TAXES AND CONFISCATION

SOME REMARKS ON THE CONSTITUTIONALITY OF SWEDISH TAX LAWS

BY

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GENERAL REMARKS

The title of this paper needs an explanation.[1] Whether the Swedish tax system can be such that it is confiscatory in a constitutional sense is a question that has been discussed several times; thus the title is not an assertion, only a starting point for discussion. First, then, some general remarks on taxes in the public economy.

Many people consider that the only function of taxes is to transfer to the public sector enough money to meet public expenditure. However, this is only partly true: public expenditure is not fixed *a priori*, but is based on political considerations. Thus it is not self-evident that a country should have defence or social welfare; nor that all education should be conducted under public management at no cost to the student. Further, even when policy has been decided, it is by no means clear what selected institutions should cost. What areas society should be responsible for, and the level of public expenditure, are constantly discussed. Priorities vary from country to country.

Through public expenditure the *Riksdag* (Swedish Parliament) decides indirectly the size of the income to be transferred to the public sector through taxes. The *Riksdag* also decides the purposes for which the public income is to be used.

The function of taxes is of course to give the public sector the income necessary to cover its expenses. But if taxes had only this function, the problems of our tax system would probably soon be solved. If no other ambition had existed but that of getting necessary income simply and fast, many of our present complicated tax regulations could disappear.

While the size and purposes of public expenditure are results of political decision, the design of the tax system is also a mark of political will. The goals to be attained through public expenditure can as a rule also be obtained through tax regulations. The effect can be double. If the ambition is redistribution, this can be achieved through income transfer to those persons with no or with small income, without the special use of tax regulations. Income received as proportional taxes can be transferred to citizens with the lowest incomes.

[1] This paper was originally published in *Äganderätt och egendomsskydd*, a book published by the Swedish Employers' Confederation, Stockholm 1985. The author has updated the paper, especially with new statistics.

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The relation between taxpayers' incomes before and after tax is not altered by a proportional tax: equalization occurs only through income transfer. But taxation may also have the direct purpose of bringing about income equalization. Using progressive taxes doubles the equalization effect as it begins with comparison between the taxpayers' pre- and post-tax incomes and is then further influenced through transfers.

Tax policy is the *Riksdag's* foremost means of realizing its aims: the foremost expression of political power is the right to decide the size and aims of public income and expenditure.

The ambitions of fiscal policy have grown considerably in recent years. Not only has the total burden of taxation grown, but conscious political intervention in the tax system has also increased so that the tax regulations now reflect ambitions regarding economic policy, growth policy, regional policy, family policy and housing policy as well as other more or less explicit goals.

OUTLINE OF THE PAPER

The first part of this paper describes the different kinds of taxes and the total burden of taxes during the last few decades, and includes a comparison with some other OECD countries.

This is followed by illustrations of the statement that the fiscal system contains regulations expressing political considerations, and that important factors are not only the tax burden but also the design of the tax system. The examples are chosen from Acts of Parliament during the first year of the non-socialist coalition government, 1976–77, and during the first year of the new Social Democratic government, 1982–83.

The next part of the paper discusses some of the constitutional rules governing Swedish fiscal legislation and the financial power of the *Riksdag*, and the paper ends with a conclusion—based on the present study—as to whether there are, or can exist, confiscatory elements in the tax regulations.

THE LEVEL OF TAXES

Taxes measured in per cent of the gross national product (GNP) have increased continuously during this century. The speed of this development is obvious when one reads statements from the turn of the century about the tax system and its effects. When for example a bill proposing double taxation of the profits of limited companies was circulated for consideration at the end of the 19th century, reactions from some members of the expert groups consulted

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were very strong. The opinion of the County Administration of Malmöhus County was that, if the bill became law, company profits would continue to be taxed, but shareholders would also have to pay tax on their dividends. The Administration's comment included the following statement: "For the same income, although it is only one, double taxes will be paid ... Therefore, considering the level of local taxes it can be assumed that the shareholders of these companies must accept a cut in income of about eight per cent, just because they have chosen to carry on its activities in the form of a limited company. It must be considered unfair in all these cases, when the formation of a large industrial business needs the help of private investors of moderate means."[2] Later developments in the tax area could not have been anticipated by the author of this statement!

The reasons for tax increases are many. Considered from year to year taxes have increased both through inflation and through the growth of the national product. The level of taxes—both compared from one year to another and between different countries—must therefore be measured in per cent of the GNP.

Even so, the increase is remarkably fast. The many reasons for this all point to a larger public sector. Demands for better incomes and wealth equalization have led to a greater need for transfers paid out of tax revenue. Full employment has been a political priority of all Swedish governments since the Second World War. Labour market support in different forms, industry and company subsidies included, has cost enormous sums that have been paid out of public funds. The demand for good and cheap housing has resulted in large subsidies to all population groups. The educational system has demanded increased public support. The growth of the public sector can also be explained by the fact that public agencies have taken over tasks earlier handled by private enterprise, or have had the virtual monopoly of administering new programmes when need has arisen.

Other reasons can be found. Productivity may have increased more in the private sector than in the public sector during the corresponding period. To finance a proportionally unchanged volume of public services, increased income is needed. It is also possible that goods and services used in the public sector have risen in price more than other goods and services. An increased portion of the national product will be the result without improvement in "quality". The great changes in society (migration in general and urbanization in particular) have burdened the public sector with many new tasks.

[2] *Överståthållarämbetets och Kungl. Maj:ts befallningshavandes i rikets samtliga län utlåtanden över det av särskilda kommitterade den 2 november 1894 avgivna betänkande med förslag till förordning angående inkomstbevillning*, Stockholm 1895, pp. 86 f. See also N. Mattsson, "Skattepolitiska frågor för en mansålder sedan", *Skattepolitiska studier tillägnade Gösta Hasselberg*, Stockholm 1977, pp. 239–51.

