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Comparative Tax Law: Theory and Practice

The authors, in this article, report on the proceedings of the inaugural Conference on the topic of "Comparative Tax Law in Theory and Practice", which took place at the University of Michigan Law School in October 2009.

1. Introduction

On 3 October 2009, a Conference on Comparative Tax Law in Theory and Practice took place at the University of Michigan Law School.¹ It was organized by Reuven Avi-Yonah (Professor, University of Michigan Law School) and Mathias Reimann (Editor, *American Journal of Comparative Law* and Professor, University of Michigan Law School), and was attended by Hugh Ault (Professor of Law, Boston College Law School), Victor Thuronyi (Senior Counsel, International Monetary Fund), Brian Arnold (Professor Emeritus, University of Western Ontario), William Barker (Professor, The Dickinson School of Law, Penn State), Michael Livingston (Professor, Rutgers School of Law-Camden), Carlo Garbarino (Professor of Taxation, Bocconi University, Milan), Assaf Likhovski (Associate Professor, Tel Aviv University Faculty of Law and Visiting Professor, UCLA Law School), Omri Marian (*Scientiae Juridicae Doctor* (SJD), University of Michigan Law School), and Nicola Sartori (International University College, Turin and SJD, University of Michigan Law School).

The conference explored the importance of comparative tax law as a venue for new academic scholarship, as well as its legal practical applications. Garbarino² made the first theoretical step in providing a methodological framework, which has been also referred to by Marian³ in his SJD thesis and Thuronyi.⁴

The conference was divided into two sessions. The first session discussed the theory of comparative tax law. Garbarino presented his work on methods of comparative taxation and provided an outline of an evolutionary approach to this new field of study. Next, Marian presented his dissertation responding in part to Garbarino and, following this, Sartori addressed agency tensions and conflicts that may emerge between managers (agents) and shareholders (principals) as a result of aggressive tax planning strategies adopted by publicly held corporations.

The second session dealt with the practice of comparative tax law by having two round tables, both hosted by Avi-Yonah. At the first round table, Ault, Arnold and Thuronyi discussed the "Practical Implications of Comparative Tax Law". At the second round table, Livingston, Likhovski and Barker considered the question: "Can Comparative Tax Law Have Practical Applications?"

The discussions and conclusions from the conference are expected to contribute to an ongoing dialogue on international comparative tax law and produce a better understanding of this field of study.

2. The Theory of Comparative Tax Law

Participants heard presentations from three speakers relating to the theory of comparative tax law. They also engaged in discussions and question-and-answer sessions on issues raised by these speakers.

Garbarino discussed the methods of comparative taxation and provided an outline of an evolutionary approach to this new and promising field of study. He began by discussing what comparative taxation can learn from comparative studies generally and what it can contribute to them. He then described what a functional approach to comparative taxation looks like and discussed the two main methods that can be applied by comparative taxation: the theory of legal formants and the common-core approach. These two functional approaches are placed into an institutional setting in which alternative solutions to tax problems found in different countries' policies are considered in local tax design and in which they manifest themselves in domestic tax mechanisms implementing tax models, frequently through legal transplants. He continued by discussing a *de minimis* agenda for future comparative tax work and distinguished between static and dynamic comparative taxation: research in the former field may lead to important insights as to the formation of tax families. Yet, it is the research in the latter area that opens up a new set of important issues relating to tax transplants and to the circulation of tax models, showing its potential for applied empirical research. Garbarino concluded that

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1. The conference was sponsored by the *American Journal of Comparative Law*, the Center for International and Comparative Law, University of Michigan Law School and the International Network for Tax Research.

2. See C. Garbarino, "Tax Transplants and Circulation of Corporate Tax Models", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356122 and "An Evolutionary Approach to Comparative Taxation: Theory, Methods and Agenda for Research", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116686.

3. See O.Y. Marian, "The Discursive Failure in Comparative Tax Law", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404323.

4. See V. Thuronyi, "Comparative Tax Law: A Response", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400866.

the analysis of the circulation of tax models allows us to identify a possible agenda for future comparative tax research, in which “five challenges for comparative taxation” must be faced.

