CHAPTER 6

ANALYSIS OF PRIMARY LEGAL RIGHTS

I  INTRODUCTION

Chapter 2 acknowledged that although there are arguments that rights are relative and their content may be based in a particular culture, there is sufficient content that is widely accepted to construct a model of rights as a guide to best practice in tax administration. The rights within the model can then be applied within the particular context of the legal and tax system of each jurisdiction.

In formulating a model it is impossible to take account of the legal, cultural and social context in which a model may be applied. To that extent, it is a sterile process. Laws should never be taken from one jurisdiction and enacted as they stand in another, as many...
developing countries have discovered to their cost. A model's value is where it can be used as a guide to the development of new systems and processes that can be tailored specifically to fit within those that already exist in a jurisdiction. The development can take account of the structure and content of the legal system, advances in the use of language and important cultural and other differences identified in Chapter 3. It can also be adopted on an incremental basis in jurisdictions where the ability to change is constrained and must take place over time.  

Chapters 6 to 8 identify the rights that should be included in a model with a brief analysis of each. Chapter 9 provides a two-tiered model of rights based upon the analysis. The justification for a two-tiered model was given in Chapter 2.

The rights included are based in the principles analysed in Chapter 3. As noted in Chapter 3, there will be differences in interpretation of the rights. The history of the OECD Model Tax Convention on Income and Capital shows that there will be debate over content, but this comes back to the requirement to contextualise and integrate the rights into the legal system and culture of each jurisdiction. The need for precise definition even where there is broadly common content is not as great in a model designed for integration into a domestic legal system. It only becomes an issue where two systems intersect. This will occur more often with the increase in information exchange, but it will be up to the double tax agreements or specific information exchange agreements to deal with the cross-jurisdictional issues.

The content will depend on the method of enforcement and in Chapters 6 to 8 the analysis highlights the differences in content depending on the classification of the right as administrative or legal. The analysis distinguishes where relevant between primary and

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2 'Apparentl[y] no compelling case can be made for assuming that social objectives should be very different in developing countries, though the political constraints on feasible changes may be more pervasive and harder to analyze, as they typically affect the administration of the tax system in addition to shaping its design'. See D. Newbery and N. Stern (eds), The Theory of Taxation in Developing Countries (New York, OUP for the World Bank, 1987), p. 262.
secondary rights and also, where there is administrative enforcement, between rights and goals. However, because there are significant variations in the forms of enforcement, it is only certain of the primary legal rights which are considered separately and first in Chapter 6. These must almost all be legislated and focus on the fundamental principles that underlie the tax system. Thereafter, in Chapters 7 and 8, the rights are analysed following a functional analysis. Chapter 7 covers the general powers of administration good governance and administrative goals. Chapter 8 analyses general principles of administration, information gathering, audit and investigation, assessment, sanctions and enforced collection, and objection and appeal. The fundamental procedural rights (rules 12 to 15 below) are also considered within these criteria. Although there is usually separate legislation providing for these rights and it is often contained in the broadest sense in the constitution, in the tax context these rights are most usefully considered in the context of the significant subsidiary rights that support them.

The starting point in determining the rights for inclusion in a model is a sophisticated tax system in an OECD country, but usually a system that has seen significant development. The OECD has long emphasised fundamental rights in the legal process, including tax regulation. Countries such as Canada, Australia, New Zealand, the United States and Germany have legislated or codified much of the regulation governing their tax systems. They have also provided taxpayers with significant rights not available in many jurisdictions. A review of the tax systems in countries such as these provides a broad framework of rights. The rights are sourced in formal law, administrative regulation and statements of intent. Examples of the latter are the statements of taxpayer rights that are published in countries such as the United Kingdom, Canada, New Zealand and Australia.

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1. This was the approach taken in the comparative analysis of taxpayers' rights in D. Bendle, Taxpayers' Rights: An International Perspective, above n. 1. It is also broadly the format suggested in P. Baker and A-M. Groenhagen, above n. 1, p. 37.

2. The last decades have seen significant reform of OECD tax systems and with it the expansion of taxpayers' rights, particularly primary and secondary administrative rights. For an analysis of tax reform see K.C. Messere, Tax Policy in OECD Countries: Choices and Conflicts (Amsterdam, IBFD Publications BV, 2018).
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The statements themselves have no force of law, but are indicative of the rights that are seen as important.

The analysis in this chapter provides examples to support the rights included. It is beyond the scope of this thesis to provide examples from every family of tax system. The examples chosen are therefore illustrative only.

The basis for including a right is one or more of: general acceptance of that right in a number of jurisdictions, whether legislative, administrative or judicial; inclusion in treaties or other international documents; support from other sources such as academic and other commentators; and general compliance with one or more of the principles set out in Chapter 3, where this is appropriate. Although it may seem arbitrary, there is fairly broad consensus on the protection that taxpayers should be afforded. The form and enforcement of the rights identified is a matter for debate. Chapters 6 to 8 aim to provide a model with analysis that will take forward the debate from a general acceptance and scattered implementation of taxpayers' rights to a more systematic recognition and implementation. The chapters provide a tool to analyse the effectiveness of different tax systems in providing taxpayers' rights and to help identify gaps in the rights provided within those systems.

II PRIMARY LEGAL RIGHTS

Primary legal rights are fundamental to the operation of the tax system and can be identified separately from those within the tax system. For that reason, it is more difficult to say that they are specific to taxation than it is for other taxpayers' rights. Primary legal

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rights are usually found in constitutions, legislation protected by interpretation clauses, or international agreements. By nature they are concerned with higher order questions, such as what makes a valid tax law.

For the purpose of this thesis the emphasis is not on when a law is valid. The assumption is that the starting point is with a system which has mechanisms to create valid rules (legal or administrative) which are enforceable. Wellman analyses the position set out thus far in this thesis.6

There are three parties or classes of parties to any right. A first party is anyone who possesses the right. A second party is anyone against whom the right holds. A third party is anyone in a position to intervene in the presupposed confrontation between a right-holder and a second party and side with one principal adversary against the other. The essential purpose or function of any legal right is to confer upon its possessor a specific sort of dominion over one or more potential adversaries. The right achieves its purpose only if the legal norms that define and confer it are respected by those subject to the law....

Given the existence of valid rules, the next question is what makes a good rule. This is a moral question that has perplexed jurists for centuries. An approach that asks what is a good rule is described by Critical Legal Studies scholar, Duncan Kennedy, as the ‘natural law approach’7 to determine whether the rationale for the law makes sense. If it does not, he argues that this methodology requires us ‘to formulate an alternative rationale that satisfies us of the rationality and justice of the outcome’.8 It can be distinguished, for example, from the critical approach that seeks to discover and deconstruct the underlying motive behind the original law and the instrumental or interest analysis that analyses the

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interests behind the original law. The advantage of the approach taken here is that it begins from a widely accepted position and seeks to improve upon that position. It is not the purpose of this thesis to analyse whether the accepted position is a flawed starting point.

The jurisprudence of Lon Fuller provides useful guidance on the characteristics of a good law once it is accepted as valid. Fuller helps to identify what a good rule looks like. His discussion can be adapted to the context of tax law to determine the rules that should govern the formulation and interpretation of 'good' tax law. Lon Fuller's list of 'Eight Ways to Fail to Make Law' is a starting point. Jurists may argue over whether the legal system has failed if any of these rules is absent, but for this thesis it is sufficient that they raise some important issues in the context of taxpayers' rights and what makes a 'good' tax law. Winston points out that Fuller's critics disagree that these canons are part of the nature of law or that they identify a necessary connection between law and morality. However, they do not quibble with the proposition that the rules may be necessary or at least beneficial for a legal system to succeed. With this caveat, it is acceptable to apply Fuller's argument that for a ruler who will fail to make 'good law':

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8 Ibid.
9 Ibid.
10 Fuller's approach was criticised by jurists such as Hart and Raz on the basis that Fuller failed in his analysis of the special features of legal systems, i.e., in determining 'what is law?'. However, the criticisms did not extend to the legitimacy of his question, 'what are some of the criteria for judging when a law is a good law?'.
11 L.L. Fuller, The Morality of Law (London, Yale University Press, 1964), p. 33. While not necessarily agreeing with Fuller, jurists have often used his criteria as a starting point for their argument. For example, J. Finnis, in Natural Law and Natural Rights (Oxford, Clarendon Press, 1980), p. 270, begins there in his analysis of what is a legal system that exemplifies the rule of law.
13 Ibid.
14 L.L. Fuller, above n. 11

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There are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicise, or at least to make available to the affected party, the rules he is expected to observe, (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.

