Legal Protection against Discriminatory Tax Legislation

The Struggle for Equality in European Tax Law

Editor: Hans Gribnau

Kluwer Law International

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KLUWER LAW INTERNATIONAL
LONDON / THE HAGUE / NEW YORK

A C.I.P Catalogue record for this book is available from the Library of Congress.

ISBN 90-411-9915-2

Published by
Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kluwerlaw.com
http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by
Aspen Publishers, Inc.
7201 McKinney Circle, Frederick, MD 21704, USA

Sold and distributed in all other countries by
Turpin Distribution Services Limited
Blackhorse Road, Letchworth, Herts.,
SG6 1HN, United Kingdom

Printed on acid-free paper

Printed and bound in Great Britain by MPG Books Ltd., Bodmin, Cornwall.

Abbreviations

AB	*Administratiefrechtelijke Beslissingen behorende bij de Nederlandse Jurisprudentie*
Arr. Cass.	Arresten Hof van Cassatie
Art.	Article
BB	Betriebsberater
BNB	*Beslissingen Nederlandse Belastingrechtspraak*
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Bundesverfassungsgerichtentscheidungen (Federal Constitutional Court Reports)
BVerfGG	Gesetz über das Bundesverfassungsgericht
Cass.	Hof van Cassatie
Cass. C.	Corte di Cassazione
Const. C.	Italian Constitutional Court
DC	Déclaration de Conformité (declaration of conformity)
DStR	*Deutsches Steuerrecht*
DStZ/A	*Deutsche Steuer Zeitung, Abteilung A*
DTC	Double Tax Convention
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities
ECnHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EC Treaty	Treaty establishing the European Communities (The Treaty of Rome)
EEC	European Economic Community
EstG	Einkommensteuergesetz
EU	European Union
EuGRZ	Europäische Grundrechtezeitschrift
EUR	Euro
FED	*Fiscaal weekblad FED*
GG	Grundgesetz
HR	Hoge Raad der Nederlanden (Dutch Supreme Court)
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
JZ	*Juristen-Zeitung*
MP	Member of Parliament
NJ	*Nederlandse Jurisprudentie*
NJB	*Nederlands Juristenblad*
NJCM	Nederlands Juristen Comité voor de Mensenrechten

NJV	Nederlandse Juristen-Vereniging
NJW	*Neue Juristische Wochenschrift*
NLG	Netherlands guilders
ÖJT	Österreichisches Juristentag
ÖJZ	Österreichische Juristenzeitung
OLCC	Organic Law of the Constitutional Court
ÖStZ	*Österreichische Steuerzeitung*
RdW	Recht der Wirtschaft
SFLGRC	State Fundamental Law on the General Rights of Citizens (1867)
StuW	*Steuer und Wirtschaft*
StVj	Steuerliche Vierjahreschrift
TBP	Tijdschrift voor Bestuurswetenschappen en Publiek Recht
TFO	*Tijdschrift Fiscaal Ondernemingsrecht*
T. Not.	Tijdschrift voor Notarissen, Privaatrecht, Fiscaal Recht
VAT	Value Added Tax
VfGH	Verfassungsgerichtshof (Constitutional Court)
VfSlg	Verfassungssammlung (Official Publications of the Constitutional Court)
V-N	Vakstudie Nieuws
VwSlg	Verwaltungssammlung (Official Publications of the Administrative Court)
WFR	*Weekblad fiscaal recht*

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Contents

Chapter 1

Introduction

J.L.M. Gribnau and C. Peters

'Taxation is a subject not usually associated with the lighter or more cheerful thoughts of men.'[1] However, taxation affects the life of almost every person in a state. In a democratic state under the rule of law, legislation must respect the fundamental right of people to equal treatment. Because it is in the nature of laws to classify or discriminate, the principle of equality demands 'treating likes alike'. This is also the case for tax legislation which, like all legislation, must conform to the demands of the principle of equality.

