https://doi.org/10.18778/8331-399-3.12

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The Importance of the Tax System for the Rule of Law. The Dutch Childcare Allowance Scandal as an Example of a Violation of the Rule of Law in a Constitutional Democracy

1. Introduction

Citizens living in a constitutional democracy based on the rule of law and the separation of the executive, legislative, and judiciary powers are not always aware of the great benefits of such a system. Mostly, they experience their freedom to appeal to an independent court if they feel their rights have been violated by the government or other citizens as something completely normal. The same is true for the trust people have in Parliament as custodian of the government and for their belief that the legislator (mostly the government together with Parliament) respects the constitution and international agreements. But if this system shows failures, e.g., if the government acts as an omnipotent ruler, innocent citizens will be the first victims as they are not in an equal position with the bureaucrats representing this government. Unfortunately, this is not something that is only present in repressive non-democratic regimes like Europe in the last century has experienced during the Nazi and Communist times. This can also happen in modern states that embrace the modern principles

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of democracy and the rule of law. Such a danger is especially present in the field of taxation. The government depends on taxation to finance its policies. Every citizen has to pay his or her fair share. Those who evade taxes will be prosecuted. But because of the complexity of many tax laws, the borderline between fraud and tax planning is not always clear. And even if aggressive tax planning is not at stake, it is possible that citizens make mistakes just because they were not informed properly or because they simply were not aware of all their formal obligations. If this happens, there should be a possibility to redress these mistakes in a proportional way. Fiscal sanctions are necessary, as long as they are proportional. However, proportionality requires comparing the offence with the compensation, taking into account the human dimension. Mostly, a non-wealthy individual citizen not legally skilled and without the help of a tax advisor is not in the same position as a citizen who knows how to find the way in the bureaucracy and legal system. Besides, in massive automated tax processes, there is often no room for an individual proportional approach. Computers do not differentiate between people; they only work on the basis of algorithms. If no escape mechanism is available in these kinds of situations, ordinary citizens threaten to be crushed by the system.

In this contribution to the jubilee book dedicated to my dear colleague, Włodzimierz Nykiel, on the occasion of his 70th birthday, I will illustrate this process with a recent example in the Netherlands with respect to the system of childcare allowances for parents. This system, executed by the Dutch tax administration, has brought about 26,000 parents into huge problems since they had to pay back large sums of received allowances because of presumed offences. This not only led to big financial problems for these parents, combined with seizures, also all kinds of personal problems like divorces and illnesses resulted from this. As turned out later, most of these parents had been wrongly accused. After the publication in 2020 of a report based on a Parliamentary enquiry,[2] at the beginning of 2021 the Dutch government resigned because of this scandal. In this Parliamentary report, all three powers – the legislative, the executive, and the judiciary – were blamed for this tragedy. An often-used argument in the analysis of this scandal is that a lot of misery for the parents could have been prevented if there had been a hardship clause in the relevant legislation. Because the executive tax officers had to follow the wording of the law, there was no place for a policy of leniency. As a result, the least imperfection on the part of the parents in applying for the childcare allowances led to the obligation to pay back the full amount of these allowances received in advance (the "all or nothing" policy).

[2] Parliamentary Interrogation Committee on Childcare Allowances, *Report: Unprecedented Injustice*, 17 December 2020.

In Para. 2 of this contribution, I will first provide for a brief overview of the Dutch childcare allowance system. Paragraph 3 summarizes the Report of the Parliamentary Interrogation Committee on Childcare Allowances (hereinafter: the "Parliamentary Committee"). Paragraph 4 pays attention to the "all or nothing" policy that was one of the main reasons for the catastrophe for so many parents. Paragraph 5 describes the role of the Administrative Jurisdiction Division of the Council of State (hereinafter: "Council of State") as the highest court with respect to administrative law cases, followed in Para. 6 with some further comments. Paragraph 7 concludes this contribution.

