary when it is applied equally to all citizens or to all members of the group in question (generality of law).

The point is that instrumentalism severely adds to the ever growing complexity of tax law, and increases taxpayers’ uncertainty with regard to existing and future tax rules, and the risk of unequal treatment. On the one hand, the tax legislator nowadays takes fundamental principles, such as generality, non-retroactivity, clarity, non-contradiction, compliability (laws should not require the impossible), constancy (temporal consistency) of the laws, all elements of Fuller’s internal morality of law, less seriously. On the other hand, the principle of equality is at risk because of unjustified discriminations and because tax officials may have different interpretations of complex tax rules and consequently apply them differently on comparable cases. Thus, taxpayers may feel to be entirely at the tax administration’s mercy, for government is evermore interfering with their life, by way of tax law. This dependence is at the expense of the republican ideal of liberty.

Fuller connects respect for these principles, which citizens expect government to respect, to the lawgiver’s legitimacy. He argues that the state’s position of superior power ultimately rests on a tacit and relatively stable reciprocity, which governments’ respect for the internal morality of law. Thus the tax legislator who flouts the factual dependence of a legal system on the interplay of reciprocal expectancies threatens the bond of relatively stable reciprocity between government and the citizen. This may seem to be a tax philosopher’s hobby horse, but empirical psychological research confirms the importance of values and principles for taxpayers. Tax legislation which lacks legitimacy will have adverse effects on taxpayers’ compliance. Indeed, empirical research found that continuous changes and complexity in

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48 Cf. Taggart, M. ‘The Province of Administrative Law Determined?’ in: Taggart M. (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing 1997), page 3: observes a ‘temptation to judges to fill the accountability vacuum left by the retreating state’ in order to ‘guarantee’ and effectuate (public) law values and principles.’

49 On this republican concept of liberty, see, for example, Viroli, M. *Republicanism* (New York: Hill and Wang 2002).


tax law have a negative effect in the compliance-level. This increases the pressure on the tax authorities to induce taxpayers to comply. Fair procedure and treatment become even more critical: this (‘compensating’) procedural justice becomes even more important.

Instrumentalism adds to the already existing complexity of rules, and comes with a lot of supervisory power and bureaucratic controls, thus creating or reinforcing a legal ‘command-and-control’ environment. Moreover, incentive mechanisms reflect a mechanical view of individual human behavior: tax incentives intend to induce passive taxpayers to respond to these external stimuli. This reinforces the tendency to view adhering to tax incentives in a mechanistic, rule-based manner. Tax statutes establish a rule-based context to control the behaviour of the taxpayer and the taxpayers will play the rules. The focus of both legislator and taxpayer is on rules. As a result, a dominantly rule-bound regulatory and compliance focus is likely to undermine a more principle-based ethical thinking. This may cause both actors not to consider tougher issues that a more ethics-focused approach might demand. Moreover, and analogous to empirical economic-psychologist research, it can be argued that in a ‘command-and-control’ environment of coercive tax legislation where people feel they have very little influence, a crowding-out effect of intrinsic motivations – such as ethical considerations – to comply with the law, may occur. In that case, not only actual ethical thinking is undermined, but even the motivation to do so. A proliferation of tax incentives results in a corrosion of character.

To conclude this section, it does not come as a surprise that the taxpayer regularly loses his or her way in the resulting forest of legal rules established by the interventionist state. The upshot is that (substantive) law has become technically very complex and is constantly changing, whereby direction on the basis of principles is lacking. Conflict generating regulation is the rule rather than the exception. Furthermore, the interaction between citizens and (tax) authorities has increased substantially, but the law which binds the tax administration provides fewer safeguards for certainty and equality of citizens. More and more legal rules must be elaborated into policy rules by the authorities to guarantee consistency of enforcement. This entails a shift in lawmaking power to the tax administration. The citizens, on the other hand, want more predictability of government action, precisely because they experience more government interference. The importance of legal certainty and equal treatment grows. More generally speaking, there is a growing need for legal protection in addition to the diminished protection offered by statute law. As a result, more citizens will appeal to the courts.

