Article

Yvette Lind

Introduction: A Contemporary Guide to Tax Justice and Tax Fairness

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Abstract: This is an introduction to the research papers that make out this Nordic Tax Journal special issue on inequality within the international tax regime. The special issue is an outcome of the discussions that took place at the (online) conference hosted by Copenhagen Business School in September 2020. In addition to introducing the papers of this special issue, this introduction also provides a contemporary guide to tax justice and tax fairness with an emphasis on theories and principles applicable to the international tax context as this was the overall theme of the conference.

Keywords: tax justice, tax fairness, fair taxation, equity, the ability to pay principle, the benefit principle

1 Motivation and challenges for discussing tax justice and fairness in a global setting

Tax justice and tax fairness is commonly discussed, and argued for, not only in academic scholarship,[1] but also by media, politicians, and general public. But regardless of intense discussions, the meaning and application of fair and just when considering taxation and fiscal policy remains unclear. Murphy and Nagel conclude, in their seminal monograph The Myth of Ownership – Taxes and Justice, that:

> *"Everyone agrees that taxation should treat taxpayers equitably, but they don´t agree on what counts as equitable treatment."* [2]

Within tax scholarship, we find few scholars who reflect more deeply over their use and application of justice and fairness in their studies. Leaving a desire for more clear answers to: *what* may be considered as fair and *how* does tax justice manifest itself in academic studies and arguments? This special issue provides some possible approaches, both methodologically and theoretically, how to answer these questions and how to integrate fairness and justice in (international)[3] tax studies.

The need for further discussions on these matters led to Copenhagen Business School hosting an (online) conference concerning inequality within the international tax regime in September 2020. The response to the conference confirmed that there is a significant need for additional discussions on inequality, which currently shape international tax matters and the international tax regime[4].

Yvette Lind: Assistant professor in Tax Law at Copenhagen Business School

1 For instance: Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice*. Oxford University Press. 2002. Dominic de Cogan and Peter Harris (eds.), *Tax Justice and Tax Law – Understanding Unfairness in Tax Systems*, Hart Publishing, 2020. Peter Hongler, *Justice in International Tax Law*, IBFD, 2019. Karina Kim Egholm Elgaard, Rasmus Kristian Feldthusen, Axel Hilling, Matti Kukkonen (eds.), *Fair Taxation and Corporate Social Responsibility*, Ex Tuto 2020. Alice Pirlot, *The Vagueness of Tax Fairness: A Discursive Analysis of the Commission's 'Fair Tax Agenda'*. Intertax vol 48 no. 4 2020. Ivan Ozai, *Two Accounts of International Tax Justice*. Canadian Journal of Law & Jurisprudence vol. 33 no. 2, 2020, pp. 1-23. Cees Peters, *Global Tax Justice: Who's Involved?* in Robert F. van Brederode (ed.). Ethics and Taxation. Springer, 2020, pp. 165-187. Laurens van Apeldoorn, *A Sceptic's Guide to Justice in International Tax Policy*. Canadian Journal of Law and Jurisprudence vol. 32 no. 2, 2019, pp. 499-512. Åsa Gunnarsson, *Skatterätvisa,* Iustus 1995. Hans Gribnau, *Voluntary compliance beyond the letter of the law: Reciprocity and fair play* in *Bruno Peeters, Hans Gribnau, and Jo Badisco (eds.), Building Trust in Taxation, Cambridge,* Intersentia 2017.

2 Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice*. Oxford University Press. 2002, p. 13.

3 Tax justice and tax fairness differs between the domestic and international context as the former generally concerns individuals while the latter generally concerns states. However, the separation between these two are not always as clear as is illustrated in this introduction.

4 International tax regime in this context comprises both hard law and soft law applicable to cross-border taxation, e.g. domestic tax law, EU tax law (and applicable EU state aid rules) and tax treaties with subsequent material from the OECD and the UN. The author does not take a stance in the question whether international tax should be considered international law and the subsequent existence of an international tax regime. A more elaborated discussion on this may be found in: Reuven Avi-Yonah, International Tax as International Law. Cambridge University Press. 2017.

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The conference itself brought together researchers at the forefront of their respective fields to identify, discuss, and underline future challenges associated with inequality in an international tax context. This special issue is an outcome of these discussions and concerns the relationship not only between individual states but also between both corporate and individual taxpayers. Emphasis was placed on present shortcomings when allocating taxing rights between differing jurisdictions in a fair and sustainable manner.

