CHAPTER 2

THE RATIONALE FOR A MODEL

1 INTRODUCTION

This Chapter sets out the underlying rationale for why it is timely and beneficial to articulate a Model of taxpayers' rights as a guide to best practice in tax administration. It first grounds the concept of a Model in existing rights theory. The first section shows that taxation is a restriction on the fundamental rights of the individual. Individuals accept taxation to fund the state and the state-provided benefits that flow back to them. Tax is imposed by law, forms part of the legal framework and benefits from procedural rights within it. However, it is only recently that the concept of specific taxpayers' rights has developed that could form the basis for a Model of taxpayers' rights.

Section 3 raises the problem of subjectivism and relativism in the rights context. It suggests that unless there is a minimum set of rules that can be agreed, the concept of a Model is worthless. Section 4 finds the solution in rights theory, which has recognised the concept of universally accepted minimum standards. In doing so, rights theory requires that standards should be adapted to their context when they are implemented. Section 5 queries whether tax systems are too diverse to discover minimum standards. It uses the example of harmful tax competition to show how such standards can and have developed. However, it notes that implementing taxpayers' rights requires a different approach from the example of harmful tax competition and suggests that adopting taxpayers' rights gives greater latitude for choice. Setting the Model up as a guide to best practice is more appropriate
than imposing a set of rules. Given the diversity of tax systems, a two-tier Model of rights is put forward.

Section 6 sets out the advantages and disadvantages of a two-tier Model and concludes that a two-tier Model best deals with the disparity between developed and developing tax systems. It offers a more widely appropriate and adaptable set of guidelines. They are therefore more likely to be used. Section 7 acknowledges that a Model is possible, but asks the question whether a Model of taxpayers' rights is realistic. It analyses the general development of national and international relationships and trends in the tax context and concludes that a Model is both realistic and timely. Section 8 considers whether the Model should include both taxpayers' rights and obligations. It notes that it is important to draw a distinction between the publication of a charter or other set of rights to the public and a Model of best practice for tax administrators and policy makers. The section suggests that the tax law as a whole sets out taxpayers' obligations and the purpose of the Model is to provide a set of standards against which just one element of that law can be assessed. It concludes by favouring an approach to standard setting that starts with the basic rights of taxpayers and considers to what extent they should be limited in the interests of the state requirement to collect taxes.

Section 9 addresses the critical question of what should be the basis of the rights chosen. It suggests that the basis should be widespread acceptance of standards and that they should be expressed generally enough so that they can be adapted to the context of individual jurisdictions. They should also fit within the accepted principles that should underlie any tax system and which are set out in Chapter 3. Section 10 concludes the chapter by analysing the incentives for states to adopt the Model. It focuses on the correlation between improved compliance and a revenue authority's relationship with taxpayers; the importance to democratic states of removing opportunities for obvious
abuse of power by the state; and the correlation for developing states between socio-economic development and good governance.

II TAXATION AND RIGHTS

The right to tax is founded in recognition of individual property rights. A society that does not recognise individual property rights of any kind would find it difficult to levy taxes, as they are commonly understood. Murphy and Nagel have argued that there are two fundamental conceptions of property rights and that these flow from consequentialist and deontological theories. Both are normative theories.

Consequentialism is arguably based in the theories of Hume, but is perhaps more recognisable in the classical utilitarianism of Bentham and Mill with its emphasis on maximising individual preferences. It holds that 'the ultimate standard for evaluating a policy or institution lies in the value of its overall consequences' and that the net benefit of individual property rights clearly justifies their protection. As a system of property rights underpins the global economic system, consequentialist theory suggests that there is little argument over the extent of its social utility.

Deontological theories focus on the standards inherent in the law that they argue should govern its nature, or what it ought to be. Locke and Kant, for example, argue that the concept of liberty, with its stress on the importance of protecting the liberty of one individual against another, encompasses the protection of individual property rights. This

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2 Ibid., p. 43.
4 L. Murphy and T. Nagel, above n. 1.
5 Discussed in L. Murphy and T. Nagel, above n. 1, p. 43.
6 N.E. Simmonds, above n. 3, p. 25.
supports ‘freedom from interference in the acquisition and use of property’. Even a Hegelian view, which accepts a broader concept of public interference, recognises the importance of property rights to individual liberty.

Recognition of individual property rights presupposes some element of liberty of the individual. It also presupposes a social order that recognises rights as against other people and duties and obligations within that social order. On the one hand property rights form part of a citizen’s natural entitlement, whereas on the other they promote the general welfare and social organisation. The prerequisites for taxation are therefore derivative. They flow from the existing social order. In deontological theory, taxation itself is not seen as a fundamental good but is justified as a necessary limitation on individual freedom. In consequentialist theory, taxation is intrinsic to the overall system of property rights designed to fund the maintenance and development of the social order and to promote beneficial economic results.

Within these broad approaches there are numerous definitions of the concepts of rights and duties that have developed more recently. Taxation is a specific obligation imposed under the law and the state has the power to collect it. As with a criminal sanction

7 L. Murphy and T. Nagel, above n. 1, p. 45.
10 L. Murphy and T. Nagel, n. 1, p. 44.
11 J. Fiamis, in Natural Law and Natural Rights (Oxford, Clarendon Press, 1980) posits a type of common good that is not fundamental, but which allows members of a community to collaborate to attain reasonable objectives (p. 155) supported by a legal system that is specific, not arbitrary and maintains reciprocity between subjects of the system and its lawful authorities (pp. 276-277). See also, L. Murphy and T. Nagel, ibid.
12 Ibid. This is most clearly seen in the justification for the introduction of new taxes by politicians in budget speeches or election manifestos.
it is direct and enforceable. How these elements are conceived shapes the definition of its nature. For example, Nozick's strong conception of individual choice and the liberty of the individual would see taxation as necessary to uphold the state's pursuit of such goals but limited as far as possible, given its direct interference with the basic concept of maximising individual choice. Communitarians, such as d'Entreves, take a subjective view of shared community conceptions as to what is good. They would see taxation as a means of distributing important social goods and that it should therefore have a much wider role.

For all theories along the continuum, arguably including Marxist theories in which there is little recognition of individual property rights, taxation is primarily concerned with funding the state and redistributing social goods. As with any exercise of state power there are limits on its exercise. This thesis is concerned with what these limits should be.

Essentially taxation can be seen as a barometer of the developing balance between state and individual rights. Legal theory as it affects taxation has always been more concerned with the structure of the tax system to determine how the tax system should be used in funding the state and distributing and redistributing social goods, than with taxpayers' individual rights. It focuses on the rules governing the level and rate of taxation, who and/or what should be taxed and how they should be taxed. Historically, detailed analysis of rules governing procedural fairness in how the tax rules are applied has not attracted the discussion among rights theorists that it has in other areas of the law.

This structural focus is not surprising, as the arguments about the rights of individuals before the law are played out in other fields of the law. By the time attention

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16 Although, 'taxation' of entities can occur within a Marxist State and is concerned with funding the central state organs and redistributing social goods in much the same way as any other society.
17 Obviously, the general discussions on legal reasoning, from Llewellyn to Dworkin to MacKinnon to Kennedy, could apply equally to the tax law, but it has received little attention in broader theoretical writing. In contrast, regulatory scholars have recently given considerable attention to empirical research in taxpayer compliance, extending to taxpayers' perceptions of justice and fairness and how these impact on taxpayer compliance. For a useful survey of the literature, see M. Wenzel, Tax Compliance and the
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turns to taxation, if it ever does, the legal system is usually sophisticated. Safeguards in place elsewhere flow into the taxation area, unless they are specifically excluded. This exclusion, explored further below, circumscribes the discussion on taxpayers' rights, for the general procedural rights applicable to all citizens usually apply to taxpayers.

Increasingly, however, the service-oriented culture of private enterprise is being applied to public administration. The traditional command and control approach to enforcement of taxation obligations is giving way to a responsive approach designed to motivate taxpayers to comply with their tax obligations. One result has been an increase in charters. However, even here, the focus of charters is on improved service delivery and relationships with taxpayers. It is not on broadening the scope of taxpayers' rights.

It is beyond the scope of this thesis to re-examine the origin and definition of rights. It will follow the standard definitions used in the international charters. Any differences will become evident in the analysis. There are many theories and they vary in their definition of rights. The reality is that primary political and civil rights have been enforced by the national and international courts, whereas social, economic and developmental rights largely have not. This is despite efforts to the contrary. This thesis focuses on defining enforceable rights that relate to taxpayers and examining the mechanisms for their enforcement. It does draw on the welfare theory concept that legal rights have no value

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18 V. Braithwaite, 'A New Approach to Tax Compliance' in V. Braithwaite, ibid., p. 1.
21 Discussed generally in D.M. Beatty (ed.), Human Rights and Judicial Review: A Comparative Perspective (Dordrecht/Boston/London, Martinus Nijhoff Publs, 1994). In describing the ECHR, M. Buquicchio-de Boer, 'Tax Matters and the European Convention on Human Rights' in Taxation and Human Rights, A Survey of Case-law, seminar proceedings at 41st Congress of the International Fiscal Association (Brussels, 1987), p. 59 states: The deniers of the European Convention on Human Rights intended to set up an international system of protection for what can be regarded as the 'classical' political and civil rights, excluding economic and social rights such as the right to social security or the right to work.
unless there is associated freedom to enjoy them. In other words, there must be the ability to access the right for it to be a real right. Although the notions of right and enforcement are broader in the tax framework than in many other areas of the law, taxpayers' rights are primarily political and civil rights concerned with balancing the rights of individuals with their obligation to the state.

