WHY DID THE UK GET IT WRONG? A REPLY

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This article replies to a recent contribution to the Jersey and Guernsey Law Review by Filippo Noseda, which argued that the United Kingdom's contribution to the development of tax transparency was largely due to Eurosceptic and anti-human rights attitude. This article argues that, regardless of what might be thought about Euroscepticism and opposition to the Human Rights Act, moves to tax transparency represent a wider consensus both in the international community and in the United Kingdom. The merits of that consensus is doubtless open to academic discussion, as is the potential for the United Kingdom to seek to impose its approaches (including potentially mistaken ones) on the Crown Dependencies. However, given that support for tax transparency has a broad and bi-partisan base in the United Kingdom and elsewhere, speculation as to the motives of the current British government do not provide a useful framework for tackling the balance between privacy and tax transparency.

1 This article is by way of response to Filippo Noseda's recent *Jersey & Guernsey Law Review* article entitled "Too Much Information: Why did the UK get it Wrong?" ("the 2021 article").[1] This was itself a follow up piece to Noseda's earlier contribution from 2017 entitled "Too Much Information: When the UK gets it wrong" ("the 2017 article).[2] The 2017 article contributed greatly to the Crown Dependencies' exposure to UK decision-making in the field of international tax information exchange. If the United Kingdom makes mistakes in respect of balancing privacy rights with the fight against tax evasion, then there is a risk that it will try to drag along Jersey and Guernsey regardless of constitutional propriety. There was very little in that earlier article directly linking the United Kingdom's approach to tax information to the government's attitudes to human rights.[3] The more recent 2021 article is, by contrast, something of a polemic linking the UK's approach to tax information exchange and tax transparency with the government's frequently negative attitudes to

[1] (2021) 25 *Jersey & Guernsey Law Review* 63.
[2] (2017) 21 *Jersey & Guernsey Law Review* 182.
[3] *Ibid*, at para 35.

human rights adjudication—and to Brexit and Euroscepticism generally.

2 It will be argued here that, whilst the 2017 article posed very interesting questions as to how the Channel Islands' relationship with international tax information standards is complicated by its constitutional relationship with the United Kingdom, the 2021 article leads itself astray by (a) mining a thin stream of international authority against routine bulk information powers (in fact, largely ongoing cases), and (b) submerging this interesting line of enquiry under a denunciation of British Euroscepticism and human rights scepticism.

3 There will be essentially five arguments made in response. First, there are longstanding critiques of human rights adjudication. Concerns as the power given to judges under human rights conventions is not something uniquely right wing. Nor has the existence of such criticisms been as operative in UK policy as Noseda suggests. Secondly, initiatives for bulk information powers or for the easy obtaining of specific information exchange have often come from the EU or the USA. Thirdly, the United Kingdom's use of routine bulk information powers to tackle offshore tax evasion dates to 2005 with the Offshore Fraud Project, which is perhaps the only context where the use of such powers has led to judicial decisions on human rights objections. Fourthly, the human rights compatibility of such measures is a matter of justification under the European Convention on Human Rights ("ECHR"). An individual may well believe a sweeping measure is proportionate under the relevant ECHR article; whether he or she proves to be correct if the matter comes to adjudication is no indication of their human rights philosophy. Finally, Noseda makes much reference to the idea of a fully public register of beneficial interests as being a violation of human rights. It is a matter of record that those in the UK Parliament who took the lead in trying to push such a register on the Channel Islands were very much pro-ECHR, anti-Brexit politicians.

The Noseda 2021 article

4 The original 2017 article focused on the UK–Crown Dependencies dynamic. Noseda sets his stall out vividly with the failure of the Prime Minister, the Rt Hon David Cameron, to defend the constitutional position of the Crown Dependencies in the House of Commons following the start of the "Panama Papers" affair.[4] The article is an intriguing exploration of the problem of the United Kingdom

[4] *Ibid*, at para 13 *et seq.*

imposing measures on the Crown Dependencies, when the legality of such measures is potentially doubtful in the jurisdictions of origin. Noseda notes at para 30 of his article that the European Commission had concerns about drafting legislation on public registers of beneficial ownership so as to avoid the resulting Directive being annulled by the Court of Justice of the European Union. That raises the obvious point: what if the United Kingdom imposes such legislation on the Crown Dependencies, only for the EU to be forced to abandon the legislation itself? The heart and soul of the 2017 article was the vulnerability of the Crown Dependencies to direct UK intervention on issues of fundamental economic importance to the Dependencies. It is an important article.

5 The follow up article in 2021 is more polemical. To explain it, it is worth going into a bit of background on the nature of its key concern, *i.e.* the "automatic exchange" of information. Information exchange can be divided into three types:

(a) "On request." This is the classic form of mutual assistance in tax matters. If Ruritania believes that Rupert of Hentzau, one of its leading citizens, is hiding money in the banks of neighbouring Sokovia, it can request that Sokovia find out necessary information. There is theoretically no limit to the number of requests that can be made, nor the number of subjects of requests, nor the number of documents included, but time and other resource limits on both sides will mean that requests will be limited.

