Article

Constitutional limits on taxation in Denmark

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ABSTRACT:

The authors discuss the Danish legislator's taxing powers in a constitutional context. The principle of legality, particularly the non-delegation doctrine enshrined in the constitution, prescribes that no taxes shall be imposed, altered, or repealed except by statute. Section 43 of the Danish constitution thus provides a constitutional prohibition on legislative delegation in the tax area. In the view of the authors, the Danish Supreme Court has approached the non-delegation doctrine pragmatically, accepting important modifications regarding both the practical realities of lawmaking and the long-standing practice of delegation of certain taxing powers to the municipalities. In accordance with the prevailing view, the authors reject the notion that a particular requirement for a clear statutory basis for imposing tax follows from section 43 of the constitution. Finally, the authors assess the constitutionality of the recently adopted statutory general anti-avoidance rules and argue that these new provisions are not unconstitutional. This article is – with the kind permission of the publishers – to a large extent based on the authors' contribution to an international anthology on constitutional principles of taxation: The principle of legality in the context of Danish tax law, in Noções gerais e limitações formais ao poder de tributar (2020), p. 385-400. Belo Horizonte: Fórum.

PALABRAS CLAVES:

Derecho tributario constitucional, principio de legalidad, poder tributario, doctrina de la no delegación, interpretación legal de las disposiciones reglamentarias, normas antiabuso, GAAR

RESUMEN:

Los autores comentan los poderes impositivos del legislador danés en un contexto constitucional. El principio de legalidad, en particular la doctrina de no delegación consagrada en la Constitución, prescribe que no se impondrán, modificarán ni derogarán impuestos excepto por ley. El artículo 43 de la constitución danesa prevé, por tanto, una prohibición constitucional de la delegación legislativa en el ámbito fiscal. En opinión de los autores, el Tribunal Supremo danés ha abordado la doctrina de la no delegación de forma pragmática, aceptando importantes modificaciones en relación tanto con las realidades prácticas de la elaboración de leyes, como con la práctica de larga data de delegación de ciertos poderes impositivos a los municipios. De acuerdo con la opinión prevaleciente, los autores rechazan la noción de que un requisito particular para una base legal clara para imponer impuestos se deriva de la sección 43 de la constitución. Finalmente, los autores evalúan la constitucionalidad de las normas estatutarias generales contra la elusión recientemente adoptadas y argumentan que estas nuevas disposiciones no son inconstitucionales. Este artículo, con el amable permiso de los editores, se basa en gran medida en la contribución de los autores a una antología internacional sobre principios constitucionales de tributación: El principio de legalidad en el contexto de la ley tributaria danesa, en Noções gerais e limitações formais al poder de tributar (2020), pág. 385-400. Belo Horizonte: Foro.

MOTS CLES :

Droit fiscal constitutionnel, principe de légalité, pouvoirs d'imposition, doctrine de non-délégation, interprétation des dispositions fiscales, règles contre l'évasion fiscale, GAAR (French).

RESUME :

Les auteurs discutent des pouvoirs de taxation du législateur danois dans un contexte constitutionnel. Le principe de légalité, en particulier la doctrine de la non-délégation inscrite dans la constitution, prescrit que les impôts ne peuvent être imposés, modifiés ou abrogés que par la loi. L'article 43 de la constitution danoise prévoit donc une interdiction constitutionnelle de la délégation législative dans le domaine fiscal. De l'avis des auteurs, la Cour suprême danoise a abordé la doctrine de la non-délégation de manière pragmatique, acceptant d'importantes modifications par rapport à la fois aux réalités pratiques de l'élaboration des lois et à la pratique de longue date consistant à déléguer certains pouvoirs fiscaux aux municipalités. Conformément à l'opinion dominante, les auteurs rejettent l'idée qu'une exigence particulière d'une base juridique claire pour l'imposition des impôts découle de l'article 43 de la constitution. Enfin, les auteurs évaluent la constitutionnalité des règles légales générales anti-contournement récemment adoptées et soutiennent que ces nouvelles dispositions ne sont pas inconstitutionnelles. Cet article, avec l'aimable autorisation des éditeurs, est largement basé sur la contribution des auteurs à une anthologie internationale sur les principes constitutionnels de la fiscalité : Le principe de légalité dans le contexte du droit fiscal danois, dans Noções gerais e limitações vous formez le pouvoir payer des impôts (2020), p. 385-400. Belo Horizonte : Forum.

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1 TAX LAW AND THE PRINCIPLE OF LEGALITY

Already by the mid nineteenth century, the basic legal framework for raising taxes had been established in many jurisdictions across the globe, and still today this basic framework implicates that taxation should take place in accordance with the rule of law (Vanistendael, 1996, Chapter 2). According to notions on the rule of law, there must be limits on the powers of governments and bureaucracies. In the context of taxation, there is general agreement that imposition of taxes must follow a proper legislative approach, and that the government and administration must comply with the enacted tax laws. In addition the enacted tax legislation must have the characteristics that constitute law, e.g. facilitate a sufficient degree of certainty and predictability for taxpayers (Cooper, 1997, pp. 13–50; Hilling & Ostas, 2017, pp. 38–40). Accordingly, as it is widely accepted that taxation needs democratic legitimacy, any tax levied must have a firm basis in law (Gribnau, 2013).[1] Often this requirement is explicitly specified in the constitution (Vanistendael, 1996, p. 1) .

