

The Rule of Law in a State of Flux - The Swedish Tax Law Perspective

Teresa Simon-Almendal*

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* Teresa Simon-Almendal is a Professor in Tax Law at the Department of Law, Stockholm University. Email: teresa.simon-almendal@juridicum.su.se. I wish to deeply thank my colleagues, Mauro Zamboni, Torben Spaak, Roger Persson Österman, Peter Melz and Karin Åhman for their valuable discussions and comments on earlier drafts of this chapter. I am also most grateful to Professor Laura Carlson who has both commented on as well as proofread the chapter.

1 Introduction

The rule of law today across Europe is being contested. The state as governed by law, the *Rechtstaat*, is being politically disassembled in several countries. General principles concerning legality and legal certainty are marginalized and illiberal constitutionalism is gaining ground. This chapter, however, will not address these extreme developments, nor investigate how to counteract these anti-democratic forces. The subject here is less radical, as the chapter aims at exploring and analyzing whether the rule of law, within its Swedish tax law framework, is in a state of flux.

The background to this topic is the immense number of regulations recently promulgated at several levels, at least for the past 30 years, which are overwhelming the field of Swedish taxation law. Sweden is globally-known for its high taxes and welfare state, the latter constructed and maintained with taxes. Historically, as in many other countries, taxation in Sweden has had a central role for the entire political, social and economic structure. The modern welfare state, as we consider it after the Second World War, in many ways was constructed, built and paid for with taxes. During the post-war period, a rapid expansion of the tax system occurred in Sweden as in other countries in Europe in order to finance the extension of the public sector.¹ A value-added tax law was introduced, and the social security insurance-system was developed and in part assumed its character on the basis of taxes. The income tax area was also broadened and income tax rates heavily increased. Politically, the impact and dominance of the Social Democratic Party (which had been in political power for more than 50 years) have left deep traces in the general view of the concept of the welfare state and the meaning and purpose of taxes.

During the latest decades, though, with Sweden joining the EU in 1995 and due to digitalization, globalization, technological development and increased cross-border mobility, there has been significant pressure on the Swedish tax system. Many other countries are naturally experiencing the same. The maintenance of the welfare-system is particularly tax dependent,² while legal and societal developments, such as globalization, have led to new methods to avoid or minimize taxes. One of the greatest contemporary challenges is to secure the national tax base and to counteract far-reaching international tax planning. Additionally, economic crises, Brexit, climate threats, the pandemic and the Russian aggression war on Ukraine are putting the welfare state under pressure and have placed even more stress on the situation.

In order to meet contemporary challenges, the number of regulations of various kinds have been increasing, much due to initiatives taken by the European Union (EU) and the Organization for Economic Co-operation and Development (OECD). Anti-Tax Avoidance Directives, Base Erosion and Profit Shifting regulations, country by country reports, environmental taxes, carbon taxes, digital taxes, war taxes, company taxes, state aid rules, etc., are all

¹ See Sven-Olof Lodin, Gustaf Lindencrona, Peter Melz, Christer Silfverberg, Teresa Simon-Almendal and Roger Persson Österman, *Inkomstskatt, En lärobok i skatterätt, Del 1* (Lund 2021) 11-12.

² See Robert Pålsson, David Kleist, Pernilla Rendahl and Bo Svensson, *Grundläggande inkomstskatterätt* (Uppsala 2019) 30–31.

examples within the field of taxation, aimed to stop or minimize threats and challenges of different kinds. In Sweden there is an ongoing powerful Europeanization of national law. The EU “machinery” and the OECD are taking over more and more of the law-making in different areas, but most specifically as addressed here in the areas of taxation and financial regulation. All these rules and regulations are followed by sanctions, fines, and penalty fees amongst other economic consequences for those, individuals and companies, who break or misinterpret the rules. It is not an overstatement to say that at least the area of taxation is being flooded with new rules and directives.

Strong and powerful government authorities have emerged in Sweden in the past fifteen years, such as the Tax Agency and the Financial Supervisory Authority. These agencies do not limit themselves to only guiding the taxpayers through soft law mechanisms on how to understand and apply the law, but also, at their own initiative, submit proposals for new legislation. In addition, by law these agencies have the mandate to impose fees and other economic sanctions on those who violate the law.

These developments can be questioned from several different perspectives. On one hand, they raise questions about how to uphold the principles of equal treatment and predictability, when the legal material appears to be almost boundless and unmanageable. Other questions in the field of legal certainty and the rule of law concern how the legitimacy of the judicial system can be maintained, and proportionality in the application of the law ensured, when sometimes not only one, but several sanctions can be applied for the same act of non-compliance. On the other hand, these developments pose questions of a constitutional character. Powerful authorities, such as the Swedish Tax Agency, are growing and getting stronger at the expense of the legislature and courts. An interesting question, therefore, is whether this development is compatible with the principle of the separation of powers.

The following examines whether the rule of law, from a tax law perspective, in Sweden, is in a state of flux. The focus is narrowed to substantive and structural challenges, and provides an overview of what indeed are many different difficult questions. The contemporary making of tax law is described in the next part, while part three investigates the notable emergence in Sweden of a strong and powerful Tax Agency, proactively working to meet challenges of various kind. The rule of law in Sweden is analyzed in part four, going deeper into the question of whether this concept is in a state of flux. Issues with respect to legal certainty and the rule of law are highlighted in part five, with part six comprising the summary and conclusion.

2 The Creation of Tax Law Today

As mentioned above, national legal systems, at least within the EU and definitely as is the case in Sweden, are being flooded by new regulations, especially in the area of tax. As well as the countries themselves, the EU and the OECD promulgate and impose different kinds of regulations.³ The body of legal

³ It is estimated that more than 30 percent of the laws adopted by the Swedish parliament during the period of 1999-2008 had some kind of connection to the EU. Jane Reichel and

material is now so huge that one could ask whether it even is possible to find the law, when it is laid out like a puzzle with the pieces being the different directives and rulings. This places a significant burden on the authorities, judges, consultants and academics to identify, interpret and correctly apply the law.

