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Enrico Mercuri
enricomercuri@bigpond.com

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The obligation to obey tax laws

Abstract

The obligation to pay tax is a controversial one. Comparatively little has been written from a philosophical point of view. The obligation is something that is assumed to exist mainly because of the coercive powers of the relevant legislation and enforcement processes. This discussion starts from the taxpayer's perspective. It is not focused on what responses are necessary from legislative requirements but on what responses are necessary from moral ones.

We have an idea what governments do with the taxes they collect. Amongst other causes they support health care, national defence, social services, roads, rail, the police force and fire protection. Not all individuals can afford taxes, so sliding scales apply: the richer pay more to help support the less fortunate.

Keywords

obligation to pay tax, Thomas Aquinas on taxation

THE OBLIGATION TO OBEY TAX LAWS

ENRICO MERCURI*

The obligation to pay tax is a controversial one. Comparatively little has been written from a philosophical point of view. The obligation is something that is assumed to exist mainly because of the coercive powers of the relevant legislation and enforcement processes. This discussion starts from the taxpayer's perspective. It is not focused on what responses are necessary from legislative requirements but on what responses are necessary from moral ones.

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BUT WHY DO WE PAY TAXES?

There are principles, developed over the centuries, which support an obligation to pay taxes. They begin with the obligation to obey just laws in general. Does this extend to taxation law? This discussion presents a perspective on the theoretical justification of tax laws and the subsequent influence of international treaties and tax law agreements. It concludes with a proposed condition for rendering the historical principles pertinent to today's society.

There has been little written on the philosophical obligation to pay taxes. The most comprehensive account is a 1944 doctoral thesis by Martin T Crowe.¹ Crowe begins with Aristotle² and St Thomas Aquinas³ and reviews the philosophical and

* BA (Hons), LLB, MJuris, Dip FS.

¹ RMT Crowe, *The Moral Obligation of Paying Just Taxes* (Washington DC, The Catholic University of America Press, 1944).

² Aristotle (384–322 BC) numbers among the greatest philosophers of all time. Judged solely in terms of his philosophical influence, only Plato is his peer. Aristotle's works shaped centuries of philosophy, from Late Antiquity through the Renaissance, and even today continues to be studied with keen, non-antiquarian interest. A prodigious researcher and writer, Aristotle left a great body of work, as many as two-hundred treatises, from which approximately 31 survive. (Christopher Shields, 'Aristotle' (25 September 2008) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/aristotle/>> at 6 December 2011.)

theological literature over several centuries - much of it in Latin. He concludes that a person is hardly obliged to pay taxes because of the commutative theory⁴ of justice. Rather, one is obliged under an obligation in conscience. This obligation is based on the presumption that just laws bind in conscience.⁵

A key question explored by Crowe is whether a tax law is a just law. He looks first to ancient philosophers and to a duty towards one's neighbour or community. Aristotle in his treatise on justice says there is a justice which is 'complete virtue, not absolutely but with reference to our neighbour' - but he stops there.⁶ Aristotle restricts his exploration of this aspect of justice to an individualistic perspective, based around the just person habitually obeying the law. In doing so, the just person exercises virtue. Aristotle does not develop his view on how the exercise of that

³ Thomas Aquinas (1225–1274) lived at a critical juncture of western culture when the arrival of the Aristotelian corpus in Latin translation reopened the question of the relation between faith and reason, calling into question the *modus vivendi* that had obtained for centuries. This crisis flared up just as universities were being founded. Thomas, after early studies at Montecassino, moved on to the University of Naples, where he met members of the new Dominican Order. It was at Naples, too, that Thomas had his first extended contact with the new learning. When he joined the Dominican Order he went north to study with Albertus Magnus, author of a paraphrase of the Aristotelian corpus. Thomas completed his studies at the University of Paris, which had been formed out of the monastic schools on the Left Bank and the Cathedral School at Notre Dame. (Ralph McNerny and John O'Callaghan, 'Saint Thomas Aquinas' (30 September 2009), *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/aquinas/>> at 6 December 2011.)

⁴ Commutative justice is described in the *Oxford Concise Dictionary of English Etymology* as follows: Commute: exchange. Change for something else. Latin - *commutare* change altogether, exchange, f. COM + *mutare* change. Aquinas also used Aristotle's concept of justice to explain rules of Canon and Roman law. For Aristotle, distributive justice secures each citizen a fair share of resources; commutative justice preserves the share of each. Commutative justice is violated if one person deprives another of resources without consent. Aquinas explained in Aristotelian terms, why, as Roman and Canon law recognized, such a person might have done so wrongfully either intentionally or through negligence. Aquinas added that if he did not act wrongfully, he must still make compensation if he was enriched, thereby recognizing what modern lawyers call a claim in unjust enrichment. The restoration of justice by means of exchange or payment. (James Gordley, 'Aquinas, Thomas' in Peter Cane (ed), *The New Oxford Companion to Law* (Oxford University Press Inc, 2008). Available online: <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t287.e87>>).