III  TAXATION, THE STATE AND THE DIFFICULTY OF RELATIVISM

Although this thesis does not explore the theories of the state, it is from those theories that the power to tax is drawn. Taxation is fundamental to the implementation of the theory of the state. As the French novelist, Karr, aptly commented in the middle of the nineteenth century, 'Plus ça change, plus c'est la même chose'. It is remarkable given the exponential increase in the pace of change how much the basic tenets of society remain the same. And so, too, do the basic tenets of our system of taxation. In Athens, in about 450 BC, Pericles could argue strongly for the importance of the rule of law as the foundation of democratic society — a society inclusive of a basic tax system. Diocletian, in about 300 AD overhauled the tax system of the late Roman Empire to cope with inflation and economic decline. In Norman England, the breadth of exemptions available to strong interest groups undermined the effective collection of Danegeld. The 1579 Union of Utrecht, which 'functioned as a kind of constitution for the Republic of the Seven United Provinces

(eds), Social Rights as Human Rights: A European Challenge, (Finland, Institute for Human Rights, Abo Akademi University, 1994), ch. 2.

V.P. Viljaren, 'Abstention or Involvement? The Nature of State Obligations Under Different Categories of Rights' in K. Drzewicki et al, ibid., p. 43, p. 50.

'And the more things change, the more they are the same', from A. Karr, Les Gobelins (6th Series, 1859), p. 304.


C.M. Bowra, ibid.

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of The Netherlands\textsuperscript{29} struggled to introduce common taxation. Even more difficult under that Union was implementation of the non-discrimination clause:\textsuperscript{30} harmful tax competition was, it seems, alive and well.

Taxation has operated indiscriminately throughout history and across states with conflicting values and social goals. As with any law, the theory of taxation tends to become distorted in its implementation. The process of law-making breaks it down into specific areas of application (quite apart from the influence of lobbyists and interest groups) and the original theory disintegrates further through the process of case-by-case interpretation.\textsuperscript{31} As Wilhelmsen observes, 'One has to acknowledge the fact that it is possible to construct several different systems on the basis of the same concrete legal material'.\textsuperscript{32} Within systems there also has to be flexibility and development using the same legal material. It is the classic differentiation between law making and interpretation\textsuperscript{33} and is one reason why the development of human rights has been so successful in the second part of the 20th century. Theory is adapted to its context as it is applied. The same approach applies to taxation and rights related to it.

It is necessary to mention here the origin of law, without any attempt to do more than summarise some of the problems that exist given the current divergent views in legal theory. The source of taxation law is constitutional. Most sovereign nations have a constitution, which forms, as Kelsen put it, the Grundnorm, or source of other laws in the hierarchy of laws.\textsuperscript{34} The right to tax occupies a special place in this hierarchy. Where even constitutions have now been found to be subject to overarching principles, these are subject to limitation when it comes to taxation. They do affect taxing rules nonetheless.

\textsuperscript{29} F.H.M. Grapperhaus, above n. 9.
\textsuperscript{30} ibid.
\textsuperscript{31} For a discussion of this process generally, see T. Wilhelmsen, \textit{Social Contract Law and European Integration} (Dartmouth, Ashgate Publishing Ltd, 1995), ch. 1.
\textsuperscript{32} ibid., p. 19.
\textsuperscript{33} See, e.g., E.W. Böckenförde, \textit{Grundrechtstheorie und Grundrechtsinterpretation} (Neue Juristische Wochenschrift, 1974).
Where do the overarching principles that govern the actions of sovereign states come from? This goes back to the origin of the law itself and can be explored across numerous theories. Natural law theories were evident in various forms in early theocracies, in Greece and in the sophistication of Roman law. They were further developed by jurists such as Aquinas and were used as a basis for international law by Grotius. Although natural law is now limited in its popularity among theorists, it is reflected in the origin of the various human rights charters and many constitutions. Natural law was founded in absolute underlying principles.

With the 'enlightenment' and the introduction of social contract theory, the development of relativism in its numerous forms has changed the way law is viewed by many. Theories based in relativism in its broadest sense now must rely on some form of inductive reasoning to create certainty, where it can be argued that the underlying premise of their arguments suggests there is none. Arguably, even positivists, such as H.L.A. Hart, can only create an artificial and temporary certainty by describing how internal and external recognition can provide an absolute legal system. The internal issue of from where the new rules (or Dworkin’s preferred ‘principles’) are drawn in the penumbra of uncertainty, when the established rules have run out, is a matter of the personal choice of the judge. The external problem of what constitutes an immoral law and whether it should be obeyed, again, rests with personal choice.

Many modern theorists have tended to build on the type of reasoning that theorists such as Holmes and Llewellyn introduced in the 19th and early 20th centuries. Holmes

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According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.
took the cynical view that judges interpret the law according to their own perceptions of what the law should be.\textsuperscript{38} Llewellyn suggested that this process could be analysed to show an underlying theoretical approach.\textsuperscript{39} The critical element for this analysis that is present in most approaches from radical feminists such as MacKinnon to postmodernists such as Murphy, is that they emphasise the subjective and relative underpinnings of modern jurisprudence.\textsuperscript{40} For most theorists there is now no such thing as a 'right law'.\textsuperscript{41} Its rightness depends upon the perception of the party affected, how it is interpreted and how it is applied. A law may seem right to the lawmaker, but constitute an 'immoral law' when applied to an individual facing circumstances not considered by the lawmaker, or considered and dismissed. Focusing on the subjective in this way removes even further the possibility of finding an absolute standard. How can the universal exist given the differences in subjective reality across the globe?

Philosophically, this creates a major difficulty in the analysis of the taxpayers' rights subset of human rights. If there cannot, by definition, be such a thing as a universal human right, it suggests that any attempt to define a subset of universal rights is futile. It follows that, relying on constitutional and internationally agreed protection of taxpayers' rights does not necessarily provide an agreed basis to begin formulating a model of taxpayers' rights. In order to create a model of taxpayers' rights there must be a minimum set of rules to which potential parties can subscribe.

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\textsuperscript{41} This requires a 'step of faith'. All such theories are based in the theorist's basic worldview.
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Fortunately, the human rights literature comes to the rescue, for it has recognised this problem. It is particularly relevant in the context of Africa, given the mix of religions, races and cultures on that continent. The domination by western culture of the formulation and content of the early international standards of human rights that claim to be universal is a matter of significant debate. Has the western domination effectively denied basic African rights or are they universal? Should the traditions, customary practices, political and religious ideologies and institutional structures peculiar to Africa, or parts of it, create a separate and distinct classification of rights that is culturally specific?

These questions were debated at length at the 1993 World Conference on Human Rights that resulted in the Vienna Declaration and Programme of Action. Article 1 states that the universal nature of the rights and freedoms is beyond question. Article 5 affirms the universality of human rights and that some freedoms are fundamental. It recognises the cultural specificity of some rights and requires the promotion of both the universal and culturally specific.

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All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The universality of many of the rights contained in the African Charter on Human and Peoples’ Rights supports this approach. The Charter came into effect in 1986 and 53 African states had ratified it by 2000.47

The result does not, of course, resolve the source of the problem. There is no real analysis of the basis of universality in these documents other than the fact that they are universally recognised. We have returned to the positivist position, relying on the rule of recognition. Recognition thus becomes the rationale for adopting the rights and not their inherent nature. It is argued that recourse to natural law could resolve the issue, but that is beyond the scope of this thesis.48 It is sufficient that there is recognition within the human rights arena, both practical and academic, that it is possible to develop a model of minimum rights to which most can subscribe.49 However, it is also important to draw from the discussion the requirement that any model should recognise the diversity of the potential subscribers.

Declaration at the World Conference on Human Rights in that year. See E. Brems, above n. 44, pp. 148-150.


D. Dešk in ‘Right to Right Tax Laws’ (2000) 28(3) InterTax, 110, ably examines the need for recourse to such principles in the tax law context, arguing that they are found commonly in civil law systems.

How does this translate to a model of rules that could govern the administration of the tax system? The goal is to produce a model of rules that does not exploit or espouse a particular worldview. Rather, it should take only those rules that are commonly understood or accepted. Because there has been little debate in the tax context, a model must draw on other areas of law where the rules are already in place. These will often be applied by analogy and must take account of the specific tax context. This approach has the advantage that the rules do not have to be created. They already exist elsewhere and can be adapted. There is a rich source of past interpretation and application within the different legal systems and internationally that can support the model and give it its credibility and relevance.

Returning to the jurisprudential analysis: adopting taxpayers’ rights from a model, but integrating them into the context of a particular tax system is a classic example of how law develops. Where past interpretation within the system has proved inadequate for the current context, the rule-maker intervenes. The new rules are then developed and interpreted within that legal system in a way that fits the broader legal, political, economic and social context. In this way, the future and changing interests within the system are catered for.

One can use the analogy that Dworkin has developed in arguing that judges should take a literary approach in their interpretation of the law and understand that it is in a sense similar to a story.\(^\text{\textsuperscript{50}}\) The judge as writer should know and understand the original context, the structure and design of the legislation and ‘the dominant lines’ of past interpretation.\(^\text{\textsuperscript{51}}\) This enables the judge to fit their contribution or chapter into the story to enable its continuation within its broader themes and structures.\(^\text{\textsuperscript{52}}\) Using the example of his

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\textit{There are ... strong universalist trends which are not only applying international pressure to move towards a more standardised model but are also facilitating and helping to reinforce such convergence.}\end{tabular}
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\(^\text{\textsuperscript{51}}\) Ibid., Freedom’s Law, p. 10.

\(^\text{\textsuperscript{52}}\) R. Dworkin, above n. 36, p. 228 et seq.
philosopher king, Hercules, Dworkin suggests that the judge should, in her or his decision-making, take account of the underlying political and moral principles that shape society.\textsuperscript{33} The same approach is appropriate for the rule-maker seeking to integrate a model set of rules into any legal system.

V \hspace{1em} \textsc{The Problem of Diverse Tax Systems}

Does this take sufficient account of the diversity of systems in which the model might be applied? It probably does not. Sophisticated tax systems contain complex rules governing complex transactions. By their very nature, they are likely to contain rights and obligations that go far beyond the requirements of a developing tax system.\textsuperscript{54} The most complex tax systems are those found in the western democratic economies. It therefore makes it easier to develop more advanced rights and obligations that are generally acceptable to those economies. That is, indeed, what has happened through the Committee of Fiscal Affairs of the OECD. The rules developed at this level are not universally acceptable.

