The War on Privacy – Can the OECD Common Reporting Standard be Resisted?

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth Amendment to the United States Constitution

Everyone has the right to be secure against unreasonable search or seizure.

Canadian Charter of Rights and Freedoms

Privacy as a Human Right

The concept of privacy as a human right lies buried deep in European history.

European civilisation began with the Christianisation of the barbarian tribes which settled in the ruins of the Roman Empire.

To the mediaeval mind, which placed men as brothers in Christ under God, the concept of the divine right of kings was a blasphemy. A king had great power, he was mighty in the land, but he was subject to law, including the law of God. Popes and barons could defend the rights of the Church or the King's subjects by insisting on his adherence to law or his dethronement by withdrawal of allegiance if the King did not mend his ways. The oath of allegiance taken by kings was always based on reciprocity. The King would protect his subjects and confirm them in their rights and do them justice. They, in turn, would do him homage, render fealty and bear him true allegiance. Everyone has his station in life and kingdoms were not unified bureaucracies but made up of the various estates of the realm.

In this scheme, the king had no arbitrary right to take the property of his subjects, to invade their houses and demand their money, save as provided by law, and given with the consent of the governed. In English law, every man's home was his castle.[1] Thus the mediaeval view of taxation was that it was fundamentally an aid, grant, or subsidy to the Crown, given as a gift by the Commons [2] to the Crown, usually as a result of some emergency.

The ancient principle of English law was that the King should live "off his own". The King did not need to take his subjects' money and invade their houses to see how much gold they had buried under the floor. All the King needed to do was to collect his feudal rents. That should be enough to run the country[3]. The mediaeval view was that the King was the underlying owner of the land and natural resources of the country, they were his property and he should leave private property alone.[4] If the people gave some money to the King it was by their free consent as voluntary contributors, not as slaves or serfs.[5]

But as Blackstone acknowledges[6], the Crown's lands and its feudal revenues were gradually plundered by private interests in the first great privatisation movement, beginning with Henry VIII and moving through the Enclosures to the clearings of the Highlands. Having lost its feudal revenues and having lost the ability for the poor to be taken care of on commons or Church lands, the Tudor and Stuart monarchs turned towards more and more taxation. As the Pope in Rome ceased to have power to sanction them, monarchs, both Catholic and Protestant, increasingly asserted that they were God's anointed with the power to govern without the consent of the governed or parliaments and, more ominously, that they were not above the law.[7] Louis the XIV's *"L'etat, c'est moi"* [8] represents the absolutism which shattered the boundaries of mediaeval monarchy and emphasizes the truth that "Where-ever law ends, tyranny begins"[9] (a truth seen with appalling clarity in the twentieth century in the centralization of legal power in the State in the hands of dictators such as Mussolini, Hitler and Stalin).

The reaction to the claims of absolute sovereignty by monarchs, first launched in England by Henry VIII, was the Civil War and Revolution of 1688. France had to wait another century for a revolution far more savage in response to far more absolute sovereigns, but not before England's American colonies had revolted against notions of the absolute sovereignty of Parliament.

What has all this got to do with the OECD and the Common Reporting Standard?

Well, if one thinks about it, an awful lot. The 17th and 18th century reactions against absolute monarchy were fundamentally mediaeval. They were an assertion of the fundamental human rights of the subject and were about to drawing limits to how far kings could go in depriving subjects of their rights or property. John Locke, for example, harks back to mediaeval concepts as he talks about the natural rights of the person and of property being founded upon the gift of the Creator of autonomy to the human person and the exercise by that person of his rights to the fruits of his labour.

The 18th century thus tried to restore the mediaeval barriers against the absolute power of kings by setting up against them the power of parliaments elected by the common people.

Unfortunately, they forgot one thing. Governments, whether Royal, Republican or Parliamentary all require money. The ancient rights of the Crown to its land revenues having been privatised, something had to be done to restore the public revenues. The logical approach was to substitute a land tax as was done in England after 1689. But that was never properly done and never adjusted for inflation.[10]

Taxation now became normal, instead of being an extraordinary aid or subsidy to the Crown given by the people.

Those who had defended the rights of the subject against the Crown and against absolute monarchy thought they had well secured the rights of the subject to his privacy and property by requiring that taxation could only be levied with the consent of representative parliaments. The United States Constitution even went further and strengthened the rights of the people by inserting them into the Constitution and forbidding *ex post facto* laws, bills of attainder and notably requiring in the Fourth Amendment the protection of privacy for one's personal papers.

