Special Section
The Constitutional Court's Inheritance Tax Case

Constitutional Review of Tax Laws and the Unconstitutionality of the German Inheritance Tax

By Oliver Lepsius[*]

Abstract

Constitutional review of German tax laws has become a major area for the development of the jurisprudence of the German Federal Constitutional Court, constitutional doctrine, and theory. This Article takes a recent decision in which the German Federal Constitutional Court declared parts of the inheritance tax statute unconstitutional as an example to demonstrate why tax law in particular has become such an interesting field in constitutional jurisprudence. The case is also noteworthy for the court's new views on equal protection, its deference to parliamentary discretion, and the abolishment of the so-called consequentiality doctrine (*Folgerichtigkeit*) it had introduced ten years before.

[*] Professor for constitutional law, comparative constitutional law and philosophy of law, University of Bayreuth.

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A. Tax Law and Basic Rights in Germany

In the last twenty years or so, decisions from the German Federal Constitutional Court concerning tax law became a major source for new jurisprudential approaches to the general doctrine of basic rights in Germany. In the last decades many fresh approaches to the German basic rights theory derive from cases dealing with tax law.[1] One can state that tax cases have become a major stimulus for the further development of basic rights in Germany. This is a remarkable development in itself because one would not expect a rather technical field like tax law to exercise such a general role in civil rights cases: It seems to be becoming a trend-setter or a reform-thrusting area in constitutional law.

One reason for this stunning role in constitutional law is the fact that taxes constitute the most frequent and most proliferated infringements of the state in individual rights: Basically, everybody must pay taxes. Taxation limits personal funds that otherwise could be spent in order to pursue individual goals. Limiting funds by taxation therefore means limiting the range of personal autonomy by spending one's money according to one's preferences. Since it is a well-established doctrine in German constitutional law that any intrusion of the state in the private sphere constitutes an infringement in basic rights, taxation must be treated as a violation of basic rights that requires a constitutional justification.

I. Which Rights are Affected by Taxation?

It is rather difficult, however, to identify the proper right. Which rights could be affected by taxation? One could think of property rights. The scope of the property clause in the Basic Law, however, does not comprise the private fortune. German property rights doctrine (Article 14, paragraph 1 and 2 of the Basic Law) requires that something is acknowledged as property by the legal order. Fortune lacks this capacity and, therefore, cannot constitute a right that is affected by taxation.[2] Only under the rare circumstances in which a specific

[1] For the most recent overview with references to older publications, see Christian Waldhoff, *Steuerrecht und Verfassungsrecht. Bericht über ausgewählte Entscheidungen zu verfassungsrechtlichen Vorgaben für die Besteuerung aus den Jahren 2008 bis 2014*, 48 DIE VERWALTUNG 85–113 (2015). Waldhoff recognizes several phases in the jurisprudence, the current phase is called the constitutionalization of tax law. For prominent accounts, see also Paul Kirchhof, *Legalität, Gestaltungsfreiheit und Belastungsgleichheit als Grundlagen der Besteuerung*, *in* GESTALTUNGSFREIHEIT UND GESTALTUNGSMISSBRAUCH IM STEUERRECHT, 33 VERÖFFENTLICHUNGEN DER DEUTSCHEN STEUERJURISTISCHEN GESELLSCHAFT 9–28 (Rainer Hüttemann ed., 2010); *id.*, *Der Grundrechtsschutz des Steuerpflichtigen*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 1 (2003); *id.*, *Die Steuern*, *in* HANDBUCH DES STAATSRECHTS VOL. V § 118 (3rd ed. 2007). For further references, see also *infra* note 10.

[2] The German Federal Constitutional Court is not quite clear on this question: The aforementioned position is shared by Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 22, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 121, 137; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 27, 1997, 95 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267, 300; the Second Senate, however, declared that taxes may infringe the property clause if the law taxes the increment of property with the effect that its private use will be limited for public benefit, Bundesverfassungsgericht [BVerfG] [Federal

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tax requires to be paid out of the substance of the property itself is an infringement in property rights conceivable. One speaks of confiscatory taxes. They are theoretically conceivable but hardly happen in everyday tax law.

Nor is the right to a profession a manageable right against taxation: Practically, a lot of taxes are attached to professional revenues and they do not limit the right to profession as long as they do not effectively foreclose the exercise of a certain profession. Hence, taxes generally do neither fall in the scope of Article 12 or 14 of the Basic Law.

When there are no specific rights at hand, one could look at the general right within Article 2, section 1 of the Basic Law, the so-called general freedom of action (*allgemeine Handlungsfreiheit*). This right does not help out either. Even if one would state an infringement by saying that the duty to pay taxes is limiting the general freedom of action this limitation could be justified easily: The general doctrine requires a reasonable and proportionate goal which, in turn, triggers the proportionality test dominating German civil rights doctrine.[3] Taxation clearly fulfills its requirements (the test requires that the mean chosen by the statute is suitable (*geeigent*) and necessary (e*rforderlich*) and that by balancing the mean's purpose with the infringed rights, the former outweighs the latter (*angemessen*). Taxation can hardly be unproportional because there is no lesser means for fulfilling the same goal: Taxes are always suited for the purpose of general financing for the state. With regard to taxes, the proportionality test therefore fails on the very first level (*Geeignetheit*), because there is no alternative to taxes when it comes to the issue of generally financing the state.[4] The only right that is viable in tax cases is the right to protect the family in article 6 of the Basic Law, however, this right will only apply to taxes affecting

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Constitutional Court] Jan. 18, 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 97, 110–13. The dissent between the two senates seems to be rather theoretical because, so far, there was no German tax law that was assessed as an infringement of the property clause. Obviously, the Court wants to keep the door open for a substitute remedy in future cases. For a more detailed discussion of this controversy see Simon Kempny, *Verhältnismäßigkeit von Steuern und Abgaben*, 2014 STEUER UND WIRTSCHAFT 185, 188–90.

[3] For a recent exploration in comparative perspective see PROPORTIONALITY AND THE RULE OF LAW. RIGHTS, JUSTIFICATION, REASONING (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014); AHARON BARAK, PROPORTIONALITY. CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012); see also the relevant chapter in ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW (2012); Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 TORONTO L. J. 383 (2007); LAURA CLÉRICO, DIE STRUKTUR DER VERHÄLTNISMÄßIGKEIT (2001); Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. OF TRANSNAT'L L. 72 (2008); Johannes Saurer, *Die Globalisierung des Verhältnismäßigkeitsgrundsatzes*, *in* 51 DER STAAT 3 (2012).

[4] For further elaboration of this argument, see Hanno Kube, *Verhältnismäßigkeit von Steuern und Abgaben*, *in* VERHÄLTNISMÄßIGKEIT—ZUR TRAGFÄHIGKEIT EINES VERFASSUNGSRECHTLICHEN SCHLÜSSELKONZEPTS (Mohr Siebeck, Matthias Jestaedt & Oliver Lepsius eds., forthcoming 2015); OLIVER LEPSIUS, DIE CHANCEN UND GRENZEN DES GRUNDSATZES DER VERHÄLTNISMÄßIGKEIT, 1 at 28–30; *see also* Kempny, *supra* note 2, at 195.

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family relations—for instance, the question how children or marriage affect the amount of the taxation.[5] In most tax cases, this particular provision will be inapplicable as well.

II. Equal Protection

When there is only one means conceivable, namely taxes, the proportionality test is inapplicable. Therefore, we come out with an unrewarding result: Taxes must find constitutional limitations in civil rights because they constitute a prominent infringement of the state in the private sphere. Yet there seems to be no rights available to furnish a bulwark against taxation. There is only one effective constitutional limitation of taxes: equality rights (Article 3 of the Basic Law). Hence, the rights discourse in tax law basically concentrates on the specific limitations of equal protection of the laws.

The problem with Article 3 limitations of tax laws, however, is that the equal protection clause of the Basic Law does not offer a substantive hurdle at first hand: In the case law of the German Federal Constitutional Court, Article 3, paragraph 1 of the Basic Law (equality rights) only requires that equal things have to be dealt with equally and unequal things have to be dealt with in an unequal way. The Court will only object if the lawmaker cannot justify the unequal treatment with a rational justification. The ordinary constitutional standard in equal protection is called the arbitrariness-formula (*Willkürformel*): If the different treatment turns out to be arbitrary the Constitutional Court will not accept a rational justification for the unequal treatment of equal issues. Rather thinking the legislature arranged its regulation in an irrational way and, therefore, will declare the statute unconstitutional. As one can imagine the arbitrariness formula does not furnish a standard for strict or even intermediate scrutiny. If one applies the arbitrariness formula, then statutes usually pass the test of constitutionality. To put it differently: When arbitrariness prevails, the legislature has broad discretion in attributing different solutions to comparable facts; the issues are open for policy reasons that may come out differently with regard to comparable circumstances. The law may differentiate, assess differently, privilege or discriminate different problem-sets—as long as the law's approach does not seem to be arbitrary. In other words, equal protection on the level of arbitrariness does not provide a substantive constitutional requirement.

Article 3, paragraphs 2 and 3 of the Basic law provide several prohibitions of discriminations based on sex, belief, race, language, descent, origin, or political convictions. Here, strict scrutiny is triggered. With regard to tax laws these anti-discrimination requirements are hardly applicable and, hence, do not increase the level of scrutiny.

[5] For an example, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1998, 99 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 216, 233.

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Finally, there exists an intermediate level of scrutiny in cases that do not discriminate on the basis of any of the characteristics of Article 3, paragraphs 2 or 3 yet affect human conduct that is related to the scope of the other protected rights in the Constitution (so-called new formula).[6] For cases where the law differentiates between the behaviors of different groups, the Court developed the so-called "new formula" of equal protection. Here, the Court is not satisfied with a justification based on rationality or the lack of arbitrariness but demands a more intense justification for the law's different treatment of comparable group-related conduct. Any reasons given by the legislature will be assessed according to the proportionality principle, which is made applicable in equality cases because the conduct-based differentiation may be related to the scope of other rights—such as freedom of profession, speech, assembly, and property. The interesting approach of the new formula results in the leveling off of the standard of scrutiny in equal protection with the level provided by other rights via a common standard that is delivered by the proportionality principle.

In roughly comparing German equal protection jurisprudence to the approach of the U.S. Supreme Court, one could recognize three levels: rational basis (arbitrariness formula) as the general standard, intermediate scrutiny (new formula) when group-related conduct with reference to specific freedoms is concerned, and, finally, strict scrutiny in cases of suspicious discriminations based on gender, religion, race, descent, language, or political convictions.

What is interesting, though, is the Court's demanding of justifications for statutory purposes.[7] However, Parliament does not need to legally justify the enactment of a statute: On the merits, majority will suffice in a democracy as proper justification for legislative action. The usual saying in Germany is: The legislature is only indebted to enact the statute but not to give a legal justification for it.[8]

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[6] Landmark cases are: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 28, 1992, 85 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 191; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 26, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 87.

