Taxation and Human Rights[1]

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1. Introduction: the Role of Taxes in Modern Democracies

Taxes have always been seen as a threat to human rights. In the past they represented the unlimited powers of monarchs and other totalitarian rulers. The biblical description by Samuel the prophet expressed this fear in the following powerful way:

This will be the manner of the king that shall reign over you: he will take your sons, and appoint them unto him […] And he will take your daughters to be perfumers, […] And he will take your fields, and your vineyards, and your olive-yards, even the best of them, and give them to his servants. And he will take the tenth of your seed […] And he will take your men-servants, and your maid-servants, and your goodliest young men, and your asses, and put them to his work. He will take the tenth of your flocks; and ye shall be his servants.

Fortunately, in modern democracy things have changed. The people have sovereign powers. Based on the concept of the Social Contract, we are willing to obey the elected government only if its actions provide security, improve our lives and enhance our welfare. Through our agents in Parliament, in the Senate and in the Houses of Representatives, we create a binding legal system that we follow in order to enhance our welfare and wellbeing. Tax legislation is an inseparable part of this system.

Most modern Constitutions contain variations of the famous catchphrase "no taxation without representation," In the modern constitutional era, this means "no taxation without public consent" so that nobody is required to make any payment without consent. The fact that taxes in a democracy may be levied only by Parliament –elected by the people to serve as their agent – means that

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tax is the product of collective consent to pay the price for public goods and services provided by the elected government. Yet mere empowerment is not enough. The provisions of the tax law need to be accepted by the public. In some modern constitutions there are specific guidelines regarding the basic principles that tax legislation has to follow[3].

The underlying assumption of tax law is that all taxpayers accept the tax and agree to pay it in exchange for the public goods or services it provides. This assumption can be challenged in cases in which it can be demonstrated that no responsible member of society would agree to pay the tax in question. In other words, the tax has to have certain characteristics to be considered an acceptable tax. As Adam Smith argued, according to the four canons of "good tax," it should be:

1. Certain and not arbitrary;
2. As convenient as possible for the taxpayer;
3. Efficient; and
4. Fair and Equitable.

Modern economists suggest some additional criteria, such as neutrality (which may be seen as a slightly different term for efficiency) and flexibility, so the tax system can be easily adapted to the economic system and the elected government's fiscal policy.[4] My argument is simple and straightforward: Any tax that does not follow the basic requirements of a "good tax" will not stand up to constitutional judicial review. Tax laws may be seen as a threat to human rights, constitutional interests, principles and fundamental values. Here I discuss four human rights that might be violated by tax laws.

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[3] For example Article 53 of the Constitution of the Italian Republic *(Costituzione della Repubblica italiana)* of 1948 states: "Everyone shall contribute to public expenditure in accordance with his ability to pay. The system of taxation shall be based on criteria of progression".

[4] See *inter alia* STIGLITZ E.J., *Economics of the Public Sector* (3rd ed., 2000),pp 456-470.

2. Human Dignity and Equality

By entering into the social contract, one of the major aims is to ensure that each member of the society has the right to maintain his or her human dignity. Human dignity is the core of human rights. The Universal Declaration of Human Rights states in its preamble: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*", and Article 1 states: "*All human beings are born free and equal in dignity and rights*". Most Constitutions refer directly to human dignity [5]. Although the American Constitution does not mention this term, the US Supreme Court has acknowledged that individual dignity is at the heart of the First Amendment[6].

2.1 Human dignity and Decent Existence

The "third generation of human rights" consists of social and economic rights[7]. A traditional classification draws a distinction [8] between passive/negative human rights that are protected from government intervention, and positive/active social rights, implying that the subject of these rights is entitled to receive from the government certain goods and services in order to maintain a certain standard of living[9]. Even in the USA, where social rights are not cited directly in the Constitution, the American economist Arthur Okun commented in 1975 that:

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[5] See *inter alia* Arts. 3, 27, and 41 of the Italian Constitution,

[6] See Cohen v. California, 403 U.S. 15, 24 (1971); Furman v. Georgia, 408 U.S. 238 (1972)

[7] VASAK K., *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights*, UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977; HENKIN L., *Economic Rights under the U.S. Constitution*, 32 Columbia J. Tran. L. 97, (1994-1995);

[8] BERLIN I., Two Concepts of Liberty, in: Four Essays on Liberty, (Oxford, Oxford University Press, 1969); KIESLING H.,*Taxation and Public Goods* , 245-264. (1992); Georg Jellinek Der subjectiven offentlichen Rechte (1892, 2nd ed. 1905). For an English description of Jellinek's distinction see: *System of Subjective Public Rights*, (Collected Courses of The Academy of European Law, 1998, Kluwer International) (Vol.VI, Book 1), pp. 163-165.

