Retroactive Legislation in a European Perspective – On the Importance of General Principles of Law

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1 The Problem

In a state based on the rule of law the problems surrounding retroactive legislation are central. With regard to legal certainty, it is important both for individual citizens and business enterprises as well as other legal entities that they can assess the legality and legal effects of a planned action before it is initialized. Therefore, they ought not be exposed to the risk of burdensome, *ex post* changes to the legal rules. This is especially true when it comes to the question of newly introduced or sharpened penalties or similar sanctions, as well as changes in tax or fee legislation making it more rigid, or prohibitions and injunctions by the authorities, aimed at actions or behaviors that were allowed when they were adopted.

Someone approaching Swedish law from the outside might easily imagine that, in the context of legal research and debate, the well known and long observed problem of retroactive legislation has been the object of great interest for quite some time. However, such has not been the case. Traditionally the interest has above all been concentrated on the prohibition against retroactive criminal statutes. In later years, attention has also been directed at the prohibition against retroactive tax and fee legislation in the Swedish Constitution introduced in 1979.

However, if one looks at Swedish legal doctrine and case law outside of these two constitutionally protected areas, that is, for all practical purposes largely within civil and administrative law, there is not much to be obtained. Surprisingly enough the problem of retroactive legislation has never tempted anyone in Sweden to write a legal monograph, nor does there exist any compilation of legislative practice in retroactivity questions, where one can get

an overview of the positions that for instance the Law Council[1] has taken over time to different legislative proposals.[2] It is likely that such a overview would show that in these matters there have been fluctuating opinions and a marked element of *ad hoc* considerations. What has been stated appears to be symptomatic of the main direction in the Swedish legal development of the last fifty years, which has appeared to be characterized by legal positivism. Until recently, not much attention has been paid to fundamental non-codified general legal principles as a central theme. From a comparative perspective this is something of a Swedish (and possibly even Nordic) particularity. For example, in German and French law, fundamental legal principles have an essentially different and stronger position as a source of law.

Professor Stig Strömholm is a Swedish legal scholar who has not followed the general trend but has especially stressed in particular legal history, legal ideology, comparative perspectives and the role of fundamental principles both in his research and teaching.[3] Though we might today be able to appreciate a revaluation of attitudes in the area, Strömholm's contribution was carried out at a time when it was not especially opportune to do so.

As Strömholm points out, retroactivity issues can be politically controversial.[4] In all likelihood this has increasingly been the case as the legislative instrument has come to be utilized more than previously as a tool for political control. A politician, for example, a minister who is strongly involved in a project of reform, considered of importance, probably will want the new legislation to have an immediate effect, something that may easily lead to a tendency to use a short transition period and allow the new statute to apply retroactively. This political aspect can be especially pronounced if, as was recently the case in Sweden, governments with different basic political ideas succeed each other. If, in such a case, a new government wants to reintroduce an earlier legal order, it is easy to understand, from a political perspective, if the willingness to pay attention to related retroactivity problems is not particularly great. There is a clear risk that objections by legal experts regarding the importance of heeding predictability and legal security and not imposing retroactive individual obligations will fall short before pressure for political change. In such a situation it makes a difference if the legal expert can refer to firmly established legal principles.

The reason why the subject of retroactive legislation is raised in this article is primarily that the legal order has recently undergone extensive changes, bound to put the problem in a new light. Until recently not much had happened in Sweden for some time in this area, except the introduction in 1979 of the prohibition against retroactive tax and fee legislation in the Swedish

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1 The Law Council – composed of judges from the Supreme Court and the Supreme Administrative Court, is asked for its opinion an the legality and legal merits of most of the Government's legislative proposals.

2 A presentation that should be mentioned, in particular, is Rodhe, *Något om retroaktiv civillagstiftning*, (Retroactive Legislation on Private Law), annex to Government Bill 1943:320. This work treats not only private law legislation but also includes a rather broad historical and comparative background.

3 Strömholm has been professor of private law and jurisprudence at Uppsala University.

4 Strömholm, *Rätt, rättskällor och rättstillämpning*, 5th ed., 1996 at 351.

Constitution. Sweden's membership in the EU from January 1, 1995 and the incorporation of the European Convention on Human Rights with Swedish law from that date entails that the question of the legality of retroactive legislation nowadays must be seen from a European perspective. As will be shown the EC Court of Justice has developed an important case law on general legal principles, common to the member states. In a plenary case in 1996 the Swedish Supreme Administrative Court took a position against retroactive legislation on environmental sanitation obligations.