[7] With reference for taxation, see, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 11, 1998, 99 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 280, 296–97; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] March 6, 2002, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 73, 112; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 7, 2006, 117 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 32; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 9, 2008, 122 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 210, 237–38; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 6, 2010, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 268, 281.

[8] See the discussion by Christian Waldhoff, *'Der Gesetzgeber schuldet nur das Gesetz'. Zu alten und neuen Begründungspflichten des parlamentarischen Gesetzgebers*, *in* STAAT IM WORT. FESTSCHRIFT FÜR JOSEF ISENSEE 325–43 (2007); *see also*, Henning Tappe, *Die Begründung von Steuergesetzen* (forthcoming, at part 2 B).

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One can clearly recognize the specific problem of constitutional review of tax statutes: Civil rights jurisprudence will hardly deliver a substantive level of review. Specific freedoms are not applicable —because the duty to pay taxes does not infringe in specific behavior— and, furthermore, the proportionality principle will not supply a constitutional safeguard, because there is no lesser means conceivable for the general financing of the state than taxes. The equal protection clause of Article 3 of the Basic Law is supposed to be applicable. A closer look, however, reveals some problems with its application: Strict scrutiny will not be triggered by tax laws. Intermediate scrutiny is hindered alike because most taxes do not relate to specific human behavior. The most likely upshot seems to be that only the "rational basis" test of arbitrariness is viable. The outcome would be that tax laws escape constitutional review based on basic rights—a puzzling effect considering the tight level of constitutional review the German Federal Constitutional Court usually has developed in other areas of the law.[9]

III. Steering Taxes

One has to keep in mind, however, that this checklist only applies to "ordinary" tax laws, namely taxes with the purpose of a general financing of the state. My sketchy outline of the Court's case law accounts primarily for cases dealing with the general income tax. If, however, taxation purports not only to finance the state but also to influence one's behavior, the level of review increases because such taxes infringe on specific behavior and, therefore, can be assessed in a stricter way either with the proportionality principle or with the new formula simply due to the effect that the intended behavior triggers the protection of specific rights provision. Imagine a tax that intends to encourage people to behave according to environmental protection—because it makes car driving more costly than using public transport. Such a tax (so-called steering tax, *Lenkungsteuer*) would infringe on behavior and, hence, could be reviewed more intensely. With regard to such taxes that channel, direct, or guide behavior constitutional review furnishes a stricter scrutiny.[10] But, if the purpose of the tax law only comprises the general financing of the state and no specific individual behavior, constitutional review is substantially limited.

B. Constitutional Jurisprudence and Doctrinal Inventions

This story has to be told in order to understand why tax law of all things has become an area of major doctrinal invention in the past twenty years. Since the 1990s, the German Federal Constitutional Court was focused on increasing the level of scrutiny of tax laws. As it could not really draw on the general rights jurisprudence sketched briefly above, it had

[9] For similar analysis of constitutional rights viable for the review of tax laws, see, e.g., Kempny, *supra*, note 2, at 185–99; with regard to the only limited applicability of the proportionality principle see Kube, *supra* note 4.

[10] For a brief discussion see Waldhoff, *supra*, note 1 at II.4; comprehensively, RAINER WERNSMANN, VERHALTENSLENKUNG IN EINEM RATIONALE STEUERSYSTEM (2005).

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to develop some new mechanisms. The need to create substantive standards for the review of tax laws attributes to the fact that it was taxation that became probably the most pertinent reference field for the further development of basic rights theory in Germany. A few examples will be discussed in the next section.

I. Specific Principles with Regard to Tax Law

With regard to taxation the Court evolved equal protection with more intermediate standards of review in order to intensify the constitutional review.[11] It screened tax laws in order to recognize system-oriented, propelled or designed decisions of the legislature that could be generalized as abstract principles of taxation. These principles were then inflated as tax-related constitutional standards through the equal protection clause and, by the means of constitutional review re-attributed to fiscal laws. With this strategy the Court managed to intensify the constitutional review of tax laws without establishing abstract judicial principles for review; instead, in terms of the justification of its standards for review, it could rely on the previous decisions of the legislature itself and claim that the Court would do nothing else than take the system-oriented principles in taxation seriously as they were modeled by the legislature. Some legislative principles that were enhanced to constitutional safeguards in this way are: the achievement or efficiency principle in taxation (*Leistungsfähigkeitsprinzip*),[12] the strictly net-principle (*Nettoprinzip*),[13] the

[11] Setting the agenda, Paul Kirchhof, *Steuergleichheit*, 1984 STEUER UND WIRTSCHAFT 297. Kirchhof was Justice at the Federal Constitutional Court from 1987–1999. For an overview of the rights-based approach in tax law, see HANS-ERICH KIEHNE, GRUNDRECHTE UND STEUERORDNUNG IN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS (2004). With regard to equal protection, see Lerke Osterloh, *Gleichheit*, *in* LEITGEDANKEN DES RECHTS. FESTSCHRIFT FÜR PAUL KIRCHHOF 217–22 (Hanno Kube et. al eds., 2013); Lerke Osterloh, *Der Gleichheitssatz zwischen Willkürverbot und Grundsatz der Verhältnismäßigkeit, in* BEHARREN, BEWEGEN: FESTSCHRIFT FÜR MICHAEL KLOEPFER 139–52 (Claudio Franzius et al. eds., 2013); Kempny, *supra* note 2, at 196–99; see *also* SIMON KEMPNY & PHILIPP REIMER, DIE GLEICHHEITSSÄTZE. VERSUCH EINER ÜBERGREIFENDEN DOGMATISCHEN BESCHREIBUNG IHRES TATBESTANDS UND IHRER RECHTSFOLGEN at 64, 114 (2012).

[12] For the general concept, see DIETER BIRK, DAS LEISTUNGSFÄHIGKEITSPRINZIP ALS MAßSTAB DER STEUERNORMEN (1983); Dieter Birk, *Das Leistungsfähigkeitsprinzip*, *in* LEITGEDANKEN DES RECHTS. FESTSCHRIFT FÜR PAUL KIRCHHOF 1591–99 (Hanno Kube et al eds., 2013). For the translation of this principle into a constitutional requirement, see, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1990, 82 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 60, 89; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 10, 1997, 96 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 6; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1998, 99 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 216, 233; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 2006, 116 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 164, 181–83; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 2010, 127 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 224, 251.

[13] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 11, 1998, 99 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 280, 290; Rainer Wernsmann, *Einkommensteuerrecht und objektives Nettoprinzip*, 47 DEUTSCHES STEUERRECHT, 101–06 Beiheft 2009; ROGER GÖRKE, EINKOMMENSTEUERRECHT UND OBJEKTIVES NETTOPRINZIP, 106–09; MONIKA JACHMANN, OBJEKTIVES NETTOPRINZIP ALS TRAGENDES ELEMENT IM GESAMTSYSTEM DES

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principle of consequentiality or logical consistency (*Folgerichtigkeit*),[14] the doctrine of self-consistency (*Widerspruchsfreiheit*),[15] the adherence to a previous conceptualizing (*Konzeptbefolgung*),[16] the permissibility to typify or stereotype the level of taxation (*Typisierung*),[17] or the principle of equal partition (*Halbteilungsgrundsatz*).[18] Basically, all of these special requirements pursue the goal to intensify intermediate scrutiny of taxation.

Several things, however, remained unclear. To some extent still undecided is the constitutional status of these special requirements. According to the decisions of the Karlsruhe Court some have a constitutional status—the achievement principle,

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STEUERRECHTS UND GRENZE FÜR DIE STEUERPOLITIK, 129–132; Stefan Breinersdorfer, *Abzugsverbot und objektives Nettoprinzip—Neue Tendenzen in der verfassungsrechtlichen Kontrolle des Gesetzgebers*, 48 DEUTSCHES STEUERRECHT 2492–97 (2010).

[14] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] March 19, 1991, 84 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 239, 271; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sep. 30, 1998, 99 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 88, 95; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] March 6, 2002, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 73, 125; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 4, 2002, 107 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 27, 46–48; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 2006, 116 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 164, 197; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 13, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 125, 155; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 9, 2008, 122 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 210; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 6, 2010, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 268, 278; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 21, 2010, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 400, 417.

[15] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 7, 1998, 98 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 83, 97–100; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 7, 1998, 98 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 106, 118–20, 25.

[16] Self-consistency and adherence to previous conceptualizing do not apply to tax statues particularly and, rather, have been established by the Court as general requirements governing equal protection issues, see, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 2008, 121 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 317; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 9, 2008, 122 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 210; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175. For a critical account, see Alexander Hanebeck, *Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber? Zu verfassungsrechtlichen Anforderungen wie ‚Systemgerechtigkeit' und ‚Widerspruchsfreiheit' der Rechtsetzung*, 41 DER STAAT 429–51 (2002).

[17] The constitutionality of stereotyping in taxation triggered an intensive case law and is a field of its own (permissibility, boundaries, reference categories, realistic assessments, comparison to relevant other groups and sets of facts etc.). *See, e,g.*, 82 BVERFGE 126 (151); 84 BVERFGE 348 (359–360); 87 BVERFGE 234 (251); 96 BVERFGE 1 (6–8); 99 BVERFGE 280 (290); 105 BVERFGE 73 (127); 116 BVERFGE 164 (182–183).

[18] Established as obiter dictum in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 22, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 121, 138; *overruled in* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 97, 108–10.

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Leistungsfähigkeitsprinzip, derived by the Court as a general principle from Article 3, paragraph 1 with Article 20, paragraph 1; Article 1, paragraph 1; and, partially, Article 6, paragraph 1. The constitutional status of the strict-net principle, however, is still undecided: Is it embedded in the Constitution itself, or is it just imposed by the legislature as result of the systematic structure of tax laws and, as a result taken over by the Court with regard to equal protection? By reading the tax related judgments of the Court one often does not know precisely where the constitutional limitations and the requirements for the justification of inequality derive from: Do they derive from the Basic Law itself (Article 3 in particular) or are they the product of an systematic and congruent interpretation of the statute with the result that one provision is traded off against another provision on the edge of an equal statutory approach?[19] In this regard the Court would not apply constitutional review yet indulges in a process of optimizing the structure of the statue. Equal protection (Article 3, paragraph 1 BL) works as an empowerment of the Court to do both: combine constitutional review with making tax law more perfect, more systematic, and more appropriate.

