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ABOUT THE JOURNAL

The Journal of Tax Administration (JOTA) is a peer-reviewed, open access journal concerned with all aspects of tax administration. Initiated in 2014, it is a joint venture between the University of Exeter and the Chartered Institute of Taxation (CIOT).

JOTA provides an interdisciplinary forum for research on all aspects of tax administration. Research in this area is currently widely dispersed across a range of outlets, making it difficult to keep abreast of. Tax administration can also be approached from a variety of perspectives including, but not limited to, accounting, economics, psychology, sociology and law. JOTA seeks to bring together these disparate perspectives within a single source to engender more nuanced debate about this significant aspect of socio-economic relations. Submissions are welcome from both researchers and practitioners on tax compliance, tax authority organisation and functioning, comparative tax administration and global developments.

The editorial team welcomes a wide variety of methodological approaches, including analytical modelling, archival, experimental, survey, qualitative and descriptive approaches. Submitted papers are subjected to a rigorous blind peer review process.

SUBMISSION OF PAPERS

In preparing papers for submission to the journal, authors are requested to bear in mind the diverse readership, which includes academics from a wide range of disciplinary backgrounds, tax policy makers and administrators, and tax practitioners. Technical and methodological discussion should be tailored accordingly and lengthy mathematical derivations, if any, should be located in appendices.

MESSAGE FROM THE CHARTERED INSITUTE OF TAXATION

The Chartered Institute of Taxation is an education charity with a remit to advance public education in, and the promotion of, the study of the administration and practice of taxation. Although we are best known for the professional examinations for our members, we have also supported the academic study of taxation for many years and are pleased to widen that support with our involvement with this journal.

WEBSITE

The Journal of Tax Administration website can be found here: www.jota.website

SOCIAL MEDIA

We also have a Twitter account: https://twitter.com/jotajournal

EDITORIAL NOTE

Guest Editor, Nina E. Olson[1]

This volume was conceived by Lynne Oats and myself on a rainy April afternoon in Exeter, England, after the 2016 TARC conference[2]. With the establishment of the International Conference on Taxpayer Rights (ITPRC), we thought it important to further the academic exploration of taxpayer rights and the role they play in strengthening rule of law, taxpayer morale, and tax compliance. Bringing discussions of taxpayer rights out of the shadows of tax administration – historically perceived as a "feel good" topic but one not requiring intellectual rigor – has been a personal mission of mine for years. And so, this volume was born.

The gestational period was unusually long, but this has allowed us to update scholarship not only from the 2nd ITPRC, but also from two other recent international conferences, as well as the full transcript of the closing panel of the 3rd ITPRC held in Amsterdam 2018. What is remarkable about the contents of this volume is how they address issues that are front and center in tax administration today, but they do it through the lens of taxpayer rights. The articles and reports also demonstrate that the subject and exploration of taxpayer rights is indeed international – the authors herald from Australia, the United States, Italy, and Kenya, and the conferences reported, held in Vienna, Sydney, Exeter, and Amsterdam, include presentations from many more countries. It is also multidisciplinary, involving law, economics, psychology, anthropology, sociology, and computer science.

John Bevacqua of Australia challenges us all to think about the truisms with respect to taxpayer rights, and asks, how do we know protection of taxpayer rights has a positive effect on tax compliance? How can we measure this effect? John makes a strong case that a rigorous research agenda will provide clarity and direction for practice as well as theory.

Alice Abreu and Richard Goldstein, from the United States, explore, in the format of a dialogue, the operation of taxpayer rights in the United States, especially following the enactment of the Taxpayer Bill of Rights in the U.S. Internal Revenue Code. What is the legal effect of this provision and does it create enforceable rights? These questions continue to arise in U.S. courts and in practice before the Internal Revenue Service.

Giovanna Tieghi of Italy proposes an approach to teaching taxpayer rights by embedding them in comparative law education that incorporates clinical experience – thereby making rights "real". She views taxpayer rights in the context of a country's governance and its relationship with its citizens, and explores the role of the lawyer in that ongoing process.

Les Book, also of the United States, examines taxpayer rights in the context of administering social welfare programs such as the U.S. Earned Income Credit through the tax system. Can a traditional tax agency, with an enforcement culture, fairly administer such a program that necessarily involves the most vulnerable taxpayers who are least equipped to navigate the

[1] Nina E. Olson is the United States National Taxpayer Advocate. The National Taxpayer Advocate is appointed by the Secretary of the Treasury and reports to the Commissioner of Internal Revenue. However, the National Taxpayer Advocate presents an independent taxpayer perspective that does not necessarily reflect the position of the Internal Revenue Service, the Department of the Treasury, or the Office of Management or Budget.

[2] The Tax Administration Research Centre (TARC) conference is held annually. See http://tarc.exeter.ac.uk/events/researchconferences/ and page 136 of this issue for a description of the 2018 conference.

organization's bureaucracy? The answer to this question has relevance to developed and developing countries.

Finally, *Attiya Waris* from Kenya examines how emerging and developing economies can build trust and legitimacy by incorporating service and rights standards into their tax administration structures. She argues that efforts to enhance legitimacy, including institutionalizing taxpayer rights protections, can begin to counter citizens' past experiences with inefficient, unaccountable, and even corrupt state agencies.

This volume, and the research and conferences it presents and summarizes, makes clear that the field of taxpayer rights is rich and impacts the lives of every taxpayer, regardless of station. But our exploration of this field is really in its beginning stages. As more countries adopt charters or bills of rights, as more judicial rulings begin to apply a taxpayer rights analysis in tax litigation, as more light is shed on best practices and standards, for example through IBFD's Observatory of Taxpayer Rights and the International Law Association Rule of Law initiative, the meaning and effect of taxpayer rights in policy and in practice will become clearer. What fun we have ahead!

November 2018
Washington, DC

Note from the Managing Editors

We are delighted that Nina Olson generously agreed to act as guest editor for this special issue of JOTA, and grateful for the time she has devoted to its production.

We are also pleased to welcome Professor Sven Steinmo, from the University of Colorado, Boulder, to the JOTA Editorial Board.

Lynne Oats & Nigar Hashimzade

TAXPAYER COMPLIANCE EFFECTS OF ENHANCING TAXPAYER RIGHTS – A PRIMER FOR DISCUSSION OF A DEDICATED RESEARCH AGENDA

John Bevacqua[1]

Abstract

There is a welcome continuing Australian and global tax administration policy focus on ensuring adequate protection of taxpayer rights. This policy focus is, in part, driven by a presumption that enhancing taxpayer rights will lead to greater taxpayer voluntary tax compliance through the fostering of a climate of trust and confidence between taxpayers and tax officials.

However, the acceptance of a positive correlation between enhancement and awareness of taxpayer rights and willingness to comply implies a presumption that terms such as fairness (or trust) and taxpayer rights are synonymous. This paper questions this presumption, arguing that fairness and trust are much broader concepts which are difficult to conceive of as rights. Consequently, concepts such as fairness and trust are poor analogues for taxpayer rights.

Further, this paper argues that there is a dearth of clear empirical evidence to support any unimpeachable presumption of a correlation (positive or otherwise) between enhanced taxpayer rights and greater taxpayer willingness to comply, let alone evidence as to the strength of any such correlation if it, in fact, exists. The paper takes the argument further, pointing out that even if such a correlation can be shown to exist and its strength measured, there is a need for research which adds nuance to our understanding of any such correlation in order to provide useful guidance to policymakers considering making specific legislative changes to strengthen and/or clarify particular taxpayer rights. This paper makes the case for developing a dedicated research agenda capable of providing that guidance.

PART I – INTRODUCTION

There is a current Australian and global policy focus on ensuring adequate protection of taxpayer rights. In Australia, this is evidenced by the recent Inspector-General of Taxation's review of the Taxpayers' Charter and taxpayer protections (Commonwealth of Australia, Inspector-General of Taxation, 2016). Internationally, there is a growing trend toward codification of taxpayer rights' protections and service standards (Organisation for Economic Co-operation and Development, 2010, pp. 202-203). This policy focus is, in part, driven by a presumption that enhancing taxpayer rights will lead to greater taxpayer voluntary tax compliance. This presumption is clear from statements such as those emanating from the Organisation for Economic Co-operation and Development's (OECD) Centre for Tax Policy and Administration. A 2001 OECD report into the principles of good tax administration practice contains the following motherhood statement: "Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply" (OECD, 2001, p. 154).

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There is a solid foundation for the OECD's conclusion that treating taxpayers fairly will foster greater willingness among them to comply with their tax obligations. This proposition is well-researched and widely accepted (for example, see Feld & Frey, 2007; Tyler, 2000; and Wenzel, 2002). Similarly, there has also been significant Australian and international research efforts to confirm the positive relationship between taxpayer trust in the system of tax administration and compliance behaviour (for examples, see Murphy, 2004; and Scholz, 1998). This paper does not propose to comprehensively examine or to challenge the conclusions of these bodies of well-established research.

However, the OECD's acceptance of a positive correlation between awareness of taxpayer rights and willingness to comply appears to include a presumption that terms such as fairness (or trust) and taxpayer rights are synonymous. For researchers dedicated to promoting an agenda of greater understanding of taxpayer rights and committed to seeking a resolution to the many challenges of striking an equitable and sensible balance between taxpayer rights and tax administration powers, this presumption is welcome. It is obviously tempting for a researcher with a taxpayer rights research agenda to unquestioningly accept its correctness. However, academic rigour and a fundamental concern to ensure that our research contributes to developing the best possible tax system for all stakeholders demands that we resist this temptation.

Accordingly, at the risk of eroding the economic case for enhancing taxpayer rights and understanding of those rights, this paper questions whether any such presumption should be accepted, arguing, for example, that fairness and trust are much broader concepts than taxpayer rights, conceivably encompassing a range of behaviours and attitudes, including nebulous aspirational concepts such as 'courteous' and 'respectful' treatment, which are difficult to conceive of as rights. They also encapsulate overarching principles in tax administration system design, such as equity and consistency, and, even more fundamentally, the Rule of Law. Consequently, concepts such as fairness and trust are poor analogues for taxpayer rights. It follows that the findings of research into links between fairness/trust and taxpayer compliance may, therefore, be unreliable predictors of taxpayer voluntary compliance responses to enhancements or greater awareness of taxpayer rights.

In fact, a scan of the literature demonstrates that there is a dearth of consensus as to a correlation (positive or otherwise) between enhanced taxpayer rights or awareness of those rights and greater taxpayer willingness to comply, let alone clear empirical evidence as to the strength of any such correlation if it, in fact, exists. In light of this lack of clarity, this paper proposes a dedicated research agenda to explore and seek to add some nuance to our understanding of any correlation between voluntary compliance behaviour and enhancements in taxpayer rights. This paper seeks to serve as a primer for discussion to generate such a research agenda.

Specifically, Part II sets out a brief summary of the current state of knowledge about the link between taxpayer compliance and taxpayer rights. It shows that, although extensive work has been carried out both in Australia and internationally to test the link between taxpayer compliance and trust and fairness, the findings of this work fall far short of confirming the existence, strength or nature of any link between taxpayer compliance and enhancement or increased awareness of taxpayer rights, despite the intuitive logical appeal of the proposition that a strong correlation must exist.

Part III builds upon this background, shifting attention to making the case for further research to test the existence and nature of any such correlation between taxpayer compliance and the

enhancement or awareness of taxpayer rights. Part IV sets out some general principles and challenges to consider when designing a research agenda to explore the relationship between taxpayer rights and taxpayer compliance, and is designed to serve as a primer for further discussion.

PART II – BACKGROUND – TAX COMPLIANCE AND TAXPAYER RIGHTS

Taxpayer compliance research has, in recent years, progressed far beyond the simple testing of the existence and strength of the link between tax compliance and tax authority deterrence activities. This body of research, conducted largely by behavioural economists, tended to focus on testing any correlation between the severity of the consequences of failing to comply, together with the prospects of detection of non-compliance and taxpayer willingness to comply with their tax obligations. This body of work is sometimes generally referred to as work examining the "rational choice" or "deterrence model" of tax compliance (Torgler, 2002).

Increasingly, attention has shifted to looking to a broader and more nuanced range of factors which might influence taxpayer willingness to comply. This has involved a re-characterisation and general acceptance of the taxpayer/tax authority relationship as a "psychological contract" with mutual rights and obligations. Researchers from a range of disciplines have weighed in on the discussion, including sociologists and psychologists (for a good example, see James & Wallschutzky, 1995 p. 215). The psychological element of compliance behaviour has also been the subject of examination by a number of other writers since the 1990s (e.g. Tanzi & Shome, 1994, and Wickerson, 1994).

It is this body of work which has revealed strong links between taxpayer perceptions of fairness and trust (respectively) in the tax system and taxpayer voluntary compliance. However, as briefly canvassed below (a detailed examination would fill many volumes), the findings of this work fall far short of confirming a uniformly accepted existence, strength or nature of any link between taxpayer compliance and enhancement or increased awareness of taxpayer rights.

A. Fairness and Taxpayer Compliance:

In terms of the relationship between fairness and taxpayer compliance, typical conclusions of recent work are that taxpayers will be more willing to comply with their tax obligations if the system is perceived to be "fair and legitimate" (Feld & Frey, 2007, p. 102). Similar conclusions are drawn by Wenzel. In his study of the impact of justice concerns on tax compliance, Wenzel notes the results of numerous studies concluding that "taxpayers are less likely to be compliant with a tax system they consider unjust, unfair, and, thus, illegitimate" (Wenzel, 2002, p. 629).

The existence of a strong positive correlation between the fair treatment of taxpayers and their willingness to comply has been picked up and unequivocally accepted as correct both in Australia and internationally. For example, as noted in the foregoing introduction, the OECD's Centre for Tax Policy and Administration has stated, without qualification, that "[t]axpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply" (OECD, 2001, p. 154). Similarly, the Australian Inspector-General of Taxation has recently concluded, without qualification, that "…taxpayers are entitled to fair treatment by tax authorities and their perception that their rights are protected and respected is key in fostering voluntary compliance" (Commonwealth of Australia, Inspector-General of Taxation, December 2016, at [1.15]).

A presumed positive correlation between fairness and willingness to comply has also been judicially accepted in some quarters, particularly in the United Kingdom, where the doctrine of legitimate expectations, which recognises a right to substantive as well as procedural justice, has been described as being "rooted in fairness" (per Bingham LJ in *R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agencies Ltd*, 1990, pp. 1569-1570). In this context, Walton J has observed that fair treatment of taxpayers is in the "interests not only of all individual taxpayers…but also in the interests of the Revenue" (*Vestey v Inland Revenue Commissioners*, 1977, at p 439 per Walton J).

The most recent and comprehensive Australian scholarly contribution to the field - a project by Devos, published in 2014, which comprehensively addresses the literature and key factors affecting taxpayer compliance which have been researched to date, including any link between fairness and taxpayer compliance - is more measured in its conclusions (Devos, 2014). Devos points out the prime significance that governments attribute to fairness as a measure of a successful tax system, despite the fact that the findings of the many studies into the link between fairness and taxpayer compliance are inconsistent "…due in some respects to measurement and definitional problems as well as the multi-dimensional nature of fairness" (Devos, 2014, p. 27).

The Devos assessment is correct. Further, the accepted wisdom of a link between fairness and taxpayer compliance has not generated any sustained academic research specifically testing whether, and to what extent, any strengthening or increased awareness of taxpayer rights might result in increased perceptions of fairness with consequent greater taxpayer compliance. The studies which come closest to linking taxpayer rights with compliance behaviour are those which have examined links between procedural justice and perceptions of justice on taxpayer compliance behaviour, and the results of such studies have been inconclusive. For instance, Murphy (2003) refers to the following apparently contradictory findings of an Australian survey by Worsham, stating that its author:

> failed to find an increase in tax non-compliance when taxpayers experienced procedural injustice. Using an experimental manipulation, Worsham (1996) found that procedural injustice experienced personally, either by being subject to inconsistency in enforcement or to enforcement attempts brought about by inaccurate information, did not increase the level of tax non-compliance. He did, however, find that procedural injustice experienced indirectly through becoming aware of another's unfair treatment did increase self-reported tax non-compliance (Murphy, 2003, p. 383).

In the study referred to by Murphy, Worsham summarises his findings in the following terms:

> The results indicate that procedural injustice experienced indirectly through becoming aware of another's unfair treatment increased the level of non-compliance. Conversely, procedural injustice experienced personally, either by being subject to inconsistency in enforcement or to enforcement attempts brought about by inaccurate information, did not increase the level of non-compliance. In fact, inconsistent audit rates actually increased the level of compliance (Worsham, 1996, p. 19).

Book also notes the difficulty in drawing any concrete conclusions from the literature, pointing out the subtleties of tax administration and "the possibility that increasing post-assessment procedural protections may embolden non-compliance or, alternatively, increase compliance through a greater sense of public confidence in the fairness of procedures" (Book, 2004, p. 1160).

All of this suggests that any link between fairness and taxpayer compliance is far from straightforward. Even if such a link is accepted as certain, any presumption of the existence of a similar link between any enhancement of taxpayer rights and taxpayer compliance may be unwise in the absence of context-specific research to test this presumption.

B. Trust and Taxpayer Compliance:

Research into compliance behaviour has also extended to the examination and confirmation of the link between trust and tax compliance (for good examples, see Mason & Calvin, 1984; Roberts & Hite, 1994; Sheffrin & Triest, 1992; Falkinger, 1995; and Cowell, 1992). Typically, such studies have focussed on the positive compliance effects of fostering a relationship of trust and confidence between taxpayer and tax authority (for examples, see Job & Reinhart, 2003; Murphy, 2003, Murphy, 2004; and Braithwaite, 2003). Prime among these is work by Braithwaite in the early 2000s. The Braithwaite work ultimately led to the adoption of the Australian Taxation Office's trust-based tax enforcement model. Braithwaite describes this model, which emphasises reward and trust over deterrence and punishment, as follows:

> This approach encourages non-compliers to cooperate with tax officers in paying the taxes they owe, with prospects of punishment and loss placed in the background, only to enter into the compliance game when cooperation fails (Braithwaite & Braithwaite, 2001, p. 215).

However, like the studies confirming the link between fairness and taxpayer compliance, this work falls short of confirming any specific correlation between enhancement and/or knowledge of taxpayer rights and taxpayer compliance. The Braithwaite work touches upon aspects of taxpayer rights, but only incidentally, in the context of the broader relationship between procedural justice and willingness to comply.

There has also been significant international focus on the relationship between trust and compliance behaviour – although this work does not extend to testing or establishing the existence of any specific correlation between taxpayer rights and taxpayer compliance either. For example, leading work by Scholz and Lubell in the late 1990s found that trust in government by United States' citizens leads to levels of tax compliance "over and above the levels expected from an internalized sense of duty to obey laws and the fear of getting caught by enforcement agencies like the IRS" (Scholz & Lubell, 1998, p. 398).

Empirical work by Torgler, Demir, Macintyre and Schaffner in 2008 reached similar conclusions on the strength of the relationship between tax compliance and trust:

> Trust in public officials might tend to increase taxpayers' positive attitudes and commitment to the tax system and tax-payment, which has finally a positive effect on tax compliance. Taxes can be seen as a price paid for government's positive actions. Thus, if taxpayers trust the public officials, they are more willing to be honest. If the government acts in a trustworthy manner, taxpayers might be more willing to comply with the taxes (Torgler et al., 2008, p. 332).

Whilst it is difficult to challenge the inherent logical appeal of such reasoning (or the corresponding reasoning that there is a positive correlation between perceptions of tax system fairness and taxpayer voluntary compliance), it is clear that such broad findings fall far short of any meaningful proof of any specific and direct correlation between taxpayer rights (and/or awareness of those rights) and taxpayer compliance.

Even where the research does venture to suggest a possible correlation founded on taxpayer trust and confidence in the tax administration system, the findings are nuanced and qualified. For example, Uslaner concludes that while taxpayers appear to respond rationally in their compliance behaviour by being more willing to comply when they have trust and confidence in the system and have legal recourse to defend their rights, this confidence only seems to matter when there is an effective judiciary (Uslaner, 2007, p. 17).

Examples such as this consolidate the prima facie case for more research specifically examining the nature and extent of any correlation between taxpayer rights and tax compliance. Part III expounds this prima facie case.

PART III – THE CASE FOR A RESEARCH AGENDA

In light of the absence of specific research into the link between taxpayer rights and voluntary compliance discussed in Part II, acceptance of any link between taxpayer rights and compliance, such as that contained in the OECD motherhood statement cited in the introduction of this paper, should be questioned.

One possibility is that such sweeping statements stem from a supposition that terms such as fairness (or trust) and taxpayer rights are synonymous. However, analysis reveals key differences. For example, fairness and trust are much vaguer concepts than taxpayer rights, conceivably encompassing a range of behaviours and attitudes, including nebulous aspirational concepts such as "courteous" and "respectful" treatment. These are difficult to characterise as legal rights in any tangible sense.

Bentley describes such concepts as "aspirational administrative rights" which "depend upon normative prescriptions of behaviour that do not have agreed content. As their definition depends upon general social rules, they are inherently uncertain" (Bentley, 1996, 111). This point is aptly illustrated by the difficulties in attempts to translate concepts of fairness into an enforceable legal right in the context of the UK doctrine of legitimate expectations which, as noted in the Part II, is a doctrine "rooted in fairness". In that context, UK commentators have lamented that "[n]o real attempt has been made…to clarify what – as a general matter – counts as 'fair' or 'unfair', or the role which fairness plays in the overall scheme of judicial review" (Bamforth, 2004, p. 1. See also Clayton, 2003, and Stewart, 2000).

The United States has taken the lead in attempting to conceptualise and translate fairness into enforceable rights in its Taxpayer Bill of Rights (TBOR) which states under the heading "The right to a fair and just tax system" that:

> Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through normal channels (Department of the Treasury, Internal Revenue Service, 2014).

These are concrete commitments that can be identified, delivered, and remedied if the IRS fails to fulfil them. However, in most other jurisdictions, fairness remains firmly in Bentley's "aspirational administrative rights" category.

Fairness and trust also encapsulate overarching principles in tax administration system design, such as equity and consistency (first enunciated by economist Adam Smith (Smith, 1776), and, even more fundamentally, the Rule of Law. With respect to the latter, Sales and Steyn describe the link between the Rule of Law and fairness, noting that "the Rule of Law enforces the minimum standards of fairness, both substantive and procedural; it requires regularity and reasonable predictability in areas where government exercises discretionary power" (Sales & Steyn, 2004, p. 569). Notwithstanding, concepts such as the Rule of Law and principles such as equity and consistency are equally notoriously difficult to pin down and are certainly not unique to the tax context. Therefore, while the concepts are far from mutually exclusive, fairness and trust are poor analogues for taxpayer rights.

However, definitional distinctions aside, the research into the links between fairness and trust and taxpayer voluntary compliance carried out to date has a number of specific characteristics which make it particularly inadequate for predicting the likely effects of enhancing taxpayer rights or awareness of those rights on compliance behaviour.

First, irrespective of the strength of any findings of studies to date, many of those which have ventured into the field have studied cohorts of taxpayers with particular characteristics and whose behaviour may not be representative of the broader taxpaying public. For example, the leading Australian studies, such as those of Worsham (1996) and Wenzel (2002), focus on the procedural justice perceptions of taxpayers subject to Australian Taxation Office (ATO) audit or inquiry into their tax affairs. Similarly, the leading work by Murphy (2004) was only tested on a group already in dispute with the ATO over compliance. Crudely put, these are, essentially, studies into the treatment of taxpayer "villains" rather than taxpayer "victims." In contrast, any work examining the possible link between taxpayer rights and tax compliance would need to broaden the focus to include compliant taxpayers and taxpayers aggrieved by acts or omissions of the Revenue. It would be highly unlikely that such a necessary shift in focus would result in the replication of the findings of studies centred on examining the behaviour of non-compliant taxpayers.

Recent work commissioned by the United States Taxpayer Advocate Service (TAS) appears to confirm this. For example, a study by Beer, Kasper, Kirchler, & Erard (2015), commissioned by TAS, on the compliance impact of enforcement activity on subsequent compliance behaviour of a broad sample of (seemingly) compliant and (seemingly) non-compliant, self-employed taxpayers concluded that, insofar as compliant taxpayers are concerned, a:

> …"direct deterrent effect" (Alm et al., 2009) of additional tax assessments potentially increases the compliance of caught evaders. The response of compliant taxpayers to enforcement activity is ambiguous, however. While audits could be seen as a justified means to enforce the law, increasing the trust in the state and the willingness to comply voluntarily, a coercive experience might have the opposite outcome (Beer, Kasper, Kirchler, & Erard, 2015, p. 71).

Similarly, it is unwise to seek to extrapolate from studies linking sanctions or rewards imposed on taxpayers and the effect on compliance and to hypothesise on a possible positive link between greater accountability of tax officials and the level of taxpayer compliance. These studies generally conclude that harsher sanctions might foster greater taxpayer compliance. The logic of such findings has been noted:

> The hypothesis that more certain or severe legal sanctions will encourage compliance with the law is consistent not only with … economic theories … but also with exchange theory in sociology' (Roth, Scholz & Witter, 1989, p.91).

Of course, there are many nuances to such generalisations. Again, work by the United States TAS bears this out. For example, a study into the effects of accuracy-related penalties on voluntary compliance on sole proprietors found that those subject to an accuracy-related penalty had no better subsequent reporting compliance than those who were not (Beers, Wilson, Nestor, Ibbotson, Saldana, & LoPresti, 2013, p. 3).

However, even if general propositions assuming a close positive correlation between compliance and harshness of penalties imposed on non-compliant taxpayers are unquestioningly accepted, there are limits on the ability to extrapolate from this reasoning that there is a similar correlation between strength of taxpayer rights and compliance. Specifically, it would be a significant leap of faith to assert that the motivations and responses of private taxpayers to the prospect of sanctions or rewards imposed on them insofar as their willingness to comply is concerned will be the same as the motivations and responses of individual taxpayers or the taxpaying public collectively to the potential ability to pursue legal avenues of relief against the tax officials for breaches of taxpayer rights.

Those motivations and responses may lead to changes in taxpayer compliance behaviour which are impossible to predict without dedicated research. For example, dedicated research into any correlation between taxpayer rights and voluntary tax compliance may find that expanded regulatory or judicial scrutiny of acts of tax officials might discourage voluntary compliance and impose significant contingencies on the viability of vital government initiatives and services funded by that revenue. Book has expressed this as a concern with how "a potentially hostile judiciary or the imposition of additional procedures could put sand in the gears of government machinery" (Book, 2004, p. 1160).

Alternatively, as already noted above, the work of Uslaner suggests that in the absence of an effective judiciary willing to enforce sanctions against breaches of taxpayer rights, increased voluntary compliance behaviour may not result from a tax administration system which otherwise incorporates strong taxpayer rights (Uslaner, 2007).

Similarly, not all taxpayer rights enhancements will have the same effect on voluntary compliance behaviour. For example, in an extreme case, 'fiscal chaos' might result from a successful challenge to longstanding tax administration practices in taxpayer claims. This

would be similar to the fiscal chaos that might result from the declaration of a longstanding tax as an unconstitutional breach of basic taxpayer rights.[2] The uncertain tax administration environment created by such a declaration might be ripe for abuse by vexatious or opportunistic taxpayer litigants and create fewer incentives for voluntary taxpayer compliance. In turn, somewhat ironically, this might actually lead to an erosion of trust and confidence in the tax administration system among taxpayers.

Equally, an extension of taxpayer rights to allow actionable sanctions against individual tax officials for breaches of those rights may also discourage those tax officials from engaging in risky but important tax administration activities, such as the dissemination of tax information and provision of taxpayer advice. The consequent reduction in service standards might ultimately also result in an erosion of trust and confidence in the tax administration system and have a long-term net effect of lowering rates of voluntary taxpayer compliance.

This argument is often referred to as a "chilling" or "chill factor" risk. For example, in the U.S. context, it has been argued:

> Although there is a valid argument that a civil action against the IRS should be available in the appropriate circumstances, it should be noted that such an action is not without risks to the operation of the tax system. The availability of a civil action against the IRS is of concern, since the threat of civil action may have a "chilling effect" on the legitimate actions of the IRS and thus diminish its effectiveness' (Greenbaum, 1997, p. 151).

Similar arguments have been raised in the context of discussing the distorted behavioural incentives which might be generated through an extension of taxpayer rights to monetary compensation from the IRS (see Johnson, 2000, p. 406).

The problem is that there are equally reasonable challenges to most of these predictions. For example, there are only limited and narrow studies which have empirically examined the motivational effects of the threat of litigation on public servants – and no tax-specific research at all. The research that does exist indicates that statutory authorities overwhelmingly respond positively and constructively to adverse judicial determinations.

The most closely relevant and broad-reaching study into the issue is the Australian study by McMillan and Creyke into the effects of adverse judicial review determinations on Australian governmental bodies. The findings from that study indicate that, in the majority of cases, changes in organisational behaviour did result from adverse judicial determinations. However, aside from a few noted instances, there was no evidence of significant over-defensiveness or "chill factor" consequences. In fact, the study concluded that an adverse judicial review outcome that brings about changes is generally received by affected agencies "as a valuable and instructive incident" (Creyke & McMillan, 2004, p. 187). Findings such as these suggest that any worries about reductions in taxpayer compliance due to reduced service standards attributable to any extension of taxpayer rights may be unwarranted.

[2] The term "fiscal chaos" has been most comprehensively examined in the literature and case law concerning restitutionary relief from the State. For a good discussion, see Mason, 1996, especially at pp. 122-123; Wells, 1994, p. 201; and the discussion by La Forest J. in the Canadian case of *Air Canada v British Columbia* (1989) 59 DLR (4th) 161. See also Pannam (1964); and Brock (2000).

Recent judicial discussion of the issue in the Australian tax context in *Pape v Commissioner of Taxation* has supported this suggestion (*Pape v Commissioner of Taxation*, 2009). In that case, the Commissioner argued (relying on *Victoria v Commonwealth and Hayden* (1975) at p. 418, per Murphy J, who asserted that a narrow construction of the provision would have a "chilling effect…on governmental and parliamentary initiatives") that the taxpayer's argument in seeking to place constitutional limits on the appropriation power contained in s81 of the Constitution "would cause Parliament constantly to be 'looking over its shoulder and being fearful of the long term consequences' if it made an appropriation outside power" (*Pape v Commissioner of Taxation*, [2009] at [589]) HCA 23, at [589]). Heydon J rejected the argument, observing that "[t]he occasional declaration that federal legislation is invalid does not cause the progress of government to be unduly chilled or stultified" (*Pape v Commissioner of Taxation*, 2009, [596]). Equally, however, there are numerous examples of judicial acceptance of such arguments (see Bevacqua, 2015).

Any argument that enhancing taxpayer rights might open the floodgates to litigation against the Revenue, creating an environment ripe for the generation of incentives not to comply, can also be readily challenged. For example, the Australian Commonwealth Ombudsman has noted that litigant desire for an acknowledgement of his or her rights or an apology is often a significant driver for seeking redress rather than being the sole attraction of a legal remedy (see Office of the Commonwealth Ombudsman, Commonwealth of Australia, 1999, p. 17). The United Kingdom Law Commission has reached a similar conclusion, observing that "[i]t is…well-known in the socio-legal literature that …the relationship between a liability regime and the propensity to litigate is by no means straightforward" (Law Commission, United Kingdom, 2008, p. 144).

Resolving the validity of these arguments and counter-arguments is almost impossible without targeted research. The only way to determine the accuracy of the various hypotheses is to specifically test the relationship between taxpayer rights and taxpayer voluntary compliance. Unfortunately, the existing research into the link between compliance and trust/fairness cannot adequately fill this void in the literature.

This void is particularly troubling in the current tax administration climate because, as noted from the outset, the general acceptance of a link between how fairly taxpayers are treated and taxpayer voluntary compliance has led to a significant current international interest in ensuring taxpayer rights are adequately protected and understood. However, all of this is proceeding whilst there is still significant work to be done to determine what effects any changes to taxpayer rights might have on taxpayer voluntary compliance.

By way of pertinent illustration, the Australian Inspector-General of Taxation (IGT) included a review of the Australian Taxpayers' Charter and taxpayer protections in his 2014 work program. The IGT described his concerns as including "concerns regarding the adequacy of the ATO's Taxpayers' Charter and related taxpayer protections" (Commonwealth of Australia, Inspector-General of Taxation, 10 April 2014, p. 2). Consequently, the IGT review set out to consider "…the nature of the Taxpayers' Charter, the existing avenues available to taxpayers seeking redress for defective ATO administration and further forms of redress that may be required" (Commonwealth of Australia, Inspector-General of Taxation, 10 April 2014, p. 2). This is not the first time the IGT has noted concerns with the Taxpayers' Charter and taxpayer rights to recourse, such as compensation for infringements of those rights, including, most recently, in the IGT's 2012-13 Annual Report (Commonwealth of Australia, Inspector-General of Taxation, September 2013, p. 7).

The terms of reference for the IGT review into the Taxpayer's Charter were broad and extended to consideration of a range of potential enhancements to taxpayer rights, including endowing the Charter with legal force and the possibility of introducing additional or strengthened taxpayer rights to compensation from the Australian Commissioner of Taxation. However, despite the breadth of the review, the call for submissions made no specific mention of any consideration of the potential effects of enhancing taxpayer rights on taxpayer compliance. Specifically, the Terms of Reference note 14 specific issues for examination, none of which mention taxpayer compliance. Interestingly, though, the background to the Terms of Reference opens with the quote from the OECD noted in the introduction of this paper, apparently accepting the link between fairness and taxpayer compliance (Commonwealth of Australia, Inspector-General of Taxation, 2 November 2015).

The IGT released his report, which made significant findings, rejecting calls for legislative entrenchment of the Australian Taxpayers' Charter and similarly rejecting calls for further enforceable taxpayer remedies, in 2016. These conclusions were, necessarily, reached without the benefit of any solid insights into the potential consequences of these recommendations for taxpayer compliance (Commonwealth of Australia, Inspector-General of Taxation, December 2016).

Of course, given the current absence of a dedicated research agenda into the link between taxpayer rights and taxpayer voluntary compliance behaviour, the IGT had no other option in making its recommendations. It is clearly undesirable for oversight bodies, such as the Australian IGT, and policymakers to continue to make recommendations or determinations with respect to significant adjustments to the trade-off between taxpayer rights and tax authority powers in the absence of any clear empirical understanding of the existence or extent of any effects such significant changes might have on taxpayer compliance.

The clearest evidence of a recognition of this fact and of concerted effort to change this situation is emanating from the United States. The National Taxpayer Advocate has been extremely proactive in pursuing a research agenda to provide multidisciplinary and empirical insights into taxpayer behaviour in response to IRS tax collection powers and behaviours, and in expressing those insights in terms of their effects on taxpayer rights. For example, in her 2016 Annual Report to Congress, the Taxpayer Advocate recommends that the IRS utilises behavioural research insights to increase voluntary compliance and identifies the links between "alternative treatment" approaches informed by such insights, tax compliance and taxpayer rights, observing, for example, that such approaches:

> …help alert taxpayers when they may not have complied, promoting the *right to be informed*. They are less intrusive than coercive treatments, furthering the taxpayers' *right to privacy*. They help taxpayers comply more quickly, promoting the taxpayers' *right to finality*. Because coercing those who would respond to nudges seems unfair, they also support the taxpayer's right to a *fair and just tax system*. Because the IRS can over-reach when using coercive tools, they also further the taxpayer right to *pay no more than the correct amount of tax* (National Taxpayer Advocate, 2016a, p. 62).

The United States' approach, evidenced by the Taxpayer Advocate's work, provides a leading effort to acquire the knowledge necessary to avoid the significant potential economic effects - which may or may not be positive - of continuing to make decisions as to taxpayer rights without a clear understanding of the tax compliance effects of those decisions.

These potential economic consequences add to the case for the development of a research agenda to examine and measure any relationship between taxpayer rights and taxpayer voluntary compliance behaviour. The issue is real, given the general acceptance of a link between levels of tax compliance and economic growth - typically framed in terms of the link between the level of tax evasion or avoidance and economic growth (see, for example, Caballé & Panadés, 1997). It follows that any material change in taxpayer compliance behaviour is likely to have corresponding measurable effects on levels of economic growth. The possibility of reducing non-compliance behaviour may also indirectly aid productivity by increasing aggregate revenue raised and providing opportunities for reductions in marginal tax rates, thus fostering greater productivity, particularly in entrepreneurial industries (for further discussion of the link between productivity and tax, see OECD, 2008, p. 7).

The United Kingdom HMRC has provided a useful summary of the link between avoidance and both economic growth and productivity in its anti-avoidance strategy, pointing out that avoidance "…directly affects the delivery of public services and long-term economic growth. Avoidance distorts markets, is economically unproductive and breaks the link between economic productivity and reward" (HM Revenue and Customs, 2 October 2013). This summary of the economic arguments is simple and compelling.

It is also well-understood that to allow increased taxpayer rights against a tax authority without a clear understanding of the consequent effects on taxpayer voluntary compliance behaviours might unwittingly impose significant contingencies on the viability of vital government initiatives and services funded by the revenue collected by that revenue authority. It is trite but true that, as one author has put it, "[t]here is obviously a strong public interest in keeping the government solvent so that it may continue to defend and improve our society" (Reynolds, 1968, pp. 122-123). Clearly, there are good economic reasons for conducting research into the likely effects on taxpayer compliance of any mooted taxpayer rights reform proposal.

PART IV – THE GENESIS OF A RESEARCH AGENDA

It is a relatively simple thing to identify a need for research, but quite another to conceive if or how it is possible to carry out that research. This is particularly true of designing a research agenda to examine the strength and nature of any correlation between taxpayer voluntary compliance and taxpayer rights. First, despite the cogent reasons for research to examine the strength and nature of any correlation between tax compliance and taxpayer rights, there could be a number of good reasons for the absence of any such research to date. Accordingly, any research agenda for redressing this apparent important gap in knowledge must be sensitive to these reasons and must be structured so as to address them.

One of the possible reasons for the ostensible void in the research literature is the perceived difficulty in measuring the compliance effects of any changes in taxpayer rights. It would undoubtedly be difficult (probably impossible) to design a research model or survey instrument capable of capturing taxpayer compliance responses to any of a broad range of possible taxpayer rights initiatives. However, it is unlikely that this is the only reason for the lack of research attention to date.

This is because, despite the unlikelihood of a single solution to the problem existing, research into taxpayer compliance responses to changes in the taxpayer rights landscape is, in some respects, narrower and more readily definable in scope than research into more nebulous concepts such as fairness and trust. Yet, as discussed in the preceding parts of this paper, there

has been no shortage of research into the relationship between taxpayer compliance and fairness and trust.

A possible alternative explanation for the lack of research, therefore, is that a great deal of the research into the link between taxpayer compliance and fairness and trust has been carried out by non-tax scholars – predominantly psychologists, sociologists and behavioural economists. These researchers are comfortable dealing with generalised concepts such as fairness and trust and assessing psychological and behavioural responses to perceptions of fairness and trust. Conversely, they are less likely to have the tax knowledge to consider examining responses to specific taxpayer rights initiatives, something which is necessary if we are to examine any correlation between those specific rights and taxpayer compliance.

Again, however, the United States National Taxpayer Advocate appears to be leading the way in recognising and addressing this issue. The 2016 National Taxpayer Advocate Report to Congress includes a detailed literature review which draws together the behavioural science (psychology, anthropology, sociology, market research, and behavioural economics) lessons for taxpayer compliance, examining 183 separate sources from around the world from a range of behavioural science scholars (National Taxpayer Advocate, 2016b, pp. 44-101) This is the most comprehensive recent work of its kind and is a significant necessary stride in the right direction with regard to generating a research agenda for exploring any link between taxpayer rights and taxpayer voluntary compliance.

A successful research agenda must also involve Revenue authorities and officials in its formulation. As noted in Part III, a key justification for carrying out the research is the potential economic benefits which would accrue from designing a system of taxpayer rights which would maximise taxpayer voluntary compliance. However as also noted, compliance responses to any taxpayer rights initiative are likely to be intrinsically linked to the likely motivational effects of any such initiative on tax officials – particularly in the long term.

For example, a taxpayer rights initiative which produces over-defensive responses from the tax officials (e.g. the introduction of new, expansive taxpayer compensatory avenues of relief for tax administration failures), may result in tax officials ceasing to provide certain perceived high-risk services to taxpayers or providing those services only after lengthy and expensive rigorous legal risk assessment. These responses may be perceived by taxpayers as drops in service standards or efficiency with commensurate reductions in incentives to comply. In the long term, this may cancel out any short-term economic benefits of any increase in compliance resulting from enhancing taxpayer rights.

Even with the involvement of a wide range of stakeholders and relevant experts, it is implausible to consider that a single research model could be devised which would produce a complete answer to all the questions surrounding the nature and strength of any relationship between taxpayer rights and tax compliance. A body of relevant work would need to be built up over time, just as has been the case with the work examining the relationship between fairness and trust and tax compliance.

Given the relationship of culture to perceptions of fairness and rights, and attitudes toward government, this research would also need to be country-specific. Cultural norms are likely to have a key influence on the findings of any study – not only between countries, but potentially also between different cultural groups within nations.

As alluded to above, this body of work would also need to consider both short-term and longer-term effects of particular taxpayer rights reform initiatives on taxpayer compliance behaviour. This is particularly true if the relationship between trust and compliance is to be accepted as correct. Trust takes time to develop and any change is unlikely to have immediate results. Any positive compliance effects of any change to taxpayer rights may not be evident in the short term.

As for the substance of any research agenda, a ready starting point for testing would be to examine the relevance of enforceability of taxpayer rights to taxpayer willingness to comply. This is advisable as, internationally, there is a shift towards enforceable charters (OECD, 2010). The question of whether taxpayer charters should be endowed with binding legislative force is also frequently raised and the debate is frequently divisive (for a detailed discussion of the case for endowing taxpayer charters with legislative force, see Bevacqua, 2013, and for a comprehensive literature review considering questions of the nature of taxpayer charters, see National Taxpayer Advocate, 2016b, pp. 27-43). Hence the findings of any work examining the compliance effects of a shift toward legally enforceable taxpayer rights would be a timely and useful contribution to the international debate.

The second reason for examining the link between compliance and enforceability of taxpayer rights is that the nationally and internationally accepted model for categorising taxpayer rights formulated by Bentley categorises taxpayer rights according to the degree of enforceability of those rights (Bentley, 2007). Accordingly, a model which tests variables built around this same categorisation is also likely to garner greater attention and acceptance from a wider taxpayer rights audience, provide a useful contribution to the taxpayer rights literature and provide further validation of the Bentley model.

As alluded to throughout, any research would also need to examine taxpayer compliance responses both to changes in taxpayer rights and *knowledge* of those rights. This is an important research priority, as it would directly test the accepted OECD assertion cited throughout this paper that "[t]axpayers who are *aware of their rights* … are more willing to comply" (OECD, 2001, p. 154 - emphasis added). If this assertion holds true, policymakers may be best advised to simply direct their attention to better communicating to taxpayers the existing array of taxpayer rights, and checks and balances on Revenue power, rather than concentrating their efforts on increasing those rights. Work carried out by the United States' TAS in the run-up to the adoption of the TBOR by the IRS and subsequent to its enactment appears to confirm the OECD's assertion, indicating a much higher awareness and knowledge of taxpayer rights in the wake of the enactment of the TBOR.

In a similar vein, a useful third limb of any research agenda would be work aimed at gleaning an understanding of the extent to which taxpayers respond more favourably (in terms of willingness to voluntarily comply with their tax obligations) to *perceptions* of whether tax officials respect their rights or to actual changes in the letter of the law as to their rights. This insight would provide some long-overdue empirical data which could be fed into the argument as to whether taxpayer charters should be legally enforceable in order to foster greater taxpayer voluntary compliance.

In terms of nuances worthy of examination, an example of a key issue worth testing would be whether or to what extent taxpayers look towards the actual behaviours of tax officials based on their personal experiences as a guide to whether they should comply with their tax obligations rather than towards the letter of the law with regard to any taxpayer rights. This

could involve applying and testing psychological theories of motivation, such as attribution theory. This theory was first proposed by social psychologist, Fritz Heider (see Heider, 1958). Extrapolating from the application of attribution theory to employee organisational commitment in response to the motivations of management (see, for example, Koys, 1991), social motivation theories, such as attribution theory, would suggest that enhancing taxpayer legal rights is unlikely to have any effect (positive or negative) on the behaviour of taxpayers unless accompanied by a clear attitude of respect and fairness towards taxpayers among tax officials, as evidenced by day-to-day interactions with taxpayers.

To test this prediction, any survey of taxpayers could include questions about likely compliance responses based on tax officials' motivations for behaving in particular ways towards taxpayers. For example, questions could be devised asking taxpayers whether it would make any difference to their willingness to comply with their tax obligations if they thought the tax officials allowed appeals against tax assessments because (1) they wanted to treat taxpayers with justice and fairness; or (2) they solely wanted to comply with the letter of the law.

Finally, as alluded to in Part III of this paper, any research into the link between taxpayer rights and taxpayer voluntary compliance would need to extend beyond the previous work examining the link between compliance and fairness and trust, which has tended to focus on the attitudes of taxpayers who have been subjected to tax audits or the subjects of previous tax disputes. As previously noted, any work examining the possible link between taxpayer rights and tax compliance would need to broaden the focus to include compliant taxpayers and taxpayers aggrieved by acts or omissions of the Revenue. There may be scope for research centred on particular classes of taxpayers to be carried out, but only in cases where mooted changes to taxpayer rights are aimed only at those particular classes of taxpayers.