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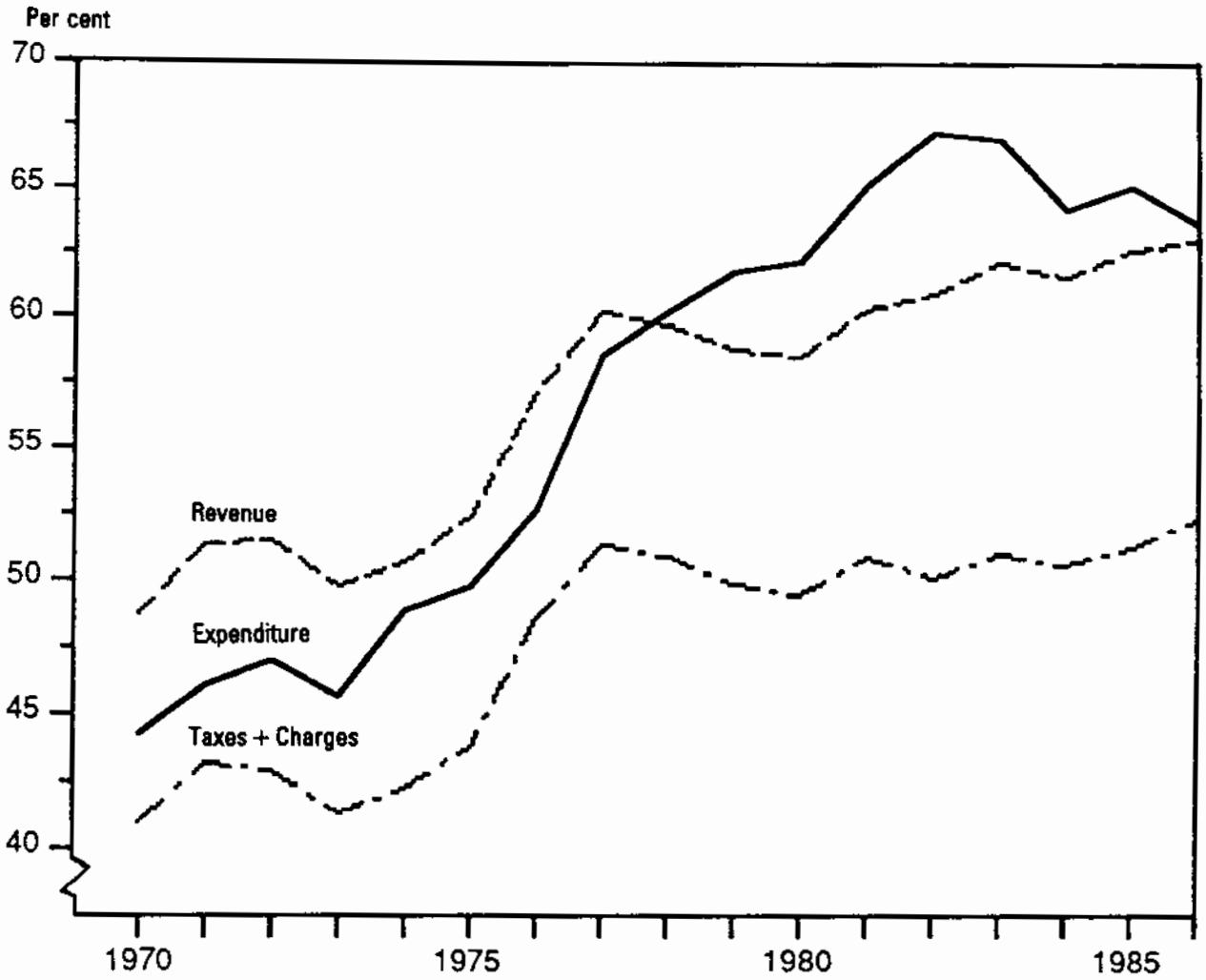

Source: Budget proposals, including the latest Revised budget proposal, 1987

Fig. 1. The total consolidated public sector share of GNP

The size of the public sector depends ultimately on popular consensus. The public sector must be acceptable to the electorate. Even if the politicians elected by the people can work for many years without check, and can increase public expenditure rapidly for a time, it is necessary in the long run that economic management be approved. But changes take time, since public attitudes normally change relatively slowly.

The total consolidated public sector and its share of the GNP during the 1970s and 1980s show the following development (fig. 1).

Firstly, expenditure has grown faster than income and, since 1978, has exceeded income. The expenditure for 1982 was calculated at more than 67 per cent of the GNP. In 1986 expenditure was down to below 64 per cent of the GNP. The gap between income and expenditure has narrowed considerably during the last few years and in 1987 income is expected to exceed expenditure. Taxes, which have always made up the greater part of the public income, have risen from almost 41 per cent of the GNP in 1970 to more than 52 per cent in 1986. The highest rise occurred in 1976 and 1977.

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Fig. 2. Different taxes as proportions of GNP during the period 1963–1985

But not only the sum of taxes is of interest. The relative importance of the different taxes also varied during this period, as shown in fig. 2 from which some interesting conclusions can be drawn. From 1970 on, the direct taxes laid on households have on the whole constituted an unchanged part of the GNP—

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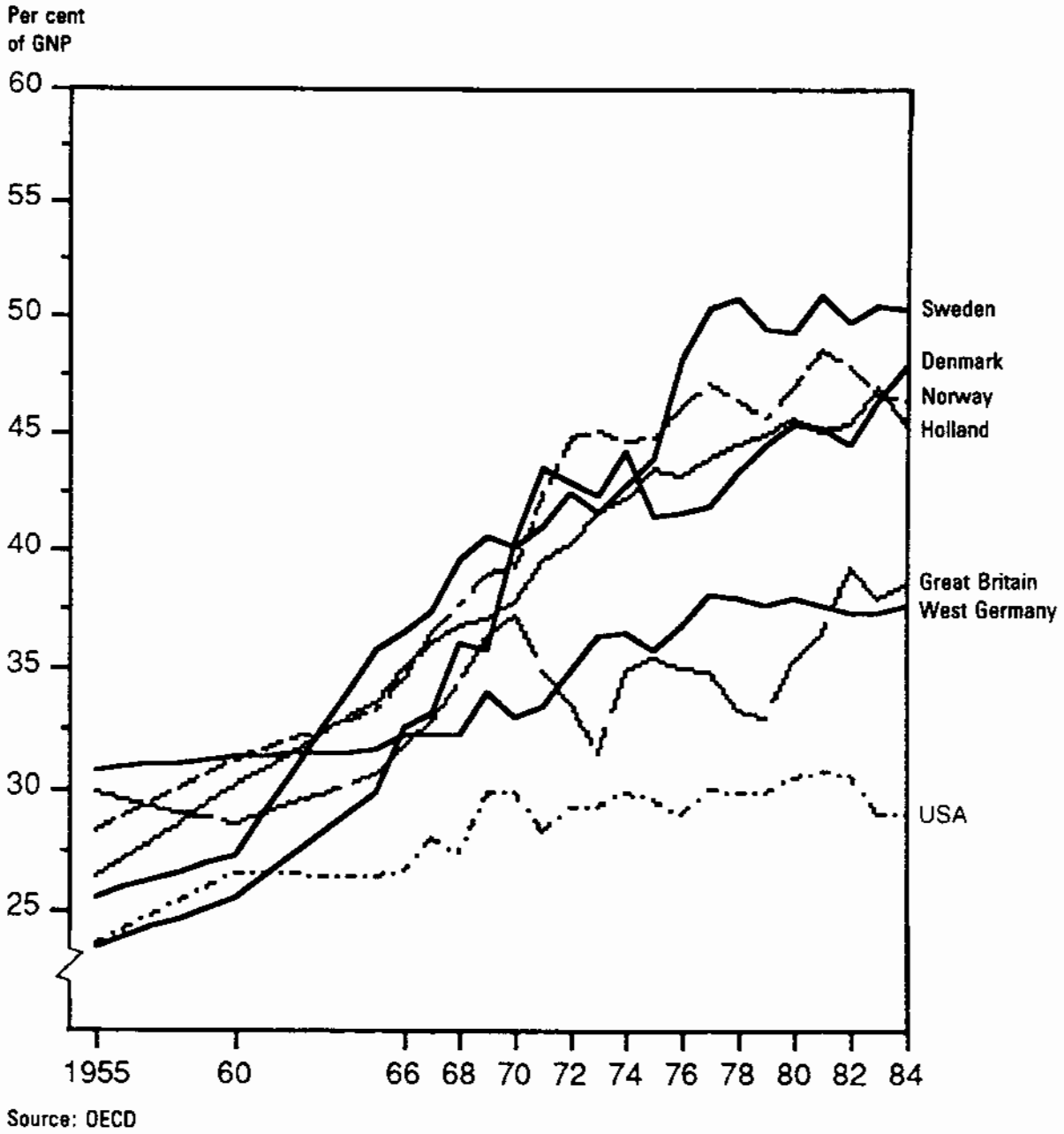