II. Norm Control Cases

In any case, Karlsruhe's exercise of its review power of tax laws is broadly accepted both by the inferior courts (the tax courts in particular) and by the political branches. An indication for this acceptance is the high degree to which the tax courts (*Finanzgerichte*) and even the Federal High Tax Court (*Bundesfinanzhof*) use the procedure of concrete norm controls (Article, 100 paragraph 1 of the Basic Law): When courts are determined that a provision relevant for deciding the case before the court is clearly unconstitutional they must pass the question to the Federal Constitutional Court. With this procedure even inferior courts can exercise a considerable influence on the constitutional review of tax laws because they are compelled to construe the statute according to the constitution. If they do not manage to do so they may present the statute's constitutionality to the Federal Constitutional Court. Concrete norm controls allow issues of statutory interpretation to easily become constitutional questions and, in turn, level off the difference in the hierarchy of norms between constitutional review on the one side and statutory construction on the other side. Both courts, the tax courts and the Constitutional Court, benefit from such a system. For constitutional doctrine, however, it becomes harder to precisely determine which requirements derive specifically from the Basic Law and which requirements are rooted in the statutory structure of taxation.

[19] For similar criticism, see, e.g., Michael Droege, *Wie viel Verfassung braucht der Steuerstaat?*, 2011 STEUER UND WIRTSCHAFT 105, 111.

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III. Is there a Special Constitutional Doctrine for Taxation?

Contemporary constitutional discourse struggles with the question, whether the aforementioned developments in the equal protection jurisprudence are general requirements that may be formulated as abstract principles and applied to all kinds of cases or whether these requirements are specifically designed to solve special tax-related problems, in particular, whether they have been established in order to make up for the shortcomings of constitutional review of tax statues that were sketched out at the beginning?[20] To put it differently: Are these special requirements limited to tax issues or can one transfer them to other areas of the law? In a case law system one would answer the question to the former: The precedents deal with tax issues, hence, their ratio decidendi should be limited to taxes. In German legal methodology it is rather the abstract purpose and not the specific set of facts that decides the question of analogy. Therefore, all the tax-related requirements bear the chance of being transferred to other issues.

The most prominent example for this process is the transfer of the consequentiality principle (*Folgerichtigkeitsgrundsatz*) from taxation to issues of trade and business in general. When the First Senate developed consequentiality as a constitutional principle it did so clearly for the purpose of deciding tax issues.[21] Justice Paul Kirchhof, who was in charge of tax law in the Second Senate and who can be named the father of this and many other tax-related constitutional requirements, limited its applicability to taxation in many of his articles.[22] Other voices, however, treat the principle of consequentialism like a

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[20] *See, e.g.*, Johanna Hey, *Steuerrecht und Staatsrecht im Dialog: Nimmt das Steuerrecht in der Judikatur des BVerfG eine Sonderrolle ein?*, 2015 STEUER UND WIRTSCHAFT 3–18; Oliver Lepsius, *Zur Neubegründung des Rückwirkungsverbots aus der Gewaltenteilung*, 2014 JURISTENZEITUNG 488, 497–500; Droege, *supra* note 19; Paul Kirchhof, *Die Leistungsfähigkeit des Steuerrechts,* 2010 STEUER UND WIRTSCHAFT 365–71; and the symposium forthcoming in 64 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2016).

[21] *See supra,* note 16. On the development of this principle, see KYRILL-A. SCHWARZ, 'FOLGERICHTIGKEIT' IM STEUERRECHT, STAAT IM WORT. FESTSCHRIFT FÜR JOSEF ISENSEE 959 (2007); Joachim Englisch, *Folgerichtiges Steuerrecht als Verfassungsgebot*, *in* FESTSCHRIFT FÜR JOACHIM LANG ZUM 70. GEBURTSTAG: GESTALTUNG DER STEUERRECHTSORDNUNG 197 (2011); Mehrdad Payandeh, *Das Gebot der Folgerichtigkeit: Rationalitätsgewinn oder Irrweg der Grundrechtsdogmatik?*, 136 ARCHIV DES ÖFFENTLICHEN RECHTS 578–615 (2011); Christian Thiemann, *Das Folgerichtigkeitsgebot als verfassungsrechtliche Leitlinie der Besteuerung*, *in* LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS—ERÖRTERT VON DEN WISSENSCHAFTLICHEN MITARBEITERN, vol. 2 183 (Sigrid Emmenegger & Ariane Wiedmann eds., 2011); Waldhoff, *supra,* note 1, at II.1; *discussed positively by* Lerke Osterloh, *Folgerichtigkeit: verfassungsrechtliche Rationalitätsanforderungen in der Demokratie*, *in* DEMOKRATIE-PERSPEKTIVEN. FESTSCHRIFT FÜR BRUN-OTTO BRYDE 429–42 (2013); *negatively*, Oliver Lepsius, *Anmerkung,* 2009 JURISTENZEITUNG 260–63.

[22] *See* Paul Kirchhof, *Verfassungsrechtliche Maßstäbe in der Steuergesetzgebung*, *in* STEUERBERATER-JAHRBUCH 17–34 (1999/2000); Paul Kirchhof, *Die Widerspruchsfreiheit im Steuerrecht als Verfassungspflicht*, 2000 STEUER UND WIRTSCHAFT 316, 322; Paul Kirchhof, *Der Grundrechtsschutz des Steuerpflichtigen*, *supra,* note 1, at 44–45; *id.*, *Die Steuern*, *supra*, note 1, § 118 at Rn. 178 s.; *id.*, *Die Reform des deutschen Steuerrechts*, 8 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN 449–97 (2010).

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general constitutional requirement as if it was an inherent part of an ideal law making process.[23]

The First Senate translated the idea of a consequentialism-requirement into a case that dealt with health-issues in pubs and restaurants (the prohibition of smoking and permissible exceptions in state laws).[24] It declared an exception from the prohibition of smoking in public restaurants unconstitutional because the exception turned out to be "inconsequential": The statute generally prohibited smoking and the random exceptions in the statute violated the equal protection clause, the Court concluded. In a dissent Justice Bryde criticized the majority opinion for its desire for consistency and consequentiality. The political process cannot fulfill such expectations. Justice Bryde claimed that it is hardly possible for the legislative process to achieve complete stringency.[25] In another forceful dissent, Justice Masing criticized the Court for its paternalistic attitude and claimed the Court should have more understanding for parliamentary discretion.[26] Consequentialism encountered severe criticism in the legal literature as well both with regard to its application in tax cases and as a general principle.[27]

The basic argument against the consequentialism-principle draws attention to the actual conditions for the political process: The general need for a majority requires to compromise. Compromises, however, make stringent solutions hardly conceivable. Compromises seek package-solutions, exceptions for relevant groups, differentiated treatment of political issues according to party preferences and so forth. The need for a compromise is even higher under a coalition government and even more so in Germany because the Basic Law includes the *Länder* in the law making process. The further compromise between federal and state interests that is required in the *Bundesrat*,

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[23] *See, e.g.*, the position of former Justice Lerke Osterloh, *Folgerichtigkeit: verfassungsrechtliche Rationalitätsanforderungen*, *in* DER DEMOKRATIE, *IN* DEMOKRATIE-PERSPEKTIVEN. FESTSCHRIFT FÜR BRUN-OTTO BRYDE 429–42 (2013); *contra* Oliver Lepsius, *Anmerkung*, 2009 JURISTENZEITUNG 260–63.

[24] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 2008, 121 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 317. The consequentialism argument was already presented in a previous case dealing with trade and business law, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 3, 2007, 119 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 59, yet there it was not relevant for the outcome of the case.

[25] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 30, 2008, 121 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 317, 378–81 (Justice Bryde dissenting).

[26] 121 BVERFGE 317, 381–388 (Justice Masing dissenting).

[27] *See, e.g.*, Oliver Lepsius, *Anmerkung*, 2009 JURISTENZEITUNG 260–63; Sebastian Müller-Franken, *Anmerkung*, 2009 NEUE JURISTISCHE WOCHENSCHRIFT 55; Christian Bumke, *Die Pflicht zur konsistenten Gesetzgebung*, 49 DER STAAT 77–105 (2010); Philipp Dann, *Verfassungsrechtliche Kontrolle rechtlicher Rationalität*, 49 DER STAAT 630–646 (2010); Bernd Greszick, *Rationalitätsanforderungen an die parlamentarische Rechtsetzung im demokratischen Rechtsstaat,* 71 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 49–77 (2012).

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especially in the *Vermittlungsausschuss* (Article 77 Basic Law) aggravates consequential solutions. In modern politics, rather, the typical outcome of the political process will be a statute that seeks to fulfill the utmost possible expectations in need of trading off and balancing a bunch of different interests. The outcome will hardly be a statute complying with the consistency or consequentiality requirements established by the Constitutional Court. By imposing such principles the Court merely neglects the constitutional provisions concerning the law making process.

To put it differently, the Court imposes structural demands on the legislative process that glorify a specific type of statutory drafting modeled after the systematic, timeless, congruent codes of the nineteenth century.[28] Basically, we witness an old-fashioned model of statutory virtue. The Court fell in love with the idea of systematic, abstract, timeless, congruent and just statutory regimes — an idea governing German legal academia since the nineteenth century and an idea being completely unpolitical and ignoring the real conditions of the law making process in a pluralistic democracy and a parliamentary system. Consequentialism may be a helpful device in order to overcome the aforementioned shortcomings of the constitutional review of tax laws. There is, however, no need to translate it to cases in "ordinary" business and trade law, because these areas are affected by both the property clause and the freedom of profession and such statutes may be scrutinized under the proportionality principle. The primary need for the creation of the consequentialism-principle, the need for a compensation of the loss of constitutional review, does not apply here, because there is no such loss in the usual cases in trade and business law. If there is no need for a constitutional substitute one should not extend the substitute as a general requirement. To impose such substitutive devices as general constitutional principle, however, distorts their compensating effect by blowing up the principle as the ghost of a lawgiver's unlimited capacities, a lawgiver unconceivable in a democracy.

C. The Case of the Inheritance Tax Law

On 17 December 2014 the Federal Constitutional Court decided a concrete norm-control brought to the Court by the Federal High Tax Court whether Section 19, paragraph 1 in combination with Sections 13a and 13b of the German inheritance tax statute were unconstitutional. The First Senate found that these provisions violated the equal protection clause of Article 3, paragraph 1 of the Basic Law and declared the provisions unconstitutional.[29] This case is a good example of how constitutional review of tax laws

[28] See the critique by Michael Droege, DIE KODIFIKATIONSIDEE IN DER STEUERRECHTSORDNUNG, *ZUKUNFTSFRAGEN DES DEUTSCHEN STEUERRECHTS II* 68 (Wolfgang Schön & Erik Röder eds., 2014); ANDREAS MUSIL, DIE KODIFIKATIONSIDEE IN DER STEUERRECHTSORDNUNG, 129; the counter-critique by Klaus Tipke, *Mehr oder weniger Gestaltungsfreiheit für den Steuergesetzgeber?*, 2014 STEUER UND WIRTSCHAFT 273–85.