(b) "Spontaneous." The OECD's definition is that the "exchange of information is the provision of information to another contracting party that is foreseeably relevant to that other party and that has not been previously requested."[5] To explain, Ruritania knows nothing of what Rupert of Hentzau is up to, but he comes to the attention of the Sokovian authorities, who contact Ruritania as they suspect Rupert is defrauding their neighbours.

(c) "Automatic." The OECD's definition is that the "exchange of information involves the *systematic and periodic transmission of 'bulk' taxpayer information* by the source country to the residence country concerning various categories of income".[6] Essentially,

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[5] *Manual on the Implementation of Exchange of Information for Tax Purposes*, Approved by the OECD Committee on Fiscal Affairs on 23 January 2006, see www.oecd.org/ctp/exchange-of-tax-information/36647914.pdf (last accessed 6 September 2021).

[6] See www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm (last accessed 6 September 2021).

certain forms of information are defined as being automatically of interest to other jurisdictions, *e.g*. interest income of third-country residents. The jurisdiction where that income arises will automatically report such income to the interested state—and such reporting to other jurisdictions in turn requires the collection of the information in the first place. Ruritania and Sokovia both collect set information on the assets and income of the other's residents, and exchange the information at regular intervals.

6 For present purposes we must add a third means of information gathering and transmitting: public registers of information. Noseda's 2021 article mentions moves towards public registers of beneficial ownership at several points (*e.g*. paras 1, 5, 9, 14 and frequently thereafter). Strictly speaking, these proposals tend to be aimed at money laundering rather than taxation issues, although they will also be of interest to revenue authorities; unexplained wealth is clearly of interest even when a taxpayer is trying to launder or otherwise hide what has been illegally retained.

7 From a data protection and general privacy perspective, the use of "automatic exchange" and public registers raises obvious concerns. Instead of requests that are targeted for cause, or the sharing of ostensibly useful data which has already been collected, an "automatic exchange"/"public register" system requires the regular obtaining and sharing or publicising of financial data on a vast amount of people and companies, most of which will be of no interest to the revenue authorities for the simple reason that most people will be entirely compliant.[7] Noseda notes the rise of FATCA-style legislation, the Common Reporting Standard and moves towards public registers of beneficial interests as moves towards tax transparency that are of concern to privacy rights.[8] Although many of his examples are international, *e.g*. the EU's Fifth Money Laundering Directive on public registers of beneficial ownership, Noseda emphasises United Kingdom leadership in the trend:[9]

> "Whilst the international community has embraced tax transparency, the evidence discussed in the previous article demonstrates that the UK has been at the forefront of the campaign towards transparency."

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[7] See *UK addresses holding Non-UK accounts, Re Application by Revenue and Customs* [2009] UKFTT 224 (TC) at para 6.

[8] Paragraph 1 of the 2021 article.

[9] *Ibid*, para 7.

8 Noseda argues that the General Data Protection Regulation of 2018 has led to challenges to automatic exchange on privacy grounds.[10] Noseda set out the plan for his article in paras 9 and 10:

> ". . . These challenges are summarised in the first part of this article, where the implications for the Crown Dependencies are also considered.
>
> As these legal challenges are the direct result of ill-conceived policies promoted by the UK, in the second part consideration turns to why the UK got it so wrong."

9 The first part of the 2021 article outlines the fact of certain ongoing EU law challenges to automatic exchange. First, Noseda outlines a Luxembourg challenge to public registries introduced under the Fifth Money Laundering Directive. The challenge was made under the General Data Protection Regulation.[11] Secondly, the article outlines a challenge in the German and Austrian courts to adherence to the Common Reporting Standard. This challenge included human rights grounds.[12] Thirdly, there were EU and UK challenges to the measures taken in respect of FATCA, the USA's Foreign Accounts Tax Compliance Act, which forced jurisdictions to facilitate their financial institutions forwarding large amounts of information to the American authorities as the price of doing American-related business.[13]

10 It is not the purpose of this article to consider the merits of those challenges. Indeed, Noseda's article goes no further than to outline the challenges. The existence of the challenges is presented as strong evidence that the various automatic exchange/publicity measures are contrary to basic rights. Such reasoning is doubtful. It shows only that a challenge is at least arguable in those jurisdictions *and* that these non-United Kingdom jurisdictions have precisely the sort of laws about which Noseda is complaining.

The position of the Channel Islands

11 There is a brief consideration of the implications for the Crown Dependencies of Jersey, Guernsey, and the Isle of Man. However, this

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[10] *Ibid*, para 9.

[11] *Ibid*, paras 14–17.