Each of these failures provides a basis for a primary legal rule in a Model of Taxpayers' Rights. Each rule also reflects the basic principles that should underlie a tax system, discussed in Chapter 3. They can be rephrased with the references to the basic principles in brackets.

1. Tax must be imposed by law (tax rules should not be arbitrary).
2. Tax law must be published (tax rules should be transparent).
3. Tax law must not be imposed retroactively (taxpayers should be able to anticipate in advance the consequences of a transaction).
4. Tax law must be understandable (tax rules should be certain: clear and simple to understand).
5. Tax law must not be contradictory (tax rules should be certain).
6. Taxpayers must be able to obey the law (tax rules should be effective and certain).
7. Frequent change must not undermine the tax law (tax rules should be certain).
8. Tax law must be applied (tax rules should be certain, fair, transparent and effective).
In the context of tax law, rules 4 to 8 focus on different aspects of the requirement for certainty and they will be dealt with on this basis. Rules 1, 2 and 4 to 8 reflect the European Court of Human Rights’ threefold test for determining whether an interference with an ECHR right is in accordance with law. It must have a basis in law, the law must be accessible and the law must allow the consequences of an action to be foreseeable or certain.

The following additional legal rules derive from the basic principles. They are consistently found in sources of primary legal rules such as charters of rights and constitutions. They can be distinguished from secondary legal and administrative rules that often give a different substance to a right expressed in similar terms.

9. Taxpayers need pay no more than the correct amount of tax (tax rules should be effective and certain).

10. Tax law should not impose double taxation (tax rules should be fair and effective).

11. Tax rules should not discriminate and there should be equality before the law (tax rules should be fair and equitable).

12. Tax rules should satisfy the principle of proportionality (tax rules should be effective, fair and equitable).

13. Taxpayers should have the right to privacy (tax rules should be fair).

14. Taxpayers should have the right to confidentiality and secrecy (tax rules should be fair).

15. Taxpayers should have the right of access to information (tax rules should be fair).


14 Ibid.

17 For example the right of access to the courts is a fundamental right that should have higher order protection through a constitution or similar instrument. The content of that right of access in tax cases is usually a secondary legal rule concerned with the administration of the tax system in the context of the
16. Taxpayers should have the right of access to the courts (tax rules should be fair),
which should demonstrate the following characteristics:\textsuperscript{18}

(a) an independent and impartial tribunal;
(b) a fair and public hearing;
(c) a fair trial;
(d) the right to remain silent;
(e) the right to representation; and
(f) public judgment within a reasonable time.

Primary legal rules provide the framework for all other rules. Some of the 16 listed rules
may be collapsed more conveniently into a rule that covers more than one concept. Where
this occurs in the analysis it is clearly articulated. Each primary legal rule provides the basis
for a number of subsidiary rules, which are analysed in Chapter 8. Rules 13 to 16 are
considered together with their subsidiary rules also in Chapter 8.

\textbf{A \hspace{1cm} Tax must be imposed by Law}

As noted in Chapter 2, the right to tax is founded in recognition of individual property
rights. The corollary is that infringements on property rights by the state, whatever their
philosophical basis, must be sanctioned by law.\textsuperscript{19} The primary requirement for the
operation of a tax system is therefore that there is a legal basis for the exaction of tax. This

\footnotesize{\textsuperscript{18} \textsuperscript{19} The European Convention, Art. 6 for the protection of Human Rights and Fundamental Freedoms (1950)
(ECHR). Raz explores the importance of the role of the courts to the rule of law, above n. 12, p. 198. It is
assumed for this analysis that courts exist and operate in accordance with the basic tenets of the rule of
law. If they do not, it is not specifically an issue for the framework of rules governing taxation, but a more
general question as to whether there is an operational legal system at all.}
is seen as such a fundamental tenet of the legal system that the power to tax is usually given constitutional sanction with a requirement that tax is imposed by law.

A history of the defence of the requirement to tax under the law reveals some of the most significant developments that have led to modern democracy. The English Civil War was driven in part by the move to end the sovereign's prerogative to tax. In 1789, Article 13 of the French Declaration of Human Rights specifically provided for taxation as the means by which governments can maintain public order and cover their administrative expenses. The beginnings of the American Revolution were attributable in part to the imposition of taxes by the British Government without reference to the elected American legislatures. Even where a tax is legislated, the response of the people can reverse it, as occurred with the 'Poll Tax' in the United Kingdom, which arguably spurred movement towards decentralisation of political power.

This emphasis on the principle of legality for taxation is found in many constitutions. In unitary systems the constitutional provisions focus on legality. In federal systems the constitutional underpinning of the principle of legality in tax matters is reinforced by the rules governing jurisdiction to impose tax.

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19 For example, ECHR Art. 1 of the First Protocol (as amended), which provides for the entitlement to the peaceful enjoyment of possessions, specifically excepts the right of a state to secure the payment of taxes or other contributions or penalties, but it only does so if there is a legal basis for its action. There are also requirements that the measures taken are in the general interest of the state and are proportionate, when balancing the individual and general interests. See M. Buquicchio-de Boeck, above n. 1, p. 59.
22 For an account of the rise and fall of the poll tax (more properly, the community charge) see D. Williams, Taxation: A guide to theory and practice in the United Kingdom (London, Hodder & Stoughton, 1992), ch. 1.
23 For an account of the constitutions of Australia (s. 51), Belgium (art. 170), Canada (art. 91(3), France (art. 34), Italy (art. 23), Mexico (art. 31), and Spain (art. 133). H. Arbutina, 'Taxation in Croatia: Developments in the Field of Taxpayers' Rights and Obligations', in D. Bentley, Taxpayers' Rights: An International Perspective, above n. 1, p. 138, p. 151, identifies the legality principle in countries in transition as an important basic criterion for the administration and assessment of tax.
The German constitution for example gives exclusive legislative power to the Federal Government over customs duties and financial monopolies and taxes can only be imposed by law. The Federal Government also has priority in legislating where both it and the Länder have jurisdiction. This means that the Federal Government may legislate where it is entitled to at least some of the revenue from taxes or if the subject matter affects the equality of life or legal or economic unity of the country. The Länder have exclusive jurisdiction over local excise and similar non-essential taxes. Rädler notes that the Bundesrat, or Council of States, can and does block taxation laws proposed by the Bundestag (Federal Parliament).

The most important issue, once the principle of legality is established, is its interpretation. Thuronyi identifies five areas that have given rise to dispute:

1. Where taxes are imposed by administrative regulation.
2. Where revenue authorities enter into individual agreements with taxpayers and it is argued that the tax is then not imposed by the rule of law.
3. Where revenue authorities are given unlimited administrative discretion to decide whether to grant a tax privilege.
4. Where it is argued that judges are required to interpret tax law strictly to avoid effectively making tax law themselves.
5. Where tax laws must be renewed annually.

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The last point, as Thuronyi points out, relates to the budget process and is not a general principle. What it does do is require the legislature to make a conscious decision to ratify the continued application of the tax laws in place as well as any new budget and other provisions. While this might be a useful discipline, it is not essential to the protection of the principle of legality.

The first three points go to the nub of the content of a rule requiring legality. They are concerned with the scope that the revenue authorities have to make decisions that require the exercise of a broad discretion. More specifically, they raise the question as to how much discretion a revenue authority can be given before it is usurping the principle of legality.

The German requirement that there should be a legal basis for any administrative act, including tax assessment and collection is mirrored in many countries, particularly civil law countries. In France and the Netherlands, for example, the tax departments of the Ministry of Finance explain and interpret statutes and decrees, but cannot set new rules. The Swedish constitution appears to be even more stringent in the limitations it imposes on delegated authority.

