

## Taxpayers' Rights and Human Rights

Editorials in this journal are usually timely comments, triggered by contemporary events. In a sense, there are two recent and current events that have triggered this editorial, but the issue is one that has been around, in principle, for several decades and ought to have been discussed earlier. The issue is the need to be more precise in our language and to distinguish between taxpayers' rights and human rights, or, more specifically, the application of human rights in the field of taxation.

The first recent event that triggered this editorial was a frustrating and, frankly, upsetting discussion in the Committee established to draft the Terms of Reference (ToR) for the UN Framework Convention on International Tax Cooperation. Specifically, the discussion (or, perhaps more appropriately, the non-discussion) of the issue of taxpayers' rights and human rights in August 2024. The background is this. The Zero Draft of the ToR made virtually no reference to human rights or taxpayers' rights at all. All that it said was as follows:

9. Efforts to make international tax cooperation fully inclusive and more effective should:

- require transparency and accountability of all taxpayers, while respecting the rights to privacy and other fundamental human rights. (emphasis added)

This minimal reference to fundamental human rights was very disappointing. After all, this is not a mere bilateral tax treaty that is being negotiated: it is a framework convention which, if successful (which is not guaranteed), could provide a structure for international tax cooperation at the UN for many years to come. The protection and advancement of human rights is part of the DNA of the UN, woven into its fabric from the very first article of the Charter of the UN. It is frankly unthinkable that a document like the Framework Convention should not contain an explicit reference to the need to promote and advance fundamental human rights as part of the objective of any such framework convention. The absence of an explicit objective relating to human rights was a clear defect of the Zero Draft, and was obviously noted by a number of those involved in the drafting. As a consequence, the First Draft of the ToR contained much more appropriate wording:

9. Efforts to achieve the objectives of the framework convention therefore should:

c. be fully aligned with international human rights law and States' existing commitments under human rights conventions to respect, protect and fulfil all human rights for all people in all countries. (emphasis added)

However, when the discussion in the ToR Committee turned to this issue, the result was both surprising and appalling. There were the obvious comments from some delegates representing countries with poor human rights records there should be no reference to human rights at all in the document. However, there were then comments by a number of delegates – some tax officials, some diplomats, and mostly from the Global South – that they saw no reason for any reference to human rights in the Framework Convention. Some of those delegates clearly expressed the view, sometimes heard from some Global South countries, that human rights are a post-colonial invention designed to provide for the criticism of some developing countries that cannot satisfy the human rights of their populations. Finally, there were a number of delegates – a surprisingly large number, and both diplomats and tax officials – who admitted that they did not understand the relationship between taxation and human rights. There were also comments that this was an attempt to extend human rights to multinational corporations which, under the UN system, do not generally enjoy human rights.

The result was that the final draft of the ToR contained very much watered down wording in this respect:

9. Efforts to achieve the objectives of the framework convention therefore should:

c. in the pursuit of international tax cooperation be aligned with States' obligations under international human rights law. (emphasis added)

This was a significantly weaker reference than was contained in the First Draft, and it prompted the European Union Council to adopt a statement on 27 September 2024 listing a number of criticisms of the ToR, one of which was the failure of 'inclusion of taxpayers' rights and safeguards'.

There are many points to take from this sad and frustrating discussion at the UN-established committee. One

of them is the clear need to educate tax officials and diplomats on the implications of human rights instruments for tax systems. After all, virtually every delegate in the room came from a country that had signed up to some or all of the major international human rights instruments, yet these officials were admitting that they knew little or nothing about the obligations their own governments had undertaken by signing up to these instruments.

One specific point that came out from this discussion is the need to be more precise and careful in the use of terminology, and to distinguish between taxpayers' rights and human rights as they apply to taxation. It is this distinction to which this editorial is addressed. An example of the confusion is the statement made at the ToR Committee on behalf of the UN High Commissioner for Human Rights, which proposed that the ToR should refer to human rights and not to taxpayers' rights. To an extent, coming from an office concerned with the observance of human rights, that is not entirely surprising. However, a framework convention should respect both human rights and taxpayers' rights.

So, what then is the distinction?

Human rights are rights that are derived from the body of international human rights law (including both global human rights instruments and regional human rights instruments). They are rights that exist in countries that have ratified and implemented some or all of the international human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, and many other global human rights instruments. These rights derive directly from the undertaking by the government concerned to observe the terms of the particular instrument, and they are constrained by and derived from the wording of the instrument. They are universal in the sense that they apply to all persons impacted by the legal systems of the states Parties to these instruments. In the UN system, these rights are generally accorded only to humans, though in some regional instruments (for example, the European Convention on Human Rights) certain rights are also accorded to non-human actors.

