



CONSTITUTIONAL EFFECTS ON THE TAX SYSTEM

– a comparison between Australia, Belgium, Brazil, Canada, France, Germany, India, Italy, Japan, the Russian Federation, Spain, and the United States –

Requested by:

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INTRODUCTION AND JUSTIFICATION

This report was written on request of the China International Centre for Economic and Technical Exchanges (CICETE) of the Ministry of Commerce, People's Republic of China.

The research project aims to identify elements of constitutional law of a selected group of countries, with a view to analyzing their commonality and relevance to the drafting of a Basic Tax Law for China. A group of countries with different legal traditions, federal and centralized government structures has been selected for this research. The research contains *all* constitutional tax issues related to the constitution itself, but is not comprehensive in taking into account constitutional case law and/or doctrine.

The research project was done by staff of the Centre for Taxation and Public Governance whom I wish to thank for their invaluable contribution. Without the country surveys and the overview of the legal constitutional provisions, I would not have been able to write the comparative analysis. Furthermore, I would like to thank my previous colleague, Mr. Victor Thuronyi of the International Monetary Fund for his valuable comments made on the drafts.

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– a comparison between countries –

I GENERAL INTRODUCTION

Most countries in the world have a written or unwritten constitution that limits tax lawmaking power. There may be restrictions on the types of taxes that may be levied or principles with which taxes must comply (e.g. the principle of equality). This document provides an overview of the main limits encountered by the tax legislator.

The following countries have been included in this comparison: Australia, Belgium, Brazil, Canada, France, Germany, India, Italy, Japan, the Russian Federation, Spain and the United States. Except for Australia and Canada, all these countries have a single constitutional act containing fundamental principles on individual rights and freedoms. In Australia the formulation of those fundamental principles is left to parliament, following the common law principles, and to international agreements. In Canada these fundamental principles are laid down in the *Canadian Charter of Rights and Freedoms*. Both approaches are characteristic for Commonwealth countries as their legal systems are strongly based upon the British legal system (common law system). As a former Commonwealth country, India has moved away from this practice after its independence in 1948 by adopting a constitution in which these fundamental principles are integrated. In the United States – a country also strongly influenced by British law – the fundamental principles are incorporated in the Constitution, particularly in the first ten Amendments, the *Bill of Rights*. The other countries in this overview have adopted constitutions which integrate the fundamental principles of individual rights and freedoms (civil law system).

The constitutions of federal countries¹ rules usually grant legislative tax power to the different levels of government. These legislative powers can be exclusive or concurrent. In addition, most federal countries have rules that redistribute tax revenue between the federal entities to balance out differences in economic activities. Finally, the constitution of some countries incorporates provisions that set the hierarchical framework for the tax administration.²

Apart from its written or unwritten constitution, international agreements and conventions by which a country is bound are also sources of constitutional law.³ Special cases are the countries of the European Union⁴ which are legally bound by the Treaty establishing the European Community (EC Treaty).⁵ The EC Treaty, although not (yet) a constitution in the common sense, contains several principles affecting taxation in the EU Member States: (a) free movement of goods,⁶ (b) free movement of persons,⁷ (c) free movement of

¹ Australia, Belgium, Brazil, Canada, Germany, India, the Russian Federation and the United States

² E.g. Germany and the Russian Federation

³ Except in the United States where international agreements have the same hierarchical level as Federal statutes

⁴ Belgium, France, Germany, Italy and Spain

⁵ Official Journal C 325, 24 December 2002

⁶ Article 28 EC Treaty provides that “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” In Article 29 EC Treaty a similar provision is included for exports.

establishment,⁸ (d) free movement of services⁹ and (e) free movement of capital.¹⁰ The European Court of Justice (ECJ) has on several occasions decided against domestic tax legislation infringing these freedoms and required Member States to amend their tax laws.¹¹ Another example is the European Convention on Human Rights which contains rules protecting property, prohibiting discrimination, and requiring due process. Although the Convention does not apply in tax matters, the procedural protections for criminal trials apply also to serious tax penalties. The Constitutional Court of the Russian Federation has confirmed the supremacy of international human rights law, which it applied to validate fundamental individual rights and freedoms. This must be seen in connection with Russia's accession to the Council of Europe and the possibility given to Russian citizens to seek protection of their rights and freedoms in the European Court of Human Rights.¹²

Another source of constitutional law is developed by the respective constitutional courts. In many countries courts can overturn statutes as unconstitutional. In these countries one can identify two sub-models: the decentralized approach in which the entire court system exercises constitutional review¹³ and the centralized approach in which a specialized court exercises this review.¹⁴ The various constitutional courts have taken different positions on the extent to which they are willing to strike down tax legislation as unconstitutional. The German Federal Constitutional Court (*Bundesverfassungsgericht*) seems to be the most active in this respect. The U.S. Supreme Court can be regarded as a “continuing constitutional convention” as it defines – in greater detail than the U.S. Constitution does – the powers of the Federal Government and the States, the respective authority of Congress and the President, and the scope of individual rights and freedoms. The courts of most other countries tend to be more restrained. For instance, in France the Constitution Court determines the constitutionality of laws prior to their enactment. The petition for review may be filed by government officials only. Private litigants thus may not bring a case challenging the constitutionality of a law or proposed law. In Japan, on the contrary, only individuals can challenge legislation against the constitution if a dispute occurs. The Japanese Supreme Court usually avoids involvement in politically sensitive issues. Finally, the *Federal Court of Australia*¹⁵ and the *High Court of Australia*¹⁶ have focussed on the limitation of legislative

⁷ Article 39 EC Treaty provides that “[f]reedom of movement for workers shall be secured within the Community.”

⁸ Article 43 EC Treaty provides that “... restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings ...”

⁹ Article 49 EC Treaty provides that “... restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.”

¹⁰ Article 56 EC Treaty provides that “... all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”

¹¹ For instance, as a result of an ECJ decision Belgium had to amend its tax on stock exchange transactions and the physical delivery of bearer note securities (C-415/02 of 15 July 2004), France and Germany gave up their imputation systems as they were scrutinized by ECJ decisions (C-315/02 *Lenz* of 15 July 2004 and C-319/02 *Manninen* of 18 March 2004). See for more examples: B. Terra and P. Wattel, *European Tax Law, FED fiscale studieserie*, fourth edition, © 2005 Kluwer Deventer, ISBN 90 130 2226 X

¹² The European Court of Human Rights (ECHR) has jurisdiction to decide cases under the European Convention on Human Rights. The ECHR is a European court, but not an EC court since some non-EU Member States are signatory of the Convention.

¹³ A decentralized constitutional review can be found in Brazil, Canada, India and the United States.

¹⁴ A centralized approach is followed by Belgium, France, Germany, Italy, Japan and Spain.

¹⁵ Competent on matters under Federal Law, including constitutional matters

power rather than on individual rights and freedoms.¹⁷ In Italy the Constitutional Court typically decides on competence issues between the state and regional governments rather than on the content of legislation, but the possibility of finding tax legislation unconstitutional based on its content is not excluded.

The main individual rights and freedoms that are influencing tax laws will be discussed in the second part of this document.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of Legality

1 *Existence of constitutional principle*

Constitutions usually require taxes to be imposed by law, often saying so explicitly.¹⁸ The Brazilian and German constitutions contain several provisions out of which the principle of legality can be deduced. For instance in Brazil the Constitution stipulates that no one may be obliged to do or not to do something other than by virtue of law. Furthermore, the Constitution allows the governmental levels to enact tax laws, but prohibits doing so without a law substantiating such imposition.¹⁹ In Germany the principle of legality consists of two constitutional requirements: (a) reservation for statutes (*Gesetzesvorbehalt*)²⁰ and (b) priority of statutes (*Vorrang des Gesetzes*).²¹ In Italy the principle of legality is deduced from Articles 70 and 76 of the Italian Constitution. The former determines the legislative power, whereas the latter prohibits any delegation of power “unless the parliament specifies principles and criteria of guidance and only for a limited time and well-specified subjects.” The Japanese Constitution establishes the principle of statute-based taxation, which means that the government cannot levy new taxes or modify existing ones unless permitted by statute.²²

Australia, Canada and the United States have no explicit provision that requires a legal basis for taxation. However, this does not mean that these countries can introduce taxes otherwise than by law. For instance in Australia the common law maxim implies that any state intervention in the private sphere requires a legal statute. In Canada the basic tax code requires that – as a minimum criterion – a tax should originate in the *House of Commons* (Canadian parliament).

¹⁶ Ultimately responsible for the interpretation of the Australian Constitution

¹⁷ This is most likely due to the fact that Australia does not have a Bill of Rights and leaves the fundamental principles on individual rights and freedoms for Parliament.

¹⁸ Article 170 of the Belgian Constitution, Article 34 of the French Constitution, Article 265 of the Indian Constitution, Article 57 of the Russian Constitution and Article 133 of the Spanish Constitution.

¹⁹ Articles 145 and 150 of the Brazilian Constitution

²⁰ Article 2 of the German Constitution requires economic freedom to act which can only be limited by other constitutional rules. Since taxation limits the economic freedom, any taxation that is not based (*extra legem*) or does not comply with a statute (*contra legem*) is unconstitutional.

²¹ Article 20 (3) of the German Constitution states that legislation is subject to the constitutional order; and the executive and the judicial powers are bound by the law.

²² Article 84 of the Japanese Constitution

2 *Content of the principle*

Some countries have been more specific as to the contents of the principle of legality. In Belgium and France tax law must determine the taxpayer, the tax base (including tax exemptions) and tax rates. In Germany similar requirements are set under the reservation of statutes. The assessment procedures and methods of tax collection are essential elements of the Japanese statute-based method.²³ The Brazilian Constitution requires the enactment of a general tax law that establishes these general tax rules.²⁴ The Indian Constitution explicitly delegates power to the executive branch to issue regulations to ensure proper implementation and application of tax laws.

3 *Yield of application*

In Belgium and France the principle of legality does not apply to fees and social security contributions, whereas in the Russian Federation the principle of legality also applies to fees. This distinction has resulted in a more or less theoretical discussion by the respective constitutional courts whether a levy is qualified as tax or as fee.²⁵ The U.S. Constitution grants Congress the legislative power to establish and collect taxes, duties and excises. This includes the power to enact all laws necessary for their proper implementation.

B Principle of Equality

1 *Non-discrimination principle*

In all countries of this survey the principle of equality is to some extent represented in constitutional law, except in the Russian Federation where the principle of an equal tax burden is laid down in the General Tax Code as one of its fundamental principles. The principle of equality is usually interpreted as a non-discrimination requirement. This is generally interpreted as not to allow different tax treatment between taxpayers in the same situation, unless objective and reasonable in light of the goal and effect of the treatment and not disproportionate for reaching that goal (proportionality principle). The non-discrimination principle typically also explicitly prohibits discrimination of interstate trade and commerce in federal countries.²⁶

2 *Ability-to-pay principle*

In some countries²⁷ the ability-to-pay principle has been derived from the principle of equality. For instance the French Declaration of Human and Civic Rights from 1789 states that taxes must be equally distributed among all citizens in proportion to their ability to pay. In Germany the ability-to-pay principle is derived from the principle of equality in the application of law (*Rechtsanwendungsgleichheit*) and requires that the tax burden between

²³ Supreme Court Decision of 23 March 1965 (see: Japan – country survey)

²⁴ The National Tax Code (*Código Tributário Nacional*) was issued in 1966 and contains general definitions, competences, tax procedures and limitations of the Brazilian tax system.

²⁵ The French Constitutional Court has decided that the difference between taxes (in the sense of Article 34 of the Constitution) and fees (*redevances*) is that the latter comprise a specific (public) service which the payer receives in return for payment.

²⁶ Australia and India

²⁷ France, Germany, Italy and Spain

taxpayers is divided according to their economic ability to pay taxes. In Spain a similar argument has been followed resulting in the requirement to apply progressive tax rates.

3 Prohibition of arbitrary legislation

The Indian Constitution contains the principle of equality, including the principle of non-discrimination and the prohibition of arbitrary legislation.²⁸ For instance the Supreme Court ruled that a property tax imposed on the sole criterion of floor area was considered arbitrary and therefore a violation of the right to equal treatment. In another case, the uniform tax rate applied in the land tax on forest land was considered unconstitutional as a violation of the principle of equality, because the rate did not take into account potential productivity of the land.

4 Effects on tax system

At which point tax policy disputes become disputes about constitutional law differs substantially in the survey countries. In some countries the constitutional court applies a low level of equal protection scrutiny to tax laws²⁹, whereas constitutional courts in other countries have been active in striking down tax legislation that violates the principle of equality.³⁰

In Australia equal protection and non-discrimination are guaranteed by parliament and judiciary. With the latter not willing to apply equal protection broadly, very few limits have been imposed on the legislature (parliament) to enact laws that violate fundamental rights and freedoms. In India it is also very rare that the Supreme Court recognizes a violation of constitutional law as “the Courts (...) admit, subject to adherence to the fundamental principles of the doctrine of equality, a larger play to legislative discretion in the matter of classification”³¹ between taxpayers. In the United States the Supreme Court has adopted a “rational basis” scrutiny finding that unequal treatment does not raise constitutional concerns where it is justified by a possible legitimate state interest.³²

C Protection from unreasonable searches and seizures; non-confiscation of property

1 Confiscation or seizure of property

Constitutional limits on the seizure of property can arise in several tax contexts, the main ones being: (a) the argument that taxation is so burdensome that it in effect constitutes a confiscation of property, (b) confiscation of goods used in committing tax or customs offences, and (c) seizure of property to satisfy tax debts. Different limits apply in different countries in each of these contexts. Most countries have a written constitutional protection of private property³³ which can only be confiscated for public purpose by the government in

²⁸ Article 14 of the Indian Constitution

²⁹ Australia, India and the United States

³⁰ For example in Germany

³¹ Venugopala Ravi Varma Rajah v. Union of India, (1969) I SCC 681

³² Victor Thuronyi, *Comparative Tax Law*, © 2003 Kluwer Law International, ISBN 90 411 9923 3, page. 82

³³ In Canada this protection is granted as an unwritten matter of principle.

accordance with the laws and in return for fair and prior compensation.³⁴ In Australia this protection does not apply to taxation since the gist of taxation is that income and capital flow (partly) to the tax administration without any corresponding obligation. In Belgium confiscation of vehicles used for smuggling without allowing the owner in good faith to reclaim them was considered unconstitutional.³⁵ In Japan seizure of property is only possible under a special warrant issued by a competent judicial officer, indicating the adequate cause and its subject. Further limitation to the seizure of private property is dealt with in the Tax Code.³⁶ The Russian Constitution restricts the right to private ownership to the extent necessary to protect the fundamentals of the constitutional system, of which everyone's obligation to pay tax is one. As the imposition of fines and the recovery of concealed or unreported profits have a punitive nature rather than the nature of a tax (according to the Russian Constitutional Court), the enforcement of these payments must be suspended in case the taxpayer appeals to the courts.

2 *Searches of private dwellings*

In some countries private premises are inviolable and searches of these premises are subject to constitutional protection. In Belgium the tax authorities are only allowed to search these premises in accordance with the law. In Brazil search is only allowed with the dweller's consent, except in cases of flagrant offence or disaster, or based on a court order. Based on the Canadian *Charter of Rights and Freedom* a search must be approved by an authorized person on a neutral and impartial basis and justified given the available evidence. Although constitutional protection of property no longer exists in the Indian Constitution, the Supreme Court explicitly allows searches and seizures for income tax purposes as they are justified and reasonable to combat tax evasion. Nevertheless adequate safeguards are put in place to minimize interference. The Italian Constitution allows for an encroachment on the inviolability of private dwellings for verification and inspection purposes. The Fourth Amendment to the U.S. Constitution also protects taxpayers from unreasonable searches and seizures. Lawmakers and courts have even further limited the circumstances under which the tax administration may search and seize property.

D Allocation of taxing powers among the national, regional and local governments, including the prohibition of discrimination against interstate trade and commerce

1 *Allocation of taxing powers*

Several of the countries in this survey are federal states,³⁷ whereas some others are highly centralized.³⁸ Typically the constitutions of federal states restrict the taxes that may be imposed either at the federal level, the state level, or both. These competences may be policed

³⁴ Section 51 of the Australian Constitution, Article 16 of the Belgian Constitution, Article 5 of the Brazilian Constitution, Article 17 of the 1789 Declaration of Human and Civic Rights (France), Article 14 of the German Constitution, Article 300A of the Indian Constitution, Article 42 of the Italian Constitution, Article 29 of the Japanese Constitution, Article 35 of the Russian Constitution, Article 33 of the Spanish Constitution, and the Fifth Amendment to the US Constitution.

³⁵ Ruling No 162/2001 of 19 December 2001

³⁶ The Japanese Tax Code disallows seizing private property in case of unusual hardship for the taxpayer and in case the seizure threatens the taxpayer's or his family's minimum standard of living.

³⁷ Australia, Belgium, Brazil, Canada, Germany, India, the Russian Federation and the United States

³⁸ France, Italy, Spain and Japan

by the constitutional courts. There are actually three general elements of sovereignty in respect of taxation: legislative authority, administrative authority, and the right to receive revenues.

With respect to the legislative power many constitutions provide for lists of exclusive or concurrent powers with respect to various kinds of taxation.³⁹ In India the main taxing powers are divided along arbitrary lines; for example agricultural income is allocated to the state level, excises on manufacturing are given to the national level, except excises on alcohol and tobacco, and sales taxes are allocated between the national and state levels, except the sales tax on services which is given to the national level. In Canada the taxing power is concurrently divided between the State and the Provinces, whereby the latter is limited to the territorial income sources and own financial needs of the province. In the United States both the Federal government and the States exercise fairly broad tax sovereignty. A similar situation occurs in Australia where the States retain full sovereignty except to the extent that these powers are explicitly assigned to the Federal Parliament. In Germany, India and the Russian Federation, however, the main taxing power is given to the federal level. The regional levels usually have an exhaustive list of taxes they may impose, whereas – based on the principle of legality – local taxing powers are typically of a derivative nature. The federal level sets the (sometimes strict) legal framework within which the local authorities may only determine the rates.⁴⁰

The revenue allocation is either laid down in a budget law or in constitutional law. This allocation is of more importance in countries in which the main taxing powers are given to the federal level. In Belgium revenue of the main income taxes is wholly or partly transferred to the regions. In Germany tax revenue is shared between the federal and state level based on a percentage of total revenue. In addition financial equalization provisions are mitigating differences between states resulting from differences in economic development.⁴¹⁻⁴²

In the German Constitution the tax collection and administration is divided between federal and state authorities.⁴³ The federal authorities have a rather limited scope⁴⁴ and leave most of the collection and administration to the state level. In the Russian Federation tax collection and administration are fully centralized, due to the constitutional requirement of a uniform tax policy and interpretation of the tax system throughout the whole territory.

2 *Non-discrimination against interstate trade and commerce*

In most federal countries in this survey discrimination of interstate trade and commerce is prohibited either by a constitutional provision⁴⁵ or by constitutional law.⁴⁶

³⁹ Belgium, Brazil, Germany, India, the Russian Federation and the United States

⁴⁰ Such strict legal framework may also be used in countries where a highly centralized government operates and small local taxes are used to stimulate and finance local initiatives.

⁴¹ The new states (Neue Bundesländer) of the former German Democratic Republic are 'subsidized' by the former states of the Federal Republic of Germany due to redistribution of tax revenues.

⁴² The same redistribution can be found in the Brazilian Constitution

⁴³ Article 108 of the German Constitution

⁴⁴ The federal authorities collect customs, excises and the taxation on minerals.

⁴⁵ Articles 150 and 151 of the Brazilian Constitution, Parts XIII and XIV of the Indian Constitution, and Article 114 of the Russian Constitution, which regards the Federation as one single economy.

⁴⁶ Australian State Parliaments are prohibited to impose legislation that hinders interstate and intrastate trade and commerce (Article 92 of the Australian Constitution), whereas in the United States the Supreme Court has struck down State taxes based on the Commerce Clause of Article I section 8 of the US Constitution. The Belgian

E Retroactivity of tax legislation

There are several reasons in the public interest why tax laws may be enacted retroactively.⁴⁷ On the other hand, taxpayers are interested in knowing the applicable tax rules when they plan their transactions. Very few countries have an explicit constitutional protection against retroactive effects of tax legislation.⁴⁸ In some countries retroactive effect of tax legislation is prohibited based on general constitutional principles. For instance in Italy the Constitutional Court decides on a case-by-case basis whether a retroactive tax law is contrary to the ability-to-pay principle. In this respect the extent to which the taxable event has been fully completed may be of importance for the eventual violation. In Japan it is commonly regarded that retroactive taxation is not allowed under the principle of legality as derived from the principle of statute-based taxation. However, according to a decision by the Osaka High Court⁴⁹, it is permissible to apply statutes or ordinances amended during the period retroactively from the beginning of that period (even to the disadvantage of the taxpayer). In Belgium and Spain the courts have reviewed retroactive tax legislation against the principle of legal certainty. It seems that both countries have not (yet) seen cases in which the court has struck down a tax law as unconstitutional on this basis. In Australia it seems that retroactivity in taxation to some extent is allowed as tax amendments are routinely made retroactive to date of announcement. The French Constitutional Court has decided that retroactive legislation cannot influence final court decisions, must have a sufficient general (public) interest, and requires that the effect could not have been reached by other means. The United States' Supreme Court has upheld retroactive taxation challenged under the "Due Process Clause" of the Fifth Amendment in most cases. Only if retroactive taxation is "so harsh and oppressive as to transgress the constitutional limitation" would the Supreme Court declare a retroactive tax law unconstitutional.

In Germany retroactivity of taxation is prohibited on the basis of the principle of the rule of law (*Rechtsstaatsprinzip*). The German Federal Constitutional Court distinguishes between two kinds of retroactivity: actual retroactivity, where the law changes previously determined taxes, and *de facto* retroactive application. Actual retroactivity is only exceptionally allowed under an overriding reason, e.g. if eventual damage of legislation is negligible, replacement of an invalid legislation, or overwhelming public interest. *De facto* retroactivity in taxation must be reviewed against the principle of legitimate expectations.

The Indian Constitution explicitly allows retroactive tax legislation.

Since 1995 the Canadian Revenue Authority (CRA) proposes retroactive tax legislation only if (a) it reflects longstanding and well-known interpretation of the Act by the CRA, (b) it reflects a clear policy understood by the taxpayers, (c) it prevents a windfall benefit to certain taxpayers, (d) it preserves the stability of the revenue base, or (e) it corrects ambiguous or deficient provisions that were not in accordance with the goals of the Act.

Arbitration Court constantly decides the Belgium is an economic and monetary union that requires the free circulation of goods and resources.

⁴⁷ Victor Thuronyi, *Comparative Tax Law*, © 2003 Kluwer Law International, page. 76-81.

⁴⁸ Article 150 of the Brazilian Constitution and Article 54 of the Russian Constitution.

⁴⁹ See Japan – country survey

F Protection of marriage

In addition to the principle of equality, constitutions typically protect special rights. In some countries, marriage and family are specifically protected by the constitution.⁵⁰ The German Federal Constitutional Court (*Bundesverfassungsgericht*) interprets this protection as a non-discrimination requirement derived from the ability-to-pay principle. The decisions of the Court in this area have affected taxation substantially: (a) the taxation of family income according to a splitting system, (b) the taxation of children's income separate from their parents' income, (c) contractual freedom between spouses, and (d) the introduction of a basic personal allowance to cover basic costs of living. The measures mentioned under (a) and (b) are meant to alleviate the effects of progressive rates of joint taxation of married couples. The latter introduction of a personal allowance in the amount of the minimum wage, however, was more controversial.

Although the other countries in this survey do not have a constitutional protection of marriage, most of them either disregard the family as a taxable unit and levy tax on individual basis⁵¹ or allow a splitting system for family income.⁵² As a result, both approaches avoid discrimination between married couples and cohabitants. The Belgian Arbitration Court has decided in this respect that a lower tax free income allowance for married couples compared to that available to unmarried cohabitants was unconstitutional as violating the principle of equality. Some countries allow the same tax provisions for married couples and same-sex cohabitants equally based on the principle of non-discrimination,⁵³ whereas others do not.⁵⁴

A special feature protecting family in tax matters can be found in the Indian legislation. According to Hindu law, property is held jointly by "coparcenaries" (all male members of a Hindu family⁵⁵ who obtain an interest in the property by birth) and forms the so-called Hindu Undivided Family (HUF). The income received from property belonging to the HUF is not taxed with the individual family members, but at the level of the HUF itself.

G Other elements of constitutional tax law

In most countries of this survey freedom of religion is constitutionally protected.⁵⁶ It usually protects the taxpayers from a burdensome church tax. It would also preclude taxation that discriminates against a church. On the other hand this freedom does not preclude religious groups from applying national tax legislation.⁵⁷

⁵⁰ Article 226 of the Brazilian Constitution, Article 6 of the German Constitution, Article 29 of the Italian Constitution. The Spanish Constitution also contains a provision protecting the family.

⁵¹ For instance Canada and Italy. In Australia a joint or family tax unit is used regarding certain personal allowances. In Spain the taxpayer has given the option to be taxed on family income.

⁵² The French, German, Indian and US tax systems recognize the family unit and grant relief for higher tax progression compared to cohabitants by allowing a splitting of family income.

⁵³ This is the case in e.g. Brazil, Canada and France.

⁵⁴ Although the US Inland Revenue Code allows married and non-married couples to jointly file a tax return. There have been a few unsuccessful cases in which non-married same-sex couples have challenged the constitutionality of this provision.

⁵⁵ A Hindu family comprises all individuals who are lineal descendants of a common ancestor, including their wives and unmarried daughters.

⁵⁶ Australia, France, India, Italy, the Russian Federation and the United States

⁵⁷ The Australian High Court observed that the Australian GST does not infringe the freedom of religion, more in particular the Islamic belief, which requires Muslims not to tax, title or charge interest. The Court held that

In Australia the prohibition of arbitrary taxation can be found in the Constitution. Parliament has to specify the criteria by which tax liability is generated. In Brazil, the Constitution prohibits cumulative taxes. This principle has played an important role in the design of the value-added tax which is partly imposed on the federal level⁵⁸ and partly on the state level.⁵⁹ The Canadian tax system provides for a Taxpayer's Bill of Rights that guarantees several rights to the taxpayer, i.e. the right to a fair and impartial treatment, the right to be treated with courtesy, respect and consideration, the right to receive complete information, etc. The latter right is also recognized under German constitutional law. Other fundamental rights under German constitutional law are the principle of proportionality (requires that the measures used by federal and state bodies are in balance with their goals) and the prohibition to introduce an excessive (confiscatory) tax. As a – usually unwritten – principle of administrative law, French taxpayers can rely on a favourable administrative interpretation of tax statutes and regulations even if the interpretation is contrary to law (principle of public trust).

III SUMMARY AND RECOMMENDATION

[This part has been eliminated due to the confidential character of the recommendations.]

the protection “was not absolute and that it did not involve a dispensation from obedience to a general law of the land which was not directed against religion.”

The United States' Constitution does not allow special exemptions, for instance sales tax exemptions for publications promoting religious faith.

⁵⁸ IPI is imposed on industrial goods (manufacturing)

⁵⁹ ICMS is imposed on the circulation of goods in general, interstate transportation and communication services

AUSTRALIA

I CONSTITUTIONAL LAW

A The Constitution

The Australian governmental system operates under a strong party-based parliamentary democracy. The Australian Constitution (hereinafter: “Constitution”) originally was a schedule to the ‘Commonwealth of Australia Constitution Act 1900’⁶⁰, which is an Act of the Parliament of the United Kingdom (hereinafter: “UK”).⁶¹ However, given that Australia currently is an independent federal state, the text of the Commonwealth of Australia Constitution Act 1900 is nowadays regarded as completely separated from the text in the original Act.