The principles of equality and taxation are historically connected: what is more, the concepts of taxation, equality, democracy and the rule of law have a common history. The current meaning of the principle of equality is co-determined by the history of the relationship between taxation, democracy and the rule of law. Taxation needs democratic legitimacy, i.e., the consent of Parliament, which represents the citizens (no taxation without representation). Democracy is the political expression of the belief that citizens are free and equal, and must therefore be self-governing on terms which respect that free and equal status. In Western democratic societies the citizens, whose liberty is guaranteed by the rule of law, must consent to taxes. The representative institutions are thus a check on arbitrary taxation. With the emergence of legislative bodies, law-making became the shared business of a ruler and a Parliament representative of its subjects, and the law they made was favourable to the interests of all individuals equally: it provided the details of the freedom of every subject, not the privileges of a single class; 'they were the property of every subject alike'.[2]

The ideal of equality is also an important part of the ideal of the rule of law. The rule of law's objective of restraining political power has led to the aspiration to make power impersonal. Government is to exercise power via general legislation. To law, conceived as a general and abstract norm, is attributed the intrinsic virtue of promoting equality (and security and liberty). General and abstract laws must be applied equally and impersonally to all; thus equality under the general rule of law is secured. Everyone receives the same rights and all receive the protection of the law under the same conditions. In its turn, equality before the law leads to the demand that all men should also have the same share in making the law. The rule of law, however, is not

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[1] R. Jones, *The Nature and First Principle of Taxation* (P.S. King & Son, London, 1914), p. 1.

[2] M. Oakeshott, 'The Masses in Representative Democracy', in M. Oakeshott, *Rationalism in Politics and Other Essays* (LibertyPress, Indianapolis, 1991), p. 369.

J.L.M. Gribnau (ed.), Legal Protection Against Discriminatory Tax Legislation, 1–5.

a self-operating system; it has to be effectuated by government. Government, necessary to enforce rights, has to be paid for by taxes in its turn.

Therefore, the principle of equality resists arbitrary taxation. The tax authorities, interference with an individual's rights and liberties needs democratic consent. The democratic process does not always guarantee compliance with the principle of equality, however: as a result, tax legislation sometimes violates it. On the one hand, municipal law may violate the principle of equality: this may be the principle of equality enshrined in a national constitution or in an international treaty (for example, the European Convention on Human Rights) which is applicable in municipal statute law. On the other hand, the principle of equality may also be binding between states, e.g., those who are members of the European Community. In EC law, non-discrimination is recognized as a general principle and therefore binding on the Community and the Member States within the scope of application of EC law.

The non-discrimination principle, although a general one, is also expressly mentioned in a number of distinct areas in the EC Treaty, e.g., in the context of non-discrimination on grounds of nationality as expressed in Article 12, and in the field of free movement as expressed in Articles 39, 43 and 49–50.

Taxpayers will challenge fiscal legislation which violates the principle of equality. The judiciary is entrusted with the legal protection of the taxpayer, which also includes the testing of the law against the principle of equality.

By so testing the law, the judiciary operates in the tension between democracy and the rule of law, for in democratic constitutions, on the one hand a political dimension can be identified, by virtue of which democracy is the power of the (legislative) majority. On the other hand, the judicial dimension of the rule of law accounts for the fact that even the power of the majority is subject to legal regulations and limits established to guarantee the fundamental rights of all individuals. Democracy and rule of law must be balanced. The legitimacy of the judiciary cannot be assessed without taking into account the performance of the legislature.

The testing of the law is generally regarded as a delicate matter. However, it should be borne in mind that the legislature and the judiciary are partners in law-making. A system of law, civil as well as common law, must be created and developed in the interaction between legislature and judiciary. It must be a product both of statute law and judge-made law (case law). The life of statute law depends on its judicial interpretation. In this way, the rule of law can be understood as an obligation on the judiciary to systematize the law and to keep it up to date. Judges thus are legitimized to assist and co-operate with the legislature (and the administration). The judges further elaborate the law – being an expression of normative principles – and bring it up to date in the light of unforeseen practical developments. They do this within the framework of a coherent interpretation of the law: however, we should not overemphasize this ideal of coherence, because we may risk making the legal system immune to change. Thus, on one hand, the law is in need of consistency, coherence and rationality; on the other, it needs sources of controversy, ambiguity and openness to be able to keep pace with the developments in society. Consequently, judicial review is part of the co-operative effort of law-making. However, the democratically legitimized legislature has priority in law-making, therefore the

judiciary should leave a margin of appreciation to the legislature, and it should certainly be very cautious in reviewing Acts of Parliament. In this way, the creation of law is based on a balance between the legislature and the judiciary. The actual balance will differ in different countries depending on their constitutional structures, their constitutional rights and liberties and, more generally, their democratic and legal culture. Other relevant factors which determine the balance, and therefore the form of judicial review, will be, e.g., tradition, political culture, social arrangements and the economic well-being of the country in question.

