IATJ MADRID 2016

The European Convention for the Protection of Human Rights - Taxation

No tax – no society

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01.09.2016

In this paper I start out by outlining some ideas on the nature of taxation. It will show that in my view both the general level of taxation and the distribution of taxes are and should be the result of a political process, and that the financial situation, the social structure and national priorities differ so widely that there is limited room for international standards. It is hardly conceivable to achieve taxpayer protection of any practical importance through international human rights conventions.

Next, I aim to show that including taxpayer rights in The European Convention on Human Rights was never the intention, and that there is nothing to suggest that the ECtHR should reach a different position today through a dynamic interpretation of the convention.

However, in current legal literature the dominant view appears to be that the Convention is of considerable importance also with regard to taxpayer rights. I make reference to these views, and in the final part of the paper, I aim to show that the common view finds little support from the jurisprudence of the ECtHR and national courts.

I The nature of taxation

In earlier times when taxes were spent in fighting wars and for the good life of royalty and nobility, taxes were, not unreasonably, seen as part of the oppression of ordinary people. Friar Tuck even calls Prince John's taxes *theft,* and indeed they were, but in a representative democracy contributions towards financing society should be seen in a different light altogether.

Tax is not something that is taken away from you. I will get to the Convention eventually, but if for the moment we choose to forget about it, it should be readily agreed that taxation is not deprivation of property, but rather the taxpayer's contribution to the financing of the array of services the state provides you with from birth to death. We are being helped into this life, we get our education, we are afforded social security and health care, we receive a pension and we are looked after when we can no longer care for ourselves. True, you don't get to choose from a menu, but you certainly do not pay for nothing. Most of us live in debt to society throughout our lives.

Opinions may differ about how to understand Margaret Thatcher's famous/infamous saying "There is no such thing as society".[1] Is this a blunt anti-social political statement, or is it no more than making a point of each individual's responsibility for themselves and others? Regardless, as the objective is to understand the nature of taxation, the saying is not helpful.

[1] I could as well have referred to the following excerpt from the Norwegian Conservative Party's program for the parliamentary election in 1933:
"The economy of the state and municipalities must be managed under strict consideration of the fact that heavy taxation weakens people's power of production and reduce their living conditions. The system of taxation and allocation of funds must not lead classes, industries or districts to believe that others are paying the public expenditure for them, and that one therefore safely can demand without any economic risk to oneself."

But that would of course be more provincial.

There is indeed a society, without which it would hardly make any sense to discuss "protection of property" at all. No tax, no society. No society, no property rights.

In a representative democracy taxation is a reflection of the society, which the population has chosen to form through political processes as the level of taxation and how taxes should be distributed is also decided through that same political process. A number of difficult decisions have to be made, and constantly re-evaluated, taking into account fairness, what level of inequality is beneficial to society or indeed acceptable, and also the consequences for business and its competitiveness. There are very few truths, and nearly unlimited scope for different opinions – within each society and certainly between states with a different financial situation and social structure. Politicians will have to make their decisions based on the actual social and financial situation in their own country.

The necessary minimum level of taxation is, over time, defined by the actual level of state expenditure. The state may, for different reasons, choose to secure a budget surplus. Considering future pension obligations this may well be the appropriate thing to do, but in our context it suffices to state that this is for the politicians to decide.

The Norwegian Petroleum Fund now exceeds five times the national budget, but that does not limit the level of taxation that may legally be imposed. Now, most of the yearly yield from the Fund will be used to balance the budget, but this is again a political question, and indeed a part of the political debate in Norway. It is not a legal question.

The state may also impose extraordinary taxes to strengthen the national financial position or for a defined purpose, and it is difficult to imagine a politically preferred purpose that would be inacceptable in a legal context. In 1921 the Norwegian Parliament introduced an extraordinary wealth tax which amounted to 30 % over a period of 10 years. The purpose was partly to repay state debt, but the funds were also intended to be used to fight unemployment. Opinions differed, but no one saw this as a legal problem.

In 1911 the Norwegian parliament enacted the first comprehensive modern tax law. Unlike today, when the differences in opinion within mainstream politics in Norway are marginal, the debate was rather intense. The following exchange of views is illustrating:

W. Konow:
"Mr. Eriksen is a socialist, and it is as expected that he favours the socialist tax system that will seek to get the most out of the taxpayer's pockets, especially from the wealthy taxpayers with private businesses. Mr. Eriksen's system is to abolish all private businesses, he wants state ownership for all, so it is fair to say that he sees it as his task, if the Socialist Party comes to power, that there will be levied heavy taxes on the owners of private businesses, such heavy taxes that they will have to close their businesses, and that the municipality can take them over – that is fair: but it is confronted with this movement that one has set up the principle that there must be a limit for this power and authority to destroy the private businesses, the free industry and commerce in the country."

Alfred Eriksen:
"With regard to our tax politics I have claimed, and I will claim nothing else, than that we must follow principles that ensure most fairness when it comes to distribution, and that one must not place hindrances for sufficient economic means for implementation of social and humane reforms. Further than this the tax law cannot go. The tax law cannot be used to place

anything under socialist rule. The tax law ought not and shall not be used for more than securing fair distribution and to enable social and humane reforms."

W. Konow:
"Mr. Eriksen said that the social democrats do not want to become rulers of the private businesses through taxation. No, it may be that they do not want this, it may be that this is not their principle view, but it is clear that when they lay burdens on all private enterprise with heavier and heavier taxes. At last one reaches the point when these cannot carry the burden and must fold because the burden of taxation has become too heavy. Furthermore, I am not certain that a socialistic majority would not pursue such a policy – regardless of what Mr. Eriksen is now saying."

This was not the end of this exchange, but it is fair to give Konow the last word. Ten years later Christopher Hornsrud[2], also from the labour party, proposed to Parliament to confiscate all individual private wealth in excess of NOK 250 000[3] through a progressive wealth tax over a period of ten years – explicitly stating the objective to nationalize industry.

Admittedly then, in the extreme, "taxation" may cause constitutional problems, but the debate in 1911 also illustrates that the level of taxation is primarily of a political nature. We can not leave it to the courts to decide on which economic theory political decisions should be based.[4]

Deciding on the total level of revenue for the state may be difficult enough; deciding how the total amount of taxes should be distributed is no easier. But again it is clear that it is all about political decisions at different levels. It has to be decided how best to combine direct and indirect taxation. Numerous choices have to be made in the split between, wealth tax, inheritance tax and tax on income. In all areas the question of progressivity arise. Also certain businesses with extraordinary income potential, such as the petroleum industry and hydro electric power production, may be singled out for additional taxation .The consequences of all these choices have to be considered, and not only in the passive sense. Taxation may also be used actively for a purpose, to encourage or discourage certain activities. It is sufficient here to make reference to the use of green taxes.[5] Again these choices are of a purely political nature.