B Absence of Bill of Rights

As an exception to most other countries, Australia does not have a Bill of Rights (whether constitutional or legislative in character). The Australian founders left most of the fundamental principles on individual rights and liberties for Parliament, following the British tradition at that time. Yet, the absence of a Bill of Rights does not mean that human rights are not respected in Australia. Derived from common law principles and international obligations⁶², personal rights and liberties can be found throughout Australian legislation.⁶³ However, these acts do not impose actual restrictions on the Australian Parliaments’ power to enact legislation.⁶⁴

C Other sources of constitutional law

Besides the Constitution, sources of constitutional law relevant for tax purposes are found in international agreements and conventions⁶⁵ as well as in the case law of the Federal Court of Australia and the High Court of Australia.⁶⁶

The Human Rights and Equal Opportunity Commission is a federative administrative agency charged with administering the Racial Discrimination Act (Cth⁶⁷) and the Sex Discrimination Act (Cth). The Commission is not able to take binding decisions and its influence in tax matters is therefore modest. However, it has reported on discriminative elements in federal

⁶⁰ Or formally ‘An Act to constitute the Commonwealth of Australia’.

⁶¹ The Australian Constitution is available at <http://www.apf.gov.au/senate/general/constitution/>.

⁶² Australia applies the dualistic approach regarding the transformation of conventional norms into domestic law. The Australian Constitution expressly provides jurisdiction to the Commonwealth on international affairs as well as the implementation of international norms in domestic law (Section 51 (xxix)). See e.g. *R v. Burgess; ex parte Henry* (1936) 55 CLR 608, and the *Commonwealth v. Tasmania* (1983) 158 CLR 1).

⁶³ E.g. the Racial Discrimination Act (Cth) and the Sex Discrimination Act (Cth).

⁶⁴ Common law principles may also be overridden by Parliament.

⁶⁵ For example, double tax conventions concluded by Australia which aim at the allocation of taxing powers between the concluding parties limits Australia’s power to tax.

⁶⁶ The Courts are mandated by Chapter III in the Australian Constitution.

⁶⁷ By adding Cth (Commonwealth), it is indicated that the legislative act is enacted on the federal level.

tax legislation occasionally.⁶⁸ The Federal Court of Australia is competent to rule on matters under federal law, including constitutional matters.

The High Court of Australia, which is the highest court in Australian judicial hierarchy, has the ultimate responsibility for the interpretation of the Constitution.⁶⁹ Due to the absence of a Bill of Rights, the Court's approach of the provisions in the Constitution has to be seen mainly in view of imposing limits of the government's legislative powers in an administrative and procedural sense rather than granting rights and liberties to individuals.⁷⁰ As a result of the Court's approach, the attempts in challenging tax laws from a constitutional law perspective are mainly based on arguments referring to non-compliance with procedural and administrative conditions set in the Australian Constitution. However, the High Court generally interprets the provisions in the Constitution in a narrow manner, consequently leading to the observation that none of the provisions in the Australian Constitution really imposes a true limitation of legislative power of the Australian Parliaments to levy taxes or are even suitable in doing so. Due to the absence of a Bill of Rights in combination with the narrow interpretation of the High Court in respect of imposing limits of the government's legislative powers based on the Australian Constitution, the power to tax has been left almost entirely to the federal and state Parliaments and the political arena.

D Current taxes in Australia

Australian tax legislation is comprised in a series of Acts. It is noted that tax laws in Australia, as a matter of 'invariable practice,' are commonly passed in two or three Acts, distinguishing the Act imposing taxation, the Rates Act and the assessing and collecting Act.⁷¹ The major federal taxes imposed in Australia are the (i) Income Tax⁷², incorporating the Capital Gains Tax, imposed on individuals and corporations, (ii) Goods and Services Tax levied on supplies of goods and services, (iii) Fringe Benefits Tax (a wage tax imposed on employers providing fringe benefits), and (iv) the Medicare Levy.⁷³

The Australian states and territories levy a range of less significant taxes.⁷⁴ Further, all revenues stemming from the Goods and Services Tax are passed on to the states from the federal government on the basis of an interregional agreement.⁷⁵ Wealth tax, inheritance and gift taxes are not levied in Australia.

⁶⁸ The Commission reported in 1998 and 1999 that federal income tax laws discriminate on the basis of sexual preference (see II-F).

⁶⁹ Judicial review of federal and state legislation for constitutionality is governed by Section 76 of the Constitution. As regards the separation of powers, Australian constitutional law applies a strict separation of the judicial branch from the legislative and executive branches. Courts do not interfere with the law making process.

⁷⁰ See for example *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 539.

⁷¹ *MacCormick v Federal Commissioner of Taxation* (1984) 15 ATR 437.

⁷² Income tax is levied on the basis of the income Tax Act 1986. The tax rates are established in the Income Tax Rates Act 1986. The rules for determining the tax base are set in two assessing Acts: the Income Tax assessment Act 1936 and the Income Tax Assessment Act 1997. Rules for the administration of income tax including regulations for objections and appeals may be found in Tax Administration Act 1953.

⁷³ Other (less relevant taxes) are excise duties on tobacco, alcohol and petrol, customs tariffs on imports, the Petroleum Resource Rent Tax on profits of petroleum production, and some other less relevant indirect taxes.

⁷⁴ Such as land tax, some payroll taxes, gambling taxes and stamp duties on transactions

⁷⁵ Based on Section 96 of the Constitution.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

1 No principle of legality in the Constitution

The Australian Constitution does not explicitly refer to the fundamental principle of legality (all public power must be based on law). Nevertheless, this does not mean that there are no constitutional limits whatsoever on the federal or state governments' power to tax. In view of the traditional British legal system where the principle of legality originated as one of the fundamental common law maxims⁷⁶, the principle of legality is generally accepted in Australia and applied in the Australian courts.⁷⁷

2 The power to tax; constitutional procedures and limitations

The principle of legality may be recognized in the specific constitutional procedures and limitations for enacting tax legislation, which stipulate that tax laws have to be enacted in the manner described in the Constitution.⁷⁸ The allocation of tax powers between the federal and state parliaments is discussed in II-D.

The basic process for enacting laws with respect to taxation at the Federal and the State and Territory level is to a great extent similar.⁷⁹ Draft tax bills have to originate in the House of Representatives and subsequently have to pass the Senate (both are Houses of Parliament).⁸⁰ The Senate does not have the right to amend a draft tax bill, but may, however, return it to the House of Representatives together with suggestions for amendments. Since the House of Representatives are not bound to take notice of these suggestions, a deadlock situation may occur, for which a special procedure is available on the basis of Section 57.⁸¹

An interesting aspect in enacting tax legislation is that Section 55 of the Constitution stipulates that laws imposing taxation shall only deal with the imposition of taxation. Any provision in a tax law dealing with any other subject matter shall have no effect. The High Court has jurisdiction in this respect enabling the enforcement of the limitations imposed by Section 55 of the Constitution.⁸² Consequently, Section 55 lies at the heart of various challenges to federal tax legislation questioning whether the disputed law is 'imposing

⁷⁶ Along the lines of the doctrine stemming from the famous *IRC v. Duke of Westminster* ruling.

⁷⁷ Recent examples of landmark court decisions in which the principle of legality was explicitly applied are *Al-Kateb v Godwin* (2004) 208 ALR 124 at [19], and *Electrolux Home Products Pty Ltd v Australian Workers Union* (2003) 209 ALR 116 at [21] and [23]. In this respect we also refer to *W.P. Keighery Proprietary Ltd. v. Federal Commissioner of Taxation* (1956-57), 100 CLR 66 at [92].

⁷⁸ The Australian Parliaments' legislative powers to tax are laid down in Section 51 (ii), 53-55, 57 and 90 of the Constitution. The High Court does not interfere in the legislative activities of the Parliaments on the basis of Section 51 (ii) (the requirements are non-justifiable).

⁷⁹ Obviously, the process differs on details since each State and territory adopted its own State Constitution. An outline of the general legislative procedure can be found at <http://www.aph.gov.au/house/pubs/PRACTICE/index.htm>.

⁸⁰ And assented by the Governor General acting on the advice of his or hers Ministers

⁸¹ The procedure involves a double dissolution, an election and a joint sitting of both Houses of Parliament. The deadlock procedure has been used only once in the tax area, in respect of the introduction of the Medicare Levy. This issue is known as *Medibank* (Health Insurance Bill 1973).

⁸² Tax legislation infringing Section 55 and found unconstitutional can be found in *Mutual Pools and Staff Pty. Ltd Federal Commissioner of taxation* (1992) 173 CLR 450.

taxation'.⁸³ However, the procedural limitations on the Parliaments legislative powers laid down in Section 55 do not have to be understood or interpreted as constitutional rights or guarantees which were granted to individuals.⁸⁴ The content of a tax law cannot be challenged on the basis of Section 55 and a breach of this Section may easily be repaired by following the procedures once again.

In any field of legislation besides laws imposing taxation, the Senate and the House of Representatives' powers are equally divided. As a result of the 'invariable practice' of passing tax laws in two or three distinguishing Acts and only the Rates Act is the statute actually imposing taxation, the Senate has powers equal to the House of Representatives to amend the assessing laws (defining the tax base) and collection laws. Consequently, Senate's powers in the tax arena are substantial.

However, it has been suggested that the Senate's powers in enacting tax legislation are fading. It has to be noted that a recent decision of the High Court⁸⁵ sustained the legitimacy of a certain tax Act⁸⁶ which included both taxing provisions and provisions for the assessment, collection and recovery of the tax. According to the Court, the inclusion of the latter provisions did not breach Section 55, since these provisions also 'deal' with the imposition of taxation. It has been suggested that this decision enables future tax laws to be established in one single Act. As a consequence of the Senate's limited influence in the process of enacting legislation 'imposing taxation', this court decision could lead to a significant reduction of the Senate's legislative powers in enacting tax legislation. The consequence of this observation in respect of retrospective tax legislation is discussed in II-E.

3 *Distribution of tax law making powers between the legislative and the executive branches of government*

Beside Parliament, the Department of Treasury, which is part of the executive branch, is also involved in the adoption of legislation (secondary legislation through Regulations). Regulations enable the utilization of minor changes in and supplements to tax legislation making a smooth application of tax law possible in practice.⁸⁷

B Principle of equality

There is no constitutional requirement of equal protection or non-discrimination in respect of individuals. To a great extent, the protection of human rights and liberties has to be guaranteed by the parliamentary system and judiciary. Due to the reserved position of the High Court of Australia, there are, in principle, very few limits imposed on Australian parliaments to enact laws that violate fundamental rights and liberties. On the basis of Section 51 (xxvi) of the Constitution, the federal Parliament even has the express power to pass laws that discriminate on the basis of race, sex, disability, sexuality, ethnicity et cetera "for whom

⁸³ As regards the relationship with the federal power to pass laws with respect to taxation, reference is made to II-D-2.

⁸⁴ *Mutual Pools and Staff Pty. Ltd Federal Commissioner of taxation* (1992) 173 CLR 450.

⁸⁵ *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* [2004] HCA 53

⁸⁶ *Commonwealth Place (Mirror Taxes) Act 1998*. The content of this tax act is of minor significance for the purpose of this survey.

⁸⁷ It is noted that the current Income Tax Law is incorporated in an abstract and rough manner, consequently leaving wide-ranging powers to enact legislation for Treasury. In this respect, it has to be noted that administrative rulings, issuing binding application of a tax law to the facts presented by an individual taxpayer, is an important instrument in the implementation of tax law in practice as well.

it is deemed necessary to make special laws". This provision actually permits racially discriminatory laws.⁸⁸

However, there are some exceptions. For example, discrimination against a person on the basis of their state of residence is precluded (Section 117 of the Constitution). There is some case law in which certain state tax legislation has been found unconstitutional by the Federal Court of Australia on the basis of this Section.⁸⁹ The principle of non-discrimination may also be recognized in Section 92 of the Constitution, which enables to some extent the freedom of movement between states. Discrimination against interstate commerce is dealt with in II-D-3.

C Protection from unreasonable searches and seizures; Non-confiscation of property

The right of property protection and the right of protection from unreasonable searches and seizures may be recognized in Section 51 (xxxii) of the Constitution, which requires the application of 'just terms' whenever property is acquired from a person on the basis of federal law, including federal tax law.⁹⁰ It has been suggested in Australian legal doctrine that this provision may limit the federal Parliament's power to tax. However, the main view in this respect is that this requirement does not apply to tax laws, since in the essence of a tax law lays an obligatory flow of money from a taxpayer's income or capital to the tax administration without any corresponding obligation. Consequently, where a law is a true tax law and not an unjust attempt to obtain property in a concealed manner, Section 51 (xxxii) will not be applicable.

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce

1 Federal system

The division of taxing powers forms one of the major difficulties with the federal-state structure adopted in Australia.⁹¹ In the Australian federal system, legislative powers are distributed in accordance with the common law principle of legality by assigning to the federal Parliament a specified list of legislative powers in a range of subjects (Section 51 of the Constitution). Some of these powers are exclusive and some of these are concurrent with the States and Territories. The states retain full sovereignty except to the extent that the Constitution gives exclusive powers to the federal government and to the extent that the federal government makes use of its concurrent powers.

In the field of taxation, the federal government has been given exclusive powers to levy customs duties and excise duties.⁹² On the basis of consistent case law of the High Court of

⁸⁸ *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 539.

⁸⁹ *Commissioner of Taxes v Parks* (1933) St R Qd 306. The matter concerned an exemption under a former state income tax regime which was only available to in-state residents. The difference in tax treatment was found to be discriminative and unconstitutional under Section 117 of the Constitution.

⁹⁰ Please note that this provision applies only to the legislative power of the federal Parliament, it does not apply in respect of the States' legislative power.

⁹¹ See e.g. Richard Webb, *Public Finance and Vertical Fiscal Imbalance*, Research note No 13 2002-3, Parliamentary Library of Australia, <http://www.aph.gov.au/library/pubs/rn/2002-03/03rn13.htm>.

⁹² Section 90 of the Constitution.

Australia, states are further not enabled to levy a sales tax.⁹³ Consequently, the Goods and Services Tax is a federal tax.⁹⁴ Furthermore, the Commonwealth Parliament has a power to make available money to the States and is also allowed to discriminate between states in this respect.⁹⁵ However, Section 51 (ii) disallows federal tax laws to discriminate between states or parts of states.⁹⁶ The Commonwealth is furthermore prohibited to levy any tax on the property of the states.⁹⁷ For the remaining part, the power to enact tax laws is a concurrent power. However, the federal government has used its concurrent power in the field of income taxation in such a way that the states have been in effect prevented from imposing income tax.⁹⁸

2 *Challenges to federal and state tax legislation*

As mentioned, the attempts in challenging tax laws from a constitutional law perspective are mainly based on arguments referring to non-compliance with procedural and administrative conditions set in the Constitution. For this purpose, the constitutionality of tax laws has often been challenged by questioning whether the disputed law actually imposes a ‘tax’ in its constitutional sense⁹⁹, meaning that it is not a “law with respect to (...) taxation”, or whether it imposes another form of impost or exaction, for which the federal Parliament has no power.¹⁰⁰ Such a challenge may occasionally raise issues in respect of basic human rights. In the event of an imposition not being a tax, the consequence is that the imposition is invalid unless it can be supported under another head of power (e.g. a penalty). An imposition being a tax in its constitutional meaning, leads to the application of the constitutional requirements and limitations in respect of the parliaments’ legislative power to tax as discussed in II-A-2.

There is a considerable body of High Court case law on the meaning of the term ‘tax’ in Section 51 (ii) of the Constitution.¹⁰¹ In this respect the classic definition of a tax is: “a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered”.¹⁰² The High Court further observed that a tax

⁹³ The high Court held that a duty falling under the scope of Section 90 of the Constitution is a tax on production, manufacture, distribution or sale of goods up to the point of consumption. See for example *Mutual Pools And Staff Pty. Limited v. Federal Commissioner of Taxation* (1992) 173 CLR 450.

⁹⁴ Please note that the states could theoretically levy a services tax, since a levy on the rendering of services is not excluded in Section 90 of the Constitution.

⁹⁵ Section 96 of the Constitution. See *Moran (WR) Ltd v DFCT* (1940) 63 CLR 338.

⁹⁶ An example of a tax law found unconstitutional on the basis of Section 51(ii) in this respect is the *Excise Tariff Act* (1906). See *R v Barger* (1908) 6 CLR 41.

⁹⁷ Section 114 of the Constitution.

⁹⁸ During World War II, the Commonwealth introduced four Tax Acts comprising the ‘Uniform Tax Scheme (UTS)’, intending to temporarily prevent the states from imposing income taxes. The UTS was challenged in Court but the challenge failed as a result of the deference given to the federal Parliament due to the war (*South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373). After the war, the UTS kept in force and was again challenged by the states. The Court found the UTS not unconstitutional, since the grants power laid down in Section 96 of the Constitution enables a condition enforced on the states not to levy an income tax (*Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575). As a result of this, the income tax is currently levied only on the federal level.

⁹⁹ On the basis of Section 51 (ii) of the Constitution.

¹⁰⁰ State taxes are often challenged by referring to the States and Territories’ constitutional limits on the power to tax. Due to the restrictions in the proportion of this survey, we will not further elaborate on this matter.

¹⁰¹ See e.g. *Matthews v Chickory Marketing Board* (1938) 60 CLR 263 and *MacCormick v Federal Commissioner of Taxation* (1984) 15 ATR 437. For additional reading, we refer to Morabito and Barkoczy, *What is a Tax? The erosion of the Latham Definition* (1996) 6 *Revenue Law Journal* 43, and Morabito, *Tax or penalty? The latest sequel* (1999) 2 *Journal of Australian taxation* 391.

¹⁰² *Matthews v Chickory Marketing Board* (1938) 60 CLR 263.

must not be incontestable¹⁰³ and it has been suggested that a tax is not arbitrary.¹⁰⁴ However, a tax is not unconstitutional in the event it is oppressive¹⁰⁵, unfair¹⁰⁶ or imposed to further goals or purposes other than taxation¹⁰⁷.

3 *Discrimination against interstate commerce*

The principle of non-discrimination described in II-B may also be recognized in Section 92 of the Constitution. Section 92 enables to some extent the freedom of movement between states, since it prohibits the Australian parliaments from enacting laws that discriminate between interstate and intrastate trade¹⁰⁸ and commerce. It also prohibits the parliaments to enact laws that unreasonably burden the movement and communication between states. For example, the GST was once challenged by arguing that the tax law interferes with Section 92.¹⁰⁹ However, the Court observed that “GST laws are not discriminatory since they operate uniformly throughout the Commonwealth. Nor do they impose burdens of a protectionist kind of interstate trade.”¹¹⁰

E Retroactivity of tax legislation

There is no constitutional limitation on retrospective legislation,¹¹¹ whether in the field of tax legislation or otherwise.¹¹² However, there is a general interpretive presumption that legislation is not applicable to prior transactions or events, unless that is expressly stated, or by necessary implication.¹¹³

As a result of critique heard in Australian politics on the evolved practice of ‘legislation by press release’, the possibilities to enact tax legislation with retrospective effect were limited. In 1988, the Senate declared principles under which it considers retrospective tax legislation. When the period of time between a government announcement of a taxation proposal and the introduction or publication of a draft tax bill exceeds six months, the Senate will amend the bill in order to reduce the period of retrospectivity to the time since the introduction or publication of the bill.¹¹⁴ Please note that this system of political limitations on retrospective

¹⁰³ *MacCormick v Federal Commissioner of Taxation* (1984) 15 ATR 437. The High Court referred in this respect to a more fundamental principle of constitutional tax law stipulating that “the legislature cannot determine conclusively for itself its power to enact legislation by putting beyond examination compliance with the constitutional limits upon that power.” This reserves to the High Court the ability to determine whether the executive has acted lawfully (see Dixon CJ in *DCT (NSW) v Brown* (1958) 100 CLR 32, 40). The incontestability of a tax may cause it to be invalid, but there has been no tax law found invalid on this basis.

¹⁰⁴ *MacCormick v Federal Commissioner of Taxation* (1984) 15 ATR 437. The condition that a tax cannot be arbitrary is further discussed in II-G.

¹⁰⁵ *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329. Barton J observed that such a tax “(...) would not alter the (...) taxing power” of the federal parliament.

¹⁰⁶ *MacCormick v Federal Commissioner of Taxation* (1984) 15 ATR 437. The Court observed in this case that ‘if the tax is found to work injustice, the remedy is not to deny its validity; the remedy must be found in Parliament’s power of amendment.’

¹⁰⁷ *Osborne v Commonwealth* (1911) 12 CLR 321.

¹⁰⁸ E.g. no customs duties or tariffs on interstate sales of good

¹⁰⁹ *Halliday v Commonwealth* [2000] FCA 950

¹¹⁰ *Halliday v Commonwealth* [2000] FCA 950

¹¹¹ This was explicitly decided by the High Court in *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

¹¹² This was decided in *Polyukhovich v Commonwealth* [1991] 172 CLR 501. A majority of the judges in the High Court observed that Parliament has power to pass retrospective statutes.

¹¹³ *Nicholas v Commissioner of Corporate Affairs* (1987) 11 ACLR 801 and *Maxwell v Murphy* (1956) 96 CLR 261.

¹¹⁴ *Senard Hansard*, Debates 1988, Vol 17, p. 2220.

effect may be at risk due to the reduction of the Senate's influence in the process of tax legislation as described in II-A-2.

The Australian tax authorities' current general practice in administering retrospective changes is to apply the existing law until proposed changes to the law are enacted.¹¹⁵ However, under Australia's self-assessment system, the Commissioner is entitled to accept returns as lodged and may, in limited situations, suggest taxpayers to meet their obligations by anticipating the effects of a proposed change to the law.

F Protection of marriage

The Constitution does not contain a specific provision on the protection of marriage or family. However, it is worth mentioning that the Australian income tax legislation (which regards the individual as the basic income tax unit) provides for a joint or family unit of taxation as regards certain personal allowances. These allowances are applicable to spouses, including both married and 'de facto' spouses (cohabitants).

Nevertheless, other alternative family structures than heterosexual couples are not recognized for income tax purposes. The Human Rights and Equal Opportunity Commission (hereinafter: "HREOC") considered that the non-recognition of other family structures than heterosexual couples in federal income tax laws discriminate on the basis of sexual preference, consequently breaching the Sex Discrimination Act 1985 (Cth). However, the findings of the HREOC are legally non-binding. Moreover, the Sex Discrimination Act 1985 does not limit the federal parliament's power to adopt tax laws that discriminate on the basis of marital or family status. Consequently, there is no law enabling the challenge of the discriminatory effects of the income tax legislation applicable in Australia in respect of alternative family structures (same-sex couples and broader family groups.)

G Other elements of constitutional tax law

1 Prohibition of arbitrary taxation

As mentioned in II-D-2, it has been suggested that one of the elements in the definition of tax in its constitutional meaning is that it is not arbitrary.¹¹⁶ In this respect arbitrariness may be defined as: "a reference to the fact that liability can only be imposed by reference to ascertainable criteria with sufficiently general application and that the tax cannot lawfully be imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislature."¹¹⁷ The prohibition of arbitrary taxation seems to mean that parliament has to specify the criteria by which tax liability is generated. Taxing the Australian taxpayer at random may therefore be unconstitutional and such a law will have no effect.

2 Freedom of religion

A fundamental principle of Australian (tax) law is the adoption of the freedom to establish and exercise any religion in Section 116, one of the scarce human rights to be found in the

¹¹⁵ See: <http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/45130.htm>.

¹¹⁶ *MacCormick v Federal Commissioner of Taxation* (1984) 15 ATR 437. It is noted that the prohibition of arbitrary taxation may be recognized as being supplemental to the principle of equality

¹¹⁷ *DFCT v Truhold Benefit Pty Ltd* [1985] HCA 36.

Australian Constitution. Section 116 prohibits the levying of a burdensome church tax hindering the exercise of this fundamental freedom. The High Court observed that the Australian GST system does not infringe the free exercise of religion laid down in Section 116, more in particular the Islamic belief, which requires Muslims not to tax, title or charge interest.¹¹⁸ The Court held that the protection “was not absolute and that it did not involve a dispensation from obedience to a general law of the land which was not directed against religion”¹¹⁹, like in this case, the GST.

¹¹⁸ Halliday v Commonwealth (2000) FCA 950.

¹¹⁹ Halliday v Commonwealth (2000) FCA 950.

BELGIUM

I CONSTITUTIONAL LAW

A The Constitution

The Belgian constitution dates back to February 7, 1831. As from 1970, it was gradually and substantially amended to transform the unitary Belgian state into a federal state. An officially renumbered and coordinated text of the constitution was issued on February 14, 1994.¹²⁰ The Constitution contains several fundamental principles of the Belgian tax system.

B Other sources of tax constitutional law; Overview of the judiciary

Other important sources of Belgian constitutional law include international treaties,¹²¹ European Community (EC) law and jurisprudence of the Arbitration Court, the Court of Cassation and the Conseil d'Etat.

As for every EC Member State, the influence of EC law on Belgian tax law is considerable. Belgian law must abide by the EC Treaty (viz. the principles of free movement and non-discrimination), as well as by secondary EC law (regulations, directives), notably in the tax area.¹²² Furthermore, the European Court of Justice (ECJ) case law in the area of taxation has an important impact on Belgian tax law developments. For instance, as a result of an ECJ ruling Belgium recently had to amend its tax on stock exchange transactions and the physical delivery of bearer note securities.¹²³

The Arbitration Court is the constitutional court competent to check the constitutionality of federal or regional legal acts (laws, decrees and ordinances).¹²⁴ However, the Court's competency is limited to specified, albeit important, provisions of the Constitution amongst which are the general principles of equality and non-discrimination, the division of competencies between the federal state and the regions, as well as the principles of legality and equality in tax matters.¹²⁵ The Court issues both preliminary rulings, at the request of the ordinary courts, and 'direct' rulings, at the request of private individuals/enterprises or of certain political actors.¹²⁶

¹²⁰ Hereafter "the Constitution"; An English translation can be found from this webpage:

http://www.oefre.unibe.ch/law/icl/be00000_.html

¹²¹ Viz. bilateral income tax treaties and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The supremacy over national (constitutional) law of international treaties to which Belgium is a party, as well as of EU law has been recognized by a 1971 landmark ruling of the Court of Cassation. A database of all treaties (as of 1987) to which Belgium is a party is available here:

<http://www.diplomatie.be/fr/treaties/dbasetreaties.asp>

¹²² An overview of the EC activities in the tax area is available here: http://europa.eu/pol/tax/index_en.htm

¹²³ ECJ case C-415/02 of 15 July 2004, *Commission v Belgium*

¹²⁴ Belgian federal legal acts are formally called 'laws', whereas legal acts of the federate entities (regions and communities) are called 'decrees' and (for the Brussels Region) 'ordinances'.

¹²⁵ Article 142 (2) of the Constitution *jo.* Article 1, 2° of the Constitutional Law of 6 January 1989 on the Arbitration Court

¹²⁶ I.e., by the president of a legislative body (at the request of at least 2/3 of its members), or by the federal or regional governments (Article 142 (3) of the Constitution *jo.* Article 2 of the Constitutional Law of 6 January 1989 on the Arbitration Court

The ordinary courts, of which the Court of Cassation is the supreme judicial court and the Conseil d'Etat the supreme administrative court, are not competent to check legal acts on their constitutionality. They are, however, competent to check conformity of legal acts with self-executing international legal norms (treaties, EC law), as well as regulatory measures on their constitutionality and conformity with international law. The Conseil d'Etat is competent to annul regulatory measures that violate the Constitution or international law. Tax litigation is mainly the competence of the ordinary judicial courts, headed by the Court of Cassation.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

The principle of legality is enshrined in Article 170 of the Constitution, stipulating that taxes may only be established by law.¹²⁷

Following the country's transformation into a federal state, the same provision now also recognizes the taxing powers of the federate bodies, i.e. the regions and communities which may impose taxes by decree or ordinance, i.e. by decision of their respective legislative bodies.¹²⁸ Local and provincial taxes may be imposed only by decision of their respective elected bodies.¹²⁹

The principle of legality applies to taxes only, not to fees ('redevances') which are regarded not as taxes but as the 'price' for a specific public service which the payer receives in return.

Finally, the principle of legality is generally interpreted as requiring that the legislator must determine the taxpayer, the tax base and rate, as well as any tax exemptions or reductions. Other aspects and modalities of taxation may be delegated to the relevant executive authority.