But they reckoned wrong.

What they did not foresee was the rise of democratic absolutism, the totalitarian fascist surveillance state with powers granted by mendicant or timorous voters. History has shown that tyranny is not confined to monarchies.

When taxes were represented by excises on common necessities of life together with taxes on luxuries, and very little of the taxes were spent on cash benefits for the populace, the requirement for the consent of the governed worked well to restrain excessive taxation or the invasion of human rights. All classes of society preferred economical and limited government. Respectable people would have been shocked by the idea that governments could routinely look at their mail or their bank accounts without so much as a by your leave.

Thus the 18th century constitutional settlements naturally lead to Gladstonian finance.

It was the rise of the modern mass welfare state pioneered by Bismarck in order to bind the working classes to the new Imperial throne of the Second Reich, and later taken up in the Anglo-American world in the aftermath of the Great Depression and World War II, which changed the dynamics of tax law. As the numbers of beneficiaries of public expenditure and transfer benefits in cash or in kind increased, more and more people saw incremental taxation as less of a burden than the potential benefit from the handouts. Often any sense of moral guilt was assuaged by the fraudulent claim that unfunded intergenerational Ponzi schemes were "insurance".

This trend has accelerated since the 1970s and increased with the increasing precariousness of family support relationships in Western societies, whether between spouses, between aged parents and children or between parents and children.[11]

Partly this trend was aided by the fact that many taxes are buried or seem to be lost somewhere and not borne by anyone in particular (VAT is a major example); partly it was due to the increasingly powerful idea that it is always possible to make someone richer than yourself pay for you. As one Canadian Chancellor of the Exchequer put it "in his experience of taxation, and it was considerable, there was only one truly popular tax - the tax on the other fellow."

Hence parliaments have gradually shifted over 100 years from being protectors of the human rights of taxpayers to being among the grossest offenders against those rights. But to be fair to parliaments, much of this has been unconscious. Most politicians are merely the servants of their bureaucracies. Bureaucracies exist to keep the show on the road. The show can only stay on the road if more and more money comes in to enable the politicians to continue to bribe the electorate with their own money. The politicians therefore become less and less squeamish about blessing the increased powers forever being sought by their supposed public servants to "protect the revenue".

Thus, in major economies, gradually building up in earnest from the 1930s, domestic legislation has attacked tax avoidance schemes and tried to turn what was legal avoidance into some sort of prescribed and proscribed quasi-tax evasion.[12] Parliaments and Courts have consciously sought to blur sharp lines of liability to create legal no man's lands where taxpayers fear to tread. This of course is the antithesis of law and a repudiation of the eminently logical principle that no man is to be deprived of his property except by clear and

unambiguous words embodied in legislation enacted as his deemed consent by his representatives.

Be that as it may, until the 1990s this was largely a matter of domestic legal and tax policy debates. These things occurred at the national level and, at least in theory, in a context of domestic accountability of governments and parliaments to their citizens or subjects.

But with the launch of the OECD publication on *Harmful Tax Competition* in 1998 a new dimension has opened up.

It seems fair to say that since 1998 extraordinary violence has been done to traditional norms of international law and national sovereignty in matters of taxation. In particular, the catch cry of the American Revolution of "no taxation without representation" has been turned on its head. Sovereign countries are being told "you will help us collect the taxes we claim on activities within your borders" - and regardless of your domestic law or constitutional principles including any human rights principles.

Thus the long-standing and logical rules of dual criminality, of non-enforcement of other countries' revenue laws and respect for domestic laws on privacy and confidentiality have all been attacked by international, nonelected, bodies of "experts" appointed from various tax bureaucracies. Somehow, these unelected bodies such as the Financial Action Task Force (FATF), the Global Tax Forum, the OECD and the IMF have elevated themselves to become the masters of sovereign governments. It is they who now lay down so-called "international standards" which sovereign countries are meant to adhere to, in areas ranging from company law, trust law, personal property law, banking law, privacy law and tax law.

With amazing ease, and a success that has probably astonished them as much as the German generals were astonished by the success of the Wehrmacht against France in 1940, these international clubs bureaucrats, with the assistance of enthusiastic and one suspects selectively briefed journalistic claques, have ridden waves of public fear and resentment through the war on terror and the global financial crisis towards their aims. They have skilfully concealed the reality that these purported new "international norms" are emerging as an unaccountable and almost unstoppable blitzkrieg against the sovereignty of nations and the human rights of their subjects.

