Oxford University Faculty of Law & University of Virginia Center for Tax Law

Taxing People: The Next 100 Years

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Scholars regard the 1923 League of Nations experts' report as the origin of the international tax system as we know it. The experts' report noted the decline of political allegiance as an accepted basis for taxation, and it acknowledged the emergence of new—often conflicting—allegiances. Given this reality, the report famously endorsed an international tax ideal according to which "The individual's whole faculty should be taxed, but that it should be taxed only once, and that the liability should be divided among the tax districts according to his relative interests in each". Aware of the magnitude of the challenge, the experts also noted that they "hold out no hopes of this proving to be a smooth and practicable arrangement". One hundred years after the League of Nations report, the international tax regime has evolved into a colossal web of rules and regulations: unilateral laws, bilateral treaties, multilateral accords, and yet, the international tax regime is still no smooth operation.

In the 1920s and after, academic and policy analysts placed heavy emphasis on business taxation. Departing from that trend, our focus will be on people.

The past 100 years witnessed major changes in people's lives. Globalization brought with it increased mobility of people and resources, transcending national borders. The digital revolution and the merging of social and cultural communities across national borders removed barriers and allowed people and businesses greater flexibility in operating major aspects of their lives across national borders. Simultaneous with these changes in technology and daily life, we have seen major changes in tax policy and governance: the rise of interstate tax competition, the development of new institutions, and the expansion of some actors' influence alongside the diminishment of others'. These developments have had major effects not only on the power of states to tax, but also on the legitimacy of taxation, raising concerns for justice at the national and international levels.

With the recent developments in international taxation, it is time to think about the next 100 years: To reconceive the goals of taxation and the role of international taxation, and to consider the potential roles of governments and international institutions in designing a tax system that puts people at its core.

List of Abstracts

1. *Reuven Avi-Yonah: Taxing Nomads: Reviving Citizenthip-Based taxation for the 21st Century*

The Covid pandemic and the rise of zooming has increased the ability of many people

(primarily the rich) to work remotely. This in turn has led to more people moving to other countries to benefit from the ability to work remotely while enjoying other benefits such as lower housing prices, a more leisurely lifestyle, and in some cases greater political stability.

Many Americans have used their newfound freedom to move overseas, e.g., to Italy. They and others like them are the new nomads.

Such a move is not tax motivated because Italy has higher personal tax rates than the US. It does, however, raise interesting tax issues because the US (uniquely) imposes worldwide taxation on its citizens wherever they live, while Italy (like most countries) does not tax nonresident citizens but taxes its residents on worldwide income regardless of their citizenship status.

The question is whether the US or the Italian regime is preferable in a world in which rich people can freely choose their residence jurisdiction regardless of their citizenship. Most of the literature (including my own) condemns the US approach as a historical anachronism and accepts the Italian approach as obvious. But this question requires reconsideration under changing conditions.

The tax policy choice (whether a country should tax non-resident citizens or non-citizen residents on global income) raises issues that would have been very familiar to Erwin Seligman and his colleagues on the 1923 League of Nations report. A key issue in the US debate on adopting the Sixteenth Amendment (1913) to authorize an income tax was whether federal taxes should be based on the benefits provided to the taxpayer by the government (the benefits or exchange principle) or on the taxpayer's ability to pay taxes (the ability to pay principle). Seligman was a major advocate of the ability to pay principle, and of the consequent insistence that Congress has the power to tax all income "from whatever source derived," since all income contributes to ability to pay. The ability to pay principle was also behind the adoption of the foreign tax credit and the rejection of exemption for foreign source income in 1918. The 1923 report is based on the benefits principle ("economic allegiance"), but the insistence that the residence jurisdiction must have the right to tax the income of its residents on a worldwide basis while allowing for credits for source-based taxes is derived from the ability to pay principle.

Which principle is better suited for taxing nomads? In my opinion, it is the ability to pay principle and not the benefits principle. A US citizen living permanently abroad does not derive sufficient benefits from their US passport (and may in some cases not even have one and not be aware of her US citizenship if that resulted from being born in the US). But if taxation is based on ability to pay, the relevant ability to pay is that of adult members of a political community, who get to vote and thereby determine the appropriate tax rates and the degree of progressivity of the tax rate schedule. And since US citizens abroad can vote in US elections, they should be subject to US taxes based on their ability to pay, i.e., on global income from whatever source derived.

Taxation of non-citizen residents, on the other hand, should be based on the benefits principle since they do not get to vote and therefore are not members of the political community in which they reside. Therefore, Italy should only tax US citizens residing in Italy on Italian source income, which reflects the benefits conferred on them by Italy, and not on foreign source income, which does not reflect such benefits. The US should credit those Italian benefits (source) based taxes in accordance with the priority of benefits (source) over ability to pay (residence) established by the 1923 report (the "first bite at the apple" rule).