[29] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 17, 2014, Case No. 1 BvL 21/12, www.bundesverfassungsgericht.de/entscheidungen/. The decision was reviewed by Heinrich Weber-Grellet,

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works; it also contains some interesting insights in the practice of both the rights-based review of tax laws and the general willingness of the Court to intervene with the political process. Finally, the decision is illuminating the contemporary position of the Constitutional Court in the German political system in general. The case comprises technical and detailed matters in a special area in tax law as well as general insights in the current state of judicial review in Germany.

I. Privileging the Heirs of Family Businesses

The rejected provisions were introduced in the latest revision of the inheritance tax law of 2008.[30] Generally, the value of an enterprise will be taxed if it falls into the heritage of a natural person. In contrast, the value of enterprises owned by legal entities cannot be taxed with an inheritance tax. The legal difference in ownership, hence, created a special burden for family-owned businesses: They have to pay taxes to the value of their business if the owner dies or gives the ownership to his or her descendants. The greater the businessman's success the higher the value of his business and, consequently, the more taxes are due. For quite a while family-owned businesses complained about the tax. One should not include the value of the enterprise in the calculation of the taxable estate of the heir. This harms family businesses in comparison to companies owned by legal entities. Furthermore, since no such inheritance tax exists in other countries the tax harms German family businesses in contrast to foreign businesses that often are major competitors on the markets. It was claimed that the inheritance tax would aggravate the business's survival on the world markets. For quite a while the lobbyists of the family-owned businesses called for an exemption of the inheritance tax in order to safeguard the persistence of the enterprises over the generations and in order to protect the many workplaces at family-owned businesses.

One has to keep in mind that family businesses play an important role in the German industrial structure.[31] They are a viable part of the German *Mittelstand*: successful entrepreneurs, inventive, competitive export oriented companies that are at the same time rooted in their regions, show responsibility for the needs of their employees as well

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Kritische Anmerkungen zum Erbschaftsteuer-Urteil des BVerfG, 70 BETRIEBS-BERATER 1367–70 (2015); Roman Seer, *Überprivilegierung des Unternehmervermögens durch §§ 13a, 13b ErbStG*, 106 GMBH-RUNDSCHAU 113–21 (2015).

[30] BGBL. I (Dec. 24, 2008) 3018. See the justification for the law as given by the Federal Government, BT-Drs. 16/7918 (Jan. 28, 2008) at 33–35, http://dip21.bundestag.de/dip21/btd/16/079/1607918.pdf.

[31] *See, e.g.*, SANDRA GOTTSCHALK ET AL., DIE VOLKSWIRTSCHAFTLICHE BEDEUTUNG DER FAMILIENUNTERNEHMEN (2011). The book was published by the Foundation for the Promotion of Family Businesses—a wide spread and influential institution that managed to bring the economic importance of such businesses to the general public's attention. There exists a voluminous literature on the social benefits and the general importance of family businesses for the German economy.

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as the local authorities.[32] Family-owned businesses in Germany are not limited to craftsmen and small enterprises; they also comprise corporations with, sometimes, thousands of employees and a solid presence on world markets. Such businesses, hence, range from the butcher or the painter to families engaged in several branches and industries. Family businesses also exercise a social benefit: Often, the local infrastructure and the actual capacities of local authorities depend upon the well-being of these companies. They stand for the economic success of smaller towns and local communities. In contrast to legal entities family businesses remain stable factors for local communities: Generally, they are neither traded on floors nor merged and acquisitioned. The owners participate in the local affairs and may meet their employees at church services. By their endurance and presence family businesses also stabilize the social environment. The protection of such businesses is, therefore, in the general interest in Germany. Their political support does not depend upon a certain party affiliation. Yet there is a broad consensus that family businesses have to be legally protected against unfair competition, as it would be created by imposing tax burdens only on such business. The general commentators claimed that the tax would severely disadvantage the continuation of these companies because it could force the heir to sell or cut the business in order to pay inheritance tax.

II. The Technique of Tax Exempts

These claims were seriously taken into consideration in the political process. Since the 1990s, the inheritance tax law contained a tax-exempt amount for family businesses that was increased over the years each time the inheritance tax law was amended.[33] In 2008, during the latest statutory reform of the inheritance tax the lobbyists finally succeeded. The Bundestag included a wide exemption in the inheritance tax statute. Under certain conditions the value of the enterprise will be completely exempted from the tax. The relevant provisions, Sections 13a and 13b of the inheritance tax law, comprise five A4-

[32] The Federal Government's justification for the tax exemption explicitly referred to these facts, see Jan. 28, 2008, BT-Drs 16/7918 at 33, http://dip21.bundestag.de/dip21/btd/16/079/1607918.pdf:

> Familienbetriebe sind für die deutsche Wirtschaft im internationalen Wettbewerb von Vorteil. Regional vernetzte Familienbetriebe sind notwendige Voraussetzungen für wirtschaftliches Wachstum und damit für die Schaffung wettbewerbsfähiger Arbeits- und Ausbildungsplätze in Deutschland. Klein- und mittelständische Betriebe stehen für offene Märkte und hohe Wettbewerbsintensität. Monopole oder auch oligopolartige Strukturen zu verhindern und damit verbundene Überrenditen zu vermeiden, wo das möglich ist, ist Staatsaufgabe und konstitutives Element einer sozialen Marktwirtschaft.

[33] For the development of the tax exempts, see the legislative history as recorded by BVerfG, Case No. 1 BvL 21/12 at nr. 24–41.

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pages in print. I cannot summarize them here adequately[34] and will simplify the statute's content for the purpose of a better understanding of the statute's incentives. It is in my view for the purpose of this article not necessary to get a precise picture of the relevant regulation in the inheritance tax law and, I will limit its description to the basic content.

(1) More than fifty percent of the assets must be used for productive purposes within the enterprise (so-called *Betriebsvermögen*); less than fifty percent of the enterprise's value may be attributed to administrative or management purposes (so-called *Verwaltungsvermögen*). The statute enumerated those assets that were attributed to non-productive and merely administrative purposes.[35] The reason for this requirement was that only enterprises actually engaged in manufacturing goods (and not just in non-producing industries like trust administration or asset management). Assets that do not contribute to the increasing economic growth or safeguarding workplaces should not be privileged.[36] If the fifty percent requirement is matched, the complete value of the enterprise is tax-free; if the productive value's ratio is less than fifty percent, the complete value will be taxed. Yet, entrepreneurs could circumvent this requirement by assigning parts of the assets to either purpose.

(2) Furthermore the statute required that the heir continued the business for at least five years. If the heir discontinues the business for whatever reason—sells the enterprise, shuts it down—the enterprise's value will be taxed by subsequently adding it to the heritage.

(3) The statute also required that the amount of the wages actually paid by the company may not decline within five years (*Lohnsummenregelung*). This requirement should prove that the heir actually continued the business and did so not just formally. The safeguarding of the workplaces in the company worked as an indicator of the endurance of the company. It was not necessary to keep a certain number of employees but a certain level of wages. An heir, therefore, was free to reorganize the company as long as a certain total sum of actually paid wages persisted. The employer, hence, could minimize the number of employees by at the same time adding higher paid workplaces and by this means fulfilling the wage-level requirement.

[34] Those interested in the detailed content may look it up in the description the Court gives, see BVerfG, Case No. 1 BvL 21/12 at nr. 5.

[35] Sec. 13b Para. 2 cl. 2 Inheritance Tax Law.

[36] See the legislative history justifying the amendment of the inheritance tax law, BT Drs. 16/7918 at 35.

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(4) Smaller businesses with less than twenty employees were not included in this requirement.

(5) In most cases only eighty-five percent of enterprise's value was deducted from the taxable heritage. Under certain further requirements an heir could extend the exemption to one hundred percent, for instance if he or she declared to increase the wage level, continue the business for at least seven years and assure that only ten percent of the company's value can be attributed to administrative purposes.

In a concrete norm control case, the Federal Tax Court (*Bundesfinanzhof*) presented to the Federal Constitutional Court the question whether such a wide exempt from inheritance taxes still meets the equal protection clause considering that large and ultralarge businesses would profit from the tax exempt without being financially endangered by the tax.[37] The tax law, therefore, privileges very wealthy persons and forwards the concentration of private fortune and funds among a rather limited group of people. The Tax Court doubted whether a tax-exemption was necessary at all to protect family businesses considering the findings of the scientific advisory board at the Federal Ministry of Finance. In a 2012 report on the matter the board did not find enough evidence to conclude that the tax exemption was relevant for the continuation of family businesses. Hence, it seemed as if the exemption could not be empirically justified and, rather, forwards benefits to the few and wealthy. The Tax Court also criticized that the wage level-requirement as irrelevant in most cases because most companies had less than twenty employees and the statute did not prevent the splitting up of larger companies into a number of smaller ones with less than twenty employees in order to circumvent the wage level-requirement. The Tax Court further rendered that a decedent could reorganize the company by contractual design in such a way that business-related funds became practically untaxable. He or she could include merely private funds into the value of the business and by that means prevent inheritance taxes even where they do not relate to businesses and jobs. Likewise such a broad tax exempt also invites descendants to creative dispositions and contract-design and, therefore, violates the principle of equal taxation according to one's capacities. In the eyes of the Federal Tax Court this constitutes a violation of the Constitution.

III. The Holdings of the Federal Constitutional Court

In its judgment from December 2014 the Karlsruhe Court's First Senate declared major parts of the tax exemption unconstitutional. The way in which the statute excluded certain funds from taxation violates the equal protection clause, and as such sec. 13a and 13b of

[37] The major arguments are reported by BVerfG, Case No. 1 BvL 21/12 at nr. 45–66.

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the inheritance tax law are unconstitutional. Besides the Court also decided on the requirements for a Federal law according to Article 72, paragraph 2 of the Basic Law. The major arguments of the First Senate are the following:[38]

The equal protection clause leaves broad discretion to the legislature what will be taxed and to what extent it will be taxed. Yet, if the legislature has decided what and to what extent to tax it may not diverge from its basic decisions without a proper justification. The intensity of the justifying reasons increase with to the level of the divergence. Considering this general standard the actual tax exemption violates equal protection because it is too broad and allows too many possibilities for contractual designs in order to evade taxation. The general decision to protect smaller and middle family businesses from inheritance tax is constitutionally acceptable and falls into the legislature's discretion. It needs a rationale, however, and there the exemption fails on many grounds. Generally privileging the assets used for productive purposes (*Betriebsvermögen*) is disproportionate as far as the exemption also incorporates the funds of larger businesses—companies that does not count as small and medium-sized enterprises in European law—and as long as the exemption does not require a neediness test. Also disproportionate is the wage level-requirement because it unconstitutionally privileges the heritage of enterprises with less than twenty employees, as they are not included in this requirement. Furthermore, the rule regarding the assets attributed to administrative or management purposes (*Verwaltungsvermögen*) violates equal protection because it does not give a justification for the tax exemption of the non-productive assets that make up to fifty percent of the value of the enterprise (so-called cash-companies). Presumed job stability, as a motive, does not suffice. Finally, the Court declares a tax statute will be unconstitutional if it allows a contractual design that deliberately circumvents taxation, therefore tolerating private action against the statutory purpose and without benefitting from a constitutional justification for a tax evasion.

