

DEMOCRATIC DISCOURSE, TAXATION AND HYPOTHECATION

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This article considers taxation from a perspective of democratic discourse and uses propositions for hypothecated taxes to illustrate transparency and government accountability. First, contemporary sovereignty in relation to taxation is sketched. Michel Foucault's concept of 'governmentality' and its principal implications for taxation are taken into account. Second, Jürgen Habermas's model of discursive democracy is outlined. Third, the principle of accountability and the practice of transparency are outlined. It is concluded that hypothecation is unlikely to enhance accountability in taxation, which, from a perspective of discursive democracy, should be pursued through an open and honest discourse between accountable government and its citizens.

1. INTRODUCTION

The right to levy taxes is 'an attribute of sovereignty',¹ and, conversely, a full obligation to pay taxes is a feature of citizenship.² Globalisation affects the ways sovereignty and citizenship are conceived.³ The idea of sovereignty uniquely vesting in the nation state has become moot, whereas the increased mobility of citizens

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¹ Joseph H Beale, 'Jurisdiction to Tax' (1919) 32 *Harvard Law Review* 587, 587.

² Among developed countries, the United States draws the closest connection between citizenship and tax liability. For a discussion, see Robert J Misesy Jr, 'Simplifying International Jurisdiction for United States Transfer Taxes: Retain Citizenship and Replace Domicile with the Green Card Test' (1992) 76 *Marquette Law Review* 73, 73-121. In this article 'citizenship' is not used in a technical legal sense and includes permanent residency.

³ Following Robert Patman and Chris Rudd, 'Introduction – New Zealand Sovereignty in the Era of Globalization' in Robert Patman and Chris Rudd, *Sovereignty under Siege: Globalization and New Zealand* (Ashgate, 2005) 1, 2, 'globalisation' may be defined as 'the intensification of interconnections between societies, institutions, cultures, and individuals on a worldwide basis'.

may have loosened the bonds of the national political community. In this context, thinking about national taxation benefits from reconsideration in various regards. This article examines one aspect of such reconsideration, namely why it is desirable for accountable government to engage in a transparent and open discourse with its citizen-taxpayers.

First, contemporary sovereignty in relation to taxation is sketched. Foucault's concept of 'governmentality' and its principal implications for taxation are taken into account. Furthermore, a contemporary conception of citizenship is sketched. Following Marshall, this article is premised on a conception of strong or social citizenship. Second, Habermas's model of discursive democracy is outlined. Once critique is accommodated, Habermasian theory provides a plausible model for discursive democracy in relation to taxation. Third, the principle of accountability and the practice of transparency are outlined. The cognate concept of tax visibility is also considered. Hypothecation proposals, in terms of which specific revenues are earmarked for particular purposes, are then used to illustrate the points raised, and conclusions are drawn.

2. SOVEREIGNTY, TAXATION AND CITIZENSHIP

2.1 Contemporary sovereignty

'Sovereignty is a notoriously elusive concept',⁴ nevertheless it is axiomatic that the sovereign may raise taxes within its jurisdiction.⁵ Indeed, taxation is so central to governance, it is a defining characteristic of the modern state. Thus, for Parsons:

The modern system of money taxation is highly exceptional in history. It is both dependent on a high development of a

⁴ Hidemi Suganami, 'Understanding Sovereignty through Kelsen/Schmitt' (2007) 33 *Review of International Studies* 511, 511.

⁵ See Thomas Hobbes, *Leviathan* (Dent, first published 1651, 1973 ed) 108. This sovereign right is usually made subject to the consent of the governed. See John Locke, *Two Treatises of Government* (Dent, first published 1690, 1990 ed) 189.

DEMOCRATIC DISCOURSE

market economy, and has an important influence upon it. It is most appropriate to a type of organization of the state in which those who 'make their living' out of the activities of the state are primarily remunerated in the form of money salaries and where there is the same kind of separation between the sphere of 'office' and of private life that there is in 'capitalistic' economic organization.⁶

However, at a time when international treaties and organisations, notably the World Trade Organization (WTO),⁷ but also human rights conventions,⁸ greatly determine the governance structures and rules within states, and transnational capital holds the potential to dictate the terms of government policy,⁹ the very idea of the sovereign nation state has become moot.¹⁰ Participation in the neoliberal form of globalisation typically requires implementation of particular domestic policies, including financial liberalisation, privatisation and deregulation, openness to foreign direct investment, a competitive exchange rate, fiscal discipline, and lower taxes.¹¹ Whether state sovereignty has withered under these conditions or, as Dora Kostakapoulou plausibly argues, 'mutated',¹² the critical point

⁶ Talcott Parsons, 'Introduction' in Max Weber, *The Theory of Social and Economic Organization* (A M Henderson and Talcott Parsons trans, Free Press, 1964) 3, 50 [trans of: *Wirtschaft und Gesellschaft* (first published 1921)].

⁷ Makere Stewart-Harawira, *The New Imperial Order: Indigenous Responses to Globalization* (Zed Books, 2005) 27 observes that the WTO establishes 'the constitution of the global economic order'.

⁸ Jean Baudrillard, 'The Global and the Universal' in Victoria Grace, Heather Worth and Laurence Simmons (eds), *Baudrillard West of the Dateline* (Dunmore Press, 2003) 23, 33 refers to human rights as 'the zero degree of democracy', a globalised 'totemic brand'.

⁹ Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1986) 28.

¹⁰ See generally, for example, Kenichi Ohmae, *The End of the Nation State: the Rise of Regional Economies* (Free Press, 1995).

¹¹ See Paul O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7 *Human Rights Law Review* 483, 483.

¹² Dora Kostakapoulou, 'Floating Sovereignty: Pathology or a Necessary Means of State Evolution?' (2002) 22 *Oxford Journal of Legal Studies* 135, 142 n 35.

is that globalisation and the neoliberal ascendancy has not left the state's capacity to act unaffected. Nevertheless, while conservatives and libertarians may propose restrictions on government's capacity to raise taxes,¹³ there is no plausible philosophical challenge to the state's fundamental power to levy taxes on economic activity within its jurisdiction.¹⁴ However, practical barriers, such as inter-state tax competition, may be significant.¹⁵ It is submitted that, in the light of these developments, the contemporary state needs to justify anew its right to tax. Such a justification can be achieved through democratic reconnection, so that government reaffirms its mandate to tax through open and honest discourse with citizen-taxpayers.

2.2 Sovereignty and governmentality

In addition to geopolitical developments, contemporary styles of thought have affected sovereignty. Thus, Gordon argues that 'a theory of the legitimate basis of sovereignty cannot be relied upon as a means of describing the ways in which power is actually exercised under sovereignty'.¹⁶ Power, including the power to regulate society, is commonly thought to be ubiquitous and diffused.¹⁷ Likewise, in this view, it is futile to categorise instruments of government power

¹³ See, for example, Association of Consumers and Taxpayers (ACT), *Spending Cap* <www.act.org.nz/taxation-policy>.

¹⁴ Despite famously likening a tax on earnings to forced labour, the pre-eminent libertarian philosopher Robert Nozick did not reject the State's right to raise taxes; see Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, first published 1974, 1990) 169-172.

¹⁵ For a discussion of the problems of tax competition and ideas to overcome it, see Reuven S Avi-Yonah, 'Globalization, Tax Competition and the Fiscal Crisis of the Welfare State' (2000) 113 *Harvard Law Review* 1575, 1575-1616.