In the following, this article is arranged so that it will first discuss the appraisal of retroactive legislation in Swedish law up to the present. Thereafter, in section 3, it treats the view on retroactive legislation in Community law. Section 4 outlines the Swedish Supreme Administrative Court's plenary decision from 1996 regarding retroactive legislation. Finally in section 5 some summary reflections regarding our new legal situation are made. The article is limited to treating main points; the subject is so extensive that it would be fitting for a monograph. The problem of retroactive effects of legal developments through court decisions is left aside.[5]

2 Retroactive Legislation in Swedish Law up to the Present

Before continuing it must first be made clear what is meant by a new statute or statutory change having retroactive effect. It can be a question of situations of vastly varied character. What are of interest are such statutory changes that have a burdensome effect on an individual, i.e., private or legal persons. Retroactive effects of new legislation that have positive effects for the individual are as a rule non-problematic from a legal certainty standpoint. Such legislation is of particular interest that retroactively prohibits an action that was permitted when it was taken; that imposes a burdensome obligation on someone, or intervenes with retroactive authority in an already existing legal relationship in a manner that is burdensome to the individual legal subject. Within private law the assessment is made more difficult, however, due to the fact that a legislative change many times may be to the disadvantage of one party but to the advantage of another. In the following, the subject is treated primarily with a starting point in public law legislation in its widest sense. It is essentially such legislation that has been under assessment in Community law.

Swedish law lacks a general legalized prohibition against retroactive legislation. The situation in this case is different from Norway. The Norwegian Constitution decrees, in Art. 97, that "no law may be given retroactive effect". There have been difficulties in limiting the statute. It is regarded as a legal standard, expressing a main rule from which it has been possible in practice to make certain exceptions.[6]

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5 A background to this paper has been the report that I made together with Bertil Södermark, Attorney, to the Swedish Government on October 26 1992 regarding the legal pre-conditions for the suspension of the premium-based general workers savings plan, see Governmental Bill. 1992/93:133 p. 5 f.

6 J. Andenæs, *Statsforfatningen i Norge*, Oslo, 1990 p. 483 ff., Graver, *Forvaltningsprossesen*, Oslo, 1996 p. 157, 190, 208, and in case law, e.g., Rt. 1992 p. 182.

Art. 7.1 of the European Convention on Human Rights contains a prohibition against retroactive legislation, which however is limited to the area of criminal law.[7] In this context, however, the right to ownership protection is of importance according to Art. 1 in the first supplemental protocol, which among other things includes a certain protection against limitations in the right of property use, premature recall of granted business permits and concessions etc.[8]

As is already mentioned, the Swedish Constitution contains a prohibition against retroactive legislation within criminal law and tax law. Within criminal law there is of old, on the grounds of legality, a general prohibition against anyone being punished for a deed that was not punishable when it was committed. Nor is it permitted to impose a more severe criminal punishment than the one prescribed at the time, *nullum crimen sine lege, nulla poena sine lege*.[9] This prohibition is absolute and closely corresponds to what is the law according the European Convention. It is considered to be applicable by analogy to administrative sanctions that are similar to criminal punishments, such as sanction fees, supplemental taxes and surplus fees of a penal character etc.[10]

In accordance with the above, the main rule states that new criminal law legislation shall be imposed retroactively if this entails positive effects for the individual in the form of non-punishment or less severe punishment. This is evident from Art. 5 in the Promulgation Statute of the Criminal Code, which however makes an exception for a deed that has been punishable only within a certain time period because of special circumstances (e.g., punishable rationing regulations).

The prohibition against retroactive tax and fee legislation was introduced in 1979 and was placed as Chapter 2 Article 10.2 of the Constitution (RF). The main rule states that a tax or governmental fee may not be imposed to a wider degree than that which follows from the regulation that was valid at the time of the occurrence of the circumstance that triggered the tax or fee obligation.

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7 The statute has been applied in only a few cases and has not been the basis for any more extensive analogical application. See *inter alia* Ehrenkrona in Karnov 1996/97, vol. 1, p. 55, Danelius, *Mänskliga rättigheter*, 5th ed., 1992, p. 180 f., Cameron, *An Introduction to the European Convention on Human Rights*, 2nd ed., Uppsala 1995, p. 67 ff., Jacobs-White, *The European Convention on Human Rights*, 2nd ed., Oxford 1996, p. 162 ff.

8 See *inter alia* Ehrenkrona in Karnov 1996/97, vol. 1, p. 64.

9 The prohibition is nowadays to be found in Chapter 2, Article 10.1 of the Constitution (Regeringsformen) and also in Article 5.1 of the Promulgation Statute of the Criminal Code.

10 Governmental Bill 1975/76:209, p. 125, cf. P. 258, see inter alia Holmberg-Stjernquist, *Vår författning*, 10 ed., 1995, p. 56, Holmberg etc., *Kommentar till Brottsbalken* I, 6 ed., 1995, p. 22 ff., Berg etc., *Kommentar till Brottsbalken III*, 4th ed., 1994, p. 550 ff.

Re: Sanction fees, Warnling-Nerep, *Sanktionsavgifter – särskilt vid olovligt byggande*, 1987, p. 86 f. As is evident from Warnling-Nerep's presentation the retroactivity prohibition has been complied with in practice in the area of sanction fees. Thus the prohibition has been complied with in conjunction with the new sanction fees in the area of competition fees in the 1993 Competition Act and market disruption fees in the 1995 Marketing Practices Act. The governmental bill to the latter statute considered it "self evident" that a marketing disruption fee cannot be imposed for marketing activities dating back to the time prior to the validation of the statute, Governmental Bill 1994/95:123, p. 162. Also, see Warnling-Nerep, *Betydelsen av konstitutionell rätt: Retroaktiv lagstiftning, kommunalt självstyre och europarättens inverkan*, Festskrift till Fredrik Sterzel, 1999 s 379 ff.

