

Revisiting rights theory and principles to prepare for growing globalisation and uncertainty

Duncan Bentley¹

Abstract

Taxation is primarily concerned with funding the state and redistributing social goods. Taxpayer rights identify the limits on how that is achieved. The concept of taxpayer rights is broadening as society changes, globalises and becomes increasingly engaged through technology. This article provides a redefinition of the terminology of taxpayer rights and explores the concept of pragmatic rights founded in soft law. It shows that where the principles and legal rules that form the basis for protecting taxpayer rights are reinforced by a strong rule of law, rights expand through engagement with taxpayers and their participation in the tax system. Engagement builds trust through independent bodies such as an ombud, through representative bodies and an accessible administration. It reduces the need for coercive power and improves voluntary compliance. The caution is that trust and reputation rely on the demonstration of consistent integrity and the effective operation of the rule of law.

Introduction

In the 800 years since Magna Carta, pursuit of the principles of justice and fairness in taxation have made and toppled kings and governments. Society is based on an acceptance that taxation funds the state and the state-provides benefits that flow back to its members.

We can explore a range of theories that both justify and limit the imposition of taxes. However, there remains in any society the question of how the rule of law should apply to protect taxpayers in the way tax laws are formulated, legislated, imposed and administered. This is made more difficult with globalisation. How the rule of law applies depends upon the meaning of the rule of law in a jurisdiction and how different meanings across borders interact.

There are principles which are fundamental to the operation of the rule of law. Some have particular and special application in the context of taxation and it is desirable that this is recognised legally. Other principles go to the administration of the tax law and how we formulate and apply taxpayer protection will often depend on how the legal system works and its practical administration. Sometimes, it is pointless providing legal protection when it is administrative protection that is needed in very practical situations. The theory and principles of taxpayer protection provide for this.

To add further complexity, some principles are seemingly unenforceable and yet are increasingly recognised as essential principles of good practice. They go hand in hand with measurable improvements in voluntary compliance and revenue generation.

¹ Duncan Bentley is a Visiting Professorial Fellow at the University of New South Wales, Australia. He is also Emeritus Professor, Victoria University, Australia and Adjunct Professor, Bond University, Australia.

Recent developments in politics, policy and the law have identified competing challenges. On the one hand taxpayer rights have become increasingly normalised and integrated into some tax legislation and most tax administration.² On the other hand, technology and mobility are disrupting tax systems, which face often piecemeal re-engineering on the run in the response to treasuries and politicians requiring active reassurance that the revenue base is secure.³

It is important to reassess how the concept of taxpayer rights is understood in the context of a more globalised and digital world. There is general acceptance of the importance of voluntary compliance to assure a nation's revenue base.⁴ This brings with it different dimensions of understanding how tax systems should best operate: they go well beyond the traditional application of the rule of law. The law is clearly still important, but so too is 'soft law', good practice and non-legal frameworks, which often can bring greater clarity and meaning to the social frameworks that support taxpayer rights.⁵

This article first explores in Part 1 the meaning of the term 'taxpayer rights' in a 21st century context. It then reviews in Part 2 the principles and rules which form the basis for any framework of taxpayer rights, legal or otherwise. In Part 3, the article examines the development of different forms of, and contexts for, taxpayer rights, particularly in light of the findings of different disciplines on taxpayer compliance and engagement. It explores the concept of pragmatic rights founded in soft law, as opposed to legal or administrative rights. Part 4 reiterates the continuing importance of legal rights and their development, application and enforcement. Part 5 explores the transition from legal rights to pragmatic rights. It identifies the emerging importance of public engagement as a fundamental requirement in making taxpayer rights real for the affected actors.

Part 1: What do we mean by 'Taxpayer Rights'?

It is important to start with definitions. It puts the theoretical framework in perspective and helps answer the question why we need taxpayer rights in the first place and what kinds of taxpayer rights in what contexts. The term 'taxpayer rights', is rich with meaning. It is used in contexts that include political, economic, behavioural and relational, as well as to

² OECD, *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies* (OECD 2015) DOI:10.1787/tax_admin-2015-en, 282.

³ See the discussion of the pre-emptive changes to Australian and UK laws in light of the OECD Base Erosion and Profit Shifting project, for example: S Piciotto, 'Indeterminacy, complexity, technocracy and the reform of international corporate taxation' (2015) 24 (2) *Social and Legal Studies*, 165; M Graetz, 'Can a 20th century business income tax regime serve a 21st century economy?' (2015) 30 (3) *Australian Tax Forum*, 551. It is reminiscent of some responses to the development of electronic commerce in the 1990s: see D Bentley, "The ATO, Tax and the Internet: The Emperor's New Clothes?" (1999) 9 *Revenue Law Journal* 99.

⁴ V Braithwaite and J Braithwaite, "An evolving compliance model for tax enforcement", in N Shover & JP Wright (eds), *Crimes of privilege* (2001 Oxford University Press) 405; JG Cullis and A Lewis, "Why People Pay Taxes: From a Conventional Economic Model to a Model of Social Convention." (1997) 18 *Journal of Economic Psychology* 305; T Makkai and J Braithwaite, "Procedural Justice and Regulatory Compliance" (1996) 20 *Law and Human Behavior*, 83.

⁵ Discussed in D Bentley, "The rise of "Soft Law" in tax administration: Good news for taxpayers?", (2008) 14 *Asia-Pacific Tax Bulletin* 32 and D Bentley, "International Constraints on National Tax Policy" 30 (11) (16 June 2003) *Tax Notes International* 1127.

describe standard legal definitions. As such, it is claimed by different interest groups, which ascribe to it different textures of meaning.

For taxpayer rights in a compliance context, a possible categorisation could cover five scenarios, which are all considered in this article. Although the nuances may seem slight, the different perspectives can lead to very different outcomes. Politicians use the term to support particular policies and politically driven regulation. Government reviews and government treasury departments often use the term to support a mix of economically and politically driven regulation. Courts and the legal system usually have a strictly construed legal interpretation of rights and their application to taxation. Those concerned with tax administration in all its forms often use the term to frame the way the administrative rules of the tax system are implemented and interpreted. Tax administrators, ombuds and taxpayers also use the term to describe service standards, behaviours and aspects of the content of the relationship between taxpayers and the tax administration.

In the United States of America (US) the concept of taxpayer rights sometimes demonstrates the political dimension very clearly and the process that takes politics into legal definition. The three Taxpayer Bills of Rights that passed into law respectively in 1988, 1996 and 1998, followed sometimes bitter political remonstrations by members of the public and Congress against the power of the Internal Revenue Service (IRS). A flavour of the speeches endorsing Taxpayer Bill of Rights 2,⁶ which was passed unanimously by both the House of Representatives and the Senate, is seen in that of Rep. Sam Johnston from Texas, who said:⁷

But this bill is important because the powers of the IRS to investigate and examine taxpayers are greater than any other Government agency. They are into our lives, and it seems that the constitutional rights of taxpayers are always trampled upon but nothing is ever done.

