The state as moral agent, the ethics of state tax related behaviour: a proposal for a normative framework balancing state obligations to taxpayers and the responsibilities of states to each other in international taxation.

G Jackson[1]

Introduction

The question of whether or not a state in itself has moral agency or whether it is simply a vehicle to deliver the normative rights or wrongs of the individuals that make it up is a complex question. In this paper, I aim to discuss whether or not a state is a moral agent in itself and if it is what the ethics of its behaviour when acting in the tax related field should be and then finally, I turn to apply my conclusions to a specific case of state behaviour, that of the EU List of Non-Cooperative Jurisdictions for Tax Purposes.

This paper has arisen as a result of the one-sided nature of the taxation debate. This may well arise from the fact that much of the literature which deals with the philosophy of tax comes from a multi-disciplinary background, written by economists or sociologists (though the attention of traditional philosophers to this field is growing and there are some notable exceptions to this) and as a result the outputs of their endeavours seem to be goal oriented, that is, for example, a justification of the redistributive aim of the state[2], or the search for efficiency, or the elimination of tax competition in

[1] ADIT, Solicitor (England and Wales and Gibraltar), Solicitor and Partner of Hassans International Law Firm, Gibraltar; Chartered Institute of Taxation's Advanced Diploma in International Taxation. Co-author of *A Practitioners Guide to International Tax Information Exchange Regimes* The author can be contacted at grahame.jackson@hassans.gi.

[2] Liam Murphy and Thomas Nagel*The Myth of Ownership: Taxes and Justice*(Oxford University Press 2002)

the name of efficiency[3]. It is of course the curse of philosophy to be the mother of all subjects[4], but to be discarded by the subjects it gives birth to. However, an approach detailing the normative relationships between the various actors in the tax and wealth area seems to be lacking, there seems to be a feeling that ethics are applied inconsistently to the various actors on our stage. The low tax jurisdiction must be subject to an ethical analysis as should the taxpayer whereas the large higher tax jurisdiction is automatically the victim of the tax injustice embedded in the system.

Witness this quote from Drogalas, Anagnostopoulou, Pazarskis and Petkopoulos;

> Tax ethics refers to the taxpayer's moral obligation to pay taxes and is affected by the relationship between the taxpayer, as a citizen, and the government.[5]

In their formulation of what tax ethics is, Drogalas, Anagnostopoulou, Pazarskis and Petkopoulos are assuming that ethics related to tax apply only to the taxpayer. That evading tax is a normative or moral wrong and that the state simply imposes tax or acts in tax related ways with no consideration for its own ethical position. This is the limit of their ethical calculus; seemingly ethics only applies to taxpayers. This will be confirmed by any search of a database of academic articles for the phrase "tax ethics", many excellent articles abound as to the ethics of tax evasion and avoidance, very few seem to analyse the ethical basis for state behaviour. I disagree with this approach. I believe that the ethical landscape surrounding tax is a complex web of ethical relationships. However, before this argument can be made one needs to answer several basic questions.

1. Is the state a moral actor in its own right? If it is not, then it has no moral agency and the concept of "ethics" is redundant when applying it to a state. If it is a moral agent then

[3] Peter Dietsch *Catching Capital: The Ethics of Tax Competition* (New York, US: Oxford University Press USA 2015).

[4] Charles C. Nweke andVera A. Uyanwune, 'Relevance of Philosophy to Any Discipline'(2020), Volume IV, Issue VIII, August 2020, International Journal of Research and Innovation in Social Science (IJRISS) |

[5] George Drogalas et al. 'Tax Ethics and Tax Evasion, Evidence from Greece'. (2018) Volume 8 *Theoretical Economics Letters*, pp. 1018-1027

there must be a set of moral constraints which apply to the state; in that case Drogalas, Anagnostopoulou, Pazarskis and Petkopoulos' definition of tax ethics is incorrect.

2. Is the act of taxing a moral act? That is if the state is a moral actor and it taxes another moral actor (i.e. the taxpayer) is that action an action which has normative significance and is subject to a series of normative constraints?
3. Does a form of ethical standard apply to tax relevant actions taken between states?

In other words, can a unified normative framework be applied not only to taxing, but also to ancillary tax related activities both between the state and the taxpayer and the state and other states?

In order to answer this question it is necessary to;

a. Establish that states are moral agents in their own right.
b. Establish what the obligations owed by the state to taxpayers are.
c. Establish the normative obligations on states toward each other in relation to tax matters.
d. Understand the interaction of those two sets of obligations.

I will seek to arrive at an understanding of the above matters through an application of both legal and philosophical principles drawing n the literature around theory of ownership and also the law as the practical application of the underlying philosophical principles. By fusing the two I will seek to develop answers to theoretical questions which can be applied to practical examples in the real world.

The paper will proceed as follows.

In Section 1 I will seek to establish whether or not the State is a moral agent and therefore subject to a normative framework, and then once I have concluded that the state is a moral agent under both a functional or agential analysis of the nature of the state.

I will then consider whether tax related actions taken by a state are normative in their character. I will divide tax related actions into two types, those in connection with taxpayers (i.e. the act of taxing) and secondly those in relation to other states (which can loosely be described as 'tax cooperation'). In relation to the first category, it will be necessary to establish what 'taxing' is in a normative context. This will necessitate an analysis of competing theories of property, specifically I will discuss, and reject, the anti-realist theory of property proposed by Murphy & Nagel in their work The Myth of Ownership[6], instead I will propose a realist theory of property which precedes tax, that is that the normative weight of property is not contingent on the satisfaction of the requirements of taxation. In the remainder of Section 1 I will discuss the normative nature of interactions between different states in the tax context, which will necessitate an understanding of sovereignty, I will take the position that sovereignty is not exercised in isolation but as part of a society of states.

In Section 2 I will lay out the obligations owed by the State to the taxpayer. Building on my theory of property I will establish a number of articulations of the underlying principle "taxing should only be performed with respect and consideration of the principle of private property". My position is that If all of the aspects of that principle are present then they will make up a way of acting, or mode of action, as opposed to the underlying policy objective, which will be acceptable when a state performs the act of taxing.

In Section 3 I will lay out a similar normative framework in relation to the acts which states take in relation to each other when entering into tax related international relations. The normative principles which I develop can be seen as different facets of the restriction not to interfere in the autonomy of another state.

In the final section, section 4, I will draw together the themes I have established in the earlier sections and in light of those will practically analyse the EU's actions through its Code of Conduct

[6] Ibid Note 2.

Group. My conclusion will be that the EU is in breach of a number of normative rules I have established in Section 3, and as such is not interacting with other states in a manner which is normatively sustainable.

By focussing not only on the interaction of the state and the taxpayer or on the interactions of states between each other I seek to establish a single normative system and an understanding of the world as an integrated system. I seek to explain not only the boundaries of how states should interact with each other but also how those interactions may impact on individual taxpayers and whether those impacts will force states to breach their obligations to those taxpayers. I will then seek to establish a number of rules that will take this understanding of a single integrated system into account. Following from that I will apply those rules and insights to a real-world issue.