Fig. 3. Comparison of tax burden in some OECD countries 1955–1964

generally between 19 and 22 per cent. Their relative importance has decreased, though, since taxes as a proportion of the GNP have risen during this period. Even indirect taxes calculated in per cent of the GNP have been proportionately constant during most of the same period—generally between 12 and 15 per cent—but have played a more important role during the last few years.

Taxes in per cent of the GNP have increased because of the growth of the social insurance sector. During the period 1970–75 social security charges made up 7–8 per cent of the GNP, but these increased heavily during 1976 and 1977 when employers' charges and charges on self-employed taxpayers were raised heavily through changes stemming from a multi-party political agreement.

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But even though direct taxes are fairly constant in relation to the GNP, the relations between state and municipal taxes have shifted considerably.

But how have Swedish taxes developed in relation to those of other countries? The latest available figures from OECD give the following development from 1955 to 1984 (fig. 3). Sweden is clearly leading when the taxes of different OECD countries calculated in per cent of the GNP are compared. Once more we can conclude that the heaviest increases for Sweden came during 1976 and 1977. The villain in the piece was the heavy increases in national insurance charges and in local income tax.

But international comparisons of this kind can be misleading, for we are dealing here with the nominal tax burden in different OECD countries. To be able to compare different countries, however, it is necessary to study how income in different income layers and in different groups changes before and after both taxes and transfers. There is also reason to consider public consumption of different kinds, e.g. education, child care, care of the aged and medical care.

TAX SUBSIDIES

The tax burden measured in relation to the GNP gives too simple a picture of the effect of taxes on the national economy and on the economy of private citizens. Again, it is necessary to know to what extent citizens receive public transfers and to what extent they benefit from public consumption.

But when considering the national tax burden it is also necessary to examine the effects of the various taxes separately. Many of these issues are too specific to be discussed in a general survey of this kind, but one problem lends itself to observation.

In a description of the effects of the tax burden it is necessary to decide *how* it affects different groups of citizens. The marginal rate of taxes hits earners with large incomes harder than those with small incomes. The reverse applies to indirect taxes, at least to general consumption taxes.

But these problems do not occur only in the choice of different taxes and in the design of the general tax rates. The tax laws also provide for different subsidies. Through transfers, the *Riksdag* can favour specific purposes, specific groups or specific areas of society, but through the tax laws it can also introduce tax subsidy regulations through which it tries to reach the goals it would otherwise have reached by first collecting taxes and then transferring sums to individuals or legal persons. Accordingly, as a means of directing resources to different groups of individuals, to companies, to parts of the country or to activities, grants are not the only measures available. It is not

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necessary first to collect funds in the form of taxes and then distribute them for selected purposes. It is possible to build into the tax rules the ideas that guide the *Riksdag* in its subsidy policy. Some examples may illustrate this.[3]

The *Riksdag* has for decades tried to direct the investment policy of private enterprises through investment funds. During years of good economic activity and high profits, companies have been allowed to offset their taxable income against deductible transfers to investment funds. These funds have been used during lean years, thus evening out the level of investment. The investment funds were an instrument of public economic policy, which, among other things, served to check demand and inflation and to cut the unemployment rate. During the last few years, however, these goals have become less and less pronounced. But the funds are still there and are used. They have now become a constant element in the effort to increase private sector investment or at least keep it at its present level.

During the 1960s, the *Riksdag* also started to use other tax measures for increasing investment activity. Through investment allowances, taxpayers could deduct an amount corresponding to a certain percentage of the investment. The purpose of these occasional investment allowances was to improve the economic climate by cutting taxes. The allowances were reintroduced with increased frequency and duration in the 1970s—and the conditions became more and more favourable to the investor.

To promote investment activity, the *Riksdag* could have given direct grants instead of subsidizing investors through deductible investment allowances. Investment subsidies are a good example of this. In some cases, direct grants have been paid to investors at the same time as they could deduct investment allowances. The purpose of these two kinds of subsidy has been the same, but both have been considered essential. While investment allowances are easier to administer, they can only be used by investors with taxable incomes. Hence, the direct investment grants are needed as a supplement.

Other tax areas, too, contain rules with the same goal as the public subsidy policy. In the value-added tax (VAT) there are several exemptions from the main rule that all consumption should be taxed. The reasons for these exemptions vary, but they are frequently such that their effect could have been achieved through direct grants. A daily paper is, as a public newspaper, exempted from VAT, thus enabling the price to be lower than otherwise. It is considered essential to promote the publication of daily newspapers, as strong newspapers are important for public debate and for political democracy. But

[3] For a more thorough analysis of the importance of tax subsidies from a fiscal policy point of view, see Mattsson and Bergkvist, "Skattesubventioner—ett medel att uppnå offentliga mål", *Svensk skattetidning* 1983, pp. 383–407.

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the daily press could be—and is—supported by other means, e.g. the direct press subsidy in the form of grants. The subsidies affect different newspapers in different ways, but the purpose of both tax subsidies and direct grants is the same. To give another example, some years ago special rules were introduced concerning social security charges. The aim was to promote industrial activity in the sparsely-populated areas in the far north of Sweden. The social security charges were cut by ten percentage units for employers and self-employed persons in the county of Norrbotten who carry on activities specified in the tax rules.

These examples given to illustrate the similarity between tax subsidies and direct grants should not be controversial. Nobody can deny that the tax rules mentioned have purposes which correspond to goals the *Riksdag* tries to reach by direct grants. The point is that the tax laws abound in different kinds of such subsidies.