Take, for example, the development of rules to govern 'harmful tax competition'. The concept, the definition and the need for rules were a product of the OECD. They did not initially elicit broader acceptance. The acceptance they have had has been effected largely through the economic power of the OECD countries, the limited number of countries targeted and the economically weak position of those targets. Interestingly, the EU countries within the OECD took forward a different and more restrictive initiative aimed at their own more sophisticated economic framework. The approaches are worth exploring in more detail.

\textsuperscript{33} Ibid., p. 65.
\textsuperscript{51} This forms part of the wider debate found in forums such as the United Nations Development Program.
The OECD launched its project on harmful tax competition in 1996. The EU established its own approach to countering harmful tax competition, with the adoption of a package of measures by the Council in 1997.\textsuperscript{55}

The EU measures were wide-ranging and focused specifically on harmful tax competition within the EU. They included draft directives on the taxation of savings and the taxation of cross-border interest and royalty payments, together with a non-binding code of conduct.\textsuperscript{56} The code of conduct, although voluntary, was intended to work through political pressure and peer review. Significant debate followed the introduction of those measures. However, the existence of that debate illustrated the influence of the measures on domestic tax policy within the EU. Ireland, for example, acted quickly to replace its preferential tax regimes to avoid criticism from other members.\textsuperscript{57}

In 1998, the OECD produced its Report, *Harmful Tax Competition: An Emerging Global Issue* (Report).\textsuperscript{58} Implementation of the recommendations in this Report has had far-reaching implications for the national financial and tax policies of those countries listed as having harmful tax practices. But the recommendations also have potentially significant consequences for the national tax policy of member countries.

The Recommendations cover three areas: domestic legislation and practices; tax treaties; and international co-operation. All aim to eliminate harmful tax competition. The Report focuses on geographically mobile activities, such as financial and other service activities, including the provision of intangibles.\textsuperscript{59} Harmful competition is defined to include distortion of investment flows, attacks on the fairness and integrity of the tax

\textsuperscript{55}Conclusions of the ECOFIN Council Meeting on 1 December 1997 Concerning Taxation Policy, 1998 OJ (C2) 1, p. 1.

\textsuperscript{56}Resolution of the Council and Representatives of the Governments of the Member States, Meeting within the Council of 1 December 1997 on a Code of Conduct for Business Taxation, 1998 OJ (C2) 2, p. 2.


\textsuperscript{58}Other institutions, such as the IMF, Financial Stability Forum and Financial Action Task Force, are also active in contiguous areas such as money laundering, supervision and transparency. Space precludes consideration of these activities in this article.
system, discouragement of taxpayer compliance, changing the public spending and tax mix, shifting the tax burden to less mobile tax bases, and increasing administrative and compliance costs.\textsuperscript{60} Key factors in identifying tax havens are: they have no or nominal taxes; they do not allow effective exchange of information; they lack transparency; and there is no requirement that an activity taking place in the jurisdiction should be substantial.\textsuperscript{61}

The Report recommended the establishment of a Forum on Harmful Tax Practices and this was approved.\textsuperscript{62} Member States were required to report to the Forum on their own harmful tax practices by 2000 and to eliminate them by the end of 2005.\textsuperscript{63}

In 2000, the Forum produced a Report, \textit{Towards Global Tax Co-Operation: Progress in Identifying and Eliminating Harmful Tax Practices} (\textquote{2000 Report}). It identified potentially harmful preferential regimes in OECD member countries.\textsuperscript{64} The 2000 Report also identified jurisdictions viewed as tax havens.\textsuperscript{65} Significantly, it excluded from this list those tax havens that made \textquote{a public political commitment at the highest level to eliminate their harmful tax practices and to comply with the principles of the 1998 Report}.\textsuperscript{66}

The 2000 Report proposed that any tax haven listed that did not commit to removing harmful tax practices would be included in a list of uncooperative tax havens.\textsuperscript{67} It also proposed a framework for implementing a common approach to restraining harmful tax practices.\textsuperscript{68} Another proposal, which demonstrates how broad the reach of the OECD is, covered the OECD\textquote{s} commitment to the extension of the work of the Forum to include

\textsuperscript{60} Report, p. 8, \url{<www.oecd.org>}, 5 September 2006. See also on the OECD website, the article by R.M. Hammer and J. Owens, Head of C.F.A., \textit{Promoting Fair Tax Competition} (2001) in which he justifies the OECD approach.

\textsuperscript{61} Ibid., p. 16.

\textsuperscript{62} Ibid., p. 23.

\textsuperscript{63} Ibid., p. 53.


\textsuperscript{66} Ibid., p. 16.

\textsuperscript{67} Ibid.

\textsuperscript{68} Ibid., p. 18.

\textsuperscript{69} Ibid., p. 24.
non-member economies with similar concerns and which were 'prepared to accept the same obligations as OECD members'. Meetings with non-member countries began in June 2000 to explore the extent to which they could be involved.

After an extension of the commitment deadline to 28 February 2002 only Andorra, Liechtenstein, Liberia, Monaco, the Marshall Islands, Nauru and Vanuatu were listed as unco-operative Tax Havens. All other tax havens had committed to introducing transparency into their tax systems and effective exchange of information, subject to the adequate protection of taxpayers' rights and the confidentiality of their information. The OECD undertook to support committed jurisdictions so that they could implement those commitments. The 2004 Progress Report noted considerable progress in achieving a cooperative process with those countries and jurisdictions outside the OECD that have made commitments to transparency and effective exchange of information.

There were a series of meetings of the OECD’s Global Forum on Taxation that aimed 'to achieve high standards of transparency and information exchange in a way that is fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD'. It is arguable that the whole point of becoming a tax haven and offering the protection of stringent secrecy laws was because no other arrangement allowed fair competition on any level between, say, the US and the Republic of Nauru. The OECD, to facilitate action in a number of identified areas, co-ordinated a number of projects through the Global Forum. These included a factual review of the 'legal and administrative frameworks in the areas of transparency and exchange of information in over eighty

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69 Ibid., p. 22.
72 2001 Report, p. 11.
73 Ibid., p. 12.
countries'. The 2006 Report continued what had proved a very effective method of imposing pressure on both participating and non-participating countries by publication.

The response to this example in the context of taxpayers' rights and obligations could be twofold. The OECD could use economic power to require countries to adopt a model of taxpayers' rights and obligations in the same way as it has influenced the national and financial tax policies of those countries listed as having harmful tax practices. The introduction of taxpayers' rights would contribute to achieving high standards of tax administration 'in a way that is fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD'. It would support foreign investment, encourage domestic compliance and thereby broaden the revenue base. Nonetheless, it will not happen as the economic interests and power of the OECD do not support it as a 'grand' initiative. A perceived fiscal imperative, an uncertain international political environment driven by fears of terrorism, and a relatively easy target, drove the early success of the attack on legal rules and structures in tax havens. There is no such fiscal imperative for OECD countries to require subscription to and application of a model of taxpayers' rights and obligations within every jurisdiction. The target base is also too wide and, as the Global Forum members have found, less able to comply.

The alternative is for there to be a two-tier model, the approach taken by the EU and in certain aspects of the OECD guidelines. More developed economies could subscribe to a more advanced model of taxpayers' rights consistent with the greater obligations placed on taxpayers in a fully developed, complex and sophisticated economy. Less developed economies could subscribe to a basic model of taxpayers' rights consistent with the level of development of their economy and their tax system. Given, the conclusions of the

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77 Above n. 75.

78 For example, the 2006 Report, ibid., p. 10, which recognises the impediments to information exchange found in domestic laws that will lead to different levels of compliance.
jurisprudential and human rights literature, this would likely prove more acceptable, provided that it was not perceived as a slight on less developed economies.\(^79\) It would also mean that development of taxpayers' rights might be possible in developing countries, where limits on administrative capacity, cost and political constraints would make major tax reform unlikely.\(^80\)

An advantage of this approach would be the scope for wider acceptance and inclusion. This point is explored further below in Chapter 3, which discusses the interpretation of a model. Suffice to say that using a two-tiered model allows each jurisdiction to implement the proposed rights in the context of its own tax system. It can then cater for cultural, political, social, economic and other factors specific to that jurisdiction in the implementation and application of the rights. This is consistent with the approach of recent human rights literature, discussed above. Nonetheless, the basic rights are sufficiently universal to allow recognition. This is of particular interest to taxpayers acting globally and countries seeking to improve foreign investment.\(^81\)

VI DISADVANTAGES AND ADVANTAGES OF A TWO-TIER MODEL

It could be argued that a two-tier model encourages states to adopt the basic level of protection for taxpayers rather than aspiring to the more advanced level. If an approach were taken between the two, developing nations would have more to aspire to. This argument is attractive in that it might lift the level of protection in some jurisdictions, but it

\(^{79}\) Politics of negotiation of differing standards.


is more likely to lift the level too high for developing countries to participate and to set it too low for developed countries to see it as having value.

Another argument is that having a two-tier model will make it unlikely that nations will subscribe to or incorporate the model. Acknowledging that it subscribes only to a basic model might be a politically sensitive issue for a country that is seeking to demonstrate the sophistication of its legislative and administrative systems. Developed jurisdictions may not see it as relevant to consider a model, given their other treaty commitments.

A third argument is that it is easier to encourage states to adopt a common international standard. It provides a benchmark. Adoption by a number of states puts pressure on others to follow suit. By breaking the model into two, there is less clarity on the benchmark. States have a choice as to which standards they will apply even where they choose to use the model as a basis for their tax rules.

These perceived disadvantages of a two-tier system relate more specifically to the adoption of an international treaty, charter or standard. In contrast, the aim of a model for taxpayers' rights is to provide a guide to states reforming their tax systems. Tax reform, as discussed below, is endemic. Policy-makers often do look to international norms when designing changes to the tax system. A two-tier model would provide guidance at the appropriate level for particular tax systems. It would suggest rules that they could incorporate to meet best practice. If the model is seen as a guide rather than a prescription, it is far more likely to gain wider acceptance. As with the Model OECD Double Tax Convention,\(^\text{82}\) over time the rules it contains may be incorporated into a large number of systems. At that point, it will become relevant to refer to it as having a more prescriptive nature, as the rules become the starting point for inter-jurisdictional negotiations on issues affecting taxpayers' rights.

