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An Alert from the Left: The Endangered Connection Between Taxes and Solidarity at the Local and Global Levels

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Abstract

Neoliberal tax policies at the local and the global levels risk democracy consolidating economic inequality by allowing and fostering capital accumulation. As a consequence capital owners have increased their political power to influence and decide on local and global tax policies for their own benefit. The Chilean income tax system and the international tax law system (including tax competition among states and tax heavens) are analysed as examples of neoliberal tax policies at the local and the global level, respectively. At the same time, neoliberalism as a normative order of reason has replaced the political aspect of taxation with economic concepts that tend to dissolve the connection between taxes and solidarity. In this scenario, taxes make no economic or political sense as they are not understood as duties of citizenship. In this Article, recent alternatives proposed to diminish global no taxation and inequality, as the OECD BEPS project and Thomas Piketty's proposal for a global tax on capital are analyzed and criticized.

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A. Introduction

One of the consequences of economic globalization combined with local neoliberal policies has been an increasing takeover of the political by the market. This shift from politics to market economy has favored the economic dimension of life to the detriment of its political dimension. Arguably, the freedom to invest around the world guaranteed to multinational corporations (MNCs) has improved our lives as economic agents because it allows for the creation of new jobs around the world; free trade enhances consumers' choices, and so on. At the same time, our lives as political equals, that is as citizens, worsen as economic inequality increases in ways such as the endangerment of welfare entitlements. This Article examines the role that neoliberal tax policy and tax law have played in this process. The analysis develops on two levels: locally and globally. This two-level analysis is justified by the way local economic decisions are interwoven with global effects in a globalized economy. At the local level, the way neoliberal tax policies increase inequality over time by failing to provide a counterweight to market distributions is analyzed. For this purpose, the effects of the Chilean neoliberal income tax system adopted in the early 1980s are analyzed. At the global level, the way the combination of local neoliberal tax policies and an international tax system anchored in the principle of state sovereignty has enabled MNCs and global capital to avoid tax liabilities is analyzed. Thus, the legal and political divisions between the local and international spheres enable participants in global markets to escape taxation, thereby undermining solidarity and, ultimately, the fragile alliance between democracy and a capitalist mode of production. Even more, as argued in this Article, the normative order of reason that characterizes neoliberalism has replaced the connection between solidarity and taxation with economic concepts that make no economic or political sense when applied to taxation. By the end of the Article, the analysis turns to two alternatives to this state of affairs: (1) the Base Erosion and Profit Shifting (BEPS) action plan proposed by the Organization for Economic Cooperation and Development (OECD), and (2) Thomas Piketty's proposal for a global tax on capital. The conclusion is that even if there are good proposals for tax policies based on demands of fairness according to a particular conception of global distributive justice, there is still a need to find the legal, and institutional, means to implement them. This limitation could be understood as part of what global tax law should aspire to; it should strive to leave the current taxable event structure to create a new form of taxation able to implement a coordinated global tax policy and provide criteria according to which nation states share or allocate their taxing rights under a principle of distributive, and not commutative, justice.

B. Neoliberalism, Economic Globalization, and Taxation

There is not much novelty in pointing out that the world is going through what could be called a redefinition of the structure and function of the political institutions that characterize modern nation states. In a world characterized by a global neoliberal economic order, part of this redefinition is explained by the way the economic dimension of life has taken over its political dimension.[1] Though the exact moment in which this change started cannot be determined, the new world economic order in which we are living has been the result of neoliberal economic policies that started to be implemented around the world by the end of the 1970s.[2] These policies initially developed within nation states brought a global change when new international institutions, such as the World Trade Organization, and previously existing international institutions, such as the International Monetary Fund (IMF) and the OECD, adopted and reinforced the neoliberal agenda in the mid-1990s.

In *Buying Time*, Wolfgang Streeck provides a strong and convincing argument showing how this redefinition of the function of the nation state happened. Streeck argues that by the mid-1970s capital owners—profit-dependent owners and managers of capital—became relevant political actors, endangering the post-war political stability. Until then, capital, as a political actor, had agreed with and conveniently accepted the terms of the post-war social contract. This agreement, according to Streeck, explains the stability of Keynesian policies adopted by Western governments. That period was characterized by peace and the establishment of the welfare state. Nevertheless, by the end of the 1970s, capital began to dismiss the post-war social contract, conditioning the function of the state by deciding to not invest when labor expectations started to grow and became difficult to control. Capital claimed a bigger share of the social product. According to Streeck, the economic crisis of the late 1970s—and the crises that were to come—is better explained if we consider capital in this way. These new social arrangements between capital and the state explain policies that lowered taxes and the consequently lost revenue. Capital, now as a self-conscious political and economic actor, conditioned the way in which the state could finance its activities and was in position to cause economic crises whenever its economic benefits were lower than expected. In this way, it became more powerful than the capital-dependent population in setting the conditions of the state's economic

[1] On the concept of neoliberalism, *see* Thomas Biebricher, *Neoliberalism and Law: The Case of the constitutional Balanced-Budget Amendment*, in this issue.