Thus tax subsidies are often a method of reaching a goal that can as well be achieved through direct grants. When estimating the involvement of the *Riksdag* in the public economy through its fiscal policy, it is just as important to rate what has not been taxed as it is to determine what is taxable income.

The Years 1976/77

One of the first pieces of legislation of the non-socialist government was an extensive bill (*Prop.* 1976/77:41) concerning changes in the tax rules for individuals. This bill provided for regulations which must be considered as tax subsidies. One such was the deduction for premiums paid by self-employed persons on group life insurance. Sums received from insurers on group life insurance are not taxable income. While this is a correct way of handling this kind of insurance from an income-tax point of view, the consequence should be that the premium is not deductible either.

On the other hand, the proposal was motivated by the fact that employees had long been exempt from declaring benefits of free group life insurance as taxable income, notwithstanding the fact that the employer, with some restrictions, has had the right to deduct the amount when paying the premium. Sums paid by the insurer to the insured are not taxable.

Another tax subsidy enacted during the parliamentary year 1976/77 was explained in a similar way. By legislation, certain severance grants became partly non-taxable (*Prop.* 1976/77:52). The rules concerned grants to employees in accordance with job security agreements between the Negotiation Cartel for Salaried Employees in the Private Business Sector and an employers' federation. A corresponding rule had already existed for some years concerning

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certain job severance grants to blue-collar workers whose employment was governed by collective agreeement.

The Social Democrat members of the Standing Committee on Taxation had no objection to the latter proposal and only a minor one to the former.

During its first year of office the non-socialist majority in the *Riksdag* decided on some reliefs in what is termed factual joint taxation of married couples. Earlier in 1976, when the Social Democrats were still in office, some reliefs had already been introduced: more were now enacted. However, this joint taxation had been considered contrary to the principle of neutrality between different types of business, and the new rules decreased the penalizing effect of the earlier ones.

Under the Local Income Tax Act and the National Income Tax Act, retired persons enjoy certain tax benefits to which other citizens are not entitled. The purpose of these regulations has been that a pensioner shall not be liable to tax if he/she has no other income than his/her basic national pension, even if another person with an income of the same size from other sources would have been liable to tax. This tax relief is designed as a special deduction, the size of which is determined with regard to the taxpayer's other taxable income and net wealth. The non-socialist government introduced new and more favourable regulations which governed the gradual reduction of this deduction (*Prop.* 1976/77:15).

Thus pensioners could benefit from favourable tax rules not applicable to other taxpayers. The Social Democrats had no objection to the proposal (Report of the Standing Committee on Taxation 1976/77:15).

Many proposals from members of the *Riksdag* during the 1976/1977 session demanded that the *Riksdag* enact legislation by which the use of firewood collected in forests owned or leased by the taxpayer should be considered a source of non-taxable income (rather than a taxable benefit in kind). A specific regulation was necessary if the use was to be considered tax-free income, and the Standing Committee on Taxation asked for such an exemption (Report of the Standing Committee on Taxation 1976/77:20). The *Riksdag* enacted the legislation, but the Social Democrats were against it.

This rule resulting in non-taxation of the use of firewood is typically an exemption from the general ideas behind income tax. It is a subsidy from which farmers benefit.

Tax subsidies were also used by the non-socialist government in the area of pure economic policy. One measure was to prolong the period during which the special investment allowance could be used (*Prop.* 1976/77:25). During 1976 a further prolongation was enacted by the *Riksdag* (*Prop.* 1976/77:73).

As already mentioned, investment allowances are typical tax subsidies which have been used by all governments, and the proposed prolongation did

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not lead to any political fight in the *Riksdag* (Report of the Standing Committee on Taxation 1976/77:9). The second time, however, the Social Democrats did not want to prolong the legislation for such a long period as the non-socialist majority of the *Riksdag* did (Report of the Standing Committee on Taxation 1976/77:33).

During 1976 the general employers' contribution had temporarily been cut from four to two per cent in the so-called inner development area of Sweden. The non-socialist government proposed that this reduction remain in force during 1977. The government estimated that there was a clear need for such assistance to business in these parts of the nation, and that it should be general in character (*Prop.* 1976/77:42). The Social Democratic minority of the Standing Committee on Taxation agreed that special measures were needed in the inner development area, but thought that much better results would probably be reached through more direct measures of a labour market policy nature. For this reason, they did not agree to the proposal.

The reduction of the general employers' charge is a typical tax subsidy for reaching a goal in the sphere of public economy.

The *Riksdag* also enacted a government proposal that the basic deduction when calculating the base for the general employers' charge should be increased from 18,000 to 30,000 SEK. The Social Democratic minority of the Standing Committee on Taxation made a reservation against the proposed bill, on the grounds that it would distort the competition between businesses of different legal form (Report of the Standing Committee on Taxation 1976/77:12).

But 1976 saw not only proposals for tax subsidies. In a government bill also before the *Riksdag*, the government proposed an investment charge on specific construction jobs. This charge was also a part of fiscal policy, namely a method of hindering the start of less essential construction jobs.

Thus many governmental bills were sent to the *Riksdag* in which tax rules were used deliberately to reach benefits of different kinds. The non-socialist majority and the Social Democratic minority were in agreement on many proposed rules, but on others they disagreed.

The Years 1982/83

During the first year of the new Social Democratic government several new bills of interest for this study were introduced.

Certain study grants, earlier taxable income, became tax-free in the tax assessments of 1984 and 1985. These regulations have been extended to the assessments of 1986 and 1987. Tax-free are those grants to employees which

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are given for the education of the recipient but which are not remuneration for work done or to be done for the payor.

The main purpose of the proposal is to give employees otherwise ineligible for paid study leave an opportunity to participate in trade-union seminars. If the grant—e.g. from an employer to an employee—is a remuneration for work performed, then it is taxable. But it is not taxable, even if the payor benefits, as long as it is not compensation for certain work done.

Earlier, grants of this kind were considered taxable income if the recipient was a union representative. The new "tax-free" rules mean that the union can pay considerably less to its active members than previously. At least indirectly, these rules are a tax subsidy to the trade unions.

Explaining the proposal as a way of equalizing the tax costs of union activity for employers and employees, the government introduced a bill proposing a tax credit of 40 per cent of trade union dues up to 480 SEK.

The Social Democratic majority of the Standing Committee on Taxation agreed to the bill but found it essential for the trade unions to use the dues only for union activity. Dues should not as formerly include a premium for collective insurance. However, the non-socialist minority disagreed to the whole idea of a tax credit (Report of the Standing Committee on Taxation 1982/83:15).