The threat to nations in the taxpayers' rights arena is significantly lower than in those areas where their revenue base is threatened. Also, the pressure to adopt rights is not sourced internationally in the way it is to support minimum standards of human rights generally. There simply is not a general awareness of taxpayers' rights. For policy-makers in jurisdictions undertaking reform it is therefore unlikely to be a major political issue whether they refer to a model of taxpayers' rights and at which level. There are at least three significant advantages to a two-tier model.

First, as countries go through major tax reforms, a model provides principles that can govern the formulation of the tax rules. Consider an example of where this occurs. Two influential organisations that have significantly influenced domestic tax policy are the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank), a UN agency. Both came out of the Bretton Woods Conference in 1944. The IMF was designed to act as a catalyst for economic cooperation, growth and stability within the international monetary system. One of its key roles has been to extend credit and provide economic relief to countries experiencing a wide range of financial difficulties. The World Bank makes available project and program loans to less developed countries on preferential terms and by acting as a lender of last resort. They often operate in tandem.

Both the World Bank and the IMF impose conditions on their lending and their involvement. Before agreeing to involvement in a country, the institutions carry out an

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assessment of the economic and other conditions in the country.\(^86\) From this assessment, they will make recommendations, usually economic and legal. Although, they are increasingly more extensive:\(^87\)

Bank-approved consultants often rewrite a country’s trade policy, fiscal policies, civil service requirements, labor laws, health care arrangements, environmental regulations, energy policy, resettlement requirements, procurement rules, and budgetary policy.

In their involvement with developing nations and nations in distress, they effectively take on the role of a sovereign government when they require implementation of their conditions and recommendations.\(^88\) Certainly, their influence on the tax systems of developing nations and, more recently, of economies in transition, reflects their sovereign role. To see this, one only has to read the technically excellent works put out by IMF and World Bank experts,\(^89\) which are reflective of their extensive fieldwork. It is precisely in the exercise of this role and influence that a basic model of taxpayers’ rights would prove beneficial.\(^90\)

One of the clearest examples of the impact of conditionality has been the spread of a broad based consumption tax (Value Added Tax or VAT).\(^91\) But the fiscal influence of the

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\(^{86}\) Described extensively in J. Cahn, above n. 84.
\(^{87}\) Ibid., p. 160.
\(^{88}\) Ibid.

\(^{90}\) See the extensive list of Technical Assistance projects, <www.itdweb.org>, 5 September 2006.

\(^{91}\) A. Tait, Value Added Tax: International Practice and Problems (IMF, Washington DC, 1988). For the increasing trend towards the implementation of a VAT, see IBFD, Annual Report, which publishes each year a worldwide survey of developments and trends in international taxation, <www.IBFD.org>, 7 November 2006. See also, e.g., IMF Commends VAT Introduction in Cameroon' (1999) 18 Tax Notes International,
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IMF and World Bank goes far beyond this. Whereas the influence of other institutions is severely circumscribed, that of the IMF and World Bank, within certain spheres, is almost unlimited. They deal primarily with developing countries and countries in distress. They generally attempt to implement solutions tried and tested elsewhere, but designed and modified to fit the peculiar circumstances of the project country. In this context, a model of taxpayers' rights would be extremely useful and provide a benchmark against which to measure the implementation of different tax systems. A basic model would be essential if it were to have practical application to tax systems starting from a very low base.

Formulation of a basic model for use in the design of tax systems by the IMF and World Bank could also form one of the bases for dialogue between those organisations and developing countries when considering tax policy. The international organisations have recognised the need for wider representation of developing countries in the policy dialogue. The IMF, OECD and World Bank jointly proposed Developing the International Dialogue on Taxation, which has continued as a dialogue involving a range of international organisations concerned with taxation.92

The aim of the Dialogue is to encourage dialogue, identify and share good practices, provide a clearer focus for technical assistance and avoid duplication of effort.93 A model of taxpayer's rights would fulfill these criteria and could be the basis for the ongoing discussion on taxpayers' rights.94 The success of the international dialogue on the policy governing taxation of electronic commerce shows how it has worked elsewhere.95

93 Ibid., part IV.
94 The papers on the strategic, planning and general principles section of the Organisation and management of tax administration section of the International Tax Dialogue website, <www.itdweb.org>, 1 September 2006, are almost all concerned to some extent with taxpayers' rights.
95 See the papers and history of the dialogue, <www.oecd.org>, 1 September 2006, under the topic 'Tax and Electronic Commerce', particularly the Reports, such as OECD, Taxation and Electronic Commerce: Implementation of the Ottawa Taxation Framework Conditions – 2003 Report.
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There are some obvious benefits to international dialogue of this kind. It avoids duplication. It provides a forum to develop international consensus at the governmental level. The discussion of international tax policy will be more informed given the range of participants and their particular perspectives. The dialogue may act as a catalyst to improve practical co-operation between tax administrations. It is in this area that a basic model for taxpayers' rights could be highly effective.

A second advantage of a two-tiered model of rights is that the international stage is now crowded with individuals, organisations and different levels of government, each with their own agenda. Fluidity is a hallmark of the set and characters. It is underpinned by the growing international economic inter-relationship. The sheer volume and extent of world trade and international investment in all its forms ensure that the livelihoods of most people are inextricably linked to it. One of the most difficult challenges is how the individual government units should manage their revenue collection in this environment.

Tax systems have become increasingly sophisticated. They are subject to constant change and development, as they have to come to terms with evolving economic imperatives. Managing that change and development includes managing the significant pressures on the system both internally, within revenue compliance and administration, and externally, for example, with the development of electronic commerce.

The very diversity of experience within each system requires the application of general principles to bring order out of impending chaos. That order is more effective if it encompasses both the internal and external elements. It is here, as different units of government seek to carve out for themselves niches that allow them to operate independently as taxing agents within the context of an increasingly integrated world order, that we see the level of that integration. Where economic or relational inter-dependence is strongest, there is most convergence between tax systems, and principles have their widest
acceptance. Where inter-dependence is weaker, there is less convergence of tax systems and the general application of accepted principles.

This explains in part the growing influence of supranational organisations and the success of central governments in controlling the taxing powers in federal systems. But it also explains in part the limitations of those organisations and governments. The deeper the level of interaction that must or does occur between different authorities, the greater the pressure to reduce transaction costs between their respective tax systems. Where there is little interaction, the pressure is correspondingly reduced.

This interaction and, to a limited degree, convergence, is most obvious between OECD countries in the area of tax administration. This will be discussed in more detail in Chapter 7 in the context of information exchange. But there are numerous other cases, from transfer pricing to harmful tax competition, where common or similar administrative approaches and systems are being put in place to facilitate revenue administration, collection and protection of jurisdictional revenue bases. An advanced model of taxpayers’ rights is consistent with and could assist this cooperation.

A third advantage to a two-tiered model of taxpayers’ rights relates to trade and investment. With the expansion of international trade comes the associated increased focus on investment flows. Investment is critical to the health of an economy and tax systems are designed to attract foreign investment. To do that consistently, it helps if the system is seen to operate with integrity and protect the basic rights of the investor.

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97 Which is why most countries only negotiate double taxation agreements with their trading partners.

98 For example, where the Pacific Association of Tax Administrators (PATA) developed a standard package of documentation for taxpayers applying for an advance pricing agreement on transfer pricing involving those jurisdictions. See IRS, Pacific Association of Tax Administrators (PATA) Transfer Pricing Documentation Package, found under ‘transfer pricing’, <www.irs.gov/businesses/international>, 5 September 2006.

99 Discussed above.

100 For example, see A. Shu and J. Yang, ‘China enacts Incentives to encourage Information Technology, Innovation and Developments’ (2000) 20 Tax Notes International, 829. See also, L. Zhaeng, L. Wang and M. Gould, ‘China establishes special trade zones to encourage export operations’ (2001) 22 Tax Notes
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The level of sophistication of the tax regime significantly alters the level of taxpayer protection expected to operate within it. For example, a foreign investor would not require as high a level of taxpayer protection in a simple regime that does not include taxation of capital gains, has limited taxation of foreign sourced income, does not have a special regime governing the taxation of transfer pricing and derives a significant portion of its revenue from indirect taxation. This is mainly because the simpler the regime, the less likelihood that there would be conflict between the investor and the revenue authorities at a sophisticated level. For example, there is unlikely to be significant demand for revenue rulings or for special procedures governing transfer pricing audits involving more than one jurisdiction. However, the investor would be anxious to ensure that there was basic taxpayer protection and security of investment from arbitrary intervention. For example, an investor would be concerned if there was no right of appeal from the decision of a revenue official or if there were no limits on the rights of search and seizure by revenue officials.

Clearly, models of taxpayers' rights will provide guidance for revenue authorities in determining the minimum expectations of foreign investors. They will also assist advisers to foreign investors in analysing all the factors affecting the investment decision.

On balance, provided that a model is not put forward as a rigid international standard, a two-tier approach has merit. It allows flexibility based on relative sophistication and provides appropriate guidelines for both developed and developing economies.

VII IS A MODEL OF RIGHTS REALISTIC?

The concept of taxpayers' rights raises immediate concerns as it sets itself up as a counterpoint to the exercise of the taxing powers of the state. Taxpayers' rights are
generally expressed in terms of an obligation on the state to act in a certain way or as a limitation on its powers to make, administer, collect or enforce the tax laws. As discussed above, the power to tax is fundamental to the operation of the state. Without taxation of some kind, a state that recognises property and liberty could not function unless it has its own independent source of funds. Any limits on taxing powers are viewed with suspicion; hence the early evolution of the margin of appreciation in international tax treaties with respect to tax matters.