The reality was that these were not bills of rights in the traditional understanding of the term (for example, the US Bill of Rights, the Universal Declaration of Human Rights, and the European Convention on Human Rights). Greenbaum notes that the translation of political rhetoric into legal reality in the Taxpayer Bills of Rights was accomplished through “a variety of procedural changes to the Internal Revenue Code (IRC) without any coherent scheme”⁸ and each so-called “Bill of Rights” was simply a part of a larger omnibus amendment law.

A different approach, using a mix of economics and politics was taken in the 1992 amendment to Article X, Section 20, Colorado Constitution, in which the focus was not procedural rights but a Taxpayer’s Bill of Rights spending limit. The rights of taxpayers were seen in the right to vote on tax increases and to impose spending limits.

⁶ PL 105-206, July 22, 1998, 112 Stat 685, HR 2676 Internal Revenue Service Restructuring and Reform Act of 1998.

⁷ Rep S Johnson, House of Representatives Debates, from Tax Analysts, *Tax Notes Today* (24 April 1996, Lexis database).

⁸ A Greenbaum, “United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?” in D Bentley (ed) *Taxpayers’ Rights: An International Perspective* (1998 The Revenue Law Journal) 347.

Compare this to the legally focused analysis of the 1987 International Fiscal Association seminar on 'Taxation and Human Rights' which attempted to begin to relate the rights of taxpayers to their broader legal rights.⁹ This strand of thought gave rise to significant research and debate on how to develop legal and administrative rights to protect taxpayers.¹⁰

At the same time, revenue authorities during the 1980s had conducted significant research and analysis that demonstrated the importance of taxpayer perception of fairness, trust, transparency and due process to taxpayer voluntary compliance.¹¹ Rational self-interest gave rise to a rich seam of revenue authority sponsored and initiated research and practice over the next twenty-five years to understand and build effective tax compliance models.¹² An example of this approach in action is the range of comprehensive administrative statements of taxpayer rights, which has developed globally.

Also flowing from the tax compliance research has been the recognition that relationships and daily interactions between agencies and taxpayers can have a significant impact on voluntary compliance.¹³ This is bolstered by the growing body of behavioural research that supports initiatives ranging from the way alternative dispute resolution is managed in tax administration to how revenue authorities should interact with taxpayers and intermediaries in the different forms of communication.¹⁴

Supported by the OECD from the 1990s,¹⁵ there has been increasing recognition of the importance of legal, administrative and standards based taxpayer rights, however framed.¹⁶ In its review, *Tax Administration 2015*, the OECD could state that, "With minor exceptions,

⁹ International Fiscal Association, *Taxation and Human Rights* (1988 Kluwer Law and Taxation Publishers).

¹⁰ For example, D Albregtse and H van Arendonk (eds) *Taxpayer Protection in the European Union* (1998 Kluwer Law International); D Bentley (ed), *Taxpayers' Rights: An International Perspective* (1998 Revenue Law Journal); P Baker "Taxation and The European Convention on Human Rights" [2000] *British Tax Review* 211.

¹¹ Discussed in D Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (2007 Kluwer Law International), ch 1. See also Braithwaite and Braithwaite, above n 4.

¹² Many built on the work by Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the deregulation debate* (1992 Oxford University Press). See, for example, OECD, *Co-operative Compliance: A Framework* (OECD 2013) DOI: 10.1787/9789264200852-en; V Braithwaite (ed), *Taxing democracy: Understanding tax avoidance and evasion* (2003 Ashgate); R Whait, "Developing risk management strategies in tax administration: the evolution of the Australian Tax Office's compliance model" (2012) 10 (2) *eJournal of Tax Research*, 436; S Hamilton, "New dimensions in regulatory compliance – building the bridge to better compliance" (2012) 10 (2) *eJournal of Tax Research*, 483.

¹³ Ibid and see also, P Dolan, M Hallsworth, D Halpern, D King and I Vlaev, "Influencing Behaviour: The Mindspace Way", (2012) 33 (1) *Journal of Economic Psychology*, 264.

¹⁴ For example, K Walsh, "Understanding Taxpayer Behaviour – New Opportunities for Tax Administration" 43 (2012) *The Economic and Social Review*, 451; J Alm, "Measuring, Explaining, and Controlling Tax Evasion: Lessons from Theory, Experiments, and Field Studies", (2012) 19 (1) *International Tax and Public Finance*, 54; J Alm, T Cherry, M Jones and M McKee, "Taxpayer Information Assistance Services and Tax Compliance Behavior", (2010) 31 (4) *Journal of Economic Psychology*, 577; and OECD, *Right from the Start: Influencing the Compliance Environment for Small/ Medium Sized Enterprises*, Information Note, (2012 OECD Forum on Tax Administration).

¹⁵ OECD, *Responsive Government: Service Quality Initiatives* (OECD 1996); OECD, *Principles of Good Tax Administration – Practice Note* (GAP001) (OECD 1999, amended 2001); OECD, *Taxpayer Rights and Obligations* (GAP002) (OECD 2003); OECD, *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies* (OECD 2015) DOI:10.1787/tax_admin-2015-en.

¹⁶ For a classification of taxpayer rights see Bentley, above n 11, ch 4.

all revenue bodies operate with a formal set of taxpayers' rights set out in law or other statutes, and/or in administrative documents."¹⁷

The US, with arguably the most complex system in the world, took the view under the National Taxpayer Advocate, Nina Olsen, that communication of existing core rights was important in helping "taxpayers better understand their rights in dealing with the tax system."¹⁸ Accordingly, in 2014 the IRS adopted the Taxpayer Bill of Rights, which brought together the multiple existing rights from across the tax code in an accessible form.¹⁹ In countries such as the United Kingdom, New Zealand and Australia, which were early adopters of taxpayers' charters, there was often criticism of the form and content,²⁰ but they are under regular review as tools both to assist taxpayers and inform them of rights.²¹

Why is this differentiation in the way taxpayer rights are described, framed and used important? It is because the language and its context tend to blur the intent and purpose of the debate. While the term 'taxpayer rights' is not necessarily a technical term it is often used as such. It can be appropriated by any interest group intent on putting forward a particular perspective. Often this is a political perspective or a perspective with political implications. Sometimes it is a communication tool. It is incumbent on lawyers, tax experts and researchers and tax administrators to communicate their message in the most effective way. This is particularly true of initiatives such as taxpayer charters or communications where the purpose is to explain legal remedies and success is based on engaging the audience.

This is not to say there is anything wrong with this use and adoption of language. The development of the term 'taxpayer rights' is based on the linguistic reality, as Edelman describes it, that there "is no one 'real' perception, then, but a cognitive structure with alternative facets, possibilities, and combinations appearing as the observer encounters new situations."²²

In examining the theory of taxpayer rights, who is using the term and the way they frame it conveys, as Edelman puts it, "a metonymic evocation of a larger structure of beliefs".²³ We define our own roles and beliefs by the language we use. By this I mean that, for example, a

¹⁷ OECD (2015), above n 15, 282.

¹⁸ IRS Press Release, *IRS Adopts "Taxpayer Bill of Rights;" 10 Provisions to be Highlighted on IRS.gov*, in Publication 1, IR-2014-72, June 10, 2014, <https://www.irs.gov/uac/Newsroom/IRS-Adopts-Taxpayer-Bill-of-Rights%3B-10-Provisions-to-be-Highlighted-on-IRSGov,-in-Publication-1> (accessed 14 October 2015).