B Principle of equality

The principle of equality in tax matters is enshrined in Article 172 of the Constitution, stipulating that no tax privileges may be awarded, and that exemptions or exceptions from tax may be granted only by law. This provision thus specifies for tax purposes the general principle of equality and non-discrimination.¹³⁰

The principle of equal tax treatment is generally understood as not precluding differential treatment between taxpayers in the same situation, on the condition however that the differentiation criterion is objective and reasonable in light of the goal and effect of the measure, the latter not being reasonably disproportionate to the goal sought.¹³¹

In sum, the Court subsequently goes through the following steps when assessing the principle of equality:

¹²⁷ Article 170 (1) of the Constitution

¹²⁸ Article 170 (2) of the Constitution

¹²⁹ I.e., by local or provincial regulation; Article 170 (3) and (4) of the Constitution

¹³⁰ Respectively Articles 10 and 11 of the Constitution

¹³¹ See e.g., Arbitration Court, No 37/97 of 8 July 1997

- Does the alleged discriminating treatment concern two or more categories of taxpayers which are in similar situations?
- What is the goal of the differential treatment, and is it justified?¹³²
- Is the differentiation criterion objectively justified and efficient to reach the goal sought?
- Is the measure reasonable proportionate to the goal sought?

C Protection from unreasonable searches and seizures; Non-confiscation of property

Property is protected by Article 16 of the Constitution, stipulating that no one may be deprived of his property than in the case of expropriation for a public purpose in accordance with the law and in return for fair and prior compensation.¹³³⁻¹³⁴ The Constitution also protects the home, stipulating that it is inviolable and that searches may only be performed in accordance with the law.¹³⁵

On the basis of this provision,¹³⁶ the Arbitration Court found unconstitutional the provision of the customs law confiscating vehicles used for smuggling without allowing the owner in good faith to reclaim his vehicle.¹³⁷

It may be noted that the home and property are also protected by respectively Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and by Article 1 of Protocol No 1 thereto.¹³⁸

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce

1 Allocation of taxing powers in Belgium

As noted above,¹³⁹ taxing powers are divided between basically three levels: the federal level, the level of the federate bodies (regions and communities) and the local level (provinces and communes).

The regions and communities have joint as well as autonomous taxing powers.¹⁴⁰ With respect to the former, the revenue of certain federal taxes is wholly or partly transferred to the

¹³² E.g., in No 74/95 of 9 November 1995 the Court found no justification for subjecting Belgian taxpayers to an additional tax on Belgian source interest with the exclusion of foreign source interest, and thus declared the tax measure to violate the principle of equality

¹³³ Article 191 of the Constitution ensures the same protection to foreigners on Belgian soil

¹³⁴ Article 17 of the Constitution also prohibits punishment by total confiscation of one's property

¹³⁵ Article 15 of the Constitution

¹³⁶ At the time of the ruling, Article 16 of the Constitution fell outside the Arbitration Court's competency; hence the Court formally ruled on the basis of the general principle of equality (Article 10 of the Constitution) by comparing the protection of ownership under customs criminal law with that under general criminal law

¹³⁷ Ruling No 162/2001 of 19 December 2001

¹³⁸ Both provisions of the European Convention and their corresponding constitutional provision have been relied on by the Arbitration Court to judge the constitutionality of the search and seizure powers of customs; Ruling No 16/2001 of 14 February 2001

¹³⁹ See II, A above; Article 170 §2 of the Constitution, and several special constitutional laws

¹⁴⁰ The taxing power of the federate bodies, at the image of the Belgian federal structure as a whole, is a rather complex matter. The overview hereafter is limited to the essentials.

regions/communities (namely personal income tax and VAT); for some taxes (notably death taxes, certain transfer taxes and property tax) the federate bodies can determine certain aspects (rates, exemptions). With respect to the latter, the federate bodies may establish new taxes to the extent these do not impede on the tax base of existing federal taxes. In practice, this has led mainly to the introduction of waste taxes and other 'green' taxes.

The local entities (communes and provinces) also have taxing power, within the limits determined by law.¹⁴¹ In practice this means that they may impose taxes on their territory without impeding on federal, regional or community taxes. They may also level surtaxes on two federal taxes, i.e. the personal income tax and the property tax.¹⁴²

To conclude: all major taxes such as personal and corporate income taxes and VAT, remain federal taxes, although part of their revenue is transferred to the federate bodies and represent their main source of revenue. Likewise, although their autonomous taxing power would seem broad in theory, the local authorities derive their revenue mostly from surtaxes on federal taxes.

2 *Prohibition of discrimination against interstate commerce*

The Constitution does not explicitly prohibit discrimination against interstate commerce.

However, it has quickly become constant case law of the Arbitration Court that the Belgian federal state is an "economic and monetary union", the economic union being characterized by an internal market with freedom of circulation of goods and resources.

Hence, 'internal' customs duties and taxes of equivalent effect are strictly prohibited between the components of the Belgian state. The Court thus struck down as unconstitutional, a Flemish regional tax which taxed waste differently depending on whether it was to be treated within the region or outside ('exported').¹⁴³

E *Retroactivity of tax legislation*

The Constitution does not explicitly prohibit the introduction of retroactive tax laws.

Article 2 of the Civil Code does prohibit retroactive legislation in general. However, this being a legal and not a constitutional law provision, it does not prevent the legislator to decide otherwise in specific cases. It does, however, prevent the local taxing authorities from adopting retroactive tax regulations, their regulatory measures having a lower status in the hierarchy of norms.¹⁴⁴ Retroactive administrative tax regulations in general are prohibited by law.¹⁴⁵

¹⁴¹ Article 170 §3, and Articles 41 and 162 of the Constitution

¹⁴² In fact, as noted previously, the property tax is actually no longer a federal tax, as the regions may determine certain aspects of it (rates, exemptions and reductions)

¹⁴³ See i.e. Ruling No 51/98 of 20 May 1998

¹⁴⁴ The decisions of the elected bodies of the local authorities are 'regulations', of a lower level than the 'laws' (in the material sense of the term) of the federal, regional and community parliaments (although the decisions of the latter are formally entitled 'decrees' or 'ordinances')

¹⁴⁵ Article 108 of the Law of 4 August 1986 on the taxpayer's charter

Despite the absence of an explicit prohibition, the Arbitration Court has ruled that retroactive tax laws in principle violate “the fundamental principle of legal certainty” (or legitimate expectations). However, in that particular case, the Court refused to strike down the retroactive effect of the law, considering that it was justified in light of its general purpose.¹⁴⁶ It would thus seem that the Court is willing to strike down retroactive tax laws as violating the (unwritten) constitutional law principle of legitimate expectations, to the extent that retroactivity is not sufficiently justified.

F Protection of marriage

The Constitution does not contain a specific provision on the protection of marriage. It does, however, guarantee “the respect of one’s private and family life”.¹⁴⁷

The Arbitration Court has ruled that a lower tax free income allowance for married couples compared to that available to unmarried cohabitants violates the Constitution,¹⁴⁸ considering marriage to be an arbitrary criterion in light of the purpose of the measure. The higher tax free allowance for single taxpayers intended to take into account the relatively higher cost of living of *singles* compared to that of married taxpayers.

Indeed, the higher tax free allowance for cohabitants was the result of their *de facto* treatment as single taxpayers (hence their benefiting the higher tax free allowance), rather than of a formal discriminatory provision favoring cohabitants over married couples. Following this Court ruling, the income tax law was changed to grant the same tax free allowance to all taxpayers irrespective of their family situation (i.e., whether single, married or cohabitating).

Several other tax provisions have since been changed to eliminate unequal treatment between married and cohabitating couples.^{149–150}

G Other principles of constitutional tax law

The most important constitutional law principles relevant in tax matters have been summarized under A. to F. above.

The principles of legality and equality appear as the chief principles on the basis of which courts have limited taxing powers. Case law has also used these ‘written’ constitutional principles as the basis for other ‘unwritten’ fundamental law principles relevant in tax matters such as the principle of legitimate expectations or legal certainty.¹⁵¹

¹⁴⁶ Ruling No 36/90 of 22 November 1990; See also Ruling No 45/01 of 4 May 2001

¹⁴⁷ Article 22 of the Constitution

¹⁴⁸ Ruling No 140/2001 of 6 November 2001; At the time of the ruling, the Court was not yet competent to check laws on their compliance with Article 172 of the Constitution (i.e., the principle of equality in tax matters; See II, B above), thus referring to the general principle of equality and non-discrimination of Articles 10 and 11 of the Constitution

¹⁴⁹ Not only personal income tax, but also death and transfer tax provisions have been amended to that effect.

¹⁵⁰ It should be noted, however, that the assimilation with married couples only applies to registered cohabitating couples whereas *de facto* cohabitants continue to be taxed like single taxpayers who, in most cases, is more advantageous for tax purposes.

¹⁵¹ See II, E above.

BRAZIL

I CONSTITUTIONAL LAW

A The Constitution

The Constitution of the Federative Republic of Brazil containing several provisions on the Brazilian tax system was adopted on October 5, 1988.¹⁵²

As a result of the program of Constitutional Reform in the course of which a number of amendments to the Constitution were proposed in 1995, the Brazilian Tax System may change in the future.¹⁵³ The proposals still pending in the House of Congress, it seems uncertain whether the amendments to the Constitution will be adopted in the near future.

B Other sources of constitutional tax law

In addition to the Constitution, the case law of the Federal Supreme Court (hereinafter: “the Court”) is another source of constitutional law relevant in tax matters.¹⁵⁴

The Court’s case law provides precedents and influences the decisions by the tax authorities. In essence, the Court’s mission is to safeguard the recognition of the provisions laid down the Constitution.¹⁵⁵ The Court has jurisdiction to rule on the constitutionality of laws or governmental normative regulations and functions as a court of final appeals in respect of sentences by other lower courts. Furthermore, the Court is competent to adjudicate on criminal offences concerning the President of the Republic and Ministers. The Court is also competent to solve disputes in both internal and interregional conflicts regarding the republic, the states and the federal district.

Moreover, the doctrine plays an important role in the interpretation of constitutional tax law. Annotations to discussions by the legislature, as well as opinions provided by leading professional and academic scholars are important sources of interpretation.

Furthermore, sources of constitutional tax law can be found in international agreements and conventions.¹⁵⁶

C The National Tax Code

Apart from the Constitution, the Brazilian tax system is governed by the National Tax Code, or Código Tributário Nacional (hereinafter: “CTN”), which was issued in 1966. This basic tax code contains all general provisions, definitions, competences, procedures and limitations

¹⁵² Hereinafter “the Constitution”; The text of the Constitution is available at: <http://www.oefre.unibe.ch/law/icl/>

¹⁵³ The proposals to amend the Constitution also deal with the Brazilian social security system, the civil service and the judicial branch.

¹⁵⁴ The entire Brazilian court system is enabled to exercise constitutional review. However, the rulings of the Supreme Court are the most relevant and therefore only mentioned in this survey.

¹⁵⁵ Article 102 of the Constitution

¹⁵⁶ For example, the authority to legislate in tax matters is limited by the double tax conventions concluded by Brazil. Furthermore, free trade agreements such as the MERCOSUR treaty limit Brazil’s power to levy customs duties and tariffs.

concerning the Brazilian tax system. The CTN is of general application and must be observed by all taxing authorities within the country: federal, state and municipal.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

The Constitution contains a number of provisions referring to the principle of legality, stipulating that the basis for all public action has to be substantiated by law.¹⁵⁷

First, Article 5(II) of the Constitution stipulates that no one may be obliged to do or not to do something other than by virtue of law. This provision also applies in tax matters, essentially providing that no one should be obliged to pay taxes unless this is substantiated by law.

Secondly, Article 145 stipulates that the republic, the states, the federal district and the municipalities may enact tax laws. Article 146 requires a supplemental law on taxes to be enacted, to regulate the constitutional limits to the taxing powers and to establish general rules for tax legislation.¹⁵⁸ The supplemental law also resolves conflicts of taxing powers between the republic, the states, the federal district and the municipalities.

Thirdly, Article 150(0.I) specifically prohibits the republic, the states, the federal district and the municipalities to impose or increase taxes without a law substantiating such imposition or increase.

B Principle of equality

The principle of equality (or principle of non-discrimination) which roughly states that the law must be applied without exception to all those in the same circumstances (equal treatment in equal circumstances), is laid down as a general principle of fundamental law in article 5(0) and (0.I). The principle of equality is also mentioned in the preamble to the Constitution.

The principle of equality is laid down in Article 150(0.II) of the Constitution, which prohibits the republic, the states, the federal district and the municipalities to submit to unequal treatment taxpayers in equivalent situations. Furthermore, distinctions by virtue of the professional occupation or function performed by the taxpayer are prohibited, regardless of the legal designation of the income, instruments or rights.

C Protection from unreasonable searches and seizures; non confiscation of property

Article 5(XXII) of Constitution guarantees the protection of private property.

¹⁵⁷ Up to the 1990s, the Constitution allowed the use of emergency decrees, also in tax matters, enabling the imposition of a tax by administrative regulation. However, the issuance of such decrees was limited by a constitutional amendment. For further reading, See David Roberto R. Soares da Silva, Constitutional Amendment Limits use of Provisional Measures, 24 Tax Notes Int'l 554 (Nov 5, 2001)

¹⁵⁸ These general rules concern the definition of the respective taxes, their taxable event, tax base and taxpayers, as well as the rules regarding tax liability, assessment, credit, laches and the statute of limitations.

However, Article 5(XIV) allows expropriation of property for public use or need, or for social interest, subject to the procedure established by law and a just and prior compensation. A provision specific to taxation is found in Article 150(IV) of the Constitution stipulating that it is forbidden to use taxes for purposes of confiscation.

Furthermore, Article 5(XI) protects the inviolability of the home, stipulating that no one may enter one's home without the dweller's consent, except in case of *flagrante delicto* or disaster, to offer assistance or based on court order.

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce

1 Allocation of taxing powers in the Federative Republic of Brazil

Brazil's federal structure comprises of the republic, the states, a federal district and the municipalities.

In accordance with the principle of legality, taxes and dues may only be imposed by 'law'.¹⁵⁹

The Constitution subsequently empowers the states, the federal district and the municipalities to issue tax legislation,¹⁶⁰ and to collect and inspect the taxes it has established. Articles 153(0), 155(0) and 156(0) of the Constitution list in a limitative manner the fields in which the republic, the states, the federal district and the municipalities may impose taxes. The republic may, however, impose a tax by supplemental law in other fields to the extent it does not impede on existing taxes.¹⁶¹

Taxes levied at federal level are: (i) the income tax, (ii) excise taxes, (iii) import and export duties, (iv) the financial transactions tax, (v) the rural real estate tax, and (vi) corporate social contributions on profits, billings and social integration programs.

Taxes levied on the state level are: (i) the sales and service tax, (ii) the property transfer tax, and (iii) the automobile tax. On the municipal level there is a service tax and a number of real estate taxes.

The revenues from taxes collected on federal and state level are not automatically income for these entities. Articles 157, 158 and 159 of the Constitution determine the percentages of state tax revenue that must be transferred to the municipalities, and of federal tax revenue that must be transferred to the states.

Theoretically, this system should generate a certain harmony and balance between the different federal entities. In practice, however, states used their taxing power to grant tax incentives particularly to attract new investments.

Discussions on tax reform are currently taking place. Some promote the idea of simplicity of the taxing system and propose to drastically reduce the number of taxes and centralize their collection.

¹⁵⁹ See II, A above

¹⁶⁰ Article 24 (0.I) and Article 30 (III) of the Constitution

¹⁶¹ Article 154(I) of the Constitution; See also II, G below

2 Prohibition of discrimination against interstate commerce

Article 150(V) of the Constitution guarantees the freedom of movement of interstate commerce and prohibits the republic, the states, the federal district and the municipalities to establish limitations to the traffic of persons or goods by means of interstate or intermunicipal taxes, except for the collection of toll fees for the use of highways maintained by the government.

Article 151(I) of the Constitution also prohibits the republic to establish taxes that are not uniform throughout the entire national territory, or that imply a distinction or preference for a state, the federal district or a municipality to the detriment of another. Article 152 prohibits tax differences between goods and services by virtue of their origin or destination.

On the basis of Article 155(0) of the Constitution, States may impose i.a. a sales and services tax (ICMS),¹⁶² a value-added tax on merchandise, electricity, telecommunication and transport services. Each state can set the tax rate for internal operations. However, these rates cannot be lower than the interstate rates. As a result of the States' competence in setting the tax rate, the ICMS rates vary throughout the country.

To avoid interstate trade distortions, the Federal Senate determines the tax rates on interstate operations and transactions. A credit system assures neutrality between internal and interstate operations.¹⁶³ Thus free interstate trade is ensured to some extent.

E Retroactivity of tax legislation

Protection from retroactive tax legislation is guaranteed by Article 150 (III) of the Constitution. Retroactive tax legislation is not permitted, except when beneficial to the taxpayer and to the extent the taxable event has not yet been completed.

It has been suggested in legal doctrine that a narrow interpretation of this principle runs the risk of imposing an unduly constraint on the taxing powers of the legislator. When the principle of non-retroactive tax legislation is applied in a strict manner, it would prohibit any change in tax legislation, since any change, even when it is only effectuated for future transactions, would influence the value of existing wealth. An excessively strict approach of this principle has therefore been considered undesirable.

F Protection of marriage

In addition to the general protection on the basis of the principle of equality, Article 226 of the Constitution guarantees the protection of the family. It also contains provisions on the institute of marriage and the family unit.

Married couples are taxed jointly on all income if one spouse has no income and is listed as a dependant on the other spouse's return. If both spouses have income, they may choose to

¹⁶² See II, D, 1 above. VAT is also levied on the federal level. Non-cumulation of federal and state level VAT is constitutionally safeguarded; See II, G below

¹⁶³ When a taxpayer registered for ICMS purposes purchases goods in another state, he is allowed to use the tax paid for the state of origin in the interstate operation to credit it against his ICMS liabilities. If the taxpayer is buying a good which will not be used in further commercial operations, the purchaser has to compensate the state in which he resides the difference between the internal tax rate and the interstate tax rate.

separately file tax returns and pay taxes, or to have a joint assessment. Generally, it is more advantageous to file separately when both spouses are employed or self-employed.

On the basis of the non-discrimination principle a number of recent court rulings have granted same-sex couples many of the rights which are also enjoyed by married couples.¹⁶⁴ This includes tax matters, as well as inheritance, immigration, state pension and welfare benefits.

Finally, since March 2004, the State of Rio Grande do Sul is the sole state to recognize the civil union of same-sex couples, granted them substantially similar rights as married couples in areas such as joint ownership of property, custody of children, pensions and inheritance.

G Other principles of constitutional tax law

As mentioned, the Constitution prohibits cumulative taxes.¹⁶⁵ An example of non-cumulative taxation is the Value-Added Tax (VAT) which is levied on both the federal and state level. The IPI¹⁶⁶ is imposed on federal level, on industrial goods at the time they leave the industry. At state level, the ICMS¹⁶⁷ taxes the circulation¹⁶⁸ of goods in general, as well as interstate and inter-municipal transportation of goods and communications services. The invoice credit mechanism ensures in principle that VAT taxpayers are totally relieved from any VAT paid on their purchases, so that the total VAT burden is borne by the end-consumers.

¹⁶⁴ Brazilian High Court, 11 February 1998, Case Milton Alves Pedrosa

¹⁶⁵ Articles 153(3.II), 154(I) and 155(2.I). See II, D, 1 above

¹⁶⁶ Imposto sobre Produtos Industrializados (Tax on industrialized products)

¹⁶⁷ Imposto sobre Circulacao de mercadorias e prestacao de services interestadual e intermunicipal de transporte e de comunicacao (Tax On circulation of goods and transportation and communication services, a value added tax levied on goods in general and some services); See II, D, 1 above

¹⁶⁸ Circulation includes all the transit of goods, such as sales and every kind of transference of property

CANADA

I CONSTITUTIONAL LAW

The Canadian constitution provides a framework for the workings of the government and for the relations between the people and the government. There is no single constitutional law act; instead the constitution is made up of various acts drafted by the Canadian and British parliaments, legislation, juridical decisions and various agreements between the federal and provincial governments. Although some parts of this constitution are written down, it also includes unwritten elements like customary law and tradition.

As part of this constitution, the *Canadian Charter of Rights and Freedoms* lays down the fundamental freedoms like freedom of conscience and religion, freedom of thought, belief, opinion, press, the presumption of innocence etc.

Canada has put forward a considerable effort to implement international human right treaties in the domestic law.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

The principle of legality is recognized as one of the federal principles for administration of provincial and territorial income taxes. *Appendix E to the Federal Administration of Provincial Taxes* states the principle of legality as one of the minimum criteria a tax should be measured against:

“Legality – the measure must be within the constitutional parameters of the province, be consistent with the Charter and existing legal jurisprudence, must be clearly authorized by the provincial statute and must not violate or impair the fulfillment of international obligations”

The *Constitution Act 1982* contains an article (section 53) specifically stating that bills appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

B Principle of equality

The principle of equality is firmly embedded in Canadian constitutional law. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equal benefit and protection of the law to everyone in Canada and also states that legislation, whether economical, social or cultural, must not be discriminatory. Exceptions to this rule however are possible provided that these exceptions are aimed at the abolition of disadvantages of a specific group or individual.

The *Constitution Act 1982* (section 28) explicitly states that the rights and freedoms are guaranteed equally to male and female persons.

C Protection from unreasonable searches and seizures; Non-confiscation of property

The *Canadian Charter of Rights and Freedoms* contains a provision concerning the protection against unreasonable search and seizure.¹⁶⁹ In brief, a search must be approved by an authorized person who, on a neutral and impartial basis, decides that a search is justified given the available evidence. Also the search should be based on a law.

Under Canadian law as a matter of principle, every one has the right not to be deprived of their property except in cases where this is justified by principles of fundamental justice.

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce

Some parts of the Canadian constitution deal with the allocation of power among the national, regional and local governments.

In recent years there have been some changes to these rules. In the *Meech Lake Accord* (1987), Quebec was recognized as a distinct society. Also the provinces were granted the right to opt out of shared-cost programs in areas of provincial jurisdiction. A further redistribution of powers has resulted from the 1992 *Charlottetown Accord*.

As far as taxation is concerned, the basic allocation of power is dealt with in section 91 of the *Constitution Act of 1867*. In this section the raising of money by taxation is mentioned as one of the national legislative powers. Yet provincial legislative powers are entitled to draft laws concerning direct taxation within the province in order to raise revenue for provincial purposes.¹⁷⁰ As a result, taxing powers are shared between federal and provincial governments in some cases giving the same taxation rights to both orders of government. For example, Personal Income Taxes, Corporate Income Taxes and Sales Taxes are levied by the federal governments as well as by the provincial governments. However, the taxing power of the provincial government is limited to direct taxation within the province and for the purpose of financing provincial expenses. Liability to taxation can be based on the principle of residence or on the principle of source.¹⁷¹

The whole system is based on the idea of different responsibilities concerning taxation: the federal government has the responsibility to take care of the proper functioning of the national economy, where the provinces have the responsibility for the local economies.

E Retroactivity of tax legislation¹⁷²

It is not uncommon for the Canadian tax authorities to use retroactive tax legislation. This practice however has some serious drawbacks as it deteriorates taxpayer's confidence in the system resulting in diminishing taxpayer compliance. As a result taxpayers have increasingly stated their concerns regarding this practice since 1983.

¹⁶⁹ Section 8 of the Constitution Act 1982

¹⁷⁰ Section 92 Constitution Act of 1867

¹⁷¹ *Tax treaties and local taxes*, IFA, Kluwer, 1993

¹⁷² See also: Debra Gordon, *More Retroactive Tax Law*, http://www.ctf.ca/articles/News.asp?article_ID=2350

The 1995 *Seventh Report of the Standing Committee on Public Accounts of the House of Commons* dealt with these matters. Following this report the following conditions for retroactive tax law amendments were issued:¹⁷³ they

- 1) Must reflect a longstanding and well-known interpretation of the law by the CRA;
- 2) Reflect a policy that is clear from the relevant provisions and that is well-known and understood by taxpayers;
- 3) Are intended to prevent a windfall benefit to certain taxpayers;
- 4) Are necessary to preserve the stability of the government's revenue base or
- 5) Correct ambiguous or deficient provisions that were not in accordance with the objects of the Act.

Furthermore, retroactivity should only be used in exceptional circumstances.

F Protection of marriage

Although the Canadian tax code recognizes the individual as the unit of taxation, it also contains a large number of rules related to children and spouses.¹⁷⁴ These rules in part try to accomplish certain policy goals (including anti-avoidance measures) but are also based on the possibilities of attaining advantages of economics of scale.

In the 1990's there has been some debate on the question whether non-married couples should be taxed on the same basis as married couples. Since 2000 same-sex couples are treated equally as heterosexual couples.

G Other principles of constitutional tax law

The Canadian Revenue Agency (CRA) the CRA is committed to respect the following basic rights in its dealings with taxpayers:¹⁷⁵

- The right to a fair and impartial treatment by the CRA;
- The right to be treated with courtesy, respect and consideration;
- Information regarding the taxpayer will be protected against unauthorized use or disclosure (based on the Privacy Act and the Access to Information Act);
- The right to choose the language (English or French) used to communicate with the CRA (based on the Official Languages Act);
- The right to receive complete information about his rights and obligations;
- The right to receive every benefit attributed to him by law, for which the CRA is committed to assist the taxpayer to provide the necessary information;
- The right to appeal to a court of law when not satisfied with CRA decisions.

¹⁷³ These conditions are quoted from: Debra Gordon, *More Retroactive Tax Law*, http://www.ctf.ca/articles/News.asp?article_ID=2350

¹⁷⁴ For an in depth review of this matter see: C. Young, *What's sex got to do with it? Tax and the "family"*, May 15, 2000

¹⁷⁵ See <http://www.cra-arc.gc.ca>

FRANCE

I CONSTITUTIONAL LAW

A The Constitution

The present French constitution is that of the Fifth Republic of October 4, 1958.¹⁷⁶ The Constitution contains a few principles that are relevant for the French tax system.

B Other sources of tax constitutional law; Overview of the judiciary

The preamble of the Constitution refers to two other sources of French constitutional law: the Declaration of Human and Civic Rights of August 26, 1789 and the preamble to the 1946 constitution.¹⁷⁷ Together, these texts are the main source of French constitutional law.

Other important sources of French constitutional law include international treaties,¹⁷⁸ European Community (EC) law and jurisprudence of the Constitutional Court, the Court of Cassation and the Conseil d'Etat ('Council of State').

As for every EC Member State, the influence of EC law on French tax law is considerable. French law must abide by the EC Treaty (principle of free movement; principle of non-discrimination), as well as by the secondary EC law (regulations, directives), notably in the tax area.¹⁷⁹ Furthermore, the case law of the European Court of Justice (ECJ) in the area of taxation has an important impact on French tax law developments. For instance, as a result of ECJ rulings France gave up its imputation system for the taxation of dividends.

There are relatively few Constitutional Court rulings on tax law. The reason for this being that the Court may only check the constitutionality of laws *before* they are promulgated.¹⁸⁰ Furthermore, only political actors¹⁸¹ may submit requests to the Constitutional Court; private individuals or enterprises may not do so. Finally, the Constitutional Court does *not* verify the compliance of laws with international law, as it considers this to be the role of the ordinary courts.

Many fundamental principles of French tax law have, therefore, been laid down by the Conseil d'Etat, the French supreme administrative court, and the Court of Cassation, the

¹⁷⁶ Hereafter "the Constitution"; An English translation of the Constitution is available at the following webpage: <http://www.conseil-constitutionnel.fr/langues/anglais/cst1.pdf>

¹⁷⁷ An English translation of the 1789 Declaration is available here: <http://www.conseil-constitutionnel.fr/langues/anglais/cst2.pdf>; and of the preamble to the 1946 Constitution: <http://www.conseil-constitutionnel.fr/langues/anglais/cst3.pdf>

¹⁷⁸ Viz. bilateral income tax treaties and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitution confirms the supremacy over national law of international treaties or agreements to which France is a party (Article 55). A database of all treaties to which France is a party is available here: <http://www.doc.diplomatie.fr/pacte/>

¹⁷⁹ An overview of the EC activities in the tax area is available here: http://europa.eu/pol/tax/index_en.htm

¹⁸⁰ Article 61 of the Constitution

¹⁸¹ I.e., the President, the Prime Minister, the Speakers of the National Assembly and the Senate, and at least sixty deputies or senators

supreme judicial court.¹⁸² The administrative and judicial courts are indeed competent to check the constitutionality of administrative regulations or decisions (but not of laws), as well as the compliance with international law of both laws and administrative measures. Hence, and based on the supremacy of international law,¹⁸³ the protection of fundamental liberties in tax matters is mainly ensured by the ordinary courts rather than by the Constitutional Court.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

This principle of legality is laid down in Article 34 of the Constitution, stipulating that the rules determining the base, rates and collection methods of taxes of all kind must be established by law, i.e. acts of parliament.¹⁸⁴ Hence, the intervention by the executive is limited to implementing the tax law by specifying, under the control of the courts, their implementation methods and terms.