The OECD's latest effort for automatic exchange of tax data as embodied in the Common Reporting Standard[13] endorsed by the G20 is an assault on human rights as bold and daring as could be imagined. By routing the debate away from domestic scrutiny in national parliaments and serving the results of a pre-orchestrated agenda back to national parliaments through the edicts of the OECD, a non-elected body representative of bureaucrats and not even appointed by parliaments and one with even less legitimacy than the European Commission, the international tax bureaucracies have skilfully sought to sidestep all domestic national constitutional requirements and processes. The process has become even more obnoxious by being skilfully embedded in G20 agendas. What leader of a government or what finance minister will look carefully at an agenda item which promises him easy revenue from some overseas pot of gold and uncritical press support?

If, for example, the US Congress and the US administration openly said to their electorate that they were passing legislation to get full information on all the financial assets and income of every American in order to give it to any foreign government in any country where

any American citizen might choose to live, one can imagine that quite a substantial proportion of the electorate or the Congress might start thinking about the Constitution and the Bill of Rights. Similarly, if the Canadian government openly did the same thing, one might imagine lawyers starting to tell taxpayers that the Canadian Charter of Rights and Freedoms might have something to say on the matter. Similarly, one might imagine that the city of London might be saying something to the British Cabinet.

The singular beauty for politicians of having the OECD Common Reporting Standard endorsed by the G20 is that politicians such as President Obama or Prime Minister David Cameron can simply say that, while it may be regrettable, it is necessary and they can take no unilateral action and the government must be seen to be a "good international citizen" [14]

The OECD common reporting standard is endorsed by the G20 is thus one of those unnoticed turning points in history. If it succeeds and is not resisted, for the first time in human history, eventually any government will be able to track the personal financial wealth of every one of its citizens.

What has been popularised in the mass media as a necessary attack on anti-social tax evaders starts to look very different when one considers that information goldmines are being created for ruthless politicians seeking to squeeze their critics, for criminal gangs planning identity theft and looking for target accounts for online hacking, or for kidnappers seeking profitable targets. Indeed, it is astonishing that Western Governments with large domestic bureaucracies and large financial institutions with staff running into the hundreds of thousands seem so indifferent to the incentives they are creating for the infiltration or corruption of their staff. It is not that long ago that the Russian Mafia were seducing and using girls in the employ of the Bank of New York to launder billions.

There is a great deal of concern and reaction against mass government surveillance, without warrant or any judicial oversight, over the communications of citizens. The revelations made by WikiLeaks and Edward Snowden about the extent of government hacking into private communications has not only disturbed but shocked and angered people. The reaction has perhaps not been as savage as one might expect because so many people feel powerless to object in the age of terror and might think that it least some of the surveillance had a socially useful purpose namely forestalling murderers. But when one puts this alongside government access to all the financial accounts of every citizen things get serious indeed. If governments can hack into mobile phones, once they know the account numbers, why can't they hack into financial accounts? Why can't they seize assets before warrants are issued? Why can't they make sure that people who are charged with any offence of any kind are deprived of the means to mount a defence in the courts?

The whole concepts of accountability and transparency of been turned on their heads. Instead of governments being accountable to those who elect and pay for them and being transparent so that their masters, the people, can see what they are doing, the private person is being made accountable and his affairs transparent to faceless bureaucrats. The idea that public affairs are public and private affairs are private (and no one else's business) has been inverted and perverted.

Practical resistance

Domestic resistance

Just as in the 17th and 18th century, there were courageous men who dared to speak out against abuses of power, and doctrines absolute monarchy or absolute sovereignty of unrepresentative parliaments, so we can hope that others will now arise and point to the obvious reality that all this is simply a slimy and slippery recrudescence of totalitarianism – the doctrine that the citizens exists for the State.

Hopefully civil liberties groups will realize that the "war on drugs", the "war on terror" and any other political wars have morphed into a war on basic civil liberties and into a war on taxpayers and a war on basic privacy.

External resistance

In the meantime, until unaccountable unelected international bureaucracies are brought to heel, one hopes that resistance will be led by some nation states and domestic jurisdictions realising at long last the violence the new so-called international norms are doing to their sovereignty, their citizens' rights, as well as the potential damage being done to their economic welfare.