Legitimate questions that arise therefore include whether this magnitude of rules is really necessary, and whether the rules actually hit the mark or just increase the administrative compliance burden for companies and individuals. The DAC 6 rulings can be used to illustrate this. These rules aim to combat tax evasion and avoidance by requiring tax advisors to submit to the tax authorities within the EU specific information about certain kinds of tax schemes being planned. These are complicated sets of rules requiring a thorough review of the company in question and its business partners with respect to tax planning transactions. Not filing the requested information, or misunderstanding what kind of information needs to be submitted, can lead to severe economic sanctions for the advisor (and their employer). However, after these rules were finally adopted, and after many companies had recruited specific personnel to exclusively work with the DAC 6 rules, it turned out that the rules were almost never applicable, as the companies in fact very seldom arranged that kind of reportable transactions.

The DAC 6-example illustrates the risk of potentially unnecessary and administratively oppressive rules coming from the EU. Another type of rules entering into the national sphere externally, are those rules that are implemented as a result of multilateral conventions being transformed into national law. This is the case with OECD's Pillar I and II, agreements between 137 states on new rules for taxation of corporate income, with, inter alia, a focus on challenges in the digital economy. These rules are, maybe, (much is yet to be clarified with respect to these rules) optional, but if a state chooses to adopt them, this has to be done in a certain way and through certain rules.

These two examples briefly illustrate the impact of the EU and the OECD on Swedish tax law. Neither the EU nor the OECD in principle have the mandate and right to make tax law. For centuries this power has rested with the nation state under the concept of "no taxation without representation".⁴ This concept embraces the cornerstone for democratic legitimacy, with respect to the power to tax. This national parliamentary legislative system however now seems to be challenged by external forces. The EU and the OECD have already been mentioned, but in addition, international cooperations, resulting in unifications

Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) SIEPS 2020:5, 29. A fair guess would be this percentage is nowadays even higher.

⁴ The phrase, "No taxation without representation" originated during the American Revolution, expressing one of the primary grievances of the American colonists against Great Britain. See for example, James Otis, *Rights of the British Colonies Asserted and Proved* (1765): "The very act of taxing, exercised over those who are not represented, appears to me to be depriving them of one of their most essential rights, as freemen; and if continued, seems to be in effect an entire disfranchisement of every civil right."

of tax rules,⁵ combined with global ambitions in the fiscal field,⁶ are changing the procedures and the processes for lawmaking in the field of tax. It is (still) true that the right to impose taxes rests within a nation's competence. But to some extent, nations in different ways have delimited their freedom to tax through supranational or intergovernmental obligations, for instance through conventions or agreements or by regional memberships such as the EU.⁷ A supranational tax law, to a certain extent, can be argued as emerging.⁸ From the Swedish perspective, this is obviously the case when it comes to VAT law, governed by EU law, particularly the EU VAT directive.⁹ The same can be said about the area of tax proceedings and procedural guarantees, where the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union have had a deep impact on Swedish legislation. Other signs of supranational tax law emerging are the double taxation agreements,¹⁰ as well as the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI).

Overall, at least in Sweden, and particularly in the area of taxation, one can detect a slight legislative shift of power, bit by bit, to bodies other than the parliament. In this light, the question arises whether there is, from at least the Swedish perspective, a movement towards fiscal polycentrism. Polycentric law

⁵ See for instance, FAR (The Institute for the accountancy profession in Sweden, *Föreningen Auktoriserade Revisorer*, far.se) cooperates with international and global industry representatives in the development of regulations, such as IFAC (International Federation of Accountants), ACE (Accountancy Europe) and NRF (Nordic Federation of Public Accountants). FAR also cooperates with standard setters such as IAASB (The International Auditing and Assurance Standards Board) and IESBA (The International Ethics Standards Boards for Accountants).

⁶ The Swedish Tax Agency (*Skatteverket*, skatteverket.se) cooperates for instance with tax authorities in many other countries and in several international forums. The cooperation is both operational and strategic. It involves, among other things, exchanges of information with other countries in order to determine the correct tax and to fight tax frauds and crimes. The strategic cooperations are also, for example, about exchanges of experiences and working together in taxation matters with other countries. In addition to that now said, the Swedish Tax Agency works together with several organizations, such as the EU, OECD, IOTA and the Nordic Agenda and it participates in the Swedish Aid Program and thereby contributes to strengthening the capacity of the tax administration in developing countries. For this information, see Skatteverket, 'Om-oss, Samverkan, Internationell Samverkan' available at Skatteverket.se, last accessed 8 January 2023.

⁷ See Cécile Brokelind, 'The Power To Tax in International and EU Tax Law: Who is sitting Behind the Wheel?' in Johan Lindholm and Anders Hultqvist (eds), *The Power to Tax in Europe, Swedish Studies in European Law*, Volume 14 (Hart Publishing 2023) 191-205.

⁸ See Anders Hultqvist, 'Internationell interaktiv rättsbildning i skatterätten' (2014) *Skattenytt* 79 and compare, Martin Berglund, *Avräkningsmetoden, En skatterättslig studie om undvikande av internationell dubbelbeskattning* (Uppsala 2013) where Berglund develops the concept of transnational taxation.

⁹ For the use of the concept parallel law-making, see Pernilla Rendahl, 'Ny skatt på digitala tjänster – Ett steg mot en mer rättvis beskattning inom EU:s inre marknad' in Antonina Bakardjieva Engelbrekt, Anna Michalski and Lars Oxelheim (eds), *EU och teknologiskiftet, Europaperspektiv 2020* (Santérus Förlag, 2020). See also Pernilla Rendahl, *Konsumtionsbeskattning av digitala tjänster – Forskningsrapport* (SNS förlag 2021).

¹⁰ See Johanna Wheeler, 'Tax Treaties: What Are We Going to Do with Them?' (2021) *Bulletin for International Taxation*, Volume 75, No. 11/12.

is a theoretical legal structure in which different “providers” of legal systems compete or overlap in a given jurisdiction, as opposed to monopolistic statutory law, according to which there is one sole provider of law for each jurisdiction.¹¹ Devolution of this monopoly occurs by the principle of jurisprudence in which they rule according to a higher law. Polycentrism, on the other hand, implies that the rules are applicable horizontally without any internal hierarchy. From a tax lawyers’ perspective, polycentrism consequently is what we see when different types of rules, originating from different kinds of sources and bodies, such as the EU, the OECD, etc., operate and are applicable at the same time in certain areas within the state. The field of tax law and tax matters are typical areas for this kind of competing rules. The notable effect of this is that which can be referred to as a form of “de-nationalization” of the law.