In common law jurisdictions, subject to the operation of Bills of Rights, there tends to be significantly more scope for delegation and discretion. In Canada, Australia and New Zealand, for example, the revenue authorities are charged with the management of the tax system and have substantial discretion. However, the discretion does not extend to

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30 Ibid. The principle is found in art. 171 of the Belgian Constitution.
31 Grundgesetz Art. 20(3), and see F. Vanistendael, above n. 20, p. 17.
34 B.J. Arnold, ‘General Description: Canada’ in H.J. Ault, above n. 27, p. 25, p. 35.
35 For example, Income Tax Assessment Act 1936 (Cth), s. 8; Taxation Administration Act 1953 (Cth), s. 3A, and Fringe Benefits Tax Assessment Act 1986 (Cth), s. 3.
36 Tax Administration Act 1994, s. 6A.
rule-making, which is often a point of some contention between taxpayers and revenue authorities.\footnote{37}{B.J. Arnold, above n. 34. In Australia, the introduction of a legal basis for the rulings made by the ATO in 1992 in conjunction with the introduction of self-assessment was largely in response to a need for legal certainty.}

The UK seems to give still greater latitude to the Inland Revenue Commissioners to exercise discretion, including extra-statutory concessions.\footnote{38}{Discussed more fully in A. van Rijn, above n. 32.} Walton J questioned the legality of these powers in \textit{Vesey v. IRC},\footnote{39}{[1978] Simon’s Tax Cases, 575, saying that he was ‘totally unable to understand on what basis the Inland Revenue Commissioners are entitled to make extra-statutory concessions’.} but McNeill J in \textit{R v. IRC, ex parte Fitford-Dobson}\footnote{40}{Ibid., p. 344.} suggested that they fall within the exercise of the Commissioners’ managerial discretion.\footnote{41}{Ibid., p. 351.} Williams suggests that a broader exercise of discretion has been encouraged by the lack of constitutional protection and may change over time with the application of the Human Rights Act 1998 to tax matters.\footnote{42}{D. Williams, ‘United Kingdom Tax Collection: Rights of and Against Taxpayers’ in D. Bentley, \textit{Taxpayers’ Rights: An International Perspective}, above n. 1, p. 331, p. 332, p. 345.}

Thuronyi’s second and third points are similar. Whether a revenue authority has the power to enter into an agreement with an individual taxpayer or can grant a general privilege such as a tax amnesty to a group or class of taxpayers raises the question of the proper extent of delegation.\footnote{43}{B.J. Arnold, above n. 34. In Australia, the introduction of a legal basis for the rulings made by the ATO in 1992 in conjunction with the introduction of self-assessment was largely in response to a need for legal certainty.} For taxpayers there is a problem where they can be disadvantaged by such delegation. Usually, negotiation of an agreement or the grant of a privilege, such as an amnesty, results in the reduction of tax payable and is thus more likely to disadvantage other taxpayers rather than those receiving the benefit.

This may be unfair to other taxpayers and result in inequity, such that taxpayers in exactly the same fiscal position are treated unequally. For example, through profligacy a taxpayer may not have sufficient funds to pay tax owing and as part of an audit the revenue authority may reduce the amount payable under a scheme of arrangement. Arguably, a general privilege is preferred as it ensures consistency between taxpayers in the same
situation. However, it is also inconsistent vis-à-vis the majority of taxpayers that have not put themselves in a position that requires a privilege to be given. Exercise of delegated administrative power in this way may be designated as arbitrary in that it goes beyond the interpretation and implementation of the law.

The difficulty lies in balancing the demands of a complex modern administration, where it is impossible for the legislature to determine how and where each rule is to apply, with the need for certainty and fairness for taxpayers. Both benefit from some flexibility in the exercise of delegated authority, particularly to ameliorate the unintended effects of legislation and to assist in voluntary compliance. Neither benefits in the long run from the exercise of delegated authority that stretches the intent of the law. It may be practically simpler, but it is unsustainable to argue that the basic principle of effectiveness should override the principles of equity, fairness and certainty, particularly where to do so undermines the operation of the rule of law.\textsuperscript{44}

The 1990 OECD survey was cognisant of this concern and identified which of the surveyed countries' revenue authorities had: discretion to waive or reduce a taxpayer's tax liability or allow grace periods for payment; and the power to negotiate the level of tax penalty applicable to the taxpayer.\textsuperscript{45} Waiver powers were limited in almost all countries, except by statute but there were varying levels of latitude in all countries to allow some grace period in the payment of tax in cases of hardship.\textsuperscript{46} There was significant divergence in the ability to negotiate the level of tax penalty and, where it was permissible, in the grounds for doing so.

A right to be included in a model cannot take an extreme position unless it is accepted that the extreme is both beneficial and likely to become a common standard

\textsuperscript{44} F. Vanistendael, above n. 20, p. 18.
\textsuperscript{46} OECD, above n. 1, p. 57.
\textsuperscript{46} Although even the period of waiver is set down by statute in some countries, such as Ireland, ibid., p. 58.
Given the range of approaches to the principle of legality and the delegation of power to administrators to make rules, it is helpful to consider the issues in the context of Article 6 ECHR and subsequent consideration of the nature of a criminal charge in the Netherlands and French national courts.

Article 6 ECHR provides the right to a fair trial with associated rights to everyone charged with a criminal offence. The assumption is that criminal offences are imposed by law, that is, the legality principle. The question in point here is what constitutes a criminal charge that is subject to Article 6? Ovey and White note that the concept of a 'criminal charge' is given an autonomous meaning by the European Court of Human Rights so that states cannot avoid 'Convention controls by classifying offences as disciplinary, administrative or civil matters'. A model of taxpayers' rights, although a standard and not an enforceable treaty, also needs to give autonomous meaning to the concept of permissible delegation to a revenue authority.

In Engel and others v. Netherlands the Court examined disciplinary action taken against members of the armed forces in the Netherlands to determine whether they constituted criminal charges under Article 6 or an administrative offence. The Court took into account the nature of the offence, the severity of the sanction and the size of the group targeted. In Bendenoun v. France the Court examined the French system of tax surcharges to determine whether it fell within the ambit of an Article 6 criminal charge. The Court found that the surcharges were: imposed under a general rule both to deter and punish; very substantial and could lead to imprisonment; and universal, covering all taxpayers. The Court had already held that a criminal charge need not lead to imprisonment.

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47 C. Ovey and R.C.A. White, above n. 15, p. 140.
48 Judgment of 8 June 1976, Series A, No. 22; (1979-80) 1 EHRR 647. See further, C. Ovey and R.C.A. White, ibid.
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The Supreme Court in the Netherlands found in 1985 that where a tax inspector increases an assessment in the form of a major fine it is a criminal charge, applying the Özfirik decision. The French Conseil d'État made a similar finding in the Méric case. Once a tax penalty imposed by a tax inspector is recognised as a criminal charge it is then subject to a wide range of safeguards imposed both domestically and under the ECHR.

In the criminal context, a charge moves from administrative to legal based on the nature of the offence, the severity of the penalty and the breadth of application. By analogy it is arguable that the framework for the operation of an administrative discretion should be spelt out in law where the content and matter of the discretion is significant, the binding quality or effect is substantial and the potential application is broad. To take an example, where a tax inspector has broad discretion to determine a wide range of tax penalties:

- The matter of the discretion is significant both for taxpayers and for the effectiveness of the revenue authority’s compliance program.
- The effect of the discretion can be substantial for the individual taxpayer, the standard of voluntary compliance, and the amount of revenue collected.
- It potentially applies to all taxpayers.

The legality principle does not limit the use of administrative discretion. It does provide a legal basis for the application of a general legal rule to particular cases and guidance as to how that application should occur. In common law jurisdictions, legislation has traditionally been distinguished from executive action on the basis that:

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51 E. Pecller, 'Fiscal Administrative Sanctions' in D. Albregtse and H.P.A.M. van Arendonk, above n. 1, p. 75.
53 G. Ovey and R.C.A. White, above n. 15, p. 142. Although much of the jurisprudence of both the European Court of Human Rights and the domestic courts is concerned with limiting the extent of criminal charges to encourage decriminalization, the question of legality remains.
54 A. Hultqvist, Legalitetsprinciper vid inkomstbeskattnings (Stockholm, Juristforlaget, 1995), p. 393 notes that in Sweden it is beyond the power of the National Tax Board (revenue authority) to give an interpretation.
Legislative activity involves the process of formulating general rules of conduct without reference to particular cases (and usually operating prospectively), while executive action involves the process of performing particular acts, issuing particular orders or making decisions that apply general rules to particular cases.

How can executive or administrative action be distinguished more specifically from that requiring legislation? The Australian Administrative Review Council suggested a three-pronged test based on the content of the matter to be ruled on, the binding quality of the instrument and the generality of its application. This supports the approach taken in the European Court of Human Rights and in the domestic courts of its signatories.