PART V – CONCLUSIONS

It is difficult to argue against the desirability of a fair tax administration system and a trusting relationship between tax officials and the taxpaying public. This paper has shown that, although there are many uncertainties and inconsistencies in the findings, there is a significant body of research indicating that a fairer and more trustworthy tax administration system will foster greater voluntary compliance. This paper has not sought to challenge any of these findings, nor does it purport to comprehensively examine this very large body of literature. The reason for this is that, even if accepting these findings without challenge, it does not follow that the same correlation between taxpayer rights and/or awareness of those rights and taxpayer compliance necessarily exists.

There are many arguments which could be raised in support of the idea that enhancing taxpayer rights will indeed foster greater taxpayer compliance. Equally, though, cogent arguments could be raised to support the theory that increasing taxpayer rights could have the opposite effect through, for example, opening the floodgates to claims against tax officials or fostering over-defensive responses from tax officials and, consequently, lowering service standards. The likely reality is that both points of view are overly simplistic. Different taxpayer rights reform proposals will likely generate different responses and have different compliance behaviour ramifications. In addition, compliance effects may well differ from the short term to the long term. However, there is little in the existing research to give policymakers any practical guidance on how to structure taxpayer rights reform proposals to take advantage of any positive compliance effects and minimise the risks of any voluntary compliance disincentives.

Of course, there is a strong case to be made that enhancing taxpayer rights is a worthy pursuit per se, irrespective of its effects on taxpayer voluntary compliance behaviour. For example, as Owens, Olson and Baker have recently eloquently observed:

> On the other hand, you can come at it from a totally different view, which is simply to say compliant or noncompliant, taxpayers have rights. They are human beings or they are entities owned by, staffed by, human beings. There is a good in protecting human rights come what may, regardless of the advantages for tax administrations (Owens, Olson, & Baker, 2016. p. 599).

If, though, a primary motivation for the pursuit of enhanced and clearer taxpayer rights is the fostering of greater voluntary compliance behaviour, a concerted effort to specifically explore the existence and strength of any correlation between taxpayer rights and tax compliance would be invaluable. Of course, it is unlikely that any single research model could be designed to provide all the answers currently lacking. However, this paper provides a justification and a primer for a long-overdue direct discussion of how to design a research agenda to facilitate evidence-based taxpayer rights policy development which will maximise taxpayer voluntary compliance.

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THE U.S. TAXPAYER BILL OF RIGHTS: WINDOW DRESSING OR EXPRESSION OF JUSTICE?

Alice G. Abreu, Richard K. Greenstein[1]

Abstract

The subject of taxpayer rights is receiving increasing attention worldwide. Tax scholars, practitioners, and administrators are grappling with the challenges of delivering on the promise of taxpayer rights, the benefits of success, and the price of failure. Nevertheless, a fundamental question has escaped pointed examination: What does the concept of taxpayer rights offer?

In this paper we suggest an answer to that question. Our focus is the U. S. Taxpayer Bill of Rights (TBOR). At first blush, the TBOR may seem to be no more than window dressing because it does not codify legal remedies for violations of the enumerated taxpayer rights. Nevertheless, we argue that by its explicit use of the language of rights and by its adoption by the IRS and enactment by Congress, the TBOR generates a powerful normative force that supports enforcement. That force, in turn, can change the behavior of the IRS toward taxpayers and support calls for Congress, Treasury, or the courts to fashion legal remedies. Put differently, there is strong reason to predict that the adoption and enactment of the TBOR will make the administration of the tax law more just.

Our format is a bit unconventional. What follows is a dialogue in which we ask and answer challenging questions. We believe this format clarifies the fundamental issues raised by the concept of taxpayer rights and best illuminates some of the tensions generated.

Alice Abreu: The concept of taxpayer rights invites scrutiny from at least two perspectives. I've been a tax lawyer for the entirety of my professional life, whereas Rick writes in jurisprudence and regularly teaches criminal law and jurisprudence. Tax and philosophy might seem like disparate fields—one intensely practical, with blunt effects on everyday life and business, and the other abstract. But in our thinking about taxpayer rights the two fields come together quite nicely. We reveal how through a dialogue about taxpayer rights from those two points of view.

We start with the observation that in the United States taxpayer rights have been a specific topic of concern for nearly three decades, and no one has promoted them like Nina Olson, who has been the National Taxpayer Advocate since 2001. Her Annual Reports to Congress have long

[1] Alice G. Abreu and Richard K. Greenstein are Professors of Law at Temple University's Beasley School of Law. This article was first presented as a paper at the 2nd International Conference on Taxpayers' Rights in Vienna, Austria, as part of a panel on "The Framework and Justification for Taxpayer Rights." We wish to thank Nina E. Olson, the National Taxpayer Advocate, for organizing that conference, as well as for inviting our presentation and encouraging the writing of this essay. We also thank the Conference participants, many of whom provided insightful commentary on the ideas expressed in this essay, including Christopher Rizek and Kristin Hickman. We are also exceedingly grateful for the dedicated and excellent research assistance provided by John Richey (Temple Law '18) and Noa Kaumeheiwa (Temple Law Library). All errors are ours alone.

championed taxpayer rights,[2] and she was instrumental in the IRS's adoption of a Taxpayer Bill of Rights (TBOR) in June, 2014 (Internal Revenue Service [IRS], 2014).[3] Later, during the 1st International Conference on Taxpayer Rights in Washington DC in November, 2015, she took understandable pride and delight in announcing the introduction of legislation codifying a TBOR.[4] That legislation is now 26 USC 7803(a)(3) of the Internal Revenue Code (the "Code") (26 USC 7803(a)(3)).[5] Such a development should have attracted substantial commentary from scholars and practitioners. Yet, the tax bar shrugged.

There was barely a mention of the TBOR in Tax Notes, a publication which has a large daily and weekly readership, and no profusion of either scholarly or celebratory articles has appeared.[6] Indeed, the one item of reader reaction that appeared in Tax Notes after the IRS announced the adoption of its TBOR on June 10, 2014, was an anonymous letter released the following day (Anonymous, 2014). That letter was highly critical and pointed to the existence of an elephant in the room. We think it is time to identify and challenge that elephant.

The author of the anonymous letter charged that:

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[2] See Olson (2013, p. 5) (stating: "Since 2007, the National Taxpayer Advocate has repeatedly recommended adoption of a Taxpayer Bill of Rights (TBOR) that takes the multiple existing rights embedded in the code and groups them into ten broad categories, modeled on the U.S. Constitution's Bill of Rights.") As she explained:

> Taxpayer rights are central to voluntary compliance. If taxpayers believe they are treated, or can be treated, in an arbitrary and capricious manner, they will mistrust the tax system and be less likely to comply with the laws voluntarily. If taxpayers have confidence in the fairness and integrity of the system, they will be more likely to comply.
>
> The Internal Revenue Code (IRC) provides dozens of real, substantive taxpayer rights. However, these rights are scattered throughout the Code and are not presented in a coherent way. Consequently, most taxpayers have no idea what their rights are and therefore often cannot take advantage of them. . . . A thematic, principle-based list of core taxpayer rights would provide a foundational framework for taxpayers and IRS employees alike that would promote effective tax administration.
>
> Simply put, labels and presentation matter. (Olson, 2013, pp. 5-6).

[3] IR-2014-72, 2014 TNT 112-113 (June 10, 2014). See Appendix A hereto for the text of the IRS's TBOR. In her 2013 Annual Report the National Taxpayer Advocate recommended that the IRS adopt a TBOR "and actively apply its principles to all IRS strategic planning, compliance and taxpayer service activities, and to outreach and education. Doing so will ensure taxpayers know their rights, enable them to avail themselves of those rights, and restore trust in the tax system. A TBOR provides organizing principles — a framework — for effective tax administration." (Olson, 2013, p. 6). As she explained: "While codifying a TBOR would require Congressional action, the IRS can articulate these rights by adopting a TBOR on its own. Internally, the National Taxpayer Advocate has had several discussions with senior IRS officials over the last few months about publishing a Taxpayer Bill of Rights, and she is hopeful the IRS will decide to do so in the near future if Congress does not act first." [Footnote omitted]. Olson, 2013, pp. 7-8.

[4] The National Taxpayer Advocate had "recommended numerous times that a statement of taxpayer rights, a Taxpayer Bill of Rights, be formally codified." [Footnote omitted]. Olson (2013, p. 7).

[5] The provision (26 USC 7803(a)(3)) is reproduced in Appendix B hereto.

[6] We do not mean to imply that there was no reaction at all to the announcement of the IRS's TBOR. The one news item in Tax Notes that described the announcement included a number of positive reactions from directors of Low Income Taxpayer Clinics (LITCs). (LITCs are not-for-profit entities operated either as stand-alone organizations providing free or low-cost legal representation in tax matters to qualifying low income individuals, or as part of law schools or legal services organizations. They can apply for and receive up to $100,000 per year in matching funds from the IRS, as provided by 26 USC 7526. Olson (2015). Fogg (2013) provides an excellent description of the history and function of LITCs.) But our point is that neither Tax Notes nor Bloomberg's Daily Tax Report contained explanatory reports or reader commentary regarding either the IRS's adoption of the TBOR or its codification in 26 USC 7803(a)(3), with the exception described later in text.

> The recently announced so-called Taxpayer Bill of "Rights" is no more than a cynical move by the IRS to stave off further regulation by Congress. I put the word "rights" in quotes because the fact of the matter is many of the enumerated items are not actually rights—the IRS is not compelled to respect them and the taxpayer has no legal remedy when they are violated (and the ones that are in fact legal rights were already enacted by Congress, not the IRS).

And the letter did not stop there. It went on to quote from the foundational U.S. constitutional law case, *Marbury v. Madison*, in which the U.S. Supreme Court observed that:

> The Government of the United States has been emphatically termed a government of law, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right (*Marbury v. Madison*, p. 163).

The letter then concluded by asserting that "in light of this proud history, I am offended that the IRS spin doctors' self-congratulatory release claims that the IRS pronouncement is 'similar to the U.S. Constitution's Bill of Rights.'"

Although it is tempting to dismiss these charges as yet another example of the IRS-bashing that has become all too common in the U.S. (and the letter does overstate the IRS's allusion to the Constitution's Bill or Rights),[7] we believe that the core charge deserves serious consideration. It also likely explains the lack of general interest that the TBOR, either as adopted by the IRS or as codified, has drawn from the tax practitioner and scholarly communities. That core is that the rights (or more accurately, most of the rights) provided by the TBOR are not enforceable;[8] that taxpayers in the U.S. who believe the IRS has violated their taxpayer rights cannot seek redress in court; and therefore, that the rights the TBOR provides are not rights at all. It is not surprising that practitioners, or taxpayers themselves, would reason that if all a TBOR does is collect and restate rights that the statute already provides, without providing any additional right to enforcement or compensation for a violation, then the TBOR provides nothing. It is window-dressing, at best.

It is correct to observe that the TBOR the IRS adopted does nothing more than collect and restate existing rights. As the IRS noted in its announcement of the adoption of the TBOR,

[7] The IRS announcement invoked only the similarity in the number of provisions (ten). It did not purport to compare the TBOR to the Constitutional Bill of Rights categorically. IRS (2014).

[8] Some of the statutory provisions implicated in the TBOR do contain enforcement mechanisms either by providing for civil actions or sanctioning violations through the criminal justice system. For example, 26 USC 6304(a) prohibits certain contacts with taxpayers and 26 USC 6304(b) prohibits taxpayer harassment (such as contact at unreasonable times or at the taxpayer's workplace), implicating taxpayer right #7, the Right to Privacy), and 26 USC 6304(c) allows civil actions for violations of 26 USC 6304. Similarly, 26 USC 6103 prohibits the disclosure of return information and 26 USC 7213 makes unauthorized disclosure of such information a felony; 26 USC 7216 makes knowing or reckless disclosure of return information by paid preparers a misdemeanor, and 26 USC 6713 provides a penalty for disclosure or unauthorized use of return information by paid preparers. But most of the enumerated rights don't map onto a statutory provision that provides a mechanism for enforcement or sanction. For example, how would a taxpayer enforce right #10, the Right to a Fair and Just Tax System?

> The Taxpayer Bill of Rights takes the multiple existing rights embedded in the tax code and groups them into 10 broad categories, making them more visible and easier for taxpayers to find on IRS.gov. . . . The tax code includes numerous taxpayer rights, but they are scattered throughout the code, making it difficult for people to track and understand (IRS, 2014).

Moreover, the legislative action that codified the TBOR was to the same effect. It neither provided additional rights nor offered any remedies for violation of the rights it states. Rather, it simply provided,

In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including [the list of the ten rights provided in the IRS's TBOR then follows]. (26 USC 7803(a)(3)).

Hence, the charge that neither version of the TBOR gives taxpayers any additional, actionable, rights is not spurious.

Rick Greenstein: I just want to note at the outset that the enforceability of most of the rights provided by the TBOR has not been tested; so, we don't know with certainty that anything beyond its adoption by the IRS and its legislative enactment as part of the Code is needed to effect compliance or compensation. That notwithstanding, you raise vitally important questions. Let's assume that most of the TBOR provisions adopted by the IRS and codified in 26 USC 7803(a)(3) are not directly enforceable. What, then, is the value of the TBOR? Indeed, can the ten items that make up the TBOR be meaningfully characterized as rights at all? Or are they, at worst, a ruse or a deception, and at best, an illusion or, as you put it, "window-dressing"?

Taxation in the United States, never the most popular of government activities, is facing a crisis of legitimacy. Legitimacy is necessary for a robust tax system because the level of voluntary compliance required for a functional tax regime depends on public acceptance that paying one's taxes is a legitimate demand of the government.[9] Some of the crisis of legitimacy stems from ideological skepticism about taxation; some from the effects of eight years of Republican opposition to all activities of the Obama Administration; and some from missteps by the IRS itself, which have enmeshed the agency in a distracting and damaging scandal.[10] But the fragility of the tax system's legitimacy also derives, I believe, from two deeper sources. I'm going to address one of those sources now and return to the other—tax exceptionalism—later.

[9] Professor Tom R. Tyler has argued that compliance is bolstered by a normative commitment to obedience based on legitimacy, "obeying the law because one feels that the authority enforcing the law has the right to dictate behavior." Tyler (2006, pp. 3-4). That normative perspective, in turn, is closely tied to perceptions of "procedural justice": perceptions that the outcomes we receive in our social experiences are produced by fair procedures. Tyler (2006, pp. 161-178).

[10] See Confessore & Luo (2013). The scandal led to investigations by the FBI, the Department of Justice, and Congress. In the wake of the controversy the Acting Commissioner of Internal Revenue, the Commissioner of the Tax Exempt and Governmental Entities Division, and the Director of the Exempt Organizations Division resigned. In addition, Congress attempted to impeach John Koskinen, then IRS Commissioner. Gattoni-Celli & van den Berg (2017); Hoffman (2016). See generally Wikipedia (2017).

The first is that the tax system is not, in the public's mind, readily associated with principles of justice. Significant burdens imposed by the government must be perceived as just in order to be perceived as legitimate. One way that the tax system would be perceived as just is if it gave good value in return for what is taken from the taxpaying public. But the relationship between what the government takes through taxation (palpable and arduous) and what it gives in terms of valuable and desired services is often obscure. For many taxpayers the tax system feels remote, arcane, opaque, oppressive, and uncaring.

Another way that the tax system would be perceived as just is if it treated taxpayers with procedural fairness (see Tyler, 2006, pp. 161-178). The TBOR responds specifically to the issue of procedural fairness, thereby bolstering the tax system's legitimacy. It does this by utilizing the language of rights. Specifically, 26 USC 7803(a)(3) refers to "taxpayer rights as afforded by other provisions of this title." As you remarked, that reference to other provisions of the Code suggests that the TBOR gives the taxpayer nothing new. But, in fact, the TBOR gives taxpayers something very new: the language of rights.

Prior to the enactment of the TBOR, the provisions that 26 USC 7803(a)(3) refers to were couched in terms of legal obligations the Code imposed on the Treasury Secretary and other tax officials. For example, 26 USC 6751(a), provides that "[t]he Secretary shall include with each notice of penalty under this title information with respect to the name of the penalty, the section of this title under which the penalty is imposed, and a computation of the penalty." (26 USC 6751(a). Similarly, 26 USC 7524 provides: "Not less often than annually, the Secretary shall send a written notice to each taxpayer who has a tax delinquent account of the amount of the tax delinquency as of the date of the notice." (26 USC 7524). Although taxpayers clearly benefit from the duties these provisions impose on the Secretary, the benefit is incidental to the duty imposed, which gives it the character of legislative grace. Hence, in fulfilling those statutory obligations the IRS can proceed mechanically, doing what is required just because it is required, rather than because it has independent value.

But the TBOR translates these obligations into a different language—the language of rights. By using the language of rights, the TBOR transforms those already-existing duties into taxpayer rights, that is, it transforms the *obligations* of IRS officials into *entitlements* possessed by taxpayers. In this way the language of rights shows a new level of respect toward taxpayers. This transformation is important because the language of rights has a particular significance in American legal and political theory.

Moreover, the language of rights signals entitlements that reflect the demands of justice. The rights enumerated in the TBOR are immediately recognizable as demands of procedural justice—demands of justice having to do with how members of the polity, now explicitly including taxpayers, should be treated by the government.[11] The language of taxpayers' rights signifies that these entitlements have their source outside of positive law; their source is justice itself.

[11] For example, "The Right to Challenge the IRS's Position and be Heard" (TBOR #4) corresponds to a widely shared understanding that procedural justice requires that people have "an opportunity to present their arguments, [be] listened to, and [have] their views considered by the authorities." Tyler (2006, p. 163).

AA: You emphasize the incorporation of the TBOR into the Code (26 USC 7803(a)(3)) and suggest that the use of the language of rights is significant because it characterizes the duties already imposed on the government by legislation as proceeding not merely from legislative grace but rather from the demands of justice. Are you suggesting that by invoking the language of rights in 26 USC 7803(a)(3), Congress is providing normative support for enforcement of the TBOR and for compensating violations? And if you are, didn't the adoption of the TBOR by the IRS a year and a half earlier provide the same normative support for enforcement and compensation?

RG: I think that although the language of the IRS's version of the TBOR is identical to that of the legislative version, their expressive meanings are importantly different.

AA: What does it mean to say that the expressive meanings are different? Isn't all language expressive?

RG: The expressive meaning of a statement comes from the *form* in which statement is made (see generally Hayner, 1956, pp. 149-157). It's distinct from what I'll call the statement's linguistic meaning: the meaning derived from the particular words used. Linguistic meaning refers to the *content* of the statement; the linguistic meaning of the TBOR is that the listed items are things taxpayers are entitled to, reflecting the demands of justice. The TBOR has the same linguistic meaning—the same content—whether it is stated in the IRS's Publication 1 or in 26 USC 7803(a)(3) of the Code because the same words are used in both of those documents. But the TBOR's expressive meaning, which derives from the form in which it is presented, varies considerably depending on which document we are talking about.

The expressive meaning of the TBOR's adoption by the IRS is a commitment by that agency to recognize and respect those rights, but the expressive meaning of the TBOR's codification is that it confers on the TBOR the force of law. The act of codification provides the force of law because that is what legislation does: it creates law. Adoption by the IRS, though significant, did not make the TBOR law. But adoption by the legislature did, and that difference—making the TBOR part of law—is what gives the codified TBOR a different expressive meaning than the IRS's TBOR. What is important about these different expressive meanings is that they have different normative significance. The commitment by the IRS to respect taxpayer rights (made by the IRS's TBOR), is subject to evaluation against a standard of sincerity, but the codification of taxpayer rights in 26 USC 7803(a)(3) is subject to evaluation against a standard of the availability of legal remedies. If legal remedies are available, the coercive power of government can be invoked to protect and enforce those rights. Therefore, by incorporating taxpayer rights into the Code, Congress has made patent that the rights enumerated are *legal* rights—that the *tax law* recognizes and stands for procedural justice.

The idea that the form in which the TBOR is presented determines its expressive meaning and therefore its normative significance, is reinforced by the scholarship on the "expressive function of law." For example, Professor Cass Sunstein has argued that in addition to "controlling behavior directly," law also "make[s] statements." (Sunstein, 1996, p. 2024). In particular, he notes how "legal 'statements' might be designed to change social norms." (Sunstein, 1996, pp. 2024-2025). That is precisely my point. The adoption of the TBOR by the IRS changed the normative

environment for taxpayer rights. It expressed what those rights are and committed the IRS to respecting them.

And enactment by Congress further changed the normative environment: It gave the TBOR the force of law. The change in the normative environment brought about by the codification of the TBOR is significant in two different ways. It expresses, first, that taxpayer rights are legal rights and, second, that the tax law stands for procedural justice. The normative environment structures our thinking about taxpayer rights.

The successive changes in the normative environment, in turn, lay the foundation for moving Congress, Treasury, or the courts toward the recognition of legal remedies for violations of those rights. In effect they create a powerful normative basis for enforcement.

AA: You seem to suggest an equation in which the language of rights, plus codification, produces a powerful normative basis for enforcement. Put another way, LR + C = NBE, where LR is the Language of Rights, C is Codification and NBE is the Normative Basis for Enforcement. That is persuasive, but it doesn't really solve the problem. The reason is that the equation brings us back to a reliance on the importance of language, and the problem with that is that it resurrects the argument with which this dialogue began: that words are meaningless if they are not backed by the ability to impose sanctions.

That is the *Marbury v. Madison* problem: the idea that rule of law requires a "remedy for the violation of a vested legal right." (*Marbury v. Madison*, 1803, p. 163). This formulation, which makes the existence of a remedy definitive of the existence of a right, is a problem. If it is true, then the codification of the TBOR is either meaningless because there is no remedy, or it requires the provision of legal remedies if it is to be anything more than window dressing. And the problem with that is that it leaves no room for nuanced analysis.

Your invocation of the expressive function of law and its power to provide a normative basis for enforcement, when combined with the *Marbury v. Madison* problem, therefore raises for me an issue that goes to the heart of the concept of taxpayer rights. That issue is this: Assume that I'm convinced that the expressive meaning of words changes depending on the form in which they are uttered, making the expressive meaning of the codified TBOR different from that of the TBOR adopted by IRS. Further assume that I agree that the expressive meaning of the codified TBOR is to change the normative environment by imbuing the TBOR with the force of law, and the tax law with the force of justice. Does that inexorably lead to the conclusion that the uttering of the words by Congress leads to making the rights enumerated in 26 USC 7803(a)(3) enforceable? In other words, does Congress' use of the language of rights require that the rights be enforced?

RG: No. If legal challenges are brought against the IRS for alleged violations of taxpayer rights, the courts will still have to decide whether and how to remedy those alleged violations. The enactment of the TBOR doesn't create those remedies directly, but incorporating the language of rights into the Code does generate a powerful normative basis for enforcement. Whether the courts are ultimately moved by the words of the TBOR is not a foregone conclusion, but the incorporation of those words into the Code does make it more likely that legal remedies will be fashioned.

Words matter. They can have enormous practical effect. We know that from so-called "performative" utterances—statements that are understood to bring about changes in the world by virtue of their mere utterance (e.g., when two individuals exchange promises, thereby creating an enforceable contract) (see Austin, 1962, pp. 4-7). More generally, to give something a verbal label can change what it is. For example, when a particular constellation of behaviors was first labeled sexual harassment, four things happened. First, the disparate behaviors were transformed into a unified concept. Second, this now-unified concept was imbued with value particular judgments. Third, the constellation of behaviors could be experienced in a different way. Fourth, the new label changed the normative environment, which in turn paved the way for the creation of legal remedies.

The same seems true for the codification of taxpayer rights. I think your equation gets it right. The Code's transformation of the obligations of IRS officials into the language of a TBOR, has important effects. First, the language of rights, transforms these obligations into entitlements that have their source in the demands of justice. Second, the statutory form—*codification* of these rights—expresses a legal recognition of the demands of justice. Together, those two effects provide a powerful normative basis for *demanding* enforcement. After all, as the quotation from *Marbury v. Madison* suggests, it would be an embarrassment to the law were it to legally recognize a right—especially one anchored in justice—but "furnish no remedy for the violation" of that right. Consequently, the incorporation of the TBOR into the Code has a very real, practical effect: it strengthens the position of taxpayers to insist that these demands of justice actually be satisfied by the actions of government officials, and that the law provide remedies for noncompliance. This strengthening of the normative position of taxpayers is not the same as concluding that taxpayers are necessarily entitled to a legal remedy; that determination will have to be made Congress, Treasury, or the courts with respect to each right, after weighing all of the relevant factors.[12]

This analysis is not unique to the tax law. A recent decision of the European Court of Human Rights provides an illuminating example. The Court ruled that laws requiring transgender persons to be sterilized as a condition for changing their names on official government documents violate Article Eight of the European Convention on Human Rights (ECHR) (*Affaire A.P., Garçon et Nicot c. France*, 2017). Regarding the effect of this ruling, the *New York Times* reported the following:

> The ruling does not mean immediate legal change in any of the countries, and none of them have so far changed their laws. The court does not possess a strong enforcement mechanism that can make lawmakers pass new legislation, and activists cautioned that it may take several more court cases before legal change comes to individual countries.

But nevertheless, many greeted the ruling as an important milestone.

[12] In the case of the judicial remedies the considerations would be even more granular. Whether any particular TBOR right is enforceable by the courts might vary case by case.

> "The European Court of Human Rights is very much respected in Europe and we can expect that in the majority of countries where this issue comes up, this ruling will be respected as the new precedent," said Richard Köhler, the senior policy officer at Transgender Europe. He said the first impacts of the decision may be seen in upcoming court cases in Bulgaria and Macedonia. (Stack, 2017).

The decision of the ECHR did not itself require member states to permit transgendered persons to change their names on official documents without first undergoing sterilization. But the decision did change the normative environment for demanding enforcement of the Court's ruling. The codification of the TBOR has a similar effect. Codification imbues the TBOR with the force of law. That does not automatically make makes the enumerated rights enforceable, but it changes the normative environment for enforcement, which may then result in enforcement.

AA: You've persuaded me that the creation of a normative basis for enforcement does not require that enforcement follow, but rather invites a deeper analysis of the costs and benefits of enforcement. That is a useful explanation; it shows that the concept of taxpayer rights has substantive effect while not precluding analysis of the difficult issues raised by enforcement or by the provision of remedies.

Nuanced analysis is necessary because the possibility of enforcement of the rights contained in the TBOR, not to mention the allowance of pecuniary damages, is not an unqualified good. Nor is it a subject that has been widely studied. Although the threat of enforcement of taxpayer rights might give the IRS a strong incentive to act to respect those rights, an avalanche of lawsuits propelled by the prospect of pecuniary reward might well cripple an already beleaguered agency. That prospect could also create or exacerbate a defensive mentality that will only intensify the legitimacy issues the agency is currently facing, thereby further eroding taxpayer rights. Although the competing values raised by the possibility of enforcement of taxpayer rights are difficult to reconcile, interpreting the enactment of the TBOR in 26 USC 7803(a)(3) as providing a normative basis for enforcement allows an examination, on a right-by-right or even a case-by-case basis, of the desirability of enforcement. Although the examination does not determine the outcome of the analysis, it does mean that taxpayer rights as currently constituted are not mere window dressing.

But all that raises another question: Given the emphasis that your analysis places on the use of the language of rights because of its expressive meaning (which creates the normative basis for enforcement), does that analysis suggest that there is a meaningful distinction between rights and charters? That question arises for me largely as a result of the discussion in the National Taxpayer Advocate's 2016 Annual Report, which contains a literature review of a number of subjects, including *Taxpayer Service in Other Countries* (NTA, 2016c, pp.3-15), and, most importantly for our purpose here, *Incorporating Taxpayer Rights in Tax Administration.* (NTA, 2016d, pp. 26-43).

The discussion of that last topic notes that many countries

> have statements of principles that use the title 'charter' as opposed to 'bill of rights,' [but] citizen charters are often akin to a bill of rights because they provide a list of fundamental rights, values, or standards to which a government either aspires or promises to uphold. (NTA, 2016d, p. 27).

A footnote cites Q.C. Philip Baker for an explanation of the distinction between a charter of rights and a bill of rights, namely that "a bill of rights enacts the provisions included in the statement of rights in legislation," while

> [a] charter is a declaration of taxpayers' rights (which can also include obligations) that is not included in legislation and has no specific force of law. However, a charter could be given the force of law through a legislative provision that directs a governmental agency to issue a charter." (NTA, 2016d, n. 5).

How does the bill of rights/charter of rights distinction connect to your analysis of expressive meaning?

RG: I think the bill/charter distinction is very helpful in that it gives us labels for distinguishing between statements of rights that do not have the force of law (charters of rights) and statements of rights that are incorporated into legislation and thus do have the force of law (bills of rights). By this account, what the IRS adopted in 2014 was a charter of rights since it didn't have the force of law. By contrast, the incorporation of those rights into the Code in 2015 was a true bill of rights. My argument has been that those two statements of rights have the same linguistic meaning, but very different expressive meanings. And that difference in expressive meaning has an importantly different normative significance. In short, enactment of the TBOR by Congress made the tax law more just. That, in turn, should increase its legitimacy and, as I suggested, provide a powerful basis for demanding remedies for violations.

AA: Your reference to the issue of legitimacy reminds me that although our discussion thus far has addressed the TBOR's role in highlighting the justice values embraced by the tax system and therefore addresses one of two sources of the tax system's legitimacy crisis, we still need to discuss the second source—tax exceptionalism.

RG: As we have argued in our previous scholarship, the repeated claim that tax is exceptional has not only separated tax from the legitimacy shared by law generally, but has rendered obscure, mysterious, and potentially illegitimate, decisions by tax administrators that would be readily explainable and justifiable if seen through the lens of ordinary principles of administrative law (Abreu & Greenstein, 2016, pp. 501-512). The TBOR undermines the claim of exceptionalism by making explicit that principles of justice are intrinsic to the tax system, as they are to multiple other fields of law, and that tax is like those other fields in that sense.

AA: But doesn't the existence of a TBOR itself mark the tax law's exceptionalism? That is, if tax were just another type of law, wouldn't it suffice for taxpayers to be covered by the Constitution's Bill or Rights?

RG: There's an important difference between noting that taxpayers are covered by the Constitution's Bill or Rights (which, of course, is true) and noting that procedural justice is an important dimension of tax in its own right. The problem is that the relationship between the law and justice, which is assumed for other fields of law, is not assumed for tax. On the contrary, the public expects tax to be unfair and oppressive—that is, to be unjust. This disconnect between public expectations and the reality that tax, like all fields of law, should be just is facilitated by tax

exceptionalism. Although law is normally thought to be subject to the demands of justice, the core claim of tax exceptionalism is that tax is different in kind from other fields of law (see, e.g., Puckett, 2015; Zelenak, 2014, pp. 1901; Hoffer & Walker, 2014; Hickman, 2013; Caron, 1994; Ferguson, Hickman, & Lubick, 1989, p. 806. See also Prebble, 2002), or perhaps not really law at all.[13] That is what makes tax exceptionalism such a dangerous challenge to the legitimacy of taxation. (For a discussion of both tax exceptionalism and the way in which it threatens the legitimacy of the IRS, see Abreu & Greenstein, 2016, pp. 497-501.)

The TBOR points in the opposite direction. It insists that tax is like other fields of law in that like other fields of law it must be applied using procedures that are consistent with principles of justice. The TBOR is an official acknowledgment by both the executive and legislative branches of government that the tax system recognizes and holds itself subject to principles of procedural justice—thereby aligning it with other fields of law and undermining the idea of tax exceptionalism. All of this is elegantly captured by the tenth taxpayer right—"The Right to a Fair and Just Tax System"—a concise statement that the administration of the tax law must be just.

AA: Your invocation of the tenth TBOR right just revived all of my concerns about enforcement. How can a "right to a fair and just tax system" ever be enforced? Could I sue the IRS because I think the tax system is unfair?

RG: I don't think of the tenth TBOR right as an independently enforceable right. Rather, its function is to sum up the TBOR by making clear that all of the specific TBOR rights that precede the tenth reflect principles of procedural fairness and justice, even though those words haven't been explicitly used. In this way, its function is analogous to the Ninth Amendment to the U.S. Constitution: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others reserved by the people (U.S. Const., amend. IX). The Ninth Amendment characterizes the first eight amendments as expressing rights, thereby imbuing them all with the linguistic meaning that comes with the language of rights. It does this even though the language of rights isn't explicitly used in those preceding amendments.[14]

AA: That's persuasive. Even if I agree that the TBOR does not make tax exceptional, but on the contrary, shows that tax is subject to the same demands of justice as other fields of law, the TBOR may make tax exceptional for another reason. Although there are BORs in other fields of law, as the National Taxpayer Advocate points out in her 2016 Annual Report (NTA, 2016d, pp. 27-36), I think that those BORs are fundamentally different from the TBOR. The Patient's Bill of Rights, for example, gives individuals the right to health insurance coverage by specifically prohibiting insurance companies from denying coverage for reasons such as the existence of a pre-existing condition (Patient Protection and Affordable Care Act, 2010). The Constitution's Bill of Rights also contains numerous prohibitions, such as those in the first, fourth, fifth, and eighth amendments. In other words, it provides rights by specifying a number of prohibitions—"thou shalt nots." I could only identify six "thou shalt not" provisions that I can see implicated in the

[13] For example, Louis Kaplow and Steven Shavell's important article, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, reflects in its very title this distinction between the "legal system," on the one hand, and "the income tax," on the other. Kaplow & Shavell (1994).

[14] This reading of the Ninth Amendment seems supported by its plain meaning. See also *Griswold v. Connecticut*, (1965, pp. 486-499) (Goldberg, J., concurring).

TBOR,[15] the most well-known of which is probably 26 USC 6103, which prohibits the disclosure of tax returns and return information (26 USC 6103(a)). So, in the absence of many "thou shalt nots," isn't the TBOR exceptional?

RG: I don't think that the language of prohibition—"thou shalt not"—is a necessary feature of rights. Here, the Bill of Rights in the U.S. Constitution is instructive. Some rights are couched in terms of prohibitions, for example, "the right of the people to keep and bear arms, shall not be infringed." (U.S. Const., amend II). Others, however, are formulated in terms of affirmative rights. Consider the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (U.S. Const., amend. VI).

It is easy enough to translate the language of prohibition into the language of entitlement. For example, "the right of the people to keep and bear arms, shall not be infringed" could just as clearly have been written, "the people shall enjoy the right to keep and bear arms" or "the right of the people to keep and bear arms, shall be preserved." If the language of rights signals entitlements that reflect the demands of justice, then there is no logical reason why those demands should be limited to either affirmative or negative language.

AA: Perhaps there is no logical reason, but might there be a psychological reason, which would be relevant to the expressive function? That is, "thou shalt not" is more emphatic because it places the government, and the constraints on government actions, in the center. The affirmative formulation places the taxpayers and their right in the center. Can that have an expressive implication?

RG: It might, but the difference in emphasis doesn't have such profound significance as to make tax "exceptional" in the sense of a being fundamentally different from other fields of law. For example, many of the "thou shalt nots" in the Constitution's Bill of Rights do not even explicitly use the language of rights. The famous First Amendment reads in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (U.S. Const., amend. I). But as I suggested earlier, the Ninth Amendment corrects for that omission by characterizing the first eight amendments as *rights*, imbuing them all with the linguistic meaning that comes with the language of rights.

[15] These are 26 USC 6103, prohibiting disclosure of tax returns and return information; 26 USC 6212, prohibiting the issuance of additional deficiencies after a Tax Court petition has been filed; IRC § 6304, prohibiting direct communication with a taxpayer regarding the collection of an unpaid tax except under specific conditions; 26 USC 6330, restricting the conditions under which levies may be made; and sections 7521 and 7602, imposing various restrictions on the IRS's conduct during an investigation.

AA: But the differences between the TBOR and the Constitution's Bill or Rights are not differences in linguistic formulation only. They are differences in level of protection. The TBOR by its terms constrains the actions of the IRS—an administrative agency. But the Constitution's Bill or Rights is much more pervasive—it constrains not only the actions of administrative agencies but also of Congress itself. It provides rights which Congress cannot infringe by legislation, but nothing in the TBOR constrains Congress. By comparison, then, the TBOR is a paper tiger. The very comparison makes that difference patent and hence de-legitimizes the TBOR.

RG: The differences between from the Constitution's Bill of Rights and the TBOR reflect the differences between a Constitution and a specific field of administrative law. The Constitution's Bill or Rights applies to all branches of the government because the Constitution regulates all branches. The more limited scope of the TBOR reflects the more limited functions of an administrative agency. Congress has the power to eliminate the TBOR, whereas it cannot eliminate the Constitution's Bill or Rights, but that is exactly why the expressive quality of the TBOR is so significant as a practical matter. By recognizing through legislation the demands of justice reflected in the TBOR, Congress changed the normative environment and made it that much more difficult to eliminate those rights in the future.

AA: There is another potential set of concerns that come from a different direction. That is, we might be concerned that whatever its salutary effects, the TBOR goes too far in at least two ways. First, the TBOR may go too far because its reach extends to all taxpayers, which means that it sweeps in entities, such as corporations and partnerships, that are big and powerful and don't really need protection. Indeed, as the corporate tax shelters of the last two decades showed, and the current issues of inversions and carried interests persistently remind us, it might be the government and the tax system that need to be protected from the predations of some taxpayers. Isn't it a waste of resources to extend the protections of the TBOR to entities like Apple, Microsoft, and Google?

RG: *Every* taxpayer is entitled to the rights enumerated in the TBOR. And that includes Apple, Microsoft, and Google. Rights reflect the demands of justice, and justice demands equality of treatment. The question, then, is whether wealth and power make those taxpayers unequal, so that affording them less protection in terms of rights is just.

Wealthy and powerful taxpayers certainly aren't unequal in principle. They can be treated unjustly. Just as wealthy and powerful individuals can be subjected to cruel and unusual punishment, so can wealthy and powerful corporations be forced to pay "more than the correct amount of tax." It is true that wealthy and powerful taxpayers have, as a practical matter, greater resources available to protect their interests. Still, they are susceptible to changes in fortune that can deprive them of those resources, and in some contexts, even wealthy and powerful taxpayers can be subject to potentially unjust treatment by taxing authorities.[16]

[16] For example, the Mutual Agreement Procedures (MAP) provided by many bilateral tax treaties to resolve double-taxation disputes can subject even powerful and wealthy taxpayers to unfair treatment. For an overview of MAP and explanation of the rights it provides taxpayers see Ault, 2013. For a succinct explanation of the conditions that could result in unfairness to taxpayers, (even if those taxpayers are large and powerful), which MAP was designed to resolve or ameliorate, see Bodner (1986); for an illustration of what can happen if MAP is not available, see FSA 1998-215 (1998).

AA: That suggests that what I classified as over-breadth might actually contribute to the TBOR's legitimizing function; the TBOR's extension of rights to all taxpayers based on their status as taxpayers underscores that the TBOR is carrying out the demands of justice. But even if that resolves my first over-breadth concern, it does not resolve the second. That is the concern that if the TBOR really applies to any person or entity who attains the status of taxpayer (defined as anyone who has a duty to pay taxes to the U.S. government, which is the definition implicit in the list of rights), then it necessarily applies extraterritorially, to individuals or entities who may have no contact with the U.S. other than through a financial investment. Although the United States Supreme Court held a long time ago that the U.S. tax law has extraterritorial reach (*Cook v. Tait*, 1924), extraterritorial application of U.S. law is the exception, not the rule.[17] Why have extraterritorial application of taxpayer rights, particularly when the likely beneficiaries of those rights are individuals or entities who are having contact with the U.S. for what is often almost certainly only pecuniary gain?

RG: Again, the government should treat *everyone* who comes into contact with it in a just manner. While it may be that laws generally should not have effects beyond the nation's borders, that should not apply to laws that are designed to effect justice. Put another way: Territorial limitations protect the sovereignty of nations, but the U.S. doesn't interfere with the sovereignty of other nations when it extends procedural justice to the citizens and residents of those nations so including non-U.S. persons within the protection of the TBOR would not violate the sovereignty of other nations.[18] In short, non-U.S. persons who are U.S. taxpayers should be covered by the TBOR.

AA: We've now established the value of the TBOR despite its failure to offer additional, enforceable and compensable, rights, and addressed concerns regarding exceptionalism and overbreadth. Nevertheless, does the value of the TBOR disappear if taxpayers don't know about it because it exists in a statute and in a government document (the IRS's Publication 1), which taxpayers may not bother to read?[19] Moreover, even if the TBOR were included in every piece of correspondence sent by the IRS, we know that many taxpayers will not read it, and even if they do, will not understand what it means. Bluntly put, can the TBOR have a legitimizing effect if taxpayers don't know about it?

RG: The TBOR can have an effect even if taxpayers don't know about it (see Olson, 2013, pp. 13-17). As we noted earlier, the Code imposed obligations on tax officials prior to the codification of the TBOR, which transformed those obligations into rights. And those obligations have not

[17] See *EEOC v. Arabian Am. Oil Co.* (1991, p. 248):
It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Foley Bros., 336 U.S., at 285.This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." Ibid. It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. See McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963)."

[18] Arguably, implementation of a MAP intrudes on sovereignty by forcing Contracting Parties to negotiate disputes arising out of Double Taxation Agreements. But the MAP respects sovereignty in that its provisions are contracted for by governments.

[19] A study commissioned by the National Taxpayer Advocate revealed that "in 2012, less than half [of taxpayers surveyed] said they believed they have rights before the IRS, and only 11 percent said they knew what those rights are." Olson (2013, p. 5). Focus groups conducted by a contractor for the Taxpayer Advocate Service showed "that taxpayers had little knowledge of, but high interest in, the list of taxpayer rights in our proposed TBOR, and they reacted very positively to it overall." Olson (2013, p. 16).

disappeared. Both through the original obligations and through their more recent transformation into rights, the Code generates normative pressure on the IRS, to treat taxpayers justly even if taxpayers don't know about their rights.

Moreover, by its own adoption of the TBOR in 2014, prior to codification, the IRS expressed its recognition of taxpayer rights, its commitment to respecting those rights, and to acting in a manner consistent with those rights. Because those rights are grounded in justice, the expressive meaning of their adoption by the IRS and codification by Congress imposes normative pressure on the IRS to act accordingly. That normative pressure is real even in the absence of a legal remedy to enforce the rights, so we can expect it to have an impact on agency behavior. In short, even in the worst-case scenario, in which taxpayers know nothing about their rights, IRS officials do, and the normative pressure on them should increase the likelihood that they will act in accordance with the TBOR. Once again, we see the practical effect of words—both through their content and the form in which they're expressed.

AA: That observation gives me a different perspective on the Commissioner's statement at the time he and National Taxpayer Advocate Nina Olson announced the IRS's adoption of the TBOR (see IRS, 2014). According to a Tax Notes report, the Commissioner said that some of the rights would be difficult to enforce without additional resources:

> If we do not have adequate funding, that means we don't have enough people answering phones, taking care of correspondence, or staffing our walk-in taxpayer assistance sites, . . . So I will continue making the case to Congress that the IRS needs adequate resources in order to properly serve taxpayers (Hoffman, 2014).

At the time, I saw the Commissioner's statement simply as part of his persistent plea for additional resources in the face of repeated Congressional budget cuts to the IRS. Now, I see it differently. I see it as a public acknowledgement that respecting taxpayer rights is not just something that imposed on the IRS from the outside, but rather is something that the IRS actually sees as *its* job. In other words, the IRS is undertaking to respect taxpayer rights.

That, in turn, has led me to reflect on another important aspect of taxpayer rights that we haven't touched on yet: the function of the Office of the Taxpayer Advocate, established by the Code (26 USC 7803(c)(1)(A)). The establishment of that Office in the U.S., and the provision of ombuds in other tax systems, is an integral part of taxpayer rights and of the IRS's duty to respect them. It ensures that IRS employees will not only know about taxpayer rights but have the legislatively sanctioned duty to ensure that they are respected. In the U.S., the Office of the Taxpayer Advocate, is "under the supervision and direction of an official to be known as the 'National Taxpayer Advocate'" (26 USC 7803(c)(1)(B)(i), who reports "directly to the Commissioner" (26 USC 7803(c)(1)(B)(i)). Its establishment ensures that there is someone who is not only aware of taxpayer rights but who has the legislatively sanctioned duty to "assist taxpayers in resolving problems with the Internal Revenue Service . . ." (26 USC 7803(c)(2)(A)(i)).

Indeed, the implementation of the legislative mandate may be the most concrete expression of taxpayer rights in the Internal Revenue Code. In the Taxpayer Advocate Service ("TAS"), taxpayers have what amounts to a form of a right to counsel (IRS, 2017). TAS employees serve

as the advocates for taxpayers in resolving problems, and although they need not be lawyers and do not serve the same function as lawyers representing clients, their advocacy allows the taxpayer's viewpoint to be heard. TAS is the concrete expression of taxpayer rights. It gives taxpayer rights teeth.

The other functions of the Office of the Taxpayer Advocate sharpen those teeth. They require the Office to

(i) assist taxpayers in resolving problems with the Internal Revenue Service;
(ii) identify areas in which taxpayers have problems in dealings with the Internal Revenue Service;
(iii) to the extent possible, propose changes in the administrative practices of the Internal Revenue Service to mitigate problems identified under clause (ii); and
(iv) identify potential legislative changes which may be appropriate to mitigate such problems. (26 USC 7803(c)(2)(A)).

