International Tax Law: LLM 2018
Comparative Tax Law
Neil Brooks

VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS:
INSTITUTE FOR AUSTRIAN AND INTERNATIONAL TAX LAW
11-12 MAY 2018

Introduction to Course
"Any intelligent thinking on taxes eventually reaches the ultimate purpose of life on this planet as each of us conceives it."
Louis Eisenstein

"EDUCATION IS NOT A PREPARATION FOR LIFE; IT IS LIFE.
JOHN DEWEY"

"THE TAX SYSTEM HAS BEEN CALLED "A MIRROR OF DEMOCRACY,"
"NOTHING SHOWS SO CLEARLY THE CHARACTER OF A SOCIETY AND OF A CIVILIZATION AS DOES THE FISCAL POLICY ITS POLITICAL SECTOR ADOPTS."
JOSEPH SCHUMPETER

"FEW THINGS SO CLEARLY REVEAL THE NAKED PLAY OF VESTED INTERESTS IN ANY COUNTRY AS DO ATTEMPTS TO CHANGE AN EXISTING FISCAL STRUCTURE."
RICHARD BIRD
The Conduct of the Course and the Rules

- See Syllabus
- 1. Why study comparative tax law? (Why take this course?)
- 2. What are the materials and how will we cover them over the next two days?
- 3. How will participants be evaluated?
- 4. Where does one find materials related to comparative tax law?

Course Description: Comparative Tax Law

Although the underlying foundations of most modern tax systems are similar, each tax law has its own distinct features resulting from different tax policy choices and often deep cultural differences. Aside from its practical value to tax practitioners dealing with transnational transactions, comparative tax law has become a significant discipline in the literature of tax law and policy because it is an important means by which tax students and practitioners can enrich their understanding of their own tax system and can learn about the factors that determine tax legislative outcomes in different countries. In this course a number of the leading studies in comparative tax law will be examined in order to discern the deep structure of the income tax, how tax laws reflect the values and institutions of different countries, and the extent to which one country can transplant tax laws from another country in order to improve its tax system.
1. Why Study Comparative Tax Law?

Joys of Studying Comparative Tax Law

- Students
  - All tax systems have to deal with the same basic issues
  - Therefore, comparing the resolution of those issues in different countries increases one’s understanding of one’s own tax system
  - It also assists in learning the deep structure or theoretical map that underlies all income taxes

- Tax practitioners
  - To learn how another country's tax laws might affect a planned international business restructuring
  - To learn about tax planning and avoidance opportunities

- Tax policy analysts
  - To learn of alternative ways of dealing with particular issues
  - To compare effects of different tax laws

- Tax scholars
  - To test hypothesis
    - relating to the economic, social and other effects of tax laws
    - relating to factors that influence tax legislative outcomes
  - To explain differences between countries

- All curious individuals
  - To learn about the fundamental values and policies of other countries through their use of one of government’s most powerful and contentious policy instruments
  - To explore a myriad of practical policy issues - almost every social and economic policy has a tax angle
  - To gauge the shape and reach of one’s own worldview - “Any intelligent thinking about taxes eventually reaches the ultimate purpose of life on the planet as each of us conceives it.”
2. Materials, Content Outline, and Conduct of Class

**Methodology of comparative tax law**

(1) Kim Brooks, Chapter 1: Major Debates in Comparative Law Scholarship and Chapter 3: A Taxonomy of Comparative Tax Law Case Studies, in Brooks, Part I: The Development of the Discipline of Comparative Tax Law. – Petra Kaminkova

(2) Kim Brooks, Chapter 2: An Intellectual History of Modern Comparative Tax Law, in Brooks, Part I: The Development of the Discipline of Comparative Tax Law. – Paola Plantamura

**Tax Transplants**


**Broad Trends in tax policy in OECD**


Cont...

**Taxes and social and economic outcomes**

**Capital Gains**

**Tax competition and tax harmonization**

Cont...