[2] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM Introduction (2005); WENDY BROWN, UNDOING THE DEMOS. NEOLIBERALISM'S STEALTH REVOLUTION 20–21 (2015); RAYMOND PLANT, THE NEOLIBERAL STATE Ch. 9 (2009). On the general characteristics of neoliberal political economy *see* BOB JESSOP, THE FUTURE OF THE CAPITALIST STATE 95–139 (2002). Leo Panitch, perhaps with extreme optimism considered that the initial regulation of markets after the 2008 subprime crisis meant the end of neoliberalism understood as the opposition between states and markets. *See* his "Introduction" to RALPH MILIBAND, THE STATE IN CAPITALIST SOCIETY (2009).

constitution.[3] Governments first reacted by diminishing tax burdens on capital, and then implemented policies that enabled the liberalization of markets and capital by opening their frontiers and abolishing financial controls. This gave way to what Streeck calls the "debt state":[4] governments decided to continue with the welfare state, financing it this time not with tax revenue but with public debt. The third and final phase of this evolution of the state has led us to international "politics of the consolidation state" caused by the accumulated debt.[5] The politics of the consolidation state are characterized by a double movement: at the local level, governments cut public spending, continue to reduce tax burdens, especially on capital and financial markets, and privatize what used to be public services; at the global level, especially in Europe, states entered into structures of international integration which make democratic decisions even more difficult because they disproportionately empower capital to press for neoliberal economic policies. Streeck argues that this evolution of the state, which is causally dependent on the economic policies adopted, during the last thirty or forty years, has only delayed the crisis of democratic capitalism, increasing the power of capital to the detriment of democracy. Streeck is not optimistic about the future of the democratic state, as he believes that this "process of de-democratization of capitalism through the de-economization of democracy" will bring redistributive democracy to an end and will reduce it "to a combination of the rule of law and public entertainment."[6]

Nevertheless, there are those who argue that neoliberal policies have improved the quality of life of people around the world, especially in developing countries.[7] At least in material terms, they say, individuals now have access to products and goods, such as a refrigerator in the case of Chile, that thirty years ago were not available worldwide. This is the result of free markets working as the network of information that allows an efficient production and allocation of goods. Hence, the role of the state is to secure the conditions under which markets can operate. Colin Crouch calls those who defend this interpretation of neoliberalism "pure neoliberals."[8] This pure conception of neoliberalism, Crouch argues, is not to be found in existing polities. On the contrary, what we find when analyzing in detail the relation between the economic order and the political order that neoliberalism has produced is what Crouch calls "actually existing neoliberalism."[9] This kind of neoliberalism

[3] WOLFGANG STREECK, BUYING TIME. THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM 6–26 (2014).

[4] *Id.* at 47–96.

[5] *Id.* at 97–164.

[6] *Id.* at 5.

[7] For an argument showing how neoliberal policy brings economic growth, *see* A. Paus, *Economic Growth Through Neoliberal Restructuring? Insights from the Chilean Experience*, 28 J. OF DEVEL. AREAS 31–56 (1994).

[8] COLIN CROUCH, MAKING CAPITALISM FIT FOR SOCIETY 23 (2013).

[9] *Id.* at 24.

is characterized by the power of MNCs that are able to lobby their interests successfully and, more generally, by the power of private wealth in politics. According to Crouch, actually existing neoliberalism "produces a politicized economy very remote from what economists understand by a liberal market economy, and a polity so unbalanced by plutocratic power that it seriously compromises the idea of liberal democracy."[10] In this sense, actually existing neoliberalism secures the political position and privileges of those who are able to benefit from market interactions. Under actually existing neoliberalism, economic inequalities carry with them inequalities of political power. The function of the state under neoliberalism has been reduced to secure the distributional effects of the market, and, for this purpose, a particular conception of private property and the rule of law have been championed and legally protected. While neoliberal discourse tries to convince individuals that this is all that is needed from the state, because obtaining economic benefits depends exclusively on how well they do in market interactions, according to their effort and responsibility, neoliberals take political control of the state to secure that this promise is not fulfilled. Hence, what seems to be a promise open to all, is not. In this vein, David Harvey argues that neoliberalism has brought not the well-being of all, as it promises, but the "restoration of class power"[11] through a process of "accumulation by dispossession."[12] This process redistributes the social product to the owners of capital who benefit from low taxation and the privatization of all sorts of services that used to be provided by the state.[13]

By now, the neoliberalization of economic policy has gone global. What started as a shy policy of open markets became a sphere of power dominated by the global economic interests of capital. In this scenario, MNCs are the real citizens of the world, or, as Crouch puts it, global firms became the "key institution of the post-democratic world."[14] They benefit from free capital flows over the world, no restrictions to commerce, global instances of dispute resolution modeled to incentivize international commerce, and especially from low taxation. Following Crouch, MNCs obtained these benefits, as they became the survivors in a world in which the toughest take it all. Once these firms became global, they had enough power to condition their investment to preferential fiscal and labor regimes.[15] At the same time, states compete to obtain the resources from these firms

[10] *Id.*

[11] DAVID HARVEY, SPACES OF GLOBAL CAPITALISM 29 (2006) [hereinafter HARVEY, GLOBAL CAPITALISM]. *See also* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

[12] *See* HARVEY, GLOBAL CAPITALISM, *supra* note 11, at 43.