3 The Emergence of a Strong and Powerful Tax Agency

A notable shift of power can be traced, not only when it comes to handing over lawmaking and fiscal mandates from the state to external bodies. A powershift is also apparent with respect to the doctrine of the separation of powers within the state, where a significant trend in Sweden is the emergence of strong and powerful authorities, with, in some cases, as an effect, a decreasing power and mandate of the parliament and courts. This development to a large extent is due to the Europeanization of Swedish law. One example as mentioned is the Swedish Tax Agency. It is deeply involved in the tax law making processes, which can partly be explained by the fact that the Agency implements many of the EU-directives that have been adopted, but is also due to the condition that the Tax Agency, through and because of EU-membership, takes part in the EU-lawmaking procedure.¹²

As well known, state power is shared under the separation of powers doctrine in order to prevent the (mis)use of powers.¹³ The doctrine refers to the division of state power, and government, into different branches, each with separate, independent powers and responsibilities, so that the powers of one branch are not too dominate and do not conflict significantly with those of the other branches.¹⁴ The typical division is three branches: the legislature (Parliament in the case of Sweden), the executive (the Government/Prime Minister and executive agencies) and the judiciary (the courts), referred to as the *trias politica* model. The intention behind the doctrine is to prevent the concentration of power by providing for checks and balances.¹⁵ The doctrine of separation of

¹¹ See Mark Stephan and Graham Roy Marshall, ‘An Introduction to Polycentricity and Governance’ in Andreas Thiel, William A. Blomquist, Dustin E. Garrick (eds), *Governing Complexity: Analyzing and Applying Polycentricity* (Cambridge University Press 2019). 21-44.

¹² See also footnote 6, *supra*.

¹³ See for example, John Locke, *Two Treatises of Government* (1689) where the doctrine of separation of powers is espoused so that power is shared for freedom to be preserved.

¹⁴ See Charles-Louis De Secondat Montesquieu, *De l’esprit des Lois* (1748). See also SOU 1999:76, Demokratiutredningens forskarvolym I, *Maktdelning*.

¹⁵ See Charles-Louis De Secondat Montesquieu, *De l’esprit des Lois* (1748).

powers is, as this author views it, a necessary prerequisite for implementing the rule of law and to have a state governed by law.

However, at least from what is happening and seen in Sweden, new economic and societal conditions, such as globalization and digitalization, have led to an increasing complexity with respect to new and more regulations and have, as mentioned above, pushed forward and opened up the gate for forceful and strong authorities in order to meet contemporary challenges. This can partly be explained by the legislature/parliament falling behind because of its lengthy legislative process, but partly also by the fact that the courts, which have to assess contemporary challenges such as different kinds of tax driven transactions, come into the process at a later stage. Often the taxpayer alone, or with the support of experts and advisers, has to navigate through the complex tax law materials. The taxpayer is frequently in need of guidance when it comes to understanding tax law and being able to determine under which rule an economic transaction should be categorized.

The Swedish Tax Agency, at its own initiative, has taken the role of helping and guiding taxpayers through the vast set of tax law rules when needed. This help is provided in different ways. Normally, a taxpayer can easily contact tax administrators by calling or emailing questions. The Agency also works proactively by using its website and different information campaigns in order to prevent taxpayers from filing incorrect information and thereby incurring economic penalties and fines for wrongdoing. The proactive mode of conveying information about the interpretation and application of tax law, explaining and providing detail, and thereby giving the law a comprehensive and uniform content, in addition to benefitting taxpayers, also generates an amount of soft law rulings.¹⁶ These can be recommendations of different kinds, governing documents, guidelines and instructions on how the tax law should be interpreted and applied, as well as articles and interviews of a more political nature with Agency representatives, aiming to influence the general tax moral.¹⁷

The Swedish Tax Agency has gone in a relatively short time, about fifteen years, from being a quite unpopular tax collector, working reactively with fines and sanctions when finding incorrect information in income tax declarations, to now being the most popular Swedish governmental agency,¹⁸ with a focus on a friendly and proactive approach when in contact with taxpayers.¹⁹ This change in perception is much due to the proactive approach, which has been fruitful and

¹⁶ See Robert Pålsson, *Riksskatteverkets rekommendationer – allmänna råd på skatteområdet* (Uppsala 1995) 32 and Robert Pålsson, 'Skatteverkets styr signaler – en ny blomma i regelrabatten' (2006) *Skattenytt* 404.

¹⁷ See the editorials by the former director-general for the Swedish Tax Agency, Ingemar Hansson, 'Skatt är en styrelsefråga' (18 October 2015) *Dagens Industri* and 'Skatteplanering är en varumärkesfråga' (29 December 2013) *SvD*. It has been argued that these politicized activities go far beyond the proper tasks of a government authority.

¹⁸ During the years 2017-2021, the Tax Agency scored number one in the national annual ranking of the most popular authorities in Sweden. See *Företagarna*, 'Myndighetsrankingen 2021, Vad tycker småföretagare om Sveriges myndigheter?' September 2021.

¹⁹ See for the historical background to the Tax Agency and its former governance, Roger Persson Österman, 'Något om alternativa former för att ge skattskyldiga rättssäkerhet och rättstrygghet i skattefrågor – en teoretisk och praktisk studie av ett amerikanskt och ett svenskt förfarande' (2022) *LawPub*, 8-13.

very successful when it comes to earning trust and confidence in tax collection. The proactive approach, the result of a thorough internal reform, aims to meet and help taxpayers with tax issues in a proactive and friendly manner.²⁰ The organizational efforts for this change in attitudes and increased public confidence has even turned into the slogan “A Proactive Tax Agency!” The overall aim with this proactive approach is to aid and assist taxpayers in doing right, instead of reacting retrospectively, when filing errors have already occurred: “It should be easy to do right and difficult to do wrong”.²¹ Another famous slogan is “The right tax in the right way”,²² meaning that tax should be imposed with respect for the constitution, and that no one should pay more or less tax than that which is in line with the law. The Agency’s vision for today is “Together we make society possible.”²³

The Tax Agency’s internal service-oriented work with values and good treatment of taxpayers has been influenced by the principles of new public management, making their services more businesslike and improving efficiency by using private sector models. A focus on approaches such as customer satisfaction, customer service etc., can be identified.²⁴ One illustrative example is from a presentation held by the director-general for legal affairs for the Tax Agency, where he explicitly stated that amongst the prioritized areas for the Agency is the “customers contact with the Tax Agency” (emphasis in original).²⁵

With this said, the popular Tax Agency is still the investigating and deciding party vis-a-vis the taxpayer. Despite this friendly-approach, the Agency is the opposing and often stronger party relative to the taxpayer. When the Tax Agency interprets and applies existing tax law given the certain circumstances in each case, it must be underscored that this is done from its fiscal perspective. In the event the case is unclear, the Tax Agency often gives itself the right of interpretation, and it is not unusual for the Agency to submit proposals as to new rulings when it finds the existing ones, or absence of rulings, unsatisfactory or insufficient. This is in fact one of the core tasks for the Agency, which amongst other assignments, is to work for adequate law reforms as seen from the

²⁰ See Anders Stridh and Lennart Wittberg, *Från fruktad skattefogde till omtyckt servicemyndighet* (Göteborg 2015).