This is also the case in Denmark, as section 43 of the Constitutional Act of Denmark (hereinafter "the constitution") provides that no taxes shall be imposed, altered, or repealed except by statute.[2] This principle of legality – enshrined in section 43 of the constitution – can be seen to reflect three basic aspects for tax regulation in Denmark: 1) administrative tax regulation, such as executive orders and regulations, cannot be in conflict with statutory law, 2) executive orders cannot constitute an independent basis for taxation, and 3) the tax authorities are only allowed to impose taxes if a legal basis for taxation can be found in statute (Nielsen, 2013, p. 355).

These aspects of the Danish principle of legality and section 43 of the constitution are analyzed in more detail below. The taxing powers and non-delegation doctrine is touched upon in section 3, while interpretation of tax statutes is discussed in section 4. However, before the analysis of the scope and limits of section 43 of the constitution, a brief description of the general Danish constitutional context is provided in section 2.

2 THE DANISH CONSTITUTIONAL FRAMEWORK

Interpretation of the constitution follows the same principles as other statutory interpretation in Danish law. The text is the starting point, but the *travaux préparatoires* and the purpose of the specific sections may be significant for establishing the scope of the constitution. Case law and legislative practice may also hold importance for interpretation of the constitution (Christensen et al., 2020).[3]

Denmark is usually characterized as a constitutional monarchy, as section 3 of the constitution stipulates that legislative authority is vested in the King and the parliament (*Folketinget*). According to section 3, the government has the executive authority while the judicial authority belongs to the courts. Importantly, the King does not personally hold the legislative powers mentioned in the constitution as the government exercises the King's constitutional authority in this regard (Christensen et al., 2020, pp. 39-40,55,65,161). Danish parliament's legislative competence is limited only by express provisions in the constitution and by customary constitutional law. Unless the constitution provides that the parliament has the exclusive competence in a particular area, the parliament may by statute

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[1] *A.P. Dourado argues that tax law receives is legitimacy from democratic procedures, public discussion and argumentation, disagreement and compromise in parliament in a context of political plurality. (Dourado, 2014, Chapter 10)*

[2] *Constitutional Act of Denmark (Danmarks Riges Grundlov), Law no. 169 of 5 June 1953.*

[3] *For a different view see the references in Christensen, p. 36-43.*

delegate specific legislative authority to the executive branch. This enables the executive branch to issue binding administrative regulation in most policy areas.

Executive regulations (*bekendtgørelser)* must have sufficient legal basis in the enabling statute, and the regulation may not be in conflict with statutory or constitutional law. In addition, executive regulations must be published in the electronic promulgation media of the Danish public authorities (*Lovtidende*) along with, inter alia, statutes.[4] Binding Danish rules are to a large extent issued administratively.

The Danish Supreme court has in practice assumed the right to perform a constitutional review of statutes passed by the legislator (Christensen, 2015). Until the *Tvind case* from 1999, the Supreme Court had not stricken down a statute as unconstitutional (Christensen et al., 2015, p. 29).[5] In cases regarding the constitution, the court will usually appoint an extended panel of seven, nine or eleven judges instead of the usual five-judge panel.[6]

3 TAXING POWERS AND THE NON-DELEGATION DOCTRINE

As mentioned above, section 43 of the constitution prescribes that no taxes shall be imposed, altered, or repealed except by statute. The phrase "except by statute" in section 43 is understood as a prohibition on legislative delegation in the tax area (Christensen et al., 2015, p. 178; Pedersen, 2006, pp. 320–321; Sørensen & Germer, 1973, p. 207).

Neither the constitution nor tax regulation defines the concept of a *tax*. Nevertheless, it is generally agreed that a tax is characterized as a mandatory payment to the administration. However, the payment is not a tax if it is reciprocal for a specific service or object (Christensen, 2015, p. 295). The Supreme Court dealt with the distinction between a tax and a service fee in the so-called *service fee case* from 1993.[7] An analysis of the case follows in section 3.1.

Despite the prohibition on legislative delegation in the tax area, delegation is indeed permissible in certain situations. Hence, executive regulations on the administration and enforcement of tax statutes are not precluded by section 43 (Christensen, 2015, p. 295; Pedersen, 2006, pp. 320–321). Conversely, on the question of the substantive tax claim, the possibility of delegation is quite limited. At least as a starting point, all essential elements must be provided for in the enabling tax statute. Essential elements – that pursuant to the principle of legality enshrined in section 43 require statutory basis – are, among others, the definition of the tax object and the tax rate. In short, the tax rules defining the tax claim must be present in the statute.(Christensen, 2015, p. 295). Consequently, in terms of limits on delegation of taxing power, Denmark holds what in Vanistendael's classification system probably may be characterized as an intermediate position compared to similar democracies (Vanistendael, 1996, p. 149).