Risk of unjustified discriminations

Politicians sometimes vie for voter support through their tax policy by following supposed voter preferences, or so it often seems. One wonders whether tax policy really is an issue for

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58 Cooper, G. ‘Conflicts, Challenges and Choices – The Rule of Law and Anti-Avoidance Rules’, in Cooper, G.
citizens in their voting behaviour, given the fact that so many other issues are at stake.
However, preferences expressed by pressure groups, which need not be fair representations of
the preferences of ordinary taxpayers at all, are not imagined but outspoken. These seductive
demands from pressure groups offer politicians the possibility to show decisiveness, whereas
the preferences of the ordinary taxpayer are unknown or not easy to discover. Majority
coalitions can use the political process as an instrument of redistribution to achieve sectional-
interest benefits, at the expense of minorities and of the community at large. Sectional interest
groups seek to create and preserve tax expenditures and attempt to shift the burden of taxation
in their own favour. Consequently, politically untouchable expenditures are usually those which
provide special benefits to well-organized groups. In this way, political competition under
majority voting leads to the ‘exploitation of ordinary taxpayers by interest group coalitions
seeking preferential treatment on the tax or the expenditure side of the budget.’

Consequently, a lack of impartiality on the part of the tax legislators may result in a violation
of the principle of equality. The supposedly impartial character, however, is one of the
characteristics of the legislative process that contributes to a certain amount of rationality of
law, and therefore, accounts for the primacy of democratically legitimized legislature in law-
making (see above). ‘Naked preferences’ are obvious violations of the impartiality requirement
in tax law: the distribution of resources or opportunities to one group rather than to another
solely on the ground that ‘those favored have exercised the raw political power to obtain what
they want.’ According to Sunstein, the prohibition of naked preferences is connected with the
idea that government must be responsive to something other than private pressure. Furthermore,
politics should not be ‘the reconciling of given interests but instead the product of some form of
deliberation about the public good.’ In this way, it is not sufficient that a particular group has
been able to assemble the political power to obtain the benefits it seeks. In this view, the
principle of equality rests on a theory of law and legislation which puts forward ‘some
conception of the public good as the legitimate public purpose at which legislation must aim.’
The legislature should invoke some public value to justify its legislation and there should be a
close fit, proportionality, between the public value and the regulation under review.

In tax law, the instrumentalist legislature may well want to introduce naked preferences in the
guise of tax expenditures. These tax expenditures constitute naked preferences if they are
solely a response to private or interest-group pressures. Consequently, they are often not
structural provisions; there is a serious risk that they will be abolished when the political
climate changes. Tax expenditures often disturb market forces and are not very effective to
attain the asserted goal, if their economic, social, or environmental effects can be measured at
all. They thus injure the public value of a reliable and effective government. Furthermore,
these tax expenditures are often ‘worth more to the high-income taxpayer than the low-

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66 Sunstein argues that the Supreme Court’s ‘rationality review’ is too lenient to the legislature.
income taxpayer.

To conclude, these kinds of naked preferences in tax law violate the demand for a non-partisan and impartial attitude on the part of the legislators.

The norm of fairness and impartiality, however, requires that majorities are not supposed to make laws selectively or unequally, however advantageous this may seem. Viewed in this light, the prohibition against discriminatory tax legislation is ‘a demand for purity of motive.’ Thus, to ensure the integrity of legislative motive, the courts should more often invalidate naked preferences in tax law by narrowing down the category of public values (legitimate ends of regulations) and by demanding a close fit between a public value and the tax expenditure in question. In short, courts should ‘require a good reason to believe that a naked preference was not at work.’

The judiciary: developing legal principles

The judiciary has reacted by adopting a more independent attitude than they used to. Legislation is no longer presumed to be perfect, or at least rational, and immune from judicial review. The same goes for administrative decisions. The judiciary has become more actively involved in the legal protection of the citizen. From its independent position, it can correct the possible arbitrariness of the legislator and remedy the diminished legal certainty and equality offered by the law (or administrative acts). On behalf of the legal protection of the citizen, the courts recognised and further developed legal principles and fundamental rights. In this way courts act as a countervailing power, as a safeguard for liberty, in line with Montesquieu’s idea that abuse of power should be prevented by creating an institutional structure in which power is distributed amongst various governmental institutions. ‘In order to prevent the abuse of power things must be arranged so that power checks power.’