Although broadly worded, the term “taxes of all kind” does not comprise fees (*redevances*),¹⁸⁵ or social security contributions. Hence, such contributions may be established by regulation.

Draft bills must in principle be adopted by both chambers of parliament, i.e. the National Assembly and the Senate.¹⁸⁶ Once adopted, the bill may be submitted for review to the Constitutional Court.¹⁸⁷ Unless it is (wholly or partly) judged unconstitutional, the law is promulgated by the President.¹⁸⁸ Once promulgated, (tax) laws may no longer be judged on their constitutionality by the courts.¹⁸⁹

B Principle of equality

The principle of equality is laid down in several provisions of the Constitution and its underlying texts, the most important of which are Article 1 of the Constitution, and Articles 1 and 6 of the 1789 Declaration.¹⁹⁰ These are general provisions that do not specifically refer to taxation.

¹⁸² The French judiciary is composed of two separate bodies: the judicial courts (generally competent for (civil, commercial) litigation concerning private individuals or enterprises, and for criminal law matters), and the administrative courts (generally competent for litigation concerning public authorities). The judiciary body competent in tax matters depends on the type of tax: the administrative courts are competent for income taxes and VAT, whereas the judicial courts are competent for other indirect taxes and the wealth tax.

¹⁸³ See above, Article 55 of the Constitution

¹⁸⁴ This provision is rooted in Article 14 of the 1789 Declaration, which provides that citizens have the right to ascertain, personally or through their representatives, the necessity for a public tax, to consent to it freely and to monitor its use and to determine its rate, base, collection and duration

¹⁸⁵ The difference between “taxes” (in the sense of Article 34 of the Constitution) and “dues” (“redevances”) is that the latter comprise a specific (public) service which the payer receives in return for payment.

¹⁸⁶ Article 45 of the Constitution; A special procedure allows the government to surpass opposition in the Senate through sole approval by the National Assembly

¹⁸⁷ See above; Article 61 of the Constitution; In practice, referral to the Constitutional Court only happens at the request of the parliamentary opposition

¹⁸⁸ Article 62 and Article 12 of the Constitution

¹⁸⁹ See I, B above; They may, however, be checked on their compliance with international law

¹⁹⁰ See also §§ 1 and 3 of the Preamble to the 1946 Constitution

Specifically with respect to taxation, Article 13 of the 1789 Declaration stipulates that taxes must be equally distributed among all citizens in proportion to their ability to pay.¹⁹¹

Although often invoked, the Constitutional Court has rarely struck down tax laws as violating the principle of equality, mostly finding that the situations between which discrimination is claimed are in fact not comparable.¹⁹²⁻¹⁹³

Finally, it may be noted that the Conseil d'Etat discrimination through tax law may be challenged by taxpayers, not on the basis of these constitutional law provisions (as indeed it is not allowed to do so) but on the basis of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (prohibition of discrimination), read in conjunction with Article 1 of Protocol No 1 thereto (protection of property).¹⁹⁴

C Protection from unreasonable searches and seizures; Non-confiscation of property

Property is protected by Article 17 of the 1789 Declaration, stipulating that no one may be deprived of his property unless for public necessity and in accordance with the law, and subject just and prior indemnity.¹⁹⁵

The Constitutional Court has also applied Article 13 of the 1789 Declaration (ability to pay)¹⁹⁶ when considering whether a tax is excessive to the point of violating that provision.

Finally, as noted above, the protection of property is also guaranteed by Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹⁷

The Constitutional Court derives the protection from unreasonable searches from Article 66 of the Constitution, stipulating that no one may be arbitrarily detained. The observance of this principle is ensured by the judiciary.¹⁹⁸ Thus, was judged unconstitutional a provision that allowed tax officers to search private homes subject to judicial approval but without specifying exactly for which infringements such searches may be performed, effective judicial control not being ensured by such an open-ended provision.¹⁹⁹

¹⁹¹ To date, the Constitutional Court has refused to strike down a tax law as insufficiently (e.g., No 90-285 DC, regarding an additional proportional income tax) or excessively (e.g. No 97-393 DC, regarding a 2.5% turnover tax on pharmaceutical companies) progressive in violation of Article 13 of the 1789 Declaration

¹⁹² According to the Court's case law, the principle of equality allows the (tax) law to treat different situations differently, but also to treat the same or similar situations differently to the extent this unequal treatment serves the general interest in light of the law's goal.

¹⁹³ Only with respect to eco taxes has the Court ruled a law to be discriminatory, i.e. with respect to polluters that were exempted from the tax (No 2002-464 DC, No 2203-488 DC), and with respect to non-polluters that were subject to tax (No 2000-441 DC)

¹⁹⁴ Conseil d'Etat, No 239693 (SA Financière Labeyrie) of 12 April 2002

¹⁹⁵ See also Article 34 of the Constitution, stipulating that the regime governing ownership and rights to real property must be established by act of parliament, i.e. by law

¹⁹⁶ See II, B above

¹⁹⁷ See II, B above

¹⁹⁸ Article 66 para. 2 of the Constitution

¹⁹⁹ Ruling No 83-164 DC of 29 December 1983

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce

Traditionally highly centralized, the taxing powers of the ‘territorial units’ (i.e., communes, departments, regions, special-status areas and overseas departments) in France are very limited.²⁰⁰

Legally, the imposition of taxes is a prerogative of the national legislator.²⁰¹ Therefore, in practice, regional and local taxing authority is limited to determining certain specific elements of the tax base and tax rates of certain taxes, albeit within the strict framework determined by (national) law.²⁰²

The Constitutional Court, although recognizing the financial autonomy of the territorial units, has never struck down a (national) law reducing or abolishing a local or regional tax.²⁰³

E Retroactivity of tax legislation

The Constitution does not contain a prohibition of retroactive tax laws. The prohibition of Article 8 of the 1789 Declaration is limited to the introduction of retroactive criminal laws.

The Constitutional Court confirmed that retroactive tax laws are not prohibited by the Constitution, unless to the extent they introduce criminal law sanctions.²⁰⁴ Further limits to the introduction of retroactive tax laws imposed by the Court are that they may not influence final court decisions, and that they must have sufficient general interest.²⁰⁵

The ordinary courts, lacking the authority to judge tax laws on their constitutionality,²⁰⁶ of laws, have attempted to disregard retroactive tax laws by reference to Article 6 §1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to fair trial). Following a ruling of the European Court of Human Rights,²⁰⁷ the Court of Cassation has ruled against these attempts.²⁰⁸

F Protection of marriage

The Constitution does not contain a specific provision on the protection of marriage. It does, however, guarantee “the individual and the family with the conditions necessary to their development”.²⁰⁹

²⁰⁰ Article 72 of the Constitution, which recognizes their self-governing authority

²⁰¹ Article 34 of the Constitution; See II, A above

²⁰² See Article 72-2 para. 2 *in fine* of the Constitution; Within those same limits, taxing powers may also be conferred to public enterprises or private entities which exercise a public function

²⁰³ Since 2003, the Constitution stipulates that whenever (taxing) powers are transferred between (mostly: to) the central government and (mostly: from) the territorial units, corresponding resources must also be transferred (Article 72-2 para. 4 of the Constitution)

²⁰⁴ See Rulings No 83-164 DC and No 89-268 DC

²⁰⁵ The Court ruled that the ‘financial interest of the State’ in general was an insufficient justification in this respect (No 95-369 DC). It also considered relevant whether the legislator could have achieved the same goal by means other than by passing retroactive legislation (No 98-404 DC)

²⁰⁶ See above, II, A

²⁰⁷ Ruling No 44759/98 of 12 July 2001, *Ferrazzini v. Italy*

²⁰⁸ Ruling No 01-11.403 of 12 July 2004

²⁰⁹ §10 of the Preamble to the 1946 Constitution

French income tax is levied jointly on married couples, progression being attenuated by a splitting mechanism based on family composition.

This system has been connected with the principle of equality and ability to pay,²¹⁰ although the Constitutional Court has never explicitly referred to it as a necessary constitutional requirement. Furthermore, the Court has systematically turned down discrimination claims against the different tax treatment of different family structures (married couples, formal or informal cohabitation), finding these situation not comparable.

G Other principles of constitutional tax law

The main principles of French constitutional tax law are included under A. to F. above. Most of them have been subject of one or more Constitutional Court or other supreme court rulings in tax matters.

Two additional fundamental principles of French tax law may be mentioned here.

First, the principle of the secular state and of freedom of religion,²¹¹ which may be construed as precluding the tax lawmaker to impose heavy taxes on churches (or other religious organisations) which would effectively hinder the exercise of one's constitutional freedom of religion.

Secondly, the fundamental principle of fair play or public trust, usually an 'unwritten' general legal principle of administrative law, is codified in the French tax law, stipulating that taxpayers can rely on a favourable administrative interpretation of tax statutes and regulations in contesting an assessment of deficiency in tax, even if the interpretation is contrary to law.²¹²

²¹⁰ Article 13 of the 1789 Declaration; See II, B above

²¹¹ Article 1 of the Constitution; Article 10 of the 1789 Declaration

²¹² Article L80 A of the Book on Tax Procedure; Article L80 B of the Book on Tax Procedure extends this principle to advance tax rulings

GERMANY²¹³

I CONSTITUTIONAL LAW

A The Constitution

Germany is a parliamentary federal republic, made up of 16 federated states (hereafter: *Länder*), which in certain spheres act independently of the Federation. Germany has a civil law system. The Constitution of the Federal Republic of Germany is the Basic Law (*Grundgesetz (GG)*, hereafter: the Constitution), which was adopted on 23 May 1949. Constitutional law occupies an important position in all spheres of life and law.

The legislative, executive and judiciary powers are divided and their relation is regulated by the Constitution. The legislative power is divided between the Federation and the individual *Länder*. There are a series of specialist supreme courts; for tax law cases the highest court of appeal is the Federal Tax Court (*Bundesfinanzhof*).

B Other sources of Constitutional law

The Federal Constitutional Court (*Bundesverfassungsgericht (BVerfG)*) is the German Supreme Court responsible for constitutional matters, with power of judicial review. It acts as the highest legal authority and ensures that legislative and judicial practice conforms to the Constitution. It acts independently of the other state bodies, but cannot act on its own behalf. Taxpayers can bring their issues to the Federal Constitutional Court if they believe that their constitutional rights were infringed by a public authority (e.g. by a decision of the tax administration). Under the principle of subsidiarity, however, they are first required to appeal to the competent court(s) (Article 94(2) 2nd sentence, GG, Art 90(2) 1st sentence BVerfGG²¹⁴) and present their constitutional complaints (i.e. they must not wait with presenting their constitutional complaint for the Federal Constitutional Court)²¹⁵.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A The principle of legality (*Das Legalitätsprinzip*)

The German Constitution does not include an explicit reservation for statutes for tax law purposes. The principle of legality is not explicitly mentioned in the Constitution, but it is derived from:

(i) *Article 2(1) GG*: the right of free development of personality contains also the economic freedom to act²¹⁶ which can only be limited by other constitutional rules. Since taxation limits the economic freedom (freedom to invest, freedom to consume, freedom to save), any

²¹³ Unless otherwise indicated, source: K. Tipke – J. Lang: *Steuerrecht*, 14. Auflage, Verlag Dr. Otto Schmidt KG, Köln, 1994

²¹⁴ BVerfGG : Law on the Federal Constitutional Court of 12.3.1951 in new edition of 12.12.1985, BGBl. I 2230

²¹⁵ BVerfGE 59, 63, 82 f.; 63, 77, 78; 68, 376, 379 f.; 74, 102, 113.

²¹⁶ BVerfGE 6,32, 36 “Elfes decision”

taxation that is not statute based (*extra legem*) or does not comply with a statute (*contra legem*) is unconstitutional;

(ii) *Article 20(3) GG*: the legislation is subject to the constitutional order; and the executive and the judiciary powers are bound by law and justice;²¹⁷ and

(iii) *Article 14(1) 2.sent. and (3)2.sent. GG*: Under Article 14(1) 2.sent. GG, property and the right of inheritance can only be determined and limited by statutes. Under Article 14(3) 2.sent. GG property can only be confiscated by statute or on the basis of a statute which must determine also the nature and extent of compensation.

The principle of legality consists of two requirements:

(i) reservation for statutes (*Gesetzesvorbehalt*): a tax can only be levied by a statute (*Gesetz*) which determines the taxable facts (taxable object, subject, base, rate, exemptions, relieves); and

(ii) priority of statutes (*Vorrang des Gesetzes*): other legislation and administrative rules must not contradict with the statute.

The reservation for statutes implies also that the statute is lawfully enacted by the parliament (Article 28 I GG) and it does not contradict with the Constitution and the constitutional values (Article 20 III GG). This is supervised by the Federal Constitutional Court. Furthermore, the reservation for statutes means also that the executive and judiciary powers may not levy any taxes.

The principle of legality also means that the administration must enforce the law, i.e. it is not just entitled, but obliged to enforce the law.

B Principle of equality (*Geichheitssatz*)

The principle of equality in taxation is derived from the general principle of equality in Article 3(1) GG. This article provides for equality before law, including also equality in the application of (tax) law by the (tax) authorities and judiciary.²¹⁸ Additionally, under Article 1(3) and Article 20(3) GG also the tax legislator is required to respect the principle of equality²¹⁹ and, accordingly, enact legislation that complies with the constitutional values.

The equality before law does not mean equality in injustice. The taxpayer may not refer to or require the application of an unlawful administrative practice that has been applied to other taxpayers and that is potentially advantageous to him.

The case law of the Federal Constitutional Court interprets the principle of equality as the prohibition of arbitrary treatment.²²⁰ This prohibition is mainly applied in connection with the equal treatment of groups, meaning that the principle of equality is infringed if a group is treated differently and that different treatment is not justified by actual differences between the addressed groups.²²¹

²¹⁷ These imply also the division of powers.

²¹⁸ *Rechtsanwendungsgleichheit*: equality in the application of law

²¹⁹ *Rechtsetzungsgleichheit*: legislative equality

²²⁰ BVerfGE 3, 135; 9, 244; 18, 46; 37, 114; 38, 257; 42, 72; 49, 283; 54, 26.

²²¹ BVerfGE 55, 88; 60, 134; 62, 112 f.; 65, 384; 66, 242; 67, 236; 68, 301; 70, 239 f.; 72, 89 f.; 73, 321; 74, 24; 75, 105; 75, 300; 78, 247; 81, 236; 82, 146; 83, 401; 84, 157; 84, 199; 84, 359; 88, 87, 96 f.; 89, 15, 22 f. (Article 3b EStG)

The principle of equality in taxation is to be realized by using the right measure of comparison. Whether there are similarities or differences between certain groups of taxpayers depend on the measure(s) that is(are) used as a basis for comparison. A comparative measure is right if it is established on the basic values of justice that are acknowledged by law, e.g. constitutional principles. The tax legislator is bound to respect these principles.

From the principle of equality (Article 3(1) GG) another relevant principle for taxation is derived, the principle of ability to pay. For details on the principle of ability to pay, see G.1.

C Protection from unreasonable searches and seizures; non-confiscation of property

Article 2(1) GG and Article 1(1) GG protect the general personal rights (human dignity and liberty) which also mean that a citizen must have an untouchable private sphere to structure and live his life as he/she wishes.²²² For tax law purposes, Article 2(1) GG means that taxpayers are to be protected in a tax procedure and must not be humiliated. For example, in the case of a tax audit, this rule does generally not restrict the audit of “private” tax facts, but rather the nature and the way of the tax audit. The detailed rules are elaborated in the Tax Procedure Act (*Abgabenordnung (AO)*, 16 March 1976).

For the principle of proportionality, see under 8C.

Under Article 14(1) GG, property and the right of inheritance are guaranteed and their content and limits are determined by statute. Under Article 14(3) GG any property can only be confiscated for the public good and only by statute or on the basis of a statute which determines also the nature and extent of compensation. The compensation must be in balance between the public interest and the interests of those affected.

See also under A on the principle of legality and G.4 on excessive taxation.

D Allocation of taxing powers among the national, regional and local governments, including the prohibition of discrimination against interstate trade and commerce

The tax legislative power (Article 105 GG), the tax revenue entitlement (Article 106, 107 GG) and the tax administration authority (Article 108 GG) are objectively allocated between the Federation and the Länder. Thereby two contradicting principles must be equalized: the principle of autonomy (Federation and Länder receive separate competences) and the principle of federation (joint competences).

The Constitution regulates the fiscal competences only with respect to taxes and not for other types of levies (duties, contributions, etc.). The definition of tax thus is included in Article 3 of the Tax Procedure Act (*Abgabenordnung (AO)*, 16 March 1976). This definition has not much relevance for the tax practice, but it determinates the tax competences described in Article 105 - 108 GG.

²²² BVerfGE 6, 41; 27, 6; 27, 344, 350; 32, 378 f.; 33, 376; 34, 245; 35, 39, 232; 38, 320; 54, 146 f.; 80, 373.

In Germany there is relevant case law²²³ and literature on the definition of tax and related issues.

1 The tax legislative power²²⁴ (Article 105 GG)

Germany's Constitution provides that the Länder have the right to legislate insofar as the Constitution does not confer legislative power on the Federation (the residual power doctrine). The division of competence between the Federation and the Länder is determined by specific provisions concerning exclusive and concurrent legislative powers. In matters of exclusive federal power the Länder have the right to legislate only where, and to the extent, they are explicitly authorized thereto by a federal statute (Article 71 GG). In matters within the concurrent legislative power they retain the right to legislate as long as, and to the extent that, the Federation does not exercise the right conferred on it.²²⁵

The rules governing the distribution of the right to legislate in tax matters are mainly laid down in Article 105 GG. This provision confers extensive powers on the Federation.

Accordingly, the Federation has *exclusive powers* to legislate on customs duties and fiscal monopolies²²⁶, and *concurrent power* to legislate on all other taxes if one of the following conditions is met:

- (i) the revenue from the relevant tax accrues wholly or partially to the Federation, or
- (ii) the conditions provided for under Article 72(2) GG apply, i.e. when

(a) a matter cannot be effectively regulated by the legislation of individual Länder, or (b) the regulation of a matter by a Land statute might prejudice the interest of other Länder, or (c) where the maintenance of legal and economic unity – especially the maintenance of uniform living conditions beyond the territory of any one Land – necessitates federal regulation (unity maintenance clause).²²⁷

Article 28(2) GG guarantees the communes (municipalities), vis-à-vis the Federation and the Länder, to regulate on their own responsibility all affairs of the local community. This is

²²³ BVerfGE 3, 407, 435; 4, 7, 13 f.; 7, 244, 251 f.; 8, 274, 317; 10, 372, 380 f.; 29, 402, 408 f.; 36, 66, 70; 38, 61, 79 f.; 42, 223, 228; 49, 343, 353; 55, 274, 299; 65, 325, 344; 67, 256, 282; 67, 256, 282.

²²⁴ Source: U. Wolff: The German Perspective, In: Tax Treaties and Local Taxes, Proceedings of a Seminar held in Barcelona in 1991 during the 45th Congress of the International Fiscal Association, Kluwer Law and Taxation Publishers, Deventer, Boston

²²⁵ The Federation's broad legislative power does not constitute a substantial disadvantage to the Länder because they are in most cases involved in the process of making federal tax laws. To safeguard their interests, Article 50 GG determines that the Länder participate through the Federal Council (*Bundesrat*) in the legislation and administration of the Federation. Furthermore, Article 105 III GG provides that federal laws on taxes the receipts of which accrue wholly or in part to the Länder or Communes, require the consent of the Federal Council in addition to that of the Parliament (*Bundestag*). Consequently, no federal legislation concerning one of the joint taxes or the capital, trade, or real estate taxes can be constitutionally passed without the approval of the majority of the Länder governments.

²²⁶ Fiscal monopoly means the exclusive right of the state to produce or trade certain goods in order to raise revenue. Currently, there is only one such monopoly in Germany: the spirit monopoly (Branntweinmonopol), The Law on Spirit Monopoly (8.4.1922, RGBI. 122, 335, 405) regulates generally the acquisition and the sale of ethyl alcohol in the territory of Germany.

²²⁷ The latter condition, usually referred to as the "unity maintenance clause", is interpreted as establishing a constitutional obligation on the part of the Federation and the Länder to maintain, to the extent possible, legal and economic uniformity within the territory of the Federal Republic of Germany. It actually gives the Federation broad authority and is also of particular importance for the distribution of legislative powers in tax matters. Whether the matter falls within the scope of the unity maintenance clause is decided by the Federation itself. Its decision does not have to take into consideration the federal structure of the nation, nor is it subject to judicial review.

commonly referred to as the right to communal self-government. This right, however, does not guarantee any power for the communes to legislate in tax matters. Accordingly, communes have no explicit right on their own to levy taxes, they are only allowed to set the tax rates within the framework of the relevant statutes on real estate tax and on local industry and trade taxes (106(6)2.sent. GG).

Of the conditions covered by Article 72(2), the unity maintenance clause is by far the most important. Based on this clause, a tax can be imposed by federal statute on grounds that nationwide economic unity calls for federal regulation even where the revenue from such tax accrues wholly to the Länder or the communes. Economic unity, in the context of taxation, is generally interpreted to require that equal public charges should be imposed and equal public services provided to secure equal conditions of competition. This includes the obligation to avoid, to the extent possible, the occurrence of regional tax differences.

According to the jurisprudence of the Federal Constitutional Court, if the Federation is exercising its concurrent legislative power, it generally constitutes an exhaustive regulation of the matter. As a consequence, once a particular tax has been imposed by federal legislation, a Land statute cannot constitutionally introduce an identical tax²²⁸. In the case when such Land statute already exists at the time the tax is introduced by federal statute, the supremacy clause of Article 31 GG applies under which the federal law takes priority over land law.

Summarized, taxes that accrue to the Länder or Communes are generally regulated by federal statute in cooperation with the Länder governments. By conferring extensive legislative power on the Federation, the Constitution reduces the residual powers of Land and communal governments to impose own taxes to virtually nil and replace it with a right to participate in the legislative process. As a result of this constitutional approach, problems of inconsistent taxation of inter-state activities cannot occur. The fact that federal legislation covers all important taxes also operates so as to automatically secure uniform standards such as nexus, source and allocation of income rules for taxing international transactions.

2 *The tax revenue entitlement (106, 107 GG)*

Article 106 GG allocates the tax revenue according to the types of taxes. The large taxes (e.g. individual income tax, corporate income tax, and value added tax) are in a collective system of common taxes (Art 106(3) 1.sent. GG) and divided between the Federation and the Länder on a percentage basis. The other taxes are allocated to the individual fiscal units (i.e. the Federation, the Länder or the communes).

The list of taxes in Article 106 GG is rather a historical list that accounted for the existing taxes. It is not meant to establish a timelessly effective tax system or to reflect any consideration on a fair division of tax burden between taxpayers. The list is only aimed at dividing the tax revenue and therefore cannot lead to the institutionalization of a certain tax. Accordingly, taxes can be abolished and new taxes can be introduced without changing the list. Also the Federal Constitutional Court finds that the list in Article 106 GG gains its actual meaning from the taxes levied on the basis of the effective tax legislation. As a result, Article 106 GG has hardly any material meaning.

²²⁸ Taxes are identical (or substantially similar) if their main features (esp. the tax base) are competing because they impose a burden at the same source of ability to pay.

Additionally, there are a number of provisions dealing with financial equalization between the different levels of governments (Article 107 GG).

3 *The tax administration authority (108 GG)*

Article 108 GG regulates the division of powers in revenue administration. Accordingly, customs duties, fiscal monopolies and excise taxes are administered by the federal revenue authorities. All other taxes are administered by the Land revenue authorities. In the case of taxes that accrue wholly or partially to the Federation, the taxes are administered by the Land revenue authorities upon assignment from the Federation. The administration of taxes accruing exclusively to the communes can be delegated to them by the Länder.

The rules on tax administration are elaborated in the Law on Fiscal Administration (*Finanzverwaltungsgesetz (FVG)*).

E Retroactivity of tax legislation

The GG does not include any provision on the retroactive effect of tax legislation.²²⁹ The principles of legality and democratic state require security in law. The principle of security in law implies a general prohibition of retroactive legislation. The Federal Constitutional Court, however, provided with some interpretation on the retroactive effect of burdensome legislation on the basis of the above mentioned principles.²³⁰

The Federal Constitutional Court distinguishes between real and unreal retroactive effect.²³¹ Accordingly, real retroactive effect is if the legislation changes with regard to the taxable facts of a closed case of the past. Unreal retroactive effect is if the legislation changes with regard to the taxable facts of an open case of the present. According to the Federal Constitutional Court, real retroactive effect is only exceptionally allowed under an overriding reason. For example, the taxpayers involved could have expected the changes, any eventual damage caused by the retroactive legislation is negligible, and the retroactive legislation replaces an invalid legislation, overwhelming public interest.²³² Unreal retroactive effect is generally allowed, but is must be checked against the principle of trust in law.^{233,234}

The above referred case law of the Federal Constitutional Court is often criticized by scholars by being inconsistent and not contributing to legal security.

Administrative rules are subject to the same requirements on non-retroactivity.

²²⁹ Article 103 II GG applies only with respect to criminal law and not for tax law.

²³⁰ BVerfGE 43, 242, 286; 63, 343, 356 f.; 67, 1, 14 f.

²³¹ BVerfGE 11, 139, 145 f.; 14, 288, 297; 18, 135, 144; 22, 241, 248; 25, 142, 154; 36, 73, 82; 51, 356, 362; 57, 361, 391; 68, 287, 306; 69, 272, 309; 72, 175, 196; 74, 129, 155; 75, 246, 279 f.

²³² BVerfGE 13, 206, 213; 13, 261, 272 f.; 18, 429, 439; 19, 187, 196 f.; 24, 75, 101; 27, 167, 173 f.; 30, 367, 387 f.; 390 f.; 37, 363, 397 f.; 45, 142, 174; 48, 1, 20; 50, 173, 193 f.; 72, 200, 258 f., 260.

²³³ BVerfGE 39, 128, 144, f.; 50, 386, 395; 51, 356, 363; 70, 69, 84 f.; 71, 255, 273; 74, 129, 155.

²³⁴ The principle of trust in law is derived from the principle of security in law, and sets the following requirements: administrative decisions are durable, administrations are bound to their statements, and generally no retroactive legislation.

F Protection of marriage

Under Article 6(1) GG family and marriage enjoy special protection. The Federal Constitutional Court interprets this protection as a prohibition of discrimination and a promotion for incentives.²³⁵ On the one hand, the requirement of non-discrimination is a specified form of the general principle of ability to pay (see under 8A.). On the other hand, a promotion for incentives in this field broadens the scope of legislative power.²³⁶ However, this has no relevance for tax purposes since no actual claims can be based on this promotion.²³⁷

More precisely, the prohibition of discrimination in Article 6(1) GG means the followings:

- A cumulative taxation of spouses' income as it would be an individual's income (for individual income tax purposes) is unconstitutional because it fails to comply with the ability to pay principle as a result of the progressive rates.²³⁸ However, it is constitutional to use a splitting system;
- Parents and children form a family and, accordingly, benefit from the protection provided by Article 6(1) GG. As a result, a cumulative taxation of the parents' and their children's income is also prohibited because of the same reason as mentioned above for the cumulative income taxation of spouses;²³⁹
- It is constitutional cumulate the property of spouses, parents and children for the purposes of the wealth tax because the flat rate system of the wealth tax does not have a discriminatory effect;²⁴⁰
- Contracts between spouses that are actually carried out are to be treated as a contract of independent parties; and
- The minimum standard of living of a family must be ensured by providing an allowance(deduction) from the taxable base for inevitable costs of living.