However, there are two notable modifications to this starting point. One leading case is the *Scharla Nielsen case* from 2006 where the Danish Supreme Court provided guidelines for answering the question of to what extent the constitution's section 43 prohibits legislative delegation of the determination of tax rates.[8] An analysis of the *Scharla Nielsen case* follows

[4] The official Danish statute regulating promulgation is consolidation act no. 1098 from August 10 2016 on udgivelsen af en Lovtidende (Lovtidendeloven). The promulgation requirement is laid down in section 2. Although section 22 of the Danish constitution only requires promulgation of statutes, executive regulations must too be published pursuant to the promulgation act.

[5] With reference to the Tvind case published in UfR 1999.841H.

[6] See inter alia the Tvind case published in UfR 1999.841H or the Iraq case published in UfR 2010.1547H.

[7] Danish Supreme Court verdict 29 June 1993 (Gebyr-sagen) published in UfR 1993.757H.

[8] Danish Supreme Court verdict 15 December 2006 (Scharla Nielsen) published in UfR 2007.788H.

in section 3.2. The other important modification is the assumed less strict constitutional limits on delegation of taxing powers to municipalities, see section 3.3.

3.1 THE SERVICE FEE CASE AND THE TAX CONCEPT IN SECTION 43

In the *service fee case*, the Danish Ministry of Justice had charged a service fee for the issuance of passports, license plates and driver's licenses.[9] The amount of the service fee did not follow from the statute providing the legal basis for the executive regulation but was determined in the executive regulation itself. With reference to the fact that the legal basis for the fee was found in an executive regulation, two citizens argued that the administratively issued executive regulation establishing the size of the fee did in fact regulate a tax, thus violating the constitution's section 43. While two of eleven judges on the bench found the argument convincing, the majority held that neither the *travaux préparatoires* to section 43, the historical background for the provision, nor the subsequent constitutional practice supported an interpretation of section 43, according to which statutory legal basis is required for all service fees charged by authorities. Although there must be certain limitations for the administration's executive regulations in this regard, the majority at the same time acknowledged that the administration had the right to estimate a fee based on all relevant expenses with reasonable connection to the issuance of the concerned permissions. Inter alia, according to the majority's judgment, the administration may take into account more general enforcement measures related to the subject that the service fee is based on – and not only expenditures narrowly related to the service fee.

One scholar criticized the majority's reasoning in the *service fee case*. The scholar referred to the arguments formulated by the minority, amplifying that the effect of the fee was indeed similar to a tax. The argument that was put forward was that passports and license plates are practical necessities in a modern society. Accordingly, pursuant to the minority's opinion and the scholar, they are in effect not voluntary, and for this reason, the fees qualify as taxes covered by the prohibition in section 43 (Germer, 2012, pp. 109–110). The scholar's criticism did not introduce new arguments, and the view has not subsequently found support among other Danish scholars or the courts. The suggested strict constitutional limits on the legal basis for administrative fees would likely burden the already overburdened legislative assembly. Considering the specific historical background for the delegation limits in section 43 and the context of section 43 as well as the subsequent legislative practice applied in accordance with the *service fee case*, an overturn of the case today appears unlikely.[10]

3.2 THE SCHARLA NIELSEN CASE ON LEGISLATIVE DELEGATION IN THE TAXING AREA

In the *Scharla Nielsen case* from 2006, the legislator had authorized the administration to issue an executive regulation regulating a rate adjustment percentage that had consequences for all individual taxpayers' tax liabilities.[11] The question before the court was whether the constitution's section 43 permitted such delegation to the administration. Interpreted strictly section 43 would indeed not allow an executive determination of a tax rate.

Apparently, the legislator did not perceive the delegation clause in the enabling statute as a matter of tax law. The high court initially assessing the case agreed with this

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[9] *Danish Supreme Court verdict 29 June 1993 (Gebyr-sagen) published in UfR 1993.757H.*

[10] *Reference is made to section 3.2 and the description of the historical background for the delegation limits in article 43 and the context of section 43.*

[11] *The case was published in UfR 2007.788H. The consequence for all individual's taxpayers'tax liabilities followed from a reference to another statute regarding individual taxpayers' (personskatteloven).(Christensen, 2015, pp. 297–299).*

viewpoint, but the Supreme Court viewed this differently, essentially defining the statute's effect as a matter of tax law within the meaning of section 43. As a starting point for its assessment, the Supreme Court looked into the scope and purpose of the specific statute and stated that the statute laid down the fundamental rules for the calculation of wages in the Danish labor market. At the same time, the calculation had an effect on individual taxpayers' tax liabilities. Importantly, the court emphasized that the statute itself did not specify in detail all information concerning the calculation and that the calculation inherently depended on a variety of statistical choices. However, although the statutory framework did not specify in detail all relevant prerequisites for the calculation, this fact did not raise concerns under the concrete circumstances in the view of the court. Against this background, the court found that the delegation clause of the statute was not in conflict the with non-delegability rule in section 43 of the constitution.