²¹ See Skatteverkets strategiska riktning, October 2020, diarienummer 8–519872. See also Anders Stridh and Lennart Wittberg, *Från fruktad skattefogde till omtyckt servicemyndighet* (Göteborg 2015) 51.

²² See Skatteverkets strategiska riktning, October 2020, diarienummer 8–519872. See also Anders Stridh and Lennart Wittberg, *Från fruktad skattefogde till omtyckt servicemyndighet* (Göteborg 2015) 49.

²³ See Skatteverket, *Vår verksamhet, Styrning och uppföljning*, www.skatteverket.se, accessed 8 January 2023.

²⁴ See for instance Skatteverkets strategiska riktning, October 2020, diarienummer 8–519872, 15 with the heading *Vi bidrar med förutsättningar i kundens miljö*. See also Roger Persson Österman, ‘Något om alternativa former för att ge skattskyldiga rättssäkerhet och rättstrygghet i skattefrågor – en teoretisk och praktisk studie av ett amerikanskt och ett svenskt förfarande’ (2022), LawPub, 4-7.

²⁵ The tax seminar, Aktuellt på Skatteverket with Michael Erliksson, held at Stockholm Centre for Commercial Law, Stockholm University, 27 May 2021.

Agency's perspective.²⁶ One way to achieve this is to clarify the meaning of the tax law and hereby reduce possible interpretations.²⁷ The overall aim is to attain an equitable and uniform application of the law. The Tax Agency has thus been given the mandate to identify and propose new rulings, even though, in the end, it is the Government that decides what proposals will go further. The Ministry though frequently listens to the Tax Agency and follows its proposals.

The Agency's proactive way to identify gaps in the rulings and its attempts to propose new rules to meet, for instance, new tax planning schemes, places the Agency in the role of a quasi-lawmaker. It can also be noted, that on a significant number of occasions in recent years, the Tax Agency has reacted instead of the legislator when it comes to the understanding of the precedents of the Court of Justice of the European Union, and has declared that certain Swedish tax rules were incompatible with EU-law and thus not could be applied.²⁸ The Tax Agency, in these cases, accordingly has taken upon itself the role and function of a constitutional court,²⁹ a type of court that does not exist in Sweden.

The development sketched above, in this author's view, implies a power shift from parliament to an executive agency. Due to the Europeanization of Swedish law, power has consequently shifted from the parliament and government to the courts and authorities.³⁰ At least with respect to the Tax Agency, the role of the Agency has changed, and its position has been clearly strengthened.

4 Is the Rule of Law in a State of Flux in Sweden?

The rule of law as a concept is not universally defined.³¹ It embraces several principles, most aiming to protect the citizenry from the arbitrary use of the coercive power of the state as exerted through law.³² To achieve this, legal

²⁶ This follows implicitly from the letter of fiscal appropriation drafted by the Government addressed to the Tax Agency, *Regleringsbrev för budgetåret 2022 avseende Skatteverket*.

²⁷ Actually, one of the core tasks for the Tax Agency is, by its own interpretation, to clarify tax law and hereby reduce the possibilities for interpretation. See Robert Pålsson, 'Skatteverkets styr signaler – en ny blomma i regelrabatten' (2006) *Skattenytt* 402 and 409.

²⁸ Due to the EU-law doctrine of administrative direct effect, the Tax Agency actually has the duty to set aside Swedish law that is in conflict with EU-law. See Case C-103/88 *Costanzo*, ECLI:EU:C:1989:256 (direct effect of directives with respect to administrative authorities).

²⁹ See Robert Pålsson, 'Skatteverkets styr signaler – en ny blomma i regelrabatten' (2006) 425.

³⁰ See Jane Reichel and Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) *SIEPS* 2020:5 63.

³¹ The universal recognition of the merits of the rule of law has in no way been accompanied by a universally accepted definition of it. On the contrary, different people mean very different things when employing the term. See Jörgen Möller and Svend-Erik Skaaning, 'Systematizing Thin and Thick Conceptions of the Rule of Law' (2012) *The Justice System Journal*, vol. 33, no 2, 136.

³² See Albert Venn Dicey, *The Law of the Constitution* (OUP reprint 2013). Dicey's first principle of the rule of law was that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.' Dicey's second principle of the rule of law concerns equality: 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'. For other theoretical approaches as to the rule of law, see for example, Joseph Raz, 'The Rule of Law and its

systems are modelled in such way that the interpretation of the legal norms is foreseeable, that similar cases are treated equally, that there are legal norms protecting private property and that there is access to justice. The concept rule of law therefore encompasses principles such as equality before the law, the right to a fair trial, access to justice and independent judges and the sovereignty of parliament. In this context though, the concept rule of law is used with reference to a state governed by law, that is what the Germans call *Rechtsstaat*, a “constitutional state” in which the exercise of governmental power is constrained by the law.³³ It is closely related to constitutionalism and is often tied to the Anglo-American concept of the rule of law, even though it also differs from it by emphasizing what is just, i.e., a concept of moral rightness based on ethics, rationality, law, religion or equity.³⁴

The rule of law in the sense of a state governed by law can be viewed from different perspectives. One way to approach the concept is to differentiate between what is known as thin and thick perspectives.³⁵ There is a long tradition in Sweden of viewing the rule of law from a strictly formal point of view, the thin perspective. As can be seen in Europe and within the EU, a more material/substantive perspective can be identified, which can be referred to as a thick perspective of the rule of law. This broader view is reminiscent of the understanding of the *Rechtsstaat* as it implies that the legal norms have to be, not only formally binding, but also morally acceptable, for instance by respecting human rights as Bingham argues in his conception of the rule of law.³⁶ The distinction formal/thin and material/thick thus stands on the requirement of a moral content in the (legal) norms.

