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# RULE OF LAW IN A TRANSITIONAL SPECTRUM

EDITED BY  
Rigmor Argren

# Rule of Law in a Transitional Spectrum

EDITED BY RIGMOR ARGREN

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# The Principle of the Legality of Taxation and the Rule of Law

*Eleonor Kristoffersson and Magnus Kristoffersson*

## **Abstract**

This chapter examines the principle of the legality of taxation in the context of the rule of law. It begins with an exploration of the legality of taxation in international and EU Law, providing a comparative overview and delving into the specific case of Sweden. The authors discuss how this principle is not explicitly stated as a fundamental right in the European Charter of Human Rights and Fundamental Freedoms but can be derived from its provisions. The Court of Justice of the European Union recognizes it as a general principle, necessitating that tax obligations and their substantive elements be defined by law.

The article then focuses on the Swedish interpretation of the principle, tracing its evolution and current application. It highlights the nuances in the Swedish legal system, where the principle of legality in tax law is interpreted as a general rule that taxation must be lawful and in accordance with the principles of the rule of law. This includes a discussion of the role of the Swedish Parliament in enacting tax laws and the interpretative approaches of the Supreme Administrative Court.

In conclusion, the paper emphasizes the principle of legality as an integral part of a larger legal system grounded in the rule of law. It addresses the challenges and complexities in applying this principle, especially when harmonizing national and EU law principles in tax cases.

## 1 Introduction

The principle of the legality of taxation is characterized by the stipulation that no tax may be imposed on an individual unless it has been explicitly

established by a statute, meaning it must be authorized by a law enacted by the legislative authority. The principle may be broken down into smaller pieces meaning that it may encompass an obligation to regulate taxes in the law, to ensure that the law is sufficiently precise, to include a prohibition against delegating tax law and a prohibition against retro-active tax laws. In some countries, such as Germany and Austria, the principle is considered to derive from the rule of law.

This chapter aims at analyzing the principle of legality of taxation in the light of the rule of law. The chapter starts with the principle of the legality of taxation in international and EU Law. Thereafter, a brief comparative overview is given, followed by the case of Sweden used as a case study. The chapter ends with our final analysis.

## 2 The Principle of the Legality of Taxation in International and EU Law

The principle of the legality of taxation is not stated as a fundamental right in the European Charter of Human Rights and Fundamental Freedoms (ECHR). However, it may be derived from Article 1 of the Protocol of the ECHR, which states that every natural or legal person is entitled to the peaceful enjoyment of his possessions. Furthermore, no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. This shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. This provision has been interpreted as meaning that every interference of a state in respect of the peaceful enjoyment of a person's possessions must comply with the principle of legality. This applies both for tax measures and other measures.<sup>1</sup>

In EU Law, the Court of Justice of the European Union (CJEU) has acknowledged the principle of the legality of taxation as a general

<sup>1</sup> Court of Justice of the European Union, Directorate-General for Research and Documentation, Research note, Scope of the principle of the legality of taxation, particularly in relation to value added tax, 2018.

principle. In C-566/17 *Związek Gmin Zagłębia Miedziowego*, the CJEU states that it is apparent from the constitutional traditions common to the Member States that the principle of fiscal legality may be regarded as forming part of the EU legal order as a general principle of law.<sup>2</sup> The principle requires that any obligation to pay tax and all the essential elements defining the substantive features thereof must be provided for by law. However, the principle does not require every technical aspect of taxation to be regulated exhaustively, as long as the rules established by law enable a taxable person to foresee and calculate the amount of tax due and determine the point at which it becomes payable. The EU principle of the legality of taxation thus requires two elements; first that there is a legal basis for the tax, and secondly a certain precision in the law.

The CJEU developed the principle of the legality of taxation in C-661/18 *CTT Correios de Portugal*.<sup>3</sup> In this case, the CJEU expresses how an interpretation relates to this principle in a manner consistent with EU law. The CJEU states that the national courts are bound to interpret, where possible, national law in a manner consistent with EU law. The obligation to interpret national law in a manner consistent with EU law cannot, however, serve as the basis for an interpretation of national law *contra legem*. Still, national courts must alter their case-law or decision-making practice, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive.

