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# Taxation, Reciprocity and Communicative Regulation

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## Abstract

Willem Witteveen promoted a communicative style of regulation with a focus on communication and dialogue between parties of more equal standing. The Dutch tax administration uses this approach to achieve voluntary compliance – supplementing the traditional command-and-control method of regulation. The underlying value of reciprocity entails a demand for good communication and even a dialogue between tax administration and taxpayers. Reciprocity here is at issue within the context of legal asymmetry, as the tax administration has considerable unilateral powers, and mutual dependence.

Political and legal philosophers elucidate the notion of reciprocity. Spinoza shows the foundational nature of reciprocal collaboration between the sovereign lawmaker and legal subjects. Unlike Hobbes, he does not conceive reciprocity in a static way. More recently, Lon Fuller contrasted the idea of law based upon the principle of reciprocity with the command theory of law – a form of legal positivism.

‘Horizontal Monitoring’ is a specific Dutch form of a communicative style of regulation. This contribution analyses several features of this kind of reciprocal interaction.

## Keywords

Reciprocity – communicative style of regulation – command and control style of regulation – Spinoza – Lon Fuller – legal positivism – co-operative compliance – deterrence model

## 1 Introduction

This contribution deals with tax law and the problems it poses for the executive, namely the Dutch Tax Administration (DTA). The extreme complexity and technicality of tax legislation seriously hinder efficient implementation. Despite its powers, the DTA struggles to enforce the massive, ever-changing body of tax rules but for the (kind) cooperation of some taxpayers. This partly accounts for the popularity of the idea of fostering cooperative compliance to enhance voluntary compliance with tax law, and shows a (partial) shift away from the monopoly of the command and control style of regulation.

This classical feature of tax law is supplemented by a communicative style of regulation, a style promoted by Willem Witteveen that focuses on communication and dialogue between parties of more equal standing, to enhance taxpayers' compliance. Reciprocity comes more to the fore in consequence. The term 'reciprocity' is interpreted as an expression of mutual dependence and the need for cooperation at the political, societal and legal level between different parties, namely the sovereign, citizens, tax administration and taxpayers. The notion of reciprocity changes colour depending on context and is fleshed out accordingly.

Reciprocity will be expounded on within the context of legal asymmetry. This asymmetry pervades the relationship between tax administrations and taxpayers, as the former has considerable unilateral powers to determine its legal relationship with citizens, particularly as to the tax liability of taxpayers. Despite the asymmetry, the tax administration should take citizens' demands and interests seriously. Indeed, tax administrations depend on taxpayers' compliance to fulfil the assigned tasks, thereby incentivising these administrations to enhance compliance.

The aim of this contribution is to elucidate the underlying value of reciprocity which is omnipresent, even in cases of superordination and subordination. Individuals' mutual impotence and dependency accounts for reciprocal collaboration and the establishment of political authority. The value of reciprocity sustains the ongoing interaction between the sovereign and citizens, for both depend on one another for security and well-being. I will contrast the idea of law as a top-down command with the idea of law based upon the principle of reciprocity and advocate that this principle entails a demand for communication, even more a dialogue between the tax administration and taxpayers.

As for methodology, insights from political and legal philosophy are used to illuminate the notion of reciprocity underlying the political and legal order and will be applied to tax law from a legal doctrinal perspective. To that end,

I apply the ideas of some of Witteveen's favourite philosophers and of Witteveen himself to taxation, showing the relevance of these ideas to a field not explored extensively by him. This approach is very much in the spirit of Willem Witteveen, for he appreciated combining the philosophies of great political philosophers with legal argument.

## 2 Spinoza and Mutual Dependence

### 2.1 *Law as a Manner of Living*

According to the 17th century political philosopher Thomas Hobbes (1588–1679) 'the Law is a Command, and a Command consisteth in declaration, or manifestation of the will of him that commandeth, by voyce, writing, or some other sufficient argument of the same (...)'.<sup>1</sup> Hence the law, as the command of the sovereign, is nothing but an expression of will.<sup>2</sup> The Hobbesian concept of political rule and the law represents a tradition in modern legal and political reasoning in which the law is closely associated with 'the asocial, self-preserving actors who fight amongst themselves for their scarce resources, and must be protected from each other by the authoritative will of the sovereign'.<sup>3</sup>

Nonetheless, the notion of reciprocity that lays the foundation of our normative order is central to Hobbes' theory of political obligation. The reciprocal relationship between the ruler and the ruled reflects the, 'mutuall Relation between Protection and Obedience', as Hobbes puts it.<sup>4</sup> The obligation of obedience to the command of the sovereign stems from the consent of the governed expressed in a social contract.<sup>5</sup> However, once the political and legal order is established reciprocity steps back in the wings, as reciprocity is not a

1 Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, Richard Tuck ed, CUP 1991) ch 26, 187.

2 Alessandro P d'Entrèves, *The Notion of the State: An Introduction to Political Theory* (Clarendon Press 1967) observes that Hobbes' voluntarism seems to know no boundaries.

3 Ulrich K Preuss, 'Communicative Power and the Concept of Law' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press 1998) 325. Preuss contrasts the Hobbesian tradition of the law with the Lockean and Rousseauist traditions, seeing the law as 'a reasonable mediator between competing utility-maximizers' and 'the law as expression of a collective identity' respectively.

4 Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, Richard Tuck ed, CUP 1991), 'A Review, and Conclusion', 491. See David Dyzenhaus, 'Hobbes and the Legitimacy of Law', (2001) 20 *Law and Philosophy*, 497.

5 David Dyzenhaus, 'The Public Conscience of the Law' (2014) 2 *Netherlands Journal of Legal Philosophy* 115; he points at three different reciprocal relationships in the *Leviathan*.

feature of the relationship between lawmaker and legal subject under Hobbes' philosophy.<sup>6</sup>

Baruch de Spinoza (1632–1677) disagrees with Hobbes.<sup>7</sup> At first sight, Spinoza seems to advocate a command theory of law in chapter four of the *Tractatus Theologico-Politicus*,<sup>8</sup> but readers are in for a surprise: Spinoza advocates a dynamic rather than a static conception of reciprocity. Unlike Hobbes, Spinoza does not reduce reciprocity's foundation to the (hypothetical) founding of society and state. Instead, reciprocity fulfils a structural role in the interaction between citizens and the state.