Marian presented his view on the discursive failure in comparative tax law. He argued that legal tax comparatists only seldom cite each other and almost never respond to each other – at least in terms of the methodologies they apply in their comparative studies. Tax comparatists almost always start their work from scratch, failing to use already existing supportive methodological arguments for their cause and ignoring contradicting theoretical arguments, which must be tackled in order to validate their conclusions. Accordingly, contemporary academic literature in comparative tax law contains the simultaneous existence of bluntly conflicting arguments, taking parallel courses, yet never engaging each other. The result is that academic writings in comparative tax law are incapable, or unwilling, to engage in a paradigmatic discourse (and, therefore, can be denominated as a “discursive failure”).

Marian argued that most legal tax comparatists can be – rather easily – associated with one of the well-established schools of thought in general comparative law. Very bluntly divided, there are four such comparative schools: (1) the functional; (2) the economic; (3) the cultural; and (4) the critical. The functional approach rests on the assumption that “the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results”. In other words, different laws perform similar functions across the globe. Functionalists regard the convergence of legal systems as an inevitable and desirable phenomenon. Their comparative project is aimed at identifying the so-called “best legal solution” to a common social problem. These premises of functionalism are widely adopted among international and comparative tax scholars.

The economic approach starts with an assumption that “there is a competitive market for the supply of law”. It may be viewed as an offshoot of functionalism, which instead of simply asking which laws or institutions fulfil which functions, asks which do so in the most efficient way. In essence, comparative economic research is aimed at inquiries into the deviations of different jurisdictions from an economically efficient benchmark: a so-called “model legal institution”. In the comparative tax arena, such economic “benchmark analysis” was used to promote distributive justice.

Cultural comparatists reject the functional assumptions of similarities of social problems and legal solutions. Rather, cultural comparatists assume that law is part of a broader cultural phenomenon. Each culture contains elements such as values, traditions, and beliefs, which give each culture its uniqueness. This “differentiation of cultures” entails that the laws (which are embedded in these cultures) are also necessarily different. Consequently, it is not surprising that cultural comparatists reject harmonization projects, as they call – by definition

– for the annulment of cultural identity as expressed in the unique laws of a given society. Writings in comparative legal culture have long celebrated (or urged that we should celebrate) the virtue of “difference”, as difference “satisfies the need for self-transcendence”. Even if harmonization was somehow desirable, cultural comparatists perceive it as an unattainable goal. Rather, according to this approach, comparative analysis should be aimed at understanding the cultural, social, political and, ultimately, the legal identities of “the other”. Such cultural “difference-oriented” stance is clearly visible in the writings of several comparative tax commentators.

Finally, critical studies in comparative law are aimed at exposing the pretentious apolitical nature of so-called “mainstream discourse in comparative law” and to suggest alternative discursive agendas. Critical scholars often see mainstream comparative law as a hegemonial-ideological project aimed at either assimilation or inclusion of other traditions, a process culminating in projects of harmonization. Instead, such scholars argue, comparative legal studies should be a “liberating project”, releasing us from the cognitive cage of abstract relativist dichotomies, which are wrongly perceived to be “objective”. At least one tax comparatist used comparative taxation as a tool to “liberate” current discussion in international tax scholarship from its own “parochial” view.

Marian concluded that each of these approaches is loaded with sub-schools and inner conflicts. None of the scholars mentioned can be purely regarded as “functional”, “cultural” and so on. These “schools of thought” should rather be utilized as methodological and ideological rallying points from which an academic debate can be launched.

Sartori addressed agency tensions and conflicts that may emerge between managers (agents) and shareholders (principals) as a result of aggressive tax planning strategies adopted by publicly held corporations. The interactions between corporate governance and taxation are bilateral and bi-unique. In fact, on the one hand, the manner in which corporate governance rules are structured affects the way a corporation fulfils its tax obligations and, on the other, the way tax designs (from the government perspective) and related tax strategies (from the corporation perspective) are planned influences corporate governance dynamics.