One need look no further than the adoption of the TBOR by the IRS in 2014 and its codification in 26 USC 7803, the same section that established the Office of the Taxpayer advocate, to see that a TBOR backed by the force of the Office of the Taxpayer Advocate is not mere window dressing. The National Taxpayer was instrumental to both of those events (see Olson, 2013, pp. 5, 8). She was also the moving force behind the establishment of a series of international conferences on taxpayer rights (see TAS, 2017b).[20]

Moreover, the National Taxpayer Advocate has effectively used the Annual Reports that the Code requires her to produce to promote the principle of taxpayer rights (26 USC 7803(c)(2)(B)(i),(ii)). For example, her 2016 Annual Report meticulously lists every taxpayer right affected by each of the 20 "Most Serious Problems" identified in the Report (NTA, 2016a). It identifies the IRS's need to "Do More to Incorporate the Taxpayer Bill of Rights into its Operations" as Most Serious Problem #5 (NTA, 2016a, p. 98), and even includes a Taxpayer Rights Assessment (NTA, 2016b)—a report card on the IRS's performance in complying with the TBOR.[21] By publicly advocating for taxpayer rights and making them central to her evaluation of the way in which the IRS interacts with taxpayers, the National Taxpayer Advocate contributes to the salience of taxpayer rights and thereby enhances the tax system's legitimacy. That her Reports are delivered to directly Congress twice a year puts taxpayer rights before the legislature on a regular basis, potentially adding to the normative pressure for enforcement (26 USC 7803(c)(2)(B)(iii)).

That, in turn, suggests another reason the TBOR is not just window dressing: it makes patent that tax administration is important. Indeed, it shows that the way the tax system is administered is as important to its legitimacy as the substantive provisions that impose the tax. In other words, the TBOR is a reminder that "procedure is substance." Although the role of tax administration in contributing to the legitimacy of the tax system is often overlooked, the TBOR reminds us that without effective administration, the wonderful technical intricacy that many practitioners and academics love about the tax law would come to naught.

[20] The 3rd International Conference on Taxpayer Rights will be held in The Netherlands on May 3-4, 2018.
[21] She first proposed this in Olson (2013, pp. xiv-xvii).

RG: There's one last concern, prompted by current political developments in the United States, Europe, and elsewhere in the world. I worry that rule-of-law norms are fraying and perhaps even breaking down. I see governments acting, or threatening to act, in ways that compromise or even ignore legal constraints, often enjoying significant popular support. And if that continues, then the power of taxpayer rights to shore up tax's legitimacy will evaporate. In other words, worrying about the legitimacy of the tax system seems beside the point if the legitimacy of law generally is in question.

Moreover, we may be witnessing a weakening of the idea that law is intimately connected to justice. We see large segments of civil society making demands on government that are motivated by fear for their well-being, resentment of the gains made by others, and a general distrust of those who are members of different racial, ethnic, and religious groups. Populism, nationalism, and tribalism are recipes for the dissolution of the very commitment to justice that the TBOR expresses. If as a society we are no longer committed to justice, then the concern that the TBOR might not be enforceable won't matter much at all. Without a shared commitment to justice, what significance could a TBOR (or, for that matter, a Constitutional Bill or Rights) possibly have?

AA: Nevertheless, at the moment the concept of taxpayer rights is enjoying significant attention from tax administrators worldwide. We have tried to show that the TBOR is important in enhancing the legitimacy of the tax system even if it does not provide specific mechanisms for enforcement, because it changes the normative environment for such enforcement. In that changed normative environment taxpayer desire for enforcement may receive serious consideration from Congress, Treasury or the courts, weighing various factors in the process. And that makes the enactment of the TBOR significant. You're correct that such significance rests on our continued commitment to justice and the rule of law, but for now, I'm going to proceed on the assumption that the commitment will endure.

APPENDIX A

IRS

Your Rights as a Taxpayer

This publication explains your rights as a taxpayer and the processes for examination, appeal, collection, and refunds. Also available in Spanish.

The Taxpayer Bill of Rights

1. The Right to Be Informed

Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.

2. The Right to Quality Service

Taxpayers have the right to receive prompt, courteous, and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the IRS, and to speak to a supervisor about inadequate service.

3. The Right to Pay No More than the Correct Amount of Tax

Taxpayers have the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly.

4. The Right to Challenge the IRS's Position and Be Heard

Taxpayers have the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position.

5. The Right to Appeal an IRS Decision in an Independent Forum

Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties, and have the right to receive a written response regarding the Office of Appeals' decision. Taxpayers generally have the right to take their cases to court.

6. The Right to Finality

Taxpayers have the right to know the maximum amount of time they have to challenge the IRS's position as well as the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt. Taxpayers have the right to know when the IRS has finished an audit.

7. The Right to Privacy

Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing.

8. The Right to Confidentiality

Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information.

9. The Right to Retain Representation

Taxpayers have the right to retain an authorized representative of their choice to represent them in their dealings with the IRS. Taxpayers have the right to seek assistance from a Low Income Taxpayer Clinic if they cannot afford representation.

10. The Right to a Fair and Just Tax System

Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.

The IRS Mission Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

APPENDIX B

IRC § 7803(a)(3)

(3) Execution of duties in accord with taxpayer rights-

In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including--

(A) the right to be informed,
(B) the right to quality service,
(C) the right to pay no more than the correct amount of tax,
(D) the right to challenge the position of the Internal Revenue Service and be heard,
(E) the right to appeal a decision of the Internal Revenue Service in an independent forum,
(F) the right to finality,
(G) the right to privacy,
(H) the right to confidentiality,
(I) the right to retain representation, and
(J) the right to a fair and just tax system.

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A CHALLENGING SCIENTIFIC PATH: THE ACADEMIC VALUE OF TAXPAYER RIGHTS FOR A CONTEMPORARY, SKILLED AND COMPARATIVE LAW EDUCATION

Giovanna Tieghi[1]

Abstract

Contemporary democracies are experiencing a never-ending fiscal and legal crisis, causing reductions in agencies' budgets and having significant adverse effects, including the restriction of individual liberty, with the consequent restraint of personal ambitions and a weakening awareness of taxpayers' rights (TRs). These developments result in the need for a new paradigm of comparative law: a constitutional taxpayer-centric approach. Admitting the crucial importance of the relationship between the State and citizens as the basic requirement for overcoming the inadequacies of the contemporary State, the proposed new theory reveals personal dignity to be a constitutional value with substantial normative effectiveness.

This paper presents the case for the undertaking of such an analysis being a current matter for academics and legal experts. The aim is to gradually reach a common legal understanding of the basic foundations of contemporary legal systems, including taxpayer rights as a tool of implementation of the comparative methodology.

An updated tool of fairness should be considered for its potential to support new models of education, even beyond tax administration. The final purpose is the achievement of cooperative and positive outcomes which are supported by the comparative method. That method has, in fact, already proved to be one of the most challenging scientific approaches providing significant evidence of improvements in terms of cooperation, productive dialogue, mutual gain and relevant implications, including operational changes and enhancement of cultural change, at both national and international levels.

Key words:
taxpayer – rights/obligations – comparison - education – dignity – accountability

1. LAW: AN UPDATED, OPERATIONAL AND COMPARATIVE PERSPECTIVE WITHIN THE DIGNITY-ACCOUNTABILITY FRAMEWORK

Exploring the stimulating topic of taxpayer rights in the contemporary era demands a very challenging double prerequisite: the scholar must be humbly open to different compelling perspectives and must be interested in understanding the "world of law in context."

[1] I delivered these remarks on 13 April 2017 while a guest lecturer at Temple University School of Law, Philadelphia, U.S. I was invited there by Professor Alice Abreu. This lecture represents the ongoing dialogue on the matter reinforced by the crucial insights explored during the II International Taxpayer Rights Conferences, held in Wien, Austria, in March 2017.
Foreword: for accuracy, quotations are included in their original languages.

In fact, the modern jurist and observer of that relatively recent field of law[2], unlike his or her predecessors, plays a prominent role in the following complex ongoing process: first, in the attempt to define the role of taxpayer rights for consideration by the governors of contemporary democracies, which are experiencing a never-ending fiscal and legal crisis (law in context); second, in the struggle for implementing a compelling trend of studies on taxpayer rights shaped to foster the enhancement of an effective relationship between the State and its citizens.

However, these two requirements will lack effectiveness if we do not include a third element among the jurist's tasks: the urgent mission to rebuild and reshape the jurist's own identity within contemporary society.

In order to be effectively driving the matter forward, the modern jurist, in fact, needs to unpack his or her own personality, using specific scientific tools to help him/her find his/her correct place in the contemporary world, in which a struggle is taking place between two poles: authority and liberty (Tieghi, 2012). The task, indeed, is to find the right balance in the ongoing struggle between the individual, governed citizen-taxpayer, with his/her passions, needs, wishes, and the State, the tax administration and its governors.

How should he/she work on that? What kind of tools could – or, better, should - the jurist use so that he/she has the skills needed to face such a complex struggle? A basic requirement is a common understanding of the role played by the contemporary taxpayer and of taxpayer rights. That is a challenge directly connected with the meaning of law and its implication from a constitutional point of view, that is, in terms of liberty and dignity. One way in which to conceive the struggle is as a dialectic exchange (Olson, 2010a: "The ability to interact with the government, to be treated as a person and with dignity" in order to have a real "conversation about what is being done to that person and why it is being done") in which tax administration and the taxpayer are engaged "with mutual respect and honesty" (Tieghi, 2012; Feld & Frey, 2002a; Feld & Frey, 2002b; Frey & Feld, 2004; Frey & Feld L.P.).

Two specific elements have to be taken into consideration to support this preliminary assumption and to exhaustively define the abilities that a modern legal expert has to master: first, the proper link with concrete experience[3]; second, the use of the comparative method as a "shortcut to understand the world." (Pegoraro & Rinella, 2017). The second actually includes the first element and has to be considered as the real and effective turning point for an updated vision of law – law that "is not in the law books", but rather, law that has to be transparent and that would not be able to provide simple answers if it were connected with real experiences (for a broader application see Feinman, 2014). This means a law that is made by people, according to policy, passions, wishes and rules, and which is, primarily, about justice.

[2] One of the very first institutional works was *Taxpayers' rights and obligation: A Survey of the Legal Situation in OECD countries"*, which was produced by the Organisation for Economic Co-operation and Development's Publications and Information Center, in conjunction with the International Bureau of Fiscal Documentation (IBFD), in 1990. It followed the first conference with the symbolic title "*Taxation and Human Rights*", which was held in 1987: International Fiscal Association (1988). *Taxation and Human Rights*. Kluwer Law and Taxation Publishers, Rotterdam.

[3] "The Life of the Law has not been logic: it has been experience": Supreme Court Justice Oliver Wendell Holmes (Justice career 1902-32).

"What does the future hold for the role of the judge in a democracy? I believe," explains the former President of the Supreme Court of Israel, "(…) the need to bridge law and society will become more pressing. Social changes are becoming more and more intensive. Society," he underlines, "will need courts more than ever to bridge the gaps between law and life." A law-justice relationship will be necessary "to protect the constitution and its values" (Barack, 2006). This approach includes values which are connected with the individual role of the person in his/her proper singular dignity dimension (the so-called personalist approach) and also in his/her communitarian context (as explicated in the Italian Constitution, when it talks about people's roles in the social community and the consequent implications of solidarity obligations; see, for example, art.3, 36 and 41 of the Italian Constitution). These two aspects are summarized clearly by a basic constitutional principle which points to the mutual consideration of rights and obligations as being the basis for contemporary tax systems: for example, article 2 of the Italian Constitution.

> The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

Taxpayer rights, conceived as proposed, are not only of help to the taxpayer and the progressive consideration of the taxpayer's identity, but are also essential to the effective functioning of the tax system, where liberty and responsibility coexist to inspire an effective advancement of cultural change (Tieghi & Fransoni, 2016).

Finally, we have to consider whether the taxpayer should be positioned *within* the legal system, as a person, citizen or partner, or *outside* it, as a subject: "Public policy decisions should not be made on the basis of some imaginary hostility between freedom and the tax collector, for if these two were genuinely at odds, all of our basic liberties would be candidates for abolition" (Holmes & Sunstein, 1999).

It is in this institutional dilemma, involving the foundations of contemporary constitutional systems in terms of the relationship between the duty to pay taxes and the need to safeguard taxpayer rights, that comparative methodology gives us a multifaceted insight, positing new paradigms of law - among which, as discussed in this paper, are models based on trust, integrity, humanity and dignity[4] - thereby encouraging the consideration of similarities and differences in a dynamic and competitive way so as to shape a highly operational framework. This ongoing effort encourages dialogue about the need to foster training with a specific moral task: to become receptive to the ethical challenges of the legal profession, which means, in the end, to be prepared to work towards building an accountability network.[5]

[4] Many western democracies are causing us to ponder whether or not they have taken the fundamental approach that considers that "integrity and fairness of a tax system manifests in many ways, which go far beyond the political philosophies underlying any particular tax system", as "they apply in any tax system and thus in all tax systems, just as human rights are universal": Cadesky, M., Hayes, I. A., and Russell, D. (n.d.) *Objectives of a Model Taxpayer Charter*. Retrieved from www.taxpayercharter.com.

[5]Judges, and all legal and institutional subjects operating in an accountability-network, have to be safeguarded not exclusively in their role to design, project and define a new democracy. There is something more: they have to be supported, pushed, driven, so as to mirror the evolutionary dimension of democracy when at their best. As it was

The search for the best model to assure the effectiveness of taxpayer rights has to be driven by relevant consideration of the comparative perspective, a tool that constantly involves dialogue for the advancement of a constitutional progress. This method can overcome the current undeniable restriction of individual liberty, with the consequent restraint of personal ambitions and, of course, a weakening awareness of taxpayer rights.

The main outcome of the proposed approach will be the collective construction of a progression of ideas and, thus, of solutions; a process directly involving the taxpayer. However, what is really progressive from a legal point of view is that any suggested solution has to be assessed by its ability to provoke the articulation of different perceptions about crucial issues; for comparisons, as the Italian former Constitutional Court Chief Justice affirmed, "serve to intensify critical insight". (Grossi, 2005). Such comparison, with a subsequent exploitation of different experiences, cannot but help us to focus an issue and reach a common aim, although this does not mean resorting to mere standardization (Bertolissi, 2012b). To the eyes of a constitutionalist, it "helps us to advance, to abandon the firmness that implies a petrification of the existence".[6]

1.2. LAW AND RIGHTS: THE "MOOD" OF LAW AND THE CONSTITUTIONAL TAXPAYER-CENTRIC APPROACH

"In democratic societies", it has been wisely recalled, "the rule of law safeguards people's rights, their endeavor and their humanity. But unless the rule of law is enforceable or enforced free of discrimination or corruption, rights have little meaning". "Taxation", the distinguished author continues, "is the means used to support a civilized society – it funds government goods and services which give meaning to rights. And the style and effectiveness of tax administration impacts on a community's confidence in their tax system and on the relationship between a citizen and the state" (D'Ascenzio, 2007).

That basic and significant premise, summarizing the previous considerations, leads us to the next step: rights, to be effective – so as to acquire a significant weight on tax discourse - have to be connected with the specific framework proposed. Moreover, they have to be part of a global comparative dialogue with its own significant and proper normative meaning. The suggestion is a conception of legal rules where the content absorbs what has been relegated out of the legal field: humanity (Tieghi, 2016a). This concept has to be conceived as starting from its effective normative – basically constitutional – meaning. The aim is to have a human rights (Tieghi, 2014) basis as a point of reference, comprehensive of taxpayer's rights, and a constitutional method of interpretation based on active liberty. Active liberty, in fact, is conceived as the "connections (…) between the people and their government – connections that involve responsibility, participation, and capacity" (Breyer, 2005).

appropriately underlined in the "law in the context" approach, they have to manage to "unpack the choice and interpretation of facts that result in the legal reconstruction (…) to slow down this appropriation of reality by unfolding the space in which (…) – it – will actually operate" (Zumbansen, 2013, p. 19); to foster the direct connection between law and real experience for a new evaluation of facts and an updated interpretive decision-making process to keep up-to-date constitutional sources through dynamic technical devices (Tieghi, 2015a, p. 160).

[6] "(…) *insomma, aiuta a progredire, ad abbandonare la fissità che comporta una pietrificazione dell'esistente*": (Bertolissi, 2015a, annotation no. 6, 50).

The described approach, which is definitely not just theoretical, includes research relating to new paradigms and fields of studies beyond that which encompasses insights conceived "for a *new* tax system".[7] Moreover, this thesis has its own basic foundation in the idea that "at their core, taxpayer rights are human rights. They are about our inherent humanity".[8] Real recognition of human dignity means it must be conceived not just as a right but, above all, as a constitutional value (for the assumption by which "human dignity as a constitutional value has several functions in the field of human rights", see Barack, 2015).

The constitutional value allows for the appreciation of the individual not just as a single person, but also as an essential part of the global community: in this sense, the solidarity principle – well-described in the second paragraph of article 2 of the Italian Constitution – defines the "service relationship" between people working for a better society, and, especially, between the taxpayer and the State.

In the perspective of a "service relationship", therefore, it should be taken into consideration that

> undertaking key aspects of the tax authority-taxpayer service relationship should be important to tax authorities, who may be better able to channel their resources to prioritize a customer service focus on the attributes of the tax assessment process that are valued most by taxpayers, thereby improving *compliance* directly, or indirectly through other means, such as trust (Farrar, 2015).

In the legal logical process, we have to include tools that have wrongly been considered outside the legal discourse. Comparative experiences – even constitutional ones[9] – on the recognition of taxpayer rights demonstrate, in fact, that they have to be included in the process: the so-called "mood of law" is a way to identify negative (hate, revenge, contempt, disqualification, disregard, pride, prejudice etc.) and positive feelings (virtues, dignity, honor, modesty, solidarity, courage, equality, justice etc.) (Italia, 2017) which can acquire normative importance as fundamental legal principles.

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[7] It was not by chance that this was title and the subject of a recent meeting and, in Italy, it has been properly identified by the academics. This is clear evidence of an impelling forward projection, as summed up by the national conference, held in Italy, Genova, in June 2016. The merit is to be ascribed to Professor Victor Uckmar's outstanding view of comparative undelayable consideration: a stimulating input that we researchers all owe him thanks for. Worried by the Italian "governors' deafness to the proposals delivered" (note, March 31, 2016 Uckmar V.), he wrote: "we'd like the academics to promote drastic proposals of reform" (note, Feb 1, 2016, Uckmar V.) and pointed out that "it's not enough a Reform, but it's necessary a new system and, perhaps, reproduce what generally takes place abroad" (note, March 31, 2016, Uckmar V.) Conference Agenda retrieved from http://docplayer.it/37813590-Per-un-nuovo-ordinamento-tributario.html.

[8] (Olson, 2013, 1189). Concept explained on occasion of the Italian Conference held at the University of Padua, Italy, and reported by the local newspaper, which quoted Nina Olson directly, as follows: "To better function, tax administration has to be more human" (Ilmattino di Padova, June 4, 2013, 13).

[9] The Mexican experience regarding implementation of human rights started from an amendment process of the Constitution itself. The 2011 *Human Rights Amendments* (HRA, 2011) includes protection for taxpayers within the process of safeguarding human rights. The underlying reasoning – which is specifically relevant for the purposes of this paper – was to add value to the "pro persona principle". With regard to the safeguarding of TRs, and particularly the new article 1 of the Mexican Constitution, which requires all public administrations to abide by and promote human rights, see Figueroa and Jacobo, (2015), p. 573. Ek's interesting work considering the idea that "*human rights refers to constitutional rights*" is also highly relevant (Ek, 2012, p.9).

That approach reflects the essential and constitutional premise of the contemporary tax discourse: it offers significant insights to close the loop in the taxpayer-centered accountability network. The aim is to put the taxpayer, who is experiencing the hardship of the current crisis, in such a crucial position as to be an active part of the system. The final aim is to realize a service-oriented tax administration, including an interpretation of taxpayer charters as customer charters.[10]

Serving taxpayers, in fact, implies letting their rights be enforceable and significant under the constitutional justice system. And that is not just to solve a single case, but to establish the person to whom those rights are related at the core of the judicial review. There, the art is to balance different values in view of a specific decisional moment of evaluation of people's needs and virtues in terms of dignity. This is the way to allow the taxpayer to be engaged (especially when considering the Forum on Tax Administration's study, (FTA, 2012)) and to contribute to a fair tax system. By "actively involving and engaging taxpayers, their representatives and other stakeholders", it is easier "to achieve a better understanding of the taxpayer's perspective and to cooperate with third parties" (FTA, 2012).

2. LAW AND THE LIBERAL REVIVAL: REVISITING THE REQUIREMENTS FOR A STRONG DEMOCRACY

The turnaround can only become a true opportunity if we are aware of, and acknowledge, the negligence of the system. The recipients of that cultured empowerment are not only legal experts or academics, but also common taxpayers and, especially, the taxpayer-students who, more than others, are taking the academic path to become educated citizens of their own country. The "capacity to identify our dilemmas" has, in fact, to be readdressed in order for us to "design remedies to overcome them" (Schlesinger, 1990). The change in culture involves new options and best practices, but also an accurate use of legal sources (judicial vs, statutory law). Certainly, the consideration of different jurisdictions (common law and civil law), though susceptible to be considered a negative variable, will inevitably be hard to reconcile with the existing system.

From a progressive constitutional perspective[11] and its potential for contemplating competing visions, it is necessary to think of changes as "salutary for citizens in a democracy" (Benjamin, 2004). They could only be legally supported if they were justified by an improvement of the dialectic dimension of the institutional dialogue.[12] The constitutional background described in this paper, in fact, takes its strength directly from the dialectic attitude of the comparative methodology. It's the comparative approach that enhances reasoning about alternative methods, cultures, solutions, chances, events, regulations, recommendations, reports, official speeches, and judgments. The comparative analysis starts with the legislative – either broad or detailed – approach to classify and identify taxpayer rights; it identifies the source – constitutional or not –

[10] "*Open up the tax system so the taxpayers have more certainty as to the law, so that there is transparency in the tax administration, so that revenue authority service levels improve and to ensure that there is accountability*" (Bentley, 2002, p.1).

[11] This approach includes a human rights basis for the idea of taxpayer's rights itself and a constitutional method of interpretation based on an active liberty (conceived as "connections (…) between the people and their government – connections that involve responsibility, participation, and capacity" (Breyer, 2005, p.16).

[12] "The point is to begin a dialogue about what is the right answer in a given situation, and to ensure that everyone taking part in that dialogue has sufficient information with which to make up his or her own mind about the desired outcome or approach" (Olson, 2010b, p. v).

of the specific – written or not - constitution existing in a country, then moves on to the existence – or absence – of and effectiveness – or ineffectiveness - of a Taxpayer Advocate (national, local or federal). Finally, the analysis identifies any approaches proposed or used in other systems which have to be taken into consideration for the different levels of tasks directly connected with developing an updated and skilled educational process.

Taking the criteria to reach effective operational as well as theoretical aims into account, the suggested items are finalized so as to the fulfil the following tasks: to help legislators to find new solutions; to support judges' decisions by providing a basis for judicial reasoning; to facilitate the adoption of well-functioning models used by other tax administrations; to better understand the legal system or to recognize clues or signs of positive – or negative – direct implications; up to the level of – sometimes unconsciously – working to reinforce the whole democratic system. In other words, the goal is to make taxpayers' individual choices and preferences the fundamental criteria by which to ascertain how the taxpayer is taken into consideration by the tax administration[13], based on a wider multifaceted and interdisciplinary perspective.

The "*freedom to choose*" in the liberal conception, in fact, cannot disregard the "freedom to choose the laws under which all citizens must jointly live" (Holmes, 2002). As for the freedom of choosing funds, consensus is only required if he, who is called to choose, is concretely put in the position to concur with the definition of the whole of the choice itself. That is, to concur in the way explained in the second section of article 4 of the Italian Constitution (describing the right to work), to the remedy of every existing degraded situation. "Every citizen", states the Italian Constitution, "has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual *progress* of society".

3. LAW AND EDUCATION: NEW MODELS FOR A BETTER SOCIETY

If it is by reconsidering the appreciation of human values that taxpayer rights can become effective as part of the system, due to their potential to be an expression of citizen-taxpayers' passions (for the suggestion to consider rights as having a functional role in promoting virtues, encouraging diversity and letting democracy function, see Holmes, (1995)) and choices, the struggle against the major sources of "unfreedom" (Sen, 1999) has to become part of a wider – beyond merely legal – review process. *Cooperative compliance* – an advanced approach described in current international studies (FTA, 2013) – marks, specifically, the path by which to admit the possibility of a real act of faith towards the honest citizen, the honest taxpayer (Tieghi, 2013).

What is the role of education within this process? And how does one educate students of law as honest future taxpayers? To be effective, the educational path has to be conceived with the same prerequisites described above, namely, to include taxpayer rights within an updated, constitutionally-based and comparative framework. To this end, some specific tools need to be clarified.

[13] For a concrete example of balance between tax institutions and individual fiscal choice as "a comprehensive method of evaluating (…) alternatives (…) for delivering services to taxpayers" through the measure of "taxpayer value of a broad range service delivery options", see the experimental American model named *Taxpayer Choice Model* (TCM 2012-2013): (National Taxpayer Advocate, FY 2013, p.55).

First, education should adopt a legal approach, with a broad meaning of the term "law" which is not directly connected with specific formal and traditional legal sources, but which is concerned with functioning and producing effects. Second, legal education should consider the individual taxpayer as being central to an accountability network; someone who is to be defended by taking his/her needs, preferences and rights, but also duties, into account, as is the case in all his/her other dealings with the government. Third, legal education should adopt a team approach from the beginning, not just so as to take advantage of the student's youthful energies but, above all, so that he or she can experience the challenge overcoming natural obstacles (foreign language, new legal systems or new legal reasoning, for example) and accept interdisciplinary approaches and skills. Fourth, students should prepare, through self-assessment and evaluation, so that they are ready to interact with other members with specific roles within the group or course, conference speakers, committee members and so on as soon as possible. Fifth, students should be encouraged to develop an attitude of curiosity, embracing a problem-oriented education from the start, and being receptive to any inputs – even informal – and accommodating, so as to capture diverse suggestions and observations.

The final scope? To provide instruments for educational fulfillment. In other words, a culturally-oriented attitude towards the reconstruction of a system which has its own foundations in its own people: "(…) namely, it is of the people, by the people, and for the people".[14] Remember that "the public has no hands except those of individual human beings" (Dewey, 1927).

3.1. THE STUDENT-TAXPAYER'S AWARENESS OF THE ABILITY TO SHAPE A CONSITUTIONALLY EFFICIENT FRAME OF GOVERNMENT

To create an effective system, or a better society, we have to abandon the attitude of a servant and acquire the attitude of a freeman.[15] Taking this approach to higher ideals, we can better understand the importance of establishing an institutional framework based on civil and civilized coexistence. That is particularly useful when developing an updated interpretation of taxpayer rights which is supported by constitutional values. And, while the comparative approach emphasizes personal awareness as being part of a global interaction with a historically unique circulation of different insights, it has its main roots in very clear historical patterns. We have to reinforce, primarily, our awareness that "the spirit of a people, its cultural level, its social structure, the deeds its policy may prepare – all this and more is written in its fiscal history, stripped of all phrases. He who knows how to listen to its message here discerns the thunder of world history more clearly than anywhere else" (Schumpeter, 1918; Cattarin, 2009).

When transposing this assumption to the field explored here, we inevitably have to deal with nothing more than the basic growth of a subject who has to feel – and to be – part of a government in order to fulfill the fundamental values of a democracy. Essential prerequisites are to be aware

[14] "But for the IRS to do its job well, it must start from the perspective of what government is about – namely, it is of the people, by the people, and for the people. The government is funded by taxes paid by the people" (National Taxpayer Advocate, 2015b, vii).

[15] "*Per diventare davvero un popolo libero, bisogna sottoporsi alla fatica di realizzare una trasformazione interiore che consiste nell'abbandonare la mentalità dello schiavo e acquisire quella dell'individuo libero*" (Viroli, 2008, p.46).

that the subject matters, to be focused, to be determined, to be hopeful, to be provided with a good education, to be led by example with hope, to never fear.[16]

But the turning point of the inner message to those students has to be considered to be the inclusion of a proper attitude to overcome the mood of helplessness that modern taxpayers feel in their dealing with tax authorities all over the world:

> Do not ever let anyone make you feel like you don't matter, or like you don't have a place in our (American) story -- because you do. And you have a right to be exactly who you are. But I also want to be very clear: This right isn't just handed to you. No, this right has to be earned every single day (The White House, Office of the First Lady, 2017).

The ongoing process of the student's education precisely reflects the ongoing education of the honest taxpayer without including the fundamental constitutional values:

> You cannot take your freedoms for granted. Just like generations who have come before you, you have to do your part to preserve and protect those freedoms. And that starts right now, when you're young. Right now, you need to be preparing yourself to add your voice to our national conversation (The White House, Office of the First Lady, 2017).

That means having the ability to feel the obligation of being part of a community, exactly like taxpayers, with their duty to pay taxes and to contribute to the welfare of the public, even beyond their own interests.

Finally, legal training has to be designed to make two roles correspond: the student as a citizen, and the student as a taxpayer:

> You need to prepare yourself to be informed and engaged as a citizen, to serve and to lead, to stand up for our proud (our country) values and to honor them in your daily lives. And that means getting the best education possible, so you can think critically, so you can express yourself clearly, so you can get a good job and support yourself and your family, so you can be a positive force in your communities (The White House, Office of the First Lady, 2017).

The comparative constitutional approach embraces all of those defined competitive skills; for example, Professor Livio Paladin, Emeritus Chief Justice of the Italian Constitutional Court and Professor of Constitutional Law at the University of Padua, always encouraged young people "to fight for the Law" (Bertolissi, 2015b). This approach contemplates something more than mere legislative enactments.

[16] These remarks were made by Michelle Obama in her emotional final White House speech on January 13, 2017 (The White House, Office of the First Lady, 2017).

4. THE ROLE OF TAXPAYER RIGHTS IN THE CONTEMPORARY ACADEMIC CURRICULA

What is the best path to take in order to effectively include taxpayer rights as a tool of contemporary education and skill?

Firstly, the point of reference of traditional law studies must be changed by focusing on the government as the unique icon of tax sovereignty[17], and including the "freeman", who is, above all, the main character within the historical charters of freedom of the liberal tradition, in the debate.[18] Secondly, legal education should give attention to the public costs of individual rights. Careful consideration of the latter can, in fact, as authoritatively underlined by Holmes and Sunstein (1999), "shed new light upon old questions.".

When supported by the above-mentioned premise, comparative law, as a method of studying legal problems, can provide a most challenging update of the academic scenario. The method's added value is in its starting point – namely, the subject towards whom all the investigations have to be addressed – and in the constitutional nature of the issue of lack of public resources, connected with the topic of the costs of rights.[19]

These two features, investigated from the comparative point of view, add some useful language "to the debate about what states and people owe each other, and what they can rightfully expect from each other" (Christians, 2017). This is so because: comparative law forces scholars to move beyond the trends already investigated; it requires them to get to know things, stories, documents, customs, sources and languages in order to really understand and select the proper information to use independently from their authoritative legal force; and because, most crucially for research purposes, it pushes them to look for the common denominator of the solutions. Ultimately, comparative law permits academics, experts and students to consider which solution could be the most effective at a general level, supporting the operational, updated view, by which tax law includes *standards* as well as *rules*.[20]

[17] "Tax scholarship typically presumes the state's power to tax and therefore rarely concerns itself with analyzing which relationships between a government and a potential taxpayer normatively justify taxation, and which do not…. [The time is come to] "present the case for undertaking such an analysis as a matter of the state's obligation to observe and protect fundamental human rights" (Christians, 2017, p.1).

[18] This evolution is marked by different important acts, from the 1215 *Magna Carta Libertatum* to the 1297 *Confirmatio Cartarum*, and then to the 1297 *De Tallagio non Concedendo*, the 1628 Petition of Right, the 1689 English Bill of Rights, the 1776 Virginia Declaration of Rights and the 1776 US Declaration of Independence. See Bertolissi (2015c), pp. 4-14.

[19] "Once the costs of rights become an accepted topic of research, students of public finance will have ample incentive to provide a more precise and through account of the dollar amounts devoted to the protection of our basic liberties" (Holmes & Sunstein, 1999, p. 24).

[20] "We argue that tax law and tax administration are not objectively exceptional. That is, we believe that tax is law and as such is composed of standards as well as rules, and that the IRS has the same powers and is subject to the same constraints that all administrative and enforcement agencies have. (…) Our central claim is that when tax is viewed as objectively exceptional – that is, when tax is thought to be fundamentally different in kind from other fields of law – it is deprived of the analytical tools and vocabulary common-place in other fields of law" (Abreu & Greenstein, 2016, p. 501).

The implications are of remarkable interest. The nature of tax law is, from this perspective, a perfect point of observation. It demonstrates the importance of legal comparison, not just for topics of international tax law, but for comparison with other experiences of broad fundamental concepts of domestic tax law (for an interesting comparative review of the paper's topic, see Fransoni, 2016). This leads to the stimulating assumption by which "tax exceptionalism is not a specific idea. Rather, it is a way of conceiving tax or, still more loosely, an attitude toward tax" (Abreu & Greenstein, 2016)[21], which, in turn, leads us to review the traditional meaning of tax law – nowadays often limited and self-constrained to the formal, legislative, authoritative power of the State, or to the so-called Jacobean approach (Tieghi, 2015b)[22] – and solicits a change in terms of predominance of the coherence, legitimacy and transparency of *interpretative* – more than normative - solutions. This is, finally, a matter of comparative constitutional law.

In other words, significantly combining the need for certainty with the effective application of rules (and standards) instead of focusing on the degree of details and inflexibility of rules themselves[23], taxpayer rights studies can reveal specific scientific paths by which to explore new trends, mixing approaches which are norm-based with evidence-based ones. This quickly leads to the fascinating process of engaging in interdisciplinary reflection and work.

4.1. THE INTERDISCIPLINARY APPROACH

By overcoming the experience of difference – tax exceptionalism –we avoid viewing tax law in the way that many tax scholars do, that is, "to think of tax as different from other fields of law and, in some cases, even as something separate from law" (Abreu & Greenstein, 2016). This leads to the basic point of defining the concept of law. As proposed in this article, the interpretation of the role played by taxpayer rights in the progress of contemporary democracies reveals not a legal vacuum, but a legal gap between legal systems and a human protection perspective; in that sense, we can argue that "comparison becomes the law" (Goodrich, 2012).

This suggests a turning point exists, primarily in the academic sphere, based on the awareness that

[21] "The key to this more transparent, predictable view of tax administration is accepting that tax law is just law. This, in turn, requires abandonment of the objective aspect of tax exceptionalism. Stripped of its exceptionalist cloak, tax law becomes just law and the IRS just an administrative agency, subject to the same constraints, but able to exercise the same powers, as other agencies" (Abreu & Greenstein, 2016, pp. 498 and 505).

[22] As analyzed "from the above-mentioned approach, the breaking point to be taken into consideration to separate the two kinds of constitutionalism is the fact that western democracies, and above Italy, are all inspired to the Jacobean France model. That's why they have always been governed by reason. The State, in those countries, is represented by the impersonal will of the law, not by the personal will of people. Italy, in this context, has never generated a historical bill of rights, that means never experienced a real revolution against the power" (Tieghi, 2015b). See, moreover, Bertolissi (2015c and, on the same lines, Meneghelli (1999). This way to in which conceive power has dangerous implications on the concept, and the functioning, of fiscal policy.

[23] "We are not unmindful of the magnitude of the change we are calling for. The IRS has long thought of itself and of the tax law as exceptional, and we know that changing longstanding habits of thought and action will require a herculean effort. But we think that the transparency and legitimacy gains are well worth that effort. We propose that abandoning the objective aspect of tax exceptionalism be an integral part of that shift" (Abreu & Greenstein, 2016, p. 512).

> …tax professionals serve as *mediators* who both shape and are shaped by the taxpayers' experience. If tax professionals view the tax system and its administrators as illegitimate, they will likely convey that view to taxpayers and those taxpayers will, in turn, be less likely to be fully compliant" (Abreu & Greenstein, 2016).

To be real *mediators*, firstly between experience and law, and then between tax agency and taxpayer-experts on the matter, tax scholars must possess a specific ability to embody something missing: a balanced skill to connect original and new patterns which are deeply connected with taxpayer rights. This is directly connected to the need for the safeguarding and promotion of taxpayer rights in contemporary academic curricula, which should be designed from the starting point of current international experiences. The suggested focus is on: the *development-human rights* dichotomy (i.e. the Human Rights-Based Approach to Development – HRBAD) as a "fundamental overhaul of human rights thinking, as it introduces new substances rights and corresponding obligations" (Vandenhole & Gready, 2014); on the *promotion-protection* dichotomy, applied to enumerated and implied taxpayer rights; and, finally, on the *cooperation-confrontation* dichotomy which, finding justifications in experiments conducted in the tax field using the cooperative-compliance approach, serves to overcome the dogma of the imperatives obscuring the principle of contradictory opinions founded on the *dialectic use of power*.

By drawing attention to these patterns, legal experts (tax professionals, academics and, students) develop the legally crucial perception of investigation as acquiring a very effective interdisciplinary approach. In tax, an interdisciplinary approach means "the attitude to go beyond a law" conceived as a set of strict, detailed rules. Law now embraces open-minded attitudes towards different disciplines (such as linguistics, history, public and private policy, philosophy, anthropology, political sciences, and all social sciences serving comparison – economics, finance, statistics, geography, ethics and psychology) (Pegoraro & Rinella, 2017). Taxpayer rights studies require exploration of areas called "uncontrollable" (Crespi Reghezzi, 2012) – that is, to concern ourselves with rules *effectively* applied.

Following this perspective, taxpayer rights cannot but become a relevant part of the academic curricula which are capable of being included as an official component. They cover a field of study and research which, to date, has not been considered other than as a specific and independent field of law. Viewed narrowly by other traditional branches of law, tax law has been taught following the traditional approach, looking at it as an instrument of the State's power and sovereignty, and the topic of taxpayer rights has never been taken into account from its inner soul; its constitutional comparative nature. That is, it has never been evaluated and treated as a stimulating platform which can be used to train and shape skilled people, so they are able to give their necessary – and now urgent – contributions, thereby creating the international network of effective cooperation needed if we are to upgrade to taking a more interdisciplinary approach. This approach is not just a legally technical one, but a multifaceted approach which enhances acknowledgement of rights in taxation starting from the legal interpretation process.[24]

[24] "The topic of the taxpayer's rights in the 'modern' meaning of the term, from an institutional or constitutional viewpoint, is of crucial importance for the evolving dynamics of contemporary political systems. (…) Far from the continental Jacobean tradition, current international tendencies are considering those rights as a fully-integrated part of the political culture (…)". In that sense, common law jurisdictions that "suggest new paths for overcoming the inadequacies of the contemporary State" are being developed (Tieghi, 2014, pp.1475-1476).

5. EVIDENCE

Starting with the dignity-accountability framework proposed, I suggest the key points supporting the thesis of the academic value of taxpayer rights are the constitutional-taxpayer centric approach and the comparative perspective. The major question, however, is whether this approach is legally operational or whether it simply responds to academic curiosity or is an intellectual exercise.

The consideration of taxpayer rights proposed in this paper reveals fundamental – constitutional – issues which must be solved and needs to be bridged with an updated comparative perspective: a kind of approach by which, thanks to its dynamic component of critical evaluation, experts can effectively test and upgrade their levels of skill, motivation and professional attitude to a proper scientific methodology. Only if well-informed, can they manage competing visions. It's a challenging scientific path, which goes beyond an educational process, and reveals, on the operational level, its concrete potentialities to train people to enable them to more effectively contribute to the ongoing international dialogue by generating useful outcomes. This is not just a theoretical exercise. In terms of taxpayer rights' protection, interpretation and implementation, bridging the gap between advanced jurisdictions and fledgling jurisdictions has two empirical implications: on the one hand, the necessary identification of the crucial topics to be questioned; on the other hand, the constructive ability to look for a general and shared theory – not a single imperative dogma, but a shared trend made of multifaceted insights –- starting from the verification of experience-data. These insights must address the different levels of compliance and fairness displayed by each jurisdiction.

5.1. THE CURRICULA OF THE UNIVERSITY OF PADUA (SCHOOL OF LAW)

A current example of the work in progress with regard to the urgent identification of crucial topics to be questioned is the constitutional comparative school of academics[25] laying its basic foundations and values on a humanistic-institutional approach rather than normative approach. The school is situated within the Public International and European Law Department (DiPIC) of the University of Padua, Italy, the second oldest university in Europe and, above all in terms of interest in respect of this paper, the one where Galileo Galilei taught in the name of freedom of thought in study and teaching. This message incorporated in the globally-renowned University motto: "*Universa universis patavina libertas*".[26]

This distinctive feature is connected to two different dimensions: the dialectic approach and the operational approach. The dialectic approach is considered to be the primary logical basis by which

[25] The school was initiated by the Master Professor Livio Paladin (Professor of Constitutional Law at the University of Padua from 1969 to 1977, when he became Chief Justice of the Italian Constitutional Court), and continues today thanks to his scholar, the current Professor of Constitutional Law, Professor Mario Bertolissi. The most significant outcome of their friendly and human relationship is the institution of the *Centro sulle Istituzioni Livio Paladin*, a special observatory on Italian and foreign institutions, which was created to reinforce the dialogue on fundamental topics (which include, not by chance, taxpayer rights) which were to be explored by way of lectures, conferences, and publications while always satisfying the condition to gather as many law students together as possible. Website: http://www.studioistituzioni.it.

[26] For details of the university's history, see its website: http://www.unipd.it/en/university/history.

to foster the use of free dialogue at different levels of legal discourse[27]. But, what about its operational dimension? The organization of work implies that there a variety of academic courses, directly connected with the public field of law. Specifically, there are four courses that all students are required to take, commencing in the first year and continuing into the fourth. They represent the crucial topics a constitutional-oriented, thus competitive, academic program should offer to today's students with the primary purpose of investigating contemporary democracies' dysfunctions: fiscal, legal and, last but not least, social.

My recommendation is based on the empirically-tested courses, a "fascinating journey through legal standards" which, even if they initially seem disconnected, are shaped to build a chain of progressive steps forward. The main theme is to use the individual and his/her role in the system as reference points for analysis. The final objective is to verify the degree of legal consideration of personal dignity as a constitutional value with substantial normative effectiveness in order to globally reinforce the students' dialectic, argumentative and, above all, critical abilities with a focus on contemporary domestic and foreign events. But how can we attain that?

The four required courses start with the first-year Legal English course, which is immediately followed by Italian Constitutional Law. Then, semester by semester, the students take the Comparative Public Law course and finish with the Constitutional Italian Justice course. Using legal English – with its consequent implications - as a common shared "language of rights" with its imprinting of the "law in context approach", provides us with irreplaceable instruments of communication in the changing international framework of legal dialogue.[28] (From the taxpayer rights' point of view, the topic is also assuming a very interesting new nuance, which gives major substance to and evidence of the idea of taxpayer charters as expressions of demands for justice. See Abreu & Greenstein, 2017). Using a common language which stimulates a double perspective – including common law jurisdictions views and approach – helps with the identification of the fundamental constitutional topics connected with the relationship between the State and citizens within which the debate between tax agency and taxpayer surfaces as overriding.[29] Actually, each

[27] "Synonymous with 'creative comparison' which always keeps the routes for cooperation open" but also, as the author underlines, "synonymous with discussion aimed towards achieving resolution, an operational decision" (Bertolissi, 2005, my translation).

[28] That is why, the title, and leading theme of the course shared with students to be part of their educational awareness is "*Legal English in a changing world*". That means they will be asked not just to learn and give explanations of legal terminology, but to be open to being introduced to the significant aspects of the common law systems. It will hopefully foster a way of thinking through a dynamic perspective founded on the appropriation of real cases and authentic legal sources currently being questioned as part of the international debate. The topic of TRs, of course, allows for many innovative inputs to be taken into account from different perspectives. The subtitle of the course is: "*English for Law: the student's perspective*". The subject definitely needs a specialized register, which has to be acquired not just for academic purposes but with a long-lasting vision for skilled and competitive professional activity. What is going on worldwide? It is a question of method: students have a right to be part of the ongoing and challenging dialogue connected with their futures, that is, on the lack of resources and the parallel impellent need not to take liberties acquired for granted.

[29] The core objective of the entire curriculum is to focus on the topics which generate the crucial questions of the contemporary constitutional law: the resources available; formally protected rights and rights effectively supported by remedies of enforcement; the different levels or attempts of protection; the principle of responsibility as a crucial parameter by which to evaluate the public action. All topics start from the content of article 53 of the Italian Constitution ("*Every person shall contribute to public expenditure in accordance with his/her own capability. The tax system shall be progressive*"). All of them are equalized by the assumption that they are topics of constitutional relevance. The suggested shift from the tax field (founded on a lasting confrontation between tax agency and taxpayer)

step of the curriculum is supported by the use of a comparative approach methodology, which is applied to topics of public law, public governance and fiscal policy relevance.[30] The courses prepare students for the analysis methods of judicial reviews of legislation in order to verify the dynamic application of the constitutional principles.[31]

The second dimension – the operational aspect – is the empirical and experimental method as a distinctive component of the student's cultural background. The program encourages: the application of the problem-solving method, even with respect to issues of civil law; the planning of experiential events, such as visits to the Italian Constitutional Court in Rome to attend public courtroom discussions; and attendance at conferences (national and international) featuring guest lecturers, Italian and foreign, to discuss current topics related to the degree of wealth of contemporary democracies. In September 2016, the ongoing focus on the role of the taxpayer in the national and international framework led to the U.S. National Taxpayer Advocate and one of the Italian Taxpayer Advocates, together with more than twenty academics, tax professionals and scholars, debating the compelling original topic of "The democracy of the taxpayer" at a conference held at the university (University of Padua, Aula Magna, September 15, 2016). A significant number of seats were occupied by law school students, with 50 attendees being members of the university's organizational committee.

