The Development of the Discipline of Comparative Tax Law

Draft: January 2017

Kim Brooks

The new millennium has inspired renewed interest in comparative law generally and comparative tax law in particular, with practitioners and scholars rapidly building the literature that defines the modern field. Despite the increase in authors undertaking comparative tax work, however, the contours of the theoretical and methodological debates lack definition; despite several leading articles that call on scholars to actively engage with each other on matters of approach, most scholars continue to “write alone”; and despite the increasing availability of thoughtful comparative law textbooks and monographs, tax scholars do not connect their work with debates in comparative law generally.

In the first Part of this paper I provide a foundation for future comparative tax law research. Part 1 reviews the major debates and theoretical directions in comparative law scholarship, focusing on the recent work in the field. Part 2 offers an intellectual history of comparative tax law scholarship, identifying the major contributors to the discipline of comparative tax law and conceptualizing the field’s development in five stages. Finally, Part 3 generates a taxonomy of modern comparative tax law research based on its underlying purpose, explores how that work connects to the comparative law field, and identifies approaches to comparative tax law method, in the light of the work to date, that best advance tax knowledge.

[Part 1 redacted]
To suggest that comparative tax law is a discipline with an intellectual history is a bold claim. Nevertheless, the increase in comparative tax law scholarship, especially over the last twenty-five years, has resulted in a body of work that builds progressively on related insights and that can be clustered and described in relational ways. This Part contributes to that evolution by describing it in a way that facilitates the engagement of authors of future work with the insights of earlier work in the discipline and by considering, prospectively, how the discipline might develop.

Comparative tax law scholarship might be divided into two broad categories: work that seeks to advance the discipline of comparative tax law and work that compares tax laws to achieve another objective, without explicit consideration of comparative tax law theory or methods. This Part concerns itself with the first strand of research: work that seeks to advance the discipline of comparative tax law. The second cluster of research is the focal point of Part 3.

Part of what makes the evolution of comparative tax law remarkable is that, unlike areas of tax law where scholars seem to be engaged in a common conversation, in many cases, scholars of comparative tax law appear to write alone. Many of them do not explicitly respond to, or incorporate, the insights of those who came before them and even where they do, they do not draw on an extensive body of earlier comparative tax law work. For scholars who adopt a comparative perspective in addressing a particular tax law question or dilemma, the lack of engagement is perhaps understandable: a scholar comparing how Australia, the UK, and the US deal with interest deductions might be more interested in the non-comparative work on interest deductibility in those three countries than she is in the comparative tax law scholarship generally or in comparative work on tax avoidance, for example. Why authors fail to acknowledge explicitly the insights of other comparatists, whether of tax law or law more generally, when they author pieces that seek to advance the discipline of comparative tax law (as distinct from efforts to advance an aspect of tax law itself) is less clear.

Nevertheless, the claim of this Part is that there is a distinguishable comparative tax law scholarship and that its modern history can be coherently told. Although it is often the case that scholars fail to acknowledge the work of those who preceded them, this history reveals some common debates and a

---

1 Among other challenges, “[t]he history of ideas has long been a discipline in disrepute”. Arianna Betti and Hein van den Berg, “Modelling the History of Ideas” (2014) 22(4) British Journal for the History of Philosophy 812-835 at 812. The claim is also a risky one, given the intensity of the debates about the contours of intellectual, cultural, and social histories and the value of engaging in these kinds of exercises. See e.g. Leslie Butler, “From the History of Ideas to Ideas in History” (2012) 9(1) Modern Intellectual History 159 – 169; Daniel Wickberg, “Intellectual History vs. the Social History of Intellectuals” (2001) 5(3) Rethinking History 383 – 395. Law has not served as a centerpiece at the intellectual history table; nevertheless, for a recent collection see, “Symposium: Opportunities for Law’s Intellectual History” (2016) 64(1) Buffalo Law Review.

2 Even the simple taxonomy suggested in this paragraph is porous. In some cases, the work of a particular scholar, for example, Hugh Ault’s *Comparative Income Taxation: A Structural Analysis* (The Hague, The Netherlands: Kluwer Law International, 1997), is discussed as a contribution to the work seeking to advance the discipline of comparative tax law scholarship although he does not explicitly engage in a discussion of comparative tax law scholarship. However, given the magnitude of the work and the reliance upon it by subsequent comparative tax law scholars, Ault is identified as a major contributor to the discipline in the first category.

3 This is the major claim and complaint inspiring Omri Y Marian, “The Discursive Failure in Comparative Tax Law” (2010) 58:2 Am J Comp L 415.
trajectory of development. This is perhaps not surprising despite the fact that some scholars fail to acknowledge earlier contributions. One might predict that in the era of modern technology and travel, the central figures in the intellectual history of comparative tax law know about each other’s ideas, even if they are not expressly engaging with one another in their written work.

Before proceeding to discuss the comparative tax law scholarship in this Part and in Part 3 in more detail, I want to clarify the parameters for the work selected. First, with a few limited French exceptions, I reviewed scholarship by academics authored in English. While that undoubtedly restricts my ability to draw conclusions about the “field” of comparative tax law work, it hampers this study less than in other areas of law since a surprising amount of tax scholarship is undertaken in English, even if the author’s original language is German, French, or Italian, for example.

Second, with a few exceptions, I focused on work by academics and ignored work by institutions (like the Organisation for Economic Co-operation and Development (OECD)) or practitioners. I made that decision because my objective is to create an intellectual history and taxonomy for comparative tax law scholarship. While some institutions and practitioners produce work that might be described as scholarship in the sense that it creates new knowledge, the risk of expanding the pool of work is that in many cases the work’s primary purpose is to provide information to support tax planning or to provide descriptive details about other systems for in aid of government policy development. More than that, the aim of this Part is to support the efforts of tax scholars in the academy in considering their own uses of comparative tax law and the work of other scholars provides more realistic illustrations.

Third, in Part 3, I focus on recent work, generally work that was authored after 1990. That’s not to suggest that important work was not completed before 1990, but the real expansion in the modern comparative tax law field has occurred over the last twenty-five years.

Fourth, again with some modest exceptions, I focused on work authored by scholars who find their disciplinary home in law, as opposed to accounting, economics, sociology, or public finance, for example. This decision swims upstream of the more popular view that scholarship about an idea or concept should not be corralled into disciplinary cluster and that instead we should also seek to better understand the world in a way that eschews disciplinary boundaries. In some quarters one might imagine sustaining a claim that the study of taxation does not have disciplinary boundaries and that knowledge in the area is fundamentally and necessarily interdisciplinary. Nevertheless, part of the peculiarity of law is our attachment to formal legal rules, particularly those expressed in legislation and case law. Study of those rules tends to be unique to legal scholars, located in law faculties, and it is the scholarship that takes those texts as its starting place that is of interest for this paper. Perhaps of some surprise, given the press toward interdisciplinarity, I found few articles by tax law scholars that might be described as “interdisciplinary”. Many of the authors drew on work produced in economics, in particular, but only a few of them authored work that itself might be described as rooted in the other disciplines, like accounting, economics, sociology or public finance.

---

4 For a complete list of works reviewed for Parts 2 and 3 see Bibliography B: Comparative Tax Law Scholarship.
5 And possibly also runs counter to some of the fundamental tenants of good intellectual history. See e.g. Richard Whatmore, What is Intellectual History (Cambridge: Polity Press, 2016) at 14 (“What marks intellectual history out more than anything else is its interdisciplinary nature. Intellectual historians never respect disciplinary boundaries, except when they are the boundaries imposed by the people whose ideas they study.”)
Finally, I selected work that was primarily devoted to the comparative tax law project. Where an author simply offered fragmented comparison in an illustrative way in a piece that was essentially non-comparative in nature, it was excluded on the grounds that it would not offer much by way of insight into comparativism. Additionally, work where authors from different countries described the laws in their jurisdictions, perhaps in response to a common questionnaire, but where explicit comparison was not a component part of the work undertaken by the author, were excluded. That work may be helpful for a reader, who is then able to compare approaches adopted in different jurisdictions, but the work of the author themselves is not explicitly comparative.

This Part of the paper builds from Omri Marian’s 2010 paper, “The Discursive Failure in Comparative Tax Law”. It is distinguished by two features. First, Marian’s objective was to bring tax law comparatists into dialogue with each other, in part by aligning them with their comparative law theoretical framework (for example, whether they adopted a functionalist or critical approach). To that end, he explored the work of John Chomnie, William Barker, Victor Thuronyi, Anthony Infanti, Michael Livingston, and Carlo Garbarino. The objective of this Part is different: to lay out an intellectual history of comparative tax law. I, therefore, expand considerably the scholars reviewed and attempt to track their relationships with each other alongside the development of their ideas.

Second, Marian’s claim was that comparative tax law scholars fail to engage with each other (as demonstrated by the fact that they do not cite each other and do not explicitly take issue with one another even where their arguments are clearly contrary) and that as a result comparative tax law has suffered. My claim is quite different: that in spite of the lack of acknowledged engagement, a story might be told about the evolution of comparative tax law scholarship. As the review below reveals, comparative tax law scholarship has evolved in a sensible, if slow and irregular, way over the course of its history. The failure of one scholar to cite or directly engage with another may have hampered the speed of the discipline’s development, but the spread of comparative tax law ideas can be traced and an intelligible narrative about its trajectory revealed.

2.1 An Intellectual History of Comparative Tax Law Theories and Methods

As a sign that the discipline of comparative tax law scholarship is still nascent, few scholars have written about the discipline as an isolated topic of inquiry distinct from scholarship that uses a comparative method to approach a particular topic, for example, corporate losses. To some extent, it creates a false sense of separation within comparative tax law scholarship to treat these contributions—contributions that might be understood to define the discipline—in a discrete Part. There are, as will be clear in Part 3, scholars who have undertaken work within a particular tax law context that has generated insights of a general nature about comparative tax law as an area of study. Nevertheless, a small number of scholars have made disproportionate contributions to comparative tax law, and in some cases to its development, and I review them here to assist in telling the story of the evolution of the discipline.

2.1.1 Phase 1: Planting a Flag in the Disciplinary Ground (1927 – 1985)

Phase 1 of the intellectual history of comparative tax law scholarship occurred over an extended period. While comparative law burgeoned in the early 1900s, comparative tax law did not gain traction until just prior to World War II. Early actors in this phase, especially the International Fiscal Association (IFA),

---

likely were not acting to create a discipline. Instead, they were presumably responding to the pressures on tax advisors in an increasingly global world that required gaining knowledge of other country’s tax systems.

A flurry of activity, relatively speaking, commences with John Chommie’s contributions later in the phase. Chommie’s work develops the notion of comparative tax law as a field of study. Additional contributors – from Canada, Israel, Europe, and the United States – offered early, but richly textured work to the comparative tax law cannon. Perhaps not surprisingly, many of them were employed in tax administration or tax practice before commencing their academic careers. For the most part, the scholars in this phase undertook comparative tax law study as a minor strand of their scholarly engagement. While work in this phase resulted in at least some literature that could be taken up by later tax law scholars, little of this work has been cited or obviously relied upon by subsequent scholars. This is a shame because, particularly in the propensity of some of the scholars in this area to explore materials beyond the standard legislative design (for example, administrative guidance, court decisions, and in a few cases even institutional design issues and interviews), the work in this area is creative and engaging.

**Harrison Spaulding**


---


9 RF Harrod, Book Review of *The Income Tax in Great Britain and the United States* by Harrison B Spaulding (1927) 6:3 J Royal Inst Intl Aff 195 (“Mr. Spaulding has produced a clear, workmanlike and stimulating book on a subject which would lend itself easily to the opposite kind of treatment at the hands of one less skilled” at 195).

10 Carl C Plehn, Book Review of *The Income Tax in Great Britain and the United States* by Harrison B Spaulding (1928) 18:2 Am Econ Rev 324 (“[t]his is a comparative study, accurate, clear and interestingly written and of value to the layman and expert alike” at 324).

11 WHC, Book Review of *The Income Tax in Great Britain and the United States* by Harrison B Spaulding (1927) 90:4 J Royal Stat Soc 780 (“Dr. Spaulding has not only attempted, and successfully achieved, such a study [laborious] of one Income Tax but of two. …He has deliberately avoided writing a text-book, although this has not prevented him from going into considerable detail in describing the structure of the two laws or from giving appropriate references to numerous legal decisions of importance and other relevant authorities” at 780).

12 J Sykes, Book Review of *The Income Tax in Great Britain and the United States* by Harrison B Spaulding (1927) 37:148 Econ J 637 (Sykes review is positive “the work may profitably be consulted by those who wish for a detailed, comprehensive, and clear account which is supplementary to the general works on public finance, and to the special writings of Professor Seligman and others”, although it offers some suggestions for additional topics that would helpfully have been discussed (for example, a chapter on the distribution of the income-tax burden) at 637).
Association.\textsuperscript{13} Giant Henry Simons reviewed the work in the \textit{Journal of Political Economy}, although somewhat ambivalently.\textsuperscript{14} Simons claims that Spaulding uses “his three hundred pages to good advantage” and that he has “performed a real service”.\textsuperscript{15} However, Simons also concludes that, “[t]he author’s ventures into criticism provide the least satisfactory parts of the book”.\textsuperscript{16}

Spaulding’s work does not offer much by way of explicit examination of its comparative law method. He does justify his comparator jurisdictions (the US and Great Britain), by noting the similarities and differences of their experience of the income tax:

In both Great Britain and the United States, the income tax is the principal source of public revenue, and there is no indication that it will not continue to be so. Great Britain has had the advantage of over a century of experience with it; the United States has had, perhaps, an equal advantage in that it has been free to develop its income tax without the hampering burden of long and firmly established usages. Both countries, since the War, have given close attention to their income tax laws and have made many important changes.\textsuperscript{17}

Unlike some of the later extended comparative discussions of income tax law that seek to introduce students to the elements of income taxation, Spaulding clarifies that he has no intention to write a tax. Instead, he seeks to identify places where the laws of the United States and the United Kingdom diverge, primarily, and to reach conclusions about “the relative merits of each”.\textsuperscript{18} The book is divided into 19 chapters; for example, addressing rates, persons liable, the problem of double taxation, and corporations and shareholders. For each chapter, Spaulding offers some initial comparative reflections on the design of the income tax and then he reviews in more detail the approach taken in Great Britain and the US on that matter. Spaulding’s work is truly comparative: it is focused on identifying and examining the divergences in approach between the two jurisdictions and ultimately on taking a view on which approach is better. Noteworthy in the trajectory of comparative tax law, Spaulding looks carefully at the administrative structures of each jurisdiction. Additionally, he is one of the few scholars whose chosen jurisdictions did not include his home jurisdiction. Unfortunately given its thoughtful approach, and surprising given its illustrious reception, reliance on Spaulding’s book has been limited and it received scant attention in subsequent comparative tax law studies.\textsuperscript{19}

\textit{International Fiscal Association}

Because of the dearth of comparative tax law academic scholarship in this phase, because of its importance in providing fundamental material that could be used by tax academics and those interested

\textsuperscript{13} Willford I King, Book Review of \textit{The Income Tax in Great Britain and the United States} by Harrison B Spaulding (1927) 22:159 J Am Stat Assoc 408 (“[i]t is rare to find a book dealing with a subject of this kind which is so readable as the present volume. The author displays remarkable ability in extracting the essentials from the laws of the two countries and in making comparisons which bring the important contrasts into relief” at 409).
\textsuperscript{15} Simons, supra note X at 374.
\textsuperscript{16} \textit{Ibid}.
\textsuperscript{17} Spaulding, supra note X at preface.
\textsuperscript{18} Spaulding, \textit{ibid} at preface.
\textsuperscript{19} Spaulding’s work is not cited by any of the other scholars highlighted in this Part. But see Steven A Bank, \textit{Anglo-American Corporate Taxation: Tracing the Common Roots of Divergent Approaches} (Cambridge, UK: Cambridge University Press, 2011) at 3-5, 142-143.
in the comparative law field generally, and because its approach to design is adopted by subsequent tax law scholars, the IFA’s contribution is worth acknowledging. The IFA has undertaken comparative study as part of its mandate since its formation in 1938. It has published a set of “Cahiers de droit fiscal international” each year since 1947.