Further, the government proposed that the Alva and Gunnar Myrdal Foundation should be liable for tax only for certain income: for local income tax only for property income and for national income tax for no income at all (*Prop.* 1982/83:166). The reason for the proposal was the non-profit structure of the foundation.

Tax subsidies intended to affect employment and investment activity were introduced on several occasions in the 1982/83 session.

Certain grants are now deductible when made unconditionally to regional development funds (*Prop.*1982/83:94). Members of the Conservative Party had more far-reaching proposals. They wanted all grants to be deductible as a cost, so as to promote the business sector (Report of the Standing Committee on Taxation 1982/83:44).

As already mentioned, legislation of January 1, 1984 provided for reliefs as regards social security charges for business activity in the County of Norrbotten.

In the same way as the non-socialist governments, the Social Democrats have used the special investment allowances to promote investment activity. The Standing Committee on Taxation were unanimous about this (*Prop.* 1982/83:50, Report of the Standing Committee on Taxation 1982/83:15).

But during this session some tax rules were also stiffened.

An early measure of the Social Democratic government was to repeal some of the tax subsidies introduced by the non-socialist governments. The tax

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credit on dividends was repealed as of January 1, 1983. The tax credit on payments to special tax-free deposits for savings or for stock purchase was reduced (*Prop.* 1982/83:50). The non-socialist members of the Standing Committee on Taxation did not agree to these proposals.

During this first year of the Social Democrats' return to office, changes were proposed in the rules concerning the taxation of consumption (*Prop.* 1982/83:100 appendix 14). The petrol tax was raised in some respects, for environmental reasons.

The Social Democrats also introduced a tax on apartment houses, claiming that it would hinder a windfall profit on rents. This tax would hit those houseowners whose costs were not increased through the new, less favourable, provisions concerning interest subsidy, but who could expect larger rents as an effect of the provisions (*Prop.* 1982/83:50 appendix 2). The Conservative and the Centre members on the Standing Committee called for rejection of the proposal, and the Liberal representative asked for certain changes in the bill (Report of the Standing Committee on Taxation 1982/83:15).

A similar motive was adduced for a tax on some electric power, enacted at the same time (*Prop.* 1982/83:50). The State Power Board of Sweden, which as the largest producer of electric power sets the price, bases this on long-term marginal costs, which means that the cost of plant built most recently is decisive in setting the tariff. Older plant is therefore more profitable than newer: hence electric power produced by older plant should be the object of a special tax. All the non-socialist members of the Standing Committee on Taxation rejected the idea.

Perhaps most discussed was the temporary profit-sharing tax (*Prop.* 1982/83:102). This tax was based on the dividends decided during a certain year. As a general rule, the rate was 20 per cent of the taxable amount. The tax was intended to foster wage restraint. The non-socialist representatives on the Standing Committee rejected the proposal on the ground that the tax would stop productive investment (Report of the Standing Committee on Taxation 1982/83:40).

The intention of this study of new tax rules during the parliamentary sessions of 1976/77 and of 1982/83 has been to show how, through changes of different kinds, the *Riksdag* has tried to achieve its essential public policy goals by using tax subsidies and tax penalties. The present author considers that analysis of these tax rules is as important as the more numerous general studies of the tax burden.

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PROVISIONS IN THE CONSTITUTION ACT

This part of the paper will discuss first the terms *tax* and *charge* and secondly the taxing power of the *Riksdag*.

Tax and Charge

It has been increasingly common to call taxes *charges*. What legal difference is there?[4]

Colloquially, there is a clear difference. No-one would call 'local income tax' 'local income charge' or the National Income Tax Act the National Income Charge Act.

Charge generally conveys the idea of compensation for specific goods or services. Charges for electricity and rubbish removal are examples from the local area. The citizen has to pay because he consumes energy or because municipal employees remove his rubbish.

Tax, however, does not give the same idea. Instead, it means that the citizen contributes money to the public sector without being entitled to specific goods and services.

The prevalent definition of tax is that it is a compulsory contribution without any direct service in return from public agencies. Taxes must be compulsory contributions as they go to finance goods and services which will benefit all citizens, irrespective of their contributions to the public sector.[5] In the absence of rules constructed according to a pure principle of interest taxes of this kind are necessary. And a complete principle of interest in the area of taxation is impossible, even if the most ardent supporters of private enterprise believe that there are ways of reaching such a goal. Who should pay for national defence?—Should the charge depend on the will to defend the country? Who is to pay the royal appanage?—Should the degree of Royalistic fervour decide?

If there is a difference between the expressions *tax* and *charge*, it may be wondered why contributions to the public sector are sometimes called taxes and sometimes charges. Frankly, this may be simply because people dislike taxes and accept charges more easily.

However contributions to public activity are defined, the constitutional aspect must be remembered. The right to enact laws and statutory instruments is described in the Constitution Act. Legal provisions of most importance for

[4] For a more thorough study of this problem, see O. Westerberg, "Skatter och avgifter", *Förvaltningsrättslig tidskrift* 1982 1–2, pp. 1–48. Westerberg has cited more material of interest.

[5] See e.g. C. Welinder, *Beskattning av inkomst och förmögenhet* I, 8th ed. Lund 1981, p. 11.

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the citizen must be enacted by the *Riksdag* with no possibility of delegating the decision-making right to the government or to a public agency.

The Constitution Act, ch. 8, sec. 3, states that all rules governing the relation between citizens and public institutions must be enacted in the form of an Act of Parliament if they regard obligations incumbent upon the citizens or which otherwise interfere in their personal or economic affairs. Tax rules are an example of such legislation. The *Riksdag* has the legislative power.

However, the Constitution Act allows the *Riksdag* to delegate its power in some cases. According to the Constitution Act, ch. 8, sec. 9(2), national and local government may, after delegation, enact rules governing *charges* which according to the general rule should be enacted by the *Riksdag* itself.

Thus, there is a difference between taxes and charges in these Constitution Act provisions regarding the competence to enact statutory rules. The possibility to delegate applies to charges but not to taxes. *Voluntary* charges for which a consideration is given automatically fall under the competence of the government according to ch. 8, sec. 13(1)(2), of the Constitution Act. *Mandatory* charges where a consideration is given fall under the competence of the *Riksdag* but may, as mentioned, be delegated to national and local government.

This is why it is important constitutionally to differentiate between taxes and charges, and the different statutory instruments should obviously be named according to these rules. But having studied the different provisions it is easy to see that this is not the case.

According to stated purpose of the Social Security Charge Act of 1981, ch. 1, sec. 1, the contributions are to finance national insurance and some other social objects. Social insurance charges is a joint term for employers' contributions and for those of self-employed individuals.

The charges are transferred either to special funds or to the treasury for financing specially mentioned purposes. The fact that the charges are to finance, or contribute to financing, certain specifically mentioned objects may be the reason for using the term *charges*.