G Other constitutional aspects

I The principle of ability to pay (Das Leistungsfähigkeitsprinzip)

The principle of ability to pay is derived from the principle of equality (Article 3(1) GG) and means that the tax burden between taxpayers is divided according to their economic ability to pay taxes. This principle has been developed through centuries²⁴¹ and is a worldwide acknowledged principle of fair taxation. It applies to all taxes, incl. indirect taxes. The principle, however, is often criticized as being too general and requiring further elaboration.

The ability to pay principle requires elaboration in two aspects:

- (i) to whom does the principle apply, i.e. who is the subject of the principle; and
- (ii) how can the ability to pay be measured.

As to the subject of the principle, the question is whether it only applies to natural persons or also to other persons, organizations. The principle of equality applies only to natural persons

²³⁵ BVerfGE 6, 55, 76.

²³⁶ BVerfGE 11, 105, 126; 21, 1, 6.; 39, 316, 326; 43, 108, 123 f.; 48, 346, 366; 59, 231, 263; 75, 348, 360; 82, 60, 81.

²³⁷ BVerfGE 82, 81.

²³⁸ BVerfGE 8,55,67; 9, 20, 34 f.

²³⁹ BVerfGE 18, 97, 106.

²⁴⁰ BFH BStBl. 64, 598, 599; 68, 332, 334.

²⁴¹ Already in 1776 Adam Smith wrote about the "equality in taxation".

under Article 3(1) GG and to domestic legal persons under Article 19(3) GG. The latter however leaves the situation of foreign legal persons and other organizations open. The constitutional principles of totality and fair competition enjoyed by natural persons, however, require that all objects²⁴² (not only those of natural persons) are subject to taxation. This also means that the ability to pay principle must apply to all taxpayers including foreign corporations and those without legal personality (e.g. associations, funds).

Since the tax treatment of enterprises influences the taxable wealth of individuals, an individual's ability to pay is influenced by the tax treatment of distributed corporate profits. Therefore the ability to pay principle has an important role when determining the relief from economic double taxation of distributed corporate profits.

As to how to measure the ability to pay, the following objects can be used: income, capital, consumption or their combination. The taxable object is determined in the taxable base. The theory of most appropriate taxable object has been changing through the decades. In the 17th century it was the ground, land, in the 19th the capital and in the 20th consumption.

Additionally, Article 1(1) GG protects human dignity as the highest value. Together with Article 2(1) I GG, this means for the purposes of taxation that the minimum existence must be left untaxed (i.e. tax free).²⁴³

2 Tax secrecy

The constitutional basis of tax secrecy is derived from Article 2(1) and Article 1(1) GG which protect the personal right to informational self-determination. Tax secrecy ensures that information and data on facts relevant for determining tax liability are treated and kept secretly. It also means that taxpayers have the right to be informed about any information and data collected by the tax administration on their personal situation. This constitutional right can only be limited for reason of overwhelming public interest.²⁴⁴

3 Principle of proportionality

The principle of proportionality (same as a prohibition of excessive actions) is constitutionally based on the principle of democratic state²⁴⁵ and the basic rights (for taxation relevant: Article 14(1) GG, Art 12(1) GG). The principle of proportionality applies in all areas of state intervention, i.e. in the area of legislation, administration and jurisprudence. It provides for proportionality between goal and tools.

4 Prohibition of excessive taxation

From the guarantee of property and the right of inheritance (Article 14(1) GG) and the guarantee of free professional development (Article 12(1) GG) follows also the prohibition of excessive taxation that would endanger the proper economic utilization of a taxable object and, consequently, the existence of its owner. Accordingly, the constitutionally protected

²⁴² Object means income, capital, consumption and any combination of them which is regarded as taxable base.

²⁴³ BVerfGE 82, 60, 84.

²⁴⁴ BVerfGR 65, 44.

²⁴⁵ BVerfGE 23, 137, 133.

freedoms may only be limited by taxation to the extent that the core elements of an acquired property remain functional for a successful economic utilization²⁴⁶.

²⁴⁶ BVerfGE 87, 169.

INDIA

I CONSTITUTIONAL LAW

A The Constitution

The Constitution of India came into effect on January 26, 1950.²⁴⁷⁻²⁴⁸ The Constitution lays down the basic government structure of India and contains fundamental principles on individual rights and liberties.

B Other sources of constitutional law

Other sources of constitutional law relevant in tax matters are international agreements,²⁴⁹ and the case law of the Supreme Court, the High Courts of the States, and the District and Session Courts.²⁵⁰

The entire court system can exercise constitutional review and declare legislation null and void when it conflicts with the Constitution.²⁵¹ Our focus here is on the most relevant case law of the Supreme Court, which also ensures the protection of fundamental rights and liberties.²⁵²

Finally, it may be noted that the Supreme Court also exercises judicial review on the constitutionality of amendments to the Constitution itself, based on the so-called “basic structure or framework doctrine”.²⁵³

C Current taxes in India

Legislative powers to tax are distributed between the central and the state governments.²⁵⁴

The major taxes imposed on the union level are (i) the income tax on income and capital gains of individuals and companies, (ii) the wealth tax, (iii) the gift tax, (iv) the sales tax on interstate trade, (v) excise duties (MODVAT),²⁵⁵ and (vi) import and export duties.

²⁴⁷ Hereinafter “the Constitution”; An electronic version of the Constitution is available at http://www.oefre.unibe.ch/law/icl/in__indx.html

²⁴⁸ The Constitution was modeled on the Government of India Act 1935, an Act of the United Kingdom, but also draws extensively from Western legal traditions.

²⁴⁹ E.g., double tax conventions which allocate exclusive taxing powers between the treaty parties

²⁵⁰ There are also some specialized tribunals on tax matters, such as the Sales Tax Appellate Tribunal, whose judgments are not binding on the courts or other tribunals.

²⁵¹ Article 19 of the Constitution

²⁵² Article 32 and Articles 124 to 147 of the Constitution; The Supreme Court also functions as an appellate court over the High Courts of India, and solves disputes between the central and state governments, and between state governments.

²⁵³ Supreme Court ruling of April 24, 1973, *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; The Court ruled that it may reject constitutional amendments passed by Parliament on the basis that they change the Constitution’s “basic structure”. Opponents of this judicial doctrine argue that the Court hereby usurps the supreme power of the legislator; See II, A below

²⁵⁴ See II, D below

²⁵⁵ The MODVAT (modified value added tax) was introduced in 1986 to gradually replace existing excise duties; by 1 April 2010 it would be replaced by a comprehensive national GST, which would then also replace the central sales tax

On state level, nearly all the states levy tax on intrastate trade. In 2005 most states introduced a state level VAT.

At both union and state levels a variety of less significant taxes and duties are imposed.²⁵⁶

There is no estate tax, nor payroll taxes other than social security contributions.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

1 The principle of legality in the Constitution

The principle of legality in tax matters is laid down in Article 265 of the Constitution, stipulating that no tax may be levied or collected save by the authority of law.

2 Indian federalism and the division of legislative powers

The Indian governmental system may be characterized as a centralized federation with a central and a state level of government.

The Constitution clearly sets out the legislative powers of the union and the states: the so-called Union List and the State List define the fields in which the central government and state governments have exclusive legislative powers, whereas the Concurrent List contains the fields in which both have concurrent jurisdiction.²⁵⁷ For matters included in the latter list, union legislation prevails over state legislation in case of conflict.²⁵⁸ Residuary legislative power is reserved to the Union.²⁵⁹

The allocation of tax powers between the federal and state legislators is discussed in II, D, 4 below.

3 Administrative agencies enacting tax legislation

The executive branch has limited and delegated regulatory powers to issue regulations to ensure proper application of tax law.

B Principle of equality

The constitutional requirement of equal treatment under the law, including the principle of non-discrimination and the prohibition of arbitrary legislation, is laid down Article 14 of the Constitution.

²⁵⁶ E.g., stamp duty, taxes on motor vehicles and taxes on the value of land and buildings; the states levy fees for the registration of documents, etc., and municipal authorities levy taxes on vehicles (other than motor vehicles), boats and animals

²⁵⁷ See Article 246 of the Constitution and the seventh Schedule thereto

²⁵⁸ Article 251 of the Constitution

²⁵⁹ Article 248

Despite many challenges, Indian courts have rarely struck down (tax) laws on the basis of the equality principle. In taxation matters, “the Courts (...) admit, subject to adherence to the fundamental principles of the doctrine of equality, a larger play to legislative discretion in the matter of classification” between categories of taxpayers.²⁶⁰

There have nevertheless been instances where a violation of the constitutional principle of equality was found. A property tax imposed on the sole criterion of floor area was considered arbitrary and therefore a violation of the right to equal treatment.²⁶¹ The application of different administrative procedures to taxpayers in a comparable situation was also considered to violate the principle of equality. According to the Court, “the classification must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained and cannot be made arbitrarily and without any substantial basis”.²⁶²

The principle of non-discrimination is also found in Parts XIII and XIV of the Constitution, dealing, amongst others, with non-discrimination of interstate commerce.²⁶³

C Protection from unreasonable searches and seizures; Non-confiscation of property

The right to property ceased to be a fundamental right in 1979.²⁶⁴ However, property is still protected under the Constitution, stipulating that nobody may be deprived of property save by authority of the law.²⁶⁵

The Supreme Court ruled that the provisions of the Income Tax Act on searches and seizures, although interfering with the constitutional right of property, did not violate the Constitution as they were justified and reasonable in light of their higher goal (i.e. to combat tax evasion), and adequate safeguards were provided to limit the interference to a necessary minimum.²⁶⁶

It may be noted that the same Court ruling allowed the tax authorities to use evidence obtained from an illegal search, considering this to violate nor the text nor the spirit of the Constitution.

²⁶⁰ N. Venugopala Ravi Varma Rajah .v Union of India, (1969) I SCC 681, (1969) II SCJ 721, 725, T.G. Venkataraman etc. v. State of Madras & ANR, (1969) II SCC 299. In Pooran Mal etc. v. Director of Inspection (Investigation) of Income-Tax Mayur, (1974) AIR 348, (1974) SCC I 345, (1974) SCR II 704, it was ruled that different rules on searches and seizures for classes of tax evaders are not contrary to the principle of equality.

²⁶¹ State of Kerala v. Haji K. Kutty Naha, AIR 1969 SC 378, (1969) I SCR 645, (1969) I SCJ 691 and New Manek Chowk Spinning & Weaving Mills v. Municipal Corporation, Ahmadabad, AIR 1967 SC 1801, (1968) I SCJ 332). Another example is K.T. Moopil Nair v State of Kerala, AIR 1961 SC 552, (1961) II SCJ 269 in which the Supreme Court found a land tax on forest land, which was imposed at a uniform rate without making reference to the potential productivity of the land, to be unconstitutional as a violation of the principle of equality.

²⁶² Anandji Haridas & Co. v. S.P. Kushare, AIR 1968 SC 565, (1968) I SCJ 820, 828

²⁶³ See II, D, 4 below

²⁶⁴ Article 31 of the Constitution was repealed in 1979

²⁶⁵ Article 300A of the Constitution; the privacy of the home is guaranteed by the 4th Amendment to the Constitution

²⁶⁶ Pooran Mal etc. v. Director of Inspection (Investigation) of Income-Tax Mayur, (1974) AIR 348, (1974) SCC I 345, (1974) SCR II 704; although the challenge was brought under the now repealed Article 31 of the Constitution, the Court ruling still provides guidance on the Indian approach of property protection in the tax area on the basis of Article 300A of the Constitution

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce

I Taxing powers in the Indian federal system; vertical fiscal imbalance

The Constitution allocates exclusive and concurrent taxing powers to the national, regional and local governments through the Union List, the State List and the Concurrent List.²⁶⁷

On the basis of the Union List, the central government has exclusive power to impose (i) taxes on income other than agricultural income, (ii) import and export duties, (iii) excise duties (on manufacturing, except duties on alcoholic liquors or narcotics), (iv) taxes on the capital value of assets (except agricultural land) and on the capital of companies, (v) estate and succession duties (except on agricultural land), and (vi) taxes on the sale or purchase of goods in the course of interstate trade. Moreover, the central government has the exclusive power on residual matters and on issues concerning the union territories.

On the basis of the State List, the state governments have the power to impose (i) taxes on agricultural income, (ii) succession and estate duties on agricultural land, (iii) taxes on land and buildings, (iv) taxes on mineral rights, (v) excise duties on alcoholic liquors, (vi) taxes on luxuries, and (vii) taxes on the intrastate sale and purchase of goods, which is the only significant revenue raising tax on state level.²⁶⁸ Moreover, a state is allowed to (viii) tax imports from other states provided that it taxes similar goods manufactured or produced within its territory and does not discriminate against imported goods.²⁶⁹ Two or more states may delegate (part of their) tax powers to the central government.²⁷⁰

The Concurrent List contains matters for which the central government and the state governments have concurrent jurisdiction, such as for social security contributions.

The municipal authorities do not have any legislative powers to tax. However, municipal taxes and surcharges exist in practice, since the state government is enabled to delegate powers to the local authorities.

In practice, the allocation of taxing powers between the central government and the states has sometimes proved difficult. For example, the division of power on the basis of agricultural or non-agricultural source income leads to arbitrary taxation. Another example is the overlap of taxes on production (manufacturing excises) levied at central level and sales taxes levied at state level. In practice the same tax base is applied for both, leaving less room to the states to impose sales taxes, their only substantial source of revenue. Finally, the states may impose a sales tax on the transfer of goods but not on services. In addition to providing opportunity to tax avoidance and evasion, this hinders the adoption of a comprehensive value-added tax.

²⁶⁷ 7th Schedule to the Constitution; See also II, A, 2 above

²⁶⁸ Including taxes on entertainments, betting and gambling

²⁶⁹ Non-discrimination against interstate trade is dealt with in II, D, 4 below

²⁷⁰ E.g. estate duties on agricultural land

The central government also transfers revenue from centrally levied taxes to the states (granting right or expenditure authority).²⁷¹

The state governments are highly dependent from these central government grants, despite their revenue from state level taxes.

2 Challenges to Union and State tax legislation

Union or state tax laws cannot be challenged for being unjust or unreasonable, but may be challenged for breaching their respective legislative competences set by the Constitution. The Supreme Court may on these grounds declare a union or state act to be null and void.²⁷²

3 Discrimination against interstate commerce

Drawn from the Australian example, Parts XIII and XIV of the Constitution ensure the free movement of goods and services within the territory of India, by prohibiting discrimination against interstate commerce.

E Retroactivity of tax legislation

The legislature has been recognized the power to enact tax laws in a retrospective manner.

Indeed, it is settled case law that, subject to constitutional restrictions, the power to legislate includes the power to legislate prospectively as well as retrospectively. Thus, the legislative power to impose tax also includes the power to tax retrospectively.²⁷³

The only constitutional restriction in this respect concerns the separation of powers between the legislature and the judiciary. The Supreme Court held it permissible for the legislature to nullify the effect of a judicial decision by changing the law retrospectively, but unconstitutional for the legislature to encroach on the judicial power.²⁷⁴

F Protection of marriage and family

The Constitution does not contain a specific provision on the protection of marriage or family. The legislative power regarding marriage and family matters is on the Concurrent List.

The income tax legislation considers the individual to be the basic income tax unit, but does provide for family income aggregation, on the basis of which the income of husband and wife is aggregated and apportioned equally (except for salary income of each marriage partner) and assessed separately under the provisions of the Indian income tax Act.²⁷⁵

²⁷¹ The granting right is laid down in Articles 268 – 281 of the Constitution, viz. Article 275, and in Article 282 of the Constitution; The grants are allocated by centralized bodies: the Finance Commission and the Planning Commission

²⁷² Article 13 of the Constitution

²⁷³ Hira Lal Rattan Lal etc, etc. v. State of U.P. and ANR etc., etc., 1973 AIR 1034, (1973) SCR II 502, (1973) SCC I 216.

²⁷⁴ Hira Lal Rattan Lal etc, etc. v. State of U.P. and ANR etc., etc., 1973 AIR 1034, (1973) SCR II 502, (1973) SCC I 216.

²⁷⁵ Section 5A and 64 of the Indian Income Tax Act; An interesting feature is the HUF (See hereafter)

Furthermore, an extraordinary feature of Indian income tax law is the so-called ‘Hindu Undivided Family’ (hereinafter: “HUF”) that is taxed as a single taxing unit.²⁷⁶ The HUF is defined under Hindu Law as a family comprising all persons who are lineal descendants of a common ancestor, including their wives and unmarried daughters. The property of the HUF is jointly held by a narrower body, a ‘coparcenary’, which consists of the male members of the family²⁷⁷ who obtain an interest in the joint family property by birth. The income received by the individual members out of the property of the HUF is exempted from income tax. The HUF itself is taxed in a similar manner as other taxing units in the Indian Income Tax Act.

G Other elements of constitutional tax law

The 42nd Amendment to the Constitution inserted the term “secular” into the Preamble of the Constitution, securing the secular character of the Union.²⁷⁸ The absence of a state religion in combination with Article 15 of the Constitution safeguarding the freedom of religion, secures that India’s citizens can freely establish and exercise any religion. All religions have to be treated with respect and in a non-discriminatory manner.

The combined effect of the principle of equality and the freedom of religion ensures that all citizens will be treated equal, regardless of their religious beliefs. In tax matters this fundamental right may be considered as prohibiting a burdensome church tax which would hinder the exercise of this fundamental freedom. In fact, the freedom of religion is specifically acknowledged and respected in Indian tax legislation by providing conditions enabling its exercise. An example is the treatment of the HUF in Indian income tax law.

²⁷⁶ Section 2 of the Indian Income Tax Act

²⁷⁷ I.e., the sons, grandsons and great-grandsons of the holder of the joint family property

²⁷⁸ The Supreme Court observed that secularism is an integral part of the basic structure of the Constitution in *S.R. Bommai v. Union of India*.

ITALY

I CONSTITUTIONAL LAW

A The Constitution

The Constitution of Italy was adopted on 22 December 1947 and came into force on 1 January 1948.²⁷⁹ It contains several fundamental principles of Italian tax law which are discussed in the second part of this survey.

B Other sources of tax constitutional law: Overview of the judiciary

Besides the Italian Constitution, several other sources of constitutional tax law are relevant. These are in particular international treaties, the Taxpayer's bill of rights²⁸⁰ and Court Rulings of the Constitutional Court and European Community law.

The Constitutional Court is competent to decide on the constitutionality of state or regional laws on conflict arising over the allocation of powers between several state branches, between state and region and between regions.²⁸¹

As discussed below,²⁸² the state and the regions have autonomous as well as concurrent legislative power, including in tax. It is a main task of the Constitutional Court to decide in conflicts, whenever legislative power is attributed to the state or the region.

The Supreme Court is the highest judicial authority for all tax matters involving individuals and enterprises.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

The principle of legality is implicitly mentioned in Article 2 and explicitly in Article 25 of the Constitution. However, both articles concern criminal (tax) law and not tax law.

The principle of legality can be deduced from Article 70 of the Constitution combined with Article 76 thereof. The former determines the legislative power, whereas the latter prohibits any delegation of this power "unless the parliament specifies principles and criteria of guidance and only for limited time and well-specified subjects". The last part of this sentence ("well-specified subjects") prohibits a general delegation of legislative power.

Article 117(2) of the Constitution makes clear in which matters the state has exclusive legislative power and in which matters the regions have exclusive legislative power.²⁸³

²⁷⁹ Hereafter "the Constitution"

²⁸⁰ *Statuto dei diritti del contribuente*, introduced by law 27 July 2000, No. 212

²⁸¹ Art. 134 of the Constitution

²⁸² See below under II, D, 1

²⁸³ See below under II, D, 1 for more detailed information about allocation of tax powers between state and regional jurisdictions

B Principle of Equality

Article 3(1) of the Constitution lays down the principle of equality in general. Article 53(1) of the Constitution stipulates that everyone should pay taxes in proportion to his own capacity.

According to the Constitutional Court, the “ability to pay” principle is a specification of the general principle of equality.²⁸⁴ In the Court’s opinion everyone with the same “ability to pay” should pay equal amounts of taxes. Conversely, people with different abilities to pay should pay different amounts of taxes.²⁸⁵

C Protection from unreasonable searches and seizures; non-confiscation of property

Article 42(1) of the Constitution enumerates who can own economic goods. Property, public or private, may belong to the state, to a public body or to a private person. Article 42(2) contains the constitutional protection of private ownership.

The Constitution sets limits to the right of property. The first is mentioned in Article 42(3), stipulating that private property can be expropriated for reasons of public interest. Ultimately it is up to the court to determine whether an expropriation is in the public interest or not.

The second infringement is Article 43 of the Constitution, which allows reservation or expropriation of specific enterprises or categories of enterprises to public bodies in the common interest.

Protection against unreasonable searches is granted by Article 14(1) of the Constitution, which states that the personal domicile is inviolable. Article 14(3), however, allows the legislator to provide for verification and inspections of the personal domicile for specific purposes, including fiscal purposes.

Finally, protection of property is guaranteed by Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce.

1 Allocation of tax powers among the national, regional and local governments

Article 117(1) of the Constitution stipulates that both the Italian state and the regions have legislative power.

However, several matters are explicitly reserved to the state.²⁸⁶ The legislative power regarding the coordination of the state taxation system as well as regarding customs, are exclusively reserved to the state.²⁸⁷

²⁸⁴ Constitutional Court, 6 July 1972, No. 120

²⁸⁵ Constitutional Court, 13 December 1963, No. 153

²⁸⁶ Article 117 (2) of the Constitution

²⁸⁷ Article 117 (2) (e) and (q) of the Constitution

The Constitution also lists matters for which both the state and regions have legislative power,²⁸⁸ including the coordination of the public finance and the taxation system. In matters of concurrent legislation the regions have legislative power, except for fundamental principles which are reserved to state law.²⁸⁹

Article 117 (4) makes clear that residual legislative power is granted to the regions.

The power to introduce state tax laws lies with both chambers of parliament.²⁹⁰ The legislative power at regional level lies with the regional council. The council is the only authority which may propose bills to the chambers of parliament.²⁹¹

Local taxes can be established to the extent they are in harmony with the Constitution and the principles of coordination of the taxation system.²⁹²

The taxes on state level are laid down in the Consolidated Tax Code²⁹³. The main direct taxes, levied at state level, are the personal income tax and the corporate income tax. The main indirect taxes are value added tax and transfer tax.

2 *Prohibition of discrimination against interstate commerce*

The prohibition of discrimination against interstate commerce is laid down in Article 120(1) of the Constitution. This article prohibits any charges on import or export duties, duties on interregional transit, limitations which may hinder the free movement of persons and goods and it prohibits limitations on the right to work anywhere within the national country.

The second clause of Article 120 gives the national government the right to act as a substitute for a region in several cases. One of them is the right to act in order to safeguard the legal or economic unity of the nation, and particularly in order to safeguard the basic standards of welfare related to social and civil rights. Thus, if regions discriminate any interstate commerce in one of the above mentioned ways, the national government has the right to interfere and to undo the discrimination.

E *Retroactivity of tax legislation*

The Constitution does not prohibit retroactive tax legislation. Article 25 of the Constitution prohibits non-retroactive criminal law.²⁹⁴

The Constitutional Court has heard several cases in which the retroactivity of tax legislation was challenged. Since there is no general prohibition on retroactivity, the Court considered whether retroactive tax law is in itself contrary to the principle of ability to pay. The Court does not answer this question in general, but considers every case on its own merits. It held

²⁸⁸ Article 117 (3) of the Constitution

²⁸⁹ Article 117 (3) and Article 119(2) of the Constitution

²⁹⁰ Article 70 of the Constitution

²⁹¹ Article 121 (2) of the Constitution

²⁹² Article 119 of the Constitution

²⁹³ Law No. 80 of 7 April 2003, Testo Unico delle Imposte sui Redditi. This law was adopted in 2003 as a major tax law reform and aimed at simplifying tax legislation and at creating a favorable tax environment for domestic and foreign investments.

²⁹⁴ Corte di Appello di Milano, 3 October 1989, No. 2811, where is stated that Article 25(2) of the Constitution and Article 7(1) of the ECHR only prohibit retroactive criminal provisions.

that in each specific case it is necessary to check whether the retroactive taxing statute affects a situation in the past which has come to full completion or exhaustion, thereby severing the required relationship between taxation and current and actual ability to pay.²⁹⁵

F Protection of marriage

Article 29 of the Constitution recognizes and protects marriage. Furthermore, Article 31 supports family formation and protects maternity, infancy and youth.

The Constitutional Court has ruled that separate taxation of each spouse on his income must be allowed, considering that mandatory attribution of the income of the wife to the husband violates the principle of equality and is thus unconstitutional.²⁹⁶ Spouses are now charged separately on their own income.

To prevent another constitutional issue to arise, the government introduced a tax deduction and allowance system to tax single-income and multi-income families equally. This way a single-income family with an income equal to a multi-income family pays exactly the same amount of tax.²⁹⁷

G Other Principles of constitutional tax law

In addition to the main principles of Italian constitutional law which are discussed above, there are other rules that may apply in tax matters.

The first is Article 20 of the Constitution. This Article contains a provision which prohibits the government to lay down specific fiscal burdens upon religious associations or institutions. This is actually a specification of the freedom of religion, laid down in Article 19. Article 8 prohibits direct discrimination of religious associations whereas Article 20 prohibits the central and regional governments from discriminating religious associations indirectly through taxes.

Finally, all constitutional law provisions that limit the legislator's power, will apply to tax law as to any other type of law.

²⁹⁵ Constitutional Court, 16 June 1964, No. 45

²⁹⁶ Constitutional Court 14 July 1976, No. 179

²⁹⁷ Because of the progressive income tax (Article 53(2) of the Constitution), multi-income families would normally pay less tax, because of a lower progression rate, than a single-income family with an equal amount of income.

JAPAN

I CONSTITUTIONAL LAW

A The Constitution

The currently effective Japanese constitution (hereafter: the Constitution, (C)) was adopted in 1946 and has not yet been subject to amendments. Under the Constitution, legislative power is vested in the Diet (Japan's Parliament); executive power is vested in the Cabinet headed by the Prime Minister designated from among the members of the Diet; and judicial power is vested in the Supreme Court and inferior courts such as high courts, district courts, family courts, and summary courts. As such, the Constitution provides for a democratic, fundamental separation of state powers. The courts are the final adjudicators of all legal disputes.

B Other sources of constitutional law

The Supreme Court is the only Japanese court explicitly empowered to review the constitutionality of laws,²⁹⁸ although it has held that lower courts also have power to interpret the Constitution.²⁹⁹ Unlike constitutional courts in civil law countries, it only exercises judicial review in cases where there is a genuine dispute between parties, and does not accept questions of constitutionality from government officials.³⁰⁰

The Supreme Court is generally reluctant to exercise the powers of judicial review given to it by the Constitution, in large part because of unwillingness to become involved in politically sensitive issues. In the words of political scientist T.J. Pempel, the Supreme Court “has been an important, if frequently unrecognized, vehicle for preserving the status quo in Japan and for reducing the capacity of the courts to reverse executive actions.”

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality³⁰¹

Article 30 of the Constitution provides that people must pay tax as provided by law. Additionally, Article 84 prevents the government from levying new taxes or modifying existing taxes unless permitted by statute or under such conditions as statute may prescribe (principle of statute-based taxation).

²⁹⁸ The Article 81 of the Constitution provides that the Supreme Court is "the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act."

²⁹⁹ Food Staple Management Law Constitutionality Case, 4 Minshu 73 (1950).

³⁰⁰ National Police Reserve Constitutionality Case, 6 Minshu 783 (1952).

³⁰¹ Hiroshi Kaneko: The Principle of Statute-Based Taxation in Japan: Trends of Scholars' Opinion and Case Law, *International Tax Review*, Volume 32, Issue 1, Kluwer Law International 2004

In this context, the Supreme Court repeatedly held that the principle of statute-based taxation requires the legislator to clearly lay down the prerequisites of tax liability, tax assessment procedures and tax collection in an Act of Parliament.³⁰²

For the related aspects of retroactive legislation, see under E.

