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Tax and human rights – much ado about nothing[1]

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Abstract

There are claims that large Australian and other multinational corporations that pay no or little tax because of taking abusive tax positions breach their human rights obligations as they deprive governments of the means to provide services. These services

1. INTRODUCTION

There are many organisations and individuals, such as Carmona,[3] the German Tax Justice Network (GTJN),[4] the Australian Tax Justice Network,[5] Pogge,[6] de Zayas,[7] Scheffer,[8] Darcy,[9]the Centre for Economic and Social Rights,[10] Avi-Yonah and Mazzoni[11] and Lipsett,[12] who contend that large Australian and other multinational corporations (collectively referred to as MNCs) pay no or little tax because of taking abusive tax positions. In doing this they deprive governments of the means to alleviate poverty and to provide basic services such as health, education, housing and access to water (the rest of this article will only refer to the alleviation of poverty as a collective phrase for all of the foregoing).[13] Those who contend for a link between human rights and tax state that an abusive tax position includes criminal conduct, tax evasion, avoidance, and embarking on schemes that appear to be in compliance with the tax laws but do not result in the MNC paying what is referred to as a fair share of taxes.[14] This article examines whether there is any legal basis for such claims.

There are a few limitations to this article. The article does not seek to determine whether human rights can impact on the decision of the regulator or legislature in seeking to enforce or legislate the tax laws. Nor does it consider the issues that arise if a taxpayer human rights are infringed by the tax law-maker or regulator. It is for this reason that there is little discussion on such human rights as privacy or the right to fair trial. Only limited reference is made to human rights cases both in Australia and overseas to illustrate that to the extent that human rights are raised in tax cases they are limited to allegations by taxpayers of a breach of their ri

> Evidence shows that, even in developing countries, widening tax bases and improving tax collection efficiency could raise considerable additional Tax collection efficiency can also be increased by improvements in tax administration. Tax administrations with appropriate financial, personal and technical resources are critical to increase levels of revenue collection and to avoid abuse.[18]

At the third International Conference on Financing for Development (July 2015) the participant countries agreed that domestic resource mobilisation was central and required measures that widened the revenue base, improved tax collection and combated both tax evasion and illicit financial flows.[19]

Alston (United Nations Special Rapporteur on Extreme Poverty and Human Rights) considered the link between tax and human rights and suggested the problem was primarily based on policy issues rather than the obligation to pay any taxes imposed. He said:

> First, there is the most obvious link which is that of resource availability. Refusing to levy taxes, or failing to collect them, both of which are commonplace in many countries, results in the availability of inadequate revenue to fund human rights related expenditures.[20]

The problem alluded to by Alston is not limited to human rights expenditures. Tax policies that allow MNCs to pay little or no tax should be discouraged.

Next the European Court of Human Rights (ECtHR) in tax cases where breaches of the European Convention on Human Rights (ECHR) are raised, refers only to rights of taxpayers. For example, the inalienable right to property is reJETQq0.000008872 0 595.38 841.98 r

The ECHR does not apply to tax disputes because tax disputes are not civil rights and obligations to which Art. 6 applies. The decision of the ECtHR in *Ferrazzini* implies that in a tax dispute a litigant does not have a right to a fair hearing under Art. 6 of the ECHR.[24]

> tax arrangements and said that his com .[30]

Committee, Margaret Hodge, who, in a question to Matt Brittin, vice-president for Alphabet Incorporated (Google) in northern and central Europe, said that [31] What Hodge appears to be saying is that the UK would like Google to pay more tax than it did and presumably in an amount greater than mandated by la
statement is correct it is an indictment of the laws then in force in the UK or their administration or both.

Gelski, referring to a similar Senate enquiry in Australia, notes:

> Most representatives of MNEs appearing before Senator Dastyari and his colleagues also pointed out that, not only were they legal, but many of their arrangements and structures had been blessed by the ATO in Advance Pricing
>
> and woman in the street .[32]

Next even if MNCs paid all the taxes demanded by those who seek to draw a link between tax and human rights it does not mean such monies will be used to alleviate poverty. It is in the absolute discretion of governments to allocate resources as they deem appropriate unless required by legislation. The tax laws do not allocate revenue to any resource other than the Consolidated Revenue Fund.[33] These monies can be allocated to whatever project the government of the day determines including those which may breach their human rights obligations.

Penultimately, in Australia and other common law countries taxes can only be imposed by legislation. There is no common law of taxation.[34] The High Court has developed detailed and comprehensive criteria that must be met before determining whether an exaction is a tax or something else. A tax is defined in the following terms: a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered .[35] A charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are not taxes.[36] There are two further important factors the courts consider whe

not be arbitrary and second it must be contestable.[37] For a tax not to be arbitrary the legislation must determine the identity of the entity to be held liable and set out how that liability is to be calculated by reference to objective ascertainable facts. A tax that is arbitrary or not contestable is unconstitutional and unenforceable. These prerequisites are attempts to protect individual and other taxpayer rights and the rule of law.

> Enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation.[49]

Avi-Yonah, discussing Corporate Social Responsibility, refers to three theories about tax and the corporation and states that corporations should not embark on tax minimisation schemes under any theory because:

> Under the artificial entity view, it undermines the constitutive relationship between the corporation and the state. Under the real view, it runs contrary to the normal obligation of citizens to comply with the law even in the absence of effective enforcement. And under the aggregate view, it is different from other forms of shareholder profit maximisation in that it weakens the ability of the state to carry out those functions that the corporation is barred from pursuing.[50]

Two of the matters mentioned by Avi-Yonah raise some difficulties. First, even if the company is a creation of the legislature, this does not mean its tax obligations should be other than as the law provides. If this were not the case, how would one determine how much tax must be paid and by whom this determination is to be made? Second, the fact that a corporation cannot perform certain functions that are the exclusive preserve of the state is not a basis for requiring corporate taxpayers to pay an indeterminate amount of tax to the revenue. If this argument had any validity, all taxpayers would be required to pay more tax than provided by law in some indeterminate amount. The real view as described by Avi-Yonah accords with the tax obligations of all corporations. Taxpayers must pay those taxes required by law. Avi-Yonah does not suggest they must pay more.

Evasion is intentional criminal conduct designed to limit or not pay taxes.

Even though Australia has anti-avoidance rules not all countries have such rules in their tax legislation. In some jurisdictions, the courts may resort to statutory interpretation or other tools to protect the revenue from tax avoidance schemes. In the UK, for example, the Commissioner can rely either on an anti-avoidance rule enacted in 2013[52] or the *Ramsay* principle as a means of challenging what HMRC contend to be an avoidance scheme.[53] The *Ramsay* principle requires a court to interpret legislation purposively and then to apply that finding to the facts found as a composite whole and viewed realistically.

In keeping with the views of the OECD,[54] the CoT and regulators in other jurisdictions at times refer to avoidance as following the letter, but not the spirit of the law; [55] or not following the policy of the law; or as being a scheme that undermines the integrity of the tax system. Accordin

the existence of some form of shadowy parallel tax code to which only a

[56] Freedman argues that proper consideration has to be given to the actual legal

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enquiry about the distinction between tax planning and tax avoidance, although the i

provision. For example, when interpreting the general anti-avoidance rule, a court may have regard to the policy behind the law

meaning and purpose of the legislation has been determined, these concepts play no further role in assessing whether a transaction is affected by these rules.[58]

Notwithstanding the foregoing, judicial officers have views on morality which may play a role in the ultimate determination of a tax or other dispute. If a scheme infringes that view the officer may insofar as the law permits seek to set aside the transaction. This has the inevitable consequence that if a taxpayer believes or is advised that a scheme is

It is worth noting, while

- Starbucks would not apply the law of the land and claim a deduction to which it was entitled to appease a demand by customers;
- the law is of secondary importance when a corporation is named and shamed; and
- whether the corporation was blameless or not is irrelevant to the campaign of naming and shaming by the media.

reputation should not occur. Unfortunately, these attacks are commonplace.

Either a scheme is a lawful tax planning exercise, or it is avoidance or evasion. There is no *via media*. If the state wishes to collect more revenue (assuming no breach of the tax laws):

> A change in the law is the only way to ensure these transactions are subject to tax. The House of Lords notes that it is primarily for the UK government to correct flaws in the (corporations) tax regime. If there is manipulation, the best way to counter this is to tighten the regulatory framework. There is no substitute for improving the tax code to reduce tax avoidance.[64]

[65] For example, the question has been asked elsewhere by the author whether

> [a]
> or is this an allusion to some other percentage? If the latter, how and who determines this liability? Must a taxpayer not claim deductions that the law allows? To suggest that, because some corporate taxpayers have a lower effective tax rate than the headline rate of 30 per cent, they are not paying their fair share is meaningless unless one knows how the tax is calculated and whether this is in accordance with the law.
> of tax is incapable of a rational answer by reference to the laws imposing tax.[66]

As Vodafone has noted in its Tax Risk Management Strategy document:

> Vodafone believes its obligation is to pay the amount of tax legally due in any territory, in accordance with rules set by governments. In so doing it is not able to determine the fair amount of tax to pay.[67]

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[64] Datt, -A tale of two myths, above n 16 (references omitted).
[65] According to Slemrod, Old George Orwell got it bac (CESifo Working Paper No. 2777, September 2009) 5.
[66] Datt, -A tale of two myths, above n 16.
[67] Vodafone Group plc, Tax risk management strategy <https://www.vodafone.com/content/dam/sustainability/pdfs/vodafone_tax_risk_management_strategy.pdf>.