Thuronyi's fourth point that disputes have arisen over a judge's capacity to make tax law using a broad interpretation of the law through the cases returns to the differences between legal families. Even within the common law family, the difference in approach between the US Supreme Court and the House of Lords or the High Court of Australia is substantial and courts within the same jurisdiction can often have different styles.

The legislature and the judiciary are two arms of government. They act as a check on the executive. From a taxpayer's perspective, if the judiciary takes a strong purposive approach to interpretation that leads to a different interpretation of the tax law from the common expectation, it can undermine certainty. However, this goes to the nub of the

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58 It is the subject of popular and political debate. This is particularly evident where an appointment to the highest court can have significant impact on the shape of legislation. See, e.g., 'Statistical modeling: The Wisdom of Hercules', The Economist, 27 August 2005, p. 69, which describes research into maps of legal precedent to determine the effect of precedent on the US Supreme Court in line with R. Dworkin's seamless web of the law: R. Dworkin, Law's Empire (London, Fontana Press, 1986), ch. 7.

59 See IMF Code, above n. 44, 1.1.2 and the explanation, p. 10-11.
constitutional structure of the state. Taxpayers’ rights are realistically going to have little impact on this aspect of the debate. It is far more important that any model of taxpayers’ rights focuses on the need for checks on the executive to uphold the legality principle. The form of those checks, whether through the legislature or judiciary will depend upon the constitutional structure and approach of the particular jurisdiction.

In summary, it is possible to identify the key constituents of the legality principle:

1. A tax in its broadest sense must be imposed by law.\textsuperscript{59} It helps to have this principle embodied in the constitution, but otherwise it should be stated expressly in the main taxing act, or in individual taxing acts where they are separate and independent.

2. The structure of a tax system requires rules governing tax administration, collection and enforcement, which grant to the revenue authority administrative discretion in a wide range of different contexts.

3. The rules should provide limits on the exercise of all discretion\textsuperscript{60} and a precise framework for the exercise of any discretion where:

   (a) the content and matter of the discretion is significant;

   (b) the binding quality or effect is substantial; and

   (c) the potential application is broad.

It could be argued that this protection is embodied in administrative law. However, it goes beyond an analysis of administrative discretion and the relevant administrative law safeguards. It is fundamental to the principle of legality. The operation of Article 6 ECHR shows that how discretion is exercised can determine whether or not a taxpayer is taxed

\textsuperscript{59} Ibid., 1.2.2.
and how much. It is therefore essential to provide a legal basis for what is effectively administrative regulation, as well as for legislative regulation.

The UK may have survived without a written constitution for centuries. However, it has had the benefit of those centuries to work out the delicate balance between the executive and taxpayers. For countries that are still developing their systems and finding that balance, the operation of the rule of law and the consistent application of the legality principle is a precursor to the existence of genuine taxpayers’ rights. The benefit to those countries is that on a political level it enhances ‘the legitimacy of the political group in power’. Arbutina argues that it has the added advantage of transforming ‘taxpayers from the objects of the exercise of state power to subjects participating, through the formulation of their rights and obligations, in the shaping of their situation’.

B Publication of Rules

It is self-evident that it is particularly important to taxpayers that all rules governing the tax system are compiled and publicised. Tax systems usually suffer from an overabundance of rules and if there is no duty to publish them, the obvious result is that it is difficult for taxpayers to comply. Taxpayers should be given current information ‘on the operation of the tax system and the way in which their tax is assessed’. They should also be informed about their appeal rights.

Ibid.
H. Arbutina, above n. 23, p. 151.
It is emphasised by most commentators on tax administration, particularly those concerned with its development in non-OECD countries. See, e.g., R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thunorpi, above n. 20, p. 95, p. 100 and R.A. LeBauhe and C.L. Vehorn, 'Assisting Taxpayers in Meeting Their Obligations Under the Law' in R.M. Bird and M. Casenegra de Jantischer (eds), Improving Tax Administration in Developing Countries (Washington DC, IMF, 1992), p. 310, p. 314. See also IMF Code, above n. 44, 1.2.2 and the explanation, pp. 18-19.
OECD, above n. 1, p. 12.
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The point is not as obvious in practice as it first seems. It is only relatively recently, in some jurisdictions, that many of the internal rules applied by the tax authorities in administering the tax system have become available to taxpayers. South Africa is an example. In jurisdictions such as Japan, much of the detail as to how the tax authorities operate is arguably still unknown.

In many OECD jurisdictions, the volume of information available is overwhelming. The Internet has assisted significantly in developing transparency and the publication of vast amounts of information that may or may not be relevant to individual taxpayers. It is therefore important that there is some guidance to the information published. In less sophisticated tax jurisdictions it is vital that the information made available to taxpayers is targeted and specific to their particular knowledge requirements. Otherwise taxpayers may not have the skills to identify what the rules are even though they are freely available. The result is then the same as if publication had not occurred.

The problem becomes more acute where there are low literacy levels among taxpayers. There is a tendency to concentrate on indirect taxation in developing countries, usually a consumption tax, as the means of raising revenue from less educated, low-income taxpayers. The education process during the period of implementation is critical and can focus on radio, television and other accessible media. Thereafter, little ongoing education is required for the average taxpaying consumer. An alternative to direct collection from those

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67 This is an old technique in litigation where discovery of documents can produce literally truckloads of information, in which the relevant documents are carefully hidden in obscure places to escape easy detection. Sir Humphrey Appleby parodied the technique when concealing important papers for signature among those of less consequence in the Prime Minister’s ‘Red Boxes’ in the 1980s television show ‘Yes Prime Minister’.

68 See generally, A. Tait, Value Added Tax: International Practice and Problems (Washington DC, IMF, 1988). For the increasing trend towards the implementation of a VAT, see IBFD, Annual Report, which publishes each year a worldwide survey of developments and trends in international taxation. See also, e.g., ‘IMF Commends VAT Introduction in Cameroon’ (1999) 18 Tax Notes International, 1770 and ‘IMF Welcomes
whose education, background and literacy makes it most difficult to explain the compliance requirements that exist in a complex modern tax system is to use third parties such as employers and financial institutions to collect tax on the taxpayer's behalf.\textsuperscript{69}

However, as aid and state economic development programs target small business and the development of an entrepreneurial sector, there is a commensurate increase in the number of taxpayers required to comply with more complex tax rules.\textsuperscript{70} In countries where the literacy rate is low and participation in education is predominantly limited to the primary level, it becomes a serious challenge for governments and revenue authorities to make the rules available to taxpayers in a comprehensible form.\textsuperscript{71}

Almost as important as the publication of rules is the manner of publication. Usually governments publish legislation and delegated legislation together with explanatory material. However, it is seldom easily accessible. It is left to the revenue authorities and commercial printers to distribute the rules and information explaining them. In most OECD countries the growth in the complexity of tax legislation has spawned a burgeoning tax industry comprising the revenue authorities, taxpayers, advisors, publishers, trainers, academic institutions, media specialists and more. The Internet has exacerbated the information flow, but has been a boon to revenue authorities. As taxpayers and their advisors gain ready access to the Internet, the revenue authority website becomes a focal point to obtain authoritative information.

\textsuperscript{69} Variants on a Pay As You Earn System are standard for employees in most jurisdictions. Other forms of third party collection have been widely accepted for many years, although not without difficulty in many developing countries that do not have the administrative and physical infrastructure and resources to support its implementation. See, e.g., L. Fernando Ramirez Acuña, 'Privatization of Tax Administration' in R.M. Bird and M. Casenega de Jantscher, above n. 63, p. 377.


This highlights an important caveat on the publication of rules. Information and explanation of the rules must be published in an impartial and unbiased manner. In Australia in 2005, for example, the Inspector-General of Taxation constituted an inquiry into bias in ATO rulings.\(^72\) If there is bias in the publication by the revenue authority, taxpayers are made aware not of the rules with which they must comply, but the revenue authority’s interpretation of those rules. This can lead to a completely different outcome for the taxpayer and effectively undermines the constitutional separation of powers.

The growing complexity of tax rules requires that the information is also available to those charged with administering the tax system so that they can provide accurate, consistent and comprehensive service to taxpayers.\(^73\) Revenue authorities invest considerable amounts in training and equipping staff with an accurate understanding of the law and their role in implementing it, although in developing countries it is but one of a number of areas making demands on limited resources.\(^74\) Internal publication to the large group of revenue authority personnel responsible for implementing the law and exercising discretion under the law is critical to the effective application of the rules. Taxpayers must have reassurance that there is a high quality publication of the rules internally to revenue authority staff as well externally.