Many offshore financial centres do grasp that private clients often have legitimate nontax reasons for wanting to place assets in anonymous structures. They think therefore that tax disclosure will not necessarily diminish their attractiveness. They are wrong. Private clients in major OECD countries know that even lawful tax planning will often be attacked as vigorously as naked evasion a nondisclosure. They also know that tax disclosure may negate or destroy the other advantages sought by placing assets offshore. For example, if a family patriarch or matriarch is dragged into a legal fight over the legitimacy of a particular offshore financial structure, the advantage he or she sought to obtain by having an anonymous structure sheltered from potential creditors or claims by disappointed heirs may be negated. Fundamentally, many offshore centres seem not to realise that their financial services sectors are under very real threat. Some seem to want to console themselves with the idea that there will be enough corporate work to compensate for the loss of private client work. Perhaps the attacks upon Ireland and Luxembourg may be lifting the veils from their eyes.

Legal resistance

However unless and until domestic opinion and countries or jurisdictions under attack, from Andorra through Delaware to Liberia, force a change of policy, tax advisors, notably lawyers, are going to have to totally rethink the nature of international tax planning for individuals.

Fundamentally, tax law is now irrelevant. The real issue is protecting the privacy of clients. Tax lawyers are returning to what they were in the 17th century, defenders of human rights.

Sir Frederick Pollock in the land laws remarked that the history of English land law was a history of the struggle of the government to create a public registry of land ownership and the successful resistance of the landholders to any such register. Thus Henry VIII failed in his attempt to destroy trusts and where registration of title has been adopted, as in Australia and New Zealand, it has learnt to coexist with undisclosed beneficial interests.

Looking at the OECD Common Reporting Standard as a lawyer, one thing stands out. It does not make sense. It never defines what ownership is. Because it is trying to be all things to all

tax authorities, it tries to create a reporting system which catches both beneficial ownership and control as if they were one and the same thing. That of course is a legal nonsense.

The purported standard states "The term "Controlling Persons" means the natural persons who exercise control over an Entity. In the case of a trust, such term means the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions. The term "Controlling Persons" must be interpreted in a manner consistent with the Financial Action Task Force Recommendations."[15] This is, of course, about as clear as mud. Any lawyer will quickly point out that it is the trustees who "control" and it is the Court who will control them. They will also point out that a Settlor may be dead or defunct and a Protector or beneficiaries not even known. As for other legal arrangements, what is meant?

If control is the test for taxation, then the United States Treasury Secretary should be paying tax on the whole US budget. A lawyer asks what do you mean by ownership, what do you mean by control? What if the control is joint? What if the control is delegated? Her Majesty is the Queen of the Commonwealth of Australia but virtually all her powers have been delegated since 1901 to her appointed Governor-General (though she can still exercise them personally when in the country). But the Governor-General in turn has to act on the advice of his Prime Minister, who in turn has to command the support of his Cabinet and a majority in the Parliament. So who is in control?

Turning to ownership, the purported standard says "The term "Account Holder" means the person listed or identified as the holder of a Financial Account by the Financial Institution that maintains the account. A person, other than a Financial Institution, holding a Financial Account for the benefit or account of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for purposes of this Annex, and such other person is treated as holding the account."[16] This attempt to substitute beneficial owners for legal owners looks set to have about as much success as Henry VIII's *Statute of Uses* had in seeking to do the same thing by executing the trust. [17]

If ownership is the test for taxation, Her Majesty is in law the ultimate owner of all the land of the Australian Commonwealth. But she has granted all kinds of titles to land, from fee simple to perpetual lease to conditional lease to licence. In turn those to whom she has granted it have created leases, trusts or further licences over her lands. So who owns the land?

When one looks at the richness of the law and the infinite subtlety of its concepts and the ability to blend and combine contract, trust and other legal doctrines to achieve the result the client wants, one sees that the OECD bureaucrats suffer from the usual vice of tax economists (I can say this knowingly, having a PhD in economics from Harvard). They have simply assumed that economic concepts of ownership and control are simple objective things which exist in nature.[18] Just as they do not realise the word "income" requires precise definition and is meaningless without a means of specifying whose income or where that income arises, so the OECD common reporting standard faces a fundamental dilemma.

If it asks for beneficial ownership, there may be none, as in a fully discretionary trust or a purpose trust such as a charity.

If it asks for control, there may be many controllers.