On the other hand, taxpayers' rights are rights enjoyed by all persons (including entities) when they are subject to the processes of national tax systems. They relate to the entire process of taxation, from the enactment of taxation, through its imposition, assessment, collection, appeals, penalties and enforcement. These rights do not derive from human rights instruments, but derive from a variety of domestic sources. It is reasonable to take the view that such rights exist in every country which has a tax system (and not simply in countries that have ratified a particular human rights instrument). They derive from a variety of sources: from the tax-related provisions in the national constitution; from the tax law itself (which may, for

example, give rights of appeal to the taxpayer); from the administrative law which constrains the activities and discretions of the revenue authorities; from specific laws relating to taxpayers' rights, such as taxpayers' charters and taxpayers' bills of rights. It is hard to imagine any domestic tax system operating without a wide range of rights accorded to taxpayers, including rights to privacy and confidentiality and, more broadly, to the fair operation of the tax system.

There is obviously scope for overlap between human rights in the field of taxation and taxpayers' rights. For example, the right to appeal against a tax assessment is likely to be granted within the domestic tax system to all taxpayers; meanwhile, the right to a fair trial is also guaranteed in international human rights instruments. Similarly, a prohibition on discrimination in the tax system is often found in many constitutions, and it is also a feature of many international human rights instruments.

However, there are also rights guaranteed under human rights instruments that have nothing to do with taxation. For example, the prohibition of torture is protected under human rights instruments such as the Convention against Torture, but that is unlikely to feature regularly in connection with tax matters.

Similarly, and rather more significant, there are many rights accorded to taxpayers within domestic tax systems that do not find their origins in human rights instruments. In fact, trying to find the origins of these rights in human rights instruments is a somewhat fruitless and potentially problematic approach. For example, many national constitutions (but by no means all) prohibit the retrospective application of tax legislation. Some countries prohibit it completely; some countries limit it to narrow circumstances. However, it would be a fruitless task to try to found the non-retrospective application of tax legislation in any human rights instrument. Similarly, many national constitutions require that taxation should be imposed in accordance with the ability to pay. That is not a principle found in human rights instruments. Many tax laws provide for a right of the taxpayer to a hearing before the tax authorities themselves before an assessment is issued; that does not easily fall within the right to a fair trial before an independent and impartial tribunal. National laws may guarantee the right to the public to participate in the process of enacting and imposing tax laws, but it is difficult to found that in international human rights instruments.

The key theme of this editorial is that there are good reasons for being precise in our use of terminology, and making this distinction between taxpayers' rights on the one hand, and the operation of human rights in the taxation field on the other. So, what are the reasons for making this distinction (and for writing about it in this editorial)?

First, it is important to recognize that taxpayers' rights and human rights derive from different legal sources – international human rights instruments on the one hand, and

domestic law on the other – and that different interpretation approaches may apply to the different legislative techniques that have been adopted. It is important, as a strict legal matter, to know whether a particular right derives from an international treaty, or from the constitutional rules of a country, or from the domestic tax law. The nature and scope of a non-discrimination principle, for example, may be very different if one derives it from a national constitution as opposed to an international human rights instrument.

Secondly, this distinction ensures that one recognizes that all taxpayers enjoy taxpayers' rights, even if they do not necessarily enjoy human rights. Thus, for example, corporate entities as taxpayers enjoy whatever rights they are granted under the domestic law; they may or may not enjoy rights under human rights instruments, according to the approach to interpretation. To recognize both fundamental human rights and taxpayers' rights does not risk extending to corporate taxpayers the rights that they do not enjoy currently under international human rights instruments. The argument that was raised by some delegates at the ToR Committee is simply fallacious.

Thirdly, there is resistance to human rights in some countries, and scepticism about human rights and taxation in others. One may debate with the opponents and the sceptics, in the hope of convincing them that they are wrong, but their argument is absolutely no reason for ignoring taxpayers' rights. Even if a government representative, speaking on behalf of their government, does not believe in human rights, it is somewhat unthinkable to have a tax system where there is no effective protection of taxpayers' rights. Many of the statements that were made in the ToR Committee would not stand up to scrutiny if clear distinction were made between taxpayers' rights and human rights.