¹⁹ *Ibid.*

²⁰ On the United Kingdom, see for example, The Chartered Institute of Taxation, *A Taxpayers' Charter for the United Kingdom* (CIOT 2008); On New Zealand, see for example, AJ Sawyer, "A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries: Have New Zealand Taxpayers' Been 'Short-changed'?", *Vanderbilt Journal of Transnational Law*, (1999) 32 (5), 1345; and on Australia, D Bentley, "The Taxpayers' Charter: More than a Mission Statement" (1996) 4 *Taxation in Australia - Red Edition* 259, D Bentley, "Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules" (1996) 25 *Australian Tax Review* 97. Several jurisdictions' approaches are reviewed in Bentley, above n 8.

²¹ For example, in Australia reviews for effectiveness have been undertaken over the years of the operation of the Taxpayers' Charter by the Australian Taxation Office, the Australian National Audit Office and by the Inspector-General for Taxation.

²² Murray Edelman *Political Language: Words That Succeed and Policies That Fail* (1977 Academic Press), 10.

²³ *Ibid.*, 16.

revenue authority's statement about taxpayer rights is given by the recipient of the statement a broader meaning, redolent with the recipient's own understanding of and experience of the revenue authority.

Understanding and experience can incorporate metaphor and emotion. Consider where the recipient of a statement about audit rights is made to someone who has recently been involved in a tax dispute during an audit – themselves or advising a client. If a revenue authority sets out a statement about rights during an audit, the picture in the mind of a taxpayer is of the experience, good or bad, that they have had with tax audits. It will frame how the taxpayer or adviser interprets the statement. The meaning will likely be different between taxpayers or advisers based on their experiences. Experiences can thus create cognitive myths that bear no relation to the statement actually made by the revenue authority.

This does not preclude a common understanding of taxpayer rights and how they might be formulated – legislatively or otherwise expressed – administered and enforced. However, it cautions against assumptions of intent and purpose and can raise issues such as inherent bias in decision-making.²⁴ It also brings to the fore the issue of context and diversity.

Take the Base Erosion and Profit Shifting (BEPS) project undertaken by the OECD and G20, which engaged with over 80 other countries in reaching its recommendations. The *Executive Summaries: 2015 Final Reports* notes that:²⁵

Political leaders, media outlets, and civil society around the world have expressed growing concern about tax planning by multinational enterprises (MNEs) that makes use of gaps in the interaction of different tax systems to artificially reduce taxable income or shift profits to low-tax jurisdictions in which little or no economic activity is performed. In response to this concern, and at the request of the G20, the Organisation for Economic Co-operation and Development (OECD) published an Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) in July 2013. Action 1 of the BEPS Action Plan calls for work to address the tax challenges of the digital economy.

The BEPS project is a clear (and legitimate) political statement. The Action Plan acknowledges the limitations of the law and articulates a statement of intent. However, the way elements of the package have been taken up in local politics, has often framed the debate in a form that emphasises breach of trust and fairness of the tax system and the importance of individual taxpayers and their rights.

In Australia, for example, politicians and newspapers support early legislative action and talk of Australia being 'fleeced', the urgent need to 'name and shame', and that governments have turned "a blind eye to the bleeding obvious that the way we have tackled aggressive

²⁴ Analysed in Martin Lodge and Kai Weigrich *Managing Regulation: Regulatory Analysis, Politics and Policy* (2012 Palgrave Macmillan).

²⁵ OECD, *OECD/G20 Base Erosion and Profit Shifting Project Executive Summaries 2015 Final Reports*, (OECD 2015), 5.

tax minimisation in the past has been woefully inadequate".²⁶ Contrast this with the reported view of the leaders of the US Senate Finance Committee and House Ways & Means Committee, counselling caution and that "Congress will craft the tax rules that it believes work best for US Companies and the US economy".²⁷ Reminiscent of the hearings of the 1980s and 1990s, *Forbes* forecasts one view that:²⁸

Now that the BEPS initiative is getting close to its year-end deliverables, it has elevated beyond the insular world of tax theory and caught the attention of senators and congressmen, rightfully so. The U.S. must ensure that BEPS doesn't further complicate the U.S. tax code or damage its business interests.

The reality is that there are large areas of the law which remain opaque, which is why the BEPS project is working assiduously to narrow their scope. Exacerbating the problem of common understanding is the challenge of establishing common meaning across diverse legal and tax systems, the difficulty of common expression of highly technical terms in different languages, and the challenges that flow from often radically different cultural, social, economic and political approaches to tax collection and administration.²⁹

While it may be feasible to establish a broadly common approach to and understanding of a technical term such as 'permanent establishment' and the meaning of 'preparatory or auxiliary' characteristics, the concept of tax administration is immediately more complex in that it requires action by an administrator, with particular powers, in a particular context embedded with its own richness and depth of meaning.

Whereas the BEPS project does have the advantage at the higher level of using a relatively common and accepted vocabulary developed over more than a century of tax treaty negotiation, taxpayer rights have a far shorter conversational history. A combination of a digital world and rapid globalisation means that there is the possibility for telescoping the conversation and establishing common understanding more quickly.

However, there is an immediate danger that the same speed of dialogue will lead to assumptions of understanding. To use a playground analogy, many players may need to get hurt before we can develop an agreed understanding of what the rules of the game mean in practice. Both revenue authorities and taxpayers will have different understanding and expectations, particularly when operating across jurisdictions. The history of tax negotiation suggests that over time, taxpayers will come to understand different countries' interpretations³⁰ and most taxpayers will voluntarily comply.

²⁶ For example, Heath Ashton, "Senate aims to out tax dodgers with register of offending corporates" *The Sydney Morning Herald*, August 16, 2015, <http://www.smh.com.au/federal-politics/political-news/senate-aims-to-out-tax-dodgers-with-register-of-offending-corporates-20150815-gizpdu.html> .

²⁷ Joe Harpaz, "Congress Girds for a Showdown Over Global Tax Plan" *Forbes*, Jun11, 2015, <http://www.forbes.com/sites/joeharpaz/2015/06/11/will-u-s-congress-throw-a-wrench-in-beps/> .

²⁸ Ibid.

²⁹ See Bentley, above n 11, ch 3, V Tanzi, *Taxation in an Integrating World* (1995 The Brookings Institute) and V Thuronyi (ed) *Comparative Tax Law* (2003 Kluwer Law International).

³⁰ F Engelen, *Interpretation of Tax treaties under International Law* (2004 IBFD), ch 10 and ch 11.

This is a relatively benign outcome. The most important development for taxpayer rights in the last twenty five years is that most taxpayers and revenue authorities have reached a similar conclusion that it is important to create an environment that encourages and incentivises voluntary compliance.