As Spinoza posits, the concept of law is ordinarily used in the sense of a command that men either obey or disobey. Such a law restricts the total range of human power within set limits and demands nothing that is beyond human power.<sup>9</sup> This human law is a prescribed norm that intends to steer the behaviour of people, but does not necessarily bring about that behaviour. Spinoza defines 'law' then more specifically as 'a rule of life which man prescribes for himself or for others for some purpose'.<sup>10</sup>

The aspect of command gives the human law a twofold meaning. First, a (normative) law issued by the government refers not only to an intended actual result that can be described in a descriptive law, but also to the reasonableness of the law. Indeed, the law regulates the behaviour of citizens that is often

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cf Michael J Sandel, *Justice: What's the Right Thing to Do?* (Farrar, Straus and Giroux 2009) 144–145. Sandel argues that consent is a source of obligation. Sometimes another source comes into play: the ideal of reciprocity, which may supplement consent or may even sometimes render consent superfluous. Thus, contracts as morally binding obligations are grounded in two ideals: autonomy and reciprocity. Sandel offers: 'As instruments of mutual benefit, contracts draw on the ideal of reciprocity; the obligation to fulfill them arises from the obligation to repay others for the benefits they provide us.'

6 Though before Hobbes Jean Bodin (1529/1530–1596) points at the reciprocal relationship between tax legislature and taxpayers, arguing 'that even kings are not allowed to levy taxes without the fullest consent of the citizens'. Jean Bodin, *On Sovereignty: Four Chapters From the Six Books of the Commonwealth* (first published 1576, Julian H Franklin ed and tr, CUP 1992) xxvi. Willem Witteveen, *De Wet Als Kunstwerk: Een Andere Filosofie van het Recht* (Uitgeverij Boom 2014) 343–347 elaborates on the concept of reciprocity as set out in Bodin's theory.

7 Although Spinoza is not well known for his political and legal philosophy, his views are very topical. See Hans JLM Gribnau, 'The Power of Law. Spinoza's Contribution to Legal Theory' in André Santos Campos (ed), *Spinoza and Law* (Ashgate Publishing 2015) 21–37.

8 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677, Samuel Shirley tr, Gebhardt edn, EJ Brill 1989).

9 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 4, 102.

10 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 4, 102.

governed by passion, thereby forcing citizens to act more reasonable than (most of) the citizens are naturally inclined to do.<sup>11</sup> Second, the (human) law is a metaphor for the reasonable 'decree of all' those who live and work together in the state.<sup>12</sup> As James shows, Spinoza relaxes the stipulation that laws are commands by redefining laws as prescriptions and subsequently 'presents law not merely as a prescription, but rather as a manner of living'.<sup>13</sup>

## 2.2 *Effectiveness*

For Spinoza, the legislature that intends to prescribe a particular way of life has to consider factors that affect human behaviour and thus the actual regularities in the behaviour of human beings and human nature. Laws describing the properties and regularities of human behaviour and nature are therefore natural laws. In other words, the (legislative) commands that prescribe certain human behaviour should observe the laws of human nature that are described in laws of nature.<sup>14</sup> These laws of nature define as it were the limits of individual behaviour.

In Spinoza's definition of law it is implied that individuals bound by a law duly behave as stipulated in that law. From this definition it follows that law posits a normative order created by human beings and contains rules with normative force intended to regulate human behaviour. However, because of unwillingness or incomprehension among the norm-addressees compliant behaviour is not a matter of course. Should the legislature ignore the laws of nature when enacting a law aimed at regulating human behaviour, a law that prescribes a certain behaviour that is beyond the bounds (power) of the citizens will follow<sup>15</sup> and this law or legislative prescription will be disobeyed as a result.

11 Herman De Dijn, 'Ervaring en Theorie in de Staatskunde. Een Analyse van Spinoza's "Tractatus Politicus"' (1970) 1 *Tijdschrift voor Filosofie* 30, 37. Hans W Blom, 'The Moral and Political Philosophy of Spinoza' in George HR Parkinson (ed), *Routledge History of Philosophy: The Renaissance and Seventeenth Century Rationalism*, vol 4 (Routledge 1993) 335–338.

12 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677, Samuel Shirley tr, Hackett Publishing 2000) 5.5.

13 Susan James, *Spinoza on Philosophy, Religion, and Politics: The Theologico-Political Treatise* (OUP 2012) 89.

14 cf Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 4.4, 'If a commonwealth were not bound by the laws or rules, without which the commonwealth would not be a commonwealth, then it would have to be regarded not as a natural thing, but as chimera.'

15 This line of thought falls in line with one of Fuller's principles of good legislation. See section 4 below.

If this is the case, we cannot speak of a law. Legal norms prescribing behaviour decreed by legal authorities that are ignored en masse cannot be deemed a law. To be effective, the law must be enforced by a system of coercive measures and sanctions should result from these legal norms accordingly. Government, therefore, should foster fear and respect.<sup>16</sup> One should not forget that legislation is only possible, or better yet, effective 'on those matters which appear desirable or to which sanctions can be attached as adequate incentives'.<sup>17</sup> Indeed, established laws are only valid, if 'most of the citizens are restrained by them'.<sup>18</sup> Simply put, effectiveness is considered a constitutive requirement for positive law.

This does not mean that positive law and the personal moral beliefs that influence the behaviour of citizens are completely independent of one another. On the contrary. Insofar as people think and act rationally they will choose the lesser of two evils if positive law conflicts with held moral convictions. Citizens will comply with laws because the disadvantage of a violation of moral convictions 'is far outweighed by the good he derives from the civil order itself',<sup>19</sup> a prerequisite for survival and self-development. Consequently, submitting to orders has nothing to do with slavery in a free republic; it means obeying the law of reason and thus being free.<sup>20</sup>

### 2.3 *Mutual Dependence*

More important than the notion of rational behaviour on the part of a small number of citizens is the premise that a sustained tension between law and citizens' conception of a good life or the public good is not possible due to the dynamic dialectical relationship between the stability of a political order and its civil law on the one hand and the needs and interests of its citizens on the other.<sup>21</sup> If the government prescribes norms that violate vital interests, desires and laws of the human psyche on a large scale, even the exertion of extreme coercion will not result in obedience.<sup>22</sup> As the positive law no longer meets the

16 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 4.4.

17 Gail Belaief, *Spinoza's Philosophy of Law* (De Gruyter Mouton 1971) 17.

18 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 3.8.

19 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 3.6.