Some concluding remarks on this point: the aim to support the ongoing educational process of new generations is precisely focused on providing them with legal tools and criteria – primarily interpretative, then normative – so that the deficiencies and problems of contemporary democracies can be faced. This experimental academic scholarship certainly has its original roots in the constitutional taxpayer-centric approach and it is supported by the comparative perspective. Its commitment, consequently, is to offer first year students a constitutional-comparative-oriented approach by which to question, step by step, the fundamental pillars of the contemporary State – beyond its deficiencies – through the lens of the relationship between taxation and rights. Furthermore, it explores the substantial link between the lack of public resources and the protection of rights.

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encourages clarification of the constitutional value of personal dignity and the taxpayer sovereignty. (*Ex multis*, specifically on the matter of the constitutional law sphere and areas of interest, here are some specific works from the above-mentioned school: Bertolissi (2012); Bertolissi (2015c); Tieghi (2012); Bergonzini (2011); Cattarin (2009).

[30] The curriculum looks at different jurisdictions through the double-lens of power (the national and local organizational structures) and of liberties (constitutional safeguards and different models of judicial review of legislation). The courses start with a comparative analysis of contemporary liberties and then look at the level of protection influenced by the new frontiers of globalization, by new models of the Welfare State and by current international trends enhancing a cooperative-compliance rather than a command-and-control approach, including liberties and fiscal history, for an updated application of the comparative method to modern tools of liberty, with priority given to taxpayer rights. For some specific analysis of the matter, see: Tieghi (2012); Tieghi (2015b); Tieghi (2016a); Tieghi (2018).

[31] This component of the curriculum explores the Italian system of constitutional justice (including the judicial review of legislation), with particular emphasis on: firstly, the methods and tools the court uses to enforce constitutional rights; secondly, the technical devices to be used to properly access the Italian court judicial review from a procedural point of view; and thirdly, the most effective legal instruments that a contemporary jurist has, and must be able to use to correctly, in order to interpret the constitutional parameters. In this way, he may suggest a decision consistent with an updated and substantially effective interpretation of the constitutional principles and rights to the court. For some specific analysis on the matter, see Tieghi (2015a); Bergonzini (2015); Bergonzini (2018); Bertolissi & Bergonzini (2017).

5.2. THE STIMULATING CURRENT EXPERIENCE OF THE INTERNATIONAL CONFERENCES ON TAXPAYER RIGHTS AND THE WORLDWIDE LANGUAGE OF RIGHTS

As regards the constructive ability to look for a general and shared theory starting from the verification of experienced-data revealed by different jurisdictions, the International Conference on Taxpayer Rights must be considered.[32] It is a very recent worldwide initiative, which was developed by the United States National Taxpayer Advocate, Nina Olson, and her staff. There have been two International Conferences on Taxpayer Rights in two years, with two more due to take place during the next two years. Delegates from 22 countries joined the inaugural meeting, which was held in Washington D.C. in November 2015; representatives from more than double the number of countries joined the second, which was held in Vienna, in March 2017, and delegates from more than 50 countries registered to attend the third one, e held in Amsterdam, in May 2018.

That original, comparative, international experience is having very positive outcomes with regard to a variety of different profiles: new and interdisciplinary research lines, effective dialogue to suggest experimental solutions, operational attempts to explore new strategies of effective administration, and efforts in building a stable international professional team connected by a stimulating network.

That is probably not an exhaustive list, but it certainly shows the extraordinary importance of tackling the topic of taxpayer rights and its connected areas of interest[33] with a critical attitude and from a comparative perspective: both are legally flexible and dynamic methods which reveal the unquestionable interpretative inner nature of the legal approach we need to use to give meaning and substance to the taxpayer rights content. That occurs, first of all, if we recognize the need for an international theory (Bentley, 1998, cited in Bentley, 2007) which takes into account different levels of tax compliance, of administrative strategies, and also different ways of questioning and considering the crucial subject of the Taxpayer Advocate/Ombudsman as a really active part of the whole system.[34] However, what is particularly relevant, is related to the different cultures of

[32] For more information, see https://taxpayerrightsconference.com.

[33] "At the beginning of 2016, I charged my immediate staff with identifying significant research into topics that have relevance for tax administration, including approaches to voluntary compliance, worldwide taxpayer service, alternative dispute resolution, taxpayer rights, fraud detection, online accounts appearance, and geographic focus. I asked that they not limit their review to tax literature, but to look at psychology, organizational theory, network theory, marketing, and other disciplines. As a result, Volume 3 contains comprehensive Literature Reviews on several tax administration topics. We used this research as groundwork for many of the Most Serious Problems herein; we wanted to look at the IRS in a broader context, and the Literature Reviews have enabled us to bring insights from other disciplines and other countries and apply them to IRS problems and challenges" (National Taxpayer Advocate, 2016a, vii-viii).

[34] Considering the U.S. experience, for example, Nina Olson said "it is indeed a very difficult mission, with almost irreconcilable tensions built into it," when she became the US NTA in March 2001. "But I believe that this tension can be a *source of creativity* for all the participants" (Camp, 2010, p.1251). How can we not mention, in this context, the *Efforts to Improve TAS Advocacy and Service to Taxpayers* in the U.S. by two alternative models presented by in the FY 2016: the Centralized Case Intake (CCI) and self-help initiatives? (NTA, FY2016, p.88-89). In this respect, considering the Mexican jurisdiction, the Mexican Supreme Court ruling (Feb, 26, 2008) concerning the legitimacy of the Mexican Taxpayer Advocate (named *Prodecon*) is of crucial importance. The judgment of the Mexican Supreme Court of Justice ruled the Action of Unconstitutionality (*Acción de Inconstitucionalidad*) 38/2006, which basically challenged two main issues: a) the designation process of the Chief Ombudsman of *Prodecon*; and b) the designation process of the internal governance body of *Prodecon*. The ruling of the Supreme Court did declare the invalidity of

rights. A tool of implementation and progress is the acceptance of realization of different understandings and awareness of taxpayer rights.

The inputs given by the dichotomy between "language of rights" and justice definitely encourages, "by making explicit the principle of justice (…) and by revealing a dimension of justice shared by multiple fields of law" (Abreu & Greenstein, 2017), in line with what's proposed here, the effort of recognizing substantial normative effectiveness of the value of personal dignity as a fundamental criteria by which to question the application and enforcement of taxpayer rights.

Undoubtedly, there is a trend to move in the direction of what has been called the "*Future State Vision*" (National Taxpayer Advocate, 2015a) with the constitutional taxpayer-centric approach, thus establishing an internationally shared comparative base. Simply stated, the explicit, fundamental purpose of this approach is "*to ensure that (U.S) taxpayers have voice in the process (…) so we can consider diverse viewpoints and gather suggestions and descriptions of taxpayers' needs*" (National Taxpayer Advocate, 2015b).

6. IN CONCLUSION: FUTURE STUDENTS, FUTURE TAXPAYERS, "FUTURE STATE"

The central perspective which animates the idea of taxpayer rights having an academic value is that of taxpayer rights as a tool of implementation of the following three profiles: implementation of the comparative methodology through the application of the legal interpretation process (educational students' process); implementation of the taxpayer-centric consideration of tax administration (educational citizens' process); and implementation of a cultural-oriented education (educational vision of the world).

The three distinctive profiles emphasize the core understanding by which "young people's minds are not vases to be filled in, but torches to be fired up", as Plutarch reminded us. However, to fire up minds, we need something more than hard work. We need a vision of the world which includes a project: the same project the U.S. Founding Fathers fought for – to obtain the *confidence* of citizens in proportion with the *fortification the rights* of the people against the encroachments of the government.[35] This kind of engagement results in a "humbling and moving experience" which becomes a real "transforming experience" (National Taxpayer Advocate, 2016a)[36] when the object of interest is the current taxpayer in his/her different dimensions of the student-citizen. In the

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the designation process of the internal governance body of *Prodecon*. However, the designation process of the Chief Ombudsman was untouched, as the Court determined that the participation of the Mexican Senate in the designation process is correct and desired, as it functions as a counterweight in the appointment of an individual that will be responsible for safeguarding the rights of taxpayers. As a part of his functions, through brief documents (called "*Cuadernos*", to be consulted in http://www.prodecon.gob.mx/index.php/home/cc/publicaciones#cuadernos), the *Prodecon*, like the U.S. Taxpayer Advocate, explains in a very easy and understandable way what taxpayer rights are, what the situation of those rights is in Mexico, and how *Prodecon* is protecting them on the basis of the progressive equivalence between taxpayer rights and human rights.

[35] James Madison's language quoted in a display in the Rotunda of National Archives, Washington D.C.

[36] vii. A "transforming experience" as it was for the ones who have recently enjoyed the stimulating experience of the 12 Public Forums on Taxpayer Needs and Preferences. Further information and full transcripts are available here: https://taxpayeradvocate.irs.gov/public-forums.

contemporary era, more than ever, the updated and challenging vision we need includes the three aspects summarized below.

Firstly, this educational vision must give substance to "the law in context" and to the comparative approach. Interpretation should play a substantial role in supporting this:

> it goes without saying that interpretation has (something) to do with mystery, because it has to do with man. The true jurist knows that and that should represent the necessary knowledge of anyone who ponders on a set of values – which is the Constitution[37],

not of regulations to exacerbate in their literal essence.

Secondly, the vision must connect "Taxpayer Rights and the Future State", to ensure they "are the foundation for tax administration" and to enhance "the foundational role of the Taxpayer Bill of Rights" (National Taxpayer Advocate, 2016b; IRS Future State, 2016). In other words, it must give meaning to the ongoing international dialogue for a constructive dialectic discussion, a debate which has to be, on the one hand, finalized to deliver better outcomes[38] and, on the other hand, founded on constitutional premises. That means giving substance to the living values of the Constitution[39], primarily as human dignity[40] to reinforce the role of jurisprudence and to strengthen those values even against legislative and executive action.

Thirdly, the vision must effectively define the Dignity-Rights and Accountability-Obligations dichotomy. According to relevant experimental studies, it has been shown both that "procedural fairness enhances identification which in turns supports positive tax attitudes and reduces the inclination towards tax evasion" (Hartner, Rechberger, Kirchler & Schabmann, 2008; Murphy, 2005). Moreover, "the interaction paradigm is shifting to a trust relationship between taxpayers and authorities, which is based on a compliance and fair-play agreement as well as on effective tax control" (Kirchler, 2015).

These elements comprise an updated, skilled, comparative and culturally-oriented law education that harnesses the power of education[41]: "I figured out first how to be a generally informed citizen

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[37] Translated from Bertolissi (2015d), p.110. Further insights on the matter come from the idea that "law, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it" (Geertz, 1983).

[38] For a great example of the constructive dialogue: "*We disagreed now and then,*" Justice Ginsburg reminisced, with reference to Scalia, "*but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation*" (Lind, 2016).

[39] "It is the living Constitution that is responsible for keeping the (...) Constitution from becoming obsolete, or worse" (Strauss, 2010, p.5). Although this refers to the U.S. Constitution, the thesis has to be taken into account in all nations.

[40] "Human dignity as a constitutional value has several functions in the field of human rights. It provides the theoretical foundation for human rights; it assists in the interpretation of human rights at the sub-constitutional level; it is one of the values that every constitutional right is intended to realize; it plays a role in the limitations to constitutional rights and in determining the limits to such limitations; it plays a primary interpretative role in those cases where the constitution does recognize a constitutional right to human dignity" (Barack, 2015, p.362).

[41] "To become who you are and to do the work you want to do is to be open to want to learn and give at the same time" (Shashkevich, 2017). Furthermore: "You've got to get your education! It's the only way to get ahead in the world" (Sotomayor, 2013).

before I tried to be a specialist in anything else," said U.S. Court Justice Sotomayor on the auditorium stage at Stanford Law School in March 2017. "And that's the advice I would give all of you who are experiencing college. Take courses in areas that don't particularly interest you, but might make you a more knowledgeable person. … Curious people go further" (Shashkevich, 2017).

How can we go further in respect of the taxpayer rights perspective?

The former Italian Chief Justice of the Constitutional Court strongly recommended taking the route of inviting today's law students to be aware that they are living in a post-modern era, where the term "post-modern" really means, legally speaking, *transition*: the jurist has to rediscover his/her own specific identity, which calls for the interpretative moment to be a starting point – not a final destination –from which to trace a path requiring bravery and responsibility in order to face, and try to interact in, the current world (Grossi, 2016; Grossi, 2017).

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U.S. REFUNDABLE CREDITS: THE TAXING REALITIES OF BEING POOR[1]

Leslie Book[2]

Abstract

This paper looks at the American experience in using tax law to deliver benefits to low and moderate-wage workers. First examining two recent cases in which individuals improperly claimed the earned income tax credit, this paper explores some of the challenges to both taxpayers and tax administrators associated with using the tax system to deliver benefits that are dependent on levels of attachment to children and the presence of earned income. The paper then explores two approaches to improve compliance. One approach is a proposal in a recent Heritage Foundation policy briefing recommending that only parents with legal custody of their children should be entitled to receive the earned income tax credit. The state of California initially excluded self-employment income from its definition of earned income in its state earned income tax credit. Both measures fail to reflect characteristics of the lives of the working poor, including a growing reliance on multi-generational living arrangements and shared care of children, a surge in nontraditional employment associated with the gig economy, and a reliance on third parties such as return preparers and tax software providers. Despite the problems with the proposals, they reflect genuine compliance concerns. This paper concludes with recommendations to address those compliance concerns that will likely serve the goal of improving integrity, while also ensuring the law and administration of the law reflects the lives of lower-income Americans who increasingly rely on the tax system to meet basic needs and support their families. As the American tax system is increasingly a key component of the safety net, this paper is especially timely and can assist policymakers who wish to balance improvements in program integrity with a respect for taxpayer rights and achievement of other program goals.

Key Terms
Tax compliance; earned income tax credit; tax credits; self-employment income; return preparers.

INTRODUCTION

It has been over twenty years since the last significant procedural and administrative reform of the IRS, the 1998 IRS Restructuring and Reform Act. Since that time, the Internal Revenue Code has

[1] I am grateful for the feedback I received on presentations based on this article at the Second International Taxpayer Rights Conference in Vienna in March 2017, the 2018 Critical Tax Conference at the University of South Carolina Law School, the Georgia State Law School Tax Justice Workshop, and the 2018 annual conference of the National Tax Association. Special thanks to Nina Olson, Leandra Lederman, Ariel Kleiman, Keith Fogg, Steve Chanenson, Alice Abreu and Ted Afield, who provided valuable comments and edits on earlier drafts. My research was ably assisted by John Mickles, Villanova University Charles Widger School of Law, JD, 2018.
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grown increasingly complex.[3] Part of that complexity stems from Congress expanding the use of the Internal Revenue Code to deliver benefits in the form of tax expenditures, that is, preferential tax rates, deductions, exclusions and credits (Hickman, 2015; Office of Tax Policy, 2016).[4]

Key legislative and executive branch proposals share a desire to simplify the Code, especially for individuals; major American tax legislation enacted in 2017 failed to achieve meaningful simplification and, in fact, has added new layers of complexity (August, 2018).[5]

One of the key voices in the American tax reform process is Nina Olson, the National Taxpayer Advocate (NTA), who, in a series of annual reports to Congress, has repeatedly emphasized the need to simplify the American tax law. In her 2016 Annual Report to Congress, Olson emphasized that reducing the use of the Code as a vehicle for delivering social benefits would simplify tax administration and alleviate taxpayer burden (National Taxpayer Advocate, 2016a, p. 305-07). Despite the call to curtail tax expenditures, the NTA acknowledged the trade-offs that accompany using the tax system to achieve a variety of social objectives (National Taxpayer Advocate, 2016a, p. 306-07). To that end, the NTA suggests that in considering tax reform, Congress should explicitly consider the rights of taxpayers, the burden on taxpayers and on the IRS's ability to administer any provision (National Taxpayer Advocate, 2016a, p. 306-07).

As part of that directive to more explicitly consider administrative issues, the NTA proffers a series of core principles that should guide the tax reform process (National Taxpayer Advocate, 2016a, p. 319-20). The first core principle is that tax law should not "entrap" individuals (National Taxpayer Advocate, 2016a, p. 319-20). This paper explores how one part of tax law, the earned income tax credit (EITC), violates this foundational principle. This paper reveals that the EITC entraps individuals, contributing to greater distrust of the tax system. To illustrate this point, this paper will use as a platform two recent court cases, a case from the United States Tax Court, *Smyth v Commissioner* (2017), and case from the Court of Federal Claims, *Foxx v U.S.* (2017). Both cases involve taxpayers who improperly claimed EITC. In *Smyth*, the taxpayer was a grandmother who worked as a nursing assistant and lived with and cared for her grandchildren. In *Foxx*, the taxpayer, in filing her return claiming an EITC, relied on a tax return preparer with years of experience preparing individual tax returns and who referred to himself as the "Tax Doctor". Yet, in both cases, the taxpayers were not entitled to receive the EITC. The cases reflect the two most common sources of taxpayer error with the EITC: errors associated with qualifying child eligibility and errors pertaining to income misreporting. In addition, they provide a window into the lives of the working families that claim the EITC: multi-generational living arrangements and tax return preparers who instead of helping individuals comply with the tax laws actually facilitate the filing of tax returns that are incorrect. This paper argues that the *Smyth* and *Foxx* cases provide a window

[3] Internal Revenue Code of 1986, as amended (herein "Code"). The National Taxpayer Advocate noted that since 2001, Congress has made over 5,900 changes to the Internal Revenue Code, contributing to complexity and compliance costs that lead to individuals and businesses spending approximately 6 billion hours per year complying with filing requirements (National Taxpayer Advocate, 2016a, p. 305-07). This does not include time spent responding to correspondence or other post-filing burdens.

[4] Treasury estimates that for FY 2016 total U.S. tax expenditures amounted to $1.42 trillion; as a point of comparison U.S. individual income tax revenues in the same period were $1.63 trillion (Office of Management and Budget, 2015, Table 2.1).

[5] See Cohn, G. (2017, April 26), for a discussion on the importance of simplifying the tax code, noting taxpayers spend roughly 7 billion hours per year complying with the tax code.

into ways that policymakers should consider reform of the EITC to reduce program overpayments and ensure that individuals do not end up worse off by claiming the EITC.

In considering specific proposals to improve program integrity, Congress and the IRS should anticipate the largest areas of noncompliance, minimize opportunities for noncompliance and consider the lives and circumstances of EITC claimants. Using these criteria and insights into the lives of the working poor as reflected in the *Smyth* and *Foxx* cases, this paper critically examines two recent efforts to reform the EITC that are intended to reduce taxpayer qualifying child and income reporting errors. These measures are inadequate because they fail to reflect the lives and circumstances of the EITC, including that taxpayers increasingly care for children with the assistance of multiple family members and often live with multiple generations of family members, earn money as part of the growing platform economy that allows for work without traditional employment arrangements, and rely on tax return preparers who may promise refunds at the expense of complying with the tax laws. Proposals that fail to address the reality of the lives of claimants themselves are likely to backfire and will contribute to greater distrust in the IRS and perhaps have the unintended consequence of contributing to increased noncompliance (Gangl, Hofmann, Pollai, & Kirchler, 2012; Olson, 2015).

Before proceeding, it is important to briefly describe the EITC, provide some general figures on U.S. tax compliance and to define what "entrap" means. As with many countries, the U.S. tax agency is charged with administering credits that taxpayers can claim on a tax return and receive as a refund in excess of any individual tax liability. The EITC is the most important refundable credit in terms of dollar amount claimed and impact (Nichols & Rothstein, 2015). Based primarily on the presence of earned income and the residence of qualifying children who satisfy age, residency and relationship tests, in 2015 over 27 million taxpayers received approximately $67 billion in EITC benefits, with $2,455 as the average amount claimed (Earned Income Tax Credit & Other Refundable Credits, 2017). It has become one of the largest federally administered means-based anti-poverty programs and a major part of the way U.S. creates incentives for low-wage work.[6] In 2013, nearly one in five taxpayers filing individual tax returns claimed the EITC and approximately 44 percent of all filers with children received the EITC (Hoynes & Rothstein, 2017). The number of taxpayers claiming the EITC and the amount those taxpayers claim has grown significantly over the years since the EITC's inception as a temporary provision in 1975.[7]

The voluntary compliance rate for the EITC (looking at lower and upper bound overclaim percentage prior to enforcement) is estimated at between 60.9 percent and 71.5 percent (Marcuss, Dubois, Risler, & Leibel, 2014). This compares to an overall voluntary compliance rate of 81.7 percent, though that figure is somewhat misleading, as the voluntary compliance rate for items that are not subject to information reporting falls significantly (Internal Revenue Service, 2017). Key factors that drive EITC eligibility – residency and relationship of children to claimant, as well as much of the income that sole proprietors earn – are not subject to third-party reporting.

[6] Under U.S. law, the EITC cannot be counted as income in determining eligibility, or the amount of benefit, for any federally funded public benefit program, such as Supplemental Nutrition Assistance, federal housing benefits, and Temporary Assistance to Needy Families (Falk, p. 13).

[7] See Book (2016), for growth in EITC since its inception. There are many excellent discussions of the EITC's history and its current place as one of the main federal policies to address poverty and incentivize work. See Ventry (2001), for a historical discussion. See Nichols & Rothstein (2015), for a discussion and compilation of current research of the EITC's impact on addressing poverty and incentivizing work.

Approximately 20 percent of all individual income tax returns include the EITC, but total EITC overclaims comprise 3 to 4.2 percent of the total tax gap, 4.3 to 6.6 percent of the gross tax gap for individual income and 5.3 to 7.3 percent of the underreporting tax gap for individual income.[8] Despite contributing to a relatively small share of the overall or individual tax gap, EITC audits account for approximately 39 percent of all IRS income tax examinations (Crandall-Hollick, 2015, p. 3-4; United States Government Accountability Office, 2016, p. 33).[9]

A dictionary definition of "entrapped" includes "to lure into a compromising statement or act" (Entrap, n.d.) or "to lure into danger, difficulty, or a compromising situation" (Entrap, 2014). This article does not make the claim that either Congress, in drafting the law, or the IRS, in administering the law, acts with intent to trick or deceive individuals. Yet, entrap is an apt word to describe the EITC's impact for at least two reasons. First, many individuals find themselves worse off than if they had not filed a tax return claiming the EITC. In addition to potentially owing money back to the IRS as a result of compliance actions the IRS takes, the claimants may have incurred return preparation fees and spent time both in preparing the return and in responding to IRS correspondence. Second, due to a variety of factors, such as the legal complexity of the EITC itself, individual characteristics of the claimants and the role of third party return preparers, a significant number of individuals who may claim a credit to which they are not entitled are likely to act without intent to cheat or misstate eligibility.[10] Many taxpayers have a good faith but erroneous belief that they are entitled to the credit they claim on the tax return even when they are not eligible to claim the credit at all or at times are only entitled to a lesser amount.

Individuals who mistakenly claim the EITC come to the tax system expecting to receive a refund or credit based on their earnings and family situation. Yet, these individuals often come away worse off for the experience, facing thousands of dollars in assessed liabilities, or for the lucky ones who are audited prior to receiving a refund, just the experience of having to try to respond to the IRS requests to verify information via correspondence. Those assessed liabilities and additional costs often strike the most vulnerable; that is, those taxpayers who are least likely to be able to afford the costs and who may suffer economic hardship when they expected that their filing a claim for an EITC would lead to a sizeable refund.

This article proceeds in two main parts. The first part discusses those two recent cases and illustrates how they reveal the traps facing taxpayers who claim the EITC. In the second part, this article briefly describes an overview of the EITC compliance problem and critically evaluates proposals to reform the EITC, using the *Smyth* and *Foxx* cases as illustrations.

[8] I compute this using the lower and upper range EITC overclaim amounts as a numerator and the 2008-10 gross tax gap and gross income tax gap figures as denominators (Internal Revenue Service, 2016, April, p. 2). The share of the tax gap attributable to all credits is 9 percent.

[9] In FY 2013, the IRS estimated that of approximately $37.1 billion of additional tax owed as a result of examinations about $2.5 billion, or 6.9% of all additional estimated tax owed, was due to examinations of returns that had an EITC claim (Crandall-Hollick, 2015, p. 6).

[10] While the EITC may be one of the most robustly studied provisions in the tax code in terms of compliance, there is no consensus on the amount of error that is unintentional relative to intentional misconduct. See Holt (2016, p. 5-6), for a discussion of evidence of good faith versus intentional errors.

CASE STUDIES

The Sad Tale of Grisel Smyth

The living arrangement in *Smyth* is relatively straightforward and not uncommon among many American families where multiple generations live together, often with a grandparent or older adult relative providing the main financial support for the household (Maag, Peters, & Edelstein, 2016). As the opinion discusses, Grisel Smyth worked as a nursing assistant in El Paso and maintained a home with her modest earnings (*Smyth v. Commissioner*, 2017). Her adult son, his wife and their two young children, ages 2 and 4, lived in her home. (*Smyth v. Commissioner*, 2017). The opinion discussed how Grisel provided all the financial support for the household, noting that Grisel's son "'did not work, and he was into dealing drugs' while his wife 'stayed home and took care of the babies'" (*Smyth v. Commissioner*, 2017, at *1).

Grisel's tax problem arose after she filed a 2012 tax return claiming her grandchildren as dependents and qualifying children for the EITC (*Smyth v. Commissioner*, 2017). She expected a refund of $5,300; of that amount about $2,900 was attributable to an EITC that she claimed using her grandchildren as qualifying children (*Smyth v. Commissioner*, 2017). She claimed the grandchildren after her son told her he was not going to claim them and that she should use the refund to recover some of the money she spent supporting the family (*Smyth v. Commissioner*, 2017). Grisel's son lied to his mother; rather than not filing, he raced to file a tax return before she did, and the son claimed the EITC and treated his kids (Grisel's grandchildren) as his and wife's qualifying children, and, as the opinion notes, took the refund and spent it on drugs (*Smyth v. Commissioner*, 2017).

The opinion discusses how Grisel credibly testified that she had no knowledge her son claimed her grandchildren on his tax return and she would never have claimed the kids had she known her son and daughter-in-law filed their own tax return using the children as their qualifying children (*Smyth v. Commissioner*, 2017).

Why did it matter for Grisel that her son and daughter-in-law filed a return claiming the children? The U.S. tax code allows for the possibility that multiple adults could theoretically be in a position to claim a child as a "qualifying child."[11] When one of those adults is the child's parent and the other adult is not, generally the parent is the one entitled to claim the child as a qualifying child. It does not matter if the other adult claiming the child is the primary caregiver; it does not matter if the parent agreed that she or he would not claim the child but in fact did; it may not even matter if the parent files an amended return after the fact disclaiming the earlier position he took on the return (though the Tax Court in *Smyth* and other cases have demurred on that issue; see below). On the other hand, if the child's parents do not claim the child, then another adult who is otherwise eligible can treat the child as a qualifying child so long as the other adult has a higher adjusted gross income than either parent. In sum, if either of the child's parents (or both if the parents are filing a joint return) claim the child, then the other adult is out of luck, no matter that adult's connection to or financial support of the child, or the agreement or understanding the parents may have reached.

[11] The Code's tiebreaking rules for qualifying children are found in 26 USC § 152(c)(4).

Bringing this back to Grisel, it is easy to see the difficulties Grisel faced. Instead of filing a tax return and getting a sizeable refund, she received a letter from the IRS notifying her that someone else claimed the children and challenging her right to claim her grandchildren as dependents and qualifying children for the EITC (*Smyth v. Commissioner*, 2017).[12] The letter froze her refund and proposed to assess a $1,000 civil penalty for good measure (*Smyth v. Commissioner*, 2017).

The situation Grisel found herself in was not unique; IRS processes are set to automatically reject returns like Grisel's when another person, especially a parent, claims a child. The reason why the IRS selected her return for examination, as the opinion states, is that "Smyth's unemployed son had already claimed the children on his tax return, gotten a check from the government, and cashed it to spend on drugs" (*Smyth v. Commissioner*, 2017, at *1).[13] Grisel testified that she could not understand how another had claimed her grandchildren (*Smyth v. Commissioner*, 2017). She thought that the dual claim was due to identity theft (*Smyth v. Commissioner*, 2017); that was not an unrealistic assumption as the IRS and innocent taxpayers have struggled with sorting between real taxpayers and imposters who essentially steal another person's identity and access the tax system to receive improper credit-driven refunds (Treasury Inspector General, 2017).

Grisel, on her own, (and probably after spending a considerable amount of time, and perhaps a $60 filing fee)[14] filed a petition to U.S. Tax Court asking the Tax Court to allow her to treat the grandchildren she supported and lived with as qualifying children (*Smyth v. Commissioner*, 2017). After she filed the suit and feeling guilty about lying to his mother, Grisel's son offered to write an affidavit describing his mother's role in supporting the children (*Smyth v. Commissioner*, 2017). He then (with the assistance of a return preparer) prepared an amended return disclaiming treating his children as dependents and qualifying children during the pendency of his mother's case (*Smyth v. Commissioner*, 2017).

After Grisel filed the petition to Tax Court, the court scheduled a trial to consider the evidence and applied the law to Grisel's circumstances (*Smyth v. Commissioner*, 2017). Presumably Grisel took time off from work to testify; luckily for her, a volunteer attorney was at the Tax Court calendar call (*Smyth v. Commissioner*, 2017).[15] The opinion notes that "[h]e was moved by Ms. Smyth's testimony and entered an appearance after trial[,]" presumably to assist in preparing and submitting a post-trial brief (*Smyth v. Commissioner*, 2017, at *5, footnote 1). After trial, the Tax Court issued an opinion (*Smyth v. Commissioner*, 2017). To the Tax Court, the legal issue was clear: given the children's parents also claimed the children, under the tie-breaker rule, Grisel was not entitled to treat the children as qualifying children, and thus, not able to receive the refund she claimed on her tax return (*Smyth v. Commissioner*, 2017).[16] In addition, the son's submission of an amended return failed to meet the technical requirements because he did not mail it to the appropriate IRS office or hand-deliver it to an IRS employee that had authority to accept an amended return (*Smyth*

[12] The IRS examination proposed an approximate $5,000 deficiency; in addition, the IRS proposed a 20% civil penalty, which it later conceded.

[13] The opinion does not discuss the amount of the refund her son received nor whether the IRS had examined his return.

[14] See US Tax Court Rule 20(d), establishing a $60 fee unless the petitioner establishes the inability to pay the fee.

[15] See Panuthos (2015), for a discussion of the efforts of hundreds of volunteer attorneys who volunteer to assist unrepresented taxpayers such as Grisel Smyth.

[16] There is a small EITC available for childless workers between the ages of 25 and 65; the cap in 2012 for receipt of an EITC for a childless worker was $13,980 and Grisel's income exceeded that limit (*Smyth v. Commissioner*, 2017).

v. Commissioner, 2017).[17] Even if the son and his wife had properly filed the amended return, no case has held that a taxpayer can by way of amended return disclaim a previously claimed child as a dependent or qualifying child (*Smyth v. Commissioner*, 2017).[18]

Despite the relatively straightforward application of the law, Judge Mark Holmes, the judge who wrote the opinion, was struck by the case's injustice (*Smyth v. Commissioner*, 2017). His concluding comments in the opinion reflect the unease he felt in finding for the government.

> We are sympathetic to Smyth's position. She provided all of the financial support for [her grandchildren], had been told by her son that she should claim the children as her dependents, and is now stuck with a hefty tax bill. It is difficult for us to explain to a hardworking taxpayer like Smyth why this should be so, except to say that we are bound by the law. And it is impossible for us to convince ourselves that the result we reach today--that the IRS was right to send money meant to help those who care for small children to someone who spent it on drugs instead--is in any way just. Except for the theory of justice that requires a judge to follow the law as it is but explain his decision in writing so that those responsible for changing it might notice (*Smyth v. Commissioner*, 2017, at *4).

The Tax Doctor: Doctor Foxx and Doing His Clients Harm

George Foxx came to the attention of the IRS after the IRS audited the 2007 federal income tax return of Shakeena Bryant (*Foxx v. U.S.*, 2017). For the 2007 year, Bryant claimed an EITC of $2,577. Foxx held himself out as a tax doctor and referred to himself as Dr. Foxx,[19] and claimed to have 37 years of tax return preparation experience. Bryant went to the tax doctor with a friend of hers, Herman James (*Foxx v. U.S.*, 2017). She brought with her a W-2 income statement showing $15.51 from brief employment at an amusement park in Florida (*Foxx v. U.S.*, 2017). According to an affidavit of both Bryant and James, Foxx told her that she could receive a refund if she reported income from a business (*Foxx v. U.S.*, 2017). According to Bryant and James, on

[17] The son arranged for the purported amended return to be delivered by a return preparer to IRS counsel in his mother's Tax Court case (*Smyth v. Commissioner*, 2017). *Smyth* (2017) referred to *Quarterman* (2004), where the hand delivery of a tax return to an IRS attorney did not constitute a filing. The opinion does not state how much the return preparer charged and whether Grisel or her son paid that fee (*Smyth v. Commissioner*, 2017).

[18] The Tax Court has not resolved whether a parent or other adult can disclaim a prior claimed dependent or qualifying child, though *Smyth* notes that prior cases have suggested that in certain circumstances it might be willing to treat an amended return as a valid disclaimer. (*Smyth v. Commissioner*, 2017). *Smyth* (2017) referred to *Brooks* (2013) that suggested perhaps a daughter's amending of a return prior to the IRS auditing her mother might have been sufficient; and *McBride* (2015) that suggested that a grandfather might be entitled to a dependency exemption if the mother filed an amended return before the statute of limitations would have barred the IRS from determining a deficiency against the mother.

[19] A separate issue in the case involved the government's seeking discovery from the University where Foxx claimed to have received a doctorate; Foxx filed a request for sanctions claiming the government's discovery was irrelevant and an attempt to harm him (*Foxx v. U.S.*, 2017). The court found the government's discovery efforts were appropriate as it was "reasonably calculated to assist the trier of fact in assessing Dr. Foxx's education and credibility" (*Foxx v. U.S.*, 2017, at *421).

direction from Foxx, Bryant left the office, applied for and received a Florida business license for automobile detailing (*Foxx v. U.S.*, 2017).[20]

Bryant returned the same day with the license, and filed a tax return showing $18,288 in business income (*Foxx v. U.S.*, 2017). The presence of the income generated a $2,577 refund (*Foxx v. U.S.*, 2017). The existence of income created a positive tax result that is attributable to the credit exceeding Bryant's income and employment tax liability, a common situation for many lower income claimants, whose taxable income is often low due to deductions attributable to claimed dependents and the standard deduction.[21] This places the IRS in the awkward position of disproving that a claimant has earned income (or trying to demonstrate that a claimant has expenses that should have been deducted but were not).[22] Bryant also paid Foxx a $169 return preparation fee (*Foxx v. U.S.*, 2017), which is also a common situation for claimants, who annually pay billions of dollars in fees for the preparation of returns and ancillary services related to claiming the EITC (Wu & Hernandez, 2016).

On audit of Bryant's return, the IRS disallowed the credit (*Foxx v. U.S.*, 2017). During the audit, Bryant agreed she did not have the income necessary to justify her claiming the credit, and the IRS presumably sought to recover from Bryant the refund she received (*Foxx v. U.S.*, 2017). In correspondence, Bryant claimed she was instructed by Foxx to report the income to justify the refund (*Foxx v. U.S.*, 2017).

The IRS then examined Dr. Foxx and assessed a $5,000 civil penalty under Section 6694 for his willful or reckless conduct in preparing the return (*Foxx v. U.S.*, 2017). After an administrative appeal of his penalty, the IRS reduced it to $2,500. Foxx paid and sued for refund in the Court of Federal Claims (*Foxx v. U.S.*, 2017).

The case on the surface turned on whether the preparer George Foxx 1) facilitated the improper claiming of the credit by instructing the taxpayer how to claim the credit and to make it look legitimate by applying for a business license even in the absence of the actual business or 2) prepared the return based on what Bryant told him about her business (*Foxx v. U.S.*, 2017).

A bad fact for the Tax Doctor in this case was that Bryant's friend James on deposition supported Bryant's version of the facts. Both Bryant and James stated that she obtained a business license the same day the return was prepared pursuant to Dr. Foxx's instruction (*Foxx v. U.S.*, 2017). James also stated that "Dr. Foxx explained that such a license would allow him to obtain more money for Ms. Bryant, and Dr. Foxx, not Ms. Bryant, created the false business income that appeared on Ms. Bryant's tax return" (*Foxx v. U.S.*, 2017, at *419).

According to the opinion, Foxx claimed that in preparing the return he relied upon Bryant's business license which she on her own received and two pages of his notes that outlined expenses associated with the business (*Foxx v. U.S.*, 2017).

[20] Florida requires that small businesses register for licenses to do business (Small Business Advice, n.d.).

[21] See Crandall-Hollick (2015, p. 11), for a discussion on how income misreporting includes both under and overreporting.

[22] See Order, *Kalokoh v Commissioner* (2015), where a self-employed hairstylist claimed EITC and proved at trial she had receipts from her business that generated sufficient earned income for a claimed EITC.

Both parties filed motions for summary judgment; generally, a summary judgment motion is inappropriate for resolving disputes when the parties differ on the facts (*Foxx v. U.S.*, 2017). Yet, despite the presence of a dispute as to which version was accurate, the Court of Federal Claims resolved the case on the motion, essentially concluding that even if Foxx were telling the truth, he was reckless in disregarding his due diligence obligations under Section 6695, which require preparers to "make reasonable inquiries if the information furnished to, or known by, [the preparer] appear[ed] to be incorrect, inconsistent, or incomplete" (*Foxx v. U.S.*, 2017, at *419). Even if Bryant did tell the preparer about her income, the court concluded Foxx had an affirmative obligation under the specific EITC due diligence regulations to dig deeper:

> Dr. Foxx argued before the IRS that his reliance on Ms. Bryant's alleged statements regarding her business was reasonable because Ms. Bryant otherwise would have only earned approximately $15 in 2007 based on the W-2 she provided to Dr. Foxx. Such an argument is misplaced; Ms. Bryant's financial situation did not relieve Dr. Foxx of his obligation to make reasonable inquiries into any auto detailing business purportedly conducted by Ms. Bryant after she did not provide adequate documentation. His failure to do so was an intentional or reckless disregard of relevant Treasury Regulations [referring to the due diligence regulations under Section 6695]. (*Foxx v. U.S.*, 2017, at *419-20).

LESSONS LEARNED: THE COMPETING NARRATIVES AND PROPOSALS FOR REFORM

The Competing Narratives of the EITC

As with many countries, in the U.S. the tax agency is charged with administering credits that taxpayers can claim on a tax return and receive as a refund in excess of any individual tax liability. As mentioned above, the EITC is the most important. It has become one of the largest federally administered means-based anti-poverty programs and a major part of the way the U.S. supplements wages and provides incentives for low-wage work.

The IRS estimates that anywhere from 28.5 percent to 39.1 percent of the EITC is overclaimed, and that approximately 24 percent of all EITC payments are improper. The IRS also estimates that anywhere from 43 to 50 percent of all EITC returns are incorrect, with most of those errors going in favor of the claimants, not the government. Despite there being little understanding (and in fact often heated partisan debate) about whether the EITC errors are the source of willful misconduct or innocent mistake,[23] the IRS has been a target for its inability to reduce the overclaim or improper payment rate over the better part of the last 15 years. While the EITC has generally received bipartisan support (Holt, 2016),[24] proposals to expand the EITC often return to the issue of compliance,[25] with opponents keying in on errors as likely due to fraud, while proponents generally

[23] See Holt (2016, p. 5), for a discussion stating the true extent and nature of the problem are subjects of stalemated debate between program skeptics and advocates.
[24] See Adamson (2016), for a discussion of current bipartisan support around expanding EITC.
[25] For example, in the Protecting Americans from Tax Hikes Act of 2015 (PATH) legislation that made permanent some aspects of the child tax credit and the EITC that were set to expire in 2016 (such as an increased credit for

look to program complexity as a main driver of error (Drumbl, 2017; Holt, 2016).[26] The compliance problem exists despite the IRS and Congress having taken a variety of efforts to combat errors, including approximately 450,000 annual correspondence examinations requiring claimants to verify eligibility to the IRS by sending in documents proving eligibility after the filing of a tax return, expanded civil penalties giving the IRS power to punish both claimants and preparers, and the IRS authority to make changes to certain EITC-claiming returns without giving claimants the full-blown pre-assessment court review that other taxpayers enjoy (Olson, 2015).

There are two main and at times competing narratives when thinking about the IRS's administration of refundable credits. I will call them Narrative A and Narrative B. In Narrative A, as the U.S. has de-emphasized much of the federal safety net outside the tax system, the IRS has become a steward and key deliverer of one of the nation's most important means-tested anti-poverty programs, the earned income tax credit.[27] The EITC is a major aspect of American social policy that has generally received bi-partisan support. The IRS has been a remarkably efficient deliverer of these benefits. Working with the private sector commercial return preparer industry and software providers to ensure high take up rates, the IRS has helped push many low and middle-income taxpayers into the 21st century of online tax return filing and away from the stigmatizing receipt of benefits associated with other means-based programs. Narrative A highlights the IRS role in lifting millions of children out of poverty, encouraging a return or entry into the labor force for many workers, especially single mothers, and generating benefits that millions of lower-income workers rely and depend on to meet essential consumer purchases and at times special purchases that are facilitated by the lump sum nature of the annual tax refund.

Narrative B focuses on the negative.[28] It goes like this: the attributes that make Narrative A so compelling have also contributed to the EITC being plagued with fraud, errors and overpayments that generally exceed the reported rates in other non means-based benefits, like food stamps and traditional welfare programs. In relying on the U.S. tax system's self-attesting process that does not have intrusive and costly case workers screening eligibility, and by tethering eligibility to items (such as relationship of family, residence of children or the presence of income) that may not be known to the IRS at the time an individual files her application for the credit in the form of an annual tax return, the IRS has major challenges in maintaining program integrity. Individuals, some on their own and others in concert with illicit tax return preparers (like Dr. Foxx) or complicit friends and relatives, can exploit the tax system's self-attesting method of claiming benefits and limited capacity for ex post compliance measures. With annual estimates of the EITC improper payment rate at about 24 percent (which accounts for an estimated $15.6 billion in improper payments), this places the IRS at the top or near the top of agencies that (as the narrative frames it) squander precious federal resources on ineligible recipients.

families with three or more children and increased phase-out range for married couples filing jointly), Congress added additional compliance measures directed at refundable credit integrity (Book, 2015, December 18). The additional PATH compliance provisions are "part of the quid pro quo associated with extensions and sweeteners to refundable credits that largely benefit lower-income and more moderate-income taxpayers" (Book, 2015, December 18, para 4).

[26] See Rubin (2016), for an article that can be placed among other scholarship attempting to unpack the rhetoric surrounding the EITC compliance problem.

[27] See Marr, Huang, Sherman, & Debot (2015), for a representative perspective reflecting this narrative.

[28] See Rector & Hall (2016), for a representative perspective reflecting this narrative.

Smyth and Limiting EITC Eligibility to Only Parents

The compliance issues presented in *Smyth* relate to a broader class of issues concerning who are the appropriate adults to be entitled to claim a child for purposes of generating a tax refund based on the EITC. One way to explain the compliance challenges associated with the EITC is in the way the eligibility criteria allows for differing classes of family members to claim the EITC. While parents essentially are the default eligible taxpayers to claim a child who meets age and residency requirements, other family members, such as grandparents, aunts and uncles and siblings, can also claim a child for these purposes. One approach that could minimize compliance challenges for the IRS would be to limit the EITC to adults who are the children's biological parents or other adults who have a legal relationship with the children.

Consider a recent paper by Robert Rector and Jamie Hall at the Heritage Foundation (2016), which proposes to limit the EITC along these lines. In a 2016 report called "Reforming the Earned Income Tax Credit and Additional Child Tax Credit to End Waste, Fraud, and Abuse and Strengthen Marriage[,]" Mr. Rector and Mr. Hall make some broad assertions about the EITC and related benefits' programs, essentially taking a Narrative B type approach to the issue, claiming the program's errors are best explained by claimant fraud rather than by other reasons such as misunderstanding of the EITC's complex eligibility requirements, inability to verify eligibility or actions of third parties like preparers like Dr. Foxx. Rector and Hall make the common-sense claim that it is impossible to expect the IRS to check for eligibility for all the variants of eligibility (2016). The solution they propose (in part) is to scale back who is eligible for the credit, enhance the IRS's verification and substantiation of income requirements prior to the IRS issuing a refund, and to increase claimant penalties for noncompliance (Rector & Hall, 2016).

The proposals merit consideration though, as discussed below, reflect an approach that disregards the circumstances of millions of lower income Americans who depend on the EITC to help meet basic needs and will cause significant harm to children who are major beneficiaries of the EITC. Consider one of the main points concerning the compliance challenges the IRS faces relating to the claiming of children. Rector and Hall note that "[r]oughly one in 10 EITC claims, or some 2.8 million claims per year, are based on false claims of residence by absent parents or relatives" (Rector & Hall, 2016, p. 7). It is a substantial and costly aspect of the EITC compliance challenge (Rector & Hall, 2016). Mr. Rector and Mr. Hall assert it is a reasonable assumption "that most residency fraud involves claims by noncustodial unmarried parents (generally absent fathers) and adult relatives who do not actually reside with the child" (Rector & Hall, 2016, p. 11).[29]

Their solution is to remove millions of potentially eligible claimants by limiting claimants to parents who have a legal relationship with their child, and if no biological parent has legal custody,

[29] As discussed above, there is substantial disagreement as to whether and to what extent errors are attributable to claimant fraud rather than mistake. That under the US tax code noncustodial parents may be allowed to claim children as qualifying children for purposes of dependency exemption (but not for purposes of EITC) suggests the possibility that taxpayer confusion is the reason for error (IRC § 152(e)(2)). The difficulty associated with identifying an error as due to fraud or some other reason is not unique to tax. The Stanford Center on Longevity, in conjunction with the Finra Financial Education Foundation, conducted one of the largest US surveys on the extent of financial fraud in the US suggests that measuring fraud is inherently difficult due to the challenges in determining "intent to deceive" (DeLiema, Mottola, & Deevy, 2017, p. 26).

then only an adoptive parent, legal guardian or foster parent could claim the child (Rector & Hall, 2016, p. 11).