¹⁶ Colin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Colin Gordon, and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality: with Two Lectures and an Interview with Michel Foucault* (University of Chicago Press, 1991) 1, 7.

¹⁷ Joel Handler, 'Postmodernism, Protest and New Social Movements' (1992) 26 *Law and Society* 697, 705.

DEMOCRATIC DISCOURSE

in order to allocate juridical consequences.¹⁸ Under these circumstances, it becomes appropriate to pay attention to ‘governmentality’;¹⁹ on the practices of governance, rather than its institutions.²⁰ Gordon argues that contemporary Western society is essentially characterisable as a society of security,²¹ rather than a *Rechtsstaat* (state under the rule of law).²² In a security state, the ‘legitimacy’ of a branch of government is derived from its ability to

¹⁸ Tony Prosser, ‘Towards a Critical Public Law’ (1982) 9 *Journal of Law and Society* 1, 2-3 observes that legal positivism ignores ‘the multifarious forms of modern state intervention through the less formal devices such as circulars, tax concessions and diverse methods of state economic management’. Similarly, Gordon, above n 16, 10-11 notes that, for Michel Foucault, a defining characteristic of the police (policy) state is ‘the marginalisation of the differentiation between government by law and government by decree’.

¹⁹ Michel Foucault, ‘Governmentality’ in Graham Burchell, Colin Gordon, and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality: with Two Lectures and an Interview with Michel Foucault* (University of Chicago Press, 1991) 87, 102-103 proposes the modern pre-eminence of governmentality over sovereignty or discipline. For a more recent review of governmentality, see Nikolas Rose, Pat O’Malley and Mariana Valverde, ‘Governmentality’ (2006) 2 *Annual Review of Law and Social Science* 83, 83-104.

²⁰ Gordon, above n 16, 4. In this view, as Nikolas Rose argues, liberal democracy can be ‘understood as an art of government and a technology of rule, [which] has long been bound up with the invention of techniques to constitute the citizens of a democratic polity with ‘personal’ capacities and aspirations necessary to bear the political weight that rests on them’. See Nikolas Rose, *Inventing Ourselves: Psychology, Power and Personhood* (Cambridge University Press, 1996) 155.

²¹ Gordon, above n 16, 20. See also Pat O’Malley, *Risk, Uncertainty and Government* (GlassHouse, 2004) for an argument that that neoliberal conceptions of risk and uncertainty are complementary techniques of contemporary governance.

²² This conception of the *Rechtsstaat* may be unduly narrow. Thus, in *Ferreira v Levin NO* (1) SA 984 (CC) [250] Sachs J, for the South African Constitutional Court, said: ‘The rechtsstaat, as I understand it, is not simply a state in which government is regulated by law and forbidden to encroach on a constitutionally protected private realm. It is one where government is required to establish a lawfully regulated regime outside of itself in which people can go about their business, develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security.’

perform the functions of government actively,²³ that is, the achievement of prosperity.²⁴ This article is premised on the idea that the exercise of power must be legitimate and not merely effective.²⁵ Nevertheless, account needs to be taken of governmentality and the expectations it fosters in citizens; the *Rechtsstaat* that fails to deliver prosperity is itself exposed to risk.²⁶

Whether the state seeks to achieve desired socio-economic outcomes directly in the way of the comprehensive welfare states that flourished in the mid-twentieth century or through contemporary

²³ Traditional conceptions of legitimacy are not relevant to Foucaultian governmentality, which may be characterised as a form of governance ‘that is freed from the criterion of legitimacy, and is evaluated solely in regard to its effectiveness’; Sven Opitz, ‘Government Unlimited: The Security Dispositif of Illiberal Governmentality’ in Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (Routledge, 2010) 93, 101.

²⁴ Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (Ashgate, 2003) 42 observes: ‘A series of exogenous economic shocks to the advanced capitalist societies in the mid-1970s prevented them from delivering the levels of material well-being which had helped to guarantee continued legitimacy during the long boom of the post-war period.’ Similarly, Kostakapoulou, above n 12, 150 connects authority to ‘the quality of political projects, the effective performance of key functions and on the actions of welfare providing administration’.

²⁵ This article is, then, essentially Habermasian rather than Foucaultian in its informing principles. See Bent Flyvbjerg, ‘Habermas and Foucault: Thinkers for Civil Society?’ (1998) 49 *British Journal of Sociology* 210, 210-234 for a comparison of the central ideas of Foucault and Habermas. See also the debate between Foucault and Noam Chomsky on social justice (Paul Rabinow, ‘Introduction’ in Paul Rabinow (ed), *The Foucault Reader* (Penguin Books, 1984) 3, 3-7). This article is also premised on the desirability and attainability of social justice.

²⁶ *Constitution of the Republic of South Africa Act 1996* (South Africa) ss 16, 27, for example, provide socio-economic guarantees. However, government failure to give effect to these rights and consequent search for a scapegoat has led to concerns for the Constitutional Court’s independence; see ‘ANC Mulls Review of Constitution’, *Mail & Guardian* (online), 4 March 2012 <<http://mg.co.za/article/2012-03-04-anc-mulls-review-of-constitution/>>.

DEMOCRATIC DISCOURSE

public private partnerships,²⁷ central government must be funded to some extent by taxation.²⁸ Seen through the lens of governmentality, to be legitimate or effective, taxation should not impede government's delivery of prosperity.²⁹ This imperative does not necessarily imply low taxes since high levels of taxation may be consistent with high levels of general prosperity.³⁰ However, it does imply that taxpayers should be able to assess contributions to the treasury against government's delivery or enablement of prosperity.

2.3 Contemporary citizenship

Marshall defined citizenship as 'a state bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed'.³¹ In this view, citizenship comprises a civil element (rights necessary for individual liberty), a political element (electoral rights) and a social element (ranging from a right to some economic welfare to living 'the life of a civilised being according to the standards prevailing in society').³² Building on the Marshallian conception of citizenship, Isin and Turner observe:

Modern citizenship is constructed historically from a set of contributory rights and duties that are related to work, public

²⁷ On public private partnerships, see, generally, Thomas A Cellucci, *A Guide to Innovative Public-Private Partnerships: Utilizing the Resources of the Private Sector for the Public Good* (Rowman & Littlefield Publishing Group, 2011).

²⁸ See the discussion of the necessity of taxation and other forms of raising revenue in *Report of the Royal Commission on Taxation* (Carter Commission) (Queen's Printer, 1966) vol 2, 2-5.

²⁹ It is submitted that the broadest interpretation may be given to 'prosperity', including measures, such as investing in sustainable energy, that will contribute to future quality of life. See Tim Jackson, *Prosperity without Growth? The Transition to a Sustainable Economy* (Sustainable Development Commission, 2009) 86.

³⁰ See Will Hutton, *The World We're In* (Little Brown, 2002) 216 on the Scandinavian model of public finance.

³¹ T H Marshall, 'Sociology at the Crossroads' in *The Right to Welfare and Other Essays* (Heinemann Educational Books, 1981) 74, 87.

