

60 Years of the European Convention on Human Rights and Taxation

In this article, the author provides a survey of European Court of Human Rights decisions, from the 1959 *X v. Germany* case, regarding a tax levy on speculative bonds, to a series of recent cases on the prohibition of double jeopardy (*ne bis in idem*) set out in article 4 of the Seventh Protocol. The author goes on to examine areas in which the application of the ECHR has resulted in changes in the law, the biggest failings of the ECHR/ECtHR, the position of the taxpayer in the 2020s and, finally, the cause of any shortcomings in failing to protect taxpayers' rights, together with possible solutions.

1. Introduction

The European Convention on Human Rights (ECHR) is only slightly older than this journal, *European Taxation*. The Convention was signed in Rome on 4 November 1950 and entered into force on 3 September 1953. However, the earliest published decisions applying the ECHR in tax matters date from very close to the foundation of this journal.¹ Without going into the archives of the European Court of Human Rights (ECtHR), it is not easy to know whether there were any earlier, unpublished cases. The earliest published tax case appears to be *X v. Germany*,² which concerned the compatibility, with the ECHR, of a tax levy set at a rate of 100% to “haircut” the entire profit from certain speculative bonds. The taxpayer was unsuccessful in challenging the levy. One might add that, if one looks at the reported cases, the earliest reported case where the taxpayer was successful was a case decided in June 1968.

The case law of the ECHR in the area of taxation built up relatively slowly in the first 30 years. In the 1960s, there were only ten reported tax cases.³ In the 1970s, there were 19 reported cases. By the 1980s, there were 47 reported

cases. Most recently, the jurisprudence of the ECtHR has been running at around 10-20 tax cases per year.⁴ Cases of the ECtHR in the past few years have included a number of topics relating to a variety of taxes and a variety of countries. Examples of cases decided in the past year include the following:

- *Antonov v. Bulgaria* (58364/10)⁵ – long delays (more than 3.5 years) in repaying tax, constituting a breach of article 1 of the First Protocol (right to enjoyment of possessions);
- *Yunusova and Yunusov v. Azerbaijan* (68817/14)⁶ – harassment of human rights advocates, including with regard to their tax affairs;
- *Christian Religious Organization of Jehovah's Witnesses v. Armenia* (73601/14)⁷ – imposition of VAT on the importation of religious literature and the application of the freedom of religion in article 9;
- *Vegotex International SA v. Belgium* (49812/09)⁸ – retroactive tax legislation after a court decision;
- *LB v. Hungary* (36345/16)⁹ – naming and shaming of tax defaulters;
- *Ryser v. Switzerland* (23040/13)¹⁰ – application of the Swiss military service tax;
- *Halet v. Luxembourg* (21884/18)¹¹ – conviction of a whistle-blower for “Luxleaks”;
- *Ganco v. Lithuania* (42168/19)¹² – excessive length of criminal proceedings for supplying software used for tax evasion;
- *Kristjansson v. Iceland* (12951/18)¹³ – double jeopardy arising from the imposition of a tax surcharge and also a criminal conviction for a major tax offence; and
- *Milosevic v. Croatia* (12022/16)¹⁴ – double jeopardy from the imposition of a minor offence fine and a

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1. There are a number of sources of information on the tax case law of the ECHR, including a number of articles in *European Taxation* over the last two decades in particular. Particular reference should be made to a number of articles by Robert Attard analysing case law on the ECHR. For a now somewhat dated analysis of the case law of the ECHR, see P. Baker, *Taxation and the European Convention on Human Rights*, BTR pp. 211-377 (2000) and also *Taxation and the European Convention on Human Rights*, 40 Eur. Taxn. 8, pp. 298-374, Journals Articles & Opinion Pieces IBFD.

2. DE: ECHR, 31 May 1959, Application no. 551/59, *X v. Germany*.

3. Again, there may be more cases if one examined the archive: at this time a small number of cases were published in physical form and there was no electronic reporting of cases, so it is hard to say whether this is, in fact, the total number of tax cases.

4. Of course, it is somewhat subjective as to what is a “tax case”. Within that category, the author has included cases that have a significant discussion of issues that are specific to tax matters, and has generally excluded, for example, criminal cases on tax fraud where there is nothing about the case that is particularly specific to tax matters.

5. BG: ECHR, 28 May 2020, Application no. 58364/10, *Antonov v. Bulgaria*.

6. AZ: ECHR, 16 July 2020, Application no. 68817/14, *Yunusova and Yunusov v. Azerbaijan*.

7. AM: ECHR, 29 Sept. 2020, Application no. 73601/14, *Christian Religious Organization of Jehovah's Witnesses v. Armenia*.

8. BE: ECHR, 10 Nov. 2020, Application no. 49812/09, *Vegotex International SA v. Belgium* – the case has been referred to a Grand Chamber.

9. HU: ECHR, 12 Jan. 2021, Application no. 36345/16, *LB v. Hungary*.

10. CH: ECHR, 12 Jan. 2021, Application no. 23040/13, *Ryser v. Switzerland*.

11. LU: ECHR, 11 May 2021, Application no. 21884/18, *Halet v. Luxembourg*.

12. LT: ECHR, 13 July 2021, Application no. 42168/19, *Ganco v. Lithuania*.

13. IS: ECHR, 31 Aug. 2021, Application no. 12951/18, *Kristjansson v. Iceland*.

14. HR: ECHR, 31 Aug. 2021, Application no. 12022/16, *Milosevic v. Croatia*.

subsequent surcharge equal to 100 times the fuel duty evaded.