D. The Major Arguments of the Court

What is new, interesting in the Court's judgment or merits special attention? One has to keep in mind that the case does not concern a fiscal tax issue because the tax emptions are not intended to increase the tax revenue but to safeguard workplaces. The judgment deals with the constitutional limitations of taxes that promote further purposes not just generally financing the state, and therefore applies primarily to so-called steering or incentive taxes (*Lenkungsteuern,* taxes that aim to change, direct or guide behavior). With regard to the constitutional review of such taxes, the decision contains some remarkable statements. Some might even say this judgment could act as the new standard doctrinal approach to the constitutional review of taxes with behavioral effects.

[38] *See* BVerfG, Case No. 1 BvL 21/12 at nr. 119.

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I. Equal Protection Doctrine

First of all the Court restates its Article 3 doctrine in tax law and gives a treatise-like summary of its approach. The Court acknowledges three levels of scrutiny with regard to unequal treatment: (1) the low standard of a rational basis-review according to the old arbitrariness-formula and (2) stronger levels of scrutiny which, again, differ when (a) a corresponding freedom is affected and, hence, the proportionality principle is applicable or when (b) the individual cannot adjust his or her behavior to the statute or when the statute uses criteria for distinction that resemble the prohibited criteria of Article 3, paragraph 3 Basic Law (gender, faith, race, origin etc.). The Court then repeats its distinction between the object and the level of taxation: If the legislature has chosen one object for taxation it must justify any exemptions and distinctions; if the legislature has chosen a specific level of taxation of a certain object it must shape the actual tax-level consequently; any divergence must be justified. For justification the legislature may allude to the furtherance and promotion of public goods. As a result, tax exemptions that promote public goods are acceptable. But, the justification for the exemption will be scrutinized according to the aforementioned three levels test. The more unequal the tax exemption proves the harder the Court's look on the presented rationales.

The Court applies this three level test, and uses all levels at different points: The lowest level (arbitrariness formula) is applied to Parliament's decision what to exempt; the design of the exemption, however, will be scrutinized stricter. The statute's furtherance of certain purposes falls into the lower level of scrutiny; its specific design, again, will be tested harder. In sum, we see a rather sophisticated constitutional review: Equal protection requires different constitutional levels of scrutiny and statutory justification for distinctions. A harder look and a more lenient approach are intertwined: General decisions are less scrutinized, issues of concrete statutory design, however, will be looked at closer. What is particularly interesting is a gradual formula the Court is presenting here: Instead of trying to formulate precise thresholds the First Senate establishes a dynamic test whose level of scrutiny depends on incremental effects: The broader the tax-exempt and, consequentially, the larger the margin of inequality the more intense will be the burden of justification.[39] This clause could find its way into the general doctrine of Article 3 (*Gleichheitsdogmatik*) because it formulates an abstract approach that relates the effects of the statutes with the intensity of constitutional review. We know similar approaches also in the doctrine of other fundamental rights (the right to profession, Article 12 Basic Law, in particular). One also might infer from the general application of the proportionality principle a similar principle. Under the proportionality test it seems viable that the burden of justification for a statutory means increases with the intensity of the infringement into

[39] BVerfG, Case No. 1 BvL 21/12 at nr. 172, holds: "Je umfangreicher die Steuerverschonung und je größer deshalb andererseits das Maß der Ungleichbehandlung gegenüber den Erwerbern nicht begünstigten Vermögens ist, desto anspruchsvoller wird die Rechtfertigungslast hierfür."

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another right by the means. This balancing between the rights infringed and the goals pursued is now translated to the constitutional review of tax laws under the equal protection clause.

The whole treatment of the equality issue is deemed rather doctrinal by the Court: The Court obviously is inclined to present its constitutional review as a coherent application of an abstract test—a test that is presented as a neutral and principled framework, designed to be generally viable for the constitutional review of tax laws. What makes this decision so lengthy and, partly, hard to read is the desire to give both a general dogmatic standard for equality issues and a concrete assessment of the inheritance law at hand. The judgment is over-sophisticated and intends to do more than just solve a case. Besides deciding the case, it also wants to shape doctrine and bring the often-confusing distinctions within the Court's treatment of equal protection into a coherent, systematic doctrinal order. One may therefore consider this judgment a leading case for the further review of steering taxes in particular under equality requirements.

II. The Limits of Parliamentary Discretion

One can further assess the Court's holdings with regard to the discretion it is willing to attribute to the political branches of government. Usually the German Federal Constitutional Court uses a wording that may embarrass constitutional scholars from other jurisdictions. Karlsruhe commonly does not defer to Parliament; rather, it attributes a discretionary sector called *Einschätzungsprärogative des Gesetzgebers*.[40] Other wordings recognize a margin of appreciation (*Beurteilungsspielraum*) or latitude for a prognosis. One gets the impression that the Court rules from the basis of a complete constitutional review and then individually grants sectors to the political branches in which it will not exercise its complete judicial review.[41] This usage, that only started around 1980, implies that the Court has the final say on whether Parliament has discretionary power at all and to what extent it may exercise its discretion in the concrete case. What may sound offensive is the status of an ultimate arbiter one branch (the Constitutional Court) is allowing itself at the expense of another branch (the Legislature). It is the Court that is assigning discretion to Parliament. To put it differently, the Karlsruhe Court does not use the idea of judicial self-restraint. It neither defers to other branches of government. It, rather, increases or

[40] For recent overviews, see CHRISTIAN BICKENBACH, DIE EINSCHÄTZUNGSPRÄROGATIVE DES GESETZGEBERS (2014); NIELS PETERSEN, VERHÄLTNISMÄßIGKEIT ALS RATIONALITÄTSKONTROLLE 90–109 (2015).

[41] Some examples for this attitude from more recent decsions: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 19, 2000, 102 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 197, 218; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] March 28, 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 276, 209; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] March 2, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 260, 329; *see also* OLIVER LEPSIUS, *Die Chancen und Grenzen des Grundsatzes der Verhältnismäßigkeit*, *in* *VERHÄLTNISMÄßIGKEIT – ZUR* TRAGFÄHIGKEIT *EINES VERFASSUNGSRECHTLICHEN SCHLÜSSELKONZEPTS* I.3 (Matthias Jesatedt & Oliver Lepsius eds., forthcoming 2015).

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decreases the scope of political discretion. Most other Constitutional Courts would not go so far when the balance of power between different branches of government or constitutional checks and balances are concerned.

Considering this amazing self-esteem of the Court—particularly in contrast to Parliament—the First Senate's judgment in the inheritance case is remarkable because it yields more discretionary power to the legislature than we are acquainted with from the Court's previous decisions. With regard to the steering purposes, the Court practically defers to the political branches: The purpose must only be plausible. As justification politics need only present a "reasonable expectation" that the steering means (i.e. the tax exemption) will actually forward the purpose (i.e. safeguarding jobs). This holding applies to situations where the actual effect cannot be easily assessed empirically yet depends upon future developments and a prognosis. Whether the intended effect actually will occur is a matter that remains in the legislature's discretionary sector. This usage is subtle because it allows the Court to defer generally and at the same time keep the general perception of complete judicial review of parliamentary action.

III. The Review of Prognostic Political Decisions

From this passage one can generally infer that the Court is cutting back its eagerness to control prognostic political action. In other cases the Court did not show any reluctance to control an intensified constitutional review of legislative prognostic decisions.[42] What is even more telling is the fact that it was very dubious whether the tax exemption of family businesses actually succeeded in the intended purpose of safeguarding workplaces. There was no evidence that the inheritance tax was of any relevance on the continuation of the companies and the safeguarding of the workplaces. From the data, one got the impression that exempting family businesses from the inheritance tax was irrelevant for the number of jobs or the wage-level at the relevant enterprises and, hence, that the presented purpose was just a welcome political justification for privileging some decedents to others. The real purpose, presumably, favored family businesses on the world markets where they compete with other companies that do not undergo such taxes; the intention was to keep family businesses in Germany and encourage entrepreneurs to embark on such businesses. The workplace-argument helped out to ensure political majorities for the privilege. In comparable cases the Court would have taken the unclear empirical evidence as cause for stricter scrutiny: Claiming that the steering means (tax exempt) does not match the intended purpose (safeguarding of workplaces) and, hence, is unsuited under the requirements of the proportionality principle. This is not so now.

[42] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 24, 2002, 106 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 62, 140.

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The Court accepts this cloudy justification. Parliament may choose this purpose in order to treat inheritances differently. According to the court, the purpose meets the requirements of the proportionality test: The exemption from the tax is suited, necessary and proportional.[43] It is a legitimate aim to prevent family businesses from getting into financial troubles because of an inheritance with the purpose of being able to continue the enterprise and safeguard the workplace. The Court does not only accept the legislature's policy,[44] but also accepts the legislature's assessment that the tax exemption will actually forward the purpose. The Court says that it is in the legislature's discretion to rely on a prognostic decision if one cannot clarify the state of affairs meaning the precise effect of the tax exempt on the stability of workplaces.[45] The Court at least found no evidence that the legislature relied on wrong conclusions or false statements. It was neither impressed by the findings of the aforementioned report of the advisory board to the Federal Ministry of Finance concluding that there was no clear evidence that the tax exempt had any influence on the number of workplaces in family businesses. To the knowledge of the advisory board no single enterprise went out of business just because of its value having been taxed in the case of an inheritance. The Court on the contrary asserted that there neither was evidence for the opposite and, therefore, the prognostic decision of the legislature could not be rejected.[46]

Interestingly, the Court did not seem impressed by any expert witnesses; the conclusions of scientific advisory boards do not guard the Courts judgment of the suitability or the necessity of the purpose. Politics could freely decide, and the Court will accept its decisions when there is an unclear prognostic situation—this is how one could summarize the Court's position. The outcome partly surprises: At the beginning the Court declares that it will increase the level of scrutiny and will apply the stricter standard of proportionality onto the aim of the steering tax. Then, however, the Court declares that all political findings are acceptable. Contrary scientific conclusions do not matter because all findings depend on an unclear, open prognostic decision. One gets the impression that the Court generally claims a level of review that in fact is not applicable on the case at hand—in other words, the Court is preparing its doctrine for future cases.

IV. Questions of Statutory Design

A stricter scrutiny under the proportionality principle, then, is applied with regard to the peculiar design of the tax-exempt. The legislature may have discretion to choose the

[43] BVerfG Case No. 1 BvL 21/12 at 127–54.

[44] BVerfG Case No. 1 BvL 21/12 at 134, 138.

[45] BVerfG Case No. 1 BvL 21/12 at 144.

[46] BVerfG Case No. 1 BvL 21/12 at 145, 149.