Foxx and Phantom Income: The California Approach to Income for Purposes of the EITC

California, like many states, supplements the federal EITC with a state EITC that is modeled in large part on the federal program (Center on Budget and Policy Priorities, 2016), but when it initially enacted its EITC, it featured one key difference: self-employed taxpayers were generally not permitted to treat their self-employment income as earned income for purposes of the State EITC.[30] As indicated above, the presence of earned income is a necessary element to claim the EITC. The EITC creates special challenges for many self-employed taxpayers because the IRS may, as with the *Foxx* case, find itself investigating whether in fact the taxpayer truly has the earned income she claims on the tax return. In addition, the IRS may find itself examining a taxpayer to ensure that in fact the taxpayer claims all deductions to which she might be entitled, as the amount of the credit may exceed by thousands of dollars the amount of any income or employment tax liability. The inability to seamlessly determine whether a taxpayer's self-reported self-employment income is accurate has led California to change the definition of earned income for these purposes.

The IRS ability to verify earnings claimed on an EITC tax return is one that has attracted Congressional attention. While not as costly as qualifying child errors, income misreporting is the most common error on EITC returns; in fact, approximately 51 percent of returns with an EITC overclaim had an income misreporting error as its sole error (Marcuss, Dubois, Risler, & Leibel, 2014, p. 10). Recent studies indicate between $3.7 billion to $4.5 billion in overclaims were attributable to incorrectly reporting earned income, of which between $3.2 billion and $3.8 billion was associated with self-employment income misreporting (Marcuss, Dubois, Risler, & Leibel, 2014, p. 16). Congress has recently acted to address the issue. The PATH Act accelerates to January 31 for the filing of third-party information returns, including the form that covers nonemployee compensation (Form 1099-MISC). It also delays payment of a refund attributable to an EITC and certain other credits until February 15. The purpose of the delay is to give the IRS more time to identify incorrect or fraudulent claims prior to making payments by requiring employers to report to the IRS and Social Security Administration wages paid earlier than under prior law, which required third parties to file information returns by March 31 (February 28th if by paper) and penalized IRS for not releasing refunds within 45 days of processing a refund by imposing an interest obligation IRS on refunds not issued within that time frame.

In the 2017 filing season the IRS implemented these provisions and had considerable success in using the new rules to prevent the payment of improper claims (National Taxpayer Advocate, 2017). The NTA reports that the PATH changes allowed the IRS to have a material impact on its ability to freeze refunds on returns that may otherwise have reflected income misreporting, with a projected 2.1 percent decrease in improper payments as compared to the immediately preceding

[30] Adopted in 2015 for the 2016 year, California is the 26th state to add a state-level EITC. Unlike most other states, which give individuals a fixed percentage of the federal EITC, California concentrates its credit on lower-income individuals by phasing out the credit at a much lower-income threshold than under federal law (Montialoux, C. & Rothstein, J., 2015). Under legislation enacted in 2017, however, California increased the amount of income that recipients could earn before phasing out its benefits (State of California Franchise Tax Board, 2017b, p. 4).

filing year when the PATH changes were not yet effective (National Taxpayer Advocate, 2017, p. 64-65). The IRS and Congress have high expectations these measures will reduce the opportunities for incorrect claims and increase the ability for the IRS to prevent payment on returns that reflect income that is not reported by third parties.[31]

Yet, while PATH makes considerable inroads in allowing IRS to associate third party income reports prior to having to decide whether to release a refund, it does little to address income that is earned by millions of sole proprietors who are part of the cash economy or the sharing economy and whose income is often not subject to third party reporting.[32] Many of those sole proprietors receive income that is not reported to the IRS; even among the sole proprietors whose income is reported to the IRS (and who are thereby subject to the PATH changes), it is often the case that the information returns are insufficient for the IRS to associate those information returns with the EITC claims. This is because the EITC claim is based on net income; the Forms 1099 are generated based on gross payments.[33]

In contrast with Congress' approach in PATH to give the IRS additional tools to detect and prevent improper payments, California, in initially adopting a state earned income tax credit, took a different approach (California Earned Income Tax Credit, 2017). California avoided the problem of putting the California Franchise Tax Board (the state equivalent of the IRS) in the position of having to prove the amount or existence of a sole proprietor's income by carving out from the definition of earned income any income from self-employment (California Earned Income Tax Credit, 2017).[34] Under the original law, unless the income was received in the capacity as an employee and subject to California withholding, the amount could not be used to generate a state-level EITC (California Earned Income Tax Credited, 2017; State of California Franchise Tax Board, 2017a). To be sure, in 2017, California expanded its EITC to self-employment income, though in doing so it recognized that self-employed taxpayers present challenging compliance problems for tax administrators (State of California Franchise Tax Board, 2017b).[35] Despite

[31] See U.S. House of Representatives Oversight Subcommittee Hearing (2017), for a discussion on this point from the Chair of the Oversight Subcommittee in his introduction statement and from IRS executive Kirsten Wielobob in her testimony.

[32] See Oei and Ring (2016), for a discussion of the sharing economy, where individuals can obtain goods and services from peers via the internet, and how that has exacerbated tax administration problems for sole proprietors.

[33] See Lederman (2010, p. 1740), for a discussion on the conditions where information reporting will likely reduce noncompliance. The article notes information reporting is most effective when it provides the government with complete information necessary to match what is reported on a person's tax return (Lederman, 2010, p. 1740).

[34] See Montialoux & Rothstein (2015, p. 9), who speculated that the reason for the rule was a concern with compliance.

[35] The California EITC is premised each year on the State legislature authorizing and appropriating funds to allow the State taxing authority the resources to "oversee and audit returns associated with the credit" (State of California Franchise Tax Board, 2017b, p. 2). When California initially enacted its EITC, the legislature directed the Franchise Tax Board to explore ways "to allow self-employment income to be included as earned income while protecting against improper payments" (State of California Franchise Tax Board, April 27, 2016, p. 1). The FTB identified a number of ways to enhance compliance among self-employed taxpayers, including imposing additional verification and documentation associated with self-employment income and additional audits of taxpayers whose returns reflect self-employment income. The FTB noted that it surveyed other states' experiences and met with representatives from New York State, which has a vigorous and resource-intensive effort to address improper State EITC claims. According to the FTB, New York representatives told the California FTB that "self-employment income was one of the primary reasons for improper EITC payments" and that "[l]imiting the EITC to wage only-earned income would be an effective method of reducing improper payments due to the ability to reliably match taxpayer-reported wage income against employer-provided wage data" (State of California Franchise Tax Board, 2016, April 27, p. 4).

California now allowing its self-employed taxpayers to potentially benefit from the EITC, its approach to the issue shows how it is possible for a legislature, in the interest of program integrity, to overreact and sacrifice other key policy goals associated with the delivery of refundable credits. California is a cautionary tale showing how the EITC compliance problem can contribute to unfairly punishing taxpayers in an economy that they do not have much power over, instead of thinking through the difficult task of compliance and establishing compliance norms.

Proposals That Anticipate Noncompliance But Also Reflect The Lives of the Working Poor

First Proposal: Allow for Greater Flexibility in Establishing Eligibility Criteria

In the previous section, I discussed two reform proposals designed to address the types of compliance issues associated with in *Smyth* and *Foxx*. *Smyth* implicates qualified child errors, the costliest type of EITC error. *Foxx* implicates income-misreporting errors, the most common EITC error associated. The proposals address different aspects of the EITC compliance problem but share a common theme: reduce opportunities for noncompliance by removing from the eligibility criteria sources that are difficult for the IRS to verify. The Rector and Hall proposal simplifies the IRS task by only allowing biological parents with formal legal custody, foster parents and legal guardians to treat children as qualifying children for purposes of the EITC (Rector and Hall, 2016). California's initial approach would simplify the agency's task by only allowing earned income that is reported by employers on W-2s or otherwise subject to state withholding to be treated as earned income for purposes of credit eligibility (California Earned Income Tax Credit, 2017).

Both measures, if adopted at the federal level, would have a significant impact on overclaims. Consider Rector and Hall's proposal first. It addresses two different, but related, EITC compliance problems relating to qualifying children: residency and multi-generational household errors of the kind in *Smyth* (Rector & Hall, 2016). First, they note that most qualifying child error issues relate to residency (2016). By some estimates, approximately 2.8 million claims are based on false residency claims by noncustodial parents or other adult relatives; in other words, the claimant does not live in the same household with the claimed child for more than half the year (2016, p. 14). Second, Rector and Hall note that, among multi-generational households, another approximately 500,000 erroneous claims relate to custodial parents "permitting" other related adults to claim the child to maximize EITC benefits (2016, p. 7, footnote 39). In those multi-generational households, Rector and Hall argue, families engage in active "benefit gaming" by sharing children among relatives to maximize household EITC receipt (2016, p. 11).

The Rector and Hall proposal directly addresses multi-generational households by eliminating non-parental claimants even if those relatives live with and support minor children (2016). The proposal indirectly addresses residency issues by limiting opportunities for sharing children among nonparental family members who do not reside in the same household.[36]

[36] Rector and Hall discuss the indirect impact and his assumptions:

> A demographic breakout of false residence claims is not available, but it is reasonable to assume that relatively few single biological parents with legal custody fail to reside with their children but still claim the EITC. Similarly, it is unlikely that large numbers of married couples claim the EITC when neither parent resides with the child. A reasonable assumption, therefore, is that most residency fraud involves claims by noncustodial unmarried parents (generally absent fathers) and adult relatives who do not actually reside with the child (2016, p. 11).

Despite little evidence that supports the claim, and considerable evidence that suggests to the contrary (National Taxpayer Advocate, 2015c, p. 330), Rector and Hall assert that the IRS has access to federal databases that will allow it to easily verify the legal relationship of claimants to children; the implication is that under this approach IRS could use summary powers to reject an EITC claim when the clamant is not a biological parent with legal custody or foster parent (2016). This aspect of his proposal is important, as IRS resources are strained,[37] and to be able to reject claims using summary math or clerical error powers is significantly less costly than under traditional correspondence-based examinations that cost hundreds of dollars per examination and often take months to resolve.[38]

To be sure, the proposal reflects and is consistent with the idea that the government should anticipate the largest areas of noncompliance and minimize opportunities for that noncompliance. Limiting the class of adults to essentially biological parents with legal custody would have a major impact on overclaim rates. Assuming accuracy of database information (which is not a reasonable assumption), the IRS at little cost to it could reject erroneous claims without the need for costly and time-consuming correspondence.

Even assuming that IRS could seamlessly have access to accurate information about the residency and relationship of claimed children, the Rector and Hall proposal has a significant shortcoming: it does not reflect the circumstances of the working poor. A core aspect of the proposal is that the EITC is meant to encourage parental work, which in his view is "at the philosophical heart of the program" (2016, p. 11). To be sure, encouraging parental work is a key aspect of the EITC but its origins stem from reducing welfare rolls and incentivizing entry into the labor force, and not promoting any one idea of traditional family arrangements.[39] The lives of the working poor are often characterized by situations present in *Smyth*: adult family members other than parents who live with and support minor children. By eliminating the possibility that the EITC provides a benefit to those families, Rector's proposal results in denying benefits to responsible adults who, like the grandmother in *Smyth*, worked hard to keep and maintain a home for her grandchildren. By extension, the proposal may have a significant negative impact on the lives of children, especially like the grandchildren of Grisel Smyth who benefit from the care and support of family members who act as surrogate parents when biological parents either cannot or are unwilling to provide the support that the children need. As Judge Holmes notes in *Smyth*, it does not in any way "seem just" to deny a benefit meant to reward a low-wage worker who supports and lives with minor children (*Smyth v. Commissioner*, 2017, at *4).

[37] See Debot, Horton, & Marr (2017), for a discussion of the reductions in the IRS's budget since 2010 and the overall decline in the agency's employees.

[38] The IRS estimates that each correspondence examination costs IRS $410.74 and imposes significant burdens on taxpayers in terms of time needed to respond to correspondence (United States Government Accountability Office, 2016). The United States Government Accountability Office also noted that the burden of correspondence examinations on taxpayers is not evenly distributed and that it takes taxpayers approximately 30 hours to fully participate in correspondence examinations (2016). To summarily assess using math error procedures costs significantly less, at least in up front measurable agency costs. The NTA has argued that summary assessment powers are actually much costlier when considering downstream agency and taxpayer costs (National Taxpayer Advocate, 2014, p. 171; National Taxpayer Advocate, 2015c, p. 330).

[39] See Crandall-Hollick (2018) for a summary of the legislative history of the EITC, including its origins as a means to reduce dependence on traditional welfare and encourage entrance in the labor force.

Simply eliminating the ability to claim the credit for the millions of adults who play by the rules and work and care for children is at least in some metrics a way to increase compliance. It will reduce the IRS's challenges in the short-term, and it likely would have not resulted in Grisel Smyth improperly claiming the EITC if there were a bright line "parent with legal custody only" test. A simple rule along the lines Rector and Hall propose is easy for individuals to understand. But it has other effects as well, including creating a structural mismatch between the reality of people's lives and the eligibility for benefits, a situation that can contribute to individuals' increased willingness to engage in noncompliant behavior.[40] If the EITC is principally intended to reward low-wage work, offset the regressive impact of payroll taxes and provide needed benefits to offset poverty for low-wage workers who care for children, should a family member like Grisel Smyth who maintains a household and works a full-time low wage job as a nursing assistant not be able to claim the credit because she, rather than her son, is the main family breadwinner? Inherent in the proposal is a yearning for a time when tax rules generally benefited more "traditional" households, headed by a married couple living solely with their biological children. That period does not exist, was not a stated policy goal of the EITC at the time of enactment or as part of post-enactment legislative expansions, and is unlikely to return notwithstanding any federal incentives.[41]

The basic facts in *Smyth* reflect an increasing reality of American family life. Households consisting of two biological parents and their children are declining, especially for lower-income Americans. A study by the Council on Contemporary Studies and a paper by the Tax Policy Center discuss the decline of traditional two-parent households, with both indicating that changes in family households are more pronounced among lower-income families. In the 1960's about 90 percent of children lived in two parent households; by 2014 just under 68 percent of children were living with both parents (Cavanagh, 2015). American households are increasingly characterized by a shared parenting approach, with younger adult Americans often living with other adults who help financially and with the nonfinancial aspects of child rearing. The Tax Policy paper also discusses the greater fluidity of living arrangements, that is, changes in locations within a year and changes of composition within households (National Taxpayer Advocate, 2016b, p. 336). Underlying census data also shows that, as of 2013, approximately 7.3 million custodial parents of the nation's 13.4 million parents living with children under age 21 did not have any type of legal arrangement outlining custody. About half of the 6.5 million custodial parents who had some arrangement with noncustodial parents provided for visitation privileges for children but did not provide for shared legal or physical custody (Grall, 2016, p.8). These changes are more pronounced among lower and moderate-income families (National Taxpayer Advocate, 2016b, p. 336).

These changes create challenges for the IRS. As the National Taxpayer Advocate has noted, current U.S. tax law, and the EITC in particular, assigns benefits to only one person (or in the case

[40] Sociologists Robert Kidder and Craig McEwen have persuasively discussed how individuals may engage in "symbolic noncompliance" as a way to combat perceived unfairness or inequities in the law (1989, p. 59).

[41] For a summary of the legislative history of the EITC from origin to the present, see Crandall-Hollick (2018), Many reasons have contributed to the changing family make up of American households, including the cost of housing and the opioid epidemic that has afflicted many young adults, often resulting in other family members stepping in and taking informal custody of children. See Desmond (2015), for a discussion of housing costs and its impact on lower-income families. See Whalen (2016), for a recent article discussing the impact of the opioid crisis on children and caregiving.

of a married couple, two people) (National Taxpayer Advocate, 2016b, p. 325). Yet, multiple adults other than parents or legal guardians often have responsibility for and support minor children; many parents are deeply involved in their children's lives, but for many reasons the parents may not have formal legal custody of their children. Limiting the EITC solely to parents with legal custody is inconsistent with the fundamental ways in which lower and moderate-income individuals raise children. As lower-income families often take a shared approach to child-raising (due in part to factors such as high costs of housing and child care), a proposal that limits the class of eligible adults smacks of attempting to shoehorn policy into an idealized image of family life rather than the reality that many lower-income individuals experience.

Is there a different approach that could perhaps better reflect the changing reality of American family life? If some of the noncompliant claimants (like Smyth) are truly engaged in the lives of minor children, then perhaps the solution is to expand rather than contract the class of adults who can qualify to claim children as qualifying children.[42] To better reflect the ways in which many Americans actually live and care for children, Congress could amend U.S. law to allow an adult to treat a child as a qualifying child if that adult provides significant care for a child during the course of a 12-month period. This is similar to what Australia does with its Family Tax Benefit credit, which provides a refundable credit for a child who is in a parent or grandparent's care for at least 35 percent of the time (Australian Department of Human Services, 2017). There would be many details to be worked out in such a system, including the possibility that multiple adults could potentially qualify as a primary carer (and perhaps share the credit, as is possible in Australia), the process for establishing that an adult is a primary carer, and how to define care in a way that perhaps includes but is not limited to residency.[43]

Despite the considerable details that would need to be resolved, the virtue of this approach is that it allows for and considers the greater reality that many adults have connections to children that may justify support from the state, unlike the Rector and Hall proposal, which attempts to limit overclaims by narrowing the class of individuals who would be eligible to claim the EITC. It would have the virtue of redefining previously noncompliant behavior as compliant,[44] an especially attractive option if one views the noncompliant behavior as consistent with the EITC's broader policy goals of rewarding low-wage workers who care for children.

[42] A more far-reaching proposal would be to bifurcate the work and child aspects of the EITC into two separate credits (National Taxpayer Advocate, 2016b, p. 328). Under this proposal, individuals would be eligible for the Family Credit to all taxpayers regardless of income; the EITC would be awarded on a per worker basis, which by definition would include more generous benefits for childless workers. Under this proposal, adults who live with and care for children (even perhaps with children not related to the adult) would be eligible for the Family Credit. By not limiting the Family Credit to households based on income levels, the proposal significantly reduces incentives to improperly share children to maximize credits; by unifying the definition of child it would also minimize taxpayer mistake as a source of error.

[43] In Australia, caring includes factors that are broader than residency. Australia looks to who is the "primary carer" or who in fact has the greater responsibility for the child, including things like who has daily responsibility for the child, who is responsible for transportation to and from school, and who is the child's primary emergency contact (Australian Department of Human Services, 2017).

[44] Congress has done this before with the Economic Growth and Tax Relief Reconciliation Act of 2001 in which the tiebreaker rules were amended and relaxed to "allow[] eligible taxpayers with the same qualifying child to decide amongst themselves who would claim the child" (Marcuss, Dubois, Risler, & Leibel, 2014, p. 2).

Second Proposal: Waive Repayment or Reversal Where to Do So Would be Inequitable

Congress may be unwilling to expand the definition in the way I suggest above. Another more limited proposal that may provide for relief for individuals like Grisel Smyth would be to give the IRS or, on review, a court the option to waive repayment or reversal of an erroneously claimed EITC if repayment or a reversal would be inequitable. This option exists in a number of nontax federal statutes when the government must decide whether it should recover erroneously disbursed funds[45] and shares the objective of giving the IRS additional discretion to compromise an agreed-upon liability when compelling public policy or equity considerations warrant a compromise.[46] The statutes give federal agencies the power to allow for the waiver of repayment when to do so would be "against equity and good conscience" (*Trimmer v. Commissioner*, 2017, at 45-46). While the standard differs according to context, the underlying theme when thinking about equity is whether a waiver would promote the "spirit and habit of fairness and justice" (*Groseclose v. Bowen*, 1987, at 505). The term conscience means "the sense of right or wrong * * * together with a feeling of obligation to do or be that which is recognized as good" (*Groseclose v. Bowen*, 1987, at 505).[47] Often, considerable discretion is left to the agency to consider an individual's facts and circumstances, though in application the courts have looked to the underlying program purpose and have attempted to identify factors to guide the process.

In the context of the EITC, a number of factors could assist the IRS and courts in this determination, including whether it was reasonable for the claimant to conclude she was able to claim the child as a qualifying child, the good faith reliance on a tax return preparer who was given all information about the claimant's circumstances, the degree to which the claimant can establish that she spent a considerable amount of her earnings on support of the household and child, and the hardship that would result from repayment of the erroneous amount. While there would be considerable details to consider in such a proposal (including the mechanism for establishing relief and whether the benefit could extend to individuals who claimed but did not receive the credit following an IRS pre-refund examination), the proposal reflects the possibility that good-faith mistakes may in fact contribute to inequities and that allowing for limited exceptions to the application of eligibility criteria may in fact contribute to more just administration of the laws.[48]

[45] See *Trimmer v Commissioner* (2017, at 45), where the court listed a number of statutes "where the Government must decide whether a recovery of erroneously disbursed funds should be attempted[,]" including Railroad Retirement Act of 1974, Pub. L. No. 93-445, §10(c), 88 Stat. at 1344, codified as amended at 45 U.S.C. §231i(c) (2012); Railroad Unemployment Insurance Act Amendments, Ch. 842, §. 11, 54 Stat. at 1096, codified as amended at 45 U.S.C. §352(d) (2012 & Supp. I 2013); 5 U.S.C. §§5584(a), 8346(b), 8470(b) (2012); 10 U.S.C. §§1442, 1453(b)(2) (2012); 37 U.S.C. §§303a(e), 373(b) (2012); 38 U.S.C. §§5302(a) and (b) (2012); Intelligence Authorization Act for Fiscal Year 1993, Pub. L. No. 102-496, §265, 106 Stat. at 3237-3238, codified at 50 U.S.C. §2095 (2012); Social Security Amendments of 1967, Pub. L. No. 90-248, §152(b), 81 Stat. at 861, codified as amended at 42 U.S.C. §404(b) (2012 & Supp. III 2015); Social Security Amendments of 1965, Pub. L. No. 89-97, §1870(c), 79 Stat. at 331, codified as amended at 42 U.S.C. §1395gg(c) (2012 & Supp. I 2013).

[46] These are so-called effective tax administration offers in compromise (Compromises, 2002). See Freund (2014), for a discussion and critique of the IRS's ineffective administration of ETA offers.

[47] See also *Quinlivan v. Sullivan* (1990, at 526-27), where the Ninth Circuit concluded that in using the phrase "against equity and good conscience[,]" with respect to waivers of overpayments of disability benefits, "Congress intended a broad concept of fairness to apply to waiver requests, one that reflects the ordinary meaning of the statutory language and takes into account the facts and circumstances of each case."

[48] See Book (2015, May 10), for a particularly unfair application of current EITC rules.

Third Proposal: Require Additional Upfront Eligibility Requirements for Some Self-Employed Claimants

The prior two proposals are directed more at the qualifying child errors raised in the *Smyth* case. The California approach to reducing errors in its initial enactment of the EITC is based on income misreporting errors and reflects the somewhat unusual aspect of the EITC as compared to other means-tested benefits programs. While the EITC is designed in part to promote work, the EITC can also promote taxpayers claiming that they did work when they did not, leading to claims based on unverified or perhaps nonexistent earnings or earnings that are reported without any offsetting deductions.[49] This leads individuals to invent fictitious businesses or inflate income (or omit deductions) associated with real businesses.[50]

It is useful to think of this activity in context. In the context of the EITC, there are general issues relating to the IRS's inability to verify taxpayers' earned income. Recent legislation addressed part of this problem. The legislation accelerates the due date when employers and other service recipients are to file Form W-2 and Form 1099 to January 31 and delays issuing EITC-based refunds until February 15th. The idea behind the changes is to ensure the IRS can verify income that claimants report on EITC claims, and allow the IRS to contact taxpayers where those information returns do not match reported income on the tax returns (Protecting Americans from Tax Hikes Act of 2015).

The PATH legislation partially addressed EITC income misreporting issues of self-employed individuals. Self-employed individuals account for approximately two-thirds of income misreporting overclaims (Marcuss, Dubois, Risler, & Leibel, 2014). It is noteworthy that self-employed individuals present the greatest challenges in terms of individual income tax compliance,[51] and the EITC is only a small subset of issues that pertain to this class of taxpayers. Due in large part to the absence of meaningful third-party reporting and withholding, the underreporting of income associated with self-employed individuals accounts for a majority of the overall individual tax gap (Internal Revenue Service Research, Analysis and Statistics, 2016; Tax Policy Center, n.d.). While there have been legislative and administrative proposals to address that issue, it stubbornly persists.[52]

California's initial approach to address this issue in the context of EITC was simple: rather than require the California Franchise Board to verify whether a sole proprietor truly had the income she reports, California removed income that is self-employment income from the definition of earned

[49] Deductions associated with a trade or business that would potentially generate income to support a claimed EITC are not permissive; in other words, a taxpayer is required to claim deductions that are attributable to the taxpayer's trade or business (See e.g., Order, *Kalokoh v Commissioner*, 2015).

[50] It is possible as well that an EITC claimant in the phase-out range of the EITC could take the more traditional approach to noncompliance and understate income or overstate deductions.

[51] See DeLaney Thomas (2013), for a discussion of recent compliance data and noting that self-employed individuals have an overall compliance rate of less than 50%. Delaney Thomas, looking at IRS data, notes that among individuals in cash businesses sole proprietors report "a staggeringly low 19% of their income" (2013, p. 112).

[52] See Beers, LoPresti, & San Juan (2012) and Beers, Wilson, Nestor, Ibbotson, Saldana, & LoPresti (2013), for thoughtful studies on factors that might encourage sole proprietors to comply, including the importance of increasing trust in the government and tax system). See Bankman, Nass, & Slemrod (2015), for suggestions on ways to use behavioral economics principles to prompt greater compliance among self-employed taxpayers.

income. The California approach takes as a starting point the goal of minimizing the opportunity for noncompliance. Like the Rector and Hall proposal, however, it shares a disconnect from the lives of the working poor. Over the past decade, there has been a significant increase in the number of workers who work as sole proprietors, with the norm of steady employment by one employer shrinking.[53] By removing the possibility that self-employment income can generate an EITC, the proposal sacrifices other program goals. It raises equity concerns as people are treated differently depending on whether income is classified as wages or as self-employment income. Given that worker misclassification is a serious problem in the United States (and employers have incentives to treat workers as contractors rather than employees) the California's initial approach if adopted elsewhere would likely cause significant hardships to workers.[54]

Is there a way to minimize opportunity for noncompliance among the self-employed but still reflect the importance of this type of work? Rector and Hall propose that individuals either provide a Form 1099 showing the income that is earned or submit proof of a business' existence by furnishing information about State or local registration or licensing. In addition, Rector and Hall propose that all self-employed individuals submitting EITC claims would be required to submit invoices identifying goods or services sold and also prove that in fact they have paid self-employment tax regularly during the year.[55]

Rector and Hall's proposal that self-employed individuals be required to submit invoices and other proof of existence is far too burdensome on taxpayers, who would likely be unable to e-file returns with such requirements. In addition, it would impose significant costs on the IRS. Imposing additional burdens on self-employed taxpayers who claim the EITC raises fairness and potential due process concerns,[56] as it is inconsistent with what the tax law generally requires of other self-

[53] U.S. labor is increasing the number of sole proprietors and the number of sole proprietors who rely on independent contractors (Beesley, 2013; King, 2014). In 2013, over 70% of businesses were "owned and operated by sole proprietors or sole traders" (Beesley, 2013). According to King (2015), in 2013, there were 24 million sole proprietors who generated $1.34 trillion in revenue, compared to 2012, where there were 23.5 million sole proprietors who generated $1.30 trillion in revenue. Similarly, in 2014, nonfarm sole proprietorship activity reported "approximately 24.6 million individual income tax returns [, which represents a] 2.3-percent increase from 2013 (Dungan, 2016, p. 2). Further, in 2014, profits for nonfarm sole proprietorships totaled $317.1 billion, which represented an increase of 4.9 percent from 2013 (Dungan, 2016, p. 2). Additionally, between 2010 and 2013, there was a 38 percent "growth in the dollar amount of sole proprietor's use [of] contract labor" (King, 2015). According to Worstall (2016), job growth over the past decade, from 2005 to 2015, is contributed to a significant rise in contractor and temp jobs. For instance, the study shows that from 2005 to 2015, alternative work arrangements, such a temp jobs, on-call workers, and contract works, "rose from 10.1 percent in February 2005 to 15.8 percent in late 2015" (Worstall, 2016). "The percentage of workers hired out through contract companies showed the sharpest rise increasing from 0.6 percent in 2005 to 3.1 percent in 2015" (Worstall, 2016).

[54] Worker misclassification "presents one of the most serious problems facing affected workers, employers and the entire economy" (United States Department of Labor). The U.S. Department of Labor has, in partnership with many states, undertaken a major initiative to combat misclassification but the problem persists and is often disproportionately affects lower-income workers with less bargaining power (Department for Professional Employees, 2016).

[55] Rector proposes all individuals claiming an EITC based on self-employment income must provide a Form 1099 documenting the income or be a registered or licensed small business under state law (Rector, 2016, p. 14). In addition, all individuals must provide invoices of payments that identify customers and the service provided and must have paid self-employment taxes regularly during the year (Rector, 2016, p. 14).

[56] See Tahk (2017), for a discussion of how rights-based claims, including procedural due process, may extend to EITC claimants.

employed taxpayers, despite high levels of noncompliance associated with self-employed taxpayers in areas outside the EITC.

Despite the obvious flaws in the specifics of the proposal requiring submission of invoices, the notion of varying EITC-filing requirements among differing taxpayers has appeal. In other words, current rules essentially default to a one-size-fits all approach to upfront filing requirements for the EITC. Perhaps some classes of claimants should have additional requirements that perhaps can be satisfied with submission of some sample documents or an affidavit of eligibility that explicitly identifies and describes the goods or services that the claimant provided. For example, sole proprietors whose income is not subject to Form 1099 reporting (and thus not addressed in the recent PATH legislative changes) might be a prime target for additional self-disclosure requirements.

While the Rector and Hall proposal in its full form is a likely nonstarter in light of fairness concerns and taxpayer and IRS burden, the principle that some claims may necessitate additional upfront eligibility requirements warrants further consideration. There are considerable details that would need to be addressed in any approach that would vary the upfront eligibility requirements associated with self-employed workers. Some of those details include what documents would suffice, which taxpayers were subject to the requirements, whether third parties could assist the IRS in reviewing documents and whether the payment of self-employment tax should be a necessary requirement, since so many EITC claimants have no positive self-employment tax liabilities when taking into account the EITC. To reflect the reality that not all individuals with self-employment income have a structural incentive to misreport income, perhaps the additional documentation requirements should only be targeted to self-employed individuals who have self-employment income that generates an EITC that is greater than would exist in the absence of the reported self-employment income.[57] In addition, if IRS were to consider varying the requirements for some claimants it would benefit from the input of small business taxpayers and their advisors as well as a careful review of the impact of the benefits and costs of the requirement, including their impact on eligible claimants who may decide to opt out of claiming the EITC in light of the additional compliance costs.

Fourth Proposal: Further Encourage the Use of Certain Tax Return Preparers

A final proposal bridges the issues implicated in both *Smyth* and *Foxx*. Both cases are typical in many EITC claims because the taxpayer relied on and paid for the services of a tax-return preparer and Foxx was subject to IRS attention after it had discovered that many returns he prepared reflected income that was non-existent or overstated. Tax-return preparers play an important role in the tax system in general and with respect to the EITC in particular. While there has been a steady growth in individual use of tax software to prepare tax returns and EITC claims without the use of a preparer, approximately half of all EITC returns are prepared by tax return preparers.[58]

[57] Consider an example where an individual has W-2 income that places the EITC recipient in the plateau or phase-outrange of the EITC. That individual who properly reports her self-employment income would actually receive a lower EITC as a result of reporting the self-employment income. Imposing additional compliance responsibilities on that person would be unwise as it would increase taxpayer burden at no potential benefit to the fisc.

[58] "Fifty-five percent of returns claiming EITC were prepared by paid return preparers in tax year (TY) 2013" (National Taxpayer Advocate, 2015a, p. 261).

Apart from a few states, the U.S. tax system allows for any individual to prepare tax returns for compensation, without requiring individuals to possess minimum or continuing education requirements or to pass a test demonstrating competence in basic tax knowledge.[59] The IRS unsuccessfully sought to regulate unenrolled return preparers with the Court of Appeals for the District of Columbia in *Loving*, holding that the IRS acted outside its authority in mandating continuing education and competency testing for unenrolled tax return preparers (*Loving v. IRS*, 2014). Unenrolled preparers play a significant role in preparing and submitting EITC claims, accounting for approximately three-fourths of all prepared EITC returns (National Taxpayer Advocate, 2015b, p. 71). A 2014 IRS study, released after the D.C. Circuit decided *Loving*, showed that unenrolled return preparers had the highest frequency and percentage of EITC overclaims, with almost half of those EITC returns having an overclaim, and overclaims constituting roughly one-third of the total EITC claimed on those returns (Marcuss, Dubois, Risler, & Leibel, 2014).[60]

Following the IRS defeat in *Loving*, it instituted a voluntary program known as the Annual Filing Season Program.[61] The program allows unenrolled preparers to voluntarily elect to take continuing education classes, pass a competency examination and agree to be bound by professional responsibility standards. In exchange, the IRS lists the preparers in a national searchable database and allows those preparers to interact with IRS examination employees if the return that the preparer submits is selected for examination or if the IRS has questions regarding the processing of the returns. The NTA, among others, has repeatedly called for legislation that would explicitly give the IRS the authority to regulate and require a mandatory return preparer regulatory program (National Taxpayer Advocate, 2002, p. 216; National Taxpayer Advocate, 2013).[62] The idea behind the proposals is that the error rates among unenrolled preparers suggest that significant numbers of preparers either lack the tax law knowledge to competently advise taxpayers or seek to exploit taxpayers. They may exploit taxpayers by facilitating noncompliance by recommending ways to generate an improper refund or by turning a blind eye to due diligence requirements that are specifically targeted to return preparers submitting tax returns with certain refundable credits, including the EITC.

While regulation of return preparers alone cannot control for all program errors, the increased accountability and visibility of preparers would likely serve to encourage additional compliance (Book, 2008, p. 90-91), and increasing the skills of preparers would likely contribute to fewer returns reflecting unintentional errors. This would be especially likely if the IRS embarked on a sustained public education campaign regarding the role of tax return preparers and the IRS further paired a program with a compliance and education campaign directed specifically toward encouraging the use of competent and ethical return preparers.[63]

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[59] One exception is for return preparers under various IRS sanctioned volunteer programs (Internal Revenue Service, 2016). Those preparers are required to pass a competency examination and to sign volunteer standards of conduct certification (Internal Revenue Service, 2016).

[60] See Marcuss, Dubois, Risler, & Leibel (2014, p. 36, Table 9), for a comparison of other preparers as comparison.

[61] The program started in 2014 (Internal Revenue Service) and has been updated annually (Internal Revenue Service, n.d.).

[62] See Soled & Delaney Thomas (2016), for a proposal to regulate both tax return preparers and tax preparation software providers.

[63] See National Taxpayer Advocate (2013, p. 70), for specific ideas around such an awareness campaign. See also Kornahuser (2007), suggesting that tax morale can influence compliance and suggesting that the IRS should better use media campaigns and education to influence compliance. The theory behind such an approach recognizes that not all

When unenrolled tax return preparers, such as Dr. Foxx, facilitate noncompliance either by directly advising individuals how to file erroneous claims or failing to exercise their specific due diligence obligations, taxpayers like Shakeena Bryant are often left with the consequences, including a possible tax liability to the IRS and no way to recoup the preparation and ancillary costs associated with submitting the tax return.

In the absence of legislation, the IRS does not have the authority to require all preparers to consent to testing and education requirements. There are possible ways the IRS could further encourage individuals who do use tax return preparers to use certain preparers that opt in to the IRS voluntary program. For example, the IRS could expedite the issuance of refunds for returns submitted by preparers who opt in to the annual filing season program, on the ground that the relatively high error rates associated with unenrolled preparers justifies additional scrutiny of those returns.[64] In addition, the IRS could publicize that it would subject returns from preparers who do not opt in to the IRS program to greater risk of audit. Aversion to IRS scrutiny might encourage taxpayers to visit preparers who have demonstrated a commitment to education in the tax law and have explicitly agreed to be covered by Treasury rules meant to regulate the conduct of those who appear before the IRS.

There are additional costs associated with additional requirements imposed on preparers and taxpayers, including the possibility that preparers will pass on additional compliance costs to the taxpayers. In addition, there is always a risk that taxpayers and preparers wishing to avoid the scrutiny of the IRS may collude to ensure that the preparer does not identify him or herself on the tax return, a phenomenon known as ghost preparing. Ghost preparers (anecdotally at least) seem to be on the rise and may explain the recent decline in paid preparer usage on EITC returns.[65] Yet, the relationship between preparers and taxpayers is dynamic and is a fertile area for additional research. Prior studies have identified at least seven different reasons why a preparer may submit an erroneous EITC claim, and not all errors associated with preparer-submitted returns are attributable to preparer misconduct or incompetence.[66] The IRS itself has warned it is difficult to

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regulated parties will need to have intrusive actions to comply; some may comply as a result of education and service that the agency can provide. These insights have come under the broad heading of responsive regulation. Responsive regulation sets forth a regulatory pyramid with a "series of options that a tax authority might use to win compliance, sequenced from the least intrusive at the bottom to the most intrusive at the top" (Braithwaite, 2007). See National Taxpayer Advocate, 2015a, p. 266 for specific suggestions that adopt the responsive regulatory framework in the context of ways the IRS can improve the oversight of tax return preparers submitting EITC claims.

[64] See Drumbl (2017, p. 284), for a similar idea, suggesting a "Fast-track EITC" along the lines that airport passengers can opt in to avoid security lines.

[65] The IRS itself identifies these preparers as ghost preparers (Internal Revenue Service, 2011).

[66] The seven different reasons why a preparer may submit an erroneous EITC claim include the following:

1. Ignorance or misunderstanding of the law – poor training, inadequate attention to changes in the law, or complexity of the law;
2. Misunderstanding or failure to understand or learn the facts – due to language or cultural barriers – can also be related to ignorance or understanding of the law, as the practitioner may not know what information is relevant;
3. Inability or unwillingness to detect false or incorrect information, though the inability or unwillingness or inability is not reflective of failing to exercise due diligence;
4. Facilitate noncompliance by not exercising appropriate due diligence to verify facts or information;
5. Aid and abet in noncompliance by advising taxpayers how to misstate or omit income, or claim inappropriate or excessive deductions or credits;

draw conclusions from the compliance research that shows a higher overclaim rate among unenrolled preparers, as the higher rate may be attributable to selection bias of the taxpayers themselves (Internal Revenue Service, 2014), an issue the *Foxx* opinion raises in light of Dr. Foxx's claims that he was essentially preparing the erroneous return based on the information that Ms. Bryant provided to him. Yet, even assuming that selection bias accounts for some of the differences, preparers who comply with due diligence obligations or otherwise signal compliance norms may influence taxpayers, especially taxpayers who are not committed to gaming the tax system or taxpayers who may in fact be influenced by preparers who wish to prepare and submit accurate tax returns.[67] Taxpayers who may be on the fence or subject to the influence of preparers who facilitate or broker noncompliance would benefit from a system that encouraged the use of preparers who are more visible and accountable.

CONCLUSION

The EITC presents significant challenges for taxpayers and the IRS. American tax reform is likely to include a review of the IRS role in administering benefits that that benefit working families. While the EITC has enjoyed bipartisan support, critics have pointed to high error rates and have suggested proposals to limit eligibility as part of an effort to improve program integrity. In designing any benefits' program targeting lower-income working families, there are differing ways to minimize opportunities for taxpayer noncompliance and facilitate greater systemic detection and prevention of error. This paper reviews two recent tax cases, *Smyth* and *Foxx*, and explores aspects of key compliance issues that those cases typify. After reviewing those cases and suggesting that they represent ways in which the current law can entrap individuals to misstate EITC eligibility, this paper considers a recent Heritage Foundation proposal and the initial California state EITC legislation meant to address compliance concerns implicated in the Smyth and Foxx cases. This paper reveals how the Heritage Foundation proposal and the initial California rule reduce compliance risk but fail to reflect the ways Americans live and work. While tax agencies can often efficiently deliver benefits, given increasing family complexity and fluidity, and a work force that often has earnings that are not subject to information reporting, limiting EITC eligibility to parents with legal custody and eliminating from the definition of earned income self-employment income raises equity concerns. Proposals that restrict the ability for families to claim the EITC may improve program integrity but if the proposals do not reflect the lives and experiences of the claimants themselves, they will likely be counterproductive. Despite the challenges in crafting measures to address integrity that do not impose unfair taxpayer burden,

> 6. Facilitate continued noncompliance by advising taxpayers how to arrange affairs to minimize chances of detection, including advising taxpayers on practices or positions that are likely to otherwise generate IRS attention; and
> 7. Directed noncompliance – working in an environment where there is a culture of noncompliance, either through insufficient quality control or active and affirmative exhortations to take affirmative steps which are meant to minimize liabilities or maximize refunds. (Book, 2008, p. 6)

[67] Morse suggests the IRS could better utilize gatekeepers, like tax return preparers, to encourage taxpayer compliance, especially if the IRS tied such reliance to greater publicity and education (2009, p. 499-500). In addition, Boll looked to Danish efforts to nudge consumers to purchase services from tax compliant businesses; as with incentives to use certain preparers, the idea behind the Danish approach is to rely on external stakeholders to achieve regulatory goals (2016). Lederman suggests that normative beliefs about honesty play an important role in tax compliance, with the IRS capable of using targeted enforcement to establish a critical mass of compliance norms among subgroups that may have stubborn norms of noncompliance (2003). Oats and Onu review research on social norms on tax compliance, sharing insights from other disciplines (2015).

there are ways to improve compliance that also reflect the reality that many lower-income Americans face.

Ultimately, no single approach is likely to be effective given that there are many differing causes for EITC noncompliance. With recent legislation accelerating the filing of information returns and mandating a delay in payment of credit-based refunds, Congress provided an approach that allows the IRS to have better information before it decides to release refunds to claimants. This paper offers other proposals that can contribute to greater program integrity while also reflecting the reality and complexities of lower-income lives.

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DEVELOPING FISCAL LEGITIMACY BY BUILDING STATE-SOCIETAL TRUST IN AFRICAN COUNTRIES

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Abstract

Developing countries continue to face the challenge of creating state-society trust and, in turn, compliant taxpayers. This endeavour is hampered by, amongst other things, state inefficiencies, inequalities and corruption, and a lack of accountability, responsibility and transparency, which continue to exist in developing countries, potentially resulting in unfair and unjust government administrations. The impact that a government and its tax administration have, through practices (either real or perceived) relating to these challenges, has an effect on taxpayers' compliance and trust in government. This article analyses elements of fiscal legitimacy of the fiscal state and posits that, in trying to widen a developing country's tax base and increase taxes, one must understand how to build taxpayer compliance. Using African examples, this article reflects on the context of taxpayers in African countries and the ways in which a state can go about building a culture of compliance and trust between state and citizens.

1. INTRODUCTION

Tax revenues, which are essential for development, are structurally falling short. Domestic regional, continental and global fiscal systems have not been properly designed and implemented, with poor legal and regulatory systems and even weaker enforcement systems being in place. The state is unable to keep up with modern developments in the economy. As a result, tax evasion and illicit financial flows are widespread, the tax base is too narrow, and the payment of taxes and tax morality are not embedded into the social fabric of states. Tax, however, is not solely to be viewed as a technical matter – it is at the heart of nation-building, politics and social justice (Martin, Mehrotra, & Prasad, 2009). Taxes are at the heart of the social contract between citizens and the state (OECD, 2012). Tax both shapes government legitimacy and promotes public accountability to tax-paying residents (Di John, 2009). However, weak political institutions and poor administrative capacities represent major constraints (The IMF, OECD, UN and World Bank, 2011). In Kenya, for example, when the current president was asked, in 2013, what he was intending to do to curb corruption, his response was that he could do nothing. This has, arguably, led to a spiralling increase in corruption within the state administration and a discourse in general society suggesting that there is no need to pay taxes as the money is all being stolen. Recent corruption scandals which have appeared in the press, such as that involving the National Youth Service, have reinforced this idea (Mukinda & Lang'at, 2018).

Public goods have become the property of the privileged few. Many countries on the continent do not provide good health care and many people are left to their own devices, making out-of-pocket payments as well as using insurance schemes when faced with medical problems (Tafirenyika, 2016). However, the limited public health services available in Kenya are not being maintained

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and staff are not well paid. In Kenya, doctors and nurses were on strike for several months in 2017, crippling the public health care system (Oketch, 2017). The academic staff in the universities were also on strike for more than four months last year, delaying the graduation of the students and, again, leading to a breakdown in the system and a compromise in the quality of local degrees (Wanzala, 2018). As a result, impunity, corruption, fraud and capital flight have become the norm.

Even when the system has been designed well, the regulatory environment does not work and enforcement is often subject to political whims and economic interests. The pressure on more developed governments to give preferential treatment to their multinational companies in lesser developed countries when granting tax advantages and exemptions is also high (Morisset & Pirnia, 2000). Although the traditional answer to the question of how best to increase revenues seems to rest on improved collections, one of the ways by which collections can be increased in developing and post-conflict states is to make a clearer link in the minds of citizens that taxes are, in fact, being used for their benefit, thus converting them from unwilling to willing and compliant taxpayers who then contribute to the state (Björklund Larsen, 2018).