³² *Ibid*, 74.

service (for example, military or jury service) and parenthood and family formation. It defines belonging to a society through the entitlements associated with service, and is perhaps most clearly evident in a national system of taxation.³³

This model of citizenship seems plausible in stable political communities. However, when capital, goods and services, and, albeit to a lesser extent, skilled individuals are highly mobile, it may appear outmoded. Indeed, the social bonds, particularly in large contemporary cities, including those in Australasia, seem fluid and loosely connected.³⁴ As any plausible model of sovereignty must take into account the effects of globalisation, so must its effect on citizenship within states be considered.³⁵ Analogous to the argument that sovereignty has mutated in the context of globalisation,³⁶ so Isin and Turner argue that, despite the common assumption of citizenship losing its importance under globalisation, the nature of citizenship has changed but nevertheless retains 'its vital importance to contemporary political institutions'.³⁷

Globalisation raises numerous issues for tax policy.³⁸ The hyper-mobility of capital tends to be seen as the principal feature or threat of globalisation,³⁹ and has, inter alia, engendered proposals for Tobin

³³ Engin F Isin and Bryan S Turner, 'Investigating Citizenship: An Agenda for Citizenship Studies' (2007) 11 *Citizenship Studies* 5, 5.

³⁴ For a discussion of the distinction between the *demos*, with its common political goals, and the globalised *cosmopolis*, see Daniele Archibugi, 'Demos and Cosmopolis' (2002) 13 *New Left Review* 24, 24-38.

³⁵ See, generally, Saskia Sassen, 'The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics' (2003) 3 *CR: The New Centennial Review* 41, 41-66.

³⁶ See Kostakopoulou, above n 12, 142 n 35.

³⁷ Isin and Turner, above n 33, 5.

³⁸ For a discussion of key issues, see Adrian Sawyer, 'Is an International Tax Organisation an Appropriate Forum for Administering Binding Rulings and APAS?' (2004) 2 *eJournal of Tax Research* 8.

³⁹ Alain Touraine, for example, argues 'the main cause of the threats that hang over us is neither the globalization of the economy nor the emergence of new industrial countries, but capital's freedom to move around the world'. See Alain Touraine,

DEMOCRATIC DISCOURSE

taxes.⁴⁰ Globalisation may have caused the tripod of taxes on capital, labour and consumption to become unbalanced as governments seek to attract mobile capital,⁴¹ although this is disputable.⁴² Certainly, the general abolition of exchange controls has led to practical difficulties in taxing foreign sourced income and raised the potential for capital flight;⁴³ issues of transfer pricing and the use of offshore centres have been exacerbated;⁴⁴ and goods and services tax (GST) on goods bought overseas via the internet has become problematic.⁴⁵ However, because this article is principally about the role of taxation in democratic discourse, the implications of individual mobility are most significant. In short, it is submitted that, to remain viable, a country needs to retain a critical mass of stable and committed citizen-taxpayers.

Beyond Neoliberalism (David Macey trans, Policy Press, 2001) 14 [trans of: *Comment Sortir du Libéralisme?* (first published 1998)].

⁴⁰ See James Tobin, 'A Proposal for International Monetary Reform' (1978) 4 *Eastern Economic Journal* 153, 153-159 for the basic proposition.

⁴¹ For a discussion of globalisation and tax competition, see Eckhard Janeba and Guttorm Schjeldrup, *The Future of Globalization: Tax Competition and Trade Liberalization*, World Development Report 2003 Background Paper <http://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_economy/pdf_glob_SAP/WorldBank_Janeba_Future_Globalization.pdf>.

⁴² Axel Dreher, 'Globalization and Taxation in the OECD: Evidence from a New Indicator of Integration' (2005) 5 *Public Finance and Management* 400, 413 argues 'that average effective tax rates on capital have been influenced by globalization, while effective tax rates on labor and consumption are not ... tax rates on capital did not decrease with globalization but increased instead'.

⁴³ For a discussion of globalisation and capital flight, see, Jacob A Frenkel, Assaf Razin and Efraim Sadka, *International Taxation in an Integrated World* (MIT Press, 1991) 185-196.

⁴⁴ For an overview of offshore tax planning techniques, see, generally, Adrian Ogley, *The Principles of International Taxation* (Intefisc, 1993).

⁴⁵ On Australian problems with imports and GST, see, for example, Chris Zappone, 'GST on Web Imports No Silver Bullet for Struggling Retailers', *The Sydney Morning Herald* (online) 16 November 2010 <<http://www.smh.com.au/business/gst-on-web-imports-no-silver-bullet-for-struggling-retailers-20101116-17v0j.html>>.

The Tiebout hypothesis holds that dissatisfied taxpayers will ‘vote with their feet’ so that households sort themselves among jurisdictions according to their preferences for the mix of taxes and public expenditures.⁴⁶ Whether or not this proposition is empirically supported,⁴⁷ it is plausible in relation to members of certain highly mobile groups, in particular, the cosmopolitan wealthy, who may not hold strong ties to particular countries.⁴⁸ Despite their potential lack of allegiance, such people may significantly affect democratic discourse. In particular, ‘the progressive breakdown in communication between the increasingly global and extraterritorial elites and the ever more ‘localised’ rest’ is important to note,⁴⁹ but lies beyond the scope of this article. Current concerns lie with those members of society, who are either immobile by virtue of their qualities or circumstances, or currently settled by choice; they constitute the core of the political community.⁵⁰ In a borderless world, citizens’ belief in a national community of mutual support is critical.⁵¹ If a cohesive political community is to be maintained, government cannot take an informed and potentially mobile citizenry’s commitment to taxpaying for granted. Taxpayers, it is

⁴⁶ Charles M Tiebout, ‘A Pure Theory of Local Expenditures’, (1956) 64 *Journal of Political Economy* 416, 424.

⁴⁷ See Paul W Rhode and Koleman S Strumpf, ‘A Historical Test of the Tiebout Hypothesis: Local Heterogeneity From 1850 – 1990’ (Working Paper 7946 National Bureau of Economic Research, 2000) < <http://www.nber.org/papers/w7946>>.

⁴⁸ The cosmopolitan wealthy may, in particular, be able to take up tax exile. Wealthy people with strong ties to particular countries may nevertheless be able to opt out of the ‘tax community’ in other ways, such as by making massive donations to their favoured charities. See Chrystia Freeland, ‘The Rise of the New Global Elite’ (2011) 307 *The Atlantic* 44, 44-49.

⁴⁹ Zygmunt Bauman, *Globalization: The Human Consequences* (Columbia University Press, 1998) 3.

⁵⁰ It is assumed that the relevant political community is stable economically and politically. Civil war, for instance, can render almost everyone mobile as emigrants, exiles or refugees.

⁵¹ See, generally, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991) on the importance of citizens imagining the existence of a particular political community and they as a part of it.

DEMOCRATIC DISCOURSE

submitted, must be respected as full members of a distinct political community, which is both inclusive and exclusive,⁵² and taxpaying recognised as a critical democratic practice.⁵³ Thus, for the Tax Commission of the Fabian Society:

... at the heart of the strong conception of citizenship ... is the idea that decisions about taxation and spending are really issues of democratic choice. They are about the kind of society which we want as citizens and as a community, and how the resources available to us are spent to achieve this.⁵⁴

3. DISCURSIVE DEMOCRACY

Habermas presents a high Enlightenment model of discursive democracy in which empathetic and competent speakers arrive at the decisions that bind their community through processes of rational argumentation.⁵⁵ The legitimacy of the political community is founded 'on the basis of a discursively achieved argument'.⁵⁶ Other models of discursive democracy are less idealistic and take into account hegemony, and both the undesirability and implausibility of

⁵² See, generally, Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equity* (Basic Books, 1983).