The problem with this proposal, of course, is that it encourages taxpayers to obtain passports in tax havens and live permanently in other countries, and if those residence countries will only tax them on domestic source income, the result is massive under-taxation of the rich.

Such "non-dom" regimes are a serious problem under current rules because countries like the UK (and many others) have adopted them to attract the rich. But there are ways to address this issue since non-dom regimes are politically unpopular and therefore ripe for legislative change in democratic countries. First, a residence country should be able to impose tax on its residents on worldwide income if the country of citizenship does not do so at all. Second, while the country of citizenship should be able to impose any non-zero tax rate it wants on its citizens (that is the point of taxation based on voting in a democratic political community), that choice should be respected by the country of residence only if the citizenship is meaningful, i.e., if the resident non-citizen has real links to their country of citizenship and not just a nominal passport (under the well-established *Nottebohm* test adopted by the ICJ). Finally, the country of residence should respect the primacy of the country of citizenship only if its citizens (including non-resident citizens) are given a meaningful right to vote in free and democratic elections in the country of citizenship (as determined by outside observers).

Hannah Arendt defined citizenship as "the right to have rights". In today's deglobalizing world, citizenship has become more important than ever because an increasing number of people (refugees) are effectively stateless and do not have either diplomatic protection or the right of abode in their country of citizenship. In addition, the ability to work remotely has significantly increased the ability of the rich to move permanently to other countries without obtaining citizenship rights and obligations. In this context, I believe the US approach of taxing its citizens on global income regardless of where they live is justified by the ability to pay principle (but not by the benefits principle), and that the current practice of the US and most countries to tax non-citizen residents on global income is not justified (within the limits of the anti-avoidance rules outlined above). This may not be a drastic change from current rules for resident non-citizens because most of them do not have foreign source income. But for those that do (like the rich nomads of the pandemic), ability to pay (citizenship) is a better basis for taxation than benefits (residence). Seligman, I believe, would have approved.

2. *Yariv Brauner: Tentative title: Personal rather than ad personam individual income taxation*

The chapter demonstrates that income taxation of individuals in the 21st century does not require a personal link of the “residence” kind. It details policy options available to states and to the international tax regime that would preserve the personal income tax on individuals without a singular reliance on single residence of such individuals. Taxing individuals in this manner alleviates many of the most pressing challenges faced by the international tax regime at the present, including the taxation of remote workers, digital services, the digital nomads, etc.

3. *Richard Collier: The Individual, Mobility and the Corporate*

It is widely recognised that in certain situations the mobility of individuals can raise corporate income tax as well as individual income tax issues. For example, a common question is whether the relocation of an employee might trigger the permanent establishment threshold, thereby creating a taxable presence for a corporate in the state of relocation, as well as raising income tax issues for the individual. However, the real scale of the pressures on the corporate tax system created by mobility, especially in cases involving the mobility of senior executives, is a long way from being fully appreciated.

The paper will address this situation by explaining how the corporate income allocation rules have developed in last twenty years in a way that means that the impacts of mobility for the corporate income tax system are likely much more significant than is widely appreciated. The paper will demonstrate how recent controversies about the interpretation of the income allocation rules in the light of the BEPS changes to the ALP and the taxable threshold rules (which were also amended in the BEPS project) are likely to further fuel the corporate income tax difficulties from mobility, and in some cases create entirely novel problems. A prognosis of the likely future outturn relating to these issues concludes the discussion.

4. *Steven Dean: Fear of a Black Planet and the Wealth of Nations*

Fear of a Black Planet explores the impact of anti-Black racism on the international tax regime, tracing the evolution of international tax rules that have impoverished vulnerable states and eviscerated social safety nets in wealthier ones. Decolonization granted political power and economic autonomy to erstwhile possessions only to watch it be stripped away by treaties designed to constrain fiscal sovereignty. Fear of a Black Planet retells the familiar story of the international tax regime from an unconventional perspective, revealing how racial fears have burdened communities around the globe.

5. *Mitchell Kane: Exit, Voice, and Electivity: Democracy and Global Distribution*

Globalization creates a paradox. Economic integration of international economies shrinks the world, thereby highlighting distributional inequities across nations that extant domestic tax systems are ill-suited to address. At the same time, certain key aspects of globalization—concentrations of wealth and corporate power—can make the world seem larger, in the sense that domestic political processes and outcomes become detached from the democratic preferences of ordinary, individual voters. The world has made but modest progress on these two problems, focusing efforts on reallocation of the global corporate tax base (as the locus of a large amount of money, though not the locus of distributional issues we actually care about) and on experiments in greater direct democracy. The two problems have not generally been analyzed in tandem. This paper argues that problems of global distribution and domestic democratic accountability ought to be approached as one and proposes a novel, perhaps radical, innovation in the taxation of individuals. Specifically, the paper proposes that individual taxpayers ought to be able to elect to allocate some fraction of payments on domestic tax liabilities (calculated under typical domestic tax rules) to the nation of their choosing, in virtue of which they would receive a 1-1 credit offsetting domestic tax liability. Such a mechanism would allow taxpayers to "vote" directly with their tax dollars, thereby addressing democratic accountability and would allow distribution of resources across individuals unmediated by domestic political interests that are frequently hostile to extraterritorial payments. Various challenges and implementation concerns are also addressed.