20 Thus, Spinoza shares the republican view that the laws help to create people's freedom.

21 Manfred Walther, 'Spinoza und der Rechtspositivismus' (1982) 68 *Archiv für Rechts- und Sozialphilosophie* 407, 416.

22 In Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 17, 201–202 Spinoza deals with the boundaries inherent in human behaviour. cf Manfred Walther, 'Institution, Imagination und Freiheit bei Spinoza: Eine Kritische Theorie Politischer Institutionen' in Gerhard Göhler and others (eds), *Politische Institutionen im*

constitutive requirement of effectiveness it is rendered void.<sup>23</sup> In that case, the legislature, more generally political power, cannot exercise its absolute 'right' without jeopardising its authority. If government fails to recognise that self-restraint is necessary to remain in power, it actually ceases to be *summa potestas* (sovereign power). It loses 'the right of complete command, which passes to one man or a number of man who have acquired it and are able to retain it'.<sup>24</sup>

Under those circumstances the government should draw an important conclusion and restrict its regulatory powers to the end that the dynamic dialectical relationship is observed and no long-lasting tension with societal morality arises. Government, therefore, should heed not only the legality but also the legitimacy of its decisions. As per Spinoza, in a sovereign state the welfare of the people, not the ruler, is the supreme law.<sup>25</sup> The highest aim is 'to direct public affairs in the best way',<sup>26</sup> rather than merely by right. Thus the state, building its strength from the bonds of allegiance of its people, should establish institutions of government that generate trust and grant its citizens extensive civic liberties.<sup>27</sup> Legitimate authority, not naked exercise of power, constitutes the basis for viable government action in the end.

Spinoza rightly argues that the formation of a society is advantageous, even absolutely essential for not only public security but also the efficient organisation of an economy.<sup>28</sup> Society enables men 'to live harmoniously and be of assistance to one another'. Therefore, institutions should be established 'to make one another confident and have trust in one another'.<sup>29</sup> As Balibar shows, reciprocity can be seen as 'an expression of the mutual implication of "individual" elementary liberty and "collective" liberty'.<sup>30</sup>

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*Gesellschaftlichen Umbruch: Ideengeschichtliche Beiträge zur Theorie Politischer Institutionen* (Westdeutscher Verlag 1990) 248.

23 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 3.8–3.9.

24 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 16, 242.

25 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 16, 243; cf. 20, 293: 'the purpose of the state is ... to enable [men] to develop their mental and physical faculties in safety.'

26 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 5.1.

27 Martin Loughlin, *Foundations of Public Law* (OUP 2010) 105.

28 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 5, 116.

29 Baruch de Spinoza, 'Ethics' in Edwin Curley (ed and tr), *The Collected Works of Spinoza*, vol 1 (Princeton UP 1985) 567.

30 Etienne Balibar, 'What is "Man" in Seventeenth-Century Philosophy?' in Janet Coleman (ed), *The Individual in Political Theory and Practice* (OUP 1996) 226. cf André Santos Campos, *Spinoza's Revolutions in Natural Law* (Palgrave Macmillan 2012) 48–49.

#### 2.4 *Reciprocity*

Indeed, the idea of mutual reciprocity underlies Spinoza's reflections on society and state.<sup>31</sup> Spinoza was acutely aware that the power of a government is determined by the way these powers are exercised.<sup>32</sup> Spinoza argues that 'Nobody can so completely transfer all his right, and consequently his power, as to cease to be a human being (...)'.<sup>33</sup> Thus, the power of the legislator is not unlimited and its commands must respect the power of the subjects.

Good laws enhance the power of citizens, which in turn increases the power of the commonwealth and sovereign.<sup>34</sup> As Bobbio observes, Spinoza sees matters *ex parte populi*, i.e., from the 'view of the ruled in order to justify their right not to be oppressed and the ruler's duty to proclaim just laws'.<sup>35</sup> By stressing that laws should give rise to respect rather than fear, Spinoza makes clear that law cannot be reduced to a command. Time and again lawmaking should be aimed at producing laws that inspire and rely on respect rather than power. Here Machiavelli's famous expression of 'the art of the state' can be invoked, in which 'art' signifies craftsmanship and artisanal activity.<sup>36</sup> In the same vein,

31 cf Stephen B Smith, *Spinoza's Book of Life: Freedom and Redemption in The Ethics* (Yale UP 2003) 138; Martin Saar, *Die Immanenz der Macht* (Suhrkamp 2013) 197, 338.

32 See Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 16, 237ff.

33 Baruch de Spinoza, *Tractatus Theologico-Politicus* (first published 1677) 17, 250. cf Håkan Gustafsson, 'Immanence of Law' in Ari Hirvonen (ed), *Polycentricity: The Multiple Scenes of Law* (Pluto Press 1998) 145–148 referring to the seminal work of Antonio Negri, *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics* (Michael Hardt tr, University of Minnesota Press 1999).

34 Hans JLM Gribnau, 'Lex' in Wiep van Bunge and others (eds), *The Continuum Companion to Spinoza* (Continuum 2011) 235–239.

35 Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power* (University of Minnesota Press 1989) 143. cf Hans JLM Gribnau, 'The Power of Law. Spinoza's Contribution to Legal Theory' in André Santos Campos (ed), *Spinoza and Law* (Ashgate Publishing 2015).

36 Corrado Vivanti, *Niccolò Machiavelli: An Intellectual Biography* (Simon MacMichael tr, Princeton UP 2013) 21–22 refers to Machiavelli's letter to Vettori of 10 December 1513. Vivanti disagrees with the historian Jacob Burckhardt (1818–1897). cf Jacob Burckhardt, *The State as a Work of Art* (Penguin 2010) 2 stating 'a new fact appears in history, the state as the outcome of reflection and calculation, the state as a work of art'. In this vein he regards Machiavelli as a constitutional artist, see Jacob Burckhardt, *The State as a Work of Art* (Penguin 2010) 82. In his last book Willem Witteveen proposes to consider the law as a work of art that demands 'attention, maintenance and craftsmanship' rather than a regulatory instrument. According to Witteveen, Machiavelli is one of the great thinkers who views the law as a work of art; See Willem Witteveen, *De Wet als Kunstwerk: Een Andere Filosofie van het Recht* (Uitgeverij Boom 2014) 14 and 55 respectively.



the art of legitimate lawmaking requires skills capable of taking the interests of citizens into account. Spinoza shares Machiavelli's realism and concern for liberty, for reciprocity connects individual and collective liberty.<sup>37,38</sup> Reciprocity cannot be contemplated in a static way, only at play at the moment of the founding of society and the state. It is a value that should be held in high regard at all times. Spinoza's political philosophy duly considers the dynamic nature of reciprocity in political and legal communities.<sup>39</sup>

And still, notwithstanding Spinoza's plea, reciprocity does not seem to attract much attention in modern legal philosophy. We now turn to Hans Kelsen's legal positivism that serves as a fine example. Kelsen's theory echoes Hobbes' command theory of law which is at odds with the idea of a reciprocal relationship between the lawgiver and its legal subjects.