B Principle of equality

The Constitution does not include any explicit provision as to equality in taxation. However, Article 14 of the Constitution guarantees equality before law and prohibits discrimination based on “political, economic or social relations” or “race, creed, sex, social status or family origin”. Equality between the sexes is explicitly guaranteed in relation to marriage (Article 24 C) and childhood education (Article 26 C).

C Protection from unreasonable searches and seizures; non-confiscation of property

Article 35 of the Constitution provides for the right of all persons to be secure in their homes and of their belongings from unlawful searches and seizures. Each search or seizure must be made upon separate warrant issued by the competent judicial officer and indicating the adequate cause and its subject.

There are further limitations to the seizure of property in collecting taxes when the seizure would create unusual hardship for the taxpayer or would threaten his or his family’s minimum standard of living. These limitations are determined in the National Tax Collection Law (20 April 1959 Law. No. 147) and the General National Tax Law (2 April 1962 Law No. 66).

Article 29 of the Constitution provides that the state may only confiscate property for public use if it pays just compensation. Additionally, Article 30 allows the state to restrict the right to property by levying taxes.

D Allocation of taxing powers³⁰³ among the national, regional and local governments, including the prohibition of discrimination against interstate trade and commerce

Administratively, Japan is divided into a total of 47 prefectures. Prefectures are further divided into municipalities which consist of cities, towns and villages. Prefectures stand midway between the national government and the municipalities and their functions are divided into two categories: intermediation between national government and municipal governments, and area-wide administration.

Local governments in Japan (i.e. prefectures and municipalities) have a political system which differs from that of national government. While the national level has a parliamentary system, the sub-national government is run by a presidential system of government. Local authorities have self-governance as long as they do not infringe on the national legal framework (i.e. national laws and Cabinet ordinances). The fact is, however, that the central

³⁰² For instance, Decision of March 23, 1965, Supreme Court Civil Cases Reporter, vol. 9, no. 3, p. 336, Decision of March 27, 1985, id., vol. 39, no. 2, p. 247.

³⁰³ Unless otherwise indicated, source: Managing Across Levels of Government, Japan, OECD report, 1997

government has established national laws in major policy areas (incl. taxation), keeping control over local governments. This situation can partly be attributed to the highly centralized system of administration in the pre-war period.

1 Tax legislative power

The legislative power is exclusively vested in the Japanese Parliament (Article 41 C). Since under the principle of statute-based taxation (Article 84 C), taxes can only be levied by statutes, only the Parliament is empowered to enact legislation that imposes a tax.

The Local Tax Law (31 July 1950, Law No. 226) provides for the framework for local taxation, including the kinds and rates of taxes allowed. There is little room for local governments to take discretionary decisions. Normally, the tax offices of local governments are in regular contact with the Local Tax Bureau of the Ministry of Home Affairs and follow directions and guidance from it, whether they are legally compulsory or not.

2 Tax revenue entitlement

Japan has a system of grants³⁰⁴ from the central government to local governments, to fill the gap between the expenditure local governments are supposed to carry out and the revenue that they can actually raise. Approximately 70% of the taxes collected as national tax are redistributed to local governments through the system of grants.

The only own source of revenue of local governments are the local taxes, regulated by the Local Tax Law.

3 Tax administration authority³⁰⁵

The National Tax Administration Agency is responsible for administering the Japanese tax system. It has offices also on regional and prefecture or municipal levels. Local taxes are managed by local governments in close consultation with the Local Tax Bureau of the Ministry of Home Affairs. On the basis of Articles 92 and 94 of the Constitution³⁰⁶, the Local Tax Law confirms the right of local public entities to assess and collect taxes within its legal framework.

E Retroactivity of tax legislation

³⁰⁷

There is no explicit provision in the Constitution that prohibits retroactive taxation. As a result, scholars were of the opinion that the prohibition of retroactive legislation was no constitutional principle but just a principle of legislative policy. However, the principle of

³⁰⁴ The central government grants can be divided into two categories: global grants (the “Local Allocation Tax Grant” and the “Local Transfer Tax Grant”) and grants where usages are predetermined by central government.

³⁰⁵ 2005 Report of the Japanese Ministry of Finance on the Japanese tax System

³⁰⁶ Article 92 of the Constitution states that “Regulations concerning the organization and operation of public local entities shall be fixed by law in accordance with the principle of local autonomy”. On the basis of this provision the Local Autonomy Law was enacted, determining that local public entities can assess and collect taxes as provided by law. Additionally, Article 94 of the Constitution provides that “Local public entities shall have the right to manage their property, affairs, and administration and to enact their own regulations within the law”.

³⁰⁷ Hiroshi Kaneko: The Principle of Statute-Based Taxation in Japan: Trends of Scholars’ Opinion and Case Law, *International Tax Review*, Volume 32, Issue 1, Kluwer Law International 2004

statute-based taxation (Article 84 C, for details see under A) should imply the prohibition of retroactive legislation in the field of taxation.

Nowadays, the opinion prevails among Japanese tax scholars that retroactive legislation violates the principle of statute-based taxation.³⁰⁸ However, in the case of periodic taxes (e.g. CIT, IIT) the tendency of scholars' opinions and court decisions is that it is permissible to apply the statutes or ordinances amended during the period retroactively from the beginning of that period.³⁰⁹ In the field of regularly levied taxes, it often happens that amendments are made for the disadvantage of taxpayers during a tax period and that these amendments are to be applied from the beginning of that period. There are several court cases in which the constitutionality of such legislation was disputed.

F Protection of marriage

With respect to marriage, the Japanese Constitution includes only a provision that provides for the equality of both sexes in the marriage (Art. 24 C). There is, however, a general provision providing that all people are to be respected as individuals and their right to life, liberty and the pursuit of happiness must be the supreme consideration in legislation and in other governmental affairs (Art. 13 C). It is not known to us that these provisions would have had any (direct) implications for the tax legislation.

³⁰⁸ The Okinawa commodities tax case (Decision of Fukuoka High Court of 31 October 1973) was highly appreciated for the establishment and development of the principle of statute-based taxation in connection with retroactive legislation.

³⁰⁹ Special land-holding tax case: Decision of Osaka High Court of August 30, 1977

RUSSIAN FEDERATION

I CONSTITUTIONAL LAW

A The Constitution

The constitution of the Russian Federation³¹⁰ was adopted on December 12, 1993 and came into force on December 25, 1993. The Constitution lays down several fundamental principles of the Russian tax system.

B Other sources of tax constitutional law; Overview of the judiciary

Other important sources of Russian constitutional law which are relevant in the tax area include international treaties³¹¹ and court rulings of the Constitutional Court, the Supreme Court of the Russian Federation and the High Court of Arbitration.

In tax matters, the Constitutional Court mainly acts as the exclusive judicial authority for verifying, at the request of other courts (preliminary rulings) or of individual citizens, the constitutionality of laws applied or to be applied in a concrete case.³¹² It decides cases exclusively on the basis of the Constitution and limits its considerations to matters of law: it refrains from examining the facts whenever such activity falls within the competence of another court or another authority.

The Constitutional Court has confirmed the supremacy of international human rights law, which it applied to validate fundamental rights including guaranteed legal protection of rights and freedoms, the right to be protected against discrimination, each individual's right to possess and dispose of private property, the right of free access to information from the government, etc.³¹³ This must also be seen connection with Russia's accession to the Council of Europe, which has given Russian citizens the opportunity to seek protection of their rights and freedoms in the European Court of Human Rights.³¹⁴

The Supreme Court acts as the highest judicial authority in tax matters concerning individual taxpayers, whereas the High Court of Arbitration assumes that role for enterprises.³¹⁵

³¹⁰ Hereafter "the Constitution". The English text of the Constitution is available at the following webpage: <http://www.constitution.ru/en/10003000-01.htm>

³¹¹ Viz. bilateral income tax treaties, and the European Convention for the Protection of Human Rights and Fundamental Freedoms; See *infra*

³¹² Article 125 (4) of the Constitution, and Article 3 of the 1994 Federal Constitutional Law on the Constitutional Court of the Russian Federation. See e.g., Ruling of October 24, 1996 of the Constitutional Court on the constitutionality of Article 2(1) of the Federal Statute of March 7, 1996 on amendments to the Statute of the Russian Federation on Excise Taxes (principle of non-retroactivity; see *infra*)

³¹³ See also Article 15 (4), Article 17 (1) and Article 55 of the Constitution

³¹⁴ The Constitutional Court has, in a tax case, also referred to the 1948 UN Universal Declaration of Human Rights; see Ruling of December 17, 1996 of the Constitutional Court on the constitutionality of Clauses 2 and 3 of Article 11(1) of the Law of the Russian Federation of June 24, 1993 on Federal Tax Police Bodies, point 2

³¹⁵ Articles 126 and 127 of the Constitution

C Relationship between the Constitution and the tax laws; Hierarchy of norms

The Constitution explicitly confirms its supremacy over all other legal acts, including tax acts, adopted in the Russian Federation.³¹⁶ This supremacy concerns not only the text of the Constitution itself, but includes universally recognized norms of international law and international treaties and agreements to which Russia is party.³¹⁷

The hierarchy of norms under the federal structure is also determined by the Constitution: next level down from the Constitution (including relevant provisions of international law) are the federal constitutional laws, then the federal laws (which may not contradict the federal constitutional laws), and then the laws and other normative acts of the subjects of the Russian Federation³¹⁸ (which may not contradict federal laws on issues under the exclusive jurisdiction of the Russian Federation or on issues under joint jurisdiction of the Russian Federation and its subjects; hence, they may contradict federal laws on issues under the exclusive competence of the subjects of the Russian Federation).³¹⁹

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

The principle of legality in tax matters is laid down in Article 57, first sentence, of the Constitution.

This means that taxes may be introduced only:

- by federal law of the Federal Assembly (i.e. the parliament of the Russian Federation, composed of two chambers: the Council of the Federation and the State Duma), for federal taxes and dues;
- by laws or legislative acts of the legislative authorities of the subjects of the Russian Federation, for regional taxes and dues; and
- by legislative acts of the local self-government bodies, for local taxes and dues.³²⁰

From Article 57 of the Constitution, read in conjunction with articles 1, 3, 4 and 7 of the Constitution, the Constitutional Court derived the public law nature of tax law.³²¹

³¹⁶ Article 15 (1) of the Constitution; with respect to federal laws, this principle is repeated in Article 76 (3) of the Constitution

³¹⁷ See I, B above, and Article 15 (4) of the Constitution

³¹⁸ The “subjects of the Russian Federation” include the republics, territories, regions, ‘cities of federal importance’ (i.e. Moscow and St. Petersburg) and autonomous areas listed in Article 65 of the Constitution

³¹⁹ Article 76 of the Constitution

³²⁰ See *infra* under II, D for more detailed information about the allocation of tax powers between the federal, regional and local jurisdictions.

³²¹ Ruling of December 17, 1996 of the Constitutional Court on the constitutionality of Clauses 2 and 3 of Article 11(1) of the Law of the Russian Federation of June 24, 1993 on Federal Tax Police Bodies, point 3

B Principle of equality

The principle of equality is expressed in several provisions, the most important of which include Article 5 (4), Article 6, Article 8 (2), Article 17 (2), Article 19, Article 45 and Article 57 of the Constitution. These provisions do not specifically refer to taxation. The Constitutional Court has identified the ‘equal tax burden principle’ as one of the fundamental principles of Russian constitutional tax law. The Court derived this principle of equality in taxation in particular from Articles 8 (2), 19 and 57 of the Constitution.³²²

C Protection from unreasonable searches and seizures; Non-confiscation of property

Property or ownership is protected by several provisions of the Constitution, the most relevant provisions being Article 8 (2) and Article 35 of the Constitution.³²³⁻³²⁴

Article 8 (2) ensures equal protection of ownership irrespective of its form, i.e. private, state, municipal or any other form of ownership.

Article 35 specifically protects private ownership in general,³²⁵ and the right to own, possess, use and dispose of property, either personally or jointly with other people.³²⁶ Furthermore, no one may be deprived of his property other than by judicial decision, and forced confiscation for public use is subject to prior and adequate compensation.³²⁷

The Constitutional Court has interpreted and applied these provisions in tax matters.³²⁸

First, the Court noted that the right to private ownership is not absolute but may be restricted by federal law to the extent necessary to protect i.a. the fundamentals of the constitutional system,³²⁹ of which everyone’s obligation to pay lawfully established taxes and dues is one.³³⁰ Thus, in general, tax collection cannot be regarded as arbitrary taking of a portion of one’s property. Furthermore, the taxpayer may appeal decisions of the tax authorities to the courts in order to protect his constitutional rights.³³¹

However, based on these provisions and from the public law nature of the tax law, the Constitutional Court distinguishes between the collection of tax arrears and late payment interest on the one hand, and fines and concealed or unreported profits on the other hand. The former have the nature of a tax, whereas the latter have a punitive nature (criminal law).

³²² Ruling of March 21, 1997 on the Constitutionality of the Provisions of Article 18, (2), (2) and Article 20 of the Law of the Russian Federation of December 27, 1991 on the Fundamentals of the Tax System in the Russian Federation, point 3, para. 6

³²³ It may be noted that the protection of property is also guaranteed by Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (also ratified by the Russian Federation)

³²⁴ Furthermore, Article 22 of the Constitution guarantees personal freedom and immunity (prohibition of unlawful detention and personal searches), whereas Article 25 guarantees the inviolability of the home.

³²⁵ Article 35 (1) of the Constitution

³²⁶ Article 35 (2) of the Constitution

³²⁷ Article 35 (3) of the Constitution

³²⁸ Ruling of December 17, 1996 of the Constitutional Court on the constitutionality of Clauses 2 and 3 of Article 11(1) of the Law of the Russian Federation of June 24, 1993 on Federal Tax Police Bodies

³²⁹ In accordance with Article 55 (3) of the Constitution

³³⁰ Cf. Article 57 of the Constitution

³³¹ Cf. Article 46 of the Constitution

Thus, whereas the collection of both types of payments may be imposed unilaterally by the tax authorities, the enforcement of the latter type of payments must be suspended in case the taxpayer appeals to the courts. Stipulating otherwise would violate Article 35 (3) of the Constitution according to which no one can be deprived of his property other than by judicial decision.³³²

D Allocation of tax powers among the national, regional and local governments, including prohibition of discrimination against interstate commerce

I Allocation of taxing powers in the Russian Federation

In accordance with the principle of legality, taxes and dues may only be imposed by ‘law’.³³³ The Constitution also determines the division of taxing powers between the different lawmakers of the Russian Federation:

- federal taxes and dues may be imposed only by federal law, i.e. a legal act of the lawmaker of the Russian Federation (i.e. the Federal Assembly, consisting of two chambers: the State Duma and the Council of the Federation;³³⁴ and the President of the Russian Federation);³³⁵
- regional taxes and dues may be imposed only by legal acts of the government bodies of the “subjects of the Russian Federation”;³³⁶ and
- local taxes may be imposed only by legal acts of the local self-government bodies.³³⁷

The system of taxes paid to the federal budget and the general principles of taxes and dues in the Russian Federation are determined by federal law,³³⁸ whereas the establishment of common principles of taxation and dues in the Russian Federation is an issue of joint jurisdiction of the Russian Federation and its subjects.³³⁹ However, the Constitution also stipulates that issues under joint jurisdiction of the Federation and its subjects must be regulated by federal law with which normative acts of the subjects must comply.³⁴⁰

The Constitutional Court thus ruled in this respect that the power of the subjects of the Russian Federation to establish regional taxes is “of a derivative nature”, as they are bound by the general principles laid down by federal law as well as by the Constitution.³⁴¹

These general principles of taxation in the Russian Federation are laid down in the federal law of December 27, 1991 on the fundamentals of the tax system of the Russian Federation, which also contains an exhaustive list of regional taxes which the Federation’s subjects may introduce. Within this federal legal framework, the regions may thus determine whether to

³³² Ruling of December 17, 1996 of the Constitutional Court on the constitutionality of Clauses 2 and 3 of Article 11(1) of the Law of the Russian Federation of June 24, 1993 on Federal Tax Police Bodies, point 5

³³³ See II, A above

³³⁴ Cf. Articles 94 et seq. ; Federal tax laws must be adopted by both chambers of the Federal Assembly (Article 106 (b) of the Constitution

³³⁵ Cf. Article 107 of the Constitution; the President may reject draft federal laws voted by the Federal Assembly, unless the latter reconfirms the draft law with a majority of two thirds of its members.

³³⁶ Article 73 of the Constitution

³³⁷ Article 132 (1) of the Constitution

³³⁸ Article 75 (3) of the Constitution

³³⁹ Article 72, (1), (i) of the Constitution

³⁴⁰ Article 76 (2) of the Constitution

³⁴¹ See Ruling of March 21, 1997 on the Constitutionality of the Provisions of Article 18, (2), (2) and Article 20 of the Law of the Russian Federation of December 27, 1991 on the Fundamentals of the Tax System in the Russian Federation, point 4, para. 3; See also I, C above on the hierarchy of norms

introduce such regional taxes, and determine the taxpayers, tax base, rates, exemptions and procedures.³⁴²

The most important taxes of the Russian Federation are regulated by the Tax Code, consisting of two parts (containing general provisions and special provisions on calculation and payment of particular taxes respectively).³⁴³ Most important chapters of Part II of the Tax Code are on Value-Added Tax (VAT), Excise duties, Individual Income Tax, Unified Social Tax, Profits Tax, Sales Tax, Mineral Extraction Tax, Unified Agricultural Tax, Transport Tax, Gaming Tax and a Special Regime of Taxation of Production Sharing Agreements. Certain other taxes such as the property tax and the advertisement tax, as well as certain regional and local taxes, are governed by the federal law of December 27, 1991 on the fundamentals of the tax system of the Russian Federation.

2 Prohibition of discrimination against interstate commerce

The Constitution stipulates that the Russian Federation is a single economic space, in which a free flow of goods, services and financial resources is guaranteed.³⁴⁴ Hence, within its territory no customs borders, dues or any other barriers to a free flow of goods, services and financial resources may be established.³⁴⁵

Based on these provisions, the Constitutional Court ruled that regional taxes may not directly or indirectly restrict free movement of goods, services and capital within the Federation's single economic space, nor introduce regional taxes at the expense or to the benefit of other territories.³⁴⁶

The Court also connected this principle to the principle of a uniform financial policy within the Russian Federation,³⁴⁷ which includes a uniform tax policy and tax system.³⁴⁸ The Court also pointed out that this implies a unitary system of tax authorities. Hence, the regional tax authorities are territorial divisions of the federal tax authorities rather than autonomous regional authorities.³⁴⁹

³⁴² *Ibidem*, point 5, para. 2

³⁴³ Federal Law n° 146-FZ of July 31, 1998, as amended (Part I), and Federal Law n° 117-FZ of August 5, 2000, as amended (Part II); an English translation of Parts I and II of the Tax Code is available here from the following webpage: http://www.garweb.ru/project/mns/en/law/garweb_law/10800200/10800200-001.htm

³⁴⁴ Article 8 (1) of the Constitution

³⁴⁵ Article 74 (1) of the Constitution; restrictions may only be imposed by federal law and to the extent necessary to ensure security, protect the life and health of people, protect nature and cultural values (Article 74 (2) of the Constitution).

³⁴⁶ Ruling of March 21, 1997 on the Constitutionality of the Provisions of Article 18, (2), (2) and Article 20 of the Law of the Russian Federation of December 27, 1991 on the Fundamentals of the Tax System in the Russian Federation, point 3, para. 4

³⁴⁷ Article 114, (1), (b) of the Constitution

³⁴⁸ Ruling of March 21, 1997 on the Constitutionality of the Provisions of Article 18, (2), (2) and Article 20 of the Law of the Russian Federation of December 27, 1991 on the Fundamentals of the Tax System in the Russian Federation, point 3, para. 2

³⁴⁹ *Ibidem*, point 3, para. 5; Cf. Article 78 (1) of the Constitution

E Retroactivity of tax legislation

The Constitution explicitly prohibits laws introducing new taxes or deteriorating the position of taxpayers to have retroactive effect.³⁵⁰

Furthermore, the Constitution stipulates that unpublished laws may not apply.³⁵¹ In application of this principle, the Federal legislature defined general rules according to which federal laws enter into effect at the expiration of a ten-day period following their official publication, unless the law itself provides for a different procedure for its entry into force.³⁵²

However, as the Constitutional Court has pointed out, the latter provision does not allow the legislator to derogate from the constitutional prohibition of retroactive tax laws (to the extent they change the taxpayer's position for the worse).³⁵³ Hence, the Court ruled that an amendment to the federal law on excise taxes subjecting excise goods to tax as of February 1, 1996 violated Article 57 of the Constitution as the amendment was officially published only on March 13, 1996.³⁵⁴

F Protection of marriage

The Constitution does not contain a specific provision on the protection of marriage. It does, however, contain a provision on the protection of "maternity, childhood and the family".³⁵⁵

To the best of our knowledge, there is no case law of the Constitutional Court on this issue in relation to taxation.

Married couples confronted with discriminating tax legislation in light of their marital status may, in our opinion, nevertheless be able to successfully challenge such legislation before the Constitutional Court. Their claim could be based both on the protection of the family (the latter term construed as comprising married couples) and, more generally, on the basis of the overall prohibition of discrimination.³⁵⁶

³⁵⁰ Article 57, second sentence, of the Constitution; Article 54 (1) of the Constitution stipulates, in general terms, that a law introducing or aggravating responsibility may not have retroactive effect (Article 54 (2) of the Constitution contains the principle of non-retroactivity of more restrictive criminal law)

³⁵¹ Article 15 (3) of the Constitution

³⁵² Federal Law of June 14, 1994 on the procedure for the publication and entry into full force and effect of the federal constitutional laws, federal laws and acts of the chambers of the Federal Assembly

³⁵³ Indeed, as the Constitutional Court pointed out, retroactive tax laws which change the taxpayer's situation *for the better* are not prohibited by the Constitution; Ruling of October 24, 1996 of the Constitutional Court on the constitutionality of Article 2(1) of the Federal Statute of March 7, 1996 on amendments to the Statute of the Russian Federation on Excise Taxes, point 4, para. 5

³⁵⁴ *Ibidem*, point 5

³⁵⁵ Article 38 (1) of the Constitution

³⁵⁶ Article 19 (2) of the Constitution guarantees equal rights and freedoms to man and citizens "regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, *and also of other circumstances*" (emphasis added)

G Other principles of constitutional tax law

The main principles of constitutional tax law in the Russian Federation are included under A. to F. above. All have been subject of a Constitutional Court ruling in tax matters (except, to our knowledge, the protection of marriage).

In addition to the general clause on prohibition of discrimination,³⁵⁷ the guaranteed freedom of religion may also be relevant in tax matters.³⁵⁸ This provision may be construed as precluding the tax lawmakers to impose heavy taxes on churches (or other religious organizations) which would effectively hinder the exercise of one's constitutional freedom of religion.

Finally, and in a general manner, all constitutional law provisions that limit the legislator's power apply to tax law as to any other type of law.

³⁵⁷ Article 19 (2) of the Constitution; See also II, F above

³⁵⁸ Article 28 of the Constitution; See also Article 14 of the Constitution (principle of the secular state)

SPAIN

I CONSTITUTIONAL LAW

In Spain the Constitution consists of a set of values on which the whole Spanish legal system is based. The Constitution is the highest source of law, meaning that all other laws should be in accordance with the Constitution. The preamble to the constitution contains an assignment from the Spanish people to the government to strive for a democratic constitutional state.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

The principle of legality is one of the leading principles in the Spanish legal system and is specifically mentioned in Article 9 of the Constitution. This principle means in essence that all citizens and public powers are subject to the Constitution and the legal order.

Regarding taxation in particular the Constitution stipulates that all fiscal profits which affect the state must be established by virtue of law.³⁵⁹ The Constitution also stipulates that personal or property contributions of a public nature may only be made in accordance with the law.³⁶⁰

B Principle of equality

Equality is one of the main constitutional concerns. It is mentioned in the very first article of the Constitution as one of the fundamental principles and further explored in article 14 where it is stated that all Spaniards are equal before law, without any distinction for reasons of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.

Specifically of respect to taxation, the Constitution stipulates that everyone shall contribute to the sustenance of public expenditures according to his economic capacity through a just tax system based on the principles of equality and progressive taxation which in no case shall be of a confiscatory nature.³⁶¹

C Protection from unreasonable searches and seizures; Non-confiscation of property

The Spanish constitution guarantees the right of honor, and personal and family privacy. Without an adequate legal authority the home is inviolable, unless the owner approves.³⁶²

³⁵⁹ Article 133 of the Constitution

³⁶⁰ Article 31 of the Constitution

³⁶¹ Article 31 of the Constitution

³⁶² Article 18 of the Constitution

Personal or property contributions of a public nature may only be made in accordance with the law.³⁶³ Also no one may be deprived of his property and rights except for a justified cause of public utility or social interest and subject to proper indemnification in accordance with the provision of law.³⁶⁴

D Allocation of taxing powers among the national, regional and local governments, including the prohibition of discrimination against interstate trade and commerce

Article 133 of the Constitution deals with taxing power. The original power to establish taxes by means of law belongs exclusively to the State. The taxing powers of the state are only limited by the Constitution. All taxation must be levied by virtue of a law.

The autonomous communities levy their own taxes,³⁶⁵ yet also share in the revenue of State taxes.³⁶⁶ The taxing power of these communities is limited by the Constitution and the law³⁶⁷ and excludes the taxation of property located outside their territory and taxes that are likely to hinder the free movement of goods or services throughout the state.³⁶⁸

E Retroactivity of tax legislation

The Constitution does not specifically prohibit retroactive tax legislation.

However, it does prohibit the conviction or sentencing of a person for actions or omissions that did not constitute a crime at the time these actions were committed.³⁶⁹ This rule is an elaboration of Article 9 of the Constitution where non-retroactivity of punitive provisions is mentioned. Basic rights and public liberties can also not be altered retroactively.

It appears that in other fields of law retroactivity of legislation is allowed. The Constitutional Court has ruled that retroactivity of tax legislation is not in all cases prohibited by the Constitution. It was however held that retroactivity of tax legislation could possibly lead to an infringement of legal certainty. Whether this is the case should be judged on a case by case basis.

F Protection of marriage

Under Spanish tax law, it is possible for a family to be taxed as single unit. Following a ruling by the Constitutional Court, this regime is not obligatory: taxpayers are allowed to opt for this regime.

³⁶³ Article 31 of the Constitution

³⁶⁴ Article 33 of the Constitution

³⁶⁵ Article 142 of the Constitution

³⁶⁶ Article 157 of the Constitution

³⁶⁷ Article 133 of the Constitution

³⁶⁸ Article 157 of the Constitution

³⁶⁹ Article 25 of the Constitution

UNITED STATES OF AMERICA

I CONSTITUTIONAL LAW

A The Constitution

The Constitution of the United States of America was adopted on 17 September 1787, and became effective on 4 March 1789.³⁷⁰ Individual rights and liberties, however, were laid down only in the 1791 Bill of Rights, constituting the first ten amendments to the Constitution.

B Other sources of constitutional tax law: Overview of the judiciary

Case law is the other source of constitutional tax law. In a common law country like the United States, court decisions are a source of law. Courts not only resolve concrete existing controversies, their decisions are considered a precedent to resolve future controversies.

The US Supreme Court has played a critical role in the longevity of the Constitution, and has even been described as a ‘continuing constitutional convention’. Vested with the power of *judicial review*, i.e. the power to declare acts of Congress unconstitutional, the Court became the ultimate arbiter for interpreting the Constitution. The Court thus defined, in greater detail than the Constitution does, the powers of the federal government and the states, the respective authority of Congress and the president, and the scope of individual rights and liberties. Furthermore, the Court's ability to adapt those definitions over time has reduced the pressure for constitutional amendments.

The Supreme Court is not exclusively nor primarily a constitutional court. Each year the Court issues around seventy to ninety written decisions that encompass a wide variety of constitutional, statutory, and common law issues. Often the Court decides individual cases on other legal grounds than the Constitution. By exercising *judicial restraint*, the Court conserves its political strength for most effective use. Sometimes the Court delays the consideration of a constitutional issue simply by refusing to accept cases for review.