This list gives some indication of the range of cases relating to different taxes that are now heard by the ECtHR each year.

This article considers, first, some of the leading tax cases of the ECtHR during the past 60 years¹⁵ and then some of the changes in tax law and administration that have come about as a result of the ECHR. It then looks critically at the failings of the ECHR system where taxation is concerned, the position of taxpayers' rights in the 2020s and, finally, considers some of the causes for the failings, together with possible solutions.

2. Leading Tax Cases of the ECtHR during the Past 60 Years

Any selection of "leading tax cases" is likely to be somewhat subjective. However, the author would submit that the cases discussed under this heading are those that have had perhaps the most significant impact on tax practice in the Council of Europe countries.

Perhaps the most significant tax case of the last 60 years is the decision in *Ferrazzini v. Italy* (44759/98).¹⁶ That case is not given prominence because it is correct – in fact, the author considers the decision was completely wrong – but because it has had probably the single biggest impact of any tax case anywhere in the last 60 years. The case concerned the question of whether a 13-year delay before a tax dispute came to court in Italy meant that the guarantee in article 6 of the ECHR of a determination within a "reasonable time" was not respected. The ECtHR (by a majority of 11 judges to 6) decided – again, quite wrongly in the author's opinion – that the scope of article 6 (which refers to the determination of "civil rights and obligations" and "criminal charges") did not encompass an area of administrative law (in the view of some countries only) such as taxation. That decision almost certainly did not reflect the original intention of the drafters of the ECHR. Nevertheless, it is important to recognize what that decision has meant in practice, and how much of an impact it has had for all of the countries of the Council of Europe: that is (to remind oneself) virtually every country from Ireland in the west to the Pacific coast of Russia in the east, and virtually all countries in between. It meant that, under the ECHR, a taxpayer in these countries has no right in an ordinary tax dispute to a fair trial by an independent and impartial tribunal.¹⁷

In practical terms, perhaps the most important gap in the protection of taxpayers is the absence of any right to a determination within a reasonable time. Unlike criminal cases or ordinary civil cases, a tax case could languish

before the administration and the courts of a country for years or decades without a final determination. Had the ECtHR decided the case correctly, and in the opposite sense, then governments would have been required to put adequate resources into their tax authorities and their tax tribunals to ensure that tax disputes were dealt with according to the same speediness that applies, for example, in criminal cases. Taxpayers would have been able to expect that their disputes would receive prompt consideration from an adequately staffed and resourced tax authority, and would proceed through a properly funded and staffed appeal process so that the entire period from the opening of a dispute to its final resolution would be, as a rule of thumb, around five years. Taxpayers would then be able to see their disputes resolved, and get on with the rest of their lives. It may be that, in some countries of the Council of Europe, the five-year rule of thumb is the norm, but in many countries it is absolutely not the norm. How different life would have been if *Ferrazzini* had gone the other way.

With the ECtHR having concluded that non-criminal cases did not come within the scope of the right to a fair trial in article 6, the ECtHR may have bent over backwards to expand the scope of the "criminal charge" umbrella of article 6 to cover a wider scope of tax cases. The case law here evolved in a run of cases that begins with *Bendenoun v. France* (12547/86)¹⁸ and ends with *Jussila v. Finland* (73053/01).¹⁹ That line of cases gradually determined that fixed penalties based on a percentage of the tax avoided or evaded constituted "criminal charges" for the purposes of article 6. In *Bendenoun* the penalty was a potential 100% of the tax avoided for *manoeuvres frauduleuses*, but the run of cases gradually brought the borderline of a criminal charge down to a 10% tax surcharge (EUR 308 in that particular case) in *Jussila*. In principle, therefore, wherever there is a tax-geared penalty for avoidance of tax, similar guarantees of a fair trial apply to a tax surcharge case as might apply to an individual facing trial for a serious criminal charge. That makes relatively little sense, and may be seen as a reaction by the ECtHR to its otherwise powerlessness if, following *Ferrazzini*, it concluded that a tax matter did not come within the scope of article 6 at all. The ECtHR in *Jussila* somewhat tempered this by saying that tax offences do not come within the "hard core" of crime. What exactly that means in practice remains to be determined.²⁰

Overall, this creates a somewhat bizarre result that if a taxpayer is lucky enough to have a (small) tax penalty assessed against them, then the taxpayer enjoys the full panoply of criminal charge rights in article 6. The unlucky tax-

15. A small number of the cases are from the European Commission on Human Rights, but to avoid complexity this distinction is not specifically made in this article.

16. IT: ECHR, 12 July 2001, Application no. 44759/98, *Ferrazzini v. Italy*.

17. It should be emphasized that this is the case under the ECHR. In some countries there will be constitutional provisions that give greater rights than under the ECHR.