This point may be illustrated by comparing judicial review in Germany and in the United Kingdom. The *Bundesverfassungsgericht* in Germany is a constitutional court which, in a European context, applies the principle of equality in the most far-reaching way. This can be derived from rulings of the court on issues such as the (family) minimum standard of living, the basic tax-free allowance, and taxation according to the assessed value in net-wealth tax.[3] In the United Kingdom the government must act within the law, but Parliament seems to have an unfettered power to enact the law. As such, the rule of law appears not to place any substantive constraint (for example, equal treatment) on statute laws, 'provided the government can secure their passage in Parliament'.[4]

These general observations may serve as introductory remarks for a book which deals with equality in tax law.[5] Here several selected topics are presented and, in respect of Germany and the Netherlands, an analysis of some recent case law is given. The contributions by Jaap van den Berge, Dietes Birk and Sophie Boyron are based on papers presented at a seminar dedicated to the principle of equality in relation to the tax law of some European countries. The contribution of Hans Gribnau and Jaouad Saddiki is partly an elaboration of a thesis by Jaouad Saddiki, completion of which was part of the Wintercourse project which is organized annually by EUCOTAX.[6] The contribution by Cees Peters is an elaboration of his undergraduate EUCOTAX thesis at Tilburg University in the year 2000 finalizing the study of tax law.

To provide a conceptual and methodological background, Hans Gribnau has written the chapter with which the book opens. The focus of this opening chapter is the relationship between increasingly complex tax legislation and the principle of equality. Gribnau begins with a conceptual analysis of equality; then the focus shifts to the character of the formal principle of equality. He argues that it is not as empty as is sometimes maintained, because it guides the legislature by providing standards with respect to legitimate discriminations. Turning to tax law, the prevailing

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[3] Cf. chapter 4 by Birk in this volume.

[4] M. Gammie, 'Tax Avoidance and the Rule of Law: The Experience of the UK', in G. Cooper (ed.), *Tax Avoidance and the Rule of Law* (IBFD Publications, Amsterdam, 1997), p. 185. Compare chapter 3 by Boyron in this volume.

[5] As to the content, this book is in a way complementary to G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation* (Kluwer Law International, The Hague, etc., 1999).

[6] EUCOTAX (European Universities Co-operating on Taxes) is a joint venture of the Universidad de Barcelona, the Catholic University Leuven, Queen Mary and Westfield College, London University, Universität Osnabrück, Université de Paris I-Panthéon-Sorbonne, Luiss University, Rome, Handelshögskolan I Stockholm, Tilburg University and the University of Economics, Vienna.

instrumentalism appears to make it vulnerable to unjustified classifications. Instrumentalist tax expenditures especially may be a response solely to pressures of interest groups without respect for the principle of equality. Gribnau argues that, while recognizing the margin of appreciation of the legislature, the courts should more strictly scrutinize the proportionality of the discriminations involved in these (exceptional) cases of arbitrary tax legislation.

In 1998, the European Convention on Human Rights was incorporated into British law. However, in her chapter Boyron doubts whether this document will go far enough in providing the required constitutional environment for the development of a fully operational principle of equality; more radical changes in constitutional law might be necessary. She argues that the adoption of a written document might be welcome to settle the political differences as regards the content of the principle of equality and many other constitutional principles, since constitutional rules ought to be debated and decided upon by the electorate in order to help facilitate a consensus. This is particularly relevant to the principle of equality in order to define the many choices which this difficult concept entails.

Birk begins his chapter with the observation that the principle of equality is not a very efficient one and does not have much effect on tax law as a whole. This applies equally to Germany and Europe. The establishment of equality of the tax burden in Germany is a task with which the legislature, the administration and the courts are equally faced. The fact that the German legislature is bound by the Constitution to tax equality leads to a constant testing of the legislative measures against the Constitution and, as a result, to a weakening of the legislature's position. In Germany, in Birk's opinion, experience has shown that the decision to bind the legislature to the basic rights guaranteed in the Constitution was a good one. It seems that the confidence in the accuracy of legislative decisions and in the respect for the constitutional principles is much stronger in the other Member States of the European Union than in Germany, in which the legislature is obliged over and over again to prove the claimed constitutionality before the Federal Constitutional Court.