Therefore, the legislature and the courts, as well as the administration, are partners in the business of lawmaking. Legislators make statutes which cannot be implemented without being interpreted by the judge and the administration. The judge, therefore, is a partner in ‘the legislature’s creation and implementation of statutes, even if this long-term partnership is a limited one.’ The legislature which determines the purpose of the statutes is the senior partner in lawmaking, while the judge acts as a junior partner. Constitutional review puts a check on legislative power. Consequently, the judge is a mouthpiece of the legal values and principles underlying the constitution, rather than a mouthpiece of statute law. As stated above, the idea of partnership also goes for the (tax) administration. Through its interpretation of the tax statute the tax administration must give effect to the purpose of the tax law. Thus

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67 Tax Incentives as an Instrument for Achievement of Governmental Goals, Cahiers de droit fiscal international, 1976, page 35.
71 This recognition caused a radical change in legal consciousness over the past generation or so. The notion of legal principles offering protection to the citizen against the administration ‘has spilled over from the court room, to institutional and administrative behaviour in general’; Friedman, L.M. Total Justice (New York: Russell Sage Foundation, 1985), page 82.
the tax administration, acting as a junior partner, has to interpret and specify the norms of the general and abstract tax statutes. Judicial review of administrative actions is a check on administrative power.

First, the judiciary, on the basis of case law, has developed legal principles with regard to improper actions and decisions of the administration. The courts, in co-operation with jurisprudence, developed legal principles which offer protection to the citizen. These principles sometimes are called general principles of proper administration, which comprise procedural norms but also substantive norms. The judiciary offers the citizen extra legal protection in addition to the protection embodied by statute law. In a way, the diminished legal certainty of statute law is compensated for by these general principles of proper administration, especially when they protect legitimate expectations of the citizen. Through the development of legal principles, the executive is no longer exclusively bound by the (statute) law. The principle of legality remains in full force, but in cases in which there is a conflict with the law (i.e., legal principles), the principle of legitimacy may correct the principle of legality in order to attain legitimate administrative decisions.

Furthermore, sometimes the law itself is reviewed for compatibility with the fundamental legal principles, especially the principle of equality. The fundamental legal principles used by the judiciary in this process of review are expressed in the constitution or in international treaties. However, the judiciary adopts a reserved attitude in this matter. The legislator, after all, has the primacy in shaping the public policy and therefore has ‘a certain margin of appreciation.’ If at all possible, the court will leave it to the legislator to formulate a more democratically legitimized regulation. Nonetheless, according to the European Court of Human Rights - and following its tracks the Dutch Supreme Court - no objective and reasonable justification for unequal treatment exists if a legitimate aim of government policy is lacking. This way, case law reflects the ethical minimum requirement of a legitimate purpose (see above).

This means that, in exceptional circumstances, courts may decide that a democratically realized statute conflicts with the law. The will of the majority in the democratic decision-making process is thus not simply right. We should not fail ‘to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second.’ So democracy and the rule of law may conflict. The will of the majority and therefore of the democratically legitimised legislator may conflict with fundamental legal principles, and thus with the rule of law. It must be emphasized again that this involves only exceptional cases of bad legislation.

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76 The judge often leaves the administration a margin of appreciation; Barak argues that this manoeuvring space is ‘similar to the zone of reasonableness of the executive branch’; Barak, A. The Judge in a Democracy (Princeton: Princeton University Press 2006), page 258. See also Koopmans, T. Courts and Political Institutions (Cambridge: Cambridge University Press 2003), pages 108-117.
Judicial restraint

The courts should certainly be very cautious in reviewing enacted law, *a fortiori* in reviewing Acts of Parliament. ‘On the one hand, courts must safeguard the supremacy of the constitution as positive law; on the other, they must not inhibit democracy.’

The non-elected judiciary is not democratically legitimized, but may certainly claim to have some special expertise. Judges are disciplined by the specificity of the cases they must decide and, as a result, their professional experience reflects ‘the value of deliberative wisdom – the wisdom that consists in knowledge of particulars and that no general theory can provide.’

Because of their specialized legal education, judges are experts at applying the law, and more broadly at making value judgements. ‘The authority of judges derives in part from their epistemological competence.’

It is not their job to express their own moral convictions, but to form and enforce opinions about the demand of the system of law. In a way, they function like democratic institutions. Important decisions, hard cases, are reasoned and public. As such, they feed expectations and breed a common understanding of a country’s legal system. The independent judiciary is formally not accountable to anyone, but they are certainly public. ‘They are constantly in the public gaze, and subject to public criticism.’

Judicial review, if cautious, is justified, because, as Fuller states, we should not believe that the existence of wants and interests, even backed by a wide popular acclaim, necessarily justifies legal intervention on their behalf. Rather, wants and interests must be subjected to qualitative tests - to the scrutiny of substantive notions of the just, the right, the good. It is suggested, we should regard legal principles as the substantive legal norms *par excellence*. The recognition and development of legal principles means that law and statute law are no longer identical. Law does not exclusively consist of legislation, but also of legal principles. It is especially legal principles that enable the court, in addition to legislation, to offer the citizen legal protection. However, legal principles do not fit in very well with the legal conception of the legislator having the monopoly on lawmaking. The increasing importance of legal principles requires a reconsideration of law as a whole. In the next sections, a conception of law will be presented that will do justice to the importance of legal principles.