A less benign outcome could occur now that globalisation has drawn broader political attention to the share of tax take. The World Trade Organisation has faced seemingly insurmountable obstacles in the detail of negotiating multilateral outcomes where countries are focused justifiably on protecting their own interests.³¹ The global head of tax for KPMG, Greg Wiebe, is reported as saying in relation to the BEPS project that the problem for taxpayers will be a 'country by country approach' and "If every country goes its own way, you could end up with a situation that's way worse than what we have today".³²

Part 2: The fundamental principles and rules

With what tools should we face the task of maintaining a legitimate and effective tax system? How do we approach the misty areas where law, regulation and practice merge? It is easy to go straight to the rules that should be enshrined in any compilation of documents comprising the taxpayer rights that should be protected. However, it is useful to identify the principles that have been used over the centuries, most often since Adam Smith in 1776, to identify what is required of a tax system.³³ Although they vary, depending on the context, they reflect the approach taken in most reviews of tax systems.³⁴ More importantly, they provide, together with the fundamental rules, a basis for any framework of taxpayer rights, legal or otherwise.

The principles can be summarised as follows:³⁵

Equity and fairness

- Taxation system design should take account of horizontal and vertical equity.
- It is important that the public perceives the tax system as fair.
- Inter-nation equity should be considered for international elements.

Certainty and simplicity

- Tax rules should not be arbitrary.

³¹ Discussed in JS Odell, "How Should the WTO Launch and Negotiate a Future Round?" (2015) 14 (10) *World Trade Review*, 117-133, DOI: <http://dx.doi.org/10.1017/S147474561400038X> .

³² Richard Gluyas, *The Australian*, 13 Oct 2015, available at <http://www.businessspectator.com.au/news/2015/10/13/financial-services/uniform-tax-plan-needed-kpmg?t=4f998390586bb092380f1fc77945641db27e302> .

³³ *An Inquiry into the Nature and Causes of the Wealth of Nations* (Selected Edition), (1993 Oxford University Press), 450.

³⁴ An analysis of some of the most influential reviews is set out in CR Alley and D Bentley, "Remodelling Adam Smith's Tax Design Principles", (2005) 20 *Australian Tax Forum* 579. The principles have been used in similar form since then in reviews such as James Mirlees et al, *Tax by design* (OUP Oxford 2011) and Australian Government, *Re:think: Better tax, better Australia* (2015) <http://bettertax.gov.au/> .

³⁵ I am grateful to the members of the Tax Committee of the Law Council of Australia for their input into refining these principles as part of the Law Council submission to the *Re:think: Better tax, better Australia* project, *ibid*.

- Tax rules should be applied to commerce in accordance with the structures and mechanisms by which commerce operates. Commerce should not be compelled to operate in a manner which is convenient for the collection of tax.
- Tax rules should be as clear and simple to understand as the complexity of the subject of taxation allows, so that taxpayers can anticipate in advance the tax consequences of a transaction including knowing when, where and how the tax is to be accounted.
- There should be transparency and visibility in the design and implementation of the tax rules.

Efficiency

- Compliance and administration costs should be minimised and payment of tax should be as easy as possible.

Neutrality

- The tax system should not impede or reduce the productive capacity of the economy.
- Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.
- Capital import neutrality and capital export neutrality should be considered.

Effectiveness³⁶

- The system should collect the right amount of tax at the right time without imposing double taxation or unintentional non-taxation at both the domestic and international levels.
- The system should be flexible and dynamic to ensure a match with technological and commercial developments.
- The potential for active or passive non-compliance should be minimised while keeping counter-acting measures proportionate to the risks involved.

These principles will always compete and overlap with each other. The art of taxation design is to balance the principles most effectively in achieving the intended purpose. Vertical equity, for example, is often sacrificed to achieve other principles. As the Carter Commission put it in 1966:³⁷

We realize that some of the objectives are in conflict, in the sense that movement toward one goal means that others might be achieved less adequately. Simultaneous realization of all the goals in some degree will constitute success if, as we hope, our choices as to the appropriate compromises adequately reflect the [informed] consensus....

³⁶ This principle incorporates the principles of 'sustainability' and 'policy consistency' articulated in the 'Henry Review': Commonwealth Government, *Australia's Future Tax System: Final Report*, Chapter 2:1 available at http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm.

³⁷ Canada, *Report of the Royal Commission on Taxation* ('Carter Report') Vol 2, *The use of the tax system to achieve economic and social objectives* (1966) ch 1.

The principles frame a discussion of the basic rights of taxpayers in tax systems. They demonstrate that the 'social compact' of the state and its citizens is underpinned by exercise of these rights in conjunction with the imposition of obligations to pay taxes.³⁸ They also help to place the rules in a global context.

My analysis of the source documents; ranging from constitutions, through treaties and legislation to administrative charters and service standards; has identified a list of globally accepted rights. I term these Primary Legal Rules, as they are most effective when supported by law. Reference to the basic principles is in brackets.³⁹

1. Tax must be imposed by law (tax rules should not be arbitrary).
2. Tax law must be published (tax rules should be transparent).
3. Tax law must not be imposed retroactively (taxpayers should be able to anticipate in advance the consequences of a transaction).
4. Tax law must be understandable (tax rules should be certain: clear and simple to understand).
5. Tax law must not be contradictory (tax rules should be certain).
6. Taxpayers must be able to obey the law (tax rules should be effective and certain).
7. Frequent change must not undermine the tax law (tax rules should be certain).
8. Tax law must be applied (tax rules should be certain, fair, transparent and effective).

In the context of tax law, rules 4 to 8 focus on different aspects of the requirement for certainty. Rules 1, 2 and 4 to 8 reflect the European Court of Human Rights' threefold test for determining whether an interference with an ECHR right is in accordance with law.⁴⁰ It must have a basis in law, the law must be accessible and the law must allow the consequences of an action to be foreseeable or certain.⁴¹

The following additional legal rules derive from the basic principles. They are consistently found in sources of legal rules such as charters of rights and constitutions. They can be distinguished from subsidiary or what I term secondary legal rules and administrative rules, which although they express a right in similar terms, often give it a different substance.⁴²

9. Taxpayers need pay no more than the correct amount of tax (tax rules should be effective and certain).
10. Tax law should not impose double taxation (tax rules should be fair and effective).
11. Tax rules should not discriminate and there should be equality before the law (tax rules should be fair and equitable).

³⁸ Bentley, above n 11, ch 2.

³⁹ This analysis was first set out in Bentley, *ibid*, 219.

⁴⁰ C Ovey and RCA White, *Jacobs & White European Convention on Human Rights* (3rd ed, 2002 OUP), 201.

⁴¹ *Ibid*.

⁴² For example the right of access to the courts is a fundamental right that should have higher order protection through a constitution or similar instrument. The content of that right of access in tax cases is usually a secondary legal rule concerned with the administration of the tax system in the context of the wider court process.

12. Tax rules should satisfy the principle of proportionality (tax rules should be effective, fair and equitable).
13. Taxpayers should have the right to privacy (tax rules should be fair).
14. Taxpayers should have the right to confidentiality and secrecy (tax rules should be fair).
15. Taxpayers should have the right of access to information (tax rules should be fair).
16. Taxpayers should have the right of access to the courts (tax rules should be fair), which should demonstrate the following characteristics:⁴³
 - (a) an independent and impartial tribunal;
 - (b) a fair and public hearing;
 - (c) a fair trial;
 - (d) the right to remain silent;
 - (e) the right to representation; and
 - (f) public judgment within a reasonable time.