A Changes in Approach to the Limits

On a traditional analysis, it would seem fair to say that states have little interest in accepting formal limits on their rights to tax. It has been left largely to the state to determine the appropriate delicate balance between the wishes of the individual and the utilitarian greater good of the majority. But this is changing, because the operating framework is changing. What is our operating framework? There are different levels of political power and authority. The lower the level the more limited is the jurisdiction. Ultimate sovereignty supposedly rests in the nation state. Yet, this sovereignty is limited increasingly by binding

\[\text{Journal of Public Economics, 337.}\]
101 Even low tax countries such as Bermuda and Nauru require some form of tariff, excise or other impost to provide funds for the operation of the government.
102 It could be argued that state ownership of oil wealth in countries such as Brunei and Saudi Arabia provides an example.
103 L. Catà Backer, in 'Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union' (1998) 12 Emory International Law Review, 1331, explores the tensions between what he sees as 'the craving for normative enforceable uniformity within Europe' (1332) and the retention by nation-states of 'the ultimate power to impose norms and to implement law within their respective territories' (1333). It is a useful analysis of the broader contest that gives rise to states exploiting margins of appreciation in treaties and the underlying rationale for their doing so. The logic as applied to the protection of national sovereignty extends specifically to taxation, which is one of the areas most fiercely protected. See further, H.C. Yourov, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (The Hague and London, Kluwer Law International, 1996) and F. Jacobs and R. White, The European Convention on Human Rights (Oxford, OUP, 1996), p. 258.
104 Halsbury v United Kingdom, \(\Delta\) 24 (1976); (1976) EHRR 737.
agreements at the supranational level. At all levels, the framework is determined in part by the formal legal and administrative authority vested in each component, whether an international organisation, a national government, a state or provincial government, a city or town council or some other entity vested with civic authority.

However, there is a further vital dimension to the operating framework: the voluntary and involuntary cooperation that provides an informal counterpoint to the exercise of formal legal and administrative authority. Sometimes it is based in delegated authority. For example, where the revenue authorities in the Pacific Association of Tax Administrators developed a standard package of documentation for taxpayers applying for an advance pricing agreement on transfer pricing involving member jurisdictions, or where the Australian state of Queensland negotiates special state tax concessions to persuade a multinational company to establish its regional headquarters there. Sometimes it simply represents the exercise of economic or other power. An obvious example (above) is where the members of the OECD forced a number of small nations to comply with OECD requirements designed to prevent those nations from allowing money laundering or practising tax competition.

The whole provides a complex matrix of vertical and horizontal relationships. Advances in trade, technology and communication have exacerbated the complexity as different players can now relate to other players at different levels in a way that was not possible until recently. Individual taxpayers in one jurisdiction now routinely interact with

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105 Although L. Catá Backer, above n. 103, argues that principles such as the European subsidiarity concept ensure that 'supranational entities are little more than well-organized networks of legal obligations among sovereign states' (1335). He goes on to state that, 'subsidiarity ultimately rejects the independent power of the networks of obligations to impose normative limits on the power of the nation, except to the extent the nation-state permits it'. His arguments focus on the limits of supranational bodies to impose normative limits. Taking it from the opposite perspective, although nation states are careful to limit inroads into their sovereignty, the network of legal obligations (albeit in the taxation area subject to wide margins of appreciation) does result in the slow but incremental erosion of sovereignty.


authorities at all levels in another jurisdiction that they are targeting for direct investment. Where supranational organisations were once the preserve of member governments, the OECD Committee on Fiscal Affairs' (CFA) Technical Advisory Groups (TAGs) on aspects of the taxation of Electronic Commerce included both individual taxpayers and representatives from non-member jurisdictions.

The sheer scale of tax administration ensures a level of interaction with the revenue authority at all levels that 100 years ago would have been simply unimaginable. Revenue authorities increasingly have contact in some form with almost every adult and many children. It is in this context that the balance between the interests of taxpayers and the state is starting to shift in favour of the taxpayer. For the complex and interdependent relationships between taxpayers and states to flourish it is no longer possible to rely on the traditional command model of tax administration. That this is widely recognised is seen in the proliferation of charters or statements of taxpayers' rights. A Model of taxpayers' rights is therefore realistic in a changing world.

B National Limits

At the national level, tax collection is obviously important and any actual or perceived threat to tax collection is taken seriously. In most jurisdictions, legislation providing the financial means for the government to operate warrants favourable legislative process (the powers of supply in common law jurisdictions).


111 See generally, V. Braithwaite, above n. 17.

112 See further, International Tax Dialogue, above n. 94.
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This special treatment is carried through into the procedural application and operation of the law. The power of the courts to review the operation of the tax system is specifically restricted. Australia, the UK, Canada and Japan provide examples. In Australia, administrative law governs the legality of process and the rights of judicial review of administrative actions are codified in the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act). The common law rights remain, but in most cases they are now found in a clearer form in the ADJR Act. Under Schedule 1(e) of the ADJR Act, any decision connected with the making or amending of tax assessments or the calculation of tax or duty is excluded from the jurisdiction of the Federal Court. The availability of judicial review of decisions in tax matters is as limited in the UK. Saunders states that in tax matters, ‘potential applicants for judicial review should normally use grievance procedures and the Ombudsman and “any system of dispute resolution available before using judicial review as the ‘remedy of last resort’”’.114

In Japan, the Gyōsei Tetsuzuki Hō115 (Administrative Procedure Law (APL)) states in Article 1:116

The aim of this Law is, in relation to dispositions, administrative guidance and notifications, to aspire to greater fairness and transparency ... in administrative management by providing for common matters, and by these means to contribute to the protection of the rights and interests of the Japanese people.

Ishimura states that, ‘the operation of the APL has been almost entirely excluded in the area of tax administration’.117 There is specific exclusion from application to taxation of the...

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113 See also Administrative Decisions (Judicial Review) Act 1977 (Cth), (the ADJR Act), s. 10.
116 Translated by K. Ishimura, ibid.
principles governing administrative management and the general principles for administrative guidance.\footnote{118}

Even where states introduce charters of rights, the rights of taxpayers are restricted. In Canada, the applicability of the Canadian Charter of Rights and Freedoms\footnote{119} (the Charter) to taxation matters was considered in \textit{Thibaudau v. Canada}\footnote{120} and it was found that the Income Tax Act was subject to the Charter. However, the courts have been unwilling to find taxation laws contrary to the provisions of the Charter, as the very essence of the tax law is 'to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests'. Philipps argues that, 'Gonthier J relied on the "special" status of tax law to support a narrower reading of the equality guarantee itself, excusing the government from having to show that the provisions are reasonably justifiable on policy grounds'.\footnote{121} Whether or not the courts use the 'special status' of tax law to read down Charter rights, the critical point is that tax law has this 'special status'.

However, these legal restrictions in many countries have been balanced by a mix of legislative and administrative limits on the power of the state in taxation matters. Australia, Canada and the UK have introduced administrative statements of taxpayers' rights. Limits on the state in Japan are less obvious,\footnote{123} but even there, for example, the tax authorities have introduced a system of advance pricing agreements to provide certainty to taxpayers in transactions involving transfer pricing and recognise the importance of securing taxpayer co-operation, participation and understanding in tax matters.\footnote{124} In a state where the limits

\footnotesize{\begin{itemize}
\item \footnote{117} Ibid., p. 236.
\item \footnote{118} Ibid.
\item \footnote{120} Thibaudau v. Canada, [1995] 1 CTC 212; 95 DTC 8978 (SCC).
\item \footnote{121} Ibid., per Gonthier J, p. 392 (CTC) discussed by J. Li, 'Taxpayers' Rights in Canada' in D. Bentley, above n. 115, p. 130.
\item \footnote{123} K. Ishimura, above n. 115.
\item \footnote{124} Individual Circular: On the Advance Recognition of Arm's Length Price Calculations on Intercompany Transactions [Kobetsu Tsūatsutsu: Dokuritsu-kigyō-kan Kakaku no Santei-hōhō-tō no Kakunin ni Tsuite]}

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are slow to change, it supports the analysis above that changes take place where there is interaction between different systems. It is inevitable in the context of international trade and the desire to create an attractive location for foreign investment.

In this context there are two significant areas where a model can contribute within national limits. First, developed countries have an ad hoc approach to taxpayers' rights. The Taxpayer Bills of Rights in the United States are hardly bills of rights as they are normally understood. Rather, they constitute piecemeal amendments to the Internal Revenue Code. The same position is reflected in most OECD countries, where taxpayers' rights are found spread across tax and other legislation. This is why lists of administrative rights are used to draw the threads together. Second, for developing countries and countries in transition, there may be opportunities to redraft their revenue laws. As such, it presents an opportunity to identify the basic rights that any system should provide to its taxpayers, and to include them in the law. Drafters will not find these rights clearly identified in the tax laws of any OECD country, to use as a precedent. Accordingly, it makes sense to draw up a list of those rights that should be found in any system.

Historically, it may have been of little consequence to introduce a model of taxpayers' rights. The national exclusions seemed too wide-ranging for it to have had any effect. But the changes in approach in recent decades have completely altered the way tax systems are administered. This will be explored in detail in later chapters. A Model of taxpayers' rights is realistic in the national context.

C. International Limits

The position is the same at the international level. There is a history of ensuring that the possibility for interference in tax matters is limited. In most multilateral treaties that might otherwise affect taxation, it is specifically excluded. The WTO provides an example. Although, the focus is on allowing nations to grow through competitive advantage in a free international market and more than 140 nations in the WTO have agreed over time to significant reductions in tariffs and the abolition of quotas, the history of the General Agreement on Tariffs and Trade (GATT) has been to exclude taxation from its ambit. The non-discrimination requirement in the GATT does extend to domestic taxation, which cannot be used as an instrument to protect domestic goods. The General Agreement on Services (GATS) also includes a non-discrimination clause but has exceptions for existing tax treaties and domestic tax laws.