The design of the Cahiers has been fixed since the outset. Each Cahier has an identified, specific tax theme; for example, “Taxation with Regard to the Earnings of Limited Companies with International Interests” or “The Territorial Competence of the Fiscal Authorities in the Field of Succession and Property Taxes”. Each Cahier includes a “general report” or general reports, usually authored by one of the world’s leading tax practitioners, which builds on the descriptive summaries of substantive law presented by various country reports. These country reports are authored by representatives (again, usually leading tax practitioners but sometimes tax academics) from IFA’s branches. This work has been vital to the tax practitioner and tax policy communities. Nevertheless, it has been distinguished from the work of comparative law scholars by Jörg Mössner, who explains that “the purpose of the … IFA … congresses [is] really to compare the various tax laws by combining national reports with a general report [and] the result is more a description of the state of national laws than a comparison”. In other words, the IFA does not seek to advance new insights into tax law, it seeks to better disseminate what is already known and to facilitate knowledge acquisition.

Like the IFA, other international organizations, for example, the OECD, United Nations (UN), International Monetary Fund (IMF), and World Bank have produced wonderful, rich comparative tax work since early in the twentieth century. Although that research offers much to comparative tax law scholars, it is not further discussed in this Part since the framework developed by the IFA set the stage as the dominant design for future comparative tax law research. While the other international organizations have similarly produced outstanding work, their contributions have not attempted to advance comparative tax law scholarship as an end in itself.

*John Chommie*

---

20 Competing in the field of work that could be identified as launching comparative tax law as a discipline is the World Tax Series published by Harvard Law School in cooperation with the United Nations. The series’ goals were “to (1) to describe each country’s tax system in its own legal and administrative terms; and (2) to present each system in such a way that it can be compared, point by point, with others” (see The Harvard Crimson, “Tax Reports Published by Law School” (22 April 1957), online: <http://www.thecrimson.com/article/1957/4/22/tax-reports-published-by-law-school/>. The work was not comparative in itself – but it did allow scholars, policy-makers, and practitioners to do comparative work by evaluating how different countries (each country was reviewed in a separate volume) dealt with a common list of issues and problems. The books were authored by leading scholars and practitioners – often with someone in the United States (regularly an academic) working collaboratively with scholars and practitioners in the “home” jurisdiction.

21 The first Cahiers were published in 1939 but, presumably because of the intervention of World War II, no Cahiers were published between 1939 and 1947.


John C. Chommie, a professor at the Dickinson School of Law (which later merged with Penn State) and later a professor at the University of Miami Law School—wrote three short articles in the mid-1950s on comparative taxation and a longer intervention in 1960. In his 1956 piece, Chommie advocated for comparing Canadian and US federal tax law and explained that comparisons of legislative policy-making, administrative process, and judicial process would all be fruitful. Chommie was prescient in noting that valuable comparative work must be something more than the “synoptic description of legal rules and institutions” to be useful. He pressed scholars to inquire into the social forces affecting policy-making, the role of the executive, and the underlying major policy issues to better understand legislative process in its comparative context. He identified administrative practices as an important element of tax law and suggested that the judicial process might be studied in terms of the machinery of review, the techniques of interpretation, and the notions of judicial function. Ultimately, Chommie’s focus in advocating for comparative tax law was to understand the law and context in the countries being compared and to “provide the needed insights for reform in both countries”.

In 1957, Chommie published an article that advocated for seminars in comparative taxation, continuing his argument that comparative tax law should be viewed as a distinct area of tax law study. Chommie laid out comparative tax law’s advantages, which include understanding better one’s own system, assisting in the development of tax theory and tax policy-making, and supporting the needs of a democratic community. Chommie explicitly advocated for using Canada as a comparator jurisdiction to the US because the language is the same; the materials are readily available; the states are both federal; the countries have similar mixes of agriculture, mining, and other industries; the countries share a common legal and cultural heritage; and the countries have been active in developing their tax laws. One hopes that Chommie was able to offer some comparative law teaching when he served as the Director of the University of Miami’s Tax Program or perhaps when he directed a Cuban refugee lawyer program, apparently authoring teaching materials in Spanish to facilitate study.

In 1957 and 1960, Chommie authored pieces that applied his comparative tax law theories. His 1957 article compared how Canada, the United States, and the United Kingdom taxed corporate earnings. Much of the article is consumed with the details of each of the three country’s approaches, with each country separately discussed, but Chommie’s joy in studying tax law in its comparative setting shines through. As he concludes, “[a] study of the tax experience in the United Kingdom and Canada – their formulation and execution of policy – can have an educative and liberating effect on the thinking of tax policy makers.” The 1960 piece was devoted to the study of how the United States and the United Kingdom addressed corporate reorganizations. The piece provides little by way of explicit discussion of Chommie’s comparative tax law method; however, true to his earlier advocacy, he compares not only the formal legal rules in each jurisdiction, but also their administrative and judicial practices.

Chommie’s early work on comparative tax law laid critical ground for the work that was to follow in four ways. First, he stepped beyond the thin understanding of comparative law that imagined only comparing tax laws superficially based on their formal expressions. Second, he articulated some functional and aspirational goals for comparative tax law study: to assist in the development of reforms, to support a better understanding of one’s own system, to enrich the theory of tax law and policymaking, and to support a democratic community. Third, methodologically, he specifically and directly addressed his rationale for choosing particular countries as the focus of his study. Finally, in a succinct way, Chommie set out a program of study for tax law comparatists who would follow him. Chommie’s 1950s contributions cite no earlier comparative tax work. And his work has been only scantily relied upon, which suggests that perhaps other scholars did not benefit from his insights. Nevertheless, the work that follows seems to have accepted these early insights and to have built from them.

Gwyneth McGregor

Gwyneth McGregor served as the editor of the Canadian Tax Journal for 18 years, retiring from the editorship in 1970. She authored 42 articles for the Canadian Tax Journal, alongside hundreds of case comments and editorial notes. She also served as writer and editor for Canada’s Royal Commission on Taxation. McGregor was not a tax law academic, but given that her tenure at the Journal preceded the

---

time when women in Canada were appointed as faculty members at law faculties (a practice that didn’t begin until the 1960s), I have included her. One imagines that had the world been a fairer place, she would have made her home teaching and researching tax law in a university setting.

McGregor authored three substantial comparative studies; each compared Canada, the United Kingdom, and the United States. The first two, both written in 1960, examined employees’ deductions and tax appeals, respectively.\(^{40}\) McGregor reviews the approach of each of the three countries separately, with a modest introduction and conclusion containing some comparative reflections. Notable, however, McGregor is broad in constructing her base of materials – for each country she looks not only at the formal law, but also at administrative guidelines and judicial decisions, and she interviewed tax practitioners and government officials. Her 1962 study, on personal exemptions and deductions, is a substantial contribution.\(^{41}\) While each country has a separate chapter, McGregor offers significant comparative analysis integrating the insights that can be drawn from the individual country studies. Again, she is pluralistic in her choice of materials to support her analysis.

**Arye Lapidoth**

Arye Lapidoth was born in 1930 and made significant contributions to tax law and policy in Israel over the course of his career. He served as the Director of Fiscal Legislation at the Ministry of Justice and became a professor at Bar-Ilan University.\(^{42}\) He pursued a PhD at the University of London in the 1960s and his book, *Evasion and Avoidance of Income Tax: A Comparative Study of English Law and Israeli Law* was the result of those labours.\(^{43}\)

Like all work in this era, Lapidoth’s study does not offer a detailed or lengthy exploration of comparative law theory. Yet, his general approach can be discerned. His choice of jurisdictions was presumably practical – he came from the Israeli system and was studying in London. He notes the similarity of systems, “Israel has retained the income tax law of Palestine; this was basically English Law in a simplified and modified form prepared for the use of British colonies and adapted to the circumstances of Palestine”.\(^{44}\) To the extent that the resolutions to issues are similar, he concludes, “[t]here is no use in comparing” them.\(^{45}\) He also concludes there is no use comparing problems that are too dissimilar.


\(^{41}\) Gwyneth McGregor, “Personal Exemptions and Deductions under the Income Tax, with Special Reference to Canada, the US. And the U.K.” (1962) Canada Tax Foundation Canadian Tax Paper No 31.

\(^{42}\) For a brief biography of Lapidoth’s wife, see Mika Levy, “Ruth Lapidoth” (1 March 2009), *Jewish Women: A Comprehensive Historical Encyclopedia*, online: <http://jwa.org/encyclopedia/article/lapidoth-ruth>.

\(^{43}\) Arye Lapidoth, *Evasion and Avoidance of Income Tax: A Comparative Study of English Law and Israeli Law* (Jerusalem: Museum of Taxes, State Revenue Administration, 1966). For a review see Stephen Cretney, Book Review of *Evasion and Avoidance of Income Tax: A Comparative Study of English Law and Israeli Law* by Arye Lapidoth (1969) 32:6 Mod L Rev 711 (“[m]uch of Dr. Lapidoth’s thesis is...based on experience and insight rather than convincing proof...[h]owever, the book will be of interest to all concerned with revenue law, particularly in countries where a basically English code has to be adapted to new requirements” at 712).

\(^{44}\) *Ibid* at 14.

\(^{45}\) *Ibid.*
For example, since Israel did not use a trust concept, issues related to trusts were not addressed.\(^{46}\) That left Lapidoth to focus on “similar problems which have been differently solved”.\(^{47}\)

Unlike some of the other work in this area, Lapidoth explicitly recognizes tax law’s interaction with economics, sociology, and politics, as well as its historical and institutional context.\(^{48}\) Like McGregor, he explores legislative, judicial, and administrative expressions of law. He also looks at the institutional design features, like the design of human resource positions in tax agencies. Lapidoth’s study is granular and detailed. What it lacks in high-level reflection and analysis it makes up for by providing rich context, particularly in the case of Israel.

\textit{L. Hart Wright}

In 1968, L. Hart Wright, then approximately 50 years old, and five additional authors published \textit{Comparative Conflict Resolution Procedures in Taxation: An Analytic Comparative Study.}\(^{49}\) Wright, originally from Oklahoma, joined the University of Michigan as a professor in 1946. Prior to that he worked for a number of years with the Internal Revenue Service and he served in World War II. He was a regular advisor to the Internal Revenue Service on “matters of organization, training and procedure”.\(^{50}\) The other five contributors to the book authored country chapters (on Belgium, France, West Germany, Great Britain, and the Netherlands) in a common format.\(^{51}\)

The book commences with an explicit discussion of why the volume was written. Importantly, Wright identifies one of the chief concerns was to provide a glimpse into tax administration practices in developed countries for administrators in developing countries who might be interested in learning more about models that have developed in places with longer experience with taxation. The countries were chosen because they “differ in their size and population, the complexity and precision of their tax statutes, the degree their legislative bodies provide additional guidance through pre-enactment materials, the assessment system used…, the standards of construction to which their courts traditionally conform, the theoretical status assigned by each to the doctrine of precedent, and the types of persons available to handle tax disputes”.\(^{52}\) Additionally, the volume sought to provide tax practitioners with guidance on international approaches to conflict resolution, a purpose which fits easily within this era of comparative tax law.\(^{53}\)

Part One of the book, which is the only comparative part, analyzes and compares the approach to conflict procedures of the United States with the five European countries. Wright uses the country chapters that follow in subsequent parts as the source material for his comparative work. The chapter is densely written and highly detailed. It lays helpful groundwork for tax administrators given that it

\begin{itemize}
  \item \textit{Ibid.}
  \item \textit{Ibid} [emphasis in original].
  \item \textit{Ibid} at 15–16.
  \item Wright et al, supra note X at 3.
  \item \textit{Ibid} at 4.
\end{itemize}
provides a sophisticated description of the necessary parts for a jurisdiction to develop effective mechanisms for the resolution of tax disputes.

*Comparative Conflict Resolution Procedures in Taxation* received some attention on publication, with three book reviews. William Popkin’s review in *The American Journal of Comparative Law* claims that the book “should serve as a model for comparative studies”. He particularly praises Wright for commencing the book with the comparative and analytical chapters, which provide a lens for the reader when they reach the descriptive country chapters. The most extensive review, in the *Michigan Law Review*, is offered in two parts. Review I is penned by Thomas A. Troyer, a tax lawyer, and Arthur B. White, Special Assistant to the Chief Council of the US Internal Revenue Service. They identify the book’s audience as “tax practitioners and business advisors..., parties in and out of the Government who wish to refer to the experience of other countries to improve their own tax procedures, and participants in the establishment of new tax structures in emerging nations or elsewhere”. Review II is offered by Donald W. Bacon, Assistant Commissioner (Compliance) for the US Internal Revenue Service, who effuses that, “[a]ll tax administrators are in his debt.” Despite its relative originality (this is the first book by a tax law scholar to rely on the IFA model of individual country chapters as the source material for comparative work; although the comparative work in this book is substantially more detailed and analytical than generally reflected in the IFA reports), Wright’s work has not been the subject of much subsequent study by comparative tax law scholars.