2. The Dutch childcare allowance system[3]

In 2004, the Dutch Parliament adopted the Childcare Act (*Wet kinderopvang*).[4] Formally, this law falls under the responsibility of the Ministry of Social Affairs and Employment, but the Allowance Department of the Tax and Customs Administration of the Ministry of Finance (hereinafter: "Tax Administration/Allowance Department") is responsible for its implementation, including payment and fraud prevention. In 2005, the General Act on Income Dependent Schemes (*Algemene wet inkomensafhankelijke regelingen* – AWIR)[5] was introduced; this act dealt with the whole system of allowances, including the childcare allowance system.

In the Netherlands, childcare is not free of charge; parents are generally required to pay for the costs by themselves. However, part of the costs may be covered by a childcare allowance. The amount of this allowance is calculated as a percentage of the hourly rate of the childcare centre or childminding agency, ranging from 33.3% to 96%, depending on the parents' collective income and the number of children. This means that there is a mandatory contribution for parents to pay 4% to 66.7%

[3] J. Frederik, *Zo hadden we het niet bedoeld. De tragedie achter de toeslagenaffaire*, De Correspondent, Amsterdam 2021. See also: *Dutch childcare benefits scandal*, n.d., https://en.wikipedia.org/wiki/Dutch_childcare_benefits_scandal (accessed: 12.04.2021).

[4] NL, Childcare Act of 9 July 2004 [*Wet van 9 juli 2004 tot regeling met betrekking tot tegemoetkomingen in de kosten van kinderopvang en waarborging van de kwaliteit van kinderopvang, Wet kinderopvang*], Offcial Gazette [*Staatsblad*] 2004, 455.

[5] NL, General Act on Income Dependent Schemes of 23 June 2005 [*Wet van 23 juni 2005 tot harmonisatie van inkomensafhankelijke regelingen, Algemene wet inkomensafhankelijke regelingen*], Offcial Gazette [*Staatsblad*] 2005, 344.

depending on their income. Each year, the government sets a maximum hourly rate for which families may receive childcare allowance. Any amount exceeding the maximum hourly rate must be fully paid by the parents. The number of childcare hours for which a family is entitled to a childcare allowance depends on the number of hours that each parent works. The maximum is 230 hours per month per child. Parents may opt to receive their childcare allowance on their own bank account or to have it transferred directly to the childcare centre or childminding agency.

Some childminding agencies committed fraud by applying for a childcare benefit on behalf of their clients without asking for the mandatory contribution of 4% to 66.7%. Sometimes, they provided informal babysitters (e.g., grandparents babysitting their grandchildren) with a formal employment contract, so that childcare allowances could be applied for. The agencies did not inform the parents of the fact that they were legally required to pay for the remainder of the "costs", i.e., the part of the agency's (imaginary) hourly rate not covered by the childcare allowance they had received.

In 2009, a director of such an agency was sentenced to 18 months' imprisonment for forgery and fraud. The Tax Administration/Allowance Department forced the parents involved to pay back all childcare benefits the agency had received in their name.

The parents claimed the funds given to the fraudulent agencies had to be recovered from these agencies instead of from the parents who acted in good faith; such an option was however considered against the law. The parents appealed this decision of the Tax Administration/Allowance Department, but after several lawsuits, the Council of State confirmed that the law required them to pay back the full amount of childcare allowances they had received: the so-called "all or nothing" policy.

In 2013, the Dutch press revealed that a number of Bulgarian citizens were encouraged by criminals to briefly register at an address in the Netherlands and to retroactively apply for EUR 6,000–8,000 health care and housing allowances. At the time, the tax authorities paid allowances immediately and checked eligibility afterwards, at which point the Bulgarians had already left the country.

In response to the Bulgarian migrant fraud, the House of Representatives (part of Parliament) insisted on stricter fraud prevention. As a consequence, the government established a Fraud Management Team, consisting of top officials from the Tax and Customs Administration and the Ministry of Finance.

Later that year, the Fraud Management Team established the Collaborative Anti-facilitation Force (CAF), whereby "facilitation" refers to individuals or institutions that enable or encourage people to commit

fraud. In the context of childcare benefit fraud, this meant that the CAF actively looked for childcare centres and childminding agencies that submitted suspicious childcare benefit applications.