In the formal meaning of the rule of law, the thin perspective, “law” is understood as, and synonymous with, written law, law as it stands, that is rules of different kinds.³⁷ This view of the rule of law must be understood

Virtue’ (1977) 93 LQR 195; Robert Unger, *Law in Modern Society* (Free Press, 1976) 176-181, 192-223; Ronald Dworkin, *A Matter of Principle* (1985) 11-12; and Tom Bingham, *The Rule of Law* (Penguin 2011).

³³ For a definition of *Rechtsstaat*, see Carsten Bäcker, ‘*Rechtsstaat*’ in Mortimer Sellers and Stephan Kirste (eds) *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2020).

³⁴ See András Sajó and Renáta Uitz, ‘The Rule of Law and Its Executors’ in András Sajó and Renáta Uitz (eds), *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, (Oxford University Press 2017) 308-314.

³⁵ See Jörgen Möller and Svend-Erik Skaaning, ‘Systematizing Thin and Thick Conceptions of the Rule of Law’ (2012) *The Justice System Journal*, vol. 33, no 2, 136-53. See also Brian Z. Tamanaha, ‘A Concise Guide to the Rule of Law’ in Neil Walker and Gianluigi Palombella (eds), *Relocating the Rule of Law* (Bloomsbury 2009) 3. See also Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory* (Cambridge University Press 2007) 102-113. Compare Gülriz Uygur, ‘The Rule of Law: Is the Line Between the Formal and the Moral Blurred?’ in Immer Flores and Kenneth Himma (eds), *Law, Liberty, and the Rule of Law* (Springer 2013) 113-118.

³⁶ See Tom Bingham, ‘The Rule of Law’ (2007) 66 CLJ 67, 739-740.

³⁷ See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 211; and Jörgen Möller, ‘The Advantages of a Thin View’ in Christopher May and Adam Winchester (eds.), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 21-33.

institutionally, so to say that it governs who decides the law, whether it be the parliament, the courts, the authorities, etc.³⁸ The formal perspective of the rule of law implies rigidity when it comes to the interpretation and application of the law. The letter of the law is what is to be applied, and the space for a principle-based application of the law is limited. With this approach to the rule of law, the authorities are upholding a central position when it comes to interpreting and applying the law.³⁹ It is transmitted to the authorities to realize the aim and purpose of the law. The courts, on the other hand, will, in this formal way of looking upon the rule of law, receive a more limited role, more or less merely to review and ensure that the authorities respect different kinds of procedural requirements and prerequisites such as time limits, party insight, communication, etc.⁴⁰

The thick perspective of the rule of law opens for a broader view of what constitutes the “law”. This perspective is more structural in its character, meaning that it provides room for interpretation as to how the law is to be formulated and structured.⁴¹ This more material/substantive-oriented perspective implies that “law” is defined not only as rules, but also as principles and rights.⁴² With this view, the courts assume a central position when it comes to clarifying the purpose of the law and interpreting and applying it.⁴³ In addition, with this thick/material/substantive understanding of the rule of law, courts often get, or take, a more creative role when interpreting and applying the law, they make law as they point out certain fundamental principles and rights within the legal framework, which are to be respected and upheld.⁴⁴

For different historical reasons, such as the deep impact and meaning of the welfare state, the fairly homogenous population, the dominance of the Social Democrat Party for over half a century, etc., a thin/formal perspective on the rule of law has been kept and maintained in Sweden.⁴⁵ Traditionally there has been

³⁸ See Nishigai Konatsu, ‘Two Types of Formalism of the Rule of Law’ (2022) *Oxford Journal of Legal Studies*, Volume 42, Issue 2, 496-519.

³⁹ See, e.g., Joseph Raz, ‘The Law’s Own Virtue’ (2019) *Oxford Journal of Legal Studies*, Volume 39, Issue 1, 7-8.

⁴⁰ See András Sajó, ‘The Rule of Law’ in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 264-265. See, e.g., Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press 2012) 83-96.

⁴¹ See Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467; and Adriaan Bedner, ‘The Promise of a Thick View’ in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 34-47.

⁴² See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 91.

⁴³ See András Sajó, ‘The Rule of Law’ in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 263.

⁴⁴ See also Jane Reichel and Karin Åhman, ‘Tjugofem år av Europarätt i Sverige’ (2020) *SIEPS* 2020:5 52.

⁴⁵ See Stig Strömholm, ‘Uppsalaskolan och konstitutionens normativitet’ in Eivind Smith (ed), *Grundlagens makt: Konstitutionen som politiskt redskap och som rättslig norm* (SNS Förlag

a distinct show of loyalty by the courts to the legislator when interpreting the law. Until 2010 a court could only find a law in violation of the constitution on its face and only in the case in hand. The courts seek guidance with respect to interpreting the law in the legislative preparatory works.⁴⁶ The consequence of this has been a tight connection and a high compliance between the courts and the legislature. As stated above with respect to the Tax Agency, public authorities have had, and still have, great power in interpreting and applying the law, and the role of the courts has been, and still is, more limited. This limited role of the courts, though, is now evolving into something different. From this author's perspective, the rule of law as applied in Sweden is in transition. More or less since the Swedish EU membership in 1995, there has been a discernible shift, a slight movement within the state, towards a thicker view of the rule of law. At least three noticeable factors working in this direction can be identified.

Firstly, the ongoing *Europeanization* of national law must be pointed out. The impact of the EU on the member states' legal systems cannot be underestimated. By way of example, even though the EU does not have the formal power to tax, its initiatives and measures with respect to minimizing harmful tax competition, tax evasion, tax fraud, aggressive tax planning and tax avoidance schemes etc., have had a deep influence on the Sweden legislature. Take for instance the impact of the State Aid Rules and The Anti-Tax Avoidance Directives, which all have been used in order to combat and eradicate the incentives for tax base erosion and "race to the bottom" transactions when it comes to offering on the nation-state-base level the lowest corporate tax within EU.

But more intriguing, with regard to the rule of law, is the right-based principle thinking that characterizes the interpretation and application of the law by the European judges and courts. In Sweden this has led to a deep impact of the concepts of rights,⁴⁷ whether legally enacted or not. This is distinctly the case when it comes to tort and tax law. Rights of different kinds have become relevant as principles of law, and these affect the decisions of the Swedish authorities and courts. By way of example, the Swedish tax procedure rules have been much modified and reformed by the influence of the European Convention on Human Rights and the case law of the European Court of Human Rights and the Court of Justice of the European Union. During the 2010s, the understanding and application of European law in Sweden led to an outright "uprising" within the judiciary, with some judges endorsing one understanding and interpretation of the European case law, and others a totally opposite one, with the effect of a complete unpredictability for taxpayers as to the meaning and application of the law.