If rules are not published accurately or completely it can also impact on the capacity of those charged with adjudicating them. An adjudicator must have access to a complete set of rules or it undermines the process of adjudication and the office of the adjudicator.

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\(^73\) See R.A. LiBaube and C.L. Vehorn, above n. 63.
\(^74\) See R.M. Bird and M. Casenegra de Jantscher, ‘Reform of Tax Administration’ and A. Schlemenson, ‘Organizational Structure and Human Resources in Tax Administration’ in R.M. Bird and M. Casenegra de Jantscher, above n. 63, ch. 1 and ch. 11. In the same volume, E. Tulloch-Reid, ‘Comments’, p. 111 describes development initiatives for tax auditors in Jamaica; and C.E. McLure Jr and S. Pardo R, ‘Improving the Administration of Colombian Income Tax, 1986-88’, p. 124 describes the creation of a National Tax School in Colombia to provide tax law training for both the public and private sectors. This mirrors developments in OECD countries, where universities and professional bodies provide training.
A problem fundamental to taxation is retroactive or retrospective legislation. The terms are used differently in different jurisdictions, but Sampford, in his comprehensive study, finds on analysis that there is no effective difference in meaning between the terms. He defines retroactive or retrospective laws as "laws which alter the future legal consequences of past actions and events." One of the tenets of most legal systems is that certain legislation should not have retroactive effect. This flows from the prohibition on retroactive criminal laws in international instruments such as Article 15 International Covenant on Civil and Political Rights and Article 7 ECHR. The courts have interpreted these provisions as an extension of the principle of legality: any provision authorizing interference with an individual right should be sufficiently precise to render the interference "in accordance with the law." However, Ovey & White note that for Article 7 ECHR, "the Strasbourg case law shows that a crime has to be very loosely defined indeed before the Court will find a violation of this provision."

As Article 1 of Protocol 1 (as amended) ECHR requires only that there be laws securing the payment of taxes, their retroactivity or otherwise is not specifically taken into account under the Convention. In National & Provincial Building Society and others v. United Kingdom, the European Court of Human Rights upheld retroactive tax legislation. It found that retroactive legislation introduced in 1991 and 1992 served to carry out the intention of the 1986 UK Parliament by filling in gaps left by the original legislation. Parliament did not

C. Sampford, above n. 12, ch. 1, 'Defining Retrospectivity'.
Ibid., p. 22.
C. Ovey and R.C.A. White, above n. 15, p. 191.
Ibid.
act unreasonably as the legislation served a legitimate purpose. The legislation was also proportionate in that it struck a fair balance between the taxpayer and the state.81

Most international instruments protecting human rights take a similar approach, reserving the right to tax within the law to the member states.82 This is reflected in domestic law. Vanistendael notes that, 'in most countries, the principle of nonretroactivity is observed not as a legally binding principle ... but as a principle of tax policy that the legislature follows as it considers appropriate.'83 The 1990 OECD survey, however, states that as a matter of principle, tax laws should normally not be retroactive as taxpayers should know what the consequences of an action will be before taking it.84

The nature of tax law is such that it is difficult to legislate against retroactivity. Tax law is not restricted to a single transaction or event. It is generally applied over time and a change in the law will almost always have some past as well as future economic effect.85 For example, it is fairly common for a government to announce in its annual budget that tax rates will change from a particular date. The legislative process can be slow where a government cannot easily command a majority in the legislature to pass its legislation and sometimes the legislation authorising third parties, such as employers, to make deductions of tax at the new rates has not come into force by the time those deductions should be made.86 Legally, deductions cannot be made, but if the law has retroactive effect, penalties may subsequently apply for failure to deduct. The UK extra-statutory concessions or other administrative arrangements that fudge the law are the simplest response.87 However, it is an inappropriate mechanism and undermines the principle of legality.

83 F. Vanistendael, above n. 20, p. 24. The exceptions include Belgium and France, which may provide specifically for retroactivity in the tax code.
84 OECD, para. 2.21.
85 Discussed further in F. Vanistendael, above, n. 20.
86 Australia has faced this issue on a number of occasions in recent years with different taxes. ATO, Administrative Treatment of Retrospective Legislation (Canberra, ATO, 1994), available under ‘Tax Professionals’, <www.ato.gov.au>, 20 October 2006.
Some retroactivity is beneficial to taxpayers, where it makes technical corrections to laws passed in error, clarifies the law or overturns a judicial decision that goes against past practice. More commonly, tax law is passed retroactively to counter tax avoidance or to prevent taxpayers having a window of opportunity to take advantage of tax schemes between the announcement of legislation countering them and the implementation of the law.

In Australia, there is a history of aggressive tax avoidance to exploit loopholes in the law, encouraged for some years by the courts, which used a formalistic approach to statutory interpretation. The Government has overcome this problem through its wide-ranging general anti-avoidance rule. However, the previous culture remains of using a statutory response to any issue that may represent a risk to the revenue. There is no constitutional or legal impediment to retroactive legislation of tax laws. Faced with tax arrangements that fall within the law, but which represent a risk to the revenue, the Government legislates to fill the gap in the law. This is usually given effect by announcement that legislation will be introduced in an area to achieve a particular effect. In principle, this appears to be an appropriate use of retroactive legislation. Otherwise taxpayers would rearrange their affairs to take full advantage of the loophole before the legislation came into effect.

However, there is a difficulty where the legislation is produced some time later, is debated and amended, and the law can be passed even years after the announcement is first made. The additional problem for taxpayers is that the legislative process can introduce laws that are significantly wider than or different from the original announcement but...
which have effect from the date of the original announcement. From the Government perspective, there is generally broad debate in the tax profession as the law develops, so where there will be significant amendments to the original announcement, they are usually publicised at least to the tax profession even if not to the public. Nonetheless, it undermines the principle of legality, as taxpayers are forced to manage their affairs on the basis of legislation that has neither been passed and of whose precise content they are unaware. In response, the Senate (Australia’s upper house in a bicameral system) has adopted procedural rules to pass legislation prospectively if legislation is not introduced into Parliament within six months of its original announcement.

In France, there have been a number of cases which highlight the problem of retroactive legislation against tax avoidance. Where legislation has been upheld in the courts and Parliament then passes retroactive legislation to overturn the original law, it raises concerns. Cyrille argues that there should be strict limits on Parliament’s ability to introduce retroactive legislation to overturn earlier legislation that the judiciary has upheld as valid, particularly where the risk to revenue is minimal.

In Germany, the constitution prohibits legislation where the legal consequences based on past facts are retroactive, effectively backdating a change in the law. However, where the legislation applies prospectively but to facts or events that have already occurred, there may be limited exceptions. Thuronyi provides a useful summary of the exceptions that might justify retroactivity.

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94 Ibid., p. 158.
95 The case of Gray v. FCT (1989) 20 ATR 649, illustrates the application of a capital gains provision that was significantly different in its effect from the original announcement. To their detriment, the taxpayers entered into transactions on the basis of the announcement before the detail of the law became available.
98 Ibid.
99 C. Dauber, above n. 24, p. 159.
100 Ibid.
101 V. Thuronyi, above n. 5, p. 80.
the retroactive consequences could be considered de minimis;
- the law was unclear or contradictory before enactment of the legislation;
- retroactive application was required in order to correct a constitutionally
defective legal rule (for example, a rule that violated the principle of equality);
- retroactive application was required because of 'urgent requirements of the
public interest'.

Sweden takes a similar strong line against retroactivity102 and this is mirrored in a number
of other jurisdictions.103

Others take a completely different view. Croatia has a history of retroactive
regulation,104 as do Australia105 and the United States. In United States v Carlton the Supreme
Court found that the retroactive legislation in question was acceptable as it fulfilled a
legitimate legislative purpose, was reasonable, the means were rational and the amendment
was neither illegitimate nor arbitrary.106 It was found to be reasonable for Congress to
prevent loss to the revenue by imposing a tax on taxpayers entering into purely tax-
motivated transactions that took advantage of an uncorrected law.107

Given the divergence in approach by sophisticated tax regimes, a model must take a
consensual approach to gain acceptance. The best outcome for taxpayers would be for
jurisdictions to adopt the German or Swedish constitutional models. However, a less
stringent approach is acceptable provided it includes safeguards. This is the point where
countries that do allow retroactive legislation have sometimes allowed pragmatism to

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view from Sweden' (1990) 2 The Cambridge Yearbook of European Legal Studies.
103 V. Thüronyi, above n. 5, p. 81 notes that specific constitutional protection exists in Brazil, Greece,
Mexico, Mozambique, Paraguay, Peru, Romania, Russia, Slovenia and Venezuela.
104 H. Ashutpin, above n. 23, p. 139.
105 Although retroactive statutes are permissible, the courts will generally resist their retrospective application
unless the statute clearly intends it, see MacCormick v. PCT (1984) 15 ATR 437.
106 Discussed in V. Thüronyi, above n. 5, p. 78.
107 Ibid, p. 79. See, however, Public Law 1-4-168-July 30, 1996 (H.R.2337), Title XI - Relief from
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overcome the basic principles that underpin the rule of law. The urgency to pass legislation has tended to supersede good legislative practice.