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purpose, because there is no reliable evidence that the purpose itself is not proportional. When it comes to the implementation of a statutory design that further elaborates the conditions under which one will benefit from the exempt, the Court, sharpens judicial review. It demurs the exempt of enterprises from the inheritance tax that do not count as small and middle-sized enterprises and that are exempted without any further verification whether it is necessary to exempt these businesses in order to achieve the intended purpose of the exemption—whether taxation actually will endanger the continuation of the business or the continued existence of the workplaces.[47] The constitutional justification of the tax-exempt requires a social purpose such as safeguarding of workplaces. It is not admissible, however, to allow exemption from the tax just in order to privilege certain decedents or heirs. The mere fact of the ownership of the enterprise—family owned in contrast to legal entities as proprietors—does not justify an unequal treatment, because the dimension of the unequal treatment increases disproportionally if the exempt is applied to large enterprises with a high value. For a constitutionally acceptable privilege of the value of the enterprise in comparison to other assets of the decedent it must actually be plausible that the exemption will promote the continued existence of workplaces. Hence, the extension of the exemption to all kinds of family owned businesses does not proportionally forward the statute's generally acceptable purpose. The value of larger enterprises may only be exempted from the tax if there is a verification that the exempt actually forwards the safeguarding of workplaces. The law, however, does not provide for a sufficient verification. To this extent, it is declared unconstitutional.

V. Typifying

The Court finds some more unconstitutional provisions in the structure of the tax exemption: (1) the general dispensation of enterprises with less than twenty employees from the wage-level requirement in the tax exempt violates equal protection;[48] (2) the provisions regulating the ratio of the non-productive value of the enterprise do not fit constitutional requirements;[49] (3) the statute is declared unconstitutional as far as it allows to a broad extent contractual designs of the companies that enable the evasion of the inheritance tax.[50]

With these provisions the legislature wanted to typify situations in order to facilitate the enforcement of the law. Typifying as such is a legitimate purpose and may be a constitutional justification for an unequal treatment. Regardless, the Court will review such

[47] BVerfG Case No. 1 BvL 21/12 at 170–75, 278–81.

[48] BVerfG Case No. 1 BvL 21/12 at 201–29.

[49] BVerfG Case No. 1 BvL 21/12 at 231–58.

[50] BVerfG Case No. 1 BvL 21/12 at 253–77.

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stereotyping with the proportionality test: To what extent is it suited, necessary and appropriate? Here, again, we encounter a stricter review. The statute formally intends to safeguard jobs but as it happens it does not pursue this aim in most cases. Since around ninety percent of the family businesses have less than twenty employees the general dispensation of businesses in this category turns the general rule (wage-level requirement) into an exception. According to the Court such a typifying provisions does not forward the justification that, however, is needed for an unequal treatment. The dispensation of enterprises with less than twenty employees from the wage-level requirement, hence, was declared unconstitutional, and it could not per se be justified with the counter-argument of facilitating the enforcement of the law. In order to be constitutional the dispensation criteria had to be much more limited but could not be drafted in a way that actually turns the general rule into an exception.

Typifying the ratio of the non-productive value of the enterprise—the value used for administrative and managerial purposes—neither met the proportionality requirements. The fifty percent ratio also leads to severe inequality and, hence, had to be reviewed stricter. It turned out to be inappropriate—unproportional in the narrower sense—in comparison to enterprises with a higher ratio of non-productive value which in turn do not benefit at all from the tax exempt. The court concluded, that there is no justification for a fifty percent margin concerning. . Typifying and the desire for plain enforcement cannot justify the unequal treatment of enterprises over and under the fifty percent margin.

VI. Abuse and Circumvention

The most interesting holding with regard to typifying, however, is the Court's reasoning that statutes may be unconstitutional if they allow tax evading contractual designs from the outset. In such cases the statutes contradicts its purpose. Since the pursuance of the purpose is needed in order to justify an unequal treatment, the statute becomes unconstitutional if it does not pursue the purpose properly, such as if the statutes broadly allows the circumvention of the purpose by creative contractual design.[51] The Court tightens its holdings saying it does not depend on the legislature's willingness or capacity to recognize the possibility of circumventing contracts. A provision may be unconstitutional if the legislature could not even foresee the possibility of tax evasion.[52]

This is an astonishing and courageous holding for several reasons: On the one hand the tax procedure act know in Section 42 tax procedure code (*Abgabenordnung*) contains a provision that intends exactly this: Contractual design intended to evade taxes, an abuse of freedom of contract, is invalid. The Federal Constitutional Court in a way duplicates this

[51] BVerfG Case No. 1 BvL 21/12 at 254.

[52] BVerfG Case No. 1 BvL 21/12 at 255.

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provision on the higher level of the constitution. This only makes sense if either the tax procedure act is insufficiently applied by the tax authorities and the tax courts or if the Federal Constitutional Court wanted to empower itself with stricter means for review, mentioning that it will consider as part of the judicial review whether the abuse was foreseeable or recognizable. One may doubt how the legislature could cope with such a constitutional requirement. How could it prevent abusive contracts? It already provided Section 42 preventing exactly such abuses. What else could it do? If one takes the new criterion seriously, tax laws may be pending unconstitutional depending on the use or abuse of freedom of contract in the aftermath of the regulation. What the Court probably means is that the legislature should draft the provision in such a way that contractual abuses are minimized and hampered, while the inheritance tax exempt was drafted so lavishly that it rather encouraged circumventions. This criterion probably needs further elaboration by the Federal Constitutional Court.[53] At least, it is a very interesting requirement derived from equal protection, a requirement that generally requests good statutory drafting and statutory foresight of abusive behavior. If one generalizes this argument as an abstract constitutional requirement the drafting of statutes, however, will encounter a cumbersome future. Any statute may become unconstitutional in the course of time just if parties develop contractual designs in order to evade the rules. Freedom of contract may turn statutes unconstitutional if those contracts are deemed abusive.

VII. Further Application of the Law despite its Declaration of Unconstitutionality

Although Sections 13a and 13b of the Inheritance Tax law violate the equal protection clause only partially, the provisions are completely declared unconstitutional. The unconstitutional parts, the Court held, form essential parts of the comprehensive provisions, and, therefore, the constitutional components of the provisions could not stand alone. The Court also ordered that despite their unconstitutional character the provisions have to be applied for a limited time for administrative and calculative reasons until the legislature has amended the inheritance tax law. The deadline for amending the statute in a constitutional way is 30 June 2016.

[53] The Court could refer to a similar criterion it established well back in 1991: In Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] June 27, 1991, 84 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 239, 275. The Second Senate held it a violation of the equal protection clause if the statute cannot be properly enforced or if the relevant data for taxation cannot be assessed properly from the outset (*strukturelles Vollzugsdefizit*, *strukturelles Erhebungsdefizit*). The Second Senate came out similarly in Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] Oct. 7, 2002, 110 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 94, 114–16, 131–34. Interestingly, the First Senate does not refer to these two decisions of the other Senate, although the Court usually likes to cite itself in order to prove the consistency of its judgments and although the new argument easily could add to the previous one.

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VIII. Concurring Opinion

The holding of the First Senate came out unanimously. However, three justices—Gaier, Masing, and Baer, who all count as left wing—issued a concurring opinion stating that the decision should also consider the social state principle (Article 20, paragraph 1 Basic Law).[54] The inheritance tax, the justices held, is an instrument of the social state to prevent the accumulation of large fortunes in the course of generations. Wealth by means of inheritance is increasingly growing money in the hands of few. The concurrence mentions data of increasing differences in the distribution of wealth in the society, e.g. indicating that in 1993, eighteen-point-four percent of the private households still owned sixty percent of the monetary property. In 2007 this ratio had decreased to only ten percent. The principle of the social state requires the legislature to establish a just social order and to balance social discrepancies. The concurring justices remind their brethren not only to review tax statutes according to individual rights—equal protection, proportionality to freedoms—but also to take into account the constitutional mandate to the social state. When assessing the legislature's discretion the Court should also turn to Article 20, paragraph 1 of the Basic Law. The principle of the social state influences the scrutiny of the equal protection clause, which has to be two-sided: taking into account both the individual rights and social justice.

E. Assessment

What is remarkable of this decision? Why should one focus on a case in such an extremely intricate and knotty are of tax law, a case that depends upon the tides of politics so much? Most likely a foreign observer will be surprised by the intensity and rigidity of constitutional review of tax laws in Germany. For twenty-five years now the Federal Constitutional Court has established a tradition of a comprehensive review of tax statutes. From this follows a variety of criteria that tend to form a special constitutional tax doctrine—in contrast to the rights based review in other subject matters. Since civil rights are only applicable to tax issues in a reduced way the Court's approach mainly relies on equality issues and reasoning that allude to structure, coherence, and abstract principles, hence, to the precise statutory design. Those criteria are, at first sight, not embedded specifically in the Constitution. Rather, they are construed—equality working as the anchor in the Basic Law—and then transferred to the statute. One might discuss whether constitutional tax review in Germany actually is completely driven by the Constitution or whether the Court has not established review standards that operate on the statutory level (and only nominally originate in Article 3 Basic Law). In any case, the Federal Constitutional Court was very creative to overcome the constitutional shortcomings presented at the beginning of this article. Tax review, as this case shows again, has become a subject matter

[54] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 17, 2014, Case no. v. 17.12.2014, 1 BvL 21/12, concurring opinion, at 3–6, www.bundesverfassungsgericht.de/entscheidungen/.

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well suited for innovative constitutional doctrine. When one further discusses the general relevance of this judgment one has to distinguish two questions: What is its relevance for the future elaboration of tax review? And, what is its relevance for the whole picture of constitutional review in Germany, in particular when it comes to imposing requirements on the design of statutes and the Court's willingness to accept parliamentary discretion?

I. Tax Law Review

In the foreseeable future this decision will be the leading case for constitutional review of tax laws under the equal protection clause. Yet, it only applies to constitutional issues of steering taxes. Many of the holdings will be hardly applicable to "ordinary" tax statutes, such as those taxes that only intend to generally finance the state and do not aim at influencing behavior or promoting social goals. The proportionality principle can only be applied in this decision because the law pursues a special purpose. This purpose can be assessed according to the proportionality principle of suitability, necessity, and appropriateness. If there were no particular purpose, like in fiscal tax laws, the Court could not apply proportionality at this level. It neither could structure its review accordingly. If proportionality is applicable, however, the legislature has manifold reasons at hand to justify unequal treatment as this case clearly shows. In ordinary fiscal statutes there is no possibility to justify a tax with a special purpose, the only purpose would be that the state always needs more money, which, of course, is no admissible purpose. Hence, one may well infer that it will be easier to justify steering taxes than fiscal taxes—which, however, would be an astounding result because it aggravates the level of constitutional justification for the normal situation (fiscal taxes) and alleviates it for special taxes (steering taxes). For constitutional doctrine this is not convincing.