-Michael J. McIntyre and Oliver Oldman-

In 1975, when Michael McIntyre was starting his career as a professor at Wayne State University and Oliver Oldman was serving as a professor and the Director of the International Tax Program at Harvard University, the two authored *Institutionalizing the Process of Tax Reform: A Comparative Analysis*. McIntyre had first met Oldman in 1967, when McIntyre was a first year student at Harvard Law School and Oliver Oldman taught him in a seminar on land use planning in developing countries. In the early

---

54 Troyer, White & Bacon, supra note X (“[t]he book represents an impressive undertaking, impressively carried out. Professor Wright and his co-authors deserve compliments on a careful, incisive, and thoroughly useful job” at 1636 (Review I); “Professor Wright has charted a course for organizing a system to prevent and resolve [tax law] disputes” at 1638 (Review II)); William D Popkin, Book Review of *Comparative Conflict Resolution Procedures in Taxation: An Analytic Comparative Study* by L Hart Wright, ed, (1969) 17:1 Am J Comp L 116 (“there might have been greater orientation towards developing countries if one or two developing countries, in addition to six western countries, had been chosen for country studies, or if the United States country study had not been integrated with the analysis [however] these comments might be best considered as an agenda for the future rather than as a criticism of this volume); Leonard Lazar, Book Review of *Comparative Conflict Resolution Procedures in Taxation: An Analytic Comparative Study* by L Hart Wright, ed, (1969) 18:4 ICLQ 1044 (“[t]his is a competent and interesting work in a field where little research has been attempted and much is needed as the impetus towards tax harmonisation on an international scale increases inevitably” at 1044).

55 Popkin, supra note X at 116.

56 Ibid at 117–118.

57 At 1628.

58 At 1638


61 Michael McIntyre, “Oliver Oldman, a Remembrance” (December 15, 2008) 121 Tax Notes 1320 at [check page – around 1322?]
1970s, the two worked together at Harvard’s International Tax Program. Their 1975 monograph was the second in the “Selected Monographs on Taxation” series published jointly by the International Bureau of Fiscal Documentation and the Harvard Law School International Tax Program.

The purpose of the monograph was to provide a conceptual framework for evaluating tax reform institutions. The authors review four categories of reform: technical changes in tax law, enactment of tax expenditures, short run changes in rates, and major overhauls. They use multiple countries to illustrate reform techniques, including developing countries (especially Chile, Venezuela, and Colombia). The focus on developing countries is not surprising, given that both authors had connections to the Harvard International Tax Program, which facilitated academic study for foreign officials, teachers, and researchers at Harvard. McIntyre was a newly minted professor when the monograph was released, but his commitment to tax and development continued throughout his career. He “served as a consultant to national governments on six continents” and was a tax expert with the United Nations and Organisation for Economic Cooperation and Development. Presumably he was inspired by Oldman, who was similarly active in consulting with various governments around the world on the development of tax systems. As Director of the International Tax Program, Oldman taught hundreds of tax administrators.

It cannot be surprising, then, that the authors show a developed sensitivity to the complexity of comparative tax law research. They are clear that comparative work of the sort they have undertaken requires looking carefully at the context in the compared countries because “institutions which appear the same and employ the same names may prove on closer examination to have little in common. Likewise, the common features of institutions are often obscured”. Their approach to comparative work reveals a fundamental commitment to the idea that tax systems can, in fact, be compared — as long as “the same type of analytical and descriptive work is done concerning the process of tax reform”. They set a future agenda for research in this area as requiring understanding better the interdepartmental relationships within governments and they understand the value of obtaining more nuanced understandings of processes from conducting interviews.


Phase 2 of comparative tax law scholarship comprises major, generally solo, projects by authors with grand comparative aspirations. The format of the IFA work lingers: some of the work in this phase

---

63 Ibid.
65 It is surprising that this monograph does not receive greater attention from the later comparative tax law scholars, given its sensitivity to countries’ levels of development and it sophistication of analysis. See only Victor Thuronyi, Tax Law Design and Drafting I (Washington, DC: International Monetary Fund, 1996) at 1.
66 McIntyre & Oldman, supra note X at 50 [emphasis in original].
67 Ibid.
68 Ibid.
mirrors the structure of country reports preceded or followed by comparative work using the country reports as source material. But a more integrated approach, where an author uses his understanding of the laws of various countries to present a general review of the policy options available in an aspect of tax law emerges as another possible design. Generally, the work of this phase is not self-conscious about its role in advancing comparative tax law – the scholars just do the work, accepting that comparative tax law is a defensible discipline. Additionally, it focuses primarily on the legislative framework, with less discussion of judicial or administrative guidance or bureaucratic or institutional practices.

Paul McDaniel and Stanley Surrey

Stanley Surrey and Paul McDaniel were giants in tax policy. Surrey worked in the US Treasury Department before joining the law faculty at the University of California at Berkeley and then at Harvard. He provided international tax policy assistance to a number of other countries, including as a member of Carl Shoup’s famed tax advisory trip to Japan, and he started Harvard’s International Program in Taxation. Paul McDaniel was a student at Harvard while Surrey taught there; he graduated from Harvard’s law school in 1961. He also worked for the US Treasury Department before taking up an academic position at Boston College Law School in 1970. Later, he joined New York University’s faculty of law and then University of Florida’s law school in both cases where he was instrumental in the development of the LLM in international taxation.

In 1985, shortly following Stanley Surrey’s death, Paul McDaniel and Stanley Surrey published an outstanding international review of the tax expenditure concept. While the book has received significant attention for its contributions to the evolution and understanding of the tax expenditure concept, it has not usually been referred to for its contribution to comparative tax law scholarship.

---


72 See book reviews by George E Glos, Book Review of International Aspects of Tax Expenditures: A Comparative Study by Paul McDaniel & Stanley Surrey, eds, (1985) 13 Intl J Legal Info 94 (“[i]t provides a comprehensive treatment of tax expenditures in the...six countries on a comparative basis. It is highly recommended for use by tax experts and persons engaging in research in international taxation” at 107); Aaron Wildavsky, Book Review of International Aspects of Tax Expenditures: A Comparative Study by Paul McDaniel & Stanley Surrey, eds, (1985) 5:3 J Pub Pol’y 413 (“[d]espite the high level of the editors’ comments (they comprise 118 pages of a 420-page book, the rest being comprised of lists of tax expenditures in the various countries), their analysis does not justify the claim that this is a comparative analysis of tax expenditures. Such a comparison, in my opinion, would require explaining the various ways in which different political forces treat tax preferences” at 423).

The book includes a detailed review of the approach to tax expenditures in Canada, France, the Netherlands, Sweden, the UK, and the US. The editors drew together an expert from each of those jurisdictions and convened group meetings. The work was undertaken over four years.

McDaniel and Surrey were clear in their objectives, which were to develop tax expenditure lists for selected countries using uniform criteria and to make international comparisons of tax expenditures. They explicitly asked themselves whether the countries’ tax histories and philosophies were too different to make comparative study useful, concluding that comparison was feasible because each country had a concept of a normative income, value added, or wealth tax that could serve as “a general standard with which to compare the existing tax legislation”. They then set out extensive guidelines for how to identify a tax expenditure in a general way before moving to a country-by-country review of the tax expenditures offered by each country.

Like Wright, McDaniel and Surrey worked backwards into comparativism. The book starts with an extended study of the normative definition of income. Then, supported by discussions with the country experts, the book delineates guidelines for what the benchmark tax system should look like. From that benchmark, deviations that should be considered tax expenditures or tax penalties are identified and the framework is applied to each country’s tax systems to produce comparable lists.

Pierre Di Malta

Pierre Di Malta, a tax law professor at the University of Montpellier, published the first solo-authored book in this era claiming to examine comparative tax law in its broad context and to explore the approach to taxation in many jurisdictions. Di Malta’s book offers material on tax law under three broad headings: taxation of revenue, expenditure, and capital. The book presents detailed information about Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the UK. The parts of the book are organized around the major aspects of tax law design (e.g., income from professional activities) with brief statements of the tax treatment of that type of income in each of the jurisdictions. Although the introduction situates the work as important given the need for greater harmonization of European tax systems, Di Malta does not offer overarching recommendations about what he views as the best approaches following his detailed study.

---

75 Ibid. at 5 (“[d]espite the differences among countries with respect to forces that have shaped their tax systems – history, social attitudes, culture, jurisprudence, political philosophies, etc. – tax experts from different countries can and do maintain a fruitful dialogue about their respective tax systems”).
76 Ibid. at 5.
Victor Thuronyi’s career has included time in tax practice, at the US Treasury Department, and as a faculty member at the State University of New York at Buffalo. In 1991, he joined the International Monetary Fund’s legal department where he served as senior counsel (taxation). Victor Thuronyi published two books that spurred the comparative tax law field.\textsuperscript{79} Capturing the perception that comparative tax law was still nascent as a disciplinary field before Thuronyi’s interventions, Tim Edgar states in his review of Thuronyi’s 2003 book, “[i]t is not entirely unfair to suggest that much of the existing comparative work in tax law is of limited interest or even usefulness”.\textsuperscript{80} Certainly, Thuronyi’s work becomes the “must cite” reference for subsequent tax law comparatists.\textsuperscript{81}

Thuronyi’s \textit{Tax Law Design and Drafting}, the first of his books, was published in two volumes, one in 1996 and one in 1998. The edited collection reads as a “who’s who” of tax academics, with each

\textsuperscript{79} Victor Thuronyi, ed, \textit{Tax Law Design and Drafting I} (Washington, DC: International Monetary Fund, 1996); Victor Thuronyi, ed, \textit{Tax Law Design and Drafting II} (Washington, DC: International Monetary Fund, 1998); Victor Thuronyi, \textit{Comparative Tax Law} (The Hague, The Netherlands: Kluwer Law International, 2003). Every serious scholarly piece on comparative tax law following Thuronyi’s 2003 book cites one, or both, of these contributions. For reviews, see John Azzi, “Book Review: Tax Law Design and Drafting (Vol. 2): Comparing Income Tax Laws of the World” Book Review of \textit{Tax Law Design and Drafting II} by Victor Thuronyi, ed, (2000) 18 BJIL 196 (“Dr. Thuronyi should be commended for his effort and vision in coordinating and producing a valuable book of high quality, which covers a broad range of income tax issues on a comprehensive, comparative basis. … \textit{Tax Law Design and Drafting (Vol. 2)} provides a welcome and much needed boost in the ever-growing and increasingly popular study of comparative taxation” at 204); Duncan Bentley, “Current Books”, Book Review of \textit{Tax Law Design and Drafting} by Victor Thuronyi (1998) 8:1 Revenue LJ 216 (“[t]his is the first of two volumes that any person involved in any aspect of taxation should read. … The two volumes could also form the texts for courses on tax policy and tax design” at 216–217); Tim Edgar, Book Review of \textit{Comparative Tax Law} by Victor Thuronyi (2003) 51:6 Can Tax J 2357 (“by combining some of the positive features of existing comparative tax work with the much deeper tradition of comparative legal scholarship, this book breaks important new ground. More particularly, it combines breadth of coverage of country tax systems with a distinct conceptual focus” at 2357); Miranda Stewart, “The ‘Aha’ Experience: Comparative Income Tax Systems” Book Review of \textit{The Tax System in Industrialized Countries} by Ken Messere, \textit{Tax Law Design and Drafting II} by Victor Thuronyi; \textit{Comparative Income Taxation: A Structural Analysis} by Hugh Ault 19 Tax Notes Intl 1323 (\textit{Tax Law Design & Drafting} “is broadly relevant to academics, policymakers, and even practitioners, who may find that the discussion of issues that arise in every income tax can form a useful checklist for structuring transactions or considering potential problems” at 539).

\textsuperscript{80} Tim Edgar et al, Book Review of \textit{Comparative Tax Law} by Victor Thuronyi, (2003) 51:6 Can Tax J 2357 at 2357. See also Duncan Bentley, Book Review of \textit{Tax Law Design and Drafting} by Victor Thuronyi, (1998) 8:1 Revenue LJ (“[t]his is one book, with its companion volume when it is published, that should be on the shelves of every tax library” at 217)

chapter focusing on an aspect of tax law design and drafting in a comparative tax law setting. For example, chapter 14, authored by Lee Burns and Richard Krever, examines the design and drafting of the income tax law for individuals and provides a generally applicable overview of the major policy decisions that need to be taken by a country in drafting a personal income tax law. Specific country examples are provided throughout the chapter, but the chapter is not intended to describe any particular country’s personal income tax law. This double volume, which remains the leading source for tax administrators who wish to better understand some of the common elements of tax design and drafting, was motivated by Thuronyi’s unabashedly instrumental objective: to assist developing and transition countries in their efforts to reform their systems of taxation.

Thuronyi further and more explicitly develops his theory of comparative tax law in his 2003 book, elegantly titled *Comparative Tax Law*, and related articles. That work reveals aspects of Thuronyi’s approach to comparative tax law. He unquestionably loves studying the tax systems of other countries for the joy of learning more about one’s own system, as well as about other tax systems; believes that there are legislative and policy lessons that can be imported and exported from one country to another; values the explanatory potential of comparing the development of tax laws in different jurisdictions; and expects there to be convergence of legal systems when one resolution to a policy problem is superior to others, taking the position that such convergence is desirable.

One of Thuronyi’s novel additions to the literature is the development of legal families for the purposes of comparative tax scholarship. In his 2003 book, he classifies countries into ten families in a rough and ready way, accepting that some countries may belong to a few families. His claim is that the countries

---

83 Victor Thuronyi, *Comparative Tax Law* (The Hague, The Netherlands: Kluwer Law International, 2003). This book was published in phase 3 and it fits better with the scholarship in that era. However, it seemed more coherent to keep the discussion of a particular author’s work confined in one place.
85 Victor Thuronyi, “What Can We Learn from Comparative Tax Law?” (2004) 103 Tax Notes 459 at 460 (“[c]omparative tax is therefore not just interesting on its own – because it involves phenomena that are new and different – but causes us to look on our own system with a fresh eye”).
86 See e.g. Thuronyi, “Why Care about Comparative Tax Law”, *supra* note X: “[i]t would be difficult to debate indexing intelligently [in the US] without referring to [how indexing worked in Latin American countries].
87 Victor Thuronyi, “What Can We Learn from Comparative Tax Law?” (2004) 103 Tax Notes 459 at 460 (“[c]omparative study allows us to gauge the influence of the past by comparing the development of different countries”).
88 Victor Thuronyi, “What Can We Learn from Comparative Tax Law?” (2004) 103 Tax Notes 459 at 460 (“[t]o the extent that tax policymakers behave in a rational way, if there are clearly superior solutions to particular problems, one can expect them to have been adopted by most countries”); Victor Thuronyi, *Comparative Tax Law* (The Hague, The Netherlands: Kluwer Law International, 2003) at 17 (“[t]his is not to say that the trend has uniformly been in the direction of convergence or that the degree of approximation of tax systems is as great as one would like”).
within each family have a common tax law skeleton that should make it possible to predict with some accuracy the tax law design of other countries in the same family once one has familiarity with one of the countries in the family. Even more dramatically, Thuronyi claims that scholars with insufficient time to explore the richer array of families could learn most of what there is to learn from tax law design by studying Germany, the UK, and the US.\textsuperscript{90}

Thuronyi’s work presents a different methodological model to the one presented by the Cahiers or McDaniel and Surrey. Instead of a detailed review of each country followed by some comparative reflections, like Di Malta, Thuronyi compares jurisdictions at each stage of his inquiry. His work is organized around the common policy decisions that need to be made in the design of tax law and different jurisdictions are used to illustrate different legal ways to resolve the underlying policy dilemmas. Thuronyi’s approach demands an extensive understanding of the underlying doctrinal or descriptive aspects of each country’s legal framework.