[12] *Ibid*, at paras 18–20.

[13] *Ibid*, at paras 21–27. The measures for Jersey are the Taxation (Implementation) (International Tax Compliance) (United States of America) (Jersey) Regulations 2014, implementing the agreement between the Government of Jersey and the Government of the United States of America to improve international tax compliance and to implement FATCA signed on 13 December 2013.

goes no further than to state correctly that there have been no challenges in those jurisdictions, although such challenges could be made under Jersey and Guernsey's human rights legislation, being directly equivalent to the Human Rights Act 1998.[14]

12 This brevity is unfortunate, as there are issues more relevant to smaller jurisdictions that could be explored. Most notably would be the extent to which economic *force majeure* can justify measures that infringe on rights, *e.g.* if countries or groups of countries that are economically vital to Jersey demand exchange of information or other measures touching on protected rights as a precondition for doing business. It is a point which is somewhat undignified, as few legislatures would want to say "we disagree with our own law, we had no choice, a 'bigger boy' made us do it". Such a point would only be taken *in extremis*, and it is notable that the context of French pressure was not argued as a relevant point in defending the 2013 amendments which streamlined the grant of tax assistance under the Taxation (Implementation) (Jersey) Regulations 2008.[15]

13 The point was noted in the human rights notes to the Minster for External Relations' proposition to Jersey's States Assembly for the then draft Taxation (Companies—Economic Substance) (Jersey) Law 201-:

> "The draft Law requires that those who conduct certain defined activities in Jersey should have economic substance in Jersey. The reason is to prevent blacklisting by the European Union as part of its Code Group process . . .[16]
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> However, whilst the draft Law addresses a new subject, it follows established norms of investigation and provision of information. There is nothing in terms of its mechanics to established international tax co-operation procedures, it is bringing equivalent mechanics to the area of economic substance . . . Human rights law does not pretend to lay down codes of economic regulation, and providing that there is a 'fair balance', A1P1 is satisfied. That is clearly the case here, particularly considering the economic imperatives of the EU Code Group process."

The focus of those notes was on property rights rather than privacy rights—which are doubtless weaker in the field of corporate

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[14] *Ibid*, at paras 28–29.

[15] See *Volaw v Comptroller of Income Taxes* [2015] JRC244, at para 21.

[16] P.121/2018, see www.statesassembly.gov.je/assemblypropositions/2018/p.121-2018.pdf (last accessed 6 September 2021).

governance—but the point being made is doubtless powerful: the Crown Dependencies will frequently implement economic regulation because of the demands of international opinion.

14 Such issues can perhaps be side-stepped where the EU is party to the measures concerned. The point was explained in the Human Rights Notes on the draft proposition for the Bank (Recovery and Resolution) (Jersey) Law 201-:[17]

> "From a human rights review perspective, the EU origins are significant. It was held by the European Court of Human Rights in the case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland (2006) 42 EHRR 1 that there is a 'presumption' that 'the protection of fundamental rights by EC law could be considered "equivalent"' to that of the Convention system."

It is a remarkable abdication by the European Court of Human Rights, but it appears that the Crown Dependencies can proceed on the basis that, if it is alright within the EU legal order, then it is alright for the purposes of the European Convention of Human Rights—unless for some exceptional reason the European Court of Human Rights says otherwise, or the EU measures fall foul of the EU's own legal processes.

15 In those other cases, doubtless an analogy could be made to the famous *Corner House* case, where the House of Lords recognised that decisions taken in an international context cannot expect to be rigorously principled, ignoring even distasteful realpolitik.[18] That analogy is not perfect—*Corner House* concerned the dropping of a decision to prosecute in the face of threats to national security—but the point is that the courts accept even in a matter as important as the rule of law that decision-makers must exist in a wider world than their home jurisdiction. A measure may be unjustified in the jurisdiction that has promoted it, or in a jurisdiction that is able safely to ignore any threat, but most of the world has to choose its battles more wisely.

"Why has the UK got it so wrong"

16 The remainder of the article is essentially a polemic on human rights scepticism and Euroscepticism in the United Kingdom. The polemic is introduced by para 37 of the article:

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[17] P.134/2016, see www.statesassembly.gov.je/assemblypropositions/2016/p.134-2016.pd (last accessed 6 September 2021).

[18] *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756.

> "As litigation is ongoing, definitive statements must be avoided. However, as a Swiss lawyer turned English solicitor almost 20 years ago, the author has been reflecting at length on the seeming disconnect between the policies advanced by successive UK governments and the fundamental values enshrined in a human rights convention that was introduced in the immediate aftermath of the Holocaust and the European continent's descent into madness."

The remaining twenty-five (out of thirty-four) pages are almost entirely detached from the issues of tax transparency, and into more general issues of law and politics. As such, the relevance of a critique of the United Kingdom's various approaches to international human rights instruments and adjudication to the issues of tax transparency is never properly explained.