Van den Berge deals with the application of the principle of non-discrimination as embodied in Article 14 of the European Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights. He compares the case law of the German Federal Constitutional Court and the Dutch Supreme Court with respect to the ban on discrimination. He draws attention to the difference between the two courts as to the relationship between the non-discrimination principle, e.g., as embodied in the Constitution and in Article 14 of the Convention, and the principle of ability to pay as a general principle of taxation. He also addresses the obligation to provide redress. Here, a crucial question will be whether the court should grant redress to the complainant or leave this to the legislature. The relationship between the legislature and the judiciary is involved with the related question of judicial restraint. Van den Berge argues that the judiciary is not equipped to act as a substitute legislature. In addition, the questions which arise when formulating a new regulation should not be decided in a dispute between only one complaining party and a public body.

The first half of Gribnau and Saddiki's chapter is concerned with some methodological aspects of the 'Dutch' principle of equality. Here the point of departure is

constitutional prohibition on reviewing the legality of legislation against the constitutional principle of equality, except on the basis of incompatibility with an international treaty. As a result, a much greater reliance has been placed on Article 14 of the European Convention on Human Rights than on the constitutional principle of equality. In testing the law, the Dutch Supreme Court leaves the legislature a wide margin for manoeuvre.

In the second part, they compare the principle of equality with respect to taxation in Austria, Spain, France, the Netherlands, Italy, Germany, the United Kingdom and Belgium. The legal comparison concentrates on the different sources of the principle of equality in tax law, the enforcement of this principle, and some aspects of constitutional (or judicial) review in tax law. Thus, the enforcement of the principle of equality may differ according to whether the source of the principle is a domestic constitutional provision or (solely) Article 14 of the Convention. Often, however, the judiciary leaves the legislature a wide margin of appreciation in tax matters. Furthermore, the various constitutional and ordinary courts operate in different societies and legal and political cultures, which accounts for the different methods of application of the principle of equality. Here greater guidance is needed from the European Court of Human Rights.

Peters deals with the freedom of establishment in his chapter. He starts by describing the freedom of establishment as a principle of non-discrimination, focusing mainly on the evolution of this principle inspired by the case law of the European Court of Justice. Subsequently, the effect of the principle on the rules of (international) tax law is described. Three conflicting areas of tax law are dealt with: the treatment of resident and non-resident self-employed persons, the treatment of resident companies and non-resident companies with a permanent establishment, and exit taxes. Although every section begins with Dutch tax law, the main focus is on legal comparison.

Many people besides the authors have been helpful in the realization of this book. Peter Essers initiated it, Ineke Sijtsma checked and polished the use of the English language in most of the texts. In addition, Cees Peters would like to thank Peter Essers, Hans van den Hurk and Marc van Oers of the Fiscal Institute of Tilburg University, without whom writing the undergraduate thesis and the subsequent contribution to this volume would have been much more difficult. For obtaining the information to set up the comparative law study Cees Peters wishes to acknowledge fellow students from the participating universities, in particular, Markus Stefaner, Thor Leegaard, Aude Gross, Jens Gullfeldt, Georg Berka, Andreas Kruchen and Antonio Santoro. Finally, he wishes to thank Marloes Lammers for her assistance in checking the validity of the information in the comparitive study.

Hans Gribnau wishes to thank Pauline Westerman and Richard Happé for their encouragement and comment on a previous draft of his chapter.

Chapter 2

Equality, Consistency and Impartiality in Tax Legislation

J.L.M. Gribnau

'The spirit of a people, its cultural level, its social culture, the deeds its policy may prepare – all this and more is written in its fiscal history, stripped of all phrases.'[1]

1. Introduction

Tax law is becoming increasingly complicated, partly due to the numerous policy aims of legislatures. The resulting complexity of the body of tax laws sometimes seems to be at odds with the principle of equality. This may seem to constitute a paradoxical development in law. Although tax law is often used as an instrument to promote greater social and economic equality in society, one kind of equality may be promoted at the cost of another. At the same time, fiscal legislation is in danger of violating the principle of equality: equality itself appears to be a complex ideal with built-in tensions. As a result, the principle of equality, a fundamental legal principle, affects the distinctions made by the legislature. These legislative discriminations, made to achieve a particular goal, may not be justified by the purpose of the regulation in question.