Underlying many of the political choices, which have to be made, is the conflict of interest between those who earn little or less and those who are better off or even wealthy. Opinions differ, but in a legal perspective the tax laws passed and the level of taxation applicable to each individual and entity, must be seen as the presumed ideal solution to the many dilemmas. It follows, with the modification that follows from the rule of law and the protection against

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[2] Prime Minister in Norway 28 January – 15 February 1928, a minority government.
[3] In 1928 the yearly salary was in the magnitude of NOK 3000 for most workers.
[4] An attempt to transfer the political debate to a legal one, was made in Gudmundsson v Iceland, but with no success. Application No. 511/59, Gudmundsson v. Iceland., Yearbook of the European Convention on Human Rights, page 424-426
[5] The Constitutional Court of Belgium dealt with a case of this nature in 2010, BEL-2010-1-003. In principle the Court found that an imposed tax may constitute a violation of P 1-1, provided it imposes an excessive burden on the taxpayer or fundamentally jeopardizes his or her financial position. A special tax was passed which required nuclear power producers to pay a single distribution contribution of 250 million euros. One company asserted that it had to pay 89 % of the contribution. The court considered that when, in such matters, the legislature decided to impose a contribution on certain categories of entities, this approach was part and parcel of its overall economic, tax and energy policy and the Court could not censor differences in treatment resulting from such decisions unless there were clearly no reasonable justification for them. No violation.

arbitrary application of the tax laws, that one taxpayer paying too much tax is no worse than one taxpayer paying less than intended. Such a negative deviation from the presumed ideal distribution of the tax burden, will systematically lead to other taxpayers paying too much.

This consequence does not eliminate the legal security issue, but it is an important perspective, which is no less relevant when dealing with tax procedure. Making it more difficult to effectively collect taxes due, will not reduce the revenue necessary, but will shift the tax-burden to other taxpayers. It should not be forgotten that the fundamental issue of fairness in taxation is between those who pay taxes and those who don't.

The amount of tax payable by each individual taxpayer is the function of a complex set of interwoven tax regulations, which can not reasonably be judged in isolation. The unreasonableness of one regulation may be set off by the effect of other elements in the total taxation system.

Clearly the level of income-tax in the top bracket cannot be considered in isolation. A simple illustration could be:

Alternative A:	
0-100 000	10%
100 001-200 000	20%
200 001-1 000 000	30%
Above 1 000 000	70%

Alternative B:	
0-200 000	10%
200 001-3 000 000	20%
3 000 000-15 000 000	40%
Above 15 000 000	90%

In alternative B everyone will pay less tax than in Alternative A unless the income exceeds 48 000 000.

Another example could be the deductibility of the cost of travel to work and other similar costs where the actual expense is not linked to income. When deductions for such costs are allowed as a percentage of the income, it can be, and has been, argued that this unreasonably favours those with high income. It does. However, this must be considered in light of the overall progressivity of the taxation of income.

Designing the total tax-package is of course overly complicated and numerous compromises must be made, and simplifications will often be necessary. In the tug of war between different interests a cut off must be made. This may not be dictated by logic, and often an alternative solution would be equally justified. It may well not be possible to show that a taxpayer falling to the wrong side of the dividing line is in a position much different to that of one who just makes it into the right bracket. Tax relief for students may be cut off at the age of 25, but a 26 year old student may be in a situation no different from students one year younger. Still, a line has to be drawn.

Comparing the level of taxation in one country with another raises additional complications. Obviously, the level of taxation will systematically be higher in a society where the state pays

for health care and education at all levels and where sickness, unemployment and disablement benefits are generous, than in countries where the state has a more remote role in these respects. Also, the level of taxation will be influenced by the financial situation in the country. A country with a weak economy may have to rely on higher taxes than countries with a stronger economy in order to provide its inhabitants with the same services and benefits.

A further complicating factor when comparing tax rates in different countries is deductibles – what is the effective tax rate? As advisor in a contemplated transaction I once raised concerns about a certain tax exposure, but was quickly interrupted with the simple statement: Don't worry; we do not pay taxes.

All this to say that it is for good reason that countries have seen it as important to remain in control of taxation.

II The European Convention on Human Rights

Taxation has generally been considered by most as central to national sovereignty. Even in the European Union direct tax remains one of the most closely protected areas of Member State Competence.[6]

Considering the internationalization in this field over the last decades in the form of tax-treaties, multinational agreements concerning exchange of information and not least through the OECD, it must be fair to assume that this national sovereignty attitude towards tax was even more dominant when the ECHR was agreed more than 60 years ago. It seems reasonable to consider the fact that there is nothing to be found in the preparatory works to the convention about taxes, as confirmation that this was indeed so.

However, when two years later P 1-1 was agreed including "Every national or legal person is entitled to the peaceful enjoyment of his possessions", it was felt that the issue of taxation had to be addressed.

It was always a controversial question whether or not to include an article in the convention providing for the protection of property. The opposition was not primarily concerned with protecting the right to property; those opposing the inclusion were concerned about the political implications from including the protection of property rights and at the same time leaving out the right to employment, education and social security.

The issue was extensively discussed in different fora prior to the conclusion of the convention, and a number of concrete proposals were put forward. Still, no agreement was reached, and the convention was agreed without the inclusion of an article on the protection of rights to property. The issue was set aside for further discussions.

Taxation was hardly a part of these discussions, but the issue was raised in a meeting of the Consultative Assembly

[6] Suzanne Kingston, Common Market Law Review 44, pages 1321-1359, 2007.

At this stage the proposals under discussion did not mention taxes specifically, but included general qualifications such as:

> **"The present measures shall not however be considered as infringing in any way the right of a State to pass necessary legislation to ensure that the said possessions are utilized in accordance with the general interest."**

In the meeting, Miss Bacon, representing the Labour Party in the UK, asked the following question to Sir David Maxwell-Fyfe (UK), who I understand chaired the meeting:

> **"I should like Sir David to give us assurance, if he can, that this Article safeguards the right of any State to undertake schemes of nationalization and for the taxation of wealth necessary to carry out its social policy."**

In response Sir David Maxwell-Fyfe first stated that he had no difficulty in giving Miss Bacon the assurance for which she had asked. He then made the following further clarification:

> **"If I rightly understand her, she asks whether legislation the object of which is to carry out a social policy in the general interest, would be saved. In my view it would be saved, and I feel sure that Miss Bacon has not in mind taxation which would amount to arbitrary confiscation."**

No further comment was made in the meeting in this regard.

November 4, 1950, the Convention was opened for signature without an article relating to the protection of property rights. However, the work towards agreeing the inclusion of such an article continued uninterrupted.

In the continued discussions, new proposals were put forward, and proposals from Belgium and the UK now included explicit wording securing the States right to impose taxes. This was later not objected to by anyone.