A good state-led development policy, if disseminated properly, can be used to make the case that taxpayers' money, i.e. residents' money, has been used to improve their lives. Improvements to living standards must be linked to taxes as clearly as possible through proper tax collection, media awareness campaigns, and finance and tax literacy classes, as well as in a clear taxpayers' charter (Cvrlje, 2015). Unfortunately, there will always be tax evaders and, as a result, this article will move forward on the premise that there will never be a perfect solution, only a suboptimal compromise. However, in order for this compromise to be predominantly positive and progressive, the policy must begin with the dissemination of information about effective and efficient expenditure systems which are carried out transparently, accountably and responsibly, through a decision-making process that is fair and just in the eyes of society at large.

This article will consider the perspectives of the state and society in order to investigate the reasons for tax collection, the importance of taxes and the roles that both parties have to play. The state plays an oversight role in spending emanating from the levy and collection of taxes. If the relationship between taxes and spending is not carefully handled, the fiscal legitimacy of the state is potentially undermined through an erosion of taxpayer compliance. The focus of this article will be to delve into the structure, composition and actions of revenue authorities in their interactions with tax compliance and societal trust, as they grapple with how to achieve a tax collection system that works *with* rather than *against* fiscal legitimacy.

The analysis will be based on the theory that, firstly, one needs to build societal confidence in a state in order to collect taxes and, secondly, that the collection of taxes is an affirmation of societal confidence based on the willingness of the taxpayer. In an era of fiscal crisis, it is critical to ensure that taxpayers remain willing to comply. The manner in which to approach this, in a developing state, becomes critical for the financial survival of that state. As a result, this article is broken down into several parts. Part 1 introduces the issue. Part 2 explores the concept of fiscal legitimacy and the theory of the fiscal state as a mechanism by which to develop taxpayer compliance. Part 3 charts the practical problems with tax compliance in African fiscal states as elements within the rubric of fiscal legitimacy. Part 4 makes recommendations and Part 5 concludes.

2. BUILDING FISCAL LEGITIMACY

Fiscal legitimacy consists of the trust that the society has in the state and is expressed by a continuing willingness to pay taxes. Fiscal legitimacy has seven characteristics: the transparency, accountability, responsibility, effectiveness and efficiency, and fairness and justice of a tax system (Waris & van Kommer, 2011). However, the question of who is responsible for the system when it comes to achieving fiscal legitimacy remains a challenging one and the stakeholders in this process include the domestic society, state, donors, international institutions, educators, taxpayers and the media (Waris, 2013a).

It is impossible to discuss all elements of these very broad concepts within one paper and, as a result, this paper will identify and focus on the challenges of trust and taxpayer compliance facing most African countries for each of the seven concepts, which will be grouped together as follows:

- Fairness and justice.
- Transparency and accountability.
- Responsibility.
- Efficiency and effectiveness.

Undermining any of these concepts potentially results in some form of taxpayer non-compliance which, in turn, leads to an unfair distribution of the tax burden and a reduction in the resources available for redistribution. Before examining these seven characteristics of fiscal legitimacy, the article first explores the fiscal state, its typology and its relationship to tax compliance.

2.1 The Fiscal State and the Social Contract

Schumpeter argued that a good fiscal administration could delay or even avoid a fiscal crisis (Schumpeter, 1918). He stated, in his analysis of the collapse of the Austrian tax state, that its failure was not merely to do with the budgetary crisis, but was also a superficial sign of the link between fiscal affairs, the social structure and the understanding of its historical structure (Musgrave, 1992). In delineating the development of states into two types, Schumpeter broadly set out the characteristics that feature in the transition of a state from a domain state to a tax state (Schumpeter, 1918, pp. 102-116). Subsequently, in 1987, Kruger proposed a model of transition of a state from a domain to a tax state, based on Schumpeter's analysis (Ormrod, 1999).

In 1999, Ormrod and Bonney analysed Schumpeter and Kruger's models and supplemented them to create a typology of the stages of development of the fiscal state. They posited that there was a necessity to build upon the Schumpeter-Kruger "model for two reasons. Firstly, it was too limited to a particular era and part of Europe. Secondly, it failed to address the issue of the interaction between expenditure, revenue and credit, and the causes of instability and change in a fiscal system" (Waris & van Kommer, 2011). Instead, they argued that Schumpeter had posited that public expenditure was a circumstance to which tax must adjust, which has been supported by others (Musgrave, 1992, p.103). The Ormrod-Bonney (OB) model identifies several characteristics of states that can be used to distinguish states' different historical forms based on their levels of fiscal development, specifically: financial theory; form of government; central administration; local administration; office holders; state responsibilities; method of financing; public finance;

expenditure; revenues; credit structure; role in economy; economic policy; public enterprises; political participation; social consequences; statistics; and causes of instability / precipitants of change in the system. However, their analysis was based on the development of European states. Subsequently, there has been an attempt to begin to analyse the status of developing countries, in particular, Kenya (Waris, 2013a). Waris begins to categorise it using the OB model and adding inhuman rights as an indicator. A further reading of the model, however, makes one feel that, in the case of developing states, there are other requisite changes that need to be accounted for. Since then, scholars have added further features, including the structure of African tax administrations (Waris & van Kommer, 2011), and tax literacy in Rwanda and, more recently, South Sudan (Waris & Murangwa, 2012).

The OB model, developed through the historical analysis of European states, set out key indicators but did not explore the principles that developed in a society leading to the improvements in the indicators. This gap was subsequently addressed by Waris through an analysis of the OB Model while reflecting on, and developing, the principles of fiscal legitimacy (Waris, 2010). However, fiscal systems and models are, at best, suboptimal and a compromise between limited resources and unlimited requirements. It is accepted that no state's development mirrors another. While recognising the incompleteness of any solution, an attempt is undertaken in this section to utilise fiscal sociology and fiscal legitimacy, so as to draw a parallel between their diverse developmental processes and chart a way forward for the building of taxpayer compliance based on the direction African states have taken. The ensuing analysis will proceed on that basis, although all states may not, and should not necessarily, emulate the European experience in order to build state-societal trust and tax compliance. The next subsection will set out the principles of fiscal legitimacy in the context of tax compliance.

2.2 Fairness and Justice

The influential, fourteenth-century, African historian, Ibn Khaldun, developed what is today referred to as the natural law view of justice. His perspective is different from that of Adam Smith and, basically, Ibn Khaldun argues that justice is an umbrella principle which must be considered when looking at all other tax principles (Waris & Latif, 2015). This paper will move forward on the grounds that, while fiscal legitimacy encompasses the seven principles set out, these two principles, fairness and justice, remain the umbrella principles, as argued by Ibn Khaldun, under which all others should be applied.

Ibn Khaldun's argument is, for example, reflected in the U.S. taxpayers charter, which lists ten rights, including the right to a fair and just system.[2] However, the terms of justice are traditionally for human taxpayers, while these are for all taxpayers, human and non-human. As a result, one must not confuse human rights under the Universal Declaration of Human Rights with taxpayers' rights under the taxpayer charters that are being developed globally. There are arguments for different types of fairness for companies versus individuals and domestic versus cross-border activities.

[2] IR 2014-72. Other rights include the right to be informed; quality service; pay correct amount; IRS position challenge; appeal; finality, privacy, certainty retain representation.

When reflecting upon fairness and justice in respect of a society and its people, odd spending decisions can be pinpointed, especially in the context of development and its failure to tie spending and capacity-building to the national development plan of a state. For example, the Rwandan government insists that all donor aid spending must tie in with the state's National Development Plan, which shows the achievement of development priorities agreed upon with the society annually (Government of Rwanda, 2006). However, in 2014, the UK's Department for International Development funded the revenue authority, Her Majesty's Revenue and Customs (HMRC), to go to the Republic of South Sudan to train staff on transfer pricing. In a country where the nation is still in conflict, and the domestic society has never paid taxes and has no domestic education system in place at all, and where more than 90% of the population live on less than 50 US cents a day, to train staff on transfer pricing – a complex and often misunderstood law that takes years to understand – adds complexity to laws in a state that should be focussing on simple laws and the broadening of the domestic tax base through literacy and tax literacy campaigns.

Most African countries that receive aid or take loans from the International Monetary Fund (IMF) do not get to decide on their tax policies and, as a result, are constrained to implement what an institution that is not part of the society decides on their behalf. 19 African countries have had loans from the IMF in 2018 ("The IMF Is Back in Africa", 2017). From these few examples, one can see that fairness and justice must be placed in a domestic context and must answer domestic needs and requirements without undermining the governance of a state. However, in the case of fairness and justice, the result is always as affected by perception as it is by reality (openAfrica, 2015).

2.3 Transparency and accountability

Transparency and accountability work hand in hand in two ways, firstly, in terms of the information being provided to tax authorities by taxpayers and, secondly, in terms of the information being provided to them by other revenue authorities and the information being provided by the government and revenue authority to their taxpayers. Without confidence in the system and trust, there cannot be integrity and, therefore, accountability and transparency go hand in hand. This needs to be balanced against the right to privacy, as well as taxpayer literacy and knowledge. More and more information is being released into the public domain, but not all African countries currently have freedom of information legislation and, even when they do, this is not always extended to taxation.

Access to information includes the ability of a citizen to obtain information in the possession of the state. That means real information, which is useful, practical and capable of helping the citizen to form an informed opinion about an issue. Unhindered access to information, in addition to being regarded as an essential ingredient in democratic governance, is regarded as a fundamental human right (Arko-Cobbah, 2007). Where freedom of information (FOI) is absent in a national legislative framework, citizens cannot effectively access information about basic services, fully participate in the social and economic development of their country, or hold their government accountable for public spending, which can, in turn, adversely affect their rights to health, employment and education, and their capacity to fight corruption (Mohan, 2014). Poor access to information disproportionally affects women, children, the poor and the marginalised, who are often adversely affected by a lack of vital information with respect to their legal, political and economic rights.

Furthermore, it negatively affects economic growth and development, where inadequate mechanisms for sharing information are often attributed to slow progress (Mohan, 2014).

Prior to 2011, the number of African countries with FOI legislation stood at five, representing just 9% of the continent; this number has since increased to 13, representing 24% of all countries in Africa. Currently, South Africa, Angola, Zimbabwe, Uganda, Sierra Leone, Côte D'Ivoire, Nigeria, Niger, Ethiopia, Rwanda, Tunisia, Guinea and Liberia have all adopted FOI laws (Mohan, 2014). A study by the African Platform on Access to Information (APAI) examined the state of access to information in 14 countries in Sub-Saharan Africa. It found that, in addition to existing legislation, 65% of the countries surveyed had more specific sectoral laws that supported the right of access to information (Mohan, 2014). The study found that in countries where no specific FOI rights existed – including Senegal, Tanzania, Zambia, Kenya and the Democratic Republic of the Congo – sectoral laws often provided an alternative mechanism by which citizens could access information. In the Democratic Republic of the Congo, for example, laws such as the mining code had been used to ensure greater access to, and disclosure of, information (Mohan, 2014). Mining communities have used the act to seek information about mining revenues and the amounts they are entitled to, as well as how licences are allocated (Mohan, 2014). Other examples of such laws include whistle-blower protection, data protection, public procurement, fiscal responsibility and extractive industry transparency initiative acts (Mohan, 2014).

In Angola, the biggest question related to freedom of information is: what has happened to the country's oil wealth? Angola has a freedom of information law in place, but it has no constitutional foundation other than parliamentary initiative (Darch & Underwood, 2010). In the Democratic Republic of the Congo, the 2002 Mining Code clearly establishes the procedures for obtaining licenses (Democratic Republic of the Congo, 2002). However, state-owned companies (SOCs) still hold many of the most lucrative titles and have signed numerous joint-venture contracts under opaque circumstances, undermining the competitive provisions of the Mining Code (Revenue Watch Institute, 2013). There is no equivalent of a Freedom of Information Act (Revenue Watch Institute, 2013). In addition, it remains unclear as to which royalties actually flow into the national treasury. In Mozambique, the government makes much information freely available. However, the media do not use it to hold the political class accountable in new ways and a draft access law has not gained widespread support (Darch & Underwood, 2010).

Tanzania provides some information about mineral production and revenue, but its failure to publish mining contracts and a lack of available data on the state-owned mining company contributes to a weak governance regime (EITI, 2017). Little information is available about the mineral licensing process before licences are granted (EITI, 2017). Once mining rights have been awarded, information is only available in a complex digital format for a fee and environmental impact assessments, which are often not submitted before a licence is granted, are released only upon request. In addition, Parliament does not regularly review mining earnings. Meanwhile, in South Africa, the laws on access to information are regarded as the "gold standard", but the government does not publish mining contracts or environmental impact assessments and the Mineral Resources Department regularly ignores requests for information, violating the provisions of the Promotion of Access to Information Act (Darch & Underwood, 2010).

Generalist or tabloid media cause a crucial block and their effect on transparency is crucial. Taxpayer rights would be problematic without a free, aggressive media. There must be no secrecy-based laws. The government, as the steward of the resources of the country, could be tempted into corruption and other forms of maladministration where there is no transparency or accompanying accountability. Throughout the world, therefore, there is a demand for more open, democratic, responsive and accountable governments. The key way in which this is being achieved is through transparency and increased access to information, which is the key to increasing taxpayer knowledge and improving taxpayer literacy, as well as to maintaining check and balance between the state and society.

Although accountability works with transparency, as discussed above, it is crucial that it can hold both government and taxpayers accountable in its own right. In addition, the right to a remedy varies between the substantive dispute in the case of bigger taxpayers while, on the other hand, smaller taxpayers may focus more on the amount due. However, accountability demands that all be held accountable. In light of scandals like the Panama Papers, LuxLeaks, WikiLeaks, SwissLeaks, more than 9.8 billion individual disclosures of information are said to have taken place. The sheer size of information exchange actually taking place is mammoth and governments must be able to hold taxpayers accountable for this.

Concerns being raised, for example, in dispute resolution processes, reflect on whether the taxpayer is present, visible and has a right of reply, and therefore a basis for challenging any decision. Transparency is a crucial component, even within accountability, and, as a result, cases should be made public, reports released and settlements shared, so all members of society are treated equally. When preference is shown in an accountability process, that process is undermined. In some African countries, like Rwanda, revenue decisions and tribunal decisions are currently made public. In Kenya, however, they are confidential, causing concern over the accountability of government. Perceptions of issues like corruption can often be stronger than the real level of corruption and accountability may actually protect the state.

2.4 Responsibility

When it comes to taxpayers' rights, literacy and knowledge dissemination, the enforcement and the responsibility for enforcement would fall under the educational mechanisms of the country in question. Responsibility also needs to be taken for providing citizens with feedback. Indeed, delaying in doing so can increase perceptions that the system is unjust and unfair. However, the government is responsible to society and its citizens in respect of reporting failures to comply with the law and then following the courses of legal and disciplinary action set out by the law. The questions that then arise are: are cases of tax evasion noted? Are suspected tax evaders charged in court and tried? When found guilty, are they incarcerated? The biggest problems facing most African countries rest on their failure to proceed on issues of criminal responsibility. While limitations on the cross-border enforcement of tax liabilities impede governments in their efforts towards holding foreign nationals and corporations to account, actions on the domestic front can, depending on the country in question, be limited in a similar way. In Rwanda and Kenya, as well as in many other African countries, domestic businesses are padlocked if they fail to pay their taxes: revenue officers arrive and actually place padlocks on business premises, effectively preventing the owners and employees from entering them.

However, in Libya, Tunisia and Morocco, perception of corruption remains high, with a study carried out in 2014 showing that one of the identified causes of the Arab Spring was corruption (Teti & Abbott, 2017). In South Africa, during the 2014/5 financial year, 256 individuals/entities were convicted in cases involving R196 million and fines totalling R9.6 million were issued. An effective 555 years of imprisonment, 258 months of correctional supervision and 2480 hours of community service were handed down to those convicted. In terms of the different crimes involved, there were 32 convictions for VAT fraud, 73 convictions for income tax fraud, eight for tobacco-related crimes and nine involving the construction industry (largely for tender fraud), amongst others (South African Revenue Service, 2015).

Since most African countries pick the right to remedy from the human rights paradigm, it is important to ensure that developing countries' governments make it clear whether taxpayers rights would be tied into this particular right and, perhaps, nuance the article carefully to exclude the issue where the African Approach, as set out in the African Commission on Human and Peoples' Rights (ACHPR), is being followed, as is the case in all African countries since they are signatories to the ACHPR. Actions like these do not only show responsibility by the government actors and the revenue authority, but also show the government's intention to set up an effective and efficient system.

2.5 Efficiency and Effectiveness

An efficient and effective system is one with minimal delays and with fairness and justice imbued in the process. However, this is not just about what is being done, but how and where it is being done. One of the biggest concerns now facing developing countries is where to limit the powers of revenue authorities or tax offices and where to place other matters of concern. Taxpayer literacy has been housed with the revenue authorities for a long time, but incidents in Kenya, Rwanda and several other African countries have shown that taxpayers are afraid to go to tax authorities or tax offices for guidance on filling in returns, as they fear that they will then be audited. As a result, taxpayer literacy ought to be housed in a different space. The next section will analyse the approach taken by governments in Africa to increase taxpayer compliance while reflecting on the need to have a system that builds the fiscal legitimacy of the state.

3. FISCAL LEGITIMACY THROUGH TAXPAYER COMPLIANCE IN AFRICA

There are several settled methods of improving taxpayer compliance. The common themes used to evaluate compliance usually include: integrity and equality; certainty, efficiency and effectiveness; appeal mechanisms and dispute resolution; appropriate assistance, confidentiality and privacy; accuracy in determining liability; representation; and honesty. These are all sub-themes of the principles of fiscal legitimacy. However, before you can delve into this, you need to assess who your taxpayers are and ought to be. This subsection will first set out how and where tax compliance is administered in African countries, before elaborating upon three strategies for the development of taxpayer compliance – tax literacy, simplified laws and a risk-based verification programme – and how these strategies are operationalised on the African continent.

3.1.1 Unpacking Taxpayer Compliance through the Revenue Administration

Initially, each African government ran a tax office under the Ministry of Finance. However, as part of structural reforms which have been spearheaded by the IMF since the 1990s, African states were required to set up semi-autonomous revenue agencies as part of loan conditionalities (Ayee, 2005). Today, revenue authorities in African countries tend to be structured in one of two ways: either as a tax office housed physically within a ministry of finance or as a revenue agency that is semi-autonomous and separate from the ministry (Crandall & Kidd, 2010).

The country status is set out in Table 1, below.

Table 1: Types of Revenue Administrations in Africa

Revenue Authorities	**Tax Office within Treasury**
Angola, Burundi, Egypt, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Sierra Leone, South Africa, South Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe.	Algeria, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Republic of the Congo (Brazzaville), Equatorial Guinea, Eritrea, Gabon, Guinea, Guinea-Bissau, Libya, Madagascar, Mali, Mauritania, Morocco, Niger, Nigeria, São Tomé and Príncipe, Senegal, Sudan, Tunisia, Western Sahara.
(24 countries)	(30 countries)

Source: Author

In 2018, the African continent seems to be equally split on whether to have a tax office or revenue authority. The table above also shows that the Anglophone countries tend to have revenue authorities while the francophone ones retain tax offices. Several key operational differences have started to emerge as a result of the adoption of the semi-autonomous model rather than the older model of the in-built tax office. These differences are set out in Table 2.

Table 2: Legal Framework for Revenue Administration and Taxpayer Compliance in Africa

	Revenue Authority	**Tax Office**
Connection to the Ministry of Finance	Semi-autonomous: physically separate but still under the ministry.	A department within the ministry.
Constitutional mandate	Constitutionally created.	Not necessarily referenced in the constitution.
Legislative Mandate	Usually has an act creating it.	No separate act to give the office mandate.
Policy Space	Lost space to the Ministry of Finance.	Housed in the Ministry of Finance, so tends to have better linkages to policymakers.
Separate Legislation for Types of Taxes and Procedures	Yes.	Yes.
Office of Taxpayer Education	Yes.	No (Ministry of Education).
Risk-Based Verification Programme	Yes.	Yes.

Source: Author

The table above shows that the tasks carried out by the two types of agency seem to be predominantly similar, with two exceptions. First, with regard to the development of laws and policies, there were no law and policy offices within the revenue authorities and, even after transition, these remain housed in the Ministry of Finance, whereas, in the tax office model, agencies maintain their law and policy spaces. Second, the function of taxpayer education seems to be housed in the revenue authority while the traditional space was within the Ministry of Education. However, since the IMF continues to advocate for these revenue authorities to be set up, the challenge to taxpayer compliance remains unaddressed. The following subsections will analyse the three elements of tax literacy, simplification of laws and risk-based verification in order to assess their effectiveness.

3.1.2 Tax Literacy and Legitimacy

Improving tax literacy is already a challenge for many countries in the developing world, including those in Africa. Achieving financial literacy is a step that can only be taken after literacy has been achieved. Tax literacy thus becomes a third step and, since literacy remains weak, improving the tax literacy of local rural and urban populations, so that they understand the following five points, has not been prioritised in most African states:

1. All members of society are taxpayers, whether through direct or indirect taxes.
2. All members of society are supposed to pay taxes.
3. Taxes are supposed to be collected for a purpose.
4. All state resources belong to the people and ought to be used on their behalf for communal, and sometimes specific, purposes.
5. The collection and use of tax must be in line with the constitution and laws of the state, which reflect the people and society, and which they understand.

As a result, tax literacy does not depend on the sophistication of the tax system, although it does play a particularly important role when a state is developing. However, what does matter is who is selected to be the communicator of the information for purposes of tax literacy. In many African countries, during the colonial era, refusal to pay taxes was an act of civil disobedience, and tax collectors were feared and avoided (Tarus, 2004). To use a tax administrator to build tax literacy is an exercise in futility; this task needs to be the responsibility of a non-threatening ministry, like education. In Kenya, for example, this is carried out by the revenue authority and, more often than not, the information desk has no customers. In Rwanda, attempts to improve tax literacy within companies resulted in people shutting their shops and disappearing when they saw the tax collectors coming.

Advancement through the indicators of the development of the fiscal state, as set out in section 2.1. above, can be directly linked to tax compliance and morale, as citizens tend to refuse to comply and have low morale where governance is poorly managed and where there is evidence of non-tariff barriers, like corruption. Tax literacy becomes critical, especially in developing countries, where confidence in the state is low and governments are perceived as being incapable of carrying out the mandates that societies have granted them. The direct link between state-societal trust, tax compliance and the legitimacy of the fiscal state lies here.

3.1.3 Simplified Laws, Policies, Regulations and Procedures

One area that is frequently ignored is the need for developing countries to simplify their systems and the way in which they communicate with their citizens. The previous subsection looked at what needs to be communicated, but this section will focus on how, i.e. simply. This subsection focusses its attention on this particular challenge for securing compliance.

Firstly, laws must reflect society. The tax laws currently in place in developing countries are frequently those that were inherited during colonisation. Most former British colonies continue to operate variations of the colonial Model Income Tax Ordinance (1922). Using laws like this, which were clearly developed to remit revenue to the imperial state, and which do not take modern developments and the present realities of the African continent into account, cannot help but be problematic.

Secondly, taxpayer education and assistance programmes help taxpayers and their advisors understand their obligations and entitlements, on the basis that taxpayers cannot comply if they do not understand the tax laws and procedures (United Nations, 2000). The language of laws enacted must reflect the literacy level in a state and of the population they seek to administer. Legitimacy can only be built if the laws that are mandatory are in the language that people communicate in, such as vernacular languages, and use words that allow for easy compliance.

Thirdly, these programmes should be completely reliant on simple laws and procedures that make it easier and less expensive for taxpayers to comply with their obligations and access their entitlements (World Bank, 2004). It is common knowledge that taxpayers may not voluntarily comply if the tax system itself makes it too difficult or too expensive for them to meet their obligations. Mandatory use of electronic self-assessment filing and use of tax agents in Kenya, for

example, simply makes it harder for people to comply in a country where there are frequent electricity cuts and where the internet has not reached all parts of the country.

Finally, the taxpayers need to see results of their contribution, i.e. receive feedback from the government on the collections made. For example, in Rwanda, on Taxpayers' Day, citizens receive feedback on the collections made and the percentage of the national budget that these represent (Waris & Murangwa, 2012). This adds to the growth of tax morale, state-societal trust and tax compliance, as members of the taxpaying community get feedback on the contribution they make as corporations or individuals (Waris & Murangwa, 2012).

3.1.4 Risk-Based Verification Programme

Traditionally, tax non-compliance has been dealt with through stringent responses, such as risk-based verification programmes, which counteract poor compliance behaviour by detecting and deterring non-compliance through the use of risk management approaches (OECD, Forum for Tax Administration Compliance Sub-Group, 2004). Arguably, taxpayers are more likely to comply if they perceive that there is a strong chance of detection and see blatant non-compliers being brought to account. Increasingly, information and communications technology are playing critical roles in compliance management (through, for example: the automatic gathering of third-party information as a by-product of natural business processes; the use of electronic invoices to facilitate real-time transaction monitoring and verification; and the analysis of revenue risks) (OECD, Forum for Tax Administration Compliance Sub-Group, 2004).

The analyses of taxpayer compliance are usually the responsibility of the tax administrations and this, unfortunately, is not a burden they have created or, indeed, should shoulder. The presumption is that revenue and expenditure are unrelated when, in actuality, they are related. Whenever tax collectors speak about their collections, they are usually questioned on the use of tax literacy programmes, information that they are not privy to. In addition, these types of risk-based verification programmes are crippled by countries emerging form conflict who do not have enough electricity available, let alone the resources to purchase systems like this for their states. As a result, forcing compliance through systems of this nature tend to predominantly fail on the continent. However, in Kenya, all persons applying for public office are required to have tax compliance certificates, although people are, incidentally, still able to receive these and be interviewed despite the fact there are pending cases against them in court, as in the case of the Kenya Power (KPLC) directors (Mutavi, 2018).

4. RECOMMENDATIONS: CHANGING TAXPAYER CULTURE

It is impossible to change all parts of taxpayer culture and, as a result, focussing on prioritised areas on an annual basis may be crucial if there is to be a change in the culture which will, in turn, build the legitimacy of the state. However, the one set of principles that should be consistently maintained is the principles of fairness and justice. If these principles were to be compromised, it would conflict with idea of a system built on legitimacy of the state through the viewpoint of society. As the social contract continues to develop, it is important that there is a statutory basis; that includes obligations and rights which are linked and that also reflect culture and behaviour.

One of the main challenges that seem to arise from the analysis is the misplacement of tasks within government in order to achieve taxpayer compliance. Table 3, below, sets out the possible challenges facing the different arms of government where elements of taxpayer compliance seem to be housed and recommendations in respect of where they should be moved.

Table 3: Agency Change Recommendations

	Challenge	Recommended Responsible Agency
Transparency	The figures and their access.	Bureau of Statistics.
Accountability	Corruption; relationship with the Ministry of Finance.	Better linkages between agencies.
Responsibility	Taxpayers education…misplaced in Revenue Agency/Tax administration.	Ministry of Education.
Efficiency	IT and its limitations in African countries.	Phased implementation; electricity; internet; education.
Effectiveness	The antagonism it creates.	Development resulting from collections.
Fairness	More tax from those more able to pay; incentives; tax holidays.	Ministry of Finance and other industry-based agencies.
Justice	The robustness of the legal system.	Ministry of Education.

Source: Author

5. CONCLUSION

Good governance paves the way to fiscal legitimacy by building people's faith in the state and ensuring their acceptance of its laws and policies. Good governance has become the centre of attention for many post-colonial fiscal states in the drive to improve efficiency and effectiveness through transparency, accountability and responsibility in order to be both just and fair. States can enhance fiscal legitimacy by: firstly, involving independent third parties (third parties do not include the government but can include citizens and watchdog institutions within a state) in the auditing and evaluation of public policies to strengthen transparency and accountability; secondly, promoting better, fairer and more transparent spending; and, thirdly, broadening the tax base and making tax systems fairer and more balanced. Finally, in the African context, it is important to reinforce the capacity, authority and accountability of subnational government bodies. Fiscal legitimacy is not only an issue of capacity; in addition to strengthening a state's administrative capabilities, societal participation and open and informed debate can result in more transparency. Independent actors with the capacity and the financial independence to carry out critical evaluations of policies and proposed reforms can also contribute to the development of good governance and fiscal legitimacy (Waris, 2013b, p. 155).

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REVIEW OF THE 2ND INTERNATIONAL CONFERENCE ON TAXPAYER RIGHTS, VIENNA, 2017

Nigar Hashimzade[1]

The conference was held in Vienna on March 13-14, 2017. In their opening remarks, Nina Olson, the National Taxpayer Advocate (IRS, Washington, D.C.), and Prof. Michael Lang (WU: Vienna University of Economics and Business) welcomed the participants and introduced the members of the first panel, "The Framework and Justification for Taxpayer Rights", which was moderated by Prof. Peter Essers (Tilburg University, The Netherlands).

The panellists – Ian Young (Institute of Chartered Accountants, UK), Elaine Benn (HMRC, UK), Prof. John Bevacqua (La Trobe University, Australia), and Prof. Alice Abreu and Prof. Richard Greenstein (both from Temple University, USA) – reviewed the constitutional, statutory and administrative sources of taxpayer rights. Ian Young noted the exceptional place of taxes: although human rights include the right to own property, a special protocol (the First Protocol (1952) to the European Convention for the Protection of Human Rights) makes an exception with regard to taxes, as a state can deprive its citizens of their property in order to ensure taxes to fund public goods are paid. His overview of the Taxpayer's Charter, introduced in the UK during the 1990s as a means to set out taxpayers' rights and detail how these should be protected, was continued by Elaine Benn, who referred to an updated version produced by HMRC, "Your Charter". The issue of tax exceptionalism, and its effect on taxpayers' rights, was raised by John Bevacqua, who talked about the "chill factor" effect and the tendency of judges to extend the immunity of tax officials. Alice Abreu and Richard Greenstein discussed the IRS's Taxpayer Bill of Rights (TBOR). An important point, they emphasised, is whether there is a mechanism in place by which to implement these rights, as well as procedures for enforcement, compliance and retribution. Another important issue relates to the different levels of power possessed by different taxpayers: should the protection of rights be differentiated? An obvious practical problem is that wealthier taxpayers are better able to protect themselves. The next issue is extraterritoriality: does the U.S.A violate the sovereignty of other states when extending protection of rights and justice to its taxpayers in other countries?

Several issues were raised in the discussion that followed: the panellists and the audience exchanged their views on the following:

- Who is responsible for taxpayers' rights –, the revenue service or the ombudsman?
- How many taxpayers are aware of their rights and how often do they invoke them?
- What are the biggest practical problems with taxpayers' rights in the U.S.A?

Nina Olson pointed out that before the TBOR was codified, it was impossible to say that rights were being violated. Now that it is law, the next step is to work with courts and create precedents. The responsibility for taxpayers' rights should be taken jointly and these rights must become the substance of the law. According to Nina Olson's estimates, less than half (about 40%) of American taxpayers are aware of their rights, but before 2014 (when the TBOR was adopted) only 11% knew what their rights were. Elaine Benn and Ian Young noted that many taxpayers do not complain and

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do not wish to be involved with tax system. The National Taxpayer Advocate's annual report has identified about twenty practical problems; one is that tax practitioners must be better informed about taxpayers' rights.

The second panel, on "Privacy and Transparency", which was moderated by Christopher Rizek (Caplin & Drysdale, Washington, D.C.), was led by Maryte Somare (PhD Candidate, WU, Vienna), Ali Noroozi (Inspector-General for Taxation, Sydney, Australia), and Robert Goulder (Special Counsel, Tax Analysts, Arlington, Virginia, U.S.A). The central issue discussed by the panellists was the use of information about the taxpayer which has been collected by and shared among tax authorities in different jurisdictions.

Maryte Somare talked about the links between tax transparency and financial transparency, and a trend from anti-money laundering to tax crimes. She touched upon the difficulty in identifying tax evasion and tax fraud as opposed to aggressive tax planning. Further, she compared the framework for cross-border exchange of information between tax authorities and financial intelligence units (FIUs): although the issues seem to be more complex in tax matters, tax authorities make extensive use of information provided by FIUs; for example, about 40 percent of cases in Jersey reported by FIUs were investigated by tax authorities and only a small number were investigated by the FIUs.

Ali Noroozi focussed on the challenge that tax authorities are facing in striking the balance between transparency and the right for privacy, especially in the corporate sector. Nowadays, tax authorities cooperate globally, as tax advisors used to do before. An important issue is the cost of litigation: individual taxpayers are less likely than large corporate taxpayers to take issues of "substance" to court. Moreover, the courts are more likely to come down on the side of the tax authority, even if the use of private information was arguably excessive. Ali Noroozi also noted that pre-filled tax returns may result in extra compliance costs for taxpayers if they contain mistakes. Finally, he pointed out that transparency, or voluntary disclosure, may not be understood or correctly interpreted by the media and the public.

Robert Goulder spoke about the role of the media. He emphasised that there should be no secret law: more recently, disclosures have occurred, not by law, but by whistle-blowing and stolen information, which raises ethical issues. Headline cases, such as that of the Swiss investment bank, UBS, have led to changes in the information exchange system. The Panama Papers case was based on stolen documents: the journalists involved have acknowledged that this was a breach of privacy but claimed that the end justified the means. The question is do "tax cheaters" deserve less protection? Can socially beneficial reform be caused by a breach of law?

Several issues concerning the exchange of information (EOI) were discussed, in particular, its extent and automatic cross-border exchange. It has been pointed out that EOI is transparency between tax authorities. In relation to the role of the media, the discussants noted that many journalists do not understand tax terminology and blame taxpayers for availing of the possibilities afforded by law; they need to be educated or encouraged to learn. For example, "fair share of tax" is often mentioned in the media but what is it? Instead, the lawmakers should turn to the law. Other issues discussed by the panellists and the audience included the relationship between the transparency and crisis of trust and integrity of state leaders, and the possibility of establishing a "benchmark" for what to expect from different taxpayers in different jurisdictions. In particular, it

was noted that it would be hard to come up with a benchmark for large, complex, corporate taxpayers, as perceptions of fairness differ between small and large taxpayers.

"Protection of Taxpayer Rights in Multi-Jurisdictional Disputes" was the topic of the third panel, which was moderated by Philip Baker, QC (Field Court Tax Chambers, London, UK). The panellists were Mary Bennett (Baker McKenzie, Washington, D.C.), Cora O'Brien (Irish Tax Institute, Dublin, Ireland), Katerina Perrou (IBFD, Amsterdam, The Netherlands), and Michael Sell (Taxation Directorate-General, Berlin, Germany). The discussion focussed on the framework for an effective multi-jurisdictional dispute resolution and the adequate protection of taxpayer rights between jurisdictions.

Cora O'Brien talked about double taxation and cross-border disputes. She pointed out that since the introduction of the base erosion and profit shifting (BEPS) action plan by the Organisation for Economic Co-operation and Development (OECD), almost 91 percent of companies surveyed expected more double taxation. Tax authorities are more reluctant to give rulings because situations can change in the future, but business taxpayers want more certainty for future operations. A possible alternative to dispute resolution is the double tax convention. Taxpayers' experiences of dispute resolution under the Mutual Agreement Procedure (MAP) have been characterised by exclusion, uncertainty and cost. Exclusion arises because, in multi-jurisdictional disputes, taxpayers do not participate in disputes between countries. The costs are associated with having to deal with documentation from many years ago which is located in other countries; this can attract additional fees, and sometimes a requirement for upfront payments, as is the case in the UK, plus payment of interest. Thus, the costs exceed the potential benefits, especially for small and medium-sized businesses (SMBs).

Mary Bennett noted that more than 90 percent of disputes under MAP are resolved with full relief from double taxation; however, it is difficult for SMBs to file disputes. The problem facing the MAP framework is the growing number of cases in its inventories. The major barrier to MAP is its cost, while the outcome is uncertain. She also noted that the only action of OECD BEPS favourable to the taxpayer is action 14, on minimum standards.

Katerina Perrou talked about a fair and inclusive system for the resolution of international tax disputes. Her central argument was that the right to a fair trial is a universal civil right. However, in international, cross-border disputes, access to this is difficult, there is no equal control and achieving an effective remedy is difficult, because two countries involved can make different decisions. MAP and arbitration can provide effectiveness and independence, but do not always provide access.

Continuing the discussion, Cora O'Brien quoted a list of relevant rights from the Charter of Fundamental Rights of the European Union and touched upon an imbalance of power between taxpayers and tax authorities: taxpayers often fear to assert their rights because of concerns about potential repercussions and future audits. Mary Bennett also spoke about access to MAP and arbitration, and the prevention of unilateral allegations of abuse or tax avoidance, as well as the prohibition of forced settlements.

During the subsequent discussion, Philip Baker mentioned a MAP case that went on for more than 17 years and was, in the end, left unresolved, and Cora O'Brien noted that SMBs prefer to settle with tax authorities rather than taking their cases to MAP or arbitration, based on the cost-benefit analysis. A new development, akin to baseball arbitration and termed "final offer" has been described, in which two sides present their "scores" and the arbitrator picks one without explanation; however, this may have no benefit in terms of providing information to other taxpayers, because the taxpayer involved keeps details confidential. Other issues raised included the opportunities for taxpayers to know the MAP criteria before starting the process and the possibility of extending this framework to non-business taxpayers.

The fourth panel was on "Access to Rights: the Right to Quality Service in an Era of Reduced Agency Budgets" and was moderated by Nina E. Olson (National Taxpayer Advocate, Internal Revenue Service, Washington D.C., United States). The panellists were Dr. Sebastian Beer (Austrian National Bank), Prof. Leslie Book (Villanova University, USA), Michael Hallsworth (Behavioural Insights, UK), and Dr. Matthias Kasper (University of Vienna, Austria).

Michael Hallsworth argued that, in a world of tight budgets and complex tax environments, in order to maintain high-quality services, tax authorities need to draw on the findings from behavioural sciences with regard to understanding taxpayers' behaviour. He outlined three opportunities for tax authorities: to maximise the effectiveness of existing forms of communication (e.g. by listing call centre opening times in the letters to taxpayers); to make better use of new communications channels (e.g. sending taxpayers reminders by SMS [text messages]); and to improve the design of digital services (e.g. the location of the information on the screen).

Sebastian Beer spoke about the experimental evidence of the impact of complexity in tax law on taxpayers' behaviour. He noted that issues of particular concern are the outsourcing of outreach and education to the private sector and the replacement of personal contact between the tax administration and taxpayers by automated procedures, which are likely to increase the cost of tax knowledge and the perceived complexity of tax system. Theory and experimental studies suggest that risk-averse taxpayers tend to evade less in more complex environments, which appears to justify spending cuts in outreach and education. At the same time, increase in complexity leads to discrimination against less wealthy, less privileged taxpayers, who cannot afford private tax preparers and thus become over-compliant.

Matthias Kasper talked about his research with co-authors into the potential negative effects of cost-saving shifts in services on taxpayers' perceptions of their competence and attitude towards compliance. The research was based on a sample of about 22,000 taxpayers in 14 Central and Eastern European countries.

A question was raised about the seeming contradiction in the outcomes of increasing tax complexity: higher evasion and higher over-compliance. However, as a survey of self-employed people in Germany and Austria has indicated, tax knowledge is positively correlated with tax planning. Other related questions were about simplification as opposed to simplexity and about the revenue effect in contrast to compliance effect.

Leslie Book talked about the benefits administered through the tax system, or tax expenditures. Earned Income Tax Credit (EITC), he argued, is often criticised as being ridden with fraud and overpayments. The deficiencies in EITC are worse than in similar non-tax programmes. This raises the question of why tax authorities should have the same missions as benefit agencies. During the discussion, it was pointed out that taxpayers would prefer a better tax outcome over tax simplicity (Ali Noroozi).

The fifth panel, the final on the first day of the conference, was on "Challenges of Scrutineering Entities", and was presented as a "fireside chat with Inspectors General, Ombuds, and Advocates". The main issues raised during the discussion were how ombudsman services or taxpayers' advocates operate in changing tax environments, and how to get the right balance between service and enforcement, especially when tax authorities in many countries face budget cuts. The panel was moderated by Prof. Jeffrey Owens (WU, Vienna, Austria) and included Sherra Profit (Office of the Taxpayers' Ombudsman, Canada), Ali Noroozi (Inspector-General of Taxation, Sydney, Australia), Hanyana Eric Mkhawane (South Africa Tax Ombudsman), Nina Olson (National Taxpayer Advocate, Washington, D.C.), Anders Bengtsson (Swedish Tax Ombuds) and Diana Bernal (Prodecon, Mexico). Among other issues, the participants talked about the taxpayers' expectations of better services and "fairer" treatment, and whether or not taxpayers are becoming more aggressive in pursuing their rights.

The second day of the conference started with a panel on "Penalties and General Anti-Avoidance Rules (GAAR)", which was moderated by Prof. Erich Kirchler (University of Vienna, Austria). The panellists were Prof. Christoph Kogler (Tilburg University, The Netherlands), Prof. Luigi Mittone (University of Trento, Italy), Prof. Rupert Sausgruber (WU, Vienna, Austria) and Christophe Waerzeggers (Senior Counsel, International Monetary Fund).

Introducing the discussion, Erich Kirchler outlined the importance of issues related to fairness in tax compliance. In the traditional models, tax evasion is identical to a risky activity and the tools are audits and punishment. Audits can, however, backfire. Lab experiments have been conducted to test for the presence of the bomb-crater effect or the echo effect (i.e. the probability of a future audit as perceived by an evader falling or increasing after a successful audit). In a study based on data from 34 countries, the relationship between audit frequency and tax compliance had an inverted-U shape. The data from the IRS shows that audits with substantial adjustments lead to higher compliance and, conversely, audits with small adjustments lead to lower compliance. This suggests that audit and punishment policies will not necessarily induce compliance.

Christoph Kogler presented the results of an empirical study of the effect of delaying tax audit feedback on compliance and perception of fairness. The compliance responses to the delayed and the immediate feedback were different. Study participants who received delayed feedback showed higher compliance, higher perceived probability of audit and more severe perceived punishment than those who received immediate feedback. This may suggest that the longer the period of uncertainty experienced by a taxpayer, the greater his or her honesty will be in the short run. However, in the long run, compliance may still deteriorate.

Luigi Mittone presented the results of an experiment on the role of principal witness regulations in the study of tax evasion and institutions, namely, in the presence of corruption. The study

focussed on the difference in tax compliance under two regimes with and without regulation – and on the changes in compliance following the transition between the two regimes. The main finding was that compliance was higher under the regime with regulation when the regime was fixed. However, the transition from the regime without regulation to the regime with regulation led to a drop in compliance. These findings imply that the time path of institutional changes is important and that, for a particular political measure to work, the required institutions must be in place before that measure is introduced.

In his talk, Rupert Sausgruber argued that the optimal tax gap is positive because of the compliance costs. Non-compliance leads to an unfair distribution of tax burden and tax-minimisation activities lead to deadweight loss, for example, from rent-seeking. Increasing the probability of detection is costly; it is easier to increase the penalty and reduce the probability of detection. However, there is evidence that the penalty has a weak effect on compliance. Corporate tax morale is important: in a competitive environment, ethics tend to fall. At the same time, stronger enforcement is likely to increase tax avoidance. He also argued that the introduction of GAAR has led to an increase in tax planning.

The discussion of avoidance and anti-avoidance rules continued with a presentation by Christophe Waerzeggers. The emphasis of his talk was on the tension between preserving the rule of law and the integrity of the tax system. The main points of his argument are developed in the technical note on "Introducing a GAAR" published by the International Monetary Fund (IMF), that he co-authored with Cory Hillier.[2]

The second panel, moderated by Prof. Michael Lang (WU, Vienna, Austria), was on "The Role of Intergovernmental Actors in Furthering and Protecting Taxpayer Rights: A Conversation." The panellists were Dr. Anette Kugelmüeller-Pugh (Federal Fiscal Court, Munich, Germany), John Peterson (OECD), Prof. Piergiorgio Valente (Link Campus University, Rome, Italy and President, Confédération Fiscale Européenne), Melchior Wathelet (Advocate-General, European Court of Justice, Luxembourg) and Héléne Michard (European Commission).

Piergiorgio Valente talked about the importance of transparency. Increasing globalisation has undermined the territorial rules of taxation. The OECD's BEPS Action Plan aims to contravene this trend. The main message is that the law must be changed as the world has changed. John Peterson argued that BEPS may have led to more uncertainty between taxpayers and tax authorities, as well as between the tax authorities.

Hélène Michard talked about cross-border ruling and the growing need for legal certainty. Currently, businesses can obtain information from their own tax authorities on how their transactions will be treated in a participating country, but only in respect of VAT.

Melchior Wathelet talked about the role of the courts and put forward the following arguments. First, when tax is imposed in breach of European Union (EU) law, it must be refunded with interest from the date on which the tax was paid, with full compensation, and the administrative costs must not be deducted. Second, if there is abuse of the law, the tax authority must respect the rights of the taxpayer to defence and any evidence must be obtained under criminal procedure according to

[2] http://www.imf.org/external/pubs/ft/tltn/2016/tltn1601.pdf

the EU fundamental rights. He mentioned the 2011/16 directive against evasion and the Berlioz case in relation to the information exchange between France and Luxembourg. Finally, he spoke about a case of an Italian firm which committed tax fraud during 2005-2009. Under Italian law, the seven-year limitation period would apply. The case was brought to trial in 2014, overriding the limitation against Italian constitutional rights. This was an example of the EU's rules going against a sovereign constitution.

Anette Kűgelmueller-Pugh argued that a taxpayer should be able to appeal in an independent court, with access independent of claim and taxpayer's wealth or the need for legal aid or representation. The right to a fair trial and the court of appeal should also apply in all cases.