[13] *See also* COLIN CROUCH, POST-DEMOCRACY 31–69 (2004) [hereinafter CROUCH, POST-DEMOCRACY]; COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM (2011).

[14] *See* CROUCH, POST-DEMOCRACY, *supra* note 13, at 31.

[15] *Id.* at 32.

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making all kind of regulatory concessions to them. This is how special non-tax regimes have trended worldwide, for example tax benefits for capital gains such as deferrals or exemptions for the exchange of stocks and other benefits for financial market capital gains, such as bonds.

According to Harvey, one of the ways in which the neoliberal process of dispossession has been successful was the establishment of tax policies that permit the accumulation of capital, but do not take into account that capital accumulation endangers equality. This also explains why states have lost the democratic control of the economy, as Streeck argues. At the same time, states have had to continue financing part of their public expenditure through the tax system.[16] The middle class has had to carry an important part of the economic burden associated with the State. But it is easy to see how the tax system loses its legitimacy under actually existing neoliberal policies. First, direct taxation does not fulfill its traditional redistributive function because capital and profit can be easily shifted to low or no-tax jurisdictions if they do not receive preferential treatment. Secondly, the tax system relies heavily on indirect taxation to obtain revenue; hence, those who pay taxes are either those who obtain their income from labor or those that cannot easily move their source of income to a different jurisdiction. Finally, the tax system becomes oppressive, as the state does not give anything back to its citizens; the citizens have to pay for their own pensions, health, education, and so on, while at the same time they cannot accumulate capital. This can be called the economic nonsense of taxation under neoliberalism.[17]

The economic nonsense of taxation under neoliberalism is not the only way in which taxation has lost meaning. Taxation also lost its political meaning, namely as part of those duties of citizenship required by solidarity. According to Wendy Brown, neoliberalism is not only a set of economic policies but also a "normative order of reason" that "transmogrifies every human domain and endeavor, along with humans themselves, according to a specific image of the economic."[18] Brown argues that neoliberalism has extended the "model of the market to all domains and activities" and "configures human beings exhaustively as market actors, always, only, and everywhere as *homo oeconomicus*."[19] In this sense,

[16] Many countries finance their public expenditure with a combination of tax revenue and public debt. This is not the case of a consistent neoliberal country as Chile, where public debt has been strictly controlled through a structural balance rule. According to this rule public expenditure cannot exceed tax revenue. This rule, nevertheless, has not been constitutionally adopted.

[17] For an exposition of the neoliberal argument, as an economic argument, according to which taxes "become inconsequential," *see* EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS. HOW GOVERNMENT SHOULD SPEND OUR MONEY 37–41 (2014).

[18] *See* BROWN, *supra* note 2, at 9–10, ch. 1.

[19] *Id.* at 31.

neoliberalism is different from classical economic liberalism.[20] This normative idea that comes with neoliberalism pervades the political, pushing away the *homo politicus* from the political to exchange "democratic principles of justice into an economic idiom,"[21] with important consequences for democratic institutions. The normative idea of neoliberalism, according to which individuals that are part of a state are actually understood as units of human capital that compete with each other, or at most as economic agents who share the risks of economic life, as it happens in any firm, but receive no protection from even a liberal notion of the social contract,[22] has destroyed the notion of solidarity that justified taxation. Contrary to the normative logic of the market, one of the most important public goods of political communities is solidarity. It is a public, or collective, good in the sense that it is "indivisible and must be produced, or at least decided upon, by those who benefit from"[23] it. In this sense, solidarity is one of those goods that are part of political communities understood as "communities of fate."[24] Paying taxes is the paradigmatic way in which "citizenship demands that one provide generalized support to the community as a whole ... which may be put to as yet undecided uses by a lawfully constituted government."[25] In this sense, taxes are part of those duties that constitute citizenship. Elsewhere I have developed in detail an argument in favor of this conception of taxation. It is argued that taxation and tax law should be understood as institutions of mutual recognition rather than as mere economic mechanisms for redistribution as which they have so far been understood by liberal egalitarian and luck egalitarian justifications of progressive taxation.[26] The problem with those justifications is that they concentrate on providing a moral justification for redistribution but leave—neoliberal—institutions as they find them. Hence the duty to pay taxes is justified by the self-interest of those who interact in the market, and not by solidarity. But as said before, this is not of much help when taxation has lost its economic sense. Thus, liberal and luck egalitarian justifications for progressive tax systems have been fighting fire with fire. They have followed an economic rationale by showing that progressive taxation is in the interest of individual well-being, but they disregarded the political meaning of citizenship's duties and hence the importance of solidarity. In this sense they have assumed—perhaps rightly—that politics have become marketized.

[20] *Id.* at 33.

[21] *Id*. at 35.

[22] *Id.*

[23] Wolfgang Streeck, *Citizens as Consumers*, 76 NEW LEFT REV. 27, 41 (2012).

[24] *Id.* at 42.

[25] *Id.*

[26] *See* Francisco Saffie, Taxes as Practices of Mutual Recognition: Towards a General Theory of Tax Law Ch.3 (July 2, 2014) (unpublished Ph.D. thesis, Edinburgh University) (on file with author).