Although admittedly of limited interest when interpreting P 1-1 today, a letter dated August 3, 1951, from the Chairman of the Committee of Ministers to the President of the Consultative Assembly, seems to indicate that the reservation for taxes was indeed meant as an absolute exemption:

> **"The last sentence of the Assembly's text has been expanded somewhat to make it clear that this article does not prevent the State from collecting taxes, or other penalties, such as fines, even though they might constitute the whole of the property of the individual in question."**

The tax issue did not undergo any further discussion, and the first Protocol to the Convention, which was agreed 20 March 1952, included the following:

> **"Art 1.** ***Protection of property***
>
> **Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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.**

The preceding provisions 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."

Literally the exemption for taxes is limited to "The preceding provisions", but it should be kept in mind that prior to P 1-1, the Convention included no articles intended to apply to taxation. And, as Article 14 of the Convention cannot be relied upon independently of the material articles of the convention[7], certainly P1-1 is the most important provision in relation to possible control with material tax law.

An early decision by the Commission[8] reveals an understanding of the tax exemption fully in line with what has been indicated above. Gudmundsson had to pay a property-tax based on the value of his share of certain properties exceeding one million kroner. The rates were progressive with 25 % the maximum. Among other objections, Gudmundsson argued that the levy was of a confiscatory measure, that the levy was discriminatory, that the direct appropriation of the levy to certain purposes was incompatible with general taxation, and that the levy was a politically inspired measure.[9]His application was not successful, and the Commission made explicit reference to the exemption in Article 1 second paragraph.

It is, apparently, a reasonable conclusion that the ECHR was nor written to protect taxpayers, and that P 1-1 may well, in spite of the wording, be considered as a general exemption from the Convention. Everyone do not agree.

III Dynamic interpretation of the Convention.

It has for a long time been well established that the ECtHR will interpret the Convention dynamically. The statement from Tyrer v UK[10], "the Convention is a living instrument which…must be interpreted in the light of present-day conditions", has been referred to ever since.

In Harris, O'Boyle & Warbrick[11] is given a comprehensive summary of this dynamic interpretation. Two paragraphs highlight under what circumstances such interpretation is seen as justifiable:

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[7] Application No. 511/59, Gudmundsson v. Iceland., Yearbook of the European Convention on Human Rights, page 424-426:
"Article 14, by its express terms, forbids discrimination only with respect to the enjoyment of the rights and freedoms guaranteed in the Convention or Protocol and whereas the right claimed by the Applicants, as the Commission has already held, is not a right guaranteed either in the Convention or in the Protocol."

[8] Application No. 511/59, Gudmundsson v. Iceland.

[9] Gudmundsson's pleadings in this respect is reminiscent of the argument in the Norwegian Parliament in 1921:
"The applicants contended that the levy was a politically inspired abuse of the right of a State to tax its subjects. It amounted to an attempt on the part of a Communist-influenced Parliament and of a Government in which two ministers out of six belonged to the Communist Party to take over private enterprise for the purpose of suppressing the institution of private property. A pursuit of a policy of nationalization will eventually lead to a complete denial of the human rights which are fundamental for the preservation of Western Democracy."
See also John Snape, Stability and its significance in UK tax policy and legislation, British Tax Review, 205, 4, 561-579:
"Specifically, what the ECHR does do, in the name of "the general interest", is to open up possibilities of redistribution from rich to poor."

[10] A 26 (1978); 2 EHRR 1 para 31

[11] Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights, second edition, 2009 page 7

"When deciding a case by reference to the dynamic character of the Convention, the Court must make a judgment as to the point at which a change in the policy of the law has achieved sufficiently wide acceptance in European states to affect the meaning of the Convention. In the course of doing so, the Court has generally been cautious, preferring to follow state practice rather than to precipitate a new approach. But the court does not necessarily wait until only the defendant state remains out of line before it recognizes a new approach."

and

"The question whether the Court should be influenced by the law in European states in its interpretation of the Convention is relevant not only in contexts in which the policy of the law has changed. The question may arise when the Court has to decide how rigorously to interpret the requirements of the Convention in other circumstances also."

In Norwegian theory[12] it has been argued that the dynamic interpretation should not lead to an interpretation that does not even fall within a wide interpretation of the Convention.

And Harris, O'Boyle and Warbrick make a distinction between judicial interpretation, which is permissible, and judicial legislation, which is not, and make a general statement of direct relevance to the application of the Convention to taxation:

"However, the Convention may not be interpreted in response to "present-day conditions" so as to introduce into it a right that it was not intended to include when the Convention was drafted."

Hardly an invitation to disregard the exception in P 1-1 second paragraph.

Even so, it is of some interest to consider if taxation has changed since the 50s in a way that could at least explain a new attitude towards the application of P 1-1 in tax matters. No such change has taken place. On the contrary, the level of taxation has been substantially reduced over the last few decades.

The low taxes on income in the years prior to the First World War were dramatically changed during the war and in the following years[13]. This is the conclusion of a recent book by Kenneth Schieve. Several countries adopted top income tax rates that exceeded 70 %. Increased taxes also followed after the Second World War. Top rates could exceed 90 % and many countries imposed substantial wealth taxes, which did more than just "confiscate" the yield.

Schieve also finds that increasing the taxation of the rich had more to do with changing beliefs about tax fairness and preserving equal sacrifice in the war effort than simply that wars were expensive. He finds that this follows from the fact that it was not the financially most desperate countries that taxed the rich the most, but democratic countries for which equality

[12] Jens Edvin Skoghøy, "Dynamisk tolking i internasjonale domstoler som fenomen, problem og effektivitetsgaranti", Lov og Rett 2011 pp 511-530.
[13] Kenneth Schieve with coauther David Stasavage, Taxing the Rich: A History of Fiscal Fairness in the United States and Europe, Princeton University Press, 2016.

and fairness norms were the strongest, that tended to respond to mass mobilization with higher taxes on the rich – much more so than non-democracies.

In 1950 the delegates negotiating the Convention were amidst all this. The increased taxes, which at today's standards might appear exorbitant, seems not to have inspired anyone to see the level of taxation as a human rights problem.

And what has happened since? We all know about the race towards the bottom, and it suffices to refer to the general statements by Thomas Piketty that the corporate tax rate has been cut in half since the 1980s, and that in the same period the progressivity of tax systems has been sharply reduced[14]

What has changed since the 50s is of course the general awareness of the importance of legal security for the individual, and this will have influenced the drafting of tax legislation and tax procedural law in many countries[15]. On a national level this can be done with due regard to the nature of taxation and the general national interest. This will necessarily prove more difficult when applying an international convention which was not written with this in mind.

IV The general opinion in tax literature

The scepticism reflected in the above paragraphs is hardly present in recent tax literature. The dominating view seems to be that the ECHR is an important tool for keeping taxation in check. This holds both for material tax law and for tax procedure.