1. Is the State a Moral Agent?

The first step to describing a fully functioning and integrated normative system as described above is to establish that not only the individuals involved in the tax system but the state itself is a moral agent. Fleming (2017) makes a strong argument that states are moral agents. He states:

> The practice of holding states responsible is central to modern politics and international relations. States are commonly blamed for wars, called on to apologize, punished with sanctions, admonished to keep their promises, bound by treaties, and held liable for debts and reparations.[7]

This establishes that states are responsible for their actions but can they be argued to be subject to a normative analysis? An animal is in a sense "responsible" for biting the child but I am unsure that we seek to ascribe the same normative attributes as we would to a human who hurts a child. It would

[7] Sean Fleming, 'Moral agents and legal persons: the ethics and the law of state responsibility', (2017),Volume 9 , Issue 3 , November 2017, International Theory , , pp. 466 - 489

seem that mere responsibility is insufficient to ensure a normative judgment on the doer of the act for which it is responsible. Fleming seems to agree with this position when he states:

> Although non-agents can be causally responsible, such as when a hailstorm is responsible for damage, they cannot be normatively responsible.[8]

Fleming goes on to expand that there are two dominant theories of state responsibility, the *agential* and the *functional.*

The *Agential* Theory of state responsibility is described by Fleming, thus.

> The key concepts for the agential theory are agency and intentionality, and the model for state responsibility is a simple case of individual responsibility. States, like human agents, are responsible for actions that they perform intentionally or wilfully.[9]

The *Functional Theory* of state responsibility is described by Fleming thus:

> The key concepts for the functional theory are attribution and function, and the model for state responsibility is a principal–agent relation. States are responsible for actions that their organs perform on their behalf.[10]

For the purposes of this article, it is only worth conceding that both theories conclude that the state is responsible for its actions from not simply a causal but a normative perspective and not necessary to conclude which more accurately describes the situation. If international law not only ascribes responsibility but also sanctions for a misuse of such responsibility, then that would seem to indicate that there is a normative dimension to the state. Whether or not that normative dimension arises because the state is sufficiently analogous to a human (as in some forms of the *Agential* Theory[11]), or

---

[8] ibid
[9] ibid
[10] ibid
[11] Erskine, Toni. 'Coalitions of the Willing and Responsibilities to Protect: Informal Associations, Enhanced Capacities, and Shared Moral Burdens.', (2014), Volume 28, Issue 1, Ethics & International Affairs pp. 115–45.

whether the vicarious liability of the state for those who act on its behalf is not relevant. All that matters for our purposes is that the state is responsible from a normative perspective. The mechanisms by which it acquires that responsibility are interesting but ultimately extraneous to an analysis of the moral actions of the state.

1.1 Are State Tax Acts moral actions?

Once one has established that a state is a moral agent then one must consider whether or not the class of actions under consideration are themselves moral actions. In other words, for our purposes, are actions related to tax subject to ethical consideration? It is true that not all actions have normative weight. For example, eating a piece of broccoli is not normally considered a normative act. However, where the context of the broccoli eating is correct it could amount to a normatively relevant act. If we reimagine our situation where a piece of broccoli is eaten. In the new context the eating of the broccoli is carried out as a protest against low wages in the third world. Highlighting that all a person earning less than a dollar a day can afford to eat is a piece of broccoli.

Has the eating of broccoli now become “moral”. There are two possible responses, first the normative characteristics of the action are given to it by the context within which it sits, secondly the act of eating broccoli has been wrongly described and that actually what is happening is a protest through the medium of eating broccoli, and the normative aspect of the situation sits with the act of protest, not eating. However, that classification error cannot be understood without the context

In both descriptions of the normative value of the act of eating the context is vitally important, either because it modifies an otherwise normatively neutral act to give it a moral charge or it is vital in the process of correctly understanding which is the act that contains the moral element. Thus, when considering the actions of the state one must consider the context.

In the case of a state acting in relation to taxation matters we should first divide the actions a state can take into two categories. Firstly, those actions taken in connection with taxpayers and secondly those taken in connection with other states or jurisdictions.

1.2 Actions with relation to taxpayers

If the act of taxing is an event which occurs between two moral agents (a person and a state) nut this does not mean that all interactions between them have normative characteristics. In other words, the mere fact of two moral agents interacting is only part of the story, not all interactions are of a normative nature. Instead, the interaction must not only be an interaction between moral agents but there must be something in the context of the interaction which brings that specific interaction into the normative sphere. In which case we must identify the characteristics of the interaction and that will allow us to understand if the interaction is itself of a normative nature.

1.2.1 **What is taxing?**

The normative status of the act of taxing is not as clear cut as it would appear. The question of what "tax" <u>is</u> cannot be answered without answering some basic questions that go to the nature not only of taxation but also of property. One position is that taxation is a deduction of pre-existing owned property (which I will call "Property Realism"), a further position as articulated by Murphy & Nagel is that taxation precedes ownership as ownership arises from a web of laws and customs which includes the payment of taxes (which I will call the "Property Anti-Realism").

This distinction is important. Without resolving this question, the normative nature of the act of taxing cannot be ascertained. If the Property Realist is correct and property pre-dates taxation then a justification must be given for the deprivation of an individual of their property. If it does not, and the Property Anti-Realist is correct then property does not exist until after taxation has been resolved, and no normative calculation is required. The state

merely allocates resources to itself and the individual and no mormativity is engaged because the individual has nothing and therefore loses nothing.

Murphy & Nagel conveniently lay out the two positions for us. Firstly, they describe the Property Realist position thus:

> One view is that taxation is an appropriation by the state of what antecedently belongs to the individuals, and that it must overcome a prima facie objection to the transgression of the right of the individual to dispose of their property as they wish.[12]

The Anti-Realist position is described so:

> The opposite view is that what belongs to you is simply defined by the legal system as what you have discretion to dispose of as you wish, after taxes have been levied.[13]

They correctly identify the effect of the Anti-Realist position on the normative question at hand when considering taxes;

> Since there are no property rights independent of the tax system, taxes cannot violate those rights. There is no prima facie objection to overcome, and the tax structure, which forms part of the definition of property rights, along with the laws governing contract, gift, inheritance, and so forth must be evaluated by reference to its effectiveness in promoting legitimate societal goals, including those of distributive justice.[14]

[12] *Supra* Note 2 p58
[13] ibid
[14] ibid

It is the author's contention that what Murphy and Nagel are proposing is not a theory of taxation but actually a theory of property, from which flows a description of what taxation is. In their Property Anti-Realist position they are describing that property and property rights are contingent on the application of a number of laws, that the state, through the framework of laws and conventions sanctions the creation of property and that the property itself does not exist prior to the conditions precedent to its creation (including the allocation of taxation) being fulfilled.

Murphy and Nagel discard the Property Realist position by arguing that one is trapped within a series of conventions so deeply embedded in our culture and society that those conventions appear to be the natural order of things. It is only when one takes a step back that one realises that what was once considered the "natural order" is not by any means a natural system but instead a man-made system which cannot be seen from the inside.

> Most conventions, if they are sufficiently entrenched, acquire the appearance of natural norms; their conventionality becomes invisible. For another pervasive example, consider the conventions governing the different roles of men and women in society. There may be good or bad reasons for the existence of such conventions, but it is essential, in evaluating them to avoid the mistake of offering as a justification precisely those ostensibly "natural" rights or norms that are in fact just the psychological effects of internalising the convention itself. If women are always treated as subordinate to men, then the perception inevitably arises that submissiveness is a natural feminine trait and virtue and this is in turn used to justify male dominance.