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This article now turns to a consideration of the human rights obligations of states and MNCs.

3. HUMAN RIGHTS, STATES AND MNCS

3.1 The human rights obligations of states

The starting point is the *Universal Declaration of Human Rights* by the United Nations in 1948 which *inter alia* provides that human rights are universal, inalienable and indivisible.

Donnelly notes:

> Human rights are also inalienable rights, because being or not being human is an inalterable fact of nature, not something that either is earned or can be lost. Human rights are thus universal rights in the sense that all human beings hold them universally . Conceptual universality is in effect just another way of saying that human rights are, by definition, equal and inalienable.[69]

Shaw et al. in similar vein suggest human rights have four characteristics. These are that they are universal, equal, not transferable and are not dependent on human institutions.[70]

Any person that introduces a bill before the Australian Parliament must cause a statement of compatibility to be prepared that shows the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[71] A failure to comply with this Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.[72]

rights are achieved. They do not impose obligations on those entities that do business in

> Declarations and Covenants are not the corollaries of the human rights that the documents proclaim. The Covenants do not assign states straight- forward obligations to respect liberty rights (after all, liberty rights have to be respected by all, not only by states), but rather second-order obligations to secure respect for them.[73]

The article now turns to the human rights obligations of MNCs.

3.2 The obligations of MNCs

This section commences with an extract from an article by Wilkinson, a Circuit Judge, United States Court of Appeals, for the Fourth Circuit in discussing the approach courts in the US take to the enforcement of what at times appear to be absolute human rights. He states:

> More fundamentally, rights impose obligations on others, and in many cases, those obligations are more than society can absorb. Competing social needs and goals, not to mention limitations of time and money, necessitate various qualifications on rights that we think of as absolute. The implementation of individual rights should not take its cues from rhetoric alone, without any concern for the dictates of prudence.[74]

This statement reflects that courts, when enforcing human rights, must consider various competing interests when reaching a decision. This would appear to be an implicit limitation on the obligations of MNCs in relation to human rights.

> For most of the companies that have signed on to the UN Global Compact, the sphere of influence extends beyond the factory site and includes immediate business partners and suppliers it usually does not cover government and the wider society
> among leading companies that there is a gradually declining direct corporate responsibility outward from employees to suppliers, contractors, distributors, and others in their value chain but also including communities.[78]

Kinley and Tadaki say:

> However, it can be argued that TNCs [MNCs] do have duties to prevent human rights abuses in certain circumstances where they maintain close connections with potential victims or potential perpetrators, and where TNCs are in a position to influence the level of enjoyment of human rights.[79]

It seems that an MNC s human rights obligations are merely a reflection of the obligations of the state and are enforceable by the laws of the state in which the MNC does business. Cohen appears to accept this when he states that:

> own territory, one has the sense in reading the Covenant that extraterritorial obligations were not considered or intended.[80]

Cohen does note that:

> [A]t least one committee of legal experts, convened by Maastricht University and the International Commission of Jurists, interprets the Covenant to impose extraterritorial obligations.[81]

The preamble to the United Nations *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* appears to go further contending for an extra-territorial operation of human rights. It states:

> Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.[82]

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[78] Klaus M Leisinger, Special Advisor to the Secretary General on the Global Compact, On corporate responsibility for human rights , Basel, April 2006, <http://www.commdev.org/userfiles/files/958_file_corpresforhr_kl.pdf>.

[79] David Kinley and Junko Tadaki, The emergence of human rights responsibilities for corporations at international law (2004) 44(4) *Virginia Journal of International Law* 931, 964.

[80] Stephen B Cohen, Does Swiss bank secrecy violate international human rights? (2013) 140 *Tax Notes* 355, 356, referring to the *International Covenant on Civil and Political Rights.*

[81] Cohen, above n 80. See also United Nations, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* art 1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement>.

[82] United Nations, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, above n 81.

Even with this extended meaning the obligation is that of the state to enforce these rights.

Brenkert[83] suggests there are divergent views as to whether businesses need only comply with some or all human rights, other than those enshrined in law. He refers to a variety of approaches on how businesses should go about determining their specific human rights responsibilities. The first is what he refers to as a good reasons approach. Here the MNC must take a decision where the strongest weight of reason lies. This involves evaluating the extent to which it can make a difference, on what others can be expected to do, and the appropriateness of how the required supportive actions may be shared. On this basis and depending on the facts there may be no obligation to take any action. This approach is dependent on the view one takes of the corporation. Is it a private body or one with public powers? If the latter the obligations may be greater depending on the f and may be synonymous with those ing th those ing th those ing th those go thbe

- MNCs should strive to honour human rights provided it does not cause them to breach the laws of the land in which they do business;

- where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact or if possible, use whatever influence it may have to effect change in the practices of an entity that cause adverse human rights impacts.