One may further ask whether the approach presented by the Court here will make its way into general constitutional doctrine or whether it will turn out as the formation of a specifically tax-related approach. Do tax cases furnish general precedents for civil rights jurisprudence or do they require a "*Sonderdogmatik*," a peculiar doctrine, specially sized for tax issues? One has to keep in mind that tax review cases often contain innovative doctrinal solutions because "traditional" doctrine does not suffice here for the reasons outlined at the beginning. Therefore, it is intricate to transfer tax-related doctrinal approaches to other sets of fact. To give an example: The principle of self-consistency (*Widerspruchsfreiheit*) was established by the Second Senate in cases dealing with tax powers in the federal state: to what extent may States establish taxes that diverge with material approaches in federal environmental law?[55] The tax power-related principle was transferred to issues of statutory design in general: To what extent must federal statutes

[55] Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] May 7, 1998, 98 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 83; Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] May 7, 1998, 98 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 106, 125.

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be drafted in a clear and non-contradictory sense generally?[56] Or, to mention an even more cumbersome example: The principle of consequentiality (or logical consistency, *Folgerichtigkeitsprinzip*)[57] was established in cases corning the design of the income tax rate. There was no "traditional" approach available to address these specific issues; hence, the Court further elaborated special equal protection requirements into such a sub-principle. The same principle, however, was then applied by the other senate in a completely different context, namely the prohibition of smoking in public restaurants. In this context there was no need for the consequentiality-requirement because the context was well encompassed by rights such as profession and health. The traditional doctrine, therefore, sufficed, and the case could have been decided like so many others with conflicting rights under the proportionality principle. The import of the peculiarly tax-related criterion of consequentiality transferred the Court's reasoning in this case into a different fabric. Cases like the non-smoker-decision demonstrate how problematic it is to easily apply tax-related doctrines to other contexts. One, rather, has to carefully assess whether tax cases suit as general precedents for the rights doctrine or whether their binding authority should be limited to the realm of taxation. Legal scholarship will have to elaborate this question further.

II. Premature Generalizations of Precedents

One has to remember that there is no established acquaintance and handling with the phenomenon of precedents. Precedential thinking in case-law systems always refers to the context of the decision and keeps in mind that solutions in one context may not be automatically transferred to another context. The analogy of the rule requires contextual similarity. In Germany, however, analogy rather requires a purposive similarity than a factual vicinity. Whether a rule will be applied analogically is a matter of the purpose of the norm and not of the similarity of the sets of fact. The purposive approach to analogy makes it easier to transfer the holdings of one case to another, at least the transfer does not depend upon the factual context of the cases but on the legal or normative problems these cases address. It is therefore more difficult to isolate a peculiar jurisprudence to certain contexts or specific factual issues.

In analyzing the courts' reasoning one will recognize the same effect: When the courts establish a precedential rule they do not relate it to the facts the case presents, rather,

[56] Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] July 15, 2003, 108 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 169, 181; Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] June 21, 2006, 116 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 164, 185; Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] Dec. 20, 2007, 119 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 331, 366; Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] March 23, 2011, 128 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 282, 318.

[57] 84 BVERFGE 239 (271); 99 BVERFGE 88 (95); 105 BVERFGE 73 (125); 107 BVERFGE 27 (46–48); 116 BVERFGE 164 (197); 120 BVERFGE 125 (155); 122 BVERFGE 210; 126 BVERFGE 268 (278); 126 BVERFGE 400 (417).

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they are inclined to justify the rule as an abstract deduction of a more general rule or principle.[58] We witness this understanding also in the inheritance tax decision: When the First Senate is presenting its different levels of scrutiny within the equal protection clause it does so abstractly as if it was applying equal protection standards quite generally without taking into consideration the corresponding questions. The Court pretends to reason from a purely normative perspective, deducing compelling normative reasons. Only at a second stage it will apply these abstract reasons to the facts before the Court. This general approach also accounts for the lengthy and often very doctrinal reasoning: The Court embarks on two processes at the same time: developing a universal equal protection doctrine on the one hand and reviewing a specific statute at the other hand. Its reasoning, consequently, is apt for over-generalization—and this creates a problem of its own because it attributes to the Court's holding a potentially larger binding force than a precedent in case-law reasoning ever would do.

III. Equality Doctrine and Legislative Discretion

The Court tries to bring its previous approaches in a halfway coherent doctrine that builds on a three-level scrutiny test: mere arbitrariness control, middle-sized review under the proportionality requirement, and, finally, strict review if the statute is appealing to the criteria of antidiscrimination in Article 3, paragraph 3 Basic Law. Throughout the decision the Court tries to formulate a clear doctrinal approach. It always starts the different holdings with remarks on the level of scrutiny: Why low scrutiny applies to this part of the judgment and why the Court reviews stricter in other parts. These rather abstract explanations of the standard of review usually tend to become abstract doctrinal holdings that will be applied in future cases. If one looks through the doctrinal arrangement of the different levels of review one might not be completely convinced whether this arrangement will stand the test of time. Obviously the relevant standard depends upon the either political or technical character of the relevant rule. At some points the Court rather defers to political judgment, declaring there is parliamentary discretion, at other points the Court limits the amount of discretion and intensifies its review. The ruling does not merely depend on the intensity of an infringement into a right; it also takes into account rather objective reasoning like the constitutional admissibility of a statutory purpose or the interior structure of the statute in furthering this purpose. Judgments that give the impression of leaving substantial issues to the political branches may come out to the opposite: The legislature may decide on the purpose in deed, however, it will be strictly reviewed according to its own decision. The deference to politics stops immediately after the legislative branches have decided on a purpose or a steering aim. Afterwards the Court will be a severe arbiter whether the legislature actually achieved in transforming its goals

[58] For this practice, see also MATTHIAS JESTAEDT ET AL., DAS ENTGRENZTE GERICHT (2011), with many examples; Oliver Lepsius, *Entscheiden durch Maßstabsbildung*, *in* HANDBUCH BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 119–35 (Martin H. W. Möllers & Robert C. van Ooyen eds., 2nd ed. 2015).

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properly. The review of the equal protection clause, hence, shifts from the protection of rights to the safeguarding of general aspects of the rule of law, in this case a coherent structure of the law or a congruent design of the law. This, of course, impedes the political process. It is only free in deciding basic decisions. When it comes to the further elaboration of the statutory program, however, the Constitutional Court will overlook the legislative process.

One can infer that the Court will stand to its approach in future cases, at least in the realm of taxation: The concrete design of the statute will be reviewed much stricter than the abstract political determination of the aims of a steering-tax. The Court installs itself not as a guardian of the Constitution but rather as a guardian of systematic and coherent legislation when it declares that issues of a coherent statutory design are in fact constitutional matters. One may predict that the Court will review tax statutes with reference to their consequential design, to their logical molding of political justifications. Typifying in particular will happen to be reviewed closely. Whether it will become more difficult for the legislature to establish exceptions in the rules remains to be seen: On the one hand it is seemingly easier to present an exception and justify it politically. The Court will review such exceptions only loosely. Whether they are sound or empirically justifiable are no real matters for constitutional review. Hence, the Court is stepping back from previous approaches that went much further in the review of political action and the setting of goals or directions. On the other hand the Court may review the precise elaboration of such an exception from a general rule as it presents itself in the statutory design. Whether this approach, in sum, guides the political process or rather infringes into it, needs to be closely looked at in the future. At least it is clear that the Court remains entangled in the political process. There is no line of deference to politics; there is no political question doctrine. Generally one can infer that the Court allocates more discretion to the legislative process than it did before. The intensity of judicial review, however, remains in the Court's hands although it presents a doctrine that seemingly prearranges different levels of scrutiny.

IV. Some Discontinuity of Special Constitutional Doctrines in Taxation

One caveat is necessary, concerning something the Court did not decide although there would have been plenty of opportunities to do so: The inheritance tax case could have been a paradigm for the consequentiality principle (*Folgerichtigkeitsprinzip*). It is striking that the Senate does not mention the concept a single time in the more than 50 page long decision. This case would have provided multiple opportunities to refer to consequentiality or logical consistency. The Court obviously refrained from doing so. This is remarkable considering the Court's effort to rely on this idea in previous decisions. Instead the Senate goes back to the more traditional equal protection standards. The divergence of the previous approach is particularly visible where the Court discussed the justification of the

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unequal statutory design forwarding the steering purpose.[59] The traditional approach would have required assessing the statutory design according to its consequentiality. This time, however, the Court accepts the classical bunch of justifications for unequal treatment: If the statutes diverges from consequentially forwarding the steering-purpose and allows for an exception one has to look whether this exception may be justified with a constitutional admissible reason. Instead of measuring the exception at the consequential structure of the statute, the Court refers to the great variety of reasons that the classical reading of Article 3, paragraph 1 of the Basic Law allow. Those reasons for justification increase with the level of inequality, as mentioned above, yet in total it will be easier to justify the statutory design with the possible variance of reasons for unequal treatment than with the limited reasons accessible under the much stricter consequentiality principle.

What is also appealing is the different status of the standard: Under the consequentiality principle it was rather the structure and systematic reading of the statute that forwarded the standard of review. Now it is not the spin-off of the statute's systematic and consequential construction but the Constitution that governs the review and allows for a much broader range of reasons in order to justify unequal treatment.[60]

This reading of the judgment is fostered by the fact that the decision presents its downsizing of the consequentiality principle in general terms. The whole discussion of this point is penned in broad and abstract words not alluding to special problems in taxation. More so, the Court attaches to its new reasoning the name of the principle in brackets as if it was giving the principle a new definition,[61] and it also mentions this passage as the third headnote (*Leitsatz* 3) of the decision. This clearly indicates that the Court deliberately downsized the previous understanding of consequentiality and presented its reasoning like an abstract conclusion made fit for general application in the future. At a conference at the Federal Tax Court in Munich, Justice Eichberger, who was the rapporteur of the decision, stated publicly that the Senate deliberately refrained from citing and applying this principle in its old form.[62] Is the consequentiality principle of the old-style dead therefore, or must it be strictly limited to the context of its birth, namely the design of the income tax tariff? It seems that the majority in the first senate wants to give up the consequentiality principle completely. We encounter the rare occasion that the Court is overruling itself without openly declaring so. One may further conclude that the Court does not want to continue

[59] *See* BVerfG Case No. 1 BvL 21/12 at 123–26.

[60] For a similar assessment, see Simon Kempny, *Steuerverfassungsrechtliche Sonderdogmatik zwischen Verallgemeinerung und Zurückführung*, 64 JAHRBUCH DES ÖFFENTLICHEN RECHTS) (forthcoming 2016 at 1d).

[61] BVerfG Case No. 1 BvL 21/12 at 123.

[62] His outspoken comments may be understood as a reaction to an article by his brethren Justice Ferdinand Kirchhof, *Verbrauchsteuern im Lichte des Verfassungsrechts*, 70 BETRIEBS-BERATER 278–82 (2015), where Kirchhof endorses the consequentiality principle.