The *Scharla Nielsen case* shows that the legislator may delegate to the administration the power to issue executive regulations of implementing nature regarding statistical and technical areas of tax law, in accordance with the general view amongst Danish scholars (Germer, 2012, pp. 109–110). Although all essential elements must be provided for in the enabling tax statute, the *Scharla Nielsen case* established that – under certain circumstances concerning implementing measures – the tax rate itself does not necessarily need to be defined in the enabling statute. However, while case law permits delegation of the statistical-methodological choice, the basic calculation framework must surely follow from the statute in order to satisfy the requirement in section 43 (Christensen, 2015, p. 299).

As mentioned, a strict literal interpretation of the phrase "except by statute" in section 43 would indeed suggest that no delegation is permissible. Nonetheless, Danish scholars argue that under specific circumstances there might be a need for quite broad implementing measures. In this context, it is important to emphasize the weight in Danish constitutional law given to legislative practice and the practical needs in the tax area (Germer, 2012, pp. 109–110). Former constitutional law professor and judge in the *Scharla Nielsen case*, J.P. Christensen, commented the ruling, stating that the decision is in accordance with the notion that the legislator should decide fundamental tax matters. However, as Christensen argues, the extent of the non-delegability rule in section 43 should be determined with due regard to the practical realities of lawmaking (Christensen, 2011, p. 72) .

Additionally, the development in Denmark in the middle of the nineteenth century is of importance to the understanding of the constitution's stipulations on tax.[12] Preceded by an absolute monarchy, section 43 from 1849 intended to secure the legislator the taxing power. This power was highly relevant in the Danish constitutional system in the period before 1901, at a time where the legislator in Denmark did not enjoy the control functions and insight with the administration, e.g. the possibility of a no confidence vote, which the parliament has today (Christensen, 2011, pp. 64, 69) . The placement of section 43 indicates that not individuals but the parliament itself is the object of the protection provided in section 43 (Christensen, 2011, pp. 69–70).[13] Thus, neither the specific historical background for the non-delegation doctrine in section 43 nor the context of section 43 support a strict literal interpretation. It is true that a strict interpretation might provide a minority in parliament with the protection secured by the thorough legislative process that applies for adopting statutes

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[12] *Section 43: »No taxes shall be imposed, altered, or repealed except by statute; nor shall any man be conscripted or any public loan be raised except by statute.« Section 46(1): (1) »Taxes shall not be levied before the Finance Act or a Provisional Appropriation Act has been passed by the [parliament].«*

[13] *Christensen points to, inter alia, the fact that section is placed in chapter 5 in the constitution, which contains provisions on parliament and the legislative process, and not chapter 8 on the protection of individuals. In addition, he points to restraint generally exercised by the Danish Supreme Court in cases on constitutional provisions regulating the relations between the parliament and the administration. This restraint supports the argument that legislator should enjoy a margin of appreciation when it comes to the determination of the extent of the prohibition of delegation.*

(Germer, 2012, p. 109). Although this view is sympathetic, it seems inadequate to justify a strict reading of section 43 (Christensen, 2011, p. 70). As pointed out by the lawyer representing the government in the *Scarla Nielsen case*, the constitution should not be understood as requiring a tax statute to be a textbook in statistics (Christensen, 2011, p. 72). In the light of the practical realities of lawmaking pointing to the same result as the background and context of section 43, it is thus difficult to see how a court could have found the statute in question incompatible with section 43.

3.3 MUNICIPALITY TAXES AND SECTION 43

The municipality tax area holds a special position in terms of the delegation of taxing powers. According to section 82, the right of the municipalities to manage their own affairs independently - under state supervision - shall be laid down by statute. With reference to section 82, some scholars have concluded that case law suggests that the non-delegability rule in section 43 does not apply to municipality taxes (Pedersen, 2006, p. 320; Sørensen & Germer, 1973, p. 207); others find that there is a particularly broad access for the legislator to delegate to the municipalities certain taxing powers regarding local municipality taxes (Germer, 2012, p. 110; Zahle, 2001, pp. 375–376) .

The Supreme Court has never explicitly touched upon the relationship between the non-delegability rule in section 43 and tax rates determined by the municipalities (Christensen, 2011, p. 67). However, due to section 82, it seems unlikely that the courts should overrule the long-standing practice of the delegation of taxing powers to the municipalities.