As a result of this methodological choice, however, it is probably fair to say that Thuronyi does not focus his work on tax law in its richer institutional context. While both Tax Law Design and Drafting and Comparative Tax provide guidance on the overarching frameworks that guide the reader through the different structural and policy decisions taken in the design of tax law and, to a lesser extent, in the approach to legislative drafting by governments and interpretive matters by judges, the texts do not offer much detail on how the administrative practices (whether in the form of officially issued guidelines, non-judicial dispute resolution, or informal institutional practices) or on how other economic, social, and political contexts support tax law in the families of countries compared. As Thuronyi acknowledges, one could not expect an author to provide this rich contextual detail as well as provide the useful and practical overarching framework.\textsuperscript{91}

\textit{Ruud Sommerhalder}

In 1996, without obviously relying on the work of earlier comparative scholars, Ruud Sommerhalder, a Dutch scholar who was at the time a lecturer at Erasmus University Rotterdam (and who later went on to work as a tax partner at PricewaterhouseCoopers), published a comparative tax law thesis on individual income tax reform.\textsuperscript{92} The book follows the IFA model and has country chapters describing the law reforms in Belgium, Germany, the Netherlands, Sweden, the UK, and the US. These countries were chosen because of their efforts to reform individual income tax between 1986 and 1991. The country reports are followed by a section that provides summative comparisons based on the country reports and the book concludes with an analysis where Sommerhalder offers some of his own reflections, distanced from a country-based analysis, on the tax reform exercise more generally.\textsuperscript{93} Sommerhalder’s book on \textit{Comparative Tax Law}, he added Japan/Korea and the European Union as two additional groups to bring the total clusters to ten.

\textsuperscript{90} Victor Thuronyi, \textit{Comparative Tax Law} (The Hague, The Netherlands: Kluwer Law International, 2003) at 9 (“three countries (Germany, U.K., and U.S.) will reveal most of the basic contrasts that would arise from including other countries in the study”).

\textsuperscript{91} See e.g. Victor Thuronyi, \textit{Comparative Tax Law} (The Hague, The Netherlands: Kluwer Law International, 2003) at 10 (“I do not emphasize the economic classification, but that is not intended to downplay its importance”).


work in this phase goes unheralded. It is cited by Thuronyi in his 2003 book, but otherwise the text has been largely ignored by subsequent comparative law scholars.  

Hugh Ault


Ault does not articulate his theory of comparative tax law scholarship, does not offer explicit discussion of his method, and does not acknowledge the contributions of any of the scholars identified so far in this review of the intellectual development of comparative tax law scholarship. However, some elements of their approaches are discernable from the general design of the text itself. It is clear that Ault believes that part of the value of comparative tax law is in its ability to reveal aspects of the approach taken in national tax systems that might otherwise have been hidden to insiders. Also apparent is his understanding that comparative tax law is useful as a tool for educating students. Additionally, he sees value from a policy perspective – in terms of the advancement of laws – to looking at the approach adopted by other jurisdictions. Ault does provide some justification for the selection of the nine countries subject to comparison: each has a relatively mature and sophisticated tax system and several belong to the same legal family.

---


96 Hugh Ault, ed, *Comparative Income Taxation: A Structural Analysis* (Boston: Kluwer Law International, 1997) at 1 (“[t]he approaches of the United Kingdom, Canada and Australia all display some of the expected degree of similarity, given their common historical roots. The Continental systems likewise, though to a lesser extent, have similarities in structure and result. The United States system has developed without much influence from other
Ault’s project is remarkable both in the level of detail provided and in the degree of comparison. Nevertheless, in many areas of Parts Two, Three, and Four, which offer the comparative analysis, the book does not step far beyond recounting in succinct form the approach to each issue adopted by the nine countries presented in the individual country descriptions in Part One. Some effort is made to critically compare legal resolutions to common problems in the jurisdictions; for example, particular approaches are not recommended over others. Still, given its scope and detail, the work has become (along with Thuronyi) a foundation text in the comparative tax law canon.

2.1.3 Phase 3: Reflective Engagement with the Function and Purpose of Comparison in Tax Law Scholarship (1996 – 2007)

Thuronyi’s Comparative Tax Law and Ault’s Comparative Income Taxation “have achieved such a hallowed status that one could not find a comparative tax article failing to cite them. Yet, both of these texts say almost nothing about the theoretical framework on which they are based”. It is the absence of that explicit discussion that inspires the work in phase 3: the work in this era is designed to grapple with what comparative tax law scholarship might entail. There is some overlap in the time periods of phase 2 and 3 work. That is in part because in the period of time between 1993 and 2007, the work in the field was rapidly evolving. But the type of scholarship undertaken can be distinguished. Phase 2 work lacks a self-consciousness about the contribution it is making to the scholarship; phase 3 work sets out to explicitly make a contribution not only to the subject matter discussed but also to comparative tax law study more generally.

William B. Barker

William B. Barker made both his scholarly and intellectual home in the shadow of Chommie at Dickinson Law, Penn State. He also has a standing visiting appointment at the London School of Economics and systems and the Japanese system has both Continental, especially German, features as well as displaying a strong influence from American ideas in the post-war developments”).


Although Barker does not refer to Chommie in his comparative tax law scholarship.
Among his body of work, he has authored two significant articles that advance comparative tax law scholarship. Barker’s 1996 piece compares the US and UK’s tax laws, especially the law of realization and taxable event, in the light of the history of law’s evolutions. It is detailed and rich, although it does not set out in great specificity his orientation to comparative tax law. The fundamentals of his views are visible, though, from within the comparative study.

Barker’s approach to comparative tax law is clearer by his 2005 piece, which firmly espouses comparative tax law as a mechanism for “suggest[ing] new directions by removing tax law from the confines of one nation’s practice, and by placing it within the wider context of human kind’s struggle for greater economic equality”. He aligns his perspective with those who view comparative tax as a way of assisting the “law-in-action” project, seeking change in legislation and by law’s actors. Eschewing a limited role for comparative tax law as offering only comparisons of formal legal rules, Barker argues for the place of comparative tax law as “a critical advocate for reform, directing its efforts toward the improvement of the lot of people in society. It should be concerned with tax law’s role in accomplishing democratic ideals”. Barker accepts the distinction between insider and outsider comparative law scholarship and recognizes that law “includes attitudes”, “unconscious motivations”, and “frames of reference which rely on special moral judgments”. Nevertheless, he takes the view that, with due study, outsiders can become insiders or at least close enough to insiders to undertake valuable comparative study.

---

104 William B Barker, “Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa” (2005) 109:3 Penn St L Rev 703 at 708 [footnotes omitted]. I disagree with Marian’s characterization that this suggests “little more than that comparative tax is ‘important’” (Omri Y Marian, “The Discursive Failure in Comparative Tax Law” (2010) 58:2 Am J Comp L 415 at 444). Instead, I see this as placing Barker alongside those who see comparative tax law as an avenue to achieve higher-order, aspirational, non-tax values.
106 William B Barker, “Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa” (2005) 109:3 Penn St L Rev 703 at 710. As a consequence of this view, to better situate himself as an insider in his 1996 piece, Barker reviews in significant detail material about the evolution of the UK and US’ tax systems before he turns to the more concrete project of comparing their approach to realization and taxable events.
Barker makes two moves in his work that distinguish him from his tax law comparatist predecessors. First, he recognizes that law is part of a values system and that comparing laws and, more than that, seeking to transplant legal solutions from one country to another, requires uncovering and understanding those underlying values. Second, Barker acknowledges the role and responsibility of those who interpret law – judges, administrators, private counselors, and scholars – as key figures in terms of their ability to use comparative tax law to advance the human condition.

Anthony Infanti

Anthony Infanti, the Buchanan, Ingersoll & Rooney Faculty Scholar and professor of law at the University of Pittsburgh School of Law, has contributed several articles to the comparative tax law canon. The article that perhaps most contributes to the development of the field as a whole is his 2003 piece, “The Ethics of Tax Cloning”. That article takes the claims of the hermeneutics school of thought, which includes as a core principle the impossibility of transplanting the legal ideas of one country to another in the face of significant underlying cultural difference, as a jumping off point to critique the work of tax reformers from high-income countries who attempt to transplant tax law to lower-income jurisdictions.

Stated in its strongest terms, Infanti’s analysis is that a missionary zeal:

… has characterized American efforts to propagate Western legal ideas in developing countries … The effort to convince these countries of the correctness and universality of our ideas may be perceived either as a benign attempt at sharing with them what has worked for us (fueled, of course, by a healthy dose of American hubris) or as a more malignant, thinly-veiled form of imperialism. … I particularly question the utility of replicating all or portions of Western tax systems in the so-called ‘transition’ countries …

Infanti’s work adds additional dimensions to the comparative tax literature, including introducing the work of transplant theorists Otto Kahn-Freund and Alan Watson squarely into the tax context and suggesting that legal ethics provides a framework through which tax experts may mediate their engagement in the provision of advice to low-income countries. Ultimately, Infanti does not preclude the possibility of Western advisors assisting with the development or transplant of tax law in transition


countries. However, he argues that those advisors need to behave respectfully in line with ethical standards.\textsuperscript{113}

\textit{Michael Livingston}

Michael Livingston, a tax law professor at Rutgers-Camden School of Law, continues Infanti’s emphasis on the importance of culture in predicting similarities between tax laws of different jurisdictions and, presumably, of enabling the transfer of laws from one jurisdiction to another.\textsuperscript{114} Livingston’s focus on culture is strategically narrowed to tax culture and, to that end, he does not invoke the broader concerns of the hermeneutics school of thought in comparative law more generally.\textsuperscript{115}

What then should scholars do? … The most promising approach is to carry out studies sufficiently narrow in focus that the interplay of competing forces – national culture, tax culture, the influence of specific institutional structures – can be evaluated without resorting to sweeping generalizations or broad platitudes. Thus, a study of general attitudes toward social justice in the United States and India is likely to be so broad, and so overwhelmed by the remaining differences between the two countries, as to have only limited utility. However, a study of responses to progressive or flat tax proposals in a specific historical period, or the role of particular factors (political, cultural, institutional) in that process may be more rewarding.\textsuperscript{116}

This more specific focus, on tax culture as opposed to culture more generally, as part of the explanatory framework for divergences (or similarities) in tax laws explains why Livingston focuses on, for example, the education of tax elites, the relationships between tax professionals, the nature of tax administration, attitudes about compliance and evasion, and the implementation of tax policy in his comparative


\textsuperscript{115} Livingston does not refer to the work of any comparative law scholars in his research, so perhaps his reference to culture in his comparative tax scholarship is not intended to connect to any of the more general comparative law schools of thought.

projects. Ultimately, Livingston’s focus on tax culture, as a local phenomenon, leaves him less convinced that jurisdictions’ tax systems will move toward convergence.

Ann Mumford

Ann Mumford, a law faculty member at Queen Mary University of London, describes herself as someone whose work has “ranged from feminist perspectives on taxation law; to...the integration of tax legal scholarship into the realm of economic sociology”. She has authored two books, which collectively reflect an evolution in the direction of comparative tax law scholarship. Her 2002 book, *Taxing Culture*, was undertaken with the aim of “provid[ing] a cultural context for the laws of tax collection, within a comparative, UK/American structure”. At a minimum, Mumford attempts to integrate her comparative review of tax law with an attention to its cultural context. Nascent in the work, although sometimes percolating to the surface, is a more Riles-ian inquiry into how tax law itself might be integrated into and part of a larger social, political, and economic system that demands interdisciplinary inquiry.


121 Ann Mumford, *Taxing Culture: Towards a Theory of Tax Collection Law* (Aldershot, Hants: Ashgate Publishing Company, 2002) at 1. For a review, see David Duff, Book Review of *Taxing Culture: Towards a Theory of Tax Collection Law* by Ann Mumford (2002) 50:5 Can Tax J 1822 (“[h]roughout the book, the author adopts a ‘critical, cultural approach’ to the subject at hand ... Unfortunately, the task of comparative legal and cultural analysis is enormous, and it is often difficult to find the common thread that runs through the various issues that the author chooses to address” at 1823).

122 See e.g. Ann Mumford, *Taxing Culture: Towards a Theory of Tax Collection Law* (Aldershot, Hants: Ashgate Publishing Company, 2002) at 5 (“[w]hether or not the spectre of US-style direct taxation in Europe has strong foundations, placing taxing culture (US, UK, European) in contrast, whatever we draw from it, is interesting. Even on a basic level, it is interesting that one jurisdiction gives tax relief on child care, and another does not. These are matters of formal rules. But it is also interesting that one jurisdiction gives tax relief on child care and has a high proportion of working mothers, and another has the same rule and does not. What this project is attempting to articulate is a means of thinking about a tax culture”).
Mumford’s approach is further developed by the time she publishes her 2010 book, *Tax Policy, Women and the Law: UK and Comparative Perspectives*. Instead of identifying a list of comparator countries, Mumford focuses the work on the UK and draws liberally from the experiences of other countries as she finds it helpful – including from Australia, Bolivia, Canada, Denmark, France, Germany, India, Ireland, Japan, Sweden, Tanzania, and the US. Although tax law remains the focus of the work, its use is instrumental – designed to serve the larger purpose of exploring the link between implicit bias and theories about the status of women in the market economy.

2.1.4  Phase 4: Building a Community of Comparative Tax Law Scholars (2007 – 2009)

Workshops and conferences are to academic disciplines what driving and voting are to human beings as markers of “coming of age”. Phase 4 marks the first international workshops on comparative tax law. By phase 4, the field of comparative tax law had achieved sufficient profile in academic circles to merit concentrated study. The conferences themselves both demonstrate the range of comparative tax law scholarship undertaken by scholars from a wide variety of countries and also inspired some scholars who had not previously undertaken comparative work to do so.