Legal values and principles

In order to do justice to the new role of fundamental principles in law, a conception of law is required which gives room to principles as an important element of law. Only if the importance of principles in the body of law is clarified can we explain that laws and administrative decisions can be tested against principles, for example, the (fundamental, often constitutional) principle of legal equality. Part of the explanation is the fact that one of the central concerns of law is equality, in other words, legal equality. This idea implies that law which does not fulfil certain requirements of equality cannot be labelled law.

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The German lawyer and legal philosopher Radbruch shows how the idea of equality and the idea of law are intertwined. However, his value-oriented theory of law also enables us to understand the judicial recognition of principles and to give room to principles in the body of law. The point of departure of Radbruch's value theory of law is the idea that law aims to realise justice (although law does not necessarily serve it in fact); justice - or the 'idea of law' ('Rechtsidee') - is the specific constitutive value of law. However, justice is not something which has an existence of its own, independent from the reality of law. Justice both determines and is determined by positive law. Radbruch’s is a tripartite conception of justice; he distinguishes three elements of justice that the law aims for: legal equality, expediency (purposiveness), and legal certainty.

Equality demands equal treatment of equal cases, and unequal treatment to the degree of inequality. This formal element, equality, does not determine the content of law, which depends on the purpose of law. Therefore, in order to know who should be regarded as (un)equal and how to treat them, one needs another value. Here ‘Zweckmäßigkeit’ comes in. This value refers to the purposiveness of law. The purpose of law is the good which is determined by the political theories of the day. This second value is the gateway through which all kinds of societal and ethical values and policy goals may enter the legal system. However, there are many views and theories about the good society, and therefore about the actual purpose of law. According to Radbruch, a final determination of the purpose of law is impossible. Thus, a choice between the many views about the actual purpose of law has to be made, to provide one order for all; for ‘the law qua framework for living together cannot be left over to the differing opinions of individuals. It must stand as a single framework for all.’ Here the third element comes in: the value of legal certainty, which requires that law be positive. One might say that taken together (legal) equality and legal certainty fulfil a function in Radbruch’s legal theory comparable to Fuller's ‘inner morality of law’, the moral core of law. By introducing the value of ‘Zweckmäßigkeit’ the relation between law and other domains, for example, politics, morality and economics, is conceptualised. The external – for example, societal and statal – input from these domains into the legal order has to pass the filter of equality and legal certainty.

The article will not elaborate further on Radbruch’s theory, but will be restricted to one more remark on the relation between these values. In practice, these components of justice must be constantly weighed and balanced. In effect, what is at stake is the best balance of the relative positions of these legal values. Other values may be distinguished, for example, impartiality and integrity. More important here, however, is the idea that legal values are necessarily very abstract. They cannot be identified with norms which are directly applicable: they can hardly be conceived as guidelines for human behaviour. Therefore, values as the expressions of people’s basic commitments need a more concrete shape. Norms are these action-oriented concretisations of values. Likewise legal values find their more concrete shape in legal principles. These principles are guidelines to realise legal values.

Montesquieu defined laws as ‘Laws, in their most general signification, are the necessary relations arising from the nature of things.’ Montesquieu spoke of law as a relation precisely

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because ‘he did not regard it as the command of a superior or the will of a sovereign … “relation” may be a somewhat vague word, but what it does not mean may be more important than what it does imply, in this case.’

Elaborating further on Montesquieu as well as on Radbruch’s theory of law, one can say that norms and values, evolving over time, are not imposed on society by a sovereign power. In a way, they form a bulwark against (legislative) voluntarism, e.g., instrumentalism. Law seeks to implement legal values, such as equality, impartiality and certainty, which can be regarded as legal translations of important social and cultural values. These values - with norms as their sediment - guide the interactions and relations between free and equal people. No other institution than society can be regarded as the author of values.

Legal principles fit in a value-oriented theory of law. They are concretisations of legal values in the legal system and may specify legal values as a whole: these fundamental legal principles are common denominators of the various sections of the legal system. Legal principles may also specify legal values in a specific part of the legal system, e.g., public or private law, or even a more specific subdivision of law, tort law or tax law. So they exist at varying levels of generality in the legal system. In the next section, we will take a closer look at the meaning of principles in modern law and the way in which they pose limits to instrumentalist lawmaking.