4 INTERPRETATION OF TAX PROVISIONS

As mentioned above, it can be deduced from section 43 of the constitution that the tax authorities are only allowed to impose taxes if a statutory basis for taxation can be found. Even though this is a common principle among most jurisdictions, it is not always clear what interpretational consequences the application of such a principle should have (if any) (Vanistendael, 1996). The principle could perhaps be seen to mean that the courts should not extend the wording of a tax statute to impose a tax in circumstances where the language of the law does not clearly prescribe that taxation should take place, i.e. the principle could be perceived to dictate that a literal or strict interpretation should be made instead of a teleological or analogical interpretation. However, if courts should always restrict themselves to a literal or strict interpretation of tax statutes, it may conflict with other principles or aims such as the principle of equality or the need to mitigate tax avoidance.[14]

This aspect of the principle of legality has also caused debate in a Danish context. The debate was particularly intense in the late 1990s after the Supreme Court had decided against the Danish Ministry of Taxation in a number of prominent cases.[15] As a consequence of the lost cases, the ministry published an announcement in which it was concluded that the Supreme Court by its decisions had underlined that a clear statutory legal basis is a precondition for imposing tax. The ministry also argued that the Supreme Court's decisions apparently showed – at least with respect to situations not involving avoidance and abuse – that the interpretation of tax statutes cannot be extended beyond what is actually stated in the wording of the statute and perhaps also in the *travaux préparatoires*. In continuation of

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[14] *Ibid.*

[15] *See for example the Supreme Court's decision of 20 August 1996 (TfS 1996.642H), the Supreme Court's decision of 30 August 1996 (TfS 1996.653H) and the Supreme Court's decision of 14 August 1996 (TfS 1996.654H). See also P.K. Schmidt, Legal Pragmatism – A Useful and Adequate Explanatory Model for Danish Adjudication on Tax Avoidance, Nordic Tax Journal (2020 – ahead of print) and P.K. Schmidt, Retspragmatisme og skatteundgåelse, Kritisk Jus 3, 2020, p. 207-220.*

this, the ministry also deduced that uncertainty concerning the scope or reach of a provision normally should entail that the provision should be subject to an expansive interpretation, if this is in the interest of the taxpayer.[16]

That taxation presupposes a clear statutory basis has also been advocated in the Danish scholarly literature. *Jan Pedersen* has for example argued that section 43 of the constitution prescribes such a requirement. (Pedersen, 2006, pp. 319–326)[17] However, at the same time the author added that the requirement does not prevent interpretation based on analogy and that interpretation of tax legislation does not differ from the interpretation of other kinds of administrative law.[18] When these modifications are taken into account, it becomes quite hard to see what is actually left of the postulated requirement for a clear statutory basis.[19]

In a dissertation from 2003, *Jakob Graff Nielsen* initially classified section 43 of the constitution as belonging to a broader group of legal areas where a requirement of clear statutory basis has to be respected (e.g. criminal law and legislation interfering with citizens' private life). (Nielsen, 2013, p. 264). However, after a thorough examination of court cases related to taxation, he concluded that case law concerning this matter was nuanced and that the requirement of clear statutory basis was not absolute. Moreover, he argued that analogical interpretation is possible and that there is no maxim according to which tax legislation has to be interpreted in favor of the taxpayers or in favor of the tax authorities (Christensen, 2011, p. 354). Accordingly, with respect to Jacob Graff Nielsen's findings, it could be argued that it is difficult to see what is actually left of the postulated requirement of a clear statutory basis.[20]

Jens Peter Christensen has criticized the views originally presented by both Jan Pedersen and Jakob Graff Nielsen (Christensen, 2011, pp. 72–75, 2015, p. 297). Thus, Jens Peter Christensen argues that it would be more appropriate to state that section 43 of the constitution does not say anything about how clear the statutory basis should be. Secondly, the courts' assessments of the requirement for a clear statutory basis varies to such a degree that abstract assertions about the existence of such requirement do not make sense. What matters according to customary administrative law is the extent or intensity of the specific government interference and not the fact that the interference generally could be categorized as a matter of tax. Thus, tax legislation should be interpreted along the same lines as other kinds of legislation interfering with for example the citizens' private lives. Jens Peter Christensen places emphasis on the fact that the underlying aim of section 43 of the constitution historically was to regulate the power relationship between the parliament and the administration. Hence, the main idea behind article 43 was, as also mentioned in section 3.2, not to provide protection for the individual citizens but to regulate the relationship

[16] *For more about the case law of the Supreme Court in late 1990'ies see also I.A, Strobel, Skattevæsenets problemer med lovhjemmel, Skattepolitisk oversigt, p. 134 et seq. (1998), J. Pedersen, Virksomhed i selskabsform, Revision & Regnskabsvæsen SM, p. 307 et seq. (1998), N. Schiersing, Om hjemmelsspørgsmålet i skattesager, Skattepolitisk oversigt, p. 61 et seq. (1999), A. Michelsen, Legalitetsprincippets bæredygtighed over for transaktioner foretaget udelukkende eller hovedsagelig i skattebesparelsesøjemed, Revision & Regnskabsvæsen SM, p. 150 (1999), and Erik Werlauff, Let us pretend, Tidsskrift for skatter og afgifter 237 (1999).*