17 The only link with the first part of Noseda's argument is a short section at paras 88–99 contrasting the UK's apparently unthinking acceptance of tax transparency in automatic exchange agreements (and FATCA in particular) with the EU's raising data protection concerns over FATCA. It is unclear on the material cited how far those concerns went beyond concerns as to the level of protection the personal data would enjoy once it arrived in the USA (para 94) and the exploration of ways that FATCA could be both workable and ask for less data (para 95). We are told that the EU's Data Protection Working Party decided against FATCA (paras 96 and 97), but the only reason offered for the EU Member States ultimately accepting FATCA was that the United Kingdom did so, and this gave them (for an unspecified reason) no choice (para 98). In other words, the EU's published material and statements suggest that it was at least interested in data protection and human rights concerns, but this was not so with the United Kingdom. Noseda concludes this detour (para 99) by saying:

> "The UK government's disregard for the opinion of the EU Data Protection Working Party in relation to FATCA, and the introduction of public registers of beneficial ownership in 2016, are indicative of a poor level of understanding of the fundamental rights contained in the Charter and the ECHR."

It is thus not a disagreement over what can be justified in derogation to privacy rights under art 8 of the Convention, but something far more fundamental.

18 The thrust of the second part of Noseda's argument can be readily appreciated from the relevant sub-headings:

> The UK as a driving force behind the ECHR[19]
> Political backlash (Brexit)—"enemies of the people"
> Parliament
> The courts
> Human rights—hostage of 21st century UK politics
> EU Charter of Fundamental Rights—victim of Brexit EU Charter of Fundamental Rights—victim of Brexit
> David Cameron starts the assault on the ECHR
> Poor understanding of the Charter
> UK politics
> The winner takes all [i.e. the first-past-the-post system]
> Useful charisma—and dangerous populism
> Continental Europe—the enemy within
> The UK—the enemy without
> The curious story of CCTVs and identity cards in the UK
> Conclusions

It is a list of subject matters that suggests an article on the high-level direction of Britain's constitutional direction.

19 It would be impossible to reply in detail to the points made. As would be inferred from the sub-headings, many of the points are ultimately political. It suffices for present purposes to make the criticisms under five heads.

Longstanding critiques of human rights adjudication

20 The tenor of Noseda's article is that attacks on human rights' adjudication are inherently dangerous and irresponsible—linked intrinsically to a disregard of freedom and rights against the dangers of an overpowerful state.

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[19] This is a very common point to make, but it is difficult to understand. First, there is significant doubt that the United Kingdom intended the European Convention to be anything more than minimalist, *e.g.* E Bates, "British Sovereignty and the European Court of Human Rights", (2012) 128 *Law Quarterly Review* 382. Secondly, Dicey's famous comment that half of the content of statutes comes from interpretation is even more true in respect of human rights conventions. It is entirely irrelevant who was responsible for creating them when their meaning comes from subsequent interpretation. This follows from the nature of the Convention as a "living instrument". Thirdly, it is parochial to suggest that support or opposition to an international convention on human rights should in any way depend on how far one's compatriots had been involved in the drafting.

21 This attack sidesteps the obvious point that there are long standing criticisms of both human rights' adjudication and judicial bias. These can be found resonating in the writings of Oliver Wendall Holmes and Benjamin Cardozo from the days when judicial activism in the US Supreme Court came generally from the conservative side. Holmes's *Lochner* dissent still resonates as a classic statement of the dangers of constitutional review leading judges to decide what can or cannot be done in areas of social and economic policy.[20] Cardozo's still often-cited *The Nature of the Judicial Process* warns clearly that judges are influenced by the opinion groups to which they belong.[21] It would be possible to compile a lengthy review of literature sceptical of the ability of judges to step away from their biases, and of the particular dangers this brings when judges step into the field of interpreting and applying broad constitutional/human rights clauses, and barely cite a conservative voice. The classic British statement comes, of course, in Griffith's *The Politics of the Judiciary*, the centrepiece of which was a withering and compelling denunciation of how the conservative judges of the day tended to suck the life out of pro-trade union legislation.[22] All that has happened, is that the critiques of judicial activism now tend to come more from the right than the left.[23]

22 It might, of course, be argued in response that none of the British attacks on the judges and on the Human Rights Act has anything to do with such reasoned criticism. This may be true of some, possibly many attacks, but as a general proposition it risks high-handed elitism. The simplest and perhaps most repeated criticism of constitutional review is that famously given by Alexander Bickel—at the time politically liberal—when he said that "[t]he root difficulty is that judicial review is a counter-majoritarian force in our system".[24] Whether it be "judicial review" in the US sense of striking down statutes on the basis of a broad definition of "due process", or British judges applying ss 3 and 4 of the Human Rights Act, this "root difficulty" is at the heart of criticism of human rights' adjudication. It

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[20] *Lochner v New York*, 198 US 45 (1905).