[9] *Supra*, n. 7; OLIVIER M., *Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences* 33 Victoria U. of Wellington L. Rev. 11, (2002). On the elaborate social constitutional rights, see the Constitution of the Republic of South Africa 1996 As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Act 108 0f 1996 (hereinafter SA Constitution); : http://www.gov.za/constitution/1996/96cons2.htm.

"[T]he assurance of dignity for every member of the society requires a right for a decent existance – to minimum standard of nutrition, health care and other essential of life. Starvation and dignity do not mix well. …."[10].

In order to ensure a decent existence for all members of society, wide social gaps and inequality should be diminished, not only for normative and ethical reasons, but also for economic efficiency as well[11]. In order to ensure a decent existence, the government needs funds that are raised by taxes[12]. In this perspective, a progressive income tax is an efficient tool to cope with inequality, and is supposed to protect and even strengthen the constitutional principles of equal opportunity and human dignity.

2.2 Equality and Regressive Taxation

Although most income tax codes envisage a progressive tax scale, extensive data shows that the tax system, especially in the USA, has become regressive. Among others[13] Prof. Joseph Stiglitz, a Nobel Laureate in Economics, describes the economic risks the USA faces due to the huge economic and social gaps and the growing poverty. He identifies two main reasons for the widening inequality in our age: the deregulation of the financial sector and the reduction in the progressivity of the tax system. With regard to the tax system, he describes the tendency of lowering top marginal tax rates: first the top rate was reduced from 70 per cent to 28 per cent, then it was raised to 39.6 per cent, then reduced again to 35 per cent. But then the taxes on forms of income received disproportionately by the rich (capital gains, more than half of which is earned by the top 0.1 per cent) were lowered further to 20 per cent and then even further to 15 per cent. The result is that the top 400 income earners in the United States paid an average tax rate of 19.9 per cent in 2009.

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[10] OKUN A., Equality and Efficiency – the Big Trade-off (1975), 6.

[11] See *inter alia*, STIGLITZ J., *The Price of Inequality*, (paperback ed. 2014); PIKETTY T., *Capital in the 21st Century* (2014); OSTRY J.D, Andrew Berg, and Charalambos G. Tsangarides, Redistribution, Inequality, and Growth (IMF STAFF DISCUSSION NOTE (2014).

[12] According to Piketty, the extremely high tax rates in the USA – 70 % income tax and 50% gift and estate tax – were intended to reduce the sharp inequality, as a compromise between equalitarian society and the liberal state rather than for raising revenue; PIKETTY T., ibid, 505-506.

[13] *Supra* n. 11.

Overall, the richest one per cent of Americans pay effective tax rates in the low 20s, that is, less than Americans on more modest incomes[14]. In other words, the tax system in the USA, as well in other countries, has become regressive. It is noteworthy that the billionaire investor Warren Buffett complains and sharply criticizes the US tax system due to the fact that he continues to pay a lower tax rate than his secretary[15].

As noted above, such a regressive system is not only a political issue. Taxpayers are required to pay taxes according to the benefits they enjoy from the social order provided by the elected government through public goods and services. The wealthier the taxpayers are, the more they benefit from the major public services: recognition of private property and its protection, economic markets, national and domestic security, the legal order and law enforcement that enable them to operate and make earnings and profits, and to dispose of their property and assets as they see fit. Hence, a regressive tax system is not merely unethical or immoral, but, as I argue in this short paper, it entails a violation of the constitutional human rights of equality and human dignity.

2.3 Human Dignity and Discretionary Consumption

Another dimension of human dignity and personal income tax is that there is a general principle that a tax which drives a taxpayer into poverty violates the constitutional concept of human dignity. The Carter Commission in Canada[16] defined the tax base as the "discretionary economic power," meaning that the government should not tax all the taxpayer's wealth, but should exclude the portion required for non-discretionary consumption, i.e. to ensure a minimum standard of living. This includes the means required for housing, nutrition, medical insurance and services, basic education, and so on. Indeed, most

[14] STIGLITZ, *supra* n. 11, at pages xxxi-xxxii.