### 3 Kelsen's Legal Positivism

Hans Kelsen (1881–1973) propounded an influential version of legal positivism based on the strict distinction between what the law 'is' and what the law 'ought' to be. He sought to separate legal knowledge from ethics – and from the social sciences alike, as William Twining points out.<sup>40</sup> Kelsen asserts that only positive law can be conceived as 'law'.<sup>41</sup> A legal norm is only valid 'because it is

37 cf Maurizio Viroli, *Machiavelli* (OUP 1998) 115 stating 'the interpretation of Machiavelli as a champion of liberty was resumed by Spinoza.' Cf Martin Loughlin, *Foundations of Public Law* (OUP 2010) 173–174.

38 This view on the need for reciprocity fits the republican conception of liberty as advocated by Machiavelli for example. Willem Witteveen, *De Wet als Kunstwerk: Een Andere Filosofie van het Recht* (Uitgeverij Boom 2014) 160 argues that the republican conception of liberty enhances personal autonomy that is linked to the positive ideal of freedom as self-mastery. Witteveen subsequently points to the demand of reciprocity by referring to Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999) 36 and states that laws can only create the authority that rulers enjoy and the freedom that citizens share so long as 'they respect people's common interest and ideas and conform to the image of an ideal law'.

39 cf André Santos Campos, *Spinoza's Revolutions in Natural Law* (Palgrave Macmillan 2012) 167–174.

40 William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell 1994) 157.

41 Hans Kelsen, 'Was ist Juristischer Positivismus?' (1965) 20 *Juristen-Zeitung* 465. Reprinted in Hans Klecatsky, René Marcic and Herbert Schambeck (eds), *Die Wiener Rechtstheoretische Schule: Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (Europa Verlag 1968) 941–953.

created in a certain way – ultimately in a way determined by a presupposed basic norm'.<sup>42</sup> The sole reason that the legal norm belongs to the legal order is that its creation is deduced from this *Grundnorm* (basic norm). This means that the principle of legitimacy can be rephrased as the 'principle that a norm may be created only by the competent organ, that is, the organ authorised for this purpose by a valid legal norm' which is 'the question of legality of a judicial decision or the constitutionality of a statute'.<sup>43</sup> For Kelsen, the validity of a legal norm has nothing to do with its content.<sup>44</sup> Any kind of content might be law, for in presupposing the basic norm, no value transcending positive law is affirmed.<sup>45</sup> What is more, positive law must be understood as a normative order that prescribes the competent organ to apply a coercive act, a so-called sanction, if unlawful conduct occurs.<sup>46</sup> The validity of the normative order is then based on two facts, namely, that positive law is authorised by a valid legal norm and that this law is effective to some extent. Again, the normative legal order and ethics are not (necessarily) conceptually connected; behaviour prescribed by law (the 'is') therefore may differ from what the law should prescribe according to certain moral views (the 'ought').

The result of legal positivism is the separation of law and morality. Conversely, this conceptual separation of law and morality does not imply that the claim 'that law should be consistent with morality and with justice in

42 Hans Kelsen, *Pure Theory of Law* (2nd edn, Max Knight tr, Peter Smith Publisher 1989) 198.

43 Hans Kelsen, *Pure Theory of Law* (2nd edn, Max Knight tr, Peter Smith Publisher 1989) 276.

44 Herbert LA Hart shared this view. Likewise, the validity of legal norms is a matter of their sources rather than their content in Hart's theory, see Herbert LA Hart, 'Postscript' in Herbert LA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 269. The existence and content of the law can be identified by reference to the social sources of the law (eg legislation, judicial decisions, social customs) without reference to morality, except when the law has itself incorporated moral criteria for the identification of the law. For Hart, however, the existence of law depends ultimately on empirical matters such as official compliance with a secondary rule of recognition, whereas in Kelsen's 'pure' theory of law there is no place for the empirical.

45 cf David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Clarendon Press 1997) 103–104; Diogo Pires Aurélio, 'Spinoza, Kelsen and the Nature of the Legal Norm' in André Santos Campos (ed), *Spinoza and Law* (Ashgate Publishing 2015) 249–268.

46 Hans Kelsen, 'Was ist Juristischer Positivismus?' in Hans Klecatsky, René Marcic and Herbert Schambeck (eds), *Die Wiener Rechtstheoretische Schule: Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (Europa Verlag 1968) 948 states 'ein Zwangsakt als Unrechtsfolge als sogenannte Sanktion'.

particular, that it should be just right' is rejected.<sup>47</sup> Instead, the concepts of law and morality are simply not necessarily connected. Positive law takes precedence even when its content is unjust; (extremely) unjust but effective laws are still law.

#### 4 Fuller's Reciprocity<sup>48</sup>

Yet, legitimate lawmaking cannot be reduced to mere legality. Law cannot be reduced to commands that dictate obedience irrespective of content. Legal rules, important though they are, do not paint the complete picture. There is more to law, for those ideas underlying the rule of law include 'expectations about (...) conceptions of authority, justice and legitimacy'.<sup>49</sup>

This emphasis on expectations fits well with Lon Fuller's (1902–1978) argument that the lawgiver should take citizens more seriously. Fuller opposes the view that the essential characteristic of law lies simply in the exercise of authority. 'Sharing a traditional liberal suspicion of legislators exercising top-down control',<sup>50</sup> he explicitly connects reciprocity to the idea(1) of law. Fuller even denies the existence of any rational justification for the assertion that a man is under a moral obligation to obey a legal rule that completely violates a fundamental principle such as legal certainty, and thus commands the impossible,<sup>51</sup> for 'at some point obedience becomes futile'.<sup>52</sup> Reciprocity demands the lawgiver to respect (this and other aspects of) the principle of legal certainty for it reflects a fundamental social or even moral norm shared by the legal subjects.

Fuller elaborates on the work of sociologist Simmel who maintains that action is mutually determined, even in cases of 'superordination and subordination'.<sup>53</sup> In like manner, the state's superior power rests ultimately on

47 Hans Kelsen, 'Was ist Juristischer Positivismus?' Hans Klecatsky, René Marcic and Herbert Schambeck (eds), *Die Wiener Rechtstheoretische Schule: Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (Europa Verlag 1968) 950.

48 This section is based on Hans JLM Gribnau, 'Legal Certainty: A Matter of Principle' in Hans JLM Gribnau and Melvin Pauwels (eds), *Retroactivity of Tax Legislation: EATLP International Tax Law Series*, vol 9 (International Bureau of Fiscal Documentation 2013) 76–77.