In 2007, the University of Bergamo in Italy hosted a seminar on comparative tax law that saw PhD candidates produce comparative tax law reports as part of a collection that also featured an introduction and two general essays on the directions of comparative tax law. The work, most of which was written in Italian and translated into English, provides some insight into the approach to the discipline of comparative tax law in Italy, particularly with a view to its setting within the European Union (EU). That work reiterates the relative newness of the discipline. The contributions of Claudio Sacchetto and Marco Barassi, Italian tax professors, and Jörg Mössner, a German tax professor, in the collection reveal a distinct approach to comparative tax law. First, as with some of the earlier work on

---

124 Ann Mumford, *Tax Policy, Women and the Law: UK and Comparative Perspectives* (Cambridge, Cambridge University Press, 2010) at 4 (“[a]s indicated by this book’s title, comparative perspectives are presented through relational analyses. Different jurisdictions are considered not to determine which affords great equity, but to analyze tax and gender in different contexts, in relation to divergent cultures, legal systems and market structures. The literature and legal structures of the US are considered perhaps most frequently, largely due to the emergence of the interesting and challenging critical tax movement there, although a range of other jurisdictions are addressed as well. The objective of these relational analyses is to forge a link between the issue of implicit bias, and theories as to the resulting status of women in the market economy”).
126 Claudio Sacchetto, “Introduction” in Claudio Sacchetto & Marco Barassi, eds, *Introduction to Comparative Tax Law* (Soveria Mannelli: Rubbettino Editore, 2008) 5 at 5 (“[t]he study of Comparative Public and Private Law can be regarded as a renowned and well-established tradition. On the other hand, the study of the Comparative Tax Law can be considered, in a certain sense, the new scholar’s challenge in the domain of the legal jurisprudence and the Italian Academic Community is taking its first steps, too”).
127 In Mössner’s chapter, the contributions of Di Malta, Thuronyi, and Ault are acknowledged, but not Chommie. Mössner’s chapter was authored in 2002, before Thuronyi’s 2003 book was released. As of 2002, however, Mössner claims “…the book of Thuronyi and his co-authors as well as the book of Hugh are without any model. But, having said this, it seems surprising that neither Thuronyi nor Ault deal with the method of comparing tax law. Checking the topics of all seminars of the IFA congresses brings nil return. [new paragraph] This seems the more astonishing as the science of comparative law in general can look back upon a long tradition of methodological
comparative law generally, the scholars are committed to the use of comparative law as a means for identifying “better” tax rules and for making better judicial decisions. They additionally see harmonization as good, at least in the European context. They embrace the view that comparative tax work should allow a scholar to better understand his or her own system and they point to the joy of comparison. Their three contributions reveal a commitment to moving beyond mere comparison of law “on the books”. Although they do not imagine comparative tax law with the kind of contextual scope envisaged by Annelise Riles, they distinguish comparative tax law as a discipline with practices distinct from comparative law, including a unique formant which is defined as “a type of personnel, or a community, institutionally involved in the activity of creating Law”. Mössner’s chapter lays out a taxonomy of three types of comparative law, borrowed from Ernst Rabel: the applied, the dogmatic, and the philosophical. His claim is that the work by the IMF reflects the first stage (the applied) and that the comparative tax law work by scholars has brought inquiry into the second stage (the dogmatic), but that what remains is the elaboration of a philosophical approach to comparative tax law scholarship. The next workshops were hosted by the Monash University Taxation Law and Policy Research Institute, the Israel Science Foundation, the Marc Rich Foundation, and the Institute for Advanced Studies at Tel Aviv University. Following two workshops, one hosted at the Buchmann Faculty of Law, Tel Aviv University in August 2008 and the second at the Monash University Prato Centre in Italy in June 2009, a collection of essays called “Comparative Tax Law and Culture” was published in Theoretical Inquiries in Law. As the title of the essays makes plain, one of the central questions of the workshop was whether disputes about the correct way of comparing law systems” (Mössner, “Why and How to Compare Tax Law” in Claudio Sacchetto & Marco Barassi, eds, Introduction to Comparative Tax Law (Rubbettino, 2008) 13 at 15).

128 Sacchetto, “Introduction” at 6 (“[q]uoting Yasuo Suwa: ‘The best way to solve legal questions is drawing comparisons with other countries’”). See also Mössner “Why and How to Compare Tax Law” at 14.

129 Sacchetto, “Introduction” at 7 (“[m]oreover, a comparative study can identify either general or shared rules in order to build up a systematic EU law in Income Taxation domain, better than a EU legislator may do”) [footnote omitted]. See also Marco Barassi, “Conclusions” in Claudio Sacchetto & Marco Barassi, eds, Introduction to Comparative Tax Law (Soveria Mannelli: Rubbettino Editore, 2008) 157 at 164 (“typical uses of comparison ... are unification and harmonisation”).

130 Sacchetto, “Introduction” at 8 (“[i]n fact, the comparison let scholars detect those implicit elements of their system that are simply verbalized in another one. This process allows a better understanding of the domestic law and its evolution”) [footnote omitted]. See also Mössner, “Why and How to Compare Tax Law” supra note X at 14.

131 Mössner, “Why and How to Compare Tax Law” supra note X at 23 (“[i]n deed, it gives sometimes great intellectual pleasure to compare different tax systems”).

132 Sacchetto, “Introduction” at 9 (“scholars cannot confine their search for foreign law in the statute books”). See also Mössner, “Why and How to Compare Tax Law” supra note X at 21 (Ernst Rabel “stresses that it is not sufficient to compare the articles and paragraphs of a statute, but that it is necessary to evaluate the special article in connection with the whole legal system”); Barassi, supra note X at 159 (“in comparing one has to look to the law in action and not only to the law in the book”).


136 Comparative Tax Law and Culture (2010) 11:2 Theor Inq L.
law can transition between cultures. The introduction to the collection promises a focus on interdisciplinary inquiry and an expansion of the subject of study from formal legal rules to formants.\footnote{137}{"Introduction" (2010) 11:2 Theor Inq L 469 at 469 ("the articles collected here adopt different perspectives regarding the relevant ‘social’ or ‘cultural’ factors for analysis – from political struggles, through broad cultural concepts, historical contingencies, administrative and institutional practices, all the way to discrete local actors").}

Later in 2009, the University of Michigan Law School hosted a “Conference on Comparative Tax Law in Theory and Practice”.\footnote{138}{Reuven S Avi-Yonah et al, “Comparative Tax Law: Theory and Practice” (2010) 64:3 Bull Intl Tax 183 at 183. There was some overlap in participation in the various conferences. The three major players in the Italian seminar did not attend either of the subsequent workshops. Kathryn James, Ajay Mehrotra, Yoram Margalioth, Tsilly Dagan, Marjorie Kornhauser, Jinyin Li, Li Jin, Richard Krever, Neil Brooks, and Thaddeus Hwong participated in the workshop that produced the Theoretical Inquiries collection. Reuven Avi-Yonah, Mathias Reimann, Hugh Ault, Victor Thuronyi, Brian Arnold, William Barker, Omri Marian, and Nicola Sartori participated in the Michigan workshop. Only Carlo Garbarino, Assaf Likhovski, and Michael Livingston participated in both workshops. \footnote{139}{See Reuven S Avi-Yonah et al, “Comparative Tax Law: Theory and Practice” (2010) 64:3 Bull Intl Tax 183 at 184.} Carlo Garbarino, a tax law professor at Bocconi University who completed his graduate work at the University of Michigan, published what appears to be the first serious academic article\footnote{140}{This quickly became a crowded field with the articles produced in response to the various workshops published in quick succession in 2010 and 2011. Garbarino’s work has been cited by Omri Y Marian, “The Discursive Failure in Comparative Tax Law” (2010) 58:2 Am J Comp L 415 (citing Garbarino’s 2009 article throughout and 2011 article in working paper form at 438, 462); Omri Y Marian, “Meaningless Comparisons: Corporate Tax Reform Discourse in the United States” (2012) 32:1 Va Tax Rev 133 (citing Garbarino’s 2009 article at 139, 145 and his 2010 article at 139).} that attempts to characterize comparative tax law as a field of study connected to comparative legal studies and to build a research agenda using what he terms “comparative evolutionary analysis”.\footnote{141}{Garbarino acknowledges the paper authored by Marian, which was not published until 2010 but had been posted on SSRN. See Garbarino, ibid, at footnote 5. For a review of “An Evolutionary Approach to Comparative Taxation”, see Michael Livingston, “Recent Developments in Comparative Tax Theory” (2010) Jotwell 93. See also Carlo Garbarino, “Comparative Taxation and Legal Theory: The Tax Design}
Garbarino explicitly embraces the functional approach. He advocates for seeing comparative tax law both in terms of the systemic and process elements of taxation and notes that comparison might occur either at a given moment or through a historical lens.

Helping the evolution of the discipline, Garbarino sets out an approach to comparative taxation that requires examining the systemic and process elements of tax systems and then describing how models circulate. This is a more narrow view of the range of objectives of comparative tax law than exemplified by the comparative tax law case studies that follow in Part 3. He also proposes a methodology that requires: “(i) selection of methodological approaches; (ii) collection of statutory materials, case law, administrative guidelines, and legal doctrine in the different national systems; and (iii) explanation of the data through a coherent functional model.”

Building from comparative law scholarship, Garbarino holds the view that there is a tax common core of legal systems that can be discovered through careful comparative study. This leads him to identify five challenges for building the research agenda for comparative tax law study. First, to share a theoretical framework that will assist in explaining the process of “competition among tolerably fit tax mechanisms.” Second, to study “tax convergence and divergence” with a view to explain tax solutions around the world. Third, to explain how tax transplants operate. Fourth, to identify common cores with the aim of constructing an evolutorial tax map for EU member states and EU corporate tax law in particular. Finally, to consider whether there is a tax consolidation model that should be implemented in the EU.

Garbarino believes that by “directly confronting the answers given by local jurists to a set of common questions based on common problems, [and] carefully avoiding explicit linguistic reference to local tax concepts” one can “decode” local concepts to build a common functional language (the common core). This belief is connected to his view that comparative tax work is best undertaken using “level-3”


Garbarino, “An Evolutionary Approach to Comparative Taxation” at 683 (“comparative taxation focuses on both the structure (systemic elements) and on the evolution (processes) of tax systems, and it allows their comparison not only synchronically, i.e., in a given moment in time, but also diachronically, i.e., through time”).

Garbarino, “An Evolutionary Approach to Comparative Taxation” at 684-685 (“a) comparative taxation is based on a comprehensive approach, i.e., a theory of the structure and evolution of tax systems; it looks at how tax systems work dynamically as a whole (tax law-in-action); b) comparative tax research adopts the functional approach; c) comparative taxation looks primarily at legal transplants, rather than performing static comparisons of statutes; and d) domestic tax change is mainly viewed as the result of circulation of models among countries”).

Garbarino, “An Evolutionary Approach to Comparative Taxation” at 685.

Garbarino, “An Evolutionary Approach to Comparative Taxation” at 697.

See also Garbarino’s more specific proposed research agenda for comparative research on the circulation of tax models of corporate taxes in Garbarino, “Tax Transplants and Circulation of Corporate Tax Models” at 184-187.
language.\textsuperscript{153} Level-3 language is meant to capture the language of tax theory (as opposed to tax legal doctrine (level 2) or statutes, cases, and administrative decisions (level 1)).\textsuperscript{154}

Finally, Garbarino contributes in a sustained way to work on tax transplants.\textsuperscript{155} As he articulates, “a tax transplant occurs when a tax solution is imported for example from Country C (exporting country) into Country A and Country B (importing countries)”.\textsuperscript{156} In his 2011 article, Garbarino offers a taxonomy of transplants that delineates combined tax transplants (which occur when one country receives the tax law of another country but through a different legal vehicle (for example, tax legislation in jurisdiction A is received by jurisdiction B in the form of an administrative guideline)) and hybrid tax transplants (where there is either a direct, immediate modification or subsequent change to the law received in jurisdiction B from jurisdiction A).\textsuperscript{157} One significant aspect of Garbarino’s work on tax transplants is his effort to describe the effect of tax elites on the tax transplant process, an effect that he describes as instrumental to the success and circulation of tax transplants.

\textit{Omri Marian}

If Garbarino laid some solid grounding for a comparative tax law research agenda in the twenty-first century, Omri Marian chastised us for taking so long to get to that point.\textsuperscript{158} Marian, who hails from Israel, is a law professor at the University of California, Irvine School of Law. Prior to his appointment there, he held an appointment at the University of Florida, Levin College of Law and he completed his graduate work at the University of Michigan. In his 2010 article, Marian rebukes tax law comparatists for their failure to produce a paradigmatic discourse, to critically engage with each other,\textsuperscript{159} and to build from the comparative law scholarship.\textsuperscript{160} The major contribution of Marian’s work is to consolidate some of the insights available from other comparative law and comparative tax law scholarship – insights that were un- or under-recognized by authors of that work. For example, Marian concludes that “‘comparative tax law’ is not a method of research in its own right, but rather an application of ‘comparative law’ methodologies to the study of tax laws”.\textsuperscript{161} According to Marian, the new knowledge created by tax comparatists is knowledge garnered by the juxtaposition of one thing (tax laws) against

\begin{footnotesize}

\textsuperscript{154} Garbarino, “Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules” (2010) 11:2 Theor Inq L 765 at 770 (“[t]he discourse of comparative taxation among tax scholars should use level 3-language to be effective and achieve an acceptable degree of communication”).

\textsuperscript{155} Garbarino’s “Tax Transplants and Circulation of Corporate Tax Models”, \textit{supra} note X is most clearly focused on tax transplants, although Garbarino’s theory and taxonomy of tax transplants is laid out in Garbarino’s “Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules”, \textit{supra} note X.

\textsuperscript{156} Garbarino, “Tax Transplants and Circulation of Corporate Tax Models” at 171.

\textsuperscript{157} Garbarino, “Tax Transplants and Circulation of Corporate Tax Models” at 171-177.

\textsuperscript{158} Marian, “The Discursive Failure in Comparative Tax Law” at 416 “[t]ax comparatists point to the seemingly ever-primordial stage of scholarship – a stage from which the field apparently is not able to extract itself”).

\textsuperscript{159} In his 2010 article, Marian provides a table that quickly and strikingly reveals how few of the scholars captured by this intellectual history have explicitly relied upon (by citation) each other’s work. See Marian, “The Discursive Failure in Comparative Tax Law” at 425. For a review of this piece, see Michael Livingston, “Recent Developments in Comparative Tax Theory” (2010) Jotwell 93.


\textsuperscript{161} Marian, “The Discursive Failure in Comparative Tax Law” at 421 [emphasis in original].
\end{footnotesize}
another that produces observations that could not have been produced in the absence of the comparison.\textsuperscript{162}

Marian’s work presents a taxonomy of comparative law scholarship. Notably, he classifies comparative law research into four categories: functional, economic, cultural, or critical.\textsuperscript{163} His 2010 article offers a fine introduction to the comparative law literature for tax scholars considering moving toward comparative projects.