**Income tax: Germany vs. United States**

**Conjugal relationships and taxes**
Cont...

**General anti-avoidance rules**


**Taxation of Small Businesses**


Cont...

**Wealth Taxes**


**Global Taxes**

Cont...

**Tax expenditures**

**Tax Incentives for Innovation – Patent Boxes**

---

3. Evaluation

- Class Presentation
- Short Essay
- (a) Critique one of the readings listed in the content outline
  - More than a summary
  - Learn something about the author and motivation
  - Consider the reasoning and evidence in support of the central claim
  - Might consider related studies
  - Draw on some of the discussions from the class and related readings
  - Give your opinion on the substantive policy issues and the research project
• (b) Compare some aspect of the income tax laws of two or more jurisdictions
  o For example, how particular income inclusions or deductions are treated
  o Describe the law in the countries being compared
  o Conceptualize the issue to be compared in a way that promotes a meaningful comparison
  o Attempt to explain why the laws differ
  o Argue the law of one country is to be preferred over that of the others or that each reflects unique characteristics of the relevant jurisdictions
  o To the extent they are relevant, draw on insights from the discussions in class and readings covered

• The 5- or 6-page essay will be due about 3 weeks after the end of the seminar, by June 4, 2018.

• Please e-mail the essay to Barbara Ender-Rochowansky, b.ender@wt-akademie.at

• She will forward the papers to me for evaluation.
Writing the Research Paper

- **Benefits to the author**
  - To learn a subject area, to remember it more accurately, to understand it better, to think more clearly about it, and to gain a new perspective of it
  - To further develop the important skills of researching, writing, critical thinking, and the ability to evaluate the research of others
  - To join in an on-going conversation among a community of scholars
  - To experience the joy of learning, understanding, and discovery

Benefits to readers and society

- In spite of benefits to the author, the main purposes of a research paper are –
  - To benefit the reader
  - Advance knowledge and understanding
  - Result in better public policy – a more equitable and efficient distribution of society’s resources
  - Result in more informed and just legal decisions
Forms of Knowledge

- **Analytical or conceptual knowledge**
  - Defining and categorizing legal phenomena – in order for example to facilitate a comparison

- **Empirical knowledge**
  - Determining the effects of the law
  - Explaining the variables that influence the development of the law – and how they differ across countries

- **Normative knowledge**
  - Reasoning about the values and goals of the law
  - Which countries’ laws are better?

- **Instrumental knowledge**
  - Reasoning about the most appropriate manner of achieving a particular goal

Transforming an Interest into a Research Question

- **Finding something that interests you**
  - What would you like to learn about? What do you observe in tax law that you find puzzling?

- **Finding a research problem**
  - “What distinguishes great researchers from the rest of us is the brilliance, knack or just dumb luck of stumbling on a problem whose solution makes the rest of us see the world in a new way.”

- **Formulating a claim that meets the following criteria**
  - Interesting – useful – significant – original (or at least add value) – supports a more general proposition
Getting Started

- Make a plan
  - Set dates for background reading; determining the topic; establishing a claim; completing a first draft; redrafting - strengthen the arguments, tighten up the structure, polish the writing, refine headings; and preparing the final draft - copy-edit, fix footnotes, prepare bibliography, prepare title page, submit. Relax and have a big fat latte.

- Write as you research and read
- Develop a working bibliography
- Have a first draft by two-thirds way through your planned time for writing the paper
  - the most effective learning takes place in the redrafting.