Their application of this thinking to taxation and property is articulated thus:

> The feeling of natural entitlement produced by an unreflective sense of what are in fact conventionally defined property rights can encourage complacency about the status quo, as something more or less self-justifying. But it can also give rise to an even more confused criticism of the existing system on the ground that it violates natural property rights, when in fact, these "natural" rights are merely misperceptions of the legal consequences of the system itself. It is illegitimate to appeal to a baseline "pre-tax income" for the purpose of evaluating tax policies, when all such figures are the product of a system of which taxes are an inextricable part. One can neither justify nor criticise an economic regime by taking as an independent norm something that is in fact one of its consequences.[15]

The author rejects the argument presented here by Murphy and Nagel. They are correct to identify that some systems can be so deeply engrained that their effects are so invisible to us as effects that they become perceived as natural occurrences. Their argumentation around the role of women is reminiscent of Mary Wollstonecraft's line of argumentation in A Vindication of The Rights of Woman[16]. However, the mere fact that some systems become so embedded in our perception that their outcomes appear natural is not an argument for all situations to be cases where the outcomes of systems are hidden from view in this manner. Murphy and Nagel fail to justify why the case of women's rights is similar to that of property rights. They simply assert that it is. They assert that the conventionality of property rights is "perfectly obvious"[17] and thus leave that at that. However, the limited amount of argumentation on their part is not sufficient justification to discard the Property Anti-Realist

[15] ibid

[16] Wollstonecraft articulated the same line of argumentation when she stated "For this distinction [the distinction between the sexes] is , I am firmly persuaded, the foundation of the weakness of character ascribed to woman; is the cause why the understanding is neglected, whilst accomplishments are acquired with sedulous care: and the same cause accounts for their preferring the graceful above the heroic virtues" Mary Wollstonecraft, *A Vindication of the Rights of Woman* (Penguin Books, 2004)

[17] Supra note 9

position all together. The author believes there are six main arguments against the Anti-Realist position as articulated by Murphy and Nagel:

i) **Property engages regardless of tax. The problem of tax evasion and equal enforcement of property rights between those who are evaders and those who pay.** If Murphy and Nagel are correct then the English legal system, at least, throws up several anomalies which weigh against their interpretation. The first is that property is respected irrespective of whether tax is paid. In a scenario whereby a workman comes to my house, carries out a task and I pay him cash, no invoice is issued, and he does not declare the income, the property of the workman over cash which I have given him is perfected simply by him holding the bank notes in his hand. If Murphy and Nagel were correct then this could not be the case, for them the property does not exist until the tax is paid, it comes into being via the action of the conventions and laws around property. As a bold expression of this issue one should consider, if the workman leaves my house, is robbed and reports the robbery to the police, the police (at least in England) will seek to enforce the property right of the workman by pursuing the thief. At no point in that process is the fact that I have paid cash to the workman relevant. In fact, English law has a functioning and longstanding definition of what it means to own property in s5 of the Theft Act 1968:

5"Belonging to another".

(1)Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an

equitable interest arising only from an agreement to transfer or grant an interest).

(2)Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

(3)Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

(4)Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.[18]

In other words, the state through its law enforcement arm will protect the property rights of all individuals regardless of their tax status. It is difficult to see how Murphy & Nagel's position can recover from this real world objection. It is true that the system could be altered to make their argument correct, but that is not how the system functions as it is today, and property comes into being everyday under the system which is not as they describe.

[18] Theft Act 1968, s 5

ii) **Is property created by the act of taxation and if not what exists before the act of taxation?** To develop this point further, Murphy and Nagel claim that property rights do not engage until the gamut of conventions (including the payment of taxation) are fulfilled. They seem to be arguing that property or at least property rights do not exist until the moment that taxation has been paid. This seems counterintuitive. This seems to be saying that the state itself brings those property rights into being, how does it do that? It is worth remembering that a property right is a right over an asset. Murphy and Nagel are arguing that rights come into existence on the completion of the conventional requirements. This then begs the question does the asset itself exist prior to the completion of the conventional requirements? It is clear that assets do exist before they are earned, a house for example, it has a physical presence. Murphy and Nagel appear correct that property rights over a house are engaged after the completion of a number of conventions (the completing of the correct forms, the registration at land registry etc). This creates title, and the individual concerned can then express his property right. However, at no time does the asset itself not exist and the completion of the conventions in question simply transfer ownership from one to another. There is no element of confirmation of tax payment in the process to transfer a property (other than the payment of stamp duty). It seems odd that if Murphy and Nagel truly believe that the property rights of the house buyer are not engaged if the house buyer has not paid his tax properly that there is no practical real world mechanism by which this conceptual framework is delivered.

iii) **Is the state a central depositary of value?** Let us consider ownership of intellectual property, a work of literature. Murphy and Nagel talk about

property rights. Property rights over a piece of literature are created by the act of writing, that then creates a moral and legal ownership of the copyright in the work of literature. One is forced to ask, what role does Murphy and Nagel's insight that property rights are conventional and do not exist until the conventions are completed play in this scenario. I am writing this article, as I type the moral and legal ownership of the copyright is created, by what mechanism is my tax compliance measured before my legal and moral right to ownership engages? And if it does (which it would seem it does not), where does the ownership of the intellectual property reside before I am acknowledged as the owner? According to Murphy & Nagel the intellectual property I create by the act of typing is not yet mine until I have fulfilled the conventions of the legal system which includes my tax compliance. So, where does that property reside before I have declared my tax status? For example, a number of countries have wealth taxes. If I live in such a country does Murphy & Nagel's analysis mean that I do not have a property right over my intellectual property before I have declared my IP on my annual wealth tax return? If not, who holds the property right in the interim? Does it belong to the state? Is there no right to ownership of it at all? Does that mean that if I do not pay my taxes others can use my IP without paying me a royalty because I do not have any property right as yet? Or are they saying that if I fail to file my wealth tax return properly that my property right ceases to exist? None of the questions appear to have been tackled in *The Myth of Ownership*.

iv) **Murphy & Nagel's conceptualisation of property is too narrow.** It is possible that Murphy & Nagel's position is borne out of a limited conceptualisation of what property is. It is true that in certain circumstances

property rights do not engage until tax has been paid. That is in the case of a withholding tax[19] and also in the case of Value Added Tax[20] or other sales taxes. Given that these are the predominant relationships and sources of wealth then it seems that Murphy & Nagel are themselves guilty of the thing they accuse those who take the Property Realist of being. That is, the predominance of the PAYE system means that from within that system it is natural to assume that no property rights exist until after tax has been paid. That is not, however, the case in some of the scenarios we have discussed above, such as intellectual property. Their analysis is not broad enough to take into account all types of property rights, and it is difficult to see how their analysis can survive contact with the practicalities of actual systems and the creation of property rights within the legal system.

v) **Is there a right to property outside legal forms?** Murphy & Nagel seem only to concern themselves with the legal property right which the state acknowledges. There seems to be no place in their analysis for the concept of moral ownership (I will use the phrase "moral" ownership to distinguish from "legal" ownership). The English legal system does attempt to acknowledge the concept of "moral" ownership through the system of equity which attempts to deliver natural justice where the strict application of the law would result in too harsh an outcome as opposed to a just outcome. For Murphy & Nagel the property right exists after the conventions and legalities are met. Equity exists specifically to permit property rights where the legal form is not perfected. Murphy & Nagel have no place in their analysis for this, and as a result it is incomplete. One

[19] Such as PAYE, that is that tax is withheld from the payment of the income to the individual by the employer.
[20] Where tax is paid as part of the consideration for the item.

analysis of the legal system would be that the legal system is an attempt to accurately reflect the “moral” rights to property. Murphy & Nagel seem to take the opposite position, that is that the legal system creates property rights and that nothing, however that may run contrary to what is “right”, exists without the legal form being completed. This runs counter to the doctrine of equity and whilst it may be closer to the functioning of the civil law system it is a serious failing of Murphy & Nagel’s analysis.

