



The application of distributive justice to energy taxation utilising sovereign wealth funds

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ABSTRACT

The energy sector is characterized by inequality and this is part due to the lack of distributive justice applied to energy resource tax revenue. This paper advances one solution to this problem which is for such countries to establish a Sovereign Wealth Fund. There is limited literature on ensuring that distributive justice is a key policy goal of energy taxation and this research aims to contribute to that literature as well as the emerging literature on Sovereign Wealth Funds. Too often as identified in the research, energy taxation policy is developed in isolation and a more holistic perspective is needed which incorporates the entire tax system. A focus on distributive justice as an over-arching energy taxation policy goal is particularly important as a retention of the current status quo will continue to see countries lose the majority of the benefits of their own energy resources to foreign markets and consumers. A Sovereign Wealth Fund, at its core a legal construct with a financial purpose can not only contribute to increased distributive justice but can also ensure increased accountability, transparency and governance in their energy sector.

1. Introduction

The last two years of 2016 and 2017 are witness to some key developments in the development of tax law and policy around the world. One of these has been the reform of the US tax code led by the Trump administration and advanced through the House and the Senate via the Republican party. The majority of commentators and also the Democrat party have made it clear that these changes will result in an unfair distribution towards the wealthy and corporate elite. That this situation has arisen, and in such an open and transparent way, demonstrates a problem of our times. It is therefore of vital importance that there are public interest groups and/or individuals who bring voices to policy debates that challenge the policy-makers.

Controversy surrounds the taxation of multinational companies (MNCs) from all business sectors. This paper focuses on the energy sector. This is a sector that has long been recognized as one where inequality is rife internally and that it is responsible for much societal inequality (with a 2017 Special Outlook within *Nature* on these issues) (Nature, 2017). There has been some progress on reforming taxation in the energy sector over the last decade with the continued success of the [Extractive Industries Transparency Initiative \(2018\)](#) that places disclosure obligations on companies and governments. Nevertheless, there remain significant problems and in particular the issue of inequality because of a lack of tax revenue received and redistributed from the extractive industries by host governments.

This paper focuses on this issue of taxation (revenue raising, collection and spending) and inequality in relation to the management of natural resources. The central question of this paper is to determine whether through taxation a fairer distribution of the benefits of a country's natural resources can be achieved. In this context, The aim of this conceptual and comparative paper is to advance the hypotheses that: (1) policy on energy taxation is too often formulated in isolation and not integrated within the overall energy system; and (2) a creation of a Sovereign Wealth Fund is one method of a more integrated tax policy and has a key feature of ensuring distributive justice in the energy sector.

At its core, this is a conceptual and desk-based research paper that searches specifically for how there can be increased distributive justice in the area of energy taxation. The comparative element of the analysis examines the policies of Norway and the Democratic Republic of Congo (DRC). Finally, the article contributes to the growing literature in relation to distributive justice in taxation and energy literature, while also advancing the emerging literature on Sovereign Wealth Funds (SWFs); with the latter being identified as one potential solution of how to increase distributive justice in energy taxation policy.

This paper begins in section two with a focus on distributive justice and highlights some of the recent literature in economic, energy law and policy, and taxation. Section three explores how the problems of energy taxation, and how it is a policy area that is formulated in isolation, i.e. there is no holistic and integrated thinking. Section four then discusses one solution that emphasizes a more holistic approach to

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energy taxation and this is the establishment of a Sovereign Wealth Fund (SWF). A SWF can ensure that distributive justice is a core goal of energy taxation policy. This section presents a comparison of Norway with a SWF and a country without one, the DRC. Finally, the paper in the conclusion highlights how increasing distributive justice through establishing a SWF aligns with energy law principles and provides several other reflections on the policy implications of this paper.

2. Distributive justice as a policy goal and in the literature

2.1. Introduction

Distributive justice is fast becoming a popular area of focus in law and public policy literature and also in other disciplines. One can argue it has always been central to the political debate in that it is a foundation of a democracy or more specifically perhaps a ‘social democracy’. This paper does not intend to engage in those debates which are worthy of extended discussions in themselves, rather, the focus here is why distributive justice remains lacking in the area of taxation and more specifically in relation to energy taxation. This section covers in brief those areas in the literature that research distributive justice such as economics, energy law and policy, and tax law and policy.

2.2. Distributive justice and economics

Economists for years have been working on the issue of distribution (i.e. in essence they have advocated for distributive justice). Several of these scholars have now received Nobel Prizes for their work in this area and closely related areas, mainly: Angus Deaton, Joseph Stiglitz, Paul Krugman, and Amartya Sen. One economist who may join this group in the future is Thomas Piketty whose work on taxation and wealth distribution has received significant attention recently (Piketty, 2014). Unfortunately, as demonstrated by the earlier example of what is happening in the US, the work of these academics has not translated into policy outcomes there, but it still influence policy in other countries.