49 Paul W Kahn, *Law and Love: The Trials of King Lear* (Yale UP 2000) xvi.

50 Kenneth L Winston, 'Introduction to the Revised Edition' in Kenneth L Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (rev edn, Hart Publishing 2001) 21.

51 cf sec 2.

52 Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1977) 39.

53 Kurt H Wolff (ed and tr), *The Sociology of Georg Simmel* (The Free Press 1950) 183.

tacit and relatively stable reciprocity between the state and citizens.<sup>54</sup> If citizens follow the rules government prescribes, citizens should be assured that those rules will be applied to conduct displayed. As Fuller puts it: 'When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.'<sup>55</sup> The lawgiver that flouts the factual dependence of a legal system on the interplay of reciprocal expectancies threatens the bond of relatively stable reciprocity between government and the citizen.<sup>56</sup> It follows that 'the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject'.<sup>57</sup>

Fuller thus draws attention to the two-sided nature of legal relationships,<sup>58</sup> and advocates 'a procedural, as distinguished from a substantive natural law.'<sup>59</sup> The importance of the interplay between legal actors concerning the reciprocal expectancies points beyond a formal conception of the rule of law. Law's central purpose is to provide guidelines for and facilitate human interaction. The reciprocal expectancies depend partly on values and norms shared by the people whose behaviour are guided and coordinated by the law. These societal values and norms can become part of the legal order and be morally binding upon the legislature as a result. The reciprocal values and norms are

54 Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1977) 61.

55 Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1977) 40.

56 Trevor RS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 52ff rather convincingly argues that Fuller's principles, as well as his claim that they make up a morality, require the principle of equality if Fuller is not to be turned into a proponent of a rather formal, positivistic conception of the rule of law. Fuller's first principle, the principle of generality, is one of the most important principles of the rule of law because it serves the value of equality before the law. cf David Dyzenhaus, 'The Dilemma of Legality and the Moral Limits of Law' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *The Limits of Law* (Stanford UP 2005) 151–152.

57 Lon L Fuller, 'Human Interaction and the Law' in Kenneth L Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (rev edn, Hart Publishing 2001) 254. The procedural dimension refers to the stabilisation of interactional expectancies; cf. p. 254: 'the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject.' cf Lon L Fuller, *The Morality of Law* (Yale UP 1977) 209.

58 Willem Witteveen, 'Rediscovering Fuller: An Introduction' in Willem Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller: Essays on Implicit and Institutional Design* (Amsterdam UP 1999) 33ff.

59 Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1977) 96. Larry May, *Limiting Leviathan: Hobbes on Law and International Affairs* (OUP 2013) 121 argues that 'Hobbes's discussion of the natural law limits on positive law is similar to Lon Fuller's view'.

expressed in individual rights protected from action. Legitimate lawmaking, therefore, has to respect these values and norms. This line of reasoning explains a substantive conception of the rule of law. Consequently, the law is not morally neutral as to the aim it pursues. Legal principles play a crucial role in the substantive conception of the rule of law, as will be illustrated in the next section.

## 5 The Communicative Style of Regulation

As we have seen, law is a means to communicate standards of behaviour that can take the form of commands.<sup>60</sup> Although the command and control style of regulation leaves little room for reciprocal interaction and communication, the communicative function of law has come more to the fore in recent times.<sup>61</sup> The communicative function is not to be restricted to legislation or law, for legislation and law are but one dimension of modern governance. Regulation encompasses legislation, but is not restricted to legal instruments. Regulation is a multidisciplinary field that is by no means restricted to governing by rules. Indeed, much regulation is accomplished without recourse to rules of any kind. 'It is secured by organizing economic incentives to steer business behaviour, by moral suasion, by shaming, and even by architecture.'<sup>62</sup> And so regulation is only partly about (legal) rules and a fortiori about the enforcement of these rules.<sup>63</sup>

Of course, the legislature not only uses the law as a legal instrument to communicate standards of behaviour, but also to steer and influence the behaviour of citizens, corporations and other organisations.<sup>64</sup> As Fuller rightly argues, the principal object of tax laws is often not merely to raise revenue, but 'to

60 Mark van Hoecke, *Law as Communication* (Hart Publishing 2002) argues that communication increasingly plays an role in the making and legitimation of law.

61 Willem Witteveen and Bart van Klink, 'Why Is Soft Law Really Law? A Communicative Approach to Legislation' (1999) 3 *RegelMaat* 120, 126–140. cf Willem Witteveen, 'Turning to Communication in the Study of Legislation' in Nicolle Zeegers, Willem Witteveen and Bart van Klink (eds), *Social and Symbolic Effects of Legislation under the Rule of Law* (Edwin Mellen Press 2005) 17ff.

62 Christine Parker & John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 119.

63 From a social science perspective regulation has three functions: standard setting, information gathering behaviour modification. See Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007) 3.

64 Hans Gribnau, 'Legislative Instrumentalism vs. Legal Principles' (2012) 3 *Rivista di Diritto Tributario Internazionale* 9–42.

shape human conduct in ways thought desirable by the legislator' which entails that tax laws like other kinds of laws 'often have the explicit purpose of inducing men toward, or deterring them from, particular forms of behavior'.<sup>65</sup> Interestingly, administrative agencies try to steer and affect behaviour as well by setting rules within the existing legal framework.<sup>66</sup> As such, regulatory researchers study administrative agencies that enforce standards of behaviour through the use of legal and non-legal instruments. An example of such an administrative body is the Netherlands Tax and Customs Administration (NTCA), that seeks to stimulate taxpayers to fulfil legal obligations in a timely and correct manner.

Consequently, a government may opt to influence actions by means enacting and enforcing clear directives or by appealing to citizen's conscience or sense of decency to cooperate. The first style of regulation is the traditional command and control style of regulation. Where this system of command and control is characterised by 'the domination of hierarchy and monopoly for rule setters',<sup>67</sup> the communicative style of regulation relies on persuasion rather than punishment. Here, regulation is negotiated during a dialogue between more or less equal parties, namely state officials (intermediary organisations and citizens).<sup>68</sup> The legislature does not intervene directly in social reality, but lays down 'in the law a fundamental value (...) in order to promote a gradual change in attitude and behaviour within the legal community'.<sup>69</sup> Communicative regulation depends on reciprocal interaction rather than unilateral commands and may be better capable of responding to the expectations, interests and preferences of a community.