However, the prohibition is not absolute. It opens a general possibility for Parliament to prescribe exceptions if Parliament finds this called for, due to special circumstances in connection with war, risk of war or economic crisis. Furthermore, it is possible to allow new tax legislation to enter into force at an earlier time than when the law was introduced, however at the earliest when the government communicates its written proposal for change to Parliament. This regulation is unique to tax legislation and is intended to prevent transactions with the intended purpose of evading the effects of an already publicized governmental Bill.

The prohibition against retroactive tax and fee legislation, which at the time of its enactment was assumed to influence the position of the governmental authorities also outside the actual area of application,[11] has created interesting case law.[12] Thus it is clear that the prohibition must not be interpreted *in contrario*. But the question of how far the Constitution's two retroactivity prohibitions – that of criminal law and of tax law -- shall be considered applicable by analogy appears uncertain.

A certain protection against retroactive legislation, especially within property law, exists since 1995 in the expanded ownership protection of Chapter 2 Article 18 of the Constitution. The provision prohibits expropriation and access restrictions for use of land or building, except when it is necessary in order to satisfy important public interests.[13] However, this subject shall not be discussed here.

The question of a more general prohibition against retroactive legislation was discussed in conjunction with the constitutional work of the 1970s, aimed at achieving increased constitutional protection for individual freedoms and rights. Statements against such a general rule were made, pointing to the difficulties in limiting what is meant by retroactivity, and to the problems of being able to pinpoint sufficiently those cases in which necessary deviations from such a prohibition should be allowed.[14] However, the text in the Government report is not very comprehensive. Nor was there much domestic foundation to build on in terms of case law and legal doctrine.

No clear prohibition against retroactive legislation seems to have been upheld in Swedish case law outside the constitutionally protected areas. It appears however to follow from the meager legal doctrine in the area and other standpoints taken in legislative matters, that retroactive legislation in general is

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11 Governmental Bill 1978/79:195, p. 55 f. The provision has been discussed in detail by Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen*, 1995, p. 100 ff., 142 ff. Regarding the earlier legal situation and its principal problems, Hagstedt, *Retroaktiv skattelag*, 1975.

12 Here should be noted *inter alia* two decisions by the Supreme Administrative Court, Regeringsrättens årsbok (RÅ) 1992:10, where the debated statute regarding temporary wealth tax for life insurance companies and others was not considered to be contrary to the retroactivity prohibition and RÅ 1993:79, where the calculation method for an increased chemical fee was judged to be unconstitutional. See further H. Strömberg in Förvaltningsrättslig tidskrift (FT) 1988, p. 123 ff.

13 Regarding this provision, see especially Bengtsson, *Grundlagen och fastighetsrätten*, 1996.

14 See the report Medborgerliga fri- och rättigheter, Regeringsformen, SOU 1975:75, p. 158, 436, Governmental Bill 1975/76:209, p. 125 f., cf. p. 259 f., Holmberg-Stjernquist, *Vår författning*, *supra*, p. 57.

regarded with unease. One could probably consider as a vague main principle what was expressed in the 1975 Freedom and rights report, namely that retroactive legislation ought to be avoided but that heavily weighted arguments should be able to motivate departures from this main principle.[15]

In a 1974 report of the Parliamentary Constitutional Committee a certain differentiation between different legal areas was suggested.[16] After having discussed property law legislation the Committee found that, within this area:

> "great weight be attached to the individual's possibilities to get an overview of the consequences of the timing of a legal act. Therefore, it has been a general aim to avoid giving legislation a retroactive effect. Only heavily weighted social reasons shall be considered sufficient in order to allow deviations from this principle."[17]

The Committee furthermore found, however, retroactive effects in family law legislation to be allowed to a greater extent because of "changed attitudes in ethical questions". Within the area of administrative law, the Committee did not find any prohibition in principle to exist against legislation with retroactive effects.[18]

With regard to civil procedure law one might add that the Law Council has voiced the opinion that, according to a generally accepted principle, all procedural regulations in new legislation in general be applied immediately after

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15 SOU 1975:75 p. 159.

16 Parliamentary Constitutional Committee Report 1974:60.

17 An example of the application of the main principle regarding non-retroactivity is the new Sales Act and the new Consumer Sales Act of 1990. In both cases, the transition rules prescribe that older legislation applies to contracts entered into prior to the promulgation of the laws.

The questions of retroactivity were considered during the enactment of the Competition Act of 1993, where Section 7 regarding the nullity of agreements limiting competition implied the introduction of an important new rule. The Governmental Bill stated: "The fundamental rule that a new civil law legislation shall not interfere with the contents of a contract that has been reached prior to the ratification of such legislation expresses an important legal certainty principle. Departures from this principle should only occur if strong societal interests speak for it." This was not found to be the case. (Bill 1992/93:56 p. 56.).