With extreme harshness, the CAF investigated agencies and parents by applying "collective punishment", knowing that 20% of the accused parents were innocent. For innocent parents it was virtually impossible to reverse decisions. This gave the impression of institutional prejudice. When the Tax Administration/Allowance Department suspected serious culpable acts, the Dutch bureaucracy would mark the involved parents with the label "Deliberate intent/Gross negligence". Individuals with such a label were no longer eligible for standard debt collection arrangements. Under the standard arrangement, debtors repay their debt as much as possible over a two-year period (without falling below subsistence level) and any debt remaining after that period would then be considered irrecoverable. Because the accused parents were not eligible for such a payment plan, they became heavily in debt. Reclaimed amounts of EUR 20,000 or more per year for families with several children were no exceptions.

Another group of parents fell afoul of strict administrative policies, in which a small mistake (e.g., a missing signature or an undeclared change in income) could lead to a full clawback of the childcare allowance. This was initially confirmed by a decision of the Council of State. In October 2019, however, the Council of State reversed this decision, and decided that the recovered amount had to be returned to the parents, along with compensation on a case-by-case basis.

When it became more and more clear that the Tax Administration/Allowance Department had made/committed serious mistakes/offences against the parents, and that the government had failed to intervene and to adequately inform Parliament, on 2 July 2020 the House of Representatives established the Parliamentary Interrogation Committee on Childcare Allowances (the Parliamentary Committee). On 17 December 2020, this Committee presented a report, *Unprecedented Injustice*. It criticised the Tax Administration/Allowance Department, the Ministry of Social Affairs, the cabinet, the Council of State, and also the House of Representatives. Most of all, the "all or nothing" policy was criticised. According to the Committee, the affected parents had not received the protection they deserved because of the group penalties implemented by the Ministry of Finance, thus violating the fundamental principles of the rule of law.

In response to the report of the Parliamentary Committee, on 22 December 2020 the government announced that all wrongly accused parents would receive EUR 30,000 compensation, regardless of the financial loss, unless they qualified for higher compensation. On 15 January 2021, the cabinet offered its resignation to the King.

One of the common arguments in search of the causes and delinquents of this debacle is that a lot of sorrow for the parents could have been avoided if there had been a hardship clause in the childcare allowance legislation. Because the executive officers had to follow the letter of the law, there seemed to be no place for a policy of leniency. As a result, the "all or nothing" policy was applied, meaning that the least imperfection on the part of the parents would cause the obligation to repay the complete childcare allowance received, with all extremely harsh results.

In my opinion, in a constitutional democratic state, the human dimension should never be held back by rules affecting the rule of law, not even if these rules have been adopted democratically. Nevertheless, this is exactly the discussion that is going on in the Netherlands as a follow-up to the scandal of the childcare allowance whereby tens of thousands of parents became victims of a ruthlessly operating government.

In the following, I will go into more detail of the alleged contradiction between the human dimension and legality. As a starting point, I will take the report of the Parliamentary Committee of 17 December 2020 and the reaction to this report by the present chairman of the Administrative Jurisdiction Division of the Council of State, Bart Jan van Ettekoven, in an article in "Nederlands Juristenblad" (NJB) of 15 January 2021.[6]

3. Report of the Parliamentary Committee

To Dutch understanding, the childcare allowance affair is of an unprecedented size and seriousness. The Parliamentary Committee concludes that in the implementation of the childcare allowances "fundamentals of the rule of law have been violated". In this respect, all three powers can be blamed: the legislator, the executor (especially, the Tax Administration/Allowance Department), and the judiciary (especially the Council of State). The legislator (government and Parliament) is blamed for being responsible for legislation "that was rock hard and for paying insufficient attention to possibilities to justify individual situations". In this context, the Parliamentary Committee mentioned the lack of a hardship clause and the absence of attention "to necessary principles of good governance, especially the proportionality principle".[7] The executor – the Ministry of Finance – is blamed to have been responsible for having executed the childcare allowance as a mass process,

[6] B. J. van Ettekoven, *Tussen wet en recht*, "Nederlands Juristenblad" 2021, No. 2, p. 98.