⁵³ However, it should be noted that people pay taxes and receive public goods and services in non-democratic as well as democratic societies. Indeed, Casey B Mulligan, Ricard Gil and Xavier Sala-i-Martin, 'Do Democracies Have Different Public Policies than Nondemocracies?' (2004) 18 *Journal of Economic Perspectives* 51, 71 found 'no significant partial correlation between democracy and the amount of spending on pensions or welfare' and conclude: 'The one difference [between economically and demographically similar democracies and non-democracies] is that democracies tend to have flatter (and therefore less distributive) personal incomes taxes.'

⁵⁴ Fabian Society, *Paying for Progress: A New Politics of Tax for Public Spending* (Fabian Society, 2000) 150.

⁵⁵ See, in particular, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg, trans, MIT Press, 1996) 631 [trans of: *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (first published 1992)].

⁵⁶ *Ibid*, 449.

genuine consensus.⁵⁷ In a model of discursive democracy that assumes conflict, Mouffe argues for *agonism* between adversaries but not antagonism between enemies.⁵⁸ However, because dialogue and rational deliberation are pre-eminent, passion is mobilised through democratic channels.⁵⁹ Despite their differences, proponents of conflicting visions for discursive democracy recognise in common that, in a modern polity, a plurality of voices must have the opportunity to be heard on issues that affect them, such as taxes.

Following Sen, social inclusion can be seen as a pre-condition of democratic participation.⁶⁰ Whether social inclusion is constituted by government meeting certain basic socio-economic needs,⁶¹ more complex and comprehensive needs and demands,⁶² or by the ‘cultivation of human potential’,⁶³ it seems incumbent on the State to

⁵⁷ See, generally, Jacob Torfing, *New Theories of Discourse: Laclau, Mouffe and Žižek* (Blackwell, 1999).

⁵⁸ Chantal Mouffe, ‘Deliberative Democracy or Agonistic Pluralism?’ (1999) 66 *Social Research* 745, 745-758.

⁵⁹ Chantal Mouffe, *On the Political* (Routledge, 2005) 3.

⁶⁰ Amartya Sen, ‘Social Exclusion: Concept, Application, and Scrutiny’ (Social Development Papers No 1 Office of Environment and Social Development, Asian Development Bank, 2000).

⁶¹ In the social Catholic tradition, David Cappelletti sees inclusion in terms of people feeling valued, their differences respected and ‘their basic needs are met so that they can live in dignity’. David Cappelletti, ‘Social Inclusion, Participation and Empowerment’, Paper presented to the Australian Council of Social Services National Congress, 28 November 2002 <http://www.socialinclusion.sa.gov.au/files/speech_02nov_acoss.pdf>.

⁶² Peter Wehling argues that ‘social inclusion, political participation, and recognition of social identities both transgress the boundaries of the nation-state and refer to citizens’ needs and demands in a greater variety of social spheres (culture, science and technology, health, sexuality, etc) beyond the classic [Marshallian] triad of civil, political and social citizenship’. Peter Wehling, ‘Biology, Citizenship and the Government of Biomedicine: Exploring the Concept of Biological Citizenship’ in Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (Routledge, 2010) 225, 227.

⁶³ Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, 1998) 101. See also Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315, 315-356 and Martha C Nussbaum,

DEMOCRATIC DISCOURSE

facilitate participation by its citizens in the decisions that affect them. Otherwise the formal freedom and equality of liberal democracies would lack substance.⁶⁴ In a discursive democracy everyone should have some opportunity to participate in the formulation of the laws and policies that regulate their lives.⁶⁵ Conversely, no one may breach with impunity duly enacted laws with which they disagree.⁶⁶ From time to time, it may not be possible to overcome recalcitrance with reason, and other measures must be used, such as criminal prosecution in the case of tax evasion. But these exceptions do not detract from the essential discursiveness of the relationship.

This briefest of sketches has sought to indicate how taxation may be re-justified in a contemporary liberal democracy by infusing policies and laws with the principles and practices of citizen participation. In order to participate in democratic decision making about the taxes they must pay, citizens need to understand and to be able to make judgments about taxes, and ultimately hold government accountable for their fiscal policies. In the following section, accountability and transparency – methods ‘of keeping the public

‘Capabilities as Fundamental Entitlement: Sen and Social Justice’ (2003) 9 *Feminist Economics* 33, 33-51 on the capabilities approach to human rights. On the comparable social liberalism of T H Green, see I M Greengarten, *Thomas Hill Green and the Development of Liberal-Democratic Thought* (University of Toronto Press, 1981).

⁶⁴ Peter Kivisto and Thomas Faist, *Citizenship: Discourse, Theory, and Transnational Prospects* (Blackwell Publishing, 2007) 72.

⁶⁵ The role of experts in managing risks in the security society tends to hinder democratic participation by non-expert citizens; see, for example, S G Reddy, ‘Claims to Expert Knowledge and the Subversion of Democracy: The Triumph of Risk’ (1996) 25 *Economy and Society* 222, 222-254. Consequently, for O’Malley, democratisation is ‘the new challenge of governing risks’; Pat O’Malley, ‘Governing Risks’ (The University of Sydney, Sydney Law School, Legal Studies Research Paper, 09/86, 2009) 22 < <http://ssrn.com/abstract=1473553>>.

⁶⁶ In the *Rechtsstaat*, an imperative of ‘due enactment’ incorporates adherence with the proper constitutional process, which itself is coherent with respect for fundamental human rights. See Habermas, above n 55, 125.

informed and the powerful in check⁶⁷ – are outlined in relation to taxation. The cognate issue of tax visibility is also considered.

4. ACCOUNTABILITY, TRANSPARENCY AND TAX VISIBILITY

4.1 Accountability

Jean-Jacques Rousseau proposed that if the people of a political community were to govern themselves:

... and there were no intermediary between the administration of the State and the citizens ... as they would all keep in sight the recovery and employment of such [tax] assessments, no fraud or abuse could slip into the management of them; the State would never be involved in debt, or the people overburdened with taxes.⁶⁸

Direct citizen oversight of this nature is impossible in any state, as Rousseau himself recognised.⁶⁹ Nevertheless, accountability, which ‘connects knowledge and interest’ and ‘binds the communitarian notion of popular sovereignty with ideas of individual responsibility’ espoused by the Right,⁷⁰ is necessary and uncontroversial. Accountability is not, however, open-ended; rather it is restricted to answerability within constitutional structures and processes. A citizen or a group of citizens cannot invoke the principle of accountability with an eye to controlling or containing constitutionally permitted government action.⁷¹ It is important, then,

⁶⁷ Richard Mulgan, *Holding Power to Account: Account ability in Modern Democracies* (Palgrave Macmillan, 2003) 1.

⁶⁸ Jean-Jacques Rousseau, ‘A Discourse on Political Economy’ in *The Social Contract and Discourses* (GDH Cole trans, Dent, 1992) 128, 152-153 [trans of: *Du Contrat Social* et al (first published 1762)].

⁶⁹ *Ibid*, 153.

⁷⁰ Stephen Eric Bronner, *Of Critical Theory and Its Theorists* (Blackwell, 1994) 335.