However, this is not sufficient reason for using the term. Taxes are used to meet public expenditure, and one cannot really justify the use of a special term in the Act only because the ends for which the funds are to be used are explicitly stated.

Perhaps some contributions paid by self-employed persons, e.g. their contributions to the general supplementary pension scheme, may be in such a relation to benefits received that they could be called charges in a constitutional sense. During the last few years, however, the relation between charges and benefits has become more and more tenuous, and these pension contributions should therefore be considered as taxes in the meaning of the Constitution Act. This is even more true following a change in the rules, by which the contribu-

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tions are now proportionate to size of income and not to the benefits the contributor will receive.

But even weaker, or non-existent, is the relation between charge and benefit in other areas of social insurance. Child care charges are paid by self-employed individuals. The charges are then transferred to the treasury for use in the financing of subsidies to pre-school and recreation centre activity within the local government child care organization. There is no evident connection between charge and benefit that would make it possible to call this contribution a charge and not a tax.

Social insurance payments such as employers' contributions can hardly be called charges; they must be taxes in a constitutional sense. It may be said that some of them (e.g. the pension charges mentioned) could have been replaced by other charges of a private law character if the pension system had been a private one. But the supplementary pension insurance is a system under public law, and employers' contributions should rightly be considered as taxes in a constitutional sense.

It may be suspected that the term *charge* has been used for employers' contributions because the tax base is a special one that includes the amount of wages and salaries paid by the employer. This, anyway, is the reason why the term *charge* is used in the General Charge on Wages and Salaries Act of 1982. There are, however, no important reasons why this tax should be considered as a charge. The amounts are in no way meant for any special purpose, and the tax is a general source of revenue for national government. The tax is included in the National Budget as a special item, together with other taxes.

Other taxes are also called charges. The Charge on Certain Beverage Packages Act of 1973 used the word *charge* for the turnover of specified packages for ready-to-drink beverages. No explanation is given as to why the word *charge* is used. It is obvious from the history of the Act that the term has not been used to differentiate the impost from taxes.[6]

But during recent years the term *charge* has also been used even in cases when it is obvious that the impost *is* a tax. In 1982 a 'charge' on rents from apartment houses was introduced. Before this Act was passed the Minister of Finance declared that this charge was a special kind of tax similar in substance to forest preservation charges and charges on wages and salaries.

The forest preservation charge of 1946 is the oldest of these charges. This levy was introduced to finance the activity of county forestry boards, and may

[6] See the Standing Committee on Taxation 1973:3. In its report the motives for the tax were expressed as follows: "The committee accepts that a charge is levied in order to enlarge the public revenues as well as to promote an increased use of re-usable packages at the expense of disposable packages."

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therefore be called a charge in the sense of the Constitution Act (*Prop.* 1946:126). The charge on rents from apartment houses, however, has no connection whatsoever with services from the government. This charge is levied on owners of houses which are not included in the interest contribution system and, as already mentioned, is a kind of windfall profit tax.

Are there any other reasons why some taxes are called charges?

As already indicated, one reason may be that levies which are named charges are used for financing specific objects. Applying this to the social insurance charges, for example, may give part of the explanation, but is not the whole truth. The general charge on wages and salaries and the charge on rents from apartment houses *both* go to the treasury without any specification.

Another reason for choosing the locution may be that the tax base is a special one. But this explanation is not enough either: many special levies are named taxes. Examples are the temporary tax on dividends, and the tax on undistributed company profits. Further examples can be found in the area of consumption taxation.

A third reason for the term *charge* could be that charges as opposed to taxes are deductible for purposes of national and local income tax. According to the Local Income Tax Act, a charge should be considered a special tax. This explanation of the term is probably the best, even though it does not completely cover all cases: the charge on some beverage packages is not deductible.

It must therefore be admitted that the expression *charge* for something that is *tax* in a constitutional sense has several explanations. The three given above, however, seem to cover the area.

Other Rules in the Constitution Act

The rules governing the powers to raise and distribute public funds are stated in ch. 9 of the Constitution Act of 1973.[7] In the Act the two different parts of the financing power, taxing, and budgeting, have been separated. The taxing power must be exercised exclusively through legislation and is thus governed by the general provisions concerning legislation in ch. 8 of the Constitution Act. Legislation must be of a general character; consequently tax rules must also be of a general character. This means that a tax proposal cannot become law if it covers only one specific case: in the government's Constitution bill of 1973 the Minister of Justice declared that it should not be possible for the

[7] See e.g. Holmberg and Stjernquist, *Grundlagarna med tillhörande författningar*, Stockholm 1980, and Petrén and Ragnemalm, *Sveriges grundlagar*, 12th ed. Stockholm 1980. See also writings cited in these two commentaries.

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Riksdag to pass a law which expressly covered only one single case (*Prop.* 1973:90). But it would be possible in the Minister's opinion for a law of general character to cover such a narrow area that its provisions in fact refer to one case only. The Minister's view was that the requirement of general validity would be fulfilled if the provisions were made for situations of a certain kind, or for special types of action; or if they were meant for, or were in some other way designed for, a specific group of persons described in general terms.

Taxation is created through legislative decisions, whereas in the framework of constitutional rules the computation of the resulting income, together with decisions about expenditure, is called budgeting. Expenditure is generally directed towards specified groups of activities and areas. Decisions about expenditure consequently differ in character from legislative decisions.

The difference is an important reason why the Constitution Act distinguishes between the two. In the Act there is no connection between taxation and decisions about expenditure. The latter can be made even if the *Riksdag* does not at the same time grant sufficient income for their object. This, however, is not a new model. Even under the previous Constitution the National Budget could be deficit- or surplus-financed. But the direct distinction in the 1973 Constitution Act between taxation and budgeting indicates earlier practice even more clearly.

The *Riksdag* has the supreme power to decide about income and expenditure. It is not bound by proposals from the government but is free to adjust expenditure without any decision to add new income to the budget.

This power is established in the Constitution Act, ch. 9, sec. 2, which provides that the income of the national government cannot be used in any ways other than those decided by the *Riksdag*. This provision is a repetition of the rule in ch. 1, sec. 4(2), which particularly states that the *Riksdag* decides how national government income is to be used.

In one sense, however, it is inadequate to say that the power of the *Riksdag* is total: not even the *Riksdag* can, constitutionally, decide about expenditure which may infringe basic liberties and civil rights, for the rights protected in the Constitution Act cannot be infringed by the *Riksdag* in any way.

As indicated in the introduction to this paper, the *Riksdag* can satisfy different requirements by direct expenditure within the areas of economic policy, regional policy, labour market policy, family policy or restribution policy—goals which the *Riksdag* wishes to achieve through transfers or through public consumption. But exactly the same goals can be reached through tax rules, as stated above when considering changes made in the tax laws during the parliamentary sessions of 1976/77 and 1982/83.