2002) 35–41; and Aleksander Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Norstedts Juridik 1995) 46-47.

⁴⁶ The importance of the Swedish legislative preparatory works, due to Europeanization, has decreased. Instead, new legally relevant sources of law, such as non-binding documents from Swedish and different European authorities have been added to the accepted hierarchy of legal sources. See Jane Reichel and Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) SIEPS 2020:5 62.

⁴⁷ See also Jane Reichel and Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) SIEPS 2020:5 62.

This “judicial rebellion” can be seen as a sign of Europeanization and of the shift within Sweden to a thicker perspective on the rule of law, for as in the European context, the courts have a fundamental function and a much more independent role now than in the Swedish historical legal tradition. The “rebellion” and subsequent legal discussions were actually brought to a head in the debate about how to interpret the *ne bis in idem*⁴⁸ statute in the seventh amendment to the European Convention on Human Rights (article 4.1).⁴⁹ The debate finally ended in 2016 with the Swedish Parliament adopting new rules clarifying the law.⁵⁰ All this was very unique in such a small and normally consensus-oriented country like Sweden. A new focus on taxpayer rights has occurred in Sweden in the wake of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. In the tax field, Swedish voices have even been raised for the development of a Taxpayers’ Bill of Rights.⁵¹

The second factor working in the direction of a thicker perspective on the rule of law is globalization. As mentioned above, the EU and the OECD have stepped forward as regulatory giants, not least when it comes to preventing and stopping harmful tax planning and base erosion, which, in turn, often are the effects of the possibilities opened up by globalization. Globalization has had, as developed above, a deep impact on Swedish tax law and has resulted in polycentrism. As defined, polycentrism implies several normative sources of law colliding with, or affecting, national law in such manner that national law, in order to adapt to “the outside systems”, is even created and renewed by influences from other normative legal systems. Sometimes this even gives rise to complete legal transplants.

An illustrative example from the Swedish tax context is the introduction of the ‘horizontal monitoring-processes’, starting with and introduced by the Netherlands in 2005.⁵² The process can briefly be explained as a cooperation between the tax agencies and certain appointed taxpayers, normally big international companies.⁵³ In a general framework, it is a voluntary scheme or program, to which taxpayers can adhere, through the signing of an agreement by

⁴⁸ The *ne bis in idem* principle, in simple terms, is a criminal law principle under which a person cannot be punished and be subject to several procedures twice for the same facts. The principle thus pursues to avoid double prosecutions and double punishments.

⁴⁹ See RÅ 2009 ref. 94; NJA 2010 p. 168 I and II; NJA 2011 p. 44; NJA 2013 p. 502; and HFD 2013 ref. 71 together with C-617/10, *Åkerberg Fransson*, EU:C 2013:280 and *Lucky Dev v. Sweden*, (7356/10), 27 November 2014.

⁵⁰ See the Swedish Legislative Bill, prop. 2014/15:131, *Skattetillägg: Dubbelprövningsförbudet och andra rättssäkerhetsfrågor*.

⁵¹ See for instance Katarina Fast, ‘Taxpayers’ Charter – ett alternativ för Sverige?’ (2009) *Skattenytt* 721–733. Compare United States Internal Revenue Service Publication 5170, *The Taxpayer Bill of Rights* (2014).

⁵² See Esther Huiskers-Stoop and Hans Gribnau, ‘Cooperative Compliance and the Dutch Horizontal Monitoring Model’ (2019) *Journal of Tax Administration*, vol.5:1, 66-110. See also Dennis De Widt, ‘Dutch Horizontal Monitoring: The Handicap of a Head Start’ (2017) *FairTax Working Papers Series No. 13*.

⁵³ See Dario Gonzalez, *The inspection of large Companies: the cat and mouse strategy or the Horizontal Monitoring Model* (CIAT blog 2020), www.ciat.org, accessed 8 January 2023.

which they undertake to share their planning with the tax agencies to allow access to their systems, to adopt rigorous internal control measures and in return have an individualized and specialized team in their interactions with the tax agencies and prompt responses to their inquiries. The companies obtain tax certainty for their operations, a good taxpayer image and commit themselves within a framework of trust to a voluntary, transparent and accurate fulfillment of their tax obligations, while the tax agencies are ensured detailed knowledge of the corporate operations and a check on its tax planning.⁵⁴

In the event these corporate taxpayers fulfill the conditions for the cooperation, they accordingly receive a sort of “fast track” into the tax agency, and when there, special assistance, guidance and treatment from the agency administrators when discussing their tax positions and filing tax returns. This potential legal transplant, however, was met with resistance in Sweden, as it appeared to be in conflict with the constitution resulting in, inter alia, perceptions of unequal treatment.⁵⁵

Another example of globalization within the fiscal area is the global cooperation between tax authorities all over the world, which has led to a profound change in the modus operandi when it comes to gathering information about the taxpayer revenues. For the past decade, facilitated by new digital techniques and digitalization, multilateral agreements concerning, inter alia, the exchange of income information, have been signed globally, with the effect that there are very few tax ‘havens’ and ‘paradises’ left in the world. This cooperation is both operational and strategic.⁵⁶ It involves, as mentioned, exchanges of information with other countries in order to determine the correct tax and to fight tax frauds and crimes, but also implies exchange of experiences. Overall, the collaboration implicates that tax authorities globally work together in taxation matters. In addition, the Swedish Tax Agency works together with several organizations, such as the EU, OECD, IOTA and the Nordic Agenda in matters relating to tax, and it participates in the Swedish Aid Program and thereby contributes to strengthening the capacity of the tax administration in developing countries.⁵⁷

Other signs of globalization in the area of taxation are the global initiatives to new laws and regulations by private actors, such as lobbying organizations, law firms, accounting and auditing firms, etc.⁵⁸ These actors often collaborate and interact with each other globally when it comes to achieving a desirable

⁵⁴ See Dario Gonzalez, *The inspection of large Companies: the cat and mouse strategy or the Horizontal Monitoring Model* (CIAT blog 2020), www.ciat.org, accessed 8 January 2023.