⁷¹ In Australia, legal challenges to tax laws might be pursued on the basis of the division of powers between the Commonwealth and the States; for example, *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373. In New Zealand, despite the *New Zealand Bill of Rights Act 1990* (NZ), a legal challenge to

DEMOCRATIC DISCOURSE

to distinguish accountable – and effective and cost efficient – government from small government. The former is a universal expectation, the latter is an ideological preference.

4.2 Transparency

Transparency, which relates to the free flow of comprehensible information within and beyond governmental institutions,⁷² enables assessment of government behaviour and achievement. Indeed, the principle of accountability would be a mere abstraction without the practice of transparency. With regard to taxation, transparency helps citizens to track sources of revenue, the costs of administration, and the beneficiaries of expenditure.⁷³ Despite the critical importance of the aggregate amount of revenue to be raised in a particular fiscal year, tax legislation in the British Commonwealth tradition is silent on the issue. Rather ‘it concerns itself entirely with the rules as to the incidence and amount of tax to be paid by individual persons and on individual transactions’.⁷⁴ Governments are generally hesitant to link revenues with expenditures. However, as Shoup argues, ‘the distribution of benefits should usually be in an easily recognisable pattern in order to enlist support’, not only for allocative decisions but also for the taxes which make distribution possible.⁷⁵ Likewise, revenues should ‘not be distributed so that no one is aware of them, or in a manner generally unascertainable’.⁷⁶

tax statutes is implausible in the absence of a flawed legislative process: see *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

⁷² See Warren Bennis, Daniel Goleman and James O’Toole with Patricia Ward Biederman, *Transparency: How Leaders Create a Culture of Candor* (John Wiley & Sons, 2008) 3.

⁷³ As Rousseau, above n 68, 153 observed, ‘at least the knowledge of how the money would be used would be a consolation for the severity of the tax’.

⁷⁴ T C Daintith, ‘Legal Analysis of Economic Policy’ (1982) 9 *Journal of Law and Society* 191, 215.

⁷⁵ Carl S Shoup, *Public Finance* (Weidenfeld & Nicolson, 1969) 37.

⁷⁶ *Ibid.*

If citizens understand the sources of revenue and how it is spent, value choices come to the fore. Greater democratic participation becomes likely and public discussion, which has an invaluable role in defining ‘which economic goals are socially feasible’,⁷⁷ should occur. Perceptions of government activity, particularly expenditure, affect both public opinion and the direction of political debate, so that ill-informed views may have a deleterious effect on government programmes. Naturally, taxpayers hold perceptions about sources of government revenue and its distribution. Therefore, through processes of active communication, government should ensure taxpayers have sufficient information to confirm or refute their assumptions.⁷⁸ Even without sophisticated analyses, comparisons of, say, the proportion of revenue allocated to defence compared with that spent on education, simplistic as they may appear, may nevertheless promote public debate and, ultimately, influence government policy and responsiveness. Government’s reasons for particular allocations may be unimpeachable, but it should be able and prepared to argue for them and persuade the public to their cause.⁷⁹ Accurate and readily comprehensible information released into the public domain can have a considerable effect on public finance debate and, thus, practical democracy. To this end, government should ensure that sufficient, timely and readily comprehensible fiscal information is widely available in the public

⁷⁷ Amartya Sen, ‘Democracy as a Universal Value’ (1999) 10 *Journal of Democracy* 3, 11.

⁷⁸ Useful private initiatives to help citizens visualise tax sources and expenditure destinations include: <<http://www.wheredomytaxesgo.com.au/>> and <<http://wheresmytaxes.co.nz>>.

⁷⁹ Richard Bird argues, ‘if one takes the view that people should know what they are paying for what they are getting from government, then even if the price of more transparency is a less perfect [tax] or a smaller public sector, some might consider the price well worth paying’.; Richard M Bird, ‘Visibility and Accountability: Is Tax-Inclusive Pricing a Good Thing?’ (2009) 16 <<http://ssrn.com/abstract=1529145>>.

DEMOCRATIC DISCOURSE

domain to encourage the formation of ‘constituencies for information’.⁸⁰

In a modern economy, appropriate specialists necessarily make important financial decisions but this does not infer the inevitability of technocracy. To employ a common analogy,⁸¹ in a political community, an engineer must ensure the structural integrity of a bridge, but everyone in the community should have the opportunity to contribute to the debate whether scarce resources should be allocated to building a bridge, as opposed to, say, a hospital. Participation opportunities are critical for a healthy democracy and, even if individual citizens do not actually participate in democratic processes, they still value the right to participate, and the consequent feelings of control, self-determination and influence on the political sphere.⁸² Accountability and transparency can therefore contribute to genuine democratic participation and empowerment.⁸³ In particular, as Mulgan argues, they can contribute to a reconnection of taxation, which can ‘be transformed into a more visibly effective tool for achieving commonly agreed goals’.⁸⁴

4.3 Tax visibility

It has been argued that transparency requires useful fiscal information to be made public in order to promote government

⁸⁰ World Bank, *World Development Report 2003* (World Bank, 2002) 186.

⁸¹ See, for example, Edgar Bodenheimer, *Power, Law and Society* (Crane, Russak, 1972) 54.

⁸² Bruno S Frey and Alois Stutzer, ‘Beyond Bentham – Measuring Procedural Utility’ Working Paper No 492 (Center for Economic Studies and Institute for Economic Research, 2001) < <http://ssrn.com/abstract=268059>>.

⁸³ World Bank (PREM), *Empowerment and Poverty Reduction: A Sourcebook* (World Bank, 2002) vi identifies ‘empowerment’ as ‘the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives’.

⁸⁴ Geoff Mulgan, *Connexity: How to Live in a Connected World* (Chatto & Windus, 1997) 214.

accountability regarding its tax policies.⁸⁵ A further consideration, which is primarily psychological in nature but political in its consequences, is the extent to which different taxes are visible to taxpayers. Bird observes that the question of tax visibility ‘is neither easy nor simple because underlying it are some serious methodological and political issues that are as yet largely unexplored’ but ‘may have significant implications with respect to the fundamental question of how best to secure adequate governmental accountability in a complex modern democracy’.⁸⁶ Despite these technical uncertainties, a tax may be considered visible to the extent its informing principles, legislative requirements, and the burdens and benefits it confers are effectively communicated to taxpayers and understood by them.

Broadly, indirect taxes, such as customs duties, are *prima facie* invisible, whereas direct taxes, notably local property taxes, tend to be conspicuous.⁸⁷ However, classification of taxes on visibility grounds is not straightforward. For example, consumers travel internationally and have access to information sources that allow them to compare prices of goods in different countries. Consequently, a person intending to purchase an expensive item may be acutely aware of the effect of customs and *ad valorem* excises on that good. Withholding requirements might make direct taxes less conspicuous,⁸⁸ but income tax, particularly for those subject to pay as you earn (PAYE), is likely to be highly visible because modern payroll systems invariably record year-to-date, cumulative deductions of PAYE. Nevertheless, it has been argued that income

⁸⁵ See World Bank, above n 80.

⁸⁶ Bird, above n 79, 4.

⁸⁷ David Brunori, *Local Tax Policy: A Federalist Perspective* (The Urban Institute, 2007) 7 observes that local property taxes are considered by taxpayers as the ‘worst tax’ because of their egregious visibility.

⁸⁸ *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa, under the Chairmanship of the Honourable Mr Justice Margo* (Margo Commission) ch 4 part III, extract in Trevor Emslie, Dennis Davis and Sally Hutton (eds), *Income Tax Cases and Materials* (2nd ed, The Taxpayer, 1995) 11, 12.