18. FR: ECHR, 24 Feb. 1994, Application no. 12547/86, *Bendenoun v. France*.

19. FI: ECHR, 9 Nov. 2004, Application no. 73053/01, *Jussila v. Finland*.

20. One example may be that in tax matters it is permissible for a tax official to assess the initial penalty on the taxpayer for avoidance and for the taxpayer then to either accept that or appeal against it; it is a little unthinkable that in a "genuine" criminal matter a prosecutor might determine that the defendant should face X years in jail and the defendant would then have to decide whether or not to appeal against that sentence.

payer, who is only liable for an additional amount of tax, however, has no rights to a fair trial under the ECHR.

The *Yukos* cases²¹ are significant because they involved the largest awards of amounts by way of “just satisfaction” that the ECtHR has ever made. However, what those cases demonstrate perhaps most strongly is the powerlessness of the ECtHR to ultimately enforce its decisions against aberrant governments. So far as one is aware, the Russian government has still not settled the main part of the award.²² The decisions are also some of the longest decisions handed down by the ECtHR and they detail how the tax system of a country may potentially be used as a tool for suppressing political opponents. That is a very real risk in many countries, and not simply in countries of the former Soviet Union, and one that unsatisfied awards of the ECtHR do little to remedy. Maybe the only way to take things seriously is for bodies like the OECD and UN Tax Committee to exclude participation of any country that has an outstanding award in relation to a tax matter from an international tribunal that the country has refused to satisfy. Governments may be sovereign, but if they flout awards of bodies such as the ECtHR, they should forfeit their rights to participate in international cooperative activities, such as the tax work of the OECD.

One of the earliest reported cases on taxation was *Funke v. France* (10828/84),²³ which concerned a number of issues relating to tax investigations, but specifically the question of a conviction for a refusal to produce documents to customs authorities. This was the beginning of a series of cases relating to tax audits or investigations that touch on issues such as the right to silence, the imposition of penalties for a refusal to produce documents and convictions for inaccurate disclosures to revenue authorities.²⁴ In this context, it is not entirely clear that the ECtHR has reached a definitive and stable final position on the law. Tax is a somewhat unusual field where virtually all information is in the possession of the taxpayer (subject, of course, to counterparty information held by banks or customers, for example). Affording excessive protection from disclosure to a taxpayer on grounds that it might involve self-incrimination and liability to a tax penalty (recalling, as explained previously, that even low-level but tax-gearred penalties may be regarded as criminal charges for ECHR purposes) runs the risk that tax audits become impossible. On the other hand, where a taxpayer does face a serious penalty, then the protection against self-incrimination may be just as important in tax matters as it is in other serious criminal matters. There are additional

complications where a tax audit may involve the disclosure of existing documentation (for which it is hard to argue that there is any right of silence), or the production of new documentation setting out information relevant to the tax audit (which is similar to answering questions under interrogation), as well as the more frequent issue these days of producing electronic data. This is one of a number of areas where the particular and sometimes unique features of tax procedures need perhaps a more nuanced approach than the general principles found in the ECHR presently.

Cases relating to disclosure of information start perhaps with the case of *X v. Belgium* (9804/82)²⁵ and lead on to cases such as *Bernh Larsen Holdings v. Norway* (24117/08),²⁶ which dealt specifically with the issue of obtaining data held on a server drive where other, private, information was held on the same server. Later cases in this line, dealing specifically with the application of article 8 and the right to privacy in relation to tax matters include the detailed guidance on searches carried out by the tax authorities in the case of *Erduran v. Turkey*.²⁷

Cross-border exchange of information for tax purposes has attracted some attention from the ECtHR, though surprisingly little so far. Leading cases in this area include *GSB v. Switzerland* (28601/11),²⁸ which concerned the retrospective effect of the intergovernmental agreement between Switzerland and the United States to give effect to FATCA. The case of *Othymia Investments BV v. Netherlands*²⁹ may be seen as somewhat disappointing in that the ECtHR did not recognize the right of a taxpayer to receive any prior notification when information already held by a tax authority was exchanged with the authorities of another country. While wrongful exchanges of information may occur only occasionally, it is hard to see how a taxpayer can ever prevent a wrongful exchange if the taxpayer is not notified of that exchange. A better approach would have been to recognize the right of a taxpayer to be notified, but to be given limited rights to challenge the exchange of information on narrow and precise legal grounds, and to make that challenge within a short period of time after the notification, so as not to unduly impede the exchange of information between revenue authorities.

The issue of retroactive tax legislation is also one where the ECHR has been interpreted to provide little protection to taxpayers. Here the leading cases start with *ABCD v. United Kingdom* (8531/79)³⁰ and run through cases such as *MA v. Finland* (27793/95)³¹ and *SB v. Finland* (30289/96),³²

21. There are several cases related to the *Yukos* litigation – see especially RU: ECHR, 20 Sept. 2011, *Yukos v. Russia* and also cases such as RU: ECHR, 14 Jan. 2020, Application no. 51111/07, *Khodorkovskiy and Lebedev v. Russia*.

22. See Interim Resolution CM/ResDH(2020)204, which indicates that payments of costs have been made, but not payments of the just satisfaction award.