Organizing Your Writing

- Every paper should have a beginning, middle and end – plan and structure each part.
- Make effective use of headings
- Relationship between various parts should be obvious
- You will increase your productivity enormously if you use some modification of the built-in heading styles in Word both for taking notes and for drafting the final paper.
Footnotes

- Purposes
  - Acknowledge sources
  - Cross references
  - Explanation
  - Author comments
- Acknowledge papers from which you have synthesized
- In some cases, follow cite with relevant quote or precise explanation
- Use consistent style

Revising

- “There is no good writing – only good re-writing”
- Use familiar words
- Simple sentence structures
- Ensure paragraphs develop a common idea and have topic sentences
- Ensure correctness of grammar and punctuation
- Provide a roadmap
Research Ethics

- Do not plagiarize
- Do not misrepresent sources
- Do not conceal objections
- Do not caricature or misrepresent opposing views
- Do not deliberately obscure arguments

4. Bibliography

1. General: Comparative Law
2. General: Tax Law
3. Organization of Economic Cooperation and Development (OECD)
4. International Monetary Fund (IMF)
5. International Bureau of Fiscal Documentation (IBFD)
6. International Fiscal Association (IFA)
### General Principles for Effective Learning

1. **Importance of prior knowledge**
   - Try to do the reading before or after class

2. **Meaningfulness**
   - Try to relate materials to personal and professional experiences

3. **Right mix of generalizations and example**
   - Try to relate to specific problems

4. **Attention determines learning**
   - Don’t read the newspaper in class

---

### General Principles for Effective Learning

- Rehearsal is necessary for retention
  - Go over material after class

- Automaticity is essential to higher skills
  - Repetition of problems and materials is essential

- Need for explicit instruction
  - Be sure to understand the purpose of basic concepts

- Relate theory to practice
  - Be sure to understand the reasons for the rules

- Organize content into coherent whole
  - Develop a framework for thinking about the issues
More on how to learn – put away your highlighter

- **Highlighting and underlining** – low
  - When done on its own, spectacularly uneffective – requires no training, takes little time, and involves little thought.

- **Summarizing** – low
  - Summarize a page of text in a few short lines or take notes. More useful than the following techniques but even though some use it all the time not particularly effective.

- **The keyword mnemonic** – low
  - Linking words to meanings through associations. Only effective where keywords are important and easy to memorize. Also, while might assist short-term memory actually less effective than rote learning for long-term recall.

More...

- **Imagery use of text learning** – low
  - Visualization is an easy technique to use – found generally not to be too useful – but may helpful for complicated factual patterns.

- **Rereading** – low
  - Immediate rereading is marginally more effective than outlining and summarizing. But rereading over a longer period of time might have a stronger effect.

- **Elaborative interrogation** – moderate
  - After reading some text, ask why the stated facts are true. Requires some prior knowledge to generate good questions.
And more...

- **Self-explanation – moderate**
  - Involves explaining and recording how you understand problems as you work.

- **Interleaved practice – moderate**
  - Instead of studying topics in blocks, study problems of different types.

- **Practice testing – high**
  - Testing is important for learning. Practice testing as you study (on flash cards) takes up much less time and is much more effective than re-reading.

- **Distributed Practice – high**
  - Divide you study over a period of time. In terms of long-term remembering, cramming is a waste of time.

---

Source:

A Few General Themes

- What are the major trends in taxation across countries?
- Tax competition – what is it and is it good or bad?
- Are tax systems converging?
- Should tax systems converge?
- Under what circumstances can the tax laws of one country be transplanted to another?
- How does one determine “best practices” in tax law?
- What are the most important variables that explain the differences in tax laws between countries?
- If there is to be more harmonization between countries how can it best be achieved?

“Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Legal Mind” by Jaakko Husa (2009)

- Claim: comparative law should not be taught as a separate course instead in every law course the discussion of the law should begin with a statement of a legal problem and then solutions in a number of countries examined.
- Pluralistic and transnational elements of the law and all features of life are now commonplace
- Paper is based on the belief that we must respond more seriously to the globalization of law
- The problem with traditional legal education is that it is based on one “mother-system” – thus lawyers regard their own system as normal
- Thus it is more difficult for students to adapt to transnational pluralism and to genuinely accept different approaches
1. Legal Weltanschauung
   ○ There is a shared comprehensive mental image of the world of law in general.