Primary legal rules provide the framework for all other rules. Some of the 16 listed rules may be collapsed more conveniently into a rule that covers more than one concept. However, the combination of these generally accepted principles and rules provide a firm foundation on which to assess any combination of approaches to taxpayer protection. It does not matter whether it is driven by politics, economics or behavioural psychology. In every situation, it is possible to assess whether a rule, practice or action is in breach of the fundamental principles and rules.

In the book *Taxpayers' Rights: Theory, Origin and Implementation* I expand on the principles and rules to develop a more comprehensive Model of taxpayers' rights, which can be contextualised to and applied in any jurisdiction.⁴⁴ However, for the purposes of this article, the principles and rules set out in this part provide sufficient basis to analyse the continuing development of taxpayer rights.

Part 3: A changing context for Taxpayer Rights: Pragmatic rights

Taking a step back, it is clear that we are faced with domestic tax systems that must operate on a global stage. It is often beyond the capacity of politicians, administrators, lawyers and tax advisers, let alone taxpayers, to make sense of disparate taxes systems operating at different levels within a nation state.⁴⁵ Now they are being asked to operate much more intentionally in a global context without a global government, but where individual nations devise and apply their own rules in their own way. Bilateral and multilateral treaties bring some clarity, but deep opacity remains.

There are fundamental issues that each jurisdiction confronts. Do the general laws provide sufficient protection to taxpayers? If not, should specific protection for taxpayers be

⁴³ The European Convention, Art. 6 for the protection of Human Rights and Fundamental Freedoms (1950) (ECHR).

⁴⁴ Above, n 11.

⁴⁵ Simon James and Alison Edwards, 'Developing Tax Policy in a Complex and Changing World' (2008) 38(1) *Economic Analysis and Policy*, 35.

provided by law, or does this make the remedies too prescriptive, specialised and narrow? On the other hand, is administrative remedy and flexibility of little help to a taxpayer in extreme circumstances? How do we balance the competing principles so that the rule of law is seen to be reasonably fair and just and, in doing this, how should we adapt for culture and context both domestically and across borders?

A significant shift has occurred in recent decades. Taxpayer rights debates in the last two decades of the 20th Century focused on developing an understanding of taxpayer rights and how they might be implemented.⁴⁶ The context was often framed as one of legal versus administrative rights. How a taxpayer might enforce a right was seen as a critical issue. Administrative rights and service charters were not recognised by many as providing sufficient protection and therefore meaning or substance as taxpayer rights.⁴⁷

However, the more research has emerged to show the importance of trust in society and its institutions, the more revenue authorities have eased back on the levers of power and coercion to apply the full panoply of measures that can engender voluntary compliance.⁴⁸ In one sense, this can be treated with scepticism from a rule of law perspective. One of the fundamental features of a legal rights framework is enforceability.⁴⁹ In another sense, behavioural economics and psychology reinforces the view that practical enforceability most of the time, even without a right to take a matter to court, provides a powerful right.⁵⁰

A concomitant development is the rise of the modern ombud with specialised jurisdiction extending to matters of taxation. Whereas historically governments eschewed most forms of administrative review of revenue administration, the new approach to voluntary compliance recognised the importance of agencies designed to reassure taxpayers that the system is fair.⁵¹ Sometimes administrative ombuds are given traditional powers and are independent of the revenue authority, for example, the Australian Inspector-General of Taxation has assumed a complaint handling role in relation to tax matters.⁵² Often ombuds

⁴⁶ P Baker and AM Groenhagen, *The Protection of Taxpayers Rights – An International Codification* (2001 European Financial Forum); Bentley, above n 20; and Sawyer, above n 20.

⁴⁷ My own views have changed since D Bentley, "Taxpayers' Charter: Opportunity or Token Gesture?" (1995) 12 *Australian Tax Forum* 1, but see CIOT, above n 20, for contrary views.

⁴⁸ Ayres and Braithwaite, above n 12, V Braithwaite above n 12 and A Prinz, S Muehlbacher and E Kirchler, "The slippery slope framework on tax compliance: An attempt to formalization" (Feb 2014) 40 *Journal of Economic Psychology*, 20.

⁴⁹ A feature, for example, of HLA Hart's framework for rule recognition in *The Concept of Law* (2nd ed, 1994 Clarendon Press) and WN Hohfeld's jural relationships in *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1978 Westport). See further, DN MacCormick, "Rights in Legislation" in PMS Hacker and J Raz (eds) *Law, Morality and Society: Essays in Honour of HLA Hart* (1977 Clarendon Press), 189.

⁵⁰ See, for example, V Braithwaite, K Murphy and M Reinhart, "Threat, motivational postures and responsive regulation" (2007) 29 *Law & Policy*, 137; V Braithwaite (ed) *Taxing democracy: Understanding tax avoidance and evasion* (2003 Ashgate); and Prinz, Muehlbacher and Kirchler, above n 48.

⁵¹ Ibid, and see Alley and Bentley, above n 34, and C Alley, D Bentley and S James, "Politics and Tax Reform: A Comparative Analysis of the Implementation of a Broad-Based Consumption Tax in New Zealand, Australia and the United Kingdom" 24 (2015) 15 *Revenue Law Journal* (<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1244&context=rlj>).

⁵² Inspector-General of Taxation Act 2003 (Cth) and Ombudsman Act 1976 (Cth). See further analysis in JM Farrar, ME Donnelly and SB Dhaliwal, "Procedural Aspects of Tax Fairness: A Content Analysis of Canadian Tax Jurisprudence", (2013) 11 *The ATA Journal of Legal Tax Research*, 21; F Serrano, "The Taxpayer's Rights and the Role of the Tax Ombudsman: An analysis from a Spanish and Comparative Law Perspective" (2007) 35 *Intertax*,

have an association with the revenue authority, as does the US National Taxpayer Advocate.⁵³

While some ombuds have less influence and power than others,⁵⁴ their existence and focus on matters of taxation raises the profile of taxpayer rights. Increasingly, there are other forms of interaction and consultation between revenue authorities and government officials responsible for tax policy and taxpayers and taxpayer representative bodies.⁵⁵ It differs depending on the jurisdiction and how open government is. But there is a growing momentum across the breadth of tax law, tax administration and tax related services, which acknowledges the importance of protecting taxpayer rights in a broad sense and to build a community perception that the tax system is fair.⁵⁶

In essence, governments and revenue authorities have developed a much clearer basis for a self-interested recognition of taxpayer rights. The self-interest is based on taxpayer perceptions of fairness and an effort to establish trust levels that maximise voluntary compliance.⁵⁷ This means that although established theory and principles should govern our regulation and interaction, we have entered an era of what can be termed pragmatic right recognition.

This applies equally in overcoming political barriers where revenue authorities or taxpayers are negotiating across jurisdictions. A growing acceptance of the importance of effectiveness of tax systems and a shared approach to problem solving requires mutuality. Often the power legally remains in the hands of the revenue authority. However, practically, public engagement with the administration of taxpayer rights and tax administration, whether through the offices of an ombud, through representative bodies or through the media, may prove an increasingly powerful enforcement mechanism.