23. FR: ECHR, 6 Oct. 1988, Application no. 10828/84, *Funke v. France*.

24. These include cases such as NL: ECHR, 26 Feb. 1997, Application no. 27943/95, *Abas v. Netherlands*; CH: ECHR, 3 May 2001, 31827/96, *JB v. Switzerland* and, more recently, CH: ECHR, 5 Apr. 2012, Application no. 11663/04, *Chambaz v. Switzerland* and NL: ECHR, 16 June 2015, Application no. 784/14, *Van Weerelt v. Netherlands*.

25. Sometimes known as the “Hardy-Spirlet” case, as that is the name of the party disclosed in the underlying Belgian litigation – BE: ECHR, 7 Dec. 1982, Application no. 9804/82.

26. NO: ECHR, 14 Mar. 2013, Application no. 24117/08, *Bernh Larsen Holdings v. Norway*.

27. TR: ECHR, 20 Nov. 2018, Application no. 25707/05, *Erduran v. Turkey* and, in particular, paras. 91-100 of the decision.

28. CH: ECHR, 22 Dec. 2015, Application no. 28601/11, *GSB v. Switzerland*.

29. NL: ECHR, 16 June 2016, Application no. 75292/10, *Othymia Investments BV v. Netherlands*.

30. UK: ECHR, 10 Mar. 1981, Application no. 8531/79, *ABCD v. United Kingdom*.

31. FI: ECHR, 10 June 2003, Application no. 27793/95, *MA v. Finland*.

32. FI: ECHR, 16 Mar. 2004, Application no. 30289/96, *SB v. Finland*.

all of which generally deny any restriction on the retroactive application of tax legislation. Only when one comes to the case of *Agurdino SRL v. Moldova* (7359/06)³³ does the ECtHR find a breach of the right to enjoyment of possessions, but only in the extreme circumstances where the retroactive legislation overrode a final and binding decision of the Supreme Court of Moldova. Generally, the ECtHR has offered little protection in this area: a far better approach to retroactive tax legislation is the approach demonstrated by the International Arbitration Tribunal in the case of *Cairn UK v. India* (2016-7).³⁴ In this context, it is correct to say that the ECHR and its protocols contain a prohibition of retroactive criminal legislation, but no prohibition of retroactive tax legislation. However, a more proactive tribunal might well have been able to fashion a better set of principles to identify acceptable and unacceptable retroactive tax legislation on the basis of the right to enjoyment of possessions in article 1 of the First Protocol to the ECHR.

More broadly, the ECtHR clearly does not wish to become a general tax court, nor to trample excessively on the powers and discretion of governments in the formulation of their own tax policies and the design of their tax systems. That is all very appropriate, and the non-activism of the ECtHR might be contrasted with the somewhat more interventionist approach of the Court of Justice of the European Union in tax matters. In this context, the ECtHR has recognized a very high margin of appreciation for states, and has been generally unwilling to interfere with national competence over tax matters. A good example is the issue of an excessively burdensome tax. In a series of cases, of which *Wasa Liv v. Sweden* (13013/87)³⁵ is an example, the Court repeatedly stated that a tax burden might breach the right to enjoyment of possessions if it became so excessive that it imposed an excessive and individual burden on the taxpayer, so as to interfere with the taxpayer's enjoyment of possessions, but never found that this hurdle had been reached. It was not until the series of cases on the Hungarian 98% tax on severance payments upon retirement of civil servants – the leading case being *NKM v. Hungary* (66529/11)³⁶ – that the ECtHR first found that a tax imposed an excessive burden. Even in that case, it was not simply the fact that the tax was imposed at 98%, but that it applied only to a limited category of persons, that it taxed the sums that these individuals had expected to have available for their retirement and that the effective tax rate was significantly in excess of the effective tax rate on ordinary income enjoyed by other taxpayers.

The other area where the ECtHR has recognized a wide margin of appreciation for states in tax matters concerns discriminatory tax measures. One of the earliest leading cases in this area was the case of *Darby v. Sweden* (11581/85),³⁷ which was an unusual case of discrimina-

tion between residents and non-residents, specifically the fact that only residents of Sweden had the right to opt out of payment of the church tax. In other cases, the ECtHR has generally not recognized discriminatory tax provisions as a breach of the rights in article 14 to non-discriminatory enjoyment of the various rights protected under the ECHR. A good example of this is the Grand Chamber decision in *Burden v. the UK* (13378/05),³⁸ which concerned discrimination between husbands and wives, same-sex couples and siblings who formed a single-family unit but were nevertheless not in a marital or other relationship equivalent to marriage because of their relationship of consanguinity.

Most recently, the ECtHR has been scratching its head particularly hard over the application in tax matters of the prohibition of double jeopardy – the principle *ne bis in idem* set out in article 4 of the Seventh Protocol. This is particularly problematic in the tax area where the evasion of tax may lead to several different procedures, including litigation to challenge the quantum of the tax assessment, the imposition of an administrative fine (subject often to one set of appeals) and the imposition of a criminal sanction (subject to another set of appeals). After a run of cases, mostly from Scandinavian countries, the ECtHR had quite frankly tied itself up in knots over the correct approach to take where there were two or more proceedings arising out of the same evasion of tax. Finally, this matter was referred to a Grand Chamber in the case of *A and B v. Norway* (24130/11 and 29758/11)³⁹ where the ECtHR held that parallel proceedings involving separate investigations and appeals in relation to a tax penalty and to a criminal charge did not breach the principle of double jeopardy where they were “sufficiently connected in substance and in time” as to constitute a coherent procedure.