[7] Parliamentary Interrogation Committee on Childcare Allowances, *Report*…, p. 7.

in which the group approach, the "all or nothing" policy and the manner in which "intent/gross negligence" was handled, caused gross infringements on the principle of the rule of law that optimal justice should be done to people's individual situations.[8] As a result of the "Bulgarian migrant fraud", big political pressure on the fight against fraud arose, every error was considered to be fraud, and parents were wrongly branded intentional frauds. The Parliamentary Committee qualified the way in which the Ministry of Social Affairs had filled in its responsibility for the policy as "far below acceptable".[9] But also the judiciary did not come unscathed through the report. That is precarious because, due to the doctrine of the separation of powers, Parliamentarians should be reluctant in criticizing judges. That is also why the Parliamentary Committee started by saying that they did not want to comment on individual court orders. Nevertheless, it is noted "that also the judges responsible for the Administrative Law for years made an important contribution to maintain the cast iron implementation of the childcare allowance regulations which were not compulsory by law".[10] According to the Parliamentary Committee, the relevant case law on Administrative Law did "neglect its important duty to legally protect individual citizens". The main point of criticism on the Council of State is, according to the Parliamentary Committee, "that, until 2019, it reasoned away the general principles of good governance, which should serve as a bumper and protective blanket to people in distress".

4. "All or nothing" approach

Although the conclusions of the Parliamentary Committee regarding all three powers of the constitutional Dutch democracy are crystal clear, the risk of a judgment that blames everyone is that the three powers can point to each other as to be the "real" chief offender. Careful reading of the report does not answer the question of the chief offender, but does answer the question of which concrete measures affected the involved parents most. Such measures are the group approach which took into the bargain that also parents who were to blame for little or nothing were included in the aggressive fraud investigation (the "80/20" – approach), the way in which "intent/gross negligence" was wielded causing 25,000 to 30,000 parents to fall under this

[8] *Ibidem*.
[9] *Ibidem*.
[10] *Ibidem*, pp. 7–8.

category, resulting in no personal payment arrangements, while afterwards it was determined that in 94% of all cases this qualification to the current standards could be labelled as being wrong,[11] but mostly because of the "all or nothing" approach. "Mostly", because it was precisely that approach through which in so many cases the full amount of childcare allowance received as an advance payment was reclaimed. Without this "all or nothing" approach most of the parents would not have got into such excessive financial problems. The group approach and the "intent/gross negligence" approach worsened the financial and human disaster for the parents even further.

What was the exact origin of this "all or nothing" approach, which was not only applicable in case of the (complete or partial) absence of an own contribution, but also in the case of administrative shortcomings like the absence of a signature? According to the Parliamentary Committee, this approach was not a direct result of the childcare regulations or the Parliamentary debate during the deliberations on these regulations.[12] It was the conscious choice of the Tax Administration/Allowance Department, thereby for many years supported by the case law of the Council of State. In this way, the executive and judiciary powers reinforced each other for many years. Only in 2019, the Council of State changed its view and forbade the "all or nothing" policy.

This statement of the Parliamentary Committee seems somehow at odds with Para. 7 of its report in which the legislator is blamed for having made legislation "that was cast-iron and that did not provide for sufficient possibilities to do justice to individual situations". In this respect, the Parliamentary Committee especially referred to the lack of a hardship clause and the lack of attention for necessary principles of good administration, in particular the principle of proportionality. The question remains whether the "all or nothing" approach could have been prevented if the legislator had implemented a hardship clause in the childcare legislation. Van Ettekoven, chairman of the Administrative Jurisdiction Division of the Council of State, suggests that a hardship clause could have been used by the administrative authorities and the administrative court "to prevent that civilians would be crushed by a combination of rigid legislation and a (too) strict implementation of rules". In my opinion, it is questionable whether such a hardship clause would have had this effect in the case at hand. After all, the opinion of the Tax Administration/Allowance Department was that the "all or nothing" approach was the explicit intention of the legislator. In that case a hardship clause cannot help because this clause is only effective in cases not foreseen by the legislator.

[11] *Ibidem*, p. 25.
[12] *Ibidem*, p. 22.

The same applies to the question whether the general principles of good governance, especially the proportionality principle, are overall applicable and can thus set aside a formal law.