This proposition draws support from the theory of the firm and the incentives driving economic activity. Roberts argues that:⁵⁸

When choice variables are complementary, any environmental change that increases the attractiveness of raising one of the variables tends to result in all of them being increased. This gives rise to systematic, predictable patterns in how the choices move in response to environmental changes.

331; K Aima, "A European Tax Ombudsman" in P Pistone, *Legal Remedies in European Tax Law* (2009 IBFD): 180; and L van Schalkwyk, "Constitutionality and the Income Tax Act – revisited" (2004) 12 (2) *Meditari Accountancy Research*, 185.

⁵³ 26 USC §7803(c).

⁵⁴ For example, the breadth and scope of activity and the resources provided to the US National Taxpayer Advocate even though the office is part of the IRS can be compared with the limited resources and much narrower powers of the independent Australian Inspector-General of Taxation.

⁵⁵ OECD, *Study into the Role of Tax Intermediaries* (2008 OECD); HL Gutman, "The Role of the Tax Advisor in the Changing World of Global Tax Administration: The 2012 Erwin N. Griswold Lecture Before the American College of Tax Counsel", (2012) 65 (3) *Tax Lawyer*, 461; OECD (2015), above n 15.

⁵⁶ OECD (2015), above n 15.

⁵⁷ See, for example, SR James, "The importance of fairness in tax policy: behavioural economics and the UK experience" (2014) 3 (1) *International Journal of Applied Behavioural Economics*, 1.

⁵⁸ J Roberts, *The Modern Firm* (2004 Oxford University Press) 50.

It is arguable that there is likely to be a similar correlation between complementary tax choices.⁵⁹ Where, for example, there are complementary choices involving tax treatment the same principle is likely to apply. For example a company has choices in the new BEPS environment. It can do one or more of, for example, following a ruling or taking advantage of a safe harbour, consciously reviewing grey areas to establish tax certainty, taking steps to mitigate the risk of future audits, developing a positive relationship with relevant tax authorities, and developing a positive media profile as a contributor to society. Taking one choice does not make it necessary to take the others, but it does make it more likely that complementary choices will follow.

Complementarity of interests forms the basis for the development of pragmatic rights. The reasons why it is in each party's interests to act in a particular way might diverge, but pragmatic self-interest drives a mutually beneficial outcome. This is the basis for the Slippery Slope Framework and the delicate balance between trust and power to deliver voluntary compliance. What it also delivers is pragmatic rights that are provided to engender trust.

Part 4: The continuing importance of legal rights

The changing nature of law to encompass soft law and the further development of pragmatic rights has not diminished the importance of legal rights. Legal rights provide in most legal systems the protection for citizens of the sixteen basic rules outlined above in Part 2. The development of soft law and pragmatic rights relies on the existence and generally long-term implementation of the rule of law and legal rights. It is only within that context and building on long-established trust in the instrumentalities of the state, that effective voluntary compliance can flourish.⁶⁰

The twentieth century saw the development of international rights documents, built on the theories, laws and practices of history, symbolised perhaps in the celebration of 800 years since the Magna Carta.⁶¹ International bodies such as the United Nations, the International Court of Justice and regional bodies, such as the European Court of Human Rights, brought reality to the concept of international law in a form not seen before in history. Inroads began to appear even into traditional exclusions of taxation from the operation of treaties,⁶² often for economic and political self-interest as discussed above.⁶³

Taxation flows from the basic property rights that are recognised to a greater or lesser extent in all modern societies.⁶⁴ Taxation is primarily concerned with funding the state and

⁵⁹ Decision-making is a complex science. However, where complementarity is intentional, for example, through regulation, as in the BEPS example, correlative choices are a logical outcome; see A Leicester, P Levell and I Rasul, *Tax and benefit policy: insights from behavioural economics* (2012 The Institute for Fiscal Studies).

⁶⁰ Braithwaite, Murphy and Reinhart, above n 50 and V Braithwaite, above n 50.

⁶¹ JC Holt, *Magna Carta* (3rd ed revised by G Garnett and J Hudson) (2015 Cambridge University Press).

⁶² H Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands" (2013) 9 (2) *Utrecht Law Review*, 52; R Persson- Österman, "Human Rights in the Field of Taxation: a view from Sweden" (1999) 2 *The Cambridge Yearbook of European Legal Studies*.

⁶³ Discussed in Gribnau, *ibid*.

⁶⁴ Discussed in Bentley, above n 11, ch 2.

redistributing social goods. From most perspectives, taxpayer rights identify the limits on how that is achieved. In the same way as there are fundamental human rights, which provide limits on, for example, state interference with individual liberties; there is broad consensus on the flow of fundamental rights into the area of taxation.

However, the detailed scope and application of taxpayer rights depends to a great extent on the balance between state and individual rights in each jurisdiction. This is to be expected given role of taxation in redistribution of social goods. It also means that within each jurisdiction, the changing politics and norms of society will see swings in the way rights and their application are viewed. The political and soft law scenarios described above illustrate this point and for the most part depend on the establishment and effective operation of legal protection.

The broadening general acceptance of the application of the rule of law outside traditional Western legal systems provides a sound basis for genuine recognition of taxpayer rights. For example, China is moving towards application of the rule of law in a form more commonly understood by foreign investors,⁶⁵ demonstrated in the October 2014 Fourth Plenum of the 18th Central Committee. Investment expectations, which are now embodied in a range of bilateral and multilateral free trade agreements, also contribute to a shared understanding of how taxpayers expect to be treated in their effort to comply voluntarily with local tax laws.

What this says is that there are basic legal rights necessary for the rule of law to operate. As discussed, even where these do not exist in a constitution or bill of rights, they may yet be observed in practice. Legal protection, from the perspective of a lawyer, particularly in respect of fundamental or primary legal rights is ideally entrenched in a document such as a bill of rights. However, all legal protection for taxpayers, provided the legal system is effective, provides confidence in the broader system of government, including the just operation of the tax laws.⁶⁶ A critical question is how to make the transition from an environment which relies heavily on the power of the law, to one in which there is sufficient trust in the organs of state for 'soft law' and 'pragmatic rights' to develop.

Part 5: The transition from legal rights to pragmatic rights

Why has soft law become so important and how have pragmatic rights emerged? What is it about legal rights that limits their applicability? Fundamentally, the law provides a framework for human activity in a society that enables it to operate freely and effectively with minimal interference.⁶⁷

As an example, where the law is brought to bear, the costs can become significant. That is a major driver to move to alternative forms of dispute resolution. It is seen as an achievement and not a failure when matters are resolved without court intervention.⁶⁸

⁶⁵ R Peerenboom, *China's Long March Toward Rule of Law* (2002 Cambridge University Press Cambridge).

⁶⁶ See B Croome, *Taxpayers' Rights in South Africa* (2010 Juta's Law Publishers) and Bentley, above n 11.

⁶⁷ See Bentley, above n 11, ch 2 and Gribnau, above n 62.