In order to put the concept of equality in tax law into perspective, we begin with a general analysis of the body of law as a whole: this analysis is elaborated in respect of tax law. In this way, the concept of equality will be clarified from the perspective of tax law.

We begin by discussing the value of substantive equality and distinguishing different forms of equality. We then focus on the principle of formal equality, which is sometimes said to be empty. However, we will see that it guides the legislature by providing standards regarding legitimate discriminations. Turning to tax law, the prevailing instrumentalism makes it vulnerable to unjustified classifications. Instrumentalist tax expenditures especially may be solely a response to pressures of interest groups without respect for the principle of equality.

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[1] J.A. Schumpeter, 'The Crisis of the Tax State' [1918], in A.T. Peacock *et al.* (eds), *International Economic Papers* No. 4 (The MacMillan Company, London, New York, 1954), p. 7.

J.L.M. Gribnau (ed.), Legal Protection Against Discriminatory Tax Legislation, 7–32.

2. The Value of Substantive Equality

Equality is generally regarded as an important value in modern society; it has been among the primary goals pursued by human beings throughout the centuries. Equality is divided into two types: formal and substantive. Formal equality states a formula without including a specific content. Take, e.g., Aristotle's classical notion of formal justice: equals are to be treated equally and unequals unequally. 'Injustice arises when equals are treated unequally and also when unequals are treated equally.'[2] The notion 'equality before the law' expresses the demand for formal equality. This formal notion of equality says nothing substantive. Equality involves the assignment of things to persons, but according to which criterion? Substantive equality identifies a concrete criterion by which distribution policies are to be assessed. We find a kind of substantive equality in Article 26 ICCPR (second sentence) which guarantees 'the protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

The debate on equality is often confused due to the multifacetedness of the ideal of (substantive) equality. However, no matter how vague and rhetorical in many discussions, there are important moral concerns implicit in the notion of equality, as the philosopher Bernard Williams reminds us. We all suffer and feel affection for close relations; we have common needs, etc. This common core of humanity is just sufficient to advance a principle that we should treat people as equals unless we have a relevant reason for treating them differently. Thus, prescriptive equalities have force because they affirm 'an equality which is believed in some sense already to exist, and to be obscured or neglected by actual social arrangements'.[3] The idea of pursuing and prescribing some kind of equality rests upon a descriptive premise.

It is important to note that the value of equality may collide with another value, e.g., liberty. 'Equality may demand the restraint of the liberty of those who wish to dominate.'[4] It is important to realize that the collision of values is essential to them. There is no perfect, ultimate solution in which the fundamental human values are harmonized. 'We are doomed to choose, and every choice may entail an irreparable loss.'[5] Thus, equality is always related to other values and promoting equality may be at the expense of those other values (or other forms of equality). In the context of tax law, these other values may include the rule of law and democracy (itself based on the ideal of equality).

Disagreement on the (actual) content of equality cannot be resolved once and for all. Equality, like liberty, the rule of law and democracy is an elusive and complex

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[2] Aristotle, *The Nicomachean Ethics* (D. Ross, ed.), (Oxford University Press, Oxford, New York, 1984), V, 1131a–1131b.

[3] B. Williams, 'The Idea of Equality', in P. Laslett and W.G. Runciman (eds), *Philosophy and Politics in Society* (2nd Series), (Basil Blackwell, Oxford, 1964), p. 112.

[4] I. Berlin, 'The Pursuit of the Ideal', in I. Berlin, *The Crooked Timber of Humanity* (John Murray, London, 1990), p. 12.

[5] Ibid., p. 13.

concept.[6] It is fluid and variable in content. There is no single use of the concept of equality which can be held up as its generally accepted and therefore correct or standard use. Different uses of the term equality serve different functions which however, are not altogether unrelated for different people, for different political groups and parties, etc. An 'essentially contested concept' like equality inevitably involves endless disputes about its proper use.[7] However people, citizens and officials must proceed in the face of disagreement on these concepts.