This disconnection between taxation and solidarity had—and continues to have—consequences for both the design of tax policy and tax law. Regarding the former, beyond reducing tax rates, neoliberal policies are structured around rational choice theories, for example when arguing that the same tax rate should apply to capital and labor income and recommending a reduction of both tax rates, arguments in favor of fully integrated income tax systems—based on the idea that in the long run the incidence of corporate taxes is on individuals, hence they do not affect the owners of capital but individuals as consumers and laborers, and that corporate taxes combined with personal income taxes create double taxation[27]—and incentivizing through taxation, corporate equity finance and investment rather than debt. These ideas have led some to suggest a complete replacement of income tax by consumption taxes,[28] but the consequences for tax law have also been important. Tax law, as we actually know it, is a young and underdeveloped area of law.[29] The "unwelcome child of the law," as Johannes Popitz calls it,[30] became an independent legal branch in the early twentieth century. In Germany, for example, tax law began to be taught independently from budgetary law by Ludwig Waldecker at the University of Berlin after 1915.[31] In the UK, the evolution of tax law was not that different. According to Freedman, tax law "is a relative newcomer to the UK law degree curriculum." It has been taught as an independent legal discipline only since the 1950s when Wheatcroft started teaching and publishing in his role at the London School of Economics.[32] The problem is that tax law scholarship never fully developed a general theory able to explain the way in which tax duties are duties of citizenship—that is, public law duties. This theoretical underdevelopment contributed to the actual state of tax law and its appropriation by neoliberalism. In other words, the general theory of tax law adopted a structure that has left an enormous space for local and global tax avoidance, which is a different way of saying that tax law—the legal form of taxation—also contributed to taxes losing their grip as duties of solidarity.

According to the general theory of tax law, the legal duty to pay taxes has a correlative right, namely, the state's enforceable right to claim the tax. This relationship between the

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[27] *See generally* Arnold C. Harberger, *The Incidence of the Corporation Income Tax*, 70 J. OF POLIT. ECON. 3 (1962); Kyle Pomerleau, *Eliminating Double Taxation Through Corporate Integration*, TAX FOUND. (Feb. 23, 2015).

[28] *See generally* DANIEL S. GOLDBERG, THE DEATH OF THE INCOME TAX (2013).

[29] This is not strange as progressive income taxes were only established around the beginning of the twentieth century. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 498–508 (2014).

[30] Quoted in MICHAEL STOLLEIS & THOMAS DUNLAP, A HISTORY OF PUBLIC LAW IN GERMANY 1914–1945 224 (2004).

[31] *Id.* at 219.

[32] Judith Freedman, *Taxation as Legal Research*, *in* TAXATION AN INTERDISCIPLINARY APPROACH 15 (Margaret Lamb, Andrew Lymer, Judith Freedman & Simon James eds., 2004).

state and the taxpayer turns the tax duty into a legal relationship. According to the contemporary general theory of tax law, in this legal relationship, the taxable event represents the will of the state. The taxable event (TE) contains the description of the relevant facts and operative conditions (OC) according to which the taxpayer (T) will have a specific legal obligation to pay (P) a certain amount of tax. This is the way in which P by T, referred to above, is expressed and specified in tax law. Nevertheless, for T to P it is necessary that OC give way to TE.[33] The space left for tax avoidance, under this structure of P is big because as long as T does not cause TE to happen—for any reason, including the intention to avoid taxes—there is no duty to P. Even for theories that accept substantive interpretation in tax law, the structure of the general theory of tax law is a limit that restricts analogical reasoning or purposive interpretations of the law because without the satisfaction of TE there is no legal duty to pay taxes.[34] Under this structure, the protection of private property is in a privileged status compared with the public duty to pay taxes.

C. Neoliberal Tax Policies and Its Consequences: Locally and Globally

I. Neoliberal Tax Policy at the Local Level: The Chilean Case

Chile is probably the only country in the world where neoliberal policies were fully implemented. The process of radical neoliberalism could not have been as successful as it was had it not relied on military force. Not one of the new policies that were established by Pinochet's regime since 1973 was deflected by the democratic process as they did not need democratic legitimacy. Chile's neoliberalism was designed following the Chicago economic school of thought.[35] Public industries and health services were privatized, a private pension system was established, and universities, schools, and any institution you name were left to private initiative. On top of the initial military force, neoliberal policies needed a supportive political discourse to survive. Presenting the new policies and the respective institutions as the only way to make the country prosper and free from Marxist totalitarianism was, at that moment, an easy and appealing discourse. It is a discourse that still echoes whenever social democratic reforms are presented in parliament. The force of

[33] According to Hensel, the legal duty to pay taxes is "born with the realization of the taxable event." ALBERT HENSEL, DERECHO TRIBUTARIO 154 (2005).

[34] For further details of this argument, *see* Francisco Saffie, Taxes as Practices of Mutual Recognition: Towards a General Theory of Tax Law Ch.2 (July 2, 2014) (unpublished Ph.D. thesis, Edinburgh University) (on file with author). For another way of putting this point but from a different conception of tax law, Kleinbard argues that the structure of the legal duty to pay taxes raises avoidance as a moral and not a legal problem, even if he recognizes that "for every real-life action in the commercial sphere, one finds a tax description and a tax operator, that together yield a tax consequence." Edward Kleinbard, *Stateless Income and Its Remedies*, *in* GLOBAL TAX FAIRNESS 132 (Thomas Pogge & Krishen Mehta eds., 2016). For Kleinbard, therefore, there is no underlying substance to the artificiality upon which the legislature structures tax obligations.

