

British Tax Review

2012

Publication Review

Separation of Powers in Tax Law

Edited by Ana Paula Dourado

Reviewed by Gianluigi Bizoli

Subject: Tax. **Other related subjects:** Constitutional law

***B.T.R. 351** The leading role played by the European Association of Tax Law Professors (EATLP) in the development of a common language in taxation is borne out by the topics chosen for its Annual Congresses. Over the years, many subjects concerning the pure theoretical basis of this field of law, such as the concept of tax, EU freedom and taxation, retroactivity and taxation, etc. have been tackled. This book must now be added to the list.

It is widely accepted that separation of powers is one of the grounds of modern constitutionalism. A positive acknowledgment of this fact can be found in Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789 which states that “[t]oute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de Constitution”. While rights supposedly provide the substantive aspect of the constitution, the political dimension is guaranteed by the distribution of powers and functions to different and independent authorities.¹ The former dimension lays down the aims of the constitutional system; the latter the means for their achievement. Even though some authors have established the supremacy of rights over means,² both dimensions limit and constrain the power and, in this sense, they must be considered as a guarantee against tyranny. In its pure essence, therefore, these two dimensions ensure the rule of law:

“by virtue of which even the power of the majority is subject to legal regulations and limits established to guarantee the fundamental rights of all”.³

Since “[t]axation is the power to coerce other individuals to surrender their property without their consent”,⁴ indeed embodying one of the sharpest expressions of authority,⁵ any inquiry into the constitutional limits of the power to levy taxes appears more than fundamental.

This book offers an insight into the close relationship between the separation of powers and taxation; close because it embodies a detailed definition of separation of powers, which involves fields other than tax law and suffers as a result of the different legal cultures in which the principle is inserted. In this sense, the Editor assumes that this study is a proper exercise of comparative analysis.

The structure of the book mirrors its origins as a topic of an annual Congress. The national reports (Part 2) are preceded by a general report by the Editor (Part 1), whereas Parts 3 and 4 are devoted, respectively, to some remarks by the co-director of the working group, H.J. Pezzer, President of the German Bundesfinanzhof, and to synoptic tables of the answers provided in the national reports.

***B.T.R. 352** Following the Habermasian tenet on separation of powers and rule of law, the Editor's first approach aims at defining the elements according to which a tax law can be considered valid. In a first attempt, validity is compared with legitimacy (at 29-30) as far as democratic procedures, such as public discussion and argumentation, free communication, etc. are concerned. This assumption leads to the acceptance of a formal concept of the rule of law, which addresses the manner in which the law is promulgated. In this sense:

“the democratic enactment procedure and underlying pluralistic discussion is essential to justify the fact that taxes are enacted by law--parliamentary law--and to its authority (validity), even if they are prepared by public officials or other experts in specialized committees and complemented by other legal instruments and soft law and case law” (at 30).

According to a settled continental tradition (see, for example, the Dutch, Italian and Spanish reports), the Editor (and H.J. Pezzer) accept the separation between procedures and values, confining the latter to a substantive conception of rule of law. It is worth noting that, especially after Dworkin's works, it is disputable within the common law systems whether (or not) hard (tax) cases should be

decided according to justice.⁶ These institutional settings obviously lead to the conclusions that:

“where the parliament is actively involved in discussing the legislative proposals, either in plenary session or in specialized commissions, the validity of law is better achieved” (at 33).

The question, therefore, moves to the relationship between parliament and government, i.e. between parliamentary and governmental acts. Needless to say, when the former do not characterise the “legal type of tax”, separation of powers and rule of law are not achieved (at 35).

Reference to the “no taxation without representation” brocard, which is often raised throughout the book, deserves some thoughts. With the right of universal suffrage, it is very difficult to characterise this ancient brocard as consent to taxation; according to the Editor and many authors, it must be considered as the need for a democratic enactment procedure of tax law.

According to a second approach, separation of powers implies a certainty and predictability of results, which are the consequences of provisions determined to be sufficient. In this sense, which can again be characterised within the formal conceptions of the rule of law, separation of powers is a requirement for the design and drafting of tax law. In general terms, tax law:

“cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able--if need be with appropriate advice--to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.⁷

In the Editor's view, “legal determinacy occurs when the whole amount of legal arguments is enough to justify a judicial decision (or an administrative decision)” (at 40). In particular, and ***B.T.R. 353** under a comparative dimension, the analysis of the different techniques of legal drafting--i.e. the adoption of general (tax) rules, on one side, and/or the typifying techniques, on the other--is one of the added values of the general report because it systematises, from a legal perspective, many years of tax regulation (diachronic perspective) arising from very different legal cultures (synchronic perspective).

The final inquiry is devoted to the judicial control (versus judicial activism) of vague laws and the administrative discretion of tax authorities.

Although the book, as stated above, undoubtedly offers an in-depth analysis of the problem tackled and reaches the objectives stated at the beginning, it lacks one side of the coin. As the US reporter affirmed, separation of powers also has a vertical dimension, i.e. the sovereign powers to tax acknowledged to the state (or local) tiers of government. Both the horizontal and vertical separation of powers share the same rationale, because they have been conceived as a barrier against the tyrannical exercise of authority, and involve problems similar to those examined in the book (for hints in this sense, see H.J. Pezzer's remark at 264). It would have been interesting to assess whether the results would have differed using a comprehensive approach.

Gianluigi Bizioli⁸

B.T.R. 2012, 3, 351-353

1. This interpretation of the role of the constitution is supported by L. Ferrajoli, “Democracy and the constitution in Italy” (1996) 44 *Political Studies* 457, beginning at 462.

2. See, for example, R. Dworkin, “Constitutionalism and Democracy” (1995) *European Journal of Philosophy* 2.

3. Ferrajoli, above fn.1, beginning at 462.

4. R.A. Epstein, “Taxation in a Lockean World” (1986) 4 *Social Philosophy and Policy* 49.

5. In a simplified picture of the (legal) world, the other is the power to restrict the liberty of individuals.

6. R. Dworkin, *Law's Empire* (Cambridge MA: Harvard University Press, 1986), 11-12.

7. *Rekvényi v Hungary* (C-25390/94) ECHR 1999-III at [34].

8. University of Bergamo.

© 2013 Sweet & Maxwell and its Contributors