That, however, has not resolved the issue in any satisfactory way. A line of subsequent cases has begun to appear from Iceland in particular, showing how difficult it is to apply this test in practice.⁴⁰ More seriously, the ECtHR appears to have missed the opportunity to consider the matter as one of principle and to come to a proper conclusion as to those circumstances where it is appropriate to protect the taxpayer against double jeopardy and those where a plurality of procedures is acceptable. That being said, it is no doubt true that the decision in *A and B v. Norway* led to a number of European countries reviewing their procedures for investigating cases of serious tax evasion with a view to introducing an integrated approach that could lead to fines or criminal penalties and did not fall foul of the prohibition of double jeopardy. Despite that, cases on this point continue to flow up to the Court in Strasbourg.

33. MD: ECHR, 29 Oct. 2013, Application no. 7359/06, *Agurdino SRL v. Moldova*.

34. IN: Intl. Arbitration Tribunal, 21 Dec. 2020, PCA case no. 2016-7, *Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India*.

35. SE: ECHR, 14 Dec. 1988, Application no. 13013/87, *Wasa Liv v. Sweden*.

36. HU: ECHR, 14 May 2013, Application no. 66529/11, *NKM v. Hungary*.

37. SE: ECHR, 11 Apr. 1988, Application no. 11581/85, *Darby v. Sweden*.

38. UK: ECHR, 29 Apr. 2008, Application no. 13378/05, *Burden v. the UK*.

39. NO: ECHR, 15 Nov. 2016, Application nos. 24130/11 and 29758/11, *A and B v. Norway*.

40. See, for example, IS: ECHR, 18 May 2017, Application no. 22007/11, *Johannesson v. Iceland*.

3. Areas Where the Application of the ECHR Has Resulted in Changes in the Law in the Last 60 Years

Over the last 60 years, there is no doubt that there are changes that have been made to the tax practices of countries in the Council of Europe as a result of the ECHR.⁴¹ One change that was identified in the previous discussion was a review of the tax investigation and prosecution procedures in a number of European countries following the *A and B v. Norway* case, with a view to producing a more integrated procedure for investigations that might lead to both administrative fines and criminal prosecutions. No doubt taxpayers facing those investigations may find it less onerous, complex and costly to deal with a single strand of investigation, and with litigation that is approximately contemporaneous, in dealing both with appeals against administrative fines and criminal prosecutions. From a human rights perspective, however, it is a little difficult to see the integration of these processes as a major step forward in securing the protection of taxpayers.

By and large, the changes that have come about as a result of the ECHR are interstitial rather than comprehensive. An examination of a few examples of the changes that are known to have come about as a result of ECtHR litigation may serve to back up this comment.⁴² Some of the changes brought about by the ECHR are apparent in the tax systems of several countries.

For example, after the decision in *AP, MP and TP v. Switzerland*,⁴³ countries were made aware that, where a taxpayer had died and was found liable for a penalty for tax evasion or abusive tax avoidance after the taxpayer's death, that penalty could not be imposed on the deceased's heirs: that would infringe a principle implicit in the ECHR that criminal penalties are not imposed on the heirs of an offender. No doubt after that change, deceased tax evaders will sleep more soundly in their graves in the knowledge that their evading activities will not be visited upon their heirs, and those who inherit an estate may do so in the knowledge that they will not have to pay the administrative fines for which the deceased was liable.

After the decision in *Chambaz v. Switzerland*,⁴⁴ any country that did not previously warn a taxpayer under

investigation and facing the possibility of an administrative fine that the taxpayer had a right to silence would have changed their practice to do so.

In some cases, the change in the law in a country is apparent from subsequent cases. For example, the rather interesting case of *Ravon v. France* (18497/03)⁴⁵ showed that the original position identified in the *Funke* case,⁴⁶ under which an investigation could be carried out by tax agents without the need for a judicial warrant, had been changed. The *Ravon* case, however, demonstrated that there was a lacuna in the procedure in that no judicial supervision existed while the search of premises was taking place to challenge the legality of that search. Subsequent litigation again shows that changes were made to French law to respond to this decision.⁴⁷

Similarly, subsequent case law following the decision in *NKM v. Hungary*⁴⁸ showed that the 98% tax on civil servants was substituted by taxes at a lower rate.⁴⁹

Where there has been a breach of the ECHR, the country concerned is required to report if they have changed their law to remedy the breach. Cases where the ECtHR has found a breach by a government have been very much the minority of applications, and in many of those cases the only remedy required has been the payment of an amount by way of just satisfaction to the applicant, together with a recognition that there has been a breach. In a small number of cases, however, the resolution of the case has involved a change in national law. An example is the case of *Glor v. Switzerland* (13444/04),⁵⁰ which involved a challenge against discriminatory tax legislation that required partially disabled persons to pay a military service exemption tax in lieu of military service: partially disabled individuals were not given the option of an equivalent to military service and were, therefore, subject to the tax on a discriminatory basis. Subsequent changes were made to Swiss administrative practice with regard to alternatives to military service to deal with this finding against Switzerland.