To enhance this type of reciprocal interaction, the use of legislation should be avoided when other forms of non-legislative instruments such as soft law are available. Soft law may instruct the observance of certain fundamental values, but not necessarily. It may define general terms or list criteria or concepts

65 Lon L Fuller, *The Morality of Law* (Yale UP 1977) 60–61.

66 cf Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 59: 'The bulk of primary legislation is vastly exceeded by that of rules made by ministers, departments, and agencies.'

67 Ulrika Mörth, 'Introduction' in Ulrika Mörth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar Publishing 2004) 1.

68 Willem Witteveen and Bart van Klink, 'Why Is Soft Law Really Law? A Communicative Approach to Legislation' (1999) 3 *RegelMaat* 120, 126.

69 Willem Witteveen and Bart van Klink, 'Why Is Soft Law Really Law? A Communicative Approach to Legislation' (1999) 3 *RegelMaat* 120, 127.

to promote further debate and change in behaviour.<sup>70</sup> Certain core elements of soft law are recognised in legal doctrine as a result of extensive debate. On the basis of these elements, Senden proposes the following definition of soft law: 'Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects.'<sup>71</sup> The use of soft law may be a suitable supplement or even an alternative to legislation, thus improving the legitimacy and effectiveness of policies and regulative processes. Soft law, responsive regulation and other new modes of governance are inevitably situated in a hierarchy of centralised command and control nonetheless. As will be shown in the next section, this applies for tax law as well.

## 6 Taxation and Cooperative Compliance

### 6.1 *The Communicative Turn in Tax Law*

Reciprocal communication is key to the levying taxes. Tax administrations depend on information supplied by taxpayers on the relevant facts and circumstances on the one hand, taxpayers need information from the tax administrations concerning the interpretation and application of tax legislation on the other. As tax legislation is often very complex and technical, one can question whether any textual and systematic coherence can be found. Is tax law able to clearly communicate standards of behaviour?

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70 The Code of Conduct for Business Taxation, agreed on by the Council and the Representatives of the Governments of the (then 15) EU Member States in 1997–1998, is a well known in European tax law (OJ No C2 of 6 January 1998) 1. It defines harmful tax competition in general terms and provides a list of criteria to define the harmful characteristics of tax competition. The common definition, vocabulary and concepts provided enabled a community of discourse to emerge; shared tax policy beliefs and norms about 'good' and 'bad' tax competition were established as a result. See Hans JLM Gribnau, 'Improving the Legitimacy of Soft Law in EU Tax Law' (2007) 35 *Intertax* 30; Hans JLM Gribnau, 'Soft Law And Taxation: EU and International Aspects' (2008) 2 *Legisprudence* 67.

71 Linda Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) 9(1) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/91/abs91-3.html>> accessed 18 June 2015; cf Linda Senden, *Soft Law in European Community Law* (Modern Studies in European Law Series, Hart Publishing 2004); Hans JLM Gribnau, 'Soft Law and Taxation: The Case of the Netherlands' (2007) 1 *Legisprudence* 291.

Willem Witteveen propounds that ‘it is instructive (...) to ask whether anything as mundane as tax law can be understood as an exercise in textual communication, involving authors, and readers in a collaborative effort to construe a coherent system of rules that can be adhered to and developed further in good faith.’<sup>72</sup> Witteveen points to the established fact that tax laws are part and parcel of the political, legislative process (which actually may favour command-based techniques<sup>73</sup>). Tax legislation is the field of political rationality and, therefore, instrumental rationality par excellence. Consequently, only a small group of well trained specialists ‘can discern a semblance of a system in the collection of rules as a whole’.<sup>74</sup> The upshot of the high level of complexity of tax law is that taxpayers are often uncertain or even ignorant of the right interpretation, reducing the responsiveness to new policies as a result. Tax complexity entails lack of legal certainty and gives rise to unintentional non-compliance and to intentional overcompliance,<sup>75</sup> thereby violating the principles of (legal) certainty and equality.

It follows that the importance of communication is quite clear to the DTA. Adequate communication helps taxpayers understand the sometimes very complex tax laws. Providing information is essential to NTCA’s ‘service-based’ approach by enhancing a cooperative atmosphere of mutual trust and voluntary cooperation.<sup>76</sup> In this way, NTCA hopes to enhance taxpayers’ compliance with tax law, as it does not command sufficient resources to enforce in the event of massive non-compliance. NTCA’s communication based techniques include attempts to persuade, educate regulate the behaviour of taxpayers ‘by enriching the information available to the targeted audience, thereby enabling them to make a more informed choices about their behaviour’.<sup>77</sup> However, the communication and clarification of legislative rules by the tax administration

72 Willem Witteveen, ‘Significant, Symbolic and Symphonic Law’ in Hanneke van Schooten (ed), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives: Legal Semiotics Monographs*, vol 10 (Deborah Charles Publications 1999) 39.

73 Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing 2004) 255.

74 Willem Witteveen, ‘Significant, Symbolic and Symphonic Law’ in Hanneke van Schooten (ed), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives: Legal Semiotics Monographs*, vol 10 (Deborah Charles Publications 1999) 3.

75 Margaret Mc KERCHAR, *The Impact of Complexity upon Tax Compliance: A Study of Australian Personal Taxpayers* (Australian Tax Research Foundation 2003).

76 Erich Kirchler, *The Economic Psychology of Tax Behaviour* (CUP 2007) 176–181; Katharina Gangl and others, ‘“How Can I Help You?” Perceived Service Orientation of Tax Authorities and Tax Compliance’ (2013) 69 *FinanzArchiv* 487.

77 Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007) 96.



is also a matter of reciprocity, for citizens attach great importance to predictability with regard to the application of the tax law. Reciprocity demands the tax administration to take this need for legal certainty seriously.

The NTCA provides information to taxpayers through different communication channels. With regard to all these types of information services the NTCA has continuously to convert often very complex tax laws into understandable information for taxpayers. As Cramwinckel observes, this is a daunting task. The legal language of the law and the ordinary language of taxpayers do not 'match', and the DTA thus has to provide a solution for this discrepancy in language.<sup>78</sup> In this process, the DTA has to balance between legal accuracy and preciseness, with comprehensibility and clarity.

The mere providing of information to convey the legislative standards of behaviour differs from sharing information between the NTCA and taxpayers on a more regular and reciprocal basis, as is the case with Horizontal Monitoring. We now turn to this distinct Dutch form of cooperative compliance that is essential to the NTCA's responsive regulation strategy. This reciprocal interaction includes setting standards with regard to the manner in which (corporate) taxpayers provide assurance that the voluntarily disclosed information and submitted tax returns are accurate.