Based on the available comparative tax law literature, Marian provides a number of entry points that may lay the foundation for future comparative tax work. He characterizes the work of the leading figures in comparative tax law along the comparative law categories he delineates;\textsuperscript{164} he summarizes tax law comparatists’ objects of comparison, including the countries chosen, the level of detail employed, and the type of tax law selected;\textsuperscript{165} and he offers an overview of the methodological approach of tax law comparatists.\textsuperscript{166} Ultimately, to engage in a dialogue about the sensible approach to comparative tax law, Marian chooses to offer a counter-position to Garbarino. To that end, Marian claims that examining tax laws as “a whole” is an unlikely proposition and postulates instead that deconstructing tax systems into their component parts for analysis may be more fruitful;\textsuperscript{167} he alleges that the form of functionalism to which Garbarino adheres undervalues tax law’s important local and political contexts;\textsuperscript{168} and he rejects the search for a common core.\textsuperscript{169} Marian ends his 2010 article with a call to comparative tax scholars to better engage with each other with the aim of producing new knowledge that is useful to us.\textsuperscript{170}

In his 2012 work, Marian provides a summary of the methodology he then employs in the context of corporate tax reform to achieve competitiveness. Marian suggests that researchers must: (1) determine the purpose of comparison; (2) select the jurisdictions to be compared; (3) select the laws to be compared; and (4) select a methodology of comparison.\textsuperscript{171} Marian does not prioritise one method of comparison over another. Instead, he argues that comparatists “should follow at least some coherent process of comparison and, at each stage, try to absorb the benefits of both comparative methods [functional and cultural approaches] or at least explain why one approach is superior to the other”.\textsuperscript{172}

\textbf{2.2 Observations on the Trajectory of the Discipline of Comparative Tax Law in Search of Phase 6}

\textsuperscript{162} Marian, “The Discursive Failure in Comparative Tax Law” at 421.
\textsuperscript{163} See Marian, “The Discursive Failure in Comparative Tax Law” Part II at 426-436. Marian concludes that the economic approach is just a variation of functionalism that centers efficiency. See also Marian, “Meaningless Comparisons” at 138-142.
\textsuperscript{164} Marian, “The Discursive Failure in Comparative Tax Law”, Part IIIA.
\textsuperscript{165} Marian, “The Discursive Failure in Comparative Tax Law”, Part IIIB (“[s]ome include numerous jurisdictions in their research in order to encompass a worldwide perspective in their studies, while others find it sufficient to compare only two. Some see tax comparison as a broad issue that necessitates a generalized observation of tax systems as ‘wholes’, while others look at narrow issues specifically in order to avoid this generalization” at 445.)
\textsuperscript{166} Marian, “The Discursive Failure in Comparative Tax Law”, Part III.C.
\textsuperscript{167} Marian, “The Discursive Failure in Comparative Tax Law”, at 464.
\textsuperscript{168} Marian, “The Discursive Failure in Comparative Tax Law”, at 465-467.
\textsuperscript{169} Marian, “The Discursive Failure in Comparative Tax Law”, at 467-469.
\textsuperscript{170} Marian, “The Discursive Failure in Comparative Tax Law”, at 469.
\textsuperscript{171} Marian, “Meaningless Comparisons”, at 143. Marian applies this approach to comparison to analyze the use of comparables in US corporate tax reform discourse.
\textsuperscript{172} Marian, “Meaningless Comparisons” at 172.
The intellectual history reviewed above creates a counter-narrative to Marian’s argument that the comparative tax law scholarship has suffered because its proponents have failed to engage with one another. Instead, it seems that Marian’s general claim that the scholarship lacks cross-dialogue as reflected in footnoting and express efforts to take issue with other scholars is accurate, but the review above displaces his view that the development of the discipline has necessarily and severely been impaired as a result. Undoubtedly, the scholarship would be richer if those of us working within it were more conscientious about directly and explicitly engaging with one another’s work in writing. But a story can still be told about the evolution of the discipline that reflects at least some dialogue, perhaps mostly undertaken informally.

The story of comparative tax law scholarship begins with pragmatic goals: to offer tax practitioners, and to a lesser extent government policy makers, a descriptive overview of the tax laws and practices of different jurisdictions. Nevertheless, the early work by Spaulding, Chommie, McGregor, Lapidoth, Wright and McIntyre and Oldman has surprising usefulness. Their work, under-read and generally excluded from the comparative tax law cannon, is worth revisiting. Most distinguishing is the willingness of those early authors to situate their comparative work in its broader framework: to look beyond the legislative framework to the additional insights about tax systems that might be garnered from a comparison of jurisprudence, administrative practices, institutional design, and individual perceptions (captured through interviews). Many of the authors in this period were early in their careers, suggesting perhaps that comparative work was newly of academic interest.

The IFA format – country reviews in a consistent design followed by a general overview report – became the sticking template from this period. It did not inspire work that was especially comparative, although it did enable detailed initial review of the different jurisdictions that might be compared and it lead to much greater collaborative work in comparative tax law than in other areas of tax. In some of its thinner forms, the general reports are simply summaries of the country reports. But in its thicker form, the work of the general reporter provides some basic insights into the underlying structure of aspects of tax systems, with attention to the similarities and divergences in their policy responses.\footnote{For a modernized version of the IFA format, see Yariv Brauner & Pasquale Pistone, eds, BRICS and the Emergence of International Tax Coordination (Amsterdam: International Bureau of Fiscal Documentation, 2015). In their work, they had scholars from Brazil, China, India, Russia, and South Africa author country description chapters. Those chapters were then provided well in advance to other scholars who were asked to contemplate different international tax policy and design questions using the country chapters as a base. The “general” chapters were not, however, designed to be tied closely to the underlying country chapters and authors were encouraged to explore a range of additional international tax issues.}

As academics became increasingly interested in the potential for comparative work to offer alternative solutions to common tax law design challenges, they began to take on projects on a major scale. The second phase of comparative tax law scholarship therefore saw the publication of lengthy monographs on massive topics – like tax law design, tax expenditures, or income tax law. The IFA format (of descriptive country chapters followed by a summary of overall comparisons) continued, but new approaches – where the work was modelled around the policy questions that government actors need to answer in designing tax laws and the discussion of country differences integrated within the analysis itself – emerged. The number of countries being compared proliferated. Almost all of the authors in
this phase were distinguished, senior male academics with considerable international advisory experience in addition to their academic interests.174

These grand projects were perhaps unsurprisingly followed by approaches that were generally more modest in scope (focused on an aspect of tax law), more skeptical (less confident of the value of comparison), or both. The work in phase 3 links comparative tax law with comparative law more generally and in some cases adopts the skepticism of cultural comparatists.

Despite the continental location of IFA, much, but not all, of the work in phases 2 and 3 was authored by Americans. By phase 4, comparative tax law had become a mainstream disciplinary topic and a few international workshops inspired scholarly comparative work by authors located in a wider range of jurisdictions. However, despite the purpose of some of the scholarship, which is seen to provide tax law solutions (transplants) to common problems for export to lower-income countries, there is no work from scholars in those jurisdictions in any of the periods.

Phase 5 brings new levels of sophistication to the scholarship. The two authors in this phase acknowledge at least some of the previous work, take a stance on their orientation to comparative tax law, and offer critical reflections on the body of scholarship authored to date.

A few unrelated observations might be offered about the intellectual history, taken holistically. First, there are clear connections among the scholars, which likely explains how some of the ideas they share and develop were transferred. Although describing Oliver Oldman, the tribute prepared by Michael McIntyre at Oldman’s death reveals the social and intellectual interconnectedness of what is, in at least some ways, a tight community.175

He worked closely with some of the leading tax figures of his day. He did tax reform projects with the late economist Richard Musgrave, wrote on tax reform in developing countries with Prof. Emeritus Richard Bird of the University of Toronto…. He gave substance to one of Surrey's dreams by promoting the World Tax Series volumes on national tax systems. The volume on France, coauthored by Martin Norr, Ollie’s longtime associate, won high honors from the French government. Long after his retirement from Harvard, he coauthored a book on the VAT with my Wayne colleague, Alan Schenk.

During his heyday, Ollie seemed to know everyone, at least everyone in the tax world. A well-traveled friend of mine claims that he could visit almost any developing country in the world and have someone ask about Ollie. I’ve been to conferences with Ollie at which Ollie introduced me to dozens of people I knew only by reputation. Together we attended a memorial service for economist Carl Shoup in a small town in New Hampshire, and I think Ollie knew almost everyone in attendance, including some of the members of the contingent from Japan.

Some of the connections among scholars are likely coincidental, others undoubtedly resulted in the direct influence of scholarly views. For example, Chommie and Barker both taught at Penn State (although not at the same time). McIntyre and Wright both taught in Michigan and McIntyre spent a year teaching at the University of Michigan, although after Wright had retired. Garbarino and Marian

174 Sommerhalder was the exception (in age) although he had been engaged by the Ministry of Finance of the Netherlands to evaluate the Dutch individual income tax reform project.
175 Michael McIntyre, “Oliver Oldman, A Remembrance” (December 15, 2008) 121 Tax Notes 1320.
were both graduate students at Michigan. McIntryre, Oldman, and Surrey all had substantial connections with Harvard’s International Tax Program. McDaniel and Ault both taught at the Boston College of Law, overlapping there for a period. Infanti completed his LL.M. in Taxation while McDaniel was teaching there.

Second, the disappearance of attention to non-legislative sources for comparative tax work is unfortunate. In some instances, it is understandable: an individual scholar simply does not have the resources to learn about judicial decisions, administrative practices, institutional norms, and individual views for many countries on broad areas of tax law. So, work that attempts to provide an overview of the policy choices reflected in large bodies of legislation is to be excused. Nevertheless, there is presumably much to be learned from the more granular and local specifics of law that are reflected in its other expressions.

Third, at least some of the major comparative tax law work has been inspired by the hope of assisting lower income countries in the design and development of tax systems. Even though that has been an express objective, as noted above, none of the scholars profiled made their homes in lower-income countries. Additionally, with the exception of McIntryre and Oldman, Thuronyi, Infanti, Livingston, and Mumford, most of the work does not use lower-income countries among the comparator set and no scholar uses exclusively lower-income countries.

To conclude with a reflection about intellectual histories generally, this review of the contributions of tax scholars to the development of comparative tax law provides support for an expansive approach to intellectual history. I share a view with Richard Whatmore that exploring both minor and major figures in the progression of ideas can serve some use. Several of the figures profiled in this review authored their contributions as part of their Ph.D. studies.

Additionally, as Whatmore claims, “the fashions of today are themselves the product of accident and unintended consequence. This is one of the most important lessons that intellectual history research imparts.”¹⁷⁶ There does seem to be an element of accident that explains why some of the scholars in this review achieved more success (as measured by formal references) with their work than others. It is an impossible exercise to imagine oneself in an era with historical accuracy, and yet in hindsight it seems surprising, for example, that Harrison Spaulding’s text, which arrived with significant attention, would have played so little a role in the trajectory of comparative tax law scholarship. In contrast, Hugh Ault’s text, which has obtained hallowed status among subsequent comparative tax law scholars, makes a perhaps predictable contribution with less analytical and evaluative content than one might have guessed given the regularity with which it is cited. That notoriety may have more to do with timing, personal reputation, convenience of subsequent citation (in the sense that once a contribution begins to be cited it then becomes the “Must Cite” reference for others), and other explanatory factors than quality. That may explain why McDaniel and Surrey’s review was so important in the development of tax expenditure analysis but has been so little relied upon as an approach to comparative work. It seems tax law comparatists were not in a position to look for foundational materials until the mid-1990s, and so earlier work – even if it was well crafted and thoughtful – has remained below the radar.

Despite the development of the discipline, what remains lacking is the articulation by authors of the intended purposes of their comparative tax law scholarship. In Part 3, I lay out a taxonomy of comparative tax law scholarship that classifies that work in accordance with its intended purpose. There

¹⁷⁶ See Richard Whatmore, What is Intellectual History? At 16.
are several reasons why scholars might pursue a comparative tax law project, some more popular than others. In anticipation of a sixth phase, the claim of this paper is that comparative tax law scholarship going forward would be enhanced if scholars would be explicit about the purpose of their decision to pursue tax law scholarship in a comparative setting.
Part 3: A Taxonomy of Comparative Tax Law Case Studies

Part 2 of this paper presents an intellectual history of comparative tax law scholarship and argues that the next step in the evolution of the discipline is for authors to develop a firmer sense of their scholarship’s purposes. In this Part, I strike out on a unique project that requires both creating a taxonomy for comparative tax law scholarship and then identifying and classifying comparative tax work within it.

3.1 Focusing on Purpose

As revealed by the earlier discussion of the dominant debates within comparative law, there are multiple ways in which the literature might be grouped – based on the theoretical framework of the author, on the unit of comparison, on what is being compared, on the perspective of the comparison, and on the process the author adopted to effect the comparison, for example. Given that the purpose of this chapter of the paper is to illuminate what comparative tax law scholars seek to accomplish through their work, I have elected to focus on the purpose of the comparison in clustering their contributions.

The function of clustering comparative tax law scholarship according to its purposes is to assist future authors in thinking about how to make and evaluate decisions about their comparative choices. In other words, the claim of this chapter is that the purpose of the scholarship dictates some, if not all, of the decisions about what and how things should be compared. Articulating and refining the purpose achieves two goals for authors: first, it provides the scholar with a benchmark against which to make decisions about the scope of the inquiry, which units (countries) should be chosen, how many countries are necessary for comparison to be robust, and how detailed a knowledge of each country’s tax laws, practices, and context is necessary for an effective study. Second, and perhaps most importantly, it provides the scholar with the ability to assess whether the work has been successful – in other words, has achieved its purpose.

This approach to creating a taxonomy of comparative law work, which doubles also as a means of framing how future work might be undertaken, aligns with Riles’ view that part of what has distinguished comparative law scholarship generally is its emphasis on projects. Riles does not appear

---

177 The literature could also be classified in line with more traditional scholarly categories: for example, whether the particular article contributes to the scholarship of discovery, integration, or application; or, whether it is empirical, normative, or analytical. But given that the question I am posing in this chapter of the paper is what scholars of comparative tax law seek to accomplish, I have elected to create a taxonomy based on the questions asked by comparative law scholars.

178 This kind of approach is supported by Adams and Heribaut’s observation that “[c]omparative law is a collection of methods that may be helpful in seeking answers to an almost endless variety of questions about law (broadly defined)” (Maurice Adams & Dirk Heirbaut, “Prolegomena to the Method and Culture of Comparative Law” in Maurice Adams & Dirk Heirbaut, eds, The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke (Oxford: Hart Publishing, 2015) 1 at 7. For an analysis of how identifying the scholarship’s audience might assist in evaluating its effectiveness, see Jürgen Basedow, “Comparative Law and its Clients” (2014) 62:4 Am J Comp L 821.

179 See Riles, Rethinking the Masters of Comparative Law, supra note X at 11 (“[e]qually important to the comparative lawyer from the outset were the projects comparative law as a discipline might serve – the unification of law, the development of a ‘universal common law’ for transnational business and other relations, the uses of
to argue for projects as a normative matter; instead, she identifies a commitment to various projects (identified through articulated or assumed purposes) as a distinguishing feature of the work of the masters of comparative law.

The purposes identified in this Part are drawn from a review of the comparative tax law literature listed in Appendix A. As a result of that review, I have identified eight purposes of comparative tax law scholarship. These purposes are, for the most part, not unique to tax law and might just as easily be applied to any comparative law subject. They are also not as distinct as the taxonomy suggests. Some, in fact most, authors will seek to achieve two or three of the identified purposes, although one often seems to drive the project.