vi) **Does the person own the product of their labour?** The Marxist analysis that a worker is alienated from his labour by the capitalist system can be seen as a useful analogy when discussing Murphy & Nagel. In the Marxist analysis the worker in the capitalist system is alienated from the product of his labour by virtue of the relations of production which capitalism imposes upon them. For Murphy & Nagel the product of productive action is the entire property of the state, that is that property rights cannot be fully engaged without state defined processes being completed. Just as in the Marxist analysis a proletarian is only permitted to keep that much of his production which is expressed as his wages and the surplus value remains with the capitalist in Murphy & Nagel’s vision the product of the productive act belongs to the state and the producer may only take property rights over that which remains after taxation. It is possible to see Murphy & Nagel’s state as playing the role of the capitalist and retaining as much as it requires prior to the producer receiving the remainder. Murphy & Nagel seem to be claiming that the producer and the state are in a relationship similar to capitalist and worker, that the legal and conventional framework which enforces property rights is somehow part of the productive process. The author would disagree, my position is that the state recognises the “moral”

property right of the owner and then taxes, the "moral" property right exists independent of the state and either the law recognises it (through the operation of "equity" in the English case) or the legal recognition is simply a legal manifestation of the "moral" right.

vii) **The analogy of the women's rights movement is not a good one.** The only substantive argument Murphy & Nagel make for their position is an analogy with the women's rights movement. They quite rightly state:

> "one can neither justify nor criticise an economic regime by taking as an independent norm something that is, in fact, one of its consequences."[21]

But in the case of the women's rights movement one can see that there was at all times clear evidence of the nonsense of the lower status of women within society. Women may have suffered economic oppression and may have been regarded as mere chattels in some systems but they were also palpably intelligent and visibly "human" in a way which was not permitted by the system which Murphy and Nagel draw an analogy with. In stark contrast when one looks around to see the underlying truth of Murphy & Nagel's analysis one can see scant or no evidence

Their theory seems to be an elegant intellectual construct but so detached from the reality of practical relationships that it falls into the Aristotelean error of relying solely on the light of pure reason and not on an actual analysis of the external world and its relationships. The Murphy and Nagel position which I have discussed occupies only the first section of the

[21] Supra Note 2 p9

Myth of Ownership and it is an attempt to deal with the clash of the "moral" right of ownership but also the "joint aims of financing public goods at the right level and securing social justice"[22] which Murphy and Nagel consider to be normative imperatives on the state. It is a convenient approach for a philosopher who wants to free the state from the need to justify its use of product or wealth created by a taxpayer, the "moral" right contained in ownership is inconvenient if one believes in redistribution of wealth. That is not to say that the author believes that redistribution is not permissible or that the state has no right to tax. But to entirely sidestep the issue by constructing an analysis which denies the existence of property rights prior to the settlement of all taxation obligations unfetters the state to such an extent that it could take all property to itself, and there is no normative brake on such behaviour. This can be shown by an understanding of how the Right to Property contained in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Protocol") would interact with the analysis of Murphy and Nagel. Article 1 of the ECHR states:

ARTICLE 1

Protection of property

(1) 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.

(2) The preceding provisions shall not, 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

[22] *Supra* Note 2 p184

with the general interest or to secure the payment of taxes or other contributions or penalties

Article 1 (1) protects the peaceful enjoyment of property and guarantees that no one shall be deprived of that property. Article 1(2) derogates from that principle in the case of taxes. This approach is a Property Realist approach, in other words it takes as its starting point the fact that property precedes tax. Article 1(1) similarly derogates from the principle of property ownership in the case of the public interest being engaged on the condition that the taking of property is subject to the law and further guaranteed by the principles of international law (this is seemingly to stop a jurisdiction passing a law stating "all green haired people must be deprived of their property" in defiance of international principles and law). Article 1 begs the following question:

1.2.1.2 What is left of a human right which is contingent on the permission of the state to engage? Under Murphy & Nagel's analysis property rights do not engage until tax has been complied with, that is nothing exists until that act of compliance. One is left questioning what the human right contained in Article 1 is worth if it is contingent on state approval. In our scenario of a workman who carries out a task for me, he exchanges his labour with me but under Murphy & Nagel's approach his human right at Article 1 to not be deprived of his property is not relevant to the money I have paid him until he has complied with the tax imposed by the state. In other words, it is contingent, and fundamental human rights cannot be contingent, they must be "inalienable" (to use the language of another famous declaration). The form of Article 1 makes this clear. The right is established by Article 1(1) and permissible derogations are then detailed. It is not the case that the right is contingent on compliance. From this flows a follow up question, if the right to property can be contingent on compliance can the right to life, or freedom of

> religion or any other human right? The consequence of Murphy & Nagel's approach seems to be that they risk undermining the whole of the post-war human rights project.

As a consequence of the issues raised above the author finds it impossible to support the Property Anti-Realist approach and, therefore, is forced to conclude that the ownership of property is not contingent on tax compliance. As a result, the author is also forced to conclude that the individual's property rights exist prior to taxation, and that as taxation is the deprivation of person of their property right then it is subject to a normative calculus. Just as with Article 1 of the protocol a derogation from that property right must be made, and the circumstances of that derogation amount to the normatively relevant elements of the taxation process. Both the taxpayer and the state must comply with their part of the normative bargain which is entered into in order to permit the derogation from the base position of the taxpayer's property right. Laying out the shape of this normative bargain will be the subject matter of Section 2 below.

1.3 Actions in connection with other states

As a first step one to establishing a normative framework for the interaction of different states one must understand not only whether or not a state can take normatively relevant actions (as established above at section 1) but also whether a state is worthy of normative consideration when those actions are being formulated (that is do states have moral "worth" similar to humans). It is obviously possible that an entity such as a state could It is clear from the literature that human beings are not the only kind of entity or being that require normative consideration, as per Gruen (2021):

> To say that a being deserves moral consideration is to say that there is a moral claim that this being can make on those who can recognize such claims. A morally considerable being is

> a being who can be wronged. It is often thought that because only humans can recognize moral claims, it is only humans who are morally considerable. However, when we ask why we think humans are the only types of beings that can be morally wronged, we begin to see that the class of beings able to recognize moral claims and the class of beings who can suffer moral wrongs are not co-extensive.[23]

The author agrees that the class of being who can recognise normative claims and those which can suffer normative wrongs are not co-extensive. The author would extend this analysis in two ways, firstly to state that the ability to recognise normative claims is not simply restricted to beings but also to those entities made up of beings who can similarly recognise normative claims, such as states, or companies, or partnerships (as per the analysis in Section 1 above). Secondly, it would also be correct in the author's analysis that all beings or entities which can recognise normative claims can also suffer normative wrongs. In the case of the state that is to say that not only can a state recognise normative claims, it can act in ways which satisfy normative demands, can inflict harm as a result of normatively relevant actions, is responsible for its own actions (and can suffer "punishment" as a result) and can also suffer normative wrongs perpetuated against it or benefit from normatively beneficial actions of other moral agents. This is not to say that only the state will suffer or benefit. There is, of course a dual effect to any normatively good beneficial act perpetuated against a state. Not only the state but also its citizens will benefit, the state is the aggregate of the individuals and other resources at its disposal, generally, where the state benefits, some, at least, of its citizenry will also benefit.