If it asks for both, it may get an embarrassment of riches. For example, a trust may be set up for classes of private persons, for public institutions and for public charitable purposes. A a Physiocrat or disciple of Henry George may be quite happy to create a trust to benefit not only his children grandchildren and great-grandchildren, but also the study of rational taxation and in relation thereto to provide benefits to such national tax offices as are willing to abolish taxes on labour and capital in favour of collecting public revenues from land and other natural resources of the nation. This is not fanciful. Trusts have been created by patriotic persons willing to permit their trustees to benefit not only their families but the nation as a whole. Who in such cases is the beneficiary?

However, I had better stop pointing out logical problems and deficiencies here since the purported standard goes to state "A jurisdiction must have rules and administrative procedures in place to ensure effective implementation of, and compliance with, the reporting and due diligence procedures set out above including… rules to prevent any Financial Institutions, persons or intermediaries from adopting practices intended to circumvent the reporting and due diligence procedures" [19] In plain English, this translates as "we do not know what we are doing but we think you should know and should do as we would like you to do (if we had thought about it) and if you don't guess rightly what we mean by 'should' you should be punished."

Such arrogance is breathtaking. Of course, private citizens will take every step they can to protect their privacy. They have every right to do so and they have every right to the services of lawyers in doing so. It is an ancient constitutional principle of English law that "everything which is not forbidden is allowed". Equally citizens and lawyers are under no duty to comply with vague requirements left unformed in the breasts of bureaucrats - *lex non promulgata non obligat* (an unpublished law does not bind).

The corruption of constitutional government

What is so disturbing about the purported Common Reporting Standard is its corruption of legal principles which have been at the centre of constitutional and limited government. It is demanded that the domestic laws of every country on Earth should be made to conform to the edicts of a group of anonymous unaccountable bureaucrats and that ancient rights and liberties should give way to the demands of the OECD and its sponsoring bureaucrats from various national treasuries.

It was the dictum of Lord Acton that "power corrupts, absolute power is apt to corrupt absolutely". Pitt the Elder earlier recalled John Locke and something similar "Unlimited power is apt to corrupt the minds of those who possess it; and this I know, my lords: that where law ends, tyranny begins."[20]

The Common Reporting Standard is an example of the corruption of due process at the hands of a global club of bureaucrats unrestrained by any nation's laws or constitutional traditions.

To go back to basics, one may ask what legal or moral right does one country, country A, have to tell another, country B, that country B should help country A collect tax on income or profits or income arising in country B, just because the income or profits may belong to a resident of country A or, even more remotely, to a company or trust in country B owned, controlled or funded by that resident of country A? What Divine Law or Law of Nature may

be cited for the proposition that extended "residence-based" income taxation is the "standard" to which all nations and peoples must conform? Whatever happened to territorial sovereignty? Not only citizens of both countries but the sovereign of country B ought to be offended by such presumptuousness.

Personally, watching politicians as both a civil servant inside and outside a cabinet room and as a lawyer and a voter have been rather inclined to the view that absolute power confuses absolutely. I most admired the Senator (Senator Harradine) I served who actually was so wise (and rare) as not to want it.

Perhaps the ultimate judgement which history will make on the common reporting standard is that to have all the information at your disposal that you would like is to guarantee that you really know nothing. Making a bigger haystack reduces rather than increases your chance of finding the needle. Information is neither knowledge nor wisdom. It may in fact be perfectly useless and in the real world of human affairs, where behavioural responses are possible, edicts from above often are useless.

Ownership and control are what lawyers choose to make of them and good lawyers are nothing if not creative. Just as the great conveyancers of the 17th century pioneered the development of settlements over landed estates, so, one trusts, the legal profession will rise to the defence of legitimate rights of privacy and property. One can certainly think of various methods of sending the search for "ownership" or "control" in the direction of hunting for a metaphysical quark.

In this, lawyers have a heavy responsibility. Their talents can indeed be sought by nefarious persons seeking to conduct criminal enterprises. But if lawyers adhere to the proper and noble traditions of the profession and confine themselves in accordance with legal and basic ethics to the securing of the rights of citizens who are merely seeking to secure their privacy and safety, lawyers will have nothing for which to apologize and should be recognized as the defenders of among the most basic of human rights.