[21] Cardozo, *The Nature of the Judicial Process* (2005, New York), pp 170–171.

[22] JAG Griffith, *The Politics of the Judiciary* (5th edn, 1996, London).

[23] For an excellent critique of this dynamic, see JH Ely, "Another Such Victory: Constitutional Theory and Practice in a World Where Courts are No Different from Legislatures", (1991) 77 *Virginia Law Review* 833. The critique is more powerful as coming from a political liberal.

[24] A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, 1962, New Haven: Yale University Press), p 16.

is this "root difficulty" that spills out less eloquently than Bickel, Griffiths, Holmes, and Cardozo into public discourse. There is nothing in the material cited by Noseda that does not have a resonance in well-established critiques from the most respectable of writers. It is difficult to draw any wider conclusions when it can reasonably be seen as just another example of what happens when judges make decisions of constitutional or legislative significance which are politically disagreeable to a vocal part of opinion. Those who disagree at a political level with the outcome of the judicial decisions tend to accuse the judges of politics; those who agree at a political level tend to defend judicial objectivity. The sides change, but the nature of the criticisms bear a striking resemblance across the generations.

23 It is also difficult to see that the strands of thought have been as influential as Noseda suggests—Griffiths would live to see his critique abandoned by his fellow left-leaning lawyers and academics. The Human Rights Act remains. The United Kingdom remains a party to the European Convention on Human Rights. It remains the case that the only Act of Parliament passed without a statement of compatibility since the Human Rights Act came into force is the Communications Act 2004. No ultra-purposive interpretations under s 3 of the Act have been overturned by legislation. The only declaration of incompatibility to be consistently ignored by Parliament was that involving prisoner voting,[25] and even then, a settlement has been reached with the Council of Europe comprising the surprisingly minimal step of enfranchising prisoners released on licence.[26]

24 The co-existence of heavy criticisms and obedience to the Human Rights Act can be demonstrated by the case of *R (F) v Home Secy*,[27] where the UK Supreme Court said that a law imposing lifelong reporting requirements for sex offenders under s 82 of the Sexual Offenders Act 2003 breached the right to privacy by reason of being disproportionate. Responding, the Home Secretary, Theresa May MP, said that she was "disappointed and appalled", and that the government would make "the minimum possible changes to the law in

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[25] *Smith v Scott* [2007] CSIH 9, following *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

[26] See Council of Europe, Committee of Ministers 1324th meeting, 7 September 2018. The position is well explained in House of Commons Library Briefing Paper No 07461, "Prisoners' Voting Rights: Developments since May 2015", 19 November 2020, pp 25–27.

[27] [2010] UKSC 17; [2011] 1 AC 331.

order to comply with the ruling". She added: "I would far rather not have to stand here saying that we have to make a change to the sex offenders' register, but we do have to make a change".[28] Presenting the government's response to the House Lords, Baroness Neville Jones said:[29]

> "The Government are appalled by this ruling, which places the rights of sex offenders above the right of the public to be protected from the risk of reoffending, but there is no possibility of further appeal. This Government are determined to do everything that we can to protect the public from predatory sex offenders and so we will make the minimum possible changes to the law in order to comply with this ruling."

Baroness Hale (2013, p 17) contrasted the vehement government criticism of the Supreme Court's decision in *R (F) v Home Secy* wiith the Government's and Parliament's legislative acceptance of the decision.[30] But this is to draw attention to the fact that legislators may hold wholly negative views of human rights decisions, and yet treat the same decision as definitive on what the law must or must not be. Strong dissatisfaction may come to nothing.

25 Most importantly, there is nothing to show that any of the complaints made by Noseda in the second part of his 2021 article were operative in respect of decisions on tax transparency. Whether it be attitudes to human rights' adjudication, Brexit, or the executive vs Parliament confrontations of 2017–19, it is difficult to see why any of these dynamics are causally linked to the UK's approach to tax transparency. It is this point that we will now explore in the four ways set out in para 3 above.

The non-UK initiative in tax transparency

26 In the last nine years, Jersey has responded to many changing international standards in areas of fiscal and financial governance. More interesting to this article is that there have been three initiatives that have been spearheaded by particular countries or groupings:

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[28] HC Debate, 2011. HC Deb 16 February 2011, vol. 523, cc.959 and 961

[29] HL Deb, 2011: col.714

[30] Hale, B (2013). "What's the point of human rights?", *Warwick Law Lecture 2013*, 8 November 2013 (https://www.supremecourt.uk/docs/speech-131128.pdf, last accessed 26 August 2021)

(a) The threatened French Blacklisting which led to the Taxation (Implementation) (Amendment No 8) Regulations 2013.[31] This greatly streamlined the procedures for responding to requests for exchange of information, making it less easy to argue privacy rights in defence of such claims. This led to, ultimately unsuccessful, human rights' challenges.[32]

(b) FATCA itself, which was an American initiative, however much Noseda tries to shift the blame to the United Kingdom on account of it being the first country to surrender the American demands. It is not as if the Americans are uninterested in privacy. The United States is the home of privacy as a constitutional right, the famous "right to be let alone" first suggested by the future great liberal Supreme Court Justice, Louis Brendeis, early in his career, and later read into the constitution.[33] This right to privacy is something very dear to the Democrat Party then in office, being at the heart of abortion and gay rights jurisprudence.[34] It would be grossly unfair to say that President Obama and his government cared nothing for privacy as they created FATCA.