A compromise may be found in the review of legislation by a parliamentary scrutiny committee of a kind discussed in Chapter 5. It is interesting to note that one of the primary focuses of the Australian Senate Standing Committee for the Scrutiny of Bills in relation to tax legislation has been on the dangers of the potential retrospectivity of such legislation. Where amendments are technical and have no financial effect, they are accepted. However, where there is potential for the retrospective imposition of liabilities, the Committee draws it to the attention of the relevant minister and seeks advice either that this is not the effect of the law or that it is indeed the intention of the law. It requires a response from the minister and ensures that retrospective legislation is not introduced unintentionally or without very good reason (the sanction in Australia being that it would otherwise be raised in the Senate debate on the bill).

Sampford endorses the approach to retrospective legislation taken by the Queensland Legislative Standards Act 1992 (Qld), which requires a scrutiny committee to ensure that:

- The purposes of legislation are defined.
- The means identified are defined.
- The proportionality of the means to that end are considered.
- Drawbacks are identified.
- Alternatives to legislation are considered.
- The supporting measures are considered.

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Retroactive Application of Treasury Department Regulation, s. 1101.

108 For example, see Senate Standing Committee for the Scrutiny of Bills, First to Fifteenth Reports of 2003 (Commonwealth of Australia 2003), p. 220.
Delegated legislation and administrative discretion should be subject to similar rules governing retroactivity. In most cases the governing legislation would prevent retroactive application of delegated legislation or administrative discretion prior to the date of effect of the governing legislation. However, the detailed interpretation of the governing law may require the implementation of rules by the authorised delegate from time to time that could take effect retroactively.\textsuperscript{111}

Administrative discretion may also change over time. In the context of tax avoidance in particular, discretion may be exercised to change the interpretation of the law by the revenue authority. This may include changes in accepted interpretations of court decisions, where the revenue authority believes that taxpayers are exploiting the existing interpretation for tax avoidance purposes.\textsuperscript{112} Although there are often no explicit safeguards for taxpayers against retroactive application of delegated legislation and administrative discretion, adopting similar safeguards to those applicable to the governing legislation is unlikely to be contentious.

\section*{D. Certainty}

The issue of certainty covers a number of considerations across legislation, application and adjudication. Often, the rules or practices that try to smooth the technical difficulties that arise in the law from time to time are not articulated clearly enough. This can create more problems than it solves. It is therefore important to identify and articulate in the tax

\textsuperscript{111} C. Sampford, above n. 12, p. 281.
\textsuperscript{112} Internal Revenue Code §7805.

For example, in Australia, the long-accepted rules governing professional service trusts have been changed by the ATO to counter what they judge to be substantial exploitation of those rules to avoid tax. See further, G.S. Cooper, 'Service Entities' (2006) 40 Taxation in Australia 592 and Taxation Ruling TR 2006/2, <www.ato.gov.au>, 1 November 2006.
context, the operational rules that allow the law to work effectively and provide taxpayers with the required certainty.\textsuperscript{113} Quite often these will be rules of interpretation.

The European Court of Human Right's consideration of the requirements for a valid limitation on rights under the ECHR is relevant. The imposition of tax is a similar class of law to a restriction on a protected right. In the \textit{Sunday Times} case,\textsuperscript{114} it was held that a norm must be formulated:\textsuperscript{115}

\begin{quote}
with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.
\end{quote}

The Court has not required a level of specificity that precludes the need for interpretation.\textsuperscript{116} However, the law must be reasonably certain. The requirement of reasonableness underpins much of the analysis below and reflects the OECD expectation.\textsuperscript{117}

An associated difficulty that can undermine certainty is that of complexity. As stated in Chapter 3, tax rules should be as clear and simple to understand as the complexity of the subject of taxation allows. Prebble argues that tax law is necessarily complex because of the nature of modern transactions and their legal treatment and can verge on the incomprehensible.\textsuperscript{118} The problem can be made worse, as some jurisdictions persist in using archaic rules of drafting that serve to make even simple laws seem

\textsuperscript{113} IMF Code, above n. 44, 1.2.2 and the explanation, pp. 18--20

\textsuperscript{114} \textit{Sunday Times} v. United Kingdom, Judgment of 26 April 1979, Series A, No. 30, (1979-80) 2 EHRR 245.

\textsuperscript{115} Ibid., para. 49.

\textsuperscript{116} C. Orey and R.C.A. White, above n. 15, para. 2.21.

\textsuperscript{117} OECD, above n. 1, para. 2.21.

incomprehensible.\textsuperscript{119} The difficulties in making tax law simple is discussed in Chapter 3. Hopefully, best practice in drafting will flow from the other rights. It is difficult to legislate.

\textbf{E \hspace{1cm} Understandable Rules}

A right that should exist in all jurisdictions, but that regrettably does not, is the requirement that tax laws should make sense. It is assumed that they do, often incorrectly. It is important that taxpayers should be able to understand the tax law, albeit with professional assistance.\textsuperscript{120}

One of the particular problems with the common law system is that there is a presumption that laws have meaning. There are rules of statutory interpretation that require judges to interpret the law to find the least absurd meaning where the ordinary meaning of the law does not make sense. In tax legislation this leads to the anomalous situation that taxpayers are supposed to second-guess what meaning judges will read into a provision, where its ordinary meaning is not clear. The problem is more acute, in that it is often broad, catch-all provisions that attempt to act as a stop-gap in tax legislation that are poorly drafted.

An Australian example concerned the notorious ‘Terrible Twins’ of the capital gain and loss provisions.\textsuperscript{121} Where no other provision applied, the language of these two subsections sought to deem a transaction to have occurred that would then be subject to the capital gains provisions. The legal concepts that had to be dealt with to achieve this in a couple of paragraphs proved too much. No-one knew exactly what they meant. When a case considering their application finally reached the full High Court\textsuperscript{122} of seven judges...

\textsuperscript{119} Discussed at length in V. Thuronyi, ‘Drafting Tax Legislation’ in V. Thuronyi, above n. 20, ch. 3.
\textsuperscript{120} OECD, ibid., para. 2.21 and IMF Code, above n. 113.
\textsuperscript{121} Income Tax Assessment Act 1936 (Cth), subss 160M(6) and (7).
\textsuperscript{122} Australia’s highest court.
they gave a number of different judgments which differed in turn from those given by the lower courts. The Chief Justice noted the judges' inability to reach a common understanding and said of the subsections:

They must be obscure, if not bewildering, both to the taxpayer who seeks to determine his or her liability to capital gains tax by reference to them and to the lawyer who is called upon to interpret them.

Where there is a provision which is obscure, bewildering or absurd, and judges interpret it, they thereby provide it with meaning. That meaning then becomes its meaning from when it was first introduced. Taxpayers who have arranged their affairs on the basis of an alternative interpretation (which may have been put forward by the revenue authority prior to the judgment) could experience significant commercial losses. It is an extension of the problem of retroactive legislation. Instead, if a provision is absurd or does not make sense, judges should interpret it in favour of the taxpayer, or order that it does not apply for lack of meaning, and the responsibility should rest with the legislature to amend the provision.

The ordinary meaning of the tax rules should be clear and comprehensible. Where the courts find that it is not, the legislature or its delegate has the responsibility to amend the relevant provision. Taxpayers should not suffer the application of an interpretation that leaves them worse off than an equally plausible interpretation of the rule. In the same way, where the revenue authority finds that the interpretation of the law is uncertain in its application, it should have discretion to take test cases to the courts. This would normally only be feasible as a standard approach in a sophisticated tax system. It is therefore a recommended right.