There are no doubt other examples that could be given of specific changes in particular countries that were prompted by a decision of the ECtHR (possibly in respect of a similar tax rule that existed in another country) or simply from a consideration of the terms of the ECHR or the signing by a country of one of the protocols to the ECHR. It would be utterly churlish not to recognize that there have been changes that may be said to protect some aspects of taxpayers' rights in the past 60 years as a result

41. It may very well be that parallel changes have also come about in countries outside the Council of Europe where those countries, for example, have in their constitutions a Bill of Rights based upon the wording of the ECHR. That is true of many former British dependent territories since the 1950s where their constitutions (at least on independence) contain a Bill of Rights based loosely on the wording of the ECHR.

42. It is not suggested in any way that this examination is comprehensive, but relies only on a few examples taken from decided cases. It would be an interesting research project to study for each of the Council of Europe countries what changes have been made to the tax system over the past 60 years specifically to reflect requirements of the ECHR. The author suspects that there are more examples than are given here, but that a comprehensive survey would still show a relatively sporadic and minor set of changes.

43. CH: ECHR, 16 Oct. 1995, Application no. 19958/92, *AP, MP and TP v. Switzerland*.

44. *Supra* n. 24. The subsequent change of the legislation in Switzerland to give a warning of the right to silence is highlighted in the published resolution of the case – see ResDH (2019) 318, available at <https://rm.coe.int/090000168098dd44> (accessed 8 Nov. 2021).

45. FR: ECHR, 21 Feb. 2008, Application no. 18497/03, *Ravon v. France*.

46. *Supra* n. 23.

47. See, for example, the decision in FR: ECHR, 19 May 2009, Application no. 43387/05, *SA LPG Finance Industrie v. France*, which shows the change in the law following the *Ravon* case.

48. *Supra* n. 36.

49. Thus, in HU: ECHR, 16 Jan. 2018, Application no. 52969/14, *Legeza v. Hungary*, a special tax of 75% had been substituted, and in HU: ECHR, 12 June 2018, Application no. 56683/13, *Csoelle v. Hungary*, a 25% flat tax appears to have been imposed.

50. CH: ECHR, 30 Apr. 2009, Application no. 13444/04, *Glor v. Switzerland*. The subsequent change in Swiss administrative practice is identified at ResDH (2019) 319, available at <http://hudoc.echr.coe.int/eng?i=001-199701> (accessed 8 Nov. 2021).

of the ECHR: no doubt life is better because the ECHR exists than if it had not existed at all.

Those changes, however, have been relatively minor and have largely dealt with outliers in the practice of certain countries operating in the interstices of the tax systems. It is difficult to show that, over the last 60 years, major changes to the tax systems have been brought about by the ECHR. It may be, on the one hand, that this is because, in many countries, particularly in Western Europe, there was already a long tradition of constitutional and administrative law, as well as good administrative practice, which provided good protection for taxpayers. It is also possible to say, on the other hand, that the existence of the ECHR has prevented countries from bringing in changes that might have trampled over the rights of taxpayers. The argument is sometimes made that the presence of a non-discrimination article in tax treaties does not necessarily result in a huge number of claims by taxpayers that they have been discriminated against (the tax system generally not discriminating on the grounds that are covered in the tax treaty), but it certainly prevents governments from adopting new measures that might be discriminatory. One moves into the realm of asking oneself: what would the tax systems of European countries have looked like if we had not had the ECHR? By and large, one is inclined to answer that question by saying: the tax systems would not look very different from the way they currently look.

The position of taxpayers' rights in the early 2020s is considered in section 5.

Before leaving this section of the discussion, however, it is reasonable to note that the application of the ECHR in tax matters over the last 60 years has broadly increased awareness of the existence of taxpayers' rights and provided a firm legal basis for those rights (if no such basis already existed in the administrative and constitutional law of the country concerned). The jurisprudence of the ECtHR has attracted academic attention and, for some people, the blackletter nature of the ECHR and the jurisprudence of the ECtHR gives a wholly different legitimacy to the discussion on taxpayers' rights; a greater legitimacy than some broad and non-specific concept of "taxpayers' rights" in general.⁵¹

4. The Biggest Failings of the ECHR/ECtHR

It may be unfair to dwell too much on the author's perceived failings of the ECtHR/ECHR. No doubt, in all cases, the judges of the Court were applying the law as set out in the ECHR and the outcome might well be one that other commentators regard as entirely appropriate. That being said, however, there are a number of aspects that are (in the author's view) undesirable.

51. In this context, one might highlight particularly the IBFD's Observatory on the Practical Protection of Taxpayers' Rights, which has been set up to document the extent to which particular taxpayers' rights are protected in practice in the countries reported on by the Observatory. Many of the specific rights considered in the reports of the Observatory derive their origin from the ECHR, as well as from national administrative and constitutional law.