[17] *See also J. Pedersen, Grundlovens § 43: "Ingen skat kan pålægges, forandres eller ophæves uden ved lov" – pas, kørekort og nummerpladegebyrer, Tidsskrift for skatter og afgifter, p. 413 et seq. (1992).*

[18] *References were made to the Supreme Court's decision of 17 May 1940 (UfR 1940 644 H), the Supreme Court's decision of 20 December 1979 (UfR 1980 121 H) and the Supreme Court's decision of 19 March 1996 (UfR 1996 775 H).*

[19] *See the criticism by Jens Peter Christensen. (Christensen, 2011, pp. 72–75)*

[20] *In his review of the dissertation, Henrik Dam argues that the results of Jakob Graff Nielsen's analyses should have caused the author to reach the more bold conclusion that article 43 of the constitution does not say anything about how clear the statutory basis should be. See H. Dam, Legalitetskravet ved beskatning, Ugeskrift for retsvæsen B, p. 290-291 (2003).*

between the institutions of government.[21] In our view, the conclusions presented by Jens Peter Christensen appear convincing.[22]

4.1 ABUSE AND AVOIDANCE – THE DOCTRINE OF REALITY?

Until recently, no statutory general anti-avoidance rule (GAAR) existed in Danish tax law.[23] However, this did not mean that abuse of tax law could not be mitigated by the tax authorities as Danish case law contains several examples where courts have struck down the arrangements of a taxpayer, inter alia, by taking the substance of the transaction(s) into account when interpreting and applying the law (Madsen & Norgaard Laursen, 2018). In this context, the so-called *doctrine of reality* has been formulated in the academic literature to explain the longstanding inclination of the courts to place emphasis on the substance of the transaction when interpreting and applying tax provisions (Pedersen, 1989).[24] Briefly described, the doctrine states that fictitious or artificial transactions may be set aside for tax purposes if the formal private law basis of an arrangement has been manipulated to such an extent that the underlying substance of the transaction significantly deviates from the outer legal shell.[25]

However, not all scholars agree that an actual coherent doctrine of reality can be considered to exist in Danish tax law. Broadly speaking, these scholars instead argue that the inclination of the courts to place emphasis on the substance of an arrangement simply follows ordinary rules for interpretation of the law, according to which the existence of abusive behavior constitutes one of several elements that may be taken into account in the interpretation process, often with significant weight attached to it.[26] Accordingly, in the eyes of these scholars, the existence of a doctrine of reality would be hard to reconcile with the requirement for a statutory basis for taxation prescribed in article 43 of the constitution. (Madsen & Norgaard Laursen, 2018)[27]

Finally – and as a kind of an intermediary position – it has been argued that the Danish Supreme Court's interpretation and application of the law in cases on tax avoidance exhibit an inclination towards legal pragmatism, in particular because the Court has shown

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[21] In the same vein see also N. Winther-Sørensen, Beskatning af international erhvervsindkomst (Thomson Gad Jura 2000), p. 52 et seq. and same author in Hjemmelsgrundlaget for Skats instruks om sagstilskæring, SR-Skat, p. 293 et seq. (2018).

[22] In this context, it is worth noting that Jan Pedersen seems to have abandoned his previous position. Accordingly, in an article from 2014 he has stated that it is a common misconception that article 43 of the constitution prescribes a stricter requirement for statutory basis within the area of tax law. See J. Pedersen, Domstolsprøvelse af skattesager – retssikkerhed, statistik og retsanvendelse, Ugeskrift for retsvidenskab B, p. 251 et seq. (2014).

[23] See also P.K. Schmidt, Abuse and Avoidance – a contemporary analysis of Danish tax law, Revue européenne et international de droit fiscal 4, p. 489-499 (2018) with references.

[24] See also J. Pedersen, Danish Branch Report in 87a Cahiers de droit fiscal international (International Fiscal Association ed., Kluwer Law International 2002).

[25] See also J. Pedersen, Omgåelse og misbrug i skatteretten – før, nu og i fremtiden, in Den Evige udfordring – omgåelse og misbrug i skatteretten (J. Bundgaard et al. eds., ExTuto 2015), p. 107-133.