In this respect, the former interpretation of Art. 26 AWIR plays an important role. This article contains the following: "If a revision of an allowance or a revision of an advance payment leads to reclaiming an amount or a settlement of an advance payment with an allowance to that end, the interested party owes the full amount of the reclaim". According to Van Ettekoven, the wording of this article leaves no room for interpretation; in his words: "if a revision of an advance payment leads to an amount to be reclaimed, the party concerned owes the amount of the recovery entirely. I repeat: *entirely.* This is no mistake; it is the will of the legislator. *No Mercy*".[13] Also the executive authorities and (until 2019) the Council of State derived from this text that it was the will of the legislator that if a citizen makes a mistake, even if it is a small mistake, he or she is not entitled to an allowance. If one of the requirements was not (completely) fulfilled, then, based on the aforementioned interpretation of Art. 26 AWIR, the full amount of the advance payment was reclaimed.

In my opinion, this interpretation was and is wrong. Article 26 AWIR only says that if and insofar as there is an amount to be reclaimed, the party concerned owes the complete amount of this reclaim. This means that the Tax Administration/Allowance Department could and should have determined first the exact amount of the reclaim by taking into account the absolutely disproportionate consequences of an "all or nothing" approach. So, the Tax Administration/Allowance Department definitely had discretion when establishing the amount to be recovered. That consideration should have led to a reclaim that in most cases would have been significantly lower. As a consequence, Art. 26 AWIR would have been applied only to that reduced reclaim, without the enormous harm that in reality has taken place. This is also the outcome of the October 2019 judgments of the Council of State.

5. The role of the Council of State

Because of the precarious relationship between Parliament and the judicial power, the Parliamentary Committee acted wisely by asking an independent expert opinion about the case law of the Council of State

[13] B.J. van Ettekoven, *Tussen*…, p. 102; see also p. 99.

on the "all or nothing" approach from 2010 until 23 October 2019, the date of the two judgments[14] in which the assent with this approach was left. The independent expert the Parliamentary Committee approached was S.E. Zijlstra, a professor in constitutional and administrative law, at the Free University of Amsterdam. On the basis of the initial case law of the Council of State, Zijlstra concluded that the most important elements of the "all or nothing" approach came from the relevant childcare legislation: "The legal possibilities for the Tax Administration/Allowance Department for a more lenient policy, if they felt the need to it, were almost nil".[15] According to Zijlstra, termination of the "all or nothing" case law by the Council of State was motivated by the "heavy, negative effects on the financial position of interested parties".[16] Zijlstra also stated that after this judicial turnaround, the Tax Administration/Allowance Department had to apply the proportionality principle in its reclaim policy.[17]

According to Van Ettekoven, the Council of State had two options to come to more fair outcomes: 1) let the proportionality principle prevail over the mandatory law provisions, or 2) a further interpretation of the relevant legal provisions, by judging that on closer examination those provisions still leave room for differentiation and that the Tax Administration/Allowance Department has the power to provide customisation and should apply in this respect the proportionality principle.[18] The Council of State opted for the second option, although, according to Van Ettekoven, this option "leads to a friction with the wording of Art. 26 AWIR". Still, he thinks this is a better option than the first one, which he characterizes as "a bridge too far". The correction of a formal law via the proportionality principle, to his knowledge, has never taken place before.[19] Van Ettekoven and Zijlstra explain the turnaround of the Council of State only in October 2019, by stating that the Council of State heard only later of the disastrous consequences of the "all or nothing" policy and the fact that year after year neither the legislator nor the government intervened, not even after the publications in 2017 of some alarming reports. According to Van Ettekoven, it was therefore necessary to apply an emergency measure.[20] In addition, Van Ettekoven points to the fact that the Council of State was not

[14] NL, Council of State, judgement, 23 October 2019, ECLI:NL:RVS:2019:3535 and ECLI:NL:RVS:3536.

[15] Parliamentary Interrogation Committee on Childcare Allowances, *Report*…, p. 127.

[16] *Ibidem*, p. 131.

[17] *Ibidem*.

[18] B.J. van Ettekoven, *Tussen*…, pp. 104, 105.

[19] *Ibidem*, p. 105.

