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Tax Exceptionalism – Should Tax law converge/diverge with other legal disciplines?

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The rapid developments in international taxation in the aftermath of the latest financial crisis (2010s), i.e. the fight against tax evasion and tax avoidance, the Pillars' work, should make us reflect on how tax law is formed and equipped to provide solutions to the current world challenges. This inquiry leads to finding the proper method of constructing tax law, especially in its international dimension. How legal strategies are designed in the field of international taxation? Do we, tax lawyers, have the autonomy to 'craft' legal solutions unique, aside from other legal disciplines, namely public international law, human rights, business law and investment law? The question is not only relevant for an abstract philosophical discussion but also influences the "making" and interpretation of tax law. We cannot forget that as lawyers, "*we do not quit the legal text and its interpretation*"- Azoulai rightly pointed out.[1]

Answering this question on the method, and how tax law should be configured concerning other legal disciplines is an ambitious project that would require a deeper reflection than this brief blog post allows me to do. Accordingly, let me present some critical points to set the stage, and stimulate further methodological discussions.

The birth of tax law

The academic discipline of tax law has its roots in the XIX century and is heavily indebted to the German tradition.[2] In the Netherlands, as Gribnau and Vording researched, taxation has always been confronted between classical political economy and the German theory of State (*the Rechtsstaat*). The former vision led by tax economists emphasized the economic impact of taxes, as well as fairness/burden distribution. The latter vision led by lawyers contributed to the study of taxation as a legal discipline, thereby articulating the relationship between the state and its citizens under constitutional and generally legal principles (rule of law). In other countries, similar tensions emerged between economists and lawyers. In Italy, while Griziotti defended the syncretic method ("*metodo sincretico*") to study taxes simultaneously under different methodologies (legal, economic, and political), other authors (Berliri, Giannini supported a clear-cut distinction between *Economia Finanziaria* (public finance, fiscal policy) and *Diritto Finanziario* (tax law).[3] Today, the interdisciplinary method of studying tax law in connection to other social sciences has overcome legal formalism methodologies.[4] Taxes encompass a polyhedric phenomenon where

economic theories, legal science, political science, and history merge.

Aside from the rich methodological debate of the anchoring of tax law within the social sciences, the relationship of tax law with other legal disciplines has not received the deserved attention in recent times. In the last century, tax law started a long process of emancipation from other legal disciplines like private law and public law. Neither the interplay between the tax administration and the taxpayer can be framed as an obligation between private parties debtor/creditor (Hensel, Giannini), nor as a power relation of submission (Bühler, Mayer).[5] Tax law has *sui generis* elements within the public law sphere. On the one hand, there is a move towards more equal footing translated into the enhancement of taxpayer rights and the rule of law, and on the other hand, the collection of taxes needs to be preserved to guarantee public expenditure. At least in Spain, the procedures of audit, collection, and dispute resolution offer distinctive features from the traditional administrative procedures.

Tax exceptionalism – examples of resistance

The emancipation of tax law from other legal disciplines has visible effects domestically (i.e. tax procedures) and internationally. A few examples can illustrate the resistance of tax law to align with public international law, business law, human rights law, and investment law. Interpreting tax treaties does not always reach uniform results under the principles of the Vienna Convention of the Law of the Treaties (i.e. discussion on “the context otherwise requires” in paragraph 2 of Article 3 of the OECD Model Convention).[6] In the light of the principle of systematic integration in Article 31 (3) (C) of the VCLT, authors have tried to interpret tax treaties in the light of principles in investment treaties.[7] Arbitration as a wide dispute resolution method in investment law has not yet reached consensus in international taxation. The “separate principle” under the arm’s length standard in transfer pricing analysis neglects the ‘group interest’ doctrine in business law that is more responsive to power dynamics in a group of companies.[8] In human rights law, the *Ferrazzini* doctrine at the European Court of Human Rights confirmed that tax disputes fall outside the scope of civil rights and obligations.[9]

Although ‘*lex specialis derogat legi generalis*’ legitimizes the legal choices adopted in tax law deviating from previous legal branches, one may wonder whether there is a normative necessity to converge with them. On the contrary, shall tax law keep its “*uniqueness*”?