2. Comparative law: clear distinction between research and tool for education
   ○ He is arguing not for a change in the scholarship of comparative law but as a pedagogical instrument. The difficult skills required in the scholarship of comparative law are not necessary for effective learning.

3. Constructivist law curriculum
   ○ Students learn best when they are constructing their own knowledge. Students should be encouraged to construct their own legal understanding from multiple sources.

Conclusion – toward multijuralism?
   ○ Must overturn the hidden curriculum
   ○ Need a “globalization of the mind”
   ○ Teach students explicitly that there are different answers to each question
   ○ Build an epistemology of law that relies on multiplicity rather than mono-systemic legal thinking
### “What Can We Learn From Comparative Tax Law?”

#### What is it?
- “focuses on the main differences between how various legal systems conceptualize issues and function to solve problems”
- Involve differences
  - In institutions and how they function
  - In basic rules (conceptual structures)
  - In detailed rules for specific issues
- Understanding the legal cultures of countries helps us understand their rules
- Important to those practicing tax law internationally
- Also, important to those who want to be broadly educated

<table>
<thead>
<tr>
<th>Comparative Tax</th>
</tr>
</thead>
</table>

#### Another point of view
- It is difficult to research and understand, but now sufficient material is available to acquire a basic understanding

<table>
<thead>
<tr>
<th>Comparative Tax</th>
</tr>
</thead>
</table>

#### History
- Importance of the past to the present
- How is it that some countries have different histories and end up with same solutions?
- How is it that other countries start in same place and end up differently?

<table>
<thead>
<tr>
<th>Comparative Tax</th>
</tr>
</thead>
</table>

#### Key themes in comparative law
- When do transplants work?
- Are tax systems converging?

<table>
<thead>
<tr>
<th>Comparative Tax</th>
</tr>
</thead>
</table>
“What Can We Learn From Comparative Law?”

- Tax law affects or is affected by all branches of law
  - Constitutional law
    - Place of tax law in the constitutional framework
  - Criminal law
    - Tax crimes
  - Contract law
    - Tax consequences of contractual agreements
  - Family law
    - Tax consequences of divorce
  - Tort law
    - Taxation of personal injury awards
  - Financial Accounting principles
    - Does tax law conform?

“What Can We Learn From Comparative Law?”

- Teaching aspects
  - Necessarily interdisciplinary
  - Involves the study of statutory interpretation
  - Basic rules of tax procedure
  - Basic policy concepts
  - Various types of taxes

- Practical solutions
  - Provides useful solutions to particular problems
“What Can We Learn From Comparative Law?”

- Some cases
  - Retroactivity
  - Capital gains
  - Search for tax equity
  - VAT
  - Taxation of couples
  - Anti-avoidance rules and statutory interpretation
  - Inflation adjustments
  - Tax and financial accounting
  - Managing detail

Comparative Tax Law: Overview, ch2

- Convergence

  Spread of VAT
  Reduction in income tax rates
  Separate treatment - capital
  Taxation of capital gains
  Time value of money
  Tax rules - financial instruments
  Denial of deductions for bribes
  Controlled foreign corporations
  Double tax treaties
  Repeal of net annual wealth taxes
  Repeal of wealth transfer taxes
  Adopt purposive approaches
  Self assessment
  General anti-avoidance rules
  Sophistication of tax administration
Some Differences Between Countries

- **Complexity**
  - Use of tax system for tax expenditures
  - Drafting style – general or specific
  - Use of regulations
  - Simplification efforts
  - How complex are tax laws? What has been the development of complexity over time?

- **Legislative process**
  - US congressional system vs European parliamentary systems
  - What influence does the legislative process have on how tax policy decisions are made?

- **Investment Incentives**
  - What kind of incentives are in effect in the country?