**Legal principles as the normative core of law**

Law is connected to the fundamental norms and values prevalent in a society of free and equal citizens by means of fundamental legal principles. Principles can be considered as expressions of legal values, and constitute the normative core of law in a modern democratic state. Now, we can combine Radbruch’s value-oriented theory of law with a conception of law which assigns to principles, because of their normative quality, a crucial place. Dworkin defines a principle as a standard which is to be observed because it is ‘a requirement of justice or fairness or some other dimension of morality.’ He distinguishes principles and policy. A policy is that kind of standard that ‘sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.’

It is important to stress the distinction between legal principles which serve legal values and moral principles which serve moral values. Therefore, a legal principle is to be observed as a standard because it is a requirement of the internal morality of law, not so much an external, non-legal, dimension of morality. Legal principles are standards which are specific for the law; they are not purely moral principles. The development and actual meaning of legal principles is coloured by extra-legal influences, like the prevailing norms in society or the practice which the law aims to regulate. Legal principles, therefore, are internal standards generated and developed by the legal system itself – although they are influenced by morality. These principles are not the product of the will of some lawmaking institution: the origin of legal principles lies not in a particular decision of some legislator or court. Their origin lies ‘in a sense of

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90 Actual moral principles will be among the influences on the actual content of general legal principles.
appropriateness developed in the profession and the public over time.  \(^{91}\)

Principles are intermediaries between legal values and positive law, in other words, legal rules. As we have seen, rules in the form of general and established laws form the basis for government’s interference with the liberties of the citizen. Government of laws and not of men is rule-governance. Making the law rule thus has a double meaning: legality of government and enforcement of law. In this formal sense of the rule of law, the rule of law is the rule of rules.  \(^{92}\) But ‘this idea is an impoverished notion of the rule of law.’ This formal understanding of the rule of law is satisfied even in a dictatorship. Therefore, the legal rules must meet certain minimum standards. Legal principles constitute fundamental standards. Legal principles embody the ‘inner morality of law’, the moral core of law  \(^{93}\) and refer to fundamental values of morality.  \(^{94}\) Thus, legal rules should be made by weighing and balancing principles.  \(^{95}\) There is need for this weighing and balancing because principles may collide, they may point in different directions. Legal principles, unlike rules, are not applicable in an ‘all-or-nothing fashion’ but constitute arguments which point in a certain direction. Therefore, they have a ‘dimension of weight or importance.’

To resolve the conflict between intersecting principles one ‘has to take into account the relative weight of each’.  \(^{96}\) This is a normative process based on the identification of the relevant values and principles. Colliding principles make visible which values are really at stake on a deeper level.  \(^{97}\) Behind the metaphorical speech of ‘balancing’ and ‘weighing’ hides the assessment of the relative societal importance of the conflicting values and principles. The act of weighing is a normative act that is intended to grant the various arguments and considerations ‘their proper place in the legal system and their societal worth in the totality of societal values.’  \(^{98}\) In this way, principles are the normative basis for the creation of rules. The validity of these principles cannot be derived from the authority or power of a specific person or

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\(^{93}\) Fuller’s inner morality of law mainly refers to aspects of legal certainty, but, of course there are other minimum requirements, such as the principle of proportionality. Fuller does not advocate a positivistic conception of the rule of law, though he does not have a (formal and substantive) principle of equality as one of his principles of the internal morality of law. Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press 1999), pages 52 ff convincingly argues that Fuller’s principles, as well as his claim that they make up a morality, require the principle of equality if Fuller is not to be turned into a proponent of a rather formal, positivistic conception of the rule of law (such as, for example, Joseph Raz).


\(^{95}\) Barak, A. *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), page 57 argues that values and principles create a ‘normative umbrella’ and assumes that ‘every legal norm seeks to give effect to these values.’

\(^{96}\) Like Radbruch’s balancing and concretising of legal values, rule making implies the determination of the actual content of principles and the balancing of principles. Cf. Taekema, S. *The Concept of Ideals in Legal Theory* (The Hague [etc.]: Kluwer Law International 2003), pages 12-13, 90-91, who sees Alexy’s conceptualisation of principles as ‘Optimierungsgebote’ interpreted as the optimising demanded by principles of legal values, with not only a deontological but also an axiological dimension (R. Alexy, ‘Rechtsregeln und Rechtsprinzipien’, *Archiv für Rechts- und Sozialphilosophie, Beiheft* 25, 1985, page 24), the closest to Radbruch’s ideas.


organization. These principles are to be considered as vehicles in the movement back and forth between values and legal rules.\(^99\) Rules are to be seen as operationalisations of principles. Consequently, rules have a more concrete and ‘technical’ character than principles and are normally less value laden. Lawmaking institutions concretise and weigh principles into rules which are directly applicable (‘in an all-or-nothing fashion’\(^100\)).