⁵⁵ See Robert Pålsson, ‘Fördjupad samverkan/horizontal monitoring i svensk offentliggrättslig miljö’ (2012) Rapport, Svenskt Näringsliv; and Ulf Bernitz and Jane Reichel, ‘Effektivitet eller legalitet? En bedömning av Skatteverkets nya samarbetsformer’ (2015) Rapport, Svenskt Näringsliv. See also Lotta Björklund Larsen, Karen Boll, Benedicte Brögger, Jaana Kettunen, Tuulia Potka-Soininen, Jukka Pellinen, Mette Brehm Johansen, and Kiran Aziz, ‘Nordic Experiences of Co-Operative Compliance Programmes: Comparisons and Recommendations,’ (2018) FairTax WP-series, No. 20.

⁵⁶ See footnote 6, *supra*.

⁵⁷ Id.

⁵⁸ See for instance FAR, footnote 6 *supra*, which cooperates with international and global industry representatives in the development of regulations.

interpretation and application of the law in certain tax issues. A now very well-known example is the application of the tax law in the cases of private equity and carried interest, where the Swedish solution finally, after years of proceedings, turned up to differ from the UK approach.⁵⁹ The same sort of opinion formation can be said about the Tax Agency itself, who often, as mentioned above, gives itself precedence in interpreting the tax law and whose soft law generating activity is becoming more and more important and intense. All these illustrating global imprints from the Swedish tax context indicate, as the author of this chapter sees it, a transfer within Sweden from a thin to a thicker, more substantive, view on the rule of law.

The third factor implying the emergence of a thicker perspective on the rule of law, is the fact that Sweden has moved/is moving from a legal monoculture to a legally-dynamic multicultural society. Sweden has for centuries been a quite isolated small fairly homogenous society in northern Europe, when it comes to population, ethnicity, culture, politics, values, etc. Under these conditions law has had an implementing role with respect to morals and values. The fragmentation of society and the contemporary emergence of (multi)pluralism, combined with the challenges following wars, pandemics and epidemics, economic crises, bleeding tax bases, climate threats and other factors putting the welfare state under pressure, have, though, deeply influenced the law and law making. Today, the law's role has gone from carrying out what in Sweden has been embraced as common values to being a tool for resolving conflicts between contradictory value systems.⁶⁰ The different, and often unexpected, societal problems and legal questions arising from this dynamic multicultural society just cannot be handled simply with only the letter of the law. A principle- and right-based application is often needed in order to evaluate different interests and different values. In this regard, European law has had a deep effect when it comes to giving fundamental rights and general principles of law a more prominent role in the Swedish application of the law.⁶¹ In European law, principles, enacted or not in law, often form the basis for the application of law. In recent years Swedish courts to a greater extent appear to have taken up a principled approach to the law, and it has become more common to consider general principles in application of the law.

5 Legal Certainty and the Rule of Law

As stated above, at least three factors, Europeanization, globalization and the emergence of a legally dynamic multicultural society, indicate that the rule of law is in transition in Sweden. This development, as depicted here, concerning

⁵⁹ See HFD 2018 ref. 31.

⁶⁰ See Mauro Zamboni, 'The Positioning of the Supreme Courts in Sweden -A Democratic Oddity?' (2019) 15 *European Constitutional Law Review* 686-687. See also Jane Reichel and Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) *SIEPS* 2020:5 64, who states that overall principles have become more important since the weight attributed to the legislative preparatory works has diminished, which places the responsibility for weighing the interest of different groups on the courts, rather than on the legislature.

⁶¹ See Jane Reichel and Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) *SIEPS* 2020:5 52.

the creation of tax law and the understanding of the rule of law in Sweden, is characterized however by a number of issues with respect to legal certainty and the rule of law. The now large number of regulations, due to legal polycentrism, working horizontally and/or vertically, sometimes impinging and cancelling each other out, sometimes hitting the same phenomena and sometimes missing what they are supposed to regulate, are cumbersome and lead to an unhappy lack of predictability for taxpayers and the different actors within the legal system. Lawyers from all categories also argue that they are overwhelmed by the quantity of tax regulations, and that it is very difficult to predict the application of the law and the outcome of certain cases.⁶²

Another effect of legal polycentrism and the multiplicity of rules that follows, is that the same legal transaction can be hit by two, three or even more, sanctions and fines. This in its turn can lead to disproportionate results and even be incompatible with Article 6 and the *ne bis in idem* article in the seventh amendment to the European Convention on Human Rights, as well as with Article 50 of the Charter of Fundamental Rights of the European Union. This plurality of rules may also result in unequal treatment. The greater risk for a lack of predictability seems to be a price for legal polycentrism. In any case, it is clear that the abundance of technically very complicated rules, the complexity of the tax system itself and the uncertainty about who is establishing the taxes, result in a problematic legitimacy question.

In the knowledge gap between how to understand tax law and which rule should be applied, the Swedish Tax Agency has grown strong and powerful, to the extent that a notable mix and shift of powers and mandates can be identified. The Agency's role has changed, and it has strengthened its position with the mandate to interpret and fill out European law and precedents. This is an important constitutional question, concerning the elected parliaments competence and freedom to decide in a sovereign manner about taxes. As stressed above, at least from a traditional historical Swedish perspective, the contemporary Swedish Tax Agency seems to go beyond its executive power as granted by the constitution and takes, or rather receives, by the mandate of EU-law, a quasi-role of lawmaker, for example, when the Agency interprets and fleshes out the law and makes proposals for new legislation. In Sweden an evident shift can now be traced when it comes to withholding separate and independent powers with reference to the doctrine of a state's government, which can be queried from a rule of law perspective. This can be explained by Europeanization of Swedish tax law. The parliaments influence over the legislative process has simply been weakened.

Legal polycentrism itself though, is the effect of that the nations and member states have delimited their freedom to tax through supranational or intergovernmental obligations, for instance through conventions, agreements and/or EU-directives.⁶³ Fundamental national principles for taxation have thus been changed and legislative power has, as a consequence, moved to government

⁶² As an example of the comments on the DAC 6-rules, at that time proposed but now adopted, see Ulrika Öster, 'Nyheter: Seminarium om rapporteringspliktiga arrangemang, Hård kritik mot utredningsförslag' (2019) Advokaten, nr 4.