[35] For details of this process *see* generally JUAN GABRIEL VALDÉS, PINOCHET'S ECONOMISTS. THE CHICAGO SCHOOL IN CHILE (1995).

the coup destroyed any other economic policy because the only alternatives that existed were a failed socialist project[36] and the new neoliberal policies that promised freedom and opportunities for all. The entire discourse was facilitated by the fact that Chileans had never experienced a welfare state, so politics had never represented that space of solidarity or common fate mentioned in the previous section. Since then, and especially after the economic success of the country during the 1980s and 1990s, neoliberalism has enjoyed a good life in Chile. Recently, neoliberalism has been at risk with the present government's proposals for tax, labor, educational and constitutional reforms, but the power of capital has shown how alive it is by threatening with less investment, capital flight and so on, a discourse that actually diminished popular support to the reforms. Be that as it may, the Chilean tax system that was established in 1983—that was recently reformed,though the reform is still debated and there is pressure to leave everything as it was—was a solid example of neoliberal tax policies, and its consequences a solid example of the consequences of neoliberalism.

An important part of neoliberal tax policy is to give a privileged status to capital, taxing it as little as possible. This explains why the Chilean income tax was designed as a fully integrated income tax. In such a system, there is no distinction for income tax purposes between firms and their owners. In other words, following economic ideas about tax incidence, the only taxpayers for income tax purposes are natural persons.[37] At the same time, in its purest version, this system requires not to tax income as long as profit is not distributed to the firm's shareholders or partners.[38] This was the original design that changed a bit in 1990 when firms where obliged to pay on their accrued profits an advance of the personal income tax of their shareholders or partners—this rate is 20 percent today, but started in 1990 at 10 percent. This is not a real corporate income tax; it "is in reality a payment on account of" the owners of the firm's personal income taxes, "which are due when profits are distributed to them; at that time, they can fully credit against their tax liability the tax paid by the company."[39] The fully integrated system, hence, allows shareholders or partners to get a refund if their personal income tax is lower than the advance payment made by the firm. Workers do not receive such a privilege treatment, as they are subject to a progressive income payroll tax with a top tax rate of 40 percent. Employers directly pay this tax to the administration. Mainly the working middle class pays

[36] This is not the place to analyze why it failed, though there are good reasons to believe that the U.S. and Chilean capitalists had responsibility in the failure of the economic system by generating the economic crisis. What happened in Chile is a dramatic case that illustrates Streeck's point about the way in which capital can control democracy.

[37] Harberger's work, *supra* note 27, was particularly influential on this issue.

[38] In the words of IMF No. 14/219, "Chile's full integration system is probably one of the purest in design." International Monetary Fund, *Chile: Selected Issues Paper*, IMF Report No. 14/219 (July 2014).

[39] *Id*.

this tax, because nearly 82 percent of the working population is exempt from the payroll income tax because they receive low salaries. This different tax treatment of capital and labor has created an incentive to avoid the payroll tax by disguising work income as capital income through the creation of firm and incentivizing entrepreneurial innovation rather than work subject to labor law. This tax system therefore destroys taxes as citizens' duties by presenting them as economic costs that the citizen as an economic agent should avoid. Hence, the remaining 18 percent of the working, or middle, class not exempt from income tax is probably paying less than what they should because most of them pay for the profit they withdraw or that is distributed to them from the firms through which they develop their professional activities.[40]

This understanding of the tax system, specifically an economic one devoid of political meaning, is corroborated by an analysis of the composition of Chilean tax revenue. Actually, it is coherent with neoliberal tax principles as it is principally composed by indirect taxation. A value added tax (VAT) with no exemptions and with one proportional rate for all kinds of products represents a bit more than 50 percent of the total tax revenue. This is problematic when combined with low public expenditure, because in those cases VAT tends to be a regressive tax.[41] Hence, the Chilean tax system does not make a redistributive difference. This explains why Chile, an extremely fiscally disciplined country, is the most unequal country of the OECD considering the Gini coefficient.[42] Over the years, this tax system financed a minimum state that destroyed solidarity bonds among citizens. It is a system that increased the power of economic elites and, at the same time, that explains why it has been so hard to reform.[43]

II. Neoliberal Tax Policy at the Global Level: International Tax Policy and Tax Competition

International tax law is another example of how tax policy has drifted under the influence of neoliberalism. At the global level, MNCs and financial institutions have been able to

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[40] In Chile there is no corporate tax. As I explain in the main text, the income tax is fully integrated so that tax paid by firms is nothing but an advance of the shareholders or partners' income tax.

[41] Generally, it is understood that a tax is regressive when those who have less income end up paying proportionally more taxes than those who have more income. For an argument according to which saying of a particular tax that it is progressive or regressive is myopic for not considering public expenditure, *see* generally LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP. TAXES AND JUSTICE (2004).