6. *Rebecca Kysar: Toward Inclusive Global Tax Governance*

This book chapter, in connection with an upcoming Oxford University conference entitled *Taxing People: The Next 100 Years,* will examine the institutional legitimacy of the new 141-country OECD/G20 Inclusive Framework body, with particular emphasis on its representativeness of the community of nations as well as its democratic accountability to the citizens of those nations. The chapter argues that the negotiation of the 2021 global tax deal solidifies the Inclusive Framework as *the* global tax governance body, while also suggesting areas for its improvement.

7. *Daisy Ogembo: Transformative Constitutionalism and The Role of Citizens in State Building through Taxation -- the case of Kenya and South Africa*

South Africa and Kenya underwent a tremendous constitutional change in the last quarter of a century, adopting radical constitutions which have come to be known as 'transformative constitutions'. Transformative constitutionalism describes the process by which the enactment, interpretation, and enforcement of a constitution transform a country's social and political institutions, and power relationships, steering them towards democracy, participation, and egalitarianism (Karl Klare, 1998). This radical social change, described as more than 'reform' but less than a 'revolution', is delivered through constitutional interpretation and enforcement by courts and public institutions such as tax administrations.

Has transformative constitutionalism influenced tax law, policy, and administration in these countries? This paper forms part of a larger project that aims to demonstrate the complex and dynamic connection between tax and constitutional law and the benefit of understanding the place of tax in a transformed constitutional order derived by the lawyer seeking to gain greater knowledge of both fields.

Public participation is at the heart of a transformative constitutional dispensation. A core aim of a transformative constitution is to promote greater democracy and participation in governance and, thus, state-building. Public participation in the context of this paper refers to citizen involvement in government decision-making on any matter touching on taxation. To what extent do citizens contribute to state-building by participating in the case countries' tax policy, administration, and legislation-making processes? How transparent and inclusive are these processes? Are there better policy, legislative, and administrative outcomes than before the enactment of the transformative constitutions? In answering these questions, this paper analyses legislation and parliamentary rules on public participation and any cases challenging improper or inadequate public participation in tax-related decisions.

8. Diane Ring: Taxing a Post-Pandemic Workforce

In the two decades preceding the Covid-19 pandemic, some workers around the world witnessed shifts in the ways in which their work could be performed including changes in location, execution of tasks, and processes by which they would be engaged to work. These changes could be seen in: (1) the increased ability to perform work at a location distant from the hiring business, client, or anyone connected to either; (2) the use of technology to collaborate on work through data management systems, shared technology, and other platforms; and (3) the use of platforms and apps to find, hire and pay those doing work. Of course, the degree of change was not consistent across fields, jobs, or countries. That said, the phenomenon was notable, and the subject of policy, regulatory, and academic inquiry in many jurisdictions. These shifts introduced potential tax ramifications for jurisdiction, permanent establishment, home office and related expenses, worker classification, and tax reporting. While these issues affected businesses, they had significant impacts on the workers themselves. Fast forward through a global pandemic and these workforce trends have, in many contexts, accelerated. In some cases, the acceleration reflects a forced structuring of where work would take place–i.e. not in the office–but remotely at the worker's own location. In others, the shared pandemic experience forced a widespread and rapid adoption of technology that not only expanded the plausible options for work locations but also the options of tech-based collaboration across time and space. Finally, even platform and app-based work saw some expanded markets for services.

Now that many countries are emerging from the heart of the pandemic period, a major question is what will work look like? How many of the trends accelerated during the pandemic will permanently reshape how workers perform their work? Will firms that demand some in-person work find they are unable to retain or attract workers? We may see some tentative answers to these questions in coming years, although long-term trends may only be fully apparent after many more. Regardless of the precise picture of countries' workforces in the next decades, sufficiently strong shifts have taken place that the tax systems will need to take account of the transformations. This paper examines several of the most prominent shifts, the tax issues they raise, and the options available to countries and local authorities. Specific topics include: (1) home office deductions and other work-related expenses; (2) jurisdiction to tax and allocation of work time; and (3) employee/independent contractor status. But beyond these particular tax issues, this paper identifies two broader cautions for tax systems post-pandemic. First, although the organization of work and the workforce itself may look sufficiently different to warrant a rethink of established rules, tax regimes should be cognizant of the risks of treating workers more like businesses and less like workers of old. Second, despite a long tradition of social safety nets in many jurisdictions across the world, the pandemic created a new and rapid need to assist disrupted workers—and in some countries the tax system proved critical in facilitating a government response. Such an option is available to governments only if the tax administration is sufficiently healthy. Accordingly, jurisdictions should be attentive to the necessary investments in tax administration infrastructure, not just for regular operations with taxpayers, but for moments of crisis as well.