Here it is useful to distinguish between concepts and conceptions. People can have different conceptions of concepts like that of equality, and they often argue with others about which particular conception of it is the better one. For example, suppose a group believes in common that acts may suffer from 'a special moral defect' which they call inequality, and which consists in a wrongful division of benefits and burdens. The members of the group may agree on a large number of standard cases of inequality which they use as benchmarks against other, more controversial cases which are tested. In that case, the group has a concept of equality to which members of the group may appeal in argument. However, although appealing to this common concept of equality, they may nevertheless differ over a large number of those controversial cases, 'in a way that suggests that each either has or acts on a different theory of *why* the standard cases' are acts of inequality. Thus, they differ on which more fundamental ideas must be relied upon to show that a particular treatment is discriminatory.[8] In short, the essentially contested *concept* of equality is understood through different *conceptions* of equality. The concept of equality is a kind of common ground for disagreement and argument about the force and scope of equality, and about what equality entails in particular cases.

These different theories, different conceptions of equality which people have or act on, seem to threaten (legal) order. According to Sunstein, intractable disagreement is often precluded through 'incompletely theorized agreements'. General principles are incompletely theorized in so far as most people do not have an abstract theory of equality and a series of steps connecting that theory to concrete conclusions. Sunstein argues that functioning constitutional orders try to resolve disagreements on rights, on the good life, on equality and liberty, etc., through reaching these incompletely theorized agreements, which may involve abstractions/theories (conceptions), accepted amid severe disagreements on particular cases. However, incompletely theorized agreements may also involve concrete outcomes rather than abstractions. Sunstein argues that when people disagree or are uncertain about an abstract question such as 'Is equality more important than liberty?', they can often

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[6] Cf. the essays collected in L.P. Pojman and R. Westmoreland (eds), *Equality: Selected Readings* (Oxford University Press, Oxford, 1997).

[7] W. Gallie, 'Essentially Contested Concepts', in W. Gallie (ed.), *Philosophy and the Historical Understanding* (Chatto & Windus, London, 1964), p. 157. He convincingly argues that this essential contestability is proof of the continuing need of 'vital, agnostic philosophy' (p. 156).

[8] R. Dworkin, *Taking Rights Seriously* (Duckworth, London, 1978), pp. 134–136. Cf. S. Guest, *Ronald Dworkin* (Edinburgh University Press, Edinburgh, 1992), pp. 34–37.

make progress by moving from this abstraction to a level of greater particularity. By attempting a conceptual descent – a descent to the lower level of abstraction – they may become clear on the practice or the result without agreeing on the (most) general theory that accounts for it.[9] On the other hand, societies may have an incompletely theorized agreement on a general principle: incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. Their agreement about what considerations are relevant and how to weigh them is incompletely theorized. 'The agreement is incompletely theorized in the sense that it is *incompletely specified*.'[10] Furthermore, as Sunstein observes, people sometimes agree on 'midlevel principle' but disagree about more general theory and particular cases. He gives the following example: people might believe that government should not discriminate on the basis of race, without having an abstract theory of equality and also without agreeing on whether government may enact affirmative action programmes. Sunstein mentions a final phenomenon: 'incompletely theorized agreement on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them'.[11] These (relatively) low-level principles include the general class of principles and justifications which do not derive from any particular abstract theory. In tax law we might think of the principle of equality as a principle of proper administration. In fact, low-level principles have ambiguous relationships to abstract theories, for they are compatible with more than one such theory. Sunstein emphasizes that when people disagree on some (relatively) abstract proposition (for example, equality), they might be able to attempt a conceptual descent. When we take the general principle of equality, e.g., people might lower the level of abstraction and find that they agree on the matter of similarity without agreeing on an abstract theory of equality.

In sum, incompletely theorized agreements allow a convergence on particular outcomes by people unable to reach anything like an accord on general principles. In this way they help find commonality and make social life possible. Likewise, participants in law may agree on practices, or concrete judgments about particular cases, despite disagreement or uncertainty about fundamental issues of equality.

3. Different Forms of Equality

To avoid confusion it is important to specify the function at hand of an essentially contested concept. Compare the way American constitutional lawyers talk about liberty: they regularly speak not simply of liberty, but of various liberties, classifying them by function: religious liberties, expressive liberties, economic and proprietary

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[9] C.R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, Oxford, New York, 2001), pp. 49–51.

[10] Ibid., p. 56. In this context, Sunstein aptly quotes O.W. Holmes's famous aphorism 'general principles do not decide cases'.

[11] Ibid., p. 57.