Philip Baker, Q.C., who has been working extensively with the ECHR and taxation for decades, sees the ECHR, or at least how it should be understood, in a different light altogether. In a recent paper he acknowledges that human rights instruments have, so far, had limited impact in the field of taxation, but finds this surprising

> **" as the ECHR is also an international convention designed to protect taxpayers, in much the same way as a double taxation convention "**[16]

Georg Kofler and Pasquale Pistone[17]give a comprehensive summary of why, traditionally, human rights instruments have not been seen as important in the area of taxation, but conclude:

> **"In summary, though intuitively tax lawyers consider the relation between human rights law and taxation to be rather remote, it is clear that basic principles of domestic constitutional law and international human rights law, which seek to protect the individual against an over intrusive state, are fully applicable and operational in the tax area."**

[14] Thomas Piketty, Chronicals On Our Troubled Times, pages 112 and 157, Penguin Viking, 2016.
[15] In Norway taxpayers are secured a fair trial in Article 95 of the Constitution, and the new Tax Administration Act, May 29 2016, is all about taxpayer security.
[16] Philip Baker, an updated version of Preliminary Topic I *Double Taxation Conventions*, looseleaf, (London: Sweet & Maxwell, 2001), 2016.

[17] George Kofler and Pasquale Pistone, General Issues on Taxation and Human Rights, Part one in Human Rights and taxation in Europe, editors George Kofler, Miguel Poiores and Pasquale Pistone, 2013.

In the same book Lorenzo del Federico concludes his chapter with the statement **"The expansion of ECHR principles seems to be unstoppable…"**[18], and Guglielmo Maisto concludes that **"A review of the case law of the ECtHR indicates the growing practical importance of the ECHR in the field of tax assessment."**[19]

Rusen Ergec[20] relies on dynamic interpretation to reach his conclusions:

> **"The framers of Article 1 of Protocol 1 of the European Convention on Human Rights (hereinafter ECHR), which protects property rights, had the main intention of safeguarding the prerogatives of the State in its regulatory functions regarding property rights. However, the dynamic approach of the European Court of Human Rights guaranteed under ECHR, endowing rights with "practical and effective content" has transformed the property clause into an important source of protection."**

Ergec adds that in spite of the limited number of cases from the ECHR, the existing decisions **"offer precious clues as to the limit of taxation power",** and concludes the section General Principles with:

> **"The recent case law considers that taxation is an interference with the right to peaceful enjoyment of possessions guaranteed under Article 1, paragraph 1 and that the exception provided in paragraph 2 in taxation issues does not preclude the Court from ensuring the observance of Article 1 in taxation matters.**
> **Consequently, the Court applies to taxation grievances the same general standards of review as those applicable in other areas of interference with property rights."**

Alberto Quintos Seara[21]concludes that:

> **"The ECHR judgments in N.K.M., Gáll R.Sz. could be considered as "test cases" concerning the interpretation of Article 1 of Protocol No. 1 and, especially, in relation to the ability of the Court to protect taxpayers against disproportionate laws developed by domestic legislator"**

And he adds:

> **"Indeed it should be noted that even a non-arbitrary tax law (accessible, precise and foreseeable) pursuing a legitimate aim could impose an excessive individual burden on the taxpayer"**

Taken together it is my opinion that these statements give an unrealistic picture of what is and can be expected to be the relevance/importance of the ECHR in taxation cases.

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[18] Lorenzo del Federico, The ECHR Principles of European Law and their implementation through the National Legal Systems, in Human Rights and taxation in Europe, editors George Kofler, Miguel Poiores and Pasquale Pistone, 2013.

[19] Guglielmo Maisto, The impact of Human Rights on Tax Procedures and Sanctions, in Human Rights and taxation in Europe, editors George Kofler, Miguel Poiores and Pasquale Pistone, 2013.

[20] Rusen Ergec, Taxation and Property Rights under the European Convention on Human Rights, Intertax Volume 39, Issue 1, 2011.

[21] Alberto Quintas Seara, The protection of Taxpayers' Property Rights in Light of the Recent ECtHR Jurisprudence: Anything new on the Horizon, or More of the Same?, Intertax Volume 42, Issue 4, 2014.

Similarly it has been difficult for practitioners to accept the ECtHR grand chamber judgment in the Ferrazzini case, where the Court maintained the earlier position that Article 6-1 is not applicable in tax-cases.[22]:

> **«In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the 'civil' sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant.»**

and

> **«The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective civil' (with the restriction that that adjective necessarily places on the category of 'rights and obligations' to which that Article applies) were not present in the text.»**

By many, the decision has simply been stated to be incorrect, and it has indeed become a popular object of hate. A particularly colorful disallowal is presented by Robert Attard:[23]

> **«The Ferrazzini dictum seems to stand on solid ground but the firm ground on which it is supposed to rest on reminds the author of a glacier in an age of global warming. The strength of the despised Ferrazzini dictum is melting down. The Ferrazzini dictum is being eroded.»**

This may be elegantly written, but is less impressive, I think, when the objective is to describe the situation de lege lata.

One of the other long term critics of the position taken by the ECtHR is Philip Baker. For more than 20 years he has argued that Article 6-1 should be applicable in tax cases also, but following Ferrazzini and later decisions by the ECtHR, he has now accepted that his view has not prevailed:

> **«It is now, regrettably, well-established that ordinary proceedings for the determination of tax liability do not fall within the scope of the right to a fair trial in article 6 of the ECHR.»**

These procedural questions fall outside the topic of this paper, but I mention them as the intensity in the arguments presented in favour of applying article 6-1 also in tax cases, is closely related to the expansive views presented in favour of seeing the ECHR as providing important material protection for taxpayers.

There is undoubtedly a strong relentless pressure from tax advisors both to apply Article 6-1 in ordinary tax proceedings and to establish articles of the Convention as effective tools to challenge the material content of the national tax legislation. This is of course, not a thing to

[22] Ferrazzini v Italy, Application 44759/98, dom 12.July 2001, se avsnittene 29-30.
[23] Robert Attard, The Classification of Tax Disputes, Human Rights Implications, inn i Human Rights and taxation in Europe, Georg Kofler, Miguel Poiores og Pasquale Pistone (red.), 2013.

be criticized, but it is important not to forget that representatives of the collective interest may well be less vocal.

One should also be aware that there are two inherent aspects of the application of the convention, which systematically in general may be part of the explanation for the expansion of the scope of the convention. The national courts will have a natural dislike for having their decisions overruled by the ECtHR - at least in Norway the political view is alsothat this should be avoided. Perhaps more importantly, a member state can do nothing when the national courts interpret the ECHR too expansively. Still, there is nothing in general to suggest that national courts apply P 1-1, or other articles of the convention in tax matters more often than what follows from the jurisprudence from the ECtHR.