The conference continued with a panel on "Building Trust", which was conducted in two parts. The first part, "Transforming Cultures of Tax Agencies and Taxpayers", was moderated by Nina Olson (National Taxpayer Advocate, Washington, D.C.). The panellists were Prof. Henk Elffers (Netherlands Institute for the Study of Crime and Law Enforcement, Amsterdam), Lotta Björklund Larsen (Linköping University, Sweden), John Njiraini (Kenya Revenue Authority) and Dr. Attiya Waris (University of Nairobi, Kenya).

Henk Elffers talked about the rules of rule compliance and the Willing – Be Able – Daring to transgress (WBAD) rules model as a diagnostic instrument for fighting tax non-compliance. Why do people transgress tax rules? Answers would typically include low morale, opportunistic behaviour and punishment. It is well known that a lack of punishment does not always lead to crime while punishment does not always prevent crime – take, for example, speeding on the roads. It is also known that some good people sometimes transgress rules and that opportunities to do so are not always seized. The WBAD model takes an integrated approach to criminal behaviour, including tax non-compliance. It also offers a series of measure for each step, which should be implemented depending on the "height" of the steps. Thus, "willingness" can be controlled by education, "being able" by closing opportunities and "daring" should be addressed by punishment.

Lotta Björklund Larsen talked about the approach taken by Swedish Tax Agency with regard to shaping taxpayers, which involved the balance of controllability and communicability. It can be difficult to follow the letter of the law, because the law can be inconsistent and impractical. For example, employed and self-employed people face different treatments for the same activity. She argued that Swedes have confidence in their national tax agency and presented the results of ethnographic fieldwork which provided insights into the work of the Swedish Tax Agency and, in particular, into how its managers decide which types of taxable activities can be controlled and what can be communicated. The ultimate goal is to make all citizens pay their fair share.

Attiya Waris talked about developing fiscal legitimacy in order to build trust between the state and the society in Africa. The main obstacles to the creation of a society of compliant taxpayers in a developing country include various state inefficiencies, corruption and inequalities, and a lack of transparency, accountability and responsibility on behalf of state institutions. She argued that policies aimed at widening the tax base and increasing revenues in a developing country should be contingent on taxpayers' current situations. Using African countries as examples, she analysed the ways in which a state can go about changing taxpayer culture.

The second part of the panel on "Building Trust" focussed on "Safeguards on Tax Agency Power". The panellists were Diana Bernal (Prodecon, Mexico), Prof. Kristin Hickman (University of Minnesota, U.S.), and the Honorable Peter Panuthos (U.S. Tax Court, Washington, D.C.). The moderator, Prof. André Lareau (Laval University, Canada), opened the discussion by noting that a judge can, in fact, "help" a taxpayer who is not represented in court or who is represented by someone without adequate skill. Peter Panuthos pointed out that the majority of tax court cases in the United States are about the amounts below 50,000 U.S. dollars. Moreover, taxpayers are underrepresented by lawyers: more than 70 percent of them come to court without legal representation. As the unrepresented litigant may not understand the court procedures, he or she may find it difficult to argue in support of his or her position. This undermines the standard paradigm of all parties understanding the substantial procedural and substantive law, and makes active, affirmative judging important. Kristin Hickman talked about the growing influence of administrative law on the U.S. tax administration. She argued that, in many cases, the IRS appeared to be exempt from procedural requirements – the situation termed "tax exceptionalism". It is important that the IRS comply with the Administrative Procedure Act (APA), unless the Congress or the IRS Code exempt the IRS from complying with a particular requirement. The comment, in the subsequent discussion, on the compliance with administrative procedures was that the IRS has focussed on the implementation of the substance of the law and has lost expertise in procedures because of its organisation.

Diana Bernal talked about the procedures ensuring the tax authority's accountability in tax court cases. She presented the Mexican experience with regard to the establishment and development of the Tax Ombudsman and focussed on its two most relevant facilities: the Complaint Procedure Against Tax Authorities' Actions and the Conclusive Agreements Procedure. She argued that the accessibility, flexibility and low cost of these procedures make them exceptional when compared to those offered in several other jurisdictions and that they form a fertile ground for achieving the desired transparency and accountability of the tax administration.

The panellists' presentations were followed by a discussion about several issues. Can the right to equal treatment be exercised if the third party does not agree to the release of its information? While the court will not act, the ombudsman may act if it has its own access to the tax authority's records. Can the final decision by the court be a threat to tax law? Ultimately, it is important to maintain consistency in regulation, and, in fact, the effect of a court's decision can be positive if the tax agency learns from that decision.

The conference closed with remarks from Nina Olson and Prof. Michael Lang, who thanked the participants for their input and invited them to the future conferences on taxpayer rights.

REVIEW OF THE 13th INTERNATIONAL CONFERENCE ON TAX ADMINISTRATION, SYDNEY, 2018: TAX SYSTEM INTEGRITY IN A DIGITAL AGE

Yige Zu[1] and Richard Krever[2]

The impact of the digital economy on tax compliance, tax bases and tax administration has emerged as a key issue for taxpayers, tax advisors, tax administrators and tax academics. The topic was the focus of the 13th International Conference on Tax Administration organised by the University of New South Wales in Sydney (UNSW Sydney) in April 2018.

Most of the papers presented at the conference fell under the umbrella of three overarching themes: the challenges and opportunities for tax administrators created by the digital economy; issues in tax compliance; and the intersections of digitalisation and international tax issues. A fourth group of papers considered several discrete tax administration and compliance issues not confined to the digital age. Additionally, support from the Asian Development Bank Institute (ADBI) made it possible for administrators from Asian and Pacific countries to report on the interaction of the digital economy and tax administration in their jurisdictions.

THE DIGITAL ECONOMY AND TAX ADMINISTRATION: CREATING CHALLENGES OR OPPORTUNITIES

Papers looking at whether the growth of the digital economy represents a threat to tax administrators or offers them new tools for enhancing compliance and collections considered the question both at a general level and in the context of some specific digital economy developments. The latter included the sharing economy and digital currency. Also considered was the rise of peer-to-peer supplies, a development that has attracted considerable attention but which may raise phantom red flags in terms of consequent tax issues.

Administrative opportunities

While digitalisation is undoubtedly a challenge to tax bases and traditional source of income and place of supply rules, the presentations by tax authorities mainly stressed the positive aspects of the impact of digitalisation on tax administration. One well-publicised change is the ease with which information can be stored and accessed. While the internet may be used in transactions intended to minimise tax, it also generates data. All it takes, as Neil Olesen, a second commissioner of taxation in the Australian Tax Office, pointed out, is one disgruntled person and a wealth of information becomes available to tax administrations. Sharon Thompson, a deputy commissioner in the New Zealand Inland Revenue, suggested that the widely publicised Panama Papers and Paradise Papers are just the tip of the iceberg in terms of the wealth of new information coming to tax administrators.

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[2] Professor, University of Western Australia Law School.

In advanced economies, there has been a significant shift towards using the internet as a source of tax information and a means of submitting tax returns. Many speakers identified a link between client-tailored digital experiences offered by tax administrations and increased tax compliance and taxpayer trust in the integrity of the tax system. Services that enhance taxpayers' experience include pre-populated forms that draw on information provided by third parties and details of the taxpayer's circumstances. Pre-population of known data has been shown to prompt taxpayers to provide further disclosures, perhaps on the assumption that the information will be available to the tax administration through other sources. Equally importantly, taxpayers can appreciate how the digital system delivers personal benefits to them. Individualised prompts provide an example – a pop-up prompt alerting taxpayers to check to see if they are entitled to another deduction or credit they may have missed can be an important tool for establishing trust and encouraging full engagement with the tax administration. A further outcome from digitalisation is the speed with which tax authorities can respond to issues of concern to taxpayers. Automatic cross-checking of data can reduce refund times, for example, to one week from the time a return is filed, again strengthening respect for, and trust in, the tax system.

A New Zealand initiative that may not have been widely copied to date is the development of integrated digital programmes that include tax as one element of broader online systems for persons starting a business, closing a business, starting a family, dealing with a death in the family and so on. The systems pull together relevant information from all government departments, so users have a one-stop shop where they can learn about both responsibilities and benefits. Someone with an expanding family, for example, can learn about tax consequences and sign up for financial benefits from another department in one spot.

Presenters from both academia and tax administrations considered the nexus between enhanced information collection and greater tax collections. If information systems can be made to communicate with one another, data from a range of sources can be correlated with income tax information to verify information provided by taxpayers or third parties, or to uncover discrepancies. This process can be carried out in real time. It was explained, for example, that income tax authorities in Japan can draw on residential real estate value data based on actual and regularly updated assessed valuations prepared for local property tax purposes. Other possibilities discussed included additional documentation from companies—in addition to internal company documents prepared for financial accounting, inventory and business management, and other purposes, companies produce financial disclosure documentation for many other agencies with information that can be incorporated into automatic audit and checking systems.

Enhanced analysis of data provides tax administrators with an opportunity to uncover avoidance and evasion arrangements at an earlier stage than was previously possible. Initially, real-time targeting of potential evaders or avoiders can enable authorities to stymie arrangements before revenue is lost. At the next stage, greater data mining can be used to find links between apparently unconnected taxpayers exploring similar schemes and tax minimisation planners and promoters. This allows tax authorities to move more quickly when schemes are being developed and to track schemes more effectively once they have been implemented.

As senior tax administrators noted, in addition to providing access to conventional information sources and complementary analysis techniques, digitalisation has created new information

sources for tax administrators. Brooke Harrington (Copenhagen Business School) explained in more detail how technological developments have facilitated leaks detailing avoidance and evasion arrangements. The development of PGP encryption keys, for example, has made it possible for employees with conscience twinges to expose files without fear of being traced and retribution.

One unexpected source of data on avoidance that prompted discussion is social media boasting, where wealthy individuals expose their consumption on platforms such as Instagram, Snapchat and Facebook. Authorities in one jurisdiction were reported to be using sophisticated algorithms to match spending revealed on social media postings with stated income.

The powers of tax administrators to access and copy or retain information held by taxpayers were first legislated in a pre-digital age. Andrew Maples (University of Canterbury, Christchurch) and Robin Woellner (UNSW Sydney) presented a paper on the interpretation and application of those powers in respect of digital information in Australia, New Zealand and the UK, concluding that it is important to regularly review how these powers should apply to rapidly changing technology in order to find the optimal balance between coercion powers and taxpayer rights over digital information.

Sharing economy

The development of the internet has opened the door to a new sharing economy, in which individuals can make their services available to a large potential customer base through internet platforms such as Airbnb and Uber. Homeowners can rent rooms through accommodation sites; car owners can provide rides through transportation sites. The possibilities are unlimited.

The key issue raised by the sharing economy from an income tax perspective is the non-reporting of receipts by individuals providing services as unincorporated entrepreneurs. The primary issue from a VAT viewpoint is the non-reporting of supplies, although where registration thresholds are high enough to exclude most small entrepreneurs, the VAT problem may not be as significant as the income tax consequences. It is, however, an issue in jurisdictions in which there are no thresholds for particular suppliers. This is the case in Australia, for example, where there is no registration threshold for persons providing taxi services, a term that has been interpreted as including sharing economy rides.

The tax issues arising from individuals offering sharing economy services are not new. Non-reporting of income and sales by unincorporated small businesses is as old as income tax and VAT. However, the challenges faced by tax authorities are multiplied many times as tens and hundreds of thousands of new sharing economy entrepreneurs start businesses via sharing economy platforms. As Jurie Wessels and Marina Bornman from the University of Johannesburg pointed out, while traditional studies of compliance and non-compliance decision-making by individuals operating as businesses might, with some modifications, be applicable to new entrepreneurs offering sharing economy services, the lessons they provide may have a limited impact on the new challenges. At the same time, the new technology that gives rise to administrative problems may hold the solution to these problems. The sharing economy entrepreneurs' reliance on internet platforms opens the door to comprehensive withholding regimes aimed at the platform operators, for example.

Digital currency

The development of cryptocurrencies, such as Bitcoin, created both VAT and income tax issues for tax administrators. In terms of VAT, the question was whether cryptocurrencies are a form of money, which would remove the sale and acquisition of the currencies from the scope of VAT, or a type of property, which would make sales of currency taxable supplies. Jurisdictions have been divided on the question but the view that cryptocurrencies should be characterised as money seems to be emerging as the dominant view.

In the income tax sphere, ownership rights to cryptocurrencies are generally treated as property rights and the main income tax issue is whether gains on the sale of the currencies should be regarded as capital gains or revenue gains from a trading business, a distinction that matters when capital gains are taxed preferentially. While the type of property may be new, the underlying tax administration issue is not and tax administrators can apply the traditional revenue versus capital tests to characterise the gains on a case-by-case basis.

Peer-to-peer arrangements

One question raised was whether the growth of peer-to-peer transactions through social media gives rise to new VAT avoidance opportunities. Peer-to-peer transactions between individuals have never previously been considered within the scope of VAT but it was asked whether the amplification of these arrangements by thousands or even millions through social media raises new concerns. The question prompted vigorous discussion, but the overall sentiment of participants was that the new relationship spawned by social media should rightfully remain outside the VAT net. The taxable supplies are not the peer-to-peer arrangements for no consideration but rather the provision by sharing websites hosting peer-to-peer platforms of space in which merchants can place advertisements targeted at peers using the websites.

TAX COMPLIANCE

Two themes emerged in papers looking at tax compliance. One concerned the impact of digitalisation on individuals required to comply with tax obligations and the other considered the question of tax compliance costs in the changing tax environment.

The impact of digitalisation on individual taxpayers

The digitalisation of tax administration raises a number of concerns for particular individuals with tax obligations. Nina Olson (U.S. National Taxpayer Advocate) and, separately, John Bevacqua (La Trobe University), both drawing on the U.S. experience, emphasised the concurrent risks to, and the need for protection of, the rights of taxpayers whose compliance activities are particularly affected by digitalisation. The primary concern was the impact of digitalisation on taxpayers lacking effective internet access, especially low-income persons, seniors and the disabled. The shift to digital sources of information and any requirement that taxpayers comply in a digital manner, such as online filing, if it were to be mandated, would have a profound impact on these taxpayers. While digital self-service improves efficiency for relatively simple tasks, some classes

of taxpayers will still need channels through which to talk to tax administrators, either face-to-face or over the phone, when problems arise.

As tax offices move to digitalise services, particularly the provision of information and assistance with resolving disputes, taxpayers may turn to third party providers for personal help, with digitalisation resulting in the outsourcing of personal support and the client being required to pay for a service previously provided by the revenue authority. As a result, Melinda Jone (University of Canterbury, Christchurch) suggested, removing personal services could risk alienating taxpayers and impact on compliance. In this light, wholesale shifts to digitalisation for client services is probably not an optimal policy choice. The question is thus not whether digital or traditional modes of communication and service delivery should be preferred but rather what is the appropriate balance between the two.

Another aspect of digitalisation that can affect taxpayer behaviour is the security of digital information. There are some taxpayers who do not feel comfortable sharing personal financial information on the internet. The optimal systems are those that exploit the benefits of digitalisation where possible and, at the same time, retain traditional systems where these are needed to accommodate persons with genuine concerns over the new technology. It follows that digitalisation of tax systems requires a high level of cybersecurity protection, so that taxpayer information is not at risk. This may not be achievable in many countries at this stage.

Taxpayers' compliance levels are also linked to their understanding of tax. One way of measuring taxpayers' ability to comply with obligations in the digital world is to measure their "tax literacy" or understanding of obligations and opportunities. Marina Bornman and Marianne Wassermann from the University of Johannesburg showed how a model for measuring tax literacy could be developed by modifying traditional financial literacy measurement techniques.

Compliance costs

An initial paper on compliance costs by Richard Highfield, Michael Walpole and Chris Evans (UNSW Sydney) described an ambitious project that seeks to develop a diagnostic tool that reveals relative levels of compliance burdens around the globe. The project commenced with VAT but the organisers plan to work with a large group of collaborators and extend it to all business taxes. The preliminary findings of a pilot study of 13 countries showed that the VAT compliance burden is lower in advanced economies than in developing economies. The findings in terms of each participant country appeared to be broadly aligned with community and government expectations.

Studies on assessing compliance costs at the international level were complemented by investigations of compliance costs at the national level. Martyn Knottenbelt (New Zealand Inland Revenue) provided a summary of the New Zealand experience measuring compliance costs for individuals, which showed how tax procedure changes that reduce time, effort and stress for taxpayers can yield increased taxpayer compliance. Karen Stark (University of Pretoria) and Sharon Smulders (University of South Africa), reporting on the compliance costs of individuals in South Africa, found that by far the largest component of these costs was the personal time spent on tax affairs, in particular the time devoted to record keeping. The findings suggested the

development of more efficient record keeping tools could have a significant impact on compliance costs.

INTERNATIONAL TAXATION

Three discrete issues concerning the emergence of the digital economy and international income taxation were discussed at the conference. The first related to information sharing in the fight against tax avoidance; the second concerned problems arising when allocating profits derived by digital suppliers; and the third looked at opportunities by which to improve the mutual agreement procedure.

Information sharing

Issues concerning the sharing of tax information between tax administrations from different jurisdictions was considered in the context of the base erosion and profit shifting (BEPS) initiative of the Organisation for Economic Co-operation and Development (OECD). BEPS has been a true game changer in terms of the way in which countries unilaterally and mutually respond to the challenges of tax minimisation by evasion in tax havens and avoidance by way of transfer pricing. A study by Kerrie Sadiq (Queensland University of Technology), Adrian Sawyer (University of Canterbury, Christchurch) and Bronwyn McCredie (Queensland University of Technology) showed, unsurprisingly, that the take-up of measures to counter BEPS has been highest among OECD members, followed by G20 members and then countries that do not belong to either organisation. The BEPS procedures that are most relevant to digitalisation are country-by-country reporting and automatic exchanges of information. Although the failure of countries to adopt cooperation arrangements of these sorts in the past was, no doubt, attributable to political reservations, it is only with the digital transmission of information by taxpayers to revenue authorities and the means to distribute information between revenue authorities that programmes such as these have become technically feasible. Crucial to the success of the automatic exchange of information is the adoption of a common reporting standard.

Also important, as Ranjana Gupta (Auckland University of Technology) pointed out, is a review of confidentiality rules in domestic legislation. It is not uncommon for jurisdictions to place strict limits on tax authorities' power to release taxpayers' data to third parties, including other government departments. These rules appear incompatible with automatic exchanges of information between tax authorities in different countries and attention to this issue is needed to harmonise domestic law and international obligations.

Allocating digital profits

Digitalisation creates new opportunities for local businesses to derive profits without a physical shop front presence and for non-residents to sell to customers in a foreign country without a sufficient infrastructure in the country to constitute a permanent establishment.

The first problem was illustrated by the situation in Thailand, where 75% of e-commerce providers sell solely over the internet without a physical sales premises. Traditional audit techniques based on field audits to check actual stock levels, the authenticity of input claims, and so forth are simply

not feasible in these circumstances. The enforcement of tax compliance must be undertaken from completely new perspectives. The first step is to find taxpayers, commencing with the organisation that issues IP addresses to identify local suppliers.

There remains the much larger problem, however, of attributing profits to foreign suppliers with no physical presence in the jurisdiction. Under current tax treaties, a source country can tax the profits of non-resident businesses from sales in that country if the non-resident has a permanent establishment in the country. A case study by Lusi Khairani Putri and Christine Tjen from Universitas Indonesia documenting Indonesian attempts to assess a non-resident Facebook subsidiary on profits derived in Indonesia successfully illustrated the practical difficulties countries have in overcoming the permanent establishment conundrum.

The only solution within the constraints of the current treaty framework would be, as several participants noted, to adopt extended deeming rules that treat servers as permanent establishments. This approach could, however, be easily circumvented by the use of offshore servers.

In the longer term, a fundamental rethink of when source countries should have taxing rights over gains attributable to their territories may be needed. An economic study by Nigar Hashimzade (Durham University) using game models suggested that the optimal outcome can be achieved through a negotiated split of taxing rights between the residence and source countries, but offered no insights into how a residence country can be enticed to negotiate away some of the taxing rights provided to it under current international tax law.

Mutual agreement procedure

The third digital economy and international tax issue considered at the conference was the extent to which digitalisation could offer paths to dramatic improvements of the mutual agreement procedure set out in tax treaties for resolution of inter-country international tax disputes by competent authorities of the countries involved. A study by Christina Dimitropoulou, Sriram Govind and Laura Turcan (Vienna University of Economics and Business) detailed the steps that could be taken to achieve this goal.

OTHER ADMINISTRATIVE AND COMPLIANCE ISSUES

In addition to the papers on the primary theme, a number of papers considered other tax administration and compliance issues. As Gareth Myles (University of Adelaide) noted, however, the tax implications of the shift to a digital economy go well beyond tax administration issues and, indeed, set the stage for a fundamental rethink of tax design and policy matters.

A paper by Monica Bhandari (University College London) on refunds on tax overpayments in the UK explored the implications of time limits imposed by the UK's revenue authority as a mechanism to control a flood of requests for refunds, with a focus on their compatibility with EU law.

Looking at the issue of directors' responsibility for the tax affairs of a company in the Australian context, Kalmen Datt (UNSW Sydney) suggested that, setting tax morale considerations aside,

directors of companies using aggressive tax minimisation tactics may find themselves subject to civil penalties imposed under company law for breaches of company duties if their companies suffer penalties as a result of participation in failed tax minimisation schemes.

The broad issue explored in a paper by Kristin Hickman (University of Minnesota) on judicial review of tax administration and executive regulations or guidelines, most significantly prior to application, will resonate with administrators in all jurisdictions, but the question is of particular interest to officials and taxpayers in the United States, where so much of the tax law is established in regulations issued by the Treasury and IRS guidance. The paper considered whether a shift in judicial interpretation of legislation governing pre-enforcement appeals to the courts is needed.

An Australian initiative to promote corporate tax transparency by way of Tax Transparency Reports has had limited take-up, Catriona Lavermicocca (Macquarie University) noted, with little evidence of company tax practices being modified as a consequence of these reports.

A factor that may be inhibiting the development of more effective simplification programmes is the reliance on input from tax policymakers or tax administrators when identifying areas of complexity or confusion. A South African initiative reported on by Bernadene de Clercq (University of South Africa) showed that taxpayers' perspectives of complexity or uncertainty differ from those of policymakers and administrators, suggesting that effective simplification initiatives require greater input from taxpayers.

Ali Noroozi, the Inspector-General of Taxation in Australia, noted that the digital economy poses challenges not only for tax administrators but also for those who scrutinise their work, such as the office of the Inspector-General of Taxation in Australia. The burgeoning growth of new sharing economy entrepreneurs has raised the number of potential complainants exponentially.

An experimental study reported by Miranda Stewart and Emily Millane (Australian National University) using behaviour insights methodology suggested that taxpayers respond positively and collections increase if tax is paid as close as possible to the time that income is derived. Changing administrative practices to achieve this goal will require associated statutory amendments that stipulate, for example, regular pay-as-you-go remittances, rather than annual payments of tax on investment income and other income not currently subject to withholding or periodic remittance rules.

In a study investigating the relationship between reminder notices and tax payments, Christian Gillitzer (University of Sydney) and Mathias Sinning (Australian National University) found that the earlier reminder notices about overdue taxes are sent, the faster the payment will be received, though the timing appears to have no effect on the ultimate probability of payment.

One tool used to evaluate administrative efficiency is a measurement of the tax gap, that is, the difference between what should be collected under the law and what is actually collected. Neil Warren (UNSW Sydney) provided some insights into measuring the tax gap and the actions that might be taken in response to the findings.

COUNTRY REPORTS

A welcome addition to the conference was the participation of representatives from several regional jurisdictions, a development made possible thanks to the generous support of the Asian Development Bank Institute (ADBI). These and other delegates presented reports from Malaysia, Indonesia, Thailand, Samoa, Kiribati and Vanuatu. The regional reports were joined by a report from further afield from Qatar. The level of development ranged across the jurisdictions and circumstances impacting on tax administration varied.

The regional presentations reinforced, to some extent, a broader study that showed that taxation often involved more complexity for taxpayers in less developed countries than for taxpayers in more developed countries. At the same time, initiatives were being undertaken to reduce complexity, such as the removal of the requirement in Indonesia that businesses had to issue separate commercial and tax invoices for the same transaction.

While island countries share many features, they also exhibit important differences. There is a divide, for example, between those with income tax systems in place and those with no, or limited, income tax systems; the latter, unsurprisingly, face difficulties in generating information for multilateral sharing purposes. There is, similarly, a difference between those connected to the internet by cable and those that are not, with the external digital economy having limited impact on the second group. VAT administrative issues may also be strikingly different in island jurisdictions with broad VAT systems, as well as in those that have high VAT registration thresholds which result in only a small number of registrants paying domestic tax with the bulk of VAT being collected on imports.

The information shared at the conference provided useful ideas for other nations. An amnesty in Indonesia was seen as valuable, not for the revenue it generated, but rather as a tool to bring persons onto tax databases. An analysis of returns filed by companies in China showed how reliance on data coerced by the tax authority (that is, tax returns and information returns) was not sufficient to find non-compliant taxpayers. China's system of exempting, rather than zero-rating, exported services shows how policies at odds with tax design principles can greatly prejudice some domestic service providers. Malaysia's experience with separate agencies collecting VAT and income tax prior to its return to the Sales and Services Tax demonstrates the importance of information sharing between all tax agencies. The role of external forces in modernising domestic tax systems was clearly illustrated by the many changes driven by the OECD (country-by-country reporting, common reporting standards and the automatic exchange of information) and the U.S. (Fair and Accurate Credit Transactions Act [FACTA] requirements).

Finally, country experience showed the paramount importance of tax policy design in developing effective tax systems. It truly does not matter how effective and efficient a national tax authority is if the tax base is fragmented and suffering concessions that undermine the integrity of the tax system.

COERCIVE AND PERSUASIVE METHODS AND THEIR POTENTIAL TO IMPROVE TAX COMPLIANCE BEHAVIOUR: A REVIEW OF THE 6TH ANNUAL TARC CONFERENCE PROCEEDINGS

Festo Nyende Tusubira[1]

1. INTRODUCTION

During the 6th Annual Tax Administration Research Centre (TARC) Conference, which took place at the University of Exeter on the 23rd and 24th of April 2018, a wide variety of studies at various stages of completion were presented and, hereunder, some of the studies are described.

The keynote address was delivered by Brian Erard, a Washington D.C.-based consultant specialising in advanced analytics, who has consulted on a broad range of tax policy and tax administration issues in the U.S., Canada and abroad. He gave a lively presentation entitled "Ghosts in the Tax Machinery"[2], in which he explored various aspect of the manifestation of ghosts, i.e. individuals and businesses that fail to file required tax returns. Noting that ghosts usually leave a shadow, he revisits the standard utility model to include the decision to become a ghost. Possible approaches to ghostbusting including ghost hunting expeditions, comparing surveys with administrative data, and looking for discrepancies in aggregated financial statistics. Following a discussion of the examples of the U.S. "nanny tax", ghost towns and offshore evasion, Erard suggests several possible approaches to exorcising ghosts, including outreach and assistance, expanded third party withholding and information reporting, audits, and "soft" notices and amnesties.

Section 2 of this paper looks at the studies presented that discuss the incentives for tax compliance behaviour and Section 3 considers those relating to the determinants of tax non - compliance. Section 4 reviews the studies on challenges in tax administration and Section 5 presents the conclusion.

2. TAX COMPLIANCE BEHAVIOUR

Large corporations around the world are believed to have developed internal systems by which to support their tax compliance needs. In their study on corporate governance and taxation under co-operative compliance, Eberhartinger, Holland, Lavermicocca and Zieser (2018)[3] observe that large corporations now increasingly focus on the development and refinement of their risk management strategies as part of their management of tax risk. In this study, employing the principal-agent framework and extending it to the relationship between the state and management, the authors empirically test whether tax risk management differs between corporations which are in co-operative relationships with tax administrations and corporations which have traditional relations with the authorities, as well as assessing whether the perceived tax risks differ between these two groups. Eberhartinger et al. (2018) survey corporations in three countries operating co-operative compliance schemes, namely Australia, Austria and the

[1] University of Makere, Uganda, Associate Fellow Tax Administration Research Centre.
[2] Erard, B. (2018). *Ghosts in the Tax Machinery*.
[3] Eberhartinger, E., Holland, K., Lavermicocca, C., and Zieser, M. (2018). *Corporate Governance and Taxation: The Case of Co-operative Compliance*.

UK. where a tax risk management system forms a vital part of governance structure of each corporation, for eligibility for a co-operative relationship.

The authors drew on prior studies on co-operative compliance (OECD, 2016; Beck & Lisowsky, 2014; Lavermicocca & McKerchar, 2013; Mulligan & Oats, 2009; Freedman, Loomer, & Vella, 2009) in which tax risk, tax risk management and uncertainty are discussed. Indeed, they believe that companies that adopt co-operative compliance strategies have better tax risk management and more certainty about their tax positions, which might encourage tax compliance behaviour. This study makes a contribution towards the analysis that identifies the relationship and interaction between tax administration behaviour and corporate governance. Tax authorities, policymakers and civil society are expected to benefit from the findings, which may be helpful when making judgements about the appropriateness of co-operative compliance as a basis for regulation.

In a related study on the taxpayer compliance behaviour of micro and small businesses in Nigeria, applying multi-stage mixed methods, Aniyie (2018)[4] highlights that, at the micro-level, taxation has been known to activate a variety of taxpayer decisions and behaviours which impact on compliance. Against this background, the author had a desire to understand how tax provisions influence taxpayers' decisions and behaviour in comparison with compliance driven by Allingham and Sandmo's (1972) model, which the author perceives has not facilitated improved taxpayer compliance behaviour. The author is partly right, as a number of studies have highlighted other factors that might have significant influence on tax compliance behaviour. Specifically, Aniyie's (2018) departure from this rests on the following points: first, the global campaign against tax avoidance is influential, albeit largely based on legal definitions; second, the call for taxpayers to pay their fair share of tax brings a moral aspect into taxation, which is likely to introduce a controversial subjective process in the determination of tax liability; and third, there is a shift of attention towards non-economic factors which are known to influence tax compliance behaviour. The study seeks to examine the relationships between corporate income tax incentives and taxpayer compliance behaviour in Nigeria and between the role of intermediaries (e.g. the members of the Nigeria Bar Association [NBA], the Chartered Institute of Accountants of Nigeria [ICAN] and the Chartered Institute of Taxation of Nigeria [CITN]) and taxpayer compliance behaviour within that context. The study confirms the existence of the relationships under study and offers recommendations which could improve tax compliance in Nigeria. The study might help to further empirical socio-legal research using mixed methods by providing an insight into the "taxpayer-tax intermediary-tax authority" relationship in Nigeria, and demonstrates that a one-size-fits-all approach may not always be productive.

In addition, tax compliance frequently requires technical assistance from professionals, especially for small and medium-sized enterprises (SMEs), who often turn to external experts to help them to navigate the tax system complexities. Schoonderbeek, Vliegen and van Rijswijk (2018)[5], in their study, argue that in the process of working for SMEs, tax practitioners gain more influence over the relationship between the tax administration and their SME clients. In other words, the tax practitioners' experience with their clients may have an influence on the SMEs' tax compliance. Tax authorities' knowledge of this influence can guide them towards developing specific policies to influence tax professionals to encourage their clients towards

[4] Aniyie, A. I. (2018). *Taxpayer Compliance Behaviour: Report of a Multi-stage Mixed Methods Investigation.*
[5] Schoonderbeek, W.M., Vliegen, J., van Rijswijk, L. (2018). *Reaching SMEs Through Their Tax Practitioner: A Survey Among Tax Practitioners by the Netherlands Tax and Customs Administration*.

tax compliance. The authors posit that if tax practitioners maintain higher levels of motivation, knowledge and permission from their clients to be compliant, they will encourage the tax compliance of their clients. The results of a survey of 852 tax practitioners suggest that a relationship exists between tax practitioners' motivation to comply, their level of knowledge about tax legislation, procedures and permission, and their tax-compliance promoting behaviour. These findings reflect the importance of the existence of good relationships between tax authorities, tax practitioners and the taxpayers

Contrary to Aniyie's (2018) assertion that deterrence audits (Allingham & Sandmo, 1972; Alm, Jackson, & McKee, 2009; Kleven, Knudsen, Kreiner, Pedersen, & Saez, 2011) may not influence tax compliance behaviour among micro and small business corporations in Nigeria and other developing countries, Beer, Kasper, Kirchler and Erard (2018)[6] note that a study of the U.S. Taxpayer Advocate Service in 2015 demonstrates that operational tax audits are likely to effectively identify non-compliant individual taxpayers, hence enhance subsequent reporting compliance. However, the same study finds that if audited taxpayers do not experience additional assessment, unfavourable audit effects are likely to occur, thus complementing prior work carried out on the effects of random tax audits on subsequent reporting compliance (Gemmell & Ratto, 2012). Although it's acknowledged that the drivers of behavioural responses to audits remain unclear, Beer et al. (2018) indicate that different operational audit types (correspondence, office and field audits) and outcomes (positive, negative and no additional tax assessment) have diverse effects on attitudes towards paying taxes.

In investigating these issues, a survey of two random samples of 1,350 Schedule C (self-employed) U.S. taxpayers, consisting of one group of taxpayers who had recently been audited and another group of taxpayers who had not, was conducted in order to try to estimate the psychological effects of audits. Using a propensity score matching analysis, the findings suggest that taxpayers' audit experiences have an impact on their attitudes towards tax compliance, which might explain their future tax compliance behaviour. The study thus argues that understanding how tax audits shape taxpayers' attitudes is a prerequisite for developing effective collection strategies that combine enforcement and the provision of high-quality taxpayer services to establish high levels of compliance.

Other studies relating to tax compliance emphasise the need for taxpayers to trust the existing tax system so as to encourage them to comply. For instance, Berenson (2018)[7] suggested, in his work, "Transitioning to Greater Trust and Tax Compliance", that State and society interact with each other through trust. In his study, Berenson (2018) focusses on Poland and Russia, which represent competing models of post-communist development, and on Ukraine, which seems to lie between the two, and argues that building and accumulating trust serves as the foremost driver for supporting the transition from a coercive tax state to a modern, legal and legitimate one. He therefore suggests that, for states failing to gain public trust, reforming street-level bureaucratic operations would go a long way towards building better governments which were capable of executing their long-term goals. The author emphasises that trust is a two-way thing, requiring the citizens to trust in the state and the state to trust its citizens to comply with state regulations without it needing to overuse coercion, and that this interaction through trust is believed to enable policy implementation. The study also suggests that the state

[6] Beer, S., Kasper, M., Kirchler, E., & Erard, E. (2018). *Audits, Attitudes and Tax Compliance: Evidence from Self-Employed U.S. Taxpayers*.
[7] Berenson, M.P. (2018). *Taxes and Trust: From Coercion to Compliance in Poland, Russia and Ukraine* (pp.253-270). Cambridge: Cambridge University Press.

is likely to build up trust by treating citizens in a procedurally fair way (e.g. by delivering good customer service), as well as by providing them with requisite goods and services. This would go a long way in encouraging citizens to comply with state regulations. Furthermore, a tax administration policy can be beneficial if it reorients the tax system to focus entirely on compliance and the reform of the whole tax bureaucratic system, engages in taxpayer outreach programmes and acknowledges employees' contribution. Once these programmes have been undertaken appropriately, they have the capacity to build taxpayers' trust in the government and the tax system, which might result in the receipt of increased tax revenue by which to fund public expenditure.

Induced voluntary tax compliance behaviour and the intrinsic motivation to comply with the tax regulation have also been increasingly investigated in recent years. Existing literature indicates that voluntary compliance reflects the taxpayers' inner-most motivation to pay their fair share of taxes without the application of enforcement mechanisms (Kirchler, Hoelzl, & Wahl, 2008; Kirchler, Kogler, & Muehlbacher, 2014). One example of induced voluntary compliance is that presented by Michael Masiya (2018)[8] in his paper, "Lessons from Voluntary Compliance Window (VCW): Malawi's Tax Amnesty Programme". The Malawi Revenue Authority (MRA) called upon non-compliant taxpayers in the fiscal year 2013/2014 to voluntarily declare and pay their tax liabilities within a period of 92 days to avoid penalties. According to the study, the VCW programme was a success, as it enabled the MRA to register new taxpayers as well as increase tax revenues for the country, generating a total of MK 4.25 billion in tax revenue from 949 taxpayers, of which MK 122.80 million was from new taxpayers. Additionally, it was discovered that existing taxpayers were not fully compliant, as the balance of the revenue generated was from them. These results signal that amnesties of this type are likely to be beneficial to developing nations that experience non-compliance, as they encourage tax compliance while reducing tax authorities' administrative costs. However, frequent implementation of amnesties may discourage the intrinsic motivation to comply.

Another study of voluntary tax compliance, by Marina Bornman (2018)[9], introduces a variant of reward systems for tax compliance behaviour stemming from a psychological tax contract, which is believed to illuminate tax morale as an interaction that brings together taxpayers and the governments in a fiscal exchange. In this work, the author argues that reward management can add to a positive psychological contract. However, drawing on Feld and Frey's (2007) scholarship, from the perspective of the crowding out theory, some rewards might weaken taxpayers' intrinsic motivation to pay taxes, although the rewards given to recognise a taxpayer for being compliant might strengthen and increase tax morale. Using the Cognitive Evaluation Theory (CET), the study finds that great care should be exercised when tax authorities are motivated to provide tangible rewards for tax compliant behaviour. Bornman (2018) advises that rewards ought to express a message of appreciation and competence – a reward reflective of the information provided would support the taxpayer and affirm feelings of competence as well as satisfy the need for autonomy. This means, therefore, that taxpayers who make the right choices ought to be appreciated.

Verberne and Arendsen (2018)[10] introduced another dimension in their exploratory socio-legal work titled "Taxation and the informal business sector in Uganda", suggesting that sustainable

[8] Masiya, M. (2018). *Lessons from Voluntary Compliance Window (VCW): Malawi's Tax Amnesty Programme*.
[9] Bornman, M. (2018). *Principles of Rewarding Voluntary Tax Compliance*.
[10] Verberne, J., & Arendsen, R. (2018) in their exploratory socio-legal work titled "Taxation and the Informal Business Sector in Uganda".

taxation could be of significance to the Global South. The authors suggest that if taxation is carried out in a sustainable way, countries that lie in the Global South could develop the capacity to contribute to the realisation of the 2030 Sustainable Development Goals (2030 SDGs). According to the authors, bringing the informal sector into the tax net could be of help in supporting revenue mobilisation support the 2030 SDGs. However, they recognise the challenges involved in taxing this category of businesses and note that taking a bottom-up approach would provide an understanding of taxation in the informal sector as well as tax compliance. Their focus was, primarily, on SMEs in Kampala, Uganda. Using a qualitative methodology, the authors found that tax morale among SMEs in Kampala was low, as their attitudes towards compliance are affected by a number of constructs, viz. their trust, tax knowledge, perceptions about the delivery of public goods and services, perception of tax fairness, and awareness of the level of enforcement. Indeed, the existing literature supports their findings, as it argues that socio-psychological factors are powerful in influencing tax compliance behaviour, more so when they are favourable, or tax non-compliance would dominate taxpayers' behaviour. The results of the study also reveal that the existing presumptive tax system does not have the capacity to effectively encourage the informal sector to comply with the tax regulations, reflecting unfavourable socio-psychological factors as well as a weak enforcement mechanism. The findings also imply that it is better to develop the informal economy to match the level of taxation required (while remembering to tackle the mischief within the tax system), as building the capacity of a society to pay taxes might be more beneficial than only having strong enforcement mechanisms.

In their study on tax administration and firm performance, Dabla-Norris, Misch, Cleary and Khwaja (2017)[11] argue that small and young businesses tend to incur excessively higher tax compliance costs than their larger and older counterparts. The authors therefore propose that high-quality tax administration is likely to lower tax compliance costs. In this study, Dabla-Norris et al. (2017) use a large sample of firms in emerging markets and developing economies to examine how the quality of tax administration affects a firm's performance. Using information from the Tax Administration Diagnostic Assessment Tool (TADAT), the authors construct a multidimensional index of tax administration quality that is novel and comparable internationally. As posited, the study demonstrates that better tax administration improves the efficiency of small and young firms, rather than of larger and older firms. The results remain robust when controlling for other constructs of tax policy and economic governance, alternative definitions of small and young firms, and measures of the quality of tax administration. From a policy standpoint, this evidence shows that different countries could benefit from growth and productivity dividends as a result of enhanced tax administration, as it ultimately lowers taxpayers' compliance costs.

Cabral and Gemmell's (2018)[12] study estimated self-employed taxpayers' income gaps. This estimation is based on registration and survey data from New Zealand's Integrated Data Infrastructure (IDI), since it synchronises data on the income and expenditure of individual self-employed taxpayers, which reduces the income measurement error and provides the capacity to measure evasion according to the different incentives for misreporting. The study considers a self-employed taxpayer's income gap to be the proportion of undeclared to true

[11] Dabla-Norris, E., Misch, F., Cleary, D., & Khwaja, M. (2017). *Tax Administration and Firm performance: New Data and Evidence for Emerging Market and Developing Economies.*
[12] Cabral, A. C. G., & Gemmell, N. (2018). *Estimating Self-Employment Income Gaps From Register and Survey Data: Evidence for New Zealand.*

income and uses traces of expenditure to deduce true income holdings, drawing on the scholarly works of Pissarides and Weber (1989), and Feldman and Slemrod (2007).

This implies that the study utilises the association between expenditure and income for the employed, since this category of taxpayers have minimal chance of evasion. This is perceived to approximate the true income of the self-employed. Indeed, matching a taxpayer's declared income with his or her actual expenditure might help to reveal discrepancies and circumstances in which individuals have spent more than they have received in income. Cabral and Gemmell (2018) estimate that, on average, the self-employed under-declare approximately 20 percent of their income but this could be estimated to be between 10 and 30 percent with a 95% level of confidence. The authors also find that the income gap might be significantly, but differently, affected by gender and regional settings within the country. All in all, this makes a novel contribution to tax compliance literature and might pave the way for further research into the tax compliance behaviour of self-employed individuals in developing countries for comparison.

Another study, by Dr. Adrian Sawyer (2018)[13], highlights the contributions that tax committees make from the perspective of New Zealand. The paper indicates that a number of governments, particularly in Western countries (especially Australia, New Zealand and the United Kingdom, seem to be using committees as tools for making contributions towards tax policy reforms. The author indicates that the use of such committees is evident in tax rewriting projects for the period running from the 1990s to the 2000s and, more recently, during their tax system reviews. The committees' contributions have been captured by literature looking at particular jurisdictions' reforms and their implications, tax committees' roles and the incorporation of comparative analyses within other jurisdictions. However, this paper shows that there has been scant research taking a longitudinal approach towards reviews of tax policy reforms as well as examining the contributions that such committees make towards the advancement and impact of tax policy and administration in specific jurisdictions.

Applying "traditional" legal methods, along with a tax policy lens, this study traces and examines the contributions of tax committees instituted by New Zealand over a period of fifty years. It considers, more specifically, the contributions made by the Hunt Committee of 1922, the Sim Commission of 1924 and the Gibbs Committee which took place nearly thirty years later and released its Taxation Committee Report in 1951, all of which were extensive reviews. The next significant contribution to reform made by tax committee was that of the Taxation Review Committee 1967 (The Ross Committee). The Ross Committee was set up in 1966 to undertake a comprehensive review of all aspects of central government taxation in New Zealand. Other contributions include: the McCaw Review on Tax Reform of 1982, which arose from the New Zealand Planning Council of 1981, which was titled "An Agenda for Tax Reform"; and, later, the 2017 Tax Working Group (TWG) which, as of September 2018, had yet to release its report. Therefore, the information provided by the committee outputs is likely to offer general guidance for economies that are considering instituting tax committees, since tax committees are frequently thought of as instruments with which the level of consultation, transparency, process of tax policy development and related administration can be improved.

Turning to another topic, Wang and Sun's (2018)[14] paper, "Satisfaction with Public Services (SPS) in China from Heterogeneous Behavior", suggest that satisfaction is the main aspect of

[13] Sawyer, A. (2018). *The Contributions of Tax Committees: A New Zealand Perspective*.
[14] Wang, G., & Sun, J. (2018). *Satisfaction with Public Services in China from Heterogeneous Behavior*.

happiness economics, and that understanding citizen SPS is frequently seen as a fairly easy and effective way of assessing real happiness levels and service quality. The study uses a multistage stratified design with a sample of 10,968 responses from the Chinese General Social Survey (CGSS) 2015. In their analysis, in order to understand people's satisfaction levels in relation to other constructs, such as income, GDP, tax, area and the internet, the authors consider public services to include: public education; health care; housing security; social governance; employment; social security; basic social services; public culture and sports; and urban and rural infrastructure. Gaining knowledge about citizens' satisfaction levels may help governments to set priorities in order to: guide improvements in the service sector; support citizens and advocacy groups in holding grassroot service providers answerable for services delivered; and abet policymakers in appraising success for the purpose of initiating decentralisation of service delivery and tax compliance.

D'Attoma, Tuxhorn and Steinmo (2018)[15] also indicate that mass attitudes could be strong determinants of budget preferences. They reveal that the U.S. Federal Government debt has increased tremendously in the past decades as a result of annual budget deficits, and that these increases create fiscal budget constraints, forcing politicians to make tough choices between spending and increasing revenue. In order to understand the kind of federal budget that voters are prepared to support when fiscal constraints exist and to explain budgetary choices, the authors utilise a budget tool designed to measure how people weigh the fiscal trade-offs between revenue and spending items. Results from a voter-age population-based survey with the embedded budget tool show that budget preferences are strongly predicated by citizens' trust in government and partisanship, but are weakly predicted by the economic self-interest construct. Improving citizens' trust in government and partisanship might therefore alleviate budget deficits so as to enhance political choices between spending and revenue items.