[20] *Ibidem*, pp. 100, 104.

counteracted by the lower courts (with the exception of the Rotterdam Court) and legal doctrine. He explicitly adds that this remark is meant to be a factual observation and not an accusation.[21]

6. Further comments

By talking about an "emergency measure" leading to a friction with the wording of Art. 26 AWIR, a measure the Council of State considered necessary because of disastrous consequences of the "all or nothing" approach and the absence of intervention by the Tax Administration/ Allowance Department and the legislator, in my opinion Van Ettekoven distances himself too little from the original case law of the Council of State on the "all or nothing" policy. In fact, he claims that this case law resulted from both the wording of Art. 26 AWIR and the intention of the legislator regarding that article. Because the executive authorities and the legislator failed to do something with the alarming signals from practice, according to him, the Council of State had to choose ("an emergency measure") for another interpretation of Art. 26 AWIR. This matches with his statement that, looking back, in the light of the subsequently shown consequences of the interpretation by the Council of State of the relevant legal provisions, this interpretation was "unfortunate".[22]

In my opinion, this interpretation was not only unfortunate, it was wrong. This applies particularly to the initial interpretation of Art. 26 AWIR. Van Ettekoven states that "looking back, it would have been better if [the Council of State] had not applied only one measure for all types of mistakes and shortcomings, but had differentiated".[23] In my opinion, not only would this have been "better", but the Council of State was *obliged* to differentiate between all types of mistakes and shortcomings. This also means that the judgments of the Council of State of October 2019 should not be seen as judgments that are at odds with the wording of the laws and object and purpose the legislator had in mind with these laws; they are completely legitimate judgments which the Council should have taken when the "all or nothing" policy was submitted to it for the first time.

Why are these comments so important? Not because anything would have changed for the affected parents when the Council of State through its

[21] *Ibidem*, pp. 100, 105.
[22] *Ibidem*, p. 105.
[23] *Ibidem*.

president would have dragged themselves through the mud even deeper. Nor would be excused the fact that the Tax Administration/Allowance Department had invented and not adjusted the "all or nothing" policy, even though it knew that parents were heavily affected by it. Neither would be excused the guilt of the legislator who waited too long to intervene (this inaction of the legislator is in strong contrast to the many examples in which the legislator – rightly by the way – normally and energetically picks up signals from the tax administration of taxpayers' improper use to implement reparation legislation).[24] However, a qualification of the initial Council of State case law as "wrong" instead of "unfortunate" is of great importance to avoid future situations in which the fundamental principles of the rule of law state are violated again.

Whether or not a hardship clause is included in a law cannot and may not be a justification for actions by the government in which the human dimension is eliminated.[25] If the execution of a law leads to situations like in the "all or nothing" policy of which in all fairness can be assumed that if during the discussions on the relevant bill in Parliament the legislator had been aware of these situations, this policy had never been accepted, then this should be a strong message for executors of these laws and the judiciary to stop this policy. This also applies to the principles of good governance in these kinds of situations. I do not share the worries of Van Ettekoven, among other people, that there is a danger that a democratically accepted formal law could be set aside by the executive power. If the legislator explicitly wanted a hard limit of, e.g., a criterion with a minimum number of business hours connected to an entrepreneur to be entitled to business facilities, or a maximum purchase house price limit to entitle a house buyer to a real estate transfer tax exemption, then, of course, a tax inspector cannot allow on the basis of the proportionality principle that a lower number of business hours or a fractional higher purchase house price will still lead to a tax benefit.[26] In Germany, these types of tax disadvantages are called *Dummensteuer*: taxes that can be avoided in a legal way.[27] They fall within the category known as "sorry but alas", *lex dura, sed lex*. You cannot act as if you worked more business hours in a year with retroactive effect or that

[24] See also: L.G.M. Stevens, *Was het onrecht rond de toeslagen wel zo ongekend?*, "Weekblad fiscaal recht" 2021, No. 7, p. 38.

[25] Compare: J. Baron, E. Poelman, *De menselijke maat in rechtsvinding*, "Tijdschrift voor Formeel Belastingrecht" 2020, No. 4; J.L.M. Gribnau, *Fatsoenlijke belastingheffing*, "Nederlands Tijdschrift voor Fiscaal Recht" 2021, No. 1125.