V The ECtHR jurisprudence in cases involving taxation

Generally speaking the ECtHR, as a rule, has, due to the wide margin of appreciation which the States enjoy in tax matters, not been willing to strike down a domestic tax laws as infringing Art. 1 of the 1. Protocol. This is true also for many of the cases relied upon to establish that indeed P 1-1 is applicable in tax cases also. There are some exceptions[24], and I will deal with some of them below.

1. Cases not related to tax assessment

Many of the cases normally relied upon in attempts to show that the ECHR is also applicable in tax-cases are not really about taxation at all. They do not involve a dispute about the correctness of the tax assessment. Instead they relate to issues such as cases with a criminal charge[25], search of private property[26], delay of payment of money due to a taxpayer[27] or revision of a legally binding court decision[28].

2. *The Rule of Law*

It follows directly from the wording of P 1-1 that interference with a property right is permissible only when this is provided for by law, but that does not solve the question of how to deal with the tax exemption in second paragraph. However this is no more than what follows from the general Rule of law, and there really is no argument in favour of not applying this requirement in tax cases also. This requirement does in no way limit the competence of the national legislature. In Shchokin v. Ukraine[29] paragraph 50, the decision is clearly based on the general principle:

> **"Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. It follows that the issue of whether a fair**

[24] Philip Baker, Some recent Cases from the European Court of Human Rights, European Taxation, June 2009, page 326, quantifies these cases as "a very small number of cases."
[25] Janosevic v Sweden (Applicaton no 34619/97), judgment 23. July 2002.
Jussila v Finland (Application no. 73053/01), judgment 23. November 2006

[26] Ravon and others v France (Application no. 18497/03), judgment 21. February 2008.
[27] Buffalo SRL under liquidation v Italy, Application no. 38746/97

[28] Stere and others v Romania (Application no 25632/02), judgment 23. February 2006
[29] Application 23759/03 and 37943/06, judgment 14 October 2010.

balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (see Iatridis v. Greece [GC], no. 31107/96, § 58, ECHR 1999-II)."

The Court concluded that the interference with the applicant's property rights was not lawful for the purpose of Article 1 of Protocol No. 1, and this was justified in paragraph 56 of the judgment:

"Even assuming that the interpretation by the domestic authorities was plausible, the Court is not satisfied with the overall state of domestic law, existing at the relevant time, on the matter in question. It notes that the relevant legal acts had been manifestly inconsistent with each other. As a result, the domestic authorities applied, on their own discretion, the opposite approaches as to the correlation of those legal acts. In the Court's opinion the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, upset the requirement of the "quality of law" under the Convention and did not provide adequate protection against arbitrary interference by the public authorities with the applicant's property rights."

A related approach was applied by the Norwegian Supreme Court in HR-2016-606-A, 17 March 2016 in a case that involved calculation of stamp duty for the transfer of a property. The Court found that the more favourable interpretation followed from the law than from the natural interpretation of the duty resolution by Parliament. The conclusion was that the interpretation most favourable to the taxpayer should be applied as the Parliament had not made it clear that the intention was to deviate from the solution which followed from the law. The basis for the decision was not P 1-1, which was not pleaded by the private party, but the general rule of law.

In the Hentrich v France-case[30], which was decided with a 5 to 4 vote, the ECtHR takes this approach one step further. Mrs. Hentrich bought a property, and the State exercised a right of pre-emption which was extended to it by law. The intention was that this right would greatly reduce tax avoidance in the form of reporting a too low transfer price. However, tax avoidance was not a condition for exercising the pre-emptive right. The ECtHR accepted the legislation, and thus the Court's decision did not prevent the French government from maintaining this policy. However, the Court found that the pre-emptive right had been exercised only rarely and scarcely foreseeable, and that this amounted to arbitrary interference with the applicant's property rights, which was acquired with no fraudulent intent.[31]

3. Retroactive tax legislation

A number of judgments by the ECtHR deal with this issue. Melvin R.T. Pauwels makes a comprehensive discussion of this jurisprudence in his article "Retroactive Tax Legislation in

[30] Hentrich v France, Application no. 13616/88, Judgment 22 September 1994.

[31] The ECtHR also held that Mrs. Hentrich bore an individual and excessive burden which could have been rendered legitimate only if she had had the possibility –which had been refused her – of effectively challenging the measure taken against her; the "fair balance" which should be struck between the protection of the right of property and the requirements of the general interest" was therefore upset…It may appear that such opportunity would have been sufficient to avoid violation, but it is not clear that such opportunity would have changed anything.

view of Article 1 First Protocol ECHR".[32]His conclusions confirm that retroactive tax legislation is acceptable under the ECHR provided that certain conditions are met. It is generally agreed that the justification for the retrospectivity must be something other than the additional proceeds, and Pauwels sums it up like this:

> **"With respect to the reasons, the ECtHR accepts the legislature's assessment unless it is devoid of reasonable foundation. From case law it can be deducted that if the reason for retroactive taxation is to counteract tax avoidance, the ECtHR will not readily judge that the retroactive taxation violates Article 1 first Protocol. Another accepted reason is to remedy technical deficiencies of the law in order to prevent that taxpayers enjoy the benefit of a windfall. I expect that other legitimate reasons could be the prevention of so-called announcement effect and to clarify an obscurity in the tax legislation…"**

Other commentators have made the more general comment that a reasonable test could be if the taxpayer could reasonably have understood that the legislature might take action to change the tax situation retrospectively.

As to the impact of the measure, Pauwels makes two observations, which are most relevant to the Hungarian cases for the ECtHR in 2013 to be discussed later:

> **"the ECtHR tests whether the legislation is such as to amount to confiscatory taxation or of such a nature as could deprive the legislation of its character as a tax law."**
>
> and
>
> **"a considerably higher tax rate than that in force when the revenue in question was generated could arguably be regarded as an unreasonable interference."**

However, my main objective in this section is not to contribute towards further clarification of under what circumstances retrospective taxation is acceptable under the ECHR. From my perspective the more principled question is if P 1-1 for retrospective taxation should be seen as a limitation, or if it is more realistic to see the jurisprudence from the ECtHR as a modification in the limitations, which would otherwise follow from the rule of law. The general principle, although not absolute, that no law should be given retrospective effect, combined with the rule that taxation is seen as an acceptable interference only when in accordance with law, could otherwise be taken as an exclusion of retrospective tax laws altogether.

I believe that this perspective clarifies why the jurisprudence regarding retrospective tax laws gives no indication of how the ECtHR will deal with other taxation issues.

4. The level of taxation – taxes that impose an excessive burden

This issue was effectively dealt with by Philip Baker, QC, in one of his many articles in European Taxation[33]:

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[32] Melvin R.T. Pauwels, Retroactive Tax Legislation in view of Article 1 First Protocol ECHR, EC Tax Review, 2013-6, pp 268-281.