[42] Tasha A. Fairfield & Michael Jorrat, *Top Income Shares, Business Profits, and Effective Tax Rates in Contemporary Chile*, 62 REV. OF INCOME AND WEALTH 1 (2016). The Gini coefficient "is a way of comparing how distribution of income in a society compares with a similar society in which everyone earned exactly the same account. Inequality on the Gini scale is measured between 0, where everybody is equal, and 1, where all the country's income is earned by a single person" (http://www.bbc.com/news/blogs-magazine-monitor-31847943).

[43] *See generally* Tasha A. Fairfield, *Business Power and Tax Reform: Taxing Income and Profits in Chile and Argentina*, 52 LATIN AMER. POL. AND SOC'Y 2 (2010); *see also* TASHA A. FAIRFIELD, PRIVATE WEALTH AND PUBLIC REVENUE IN LATIN AMERICA. BUSINESS POWER AND TAX POLITICS (2015).

shape "the structural features of the existing global economic and financial order"[44] benefiting from their indirect influence on the design of international tax policy, such as international policy recommendations and tax treaties, and pressing for tax competition with governments that have endorsed neoliberal economic policies. This diagnosis stands even if it were true that no international administrative coordination for the purposes of pursuing neoliberal economic tax policies at the global level existed, precisely because of the reasons given before in this Article, specifically the influence and power of economic interests that reach the global level without any need to take part in representative political structures.[45] Following is an analysis of the two aspects here mentioned, that is, of the way in which international tax law and tax competition have been instrumental for neoliberalism at the global level.

The network of bilateral tax treaties could, arguably, be said to constitute international tax law.[46] Reuven Avi-Yonah has argued that international tax law is constituted by two principles to which every country would agree with: (1) the single tax principle, according to which "income from cross-border transactions should be subject to tax once . . . at the rate determined by the benefits principle"; and, (2) the benefits principle, that "allocates the right to tax active business income primarily to the source jurisdiction and the right to passive investment income primarily to the residence jurisdiction."[47] Bilateral tax treaties have expanded through the world, mainly following the OECD model.[48] Nevertheless, rather "than preventing 'double taxation' [this] has, in practice, led to a world of widespread double non-taxation."[49] This has happened because treaty tax rates are very low, while at the same time they give strategic alternatives to an MNC to establish its activities worldwide according to the best treaty network combination available to it. This movement has also been part of what could be considered a neoliberal policy agenda known as the "Washington Consensus" that has influenced economic policy worldwide.[50]

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[44] Kleinbard, *supra* note 34, at 3.

[45] For a particularly interesting argument on these lines, *see* PETER DIETSCH, CATCHING CAPITAL. THE ETHICS OF TAX COMPETITION 23–25 (2015).

[46] *See generally* REUVEN AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW (2007).

[47] *Id.* at 3.

[48] Jeffrey Owens & Mary Bennett, *OECD Model Tax Convention*, OECD OBSERVER (Oct. 2008), http://www.oecdobserver.org/news/archivestory.php/aid/2756/OECD_Model_Tax_Convention.html (showing more than 3,000). *Double Tax Treaties*, ICAEW, http://www.icaew.com/en/library/key-resources/double-tax-treaties (showing over 1,300). According to Rixen, "in 2004, 90.6 per cent of all possible bilateral treaties among OECD members were in place." *See* THOMAS RIXEN, THE POLITICAL ECONOMY OF INTERNATIONAL TAX GOVERNANCE 115 (2008).

[49] *Tax Treaties*, Tax Justice Network, http://www.taxjustice.net/topics/corporate-tax/tax-treaties/. *See also* the description of the political resistance of the initial proposals for a financial tax before the 2008 financial crisis in Peter Wahl, *More Than Just Another Tax*, *in* Pogge and Mehta, *supra* note 34, at 205–07.

[50] James S. Henry, *Let's Tax Anonymous Wealth*, *in* Pogge & Mehta, *supra* note 34, at 37.

This is particularly relevant when it comes to analyzing the way in which capital has benefited from investments in developing countries. As Mehta and Dayle Siu have argued, tax treaties diminish the revenue base of these countries and "often protect MNCs at the expense of developing countries" without improving foreign direct investment as initially expected.[51] In this sense, it seems that a lot needs to be done to find a middle ground between double taxation and no international taxation when it comes to MNCs as they can use international tax law at their will, as long as there is no abuse to diminish their taxes.

Even more, the combination between international tax law and local tax law influenced by the neoliberal ethos creates an explosive mix that is very productive for base erosion and profit shifting (BEPS). Corrick explains this problem very clearly:

> BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place ... . In other words, what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed.[52]

It is a worrying consequence of the application of the combination of international and local tax law that income from "cross-border activities may go untaxed anywhere, or be unduly lowly taxed" as Corrick points out. Even more it is a major problem that tax law, the rules of which are designed to tax income, is legally used to not pay tax. This practice has led to what Kleinbard calls "stateless income," consisting of

> income derived for tax purposes by a multinational group from business activities in a country other than the domicile of the group's ultimate parent company, but which is subject to tax only in a jurisdiction that is neither the source of the factors of production through which the income was derived, nor the domicile of the group's parent company.[53]

The point here is that international tax planning allows to tax the income generated by the MNC group in a tax haven or a very low tax jurisdiction. Stateless income goes against the

[51] Krishen Mehta & Erika Dayle Siu, *Ten Ways Developing Countries Can Take Control*, *in* Pogge & Mehta, *supra* note 34, at 340.