In assessing the issue of distributive justice in the energy sector there is unfortunately a lack of literature in the area. The majority of energy economists focus on costs of production, and impacts to price etc. but there is limited literature that has reflected on distributive justice. Further, many energy economists echo the view of one economist who in his mining economics text stated that the major focus of economics in relation to mining (which includes all the extractives industries) should be profitability (Crowson, 2008). Indeed the same author went even further in his textbook and suggested that a social objective (and even environmental) for a mining company is “self-deluding” (Crowson, 2008: 405). Hence it can be stated that an issue such as distributive justice is clearly not at the forefront of the private sector actors in the mining sector.

2.3. Distributive justice and energy law and policy

In energy policy research literature, distributive justice is already a key theme (Heffron and McCauley, 2017). It has been a focus of researchers increasingly since 2013 and forms part of three central tenets of the ‘energy justice’ concept, alongside procedural and recognition justice (McCauley et al., 2013; Heffron and McCauley, 2014). However, energy researchers have identified distributive justice as the key element as it allows for more engagement with policy-makers (Heffron and McCauley, 2017). The energy sector like many areas of commerce has faced calls for reform, and a renewed focus on transparency and ethics alongside calls for a fairer and more equitable energy system (Sovacool et al., 2016). Again similar to other sectors, the energy sector is dominated by multi-nationals and international finance, and the issue of taxation plays a large role in the operations of such firms. In some cases, the issue of taxation is a lead contributor as to the decision of whether to build, buy or sell an energy asset.

More specifically, energy law scholarship to-date has hesitated in

making judgment in relation to advocating for distributive justice in the energy sector. Energy law scholars have been more interested in the construction of tax regimes rather than thinking of designing these tax regimes with an element of distributive justice. However, more recently over the last circa five years, the issue of distributive justice is increasing in the literature in energy law. Scholars have included it as they have developed: a guiding set of principles for energy law (Heffron et al., 2018); in ongoing development of the discipline (Heffron and Talus, 2016a); and in its interdisciplinary boundaries (Heffron and Talus, 2016b). All these factors are leading to distributive justice having a more prominent role in the discipline and therefore impacting more on future public policy outcomes.

2.4. Distributive justice and taxation

These developments in energy economics, law and policy scholarship mirror the growing importance of distributive justice in the tax discipline. For many taxation scholars, distributive justice has always remained a core value of their research (see the work of Reuven Avi-Yonah (2018)). Indeed, tax law and policy has certainly become a popular societal issue over the last few years, and it has been described as a noisy subject (Deloitte, 2013). And this has translated into legal academia, where last year 11 out of the top-12 most downloaded academics were tax law specialists (on the Social Science Research Network).¹ The first was the aforementioned Reuven Avi-Yonah who has an obvious distributive justice theme running throughout his research and this demonstrates in part how the issue of distributive justice is rising in prominence.

It should be noted however, that the goal of distribution has long been a tax policy goal but perhaps in many ways has received limited attention until more recently (as stated above) (Gribnau and Vording, 2017). Indeed, recent scholarship has concluded that distributive justice should be recognized as the cornerstone of tax law, i.e. as the “first or sovereign virtue of a society’s tax system” (Duff, 2017: 167). Unfortunately however, there are many examples of recent literature that do not address or focus on distributive justice despite topics of research that should, for example, such as tax fraud (De la Feria, 2018). It nevertheless has been advanced that Adam Smith has argued that distributive justice was a key tax policy goal but legal certainty was needed in order for distributive justice not to be just an illusory goal and that this still applies to this day (Gribnau and Vording, 2017); and this is certainly in issue for many developing countries when establishing their energy taxation policy.

2.5. Summary

It should be noted that in thinking about taxation and overall role in the economy, it is surprising that there is not more of a reflection on distributive justice given its relationship with Smith’s four principles of taxation. It is advanced in this paper that there is a significant lack of distributive justice already in the majority of countries and this happens particularly in relation to the issue of energy taxation. This paper aims to examine how an increased role for distributive justice can improve policy-making in relation to energy taxation.

Further it should be stated that it is not that the recent rise of distributive justice was as a result of a policy goal, rather it has resulted from the introduction of law in other areas and also the opposition to the actions and behaviour of multinational companies. In many ways a multitude of different developments have resulted in an increased change and rise to prominence of distributive justice. It is almost as if law and public policy in relation to the promotion of distributive justice

¹ See the data from the following two academic blog posts: Available at: (1) http://taxprof.typepad.com/taxprof_blog/2018/01/ssrn-tax-professor-rankings-1.html and (2) http://taxprof.typepad.com/taxprof_blog/2018/01/11-tax-profs-blow-up-the-ssrn-download-rankings.html (last accessed January 2018).

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