Perhaps some will say, let us not worry about such matters. The OECD and G20 had and have legitimate historic grievances against the abuse practised or condoned by tax havens and surely the OECD and G20 must have reached the end of their demands against other counties and the liberties of their own citizens. Such an argument is redolent of a speech given in 1938[21] by a former Chancellor of Germany.[22]

But to ignore the provocations of the OECD and its relentless assault on basic concepts of international law, sovereignty and the liberties and rights of their own citizens is to mistake the fundamentally totalitarian nature of the Common Reporting Standard. It is to condone the notable failures of OECD nations to curb their profligate spending, their corrupt interlocking networks of influence between bailed out banks and governments and their failures to raise revenues from their own lands and natural resources.[23]

The triumph of this totalitarianism is not inevitable. Resistance will not be useless. Sometimes, one just has to say "No". But even if the evil of a globally integrated network of surveillance States comes to pass, embracing regimes from nakedly authoritarian such as Russia to purportedly "human rights" based jurisdictions (such as the USA was intended to be), we have at least one consolation. It just won't work. But like all disastrous experiments in human history, from the Terror of the French Revolution to the collapse of the Bolshevik

Empire, this experiment will inflict needless suffering and it were better that an end be put to it sooner, rather than in the rueful wisdom of hindsight.

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[1] The doctrine dates back to 1300 and was pronounced by Sir Edward Coke, in *Semayne's case* (1604), famously stated: "The house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose." In 1760, Pitt the Elder recalled this ancient legal doctrine "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail, its roof may shake, the wind may blow through it. The rain may enter. The storms may enter. But the king of England may not enter. All his forces dare not cross the threshold of the ruined tenement." William Blackstone, in Book 4, Chapter 16[16] of his Commentaries on the Laws of England,[17] proclaims that the laws "leave him (the inhabitant) the natural right of killing the aggressor (the burglar)" and goes on to generalize in the following words:

> *And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with immunity: agreeing herein with the sentiments of ancient Rome, as expressed in the works of Tully;[18] quid enim sanctius, quid omni religione munitius, quam domus uniusquisque civium?[19] For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers…"*

The doctrine is the origin of the Fourth Amndment to the US Bill of Rights. Hostility to searches and invasions of privacy were a major cause of the smouldering taxpayer discontent which led to the American Revolution. That seems to have been forgotten in the brave new world of FATCA and the "common reporting standard".

[2] As F W Maitland observes in *The Constitutional History of England* , Cambridge University Press, 1920, pp 67-68, 95 the idea that taxation is a free-will offering to the lord and a gift by consent (originally individual consent) lies deep in English history and is the basis of the later demand that such consent had to be sought from elected representatives as authorised agents of the common people and from the estates of the realm. It is interesting to note that abbotts and bishops sometimes refused to make gifts to the Crown – not for them the agenda of "Christian Aid" http://www.christianaid.org.uk/actnow/trace-the-tax/

[3] It is interesting the oil States have often more or less been able to do this. Of major economies, Russia in a curious way has renationalized oil revenues as a major part of its public revenues but has not reversed, through land or rent charges, other dirty privatizations of land and other natural resources.

[4] Thus Jacob Viner writes "All of St Thomas' [Aquinas] references to taxation that I know of treat it as a more or less extraordinary act of a ruler which is as likely as not to be morally illicit. …. A medieval papal bull, *In Coena Domini*, which apparently continued to be republished each year until late in the eighteenth century, threatened with excommunication all rulers 'who levied new taxes or increased old ones, except for cases supported by law, or by an expression permission from the pope.'" pp 104-*105 Religious Thought and Economic Society: Four chapters of an unfinished work* (ed Jacques Melitz and Donald Winch, Duke University Press, 1978.

[5] Thus Adam Smith refers in his famous maxims to taxpayers as "contributors" and makes what seems to modern ears the strange statement "Every tax, however, is to the person who pays it a badge not of slavery, but of liberty", *Wealth of Nations* Book V, Ch ii, g para 11, p 857. Glasgow edition, 1976. What he means is that slaves are property and cannot give consent as free men to contribute out of their own property to the support of the King's government. Pitt the Elder had the same concept of free consent in mind when he said "Taxation is no part of the governing or legislative power...When, therefore, in this House we give and grant, we give and grant what is our own." Speech in the House of Commons on the Stamp Act (14 January, 1766) and repeated years later "The spirit which now resists your taxation in America, is the same which formerly opposed loans, benevolences, and ship-money, in England: the same spirit which called all England *on its legs*, and by the Bill of Rights vindicated the English constitution: the same spirit which established the great, fundamental, essential maxim of your liberties, *that no subject of England shall be taxed but by his own consent*." Speech in the House of Lords (20 January, 1775) .