The question then arises what are the rules that govern the tax relevant interactions an individual state can enter into? Firstly, are those interactions between states or those entities which do not meet the strict definition of "state" as contained in international law such as the Montreal

---

[23] Gruen, Lori, "The Moral Status of Animals", *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), Edward N. Zalta (ed.) The Moral Status of Animals (Stanford Encyclopedia of Philosophy), accessed 21st August 2023

Convention[24]. Secondly are the interactions which a state enters into between it and its taxpayers, and these interactions will be discussed in Section 2. Despite the differences which are obvious between interactions between states and those between state and taxpayer a common theme will emerge. Both sets of interactions are governed by both a legal framework and a normative framework. Legality and normativity do not map perfectly onto each other, though an element of normativity may well feed into the making of laws it is perfectly possible for a legal framework to be developed for anormative or immoral purposes. Legal provisions can and should be measured by a form of moral analysis, compliance with unjust laws is not mandated by a normative analysis, though it is mandated by legality.

As to the interactions between states there is a thriving literature as to the framework which governs the relations between states in the tax arena. The criticism of the literature is that it is (as per the criticism of the Drogalas, Anagnostopoulou, Pazarskis and Petkopoulos definition of tax ethics in the introduction) is that it is generally one sided. The literature as a whole discusses the "problem" of tax competition, or identifies issues in the international taxation system arising from "abuse" and then seeks to remedy them. It does not generally seek to analyse the rules of behaviour between states related to tax before seeking remedies to issues which are arising. In other words, it takes a problem-solving approach, not a moral analysis approach.

1.3.1 A normative analysis of state interaction requires an understanding of sovereignty.

The traditional description of what we know as "sovereignty" is that a state may exercise its sovereignty in whichever way it chooses free from interference of other states. This is often considered one of the underlying principles of the system that created by the Treaty of Westphalia in 1648, or as Brown (1992) has it;

[24] That is that a state must have a fixed population, a defined territory, a government and the capacity to enter into relations with other states. See Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19, U.S.T. 881.

> "even to this day two principles of interstate relations codified in 1648 constitute the normative core of international law:
>
> (1) The government of each country is unequivocally sovereign within its own territorial jurisdiction, and
> (2) Countries shall not interfere in each other's domestic affairs"[25]

Dietsch in his landmark 2015 work "Catching Capital" clearly explains that he believes that the international understanding of what sovereignty is has changed from the "Westphalian Sovereignty" (as described by Brown) to "Sovereignty as Responsibility" (that is that sovereignty amounts to a series of responsibilities to be discharged in a responsible manner by the relevant authority)[26]. Dietsch attributes this change in matters related to taxation as a necessary response to a number of changes which occurred in the late 20th Century and that the previous "Westphalian approach" was sustainable only in the economic conditions of the period prior to those changes;

> As long as economic activities and factors were relatively immobile, not only was the autonomy of fiscal authorities guaranteed but also fiscal policies were effective. Westphalian sovereignty in tax matters was by and large respected. However, in recent decades, the tax base – of capital in particular – has become increasingly mobile. As mentioned earlier, regulatory changes such as the discontinuation of capital controls by most countries in the 1960s and 1970s as well as the abolition of withholding taxes in the 1980s have significantly contributed to this trend. As a

[25] Seyom Brown, International Relations in a Changing Global System: Toward a Theory of the World Polity (Boulder CO: Westview Press, 1992), p74

[26] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York, US: Oxford University Press USA 2015).

> result the behavioural changes of the economic agents in response to taxation have become much more pronounced. They can now "shop" for the lowest tax burden.[27]

Dietsch argues that this effect means that Westphalian sovereignty has become meaningless, that a state cannot effectively exercise its rights as domestically sovereign (that is by freely choosing its "ratio of the public budget to GDP"[28]) because in effect its GDP is being undermined by the exit of capital from the jurisdiction.

There is much to be said for this analysis. However, it seems to be reliant on an understanding of the Westphalian concept being that states exercising Westphalian sovereignty exist entirely in isolation, not interacting not caring about their interactions nor the damage they do to others by their action. This is far from the truth, Hedley Bull in his work the Anarchical Society formulated his analysis of the actual process by which states interacted as;

> Where states are in regular contact with one another, and where in addition there is interaction between them sufficient to make the behaviour of each a necessary element in the calculations of the other then we may speak of their forming a system.[29]

Is this not a more accurate analysis of the way in which states interact that Dietsch seeking to entirely dispose of one version of the concept of sovereignty? In an isolated world states do not need to consider one another, and in a connected world they do. Westphalian sovereignty is not precluded by a requirement to work with your neighbour, nor is it eliminated because the state is under moral obligations to not act in a certain way, a

[27] ibid
[28] ibid
[29] Hedley Bull, The Anarchical Society: A Study of Order in World Politics, (Red Globe Press London, 1977) p10

Westphalian state can trade some of its rights away, the concept of a state as “free from interference” is a starting point, it is not static.

The sovereignty of the 21st Century state has not changed when compared to a 19th Century state; but just as a person living in an isolated farmhouse may well find no difficulty in playing loud music at 5am they will certainly find it more problematic in a crowded apartment block full of young families with sleeping children. It is the situation of the states that has changed since the 20th century, not the nature of their sovereign characteristic, put simply their sovereignties rub up against each other more frequently. That must be managed. The preferred option for managing this seems to be to create international organisations such as the OECD or the European Union or the United Nations to smooth such interactions and to establish frameworks. However, that is managed and it is clear that states in the modern connected world cannot exercise sovereignty without “rubbing up” against the sovereignty of other jurisdictions. They must behave with good neighbourliness. The author would go further, states as moral actors must act within a moral framework when interacting with each other. It is not simply that they “must not” (i.e. they will suffer consequences from other states if they do) but that also they “should not” (i.e. that they are under a moral obligation not to). This stems from the characteristic which states exhibit as moral actors. Those persons or entities which are moral actors are subject to moral considerations when they take actions, if the exercise of sovereignty is an action by a moral actor then it is subject to a moral analysis.

This seems to make a strong argument for the moral criticism levelled at “tax havens”. Dietsch 2015 states:

> Under increasing fiscal interdependence, to put it in Shue's terms, an effective protection of the right to sovereignty will call for more substantive correlative duties on the part of other states.[30]

The criticism often levelled at "tax havens"[31] is that they are not fulfilling their duties as participants in the international society by undermining the tax bases of those who are. In other words, they are "stealing" the tax base of another by use of deliberately designed systems to attract foreign investment which would otherwise not be present. This course of action would, simply put, be bad neighbourliness, and from the perspective of a high tax jurisdiction would be a moral wrong. However, one must also remember that sovereignty is a right to be exercised, and the smaller low tax jurisdiction should not be coerced into accommodating a high tax jurisdiction which cannot control its spending. Interactions are two way, it cannot simply be for the high tax to criticise the low tax. If a low tax jurisdiction has never had, say, capital gains tax, because it has never required it, why should it be forced to impose taxation where there is no domestic imperative simply to stop foreign national abusing the system?

I am not supporting "tax havens", I am simply stating that in an interaction between two moral actors as where there are two states interacting it is clear to me that the moral obligations are a two-way street. This theme will be developed in section 3.

What should be concluded is that sovereignty is not exercised in isolation, as per Hedley Bull's analysis sovereign nations interact with each other and when they do that fact influences the way in which they exercise their sovereignty. The ever increasing

---

[30] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York, US: Oxford University Press USA 2015).

[31] The author uses this phrase as a placeholder for a more accurate description. The definition of a tax haven has varied over time and place. In general, it is considered to be a place where a foreigner whether an entity or an individual can put money or assets to gain an advantageous tax treatment. Beyond that there is little consensus.

interdependence of the financial system means that the influence on their behaviour in the fiscal realm will continue to grow. In a world completely integrated all states must consider all other states, not only themselves or their peers.