Fiscal policy is double-edged: it seeks certain goals directly through special tax rules, or indirectly by collecting revenue and then distributing it to citizens.

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The rules for collecting revenue and the rules for distributing it are equally important.

Yet these rules governing both aspects of fiscal policy cause problems. The requirement of general validity in the rules is difficult to fulfil in the case of some tax rules. The National Income Tax Act enumerates several objects which are not liable to tax, or are only partly liable. The Alva and Gunnar Myrdal Foundation is one example; others are the Nobel Foundation, the Swedish Tourist Council and the Swedish Export Council. The exemption of some specific objects does not seem to conform with the generality requirement. On the other hand, it is obvious that the effect of these decisions to exempt will be the same as the effect of decisions by which tax is collected but subsidies through budget decisions are afterwards transferred to the institutions mentioned.

It is surprising that the drafters of the Constitution Act did not see this connection between decisions about income and decisions about expenditure. One result is a number of constitutional problems and inconsistencies.

CAN TAXES BE CONFISCATORY?

It has been said that taxes can be confiscatory. It is now time to see what support there is for such an opinion.

It is without legal meaning to say, generally, that "taxes have reached such proportions that they are confiscatory". A request for a more precise definition will soon reveal that the statement has no constitutional backing. For taxation to be confiscatory, what taxation, exactly, should be discriminatory and what should not? What should be the relation between direct and indirect taxes? Is value-added tax more confiscatory than income tax, or vice-versa? How narrow can the tax base be? If not all taxpayers are confiscatorily taxed, exactly which taxpayers are? What public bodies confiscate—national government, the county councils or the municipalities?

The term confiscatory taxation is often an expression of dissatisfaction with the tax system. While it is obvious that the tax burden has increased rapidly in Sweden, at the same time the relative importance of different kinds of tax has changed. National income tax has lost importance compared with primarily local income tax and the social insurance charges. Therefore the way taxes affect groups of citizens has changed. An economic study of the incidence of taxes is necessary before the tax burden of an individual can be determined. This also requires investigation of the extent to which the taxpayer has earned tax-free income and been able to deduct costs not necessary for earning and retaining the income. The size of all the tax subsidies which the taxpayer has

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been able to use is important when assessing the total tax burden. Of greater interest than the nominal tax rates are the real ones.

Therefore it is pointless to make general comments about the tax burden except as an unspecified protest. This personal view is exemplified below with some statements of which the present author is critical.

In 1961 a Swedish legal writer[8] suggested that even if the Government and the *Riksdag* are the bodies that can reflect changes in opinion regarding how far taxation can be taken, not even these bodies can enlarge the area of taxation explosively. If this statement has any validity at all after the passing of the Constitution Act one may wonder what kind of meaning it has. Will the Constitution Act restrict the total size of the public sector, or only the pace of growth?

In 1976 another writer[9] suggested that there is a basic principle of equality in the law of taxation. He does not explain this in detail, but his opinion seems to be that the tax system must be neutral: any divergence from the norm is inadmissible.

This is not true. As shown above, the very purpose of tax policy is to direct the development of society towards certain goals and, to this end, it is necessary that the tax rules give priority to certain activities (and taxpayers). No kind of principle of equality exists in the tax world of imagination.

Therefore, while critical of general statements concluding that taxation is confiscatory, the present author has no doubt that in many respects the Swedish tax system has had some destructive effects on the public economy. At least until the latest reform of tax rates, the high marginal rates were a direct discouragement of overtime work (or even full-time work). The explosive increase in social insurance charges during the middle of the 1970s contributed to forcing several companies with low profitability, for example in the textile and clothing industry, to close down. The social insurance charges had to be paid irrespective of the profitability of the companies.

To be able to criticize taxes from a constitutional point of view, a more concrete basis for analysis is necessary. Paradoxically, however, the Constitution Act gives very little help in this respect, since it does not regulate the connection between the taxing power of the *Riksdag* and the rights of citizens. A rule in the Act referred to by most commentators for analysis is the provision about compensation in case of expropriation. According to the Constitution

[8] O. Westerberg, *Skatter, avgifter och pålagor*, Stockholm 1961, p. 247. It should, however, be stressed that Westerberg opposed earlier doctrine, in which writers expressed as their opinion that it was unconstitutional to use the taxing power for other purposes than to raise the public revenue necessitated by public expenditure. He also shows that opinions differ depending on what time period is studied.

[9] S. Strömholm, "Förslaget om s k löntagarfonder i rättslig belysning", *SvJT* 1976, p. 465.

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Act, ch. 2, sec. 18, a citizen whose assets are expropriated or removed following a similar procedure has the right to compensation for the loss according to provisions stated in law.

Taxes fall outside this provision as they are mandatory payments without direct compensation from the government. This is also obvious from the provisions of chs. 8 and 9 of the Constitution Act, which deal with powers to tax and finance.

A direct conflict between these two kinds of provision—the expropriation rule and the taxing power—is possible in cases where the tax rules no longer have the general character required of law provisions. Decisions to expropriate affect named individuals, but a rule which directly names X Ltd as liable to tax is impermissible. It may be possible, however, to accept a rule which does not directly name X Ltd, but where the tax base is so narrowly defined, in general terms, that only X Ltd is liable. In such a case the judgment may in fact depend on the intention of the legislator. If the purpose has been directly to tax X Ltd, but the rule has nevertheless been framed generally, this law is comparable in its consequences with a law in which X Ltd has been named directly as liable to tax. However, if the drafter of the legal rule had a special circumstance in mind and if there was, when the law was enacted, only one taxpayer who fulfilled the necessary conditions, then the law cannot be attacked if the intention was that every taxpayer fulfilling the necessary prerequisites in the future would be treated in the same way. The tax acts include some rules enacted because of conditions concerning an individual taxpayer, e.g. the "Lex Kockum" (special rules about losses carried forward). In these rules, however, the legislator has been interested not in the taxpayer as such but in a special economic performance or situation.

As already stated, one requirement of tax laws is generality. Specific taxpayers should not be named. On the other hand, specifically named taxpayers should not be exempted from tax liability either. Exemptions from tax liability are also tax rules, and the requirement of general validity should apply to them also. The reason why this method of direct exemption from tax liability for a particular taxpayer has been accepted must be that the purpose is exemption and not increased tax liability. It would have been impossible to enact rules about increased tax liability for a specific taxpayer!

It may be claimed that, when exempting certain objects from tax liability, the *Riksdag* does indeed have some general necessary conditions which must be fulfilled for a restricted tax liability to be accepted. These conditions, however, have never been published, and are rather vague.