[26] For critisism of the doctrine of reality see for example Isi Foighel, Anmeldelse af: "Skatteudnyttelse af Jan Pedersen", Revision & Regnskabsvæsen 5 (1990), p. 60-62 (1990), T. Nielsen, Den evige udfordring in Dansk Skattevidenskabelig Forening 1965-1990 (S. Askholt ed., at p. 46-69 (1990), Aa. Michelsen, Misbrug og omgåelse i dansk indkomstskatteret in Den Evige udfordring – omgåelse og misbrug i skatteretten, (J. Bundgaard et al. eds., ExTuto 2015), at p. 135-153, Nielsen, supra, n. 6, p. 347, H. Dam, Rette Indkomstmodtager – allokering og fiksering (Forlaget Thomson 2005), at p. 451 et seq. and S.F. Hansen, Realitetsgrundsætningens naturgivne retsusikkerhed, Ugeskrift for Retsvidenskab B 378 (2008). However, among others former Supreme Court Judge Jørgen Nørgaard has shown support for the doctrine of reality. See. J. Nørgaard, Højesterets rolle i skattesager, Juristen 2 (2001), p. 65-69. Also J. Bundgaard, Skatteret & civilret (Forlaget Thomson 2006), at. p. 558, has shown support for the doctrine of reality. Moreover, another Supreme Court judge, Jon Stokholm, has argued that it seems to be a matter of taste whether the doctrine of reality should be acknowledged or dismissed. See J. Stokholm, Højesterets funktion på skatteområdet siden ca. 1960 in Højesteret 350 år (P. Magid et al. eds., Gyldendal 2011), at p. 391.

[27]. In this regard Madsen & Laursen also highlights that the courts are careful not to exercise activities that may create law if the legislature has sought to exhaustively regulate an area, as for example seen in the Supreme Court's decision of 7 December 2006, SKM2006.749.HR. However, against the criticism Jan Pedersen has argued that the doctrine of reality only concerns the preceding determination of the facts and therefore that no statutory basis is needed in order to apply the doctrine. See J. Pedersen in J. Pedersen et al., Skatteretten 1 (Karnov Group 2019), p. 136-138.

willingness to attach significant weight to features such as (lack of) commercial grounds, reality, economic risk and systemic consequences. This may be overlooked if the Court's approach to tax avoidance is trivialized as instances of ordinary interpretation, or oppositely placed on a pedestal and conceived as a consequent application of a court-developed general anti-avoidance rule (Schmidt, 2020a, 2020b).

Despite these disagreements in the literature, it appears to be a commonly accepted fact that the courts are willing to take abusive behavior into consideration when interpreting tax provisions and that this practice does not violate the principle of legality. In recent years, at least two decisions from the Supreme Court appear to illustrate this willingness of the courts to place emphasis on abusive behavior. In a decision from 2014, the Supreme Court thus concluded that losses "manufactured" for tax reasons could not be deducted because no *real* losses had been suffered.[28] Further, in a decision from 2015 concerning the tax rules applicable in the Faeroe Islands, the Supreme Court decided to set aside an arrangement involving a merger of two holding companies. [29]

4.2 THE NEW STATUTORY GENERAL ANTI-AVOIDANCE RULES

In 2015, Denmark introduced a general anti-avoidance rule (GAAR) aiming at mitigating corporate taxpayer abuse of certain EU directives as well as Danish tax treaties.[30] Additionally, in December 2018, Denmark implemented the GAAR prescribed in the EU Anti-Tax Avoidance Directive (ATAD).[31]

The scopes of the new GAARs are not particularly clear. Consequently, even though the new GAARs may assist the Danish tax authorities in their quest to mitigate abuse and avoidance, it should not be overlooked that the GAARs have brought additional complexity into Danish tax law and that the GAARs have deteriorated the possibility of taxpayers to predict the consequences of their transactions (Schmidt, 2018) . In this context, it seems appropriate to consider whether the new GAARs are in line with the principle of legality set out in section 43 of the constitution.[32]

However, this concern could be quickly rejected if it is correct to assume, as concluded above, that section 43 of the constitution does not say anything about how clear the statutory basis must be. Moreover, the new GAARs do in fact contain a number of conditions – objective as well as subjective – that should be fulfilled before the tax authorities can invoke the GAARs. In other words, the GAARs do not assign the tax authorities and the courts with an unlimited discretionary power to mitigate tax avoidance. Finally, if the court-developed practice (on taking abusive behavior into account in the interpretation process) is not in conflict with the principle of legality, it strongly suggests that a statutory GAAR adopted by the parliament should neither be seen as breaching this principle.

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[28] Danish Supreme Court [Højesteret], 11 June 2014, SKM2014.422.HR (Topdanmark). See also A.R. Vang & T. Booker, Kapitalforhøjelse – realitet eller formalitet, Tidsskrift for Skatter og Afgifter 473 (2014).

[29] Danish Supreme Court [Højesteret], 31 March 2015, SKM2016.16.HR (Ferø-sagen). See also J. Bolander & P.K. Schmidt, Retssikkerhed og omgåelse i skatteretten in Den Evige udfordring – omgåelse og misbrug i skatteretten (J. Bundgaard et al. eds., ExTuto 2015.), at p. 23-52. It should be noted that there are significant differences between the level of detail of the tax legislation in Denmark and the Faroe Islands. Accordingly, it is not clear to what extent the decision can be relied on as a precedent in purely with respect to purely Danish tax law. (Bundgaard & Schmidt, 2017)

[30] Section 3 of the Tax Assessment Act. Law no. 540 of 29 April 2015. See also Bill no. L 167 (2014/2015).

[31] Law no. 1726 of 27 December 2018. See also Bill L 28 (2018/2019).