DEMOCRATIC DISCOURSE

tax is inconspicuous relative to value added tax (VAT).⁸⁹ However, the visibility or salience of VAT is not inherent, rather it seems to depend on how retailers communicate the tax burden. Thus, unlike other VAT regimes,⁹⁰ in Canada, prices are invariably quoted exclusive of GST, which is added at the point of sale.⁹¹ According to Bird, the high visibility and ‘visceral reactions aroused by the GST’ at a federal level in Canada has led to its rate being reduced since introduction,⁹² whereas the normal experience is for VAT rates to rise.⁹³

Notwithstanding technical issues, tax visibility is ‘central to an understanding of the political and social factors that appear to shape

⁸⁹ See, for example, Stephen Moore, ‘The Economic and Civil Liberties Case for a National Sales Tax’ (April 1, 1996) *Tax Notes* 101, 101-105. Note that Australia, Canada (at a federal level), Fiji, New Zealand and Singapore, amongst other countries, use the acronym ‘GST’ rather than ‘VAT’.

⁹⁰ Under the *Competition and Consumer Act 2010* (Cth) Schedule 2 s 48, a corporation must quote prices on a GST inclusive basis. In New Zealand, while the *Goods and Services Act 1985* (NZ) does not specify whether GST must be included in quoted prices, the potential for criminal prosecution under the *Fair Trading Act 1986* (NZ) s 13(g) for making a false misrepresentation as to price is sufficient to ensure prices are in practice GST-inclusive.

⁹¹ Raj Chetty, Adam Looney and Kory Kroft, ‘Salience and Taxation: Theory and Evidence’ (NBER Working Paper 13330, National Bureau of Economic Research, 2008) 1, 50 ‘show empirically that commodity taxes that are included in posted prices reduce demand significantly more than taxes that are not included in posted prices. Individuals appear to be well informed about commodity taxes when their attention is drawn to the topic, suggesting that *salience* is an important determinant of behavioral responses to taxation’.

⁹² Bird, above n 79, 13.

⁹³ For example, GST was introduced in New Zealand in 1985 at a rate of 10 percent. In 1988, this increased to 12.5 percent and in 2010 to 15 percent.

tax structures as much as, or more than, economic realities'.⁹⁴ Bird argues that the so-called taxpayer revolt of the 1970s, manifest notably in California's Proposition 13,⁹⁵ was attributable to the increased visibility of certain taxes rather than an increase in overall burden.⁹⁶ Whether or not this explanation is plausible, it indicates the critical importance of tax visibility for democratic discourse.⁹⁷ Jean Baptiste Colbert, finance minister to the absolutist monarch Louis XIV, expressing the logic of *l'impôt invisible* (the invisible tax) said: 'The Art of Taxation consists in so plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing.'⁹⁸ The Margo Commission, convened by a non-democratic South African government in 1986, when non-payment of tax could constitute a potent act of political resistance,⁹⁹ observed that tax invisibility:

... relates to the view that the best taxes are those paid by other people. The ideal tax, therefore, is one which siphons spending power out of the private sector before it has accrued too obviously to any particular individual ... Because ... nominal incomes tend to adjust to maintain after-tax differentials, many

⁹⁴ Richard M Bird, *Financing Canadian Government: A Quantitative Overview* (Canadian Tax Foundation, 1979) 41. Conversely, Casey Mulligan argues that 'tax visibility is empirically unrelated to the amount of taxation and government spending because the impressions of voters who see the more visible taxes are by no means the only determinant of government spending. Special interests matter too.' See Casey B Mulligan, 'Don't Fear the Invisible Tax' (21 April 2010) <<http://economix.blogs.nytimes.com/2010/04/21/dont-fear-the-invisible-tax/>>.

⁹⁵ For an analysis of Proposition 13 and its informing political forces see Nikil Saval, 'Golden State' (2011) 10 *n + 1* <<http://nplusonemag.com/golden-state>>.

⁹⁶ Bird, above n 95, 42.

⁹⁷ The nexus between taxation and democracy may be seen as a foundational narrative for the United States, thus Alvin Rabushka, *Taxation in Colonial America* (Princeton University Press, 2008) 868 argues that the American revolution 'was a tax revolt, first and foremost'.

⁹⁸ Cited by Cedric Sandford, 'Introduction', in Cedric Sandford (ed), *Successful Tax Reform* (Fiscal Publications, 1993) 5 n 2.

⁹⁹ See *Tax Amnesty Act 1995* (South Africa) which was introduced in response to the resistance tactic of tax non-payment during the Apartheid era.

DEMOCRATIC DISCOURSE

believe that it does not really matter much who nominally pays the tax. Consequently, taxes should be as inconspicuous as possible.¹⁰⁰

In counterpoint, the Commission outlined the opposing view that:

... as paying tax is the privilege and duty of every citizen, taxes should be visible so that each knows what he is paying and can call the state to account for the way in which tax revenue is spent.¹⁰¹

Even in less dramatic political contexts, tax visibility may inform State-citizen discourse. Thus Shoup observes that a government which considers voters mistakenly opt for too few public goods may be tempted to ‘extol tax anesthesia’.¹⁰² Likewise, Morag argues that hidden taxes are preferable on psychological and economic grounds because ‘the psychic costs of paying tax’ are important in setting tax levels and ‘costs which politicians will heed because they are clearly relevant to the prospects of re-election’.¹⁰³ Alert to the economic effects of tax salience, certain countries, ‘particularly developing countries with problems in controlling improper crediting of VAT invoices, do not even permit the amount of VAT included in the final price to be shown on invoices issued with respect to sales to non-registrants’.¹⁰⁴ In contrast, in its consideration of indirect taxes, the seminal Carter Commission supported a retail tax, in part, because ‘at this level there would be the greatest taxpayer awareness, because there would be full disclosure of the tax burden’.¹⁰⁵

¹⁰⁰ Margo Commission, above n 88, 12. The Commission recommended the introduction of VAT; in effect, greater reliance on invisible taxes.

¹⁰¹ Ibid.

¹⁰² Shoup, above n 75, 37

¹⁰³ Amotz Morag, *On Taxes and Inflation* (Random House, 1965) 21.

¹⁰⁴ Bird, above n 79, 8 n 9.

¹⁰⁵ Carter Commission, above n 28, vol 5, 36.

In addition to the type of tax, the number of taxes in a fiscal system is important. A multiplicity of indirect taxes tends to obscure public realisation of the total tax burden, and, intended or not, may reduce public resistance to taxes.¹⁰⁶ Indeed, Diderot, the Enlightenment philosopher, noting the need for many and varied indirect taxes under the conditions of tyranny, and how a ‘single and direct tax is marvellously well-suited to pure democracy’ asked ‘[i]s it well-suited to monarchy? And other kinds of government?’¹⁰⁷ Likewise, Mill argued “[i]f all taxes were direct, taxation would be much more perceived than at present; and there would be a security which now there is not, for economy in the public expenditure.”¹⁰⁸ In short, a small number of direct taxes seems consistent with democracy, whereas multiple indirect taxes are not.