*Van der Vlugt* discusses the consequences of the principle of the legality of taxation becoming a general principle of EU law.<sup>4</sup> It should, however, be observed that the CJEU normally does not produce new general principles, but merely discovers them. In C-251/16 *Cussens*,<sup>5</sup> the CJEU states that Article 267 of the Treaty of the Functioning of the European Union, TFEU, gives the CJEU jurisdiction to clarify and define the meaning and scope of that law as it must be, or ought to have been, understood and applied from the date of its entry into force. Thus, unless there are truly exceptional circumstances, EU law as it is interpreted must be applied

<sup>2</sup> C-566/17 *Związek Gmin Zagłębia Miedziowego*, ECLI:EU:C:2019:390.

<sup>3</sup> C-661/18 *CTT Correios de Portugal*, ECLI:EU:C:2020:335.

<sup>4</sup> Van der Vlugt, Sam, *The Principle of Legality of Taxation as a General Principle of EU Law: National and Supranational Differences of Interpretation and Potential Difficulties*, EC Tax Review, 2023, 214–228.

<sup>5</sup> C-251/16 *Cussens*, ECLI:EU:C:2017:881.



by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that law before the courts having jurisdiction are satisfied. Consequently, the principle of the legality of taxation does not seem to be a new general principle.

Van der Vlugt concludes that the Court lifts the principle out of the national context, for it to be a point of reference and a guiding practice for the interpretation of supranational law.<sup>6</sup> This may create different conflicts when national courts deal with EU harmonized fields of law, since it will have both the national and the EU law legality principles to cope with. Especially seen in the light of C-661/18 CTT Correios de Portugal, where the principle of the legality of taxation sets the limit for how national laws may be interpreted consistently with EU law. This limit has previously been considered to be set by national principles of interpretation, but in C-661/18 CTT Correios de Portugal, the court refers to both this principle and C-566/17 Związek Gmin Zagłębia Miedziowego. Van der Vlugt concludes that a transplantation of principles from the national to the EU level should be respectful of all essential elements that are part of that principle in the national context. Whether that has been the case for the principle of legality of taxation is, in his opinion, doubtful.<sup>7</sup>

### 3 Comparative Overview

The CJEU has made a comparative overview of the principle of the legality of taxation in different Member States.<sup>8</sup> In that study, it is concluded that most Member States recognize the principle in their constitutions. In Austria and Germany, the principle is derived from the rule of law principle, and in Germany, also from the fundamental right to the free development of the personality. Interestingly, even though several jurisdictions have detailed rules of the principle in their constitutions, the

<sup>6</sup> Van der Vlugt 2023, 220.

<sup>7</sup> Van der Vlugt 2023, 220.

<sup>8</sup> Court of Justice of the European Union, 2018.

exact scope of the principle of the legality of taxation is really specified by the case-law of the supreme and constitutional courts. Thus, it is not the law that stipulates on what law the tax law should be based, but the courts.<sup>9</sup>

Even though the principle of the legality of taxation is recognized by the Member States that does not mean that taxation must be based on a law in a narrow sense. Several Member States, such as Germany, Estonia, Greece, Poland, and the Czech Republic, allow the drafting of legislation to be delegated to the executive body. Other Member States allow specific and technical elements to be decided in recommendations by the tax authorities, which are formally soft law, but that have a strong impact on the taxpayers, tax authorities and tax courts. In some jurisdictions, the principle of *in dubio pro tributatio* is applied when the tax law is vague.<sup>10</sup>

## 4 The Principle of the Legality of Taxation in Sweden

The Swedish principle of legality is not exactly clear in nature. It can be said to have been introduced by Seve Ljungman in his book “Om skattefordran och skatterestitution” from 1947.<sup>11</sup> It should be noted that Ljungman mentions that a similar principle as the one in criminal law should also be applied to taxation.<sup>12</sup>

In the doctrine, the principle of legality, without a precise definition to begin with, has been regarded as a generally applicable principle.<sup>13</sup> It was long considered to be linked to the requirement that taxation should be predictable. In his dissertation, Hultqvist carried out a comprehensive review of the principle of legality and argued that its core was the

<sup>9</sup> Court of Justice of the European Union, 2018, 6–7.