In conclusion as to whether the actions of states between themselves are subject to moral rules it is clear to me that they are. I believe I have shown that states are moral actors, their actions have consequences for each other, and as a result they are subject to moral analysis, and that that moral analysis is applicable to all actions carried out by all states in relation to all other states.

In other words states have moral obligations in two directions, firstly to their citizens/taxpayers and secondly to each other. What these obligations amount to will be discussed in the following sections.

2. The obligations of the state to the taxpayer.

The obligations of the state to the taxpayer and whether they are fulfilled are the foundations of the legitimacy of the state. The state cannot claim to be legitimate if it does not function within predictable modes of behaviour or act capriciously. I will not seek to lay out the obligations to the taxpayer on a granular level, nor to make assumptions as to the preferred policy objective of the state in question. Instead, I will take as my premises those statements which I hope I have established above:

i) The state is a moral actor and as a result should act in a morally correct manner;

ii) The taxpayer is a moral actor separate from the state and their rights and obligations should be fulfilled and respected;

iii) That property exists and as such taxation is a derogation from that right.

Famously Adam Smith laid out “principles of good taxation” in his work The Wealth of Nations in which he listed the four canons which he felt to be the foundation of good tax practice:

Fairness: there should be justice in the sense that taxation should be proportionate to the income of the person in question

Certainty: that taxation should be clear and transparent and give the same result for those in similar circumstances

Convenience: that in matters of both timing and method of payment the operation of the system of taxation should be convenient to the taxpayer

Economy: the cost of collecting taxes should be limited as far as possible.

As with so many foundational works Smith takes an approach which today we would consider lacking comprehensiveness, for the author it is limited by the fact that it deals not with the actions of the state but instead simply with the actions of the tax authorities themselves isolation from the state. I believe this approach to be too narrow. In developing a series of rules which follow from the premises described above it seems to me that there must be a separation of the "mode of action" (that is how the state delivers its objectives) from the "policy objectives" which are what the state intends to achieve through its actions. Policy objectives are decided through whichever policy making process any given state has[32]. The Mode of Action is the method by which the state implements its Policy Objectives.

In the area of Policy Objectives I would class several of the objectives which are seemingly assumed in the literature such as redistribution or greater equality, and those that are not assumed in the literature, such as a strong army or the ability to protect one's borders, these are policy choices made by the state in question. It is perfectly possible that these Policy Objectives being achieved would amount to a moral good, or that having them as Policy Objectives is part of the tax contract of a given state. The tax contract for each state or jurisdiction is unique given the historical

[32] It would be an error to assume some form of democratic process, many states do not exhibit those democratically informed processes and whilst that may be a moral deficiency in itself it is not the moral deficiency for discussion here.

development of that system[33]. The objective of this section is not to identify a universal tax contract but instead to identify a number of elements which if fulfilled as part of the Mode of Action of any given state will satisfy the obligation on the state to treat its taxpayers in a moral way.

The crux of the moral question at hand between state and taxpayer is the conflict between the two moral principles of private property and cooperation at state level to achieve wider goals. The right of the state to tax is predicated on a derogation from the right to private property, in order to properly remain "tax" and not become "theft" the state must act in ways which are morally consistent with that derogation from private property. In a sense, one could say that a single underlying principle may be stated as "taxing should only be performed with respect and consideration for the principle of private property". This underlying principle can be articulated in several ways;

2.1 That a fixed procedure is followed in the legitimisation of taxing and tax law.

It is clear that not all states are democracies and it cannot be that in order to tax legitimately in a technical sense that a democratic process need be followed. To a certain extent all states except the most vile govern by consent and a form of tax contract exists in non-democratic states. As Kato and Tanaka (2019)[34] point out;

> Taxation involves the institutionalisation of the revenue raising capacity of a modern state and, at the same time it can motivate citizens to hold the government accountable and facilitate collective bargaining between the ruler and the ruled.

The important word in the quote from Kato and Tanaka is "can", whilst taxation was a great motivating factor in the American War of Independence ("no taxation

[33] Steinmo et al, The Leap of Faith: The fiscal foundations of successful government in Europe and America, (Oxford University Press, 2018) p10

[34] Junko Kato and Seiki Tanaka, 'Does taxation lose its role in contemporary democratisation? State revenue production revisited in the third wave of democratisation' (2019), Volume 58, European Journal of Political Research, pp.184-208

without representation") by the evidence of normal international practice one can see that states and individuals do see that legitimate taxing is at least possible for a state which is not a democracy. To say that it is not would have far reaching consequences, not least;

i) It would mean that no state had ever taxed legitimately prior to the birth of modern democracies, including Britain and the West in general. This seems wholly incorrect. There seems to be a distinction between the concept of fiscal legitimacy and democratic legitimacy.

ii) That no state which does not meet a proper measure of democracy today is fiscally legitimate. Yet international relations require that states acknowledge each other's fiscal legitimacy. The UK for example has the largest network of treaties in the world (in excess of 120[35]) which mandate not only relief from double taxation but also information exchange and assistance in collecting tax. The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes has 167 members at the time of writing[36]. The Global Forum, to a certain extent legitimises states fiscal provisions, at least internationally, with its country monitoring processes. Yet the Democracy Index from the Economist Intelligence Unit ranked only 24 jurisdictions as "Full Democracy" in 2022[37].

It is clear then that non-democratic legitimacy is not only possible but historically, the predominant state of affairs. Therefore, the author would contend that in order

[35] HM Revenue & Customs, 'Double Taxation Treaties: how they work', Double Taxation Treaties: how they work - GOV.UK (www.gov.uk), 21st August 2023

[36] OECD, 'Putting an end to offshore tax evasion; Global Forum on Transparency and Exchange of Information for Tax Purposes - OECD, 21st August 2023

[37] Economist Intelligence-EIU, 'Democracy Index 2022', Democracy Index 2022 | Economist Intelligence Unit (eiu.com)

for taxation to be levied legitimately it must be done so in a way which is subject to fixed rules and procedures for the making of the tax legislation which are themselves legitimate. Tax cannot be imposed arbitrarily, even if the procedure amounts solely to a royal decree, the procedure for a royal decree must be followed correctly in order for the taxing it gives rise to to be legitimate.

2.2 To tax only to the extent required to achieve the policy objective

This obligation on the state flows from a principle of proportionality[38]. If we accept that property rights exist and that taxation amounts to a derogation from those rights then that derogation should only be permissible to the extent necessary. If unnecessary derogation from those rights is permissible then what exactly is left of those rights? How can they be protected if they can be derogated from at will, and a right which cannot be protected is no right at all.

2.3 To ensure fair contributions by all. As Steinmo (2018) points out:

> To guarantee fairness and inclusion, and to make demands for state effectiveness, all people should contribute. This means that *even the poor should pay something.* This might be controversial, but as derived from other principles, membership to a community should cost something. Of course, progressivity should be strictly maintained.[39]

Steinmo makes a strong point. All citizens should contribute something to society. That way the state's existence is a function of their contribution. They have ownership and participation in the state however small that may be, all are equal. It

[38] One very useful articulation of the Principle of Proportionality can be found in Article 5(4) of the Treaty of the European Union which states: 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
[39] Supra note 32 p286

is not in the interests of the promotion of Premise (ii)[40] above that the citizen becomes either a simple resource to be farmed or a beneficiary of state munificence.