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Litigation of test cases promotes certainty in grey areas of the law, particularly in areas of concern to a large number of taxpayers, or to a particular sector.\(^{124}\) A revenue authority should identify the criteria for choosing test cases. In a recent review of the ATO litigation program, the Australian Inspector-General of Taxation made recommendations that are apt in any jurisdiction.\(^{125}\) Accordingly, drawing on these recommendations in relation to litigation generally and test case litigation in particular, as part of the recommended right: the revenue authority should set out its litigation philosophy, approach and policy; there should be oversight by a senior officer of the revenue authority to ensure consistency in management of the program; risk management techniques should apply to tax litigation issues; there should be independent input into the litigation program; the revenue authority should fund taxpayers’ expenses in defending all cases where the revenue authority has been unsuccessful at any stage of the litigation; and the revenue authority should communicate the application of finalised court and tribunal decisions in a standard form. The right is most effective where taxpayers have input into the cases chosen through some form of advisory process.

Where a rule is absurd, ambiguous, contradictory, or does not make sense, it places the revenue authority in a difficult position if it is to apply the law. Providing that where there is such a provision, the revenue authority as well as adjudicatory bodies may apply it to the taxpayer’s benefit prevents anomalous results. It also reduces the need for extra-statutory concessions of the kind that are used in the UK.\(^{126}\)

\(^{124}\) The ATO has a budget line dedicated to funding a test case litigation program where taxpayer costs are funded. It focuses on litigation, where the outcome is likely to resolve taxation issues that are important to the general administration of the tax system through the creation of legal precedent, ‘Test Case Litigation Program’, <www.ato.gov.au>, 1 November 2006. Funding is limited and cases chosen tend to have wide application.

\(^{125}\) Inspector-General of Taxation, Review of Tax Office Management of Pt IV/C Litigation (Canberra, Inspector-General of Taxation, 2006) paras. 2.43-2.69.

\(^{126}\) A. van Rijn, above n. 32. This rule overcomes the concern over rules that are not obeyed in their application.
A right that is more often found in tax systems, is that rules should not be contradictory. Two rules that appear to contradict one another leave the taxpayer in a position of uncertainty. In most jurisdictions there are procedures that allow an interpretation to be given by the courts that avoids uncertainty. However, if a taxpayer can show that the application of the law is to the taxpayer's disadvantage, then it should be interpreted in the taxpayer's favour. It may be unfair that an interpretation chosen by a court to avoid contradiction between rules is different from an equally plausible interpretation of the law relied on by the taxpayer.

Statutes tend to overcome this difficulty by including interpretation provisions. Otherwise, a later act normally prevails over an earlier act. Usually, a jurisdiction will have a separate act governing the interpretation of statutes.

A similar problem arises where rules cannot be obeyed: they require conduct that is beyond the powers of the affected party. For example, legislation may require a taxpayer to provide information about a company in which the taxpayer has invested on the basis of deemed control. This creates a problem where the company is in another country and the taxpayer cannot gain access to that information under the laws of that other country. In other situations, legislation may require the taxpayer to pay tax on income which the

127 See Chapter 5 on enforcement of legislation.
128 In Australia, Acts Interpretation Act 1901 (Cth); United Kingdom, Interpretation Act 1978 (UK); Canada, Interpretation Act (R.S., 1985, c. I-21).
129 For example, under Controlled Foreign Corporation or Foreign Investment Fund provisions.
The taxpayer is deemed to have received, but to which the taxpayer is denied access by law. It is unfair in such cases to penalise the taxpayer for non-payment or extended payment and the law should allow relief. In most cases, it would be administrative relief, but the revenue authority may require additional legal authority to provide it. In such cases, it is reasonable that the onus should rest with taxpayers to prove that they cannot obey a law.

Care should be taken in introducing such a rule where it is likely to lead to abuse. There should be clear and narrow limits on the exercise of such discretion. It should be subject to the approval of the most senior officers of the revenue authority and to an annual reporting and external audit process.

H The Right to pay no more than the Correct Amount of Tax

A tax system should operate on the basis that taxpayers need only pay the amount of tax required by law. Taxpayers that overpay tax should be entitled to a full refund and, ideally, interest should be paid on the overpayment. The tax authority should be under an obligation to inform taxpayers if it finds that they are entitled to tax relief, deductions or refunds that the taxpayers have not claimed.

Although this is an issue of assessment, it is fundamental to the principle of certainty and requires particular protection to ensure that tax rules are not arbitrary. Revenue authorities are the means by which governments exact tax from their citizens. They are in a better position than the taxpayer to understand the rules of the tax system. If taxpayers make

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130 In Australia, one interpretation that the courts have given to the rules taxing trusts can lead to a beneficiary, who is a life tenant, paying tax on income that is corpus of the trust, when that income will never come to the beneficiary and will ultimately be distributed to a remainderman. An analogous position can arise where a taxpayer has assets that have been frozen in a foreign jurisdiction and the taxpayer has to pay tax on the income from the frozen assets that are taxable in the taxpayer’s country of residence, even though the taxpayer cannot access the income to pay the tax.

131 This would not be the case if the relief, deductions or refund were optional and the taxpayer had chosen not to exercise that option. In other words, it is not the responsibility of the tax authority to act as a tax planner for the taxpayer. See further, OECD, above n. 7, para. 2.20.
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errors in the government's favour, it is the duty of a revenue authority to correct those errors.132

The Right not to be Taxed Twice

Generally, tax systems should be designed to avoid double taxation and, in most cases, they are. Taxpayers should not be taxed twice on the same income. Where unforeseen anomalies occur in legislation, so that double taxation occurs, taxpayers should be able to obtain relief from the courts without needing to wait for amending legislation. It is more difficult to protect taxpayers from double taxation at the international level. Double tax agreements attempt to do so, but it is unrealistic to expect taxpayers to be able to claim general relief in domestic courts from international double taxation.

Non-discrimination

One of the most important rights in any tax system is the right to equal treatment or non-discrimination. Based on the principle of equity and fairness outlined in Chapter 3, it is also very difficult to apply in the tax context in its broad sense. Article 26 ICCPR states that ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.’ Although considered primarily in the context of the rights specifically provided for in the Covenant, the non-discrimination article provides in itself an autonomous right.133

From Chapter 3, a basic principle of tax law design is that it should treat people in similar circumstances in the same way (horizontal equity) and ensure that tax is allocated fairly between people in different circumstances (vertical equity). To what extent can the right to equal treatment or non-discrimination apply to this principle? It has been found that a system of progressive taxation does not violate Article 26.\(^\text{134}\) It has also been held that there is an objective distinction to be made between higher and lower income and the aim to achieve a more equitable distribution of wealth is both reasonable and compatible with the aims of the Covenant.\(^\text{135}\) This allows fairness or vertical equity into the principle of non-discrimination.

The jurisprudence on Article 26 ICCPR has focused heavily on horizontal equity issues in non-tax matters.\(^\text{136}\) The test is whether the discrimination is based on reasonable and objective criteria.\(^\text{137}\) An additional consideration is that distinctions that were reasonable and objective at the time of enactment of legislation, remain so in a changing society.\(^\text{138}\) Negative effects on an individual or group of individuals are not necessarily discriminatory.\(^\text{139}\)

Both points are important in the tax context. Obscure tax rules can remain in place despite the fact that the economic or social reasons for their implementation have long disappeared. Sometimes political lobbying will ensure that they are at the forefront of current awareness and are retained. At other times there is no reason or support for their retention. In such cases legislation should provide taxpayers suffering discrimination standing to question the rules' continuing validity. The second point is a necessary distinction in the context of tax rules, where the introduction of a rule often produces negative effects or less beneficial effects to at least some taxpayers.

\(^{134}\) S. Joseph et al, above n. 133, p. 526
\(^{135}\) Ibid.
\(^{136}\) Ibid., p. 519.
\(^{137}\) Ibid.
\(^{138}\) Ibid.
\(^{139}\) Ibid.
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Article 14 ECHR provides a more detailed jurisprudence on non-discrimination in response to the breadth of its jurisdiction. Unlike Article 26 ICCPR it does not have autonomous effect and therefore has little effect on tax matters. However Protocol 12 although phrased in terms of a prohibition on discrimination, effectively provides a right to equality. It is likely to have a wider impact on tax matters in that it focuses specifically on discrimination by a public authority in the exercise of discretionary power and by any act of omission. The methodology used by the European Court of Human Rights in examining non-discrimination issues under Article 26 is useful.