The negative implications of the *Ferrazzini* case have already been highlighted above. The fact that the decision was decided by a relatively thin majority shows that the case could quite easily have gone the other way. The immediate consequence is the absence of a right to a fair trial under the ECHR in normal tax cases. The practical consequence is, amongst others, long delays in the handling of tax investigations and tax litigation in many countries. Hopefully, the occasion will arise for the ECtHR to reconsider its decision sometime in the not-too-distant future. When it does so, it is hoped that the issues will be more fully debated than they were in the *Ferrazzini* case. There were a number of arguments in favour of the application of the right to a fair trial that were not ventilated before the Court in that case.

More generally, the ECtHR has accorded a very wide margin of appreciation to governments in tax matters, possibly as a way of avoiding becoming a court of last resort to challenge policy decisions on tax matters by governments. While this concern is entirely understandable, there may be some cases where the ECtHR could quite justifiably have recognized that the approach adopted went beyond the reasonable bounds of the margin of appreciation. This might be true, for example, of some of the cases involving discrimination or measures to combat tax avoidance.⁵²

Finally, and this may be an issue that is not in any way specific to tax matters, the ECtHR has taken a rather formalistic approach and denied some claims on procedural grounds where the information supplied about the conduct of the revenue authorities clearly indicates a substantive breach of taxpayers' rights. A remarkably large number of complaints by taxpayers have been rejected on grounds that the complaint was not brought within the time limit under the ECHR, or that the taxpayer failed to raise the issue before domestic proceedings, or that the Court was not in a position to resolve factual discrepancies between the account given by the taxpayer and the account given by the revenue authorities. To be fair, the ECtHR has its legal and practical limitations: it is an instrument of the Convention, and it only has jurisdiction where the procedural requirements are all satisfied. It can only give the remedies that it is competent to give, even if "just satisfaction" can sometimes seem extremely unjust. Access, however, to the ECtHR in tax cases sometimes appears to be a minefield which the taxpayer has great difficulty negotiating, even with professional advisers (whose fees they will not recover in full even on an award if they are successful) and the overall result at the end of the day may provide little if any relief to the taxpayer.

5. The Position of Taxpayers' Rights in the 2020s

It is not suggested that there is a crisis, or that taxpayers in Europe in general face serious and persistent threats to their rights. There is, however, no reason for compla-

52. Cases concerned with the denial of input VAT where a supplier has failed to comply with their VAT procedural obligations might be an example of this.

gency, and there are some very real threats that need to be tackled.

In many countries, the fight to combat tax avoidance has resulted in greater powers being given to tax authorities. These include, in particular, greater powers in respect of investigations, including invasive investigations such as telephone taps and interception of electronic communications, and much greater access to electronic data. These greater powers have not always been met by an increase in safeguards. The development of data protection rules has generally taken place outside of the specific realm of the ECHR, which, because of its age, predates the world of “Big Data” and can only really approach this issue through an extended application of article 8 and the right to privacy. Revenue authorities now hold significantly more data on taxpayers year by year and that dramatically increases the threat to taxpayers from either the misuse of that data or from the accidental or deliberate loss of that data into the public domain.

One of the biggest areas of concern is the development of the automatic exchange of information for tax purposes on the back of the US FATCA rules. Sadly, FATCA arose out of the United States, which does not offer protection of fundamental rights in the same way that those protections exist in Europe and the US legislator paid scant regard to data protection or taxpayers’ rights in coming forward with the FATCA proposals. If that were not bad enough, it was then compounded by the fact that the OECD’s Common Reporting Standard built on the edifice of FATCA and consequently built in no real safeguards for taxpayers’ rights. In recent years, there have been a growing number of examples of the hacking of data held by revenue authorities or the simple loss of that data through negligence or inadequate internal procedures for safeguarding. The consequences seem to be simply shrugged off by the international tax bodies. It is sad to say, but one probably will have to wait until there is a loss of data of pandemic proportions before anything serious is done to protect taxpayers. The potential damage to taxpayers who are affected, who will see a significant amount of their personal and financial data in the public domain, is worrying in the extreme.

The absence of a right to a fair trial in ordinary (non-criminal) tax cases, with the determination by an independent and impartial tribunal within a reasonable time, has been highlighted several times. One understands that the position varies quite significantly from country to country. In some countries the processing of tax investigations and litigation is relatively prompt. In others, it is appallingly slow. It is not unusual in some countries to find a decade or more passing from the time that a taxable event occurs before a matter is even at the first level tax tribunal. Taxpayers have to live with the uncertainty of the outcome, which would never be permitted in ordinary civil or criminal cases.

Sadly, in a small minority of countries, the behaviour of the tax authorities, or the misuse of the power of tax authorities by the political regime, is still a fact of life, and the ECHR has done virtually nothing to improve the sit-

uation. A small number of cases come from time to time to the ECtHR highlighting the abusive behaviour of the tax police, particularly in one or two of the countries of the former Soviet Union.⁵³ In most of these cases, the ECtHR was unable to conclude on a breach because of the lack of clear evidence: an example of the procedural impediments to the Court providing an effective remedy for alleged serious breaches of rights. Equally, in a small number of countries, the revenue authorities are not sufficiently independent from the political regime, and can, all too easily, find themselves involved in activities to repress political opponents or even critics of the regime. The *Yukos* litigation has already been mentioned, and reference might also be made to the case of *Magnitskiy v. Russia* (32631/09),⁵⁴ which involved the death of a legal adviser. There have also been a number of recent cases complaining of the use of the tax system as part of a concerted effort against human rights advocates who are critical of a particular regime.⁵⁵ Fortunately, in those cases of the use of the tax system against human rights defenders, the ECtHR has been able to reach conclusions that support the complaint against the government concerned. Whether or not that has changed the conduct of the particular revenue authority is a difficult issue to assess. The author would repeat the point above that, if the international tax community were to take taxpayers’ rights seriously, any tax authority found to have breached its international obligations by pressuring political opponents of a government or human rights defenders or merely critics of the government should face a peer review process and exclusion from participation in international tax discussions until that peer review process confirms the independence and impartiality of the tax authorities.