There are some aspects of tax law that might make comparative work in tax law more coherent as a body of work than other areas of law. First, tax is imposed by statute. This narrows some of the institutional differences between countries in terms of the origins of the fundamental legal framework. Second, tax scholars widely agree on the criteria that might be used to evaluate an effective tax system: equity, neutrality, and administrability. There are, of course, other criteria that are drawn upon in the scholarship (for example, fairness, transparency or competitiveness) and there are variations in what each of these evaluative criteria demand, but in the main there is likely more agreement on the appropriate evaluative criteria in tax law than in many other areas of legal study. Third, there is significant consensus on the role and function of taxation. Most countries accept that tax systems are designed to raise revenue, redistribute income, promote or discourage particular types of behaviour, compensate for market failures, stabilize the economy, and promote economic growth.

Before turning to the work of constructing a taxonomy of purposes for comparative tax law, I want to displace the standard taxonomy that is often adopted by scholars of comparative law. As described in Part 1, it has become the practice of comparatists to frame the central debate in comparative law as one among functionalists and others. Scholars who adopt a functional approach to comparative law seek to identify the underlying social, economic, or political problem that law seeks to resolve. They then compare how different units (usually countries) resolve those problems using law.

Functionalism lends itself particularly well to the project of evaluating the effectiveness of different legal resolutions to common social, economic or political problems. It is this advantage, that a functionalist approach lends itself to articulating a preference for one legal resolution over another, that has led to criticisms of the method as imperialist. The claim is that the comparatist who recommends one legal solution over another does so with insufficient understanding of the context of at least one of the jurisdictions being compared (the one in which he or she is an “outsider”) and that comparatists risk falling into the trap of assuming one legal resolution is better than another either because they have insufficient contextual (or cultural) information or because they have implicit biases (based on familiarity) that lead them to favour one solution over another.

As a result, in the modern literature commonly the “others” against whom functionalists are compared are scholars who take hermeneutics as a method of approaching comparative study. For those scholars, most quintessentially Legrand, hermeneutics avoids the imperialist potential of functionalism. The legal text is a manifestation of culture (like art or music) and is to be read as a signifier. Comparatists use that comparative information about foreign legal systems for legal reform projects. ... The comparative lawyer is a person who engages comparison for a purpose”).
text not as a subject for comparison in and of itself, but instead, as the lens through which to gain access to information about the cultural setting within which that text is embedded. The focus of comparative work undertaken in the hermeneutical tradition is not to explain different legal systems: it is to understand (or try to understand) “the other”. In its more extreme forms, scholars in the hermeneutical tradition claim that some legal regimes are so culturally distinct that they cannot be compared. For example, Legrand has claimed that there is a fundamental cultural difference of mentality between civil and common law that precludes effective comparison.180

The debate about the ability of a comparatist to meaningfully engage in comparative work, given the limits of that person’s knowledge of jurisdictions other than their home jurisdiction might be better characterized as a debate about the degree to which comparisons are helpful in achieving the purpose for which they are used. One the one extreme, if I know little about the legal rules and social, political, economic, and cultural context of jurisdiction A, my comparative work between it and jurisdiction B might be inconsequential and trivial – not worth undertaking. At the other extreme, there are presumably a limited number of purposes that would demand I become so familiar with jurisdiction A that I am able to adopt it also as a home jurisdiction. In other words, it might make more sense to think about the issue of cultural (or any other kind of) familiarity with a jurisdiction as less about a threshold point one has to reach in order to undertake any comparative project, which is the claim made at the extreme end by those who endorse a hermeneutical approach to comparative work, and to think carefully about the immersion required to achieve the stated objectives and purposes of the research work undertaken. This seems aligned with the standard debates in any social science method that require the researcher to be able to sufficiently support the claims he or she makes. Some claims will require high levels of information and understanding about the context, other claims will require less information and understanding. It is for these additional reasons that focusing on the purpose of the particular comparative project seems more fruitful than focusing on the scholar’s functionalism, for example.

3.2 Eight Purposes of Comparative Tax Law

A review of comparative tax law scholarship suggests eight possible purposes and I review each below. For each of the purposes I discuss a scholarly work that provides a helpful illustration of a scholar achieving that purpose. I have taken this approach in part because, as Jakko Husa concludes, “[m]ost textbooks give methodological advice and offer hints, but there is no intimate link to the research process. This is partly due to the heuristic nature of comparative law, which means getting acquainted with exemplary research [(i.e.,] good books and articles) and learning from them is of great importance”.181

Two initial possible purposes should be set aside before proceeding. Practitioners with an interest in comparative law have suggested that assisting practitioners to speak with foreign lawyers might be an aim of comparative work. Given that this objective has not been as much embraced in the scholarly literature, it is not highlighted in the work of this paper. And, it likely goes without saying, and therefore it is not considered as a distinct purpose below, that a motivation for all comparative tax law scholarship is the joy of studying tax laws.

180 See Pierre Legrand, “European Legal Systems are not Converging” (1996) 45:1 Intl & Comp LQ 52 at 63.
181 Husa, “Research Designs of Comparative Law – Methodology or Heuristics?” supra note X at 66.
1. To learn more about our own systems and context

One of the best ways to understand something is to compare it something else: The exercise of comparison can reveal aspects of the thing that were otherwise invisible. The object chosen for comparison in this context matters only to the extent that it is useful in revealing something more about the familiar thing.

Some comparative tax law scholarship is undertaken as a means of better understanding the tax law of the home jurisdiction of the scholar. As claimed by Kurt Hanns Ebert, a “profound understanding of one’s own system of law is available only to those lawyers who use the method of comparative law”. Additionally, one might hope that exposure to that which is profoundly different from what one is used to must of necessity change who one is including one’s perspectives and opinions.

Ajay Mehrotra’s “The Public Control of Corporate Power: Revisiting the 1909 US Corporate Tax from a Comparative Perspective” is a wonderful illustration of this kind of approach to comparative study. Mehrotra, a professor at Indiana University’s Maurer School of Law, asks why the US federal government adopted a corporate tax. He claims there are two dominant stories: one about “how populist and progressive anxieties about the growth of corporate power and prevailing juridical conception of corporate personality led ... to [the] use [of] the tax as a regulatory tool to publicize and control the wealth and power of corporate managers and owners”. The other account was that “the corporate [w]as simply an aggregation of individuals ... [and] lawmakers used the corporate tax primarily to raise revenue”.

Mehrotra identifies an admittedly small sample – US state governments, Britain, and Germany – as comparators. The objective to using comparative work in answering the research question at hand is to see whether studying the imposition of corporate-level taxes in other governments sheds light on the

---

182 For work motivated by this purpose, see e.g. Stephen Bruce Cohen, “Does Brummeria Sweep Clean? A US Tax-Law Perspective” (2009) 126 SALJ 489; Luc De Broe, International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies (Amsterdam: International Bureau of Fiscal Documentation, 2008) (De Broe reviews the case law of other jurisdictions (Austria, Canada, Finland, France, Germany, Netherlands, Switzerland, and the US) as a small part of his work on tax planning in Belgium, presumably primarily to assist him in identifying the relevant issues for exploration in the context of Belgium); Edward Kofi Osei, “Transfer Pricing in Comparative Perspective and the Need for Reforms in Ghana” (2010) 19:2 Transnat’l L & Contemp Probs 599.


184 Although there may be reasons not to be so hopeful. Riles’ exploration of how three years in Japan, learning the language and engaging in serious academic study, changed John Wigmore suggests that comparative study is not always fruitful in this regard. She concludes, “[n]ot only did Wigmore emerge from his sojourn in Japan with most of the same views with which he began, but there was much that I found troubling about both the content of those views and the genre in which they found expression”. Annelise Riles, “Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism” in Riles Rethinking the Masters of Comparative Law, supra note X at 95.


US’ path. Ultimately, Mehrotra determines that much of the US’ decision to tax corporations can be explained by its interest in disciplining corporate capital as a result of antipathy toward concentrated power. Not surprisingly, Mehrotra’s conclusions say nothing about the comparator jurisdictions-Germany, English, or the states. That’s because the comparative work he undertakes in the article, which includes a detailed review of the emergence of corporate tax regimes in those jurisdictions, is not undertaken with a view to drawing conclusions about those jurisdictions—it is undertaken with the objective of using those histories to reveal possible explanations for the US approach. The article is a model because the jurisdictions Mehrotra selects and his analysis of their histories prove sufficient for him to offer a new theory about US corporate tax law, one that was not visible in the absence of the comparative context.

2. To learn more about others’ systems and context

In contrast to Mehrotra’s article, which seeks to use comparative law scholarship to reveal something new about an already-familiar system, other scholars use comparative tax law as a means of learning more about others’ systems. Alain Charlet’s “The VAT and Customs Treatment of the Mining Industry


for Neutra
in Sub-Saharan Africa” is an illustration of this purpose.\textsuperscript{190} Charlet is an attorney in France, who also teaches in a number of universities and regularly engages in research work. His article is typical of this type of comparative tax law. In his chapter, he primarily describes Value Added Tax practices in Sub-Saharan African countries, particularly in francophone West and Central Africa. Although he purports to also offer some views on best practices, in fact, the chapter offers at most ambivalent views on best practices and Charlet concludes that “often there is no good or bad rule; no one size-fits-all approach”.\textsuperscript{191}

One of the interesting features of Charlet’s chapter is his organization of the analysis (and description) by reference to the stage in the mining process, rather than by organization of typical VAT legislation. In other words, Charlet designs the chapter by starting with the industry (mining) and by discussing how the VAT applies at its various development stages (exploration, development, and production). The details of individual country’s laws are embedded in thick and detailed footnotes with the text reserved for generalizations based on those specifics. Overall, the chapter provides the reader with a good sense of the ways in which VAT law has been applied to the mining sector in francophone West and Central Africa. It is typical of this kind of comparative tax law because Charlet makes no effort to compare the law of “other” countries with his home jurisdiction, France. The comparison among countries is entirely undertaken from the vantage point of a knowledgeable outsider. From that perspective, Charlet appropriately does not draw sweeping conclusions about political, social, economic, or cultural contexts. Instead, his analysis is tightly drawn around the design of the tax laws themselves, with some occasional observations about the external context in which those laws were adopted. The chapter does not claim to achieve more than what is realistic under the circumstances: Charlet does not purport to understand

at a deep level the context of the jurisdictions compared nor is he prescriptive about what any country should do as a policy matter, although he is clear about what makes, as a general matter, an effective VAT regime. These are the limits of research that approaches comparative law with the purpose of better understanding the laws of other jurisdictions.

3. To draw general conclusions about legal regimes and law

Another purpose of comparative law is to enable the scholar to draw some general conclusions about legal regimes, law, and law’s structures. This purpose is premised on the assumption that underlying tax law is a deep structure – a set of fundamental policy decisions that, when determined, become the basic (and common) building blocks of the particular legal regime. Comparative law is useful in achieving this purpose because in the absence of understanding a good deal about a number of systems, the deep structure would be difficult to discern. To some extent, this kind of work typified phase 2 projects, for example, those undertaken by McDaniel and Surrey or Di Malta.

Peter Harris, professor of tax law at the University of Cambridge, has authored a book, Corporate Tax Law: Structure, Policy and Practice, which is a fine illustration of work that uses comparison to draw general conclusions about legal regimes and law. In order to build a structural outline of corporate tax systems, Harris draws on his knowledge of multiple jurisdictions, much of which was likely developed when he served as a technical expert within the IMF’s legal department and subsequently, given that he

---


has continued work with the IMF as a technical consultant. Harris’ claim is that that breadth of country
knowledge was necessary for him to discern the “major issues faced by and options available for”
corporate tax systems.\footnote{Peter Harris, Corporate Tax Law: Structure, Policy and Practice (Cambridge University Press, 2013) at 1.} To that end, the design of the book reflects each of the major structural policy
decisions necessary for the drafting, design, and implementation of a corporate tax – from what is a
corporation, to dividend relief options, to the consequences of varying share interests. The book itself
refers only to a subset of that broader list of comparative jurisdictions Harris’ used to generate his
snapshot of the corporate tax’s structure – the EU, Germany, UK, and US. Those countries were chosen
to represent the common law (and scope of influence), civil law, magnitude of reach, and federal nature
of the system. They align with Thuronyi’s country-selection recommendation.

There are limits to Harris’ work that are a function of the identified purpose. For example, most of the
work in this category of comparative tax law scholarship does not include lower-income countries as one
of the comparator countries. Those legal regimes are often simpler in design and it is arguable that a
structural review of a system is missing something if it fails to take into account part of the detailed
analysis which aspects of the legal framework might be omitted or simplified, and in what
circumstances, without losing much of the overall design. More fundamentally, if the purpose of a
scholarly project is to delineate the fundamental framework of a particular tax law, the project of
necessity does not grapple with the broader context, nor does it contemplate whether there are
alternative designs that would be desirable.

4. To search for a common legal future (and to harmonize or coordinate)

Projects where the scholar undertakes comparative work to search for a common legal future share a
set of beliefs about law (purpose 4) with projects that draw general conclusions about law and its design
(purpose 3): scholars who engage in this kind of work generally believe that tax law has a “common
work, however, in its strongest form is that scholars who search for a common legal future tend to, as a normative matter, think that legal regimes would be improved if countries moved toward greater similarity – either through harmonization or coordination. They also tend to believe that some policy decisions reflected as part of the common core are better than others. In its weaker form, scholars who pursue work with this purpose believe there is progression toward a harmonized or coordinated future, although they may not believe that trajectory is desirable as a normative matter. This is the kind of approach promoted by Garbarino. Because of efforts to harmonize within the EU, there is considerable scholarship that deals with the implications of various jurisdictions’ laws in their European context by, for example, examining how those domestic legal regimes fare before the European Court of Justice. In a variation on this work, scholars review the tax approach taken by member states of the EU as a mechanism for identifying constraints on further EU harmonization.

Antony Ting, a professor at the University of Sydney’s business school, has published a detailed comparative study of the consolidation regimes of eight countries. The Taxation of Corporate Groups under Consolidation: An International Comparison identifies ten key structural elements of consolidation regimes “with the intention of searching for a model regime”. To that end, it models the work of purpose 3 projects (which use comparative law to reveal a general design) and demonstrates how some scholars use that initial purpose to achieve another purpose: the recommendation of an ideal model (that presumably all systems should aspire toward). Ting uses Australia, France, Italy, Japan, the Netherlands, New Zealand, Spain, and the US to comprise his sample because each had introduced a consolidation regime by 2009. One of the particular strengths of Ting’s work is his explicit consideration of the objectives of his comparative study.