9. *Wolfgang Schoen: Is everybody obliged to pay taxes somewhere?*

The project tries to link the current race to the bottom in the area of personal income taxation to underlying philosophical and economic themes.

10. *Daniel Shaviro: Time Is, Time Was: Lifetime Versus Current-Period Perspectives in Tax and Other Fiscal Policy*

What time periods should we use in tax (and other fiscal) policy to evaluate people's circumstances, and thus to decide (for example) what taxes they should pay, or what transfers they should receive? This question is fundamental in a number of areas – just to name three, in (a) the longstanding debate about income versus consumption taxation, (b) assessing the equity of retirement programs such as U.S. Social Security, and (c) evaluating the progressivity of various countries' fiscal systems.

Despite the widespread recognition that annual systems may need to be used in practice for administrative reasons, standard economic reasoning can be used to make a compelling case for basing one's thinking on lifetime (or even multigenerational) models. However, this reasoning relies on strong empirical assumptions that often are not entirely true. In addition, the philosophical case for favoring lifetime assessments, while in some respects intuitively appealing, is also subject to serious challenges and objections.

11. Miranda Stewart: Living Long and Living Well? Tax, Work and Care in an Era of Population Ageing

The success of the development project of the twentieth century relied on economic growth to lift incomes, and on a tax and welfare state to share the wealth. Vastly increased expenditures on health, education and the social safety net equalised incomes and access to assets in developed countries around the world, although with many differences in application in law and on the ground. Regulation of work in a labour-capital bargain increased the market return to labor. Financial liberalisation democratised access to assets and wealth grew across the population and within households. In many developed countries, economic prosperity led to increased longevity and to a population boom after World War II.

The success of the twentieth century project relied fundamentally on an unequal and gendered care economy, primarily focused on care of children. Women bore the economic cost of care and were not remunerated in the market, relying instead on an unequal intra-household economic bargain. Housework was not taxed because it was not monetized – but women did not directly control the economic return. Despite significant change in the last 50 years, this inequality remains in an era when both demographics and the economy are very different.

Today, economic and demographic conditions are becoming increasingly unlike conditions of the mid-twentieth century. Wages have stagnated relative to capital returns and to consumer prices; population-wide wealth is growing more slowly and wealth inequality has begun to increase. Tax and transfer policies fail to share the cost of care through public resourcing and taxing and continue to place a heavier economic burden on women than on men. Women with care responsibilities derive less direct benefit from the market economy; take jobs which mean that they do not fully benefit from the economic independence, reward, or security that would come with having a full-time well paid job over their lifecourse; and make up the bulk of publicly funded, and underpaid, care workers for young and old. Women have less wealth than men, including for retirement in an era when lives are much longer than 50 years ago.

Population ageing is a renewed focus of policy, with care at the centre, but tax policy and law has not adjusted to address it. The tensions in the gendered distribution of work, care and wealth are increasingly visible in an era of declining fertility and an aging and long-lived population. This paper explores the taxation of work and care including the gendered policy settings and assumptions about wealth, tax, justice and care in the twenty-first century tax and welfare state. It discusses whether, and how, we should re-orient our tax and welfare policies to ensure that we will be living long and living well in the next 100 years.

12.Afton Titus: Tax Governance in Africa: Shifting Sands to Firmer Foundations

To date, there is no legitimate international tax policy-making institution. This has led to the current international tax governance system perpetuating existing inequalities and deepening economic disparities. This paper argues that African countries should use the spirit of cooperation that the African Continental Free Trade Area Agreement encapsulates to make difficult decisions about African tax governance.

This paper proposes that African countries unite as a people to form their own international tax governance structure within the African Union to create an international tax forum that would specifically address their concerns. Moreover, such a structure would also give African countries the critical mass needed to rebalance the unequal power relations in international tax.

This paper seeks to bring more attention to the fact that tax governance is fundamentally about people and the decisions that they make – for governments, these decisions are made with a view to improving the lives of their people.

As far as these decisions play out internationally, tax governance is at a critical stage where it is uncertain that the status quo can continue. It is important for African countries to seize this opportunity to create a regional governance structure that could bring more fairness and justice to the international tax system as a whole and to the African people in particular.