## 6.2 *Asymmetry and Cooperative Compliance*

Cooperative compliance aims at effective and legitimate tax enforcement, with the purpose of 'assuring compliance, which is to say payment of the right amount of tax at the right time'.<sup>79</sup> The powers involved in tax enforcement account for the conditions, characteristics and boundaries of cooperative compliance in tax matters.<sup>80</sup> Legal asymmetry, as set out in section 2, is a pervasive feature of the relationship between tax administrations and taxpayers, as tax administrations have considerable unilateral powers to determine the mutual legal relationship, with regard to the tax liability of the taxpayer in particular. The tax administration uses these prescribed powers to compensate for the 'information asymmetry' it experiences at the hands of taxpayers when having

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78 Tirza Cramwinckel, 'Lost in Translation? A Multidisciplinary Approach on Legal Issues in Communication' (2015) *Clarity Journal*, forthcoming. She refers to Willem Witteveen, *Het Wetgevend Oordeel* (The Legislative Judgement) (Boom Juridische uitgevers 2010).

79 OECD, *Co-operative Compliance: A Framework. From Enhanced Relationship to Co-operative Compliance* (OECD Publishing 2013) 13.

80 In this context, power is often defined as the capacity to influence another person's behaviour in a certain direction. This can be done by reward or punishment, Mats Höglund and Sture Nöjd, 'Professional Communication of the Tax Authorities' (2014) 42 *Intertax* 496, 500.

to determine tax liability. These powers are necessary to secure compliance, without which the NTCA could not fulfil its assigned tasks. Although the legal asymmetry seems to be a far cry from cooperation and trust, it is necessary to establish facts and the communication of the interpretation of legal norms is of the utmost importance to both taxpayers and tax administration.

Compliance is then difficult to achieve in the long term without cooperation and trust.<sup>81</sup> Enforcing compliance is time-consuming, costly and requires a lot of resources. The NTCA has adopted a dual approach to enhance compliance to that end, for 'steering along a variety of routes can bring about the same thing, and acting in different ways can bring about the same end'.<sup>82</sup> The NTCA has opted for 'Horizontal Monitoring' as a means to enhance taxpayers' voluntary cooperation and supplement the traditional deterrence approach.

The concept of Horizontal Monitoring symbolises a type of 'horizontalisation', fostering cooperation and dialogue on a more equal footing, a feature of the communicative style of regulation. Horizontal Monitoring also implies a form of de-juridification, giving more prominence to social and moral rather than legal norms, such as trust, fair play, respect, reciprocity and shared responsibility in the interaction between the DTA and taxpayers. De-juridification also entails debating the legal consequences of actions as early as possible, preferably before tax returns have been filed and opposing parties have taken a legal position. Having this exchange and debate of opposing views on the consequences of actions prior to the filing of a tax return and the assessment thereof allows for a flexible response if any disagreement arises.<sup>83</sup> The NTCA relies on reciprocal interaction rather than on unilateral commands during the pre-filing stage.

Notwithstanding, Horizontal Monitoring supplements the traditional command and control style of regulation, whereby authorities use unilateral powers to check whether taxpayers comply with tax law and apply coercive measures when it is determined that taxpayers have failed to do so.<sup>84</sup> Although the 'exclusive' command and control paradigm is outdated and limited in its

81 María T Soler Roch, 'Tax Administration versus Taxpayer – A New Deal?' (2012) 4 *World Tax Journal* 282, 282–288. The main reason is that the lack of trust means uncertainty and uncertainty increases the risk; in this case, the tax risk for both the Tax Administration and for taxpayers.

82 Corrado Vivanti, *Niccolò Machiavelli: An Intellectual Biography* (Simon MacMichael tr, Princeton UP 2013) 38.

83 Hans JLM Gribnau, 'Soft Law and Taxation: The Case of the Netherlands' (2007) 1 *Legisprudence* 291, 312–325.

84 This traditional, vertical form of supervision is repressive, not based on trust and it concerns taxpayers who are not transparent.

effectiveness,<sup>85</sup> the cooperative compliance model of regulation is meant to support this deterrence model of regulation. Both approaches are possible within the existing legal framework as the NTCA has discretion with regard to the allocation of its scarce resources, and thus part of the NTCA's toolkit.

### 6.3 *An Informal Approach*

Tax authorities have become aware of the necessity of treating taxpayers fairly and considering them as 'equal partners', customers even.<sup>86</sup> This component of the compliance strategy was introduced to support and strengthen the willingness of taxpayers to observe the prescribed statutory obligations.<sup>87</sup> This strategy encourages taxpayers to comply and enhances their intrinsic motivation to fulfil these obligations ('voluntary compliance').<sup>88</sup> The NCTA's compliance strategy may encourage compliance by considering and reacting accordingly to the causes of non-compliant behaviour. A carefully designed compliance strategy may change taxpayers' attitude and secure compliance by enforcing a strategy that takes actual behaviour and motivation of taxpayers into account. As such, NTCA tries to increase not only compliance but also voluntary compliance and behaves therefore in a way to promote voluntary compliance accordingly. It follows that cooperation based on mutual respect and justifiable, reasonable trust is the crux of this compliance strategy.<sup>89,90</sup> Respect demands empathy on the side of tax officials and an empathetic

85 Bruno S Frey, 'Deterrence and Tax Morale in the European Union' (2003) 11 *European Review* 385; Joel Slemrod (ed), *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press 1992) 7.

86 Erich Kirchler and Erik Hoelzl, 'Modelling Taxpayers' Behaviour as a Function of Interaction between Tax Authorities and Taxpayers', in Henk Elfers, Peter Verboon and Wim Huisman e.o. (eds), *Managing and Maintaining Compliance* (Boom Legal Publishers 2006); Erich Kirchler, *The Economic Psychology of Tax Behaviour* (CUP 2007); Hans JLM. Gribnau, 'Horizontal Monitoring: Some Procedural Tax Law Issues', in Ronald Russo (ed), *Tax Assurance* (Kluwer 2015).

87 See Victor van Kommer and Matthijs Alink, *The Dutch Approach: Description of the Dutch Tax and Customs Administration* (2nd rev edn, International Bureau of Fiscal Documentation 2009) 11ff.

88 cf Roman Seer, 'Voluntary Compliance' (2013) 67 *Bulletin for International Taxation* 584.

89 cf OECD, 'The Enhanced Relationship' (2007) OECD Tax Intermediaries Study Working Paper 6, 3 <<http://www.oecd.org/tax/administration/39003880.pdf>> accessed 21 June 2015; 'Fundamental to the long-term success of the enhanced relationship is the establishment and maintenance of trust amongst all the parties'.