However, the WTO provides an excellent example of how the international trade environment can reduce the apparent limitation on bringing taxation within the scope of an international treaty. Unlike in international tax law, international trade law has managed in its agreements to introduce various forms of adjudication, including binding adjudication. This is assisted by the multilateral nature of the agreements. In the case of US Foreign Sales Corporations (FSC), the Reagan administration introduced special rules so that a FSC, with an adequate foreign presence, could defer tax on a portion of its income. It was

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117 GATT, 30 October 1947, 55 UNTS 194, arts II and XI.


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designed to give US exporters similar concessions to those given under consumption tax regimes. In 1997, the EU successfully challenged the rules under the WTO Agreement on Subsidies and Countervailing Measures. The Appellate Body upheld the ruling. In 2001, the EU successfully challenged the successor legislation to the FSC, the Extraterritorial Income Exclusion Act of 2000 and this was upheld on appeal.133

Stephan suggests that this example shows that the WTO does constrain US taxation laws.134 He argues that the US would be concerned about the economic consequences of failure to comply with WTO rulings,135 as continued growth in the global economy and confidence in it may be undermined by the instability in the world trading system caused by a failure to comply.136 This is borne out by the fact that both rich and poor countries comply with most WTO rulings.137 Confidence that the benefits of WTO membership outweigh the costs, including the threat of having to comply with adverse adjudication, is seen in the membership growth of the WTO.138 As countries comply with WTO rulings, that act of compliance also reinforces the weight of those rulings under public international law and entrenches their position as an ongoing constraint on domestic tax policy as it is affected by those rulings.

Exclusions in human rights treaties allow states a ‘Margin of Appreciation’ in matters critical to the existence and operation of the state. Essentially, in revenue matters, the state is allowed significant freedoms in the legislation and operation of the tax system. For example, Article 1 of the First Protocol to the European Convention on Human Rights (ECHR) as amended by Protocol No 11 states:

135 Ibid.
136 Ibid., 67.
137 Ibid., 68.
138 Ibid.
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payments of taxes or other contributions or penalties.

This would seem to make any model of taxpayers' rights superfluous. Yet, in *Sparrow and Lawmath v. Sweden*, the European Court of Human Rights interpreted Article 1 to mean that there must be a fair balance between the public interest demands of the community and the requirement to protect individual rights. The margin of appreciation gives the state broad powers to secure the payment of taxes, but the exercise of the right of sovereignty must be fair, follow procedural safeguards and uphold the principle of proportionality. Although Jacobs and White argue that, 'nowhere is the margin of appreciation wider than in the area of taxation', Persson-Österman demonstrates that, particularly in procedural areas, the ECHR has strengthened taxpayers' rights.

The European Union (EU) provides another example of how convergence between systems creates a dynamic environment for the recognition of interests. This is evident in the rules governing taxation. Theoretically, the EU has limited control over the direct

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142 F. Jacobs and R. White, above n. 103, p. 258.
taxing powers of individual states. But the European Court of Justice (ECJ) has been quick to strike down impediments to the implementation of the EC Treaty. Raventós puts it forcefully:

'The most serious accusation that has been made against the ECJ is that it is undermining the taxation powers of the Member States, in other words, it is attacking the sovereignty of those Member States. ... As the Schumacher decision stated: 'as Community law stands at present, direct taxation does not as such fall within the purview of the Community' but, and this is the point, 'the powers retained by the Member States must nevertheless be exercised consistently with Community law'. Where national tax provisions coincide with Community law, then all is well; where they do not, Community law must prevail.

The development of taxpayers' rights by the ECJ has been significant and much of this jurisprudence is analysed in more depth in later chapters. That protection of individual taxpayers was not the primary intention of the ECJ, but rather to take forward the vision of the EU as contained in the Treaty, does not detract from the effect. It rather underlines the point made above, that where economic or relational inter-dependence is strongest, there is most convergence between tax systems, and principles have their widest acceptance. The jurisprudence of the ECJ provides a basis for both many of the principles underlying, and much of the substance within, a model of taxpayers' rights. It also

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144 Under Articles 90 to 93 of the EC Treaty, as compared with its powers over indirect taxation. See generally, L.W. Gormley, EU Taxation Law (Richmond, Richmond, 2005), ch. 1.
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highlights the need, in the context of significantly increased international trade and investment, for consistent treatment of taxpayers' rights between jurisdictions. 148

D Conclusion

A model of taxpayers' rights is both realistic and possible. Currently the rights are disparate and are interpreted differently internationally and in individual jurisdictions. However, there has been sufficient convergence in recent decades for principles that have become widely accepted to be included in a model that will reflect the practices of many jurisdictions and act as a guide for others. 149

Baker and Groenhagen make a strong statement for a model: 150


New proposals to extend massively the exchange of information between tax authorities around the world require a more systematic protection of taxpayers' rights. There is always room for improvement and this is where the process of standard-setting comes in. By examining best practice among existing countries, by identifying problems with existing practice, rights can be enhanced in a way which is both beneficial to taxpayers and, ultimately, to effective tax administration.

VIII SHOULD THE MODEL INCLUDE TAXPAYERS’ OBLIGATIONS?


149 A. Sawyer, ibid. made one of the first calls for an international statement of taxpayers' rights in one of the seminal articles on the topic.

150 Above n. 110, p. 5.
Revenue authorities are given powers to administer the tax system. These include the powers of administration, collection and enforcement. The system itself finds its basis in primary and delegated legislation, often implemented using administrative regulation. Every aspect of the administration of the tax system has a bearing on an obligation that a taxpayer owes to the state under the tax laws and regulations. This is reflected in the broad margin of appreciation given to states under international human rights treaties in the area of taxation and the positive duty to pay taxes in some treaties. For example, Article 29 of the 1981 African Charter on Human and Peoples' Rights states that each individual has a duty 'to pay taxes imposed by law in the interest of the society'. A taxpayers' duties are comprehensive.

A model of taxpayers' obligations would therefore constitute a model tax code, or at least a model tax code governing the administration of the tax system. There may well be good reasons for devising such codes. Hussey and Lubick have done just that with their Basic World Tax Code and Commentary. Thuronyi's wide-ranging two-volume Tax Law Design and Drafting, based broadly on the experience of the IMF in developing countries, provides much useful guidance on the critical elements of such a code.

However, to state it in these terms could be to misinterpret what proponents of the inclusion of taxpayers' obligations in any model are saying. The Australian Taxpayers' Charter includes a number of 'taxpayer obligations'. They set out in simple terms the culture of voluntary compliance that should underlie the tax system. Taxpayers are expected to:

- be truthful in dealing with the ATO;

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151 Text in P.R. Ghandi, above n. 45, p. 332.
153 V. Thuronyi, above n. 89.
The Rationale for a Model

- keep records in accordance with the law;
- take reasonable care when preparing tax returns and other documents and in keeping records;
- lodge tax returns and other required documents or information by the due date;
- pay taxes and other amounts by the due date; and
- be co-operative in dealings with the ATO.

Most of the obligations are mandatory, supported by the law. Others, such as the expectation that taxpayers will treat ATO staff with courtesy and consideration are simply a statement of accepted social behaviour. It reflects the emphasis by the ATO and other revenue authorities that have published similar charters on encouraging a culture of voluntary compliance. This approach is consistently taken by the ATO. For example, the Australian Commissioners of Taxation often express this view in their speeches.\(^{156}\)

The rule of law argument is a distraction or a 'straw man' to the extent that it is put to preclude recognition of the distinct value of taxation. It is a clinical debating point that fails to recognise that attitudes and values invariably affect the choices people make, their preparedness to push the boundaries and the way laws are applied, ruled on by the courts and, indeed, framed. This is the true nature and influencer of ethical behaviour. It is about standards and values set by community culture which in turn directly influence the decisions and behaviour of its members.

It is appropriate that published charters should include statements of taxpayer obligations. They aim at encouraging voluntary compliance and are used both for information and to

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\(^{155}\) Ibid.

put forward the views of the revenue authorities. There are now many examples to choose from.

The OECD Centre for Tax Policy and Administration has issued a series of practice notes for tax administrations. In its *Principles of Good Tax Administration*,\(^{157}\) it identifies as the main role of revenue authorities: to ensure compliance with the tax laws and to focus on voluntary compliance. In its practice note, *Taxpayer Rights and Obligations*,\(^{158}\) it stresses the importance to voluntary compliance of an understanding of basic obligations:

> There is a set of behavioural norms expected of taxpayers by Governments. These expected behaviours are so fundamental to the successful operation of taxation systems that they are legal requirements in many, if not most, countries. Without this balance of taxpayer rights and obligations taxation systems could not function effectively and efficiently.

The practice note goes on to identify as critical, taxpayer obligations to be honest, cooperative, to provide accurate information and documents on time, to keep records and to pay taxes on time. Essentially, it is the same as the ATO’s list.

However, the purpose of a model of taxpayers’ rights is different. It aims to identify basic principles that should underlie any tax system and to provide a consolidated list of the most important rights that it should contain. In reality, the rights will be found across the system in different forms and with different enforcement mechanisms appropriate to that particular system. A published charter for taxpayers is informational and educational and directed at taxpayers to encourage voluntary compliance. It comprises a summary of the major rights and obligations of which taxpayers should be aware. The model, in contrast, provides guidance to policy makers as to whether any rights that should be in place within

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the tax system are missing. It also provides guidance as to the content of rights and enforcement mechanisms that may be suitable. To include obligations for educational purposes in such a model is inappropriate because the target audience is different. It is the role of the revenue authorities to develop such material in the context of their own system. Indeed, to ensure completeness, a model designed for policy makers could include obligations, but it would require the formulation of a complete model code of tax administration. That may be beneficial, but it is not necessary as a first step.