However, in 1976 the new general clause in Section 36 of the Contract's Act on unfair contract terms was made applicable also to contracts that had been entered into before its creation, with the exception of disputes that were pending in a court during the time of enactment. This was in accordance with earlier implementations of similar general clauses. The position was referred to in the preparatory work as a departure from the principle that civil law legislation should not be given a retroactive effect. It was motivated by the inconvenience of having different rules apply simultaneously during a long time period, SOU 1974:83, *Generalklausul i förmögenhetsrätten*, p. 199, see also Governmental Bill 1975/76:81 p. 149. See further Hellner in Festschrift für Robert Summers, Berlin 1994 p. 633 ff.

18 The committee made a reference to a statement by Judicial Ombudsman Wennergren in the Parliamentary Ombudsman's Official Report 1973 p. 551, see Wennergren, *Retroaktiv förvaltningsrättslig normgivning*, FT 1993 p. 275 ff. and H. Sundberg, *Allmän förvaltningsrätt*, 1955 p. 204 ff. See further section 4 *supra* on the revised position taken in the Supreme Administrative Court's decision RÅ1996:57.

promulgation, even if the underlying relationship dates from a time prior to this.[19]

The underlying reasons against retroactive legislation to the disadvantage of individuals were expressed in the 1978 Governmental Committee Report regarding increased fundamental freedoms and rights:

> "The main argument against retroactive legislation is that such legislation conflicts with the main principle that one in advance shall be able to judge the legal consequences of ones actions. A citizen who acts from the position of current legislation risks that his actions will be judged according to rules that have come into existence after the action taken and at a time when he is unable to undo what is done."[20]

Åke Frändberg, professor of jurisprudence, has expressed the matter in the following manner:

> "It is therefore quite clear that these arguments that speak *against* such a thing (i.e., retroactive legislation) make themselves felt with superior power in their intimate connection with fundamental governing legal values, and that the arguments *for* this type of legislation become applicable only under certain, rather special circumstances."[21]

Professor Stig Strömholm has examined the Swedish view of the retroactivity problem. This has been done within the context of his well-known basic textbook in jurisprudence, *Rätt. Rättskällor och rättstillämpning* (Law, Sources of Law and Application of Law).[22] Strömholm finds it difficult to substantiate any clear principles for the lawmaker's actions outside the criminal law and tax law areas. He makes the general observation that the attitude of governmental authorities has developed towards lesser consideration of established interests and positions.[23] It is apparent that Strömholm himself is hesitant as to the appropriateness of such a development and finds reasons to stress the legal certainty points of view.

The Swedish legal position – prior to membership in the EEA and EU – could be summed up as follows: that new legislation normally has not been given retroactive effect to the detriment of private or legal persons but that there has been a certain openness to give legislation such an effect, if there have been special reasons that have called for this. This could possibly be characterized as a relative prohibition against retroactive legislation. The arguments for allowing a new law to apply to previous circumstances have been juxtaposed to generally

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19 Governmental Bill 1985/86:1 p. 129 f.

20 *Förstärkt skydd för fri- och rättigheter*, SOU 1978:34 p. 156. See also the Constitutional Committee Report 1974:60, mentioned *supra*.

21 Frändberg, *Rättsregel och rättsval*, 1984 p. 175.

22 Strömholm, *Rätt, rättskällor och rättstillämpning. En lärobok i allmän rättslära*, 5 ed. 1996 p. 346 ff.

23 At p. 351. On the one hand, professor Jan Hellner claims that there does not exist a general principle in Sweden regarding the prohibition against retroactive law making outside of the constitutionally protected areas, Hellner, *Rättsteori. En introduktion*, 2 uppl., 1994 p. 35.

weightier arguments against this. There are however reasons to underscore the uncertainty of the legal situation.

3 Retroactive Legislation in Community Law

From 1 Jan. 1995 onwards, EU membership and the incorporation of the European Convention on Human Rights into Swedish law have created a profound and far reaching change in the Swedish legal system. Already in 1992, before the membership negotiations were completed, this change was thoroughly examined in the report, *European Community and Legal Science (Europagemenskap och rättsvetenskap)*, which was carried out jointly by the country's three principal law faculties on commission by the government.[24] When studying this report, in retrospective later, it appears to be unusually clear-sighted. Despite the advanced and in, to some, rather shocking perspective that the report established, it still appears that the impact of European Law seems to have been underrated. What is at stake is an extensive and continuous "Eurofication" of Swedish law, the far-reaching scope of which can only be surmised.[25]

One area where there exists a noticeable difference between EC law and Swedish law as practiced previously concerns the view on general legal principles as a source of existing law. The EC Court has to a wide degree created general principles of law ("principes généraux du droit") for interpretation and application of community law. As is well-known, a central point of departure has been the European Convention on Human Rights, which, as a result of the legal development within the Community Court has attained the stature as a part of the general legal principles of Community law. According to the Maastricht treaty (art. F) the EU shall respect, as general principles of common law, the fundamental rights as guaranteed by the European Convention and the common constitutional traditions of the member states. The Community Court has also developed general legal principles outside this area. As a rule the Court has found the foundations for these in the national laws of the member states. Here the reference in Art. 215 of the Treaty of Rome to "the general principles common to the law of the Member States" has served as a point of departure, as has, the previously mentioned reference in art. F. The Court has also, among other things, cited Art.164 in the Treaty of Rome, according to which it is the Court's task to secure the application of "The Law" ("le respect du droit").