Country Tax Families

- **Commonwealth - common law**
  - Influenced by the UK – source concept of income
  - Schedular – 1803 – 6 schedules
  - Detailed legislation – often complex rules and drafting conventions
  - Canada, New Zealand and Australia became independent before 1922
  - 1922 British colonial model

- **American – common law**
  - Global definition of income - 1913
  - Tax capital gains
  - Much tax law is judge made
  - Classical corporate tax system
  - Worldwide residence-based taxation – foreign tax credit
  - Income tax is major source of revenue and always politically contested
Country Tax Families

- French – civil law
  - Single tax code
  - Individual and corporate taxes considered separate
  - Schedular – eight categories
  - High threshold for tax
  - Family quotient system for granting relief to dependents
  - Territorial system
- Latin America – civil law
  - Similar legal systems and languages
  - Income taxes adopted after colonial period and subject to many influences
  - Many rules, in particular procedural rules, were inspired by tax code of Germany
  - Single income tax for individuals and corporations
  - Simple corporate tax systems

Country Tax Families

- Transition Countries
  - 15 countries that make up the former Soviet Union
  - Had accounting systems designed for central planning
  - Although had previous taxes, most started from scratch at the beginning of their transition.
  - Many adopted comprehensive codes of taxation
  - Tax laws have undergone rapid development and change
- Post-Conflict Countries
  - Hungary, Poland, Czech and Slovak Republics, Albania, Bulgaria
  - Mongolia, Vietnam, Cambodia, Laos
  - China
Country Tax Families

- Northern European
- Southern European
- Japanese/Korean
- Miscellaneous
  - Islamic Republic of Iran, Syrian Arab Republic, Turkey, Yemen, and so on.
- European Union

"The Discursive Failure in Comparative Tax Law"
by Omri Y. Marian (2009)

Introduction: The state of comparative tax scholarship
- Some comparative tax work has no theoretical foundations
  - Thuryoni, Ault and Arnold
- However, some authors have attempted to develop a theoretical foundation for their work
  - Garbario, Livingston, Barker, Infanti
- But although there is many good comparative tax studies, there is no academic discourse about it.
- There is no meta-comparative taxation – tax comparatists do not respond to one another
- No debate on purposes of comparative tax law
- Roadmap to article
I. What is ‘Comparative Taxation’?

A. General
  - Thuronyi – “Comparative law involves more than just describing the rules of another legal system.” – but what more...

B. Is there a unique method of legal comparative tax research
  - No unique method: comparative tax law is the application of ‘comparative law’ methodologies for purposes of studying tax law
  - Garbario – adopts the “functional approach” – which means at its most basic form finding the “functionally equivalent” rules of the systems compared
  - Mumford – states her object as to “provide a cultural context for the laws of tax collection, within a comparative UK/American structure.” Thus she associates herself with the school of comparative law and legal culture.

C. Comparative taxation as a substantive body of knowledge
  - Characteristics of an academic discipline
    - Is there such as thing as unique comparative tax knowledge - examples
      - Thuronyi, ed., *Tax Law Design and Drafting* (on-line at IMF) – excellent
        - “Book represents an effort to distill from our collective experience, and from the tax laws of many countries in the world, practical guidelines that can be used by officials of developing and transitions countries.”
      - Livingston, “From Milan to Mumbai ... Reflections on Progressive Taxation”
        - Searches for tax culture in the four countries he looks at
      - But authors do not engage one another
    - The teaching of comparative tax knowledge
      - Is it necessary to socialize the body of knowledge in the discipline - yes
    - Evaluation and critique
      - Very little evaluation and critique
  - D. Discursive failure and its significance
    - See his table showing lack of cross references
II. Setting the course for searching a theoretical framework: which comparisons should we compare?