90 Dutch Ministry of Finance, *Report of the Tax and Customs Administration Horizontal Monitoring Committee on Tax Supervision – Made to Measure: Flexible When Possible, Strict Where Necessary* (Leo Stevens and others eds, 2012) 20 <<http://www.ifa.nl/Document/>

approach ‘increases the taxpayers’ respect for the tax agency and inclination to co-operate and reduces the risks of misunderstanding’.<sup>91</sup> This informal approach prevents misunderstanding between parties who may otherwise perceive one another as enemies.

The willingness to cooperate is embodied in a compliance agreement (covenant) concluded between the tax administration and (corporate) taxpayers. The result of this covenant is a kind of informal ‘proceduralisation’ by way of a semi-permanent dialogue that ascribes ‘a critical role to deliberative, participatory procedures’.<sup>92</sup> Under the stipulations of the covenant, taxpayers are required to report all actions that involve tax risks as well as disclose their views on the legal consequences of such actions.<sup>93</sup> The voluntary reporting of tax structures goes beyond the taxpayer’s actual statutory obligations of providing proper factual information. Additionally, the taxpayer must provide assurance that the information and returns submitted are both accurate and complete by setting up a Tax Control Framework (TCF). A TCF indicates the degree of control the taxpayer has. The result of this voluntary compliance is that the tax inspector will follow the tax returns that are filed under the covenant agreement, provided that no outstanding issues arise and no random audits of tax returns are conducted. Thus, the tax administration can rely on the tax return that the TCF ‘produces’. An adequate TCF enhances taxpayer’s trustworthiness when filing tax returns and encourages the tax inspector to trust the taxpayer and follow the filed tax return in turn.

Tax inspectors are expected to share the specific monitoring strategy with the party concerned and take a stance on any planned actions and the fiscal consequences.<sup>94</sup> The NTCA will also provide its interpretation of new legal rules. Taxpayers can expect a prompt response, for a good working relationship demands ‘working in the present’ and real time troubleshooting. Rightly so, for nowadays taxpayers may expect tax administrations to be engaging and helpful. Thus, the tax administration meets taxpayers’ need for legal certainty (with

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Publicaties/EnhancedProject/tax\_supervision\_made\_to\_measure\_tz0151z1fdeng.pdf Relationship > accessed on 20 June 2015 (Stevens Committee Report).

91 Mats Höglund and Sture Nöjd, ‘Professional Communication of the Tax Authorities’ (2014) 42 *Intertax* 496, 501.

92 Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007) 141.

93 OECD, *Co-operative Compliance: A Framework. From Enhanced Relationship to Co-operative Compliance* (OECD Publishing 2013) 20–21.

94 See the internal HM guidelines issued by the DTA to guarantee uniform treatment with regard to cooperative compliance, thus enhancing equal treatment and legal certainty.

regard to tax positions) and predictable behaviour. This type of (enforced) self-regulation is a means to provide transparency.

#### 6.4 *Soft Law to Enhance a Dialogue*

As set out above, the use of soft law may be a suitable supplement or alternative to legislation and improve the legitimacy and effectiveness of policies and regulative processes. In the Horizontal Monitoring approach the reciprocal engagement to cooperate is formalised in a voluntary agreement compliance agreement (enforcement covenant) expressing the tax administration's and taxpayer's intention to cooperate.

There are 'soft' obligations, a feature of gentlemen's agreement,<sup>95</sup> where the covenant partners commit to a certain standard of performance, for example with regard to an effective and efficient method of working.<sup>96</sup> This type of commitment resembles the results of a soft law instrument; although not legally binding, may have certain indirect and practical legal effects nevertheless. Parties voluntarily take obligations – going beyond the 'hard' obligations that can be legally enforced. Here, the taxpayer agrees to bear the responsibility of having an adequate framework of internal and external controls, 'proactively' report all actions that involve tax risks and to disclose their views held on the legal consequences of such actions. In short, a covenant essentially sets out the way tax administration and a (corporate) taxpayer will interact, albeit with some obligations. The cooperation is conditional upon some form of reciprocity, a basic requirement for any kind of cooperation. These enforcement covenants try to do justice to the occasionally conflicting interests of the partners while acknowledging shared interests. A cooperative compliance approach should lead to less costly enforcement instruments such as audits and legal proceedings for example, thus resulting in efficiency gains for both taxpayers and NTCA.

Horizontal Monitoring takes place within the existing substantive and procedural statutory framework. Naturally, enforcement covenants should not influence the taxpayer's total tax liability. Indeed, this informal approach has to fit within the legal framework. Yet the point is that an informal approach concerns cooperation rather than competencies, obligations and rights as determined by procedural tax law. The consensual basis of this regulatory arrangement partly derives its force from the legal support offered by coercive

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95 cf Margot E Oenema, *De Formeelrechtelijke Aspecten van Horizontaal Toezicht in Belastingzaken* (Kluwer 2014) 96 ; Hans JLM. Gribnau, 'Horizontal Monitoring: Some Procedural Tax Law Issues', in Ronald Russo (ed), *Tax Assurance* (Kluwer 2015).

96 Stevens Committee Report, 96 uses the term 'working and behavioural agreements'.

tax law. In other words, the existing procedural legislation 'should be a stabilizing background factor, coming into the focus of attention only when conflicts cannot be solved in another way'.<sup>97</sup>

## 7 Conclusion

For Spinoza, the value of reciprocity governs the relationship between the sovereign and citizens in a political community. Fuller argues in the same vein that the legislature's power rests ultimately on a tacit and relatively stable reciprocity that underpins the citizen's duty to observe the rules. Legislation communicates standards of behaviour. Legislation, and more generally regulation, is often an announcement about how people should behave. Here, the command and control method of regulation is to be distinguished from the communicative style of regulation that rather depends on reciprocal interaction and communication than on unilateral commands.

For the NTCA, adequate communication is an important means to help taxpayers to understand the complex tax laws and enhance compliance. Taxpayers and NTCA are mutual dependent on one another, which accounts for a specific kind of reciprocity that underlies the relationship. The NTCA can unilaterally decide upon taxpayers' tax liability, but without taxpayers massive voluntary compliance the NTCA could not fulfil its tasks. Cooperation on a more equal footing than in the traditional command and control model is established by NTCA's Horizontal Monitoring approach, a fairly new cooperative compliance model of regulation to enhance taxpayers' voluntary compliance. Again, the notion of reciprocity changes colour because of the more equal relationship that is possible within the existing statutory framework.

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97 Willem Witteveen, 'A Self-Regulation Paradox: Notes Towards the Social Logic of Regulation' (2005) 9(1) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/91/art91-2.PDF>> accessed 18 June 2015.