The Community Court has independently created and formulated the general principles of law that it applies based on its view of the needs of Community Law. The principles are viewed as binding and are considered to have a judicial status above the Community's secondary legislation in the form of regulations and directives.[26] Here one is reminded of Advocate General La Grange's statement regarding the development of general principles in an early case before the Court:

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24 *Europalagstiftning och rättsvetenskap*, 1992.

25 See, among others, Bernitz, *Inför europeiseringen av svensk rätt*, JT 1991-92 p. 29 f.

26 See, as above, Strömholm, *Rätt, rättskällor och rättstillämpning*, 5th ed., p. 323 f. A well known presentation in the field is Hartley, *The foundations of European Community Law*, 3rd ed., Oxford 1994, which chap. 5, p. 137 ff. treats general legal principles.

> "… the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical "common denominators" between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objectives of the Treaty, appear to it to be the best or, if one may use the expression, to be the most progressive".[27]

Protection against retroactive legislation is a question given much attention within community law. It shall primarily be seen as an element within the context of one of the most central legal principles that the Community Court has developed, namely the principle of legal certainty ("securité juridique"). Its fundamental element is that a legal application must be foreseeable. Within the Community legal system this general principle has been made concrete in other principles that can be said to constitute secondary principles to the legal certainty principle, since they have developed from it. Apart from more procedural principles, the protection of legitimate expectations and the protection against retroactive legislation deserve special attention.

These two principles are closely related. The principle of legitimate expectations (protection de la confiance légitime, Vertrauensschutz), entails that a person is entitled to act (and to pursue his business enterprise) with the expectation that existing laws shall continue to apply. This is especially the case if explicit or implied assurances have been given in the matter by a Community institution.

In the 1978 *Töpfer* decision the Community Court expressly acknowledged the principle.[28] The Court then pronounced that a legal document which does not take into account this principle can be nullified by the Community Court according to Art. 173 in the Treaty of Rome. However, in the actual case that concerned complex rules regarding types of compensation to sugar producers, the Court held that the principle had not been violated.

The question of protection of legitimate expectations has been especially relevant in connection with the application of the Community's comprehensive system of agricultural regulation, with its different price structures, fees and supports. Thus the Community Court found already in the case 74/74, *CNTA against the Commission*[29], that it was not permitted for the Commission, without prior warning, to repeal a system of monetary compensation that was distributed to agricultural exporters to make up for exchange rate fluctuations, since:

> "a trader may legitimately expect that for transactions irrevocably undertaken by him because he has obtained, subject to a deposit, export licenses fixing the amount of the refund in advance, no unforeseeable alteration will occur which could have the effect of causing him inevitable loss, by exposing him to the exchange risk."

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27 Case 14/61, Hoogovens v. the High Authority, (1962) ECR 253 on p. 283 f.

28 Case 122/78, Töpfer v. the Commission, (1978) ECR 1019.

29 Case 74/74, CNTA v. the Commission, (1975) ECR 533.

Concerning retroactive lawmaking in its true sense, i.e., measures that aim at regulating actions already taken, the Community law has adopted a strict view concerning measures that apply to the disadvantage of the individual. The principle is that there exists a prohibition against such measures. According to established case law in the Community Court, what applies is that:

> "in general, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication".

Exceptions from this principle may however be acceptable in cases where

> "the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected".[30]

In practice, this exception has primarily been of interest in connection with changes in short term rules concerning the structure of economic compensation to agricultural producers within the context of the Community's common and strongly regulated agricultural market.[31]

Within the context of the general principle regarding a prohibition against retroactive lawmaking, the Community Court has especially held forth a prohibition against retroactive penal measures, notably the case 63/83, *Kirk*[32] which, against a Community Law background, concerned the scope of British penal sanction provisions against certain types of fishing. The Court pronounced that (p. 22):

> "The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice".

The temporal point of departure for assessing whether retroactivity exists is the point in time of the adoption of the measure according to the Community's legal order. According to Art. 191.1 in the Treaty of Rome, regulations, directives and decisions enter into force the day that they are expressed in the legal acts or, in other cases, the 20th day after they have been made public, i.e., the day the Official Journal, containing the text of the legal act, is made available. Regarding this subject, the Court has pronounced that:

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30 Case 98/78, Racke v. Hauptzollamt Mainz, (1979) ECR 69 p. 20. The presentation relies mostly on Schwarze, *European Administrative Law*, London 1992 p. 1121 and cases cited therein as well as Hartley, *The Foundations of European Community Law*, 3 ed., Oxford 1994 p. 151 and Toth, *The Oxford Encyclopedia of European Community Law, Vol. I*, Oxford 1990 p. 469 ff., see also, among others, Lamoureux, *The Retroactivity of Community Acts in the case law of the Court of Justice*, 20 Common Market Law Review (1983) p. 269 ff., Schermers-Walbroeck, *Judicial Protection in the European Communities*, 5 ed., 1992 § 101, Shaw, *Law of the European Union*, 2 ed., London 1996 p, 183 ff.