[26] See: M. Spanjers, *Alles of niets*, "Weekblad fiscaal recht" 2021, No. 16.

[27] *Was ist eine "Dummensteuer"? Bedeutung, Definition, Erklärung*, 2020, https://www.bedeutungonline.de/was-ist-eine-dummensteuer-bedeutung-definition-erklaerung/ (accessed: 12.04.2021).

you paid a lower purchase price. If the legislator did want that, he would have included, for instance, a sliding scale in the law. But if, like in the case of the "all or nothing" policy, the parents only paid a fraction of their own personal childcare contribution, or if only the signature on the childcare contract was missing, meant that without any mercy tens of thousands of euros had to be paid back (instead of only the amount of the missing personal contribution) and the "offender" was dismissed and treated as a fraud, then that is a disproportionate consequence the legislator had probably never approved if he had been aware of this, since such a policy completely ignores the human dimension.

Therefore, my opinion is that the initial judgments of the Council of State, in which the "all or nothing" policy was approved, were completely wrong and that the judgments of the Council of State of 23 October 2019 were entirely correct. They only came too late; about this, Van Ettekoven rightfully says that "if [the Council of State] had earlier changed its mind, this would have been much better for the parents".[28]

7. Conclusions

According to the Parliamentary Committee, all three main powers of the Dutch constitutional democracy are to be blamed for the tragedy of the childcare allowance case in which the fundamentals of the rule of law were violated. However, despite this conclusion, the "all or nothing" approach was the most direct cause of the misery that plagued about 26,000 parents. This approach does not result directly from the law or the Parliamentary debate.[29] It was the conscious choice of the Tax Administration/Allowance Department, hereby many years supported by Council of State case law until the Council's change of opinion in 2019. Therefore, the executive and judicial powers enforced each other for years. The judgments of October 2019 in which the Council of State came back from its former case law should not be seen as an "emergency measure". Also, it is not sufficient to qualify the initial Council case law in which the "all or nothing" approach was confirmed as "unfortunate". This case law was in my opinion wrong. The absence of a hardship clause in a law can and may never be a justification for an intervention of government authorities in which the human dimension is eliminated. If the execution

[28] Parliamentary Interrogation Committee on Childcare Allowances, *Report*…, p. 106.
[29] *Ibidem*, p. 22.

of a law leads to situations like in the "all or nothing" policy of which it can reasonably be expected that the legislator would not have accepted such a policy if this policy was known during the Parliamentary treatment of the relevant bills, this should mean for the executive and judiciary powers that they have to forbid such a policy. This also applies to the application of principles of good governance in these kinds of situations for all powers involved; taking into account the human dimension is an obligation. There are no excuses not to do so. Only, if the taxpayer has had all reasonable opportunities to avoid a tax disadvantage and this also falls within object and purpose the legislator had in mind with this law, *lex dura sed lex* is applicable.

In the childcare allowance tragedy, a violation of fundamental rules of the rule of law happened. The crucial powers of the constitutional democracy failed in being a shield for vulnerable citizens. It is of great importance that we learn from this and that all responsible persons take measures and include safeguards to prevent similar scandals in the future.

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Abstract

If a tax system does not respect the rule of law and the government acts as an omnipotent ruler, innocent citizens will be the first victims as they are not in an equal position with the bureaucrats representing this government. This can even happen in modern states that embrace the modern principles of democracy and the rule of law. In this contribution this is illustrated with a recent example in the Netherlands with respect to the system of childcare allowances for parents. This system, executed by the Dutch tax administration, has brought about 26,000 parents into huge problems since they had to pay back large sums of received allowances because of presumed offences. This not only led to big financial problems for these parents, combined with seizures, also all kinds of personal problems like divorces and illnesses resulted from this. As turned out later, most of these parents had been wrongly accused. Because the executive tax officers had to follow the wording of the law, there was no place for a policy of leniency. As a result, the least imperfection on the part of the parents in applying for the childcare allowances led to the obligation to pay back the full amount of these allowances received in advance (the "all or nothing" policy). In 2021, the Dutch government resigned because of this scandal.

Keywords: rule of law, separation of powers, childcare allowance, "all or nothing" policy, hardship clause