The Corporations Act itself imposes a limitation on the human rights obligations of corporations when it requires directors to take decisions that are in the interests of the corporation.[89] abstract concept. For example, Redmond discussing human rights and the interests of the corporation said:

> Directors may have regard for non-shareholder stakeholder interests within some uncertain limits, but not independently of consequential corporate b
> subjective duty of good faith, that is, to act honestly in the company's interests as the directors perceive them; a duty to exercise powers for a proper purpose; and a duty to consult and act by reference to interests that the law recognises as the interests of the company .[90]

Kennedy discusses various problems that, in his opinion, arise when non-government organisations and other activist entities make claims about breaches of human rights issues by MNCs in taking abusive tax positions. He accepts that some have greater

to each requires a pragmatic reassessment of humanitarian commitments, tactics and tools. Based on the views of Kennedy, various potential issues arise from the claim that abusive tax positions are a breach of human rights. These include:

- generalisations that MNCs are violating their human rights obligations by

  taxes the law requires;

- those who contend for a link between tax and human rights are unable to enact laws that prescribe how taxes are to be calculated and paid or how to enforce such laws. The claim about abusive tax positions and human rights is rhetorical even though they may bring abuses of some MNCs into the public domain. As Gelski notes:

  > It was this change in taxpayer stakeholder expectations that has caught the government, and I suspect, the ATO off guard. I am not alone in pointing out that arrangements that the ATO not only knew about but in many cases officially approved, are now being revisited and challenged;[91]

[89] *Corporations Act 2001* (Cth) s 181(1).
[90] Paul Redmond, Directors Duties and Corporate Social Responsiveness (2012) 35(1) *University of New South Wales Law Journal* 317, 324-325.
[91] Gelski, above n 32.

- there may be a mistaken impression that there is a larger pool of monies available than may be the case. This is reminiscent of the views of Forstater considered in section 2.1 above.

The foregoing suggests the link between tax and human rights is at best tenuous and appears to be based on some (possibly intentional) misconceptions. These include:

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The Australian High Court in *Alcan*[114] is to the same effect when it referred to a judgment of Gleeson CJ[115] who stated:

> [I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose.

The Honourable Murray Gleeson describes the approach of Australian courts in interpreting tax statutes as follows:

> Liability to tax is not determined by judicial discretion. The rule of law applies both to revenue authorities and to taxpayers, regardless of whether in a particular case it comes down on one side or the other.[116]

A purposive approach is adopted to determine what the law is trying to achieve from a tax perspective.[117] That it may raise revenue for the state is not such a purpose. All statutes imposing tax raise revenue for the state. As early as 1907 Isaacs J noted:

> individuals certain contributions to the general revenue, a Court should be specially careful, in the view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature, not weakening them in favour of private persons to the detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed.[118]

It seems Australian courts will adopt a similar approach to that used by the Israeli Court

question of the uses to which taxes may be utilised, unless specifically stated to be the case in the legislation, is not something of which a court will take account in interpreting tax legislation. Even if this were the case a court would still be faced with the issue of determining whether the contended liability was provided for in the legislation and if there were objective factors present capable of determining a precise liability in te733.56u2

If the law does not impose tax on an entity no liability exists. If an MNC pays the lowest amount of tax required by law, no claim can legally be made for payment of additional amounts no matter what adjectives are used to describe this conduct.

Often it is the inability (unwillingness?) of Parliament to enact legislation that targets the income sought to be taxed that enable MNCs to pay less tax than anticipated. Pascal Saint-Amans (Director of the Centre for Tax Policy and Administration, OECD) is reported to have said:

> Policy makers cannot blame businesses for using the rules that governments themselves have put in place. It is their responsibility to revise the rules or introduce new rules to address existing concerns.[119]

Demands by third parties or even governments for MNCs to pay taxes calculated on some unlegislated and subjective basis in an indeterminate amount are not taxes and no government can enforce such claims.

The Australian legislature, aware of these problems, has recently enacted legislation to capture a greater percentage of the revenue derived by MNCs and generated in Australia by amending the general anti avoidance rule in Part IVA of the ITAA 1936. These amendments are affected by the introduction of what is known as the multinational anti-avoidance law (MAAL)[120] and the diverted profits tax (DPT).[121]

The MAAL is designed to counter the erosion of the Australian tax base by multinational entities using artificial and contrived arrangements to avoid the attribution of profits to a permanent establishment in Australia.[122] Portas and Slater describe the primary purpose of the DPT as:

- ensuring SGEs, ie, MNCs with turnover in excess of AUD 1 billion) Australian tax payable reflects the economic substance of Australian activities; and
- p