[52] Lee Corrick, *The Taxation of Multinational Enterprises*, *in* Pogge & Mehta, *supra* note 34, at 175.

[53] Kleinbard, *supra* note 34, at 129.

second principle of international tax law mentioned above, specifically, the benefits principle. In other words, the instrumental use of the law that makes stateless income possible shows how international tax law was designed around ideas that are not able to grasp the nature of global commerce and international capital as it exists today.[54]

At the same time that international tax policy and existing international tax law have been the downfall of the idea of international tax law, the problem only grows in dimension when combined with the ethos of neoliberalism at the local level. When it comes to attract foreign direct investment, local tax policy has been designed according to neoliberal principles, that is, tax rates are inversely proportional to foreign direct investment. The combination of all these factors brings what has been called "tax competition." According to Shaxson and Christensen,

> tax 'competition' occurs when jurisdictions—whether independent nations or states inside a federation—dangle tax incentives to tempt investment, hot money, financial activities, or even wealthy individuals away from other jurisdictions, often nearby. There are three main ways in which this happens: falling tax rates come down; the tax base (that is, what gets subjected to tax) shrinks, and enforcement gets weakened, often deliberately. Each move either directly takes a chunk out of other countries' tax systems, or puts pressure on them to follow suit and make their own cuts: in a 'race to the bottom.' This 'competition' goes way beyond tax: it is also found in the areas of financial secrecy, financial deregulation, tolerance for criminal money, and more.[55]

Shaxson and Christensen show that there is theoretical and empirical evidence to prove that the underlying economic assumptions for tax competition lack any rigor and do not actually explain foreign direct investment.

The analysis given in this Section shows that Streeck's and Crouch's arguments described in the first part of this Article correlate highly—not only as the political will that may explain the implementation of neoliberal policies at the local level as in the Chilean case—with capital's interests as a class at the international level either in the design of tax policy or tax competition allowing capital owners to accumulate income by not paying taxes, increasing inequality worldwide.

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[54] Kleinbard makes a similar point, *supra* note 34, at 144. Nevertheless, I do not share his view that this is only, or mainly, a problem of the system being designed over non-commercial and noneconomic premises, *id.* at 145, and hence of the connection principle to tax MNC—in his argument a "territorial tax model"—for the reasons given in the last Section of this Article.

[55] Nicholas Shaxson & John Christensen, *Tax Competitiveness – A Dangerous Obsession*, *in* Pogge & Mehta, supra note 34, at 266.

All this explains why tax havens are such a problem for international tax law, as recently exemplified by the Panama papers leak. These countries benefit from attracting MNCs willing to be free of taxes. And MNCs benefit from tax havens even more if they can structure their business to combine local neoliberal tax policies in the countries where their economic activities take place—either by taking advantage of tax competition and ensuing low rates or by exploiting what are technically called "hybrid mismatch arrangements"—with the tax treaty network and tax havens. Well-known international cases are those of Amazon, Google, Apple, and Starbucks, companies that structure their business almost not to pay taxes at all, nowhere.[56]

It is not easy to suggest solutions to these problems. There are evident difficulties, starting from a common political will, to bring coordinated policy changes to local and international tax law and continuing with the inexistence of a global tax authority. This complex scenario, however, has not been a pretext for doing nothing at least at the level of proposals, as Wahl has argued.[57] The following Section evaluates some proposals to these problems.

D. Are there any Alternatives?

As argued in this Article, local and global economic inequality caused by neoliberal tax policies and the consequent risk for democracy, are an important problem worldwide. Lately, political action to change this state of affairs has taken place at the local and global levels. At the local level, social movements have been urging for policy change[58] and tax policy reforms have been put forward for developing countries in order to increase "global tax fairness."[59] At the global level there has been political action and one interesting, and popular, policy suggestion. The former is the OECD BEPS action plan, and the latter, Thomas Piketty's proposal for a global tax on capital. The former only describes ways in which existing policies can be improved locally in developing countries and does not imply bigger changes to the global tax system.

[56] Kleinbard, *supra* note 34, at 132. When finalizing this Article the European Commission ruled that Apple has to pay €13 billion plus interest in taxes because of illegal tax benefits given by Ireland, as reported by Sean Farrell & Henry McDonald, *Apple Ordered to Pay €13bn After EU Rules Ireland Broke State Aid Laws,* GUARDIAN (Aug. 30, 2016), https://www.theguardian.com/business/2016/aug/30/apple-pay-back-taxes-eu-ruling-ireland-state-aid.

[57] Wahl, *supra* note 49, at 208.

[58] In Chile, for example, a tax reform was recently passed to increase revenue to finance the public education reform. A reform that could be read as the triumph of the 2011 student movement. As the tax reform will only be put into effect in 2018, however, there has been space to increase the opposition to it and some are strongly lobbying to abolish it.

[59] *See* all the proposals contained in the recently published book edited by Pogge & Mehta, *supra* note 34.