An example where clarity and terminology would help in shooting down a spurious argument is the criticism expressed by some NGOs (who should know better) that respecting the right to privacy and confidentiality would present a barrier to cross border exchange of information. That is total nonsense. A right to privacy exists under a number of global and regional human rights instruments, but it is not an absolute right: information may be exchanged or even made public if that is in accordance with the law, necessary in a democratic society, and consistent with a valid purpose such as the enforcement of the tax system. The fact that many countries have signed up to regional and global human rights instruments has never prevented exchange of information, provided that it is in accordance with the law and meets the other necessary criteria, including proportionality and necessity. Similarly, it is difficult to imagine a tax system that can operate without guaranteeing rights to privacy and confidentiality of taxpayer information. Again, the existence of those rights in virtually every country's tax system has not prevented cross border exchange of information. What these NGOs are essentially arguing for is an abandonment of those taxpayers' rights and human rights in order that

the tax information of certain persons can be made publicly available, specifically made available to those NGOs. Whether public disclosure of tax-related information is permissible is a matter of both domestic law of the country concerned and the interpretation of human rights' instruments. There is a balance to be achieved here but it is easier to understand that balance if one recognizes the scope of the rights to privacy and confidentiality under domestic law and under international human rights instruments. In no case is it realistic to suggest that the existence of such rights prevents cross border exchange of information, subject to suitable safeguards.

Making a clear distinction between taxpayers' rights and human rights in the operation of the tax system helps in showing that some of these arguments are entirely spurious.

Human rights in the operation of a tax system exist because countries have, often in large numbers, ratified international human rights instruments. Taxpayers' rights exist because it is difficult to conceive of any domestic tax system which functions without guaranteeing certain specific rights for taxpayers. Any framework convention that evolves out of the UN discussions would be fundamentally defective if it did not maintain as its objectives both the protection and advancement of fundamental human rights in accordance with states' obligations, and also the practical protection of taxpayers' rights.

This leads on to a further contemporary event that has prompted this editorial. In a few weeks, the new membership of the UN Committee of Experts on International Tax Cooperation (the UN Tax Committee) will meet for the first time in Geneva. At this initial meeting, it is proposed that the new committee will identify a number of issues to form part of its agenda for the coming four years. In advance of that first meeting, the members of the new committee have called for proposals for items to be included on the agenda. The author of this editorial has put forward a proposal that the Committee should establish a sub-committee or working group to discuss and, if thought appropriate, provide guidance as to the application of human rights instruments in the field of taxation. This is not a proposal to provide a venue for criticizing any government on its human rights record in the field of taxation. Rather, this is fundamentally an educational process to provide guidance to countries on the obligations they have undertaken when they have signed and ratified global human rights instruments.

It was made clear from the discussion in the ToR Committee last August when many tax officials and diplomats explicitly stated that they did not understand the impact of human rights instruments on taxation. That is a massively important gap in knowledge, particularly given that those officials were representing countries that had signed up to multiple human rights instruments. For some smaller countries, the resources are not necessarily available to research and provide guidance to the government on the obligations they have undertaken. These countries may face criticism when they present their

periodic reports under some of the human rights' instruments because of failure of their tax system to comply with obligations which they have undertaken but which they do not understand. There is an educational exercise to be carried out here, and the UN Tax Committee is best placed to undertake it. First, that Committee has developed a number of highly effective working methods which allow participation from members of the committee, governments, academics, NGOs and civil society groups to help in developing their work. Secondly, the Tax Committee is well placed to work with the office of the UN High Commissioner for Human Rights to assist in providing this guidance. It can also work with other bodies such as the UN Committee on Economic, Social and Cultural Rights in developing this guidance. While the work of developing the Framework Convention is separate from the work of the UN Tax Committee, a final version of the Framework Convention is likely to

include some reference to the protection of taxpayers' rights and human rights. Once that is done, it would be extremely helpful if the Tax Committee had, in the meantime, been developing some guidance on this area.

If the UN Tax Committee does not pick up this proposal, the need for clarification is still there. It will simply fall to academics and others to provide this clarification (which is best provided through a sub-committee of the Tax Committee). In carrying out that process, this editorial emphasizes the importance of recognizing the distinction between taxpayers' rights on the one hand and human rights in the operation of the tax system on the other. Precision in the use of terminology will avoid unnecessary and fruitless arguments and help to provide useful and clear guidance.

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