4.4 Concluding comments on accountability, transparency and tax visibility

Accountability is a politically neutral requirement of democratic governance which transparency helps effectuate. In turn, visibility contributes to transparency in taxation. Citizens should be able to engage in informed debate about the taxes they must pay. It is therefore incompatible that democratic imperative for government to wilfully conceal or, through a multiplicity of taxes obfuscate, tax liability. In the following section, hypothecation, which might be expected to promote tax visibility and broader democratic goals is considered.

¹⁰⁶ C N Mitchell, ‘Taxation, Redistribution and Justice’ (1988) 88 *University of Toronto Law Journal* 151, 170.

¹⁰⁷ Denis Diderot, ‘Observations sur le Nakaz’ in John Hope Mason and Robert Wokler (eds), *Diderot: Political Writings* (Cambridge University Press, 1992) 78, 157.

¹⁰⁸ John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (Longmans, Green & Co, first published 1848, 1909 ed) V.6.1.

5. HYPOTHECATION

Hypothecation requires particular tax revenues to be earmarked for particular expenditures.¹⁰⁹ In a ‘strong’ form of hypothecation, the yield from a tax would be set aside for a specific purpose.¹¹⁰ For example, a levy on mineral oil might be used to fund directly building and maintaining roads or, inversely, environmentally friendly forms of transport. A corollary of such earmarking could be that the particular expenditure activity might have no further access to the general revenue account. ‘Weaker’ versions of hypothecation might entail a looser connection between revenue and expenditure:¹¹¹ for example, taxes on tobacco might be credited to the general account from which all health costs and social marketing campaigns are funded.

Hypothecated taxes are commonly associated with public choice theory, which envisages government as an aggregate of many individual decisions.¹¹² Earmarking ‘forces government to justify every new area of spending and to raise specific new taxes to pay for it’ thereby allowing ‘citizens to choose [ideally by referendum] which areas of government they wish to finance and at what level’.¹¹³ The individualism of public choice theory is difficult to reconcile with a strong conception of citizenship,¹¹⁴ which ‘implies a

¹⁰⁹ James M Buchanan, ‘The Economics of Earmarked Taxes’ (1963) 71 *Journal of Political Economy* 457, 458 defines ‘earmarking’ ‘as the practice of designating or dedicating specific revenues to the financing of specific public services’.

¹¹⁰ Margaret Wilkinson, ‘Paying for Public Spending: Is There a Role for Earmarked Taxes?’ (1994) 15 *Fiscal Studies* 119, 119.

¹¹¹ *Ibid.*

¹¹² John Meadowcroft, *Major Conservative and Libertarian Thinkers: James M Buchanan* (Continuum International Publishing Group, 2011) 1 identifies public choice as the application of ‘economic theory and analysis to public decision in the political realm’.

¹¹³ Fabian Society, above n 54, 156.

¹¹⁴ As Buchanan, above n 109, 458 argues: ‘The individual citizen, as voter-taxpayer-beneficiary, is enabled to participate, *separately*, either directly or through his legislative representative, in the several public expenditure decisions that may arise.’ (Italics in original.)

connectedness between the individual and other people in society, and demands the proper provision of public goods whose benefits are shared with them'.¹¹⁵ However, hypothecation has been espoused across the political spectrum. Whereas the Right may 'see it as demonstrating to voters the cost of state services and advancing opting out and privatisation', Centre-Left proponents conceive earmarking 'as a means of encouraging people to pay for better services (such as health and education)'.¹¹⁶ Indeed, rather than limiting government, earmarking can be seen not only as a means of legitimisation,¹¹⁷ but also as a way of funding expanded governmental reach through extended taxation.¹¹⁸ Thus Diamond and Giddens, arguing for a new tax on capital, observe:

There is also a strong case for hypothecating funds from the taxation of wealth transfers to the funding of a universal capital grant scheme. Such an arrangement can strengthen the perceived legitimacy of taxing concentrations of wealth.¹¹⁹

¹¹⁵ Fabian Society, above n 54, 156.

¹¹⁶ Wilkinson, above n 110, 120. For a dissenting opinion from the Right, see Tim Worstall, 'Why We Don't Do Hypothecation of Taxes' Adam Smith Institute (2010) <<http://www.adamsmith.org/blog/tax-and-economy/why-we-don-t-do-hypothecation-of-taxes/>>.

¹¹⁷ Fabian Society, above n 54, 157.

¹¹⁸ Alan Duncan and Andrew Jones, 'Economic Incentives and Tax Hypothecation' (CPE Working Paper 2/04 Centre of Policy Evaluation, University of Nottingham, 2003) 3 < <http://www.nottingham.ac.uk/economics/cpe/publications/adaj2003.pdf> > observe 'if individuals are more aware of the destination of the taxes they pay, then they can express their own preferences for public expenditure decisions, and their willingness to pay taxes, more explicitly by either withholding or increasing work effort and private consumption'. However, according to the model developed by Athanassakos, a budget under general fund financing is 'always greater or equal to that under an earmarked tax regime'; Alex Athanassakos, 'General Fund Financing versus Earmarked Taxes: An Alternative Model of Budgetary Choice in a Democracy' (1990) 66 *Public Choice* 261, 277

¹¹⁹ Patrick Diamond and Anthony Giddens, 'The New Egalitarianism: Economic Inequality in the United Kingdom' in Anthony Giddens and Patrick Diamond (eds), *The New Egalitarianism* (Polity Press, 2005) 101, 117.

DEMOCRATIC DISCOURSE

Beyond ideologically-informed motivations, the principal argument for hypothecation of revenue to particular expenditures is that it may promote transparency,¹²⁰ and ‘make for informed choices and more democracy’.¹²¹ For the Fabian Society, ‘earmarking is simply a way of connecting a tax to a spending programme to make its purpose more transparent: it need have no basis in public choice theory’.¹²² Earmarking may also indicate good faith on the part of government. For example, when yield from corrective or behaviour modifying taxes, such as excises levied on tobacco products, is not used uniquely to combat smoking, taxpayers may reasonably assume that the tax is essentially a revenue-raising device with a subordinate, if not spurious, behaviour modification purpose. Indeed, the deleterious effects on the citizen-State relationship of quasi-taxes, notably fines from speed cameras, are likely to be exacerbated by a lack of earmarking.¹²³

Despite transparency and accountability claims for hypothecation,¹²⁴ linking specific taxes to particular revenue uses implies a multiplicity of taxes,¹²⁵ and this necessarily obfuscates assessment of the overall tax burden.¹²⁶ To remedy this problem, the Fabian Society proposes that ‘taxpayers should be given information

¹²⁰ Mulgan, above n 84, 214.

¹²¹ Wilkinson, above n 110, 120.

¹²² Fabian Society, above n 54, 156.

¹²³ New South Wales Auditor-General, *Improving Road Safety: Speed Cameras* (Audit Office of New South Wales, 2011) 9 reports that almost all revenue from that state’s speed cameras (AUD 58 million in 2010-11) goes to the consolidated fund. This lack of earmarking fuels the popular perception that speed cameras are a revenue raising device, despite the Road and Traffic Authority spending AUD 822.6 million on road safety initiatives in the five years to 2009-10.

¹²⁴ See, for example, Amrita Dhillon and Carlo Perroni, ‘Tax Earmarking and Grass-Roots Accountability’ (2001) 72 *Economics Letters* 99, 99-106, who argue that if taxpayers can monitor public provision of goods and services, tax earmarking can foster accountability independently of how taxes are earmarked, because it introduces a more direct linkage between private monitoring choices and taxes paid.