[6] Sir William Blackstone, *Commentaries on the Laws of England*, Book I, Ch 8 p 306 "this hereditary revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits arising from the other branches of the *census regalis* are likewise almost all of them alienated from the Crown: in order to supply the

deficiencies of which we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the King's *extraordinary* revenue. For, the public patrimony being got into the hands of private subjects, it is but reasonable that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals, whose ancestors have had no share in the general plunder, than upon others; yet, taking the nation throughout, it amounts to nearly the same, provided the gain by the extraordinary shall appear to be no greater than the loss by the ordinary revenue." Blackstone thought this a good thing for the liberty of the subject. He is now being proved wrong. Apart from the obvious objection that future generations did not enjoy the plunder, it has been an inevitable historical necessity that governments which have had their sources of revenue stolen by vested interests have eventually been driven to strike back and plunder the legitimate hard-earned property of both the rich and the poor. From this point of view, the dirty Russian privatizations and the Putin seizures back are a simply fast forward version of English history. Henry VIII's despoliation of Church lands and disposals of Crown lands to favourites inevitably led to the surtax rates which exceeded 90% post World War II and, that failing, to mass PAYE and VAT upon the masses.

[7] The theory of the "divine right of Kings" is fundamentally a post-mediaeval, post-Reformation doctrine. It cannot be squared with any common law tradition at any time or Continental European tradition before then. One could have an interesting inquiry into the extent to which the re-adoption of Roman Imperial jurisprudence contributed to ideas of the omnipotence of the ruler and of the State and a "top down" rather than "bottom up" concept of law, whereby law does not come from custom but from edict. The nadir of such ideas may be found in such books as *The Myth of Ownership: Taxes and Justice* Lliam Murphy& Thomas Nagel, Oxford University Press, New York 2002. Fundamentally they argue (contrary to history and common law) that there can be no property rights without government, no government without taxes and therefore taxes are just as much part of the legal system as basic laws of property. In effect, taxation is the coeval price of private property. The argument is about as sensible as saying that there can be no children without parents: therefore parents should have the right of dominion over their children to the extent of demanding from them 100 per cent of their earnings forever.

[8] In this he was notably different to Charles I who set great store by legality.

[9] John Locke *Two Treatises of Government* Book II, Ch. XVIII "Of Tyranny" Section 202 "Where-ever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate; and, acting without authority, may be opposed, as any other man, who by force invades the right of another. This is acknowledged in subordinate magistrates. He that hath authority to seize my person in the street, may be opposed as a thief and a robber, if he endeavours to break into my house to execute a writ, notwithstanding that I know he has such a warrant, and such a legal authority, as will impower him to arrest me abroad. And why this should not hold in the highest, as well as in the most inferior magistrate, I would gladly be informed. Is it reasonable, that the eldest brother, because he has the greatest part of his father's estate, should thereby have a right to take away any of his younger brothers portions? or that a rich man, who possessed a whole country, should from thence have a right to seize, when he pleased, the cottage and garden of his poor neighbour? The being rightfully possessed of great power and riches, exceedingly beyond the greatest part of the sons of Adam, is so far from being an excuse, much less a reason, for rapine and oppression, which the endamaging another without authority is, that it is a great aggravation of it: for the exceeding the bounds of authority is no more a right in a great, than in a petty officer; no more justifiable in a king than a constable; but is so much the worse in him, in that he has more trust put in him, has already a much greater share than the rest of his brethren, and is supposed, from the advantages of his education, employment, and counsellors, to be more knowing in the measures of right and wrong."

[10] Sir Frederick Pollock notes "It had been proposed at an earlier time to compensate the Crown for the loss of feudal dues by assessment of a fixed money rent on the enfranchised lands. This method was not now adopted, but the excise duties which had been invented by the Long Parliament and renewed under the Commonwealth were granted to the King, 'to the intent and purpose that his Majesty, his heirs and successors, may receive a full and ample recompense and satisfaction' for the feudal incidents…" p 131 *The Land Laws*, 3rd edition, London, Macmillan, 1896. Thus the landholders successfully sought to throw their rent charges to the Crown onto the backs of the labouring poor. But things have not changed. OECD officials enjoying tax-free salaries in the best traditions of the *ancien regime* now recommend increased VATs or GST's on workers while supporting policies to drive interest rates to zero and, as a consequence, land (and hence housing) prices towards infinity. One

wonders whether young Europeans appreciate the irony of some "modern" policies being as regressive as those of the late 1600s.