Constitutionally, the method would have been acceptable if the necessary conditions for exemption from tax liability were explicitly enacted. It is rather common in the income tax acts, where, to take one example, it is stated that

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foundations enjoy restricted tax liability, if their main purpose is to promote goals scheduled in the provision. Foundations which fulfil the demands stated in the rule are then exempted from tax liability on certain income.

The present author's opinion, therefore, is that tax rules should be of general validity; further, that they should not be drafted in such a way that more than 100 per cent of the tax base is paid in taxes. To give a correct ruling, the base of the tax in question must be known. Even though this is economic madness, there seems *a priori* to be no constitutional impediment to taxing more than 100 per cent of a taxpayer's *income*, for example in a case where the taxpayer has to pay a net wealth tax on his holdings of assets which do not yield anything, e.g. a piece of land which is neither cultivated nor built upon. As there is a net wealth tax in Sweden, one has to accept taxes which exceed 100 per cent of income (but never more than 100 per cent of the tax *base*).

It is difficult to decide the exact limit for the legally permissible. But where income taxation leads to a charge of more than 100 per cent of income, the effect is that the whole tax base, and more, disappears. In the absence of provisions stating from where the excess amount is to be taken, the legal rules applicable become so indistinct that one wonders whether such a provision is not contrary to the constitutional intentions expressed in for instance the Constitution Act, ch. 2, sec. 18, about compensation for expropriation and similar measures. On the other hand, it is difficult using this reasoning to set limits to what is acceptable and unacceptable. For this, there are not rules enough in the Constitution Act.

Tax law is not only rules about tax rates. There are also provisions that regulate when tax liability arises, and how the tax base shall be calculated. Such provisions cannot generally be attacked with constitutional arguments. If the tax liability occurs before payment is received, it is possible that the taxpayer will have liquidity problems. Such a situation may happen when the taxpayer is liable for capital gains tax. Though only a part of the purchase price may have been received, the whole gain is taxable income. The present provision by which the whole capital gain is taxable during the year of the initial payment cannot be attacked on constitutional grounds.

Economic arguments have the greatest relevance when the tax rules are attacked from the standpoint that the tax burden is too high. Constitutional arguments, however, have hardly any weight here. But there must be cases where the result is so unreasonable that there is no longer a question of taxation. Here each tax must be considered separately.

The most important constitutional reservations can be made in those cases where the tax rules are contrary to the liberties and civil rights protected by the Constitution Act. Yet as we have seen, this aspect is but sparsely covered in the Constitutional Act, and the question of whether the power to tax can be contrary to constitutional rights is not answered.

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Where citizens' liberties and civil rights are expressly protected, however, it is not difficult to construct an example of unconstitutional tax laws. It is unconstitutional, for example, to allow a basic deduction when assessing all Swedish citizens except Laps. According to the Constitution Act, ch. 2, sec. 15, the legislation must not have the effect of treating a citizen unfairly because he belongs to an ethnic minority.

To sum up, interpretation of the rules of the Constitution Act indicates three cases where unconstitutional taxation is possible:

* Like all law rules, tax provisions must have general validity and not apply only to one specific case
* Taxation can be severe, but taxation which exceeds 100 per cent of the tax base cannot be accepted
* A tax rule leading to a clear violation of the liberties and civil rights described in ch. 2 of the Constitution Act cannot be accepted.

This conclusion should have answered the question put forward in the introduction to this paper: Yes, under certain conditions, Swedish tax regulations *can* be unconstitutional.

In recent years, the opinion has been expressed that not only the Swedish Constitution Act but also the provisions of the European Convention on Human Rights should be considered when Swedish tax rules are being examined. Even though this problem is outside the scope of this paper, it is relevant to the discussion and will therefore be touched on here. Article 1 of the supplementary protocol of 1951 to the Convention contains the provision that nobody shall be deprived of his possessions except in the public interest.

This provision cannot be studied in detail in this paper, but one topic, the financing of the Swedish wage earners' funds, has been intensively discussed and is of particular relevance. Are the regulations for this contrary to the Convention?

As a general rule taxes are not earmarked revenues, i.e. part of a specific budget. The National Budget is said to be based on the principles of completeness and of gross accounting. The first principle means that all activities of national government shall be part of the National Budget and the second, that all income and expenditure shall be included, e.g. shall be reported in gross figures, not in net. The Constitution Act however does not forbid earmarking (see ch. 9, sec. 2(2)) but on several occasions the Standing Finance Committee has declared it inappropriate.

To give an example—regular public means (that is general taxes) were transferred from the National Budget to General Supplementary Pension Funds, designed as wage earners' funds. In such a case there is no earmarked tax, and if the funds are to be attacked using constitutional arguments, the line must be that the expenditure—the transfer from the National Budget—is an

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infringement of the constitutional provisions. There is no earmarked tax and therefore it does not seem probable that a general tax could be considered contrary to the provisions of the Convention merely because ultimately used for a specific purpose. The vulnerability of the funds would hardly be increased even by the concurrent introduction of some general taxes and even if there were a connection in time between the introduction of new taxes and decisions about new expenditure. As already stated, a link is missing in the Constitution Act between decisions on these two aspects.

The proposal on wage earners' funds (*Prop.* 1983/84:50), however, was drafted in such a way that it was easier to attack them. The proposal was enacted and came into force on January 1, 1984. Taxes to finance the expansion of the wage earners' funds are earmarked, and the legal question then arises whether taxpayers are being deprived of their possessions in the public interest. But if the means should have been used for the expansion of pension funds in general, probably no objection could have been raised against the financing. There is a need for more money for the pension funds, and sooner or later the government will probably be obliged to pay in more capital. General taxes or earmarked taxes will have to be used.

Now it is evident from the proposal (and even more clearly from the discussion of the proposal) that there are other reasons for the design of the wage earners' funds over and above an economic strengthening of the pension funds. How is then the final evaluation to be made? If we consider the funds as designed *without* a majority of the board members representing wage earners' interests, there seems to be no doubt that, in the context of the European Convention on Human Rights, such an earmarked tax has a purpose of public interest. However, the answer is not so self-evident when the majority of the board *does* represent the interest of wage earners. The stronger the opposition to the wage earners' funds, the less does it seem that the funds can be considered as being truly in the public interest.

On the other hand it should be emphasized that the most essential critical point then becomes not the financing (general or earmarked tax) of the wage earners' funds as such, but their design. If the wage earners' funds could be attacked successfully, it should also be possible to oppose the Fourth National Pension Insurance Fund successfully if the majority of its board should be elected among wage earners' representatives. Success should be possible although general tax revenues have been used: the predominant argument should not be the finance, but the design, of the wage earners' funds irrespective of the method of financing. But it does not seem probable that the provisions of the European Convention on Human Rights now discussed could be relevant here. Therefore the European Convention on Human Rights does not seem to be applicable to the wage earners' fund.

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