⁵ Crowe at 164 under Conclusion.

⁶ Aristotle 'Nicomachean Ethics', Book V, v 2. Translation by WD Ross; referred to in Crowe at 140. The text states: The justice, then, which answers to the whole of virtue, and the corresponding injustice, one being the exercise of virtue as a whole, and the other that of vice as a whole, towards one's neighbour, we may leave on one side.

virtue extends towards others in the community. He simply states that it exists. His view was likely aimed at defining the personified meaning of the term 'just.' In other words, he was less interested in the meaning of communal justice than a sense of personal justice and therefore personal virtue.

Following on from Aristotle, St Thomas Aquinas developed a doctrine of legal justice. The results of the doctrine may be summarised as follows:⁷

1. The specific virtue of legal justice is introduced.
2. It has a specific object: the common good, instead of the generic *ad alium* ['another'].
3. Hence, it differs from particular justice not merely as whole to part, but as directed to common and particular good; and
4. Directs the acts of all virtues to its own end, rather than simply containing them as the whole of its parts.

Therefore, according to Aquinas, a just law is a law aimed at the common good which directs other virtues towards that common good. For Aquinas, a law that does not have a just character is not just a bad law - it is not a law at all.⁸ However, his view also has its limitations.

Crowe explores the limitations of Aquinas' view of the term 'legal justice' by asserting that Aquinas's *relatio ad alium*⁹ view of legal justice is, in reality, *relatio ad bonum commune*.¹⁰ Relevantly, and to give context to the obligation to pay just taxes, Crowe proposes his own three conditions necessary for a just tax. They are:¹¹

- A requisite authority;
- A just cause; and
- The just distribution of the tax burden.

The requisite authority to impose a tax means that a just tax can only be imposed by one who has the legislative authority to do so. Prior to the sixteenth century, writers saw the power to do so as vested in a monarch and some of his close delegates. Later thinkers modified this and avoided the notion of supreme power, preferring to

⁷ Ibid 141. See Crowe, 141, n 1, where the summary by another writer, W Ferree, is cited. The 4 points are paraphrased to assist in integrating them into the rest of the discussion.

⁸ Crowe, above n 1, 100.

⁹ 'With reference to another'.

¹⁰ 'With reference to the "common good".'

¹¹ Crowe, above n 1, 22-24.

accept the notion of legislative power - wherever it may reside.¹² In summary, the right to levy taxes presupposes legislative authority; although legislative authority does not always include the right.¹³

The just cause of a tax relates to its final cause. The purpose of the tax depends on whether its purpose is intended for revenue or regulation. Crowe argues that where the purpose is regulation, the impact of the tax must not interfere with rights outside the competence of the civil government.¹⁴ Where the purpose is for revenue, it can only be imposed where there is a public need. Crowe defines the public need as an absolute one (eg, healthcare), a useful one (eg, printing of documents) and a spiritual and moral (cultural) one which serves the welfare of the people (eg, museums).¹⁵

The just distribution of the tax burden provides that for a tax to be just there must be proportionality between the tax and those who must pay it. The moralist view is that the ultimate basis of apportioning the tax is the ability of the citizen to pay.¹⁶ The alternative view is that those who benefit should be taxed in proportion to the benefit received.¹⁷ Crowe appropriately rejects this suggestion.¹⁸

ARE THE THREE CONDITIONS RELEVANT TODAY?

The answer is yes, subject to a qualification. The three conditions, though acceptable in principle, pose a challenge at a time when society's parameters have long evolved. They have morphed from a monarchical structure, to a national legislative power, to one of international political and legislative influence.

In particular, although the requisite legislative authority still exists within national boundaries, the enactment of laws must take into account treaties and other influences. International standards such as the OECD Transfer Pricing guidelines now form the basis for local legislation.¹⁹ An example is the transfer pricing legislation in Australia which closely follows the OECD guidelines. The influence of

¹² Crowe, above n 1, 22.

¹³ Crowe, above n 1, 23.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Consider the inequity in the 21st century of social welfare recipients having to bear a greater tax burden than the financially independent who receive no government benefits.

¹⁸ Ibid 25-26.

¹⁹ The view here agrees with the thesis of Reuven S Avi-Yonah, *International Tax as International Law* (Cambridge Tax Law Series, 2007) 1: This book has a thesis: that a coherent international tax regime exists, embodied in both the tax treaty network and in domestic laws, and that it forms a significant part of international law (both treaty-based and customary).

such international institutions, while harmonising the law between jurisdictions, erodes the independence of each legislature. It does so in favouring participation in the international arena where global welfare is emphasised.