31 Schwarze, *op. cit*. p. 1121.

32 Case 63/83, The Queen v. Kent Kirk, (1984) ECR 2689.

> "a fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it".[33]

In order to prove that a measure has retroactive effect it must in any case be apparent from the measure itself. In the *Milac* case the Community Court determined that the legal certainty principle as a general principle does not preclude that a Community measure be given retroactive validity, regardless of whether it is to the advantage or disadvantage of those affected, so long as it is not evident from the wording or purpose of the measure that it shall only have future effect.[34]

The Community Court takes a more tolerant position to provisions that change legal conditions for a started enterprise that still has not been finalized. Thereby, the Court has accepted that repayment of EU funds to undertakings in connection with changes in already granted licenses, after the license is announced but before the actual exportation takes place.[35] Those cases that have been of current concern have involved payment systems tied to the Community's agricultural regulations.

Case 224/82, *Meiko-Konservenfabrik*[36] involved an agricultural measure regarding economic support/aid for the manufacture of cherry juice and support for EU producers in the area. The support was paid out for the purchase of berries that occurred before a certain time period every year and for which support was sought at a competent authority before a certain date. In this case, concerning a preliminary ruling according to Art. 177 of the Treaty of the Community Court held that the advance notice, through which the application date had been moved forward, was invalid. In its decision the Court reasoned (p.14) that through the action taken, the Commission had:

> "acted in breach of the legitimate expectations of the persons concerned, who, having regard to the provisions in force at the time the contracts were concluded, could not reasonably have anticipated the retroactive imposition of a time-limit for forwarding the contracts which coincided with the time-limit for their conclusion".

Also of interest is the case 246/87, *Continentale Produkten-Gesellschaft Erhardt-Renken*[37] on the imposition of an anti-dumping duty. In this case, a company's importation of cotton from Turkey was first charged a provisional anti-dumping duty by the Commission and thereafter a definitive anti-dumping duty through a legal provision. In the case, which also was a preliminary ruling, Renken claimed that the definitive anti-dumping duty acted retroactively by

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33 Case 98/78 Racke, *cited supra*, see p. 15.

34 Case 10/85, Milac GmbH, Gross- und Aussenhandel v. Hauptzollamt Lörrach, (1986) ECR 1027.

35 This type of situation has been extensively analyzed under the term "apparent retroactivity" by Schwarze, *op. cit.* p. 1121 ff.

36 Case 224/82, Meiko-Konservenfabrik v. the German Federal Republic, (1983) ECR 2539.

37 Case 246/87, Continentale Produkten-Gesellschaft Erhardt-Renken GmbH & Co. V. Hauptzollamt München-West, (1989) ECR 1151.

applying also to imports that had taken place previously, however not before the implementation of the provisional duty. The Court found that the measure was permissable,[38] however the reasoning is illustrative (p. 16):

> "It should further be noted that, . . . the definite introduction of a retroactive anti-dumping duty, although generally not allowed, is none the less permitted *inter alia* when the retroactive effect covers the period of application of the provisional anti-dumping duty introduced by an earlier regulation."

Since the Court found that the provisional duty had been somewhat higher than the definitive one and had been imposed somewhat earlier the Court reasoned: "Consequently, no unlawful retroactivity is involved."

This overview, which could have been considerably expanded, shows that Community law establishes a strict view regarding the permissibility of retroactive lawmaking and assumes that this cannot be permitted if detrimental to an individual legal subject. This principle is general[39] and lacks the primary limitation to criminal and tax law that characterizes Swedish law.

Where does this legal principle regarding a prohibition against retroactive lawmaking come from? Obviously, the Community Court has found support for the existence of such a general principle in the law of the member states. In this respect primary attention was probably paid to the law of the original member states, since the legal development within this area was well underway prior to Great Britain's, Ireland's and Denmark's membership in the EEC in 1973.

An important question arises to what degree Swedish courts and authorities must follow this Community legal principle when applying Community legal rules in Sweden. The matter can become especially pertinent during an application of community provisions, e.g., within the agricultural area. The starting point is that, when applying Community laws, national law-applying institutions become part of the Community legal system. This was made clear in the bill regarding Swedish EU membership where, among other things, the point was made that the Swedish courts shall secure the legal protection that follows from Community law.[40] The starting point must therefore be that the general legal certainty principles that apply within Community law, such as the main rule regarding a prohibition against retroactive legislation, shall also be heeded when Swedish courts apply Community law.