(c) The EU Code Group initiative which led to the Taxation (Companies—Economic Substance) (Jersey) Law 2018. Although not simply a matter of automatic exchange of information, the legislative response to the EU demands required the Jersey authorities to impose considerable reporting obligations on companies, with provision made for exchange of that information.

27 It is, of course, true that the United Kingdom subsequently made its own FATCA-style demands, but the point here is that the concept was very much an American creation.

28 It is difficult to support a conclusion that the United Kingdom sits with a special responsibility for tax transparency. The United Kingdom does have a special capability of forcing transparency on the Crown Dependencies and could do so ahead of actual international

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[31] See the Jersey States Assembly Report to P.132/2013, www.statesassembly.gov.je/assemblypropositions/2013/p.132-2013corrected.pdf (last accessed 6 September 2021).

[32] *Volaw v Comptroller of Income Taxes* 2015 (2) JLR 209, 2016 (2) JLR 198, 2019 (1) JLR 302.

[33] S Warren and L Brandeis, "The Right to Privacy", (1890) 4 *Harvard Law Review* 193.

[34] *Roe v Wade*, 410 US 113 (1973), and *Lawrence v Texas*, 539 US 558 (2003).

standards being formed.[35] But that was not the target of Noseda's concern in the 2021 article. The point was that the moves to tax transparency were because the United Kingdom was getting it wrong for various reasons. However, even if the United Kingdom had somehow tipped the balance to create a "slippery slope" towards ever greater dismissal of privacy concerns, tax transparency is a cause which has been taken up eagerly beyond the United Kingdom.

29 In short, setting aside the underlying rights and wrongs of tax transparency, in 2021, it is far too late to say "Why did the United Kingdom get it wrong?" when the anti-tax transparency inquiry must surely seek to set out "Why did everyone get it wrong . . . and the UK's special role in that mistake?" This would, of course, beg the question: why, if everyone is "getting it wrong", should we look for parochial reasons as to why the United Kingdom apparently came more quickly to the "mistake". Why is there not simply a generally shared view on the balance between privacy and tax transparency, with the real argument being whether that balance is justifiable? Attempts to drill down into psychological arguments for one country's reasons could then be left behind.

Pre-2010 use by the United Kingdom of bulk information powers

30 It is a cornerstone of Noseda's argument that the UK's approach must have been conditioned by Conservative attitudes to human rights and to Europe. A key date is thus May 2010, then the Conservatives (albeit in a coalition with the Liberal Democrats) became the governing party.

31 A problem with this approach is that the Inland Revenue (and subsequently HMRC) had already begun the use of bulk information powers, with the first applications being made in 2005. This was the Offshore Fraud Project, which used s 20(8A) of the Taxes Management Act 1970 (and subsequently para 5 of Schedule 36 to the Finance Act 2008) to require financial institutions to supply account details for all UK resident customers holding offshore accounts. The

[35] This was the essential problem the Crown Dependencies had with the "Mitchell-Hodge" amendment in 2019 that would have attempted to force the Crown Dependencies to adopt public registers of beneficial ownership. It would have been done ahead of any agreement of an international standard, essentially as a form of diplomacy practiced by the backbenchers of the House of Commons to set an example for the rest of the world. See "Miscellany: Respecting Constitutions", (2019) 23 *Jersey and Guernsey Law Review* 131.

project originally involved individual applications against specific institutions. It moved to making several applications against named institutions at the same time and culminated in 2009 with a successful application to the First-Tier Tribunal for 306 financial institutions to hand over such data on the basis of a generic risk analysis.[36]

32 Although this project was not about exchanging information with other jurisdictions, it was about obtaining vast amounts of information from taxpayers so that it could be analysed. The Revenue's analysis was that only around 20% of the offshore accounts would show a tax loss—the rest would be compliant.[37] This would drop to 5% where private banking clients were in issue.[38] If automatic exchange with foreign jurisdictions represents a failure to respect human rights, then it is no different if the information acquired is used for purely domestic consumption. Information on a mass of individuals will be obtained and be available for scrutiny by a relevant revenue authority, whether the authority that obtains the information is one and the same as the authority that scrutinises it does not change the quality of privacy-based objections.[39]