2.4 **To avoid waste.** Barlow & Pena (2021)[41] discuss at length what it is to have "Fiscal Legitimacy" for a state and at times cross over between the four principles developed here.

> taxation emerges as a central mechanism in the experienced relationship connecting individuals, society, and the state; as claimed by Martin et al. (2009, pp. 3–4), taxation 'enmeshes us in the web of generalised reciprocity that constitutes modern society'–a relationship of both necessity, as the state depends on taxes to function and guarantee social order and public goods, and of potential conflict, as both authorities and taxpayers are expected to seek to 'renegotiate this relationship to their advantage'.[42]

This would seem to reinforce the point made by Steinmo about the inclusion of individuals in society by taxing them. One of the reciprocity elements which Martin et al (2009 pp3 – 4)[43] is the constraint on the state to eliminate waste. A Fiscally Legitimate state cannot be a wasteful state. As much as the taxing of persons in excess of what is required violates the principal of proportionality then waste simply ensures the state must tax more than required to deliver its policy objectives. Therefore, it requires the state to violate the property rights of the taxpayer disproportionally. That violation is a breach of Premise (ii) above.

---

[40] That the taxpayer is a moral actor separate from the state and their rights and obligations should be fulfilled and respected

[41] Matt Barlow and Alejandro Milcíades Peña ,The Politics of Fiscal Legitimacy in Developmental States: Emergency Taxes in Argentina Under Kirchnerism, (2022) Volume 27, Issue 3, New Political Economy, pp. 403-425,

[42] Ibid p405

[43] Isaac William Martin., Ajay K Mehrotra., and Monica Prasad., 'The thunder of history: the origins and development of the new fiscal sociology'. In Isaac William Martin., Ajay K Mehrotra., and Monica Prasad, eds. *The new fiscal sociology: taxation in comparative and historical perspective (*Cambridge: Cambridge University Press, 2009), pp. 1–28.

Waste is an immoral act if the source of the funds which you are wasting stems from the derogation from someone else's right, as it undercuts the justification for the derogation from the property principle and turns a justified derogation into a violation of another's rights.

2.5 **To eliminate corruption.** The obligation to eliminate corruption is very close in its nature to the obligation to eliminate waste, it also shares characteristics with the obligation to ensure fair contributions by all.

All of these five statements are articulations of the underlying principle that "taxing should only be performed with respect and consideration for the principle of private property". It is only by fulfilling these five exhortations that the state can justify the derogation from the moral property rights of the individual which is inherent in taxation. Surely it is immoral to take arbitrarily and without due process, surely it is immoral to take more than one requires from someone else when you are backed by the power of the state, surely it is immoral to make one carry the burden too heavily when others carry none, surely it is immoral to waste that which you have taken and finally one should guard the property of others from the theft that corruption amounts to.

Finally, it is important to reiterate, there is no political stance right or left underlying these exhortations. They are normative rules, not rules to deliver a particular policy objective. The income tax rate of 90% imposed by the Wilson Government in the United Kingdom in the 1960s would be perfectly permissible if it were imposed according to the proper procedure, was simply the amount required to fulfil the objectives of government was part of an income tax which was properly progressive and was not able to be avoided easily, was not wasted and corruption was guarded against. The same rules would be applicable to a 5% rate.

3. The Obligations of states to each other.

Section 2 details what the author believes to be the rules governing one of two relationships which the taxing state has, that with the taxpayer. The second relationship which the taxing state has is with other states. In the years since the second world war the rules both legal and conventional governing that relationship have radically changed. The creation of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes covering 167 jurisdictions would have been unthinkable in 1935. It is something akin to the inclusive tax organisation proposed by Dietsch (2015). What is certain is that if sovereignty must be exercised as a part of a system as envisaged by Hedley Bull then it involves interactions with other states. As has hopefully been shown states are moral agents and interaction between moral agents are governed by normative rules of behaviour. I.e. one state can do wrong to another and should be criticised from a normative perspective for such behaviour. In forming the basis of a normative set of principles to govern the relations of states one should draw on the normative framework as articulated by the various principles of international law or the United Nations documentation and declarations, but also applying normative principles which should apply between other forms of moral agents by analogy[44].

It seems that there is a single underlying principle which can be restated in a number of ways. That underlying principle is the Principle of Autonomy, which can be formulated in the following six ways.

i) States should respect each other's autonomy.

States are moral agents and as such must have regard to the moral agency of others. As per Gruen (2021):

> A morally considerable being is a being who can be wronged.

A state can be wronged, it can suffer damage and loss of property and rights. Those same wrongs perpetrated on an individual would quite rightly

[44] For example, one could draw an analogy between the normative precept against physical violence to a person and a physical attack on a state.

be considered immoral, and so they should be considered normative wrongs in state to state relations. However, there is a special wrong which goes to the core of statehood which if carried to its conclusion would snuff any state out of existence. That is the interference with the autonomy of a state. In a sense the autonomy of a state is the defining characteristic which unites all states. Without autonomy there can be no state. For example, during the Soviet era the then Byelorussia was represented by a seat at the United Nations, and yet Byelorussia did not have what we would consider effective autonomy from the Soviet Union. The classical definition of a state contained in the 1933 Montevideo Convention at Article 1 states:

> Article 1
>
> The state as a person of international law should possess the following qualifications:
>
> a. a permanent population
>
> b. a defined territory
>
> c. government; and
>
> d. capacity to enter into relations with the other states.[45]

It may be surprising that this definition does not include some reference to autonomy or independence. The author believes that those concepts are somehow connected to the fourth characteristic (that of "capacity to enter

[45] Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19, U.S.T. 881.

into relations with other states"), though Zadeh[46] claims that this fourth criteria is more likely only to be considered fulfilled when those relations are already being entered into.

The importance of the concept of autonomy/independence to a state's existence (or as it is also called "independence") is clear from the judgment of Judge Anzilotti in the Austro-German Customs Union Case:

> The independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is no more than the normal condition of States.[47]

Thus, a state cannot exist without independence, at least not as a full member of the society of jurisdictions. Anzilotti goes on to discuss "dependent states" and concedes their existence but does not acknowledge their subservience as a matter of international law.[48]

Thus, independence is central to the existence of a state. The author would go further, it is my position that in the case of Anzilotti's "dependent states" it is the autonomy granted by the "supreme" state to the subordinate state which is the thing that calls that state into existence as anything other than simple territory. For example, consider the county of territory of the South

---

[46] Ali Zounuzy Zadeh 'International Law and the criteria for Statehood; The Sustainability of the Declaratory and Constitutive Theories as the Method for Assessing the Creation and Continued Existence of States',, <arno.uvt.nl/show.cgi?fid=121942>, accessed 13th April 2023

[47] *(1931) P.C.I.J., Ser. A/B, No. 41*. The Treaty of Peace with Austria signed at St. Germain on 10 September 1919 (*226 C.T.S. 8*), art. 88

[48] Ibid p58

Lancashire in the north of England. It is a recognisable geographic area which extends from the River Kent to the outskirts of North Liverpool. It is neither a regional nor local governmental area and has no constitutional position in the English governmental system. It is thus nothing but a defined space. Take instead now, Gibraltar, a defined territory as is South Lancashire, but as a result of the granting of the Gibraltar Constitution Order 2006 (and previous similar constitutions) a dependent state was called into existence. The autonomy which is embodied in the Gibraltar Constitution Order 2006 is the thing that differentiates the Constitution Order from a simple organisational document, by the inclusion of autonomy the Gibraltarian State (however limited by its relationship with the United Kingdom) was called forth.