In practice, one may note the *Wachauf* case[41]. It concerned the question whether it was allowed, according to Community legal certainty principles, to

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38 A similar decision on an anti-dumping duty is case C-69/89, Nakajima All Precision Co. Ltd. v. the Council, (1991) ECR 2069.

39 The legal view is summarized in the following way in von der Groeben-Thiesing, *Kommentar zum EWG-Vertrag*, 4 Aufl, Nomos Verlag 1991 Band 4 p. 4989:

"Man wird daher eine Rückwirkung nur als zulässig ansehen können, wenn die Betroffenenen nach Treu und Glauben mit einem solchen Eingriff rechnen mussten. Abgesehen hiervon sind bestimmte rückwirkende Eingriffe absolut unstatthaft."

40 Governmantal Bill 1994/95:19, Sweden's membership in the European Union, part 1 p. 524.

41 Case 5/88, Hubert Wachauf v. the German Federal Republic, (1989) ECR 2609. One can also mention the cases 205-215/82, Deutsche Milchkontor GmbH v. the German Federal Republic, (1983) ECR 2633.

deprive, without compensation, a leasee his earlier right to payment for refraining from milk production. The Community Court pronounced:

> "…Community rules which, upon expiry of the lease, had the effect of depriving the leasee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with requirements."[42]

The topic has been analyzed in an interesting article by John Temple Lang.[43] On the basis of case law he draws the conclusion that when carrying out Community legal measures, for example, directives and when undertaking measures that affect rights that are legally protected by the Community or related to areas that are particularly regulated through Community legal rules, the member states are required to acknowledge Community principles regarding fundamental rights, including the legal certainty principles that have been developed.

In Swedish legal doctrine this matter has been observed by professor Hans-Heinrich Vogel, who maintains the importance of paying attention to the Community's general legal principles when applying Swedish administrative law. As a part of Community law these principles generally apply to all forms of implementation in Sweden and push aside, by their own force, Swedish legislation in situations of conflict.[44] Vogel's view is undoubtedly correct. During the first Swedish implementation phase, one has not always been aware of this.

4 The Supreme Administrative Court's Plenary Decision in 1996 Regarding Retroactive Legislation

As a consequence of Sweden's EU membership the Swedish legal situation concerning the view on the permissibility of retroactive legislation has changed, especially regarding the aforementioned obligation of Swedish courts and law-applying authorities to be aware of the general prohibition on retroactive legislation in their application of Community legal rules. However, the effect of Community law extends further than this and affects Swedish law as a whole.

The Supreme Administrative Court's plenary decision of May 31, 1996, a well known case, is here of fundamental importance. The case concerned the

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42 The subject was further developed by Advocate General Francis Jacobs' statement in the case (p. 22). He drew the conclusion: "Member States must be subject to the same constraints, in any event in the relation to the principle of respect for fundamental rights, as the Community legislator."

43 J. Temple Lang, *The Sphere in which Member States are obliged to comply with the General Principles of Law and Community Fundamental Rights Principles*, Legal Issues of European Integration 1991 p. 23 ff.

44 Vogel, *Förvaltningslagen, EG:s förvaltningsrätt och EG:s "allmänna rättsprinciper*", FT 1995 p. 249 ff., especially p. 257.

question of obligation by the company Klippan Finpappersbruk (Klippan) to pay the costs of environmental sanitation work.[45]

The circumstances of the case were briefly as follows. In the years 1965 – 1975 Klippan produced paper and pulp at Nyboholm's Mill at the lake Järnsjön in Emån's water system in South Sweden. In 1973 the Concession Board for Environmental Protection had given Klippan permission for its enterprise, along with certain attached conditions. There were no conditions regarding future sanitation measures. In 1975 Klippan transferred its enterprise to a different company Modo AB. When it later became noticeable that the water system had become polluted as a result of the discharge of PCP fibers, the Environmental Protection Agency, supported by Sec. 24 of the Environmental Protection Act, in 1991 claimed in front of the Concession Board for Environmental Protection, that Klippan should be enjoined to pay for a certain amount of the sanitation costs for cleaning up the Järnsjön - calculated to at least 6 mil. Swedish Kronor. The Concession Board then rejected the Environmental Protection Department's argument by referring to the fact that the enterprise was now carried out by another company.

The Environmental Protection Agency appealed the decision to the Government (the Ministry). The Government in turn held that Klippan's responsibility to remedy the problems associated with the company's earlier enterprise remained the same and that a duty to carry out restoration actions could be directed at Klippan. The Government therefore set aside the Concession Board's earlier decision. The Government hereby applied Secs 5 and 24 of the Environmental Protection Act, according to its wording after a statutory change in 1989. Through this change a sentence had been added to Sec. 5, according to which responsibility to repair damages remains even after an enterprise has been sold or closed down. No transition rules were proclaimed at the time of the statutory change.