International treaties are *not* as such a source of constitutional tax law, since they are at the same hierarchical level as federal statutes. Hence, Congress can change a treaty by simply passing a contrary statute.

II OVERVIEW OF ELEMENTS OF CONSTITUTIONAL TAX LAW

A Principle of legality

As is the case in other common law countries (e.g. United Kingdom, Australia), the Constitution does not contain a specific provision on the principle of legality. The Constitution does, however, contain two provisions on the power to establish and collect taxes.

³⁷⁰ Hereafter “the Constitution”; An electronic version of the Constitution, including the 27 amendments, is available here: <http://www.law.cornell.edu/constitution/constitution.table.html>

First, Article I, section 8(1) of the Constitution grants Congress the power to establish and collect taxes, duties, imposts and excises, including the power to make all laws necessary and proper for their carrying into execution.³⁷¹

Secondly, Amendment XVI to the Constitution attributes to Congress the power to establish and collect taxes on income, from whatever source derived and without apportionment among the states.³⁷²

B Principle of equality

The principle of equality is laid down in the Fourteenth Amendment to the Constitution, which guarantees that no person may be denied “equal protection under the law”.

However, the Supreme Court minimized the role of equal protection challenges to limit the legislature’s power to enact tax laws already in 1916.³⁷³ The Court stated that in taxation, more than in any other field, the legislature possesses the greatest freedom in classification.³⁷⁴

Article I Section 8(1) of the Constitution, stipulating that taxes must be uniform throughout the United States, is not considered a codification of the principle of equality. The Supreme Court ruled that this Uniformity Clause only concerns geographical uniformity, in that any given federal tax system adopted by Congress must operate in the same way throughout the United States.³⁷⁵

C Protection from unreasonable searches and seizures; Non-confiscation of property

The Fourth Amendment to the Constitution protects from unreasonable searches and seizures. Lawmakers and court decisions provided legal safeguards to ensure that law enforcement officers interfere with individuals’ Fourth Amendment rights only under limited circumstances and subject to specific limitations.

Furthermore, the Fifth Amendment of the Constitution prohibits private property to be taken for public use without just compensation.

D Allocation of taxing powers among the national, regional and local governments, including the prohibition of discrimination against interstate trade and commerce.

As noted above,³⁷⁶ the federal government’s power to establish and collect taxes is based on the Constitution. The Tenth Amendment of the Constitution guarantees state sovereignty.

³⁷¹ Article I, Section 8(18) of the Constitution

³⁷² Amendment XVI thus removed the apportionment requirement for federal direct taxes of Article I, Sections 2 and 9 of the Constitution, on the basis of which the Supreme Court had invalidated an early federal income tax enacted in 1894

³⁷³ *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24 (1916)

³⁷⁴ *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)

³⁷⁵ *Fernandez v. Wiener*, 326 U.S. 340 (1945); *United States v. Ptasynski*, 462 U.S. 74 (1983)

³⁷⁶ See II, A above on the principle of legality

Each state retains the power to establish and collect its own taxes. States may also delegate their legislative authority to their political subdivisions such as counties and cities.

Both the federal government and the states tax individual and corporate income. General sales taxes, however, are only levied by the states. Payroll taxes, from which the social security system is funded, are solely levied by the federal government, as well as excise taxes and estate and gift taxes.

Where state and federal tax legislation are concurrent, constitutional challenges can be brought under the General Welfare Clause³⁷⁷ and the Tenth Amendment of the Constitution. In recent years, however, the Tenth Amendment has been interpreted “to encompass any implied constitutional limitation on Congress’ authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.”³⁷⁸ Thus, “the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”³⁷⁹

The prohibition of interstate commerce is deduced from the Commerce Clause,³⁸⁰ prohibiting states to interfere with interstate commerce. Although it was invoked several times, case law does not provide for a clear pattern of precedent in this respect. In *Complete Auto*,³⁸¹ four requirements were spelled out for a tax on interstate commerce to survive a constitutional challenge.³⁸² The third requirement, the ban on discrimination against interstate commerce, is the predominant basis upon which the Supreme Court has struck down state taxes in recent years.

E Retroactivity of tax legislation

The Constitution explicitly prohibits “ex post facto law” in criminal law matters.³⁸³ The Constitution does not contain an explicit prohibition of retroactive tax laws.

However, most taxpayers have challenged retroactive tax laws under the Due Process Clause of the Fifth or Fourteenth Amendments to the Constitution. The Supreme Court has consistently upheld retroactively applied income tax law changes,³⁸⁴ holding that retroactively applied tax laws are only prohibited if they are “so harsh and oppressive as to transgress the constitutional limitation”.³⁸⁵

F Protection of Marriage

The Constitution does not contain a specific provision on the protection of marriage or certain family structures.

³⁷⁷ Article I, section 8(1) of the Constitution

³⁷⁸ *South Carolina v. Baker*, 485 U.S. 505, 511 No.5 (1988)

³⁷⁹ *New York v. United States*, 505 U.S. 144, 157 (1992)

³⁸⁰ Article I, section 8(3) of the Constitution

³⁸¹ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)

³⁸² The four requirements are: 1) the activity must be sufficiently connected to the state to justify a tax; 2) the tax must be fairly apportioned; 3) the tax must not discriminate against interstate commerce; and 4) the tax must be fairly related to benefits provided to the taxpayer

³⁸³ Article I, section 9(3) of the Constitution

³⁸⁴ *Welch v. Henry*, 305 U.S. 134 (1938)

³⁸⁵ *Id.* at 147

However, the Internal Revenue Code does provide filing statuses for income taxes, such as married filing jointly. This way, spouses can split their income amongst them in order to gain a certain tax profit. This splitting of income is allowed to married couples. Non-married couples can be considered married for federal income tax purposes, because of the Defense of Marriage Act (DOMA).

There have been few cases in which same-sex non-married couples have challenged the constitutionality of this Act,³⁸⁶ so far unsuccessfully.

G Other principles of constitutional tax law

The main principles of United States' constitutional tax law are mentioned under A to F above. Most of them have been subject of Supreme Court rulings.

The Constitution also lays down the principle of freedom of religion³⁸⁷. Based on this provision, taxes on churches or religious expression which would hinder the exercise of this freedom are prohibited.³⁸⁸ Similarly, the Supreme Court struck down a sales tax exemption granted solely to publications promoting religious faith as a violation of the First Amendment.³⁸⁹

³⁸⁶ E.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005)

³⁸⁷ First Amendment to the Constitution

³⁸⁸ *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) on a licensing tax imposed on individuals distributing religious material house-to-house

³⁸⁹ *Tex. Monthly Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989)

| | Principle of legality | Principle of equality | Unreasonable searches and seizures; non-confiscation of property | Allocation taxing powers/ discrimination of interstate trade and commerce | Retroactivity | Protection of marriage | Other principles |
|----------------------|--------------------------------------|---|---|---|-------------------------|-------------------------------|--|
| Australia | Section 51(II), 53-55, 57, 90 | Section 51(XXVI), 92, 117 | Section 51(XXXI) | Section 51(II),90, 92, 114 | - | - | Section 116 |
| Belgium | Art. 170 | Art. 10, 11, 172 | Art. 15, 16, 17, 191 | Art. 41, 162, 170(3) | - | Art. 22 | - |
| Brazil | Art. 5 (II), 145(I), 146(II), 150(I) | Art. 5(0)(I), 150(II) | Art. 5(XI), 5(XIV), 5(XXII), 150(IV) | Art. 24(I), 30(III), 150(V), 151(I), 152, 153(0), 154(I) 155(0), 156(0) | Art. 150(III) | Art. 226 | Art. 153(3.II), 154(I), 155(2.I) |
| Canada | Section 53 CA 1982 | Section 15 CA 1982, Section 28 CA 1982 | Section 8 CA 1982 | Section 91(3), 92(2) CA 1867 | - | - | - |
| France | Art. 34 | Art. 1 Constitution, Art. 1, 6, 13 Declaration 1789 | Art. 17 Declaration 1789 | Art. 34, 72 Constitution, | Art. 8 Declaration 1789 | - | Art 1 Constitution; Art. 10 Declaration 1789 |
| Germany | Art. 2(1), 20(3), 28(1) | Art. 3(1), 20(3) | Art. 1(1), 2(1), 14(1, 3) | Art. 28(2), 71, 72(2), 105, 106, 107, 108 | Art. 103(II) | Art. 6(1) | Art. 1(1), 2(2), 3(1), 12(1), 14(1), 19(3) |
| India | Art. 246, 248, 251, 265 | Art. 14 | Art. 300A | Art. 13, 248, 251, 264 | - | - | - |
| Italy | Art. 2, 25, 70, 76, 117(2) | Art. 3(1), 53(1) | Art. 14(1)(3), 42(2)(3) | Art. 117, 119, 120(1),(2) | Art. 25 | Art. 29, 31, 53(2) | Art. 8, 19, 20 |
| Japan | Art. 30, 84 | Art. 14 | Art. 29, 30, 35 | Art. 41, 84, 92, 94 | Art. 84 | Art. 24 | - |
| Russia | Art. 1, 3, 4, 7, 57 | Art. 5(4), 6, 8(2), 17, 19, 45, 57 | Art. 8(2), 22, 25, 35, 46, 55(3), 57 | Art. 8(1), 72(Ii), 73, 74(1), 75(3), 76(2), 78(1), 94, 106(b), 107, 114(1b), 132(1) | Art. 54, 57 | Art. 19(2), 38 | Art. 14, 28 |
| Spain | Art. 9, 31(3), 133(3) | Art. 1, 14, 31(1) | Art. 18, 31, 33 | Art.133, 142, 156(2), 157 | Art. 9, 25 | Art. 32 | - |
| United States | Art. I Section 8(1) Amendment XVI | Amendment XIV | Amendment IV Amendment V | Art. I Section 8(1), Amendment X | Art. I Section 9(3) | - | Amendment I |

LEGAL TEXTS OF CONSTITUTIONAL PROVISIONS³⁹⁰

A PRINCIPLE OF LEGALITY

Australia:

Section 55 [Exclusive Content of Revenue Laws]

- (1) Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
- (2) Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Belgium:

Article 170 [Taxes]

- (1) Taxes to the benefit of the State may be imposed only by virtue of a law.
- (2.1) Taxes to the benefit of Communities or Regions may be imposed only through a decree or ruling as described in Article 134.
- (2.2) The law determines, with respect to those taxes described in Paragraph (1) those exceptions of proven necessity.
- (3.1) A fee or tax may be established by a province only following the decision of its Council.
- (3.2) A law determines, with respect to the taxes described in Paragraph (1), those exceptions of proven necessity.
- (3.3) The law can suppress, either totally or partially, the taxes referred to in Paragraph (1).
- (4.1) No charge or tax can be established by the urban districts, by the federation of communes, nor by the communes except by a decision made by their Councils.
- (4.2) The law determines, with respect to the taxes described in Paragraph (1), those exceptions of proven necessity.

Brazil:

Article 5 [Equality]

- (0) All persons are equal before the law, without any distinction whatsoever, and Brazilians and foreigners resident in Brazil are assured of inviolability of the right of life, liberty, equality, security, and property, on the following terms:

³⁹⁰ Each legal provision has only mentioned once. Therefore, some provisions cover more than one constitutional principle. For an overview of the provisions per country see the matrix table.

- I. ...;
 - II. no one shall be obliged to do or not to do something other than by virtue of law;
- ...
- (1) The provisions defining fundamental rights and guarantees are applicable immediately.
 - (2) The rights and guarantees established in this Constitution do not preclude others arising out of the regime and the principles adopted by it, or out of international treaties to which the Federative Republic of Brazil is a party.

Article 145 [Taxation]

- (0) The Republic, the States, the Federal District, and the Municipalities may institute the following tributes:
 - I. taxes;
 - II. fees, by virtue of the exercise of police power or for the actual or potential use of specific and divisible public services rendered to taxpayers or made available to them.
 - III. assessments, by virtue of public works.
- (1) Whenever possible, taxes shall be personal and graded according to the economic capacity of the taxpayer, and the tax administration may, especially to make these objectives effective and respecting individual rights and the terms of the law, identify the property, income, and economic activities of the taxpayer.
- (2) Fees may not have the assessment basis reserved for taxes.

Article 146 [Supplemental Law on Taxes]

A supplemental law shall:

- I. deal with conflicts of taxing power among the Republic, the States, the Federal District, and the Municipalities;
- II. regulate the constitutional limits to taxing power;
- III. establish general rules for tax legislation, particularly regarding:
 - a) the definition of tributes and their kinds, and, as regards the taxes specified in this Constitution, the definition of the respective taxable events, assessment bases, and taxpayers;
 - b) tax liability, assessment, credit, statute of limitations, and laches;
 - c) adequate tax treatment for the cooperative acts performed by cooperative entities.

Article 150 [Main Limits]

- (0) Without prejudice to any other guarantees ensured to the taxpayer, it is forbidden for the Republic, the States, the Federal District, and the Municipalities:
 - I. to claim or increase a tax without a law establishing such claim or increase;
 - II. to institute unequal treatment for taxpayers that are in an equivalent situation, it being forbidden to make any distinction by virtue of the professional occupation or function performed by them, regardless of the legal designation of the income, instruments or rights;
 - III. to collect tributes:
 - a) for taxable events that occurred before the effectiveness of the law that instituted or increased them;

- b) in the same fiscal year in which the law that instituted or increased them was published;
 - IV. to use tributes for purposes of confiscation;
 - V. to establish limitations to the traffic of persons or goods by means of interstate or inter-municipal tributes, except for the collection of toll fees for the use of highways maintained by the Government;
 - VI. to institute taxes on:
 - a) property, income, or services of one by another;
 - b) temples of any cult;
 - c) property, income, or services of political parties, including their foundations, of worker unions, and of non-profit educational and social assistance institutions, with due regard for the requirements of the law;
 - d) books, newspapers, periodicals, and paper intended for the printing thereof;
 - e) The prohibition contained in Item III b) does not apply to the taxes set forth in Articles 153 I, II, IV, and V, and 154 II.
- (2) The prohibition contained in Item VI a) extends to autonomous government entities and foundations instituted and maintained by the Government as regards the property, income and services connected with their essential purposes or resulting there from.
- (3) The prohibitions contained in Item VI a) and in the preceding paragraph do not apply to property, income, and services connected with the exploitation of economic activities governed by the rules that apply to private undertakings or to undertakings in which users pay consideration or prices or tariffs, not exempt the party who agreed to buy real property from the obligation to pay tax there on.
- (4) The prohibitions contained in Item VI b) and c) encompass only the property, income, and services connected with the essential purpose of the entities mentioned therein.
- (5) The law determines measures for consumers to obtain information regarding the taxes levied on goods and services.
- (6) Any subsidy or exemption, reduction of assessment basis, concession of presumed credit, amnesty or remission, related to taxes, fees or contributions, may only be granted by means of a specific federal, state or municipal law, which provides exclusively for the above-enumerated matters or the corresponding tax, fee or contribution, without prejudice to the provisions of Article 155 (2) XII g.
- (7) The law may impose upon the taxpayer the burden of the payment of a tax or contribution, whose taxable event will occur later, the immediate and preferential restitution of the amount paid being ensured, in case the presumed taxable event does not occur.

Canada:

Section 53 [Repealed Provisions]

- (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to be extent indicated in Column II thereof, and unless repealed, shall continue as law in Canada under the names set out in Column III thereof.
- (2) Every enactment, except the Canada Act, 1982, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the Constitution Act followed by the year and number, if any, of its enactment.

France:

Article 34 [Legislative Powers]

- (1) All legislation shall be passed by Parliament.
- (2) Legislation shall establish the rules concerning:
 - civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties; the national defence obligations imposed on citizens in respect of their persons or property;
 - nationality, status, and capacity of persons, property rights arising out of a matrimonial relationship, inheritance, and gifts;
 - determination of felonies and misdemeanours, together with the penalties applicable to them; criminal procedure; amnesty; the creation of new jurisdictions and the status of judges;
 - the assessment bases, rates, and methods of collecting taxes of all types; the issuance of currency.
- (3) Legislation shall likewise determine the regulations concerning:
 - the electoral systems of the parliamentary Assemblies and local Assemblies;
 - the creation of categories of public establishments;
 - the fundamental guarantees granted to civil and military personnel employed by the State;
 - company nationalizations and transfers of company ownership from the public to the private sector.
- (4) Legislation shall determine the fundamental principles of:
 - the general organization of national defence;
 - free local government and the powers and resources of local authorities;
 - education;
 - the rules governing property rights, chattels real, civil and commercial obligations;
 - labour and trade-union law and social security.
- (5) Finance acts shall determine the financial resources and obligations of the State, subject to the conditions and reservations laid down in an organic act.
- (6) Program acts shall specify the objectives of State economic and social policy.
- (7) The provisions of this article may be developed in detail and amplified by an organic act.

Germany:

Article 2 [Personal freedoms]

- (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
- (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Article 20 [Basic institutional principles; defence of the constitutional order]

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
- (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
- (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Article 28 [Federal guarantee of Land constitutions and of local self-government]

- (1) The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal, and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.
- (2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.
- (3) The Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

India:

265. Taxes not to be imposed save by authority of law

No tax shall be levied or collected except by authority of law.

Italy:

Article 70 [Legislative Power]

Legislative power is exercised jointly by the chambers.

Article 76 [Delegation of Legislative Power]

Legislative power may not be delegated to the government unless parliament specifies principles and criteria of guidance, and only for limited time and well-specified subjects

Japan:*Article 30 [Taxation]*

The people shall be liable to taxation as provided by law.

Article 84 [Tax Laws]

No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.

Russian Federation:*Article 57 [Duty to Pay Taxes]*

Everyone is obliged to pay lawful taxes and fees. Laws introducing new taxes or worsening the situation of tax payers may not have retroactive force.

Spain:*Article 9 [Rule of Law]*

- (1) The citizens and public powers are subject to the Constitution and the legal order.
- (2) It is the responsibility of the public powers to promote conditions so that liberty and equality of the individual and the groups he joins will be real and effective; to remove those obstacles which impede or make difficult their full implementation, and to facilitate participation of all citizens in the political, economic, cultural, and social life.
- (3) The Constitution guarantees the principle of legality, the normative order, the publication of the norms, the non-retroactivity of punitive provisions which are not favorable to, or which restrict individual rights, legal security, and the interdiction of arbitrariness of public powers.

Article 31 [Taxes]

- (1) Everyone shall contribute to the sustenance of public expenditures according to their economic capacity through a just tax system based on the principles of equality and progressive taxation which in no case shall be of a confiscatory scope.
- (2) Public expenditure shall realize an equitable allocation of public resources and its programming and execution shall be in keeping with criteria for efficiency and economy.
- (3) Personal or property contributions of a public nature may only be made in accordance with the law.

Article 133 [Taxation Power]

- (1) The original power to establish taxes by means of law belongs exclusively to the State.
- (2) The Autonomous Communities and the local Corporations may establish and levy taxes in accordance with the Constitution and the laws.

- (3) All fiscal profits which affect State taxes must be established by virtue of law.
- (4) The public administrations may only contract financial obligations and incur expenditures in accordance with the law.

United States:

Section 8 [Legislative Power]

(1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

(...)

.

Amendment XVI [1913 – Income Tax]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

B PRINCIPLE OF EQUALITY

Belgium:

Article 172 [No Privileges]

- (1) No privileges with regard to taxes can be established.
- (2) No exemption or reduction of taxes can be established except by a law.

Canada:

Section 15 [General Equality, No Discrimination]

- (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Section 28 [Sex Equality]

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

France:

Article 1 [Institution of Community]

- (1) The Republic and the peoples of the Overseas Territories who, by free determination, adopt the present Constitution thereby institute a Community.
- (2) The Community shall be based on the equality and solidarity of the peoples composing it.

Number 13 of the 1789 Declaration

A common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion to their means.

Germany:

Article 3 [Equality before the law]

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

India:

14. Equality before law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Italy:

Article 3 [Equality]

- (1) All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.
- (2) It is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country.

Article 53 [Taxation]

- (1) Everyone has to contribute to public expenditure in proportion to their capacity.
- (2) The tax system has to conform to the principle of progression.

Japan:

Article 14 [No Discrimination and Privileges]

- (1) All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.
- (2) Peers and peerage shall not be recognized.
- (3) No privilege shall accompany any award of honor, decoration, or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Russian Federation:

Article 8 [Economic Guarantees]

- (1) Unity of economic space, free movement of goods, services and financial resources, support for competition and freedom of any economic activity is guaranteed in the Russian Federation.
- (2) Private, state, municipal and other forms of ownership are recognized and enjoy equal protection in the Russian Federation.

Article 19 [Equality]

- (1) All people are equal before the law and in the court of law.
- (2) The state guarantees the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions, membership of public associations or any other circumstance. Any restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds are forbidden.
- (3) Man and woman have equal rights and liberties and equal opportunities for their pursuit.

Spain:

Article 1 [State Principles, Sovereignty, Form]

- (1) Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order.
- (2) National sovereignty belongs to the Spanish people from who emanate the powers of the state.
- (3) The political form of the Spanish State is the parliamentary Monarchy.

Article 14 [Equality]

Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance.

United States:

Amendment XIV [1868 – Privileges and Immunities, Due Process, Equal Protection]

Section 1 [Privileges and Immunities, Due Process, Equal Protection]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2 [Apportionment of Representatives]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3 [Civil War Disqualification]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4 [Public Debt]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5 [Congressional Power]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

C PROTECTION FROM UNREASONABLE SEARCHES AND SEIZURES; NON-CONFISCATION OF PROPERTY

Belgium:

Article 15 [Home]

The domicile is inviolable; no visit to the individual's residence can take place except in the cases provided for by law and in the form prescribed by law.

Article 16 [Property]

No one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by law, and in return for a fair compensation paid beforehand.

Article 17 [No Confiscation]

Punishment by confiscation of assets cannot be made.

Canada:

Section 8 [Search and Seizure]

Everyone has the right to be secure against unreasonable search or seizure.

France:

Number 17 of the 1789-Declaration

Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.

Germany:

Article 1 [Human dignity]

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

Article 14 [Property, inheritance, expropriation]

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

India:

300A. Persons not to be deprived of property save by authority of law

No person shall be deprived of his property save by authority of law.

Italy:

Article 14 [Personal Domicile]

- (1) Personal domicile is inviolable.
- (2) No one's domicile may be inspected, searched, or seized save in cases and in the manner laid down by law conforming to the guarantee of personal liberty.
- (3) Verifications and inspections for public health and safety, or for economic and fiscal purposes are defined by law.

Article 42 [Property]

- (1) Property is public or private. Economic goods may belong to the state, to public bodies, or to private persons.
- (2) Private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment and its limits, in order to ensure its social function and to make it accessible to all.
- (3) Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.
- (4) The law establishes the rules of legitimate and testamentary succession and its limits and the state's right to the heritage.

Japan:

Article 35 [Search, Seizure]

- (1) The right of all persons to be secure in their homes, papers, and effects against entries, searches, and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized or except as provided by Article 33.

(2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 29 [Property]

- (1) The right to own or to hold property is inviolable.
- (2) Property rights shall be defined by law, in conformity with the public welfare.
- (3) Private property may be taken for public use upon just compensation therefore.

Russian Federation:

Article 35 [Private Property]

- (1) The right of private property is protected by law.
- (2) Everyone has the right to have property in his or her ownership, to possess, use and manage it either individually or jointly with other persons.
- (3) No one may be arbitrarily deprived of his or her property unless on the basis of decision by a court of law. Property can be forcibly alienated for state needs only on condition of a preliminary and equal compensation.
- (4) The right of inheritance is guaranteed.

Spain:

Article 18 [Honor, Privacy, Home, Secrecy of Communication]

- (1) The right of honor, personal, and family privacy and identity is guaranteed.
- (2) The home is inviolable. No entry or search may be made without legal authority except with the express consent of the owners or in the case of a *flagrante delicto*.
- (3) Secrecy of communications, particularly regarding postal, telegraphic, and telephone communication, is guaranteed, except for infractions by judicial order.
- (4) The law shall limit the use of information, to guarantee personal and family honor, the privacy of citizens, and the full exercise of their rights.

Article 33 [Property, Inheritance]

- (1) The right to private property and inheritance is recognized.
- (2) The social function of these rights shall determine the limits of their content in accordance with the law.
- (3) No one may be deprived of his property and rights except for justified cause of public utility or social interest after proper indemnification in accordance with the provisions of law.

United States:

Amendment IV[1791 - Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V *[1791 – Grand Jury, Double Jeopardy, Self-Incrimination, Due Process]*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

D₁ ALLOCATION OF TAXING POWERS

Australia:

Section 51 [Legislative Competencies]

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

- (i) ...;
- (ii) Taxation; but so as not to discriminate between States or parts of States;
- ...

Section 90 [Exclusive Power to Impose Duties of Customs]

- (1) On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
- (2) On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Belgium:

Article 41 [Decentralization, Adjournment]

Interests which are exclusively of a communal or provincial nature are ruled on by communal or provincial councils, according to the principles established by the Constitution. The King can adjourn the Houses. However, the adjournment cannot exceed the period of one month, nor be renewed in the same session without the consent of the Houses.

Article 162 [Principles]

- (1) Provincial and communal institutions are governed by the law.
- (2) The law applies the following principles:
 - 1) the direct election of provincial and of communal Council members;
 - 2) the attribution to provincial and communal Councils all that which is in the provincial or communal interest, without prejudice to the approval of their actions in cases and following that manner determined by law;
 - 3) the decentralization of attributions in favor of provincial and communal institutions;
 - 4) the publicizing of provincial and communal Council meetings within the limits established by law;
 - 5) the publicizing of accounts and budgets;
 - 6) the intervention of overseeing authorities or of the federal legislative lower, to prevent violations of the law or harm to public interests.

- (3) In application of a law adopted by majority vote as described in Article 4, last paragraph, the organization and application of administrative overseeing may be determined by Community or Regional Councils.
- (4) In application of a law adopted by majority vote as described in Article 4, last paragraph, the decree or the ruling described in Article 134 establishes the conditions and the manner in which several provinces or communes may associate themselves or co-operate. However, the convening of several provincial or communal Councils for joint deliberation may not be allowed.

Brazil:

Article 24 [Concurrent Legislation]

- (0) It is incumbent upon the Union, the States, and the Federal District to legislate concurrently on:
- I. tax, financial, penitentiary, economic, and city planning law;
 - (...)
- (1) Within the scope of concurrent legislation, the jurisdiction of the Republic is limited to establishing general rules.
- (2) The jurisdiction of the Republic to legislate under general rules does not preclude the supplementary jurisdiction of the States.
- (3) If there is no federal law on general rules, the States exercises full legislative jurisdiction to provide for their peculiarities.
- (4) The supervening of a federal law over general rules suspends the effectiveness of a State law, to that extent that it is contrary thereto.

Article 30 [Municipal of Self Government]

It is incumbent upon the Municipalities:

- I. to legislate on matters of local interest;
- II. to supplement federal and state legislation where applicable;
- III. to institute and collect the taxes coming under their jurisdiction, as well as apply their revenues, regardless of the obligation to render accounts and public trial balance sheets within the periods established by law;
- IV. to create, organize, and suppress districts, with due regard for state legislation;
- V. to organize and render either directly or by concession or permission, essential public services of local interest, including collective transportation;
- VI. to maintain with the technical and financial cooperation of the Republic and State, pre-school education and elementary school programs;
- VII. to render, with the technical and financial cooperation of the Republic and State, health services to the population;
- VIII. to promote, where applicable, adequate land ordainment through planning and control of use, apportionment, and occupation of the city soil;
- IX. to promote the protection of local historical cultural monuments, with due regard for federal and state legislation and supervision.