[33] European Taxation, June 2008, page 316,Human Rights issues and developments – some recent decisions of the European Court of Human Rights.

"**In theory, a tax that imposes an excessive burden and undermines the economic position of the taxpayer infringes the right of protection of property in Art. 1 of the First Protocol to the ECHR. This position is entirely theoretical. To date, no taxpayer has ever successfully challenged a substantive tax provision on this basis (so far as the author is aware)."**

He then illustrates his point referring to the case Imberg de Tremiolles v France[34]. The capital tax from a property well exceeded the net income from the property[35], but the ECtHR found that the tax fell within the wide margin of appreciation enjoyed by the states in the tax field, and Baker concludes:

"It will be interesting to see if and when the ECtHR (if ever) strikes down a substantive tax provision as being excessive."

It will be clear from what I have already quoted from Albert Quintas Seara that he sees the decisions in N.K.M v Hungary[36], Gáll v Hungary[37] and R.Sz. v Hungary[38] as the answer Baker has been waiting for. I think not.

In all cases the ECtHR found that imposing a 98 % tax on the top bracket of severance pay the applicants were entitled to, violated Article 1 of Protocol No. 1. And in all cases the Court makes a traditional approach discussing the different elements usually considered relevant when deciding whether or not a violation of P 1-1 has taken place.

Even so, I find that the three decisions do not provide the answer. The cases are similar and I will base my comments on N.K.M. v Hungary. On dismissal the applicant was statutorily entitled to two months' salary and severance pay, which amounted to eight months' salary. A substantial part of her severance pay was taken from her in the form of retrospective tax legislation. For the applicant, obviously, this legislation had the same effect as if what she was entitled to had been denied her outright.

The Court found that there was a proper legal basis for the measures, but it is still of importance for the understanding of the judgment what the court stated as to the retrospectiveness of the legislation:

"Moreover, since in the present case the interference with the applicant's peaceful enjoyment of possessions was incarnated by a tax measure, it is convenient to point out that retroactive taxation can be applicable essentially to remedy technical deficiencies of the law, in particular where the measure is ultimately justified by public-interest considerations. There is in fact an obvious and compelling public interest to ensure that private entities do not enjoy the benefit of a windfall in a changeover to a new tax-payment regime (see National etc., cited above, §§ 80 to 83).

[34] Imbert De Tremiolles v France, Application No. 25834/05 and 27815/05, Decision 4 January 2008.
[35] I fail to see the problem here. From a Norwegian perspective it is quite an ordinary occurrence that wealth tax is payable even if the asset in question provide no income. It is for the taxpayer to choose how to have his wealth invested. Obviously lack of income from an asset will normally influence on the value, but that is not the issue. The value of the asset was not the issue.
[36] N.K.M. v. Hungary, Application no. 66529/11, Judgment 14 May 2013
[37] Gáll v Hungary, Application no. 49570/11, Judgment 25 June 2013
[38] R. Sz. V Hungary, Application 41838/11, Judgment 2 July 2013

However, no such deficiency of the law has been demonstrated in the circumstances of the present case…"

The Court also stated that it had to go beyond appearances and look into the reality of the matter, it highlighted that the procedures followed were unsatisfactory and that no such situation as had previously been seen as sufficient justification for retroactive tax legislation, was present. Furthermore the legislation targeted only a certain group of individuals, who the court found to have been singled out by the administration in its capacity as employer. Finally the court explicitly states that the justification given from the government to justify the legislation, had no relevance to the applicants' situation.

Considering all these elements the Court found it unnecessary to decide in abstracto whether or not the tax burden was quantitatively speaking confiscatory in nature.

I can not see how the decision in any way clarifies to what extent, if at all, the ECtHR will consider applying P 1-1 simply because of the level of taxation. I find the concurring opinion of judge Lorentzen, which was joined by judges Raimondi and Jociene, clarifying in this respect:

"It has been the Court´s constant case-law that the imposition of taxes as a general rule is for the States to decide and that only if the system or the way it has been applied in a particular case is arbitrary or devoid of reasonable foundation can the imposition of taxes be challenged under Article 1 of Protocol No 1. The judgment should in my opinion be understood as not interfering with the principles applied in this field so far."

In an analysis of the Yukos Case, Jose Manuel Calderón Carrero and Alberto Quintas Seara[39] find that:

"the position taken by the ECtHR reveals the potential protection that can be provided by the ECHR against certain types of (exceptional) fiscal actions, which can be described as oppressive, arbitrary and "pseudo-confiscatory."

The three Hungarian cases could be seen in the same light, and in my opinion no general conclusion can be drawn from these decisions other than that naming the transfer of funds from an individual to the State as tax is not in itself sufficient. When the action taken by the State is in reality indeed not taxation, the exception in the second paragraph will be of no help.

Indeed, the three cases bring us back to the clarification offered by Sir David Maxwell-Fyfe when the Convention was being negotiated: Taxation is ok, but not arbitrary confiscation. And surely "arbitrary" here is used with the meaning dictatorial/despotic.

Some countries have constitutional courts with some competence to try the distribution of taxes, but generally speaking it is not for the national courts to control the political decisions taken in this respect. There is nothing to suggest that the intention was to give such competence to the ECtHR, and this is for good reason. There is an inherent weakness in the idea that the ECtHR should try the absolute level of taxation. It would be a protection of the

[39] Jose Manuel Calderón Carrero and Alberto Quintas Seara, Transfer Pricing Disputes, Abusive Tax Schemes and the Protection of the European convention on Human Rights against Oppressive Tax Actions: The Yukos Case, Bulletin for international Taxation, 2013 (volume 67) No.6.

few and fortunate, and realistically not for those with less to spare. This is well illustrated by the fact that the dominating topic in the discussions in this respect is how high the tax can be before it becomes confiscatory. Still, a 10 % income tax for someone who has no more than is required to maintain an acceptable life, can surely undermine the financial situation of the taxpayer to a much greater degree than a 90 % income tax in the top bracket.

In most countries it would probably be considered most unreasonable to have no wealth tax, no inheritance tax, a flat taxation of income and a substantial part of tax revenue by way of indirect taxes. Such a tax system would, in isolation, lead to ever increasing inequality, and it would lead to an unreasonable tax burden for the lower income groups. Even so it is inconceivable that the ECtHR should be in position to offer any help. The idea then, that on the other hand a tax system with substantial wealth tax and seriously progressive taxation of income, should come under closer scrutiny by the ECtHR, seems rather unprincipled.