Once it has reviewed whether the complaint falls within a protected right and there is a violation of a substantive provision, the Court examines whether there is different treatment. The *Chassagnou* case highlighted that the applicant must show there has been different treatment and, once this has been done, the respondent Government must show that different treatment is justified. In identifying difference, the groups must be comparable. For indirect discrimination, the groups must show that although the same requirement applies, 'a significant number of one group is unable to comply with the requirement'.

It is generally straightforward to identify different treatment between taxpayers. Tax policy focuses extensively on the difficulties in balancing competing objectives. That is why there is such a wide margin of appreciation given to Contracting States of the ECHR and other human rights instruments in tax policy. The critical factors in an
determination of discrimination or inequality is whether the different treatment pursues a legitimate aim and whether the means employed are proportionate to the legitimate aim.148

Policy determines whether companies are taxed differently to partnerships, trusts or sole traders although they are carrying on similar businesses. Social policy determines the levels of relief available to taxpayers for dependents of different kinds. Yet, to treat taxpayers in the same position differently would undermine the effectiveness of the tax system. Germany has taken the concept one step further. It was found to be unconstitutional to impose a different tax burden on real estate as compared to other forms of property, as it breached the principle of equality before the law.149 The same decision held that a total tax burden imposed on a taxpayer which exceeds approximately 50 per cent of the total return typically derived from the taxpayer's property is a violation of the constitutional right of free disposition of property. These concepts open interesting new areas for consideration and may be an indication of how this right will expand in jurisdictions other than Germany.

Thuronyi provides a wide-ranging analysis of the application of the principle of equality or non-discrimination in courts in a number of jurisdictions.150 The German Constitutional Court clearly takes an active interventionist approach to violations of the principle of equality, and has struck down a number of taxes for breach of this rule.151 In contrast, the US Supreme Court allows a significant degree of latitude in tax matters.152 In France, an important area of intervention has been to ensure equal access to procedural rights.153

In all three courts, it is likely that the methodology of the European Court of Human Rights would have achieved similar results. The analysis as to whether discrimination is

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149 Decision of the Constitutional Court of 22 June 1995, 2 BvL 37/91 published in Official Tax Gazette II 95. 455 et seq, discussed in C. Dabier, above n. 27, p. 156.
150 V. Thuronyi, above n. 5, p. 82.
151 Ibid.
152 Ibid.
153 Ibid.
permissible requires an assessment of the legitimacy of the aim and the proportionality of
the means. The courts in each jurisdiction are influenced *inter alia* by their own legal,
political, social and economic circumstances in reaching that decision. That is how it
should be and is consistent with the arguments for some recognition of cultural relativity
identified in Chapter 2.154 This approach does not necessarily undermine the concept of
non-discrimination. Rather, it acknowledges that in an area fraught with policy and other
arguments, the detailed content of the right will differ between jurisdictions. It also leaves it
open for jurisdictions with different interpretations to include a right to non-discrimination.

K Proportionality

The principle of proportionality has its origins in civil law jurisdictions and has a much
shorter history in the common law. In the civil law tradition, the executive gives effect to
the purposes of the state and the administrative law regulates the exercise of state power.155
Administrators exercise their powers, but they are constrained by the values and principles
in the law that seek to control and supervise state activities and the state’s relationship with
private individuals.156 The effectiveness of the state is therefore assured, but not at the
expense of the interests of the private citizen.

The principle of proportionality requires broadly that the state should use
appropriate means to achieve its policy objectives. This is relevant both to taxation rules
and the actions of the revenue authorities in administering the tax system. In Germany, the
principle requires that the means used to achieve a revenue objective should be appropriate
and necessary, impose the lightest possible burden, provide the best alternative to achieve

156 Ibid.
the desired objective and any resulting disadvantage must not be disproportionate to the aim. It is a construction that has been adopted by the European Court of Justice as applicable to the European Union and was articulated in a similar three-part test requiring that the measures:

Are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question, when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

Use of the proportionality principle is not designed to interfere with a chosen policy goal, but to ensure that the means used to achieve it were the most appropriate. In this sense it provides a most effective redress for the taxpayer when a revenue authority overreaches its powers. It goes beyond the relatively restrictive review on the grounds of reasonableness found in common law jurisdictions to require a review of the appropriateness of the exercise of administrative power. The narrow common law reading of grounds for judicial review means that it is appropriate to include the principle of proportionality as a primary legal right, which should be legislated, even if it is only applicable to tax administration. Although common law jurisdictions are slowly adopting the principle as part of administrative law, it is by no means universal.

The European Court's formulation is in respect of legislation. However, it should extend, as it does in Europe generally, to the exercise of administrative discretion. The

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134 C. Dailer, above n. 27, p. 159.
138 R. Creyke and J. McMillan, ibid., p. 741 et seq.
advantage of the proportionality principle is that it is broad enough to cover a wider range of the more egregious abuses of power without requiring special grounds for review or satisfaction of particularly difficult burdens of proof often required in the common law. The Australian Federal Court, for example, would not have needed to find abuse of power in Edelsten v. Wilcox,162 in which the Commissioner exercised his discretion to require almost 100 per cent of a doctor’s income to be used to pay a tax debt, which was also under appeal. The measures used were neither appropriate nor proportionate to achieve the legitimate aim. The civil law formulation of the principle was to protect the legitimacy of the exercise of legislative and administrative power.163 As discussed in earlier chapters, there is often no greater need in respect of tax law and administration.

III Conclusion

This chapter begins by emphasising that primary legal rights go to the heart of the legal system. Using Fuller’s eight criteria for valid law as a starting point, it expands on the criteria for valid law with a focus on tax law. Simply because tax is critical to the operation of government does not mean that it is beyond the law. Caveats on the normal operation of the law used to support the operation of the tax system undermine the legal system itself. It is not appropriate to have requirements for valid law applicable only to certain aspects of the law. Just as derogations from human rights instruments are frowned upon except in the most extreme circumstances, so derogations from the normal operation of the legal system should not be accepted simply because tax is involved.

Once it is accepted that the tax law is not a special species of law that allows arbitrary rule-making, it is necessary to consider what the basic requirements are for the lega

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framework governing taxation. They are not much different to that required in other areas, but there are special emphases pertinent to tax. As discussed in Chapter 2, taxation is not generally seen as a fundamental good. It is designed to deprive citizens of their property, which is a fundamental good. However, as its purpose is widely recognised as legitimate and necessary for the continuation of society, it is important to ensure that a tax system is effective without breaching basic rights of the citizens being taxed. The primary legal rights articulated in this chapter are designed to ensure that balance is kept.

Tax laws should be imposed by law, be subject to the operation of the rule of law, and comply with principles of legality. This provides them with legitimacy. Taxpayers must know what the rules are. This requires substantial interplay between the legal and administrative rights, as publication needs to be at all levels, from the publication of rules legislated through to detailed explanation of their operation in the daily administration of the tax system. There must be careful monitoring of retrospective legislation. In some cases, it is necessary to make announcements of impending legislation to protect the fisc, particularly in cases of schemes for the avoidance of tax. However, the use of retrospective legislation should be used only to the extent available for other legislation and in compliance with the principles set out by Thuronyi, discussed above.

There should be careful management of tax legislation to allow its effective operation in accordance with the principles underlying the system discussed in Chapter 3. A tax system simply will not work effectively if its rules are uncertain, cannot be understood, are contradictory or cannot be obeyed. In most jurisdictions where such problems arise, it is not intentional. However, where the system is not constantly and consistently monitored, breaches of these rules can occur and there should be safeguards in place to protect taxpayers from those breaches.
The principles of fairness and equity are undermined if taxpayers are double-taxed, discriminated against or required to pay more than the tax due. Where this happens it is often symptomatic of a corrupt system. It can also happen where the internal safeguards are not in place to allow taxpayers redress. Where there is no redress, breaches of basic taxpayers' rights can be glossed over and ignored within the significant bureaucracy of the tax administration. The principle of proportionality tries to balance the rights of the state and the individual taxpayer. Although legal systems and tax administrations can get away with not applying these principles, it is not best practice. The Model therefore provides the rules that ensure a level of best practice to protect taxpayers, but also to ensure a tax system that operates more effectively.

Where primary legal rules do not exist to protect taxpayers they will be the most difficult to introduce, simply because they require legislation. There will always be strong defensive arguments justifying why the rules are unnecessary. Nonetheless, best practice suggests that they should be legislated.