It seems apparent then that if the characteristic of autonomy is the defining characteristic which distinguishes a state from some other form of defined area then just as any unwanted restriction on the freedom of action of an individual is an immoral act then any action which leads to an unwanted restriction of the autonomy of a State by another state is an immoral act.

One could term this as a reflection of the previously discussed “Westphalian Sovereignty”. However, autonomy is not to be held inviolate. For example, if a jurisdiction invades a second jurisdiction then a third jurisdiction would be justified in violating the autonomy of the aggressor. There are limitations and this has always been recognised. Osiander (2001) states:

> Even the European system was really a regime: “sovereignty” or rather actorhood was based not on power but on mutual convention.

That convention was a series of rules and conventions which governed the relations between states. There have always been situations in which the autonomy of a state can legitimately be curtailed.

ii) States should not use autonomy irresponsibly.

This second articulation of the Principle of Autonomy which the author would put forward is both separate from and in some senses a rearticulation of the first articulation; to respect each other's autonomy. A State should exercise its autonomy with responsibility. This reflects the argument made by Dietsch for "Sovereignty as responsibility".

In relation to non-state actors the responsible use of the great power which state autonomy amounts to informs the respect for property rights suggested above in relation to taxpayers.

However, in relation to other states one can view this normative precept as the flip side of the imperative to respect each other's autonomy. Dietsch (2015) makes the argument that by specifically designing their tax systems to be competitive the "tax haven" undermines the tax base of the non-tax haven and thus undermines what he calls the "autonomy prerogative" of the non-tax haven[49] (that is the autonomy to set the ratio between the tax base and the provision of public goods at a jurisdictionally agreed level). In other words, he argues that irresponsible behaviour interferes with the

[49] Supra note 3 page 47

autonomy of other states by removing the resources required to properly exercise that autonomy. This is conceded and it is clear that in all fields this is the case. If a state builds a badly constructed nuclear power plant on the borders of a poor but nuclear free neighbour, then it limits the autonomy of that neighbour to remain free of radioactive particles. Tax is not the only case in which this exhortation for responsibility is a normative imperative, any state which acts irresponsibly will limit the autonomy of its peers.

iii) **States should not limit the autonomy of another state without exhausting all reasonable alternative courses of action.** A third articulation of the Principle of Autonomy accepts that there may be cases in which a state must restrict the autonomy of another state, and sets boundaries to that derogation from the strictest formulation of the rule. It is true that where a state acts in an irresponsible way which limits the autonomy of another state then that wronged state has within its moral right the ability to in turn limit the first state's autonomy by the use of what are known in the tax community as "defensive measures". However, such a right to defensive measures is in turn limited.

Imagine State A it has no capital gains tax. It has never had capital gains tax, in fact no country has ever had capital gains tax. Its neighbour State B introduces Capital Gains Tax, time passes and the people of State B forget that there was ever a time when there was no capital gains tax. State A requires no capital gains tax to fulfil its obligations to its people under its tax contract and people start to move from State B to State A to reduce their tax liability. The politicians of State B (which is much larger economically than State A) begin to complain and agitate that State A is "stealing the resources of State B". Rather than exhausting the possibilities of anti-avoidance (such

as introducing citizenship based taxation such as the United States has) they impose tariffs and penalties on those dealing with State A to force State A to introduce capital gains tax forcing State A into recession. State A concedes and imposes capital gains tax.

It would seem, would it not, that State A has been attacked by State B. State B should have taken all reasonable steps to eliminate the issue before resorting to defensive measures. This scenario is very similar to the situation described by Dietsch of a two-state world of Sweden and England where England is low tax and Sweden High tax[50]. He uses this thought experiment to reject an outcomes-based approach to the proposed restraint on fiscal autonomy, and the author agrees with that conclusion. Outcome cannot be the sole measure of whether a tax provision is legitimate. Tax provisions flow from a number of historical, political and economic inputs which are unique to each jurisdiction, to simply consider outcomes would be to ignore the internal workings of the state, and the expression of legitimate decision making processes.

Thus, in order to respect another state's autonomy properly a state must exhaust all reasonable alternative courses of action which it can take unilaterally prior to imposing the other state's autonomy.

iv) States should cooperate to achieve shared objectives

A second positive formulation of the rule to respect autonomy is the exhortation to states to cooperate in order to achieve shared objectives. It is arguable that if respecting another's autonomy is a duty then enhancing another's autonomy by working together to achieve shared goals is a good.

[50] Supra note 3 page 95

Cooperation for shared goals increases the autonomy of both parties as they can achieve their goals more easily.

v) **States should not enforce cooperation where such cooperation is against the interests of the other state.** As a consequence of the fourth articulation of the precept to respect another's autonomy then it is self-evident that enforced cooperation is a restriction on another's autonomy especially if the desired outcome is against the interests of the impacted state.

vi) **States should not force another state into a conflict of duties between its duties to its taxpayers and its duties to other states.**

Finally, if the concept of popular sovereignty, that is that the existence of a state (its "sovereignty") flows from the consent of its people (and such is the basis of democratic legitimacy) is to be taken seriously or considered desirable then it must follow from this that no state should force another state to act in such a way as to force a conflict of the duties of one state to another and the duties of the state to its citizenry. There are two elements to this prohibition which require analysis.

a) The state committing the harm must "force" the state suffering the harm. Therefore, I would concede that an element of coercion is required.
b) The state may consent to something which conflicts with the duties owed to its taxpayers, subject to free exercise of its discretion without coercion of its internal constitutional process;

These six articulations of the principle of autonomy are not a checklist to be marked off before one can say that an action by a state can be considered to be a "good" action. Instead, they are a non-

exhaustive list of articulations of the one underlying principle, that autonomy of states should be respected.

Conclusion

In this article I believe I have attempted to lay out an analysis of taxpayer rights, interstate rights and a series of rules of behaviour which respect the rights of stakeholders both domestic and international in a way which show that they are an interlocking set of obligations and duties which cannot be viewed in isolation. It is clear to me that there is a boundary between responsible and irresponsible behaviour amongst states, but that the demands of international cooperation must be balanced with the obligations of the state to its taxpayers. The best method by which this can be achieved is for states to respect the autonomy of each other, and in doing so they respect the obligations owed by a state to its taxpayers.

Too often we see organisations such as the EU take an outcome-based approach, ignoring the requirements and needs of states internally. In doing so they violate the autonomy of those smaller states they can coerce and that is a moral wrong, no matter how it is dressed up. This is not always the case, and the protection of one's tax base is an important prerogative of a state or group of states, and should be undertaken, but only within the boundaries of respect for the autonomy of other states. In the preparation of the various lists propagated by international organisations such as the OECD; but particularly the EU and its List of non-cooperative jurisdictions for tax purposes[51], the EU takes non-tax based retaliation against states with no consideration of whether they have deliberately or non-deliberately designed tax systems to undermine the tax base of other states, whether the provisions in question pre-date international tax planning or were designed specifically to attract inward investment without economic substance. It is the conclusion of the author that this is an illegitimate approach which violates the normative framework established within this article.

[51] EU list of non-cooperative jurisdictions for tax purposes - Consilium (europa.eu)

To be fair to organisations such as the EU it is the case that individuals have abused the international taxation system. However, it cannot be correct that in order to restrict the possibility of such abuse the various normative obligations owed by a state to its citizens should be ignored and overridden by threats of interference from other states. Such interference is a clear breach of the normative demand to respect the autonomy of other states and amounts to a reinforcement of the position of the richer nations most of which have a history of colonial and pseudo-colonial interference in the affairs of other states.