[11] As one colleague remarked to the author " the main problem as I see it is a more fundamental one: with the breakdown of religion in society and the breakdown of families in the West, people have come to believe in high taxation – or at least higher taxation – as the main means of providing support for them when they need it. It would be much better if such support were given by extended families where they exist, and by charities where they don't. Government is by its nature bureaucratic, inefficient and very expensive when it gets involved in welfare, a state of affairs made worse when it is permeated by a secular ethos which has no mechanism for getting people to trust each other. Government's fundamental problem is that it cannot love.

However this is not the way that most people see it. With divorce rates heading towards the 50% mark it is quite understandable that people see the government as a more reliable provider of welfare than their spouses, and a nation that gives very little money – never mind time – to charity can hardly be expected to see charity as a solution either. Government then makes matters worse still by crowding families and charities out, so that people either can't afford to look after each other (because their money has all disappeared in tax), or think that they don't need to bother (because they see the government doing the job)." Indeed, one monograph in Australia once (accurately, if impolitely) described single mothers as "Brides of the State". One might see all this as the outcome of a disordered libertarianism - "I can do what I like, but you have to pay the consequences."

[12] The UK "transfer of assets abroad" legislation and the US attacks on foreign passive investment holding companies come to mind.

[13] http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf

[14] Whatever that might mean in the case of countries which have embarked upon unprovoked wars against sovereign states in the Middle East - whether or not anyone liked the rulers of Libya or Iraq is rather beside the point.

[15] Common Reporting Standard p 39

[16] Common Reporting Standard p 41

[17] Thus Sir Frederick Pollock observes of the *Statute of Uses* (designed to abolish trusts) "a measure intended to compel notoriety and simplicity became the chief instrument of secrecy and complication", pp 2-3 *The Land Laws*, 3rd edition, 1896.

[18] As Sir Frederick Pollock observed "It is commonly supposed that land belongs to its owner in the same sense as money or a watch. This has not been the theory of English law since the Norman Conquest, nor has it been so, in its full significance, at any time." *The Land Laws* p 12.

[19] Common Reporting Standard p 42

[20] Case of Wilkes. Speech (January 9, 1770)

[21] September 26, 1938, http://www.greatspeeches.net/2013/05/adolf-hitler-no-more-territorial-demands.html

[22] I am not the only one to recognize appeasement to "mission creep" over the years as OECD demands move from step to step. See, for example, Brian Garst and Andrew Quinlan October 14, 2013 *Appeasement Unlikely to Save Hong Kong From OECD's Radical Agenda* http://briangarst.com/article/appeasement-unlikely-to-save-hong-kong-from-oecds-radical-agenda and a different but, nonetheless, factually consistent view from Adrian Sawyer *Feeling the Heat: Will Hong Kong Succumb to International Pressure for Enhanced Transparency, Cooperation and Information Exchange on Taxation Matters?* AIIFL Working Paper No. 15 July 2013, Asian Institute of International Financial Law, Faculty of Law, The University of Hong Kong http://www.law.hku.hk/aiifl/wp-content/uploads/2012/07/AIIFL-Working-Paper-No-15.pdf

[23] It is notable in this context that the OECD even admits that taxes on immobile land are more efficient than taxes on labour or mobile capital but still peddles VATs and GSTs (disguised payroll tax equivalents) and extended "residence based" taxation of deemed foreign income from mobile capital. See Johansson, Å., C. Heady, J. Arnold, B. Brys and L. Vartia (2008), "Taxation and Economic Growth", OECD Economics Department Working Papers, No. 620 and OECD *Preparing Fiscal Consolidation* "As for tax hikes, they should rely on the least growth-distorting instruments. Taxes ***on immobile bases***, (emphasis added) such as property, and consumption are less distortive than those on factor income (such as personal and corporate income)." http://www.oecd.org/tax/public-finance/44829122.pdf It is strange that the OECD does not recognize a GST is just a flat rate labour income tax which exempts savings. Be that as it may, why should any country feel obliged to help out countries with huge untaxed, indeed subsidized, land bubbles? Curiously, one OECD researcher candidly admitted to me at a seminar that the reason European countries can't tax their own landholders was that it was politically impossible. There was no answer to my question as to why that domestic political consideration should legally or morally oblige foreign tax havens to help out by surrendering their sovereignty and the privacy of their own businesses, citizens and clients.