A methodological approach- mapping legal strategies toward common goals

Either supporting the emancipation of tax law, or its convergence with other legal disciplines is not an abstract exercise. Instead, it requires an empirical analysis of the responses of various legal disciplines toward the achievement of common problems and challenges. Today the achievement of the United Nations Sustainable Development Goals (SDGs) are shared as global challenges by lawyers, regardless of the label we put ourselves (tax lawyers, business lawyers, human rights lawyers, etc). The comparative and interdisciplinary method requires, first, mapping the legal strategies designed in each field of law toward the achievement of SDG goals, and second, assessing the strategies chosen for the achievement of the goals. Engaging in this interdisciplinary legal dialogue triggers important research questions: What are the legal principles informing the legal strategies? In pursuing SDGs, do we have a common understanding of key concepts like “transparency”, “abuse of law”, “responsibility”, “liability”, etc.?

At Tilburg Law School, we have recently initiated this *voyage*, engaging in a thrilling dialogue

between legal disciplines to map legal strategies to achieve sustainability in global value chains.[10] The results of this project will be relevant to understanding the reasons behind potential divergences and convergences of legal disciplines, as well as to providing a normative answer: How should law achieve a sustainable world?

This post aims to reactivate the debate on the convergence of tax law with other legal disciplines. A pure legal formalism is no longer supported in the literature. It is widely accepted that tax law cannot be an ivory tower isolated from other social sciences. Now it is time to systematically study tax law in the interplay with other legal disciplines, and question whether potential divergences (“tax exceptionalism”) are still justified to achieve common goals.

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[1] L. Azoulai, *Reconnecting EU Legal Studies to European Societies*, in <https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/> (available 2 July 2024)

[2] See Hans Gribnau and Hank Vording, *The Birth of Tax as a Legal Discipline*, SSRN <https://ssrn.com/abstract=291900>)

[3] See further references to this debate in the contributions of J. García Añoveros, *El discurso del Método en el ámbito Hacendístico* and F. Escribano López, *Algunas propuestas metodológicas para la (re)construcción de un Derecho Financiero del siglo XXI*, in I Jornada Metodológica “Jaime García Añoveros” sobre la Metodología Académica y Enseñanza del Derecho Financiero y Tributario. Instituto Estudios Fiscales, 1 February 2002. Available at <https://dialnet.unirioja.es/ejemplar/58594> (Access 1.07.2024)

[4] A. Martín Jiménez, *Metodología y Derecho Financiero: ¿Es preciso rehabilitar la figura de B. Griziotti y el análisis integral de la actividad financiera del Estado?*, RDFHP 258 (2000).

[5] See further references to this debate in M.T. Soler Roch, *Tax Administration versus Taxpayer – A New Deal?*, 4 World Tax J. 3 (2012).

[6] See the forthcoming IFA project to provide guidance and consistency of tax treaty interpretation under VCLT <https://www.ifa.nl/research-awards/tax-treaty-interpretation-in-light-of-the-vienna-convention-on-the-law-of-treaties>

[7] R. Danon, *Interpreting tax treaties in Light of Investment Agreements: the role of the Principle of Systemic Integration in tax treaties disputes*, in *Building Global International Tax Law* (P. Pistone ed, IBFD 2022)

[8] R. García Antón, *Enhancing the Group Interest in Transfer Pricing Analysis*, 3 Intl. Tax Stud. 5 (2020).

[9] R. García Antón, *The Fragmentation of Taxpayers’ Rights in International Dispute Resolution Settings: Healing Anxieties through Judicial Dialogue*, 10 World Tax J. 1 (2018).

[10] A conference was held on January 2024 at Tilburg Law School with the title: Legal Strategies

for Sustainability in Global Value Chains (18/19 January 2024). <https://www.tilburguniversity.edu/about/schools/law/departments/pbll/international-conference-connecting-responsible-organizations> ; See A. Lafarre, B. Rombouts, P. Verbruggen, D. Bose and R. García Antón, *The Cambridge Handbook of Law and Responsible Business: Legal Strategies for Sustainability in Global Value Chains* (Cambridge University Press, forthcoming 2025)

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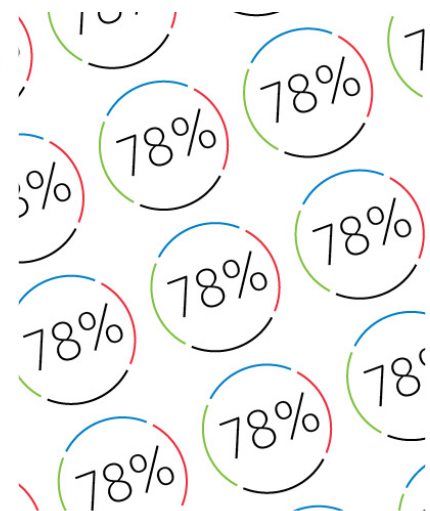
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