⁶³ See about the emergence of an international tax system, Wolfgang Schön, 'Is There Finally an International Tax System?' (August 2021) *World Tax Journal*, 357-384.

bodies other than the parliaments.⁶⁴ There is a visible mismatch between the state's and the parliament's power and the dynamic powers of the EU and the OECD, which also is the effect of Europeanization and globalization. This is a fundamental constitutional issue that has been much debated both within Sweden and in European tax discussions.⁶⁵

6 The Complexity of Swedish Tax Law Today – Who Has the Power?

Democracy, the separation of powers and legitimacy are all highlighted values when it comes to law-making. These values, however, now seem to be challenged, at least in the area of taxation. The economic and societal reality, as well as the tax law itself, are becoming more complex, cutting across national borders and even globalized. Tax sovereignty within the nation state can no longer be taken for granted.

Despite the plurality of rules, which to a large extent is the effect of legal polycentrism, it is obvious that in the field of taxation, the mere law is simply not enough in this author's view when it comes to meeting contemporary challenges. Instead, the challenges themselves seem to be generating more rules. In fact, the extent of the number of rules jeopardizing the doctrine of *jura novit curia*, which may no longer even be true or possible to maintain given both the numerous legal transactions and the often complex, and sometimes even incompatible rules, difficult to understand and even more complicated to apply. In addition, those entrusted by the state to apply the law, whether judges or agency employees, also have to be familiar with and consider sometimes colliding and competing precedents of the European Court of Human Rights and the Court of Justice of the European Union when interpreting the law. It is a challenge in itself to simply have an overview of all applicable sources of tax law.

As developed above, with respect to tax matters, the rule of law in Sweden is arguably in a state of flux. Europeanization, globalization and multiculturalism influence and contribute to the transformation of the concept, in both form and content. That which can be discerned is a thicker, more substantial understanding of the rule of law. This definition of the rule of law stands close to the notion of the *Rechtsstaat*, indicating the value of moral rightness and emphasizing what is just. The dominating factors towards a thicker notion of the rule of law have, according to this author's understanding, opened up for a broader impact on rights in the application of the law. From having adopted a generally skeptical attitude to arguments about a higher standing law and the protection of fundamental rights, Swedish courts in recent years have, to a greater extent,

⁶⁴ See inter alia Mattias Dahlberg, *EU och svensk företagsbeskattning* (SNS Förlag, 2019) and Cécile Brokelind, 'An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two' (2021) *Blueprint, Bulletin for International Taxation* 75(5) 212-219.

⁶⁵ See Johan Lindholm and Anders Hultqvist (eds), *The Power to Tax in Europe, Swedish Studies in European Law, Volume 14* (Hart Publishing 2023).

assimilated a more principle-based approach to the law.⁶⁶ It has thus become more common to consider general legal principles when interpreting and applying the law.

As stated above, the historical Swedish understanding of the rule of law, here mentioned as a formal or thin perception of the notion, implies a literal interpretation of the law, which very rarely is sufficient for addressing complex contemporary challenges. The formal/thin understanding of the rule of law leaves little space for a purposive-oriented or a principle-based application of the law, and gives less impact for rights. On the other, positive, hand, the application of the law with the thin perspective is quite predictable, even though within a rather rigid system. A more substantive understanding of the concept of the rule of law, entails in its turn, a broader interpretation of the law and a more flexible application of the same. Understood this way, the rule of law implies efficiency in tackling new legal situations and unexpected legal transactions. An effect of this may be that legality and legal certainty are set against, and sometimes even run over, by the requirements for efficiency and the desire to create justice from a societal perspective. With the influence of European law, the application of the (tax) law seems to, at least within the Swedish context and under Swedish conditions, have become less predictable and more complex, with possible unequal treatment as a consequence. On the other hand, the development of the law has strengthened the legal protection of taxpayers.

With respect to that now said, it is not a bold guess to state that lawmaking, in order to enable the treatment of new situations and legal transactions, consciously will be made vaguer and less precise.⁶⁷ The development of using vague tax law rules can already be traced in Sweden, a use that has been much debated and criticized. The discussions have been about how unprecise a tax law rule can be without being in conflict with the constitution.⁶⁸ Greater legislative detail, will not in this author's view, provide a sustainable solution to contemporary challenges, as the law, with such a design, will be overwhelming in its dimensions and consequently very difficult to overview and, additionally, be adapted for very specific cases and situations.

The use of vague rules, constructed with flexible prerequisites, is one way to tackle more advanced tax planning schemes and a way to protect an erosive tax base, as the mere unpredictability of the application of the law in those cases might have a deterring effect on more provocative and aggressive tax planning and avoidance transactions. The use of GAARs (General Anti-Avoidance Rules), SAARs (Special Anti-Avoidance Rules) and TAARs (Targeted Anti-Avoidance Rules) has increased, and these rules are very widely drawn. Many of them have and need extensive extra statutory guidance in order to be

⁶⁶ See Jane Reichel and Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) SIEPS 2020:5 52.

⁶⁷ See Anders Hultqvist, Peter Melz and Robert Pålsson (eds), *Skattelagstiftning, Att lagstifta om skatt* (Stockholm 2014) about the promulgation of tax law in Sweden.

⁶⁸ See Anders Hultqvist, *Hur vag får en skattelag va'?*, Rapport, Svenskt Näringsliv, November 2015.

understandable and applicable.⁶⁹ Even though deliberately indefinite tax rules thus are frequently used in order to tackle a variety of tax adjusted transactions, another significant explanation to the Swedish contemporary use of vague tax law rules is the impact of European law, which often gets the effect of vaguer and unprecise rules.

The application though, of unprecise law requires independent (and creative) judges, who, when meeting unexpected new legal situations, consciously can endeavor to achieve a principle and rights-based application of the law. The development in Sweden as described here, indicates that Swedish tax law and the application of the same develops correspondingly to European law, namely dynamically and driven by the courts.⁷⁰ As an effect, Swedish courts, at least when it comes to interpreting and applying European law in national tax matters, are arguably developing and adapting the European legal thinking, i.e., a more principle and rights-based application of the tax law. Through this progression, courts have received an increased power, possibly at the expense of the power of parliament. Whether this development will be at the cost of predictability, transparency and equal treatment remains to be seen.

⁶⁹ See Judith Freedman, 'General Anti-Avoidance Rules (GAARs) – A Key Element of Tax Systems in the Post-BEPS Tax World?', *The UK GAAR* (2016) University of Oxford, Legal Research Paper Series 24 19.

⁷⁰ See also Jane Reichel and Karin Åhman, 'Tjugofem år av Europarätt i Sverige' (2020) *SIEPS* 2020:5 7.