To illustrate, Thuronyi's edited work, *Tax Law Design and Drafting*, identifies as foundations for any tax system the legal framework for taxation and the law of tax administration and procedure. The two chapters provide an overview of the principal elements necessary to enact and operate a tax system. The focus is on taxing powers on the one hand and the execution of those powers on the other: the administration of the tax system, collection of taxes due and the enforcement of the tax rules. Both chapters include discussion of issues that underlie, or can be classified as, taxpayers' rights. The legal framework for taxation discusses the general principles of taxation and limitations on the power to make tax laws. The law of tax administration and procedure includes a specific section on taxpayers' rights and refers elsewhere to limits on the power of the revenue authority, for example in its powers of investigation. The work is balanced and authoritative. This volume shows that taxpayers' rights are but one element of the law governing tax administration. There is no reason why that element cannot be considered separately.

Most discussions of taxpayers' rights are derivative. They consider the balance of state power and determine to what extent that power should be limited in dealing with its

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158 OECD Committee of Fiscal Affairs Forum on Strategic Management, GAP002 issued 29 October 2003.
160 Ibid., pp. 19-31.
161 Ibid., p. 103 and pp. 110-112.
citizens. This approach forms the basis for the legitimate argument that consideration of taxpayers' rights should be made in the context of taxpayers' obligations. An alternative approach is to start with the basic rights of taxpayers and consider to what extent they should be limited in the interests of the state requirement to collect taxes. Using this approach leaves it open to the state to construct whatever obligations it wishes, but sets out clearly the limits that should apply in the exercise of those obligations. Both approaches may lead to the same conclusions. But using taxpayers' rights as the starting point goes back to the premise that taxation is itself not a fundamental good, whereas individual rights to property and liberty are.

IX WHAT SHOULD BE THE BASIS FOR RIGHTS CHOSEN?

As discussed earlier, one of the primary considerations for inclusion of any right is a widespread acceptance. Any right should be expressed in general terms so that it can be adapted to the context of a particular system. A caveat to the OECD Practice Note, *Principles of Good Tax Administration*,\(^\text{162}\) recognises this and stresses the varied environment in which each revenue authority must administer its tax system, with different policies, legislative environments and administrative practices.

Chapter 3 reviews the basic principles that should underlie any tax system. Particularly in the last 50 years, these have been identified and developed to provide a broadly accepted basis for developing tax policy. The principles are relevant and helpful in the identification of a number of rights that should be included in a model. There are variances in the definition of these principles and the analysis in Chapter 3 attempts to identify the most logical application in the broader context of rights interpretation.

\(^{162}\) Above n. 157, p. 1.
It is generally accepted that taxpayers' rights should be identified and interpreted as a species of human rights and in the context of the international human rights obligations into which states have entered. This was the starting point for the OECD in its 1990 survey of taxpayers' rights and obligations.\textsuperscript{163} There is now significant jurisprudence to explore across a range of international treaties.\textsuperscript{164}

General practice also provides a range of important rights that are included in tax systems. The OECD identified a list in its survey.\textsuperscript{165} The Inter-American Centre of Tax Administrations/Centro Interamericano de Administraciones Tributarias (CIAT) has been active in this area. It has a number of useful publications that provide a source for practices among its members.\textsuperscript{166}

The rights that flow from accepted practice in different jurisdictions include different types of right. Some are legislative and others are administrative. The method of enforcement can alter significantly the content of a right and its application. Chapter 4 provides a classification of rights and Chapter 5 examines different methods of enforcement.

Another significant factor in determining the substance of a right is its interpretation. A model of taxpayers' rights owes its significance in part, as identified above, to the increased need for international interaction. However, it has long been recognised that interpretation across borders can vary greatly.\textsuperscript{167} In determining rights for inclusion in a model, it is also important to be aware of different legal systems, different interpretations

\textsuperscript{163} OECD, \textit{Taxpayers' Rights and Obligations} (1990).
\textsuperscript{165} Above n. 163.
\textsuperscript{166} For example, as early as 1984, the Technical Papers of the 18th General Assembly of the Inter-American Center of Tax Administrators (Cartagena, Colombia, 21-25 May 1984), focused on Compliance with Tax Obligations. At the General Assembly held in the Dominican Republic (19 March 1996), it approved 'Minimum necessary attributes for a sound and effective tax administration'.
\textsuperscript{167} Recognised, e.g., for treaty interpretation, in arts 31-33 of the Vienna Convention on the Law of Treaties 1969.
and how they affect the general acceptance and application of the right. This is discussed in more detail in Chapter 3.

X WHAT IS THE INCENTIVE FOR STATES TO ADOPT TAXPAYERS’ RIGHTS?

Particularly within the revenue authorities of OECD countries, opinion has changed as to the value of specific taxpayer protection, in the context of complex tax laws. Tax law complexity is a focus for criticism and simplification has become a major issue. Part of the impetus for the rewrite of legislation has come from the revenue authorities. The complexity of the transactions that has led to complex law has also placed strains on the administration and compliance functions. Revenue authorities are constantly striving to improve compliance and make revenue administration more efficient. Their research has consistently shown that in order to do this it seems helpful to have increased cooperation from taxpayers.168 The OECD Centre for Tax Policy and Administration Principles of Good Tax Administration – Practice Note (GAP001) states:169

The promotion of voluntary compliance should be the primary concern of revenue authorities. The ways by which revenue authorities interact with taxpayers and employees impact on the public perception of the tax system and the degree of


169 GAP001, ibid., p. 3.
voluntary compliance. Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.

Results of taxpayer compliance research within OECD revenue authorities have encouraged them to support simplification of tax laws, the introduction of self-assessment systems, and to change their traditional cultures. The revenue authorities are trying to alter the way that taxpayers perceive them.\textsuperscript{170} The move is away from a culture of ‘command and control with the automatic application of penalties for various forms of non-compliance’\textsuperscript{171} to a responsive, service-orientation designed to build trust, support and respect in the community.\textsuperscript{172} This involves such diverse responses as comprehensive taxpayer education, mission statements espousing friendly and efficient collection of revenue, changes in language, such as calling taxpayers ‘clients’, and creation of a service mentality among staff. An emphasis on taxpayers’ rights is part of this process.

Taxpayer lobby groups tend to dismiss the validity of the rights and responsibilities classified here as relationship building.\textsuperscript{173} They prefer to focus on the creation of legal rights. There is no doubt that legal rights are important. However, it is also essential to remember that the revenue authorities are approaching the process from a different perspective: one which seeks to encourage compliance with the tax law.

The ATO, for example, has undertaken and supported significant research in this area.\textsuperscript{174} Their research has shown that compliance is affected by the relationship that taxpayers have with the ATO and its officers.\textsuperscript{175} Accordingly, it is no surprise that the

\textsuperscript{170} See e.g., V. Thurnyi, above n. 89; G.P. Jenkins, above n. 89; K. Theodore, above n. 89; R.M. Bird and M. Casenega de Jantscher, above n. 89; and CIAT, ‘Measures for improving the level of voluntary compliance with tax obligations: Technical papers and reports of the 18th General Assembly of the Inter-American Center of Tax Administrators’ (IBFD, 1985).

\textsuperscript{171} Ibid.

\textsuperscript{172} See, e.g., Australia, ‘Charting an Old Course’ (1995-96) 30 Taxation in Australia, 265.

\textsuperscript{173} As is evidenced by the papers presented at the 1993 and 1995 ATO Research Conferences and the subsequent biennial ATAX International Tax Administration Conferences.

\textsuperscript{174} Demonstrated by the strength of taxpayer engagement in successive speeches by Commissioners of Taxation and in the annual ATO Compliance Program, <www.ato.gov.au>, 1 November 2006. See
Commissioner's view was that, 'The fact that the Charter encapsulates in a clear and concise way the sort of approaches we are looking for from ATO staff into the future will provide them with valuable guidance'. In fact, it would be surprising if there was not significant emphasis on relationship building, given the research such as that by Stalans, who argues that:

Prior research has convincingly shown how a single experience with a rude authority lowers the recipient's support of legal authority and indirectly increases non-compliance with laws. One primary objective of tax audits should be to increase the legitimacy of tax authorities and tax enforcement rather than to lower it. When taxpayers believed their auditors were polite, communication about interpersonal treatment reinforced taxpayers' earlier acquired beliefs and support for tax authorities and tax laws. However, undignified audits are very costly for the enforcement system, especially when there is no change, or refund. The heavy cost is in terms of the loss of legitimacy in the eyes of the audited taxpayers and the other honest taxpayers who are told about the audit.

The change in the ATO culture over the 1990s reflects the ATO's view of the importance of the taxpayer relationship with the ATO. Supported by the findings of its research, the revenue authority early on supported this change in culture as a means of increasing taxpayer compliance in a way that was not possible through its traditional enforcement

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177 L. Stalans, 'Talking about Tax Audit Experiences: The Procedural Content of Socialisation', paper presented at the Internal Revenue Service Research Conference (Washington DC, 12-13 November 1992) and quoted in J. Wickerson, above n. 168, p. 13. The concept of a breakdown in compliance by taxpayers as a result of unresolved conflicts is consistent with conflict theory. A major concern for the ATO is the fact that once taxpayers establish negative attitudes and perceptions of the ATO, they are exceedingly difficult to eliminate. 'This is partly because they support each other: negative beliefs validate negative feelings, and negative feelings make negative beliefs seem right'. D.G. Pruitt and S.H. Kim, Social Conflict: Escalation, Stalemate and Settlement (3rd edn, New York, McGraw Hill, 2004) p. 100.
This approach impacted on the ATO's guidelines for internal conduct. A typical example is the extension of legal professional privilege to certain papers of professional accounting advisers. It is purely an administrative arrangement, but reflects the ATO's concern over the public perception of its audit activity following cases that were widely publicised and in which its actions were criticised, such as the Citibank Case. Another set of guidelines, again aimed at ensuring an acceptable public image for the ATO, acts as a code of conduct, governing the procedures to be followed by ATO auditors in the event of differences arising with taxpayers other than over the interpretation and application of the law.

Increasingly, the research turned to the non-economic factors affecting tax compliance. Wenzel provides a useful analysis of the importance of justice perceptions in tax compliance. The idea was taken up from 1998 by Woellner et al in a major research project which went some way towards identifying the psychological costs of tax compliance in Australia. Richardson has confirmed by his research that tax fairness has an impact on compliance behaviour in the non-western jurisdiction of Hong Kong.