⁶⁸ See, for example, T Sourdin and A Shanks, *Evaluating Alternative Dispute Resolution in Taxation Disputes* (2015 Australian Centre for Justice Innovation, Monash University); Deborah M Nolan and Frank Ng, "Tax

The same emphasis on voluntary compliance, which has seen the growing importance in soft law, underpins government and revenue authority focus on engaging with taxpayers so that they perceive the tax system is fair, just and legitimately exacting taxes. What are the drivers for 'law in action' and engagement to reinforce that sense of legitimacy? In part it is the changing nature of society, the ongoing technology-driven communication revolution, and an expectation that citizens participate in critical monitoring of government and its agencies.

There is a danger that law is not accessible or understandable and this extends to taxpayer rights. Legal rights are often spread across multiple laws and their application to tax law and practice may not be commonly understood.⁶⁹ This can undermine taxpayer confidence in the system.

The US Taxpayer Bill of Rights is an administrative document, which specifically seeks to overcome this concern by drawing together the disparate legal and administrative protections "into 10 broad categories, making them easier to find and understand".⁷⁰ The Taxpayer Bill of Rights does not create new rights, but makes existing rights accessible to taxpayers and their advisers, and importantly to IRS officials.

South Africa has a Bill of Rights enshrined in its Constitution.⁷¹ It also has multiple laws relevant to the law and administration of the tax system. In 2005 the Minister of Finance announced a project to bring the tax administration provisions, which incorporated many taxpayer rights, into a single piece of legislation.⁷² This was achieved with the Tax Administration Act 2011 (Act No 28 of 2011), which developed, refined and updated South Africa's legally protected taxpayer rights. Yet Beric Croome notes that a 1997 Taxpayers' Charter and 2005 South African Revenue Service Client Service Charter have dropped out of use and he advocates for the introduction of a US style Taxpayer Bill of Rights to ensure that taxpayers can see that they have rights and that they are accessible.⁷³

These examples demonstrate the critical importance of interconnectedness between effective legal protection of taxpayer rights and administrative rules, procedures and practices that implement the legal rules. In almost every sphere of human activity, the effectiveness of that activity depends upon the actors having the information they require to do it and being persuaded that they should do it. A study by Alley, Bentley and James across New Zealand, Australia and the UK of the politics behind the introduction of successful tax reform confirmed what should be a self-evident proposition. Ongoing

Dispute Resolution: A New chapter emerges", 6(May 30, 2011) 2 *Tax Notes International* 733-34 and Bentley, above n 11, ch 5.

⁶⁹ See the discussion in Bentley, above n 11 at 39.

⁷⁰ Taxpayer Bill of Rights Fact Sheets, available at <https://www.irs.gov/Taxpayer-Bill-of-Rights> .

⁷¹ Chapter 2, *Constitution of the Republic of South Africa 1996* <http://www.gov.za/documents/constitution-republic-south-africa-1996> .

⁷² Minister of Finance, 2005 Budget Review announcement, see <http://www.sars.gov.za/Legal/TaxAdmin/Pages/default.aspx> .

⁷³ Beric Croome, *Should the South African Revenue Service adopt a Taxpayer Bill of Rights?* 14 July 2014 <http://www.bericcroome.com/2014/07/should-south-african-revenue-service.html> .

communication, transparency and engagement with taxpayers and a wide range of experts is critical to broad acceptance and successful implementation of reform.⁷⁴

Transparency, communication and engagement are also fundamental building blocks to build trust and improve voluntary compliance.⁷⁵ Revenue authorities and ombuds are often at the forefront of new engagement and communication initiatives, responding quickly and effectively to taxpayer and adviser concerns. Regular consultation in Australia, reinforced by recommendations from the Inspector-General of Taxation for example, has resulted in improvements ranging from: the better use of risk assessment tools for risk identification and improved targeting of compliance activities; to streamlining identity authentication through voice recognition.⁷⁶

Law-in-action requires the application of the tools of coercive and persuasive power.⁷⁷ However, the role of law is to create a system that is fair and just. The scales of justice should balance equally the rights of society's most vulnerable against the mighty power of the state. The law alone can do little in the complexity of a modern state to achieve its purpose. That is why pragmatic rights found in administrative rules and service charters; a focus on voluntary compliance instead of pure coercion; and the wide range of communication and interaction between citizens and the state, are so important in giving law its meaning.

In an age where, for the average citizen, disposable income is increasing, where more people have to pay tax or engage with the tax system for tax transfers, where life is becoming more complex and the tax system has to respond;⁷⁸ communication and engagement using new technologies becomes commensurately more important for the tax system.⁷⁹ At the same time the mobility of individuals and businesses is a natural

⁷⁴ C Alley, D Bentley and S James, "Politics and Tax Reform: A Comparative Analysis of the Implementation of a Broad-Based Consumption Tax in New Zealand, Australia and the United Kingdom" 24 (2015) 15 *Revenue Law Journal* (<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1244&context=rlj>).

⁷⁵ J Hasseldine, P Hite, S James and M Toumi, "Persuasive Communications: Tax Compliance Enforcement Strategies for Sole Proprietors" (2007) 24 (1) *Contemporary Accounting Research*, 171; A Prinz, S Muehlbacher and E Kirchler, "The slippery slope framework on tax compliance: An attempt to formalization" (2014) 40 *Journal of Economic Psychology*, 20. See also, the comparative analysis by C Kogler, L Batrancea, A Nichita, J Pantya, A Belianin and E Kirchler, "Trust and power as determinants of compliance: Testing the assumptions of the slippery slope framework in Austria, Hungary, Romania and Russia" (2013) 34 *Journal of Economic Psychology*, 169.

⁷⁶ See Inspector-General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools* (Commonwealth of Australia 2013) <http://igt.gov.au/files/2014/12/use-of-risk-assessment-tools.pdf> and the ATO response at <https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Inspector-General-of-Taxation/>; and the response to requests for simpler identity verification at <https://www.ato.gov.au/newsroom/smallbusiness/general/say--yes--to-voice-authentication/>.

⁷⁷ Prinz, Muehlbacher and Kirchler, above n 75.

⁷⁸ The effects can be seen most evidently in developing countries. For example, see Y Hodges, *Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean* (2013 USAID), ch 6; House of Commons International Development Committee, *Tax in Developing Countries: Increasing Resources for Development*, HC 130 (2012 House of Commons).

⁷⁹ K Walsh, above n 14; CW Lee, *Do-It-Yourself Democracy: The Rise of the Public Engagement Industry*, (2015 OUP); D Linders, "From e-government to we-government: Defining a typology for citizen coproduction in the age of social media" (2012) 29 *Government Information Quarterly*, 446; JC Bertot, PT Jaseger and JM Grimes,

consequence of the global emphasis on free trade. Governments usually want to attract trade and investment. Confidence in the legal system and the ease of doing business is an important attractor.⁸⁰

As trade and investment flows and mobility increase, nations naturally want to secure the revenue contribution from their own residents and to ensure that they are getting a “fair share” of revenue from economic activity within their jurisdiction. Hence the OECD projects to improve transparency, information exchange and the current BEPS project. However, a point of tension will be how we manage the application of the law and practice of taxpayer rights in the context of increased scrutiny.