<sup>10</sup> Court of Justice of the European Union, 2018, 8–10.

<sup>11</sup> See Ljungman, Seve, *Om skattefordran och skatterestitution*, Uppsala 1947, p. 21 f.

<sup>12</sup> See Ljungman, Seve, *Om skattefordran och skatterestitution*, Uppsala 1947, p. 21 f.

<sup>13</sup> See, for example, Bergström, Sture, *Förutsebarhet. En studie av regeringsrättens tillämpning*, Uppsala 1987, Welinder, Carsten, *Beskattning av inkomst och förmögenhet del 2*, 8 ed., Lund 1981, p. 29, and Alhager, Magnus, *Dispens från inkomstskatt*, Uppsala 1998, p. 82 ff.

regulatory requirement.<sup>14</sup> He derived the principle from the old land laws introduced in Sweden around 1,000 years ago.<sup>15</sup> The author then described a development that was temporarily halted during the reign of King Gustav Vasa in the 16th century, where the power of taxation lay with the Riksdag<sup>16</sup>, or rather the people.<sup>17</sup> Finally, Hultqvist argues in favor of the prohibition of retroactivity in Chapter 2, Section 10, paragraph 2 of the Swedish Constitution and argues that this leads to a regulatory requirement being established in the Swedish Constitution.<sup>18</sup>

The issue has not been the subject of any real discussion since Hultqvist's thesis was published and Hultqvist's views regarding a principle of legality based on a constitutional requirement for regulations has hardly received any real support in the case-law either. The Supreme Administrative Court, for example, has not felt prevented from applying both the Tax Evasion Act<sup>19</sup> and substance over form interpretations.

It should be noted that the explicit support in the Swedish Constitution<sup>20</sup> for a principle of legality is found in Chapter 1, Section 4, paragraph 2 of the Swedish Constitution, which should be read together with Chapter 1, Section 1, paragraph 3 of the Swedish Constitution. It can be understood from these two pieces of legislation that public power, which includes the power of taxation, is to be exercised under the law and that it is the Riksdag that decides on taxes. However, these two rules do not independently provide any support for interpreting the principle of legality as a regulatory requirement. Neither do the rules on the distribution of normative power in Chapter 8 of the Swedish Constitution provide support for such an absolute interpretation. It is possible that a systematic interpretation of the regulations in Chapter 1, Chapter 2, Section 10, paragraph 2, and Chapter 8 of the Swedish Con-

<sup>14</sup> See Hultqvist, Anders, *Legalitetsprincipen vid inkomstbeskattningen*, Stockholm 1995.

<sup>15</sup> See Hultqvist, Anders, *Legalitetsprincipen vid inkomstbeskattningen*, Stockholm 1995, p. 20 ff.

<sup>16</sup> The Swedish Parliament.

<sup>17</sup> See Hultqvist, Anders, *Legalitetsprincipen vid inkomstbeskattningen*, Stockholm 1995, p. 20 ff.

<sup>18</sup> See Hultqvist, Anders, *Legalitetsprincipen vid inkomstbeskattningen*, Stockholm 1995, p. 102.

<sup>19</sup> Lag (1995:575) mot skatteflykt.