The first part of his research investigates such bilateral relationship, limiting the analysis to the specific tensions that emerge between managers and shareholders when publicly held corporations engage in strategic tax behaviours. The conclusion is that a general anti-avoidance tax rule has the power to regulate corporate governance dynamics – on the one hand, decreasing agency costs, transaction costs, and information asymmetry, and, on the other, increasing transparency and aligning interests of shareholders with those of managers. The second part of his research addresses the theoretical effects that corporate governance rules and principles may have on corporate tax behaviours, analysing the connection between corporate governance and strategic tax behaviours, and

investigating how corporate governance rules can reach a higher level of corporate compliance with the tax system. The conclusion is that good corporate governance dynamics have a positive effect on tax compliance, discouraging corporations from engaging in aggressive tax planning strategies.

3. The Practice of Comparative Tax Law

The afternoon session discussed the practice of comparative tax law, particularly the practical applications of comparative tax law. All the panel's participants agreed that comparative tax law scholarship has vast practical applications.

According to Ault, understanding the solutions given by other countries to similar problems not only helps you to understand better the rules of your own country, but also helps you to find new and better solutions to similar problems in your own country (legal environment). As an example, all countries were looking for solutions from other legal systems before drafting e-commerce tax legislation.

Arnold agreed with Ault, and he also believes that one should compare two or more tax legislations while drafting a tax rule, despite notable difficulties in conducting such a comparison in different jurisdictions, such as language differences. He provided as an example Australia's case of anti-avoidance legislation that distinguishes between "misuse" and "abuse", which has no parallel distinction in the French language, and as such is lost when applied in Quebec, Canada.

Thuronyi added that much of his practice in drafting tax laws for developing countries was based on the study of comparative tax law. He also provided examples of where legal transplants had gone awry in this work, such as where a particular transplanted rule ended up playing a totally different and unintended role.

The second session discussed the question "Can Comparative Tax Law Have Practical Applications?". Barker argued that the purpose of comparative tax law is knowledge in order to better understand the conditions under which society operates, so that we can direct and change them. This necessarily requires methodologically eclectic approaches that depend on the question being asked. He rejected the traditional assumptions of the functional approach, which he defined as similarity of tax problems across country and the superiority of a given tax law approach to each problem. Instead, he concluded that tax

law has multiple functions, and oftentimes these functions are contradictory. Function is explained by the various purposes and ideologies of tax law.

Likhovski advanced two arguments. The first is that if one defines comparative tax scholarship broadly to include not just work done by scholars who have law degrees (or are institutionally affiliated with law schools), but also comparative studies of tax law undertaken by historians, sociologists, economists and political scientists, there is actually an impressive body of scholarship, which goes back at least to the late 19th century. The discipline of comparative tax law (broadly defined) is also witnessing a real resurgence in the last two decades, as evidenced, for example, by the recent publication of *The New Fiscal Sociology*, a collection of essays which includes a wide spectrum of historical and sociological studies of tax (and tax law). The second point made, in response to the title of the panel "Can Comparative Tax Law Have Practical Applications?", is that, whilst Likhovski believes that comparative tax law certainly has many practical applications, it can also be studied as a way of self-understanding or as a way of asking broader, more abstract, questions. Specifically he argued that tax law can serve as a prism through which we can gain a better understanding of jurisprudence, law and society, and of sociological or historical questions which are of interest not just to tax lawyers but to other types of legal scholars and indeed to many students of tax law in the social sciences and the humanities.

Livingstone likewise challenged the functional approach, which creates an illusion of convergence. He argued, instead, for a "thick description" of tax laws that is rooted in an understanding of the culture they exist in. He further argued that when one moves beyond OECD countries, much more divergence can be found.

4. Conclusions

The lesson from this conference seems to be that the dichotomy between the functional and cultural approaches to comparative tax law is exaggerated. Both sides agree that in some areas tax laws are converging and that a functional approach may explain this convergence. Both sides also agree that in other areas no convergence can be observed and deep cultural differences persist. More research clearly needs to be done in this relatively new area of comparative legal studies.