As I mentioned above, projects with this purpose have inspired other scholars to critique comparative law scholarship for its colonial and imperial intentions or effects. The criticism, in its strongest form, has been to discredit all comparative work with this purpose. Ting acknowledges the risks of ignoring the local circumstances with a brief caution. While his work does not engage in any detailed way with the local context of the particular countries he compares, and he offers no analysis of which particular local


197 See e.g. Tomi Viitala, Taxation of Investment Funds in the European Union (Amsterdam: International Bureau of Fiscal Documentation, 2005).


200 Ting clearly identifies his two objectives as to “identify[y] the key structural elements” and to “search for a model consolidation regime, representing the best practice in respect of the key structural elements on policy grounds” (Ting, The Taxation of Corporate Groups under Consolidation: An International Comparison (2013) at 8).

201 Ting, The Taxation of Corporate Groups under Consolidation: An International Comparison (2013) at 8-9 (“[t]ransplanting a policy solution from one country to another without due consideration of the local circumstances and constraints can be hazardous, as the policy solution in a country may be the compromise between conflicting policy objectives and political forces particular to the country”).
conditions would affect aspects of his proposed model, his work addresses an important lacuna. Countries will confront issues about the design of how to tax corporate groups. Developing legislative responses “from scratch” is time consuming. Learning from the successes and challenges of others with similar problems can be efficient, even if there are risks to legal transplants. However, given the range of possible “local conditions”, it does seem bold to recommend a model, which is what gives rise to some of the work discussed next.

5. To press for or support legal change

Less grand in its aspirations than work that attempts to postulate a universal model or to argue in favour of broad-based coordination or harmonization is comparative tax law scholarship that reviews approaches in other jurisdictions to look for “best practice” (or workable) solutions to shared tax problems. This kind of work dominates much of the comparative tax law scholarship, perhaps in part

because it can demand the least amount of comparative depth. Undertaking to explain the underlying structure of a particular tax (or aspect of tax) (purpose 3) requires a detailed knowledge of the tax laws of many countries, as can developing a model for wide application (purpose 4). Scholars who use comparative experience to press for or support legal change in their home jurisdictions often believe that they can sufficiently support their case with a relatively superficial understanding of part of one other jurisdiction’s tax laws. The claim of this work may not necessarily even be that that law works well in the other jurisdiction — only that it would work well in the home jurisdiction. At its best, scholarship in this category seeks to ‘battle with parochialism’ and to push the scholar’s host country to implement progressive legal changes, and in some cases, by demonstrating that those design features have met with success elsewhere.\(^{203}\)

Brian Arnold, an emeritus law professor at Western University in Canada, has undertaken much comparative study and his work does not suffer from the dilettantism that can be the flaw of at least some of the work that uses comparative study to achieve legal reform. For example, in “The Process of Tax Policy Formulation in Australia, Canada and New Zealand” Arnold examines how tax policy is developed in the three comparator countries — all countries he knows well and has spent substantial time in.\(^{204}\) Arnold is careful to circumscribe the conclusions that can be drawn from his work:

> It must be emphasised that the views expressed in this article are necessarily general and tentative. They reflect the author’s personal experience as a consultant to the governments of the three countries rather than the results of any academic research. As a result, the analysis in the article may not disclose subsidiary aspects of the tax policy process that may affect the extent to which the process is integrated. ... My sole purpose in writing the article is to contribute to the debate concerning the process of tax policy formulation in the three countries in the hope that the process can be improved.\(^{205}\)

Expressly limiting the conclusions of the study to tax policy formulation in the three countries surveyed, and not attempting to expand those conclusions beyond those borders, is one of the strengths of Arnold’s scholarship. Ultimately, his major contribution in the work is the recognition that tax policy formulation is an integrated process — involving policy development, technical analysis, and statutory drafting. His ability to evaluate how each jurisdiction fares through those processes, and to recommend adjustments to the process that might yield improvements, makes this article a good illustration of this kind of scholarship at its best.

6. To explain why a country’s laws are the way they are (and why they differ or are the same as other countries’ laws)

Whether or not there is a “model” approach to the design of particular tax legislation that every country should aspire to adopt, there is significant variation among countries’ approaches. Figuring out what “local conditions” explain those variations has given rise to a category of comparative tax law

---

203 See Riles, *Rethinking the Masters of Comparative Law*, supra note X at 12.
205 Brian Arnold, “The Process of Tax Policy Formulation in Australia, Canada and New Zealand” at 381.
Much of this work is rightly undertaken by political scientists, like Cedric Sandford, and it is not discussed here; nevertheless, some lawyers with an interdisciplinary bent do commit scholarly energy to contribute to this literature. While adherents to different comparative law philosophies might find themselves drawn to this purpose of comparison, it fits particularly well with those who seek to view law in its critical context. For example, Pier Giuseppe Monateri claims “the new outline of the task of [c]omparative [l]aw is [to provide] insight into the ‘ceaseless discursive warfare’ which is fought within legal cultures among competing groups”. This kind of aspiration — to reveal the power dynamics that explain legal regulation — is one of interests of scholars who approach their comparative work to achieve the purposes of explaining why a country’s laws are the way they are. Others are interested in whether environmental factors (e.g., demographics or language), the spread of ideas, economic structure, political actors, path dependency, or some combination of factors explain why countries’ laws develop in similar or divergent ways.

Steven Bank’s book, *Anglo-American Corporate Taxation: Tracing the Common Roots of Divergent Approaches*, is an outstanding example of this kind of project. Bank, a professor at UCLA’s law school, brings an historical approach to the question of what explains the differing approaches taken by the US and UK to the taxation of income earned in a corporation. By focusing on only two countries, Bank is able to explore in detail the underlying context in each country. The choice of countries removes at least some potential explanations from discussion – both are common law countries and the US inherited many of its laws and practices from the UK. They also share well-developed capital markets and there is frequent market interaction between the businesses in the two jurisdictions.

Bank’s book is designed to be both comparative and historical. To that end, it is organized to describe the origins and development of the corporate income tax in both countries over two hundred years and then to consider possible explanations for the divergence. The potential explanations are grouped under the following themes: profits, power over the corporation, and politics. *Anglo-American Corporate Taxation* provides a model for work with the purpose of explaining divergences (especially) in the evolution of countries’ laws. It does not, of course, seek to present an ideal model for future reforms, nor would the work be particularly easy for a policy maker to digest in considering how to approach legal reform in their own jurisdiction.

7. To spread higher-order values

---


208 Monateri at 21.

209 Steven Bank, *Anglo-American Corporate Taxation: Tracing the Common Roots of Divergent Approaches*, supra note X.

As discussed above, one of the unique features of the tax system is that it serves as a mechanism for promoting “high-order” values, including, as argued by scholars like Barker, democracy, redistribution (or greater income equality), and economic stability. A small cluster of tax scholarship uses comparative tax law as a means of analyzing how those higher-order values can be promoted and pursued through the tax system.

Miranda Stewart’s “The Tax Expenditure Concept Globally” is an example of that kind of scholarship. Her chapter reviews the use of the tax expenditure concept and tax expenditure reporting in three middle-income countries – Chile, India, and South Africa. The countries were chosen because in each of them tax expenditure reporting has developed in response to activist-led advocacy. Tax expenditure reporting, that is, government disclosure of the spending delivered through the tax system, is often seen as part of “budget transparency norms” and as “advanc[ing] a fiscal politics that emphasizes the values of distributive justice, participation and democratic legitimacy”. While the bulk of Stewart’s chapter focuses on tracking the historical evolution of tax expenditure reporting in the three comparator jurisdictions and advocating for improvements to each (purpose 5), the concluding sections of the chapter focus on how tax expenditure budgeting can better serve as a mechanism for promoting democratic dialogue.

8. To provide insight into social reality

There is an even smaller cluster of tax law comparative work that might be described as work that seeks to build tax within an interdisciplinary context that helps us learn something about human problems and public policy dilemmas outside of tax law altogether. To some extent, this work is connected to the explanatory projects (purpose 6). In that line of scholarship, the author explicitly reviews possible explanations for similarities and divergences among countries’ tax laws; in the social realities scholarship, scholars look to some of the same kinds of underlying realities (geography, language, demographics, et cetera) but do so not so much to provide a tight explanatory analysis of why laws look the way they do, but instead (or also) for the insights that can be drawn about those social realities from a study that includes a focus on law. This is, in some measure, akin to the kind of “social realities” approaches undertaken by comparative law scholars like Riles and like some of the comparative tax law work undertaken by Mumford.

212 Miranda Stewart, “The Tax Expenditure Concept Globally” at 55.
213 See especially Miranda Stewart, “The Tax Expenditure Concept Globally” 74-76.
Marjorie Kornhauser’s “Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax” is work in this vein. The article is not a perfect illustration of the genre, but given the dearth of work with this purpose, it will have to serve. In some ways, the piece is not especially comparative – it does mention German, UK, and Canadian practice, but does so mainly in passing. What it does offer is an extended discussion of the context of marriage and religion in the US. And ultimately, Kornhauser focuses on the expressive function of the marital unit and joint return in the US. So, the article is not so much aimed at how the US’ marriage or religious history and context explain why the marital unit or joint return have been so intractable in that country as it is to show how tax law and social realities are intertwined and mutual reinforcing. Kornhauser’s conclusion is illustrative:

In the United States the retention of the taxable unit reflects not just a single factor – marriage/family – but three: marriage/family, religion, and the symbolic nature of taxation. While each is important across societies, the exact nature of their roles is shaped by the specifics of that society’s history, politics, and culture. In America the particularities of each have played instrumental and symbolic roles in forming and sustaining American democracy and identity. They affect numerous aspects of society, including the tax system. Until changing social and legal norms sufficiently alter this triumvirate’s nature and power, the enduring roles of marriage, religion, and tax in America help explain why its tax system remains wedded to the joint return.

3.3 Understanding the Purposes of a Comparative Tax Law Project

My claim in this Part of the paper is that comparative tax law scholarship would be improved if scholars were clear about their purposes in undertaking a comparative project. Each of the eight purposes delineated as part of the taxonomy presented in this Part requires different approaches to and knowledge about the comparative jurisdictions.

Purposes 1 and 2 require substantial knowledge about some aspects of a jurisdiction’s tax systems. In order to learn more about our own system from a review of other countries’ systems, it is critical that the scholar be familiar with their own system so they can identify the unfamiliar in the systems of others. If a scholar’s purpose is to learn about their own system and context, they may not need to delve deeply into the law of the comparator jurisdiction, nor may they need to know about more than one other system.

If the scholar’s purpose is to learn more about another system, then the scholarship improves the more the scholar can learn about the other’s system. Again, in this case, studying one other country may suffice. The work must be appropriately designed so that the scholar can learn a sufficient amount about the other’s system for the work to be defensible – this likely means that a more junior scholar should not try to learn everything about a complete tax system.

Purposes 3 through 8 can only be undertaken after purposes 1 and 2 have been achieved. To some extent, then, they are high-order comparative projects. That is not to diminish the work undertaken so that we better understand our own tax law or better understand the tax laws of others: Mehrotra’s

article is a brilliant and careful piece of scholarship. But moving to purposes 3 through 8 requires a
detailed understanding of the relevant aspects of the jurisdictions under comparison.

To be able to draw general conclusions about legal regimes and law appears to demand extensive
country experience and knowledge. This kind of work – which delineates the broad structure design of a
tax law, or an element of a tax law – requires a rich understanding of (and belief about) the shared
policy judgement calls that must be made in tax design. When this kind of project is undertaken in
haste, or with inadequate information, the scholarship is likely less useful than it could be.

Projects that search for a common future require a firm sense of the relatedness of the jurisdiction
selected for study. While there may be good reason for all countries in the world to harmonize at least
some aspects of their tax systems, the claims of scholars who press for a shared future tend to have
consolidation, harmonization, or coordination of some narrower set of countries in mind. For this work
to be useful, presumably it needs to have traction with policy makers. To that end, ensuring that the
work is tied to a rich sense of the political, social, and economic context of the jurisdictions under study
would enhance the quality of the work. The number of countries under study may be as few as two, or
as many as sensibly comprise a cluster of countries for whom a shared or coordinated legal regime make
sense.

The scholarship that seeks to press for or support legal change is often highly pragmatic in design: the
country that is the focus of the advocacy is considering law reform or an issue is before the courts. In an
effort to support what is often a more extended argument in favour of change, the author also marshals
evidence about practices in at least one other jurisdiction. Scholarship seeking to achieve this purpose is
most useful when the author is able to explain why the comparator jurisdiction’s approach is superior.
That generally requires either demonstrating how it is effective in the other jurisdiction (with
appropriate attentiveness to the context in that jurisdiction) or knowing enough about the home
jurisdiction to be able to offer grounded explanations for why the advocated approach will result in
superior results.

Explanatory projects are some of the most complicated. They demand a high level of expertise about
the broader legal culture in the comparator jurisdictions. To that end, they are perhaps best undertaken
with a smaller number of comparator jurisdictions. Additionally, the author must be able to work with
at least some interdisciplinary skills – this work cannot rest solely on legal knowledge. Choice of
countries matters. There are so many possible variables that it makes sense to reduce the scope of
possible explanatory factors as much as possible.

There is such a small sample of scholarship that attempt to spread high-order values or provide insights
into social realities that it is difficult to offer much by way of general reflection on what improves work
that seeks to achieve these objectives. Generally, given the lack of scholarship of this nature, it seems
like projects that are narrower in scope – both in terms of the focus of the work and the number of
comparators – are likely to yield better insights as the scholarship develops. Additionally, each of these
purposes appears to demand research beyond the formal laws themselves and into, at a minimum, the
legal context, if not also the social, economic, and political contexts of the compared jurisdictions.

There is nothing about any of these purposes that suggests comparator countries should be drawn from
the same families or traditions or that they should be from countries with similar economic structures or
administrative capacities, for example. Instead, in each case, scholars should have reference to the
work on legal families and traditions and consider the value in using countries with similar (or different) trajectories. It may be, for example, that in reviewing a highly technical area of tax law and where the scholar seeks to support legal change, that a country with a similar legislative and political history would be a better comparison because the chance of an effective transplant may be stronger; or that for a scholar who wishes to learn more about their own system’s approach to a technical issue may find a country with a very different legal context to be informative in revealing alternative possible solutions to the same dilemmas. The absence of comparative tax law work that uses middle or low income countries in the comparison group likely results in unfortunate gaps in the literature.

Additionally, there is nothing about the purposes that suggests that comparative tax law work should focus on the country level or should focus on formal legal regulation. Most of the work in the sample used for this Part of the paper did focus at the country-level and most of it was preoccupied with the legislation (with a smaller portion focused on case law or administrative regulation). Very little of the work committed any time to the broader political and institutional context for law-making, to say nothing of attempting to provide some of the social or economic context that informs policy-making in tax law. Identifying which of the eight purposes might motivate a comparative project, however, says nothing about what should be the subject of the comparison (formal laws, institutions, the operation of “law on the ground”, the attitudes of legal elites, and so on). Some of the purposes, though, suggest that a greater attention to the underlying context of tax regulation would enhance the quality of the work produced.