¹²⁵ Hypothecation could be highly restricted. See, for example the Medicare levy and surcharge in Australia under the *Medicare Levy Act 1986* (Cth).

¹²⁶ See Mitchell, above n 106, 170.

each year on how much has been collected, what the revenues have been used for, and the environmental and other impacts this spending has had'.¹²⁷ Nevertheless, the complexity of the mechanisms required to smooth tax revenues over an economic cycle, and the risk of government renegeing on the strict hypothecation principle, may, in practice, lead to opacity.¹²⁸ In return for tax increases, government might guarantee that 'a certain level of measurable improvement in the public service will be achieved'.¹²⁹ However, this proposal seems fraught with the negative possibilities of failure and consequential deleterious effects on the citizen-State relationship. The public may be sceptical whether earmarked taxes will be used in the ways promised, but, if trust subsists between government and citizens, pledges of this nature are unnecessary and unhelpful.¹³⁰ As Duncan and Jones ask, 'in what way would hypothecation per se bring about greater transparency more efficiently than some other form of liaison between policy setters and the public?'.¹³¹ Indeed, any positive economic effects of hypothecation are likely to be largely 'dependent the nature of the relationship between government and taxpayer'.¹³²

Hypothecation may impede government efficiency and flexibility in responding to citizens' needs,¹³³ and distort spending patterns. The more that public finance diverges from a general pool

¹²⁷ Fabian Society, above n 54, 166. This proposal intimates considerable administrative costs.

¹²⁸ *Ibid*, 160.

¹²⁹ *Ibid*.

¹³⁰ Bird, above n 79, 7 n 8 describes a maladroit attempt at hypothecation that is likely to erode citizen-state trust: 'In an attempt to offset the widespread public impression that the federal Canadian GST was a new tax that would substantially increase government revenues, all GST revenue (net of credits and rebates) was transferred to a newly-created "Debt Servicing and Reduction Account" with all the proceeds being formally earmarked to debt service and reduction. Of course, this was just window dressing because the cost of debt service was much larger than the revenue from the GST.'

¹³¹ Duncan and Jones, above n 118, 2.

¹³² *Ibid*, 23.

¹³³ Fabian Society, above n 54, 158.

DEMOCRATIC DISCOURSE

of revenue from which accountable government allocates expenditure at its discretion, the greater the temptation will be to construct taxes for the benefit or at the behest of the most vocal groups in society. Hypothecation of taxes may, therefore, confer a disproportionate privilege or prejudice on one type of activity and its participants in relation to others. The weakest members of society are least able to lobby for their own taxes or, conversely, to ensure that they do not become the subjects of unjustified behaviour modification through taxation.¹³⁴ Interest groups may promote a particular goal without concerns for broader social considerations. If government too readily responds to such calls, the risk is run of the plural voices of democratic discourse becoming a Babel of special interests.

While this article is concerned with the possibility of hypothecation promoting transparency and accountability, and, thereby democratic discourse, it is noteworthy that the preponderance of arguments weighs heavily against hypothecation.¹³⁵ Major drawbacks of earmarked taxes include: problems of surpluses and shortfalls;¹³⁶ displacement from general funds;¹³⁷ distortion of legislators' behaviour when they face re-election,¹³⁸ constrain future governments,¹³⁹ or choose between vote

¹³⁴ For a discussion of the justifiability of behaviour modifying taxes, see Jonathan Barrett, 'Behaviour Modifying Taxes: Some Ethical Considerations' in Adrian Sawyer and Andrew Maples (eds), *Taxation Issues: Existing and Emerging* (Centre for Commercial and Corporate Law, University of Canterbury, 2011) 5, 5-24.

¹³⁵ In his seminal article, Buchanan, above n 109, 457 noted '[t]he near-universal condemnation of the institution [of earmarking] by experts in budgetary theory and practice'. For an expression of general confidence in earmarking, see Ranjit S Teja, 'The Case for Earmarked Taxes' (1988) 35 *Staff Papers - International Monetary Fund* 523, 523-533.

¹³⁶ Fabian Society, above n 54, 159.

¹³⁷ *Ibid.*, 184.

¹³⁸ Vincent Anesi, 'Earmarked Taxation and Political Competition' (2006) 90 *Journal of Public Economics* 679, 679-694.

¹³⁹ Craig Brett and Michael Keen, 'Political Uncertainty and the Earmarking of Environmental Taxes' (2000) 75 *Journal of Public Economics* 315, 315-340.

maximisation and welfare maximisation.¹⁴⁰ The negative possibilities of hypothecation are so significant that it can have only a restricted potential beyond taxes based on the benefit principle¹⁴¹ or engaging with social mischiefs, such as environmental degradation.¹⁴² Otherwise, the value of earmarking proposals seems to lie in highlighting, if not delivering, accountability and transparency in taxation. As Wilkinson concludes:

Though tax hypothecation might have an expedient role to play in getting a specific project or part of a programme undertaken, it is not a solution to the large-scale and very difficult problems that governments face in making decisions on taxes and public spending. The problems that arise in providing services within resource constraints and in meeting the expectations of voters cannot be solved by earmarking, with or without referendums.¹⁴³

6. CONCLUSION

This article has identified certain ways in which sovereignty and citizenship have mutated under the conditions of globalisation, and the challenges these changes present to government in raising taxes. To maintain stable political communities, it has been argued,

¹⁴⁰ Dieter Bös, 'Earmarked Taxation: Welfare versus Political Support' (2000) 75 *Journal of Public Economics* 439, 439-462.

¹⁴¹ The benefit principle requires an approximation of market behaviour in the allocative procedures of the public sector so that a taxpayer is taken to voluntarily exchange purchasing power in the form of taxes for the acquisition of public goods and services; Bernard P Herber, *Modern Public Finance* (R D Irwin, 1983) 124. Frederick Stocker (updated Steven Maguire), 'Earmarking of Taxes' in Joseph J Cordes, Robert D Ebel and Jane G Gravelle, *The Encyclopedia of Taxation & Tax Policy* (2nd ed, The Urban Institute Press) 89, 90 observes that earmarking finds 'its limits in the fact that there are very few services or facilities for which there is a corresponding " earmarkable " tax '.

¹⁴² The Plastic Bag Environmental Levy raised by the Irish government provides an example of such a tax; Sheila Killian, 'Environmental Taxes and the Double Dividend Hypothesis: A Case Study from Ireland' (2003) 18 *Australian Tax Forum* 407, 407-430 for a discussion.

¹⁴³ Wilkinson, above n 110, 133.

DEMOCRATIC DISCOURSE

governments must reconnect taxpaying to citizenship through processes of democratic discourse. Despite this article being predicated on a strong conception of citizenship, it is submitted that the need for open and honest democratic discourse transcends particular ideologies.

Following Diderot and Rousseau, ideally, a democracy would have a single direct tax whose incidence and subsequent allocation would be clear to all citizens. Compelling historical and practical reasons may exist for multiple taxes, but obfuscation of total liability is an inevitable consequence and with it divergence from democratic ideals. Earmarked taxes are unlikely to promote transparency. Private initiatives to help taxpayers visualise tax incidence and government expenditure are to be welcomed, but it is incumbent on government that takes democracy seriously to assume leadership in establishing and servicing constituencies for fiscal information across civil society, and to engage in candid discourse with citizen-taxpayers.