<sup>20</sup> Kungörelse (1974:152) om beslutad ny regeringsform.

stitution could lead to the conclusion that there is an absolute regulatory requirement, and that this is defined as meaning that it is the laws of the Riksdag that should form the basis for taxation. What should be noted in this context is that the Supreme Administrative Court does not appear to have interpreted the regulations in this way.<sup>21</sup>

Based on how practice has developed and the overall discussion in the doctrine, the principle of legality in tax law can be understood as a general principle that the application of the law must be lawful in the sense that the taxing power must be exercised in accordance with the principles of the rule of law. This means that the framework for taxation, due to the division of competences in the Constitution, must be established by the Riksdag. However, the Supreme Administrative Court sometimes goes too far and the principle of legality hardly prevents framework legislation such as the Swedish Tax Evasion Act. In fact, there are a number of indefinite tax avoidance rules in Swedish tax legislation which, in Hultqvist's view, would be contrary to the principle of legality.<sup>22</sup>

It should also be noted that the use of placing substantive rules in the preparatory works of a piece of legislation has been criticized. This was mainly noticeable some thirty years ago, and has decreased with the Supreme Administrative Court's rejection of statements in the preparatory works when they were not in line with the statutes.<sup>23</sup>

There are in fact two sides to taxation from the point of view of the rule of law. At least in the case of democratic states and when it is not a despot who collects taxes. Taxes finance common welfare services such as hospitals, schools, the police, defense and childcare. The function of taxes is thus also to contribute to greater equality and to defend the principles of the rule of law. Discussions about the applicability of the principle of legality also arise in most cases in quite special situations. It is often the case that taxpayers have in some way tried to evade tax, which is the typical case when the applicability of the Tax Evasion Act is being discussed.<sup>24</sup>

<sup>21</sup> See, for example, RÅ 2001 ref. 21 I and II.

<sup>22</sup> See Hultqvist, Anders, *Legalitetsprincipen vid inkomstbeskattningen*, Stockholm 1995, p. 413 ff.

<sup>23</sup> See RÅ 1999 ref. 62 and RÅ 1999 not. 245.

<sup>24</sup> See, for example, HFD 2012 not. 30, which concerned a highly tax-driven transaction with the purpose of avoiding capital gains taxation when disposing of real estate.

Like in so many other situations, it is a matter of weighing different interests against each other.<sup>25</sup> It is the taxpayer's interest regarding not being taxed that must be weighed against the public interest, which is the interest of all other taxpayers, in having everyone contribute to the common tax revenue. The principle of legality, as it has been formulated in Swedish tax law, is probably more about the predictability of taxation.<sup>26</sup> This concept of predictability probably also includes a certain degree of balancing against what is reasonable for the taxpayer to be able to predict. For artificial transactions, whose purpose is to reduce the tax burden, the predictability requirement is simply not as important.<sup>27</sup>

Overall, it can be said that the principle of legality is quite strong in Swedish tax law. The substantive rules are decided in the laws enacted by the Riksdag, see Chapter 8, paragraph 3 of the Swedish Constitution. Although the municipalities have their own right of taxation under the Constitution, it is still the Riksdag that decides on the substantive tax legislation. The power of the municipalities is limited to determining the amount of tax.

A discussion of the principle of legality also seems rather pointless unless something is said about its impact on the interpretation of legislation. It is often emphasized that a consequence of the principle of legality is that it limits permissible interpretations.<sup>28</sup> It is often argued that it follows from the principle of legality that analogous approaches to statutory interpretation should not be applied in tax law. It can, of course, be argued that excessively far-reaching interpretations such as the teleological analogue method could undermine Parliament's normative competence, and thereby circumvent the Constitution.

However, it is not clear from either the Constitution or tax legislation that there are any real limitations on the permitted methods of interpretation of tax law. It can only be considered to follow from the principle of legality as a principle of the rule of law that tax law should perhaps

<sup>25</sup> See SOU 1993:62 p. 79 f.

<sup>26</sup> See Bergström, Sture, *Förutsebarhet. En studie av regeringsrättens tillämpning*, Uppsala 1987.

<sup>27</sup> See HFD 2012 ref. 20 when the Supreme Administrative Court overruled a double tax treaty to prevent tax evasion.