33 The Offshore Fraud Project was not a politically driven project. Despite having been the lawyer to the project for most of its duration and having presented most of the applications before the Special Commissioner (subsequently the First-Tier Tribunal), the author is not sure where the idea for the project came from. However, as a simple matter of constitutional logic, it could not have come from a political level, nor could politicians have had any say in the key development of the legal arguments that supported the project. Section 5 of the Commissioners for Revenue and Customs Act 2005—following s 1 of the Taxes Management Act 1970—places such matters in the hands of Commissioners (and, thus, in the hands

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[36] See for example, *A Financial Institution, Application to Serve a Notice on a Financial Institution* [2005] UKSPC SPC00517; *Section 20 Notice on a Financial Institution* [2009] UKFTT 68, 69 and 70 (TC); *UK addresses holding Non-UK accounts, Re Application by Revenue and Customs* [2009] UKFTT 224 (TC).

[37] *UK addresses holding Non-UK accounts, Re Application by Revenue and Customs* [2009] UKFTT 224 (TC) at [6].

[38] Application—customers with UK addresses holding non-UK accounts [2009] UKFTT 195 (TC), at para 4(3).

[39] In automatic exchange cases, there might be objections if a counterparty is untrustworthy but that is a different matter entirely to a general objection to the level of tax transparency required by automatic exchange agreements.

of the relevant officers). The Treasury may give general directions, see s 11, but no more.

34 The Offshore Fraud Project did have to deal with human rights objections, as can be seen from the cases cited above. Although the *ex parte* nature of information powers applications meant that only the Revenue was represented at the hearing, those financial institutions that objected (and many did not object) sent lengthy legal submissions to the Tribunal. It was also the duty of the Inland Revenue/HMRC to raise any points that were not before the Tribunal.[40] Far from ignoring human rights' objections, or holding such matters in contempt, the written decisions of the Special Commissioner/First-Tier Tribunal are a chronicle of the objections taken by the law firms engaged by financial institutions, the response of the Revenue's lawyer, and the conclusion of the Tribunal. (It might also be noted that the various arguments circulated widely in the tax world, and no financial institution ever saw fit to challenge an information notice by way of judicial review—which would certainly have been a route had any believed they had cogent human rights grounds.)

35 In short, the policy and legal basis for bulk information request and use was laid long before David Cameron became Prime Minister. It was laid at a time when Labour's Tony Blair was still winning elections. It was laid by a technocratic project run almost entirely by the Liverpool branch of the Inland Revenue's Special Compliance,[41] with legal support coming from the Revenue's Solicitor's Office. Politics and human rights scepticism had nothing to do with it; although the ability of its lawyer to answer human rights points to the satisfaction of the tribunal (and to deter judicial review) was obviously critical to its success.

Any human rights disagreement is as to justification

36 There is no dispute that bulk information powers and automatic exchange give rise to questions of art 8 rights under the European Convention ("right to privacy"). As with almost all human rights arguments, the real point is about justification.

37 It is not the role of this article to set out an argument for or against measures such as FATCA, the Common Reporting Standard or public

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[40] For a clear example of this, see para 11 of *A Tax Haven Company v Revenue & Customs* [2006] UKSPC SPC00533, which relates to a different project that also employed s 20(8A) of the Taxes Management Act 1970.

[41] That office had many name changes during the project but without really changing its nature.

registers of beneficial interests as being justified for the purposes of art 8. The point is rather that disagreements as to justification are part of the European Convention process. We set out above when considering the art 8 case of *R (F) v Home Secy* that it is possible for ministers and legislators to vehemently disagree with a human rights decision but nevertheless comply. It is similarly possible to disagree strongly with particular decisions or approaches whilst being enthusiastic about the Convention.

38 To give a good example of vigorous dissenting opinions being held by prominent supporters of the Human Rights Act, Baroness Hale strongly believed that the European Court of Human Rights decision in *Marper v United Kingdom* that art 8 forbade the blanket retention of DNA samples was wrong. She believed that the assistance it gave in solving sexual offences made the relevant Act of Parliament justifiable.[42] She was of that view judicially in the case that led to the *Marper* decision, and re-affirmed it in her Barnard's Inn Reading in 2011.[43] Baroness Hale's support for the European Convention and for human rights' adjudication is undoubted; so it is hard to think of a better example of how disagreements on justification on particular issues have little or nothing to do with overall support for human rights.

39 A further example of vigorous dissent co-existing with strong support for human rights adjudication can be seen in the House of Commons debate that supported a motion against complying with the European Court of Human Rights' decisions on prisoner voting.[44] The proposition was brought jointly by the Conservative David Davis and Labour's Jack Straw. The latter, of course, was the Home Secretary who had steered the Human Rights Act 1998 through the House of Commons.