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182 M. Wenzel, above n. 17. The chapter takes the argument forward by seeking 'to offer a conceptual framework for such justice considerations based on conceptual distinctions made in social psychological justice research'. It also includes a useful taxonomy of the social psychological justice literature.
184 G. Richardson, 'An Analysis of the Impact of Tax Fairness Perceptions on Tax Compliance Behavior in a Non-Western Jurisdiction: The Case of Hong Kong', a paper presented at the 6th International Conference on Tax Administration (Sydney, Australia, 15-16 April 2004).
It is clear that as the research momentum supporting the compliance benefits of being seen to uphold taxpayers' rights has grown, so too has the acceptance by the revenue authorities of the importance of taxpayers' rights. By 2002, the Australian Commissioner of Taxation could say of taxpayers:\(^\text{186}\)

It is early days yet and we are at the stage of identifying areas for improvement rather than solutions. However, some common themes are emerging. People are looking for recognition and acknowledgement. They want certainty, comfort and reassurance. ... Back to the first task – delivering on the integrity and fairness promised by The New Tax System. Australians want assurance that taxes are being collected fairly across the board. ... In the first nine months of this year, our audit program has raised an additional $2 billion in taxes and penalties. We have moved on from the days when compliance was simply about the number of audits you did.

Obviously, raising the revenue required by governments to fund their activities is a primary task of revenue authorities. However, it is increasingly recognised that for greater effectiveness this should be done in the context of a service-oriented relationship with taxpayers that builds a perception of the fairness of the tax system. With this backdrop, there are clear benefits to revenue authorities in upholding taxpayers' rights.

From the state's perspective there is a further important incentive to protect taxpayers' rights. Chapter 7 will illustrate the extensive powers available to revenue authorities. It is not uncommon for revenue authorities to have greater powers of search and seizure, for example, than those available to the police investigating serious crimes. Historically, democratic states prefer not to be named for abuses of any form of human

\(^{186}\) M. Carmody, 'The Changing 'Tax Landscape', address to the Institute of Chartered Accountants in Australia Networking Luncheon, 3 May 2002.
The powers available to the revenue authorities are so significant, it is inevitable that without appropriate safeguards, there is a likelihood of abuse. It is therefore in any state's interest to introduce the safeguards that will prevent abuse and ensure that those responsible for revenue administration, collection and enforcement retain public confidence.

The danger, where there is abuse and it is not checked, is an over-reaction by the legislature that could undermine the revenue authority. This was demonstrated in the United States in the 1980s and 1990s. There was clear evidence of abuse of power by the Internal Revenue Service (IRS). However, the legislative reaction was significant and the omnibus bills known as Taxpayer Bill of Rights 1, 2 and 3 were described by Greenbaum as 'less an attempt by the legislators to advance the rights of taxpayers than a means by which politicians improve their stature with their electorate by attacking the IRS'.

Congressman Sam Johnson from Texas, for example, made the colourful statement:

But this bill is important because the powers of the IRS to investigate and examine taxpayers are greater than any other Government agency. They are intrusive. They are into our lives, and it seems that the constitutional rights of taxpayers are always trampled upon but nothing is ever done.

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187 The UK derogated from the ECHR under art. 15 in respect of Northern Ireland rather than be found to be in breach. Withdrawal of the derogation resulted in a number of cases where the UK was found to be in breach, to its obvious discomfort. See M. O'Boyle, C. Warbrick, E. Bates, D.J. Harris, *Law of the European Convention on Human Rights* (2nd edn, UK, LexisNexis, 2005), ch. 16.

188 P. Baker and A-M. Groenhagen, above n. 110, p. 3.

189 A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Wine in New Bottles?' in D. Bentley, above n. 115, ch. 15.

190 Act to amend the Internal Revenue Code of 1986 to provide for increased taxpayer protections, PL 104-168, signed into law 30 July 1996.

191 An Act to amend the Internal Revenue Code of 1986 to restructure and reform the Internal Revenue Service, and for other purposes, PL 104-168, signed into law 22 July 1998.

192 A. Greenbaum, above n. 189, p. 379.

Chapter 2

It is not in the interests of taxpayers, government or the revenue authority to undermine the operation of the tax system by over-reacting to abuse of the system by any party.\textsuperscript{194} Instead, it is in all parties' interests if abuse and the associated reaction that is likely to follow can be limited by introducing appropriate standards.

For developing economies there is a further imperative that encourages the observance of taxpayers' rights. Taxpayers' rights are generally a species of civil and political rights, although many administrative rights are not enforceable by law. Kaufmann has found that socio-economic development is closely linked to the recognition of civil and political rights.\textsuperscript{195} Recognition of rights does not occur automatically as a country gets richer. Rather the evidence points clearly to:\textsuperscript{196}

the fundamental importance of positive and sustained interventions to improve governance and civil liberties in countries where it is lacking. Indeed, the fact that good governance is not a 'luxury good', to which a country automatically graduates when it becomes wealthier, means in practical terms that leaders, policymakers, and civil society need to work hard and continuously at improving these civil rights and governance within their countries.

Where they are not observed, Kaufmann's research across a range of World Bank projects shows that the likelihood of corruption and state capture by special interests is higher.\textsuperscript{197} The better the governance of public institutions, which would include the tax administration, the better would be the development outcomes. These would also be directly assisted by measures to promote the engagement of citizens with the tax

\textsuperscript{194} Arguably, the response of the Australian Government and the ATO to systematic abuse of the anti-avoidance provisions by taxpayers in the 1980s, encouraged in part by a formalistic approach by the courts to interpretation of tax legislation, has resulted in an overly complex regulatory environment, which successive governments have since tried to clarify and simplify.


\textsuperscript{196} Ibid., where these conclusions are drawn from the evidence presented in s. 2.a.
administration, which in turn is shown to encourage the control of corruption and enhancement of corporate ethics. 198

XI CONCLUSION

This Chapter began by exploring the concept that the exercise of the power to tax is an infringement of rights to property and liberty. Taxpayers' rights, as with human rights generally, provide the limit to the powers of the state. They balance the requirement to raise revenue against the rights of individuals. Even though relativism and subjectivity require any right to be adapted to its context, the human rights community has accepted that there are universal standards.

General acceptance forms the basis for a Model of taxpayers’ rights. Given the increasing integration of the global economy, the perceived fairness and integrity of a tax system is becoming more important. The free flow of funds and the ease of international investment mean that governments cannot afford to ignore the rights of taxpayers. The diversity of tax systems emphasises the need for generally accepted standards.

The Chapter showed that it is generally accepted that taxpayers’ rights should be identified and interpreted as a species of human rights and in the context of the international human rights obligations into which states have entered. This was the starting point for the OECD in its 1990 survey of taxpayers’ rights and obligations. 199 There is

197 Ibid., discussed with a case study on Bolivia in s. 3.
198 Ibid., in s. 3 and s. 5. Not surprisingly, but related indirectly to this argument, M.L. Ross, ‘Does Taxation Lead to Representation’, in a paper presented at an IDS Taxation Seminar (UK, 28-29 October 2002) <www.ids.ac.uk/gdr/clts/activites/Taxation-Seminar.html>, 27 September 2006, has found that higher taxes relative to government services tend to make states more democratic over time. This suggests that where taxes are high taxpayers increase their engagement through protest or other means to ensure the delivery of government services, thereby expanding the pressure for more democratic mechanisms within government.
199 OECD, above n. 163.
significant additional jurisprudence to explore both domestically and internationally. It is therefore timely to consider a model set of taxpayers’ rights.

As the aim is to provide a common standard of taxpayers’ rights for inclusion in domestic legislation, it is unlikely that all rights in the model will be adopted as a separate code in most jurisdictions. It is only where reform of the tax system includes a new tax act that adoption of this kind will be feasible. However, elements of the model may be included as they stand into existing tax acts as a separate section. Providing the standards in the form of a guide to best practice is therefore appropriate.

It was made clear in the Chapter that the aim of this thesis is not to provide a comprehensive tax administration code. Such a code would cover both rights and obligations. The aim of the thesis is to consider one element of the rules governing tax administration: those rules dealing with taxpayers’ rights.

For many jurisdictions the model will provide a standard to act as a form of quality control. Tax policy makers will be able to measure the quality of the rights afforded to taxpayers against an objective international standard. It will provide legitimacy and reassurance where policy makers are striving to achieve best practice. Domestically it will provide support for the revenue compliance programs. It will also assist revenue authorities and the judiciary by allowing them to assess issues brought before them comparatively, taking account of decisions on similar issues elsewhere that may helpfully be decided on a uniform basis. It is likely that commonality of problems in the administration of tax systems will increase, even if the move towards harmonisation of substantive rules is slow.

The Model will need adapting to the context of each jurisdiction. States will need a degree of latitude in the implementation of the individual rights. To maintain that flexibility the Model must remain relatively broad in its articulation of standards. That said, the value of the model will depend upon a genuine attempt to implement the rights contained in it.
Using a two-tiered model provides developing countries unable to comply with all rights contained in the model the opportunity to ensure that at least the basic rights are protected in their jurisdiction. The model should therefore identify the basic rights in each article, with any additional recommended rights that should be present in all sophisticated tax systems.

The rights that flow from accepted practice in different jurisdictions include different types of right. Chapter 4 provides a classification. Some are legislative and others are administrative. The method of enforcement can alter significantly the content of a right and its application and this is explored in Chapter 5.

Taxpayers' rights have come of age. They are an increasingly important element in any consideration of tax reform. Vociferous domestic interest groups and the need to reassure foreign investors will continue to drive governments to focus on taxpayer protection. The incentive to improve compliance will continue to encourage revenue authorities to improve perceptions of fairness and integrity in the administration of tax systems. A model of taxpayers' rights will provide a useful tool for all of the participants in the tax system nationally and internationally. Before classifying the rights, Chapter 3 outlines the principles that underlie a tax system generally, and therefore the rights within it, and identifies issues that arise in the interpretation of rights.