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establishing a special constitutional doctrine in taxation and, rather, looks for bringing tax law back into the general constitutional standards.

In total, one gets different impressions depending on whether one looks at the Court's reasoning from the peculiarities of tax law or from the general principles of constitutional law: The Court dissipates a special doctrine of equal protection in the area of tax law. It relies on the general approach in equal protection with a broader scope of permissible justifications. From the viewpoint of a general doctrine one may welcome this decision. As we have seen, however, there are good reasons why equal protection plays a privileged role in the judicial review of tax laws, and this may require some constitutional idiosyncrasies. Hence, the Court's rewording of the different levels of justification of inequalities yields a clear doctrine only at its face while in fact the seemingly general standard has become cumbersome, sophisticated and excessively doctrinal. It remains to be seen whether tax review was shaped more generally in terms of the applicability of constitutional standards or whether equal protection will become more sophisticated because of its concealed reference to underlying tax cases. At least, the inheritance tax case delivers fresh nourishment to the debate on special doctrinal approaches in the constitutional review of tax laws.

V. The Court and the Legislative Process

One might, finally, ask: What is the rationale for the review of tax statutes considering the overall doctrinal difficulty? As we have seen, it is by no means an easy endeavor to review tax statutes and to apply the civil rights provisions to taxation. In most cases there are no clear rights affected, the proportionality of an infringement in relation to funding the state is hard to assess, basically everything concentrates on equal protection, as long as there is no steering tax involved. One could bemoan that the Court by reviewing tax statutes intervenes with the political process more heavily than it does in other areas of constitutional review, because in taxation there are more considerable political effects—funding the state, budget power of Parliament—in contrast to the rather limited infringements in individual behavior by taxes. Hence, the general conflict of judicial review on the one hand and majoritarian self-determination in a democratic system on the other hand deems to be intensified. The effect of the constitutional review of tax statutes shows off in "better" or "more just" tax statutes: Statutes that are more coherent, systematic, stable, statutes that enforce a clear steering purpose, statutes that are designed according to logical consistency—those are the major effects of the constitutional review of tax laws. Individual rights are just a vehicle for prescribing a specific statutory design of tax laws. The Court, in other words, engages in monitoring taxation from an abstract view; safeguarding rights is a tool for general and objective purposes. This is nothing new. For a long time we have witnessed that the function of constitutional complaints is not limited to the protection of individual rights but also aims at further developing constitutional law in an

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objective sense. At least that is what the Karlsruhe Court has declared frankly.[63] In the realm of tax law, however, the Court does not primarily develop constitutional law in an objective sense, it rather aims at developing ordinary statutory law. In taxation the constitutional court interferes with ordinary legislation much more than it does in other areas of the law.

What may be a justification for this entanglement in the political process and the interferences in the texture of tax laws? A short history of the Court's decisions concerning the inheritance tax reveals an interesting fact. Since 1987 the German inheritance tax law has always been partly unconstitutional: In 1987 the Court declared parts of a law unconstitutional that was relevant for the calculation of the inheritance tax, yet at the same time the provisions could be applied until the statute was amended according to the Constitutional Court's decision.[64] In 1995, provisions in the inheritance tax law that were referring to these standards were themselves declared unconstitutional, retroactively back to 1987.[65] The legislature amended the law in 1996 accordingly; however, in 2006 other parts of the inheritance tax law were declared unconstitutional.[66] Parliament, again, amended the inheritance tax, now introducing the broad exemptions for family businesses. These were declared unconstitutional in the Court's latest decision of 2014.[67] In conclusion, there was no constitutionally satisfying inheritance law for roughly thirty years. Yet this did not affect the enforcement of the inheritance tax because the Court perennially decided that the unconstitutional parts of the law had to be enforced notwithstanding, because the non-enforcement of the unconstitutional provisions would have exercised grave effects. The legislature was constitutionally obligated to replace the provisions within a time limit of two years.

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[63] Practiced by the Constitutional Court since the very beginning, see Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] Jan. 16, 1957, 185 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 6, 32; Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] June 28, 1972, 33 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 247,259; *see, e.g.*, FRIEDERIKE LANGE, DIE GRUNDRECHTSBINDUNG DES GESETZGEBERS 200–02 (2010); for further examples how rights are used for objective purposes, see Lepsius, *supra* note 58, at 182–96.

[64] Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] Feb. 10, 1987, 74 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 182. The declaration of unconstitutionality concerned the rules for the estimation of the value of certain property (housing) that was privileged for social purposes in a statute for the calculation and evaluation of assets (*Bewertungsgesetz*). This statute's rules were relevant for the calculation of the inheritance tax.

[65] Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] June 22, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 165–66, 178.

[66] Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] Nov. 7, 2006, 117 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 1.

[67] BVerfG, Case No. 1 BvL 21/12.

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One might conclude that for the Court it was more important to enforce new legislation than to void existing statutes: The Court compels Parliament to enact specific provisions in a way the Court deems constitutionally admissible. We witness what could be called a constitutional dialogue in taxation: In 1995 the Court demands the enactment of new inheritance tax laws until 31 December 1996. On 24 December 1996 the amendments went into effect.[68] In 2006 the Court, again, rejected certain provisions in the law demanding their amendment until 31 December 2008. On 24 December 2008 the latest reform of the inheritance law went into effect. Parts of the statutes introduced then were declared unconstitutional in 2014 with another time limit for redrafting these provisions until 30 June 2016.[69]

The record shows a pattern: Every seven years or so the Court declares some parts of the law unconstitutional and forces the legislature to redraft and amend the statute within two years. These amendments will be reviewed after due time, depending upon the procedural situation, of course, such as a constitutional complaint or a concrete norm control case at hand. From a political point of view constitutional review of tax laws presents itself as a discourse between the Court and the legislature: The Court initiates legislation and activates statutory improvements; Parliament reacts; finally, the Court reviews the parliamentary reaction and plays back to Parliament. Often Parliament does more than just amending the reviewed statutory provisions. When the Bundestag amends the statute it often takes the opportunity to insert new or cancel older provisions. Suddenly the whole statute is up for review. Parliamentary discourse starts, and this also enables interest and lobby groups to influence the legislative process. One clearly sees this in the reform process of 2008: The previous judgment of the Court did not require Parliament to introduce broader tax evasions for family businesses. The relevant lobby groups, however, made advantage of the reform process and gained a majority for their interests. Without the Court-propelled reform process they would not have been able to bring in their voice because the legislative process would not have been opened in the first place.

Constitutional review of taxation affects the legislative process in general by establishing a discourse about the appropriate standards of taxation. The Court does not primarily act as a guardian of individual rights, rather, it serves as a player in the legislative process. In fact, one might doubt whether Parliament would have taken action if it were not forced to do so. Tax laws are a tedious business. Amending tax laws stirs different interests, requires complicated compromises, and does not guarantee electoral rewards. Besides, the revenues of the inheritance tax fall into the *Länder*'s budget (Article 106, paragraph 2, number 2 Basic Law); hence, the *Bundestag* is even less inclined to redraft a tax the federal level is not benefitting from. Generally, the political process will not be tremendously inclined to engage in such legislation if it is not forced to. One recognizes this effect by

[68] BUNDESGESETZBLATT, Teil I 1996 [BGBL. I] 2049.

[69] BVerfG, Case No. 1 BvL 21/12 at 293.

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looking at the political reactions to the latest judgment: Amending the inheritance tax law was not in the legislative agenda created in the coalition agreement of the Christian Democratic Union (CDU), its Bavarian counter-part, the Christian Socialist Union (CSU–a conservative party despite its name) and the Social Democrats (SPD) in 2013. Without the Court's judgment neither party would have brought up a reform of the inheritance tax although the injustice of the present law and the possibility for tax evasion was apparent. The legislative process was busy with other things, and, considering its limited capacity, would not have embarked on a topic that was not included in the statutory agenda agreed on in 2013. When the Court is declaring parts of the law unconstitutional it is disrupting a political agenda unwilling to address certain issues that are deemed unpopular or complicated or politically unrewarding. The Court forces Parliament to address the question of distributive justice in the level of taxation; it directs the public attention to unjustified privileges; it counteracts against successful lobbying groups. Parliamentary action is rather guided than checked. Court and Parliament interact in the long-term process of finding the ultimate inheritance tax law.

Seen this way one may justify the intense infringement in the political process as a general constitutional benefit because the Court keeps the political process running and prevents certain issues from being neglected or even closed in the political forum. The Court, then, may justify its intrusion in the political process with the idea of a representation reinforcement agent. Its entitlement for constitutional review derives from a substantive repair of the political process. This idea, however, requires an accurate diagnosis of what is running wrong in the political process, a diagnosis that is not undertaken by the Court which is, in turn, disinclined to assess the outcome of the legislative process or to evaluate the substantive influence of one lobby group at the expense of other interests. Frankly, this idea of justification is of rather theoretical origin and does not evolve from the Court's reasoning. The Court's tax decisions, at least, should not be taken as special judgements in a technical area of the law. Rather, they furnish general insights how the Court intervenes and how it integrates itself in the political process. In Germany, taxation has become the part of the law that probably enables best to see the actual influence of the Karlsruhe Court in the making of the legal order. For an American reader equal protection refers to race, sex, and discrimination; for a German audience it might rather refer to taxation—at least that is the impression we get from the Court's intense preoccupation with tax laws.

F. The Aftermath

The legislatures, *Bundestag* and *Bundesrat*, must reform the inheritance tax before 30 June 2016. In the political process the coalition parties differed in the severity of the reform: The Social Democrats (SPD) called for an intensified taxation of the heirs of family businesses by limiting the exceptions and intensifying the monitoring of the safeguarding of jobs. The Bavarian Christian Socialists (CSU) reminded wide concessions to family businesses. The Christian Democrats opted for a medium sized reform. Different proposals

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are currently discussed in Berlin. On 8 July 2015 the Federal Government issued a compromise proposal that would lead to a tax increase of estimated 200 million Euros. The general idea, tax evasion for continuation of the business and the safeguarding of jobs will be kept. Several conditions for the tax evasion will be stricter and enforced more intensely. One intends to introduce a needs-test for the tax evasion if the value of the enterprise exceeds 26 Million. Whether jobs are actually safeguarded should be controlled instead of being merely assumed. The *Bundesrat* will comment this proposal in late September 2015. Since there is a left-wing majority in the *Bundesrat* it will be interesting to see whether the *Länder* will accept a rather limited reform, because they are the recipients of the inheritance tax's revenues (Article 106, paragraph 2, number 2 Basic Law). The reform process is itself an interesting case study of law-making in Germany: under the conditions of a coalition government (with the peculiarity of a grand coalition) and under the conditions of the necessary approval of the *Bundesrat* in matters of taxation (Article 105, paragraph 3 Basic Law).

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