Discrimination

A case which is often referred to in this context is Darby v. Sweden.[40] Dr. Darby who was not a resident in Sweden, was still taxable in that country under the applicable tax treaty. He was not a member of the Church of Sweden, but was not allowed the tax deduction he would have been entitled to had he been a resident. The ECtHR found that this constituted a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1. Considering that the Swedish government did not even argue that the distinction between residents and others had a legitimate aim, it is, in my opinion, hardly advisable to rely too much on this 26 year old chamber judgment.

The judgment demonstrates that the possibility of a violation due to discrimination can not be excluded, but does little to clarify how practical this is.[41]

Another case much relied on in this respect is the Burden v UK-case.[42] Although the ECtHR did not find a violation, the Court confirmed that in principle a violation due to discrimination, unequal treatment in respect of taxes where this can not reasonably be justified, can in principle amount to a disproportionate interference with the tax-payers property rights, P 1-1.

In the UK at the time inheritance tax amounted to 40 % of the value of the transferred assets. However, there was an exemption for married couples and for those living as "civil partners". The exemption did not extend to siblings living together.

The two Burden siblings challenged this for the ECtHR, but were not successful. The Court held that the relationship between siblings was qualitatively of a different nature to that between married couples and homosexual civil partners under the Civil Partnership Act. The

[40] Darby v. Sweden, Application no. 11581/85, Judgment 23 October 1990.

[41] Dr. Werner Hashlener, Tackling complex discrimination in international taxation, British Tax Review 2012, 5, 596-622, also relies on the Darby case to establish that in principle differences in tax treatment may constitute a violation of article 14 of the ECHR. However, he is, in my opinion very realistic when it is a question of practical importance:
"Despite its generally broad scope, the importance of the provision as regards protecting taxpayers from discriminatory source state rules is remarkably low due to the margin of appreciation afforded to national legislators in their task of making "reasonable distinctions…" and also: "Article 14 ECHR will ensure that the latter has to be justified, albeit any reasonable ground for the distinction will suffice."

[42] Burden and Burden v. UK, Application 13378/05, Grand Chamber Judgment 29 April 2008.

fact that the sisters had chosen to live together all their adult lives did not alter the essential difference between the two types of relationship.

Philip Baker has commented on the judgment in the British Tax Review[43]. Already in the heading of the article Baker makes it clear that he sees the judgment as restrictive, and in the text he adds that "the final judgment of the Grand Chamber may not have lived up to the occasion." The reason for this lack of enthusiasm is that Baker is dissatisfied with the depth of the analysis:

> **"This case really required a proper discussion of the concept of discrimination. While it is correct to say that discrimination exists in the application of different rules to relatively similar situations, this only carries the matter half way. In assessing what are relevantly similar situations, it must be an essential part of the process to identify the underlying rationale for the legislative rule under consideration. Only when one understands that rationale is it really possible to decide if the situations are relevantly similar."**

This may well be good advice to the legislature, but, considering the undisputed wide margin of appreciation in tax matters, the approach is unrealistic for the sort of control it is at all conceivable that the ECtHR may carry out.

Also the decision in the Burden case should come as no surprise. In Lindsay v U.K the Commission had laid out its view rather plainly 30 years earlier:

> **"The applicants in the present case seek to compare themselves, a married couple, with a man and woman who receive the same income, but who live together without being married. The Commission is of the opinion that these are not analogous situations. Though in some fields, the de facto relationship of cohabitees is now recognized, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterized by a corpus of rights and obligations which differentiate t markedly from the situation of a man and a woman who cohabit.**
>
> **The Commission accordingly concludes that the situation of the applicants is not comparable to that of an unmarried couple and that part of the application therefore does not enclose any appearance of a violation of Article 1 of Protocol No. 1 (P 1-1) read in conjunction with Article 14 of the Convention."**

National courts have dealt with a variety of similar questions concerning special tax-regulations for married couples. Many of the decisions date back many years. The approach is no different than the one chosen by the ECtHR.

In the Netherlands the Supreme Court[44] found that it was acceptable that the attribution of income between a married couple was less favourable than between non-married couples, because matrimony calls into existence a stronger economic unity than a joint household formed by unmarried individuals.

The Supreme Court in the Netherlands has also decided[45] that the seizure of a wife's property to pay for her husband's tax debts was not unlawful, as the difficulty of determining

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[43] Philip Baker, Burden v. Burden: the Grand Chamber of the ECtHR adopts a restrictive approach on the question of discrimination, British Tax Review 2008, issue 4, pp 329-334.
[44] The dentists wife case- The Supreme Court 27 September 1989, cfr. Rene Offermanns, European Taxation, December 2001, pp 541-557.
[45] The Supreme Court April 22 1994, cfr. Rene Offermanns, European Taxation, December 2001, pp 541-557.

ownership of property in the shared home of persons who are married or cohabiting is sufficient justification for treating them differently.

In Denmark the tax law allowed transfer of a personal tax credit to a spouse, but this was not allowed for unmarried couples. An unmarried couple, who had lived together for ten years, claimed that the tax rule was a violation of ECHR articles 8, 9 and 14. The Supreme Court found no violation.[46]

In Switzerland, allegedly, the joint tax assessment of a married couple could result in a doubling of the payable tax compared with had they only been living together. The legislation was challenged as violating the ECHR articles 8, 12 and 14. The federal Supreme Court found no violation.[47]

In a case for the Austrian Constitutional Court[48] it was the other way around. The applicant complained about the higher inheritance tax for unmarried partners in comparison to that of married couples, cfr. Articles 8 and 12 of the ECHR. The Court held that the complaint was inadmissible and stated that the tax rules in question could not be considered an interference with either guarantee. Disparities in the taxation of married couples and unmarried partners were seen as justified by substantive differences in terms of status.

Only in Spain have I found that tax disadvantages for married couples have been set aside. Here the disadvantage was seen as unconstitutional, with reference to article 12 of ECHR – the right to marry.[49]

However, a decision by the Belgian court of Arbitration[50] may also show greater willingness to censor tax legislation in this respect. The Court held that differences in treatment between spouses and unmarried cohabitees were based on objective criteria, but that this point of view had its limitations. The cost of living together was the same irrespective of marital status, and the different status could not justify differences in tax-exempted income to which they were entitled.

Discriminating Inheritance Tax.