[15] GLENN J. KALINOSKI , MoneyNwes 04 Mar 2013, http://www.moneynews.com/Economy/Buffett-secretary-tax-payroll/2013/03/04/id/493010/.

[16] Report of the Royal Commission on Taxation of Income (1966) (K.L. Carter, Chair), Ottawa, Queen's Printer.

income tax systems around the globe allow a minimum amount of income free of tax by means of a personal exemption or basic tax credit.

3. Property

One argument that is sometimes put forward is that any tax violates the constitutional right to private property, since it takes the taxpayer's property and transfers it to the Treasury[17].

My claim[18] is that a good tax does not violate the right to private property. The claim rests on two grounds. The first one focuses on the "firm" and income production. The second one concentrates on the "household," i.e. the taxpayer as a consumer of public goods and services.

3.1 Income Producing, Joint Project and Economic Allegiance

The first approach relates to what I call the "Joint Project," rooted in John Locke's "labour justification" for private property[19]. Humans have a natural exclusive right to ownership of things in which they have invested their labor. However, even if we set aside Locke's two famous ethical provisos,[20] a careful analysis leads to the conclusion that the process of creating income involves not only the taxpayer's labour and its fruits,[21] but also another factor of production – social capital[22]. Hence, an individuals' right to property is limited only to the component that they add by means of their own labour. When an individual produces or improves an asset by herself, she is the sole owner.

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[17].See inter alia, DUFF D.G., *Private Property and Tax Policy in a Libertarian World: A Critical Review*, 18 Canadian Journal of Law and Jurisprudence, 23 (2005).

[18] EDREY Y.M., *A Declarative and a Constructed Constitution - the Right for Property Under the Israeli Constitutional Law and its location on the 'Constitutional Rights' Scale*, (Hebrew) 28 Mishpatim Hebrew University Law Rev. 461 (1997); EDREY Y.M., *Constitutional Review and Tax Law: An Analytical Framework*, 56 American University Law Review: 1187 (2007).

[19] LOCKE J., *Two Treatises of Government*, Second Treatise. Es. Ch. 7 (Laslett, ed. Cambridge, 1970).

[20] The right is subject to two limitations: (a) An individual's property is contingent upon not excluding or denying the necessities required by others, and (b) Man acquires property only according to his needs.)

[21] In modern life property is not limited to the value added by labour alone, but also through the investment of the fruits of that labor, i.e. financial capital.

[22] See *inter alia* the Nobel Laureate Gary Becker's book, A Theoretical and Empirical Analysis, with Special Reference to Education (3rd ed. 1993; 1 ed. 1964).

When someone works with others; if a group of people combine their labour to produce wealth, assets, or property, the asset belongs to all the group's members. Each member has a right to pro rata share of the asset. Today's economic reality, insights and knowledge allow us to advance a step further. The firm, which is actually a nexus of contracts,[23] is an example of this joint venture and embodies the "Joint Project" concept. In order to transform the fruits of labour into wealth and consumption, certain basic preconditions should exist (i.e. social capital). In order to facilitate the transformation of labour into other goods and services, we need to have functioning markets, which enable efficient and reliable trade. Income or wealth production involves factors/means of production: Real Capital (money, real property-land and assets bought by real capital); Human Capital (labour, time, knowledge, skills and abilities); and Social Capital. The latter means the institutions, relationships, and norms that shape the quality and quantity of interactions in a given society; national physical infrastructure, effective rule of law, social cohesion and solidarity, education system, level of research, health service, the efficient and functioning markets, a skilled labour force, national and domestic security, political stability, technological improvements, and so on. All of these enable the production of income.

Returning to the Lockean approach, the fruits of labour stemming from a worker's efforts are actually the fruits of production stemming from the above three factors of production.. Okun provides an example for the contribution of the social capital:

Henry Ford's mass-produced automobile was a great success in a country with a high average income, three thousand miles for unimpeded driving, an alert and ambitious work force, and a government that could protect travelers and enforce the rules of the road. It would be a loser in Libya.