- Comparative taxation is a substantive body of knowledge that requires a discursive framework

- Vertical sources of frameworks
  - Comparative law and comparative social sciences

- Horizontal sources of frameworks
  - Comparative public law and comparative tax in social sciences

III. Towards a Coherent Theoretical Discourse: Existing Comparative Tax Law Scholarship and the Discourse in General Comparative Legal Studies

- 1. The Why: What is the purpose of comparative tax studies?
  - A. General discourse
    - Functionalists - understanding, reform and unification
      - Common core projects
      - Legal transplants
    - Cultural comparatists – understanding contexts of the law
      - Cultures are unique – no common core and transplants are meaningless
B. Tax Discourse

- Functional
- Carlo Garbarino – “An Evolutionary and Structural Approach to Comparative Taxation: Methods and an Agenda for Research”
- Tax transplants “challenge the idea that tax law is exclusively a local response to social demands” made by local communities.
- Five challenges: (1) provide a theoretical framework for tax evolution (2) study domestic solutions (3) analyze the effect of tax transplants (4) analyze EU tax models (5) verify potential for bottom up harmonization (example CCCTB)

Tax Discourse (2)

- Cultural comparatists
- Examines the tax treatment of contributions made by domestic taxpayers to foreign non-profit organizations
- Finds - not harmonization, but contextual differences through coordination
- See also Livingston and Barker
2. The What: Comparative Tax Law and its Objects of Comparison

- General discourse
  - Which jurisdiction – legal families
  - Which laws – do they serve the same function

- The tax discourse
  - Which jurisdictions – how useful are Thronyi’s taxonomy of families based upon inherited legal traditions - depends on purpose of comparison – reform, explore cultural differences,
    - Similarity or degree of sophistication of tax systems
    - What about size of country
    - What about stage of industrialization
  - Which tax laws
    - Depends on purpose of comparison

3. The How: Comparative Tax Studies and the Construction of Similarities and Differences

- A. A general remark on eclecticism
- B. The general discourse – functionalism
  - (1) Identify a problem (2) Choose jurisdictions to compare (3) Describe the laws (4) Identify similarities and differences (5) Critically evaluate
  - Study legal transplants
  - Premises (1) The law is a response to a problem (2) Different jurisdictions face similar problems (3) Legal culture not so important

- The tax discourse
  - Ault and Arnold, Thuronyi
  - Livingston “comparative taxation...inevitably focuses attention of the problems of tax culture and the ways in which different country’s tax systems may be extremely different from one another, even if they face the same problem.”
IV. Taking Sides: Questioning Garbarino’s ‘Evolutionary Approach’

- Premises of Garbarino’s approach
  - “(1) Comparative taxation is secured to a global approach, i.e., a theory of the structure and evolution of tax systems and looks at how tax system work dynamically as a whole (tax law-in-action);
  - (2) Comparative tax research adopts the functional approach;
  - (3) Comparative taxation primarily looks at legal transplants, rather than a static comparisons of statutes;
  - (4) Domestic tax change is mainly viewed as the result of circulation of models among countries.”

- Marian contends that each of these premises is wrong

V. Conclusion: Now, can we Talk?

---


- What explains the political choices made by governments with respect to tax legislative outputs?

- Tax policy is somewhat distinct from other areas of public policy
  - Few citizens understand tax policy
  - The formulation of policy is dominated by economists and lawyers
  - There is seldom any electoral advantage to be gained through tax policy – other than tax cuts
  - A great deal of tax policy is made while implemented
Understanding Tax Policy

- **Political culture**
  - General cultural belief about the meaning of fairness
  - Neo-liberalism
  - Anti-statist values of many French and Italian citizens drive their governments to rely on indirect taxes
  - Results in continuation of status quo – does not account for change very well

- **Public opinion**
  - More focused than political culture
  - Initiative and referenda
  - Median voter model
  - Public rarely speaks loudly or with one voice on tax matters, but when it does there appears to be some change it will be heard.

Understanding Tax Policy

- **Parties and ideologies**
  - Party programs and associated ideologies
  - Reagan and Thatcher

- **Group politics**
  - Influence of interest groups
  - Difficulty of organizing taxpayers qua taxpayers

- **Policy reasons**
  - Used as instruments of social control

- **Institutions of taxation**
  - Formal government processes – explain tax expenditures

- **International influences**
  - Openness of economies
  - Mimicry
Now Let’s Turn to Assigned Papers