John Keane introduces the concept of ‘monitory democracy’ in his history of democracy, *The Life and Death of Democracy*, as the successor to ‘representative democracy’.⁸¹ He notes the importance of extra-parliamentary power-monitoring institutions and this is certainly true in the sphere of taxation. Combine this with the pervasive use of technology and Keane suggests that the notion of government will need to reinvent itself to respond to powerful public engagement at every level. The same can be said of the law and taxpayer rights. BEPS is the most recent example of the challenge nations have in responding to domestic and global tensions. Resources are constrained; the public generally wants more. Keane describes it as “the longing to bend the present world into a different and better future”.⁸²

Law-in-action and soft law will see the increasing emergence of pragmatic rights. However, the successful application of soft power must, as Prinz, Muehlbacher and Kirchler suggest,⁸³ be balanced by trust. Historically, the transition was slow, given that government and revenue agencies took time to build a reputation of trust. The three decades, for example, between the popularly named US Taxpayer Bill of Rights 1 passed in 1988,⁸⁴ and the US Taxpayer Bill of Rights introduced in 2014 have seen significant trust-building activity by the Internal Revenue Service.

However, the caution is that soft law is built on trust. Trust is built on a legal rights framework which works and builds public confidence. As noted in the Preface to the National Taxpayer Advocate’s 2014 Annual Report to the US Congress, “the lack of effective administrative and congressional oversight, in conjunction with the failure to pass Taxpayer Rights legislation, has eroded taxpayer protections enacted 16 or more years ago”.⁸⁵

“Promoting transparency and accountability through ICTs, social media, and collaborative e-government” (2012) 6 *Transforming Government: People, Processes and Policy*, 78.

⁸⁰ See, for example, the World Bank Group Economy Rankings, which rank economies on their ease of doing business: <http://www.doingbusiness.org/rankings> ; The SelectUSA Initiative, <http://selectusa.commerce.gov/> and government reports on increasing trade, eg Australian Government, *Australia in the Asian Century*, White Paper 2012.

⁸¹ John Keane, *The Life and Death of Democracy* (Simon & Schuster London 2009).

⁸² *Ibid*, 1.

⁸³ Prinz, Muehlbacher and Kirchler, above n 48.

⁸⁴ Technical and Miscellaneous Revenue Act of 1988 PL 100-647 Subtitle J.

⁸⁵ National Taxpayer Advocate, *Annual Report to Congress 2014*, available at <http://www.taxpayeradvocate.irs.gov/reports-to-congress/2014-annual-report-to-congress/full-report>.

Technology and the rise of ‘monitory democracy’ offer the opportunity to fast track the process of building trust. However, as in the commercial world, reputation and trust can be undermined very swiftly. Instantaneous technology and broad media and popular scrutiny, for example, are attributed with creating a revolving door for the role of Prime Minister in Australia.⁸⁶ For the first time in its history, the intensity of scrutiny and monitoring has resulted in Australia having five prime Ministers in as many years. Revenue authorities and executive arms of government will inevitably be subject to similar scrutiny and monitoring in the application of their powers to taxpayers. This provides a different dimension to the balance of power and how revenue authorities and other agencies will need to act.⁸⁷

The reality is that there is no transition from a ‘legal rights’ framework to a ‘pragmatic rights’ framework. Rather they will become even more inextricably integrated. Citizens will see the legitimate operation of the rule of law as a combination of the legal rules and their broader extrapolation in soft law. In other words, pragmatic taxpayer rights may become as important as legal taxpayer rights in assessments of the effectiveness of a tax system. An effective matrix of pragmatic rights may also become a means to check the health of a tax system and how well the rule of law is operating not simply for citizens in distress, but for average citizens in their everyday interactions with that tax system.

Conclusion

A theoretical framework must cater to the realities of diverse legal and tax systems. Furthermore, the framing of potential remedies, particularly in the administration of the law, must be cognisant of how these are most effectively accessible and enforceable in different systems. Nonetheless, fundamental principles and legal rules underpin any tax system and are suitable for application in diverse political, social and economic environments. They are designed to reinforce the ‘social compact’ and make society work.

Fundamental taxpayer rights are best protected legally. However, it is equally important that there are additional layers to the legal system including independent offices such as a taxpayer ombud. Taxpayer rights must be disseminated, and understood by both tax administrators and taxpayers and their advisors. Law-in-action and the implementation of the pragmatic rights that represent the day-to-day reality of the tax system become an expectation.

Legal rights increasingly combine with self-interested behaviours on the part of both tax administrators and taxpayers to create a system in balance that provides high levels of voluntary compliance. While compliance frameworks can help to establish the appropriate balance, the power and trust relationships are being shaped by the changes in society. Among these is the emergence of alternative dispute resolution procedures and independent umpires, whose offices are given the power to protect pragmatic rights and to deal with systemic problems.

⁸⁶ For example, Troy Bramston, “Revolving-door PMs not healthy for the nation”, *The Australian*, September 28, 2015, available at <http://www.theaustralian.com.au/opinion/columnists/revolving-door-pms-not-healthy-for-the-nation/story-fnbcok0h-1227546277572>.

⁸⁷ Kathryn James, in “An examination of convergence and resistance in global tax reform trends”, *Theoretical Inquiries in Law*, (2010) 11(2) 475 analyses a number of factors that can both “contribute to tax policy convergence and provoke fierce resistance” (at 486ff). She examines factors such as the environment, power distribution, culture and institutions.

The next decades are likely to see greater pressure on revenue. However, this will be balanced by technology in the hands of both revenue authorities and taxpayers. In states governed by the rule of law, it is likely that public scrutiny by taxpayers and their representatives will increase, facilitated by technology.⁸⁸

Similarly, there will be systemic analysis by independent bodies using enhanced data collection. The same wider scrutiny will likely and should increase the effectiveness of ombuds as a critical accountability and monitoring mechanism.⁸⁹ It will create an imperative for governments and revenue authorities to engage, communicate, and provide high levels of transparency in their activities. There will be an environment conducive to reinforcing state compliance with fundamental rights and the self-interested provision of pragmatic rights. The corresponding effect required to balance the limitations on the exercise of power will be an increase in voluntary compliance by taxpayers.

The aim is an effective system where there is no need for intervention. There is a need in each jurisdiction to define rights, to provide appropriate and contextual means to enforce different rights, in a way that encourages voluntary compliance with taxpayer obligations. Recent developments in cross-disciplinary research demonstrate how the formulation and implementation of legal rules and law-in-action can improve to the benefit of both the state and its citizens. The more such insights can be incorporated effectively into the legal system, its operation, and compliance frameworks, the better the system will become.

Ultimately society depends upon trust and a social compact that works. History is littered with examples of where this has broken down. Soft law supports legally enforceable rights to provide the glue that maintains civil society. Pervasive reliance on the enforceable legal rights law suggests that a system has broken and is moving towards a failing state. That is why relationships, understanding, transparency and trust are so important. Taxpayers need to understand this just as much as the tax authorities, for part of the social compact is for citizens to be persuaded that other citizens as well as the state itself can be perceived as operating legitimately.

⁸⁸ See, for example, United Nations, Guidance Note of the Secretary-General on Democracy, available at http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file_attach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf .

⁸⁹ Ibid.