Although literature indicates that trust in government is important, Chen, Fonseca, Grimshaw and Kotsogiannis (2018)[16] suggest that the quality and delivery mechanism of tax guidance issued by the tax administration service as a starting point may influence the overall level of compliance among taxpayers. Indeed, the results from two experiments in which subjects were required to complete tax returns for fictitious profiles containing a number of complex items partially supported this hypothesis. The content of the guidance in the first experiment was shown to have an effect on compliance, but the delivery mechanism had no effect. The results of that experiment also demonstrated that subjects made similar numbers of errors. The subjects also reported a pattern of values which conformed to a particular set of errors as a result of the erroneous classification of items and a failure to correctly process particular values. Similar results were obtained in the second experiment, where an alternative mechanism for tax filing was used, as the patterns of incorrect categorisation observed on a "by item" basis were found to be consistent with the errors found in declarations when a more general tax form was used. This means that if alternative guidance is provided to taxpayers, error rates could be reduced, which might improve tax compliance and revenue collection.

In another study, Björklund Larsen (2018)[17] considers legitimacy which has been proposed as the foundation of a functioning welfare state. In such a state, a legitimate tax system is that

[15] D'Attoma, J., Tuxhorn, K., & Steinmo, S. (2018). *A Holistic Approach to Studying Budget Preferences: Using Interactive Budget Tools for Social Science Research*.
[16] Chen, (c). J., Fonseca, M. A., Grimshaw, S. B., and Kotsogiannis, C. (2018). *Experimental Examination of Incorrect Categorisation and Calculation Errors in Tax Returns*.
[17] Björklund Larsen, L. (2018). *Striving for Legitimacy. The Swedish Fiscal System in Practice*.

which is widely accepted and broadly considered to be fair by all citizens. The author contends that a legitimate tax system, from the taxpayers' perspective, should be grounded in a legal mandate, and be applied and interpreted as such. This work recognises that legitimacy is only achieved over a long period of time, to the extent where citizens accept such authority under multiple dimensions. This is likely to be manifested in guidance on how citizens, in general, react to the provisions of the law, politicians and bureaucracy, as well as in their morale. Using ethnographic fieldwork following a risk assessment project, this study finds that Swedish citizens have confidence in the Swedish Tax Agency due to the legitimacy built up over time while applying insights from international research on tax compliance and cautious interpretation of the tax law to ensure that every taxpayer contributes their fair share. In creating legitimacy, the study reveals, tax authorities like the Swedish Tax Agency may use communication strategies, such as treating taxpayers in correct, serviceable but empathetic manners, both internally, when talking about taxpayers within the authority, and externally, when directly contacting taxpayers in writing and orally. Additionally, due to the various control systems in place to reduce errors, and the provision of information about the administration's control systems and its analysis work, all citizens are likely to trust the system and pay their fair share of tax.

Gyoshev, Kambourov and Pavkov (2018)[18] carried out a study of flat tax reforms, European Union accession and earnings inequality in Bulgaria from 2005 to 2016, specifically looking at the changes involving Bulgaria, which joined the European Union in 2007 and the introduction of flat corporate and personal income taxes. Using a comprehensive administrative dataset that covers all working individuals and their monthly earnings (excluding those employed by the central government), the authors discovered the following information about individuals between the ages of 20 and 60. First, earnings inequality increased during the period from 2005 to 2016 and there was a perceptible sharp increase in 2006-2007, which can be explained by the unique combination of tax reforms and EU accession. Second, a breakdown of the total inequality data into between-firm and within-firm inequality shows higher between-firm inequality, which jumps in 2006-2007, and a lower within-firm inequality, which demonstrates a steady increase for the period under study, all of which is contrary to patterns observed in the United States. In addition, the study finds substantially higher within-occupation inequality, which accounts for most of the observed patterns in total earnings inequality, as well as the 2006-2007 sharp increase. Overall, in order to understand the effects of Bulgaria's entry into the European Union and the changes in its tax structure on earnings inequality, we need to focus on their effects on within-occupation inequality. Furthermore, the authors suggest that the introduction of a flat personal income tax might have a small effect on overall earnings inequality, although it can create increased between-occupation inequality, as was demonstrated for the period between 2007 and 2008, when within-occupation inequality decreased slightly. The paper also advises that within-occupation inequality is likely to increase for senior officials and managers but reduce for skilled production workers, craftsmen, and assemblers and machinery operators, rather than for the other categories of occupations. This study is likely to help other countries intending to join the EU to understand the implications of doing so.

[18] Gysoshev, S., Kambourov, G., & Pavkov, T. (2018). *Flat Tax Reforms: European Union Accession, and Earnings Inequality in Bulgaria*.

3. DETERMINANTS OF TAX NON-COMPLIANCE

Many governments face challenges in financing public expenditure due to inadequate revenue sources. As indicated earlier, taxpayers' loss of tax morale might be one of the factors responsible for triggering tax evasion and avoidance behaviour. One study of tax avoidance scenarios is that of Gamannossi degl'Innocenti and Rablen (2018)[19], which addresses tax avoidance in a social network. Drawing on the existing literature on self and social comparison in judgements, the authors argue that taxpayers choose to evade taxes so as to try to further their consumption when compared to first, their referent others in a social network, and second, their past consumption trends. The authors use the unique Nash equilibrium of the model to relate optimal evasion to a (Bonacich) measure of network centrality, where more evasion is experienced among taxpayers who are central in the network. The study finds that a related Bonacich centrality might rank the direct and indirect revenue effects from auditing. The study also identifies celebrity taxpayers within the network structures with widely observed consumption, whose wealth is systematically higher, implying that authorities' observation of such taxpayers in the social network can yield additional revenue through appropriate audit targets, since a number of measures of network centrality directly and indirectly correlate with evasion.

García-Montalvo, Piolatto and Raya (2018)[20], on "Tax Evasion in the Housing Market", suggest that Spain experiences high tax evasion of approximately 20 to 25% of GDP. They indicate that many recent corruption case investigations have shown that the sectors that are most vulnerable to high corruption across the EU are urban development and construction. In the housing market, incidences of tax evasion consist of the under-declaration of purchase prices to tax authorities, where buyers tend to reduce the real estate transfer tax burden, while the vendors pay income taxes based on the lower capital gains disclosed. Although the linkage between the housing market, tax evasion and corruption has been in existence for a long time, research in this area is scant, making this study a novel contribution to the existing literature on the housing market, as it models and estimates the determinants of the undeclared income. By extending the housing market setting (Gete & Reher, 2016) to include circumstances in which buyers are allowed to declare only a portion of the value of their purchase, and using a unique dataset of housing transactions from 2005-2011, the model allows for the calculation of the extent of under-declared income in the business of second-hand housing estate sales, which might strengthen the fight against tax evasion.

More precisely, the study finds that the existence of the Loan-To-Value (LTV) ratio is linked to real estate appraisal as a critical mechanism of tax non-compliance, meaning that the study is related to the overappraisal literature. Moreover, the model used reveals that tax fraud is highly likely in regions where levels of corruption are higher and the citizens are less well educated, even if different transparency indices are used. Besides, tax evasion is more likely to increase with a larger shadow economy, which this theoretical model can demonstrate with a sufficiently high weight of social stigma in the utility function. Therefore, fighting corruption, increasing citizens' awareness, reducing the informal sector and improving disclosure of real estate income might encourage tax compliance in Spain's housing market.

[19] Gamannossi degl'Innocenti, D., & Rablen, M. (2018). *Tax Evasion on a Social Network*.
[20] García-Montalvo, J., Piolatto, A., & Raya, J. (2018). *Tax Evasion in the Housing Market*.

Moreover, in their study titled "Voting with Tax Evasion: Ideological Motives in Tax Compliance Behaviour", Rodríguez-Justicia and Theilen (2018)[21] develop a theoretical model of voting for redistributive taxation, in which voters' tax compliance behaviour is driven by fairness concerns. Using individual-level data from the World Values Survey (WVS) database and the European Values Study (EVS) with approximately 75,000 observations from 24 OECD countries over the period 1995-2012, the findings show that both the ideological stance of government and individuals, and the size of the public sector significantly influence tax compliance behaviour. Additionally, the authors indicate that voluntary tax compliance may be significantly affected by ideological remoteness between taxpayers and governmental parties. This means that, in both cases, the probability of a moderate rightist exhibiting the highest level of tax compliance under a moderate left-wing government is between –five and six percentage points lower than that of a moderate leftist doing so under a moderate right-wing government. These results emphasise the significance of ideological stances in shaping effectual income redistribution and reveal that policymakers might have to focus their attention on the growing ideological divergence lately observed in advanced nation states, as this may be an impediment to reducing income disparity.

Petruzzi and Prasanna (2018)[22] indicate that the borders between traditional and digital economies are progressively blurring as existing business models are continually being reformulated by Multinational Enterprises (MNEs). In considering the transfer pricing connotations of business restructurings, the authors indicate that the focus of MNEs is to gain unexploited commercial value and competitive advantages through digitisation and changes in the global value chains as they modify financial transactions between related businesses. Business restructuring activities are the focus of tax administrators (OECD, 2017a), especially when associated enterprises' structures are tax-motivated and result in the transfer of profit potential between related companies, because digitalisation increases the risk of profit-shifting behaviour when restructurings go unnoticed. Although international tax policymakers and certain individual tax jurisdictions are working towards addressing the challenges arising from digitisation (OECD, 2018; OECD, 2015b), taxpayers are at risk of litigation when transfer prices differ from comparable arm's length prices. This paper, therefore, discusses the challenges in accurately delineating and recognising transactions under technologically transforming businesses models, as well as the adjustments to comparability analysis and the process of determining reparation for restructuring transactions that are likely to be needed. Lastly, the study discusses the influence of the information collected by tax administrators (OECD, 2015b) along with the role that may be played by alternate dispute resolution machinery in tackling disputes.

4. CHALLENGES IN TAX ADMINISTRATION

Dr. Aleksandra Bal (2018)[23] considers whether and, if so, how blockchain technology might create transformation in tax administration and tax compliance, and what factors might impede its widespread acceptance. The author posits that, as an open, transparent and unchallengeable thin ledger, blockchain technology can record transactions among many parties and it has developed rapidly in this respect. Given that they have more diverse purposes than Bitcoin digital currencies, blockchain-based tools could be used to simplify the process of transfer

[21] Rodríguez-Justicia, D., & Theilen, B. (2018). *Ideology and Tax Morale*.
[22] Petruzzi, R., & Prasanna, S. (2018). *Digitalization of Traditional Business Models – Transfer Pricing Implications of "Business Restructurings*".
[23] Bal, A. (2018). *Technology Trends and Taxation: Does the Tax Sector Need Blockchain?*

pricing and tax compliance in the tax arena by, for example, providing the tax administrations with greater clarity and a better understanding of each and every transaction, and tracking the movement of goods and services across the value chains. Both transfer pricing documentation and audit would be made possible by the use of blockchain technology. However, new technology is normally labour-intensive and costly, as the implementation of such technology requires skills that tax officials, tax managers and taxpayers lack, Therefore, advance planning is required so that the benefits that come from the use of such technology can be enjoyed.

In a related study, van Rijswijk, Hermsen and Arendsen (2018)[24] explore the future of tax administration with reference to a blockchain scenario study conducted by the Netherlands Tax and Customs Administration (NCTA). They question whether centralised tax authorities will be relevant in the next 20 or so years as, in the digital age, there is a likelihood of a huge shift towards complex information processing occurring and large quantities of transactions being executed, which could change how these authorities operate in future. The study provides the example of Distributed Ledger Technology (DLT) as used in blockchain, and presents a novel digital infrastructure for economic transactions. Like Dabla-Norris, Misch, Cleary and Khwaja (2017), van Rijswijk et al. (2018) argue that this digital infrastructure is a transparency-based governance model which is differentiated by its distributed and immutable nature, shared information and consensus mechanisms. Given that DLT is being implemented by tax administrations, the authors indicate that this technology might have a disruptive influence on the societal playing field in which these administrations operate.

The authors highlight that, even though a large amount of publicity has been generated about DLT, the current strategic policies, plans and efforts of tax authorities are ineffective due to uncertainties with regard to understanding how DLT advances might evolve in the near future. Using an explorative scenario and thinking about gaining insights into the future, the authors carried out interviews and three expert workshops with a diverse group of blockchain experts to explore uncertainties about tax authority perspectives. The axes determined for the scenarios were active vs. passive government engagement and public vs. private dominant DLT-type adoption. When crossed, these axes generate a matrix of four separate future scenarios which were then validated with additional explanation in the final workshop by a group of tax authority employees.

Tax simplification has long been believed to influence tax compliance behaviour among various taxpayers and has been thought of as simplifying the language of the tax law so that all taxpayers can understand it. However, Paul Morton and Peter Allen (2018)[25], from the UK's Office of Tax Simplification, suggest that the volume of UK tax legislation has expanded considerably with time and argues that, in the current circumstances, tax simplification could be interpreted as the need to shorten the tax code to the length that it was in the early 1980s. However, the inexorable increase in the volume of tax law resulting from a number of factors and the complexity of broader society are issues of concern. Nonetheless, the authors note that improving the user experience is vital, since the majority of taxpayers can easily interact with the tax system which seems to be more feasible.

In fact, the author suggests a number of ways in which user experience could be improved through functional simplification of the tax legislation, including: the smoothing of cliff-edges,

[24] van Rijswijk, L., Hermsen, H., & Arendsen, R. (2018*). Exploring the Future of Taxation: A Blockchain Scenario Study*.
[25] Morton, P. and Allen P. (2018). *What is Tax Simplification?*

the use of tax reliefs, optionality and the use of technology. There is recognition that the various thresholds in the UK tax system function as cliff edges, with unequal consequences for those on either side of the thresholds (e.g. the VAT law) which may be evened out so that young businesses can easily work with the system in order to comply. The authors highlight a growing number of tax reliefs which are believed to amplify the complexity of the tax system. However, the existence of tax reliefs serves different purposes and people. Therefore, the authors argue that their retention in the tax codes remains appropriate but advises taxpayers to be responsible and only to access reliefs that relate to their needs. To further improve user experience, taxpayers would be automatically granted tax reliefs that are known to be due to them. Having general options also increases tax system complexity. However, conversely, selectively providing choices in relation to alternative treatment, such as the computation or non-computation of capital allowances for small taxpayers, might result into improved simplicity, whereas just reducing the options could introduce more intricacies into the code. In addition, if taxpayers appropriately adopt technology, there is a likelihood that their user experience will be simpler.

Stephen Daly's (2018)[26] study looks at the use of two types of soft law (type 1 and type 2) and their relationship in context of protections for taxpayers. Daly argues that the term "soft law" describes a selection of instruments at both international and national levels, although it explains norms with informal binding effects on the behaviour of others. The study indicates that there is a significant difference at the national level between soft law instruments which set out rules which the relevant official or public authority has the discretion to decide upon and soft law instruments which set out an official or public authority's view of rules which have been set by Parliament. The author indicates that this distinction is of critical importance where citizens need protection in circumstances where an official or public authority wants to take a direction other than the one set out in the instrument. The study shows that taxpayers receive more robust protection from non-legal redress through arbitration than from the courts when HMRC seeks to depart from its position in type 2 soft law instruments. This means that the use of type 2 soft law mechanisms might be more beneficial in encouraging taxpayers to comply, which could therefore improve tax revenue collections.

Other studies include that of Massey (2018)[27], who explores the gap between theoretical studies of bunching around tax thresholds and what taxpayers experience in the real world. According to Massey (2018), even though bunching is a novelty to some people in the academic world and the research divisions of tax authorities, its manifestation would not surprise those at the sharp end of tax. The author argues that the manifestation of kink points can be misleading because underlying data is often not well understood. The study also reveals more striking behaviours which only occur around the kink points, which all quantitative researchers and revenue authority analysts are advised to take note of in their work.

Lastly, in their exploratory study, Beynon and Holland (2018)[28] discuss the fuzzy-set qualitative comparative analysis (fsQCA), a set-theoretical technical methodology. The authors argue that this method is able to carry out multi-conjunctional asymmetric analyses that form a foundation for casual formula which connect, for example, the corporate effective tax rates (ETRs) measures, which include the annual total tax charge and the current tax charge. Though

[26] Daly, S. (2018). *HMRC as Tax Advisor – Types 1 & 2 Soft Law and Protections in Tax*.
[27] Massey, D. (2018). *How "The Kinks" Can Enlighten us About Bunching at the Kinks: What do Taxpayers, Tax Advisers and Front-line Tax Administrators Really Get Up to at Those Kink Points?*
[28] Beynon, M. J., & Holland, K. (2018). *Dynamic Analysis of Corporate Tax Management Strategies.*

different, these methods have hardly been used in tax compliance research, which could facilitate future research studies in this area.

5. CONCLUSION

The 6th annual TARC Conference brought together a lively set of presenters and audience and diverse set of research studies. The disciplinary mix has become a hallmark of the TARC programme and the conference provides a venue for stimulating debate from different perspectives about the ways in which our tax systems are and could be administered now and in the future.

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GOOD GOVERNANCE AND REMEDIES: TAXPAYER RIGHTS IN APPLICATION – TRANSCRIPT OF PANEL DISCUSSION FROM THE 3RD INTERNATIONAL CONFERENCE ON TAXPAYER RIGHTS, 2-4 MAY 2018

Pasquale Pistone[1], Nina E. Olson[2]

CARA GRIFFITH[3]: Almost the last panel, but this has been just a fabulous conference.

Thank you all for coming back.

I think I have what may be the easiest job all day with the two folks that are sitting next to me, who don't really need a moderator, but I'm here nonetheless and will contribute what I can. I want to just take a brief moment to thank Nina for putting this conference on, for conceiving of it, for making it a reality, and for doing it year after year after year. But also, a big thankyou to all of you; it really has been inspiring to see what is a worldwide exchange of information. It has been fascinating to sit and listen to the different opinions, to see perspectives from different countries, and really, then, to come together on the common topic of taxpayer rights. So without further ado, what our panel is going to kind of do is take a look back at what has gone on, take a look at each of the panels, and provide some reaction to it and I think that, maybe, at the end of that we will actually get to what would be a model, or at least a pathway towards coming up with a taxpayer bill of rights. So, Pasquale?

PASQUALE PISTONE: Thank you, Cara. I think it's also now my time to thank Nina for bringing us all together. I think I've been the hundredth person to say that, but I am proud of saying that because I cannot recall conferences in which I have been taking so many notes. I have counted the pages of the booklet. I've been taking 32 pages of notes and not just because I want to sound like a nerd, but because I have learned an awful lot. And this is what we can learn from each other when we consider that there are global issues which are being discussed and handled in a different way, especially that there is no overall analysis of those points. As Cara has indicated, we would like to go panel by panel just mentioning some of the issues which could also be food for future thought but also interesting for further activities. The first panel was on the "Multidisciplinary Approach to Good Governance and Legal Remedies", and I think, you know, that this first panel was important for giving us an idea that if we want to talk about trust and we want to talk about a strong interaction with people who are going to be affected by the action of tax authorities, there is a need for a profound understanding of what's going on. So, when Lotta Björklund Larsen was talking about the "acknowledging" perspective, that is really extremely important. If we really want to do good governance, we really need to understand how things work concretely in practice and the persons who are being affected by it.

Of course, it's going to take time. Of course, it's less convenient than going for setting some goals and trying to automatically process those goals. This thorough knowledge is particularly important.

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[3] President and CEO, Tax Analysts (Panel Moderator).

So there could be issues of effectively achieving the goals, but we think that it's important to stress that if we really want to come up with some quality analysis of good tax governance and we want to come up with something which is not just effective or efficient but it's also qualitatively suitable, then this holistic view of those issues is particularly important. And Nina and I, this year, have wanted to bring together good governance and legal remedies, so this is the overall line of reasoning of this 3rd International Conference on Taxpayers' Rights. Taking into account the rights of taxpayers is, therefore, not to be seen as a possible interference with how tax authorities achieve their goals, but it's enhancing the quality of the way in which tax authorities carry out their job. So, this multidisciplinary approach was really setting the ground for a proper understanding of those issues and perhaps also a proper understanding of why, at a certain moment, taxpayers decide to go one way or not the other. For instance, me as a European, I was puzzled when I heard from Bob Goulder about the Facebook case and the fact that the taxpayer, when it was denied access, then it brought lawsuits in the different court just to try and get access to the IRS Office of Appeals rather than just going to the tax court and seeking justice. But this is important, in my view, in also understanding the differences that are from around the world. I do not know, Nina, if you had some comments on this first panel.

NINA OLSON: So, this panel was actually very important to me just because, to me, you cannot do tax administration without bringing all disciplines that you can toward that issue, and I think Lotta said it really well when she said tax compliance is a relational phenomenon. I thought that that concept was so important. If you don't think about the relationship between the taxpayer and the tax administration then you might as well pack up your baggage and just go home because, you know, that's how taxpayers look at it. And I think sometimes the tax administrations, particularly as we enter an age with reduced budgets and greater automation, it's really easy to walk away from that concept that you are relating to human beings, whether they're organized as entities doing business as an entity or they're individuals relating to their government. We have one court decision in the United States, my favorite about trade or business expenses that notes life in all its fullness is what people bring to taxes and, if we ignore that and we deal with taxpayers not thinking about what they bring to us and how we're trying to influence their behavior, we're not going to have a successful tax administration. We may be able to show that we've closed this many audits or we've collected these many dollars, but it may not be a successful tax administration. And ultimately, in the long run, you will not have a tax base that voluntarily complies. And I think the other thing that really came out to me in the whole discussion was just the use of research., I have a very small research function, but I've been able to reach out to researchers from around the world, really, to benefit from their knowledge and I've tried to bring that home to the IRS. I am constantly amazed in the IRS where people say, "oh yes, we're doing that". And it's like, "no you're not". But I think that this kind of research and sharing this kind of information among all those from different disciplines really helps us go forward.

PASQUALE PISTONE: Yes, Nina. Let me go now to the second panel. And here I would like to bring together some of the points that were mentioned by Ali Noroozi and by Alessandro Baracco. I was very positively impressed when I heard Ali saying, or at least this is what is in my notes, speaking about the tailored compensation [for example, "apology" payments] in case of systemic failures, an immediate termination of audits when no issues arose. Now, if we bring together this in the context that Alessandro Baracco was mentioning of the context of business in times of crisis, this is particularly important, because if there are some system failures and we have a business which is in crisis, the fact that there is an immediate termination of some audits which do not raise an issue automatically sets free some amounts that could otherwise

be frozen for the purpose of giving guarantees. So, an immediate action with respect to issues which can really make the difference; it's really like saving somebody who has a heart attack and avoiding that this person just dies. So, this culture of showing a proactive attitude when tax authorities realize that there is no issue, and also the fact of the stated compensation, in my view, is a particularly good way to avoid that eventuality where the business ends up in a situation in which it cannot survive. So, this is something, in my view, which constitutes a particularly good practice and shows the non-adversarial nature of the relationship between tax authorities and taxpayers, which is something which really characterizes bringing together good governance and legal remedies in line with the rule of law. So, this is one of the many things that I take home from the second panel.

NINA OLSON: Ali brought up the notification of taxpayers where there is an international information exchange, and I am increasingly worried about that and we'll get into that more with the protection of data issue that really took over an entire panel, the "Privacy" panel, but to me, that is just such a critical issue in tax administration. If taxpayers' data is being sent out to countries that have lower protections than the taxpayers' host country, I would take the position that it is not the country's, the host country's, right to waive that protection; that the taxpayer needs to be given notification of that, because that is their identity, and there is nothing more core to an individual's being than their identity, except maybe their central nervous system. That really just resonated with me and I think Karen [Boll] really brought out the changing nature of tax administration. As we have this data exchange, more and more tax administrations are building up their IT function and they're also looking at using Artificial Intelligence, etcetera. Assumptions and rules start getting built into tax procedures that are invisible and often the tax experts are not at the table as those rules are being built, because it is programming and they're not doing the zeros and ones.

They're not doing the logic rules necessarily. And, pretty soon, you have a whole system where you don't know what those rules are doing but you're getting results from those rules. And that goes to, can you then give an explanation to the taxpayer why their return was selected to be held so that you won't get a refund because we suspect you of something, but no one can articulate to you why that refund is being held because it's in a black box. And I think that is profound and we have not dealt with that in any way in tax administration. I've really been trying to think about taxpayer rights in the digital age and I, myself, haven't gotten my head around that, but I think that's a huge issue.

CARA GRIFFITH: I think it is, too. It worries me. I love the concept of what that panel was all about, that the idea that we are so heavily data-driven right now and how do you tie data then into what should be a human process of looking for early warning signs, things like that. It is going to be very difficult and challenging to translate that into Artificial Intelligence and things like that with data.

NINA OLSON: I also think that what Alessandro raised, really trying to talk about taxpayers and use what we've learned from bankruptcy. I guess this is a theme of my comments, we're dealing with human beings here, groups of human beings. One thing that he said was learn from the past but give the taxpayer a chance for the future. Well, that's core for bankruptcy, and it's very hard to bring those concepts into tax administration which is looking at we have to get every last dollar from these people. There is a part of me that's thinking, really? If a taxpayer has been the victim of a disaster, he's been a victim of embezzlement, has had life happen, life in all its fullness, we need procedures that recognize that stuff happens. I could say

it in another way, but we're being taped so I won't, but the point is we need a system to be able to recognize that. In the United States, there is a process called, a procedure called Offer in Compromise, which has been in our law since the 1860s, which enables the Treasury Secretary to compromise a debt to the federal government and, in particular, a tax debt. Now, I know some constitutions say you cannot do that, but this procedure actually is an explicit statutory grant to the Secretary of the Treasury. You can compromise that debt based on a taxpayer's ability to pay. And the way that procedure is worked out is that you look at the taxpayer's ability to pay over a period of time, knowing that they have to be able to pay for their basic living expenses depending on their family size, and their specific circumstances, if they have medical needs or things like that. And when you look at that, then you come up with a number of what you think is the reasonable collection potential, and then the taxpayer can pay that finite number, which may be significantly less than the actual true legal debt, but if you pay that number then that debt is considered off the books and final. Now, there's a catch to that, because it is an agreement between the taxpayer and the IRS, and the catch is that you have to be in compliance with the tax laws over the next five years. If you aren't, then the debt is reinstated at the full amount minus whatever you've paid so far. And the point of that, and I keep trying to explain to the IRS why they should be making these deals because you have a whole analysis of the taxpayer's financial ability and everything like that, is that you are creating a new norm for that taxpayer. By definition, you have a noncompliant taxpayer on the payment side because they have a debt, but over five years, if they have been compliant with all tax laws over five years, then it is very likely that they will be compliant with tax laws on year 6, on year 7, and year 8. And we just did research to show that that is very much true. You have turned a noncompliant taxpayer into a voluntarily compliant taxpayer going forward. And I think there is a lot in that procedure to think about.

How you treat taxpayers, how you stop being judgmental about them, and how you deal with that in a fair and just way that takes into consideration the facts and circumstances of that taxpayer, but also ensures that other people don't feel appalled if you give that particular taxpayer a break, because it's done in a rational way according to procedures and standards.

PASQUALE PISTONE: And this is something which pops up also in other sessions, such as we'll see in a few minutes in a session connected with penalties. But I would like to go to what I called Panel 4. So, the first after lunch I will not be making comments on these sessions, on the presentations and updates, so the "Taxpayers' Rights in the Administrative Phase". And here, I think it was very important to see that we don't just have taxpayers. We have different categories of different taxpayers with different experiences and different problems which have to be taken into account in an assertive structured manner. And this was quite clear when we heard Liselott Kana making her presentation and also the debate that she had with George Pitsilis. But I think it's also important to understand that in the so-called administrative phase, we have some challenges connected with the fact that the potential implication of a notice of payment or an act notified by tax authorities, this act has potentially immediate consequences on the legal sphere of a taxpayer. So it's also important to try and bring together a dialog which precedes the moment of issuing of this act rather than acting at the later moment. So the *audi alteram partem* principle is really important to prevent disputes from arising or mediating them, as in the example of Mexico which has been presented by Edson Uribe just a few minutes ago, and also understanding whether the administrative appeals process or the review process can limit the potential negative implications for the legal sphere of the taxpayer. So, if somebody asks me but do you think that this administrative review is something useful? After this conference, I would still say yes, but it depends on how it works because if, in this process,

there is simply a moment in which tax authorities just reject without giving explanation, then I think that the whole function of this administrative review is deprived of its strong potential. So it's important to give tax authorities the possibility to review what they have issued, but it's also important to use this part in a way that it's in line with the principles and the rule of law without just giving discretionary powers which are not subject to a potential remedy. So, saying no motivation when there is no approval, this is something - or no remedy against notice of deficiency - I mean, all these situations are perhaps critical issues that I take home.

NINA OLSON: I really looked at this panel as, again, an extension of building trust. I mean, Lynne Oats, with her diagram that she ran out of room for with all the different relationships -- again, that relational word, between authorities, between intermediaries, between the agency, you know, etcetera, built into that as well, at any point along the way, trust could be eroded and the system sort of starts falling apart. Liselott was the envy of the world, you know, talking about 85 percent of the taxpayers, you know, having prepopulated returns. And I have to tell you - or not needing a return - that really gave me a pause for the United States because, first of all, I think we did an assessment and out of 150 million individual taxpayers, we believe only 30 million were just salary and interest in dividends. That's partly a function of our Internal Revenue Code where we have brought so many social programs into our code, including the largest anti-poverty program that the federal government runs, namely the Earned Income Tax Credit for families with working children, and so we have 27 million, by definition, low income taxpayers, having to file their return affirmatively to get that credit, which is based on family and where the child resides for more than half the year. In the United States, this is not information that the tax agency would have and if anybody proposed that the IRS regularly keeps track of this information, they would be run out of town on the rails, because the United States people do not want the government to have that information unless we give it to them. And so, -—hence you have to file a return with the information, there is also another cultural thing in the United States, every time the United States tries to do something like automate our return-filing process with auto filings or pre-populating of data, because so many of our returns are done by commercial software, the commercial software industry goes up to Congress and seeks legislation preventing the IRS from creating an electronically filed or electronically populated, pre-populated return. And, in fact, the House of Representatives, last month just passed, on a bi-partisan basis, that specific provision. And that's not the first time they've done it. So you see this dynamic in the United States that will really prevent pre-populated returns. The rationale for this, other than the money angle, this is where they make the profit. I have had people say to me, well you can't trust the IRS to prepare your return. If you have an IRS site where a taxpayer goes in and types in their information and then they make a correction, the IRS will know what you corrected and then they will audit you. And I said, well, first of all, they only have a one percent audit rate and we can barely do that, so that's not going to happen. But second, have you ever seen the paper returns that we've got that are filled in with pencil and then people cross them out?

You know, I mean, hello. We see a lot. No, we're not auditing you. But it's that level of distrust that you get in that conversation.

CARA GRIFFITH: It was funny, in this panel, there was so much about trust and the word is not one that we often hear at a lot of tax conferences, but it was repeated over and over and over and really is fundamental to what we're trying to accomplish here.

NINA OLSON: And I think Andy's [Roberson] comment, which led to the discussion this afternoon about the appeals function, trust is core and if you're trying to go to an independent appeals and yet you have the compliance personnel, the auditors, right there while you're trying to have negotiations or you have the IRS lawyers right there while you're trying to have negotiations, and the point of appeals is to make an independent assessment, you know, what I've tried to say to the appeals function in the IRS is if you feel like you need the legal guidance of the office of chief counsel of the IRS then talk to the taxpayer why you think that would be helpful.

You will get to the same place, you will get to the result that you need, but you will get there by building trust with that taxpayer. And if the taxpayer says no way then, I'm sorry, it means trust is out the door and if you force it on them you will just end up in court. You will not get a successful resolution. So, you know, what do you lose by just going the trust route?

PASQUALE PISTONE: And now let me move onto what I call Panel 5, which is "Taxpayer Protection in Cross-Border Taxation". This is an area in which time would never be enough, perhaps. This was the impression that I got because of so many issues that were raised and the fact that there is a whole world to explore. But one of the points that I noted, I mean, they, in fact, addressed topics connected with automatic exchange of information and protection of rights and the specific requests for information, but one of the points that I found particularly interesting is that there are no real rights of defense without the right of access. So, the so-called obvious data. Without an effective right of access, there can be no proper right of defense. And in cross-border situations, this is sometimes particularly problematic, and I think that this is something that should lead us to think about the potential developments also for the future.

Certainly, we also discussed the problems of data protection, and there are big issues connected with the automatic exchange of information and leakage which can take place at any time. We devoted quite some time to discussing the Berlioz case and I assumed that also in the next session, we'll hear some more points on the Berlioz judgment, which is of extreme importance and perceived, I believe, not just by the European Union, as a topic which shows that the effectiveness of the behavior of tax authorities cannot be a good enough reason to make some deals on the protection of fundamental rights of taxpayers, so it's a leading case with a global reach. Several questions were raised and one was how about the authority of Berlioz in a situation involving third countries? My first answer would have been there is no such situation because the court was analyzing the relevance for the EU Charter in a case concerning mutual assistance based on the directive, so implementation of the European Union. However, we should also wonder whether this formal answer would, to some extent, be satisfactory not just as to whether the court would have jurisdiction but, in more general terms, whether there could be some different rights according to whether we are implementing a directive, we are monitoring the protection of fundamental rights and implementing a directive, or not. And this was also something which came up this morning, in a situation involving one single audit which, for some respects, is on VAT, and for some other aspects on the same fact, is on direct taxes and then, you know, the same facts could be a problem for VAT in Europe and then not a problem for direct taxes. So, again, food for thought. And I think that another point that I would like to take home is that because there is no effective protection of rights without a right of access, the person affected can never have a genuine right of review if the requests for information are no disclosed to that person. So, if we have this situation and the taxpayer cannot check what tax authorities, directly or indirectly through a judge, what tax authorities have

been exchanging, then there is no real and effective protection. So, this is what I take home, Nina, from the last panel of yesterday.

NINA OLSON: I think that this issue will come up for the next five conferences, if not more; this is going to be something that we're living with forever and ever and ever now. I just thought, as I was listening to the panel, I was flashing back. Because I am a member of the senior leadership of the IRS and have sat in on all of these meetings of the senior leadership of the IRS for the last 17 years, more than I care to remember. I was on a particular executive steering committee where we talked about cybersecurity and identity assurance and things like that. And there was a discussion of one intergovernmental agreement on exchange of data where one of the senior executives said, well, you know, that country did not meet our standards of cybersecurity and yet, you know, we thought it was important and we did a risk assessment, and we looked at the risks and we looked at what we could do to mediate the risks, and we decided that we could accept the risks of entering into that agreement. And I'm staring at them; that thudding sound was my jaw hitting the table, because those aren't your risks to accept. Those are the risks of the taxpayer. You are accepting risks on behalf of the taxpayer that you don't have to right to accept. Again, that is a taxpayer's identity. And that led me to cribbing something that Ali Noroozi has recommended in one of his reviews, in terms of exchange of information, which I wrote about in the special issue that Tax Analysts published for last the conference. When the IRS enters into these intergovernmental agreements and they have a risk assessment like this, they need to put that out for public notice and comment so that taxpayers of the world know that the United States government or the Internal Revenue Service is thinking about entering into an agreement that has lower security standards than the United States government itself. And so there you have a systemic commenting period and that falls under the Administrative Procedure Act and there are all sorts of things that have to go into that. But then you take it one step further if you do, then, proceed with that, at least with respect to those lower security agreements, if not all agreements, then you have to give the specific taxpayers notice when you're sharing information with that country. And it has to be advance notice, so that they can intervene and say no, you can't do that. Now, I don't know what those legal rights are or what those legal remedies are, and that's something that I'll be thinking about this year, but it really crystallized like, oh, my gosh, this is happening as we speak. So I'll just throw that out there.

CARA GRIFFITH: Several years ago, I did a project looking at the amount of information that is shared between the IRS and U.S. states, and so I did a FOIA request for all of the agreements that the IRS had with any state, whether it was the Department of Revenue, Department of Labor, Department of Motor Vehicles, Department of Transportation, and there were several thousand of these agreements, and I really wonder, after listening yesterday, if taxpayers really truly have any idea how much data about them is shared and with whom it is shared, and likewise sort of wonder if, you know, I don't think there has been any risk assessment whether the Virginia Department of Motor Vehicles has the same level of risk that the IRS does and the answer is probably no. There is a lot that we have to do in this area and that's just within one country, so when you're talking about multiple countries, there is just a lot that we have to do to figure out how is this all going to work as data is increasingly shared among jurisdictions.

PASQUALE PISTONE: Let's move to today, and once more, thanks very much to you for paying attention to the new initiative on the Observatory on Taxpayer Rights. I hope that we can count on many, on the contribution of many of you to make this as good as possible. The

panel on the "Burden of Proof in Tax Treaties", which from my numbering is Panel 7, gave me also food for thought. I would like to focus in particular on two issues, considering that it's 4:06 and we only have nine more minutes to go. And one of them is to see what we can do if we take into account this global approach, this best practices approach. I would like to refer to the difficulties mentioned by Judge Paige Marvel in respect to the requirements of section - I hope I'm quoting the right number - 7491A2B, and you see this shows what problems we have when rights are in theory but not in practice. And this is an important takeaway also if we bring together case law from Europe and case law from the U.S. So. the concern expressed by Paige Marvel, if I correctly interpret it in her presentation, is also something that we have in Europe but then, in Europe, also we say that if we have a right, we have the right to exercise this right at no extra cost and in a way that it is possible. So, any situation in which the exercise of a right becomes more difficult potentially undermines the effectiveness of a right and we have a whole set of case law from the Court of Justice on these issues.

NINA OLSON: I would just say that that statute in the United States is an example of the United States' legislative process and I'm looking around the room to see if Chris Rizek is still here, because he was the attorney advisor representing the Treasury Department during those negotiations, and it started that the idea of shifting the burden of proof on factual issues in cases started with everybody getting outraged about the IRS requiring intrusive documentation at hearings. That's what taxpayers were saying. And then, once you got behind closed doors and started the negotiation and the actual language, then you got to all the little limitations. And the IRS would come up and say, well we can't do this because of whatever, or what about this, or what about this, and so you're basically saying there is this broad grand statement that then gets watered down and watered down and watered down so that it becomes almost impossible to find a case where the BIP's actually shifted, because it's met every single one of those requirements.

PASQUALE PISTONE: So, let's move to Panel 8, on "Penalties Theory and Administration: A Multidisciplinary Analysis". Here, I actually very much enjoyed the combination of the presentations because, on the one hand, Jacco Wielhouwer was presenting the analysis of issues connected with the possible consequences of somebody violating the laws, and the degree of likelihood of risk that this person may violate again. João Nogueira was presenting a view which was, to some extent, more protective of taxpayers who have been violating rules, and so the fact that if they are meant to be potentially violating again or having those out of the catalog penalties, this is something which can compromise the effectiveness of their rights. But I think some takeaways from that session are also that we have to try to reconcile the deterrents, the effect of deterrents with the principle of proportionality. So, when João said there are countries in which there is only imprisonment as penalty, do we really need to have imprisonment as penalty or can we rather apply monetary penalties in this respect?

So, these are things which we should think about also for the future. And I think that there are many other important points connected with the principle of proportionality arise from the presentation of Eric Lopresti.

NINA OLSON: I really appreciated this panel and I thought Jacco's comments about differentiating, an enforcement and regulatory communication strategy, in that you have to tailor the penalty to the act. And Eric had shown the table from our work on the various offshore voluntary disclosure programs that the IRS has instituted. We've had several comments from the floor about that. I wrote, at one point, that I viewed the application of several of the penalties

that were going on, whether it was the strict liability penalties or even the offshore penalties because they were so disproportionate, as quite possibly a violation of the 8th Amendment of our Constitution, which is a protection against unreasonable fines and seizures, essentially penalties, that it was just getting to the level of outrageousness and shocking the conscience. There was no connection between the actual underlying act and the amount of the penalty.

And, again, that goes back to trust. I can't tell you how many letters I have from taxpayers just saying, I have an account overseas to help my mother stay alive, and it's got over x amount of money, but I've never tried to hide it. I just didn't know I needed to report it and now I'm being treated by my government as a criminal. And when you see those letters you think, well, that's not good for voluntary compliance. And there were so many other ways to address that. But, again, it was lumping everybody into one scenario rather than differentiating and rather than tailoring your approach to the specific circumstances. And I know people say, well, we don't have the resources to do it, and I find that an unbelievably unpersuasive response. We are all resource-challenged, but if you can't look at the taxpayer's specific facts and circumstances, then I don't know what you're in the business of tax administration for. And that's just sort of where I am. There are ways. We're in the 21st century. We can use data. We can use Artificial Intelligence. We can use all sorts of ways to understand circumstances of taxpayers, and then go from there as a baseline, and that we're not doing this is actually a real breach of our social contract with taxpayers.

PASQUALE PISTONE: Taxpayers are persons, not just numbers, so sometimes this is something which is really worrying and, again, this is why it's important not just to talk about effectiveness, but also the existence of a possibility of having a remedy if something goes wrong. I must tell you, Nina, one impression that I got with these skyrocketing penalties that João has been presenting with this research is that there are possibilities for settlements which include a reduction in the applicable penalties. So sometimes, I'm a free thinker, and sometimes I get the impression that these skyrocketing penalties, which can be reduced if you go for settlement, are, to some extent, a way to force you to settle so that there will be a more effective handling of those controversies. But, indeed, you know, a deterrent element must be there. If you do something wrong, you have to pay a consequence for the wrong things that you did. But, at the same time, it's also important that those consequences are, to some extent, related to how harmful your action is for the community and to the risks that you create.

CARA GRIFFITH: And I do worry that a lot of taxpayers don't know they have the option to move into settlement or they think, well, it's much easier, I'll just pay then, you know, what are my options? So I think that there is a lot of education that needs to go on, particularly with low income taxpayers, so they understand what their rights are and what options are available to them.

NINA OLSON: Well, I think that's also true from meeting with small and medium businesses, and also middle-income taxpayers, and that goes to the next panel about the right to an appeal, that those procedures need to be accessible and, if not, then you are going to have taxpayers thinking, "for me to be able to get this independent appeal, I'm going to have to wait a long period of time. It's going to cost me money. It's easier for me to pay this debt. I don't think I owe it, but I'm going to pay it just because I cannot go through this. I cannot have this uncertainty." That's why I was so interested in some of the deadlines for a government response. You know, what South Africa is saying is, okay, if the agency hasn't responded, then it's deemed to have accepted that objection. I found that very fascinating. Now, I don't know

whether that would drive somebody to just give you an automatic response just to stay the 90 days and then you're stuck going to the next level of litigation. I thought that panel was really interesting. I have to tell you, I have envy for Prodecon because of their ability to go to court. I've asked for years for the authority under law to be able to file amicus briefs in our courts on taxpayer rights issues, and there is a legal precedent for an ombudsman to do that in the federal government, and one of these days I may just go ahead and test it, and file an amicus brief, and see what the courts say and see what the Department of Justice says. The media person here is saying I should do this. (laughter).

CARA GRIFFITH: Well, I say that the person that founded Tax Analysts, that was his initial idea, was to bring suits on behalf of the public on tax issues where the public was affected in some way, and we didn't have standing and so we gave that up and became a media company. But there is really something to be said for that, of bringing issues out that have the public interest at heart, but that, you're not going to get a taxpayer to take on.

NINA OLSON: And that actually goes to what we've all talked about, okay you have a charter, you have a taxpayer bill of rights; what's the legal remedy for violations of these things? And one of the things is to get to the courts. Now, I don't know what the courts are going to do when they're confronted with the Taxpayer Bill of Rights of the United States. I don't know what they're going to do in Facebook. But to me, I'm not afraid of that, because if we have a discussion, whether it's in an amicus brief that I file, or it's in a Facebook case, or somebody else files it, and the courts say this has no legal effect. Well, you know what? Then I take that opinion and go to Congress, and I say, you know, you care about this, then you have to write something different from what you've written. And that's helpful. That's not a bad thing. Now, the courts may surprise us and just say, you know there's a statutory remedy here and it is one of the ways that this right that has been given in this other part of the law is actually protected. And that makes the linkage. That shows you the remedy. What is your legal remedy for this high-sounding language? And I think all of that is salutary. There is nothing wrong with that process; in fact, there's everything right with that.

PASQUALE PISTONE: And I think that, from this panel, I also take home the impressive levels of good governance that we have through the action of the ombudsman in Mexico, the Prodecon. Sometimes it's also astonishing that you have some instruments there, but they don't work as effectively as they do in other countries and this is something which shows the importance of building up a system based on good practices. So good practices for which you may have also a legal basis in your system and they say, no, they're not effective in our system. So, looking at what happens in the other countries, you can also make your own system a better one. And this is, for me, a model of tax administration that makes real the promise of taxpayers' rights. We don't have to think that taxpayers' rights are something just for courts. You don't have to go to court for everything, or at least, if you are before a court, there should be ways - and here I want to say that I really find the settlement conference in Canada as a potentially strong element - also if you reach court to try and stop the litigation as soon as possible, because this adversarial vision should, to some extent, be reconciled with the common interest of bringing the good governance and the legal remedies' perspective to a constructive dialog. And I think, you know, that this is what, at the end of this wrap-up - if we can call it this - session, we should consider as something that we have learned.

For sure, I have learned a lot and therefore I'm very grateful to Nina that she considered having IBFD hosting this 3rd Taxpayers' Rights Conference.

NINA OLSON: So, I would just like to close by saying I'm sitting between our sponsor and our host, and I think that this conference would not have been the conference that it is or was - about to be was - without the support and the continuing support of these folks. And so, I'm just so deeply grateful to everybody here.

[Applause]