In other words, domestic legislation can derive a significant amount of substance from the ideas of those who cater for the global community rather than entirely domestic interests. If there is any doubt about this, consider the impact the OECD tax haven blacklist has had on the legislation enacted in sovereigns such as Liechtenstein since 2008.²⁰

On this point, Reuven Avi-Yonah supports the existence of an international tax regime.²¹ The argument rests mainly on the bilateral tax treaty network and Avi-Yonah points out that the regimes are quite similar given that they are drafted on OECD and United Nations (UN) guidelines. Pertinently, he argues that in most countries they are given more status in practice than domestic law. This indicates that, in matters of international tax, countries generally give the treaty due deference and will not legislate contrary to it.

The treaties that influence policy and legislation are not just restricted to taxation. Under s 51 placitum (xxix) of the Australian Constitution, the Federal Parliament can make laws with regard to external affairs. Through case law this has been interpreted as the capacity to legislate to give effect under Australian Federal statute to a treaty that Australia is a party to.²²

Applying these principles to tax law, it is necessary to identify a modification of the anachronistic meaning of condition one: requisite authority.²³ It must be recognised that there has been an irreversible²⁴ transition in nation building to its current form:

²⁰ See the Government of the Principality of Liechtenstein, *Liechtenstein Declaration* (March 12 2009). <<http://www.oecd.org/dataoecd/27/21/42340216.pdf>> at 25 February 2012.

²¹ Above n 19, 3.

²² See *Commonwealth v Tasmania* (1983) 158 CLR 1. The Australian Federal Parliament enacted legislation to prevent the construction of a dam on the Franklin River in the Australian State of Tasmania. Although the State of Tasmania (supported by other states) attempted to ignore the legislation and proceed with constructing a hydro-electric dam on its Franklin River, the High Court held that the Federal Government had acted within its constitutional powers in enacting the World Heritage Act to stop the project. The Act was held to be constitutionally valid.

²³ The term is closely aligned to the term sovereignty for the purposes of this exposition.

²⁴ The use of the term 'irreversible' assumes a continuing refinement of economic globalisation. It allows for temporary spikes and troughs in the international financial and stock markets. It does not allow for the kind of collapse lasting several centuries as experienced after the fall of the Roman Empire and the decline into the dark ages. The probability of this occurring is assumed unlikely but not impossible.

legislative power substantially influenced by the many non-domestic interests, agreements and treaties.

In addition, the role of secrecy jurisdictions²⁵ such as Liechtenstein and Switzerland, which render international financial transactions opaque, must be taken into account. This is critical because the assumption that tax laws are just and therefore binding is premised on an awareness by taxpayers that they are enacted and function for the common good.

Secrecy jurisdictions disable this awareness. By having this effect they erode confidence in legislatures, their laws and the voluntary compliance of taxpayers. They undermine the desire of the taxpayer to contribute to a common good by blurring the identity of co-taxpayers who should contribute but instead benefit through tax evasion or avoidance. Moreover, suspicion then arises in the willing taxpayer that he or she is shouldering an additional welfare burden on behalf of those who are able but unwilling to carry their burden with respect to the *relatio ad bonum commune*.

A FOURTH CONDITION

Therefore, a fourth condition, which we may call 'the transparency condition', is proposed. Combining it with the other principles above yields the following:

A tax law is just (Aristotle), is a genuine law (Aquinas) and is a singular legal virtue aimed at the common good (Crowe), when that law is enacted in an international environment in which comprehensive financial knowledge and transactional information are readily ascertainable.

By applying this principle, a greater confidence in local laws can be generated. This is because it requires them to:

1. Be just in themselves and be for a just cause;
2. Emanate from proper authority;
3. Be enacted in an environment of transparency of information; and as a result

²⁵ For a definition of the term Richard Murphy, *Defining the Secrecy World. Rethinking the language of 'offshore'* (2009), Tax Justice Network <<http://www.secrecyjurisdictions.com/PDF/SecrecyWorld.pdf>> at 25 February 2012. The definition follows: Firstly, secrecy jurisdictions create regulation that they know is primarily of benefit and use to those not resident in their geographical domain. Second, secrecy jurisdictions create a deliberate, and legally backed, veil of secrecy that ensures that those from outside that jurisdiction making use of its regulation cannot be identified to be doing so. These characteristics in combination define a secrecy jurisdiction.

4. Enable the government to apportion the tax burden more equitably.

This is all the more important when one considers the extent of the 'common good' becoming one that is ever more subject to international context. It also promotes a greater degree of equity in that those individuals and corporations who derive benefit from a domestic jurisdiction must contribute to it in return.