40 There is simply no logical connection between the UK government championing tax transparency and its wider attitude to human rights. It is quite possible to believe that maximum tax transparency is human rights compatible, and to entirely support the Convention. It is possible to support such transparency and have doubts about the Convention but on balance to support it. It is possible to oppose tax transparency measures, and not believe at all in human rights adjudication. If the European Court of Human Rights decides that view is mistaken, it is entirely possible greatly to regret

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[42] (2009) 48 EHRR 50.

[43] B Hale, "Beanstalk or Living Instrument? How Tall can the ECHR Ggrow?", 2011. See www.supremecourt.uk/docs/speech_110616.pdf.

[44] HC Debate, 2011a. HC Deb, 10 February 2011, vol 523, cc 493–58.

that decision but still to support the Convention. The attitude towards tax transparency and privacy is no indication of attitude towards the Convention; nor can we work backwards and say that because someone is critical of human rights adjudication that this makes them more or less likely to believe in tax transparency. It may from time-to-time be the case that a politician who believes in human rights adjudication is more likely to be sceptical of tax transparency (or the other way round), but this is not the same as suggesting that the two viewpoints are logically linked.

Politics of tax transparency protagonists

41 The final factor that severely undermines Noseda's argument is the point that, in the United Kingdom, support for tax transparency and public registers of beneficial interests has also been very strong in non-Conservative circles. Noseda touches on this at paras 87–88 of the article:

> ". . . Mr Cameron's government had led an onslaught on the right to privacy, as discussed in the 2017 article.
>
> In particular, although tax transparency had been on the agenda of the Labour Party, the SNP and the Liberal Democrats, it was Mr Cameron's government that signed up to the first IGA in September 2012 despite the negative opinion expressed by the European Data Protection Working Party."

42 This section is particularly curious in that the Liberal Democrats were in coalition with the Conservatives at the time—and the Chief Secretary to the Treasury was a Liberal Democrat throughout the coalition of 2010–15. The argument appears to be that, although Labour and the Scottish Nationalists may well have done precisely the same, as it was the Conservatives who signed up to the first FATCA Inter-Governmental Agreement, the reasons must have been of a particularly Conservative flavour. The pro-European Convention, anti-Brexit parties might well do the same, but the Conservatives were the lead party in the coalition that put the policies in process, so the reasons must be to do with the anti-European Convention, pro-Brexit opinion streams in the Conservative Party.

43 From a Crown Dependency perspective, the argument becomes bizarre. Noseda's complaints include public registries of beneficial interests. There have been concerted attempts to impose these on the Channel Islands from the United Kingdom. However, such attempts have been led from the backbenches, in particular by the opposition parties (Labour, Liberal Democrat, and SNP) with support from the more pro-European wing of the Conservative Party. The Mitchell of the "Mitchell-Hodge amendment" that sought to impose such registers

on the Channel Islands was Andrew Mitchell, MP, a Conservative who was on the Remain-side of the Brexit argument.

44 It is quite true that the Conservative Party has been most responsible for the tax transparency policies to which Noseda objects. The possibility that he seems to overlook is that this is simply a function of the Conservative Party being in government, and a function of there being a general consensus in favour of tax transparency—with there being evidence that the non-Conservatives tend to hold this opinion, if anything, more strongly.

Conclusion

45 In Noseda's 2017 article, he dealt vividly with the vulnerability of the Crown Dependencies to UK intervention in matters of tax transparency and public registers of beneficial ownership. These are important subjects. Without wishing to trespass in this article on the various rights and wrongs, the question raised was a vital one: what if the United Kingdom imposes something on the Crown Dependencies which is not actually an international standard, and possibly never becomes one? Given subsequent events with the Mitchell-Hodge amendment, a revisiting of the subject after even just four years was entirely justifiable and welcome.

46 The problem, however, with the follow-up 2021 article is that it does not really seek to consider the events of the last few years. It is instead a polemic on certain attitudes expressed on the right-of-centre in the United Kingdom on human rights adjudication, the role of Parliament, judicial review, and Brexit. From a Crown Dependency perspective, the key developments must be the "economic substance" demands pushed by the European Union, and the Mitchell-Hodge amendment on public registers of beneficial ownership. The latter, far from being the product of the right-of-centre attitudes that Noseda seeks to describe, was overwhelmingly the product of those on the centre and on the left of the House of Commons. This underlines that the moves to tax transparency are supported by a very broad church.

47 In truth, if the United Kingdom is getting it wrong, so is pretty much everyone else. If Eurosceptic, rights-sceptic Conservatives are getting it wrong on tax transparency, then so too is pretty much everyone else. Unfortunately, particularly given the interesting argument in the 2017 article, Noseda has allowed himself to be side-tracked by more political passions that ring through his article. Academic writing would be much poorer if it were never inspired by underlying political passions. But such passions need to be kept "underlying" lest the academic side be submerged.

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