[32] During the legislative process, however, no such discussions appear to have taken place. Generally speaking, Jan Pedersen has argued that a GAAR may be given such a broad wording that the scope of the GAAR cannot be properly deduced. In such a case the principle of legality is in his view reduced to an empty formality. See J. Pedersen, supra, n. 53, p. 118. In addition, Aage Michelsen has from a constitutional perspective argued that it could be questioned whether it is appropriate to leave the job of assessing these often value-laden and politically sensitive situations to the tax authorities. See A. Michelsen, Er der behov for en generel omgåelsesklausul i skatteretten?, Skattepolitisk oversigt, p. 96 et seq. (1984).

In the literature, *Peter Rose Bjare* and *Søren Sønderholm* has recently questioned whether the GAAR from December 2018 should be considered incompatible with the non-delegation doctrine in section 43 of the constitution interpreted in connection with the clause on separation of powers in section 3. The authors essentially argue that the GAAR adopted by the Parliament in 2018 may constitute a transfer of legislative power to the administration, as the provision contains such vague language that the tax administration may in effect exercise power equivalent to legislative power.[33]

However, because the 2018 GAAR does contain a number of conditions that should be fulfilled before the GAAR can be invoked, it seems quite unlikely that the Danish Supreme Court would find that the GAAR constitutes an unconstitutional transfer of legislative power to the tax authorities. Some of the conditions are indeed vague and subjective,[34] but similar critique applies to innumerable other legal standards in Danish legislation. While it remains difficult to define the acceptable limits of vagueness in tax law, vague statutory language does not itself amount to delegation of legislative power to the administration (Dourado, 2014, Chapter 10).

A general shortcoming in the argument put forward by *Bjare* and *Sønderholm* is that no support can be found for their argument in the wording or the *travaux préparatoires* to section 3 and 43 of the constitution. Indeed, neither the parliament nor the administration considered the 2018 GAAR to have constitutional implications.[35]

Nevertheless, during a debate in parliament in 1992, the Danish Minister of Taxation argued that a proposal from a Member of Parliament on a GAAR would in effect constitute taxation without sufficient statutory legal basis. According to the minister, the proposed GAAR would thus lead to an unconstitutional transfer of legislative power to the tax authorities.[36] However, while the explanation and assessment in the *travaux préparatoires* to a relevant act are highly significant in a Danish constitutional context,[37] a minister's remarks during a debate usually hold limited legal value.[38]

5 CONCLUDING REMARKS

Some tax law scholars have claimed that a particular requirement for a clear statutory basis for imposing tax follows from section 43 of the Danish constitution. Meanwhile, constitutional scholars have typically rejected the notion that a requirement for a clear statutory basis follows from the constitution. Instead, they argue that the general administrative law requirement for a clear statutory basis also applies with respect to Danish tax law. Thus, what matters according to customary administrative law is the extent or intensity of the specific government interference and not the fact that the interference generally could be categorized as a matter of tax law.

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[33] *P.R. Bjare, S. Sønderholm, Den nye generelle omgåelsesregel i ligningslovens § 3, SR-Skat 2019.110 referring to the transfer of power to The Tax Council (Skatterådet) with the purpose of closing 'loopholes' in Danish tax law.*

[34] *The most striking example of vagueness is the assessment regarding the question of to which extent the arrangement is opposed to the purpose and aim of statutory tax law.*

[35] *Law no. 1726 of 27 December 2018. See also Bill L 28 (2018/2019).*

[36] *See Debate in Parliament November 26 1992, Folketingstidende, Forhandlingerne 1992/1993, columns 2638-2640. The Minister of Taxation also found that the proposed GAAR would be incompliant with fundamental principles on legal certainty.*

[37] *In a Danish bill, the relevant ministry typically explains and assesses the potential impact of proposed statute. As mentioned, neither the Parliament nor the administration considered the 2018 GAAR to have constitutional implications.*

[38] *Notable in this context is the minister's explicit assumption that the specific GAAR proposal from 1992 de facto amounted to taxation without statutory legal basis, as the minister demonstrated no support for the notion that taxation based on a GAAR equates to taxation without statutory legal basis. The assumption appears mostly political and illustrates why arguments in the political debate generally are without significance in Danish constitutional law. Moreover, neither scholars nor the Ministry of Justice responsible for Danish constitutional law matters endorsed the minister's view expressed in the debate in 1992.*

Section 43 of the Danish constitution is the most important constitutional rule on tax. The provision is understood as a prohibition on legislative delegation in the tax area. However, the courts have approached the non-delegation doctrine pragmatically, accepting important modifications regarding both the practical realities of lawmaking and the long-standing practice of delegation of certain taxing powers to the municipalities.

Finally, in view of the authors the new GAARs introduced in Denmark in 2015 and 2018 should not be considered in breach of neither the principle of legality set out in section 43 of the constitution nor the non-delegation doctrine, although the new rules rightfully have received criticism for lacking an adequate level of predictability.

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