Klippan petitioned the Supreme Administrative Court to review the Government's decision on legal grounds. After a survey of the statute and the statutory changes, the Court held that, prior to 1989, there had not existed statutory support to enjoin Klippan to contribute, after a transfer of the enterprise, to sanitation efforts in the Järnsjön. The issue was, therefore, whether the new regulation could be applied retroactively. The Court unanimously held that this was not possible and rescinded the government's decision.

The majority of the Court, argued, by way of introduction, that the main principle within administrative law is, according to the Court's earlier decision in RÅ 1988:132, that those measures shall be applied that are in force when the legal examination takes place and that this shall also apply to the consideration of complaints regarding decisions taken before the adoption of those measures that applied during the consideration of the complaint.[46] The Court, however,

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45 RÅ 1996:57.

46 This decision has been criticized by Wennergren in FT 1993 p. 285 f., who holds that the administrative courts as courts of appeal ought to perform legal control *ex-post* and not apply new legislation other than when it improves the individual's legal position.

held forth that this principle is not without exception and in this context made the following statement concerning European law:[47]

> "Furthermore, it has been the opinion within Community law – in reference to the proportionality principle and to the principle of legal certainty (or security) and the protection of legitimate expectations that, as opposed to changes in procedural rules, changes in rules related to substantive rights normally do not include circumstances dating back to the time prior to the adoption of such rules, other than in cases where it is clear in different ways – such as the wording of the rule – that a retroactive application has been intended. Also in such a case it is required that the legitimate expectations of the concerned parties have been rightfully respected."

In the remainder of the of the decision the Court argued that the basic point in private law legislation is as a rule that new legislation not affect legal acts that are entered into prior to the adoption of the statute. Within administrative law, however, the principle that was expressed in RÅ 1988:132 ought to continue. The Court furthermore stated: "It does not appear, however, as reasonable to apply a statute of the type actualized in the case retroactively to the disadvantage of the individual, in any case not unless this is stated in special transitional regulations or can be clearly deduced by the legal system in general that such an application is implied".

However, a minority of the five justices dismissed and had a considerably shorter and sharper argument. They pointed out that if the principle that was considered in RÅ 1988:132 should apply in cases such as the present one, it would open the way for all sorts of retroactive legislation. Such a legal application would conflict with general administrative law principles. The minority did not consider the importance of the lack of transitional rules.

With this plenary ruling Swedish law has arrived at a central legal decision regarding the permissibility of retroactive legislation, that has a burdensome effect to the individual. That the case was taken up in plenum in the Supreme Administrative Court is probably related to the fact that it expresses an important limitation of the principle established in the Court's earlier decision RÅ 1988:132.

In any case the Court's decision establishes the principle that retroactive lawmaking, to the detriment of an individual, may not be given retroactive effect without this being clearly supported by transitional rules. This corresponds to the position taken by the Community Court in the Milac[48] decision presented in section 3 above. However, the decision establishes a legal rule that previously has not been as clearly articulated in Swedish law.

Most likely, however, the judgment can lay the foundation for more extensive conclusions, even if the majority of the Court was satisfied to pronounce that retroactive application "*at any rate*" could not be accepted in the absence of special transitional rules. The citation in the court's decision of the Community Court is of special interest here. The Court most likely meant that legal

47 Translation by the author.

48 See note 32 above.

principles established within Community law merit special attention also by Swedish national law.

It is tempting to draw a parallel to the explicit manner in which the Supreme Administrative Court currently applies another legal certainty principle, namely the proportionality principle.

Previously it has been doubtful to what degree the proportionality principle has applied to Swedish law as a general legal principle.[49] However during 1996, the Court has referred to the proportionality principle in at least three reported cases, all having to do with the demand for restrictions by the authorities in permitted property use. With this the proportionality principle be considered firmly established in Swedish law.[50]

5 A New Swedish Legal Position

We have reached a new Swedish legal position regarding the permissibility of retroactive lawmaking outside the constitutionally protected areas. The general principle that substantive legal rules and measures which detrimentally affect the legal position of individuals and business enterprises may not have a retroactive effect is, after EU membership and the plenary decision by the Supreme Administrative Court, much more clearly a general legal principle in Swedish law than was previously the case. The constitutional prohibitions against retroactive penal and tax legislation ought to be seen as specifications of a more general principle. A lawmaker should observe greater care in deciding which general exceptions to the principle are available. Swedish courts and other law-applying institutions must observe the general legal principles of the Community law also when Community law appears during legal application at the national level.[51]

As a whole, Community law - both through its direct application in Sweden and through its effect on legal developments - should lead to a renaissance within Swedish law of general legal principles of a legal certainty nature. The European Convention on Human Rights will probably be exercising a similar legal influence. What has been said is supported by what was stated above regarding the Supreme Administrative Court's active application of the proportionality principle in new cases.

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49 See however H. Sundberg, *Allmän förvaltningsrätt* 1955 p. 120.

50 See RÅ 1996:40 re the expansion of a nature reserve, RÅ 1996:44 re beach protection and RÅ 1996:56 re prohibitions against tree plantation with support of the natural resource care statute. In all of the cases the Court judged in favour of the individual's interests.

51 See above at the end of Section 3.