More generally, in many countries the demands for government revenue (which will only increase in the wake of the costs of dealing with the COVID-19 pandemic) have forced the revenue authorities to take (sometimes extreme) measures against perceived tax avoidance. This varies from country to country, but many tax practitioners will recognize some recent developments in their country where the tax authorities, in their zealotry to combat avoidance, have sometimes overstepped the mark. Suicides of taxpayers under pressure from the revenue authorities have been recorded in some countries. That should simply not occur in countries where a human rights instrument has been in place for 60 years, which, properly interpreted, prohibits inhuman and degrading treatment by any government authority.

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53. Examples where art. 3 and the prohibition of torture has been raised in connection with the conduct of tax police include UA: ECHR, 6 Dec. 2007, Application no. 75520/01, *Kozinets v. Ukraine*; LV: ECHR, 7 Feb. 2012, Application no. 28926/10, *Vinks and Ribicka v. Latvia*; UA: ECHR, 16 Jan. 2014, Application no. 6318/03, *Fuclev v. Ukraine* and UK: ECHR, 3 Nov. 2011, Application no. 18773/05, *Terletskaia v. Ukraine*.
 54. RU: ECHR, 27 Aug. 2019, Application no. 32631/09, *Magnitskiy v. Russia*.
 55. An example is AZ: ECHR, 20 Sept. 2018, Application no. 68762/14, *Aliyev v. Azerbaijan*.

6. If There Have Been Failings, What Are the Causes?

The author does not wish to suggest that the ECHR has been completely ineffectual, or that the position of taxpayers' rights in all Council of Europe countries is egregious. The author, however, considers that there have been failings, and that the protection of taxpayers' rights through the shield of the ECHR has not been as comprehensive as it should have been.⁵⁶ If there are failings, where does the cause of those failings lie?

This is a somewhat personal view, but two particular points might be raised. First, the ECHR was not drafted with tax in mind. The *travaux préparatoires* for the ECHR disclose virtually no references to taxation in the process of drafting the Convention. It is well-known that the Convention was drafted in the wake of the appalling events in Europe before and during the Second World War, and that well into the end of the 20th century, the ECtHR was dealing with disappearances, torture and extra-judicial executions in a number of countries. In that context, it is not entirely surprising that abuses of taxpayers' rights were not given the same prominence. However, as (thankfully, thankfully) the egregious breaches of human rights disappear in many countries, the protection of ordinary people from excessive demands in relation to tax assumes greater importance. However, an instrument that was drafted without tax in mind has to be applied to tax issues that have arisen. A good example is the right to a fair trial, which might possibly have been drafted so as to exclude administrative litigation (though that is questionable) and consequently has been interpreted to exclude tax matters. Another example is the failure to include a prohibition of retroactive tax legislation (but, of course, a qualified restriction where retroactive tax legislation is permitted in circumstances where it can be justified).

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56. It should be noted that within the European Union, of course, the Charter of Fundamental Rights may prove to be a much more effective instrument, though it is relatively early days in terms of the jurisprudence on the Charter.

The remedy for this might well be a specific “tax protocol” to the ECHR, adjusting the Convention for the specific circumstances of tax. Such a protocol could, for example, reverse the damaging effects of the *Ferrazzini* case, provide for rules on retroactive tax legislation and provide detailed rules for data protection in tax matters, etc. The author would give one warning: if such a protocol is to be drafted, it must not be drafted by tax officials but by human rights experts. It is not that tax officials are not deeply concerned about taxpayers' rights in many countries – they are. However, human rights experts are far better placed to envisage the possible breaches, rather than the administrative difficulties that are caused by human rights protection.

Finally, and more broadly, responsibility for the failure to take taxpayers' rights more seriously lies with the international bodies involved in developing tax rules. The OECD, in particular, does not have a specific human rights mandate and there has been too much of a tendency for other bodies (including, for that matter, the Council of Europe) to regard taxation as a highly specialized matter, best left to the OECD. The problem then is that the human rights advocate does not necessarily have any place at the table when new rules are being developed. This has to change going forward. Either the body charged with responsibility for developing rules on taxation must adopt a specific human rights mandate, or the responsibility for the tax work must be given to a body – such as the UN – which does have a definite and concrete human rights mandate.

We are now 60 years into the history of the ECHR and its application in tax matters. Even the author's basic mathematics tells him that there are 40 years to go before the centenary. Hopefully, by that time, some of the issues highlighted in this article will have been addressed and it will be possible for the person who writes in the centennial issue to point only to successes and not failings.