As a result, a "modern synergy" implies that property rights are not only the individuals' basic and natural rights, but also the result of communal life and

[23] See *inter alia*, C. Jensen & W. H. Meckling *Theory of the Firm - Managerial Behavior, Agency Costs and Ownership Structure* 3 Journal of Financial Economics (1976)305; Coase R. H., *The Nature of Firm*, 4 Economica (1937)1; Edrey Y., *Taxation of International Activity: FDAP, ECI and the dual capacity of an Employee as a Taxpayer*, 15 Virginia Tax Rev. (1996) pp.653-684.

social interaction.

I should mention also the report to the League of Nations, submitted in 1923 by a special professional committee with regard to the taxation of international activity[24]. A significant part of the report was based on Professor Edwin R. A. Seligman's book[25] where he developed the doctrine of economic allegiance. The core of the doctrine is that for tax jurisdiction purposes, a taxpayer owes economic allegiance to those states or countries that provide the conditions to create the taxpayer's wealth. The production process takes place mainly where the product generates its own economic value. Without it, all human efforts to produce goods and services would be essentially futile. This process depends not only on the existence of a legal system that recognizes property and protects it, but also on the existence of an economic market that maintains economic demand, efficiency of trade, and the presence of suitable consumers. No real wealth can be produced without the existence of a well-organized society. Bill Gates could not have developed his products without the existence of training institutions, public research and development centres, universities and research institutions, and an educated and skilled population capable of using the products that his company produces. He could not safeguard his assets without a legal system that recognizes them as his property while providing law enforcement services and a national security system.

The conclusion is that every investor in the Joint Project is entitled to a return on their investments. The social entity, i.e. the elected government, invests in the necessary infrastructure; the individual or corporation adds human and real capital; the income generated belongs to all those who invested in these three forms of capital. Thus, a good tax system is nothing but a profit-sharing mechanism, which guarantees that the public actor - who invested the social capital - will receive their fair share from the Joint Project.

[24] Report on Double Taxation, League of Nations Doc. E.F.S. 73 F. 19 (1923).
[25] SELIGMAN R. A., *Essay in Taxation* (London, 8th ed. 1917).

3.2 Purchase Price of Public Goods and services

The second approach that defies the claim that taxes violate the right to private property concentrates on household consumption. A good tax is rather the fair price for households for purchasing public goods and services; we ask the elected government to provide us with certain goods and services, and grant our consent to pay for them through general elections (usually every four years) and by approving (through our parliamentary agents) the annual national budget.

Although there are differences between buying a product in the private market and purchasing goods and services from the government in a democracy, they are not significant and substantial. The common ground of purchasing private and public products is much more significant than it appears at first glance. In both cases, an individual does not possess the power or the discretion to set the price of the goods and services. Pricing is a collective process. In a free market economy, the price is set by aggregate supply and demand, whereas the price of the government's goods and services is set by collective demand determined collectively by elections, and the approval of the annual budget. Thus, the term "compulsory payment" assigned to taxes is inaccurate and misleading. There is always an obligation to pay for all type of purchases, whether from private or public providers. The only significant difference is that the free-rider phenomenon is more prevalent or widespread when it comes to purchasing public goods.

4. Conclusion

This short presentation aims to summarize my basic ideas regarding the relation between taxes and human rights. I confine it only to human dignity, equality and property. My major arguments are as follows.

a. Like any other legislation, tax law should be subject to constitutional rights, principles and concepts.

b. The government is required to ensure that every member of society enjoys human dignity and a decent existence, financed by the tax system.
c. The amount of the taxes should reflect the benefits we derive from the public goods and services, which usually correlates with our economic ability: the more we earn and possess, the more we enjoy the social, legal and economic order safeguarded by the government.
d. A regressive tax system violates human dignity and equality principles.
e. Taxes that follow the basic requirement of "good tax" are neither compulsory payments nor a form of confiscation. They are the price we collectively agree to pay for receiving public goods and services that we require the elected government to provide.
f. Like with firms, good taxes are fundamentally a profit-sharing mechanism that provide fair returns to all those investing in the Joint Project, whether in the form of Human Capital, Real Capital or Social Capital.
g. As households, we pay taxes in order to consume public goods and services. The differences between the pricing process of private and public goods and services are much less significant than may seem to be the case at first glance.