The BEPS action plan is an effort in which OECD countries are trying to offer proposals to fight international tax avoidance. The first output of this project was delivered in 2014 and the final reports were delivered in 2015. At the same time, an implementation package has launched negotiations on a multilateral agreement to implement tax treaty-related BEPS measures, country-by-country report obligations, and "criteria to assess whether preferential treatment regimens for intellectual property (patent boxes) are harmful or not."[60] Needless to say this is an impressive and important effort to improve states' ability to tax MNCs by assuring that "profits are taxed where economic activities take place and value is created."[61] The final report includes policy recommendations divided in 15 actions, including measures to address the tax challenges of the digital economy, neutralize the effects of hybrid mismatch arrangements, strengthen controlled foreign company rules, limit base erosion via interest deductions and other financial payments, counter harmful tax practices more effectively, taking into account transparency and substance, prevent treaty abuse, prevent the artificial avoidance of permanent establishment status, assure that transfer pricing outcomes are in line with value creation, measuring and monitoring BEPS, require taxpayers to disclose their aggressive tax planning arrangements, re-examine transfer pricing documentation, make dispute resolution mechanisms more effective, and develop a multilateral instrument. As the OECD reports, the project is in development until 2020 and it is not difficult to predict that it will be under continued pressure by lobbyists trying to undermine the final implementation of these measures. Even more, according to the OECD, challenges have already risen as "some practitioners" "denounced" an "increasing uncertainty" derived from measures adopted unilaterally by certain states and the aggressiveness of some tax administrations.[62] The OECD, however, read these challenges not as a concern for capital's lobby but as a concern to maintain existing tax policies not to generate "global tax chaos marked by the massive re-emergence of double taxation."[63]

My concern, however, is a different one. Remember the two principles of international tax law identified by Avi-Yonah mentioned before in this Article, specifically the single tax principle and the benefit principle. These two principles on which international tax law has been historically built are not changed by the OECD BEPS project. On the contrary, the measures proposed by the BEPS final report mean reinforcing those principles. This brings two consequences: (1) the BEPS project does not mean that we will have a new

[60] *First Steps Towards Implementation of OECD/G20 Efforts Against Tax Avoidance by* Multinationals, OECD (Feb. 6, 2015), http://www.oecd.org/ctp/first-steps-towards-implementation-of-oecd-g20-efforts-against-tax-avoidance-by-multinationals.htm.

[61] OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, EXPLANATORY STATEMENT 4, http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf.

[62] *Id.* at 9.

[63] *Id.*

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international tax system that assures democratic influence over tax policy, or; (2) new ways to tax MNCs, or a global project linking tax policy with global distributive justice and solidarity. In other words, the BEPS project reinforces principles of commutative justice among those states entitled to tax according to the traditional principles of international tax law and hence leaves plenty of space for the neoliberal ideology that characterizes current tax policy and tax law, and only tries to fix certain excesses of those policies. New measures, however, based on distributive justice seem to be needed when the combination between local tax law, tax treaties, and tax competition creates what was called, as previously mentioned, "stateless income."

A different alternative has been suggested by Thomas Piketty in his *Capital in the Twenty-First Century*. Piketty proposed a tax policy oriented to make democracy "regain control over the globalized financial capitalism of this century."[64] The "new tool" Piketty proposes is a global tax on capital combined with high levels of financial transparency. This tax should be progressive, annual, and applied to "individual wealth—that is, on the net value of assets each person controls."[65] The tax base should be individual net worth for the wealthiest and for the rest, the market value of all financial assets and nonfinancial assets net of debt.[66] The tax rate proposed by Piketty is progressive but not necessarily high. According to Piketty these two measures, the global tax on capital and fiscal transparency, will improve equality and democracy.

Piketty's arguments for taxing capital at a global level are convincing and the policy he proposes for that is sound. He may even be right about the benefits that his proposal will bring for diminishing inequality and improving democracy's future. Nevertheless, the problem is not only the obvious coordination problem among states that he admits, but that his ideas need global legal structures to work and a principle of distributive justice to allocate this revenue as if it was a real global tax—without a necessary identity between the state that collects the tax and the state that is entitled to the revenue.

To recap, the alternatives offered in opposition to neoliberal tax policies or the consequences they bring at the local and the global level have two commonalities and one difference. The first common aspect is that they have a political problem: Their advocates have lost political power to capital as a social and economic actor. The second common aspect is that they share a legal problem: Tax law theorists have no local or global alternative to the traditional general theory of tax law and hence, the way in which tax duties are born is not structured as a duty of local or global citizenship. The difference is that at the local level, state institutions are wounded but still alive, so they are still the

[64] Piketty, *supra* note 29, at 515.

[65] *Id.* at 516.

[66] *Id.* at 517.

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place of distributive justice and solidarity as common fate; at the global level, there are no institutions based on shared political values and, therefore, there is no place for distributive justice but only for commutative justice. The aim of this Article is not to propose solutions to these problems, but to provide orientation of where to look for them. It is in this sense that Streeck's and Crouch's concern for the domestic level is understood—but with a turn, because we do not need to abandon the global. What is needed before looking again, with renewed ideas, at the global, is a reaffirmation of the political concepts underlying domestic institutions. This is the only way in which to counteract the normative order imposed by neoliberalism and the power of capital to preserve democracy and its underlying values of liberty and equality to finally reach fraternity.