In the Netherlands, the transfer of a business incurred substantially less inheritance tax than applicable for the transfer of financial assets. The applicants pleaded that this constituted discrimination and thus that the additional tax payable violated P 1-1. They were successful in the first instance, but the decision was later overturned, and the applicants brought the case to Strasbourg. The application was dismissed as manifestly unfounded.[51] The ECtHR makes its position clear:

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[46] Claes Balle, European Taxation, December 2001, page 497.
[47] Federal Supreme Court Judgment of 10 March 1989, published in Archiv für Schweizerisches Abgabrecht, 59 485, cfr. Rolf Wüthrich, European Taxation, December 2001.
[48] VfGH E B 540/79, 20 June 1984, VfSlg 10064, cfr. Tatjana Polivanova-Rosenauer, European Taxation, December 2001, pp461- 473.
[49] The Spanish Constitutional Court 20 February 1989, 20 February 1989.
[50] BEL-2001-3-008, Court of Arbitration, 6 November 2001.
[51] Berkvens and Berkvens v. the Netherlands, (Application no. 18485/14)

"31. The Court has often stated that the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In matters of general social and economic policy, on which opinions within a democratic society may reasonably differ widely, the domestic policy-maker should be afforded a particularly broad margin of appreciation (see Burden, cited above, § 60; see also, inter alia and mutatis mutandis, James and Others, cited above, 46; and Stec, cited above, § 52).

32. With particular regard to taxation, the Court has held, under Article 1 of Protocol No. 1 taken alone, that when framing and implementing policies in the area of taxation a Contracting State enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (see National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, 23 October 1997, § 80, Reports 1997-VII)."

I read this as saying: This is for the politicians to decide; we do not wish to interfere.[52][53]

Discrimination because of different tax treatment between those unfit for military service and those with major disabilities

This is a group of cases, which as one could expect, is limited to one: Glor v Switzerland.[54] I cannot say that this is an important case, but it is a case where the ECtHR has totally set aside the restraint which is essential in understanding the jurisprudence of the Court.

The facts are simple enough. Glor was willing to do his military service, but was declared unfit as having a minor disability. Those who did not do the military service had to pay an additional tax, but those with a major disability were exempt. (Conscientious objectors were also exempt, provided they did the substitute civilian service instead, but this opportunity was for conscientious objectors only.)

The magnitude of the tax was 20 % of one year's salary payable over 10 years.

Glor did not suffer from a major disability, and on examination the conclusion was that his condition was highly unlikely to be an obstacle in his future career.

Although it may be obvious, I quote the reasons for the arrangement given by the authorities:

"According to the Government the distinction pursued a legitimate aim, which was to re-establish a sort of equality between people who actually did military or civilian service and those who were exempted from it. The tax in question was meant to replace the efforts and obligations from which people exempted from serving were dispensed."

[52] The active role of the German Constitutional Court in respect of similar questions, is indeed an interesting contrast, but of no importance for the interpretation of the Convention.

[53] Philip Baker, Some Recent Decisions of the European Court of Human Rights on Tax Matters (and related Decisions of the European Court of Justice), European Taxation August 2016, pp 342-351,sees the decision as confirmation that a state has to justify potentially discriminatory tax measures. He finds the decision "not entirely surprising", but adds that:
"Perhaps the ECtHR might have considered further the Netherlands legislation to see whether there was a real and justifiable distinction between assets subject to the partial or complete exemption and other assets."

[54] Glor v Switzerland, Application no. 13444/04, Judgment 30 April 2009.

The Court was not impressed, and enters into a detailed discussion of the arrangement. First of all, however, the Court, makes the extraordinary observation that the arrangement "might prove to be in contradiction with the need to prevent discrimination against people with disabilities and foster their full participation in society."

In fact the tax had nothing to do with disability; if anything Glor had to pay his tax because he was not disabled. However, the nature of the further arguments the court relies on, makes it clear that the Court has taken the role of the Swiss legislature:

-the Court questions why the armed forces had not put in place special forms of service for people like the applicant,
-the Court refers to the staff reductions in the Swiss military, and questions if there is really any need for the applicants service,
-the court also observes the recent tendency for European States to do away with conscription altogether in favour of regular armies.

The Court found that Glor had been the victim of discriminatory treatment and that there had been a violation of Article 14 of the Convention taken in conjunction with Article 8.

In my opinion this judgment illustrates that the ECtHR for good reason has showed great reluctance against getting involved in tax politics.[55]

VAT

Another case, which is difficult to explain in any other way than that the result must have seemed reasonable at the time, is Bulves v Bulgaria.[56] The facts are straight forward: Bulves made a purchase in August 2000 from another company. An invoice including VAT was issued by the supplier and paid. Bulves registered the purchase in its VAT return for August, which was filed 15 September. The supplier, however, did not register the sale until October. As a result all conditions for Bulves to deduct the VAT were not met. This was disclosed through a later VAT audit, and a claim for VAT was presented to Bulves.
The Court observes that the applicant company had absolute no power to monitor, control or secure compliance by its supplier with its VAT reporting and that the state had suffered no loss. On the contrary, the VAT amount would be paid twice in the end. Although the result clearly was "reasonable", the solution still meant that the Court set aside an integrated element in a rather complicated system, and it is not all together clear on what legal basis this was done. Apparently this does not cause much concern.

Atev v Bulgaria[57] raises similar issues, but now the result was the opposite. The taxpayer was denied the right to deduct VAT because the supplier could not prove that the input VAT had been paid correctly. This decision is discussed by Philip Baker[58]. He points out that the Bulgarian government now argued that Atev could sue its supplier and seek pecuniary damages, under the law of tort. The ECtHR pointed out that this argument put forward by the

[55] Philip Baker refers to the case in Some recent Decisions of the European Court of Human Rights, European Taxation, December 2009, but seem to have no objections.
[56] Philip Baker refers to this case in Some recent Decisions of the European Court of Human Rights, European Taxation, June 2009. He finds that the judgment points to the unwillingness of the ECtHR to see an innocent and compliant taxpayer penalized for the failings of another person over whom it had no control.
[57] Atev v Bulgaria, Application no. 39689/05, Judgment 18 March 2014.
[58] Philip Baker, Some recent decisions of the European Court of Human Rights on Tax Matters, European Taxation, 2015 (volume 55), no. 2/3.

government had not been made in the Bulves-case, and that this option for Atev was sufficient for the Court to conclude that there was no violation. Baker's conclusion is that, once again, the ECTHR has drawn back from its decision in Bulves.

The understanding that the Atev-case does represent a change of heart by the ECtHR is further strengthened when it must be concluded that the reference to the new argument is unconvincing. The following is section 34 in the Bulves-decision, under section A *The parties' submissions*:

> **" The Government stated that the applicant company could have initiated an action against its supplier under the general rules of tort in order to seek compensation for the input VAT it had not been allowed to deduct because of the supplier's failure to comply with its VAT reporting obligations."**

Regardless; the change of heart is no indication that the ECtHR will show less restraint in the future than has been the case so far.

Conclusion

The ECtHR jurisprudence is technically based on the assumption that all taxation is prima facie interference with the right of enjoyment of possessions. In my opinion that is not the optimal approach, but from a practical perspective this is of no importance. Through the concept of an extraordinary margin of appreciation, the Court has avoided taking on a role that the Court absolutely should not have, and the Court has shown that it will not interfere with the ordinary political processes.

However, the Court has made it clear that it will protect the rule of law also in the area of taxation, as it should.