Article 153 [Taxes of the Federation]

- (0) It is incumbent upon the Republic to institute taxes on:
 - I. imports of foreign products;
 - II. exports to other countries of national or nationalized products;
 - III. income and earnings of any nature;
 - IV. industrialized products;
 - V. transactions of credit, foreign exchange, and insurance, or transactions with instruments and securities;
 - VI. rural property;
 - VII. large fortunes, according to a supplemental law.
- (1) The executive Branch may, with due regard for the conditions and limits established in the law, alter the rates of the taxes listed in Items I, II, IV, and V.
- (2) The tax established in Item III:
 - I. shall be based on criteria of generality, universality, and progressiveness according to the law;
 - II. shall not be levied, according to the terms and limits established in the law, on income derived from retirement and pension paid by the social security system of the Republic, of the States, of Federal District, and of the Municipalities to a person with over sixty-five years of age and whose total income consists exclusively of work pay.
- (3) The tax set forth in Item IV:
 - I. shall be selective, based on the essentiality of the product;
 - II. shall be non-cumulative, and the tax due for each transaction shall be offset by the amount charged at the previous transactions;
 - III. shall not be levied on industrialized products intended for export.
- (4) The tax set forth in Item VI shall have its rates established in such a manner as to discourage the maintenance of unproductive real property and shall not be levied on small rural areas, as defined by law, when they are explored by himself or with his family, by an owner who has no other real property.
- (5) Gold, when defined by law as a financial asset or negotiable instrument, is subject exclusively to the tax mentioned in item V of the main provision of this article, which is due on the original transaction; the minimum rate is one per cent, ensuring the transfer of the collected amount on the following terms:
 - I. thirty per cent to the State, the Federal District, or the Territory, depending on the origin;
 - II. seventy per cent to the Municipality of origin.

Article 154 [National Taxes]

The Republic may institute:

- I. by means of a supplemental law, taxes not listed in the preceding article, provided they are non-cumulative and have a specific taxable event or assessment basis other than those specified in this Constitution;
- II. upon the imminence or in the case of foreign war, extraordinary taxes, whether or not included in its taxing power, which shall be gradually suppressed when the causes for their creation ceased.

Article 155 [State and Federal District]

- (0) The states and the Federal District shall have the power to institute taxes on:
 - I. transfer by death and donation of any property or rights;
 - II. transactions relating to the circulation of goods and to the rendering of interstate and inter-municipal transportation services and services of communication, even when such transactions and renderings begin abroad;
 - III. ownership of automotive vehicles.
- (1) The tax established in item I:
 - I. for real property and respective rights is within the jurisdiction of the Federal District or of the State where the property is located;
 - II. for assets, instruments, and credits is within the jurisdiction of the Federal District or of the State where the probate or enrolment is processed, or where the donor has his or her domicile;
 - III. shall have its authority regulated by a supplemental law:
 - a) if the donor is domiciled or resident abroad;
 - b) if the deceased owned property, was resident or domiciled or had his or her probate processed abroad;
 - IV. shall have its maximum rates established by the Federal Senate.
- (2) The tax established in item II shall observe the following:
 - I. it shall be non-cumulative and the tax due on each transaction of circulation of goods or rendering of services shall be offset by the amount charged at the previous ones by the same or by another State or by the Federal District;
 - II. exemption or non-levy, except as otherwise determined in the law:
 - a) shall not imply a credit for offset against the amount due on the following transactions or rendering or services;
 - b) shall cause the annulment of the credit for the previous transactions;
 - III. may be selective, according to the essentiality of the goods or services;
 - IV. a resolution of the Federal Senate, on the initiative of the President of the Republic or of one third of the Senators, approved by an absolute majority of its members, establishes the rates that are to apply to interstate and export transactions and rendering of services;
 - V. the Federal Senate may:
 - a) establish minimum rates for internal transactions, by a resolution on the initiative of one third and approved by an absolute majority of its members;
 - b) establish maximum rates for the same transactions to resolve a specific conflict involving interests of States, by a resolution on the initiative of an absolute majority and approved by two thirds of its members;
 - VI. unless otherwise determined by the States and the Federal District, according to Item VII g), the internal rates for transactions of circulation of goods and of rendering of services may not be lower than those established for interstate transactions;
 - VII. the following shall be adopted for transactions and for rendering of goods and services to end consumers located in another State:
 - a) an interstate rate, when the recipient is a taxpayer;
 - b) an internal rate, when the recipient is not a taxpayer;
 - VIII. in the event of Sub-item a) of the preceding item, the tax corresponding to the difference between the internal rate and the interstate rate shall be attributable to the State where the recipient is located;

- IX. shall also be levied:
 - a) on the entry of goods imported from abroad, even in the case of goods intended for consumption or for the fixed assets of the establishment, as well as on services rendered abroad, the tax being attributable to the State where the establishment receiving the goods or services is located;
 - b) on the total value of the transaction, when goods are supplied with services not included in the taxing power of the Municipalities;
 - X. shall not be levied:
 - a) on transactions transferring industrialized products abroad, excluding semi-processed products as defined in a supplemental law;
 - b) on transactions transferring oil, including lubricants, liquid and gaseous fuels derived there from and electric energy to other States;
 - c) on gold, in the events defined in Article 153 (5);
 - XI. shall not include in its assessment basis the amount of the tax on industrialized products, when the transaction made between taxpayers and involving a products intended for industrialization or sale, represents a taxable event for both taxes;
 - XII. a supplemental law shall:
 - a) define the taxpayers;
 - b) deal with tax substitution;
 - c) regulate the system for offsetting the tax;
 - d) establish, for purposes of collection of the tax and definition of the liable establishment, the location of transactions of circulation of goods and of rendering of services;
 - e) exclude from levy of the tax, in export to other countries, services and products other than those mentioned in Item X a);
 - f) provide for the maintenance of a credit for services and goods remitted to another State and exported to other countries;
 - g) regulate the manner in which, by resolution of the States and the Federal District, tax exemptions, incentives and benefits shall be granted and revoked.
- (3) With the exception of the taxes mentioned in item II of the caption of the present article, and Article 153 I and II, no other tribute may be levied on transactions concerning electric energy, telecommunications services, petroleum by-products, fuels and minerals of the country.

Article 156 [Municipal Taxes]

- (0) It is incumbent upon the Municipalities to institute taxes on:
 - I. urban real property;
 - II. transfer of propriety among alive persons, on any account and for consideration, of real property by nature or physical accession and of any in rem rights to real property, except for collateral, as well as the assignment of rights to the purchase thereof;
 - III. services of any nature not included in Article 155 II, as defined in a supplementary law.
 - IV. services of any nature not included in Article 155 I b), as defined in a supplemental law.
- (1) The tax set forth in Item I may be progressive, according to a municipal law, in order to ensure achievement of the social function of the property.

- (2) The tax set forth in Item II:
 - I. shall not be levied on the transfer of property or rights incorporated into the assets of a legal entity to pay up its capital, nor on the transfer of property or rights as a result of consolidation, merger, spin off or extinction of a legal entity, unless, in the latter cases, the preponderant activity of the purchaser is the purchase and sale of such property or rights, the lease of real property or leasing;
 - II. is attributable to the Municipality where the property is located.
- (3) As regards the tax established in item III, a supplementary law shall:
 - I. establish its maximum rates;
 - II. exclude exportations of services to other countries from levy of the said tax.
- (4) A supplemental law shall:
 - I. establish the maximum rates for the taxes set forth in Items III and IV;
 - II. exclude exports of services abroad from levy of the tax set forth in item IV.

Canada:

Section 91 [National Legislative Powers]

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this act assigned exclusively to the Legislatures of the Provinces;

and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

(...)

3) The raising of Money by any Mode or System of Taxation.

(...)

And any Matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this act assigned exclusively to the Legislatures of the Provinces.

Section 92 [Provincial Legislative Powers]

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

1) {...}

2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3) The borrowing of Money on the sole Credit of the Province.

(...)

France:

Article 72 [Definition, Creation, Self-Government]

- (1) The territorial entities of the Republic are the communes, departments, and overseas territories. Any other territorial entities shall be created by legislation.
- (2) These entities shall freely govern themselves through elected councils and under the conditions stipulated by legislation.
- (3) In the departments and territories, the Government Delegate shall be responsible for the national interests, administrative supervision, and law enforcement.

Germany:

Article 28 [Federal guarantee of Land constitutions and of local self-government]

- (1) The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal, and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.
- (2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.
- (3) The Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

Article 72 [Concurrent legislative power of the Federation definition]

- (1) On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.
- (2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.
- (3) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by Land law.

Article 105 [Legislative powers]

- (1) The Federation shall have exclusive power to legislate with respect to customs duties and fiscal monopolies.

(2) The Federation shall have concurrent power to legislate with respect to all other taxes the revenue from which accrues to it wholly or in part or as to which the conditions provided for in paragraph (2) of Article 72 apply.

(2a) The *Länder* shall have power to legislate with respect to local taxes on consumption and expenditures so long and insofar as they are not substantially similar to taxes imposed by a federal law.

(3) Federal laws relating to taxes the revenue from which accrues wholly or in part to the *Länder* or to municipalities (associations of municipalities) shall require the consent of the *Bundesrat*.

Article 106 [Apportionment of tax revenue]

(1) The yield of fiscal monopolies and the revenue from the following taxes shall accrue to the Federation:

1. customs duties;
2. taxes on consumption insofar as they do not accrue to the *Länder* pursuant to paragraph (2), or jointly to the Federation and the *Länder* in accordance with paragraph (3), or to municipalities in accordance with paragraph (6) of this Article;
3. the highway freight tax;
4. the taxes on capital transactions, insurance, and bills of exchange;
5. nonrecurring levies on property and equalization of burdens levies;
6. income and corporation surtaxes;
7. levies imposed within the framework of the European Communities.

(2) Revenue from the following taxes shall accrue to the *Länder*:

1. the property tax;
2. the inheritance tax;
3. the motor vehicle tax;
4. such taxes on transactions as do not accrue to the Federation pursuant to paragraph (1) or jointly to the Federation and the *Länder* pursuant to paragraph (3) of this Article;
5. the beer tax;
6. the tax on gambling establishments.

(3) Revenue from income taxes, corporation taxes, and turnover taxes shall accrue jointly to the Federation and the *Länder* (joint taxes) to the extent that the revenue from the income tax and the turnover tax is not allocated to municipalities pursuant to paragraphs (5) and (5a) of this Article. The Federation and the *Länder* shall share equally the revenues from income taxes and corporation taxes. The respective shares of the Federation and the *Länder* in the revenue from the turnover tax shall be determined by a federal law requiring the consent of the *Bundesrat*. Such determination shall be based on the following principles:

1. The Federation and the *Länder* shall have an equal claim against current revenues to cover their necessary expenditures. The extent of such expenditures shall be determined with due regard to multi-year financial planning.
2. The financial requirements of the Federation and of the *Länder* shall be coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers, and ensure uniformity of living standards throughout the federal territory.

In determining the respective shares of the Federation and the *Länder* in the revenue from the turnover tax, reductions in revenue incurred by the *Länder* from January 1, 1996 because of the provisions made with respect to children in the income tax law shall also be taken into account. Details shall be regulated by the federal law enacted pursuant to the third sentence of this paragraph.

(4) The respective shares of the Federation and the *Länder* in the revenue from the turnover tax shall be apportioned anew whenever the ratio of revenues to expenditures of the Federation becomes substantially different from that of the *Länder*; reductions in revenue that are taken into account in determining the respective shares of revenue from the turnover tax under the fifth sentence of paragraph (3) of this Article shall not be considered in this regard. If a federal law imposes additional expenditures on or withdraws revenue from the *Länder*, the additional burden may be compensated for by federal grants pursuant to a federal law requiring the consent of the *Bundesrat*, provided the additional burden is limited to a short period of time. This law shall establish the principles for calculating such grants and distributing them among the *Länder*.

(5) A share of the revenue from the income tax shall accrue to the municipalities, to be passed on by the *Länder* to their municipalities on the basis of the income taxes paid by their inhabitants. Details shall be regulated by a federal law requiring the consent of the *Bundesrat*. This law may provide that municipalities may establish supplementary or reduced rates with respect to their share of the tax.

(5a) From and after January 1, 1998, a share of the revenue from the turnover tax shall accrue to the municipalities. It shall be passed on by the *Länder* to their municipalities on the basis of a formula reflecting geographical and economic factors. Details shall be regulated by a federal law requiring the consent of the *Bundesrat*.

(6) Revenue from taxes on real property and trades shall accrue to the municipalities; revenue from local taxes on consumption and expenditures shall accrue to the municipalities or, as may be provided for by Land legislation, to associations of municipalities. Municipalities shall be authorized to establish the rates at which taxes on real property and trades are levied, within the framework of the laws. If there are no municipalities in a Land, revenue from taxes on real property and trades as well as from local taxes on consumption and expenditures shall accrue to the Land. The Federation and the *Länder* may participate, by virtue of an apportionment, in the revenue from the tax on trades. Details regarding such apportionment shall be regulated by a federal law requiring the consent of the *Bundesrat*. In accordance with Land legislation, taxes on real property and trades as well as the municipalities' share of revenue from the income tax and the turnover tax may be taken as a basis for calculating the amount of apportionment.

(7) An overall percentage of the Land share of total revenue from joint taxes, to be determined by Land legislation, shall accrue to the municipalities or associations of municipalities. In all other respects Land legislation shall determine whether and to what extent revenue from Land taxes shall accrue to municipalities (associations of municipalities).

(8) If in individual *Länder* or municipalities (associations of municipalities) the Federation requires special facilities to be established that directly result in an increase of expenditure or in reductions in revenue (special burden) to these *Länder* or municipalities (associations of municipalities), the Federation shall grant the necessary compensation if and insofar as the *Länder* or municipalities (associations of municipalities) cannot reasonably be expected to bear the burden. In granting such compensation, due account shall be taken of indemnities paid by third parties and financial benefits accruing to these *Länder* or municipalities (associations of municipalities) as a result of the establishment of such facilities.

(9) For the purpose of this Article, revenues and expenditures of municipalities (associations of municipalities) shall also be deemed to be revenues and expenditures of the *Länder*.

Article 107 [Financial equalization]

(1) Revenue from Land taxes and the Land share of revenue from income and corporation taxes shall accrue to the individual *Länder* to the extent that such taxes are collected by revenue authorities within their respective territories (local revenue). Details respecting the delimitation as well as the manner and scope of allotment of local revenue from corporation and wage taxes shall be regulated by a federal law requiring the consent of the *Bundesrat*. This law may also provide for the delimitation and allotment of local revenue from other taxes. The Land share of revenue from the turnover tax shall accrue to the individual *Länder* on a per capita basis; a federal law requiring the consent of the *Bundesrat* may provide for the grant of supplementary shares not exceeding one quarter of a Land share to *Länder* whose per capita revenue from Land taxes and from income and corporation taxes is below the average of all the *Länder* combined.

(2) Such law shall ensure a reasonable equalization of the disparate financial capacities of the *Länder*, with due regard for the financial capacities and needs of municipalities (associations of municipalities). It shall specify the conditions governing the claims of *Länder* entitled to equalization payments and the liabilities of *Länder* required making them as well as the criteria for determining the amounts of such payments. It may also provide for grants to be made by the Federation to financially weak *Länder* from its own funds to assist them in meeting their general financial needs (supplementary grants).

Article 108 [Financial administration]

(1) Customs duties, fiscal monopolies, taxes on consumption regulated by a federal law, including the turnover tax on imports, and levies imposed within the framework of the European Communities shall be administered by federal revenue authorities. The organization of these authorities shall be regulated by a federal law. The heads of intermediate authorities shall be appointed in consultation with the Land governments.

(2) All other taxes shall be administered by the revenue authorities of the *Länder*. The organization of these authorities and the uniform training of their civil servants may be regulated by a federal law requiring the consent of the *Bundesrat*. The heads of intermediate authorities shall be appointed in agreement with the Federal Government.

(3) To the extent that taxes accruing wholly or in part to the Federation are administered by revenue authorities of the *Länder*, those authorities shall act on federal commission. Paragraphs (3) and (4) of Article 85 shall apply, provided that the Federal Minister of Finance shall take the place of the Federal Government.

(4) Where and to the extent that execution of the tax laws will be substantially facilitated or improved thereby, a federal law requiring the consent of the *Bundesrat* may provide for collaboration between federal and Land revenue authorities in matters of tax administration, for the administration of taxes enumerated in paragraph (1) of this Article by revenue authorities of the *Länder*, or for the administration of other taxes by federal revenue authorities. The functions of Land revenue authorities in the administration of taxes whose revenue accrues exclusively to municipalities (associations of municipalities) may be delegated by the *Länder* to municipalities (associations of municipalities) wholly or in part.

(5) The procedures to be followed by federal revenue authorities shall be prescribed by a federal law. The procedures to be followed by Land revenue authorities or, as provided by the second sentence of paragraph (4) of this Article, by municipalities (associations of municipalities) may be prescribed by a federal law requiring the consent of the *Bundesrat*.

(6) Financial jurisdiction shall be uniformly regulated by a federal law.

(7) The Federal Government may issue general administrative rules which, to the extent that administration is entrusted to Land revenue authorities or to municipalities (associations of municipalities), shall require the consent of the *Bundesrat*.

India:

246. Subject-matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the “State List”).

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

248. Residuary powers of legislation

(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

251. Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States

Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Italy:

Article 117 [State and Regional Legislative Power]

(1) Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations.

- (2) The state has exclusive legislative power in the following matters:
- a) foreign policy and international relations of the state; relations of the state with the European Union; right of asylum and legal status of the citizens of states not belonging to the European Union;
 - b) immigration;
 - c) relations between the republic and religious denominations;
 - d) defence and armed forces; state security; weapons, ammunitions and explosives;
 - e) money, protection of savings, financial markets; protection of competition; currency system; state taxation system and accounting; equalization of regional financial resources;
 - f) state organs and their electoral laws; state referenda; election of the European Parliament;
 - g) organization and administration of the state and of national public bodies;
 - h) law, order and security, aside from the local administrative police;
 - i) citizenship, registry of personal status and registry of residence;
 - l) jurisdiction and procedural laws; civil and criminal law; administrative tribunals;
 - m) determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory;
 - n) general rules on education;
 - o) social security;
 - p) electoral legislation, local government and fundamental functions of municipalities, provinces and metropolitan cities;
 - q) customs, protection of national boundaries and international prophylactic measures;
 - r) weights, units of measurement and time standards; coordination of the informative, statistical and information-technology aspects of the data of the state, regional and local administrations; intellectual property;
 - s) protection of the environment, of the ecosystem and of the cultural heritage.
- (3) The following matters are subject to concurrent legislation of both the state and regions: international and European Union relations of the regions; foreign trade; protection and safety of labour; education, without infringement of the autonomy of schools and other institutions, and with the exception of vocational training; professions; scientific and technological research and support for innovation in the productive sectors; health protection; food; sports regulations; disaster relief service; land-use regulation and planning; harbours and civil airports; major transportation and navigation networks; regulation of media and communication; production, transportation and national distribution of energy; complementary and integrative pensions systems; harmonization of the budgetary rules of the public sector and coordination of the public finance and the taxation system; promotion of the environmental and cultural heritage, and promotion and organization of cultural activities; savings banks, rural co-operative banks, regional banks; regional institutions for credit to agriculture and land development.
- In matters of concurrent legislation, the regions have legislative power except for fundamental principles which are reserved to state law.
- (4) The regions have exclusive legislative power with respect to any matters not expressly reserved to state law.
- (5) Regarding the matters that lie within their field of competence, the regions and the autonomous provinces of Trento and Bolzano participate in any decisions about the formation of community law. The regions and autonomous provinces also provide for the implementation and execution of international obligations and of the acts of the European Union in observance of procedures set by state law. State law establishes procedures for the

state to act in substitution of the regions whenever those should fail to fulfil their responsibilities in this respect.

(6) The power to issue by-laws is vested in the state regarding all matters where it has exclusive legislative power, insofar as it does not devolve such power to the regions. The power to issue by-laws is vested in the regions in any other matters. Municipalities, provinces and metropolitan cities have regulatory power with respect to the organization and the fulfilment of the functions assigned to them.

(7) Regional laws have to remove all obstacles which prevent the full equality of men and women in social, cultural, and economic life, and promote equal access of men and women to elective offices.

(8) Regional laws have to ratify agreements reached by a region with another region aimed at the better exercise of their functions, including the establishment of joint institutions.

(9) Within its field of competence the region may establish agreements with foreign states and understandings with territorial entities that belong to a foreign state, in the cases and forms provided for by state law.

Article 119 [Financial Autonomy]

(1) Municipalities, provinces, metropolitan cities and regions have financial autonomy regarding revenues and expenditures.

(2) Municipalities, provinces, metropolitan cities and regions have autonomous resources. They establish and implement their own taxes and revenues, in harmony with the constitution and in accordance with the principles of coordination of the public finances and the taxation system. They receive a share of the proceeds of state taxes related to their territory.

(3) The law of the state establishes an equalization fund to the benefit of areas where the fiscal capacity per inhabitant is reduced, with no restrictions as to the allocation of its proceeds.

(4) The funds deriving from the sources mentioned in the previous paragraphs have to enable municipalities, provinces, metropolitan cities and regions to finance in full the functions attributed to them.

(5) In order to promote economic development, social cohesion, and solidarity, to remove economic and social inequalities, to foster the actual exercise of human rights, to pursue ends other than those pertaining to the exercise of their ordinary functions, the state may allocate additional resources or carry out special actions to the benefit of certain municipalities, provinces, metropolitan cities and regions.

(6) Municipalities, provinces, metropolitan cities and regions have their own assets, assigned to them according to general principles established by state law. They may only contract loans in order to finance investment expenditure. State guarantees on such loans are excluded.

Japan:

Article 41 [Legislative Power]

The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Article 92 [Local Autonomy]

Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 94 [Budget Autonomy]

Local public entities shall have the right to manage their property, affairs, and administration and to enact their own regulations within law.

Russian Federation:

Article 73 [Regional Jurisdiction]

Outside of the jurisdiction of the Russian Federation and the powers of the Russian Federation on issues within the joint jurisdiction of the Russian Federation and the subjects of the Russian Federation, the subjects of the Russian Federation exercises the entire spectrum of state power.

Article 106 [Mandatory Consideration of Federation Council]

The federal laws adopted by the House of Representatives [State Duma] are considered by the Federation Council on a mandatory basis if such laws deal with the issues of:

- a) the federal budget;
- b) federal taxes and levies;
- c) financial, monetary, credit and customs regulations and money emission;
- d) ratification and denunciation of international treaties of the Russian Federation;
- e) the status and protection of the state border of the Russian Federation;
- f) war and peace.

Article 132 [Powers]

- (1) The bodies of local self-government independently manage municipal property, form, approve and execute the local budget, establish local taxes and levies, ensure law and order and solve any other local issues.
- (2) The bodies of local self-government may be invested under law with certain state powers with the transfer of material and financial resources required to exercise such powers. The exercise of the powers transferred is supervised by the state.

Spain:

Article 142 [Financial Autonomy]

The local treasuries must have the means necessary for carrying out the functions which the law attributes to the respective corporations and they shall be supported basically by their own taxes and by sharing those of the State and the Autonomous Communities.

Article 156 [Financial Autonomy]

- (1) The Autonomous Communities shall enjoy financial autonomy for the development and exercise of their competencies, in conformity with the principles of coordination with the State Treasury and solidarity among all Spaniards.
- (2) The Autonomous Communities may act as delegates or collaborators of the State for the collection, management, and settlement of the latter's tax resources, in conformity with the law and the statutes.

Article 157 [Tax Autonomy]

- (1) The resources of the Autonomous Communities shall consist of:
 - a) taxes wholly or partially assigned to them by statute, charges on State taxes, and other shares in State taxes;
 - b) their own taxes, rates, and special levies;
 - c) transfers from an inter-territorial clearing fund and other allocations to be charged to the General State Budgets;
 - d) revenues accruing from their property and private law income;
 - e) the yield from credit operations.
- (2) The Autonomous Communities may under no circumstances adopt measures to raise taxes on property located outside their territory or likely to hinder the free movement of goods or services.
- (3) By means of an organic law, the exercise of the financial competences enumerated in Paragraph (1) may be regulated, the norms for settling the conflicts which may arise, and the possible forms of financial collaboration between the Autonomous Communities and the State.

United States:

Amendment X [1791 - Rights Reserved to States]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

D₂ PROHIBITION OF INTERSTATE TRADE AND COMMERCE

Australia:

Section 92 [No Internal Borders]

- (1) On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.
- (2) But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Brazil:

Article 151 [Limits to the Republic]

It is forbidden for the Republic:

- I. to institute taxes that are not uniform throughout the entire national territory or that imply a distinction or preference regarding a State, the Federal District, or a Municipality to the detriment of another, provided that tax incentives may be granted to balance social economic development among the various regions of Brazil;
- II. to tax income from public debt bonds of the States, of the Federal District, and of the Municipalities, as well as the compensation and earnings of the respective public agents, at levels above those established for its own bonds and agents;
- III. to institute exemptions from taxes within the jurisdiction of the States, the Federal District, or the Municipalities.

Article 152 [Forbidden to Divisions]

It is forbidden for the States, the Federal District and the Municipalities to establish a tax difference between goods and services of any nature by virtue of their origin or destination.

Italy:

Article 120 [Free Circulation and Substitution Clause]

- (1) Regions may not charge import or export duties, nor duties on transit between regions, nor adopt provisions which may hinder in any way the free movements of persons and goods between regions, nor limit the right to work in any part of the national territory.
- (2) The Government may act as a substitute for regional, metropolitan city, provincial, or municipal authorities whenever those should violate international rules or treaties or community law, whenever there is a serious danger for the public safety and security, and whenever such substitution is required in order to safeguard the legal or economic unity of

the nation, and particularly in order to safeguard the basic standards of welfare related to civil and social rights, irrespective of the boundaries of the local governments. The law defines appropriate procedures in order to guarantee that substitution powers are exercised within the limits set by the principles of subsidiarity and fair cooperation.

F PROTECTION OF MARRIAGE

Brazil:

Article 226 [Family]

- (0) The family, the foundation of society, enjoys special protection from the state.
- (1) Marriage is civil and the marriage ceremony is free of charge.
- (2) Church marriage has civil effects according to the law.
- (3) For purposes of State protection, a stable union between a man and a woman as a family unit shall be recognized and the law shall facilitate conversion of such unions into marriage.
- (4) The community formed by any parent and his/her descendants is also considered a family unit.
- (5) The rights and duties of matrimonial society shall be exercised equally by men and women.
- (6) Civil marriage may be dissolved by divorce, after legal separation for more than one year in the cases foreseen in the law, or after "de facto" separation for more than two years.
- (7) Based upon the principles of human dignity and responsible parenthood, family planning is a free option of the couple, it being incumbent upon the State to provide educational and scientific resources for the exercise of such right and any coercion on the part of official or private institutions being forbidden.
- (8) The State shall ensure assistance the family in the person of each of its members and shall create mechanisms to suppress violence in family relationships.

Germany:

Article 6 [Marriage and the family; children born outside of marriage]

- (1) Marriage and the family shall enjoy the special protection of the state.
- (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
- (3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
- (4) Every mother shall be entitled to the protection and care of the community.
- (5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

Italy:

Article 29 [Marriage]

- (1) The family is recognized by the republic as a natural association founded on marriage.
- (2) Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family.

Article 31 [Family]

- (1) The republic furthers family formation and the fulfilment of related tasks by means of economic and other provisions with special regard to large families.
- (2) The republic protects maternity, infancy, and youth; it supports and encourages institutions needed for this purpose.

Japan:

Article 24 [Matrimonial Equality]

- (1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.
- (2) With regards to choice of spouse, property rights, inheritance, choice of domicile, divorce, and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Spain:

Article 32 [Marriage, Matrimonial Equality]

- (1) Man and woman have the right to contract matrimony with full legal equality.
- (2) The law shall regulate the forms of matrimony, the age and capacity for concluding it, the rights and duties of the spouses, causes for separation and dissolution and their effects.

G OTHER ELEMENTS OF CONSTITUTIONAL TAX LAW

Australia:

Section 116 [Freedom of Religion, Secular State]

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

France:

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No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

Germany:

Article 12 [Occupational freedom; prohibition of forced labor]

- (1) All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.
- (2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.
- (3) Forced labor may be imposed only on persons deprived of their liberty by the judgment of a court.

Article 14 [Property, inheritance, expropriation]

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

Italy:

Article 19 [Freedom of Religion]

Everyone is entitled to freely profess religious beliefs in any form, individually or with others, to promote them, and to celebrate rites in public or in private, provided they are not offensive to public morality.

Article 20 [Religious Associations]

For associations or institutions, their religious character or religious or confessional aims do not justify special limitations or fiscal burdens regarding their establishment, legal capacity, or activities.