The formulation by lawmaking institutions gives rules an ‘imperative’ quality. In this respect, they are commands formulated by authorized institutions. Principles do not have this imperative quality, for they only have a normative quality.\(^101\) Concretising principles into rules also presupposes power to enforce these rules. This imperative quality of rules promotes legal certainty and legal equality. So law needs the imperative quality. However, law ultimately cannot be regarded as a command. Since fundamental legal principles constitute the legal translations of certain basic values of a society, lawmaking should conform to legal principles. Therefore, the normative and imperative qualities are necessary conditions of law.

In sum, since fundamental legal principles constitute the legal translations of basic values of a society, the body of law - statute law, case law, and the decisions and regulations of the administration - should be ‘consistent in principle.’\(^102\) This implies that law is not only legitimised because it is established and issued by authorized institutions. Rather, legal principles function as essential criteria of evaluation, in the sense that the legislator who seeks to implement policies by means of law is bound by legal principles. In the same vein the executive, in other words, the tax administration, implementing the written laws is not only bound by the law promulgated by the legislature (principle of legality) but also by legal principles (unwritten law).

If the instrumentalist legislator evidently fails to implement these fundamental legal principles, judges may be obliged to review the law for compatibility with these principles.\(^103\) In this way, principles perform an important function in ensuring the legitimacy of the legal order and the -living - law. Under the rule of law, power is turned into authority (legality). But the way authority is exercised should be compatible with an overall framework of basic values of the legal order (legitimacy). Legitimacy requires a substantive evaluation as to whether rules agree with the principles of law.

Legality and legitimacy are both necessary properties of law. Legal rules should be created by authoritative bodies. At the same time, however, they ought to be consonant with the integrated whole of legal principles. Legitimacy of positive law is guaranteed by its conformity to fundamental legal principles. The procedural dimension - legality - and the substantive dimension - legitimacy - are intrinsically connected.\(^104\) Law is not only a normative order, it is also command in the sense that law should be enforced and accompanied by sanctions. The tension between legality and legitimacy is the tension between the law of power and the power

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\(^99\) Eliot, George Silas Marner [1861] (Harmondsworth: Penguin Books 1977), page 216 principles unwaveringly acted on. They were firm...because she held them with a tenacity inseparable from mental action. ... On all the duties and proprieties of life ... pretty Nancy Lammeter, by the time she was three-and-twenty, had her unalterable little code: a set of hard and fast rules; not principles at all. It was one of those rigid principles.


\(^103\) This is a dynamic model of the separation of powers: an institutionalized balance of powers. In this system of checks and balances the legislature, the administration, and the judiciary create law by co-operation; they are partners in lawmakers.

of law. This tension is clearly visible in the attitude of the instrumentalist legislator, which uses the law for all kind of government purposes and resulting in all manner of interferences with the liberty of the citizen. This legislative will to steer society may conflict with fundamental legal principles.

Conclusion

Incentives in tax law are a means of exerting power and influence over taxpayers. Instrumentalist legislation usually underestimates the importance of legal principles in modern law. Legal principles are the normative core of a value oriented conception of law. They function as essential criteria of evaluation for lawmaking by the legislator and the executive. In fact, legislator, administration and judiciary, all active in framing the legal system, are bound by fundamental legal principles. Therefore, if the instrumentalist legislator evidently fails to implement these fundamental legal principles, judges may be obliged to review the law for compatibility with these principles. By giving a voice to legal principles the courts act as a countervailing power. Here, the judiciary should adopt a restrained attitude to preserve the dignity of legislation. Therefore, the judiciary has to leave the democratically legitimised legislature a wide margin of appreciation. However, the deference shown by the courts to the tax legislator may not go at the expense of an effective legal protection of the taxpayer in case of instrumentalist legislation which constitutes naked preferences.

105 Compare Radbruch, G. ‘Legal Philosophy’, in: The Legal Philosophies of Lask, Radbruch and Dabin (Cambridge (Mass.), Harvard University Press 1950,) pages 117-118. Effectuating principled law also depends on power to enforce it. This is the dialectic of might and right.