<sup>28</sup> See Hultqvist, Anders, *Konstitutionell skatterätt och metodfrågor inom skatterätten*, in *Festschrift till Robert Pålsson*, Uppsala 2022, p. 184 ff.

be interpreted restrictively in favor of the individual. However, what has been said does not mean that analogies never occur in Swedish tax case law.<sup>29</sup> More central to the protection of the legitimate interests of taxpayers is probably the protection and preservation of the larger rule of law principle. There is little protection if the state itself is arbitrary in its legislation. A strictly formal principle of legality derived from explicit constitutional provisions may be relatively easy to circumvent through various legislative techniques. For example, by stipulating that everything is taxed and leaving it up to the Swedish Tax Agency to determine taxation. Such taxation rules are both predictable and very definite – everything means everything and there is no room for doubt.

In our view, the principle of legality in tax law must be seen in its context. It forms part of a larger legal system built around the rule of law, the core of which is that it is the Riksdag that enacts tax legislation. How tax law is to be interpreted has not been regulated by law other than that there is a requirement for objectivity and uniformity, see Chapter 1, Section 2 of the Swedish Constitution. In practice and doctrine, it has developed into a question of taxation being predictable.<sup>30</sup> It must be theoretically possible for taxpayers to be able to predict the tax consequences of their behavior. This approach is of course basically a bit of theoretical fiction. This is demonstrated not least by the fact that the Supreme Administrative Court sometimes has to set precedents for the application of the law. From this perspective, it could be argued that taxation is unpredictable.

Basically, however, the problem is probably somewhat exaggerated. The principle of legality can be discussed from both a purely practical and a more academic perspective. From a practical point of view, it can be argued that large parts of tax legislation are unpredictable for the vast majority of taxpayers. It simply requires expert knowledge to understand the rules and the system.<sup>31</sup> From an ideal and academic point of view, this would undoubtedly lead to the result that the principle of legality is broken. Defining the core of the principle of legality as a regulatory requirement does not help in this situation. The second approach is that

<sup>29</sup> See RÅ 1990 ref. 89 I and II and RÅ 1991 ref. 55.

<sup>30</sup> See Rosander, Ulrika, *Repressiva metoder mot skatteflykt*, Skattenytt 2007, p. 663 ff.

<sup>31</sup> See Alhager, Magnus, *Dispens från inkomstskatt*, Uppsala 1999, p. 85 ff.

in predictability, and based on the principle of legality, tax experts should be able to predict taxation.<sup>32</sup> The object of predictability must then, based on the reality of the need for guiding precedents in certain matters, also be limited to a tax expert at least being able to predict possible outcomes.<sup>33</sup>

## 5 Final Analysis

The principle of the legality of taxation is an independent principle with its own content. As this chapter has demonstrated, the content varies. The principle can, however, also be seen as an expression of the rule of law, since the rule of law contains the principle of legality in general. Since the principle of the legality of taxation is based on the rule of law principle in Germany and Austria, the former principle may be considered as originating in the rule of law principle.

The analysis of the principle has demonstrated that even though it is rather strong in Sweden, it is neither very specific nor expressively based on the rule of law principles. An explanation for this may be that Sweden does not have a Constitutional Court, which applies the fundamental rights and freedoms in the Constitution. When the ordinary courts apply this principle, the issue of the principle of the legality of taxation is always connected with and subordinated to a question of substantive tax law.

Another connection to the rule of law principle is that even though the principle of the legality of taxation is recognized in the constitutions of the Member States, its content is made by the courts. The independent courts thus collaborate with the legislator in order to realize the rule of law through the specification of the principle of the legality of taxation.

Finally, the CJEU's manner of raising the principle to a general principle of EU law, which has become clear only in the last few years, creates a complex situation, since the principle may be vague in the Member States. When dealing with cases with EU harmonized laws, the courts may find themselves in a complex situation regarding which principle to apply and to what extent. This is especially true for cases with both harmonized and non-harmonized taxes.

<sup>32</sup> See Alhager, Magnus, *Dispens från inkomstskatt*, Uppsala 1999, p. 87 ff.

<sup>33</sup> See Alhager, Magnus, *Dispens från inkomstskatt*, Uppsala 1999, p. 88.