2 *What* relationships are we discussing when applying justice and fairness? The importance to distinguish between horizontal and vertical relationships in differing contexts

Initially, it is of essence to clarify *what relationships* that are to be discussed. Horizontal and vertical relationships need to be distinguished. *Horizontally*, one may discuss the relationship between differing states and there has been, within tax scholarship, discussions on the relationship between developing states and developed states/the global north and the global south.[5] Interestingly enough, these discussions have become more prominent over the last couple of years in connection to the OCED´s BEPS project (the Inclusive Framework being one obvious example inducing discussions).[6]

In this special issue, the paper *Jurisdiction not to tax, tax sparing clauses and the OECD GloBE proposal* by Aitor Navarro Ibarrola examines the horizontal relationship between states (developing states and developed states) when examining parts of the BEPS project more closely. The OECD´s work on the challenges arising from digitalization, in particular the so-called GloBE (Global Base Erosion) proposal within Pillar 2 is specifically addressed in this context. The proposal in question consists of a series of measures aimed at establishing a minimum taxation of all cross-border incomes. The author argues, that if implemented, developing countries are in risk of being severely deprived from the possibility to grant tax incentives to attract FDI (Foreign Direct Investment) when promoting economic growth. The author emphasizes the importance of developing states undertaking a tax policy review amidst the rapid adoption of the GloBE proposal that the OECD is pushing for. To illustrate this concern, the author examines implementation issues and illustrates that a deficient enactment of the income inclusion rule proposed in GloBE could paradoxically trigger the applicability of tax sparing clauses, aimed at protecting the effectiveness of tax incentives, even when both sets of rules pursue opposing goals.

Additionally, horizontal relationships also apply to the relationship between individual taxpayers or individual groups of taxpayers. For instance, between multinational enterprises or between multinational enterprises and individual taxpayers. The latter is less commonly discussed within tax scholarship yet is often highlighted in media and by public. The public outcry of everyday citizens: "I paid my taxes" in connection to the EU Commission´s investigation into potential state aid awarded by Ireland to Apple, through a more favourable tax treatment compared to other (comparable) undertakings, constitutes one such example.[7]

Some tax scholars argue that aggressive tax planning and tax avoidance may be linked to human rights law as

5 Reuven S. Avi-Yonah, *Globalization and Tax Competition: Implications for Developing Countries*. Law Quadrangle Notes vol 44 no. 2, 2001, pp. 60-65. Reuven S. Avi-Yonah and Yoram Margalioth, *Taxation in Developing Countries: Some Recent Support and Challenges to the Conventional View*, Virginia Tax Review vol 27 no. 1, 2007, pp. 1-22. Michael Carnahan, *Taxation Challenges in Developing Countries*. Asia Pacific Policy Studies vol 2 no. 1,2015, pp. 169-182. Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*. University of British Columbia Law Review vol 42 no. 2, 2010, pp. 239-274. Michael C. Durst, *Improving Natural Resource Taxation in Developing Countries*. Tax Notes International vol. 87, 2017, pp. 1167-1180.Thomas Rixen, *Tax Competition and Inequality: The Case for Global Tax Governance*, Global Governance vol. 17 no. 4, 2011, pp. 447-467. Victor Thuronyi, *Tax Treaties and Developing Countries* in Michael Lang et al. (eds.). Tax Treaties: Building Bridges Between Law and Economics, IBFD, 2010, pp. 441-455. Eric M. Zolt, *Tax Treaties and Developing Countries*. Tax Law Review vol. 72, 2018, pp. 111-150. Yvette Lind, *Revisions of the UN Tax Treaty Model – an introduction to (global) inclusion and equity from the perspective of developing states*, Svensk Skattetidning Wolters Kluwer nr 10 2020, pp. 595-610. Finally, also see the special issue on international tax challenges for developing countries in the Nordic Journal on Law and Society vol 4 no 1 2021.

6 OECD. *Addressing Base Erosion and Profit Shifting*. 2013. OECD. *Action Plan on Base Erosion and Profit Shifting*. 2013. Ruth Mason, *The Transformation of International Tax*. American Journal of International Law vol. 114 no. 3, 2020, pp. 353-402. Allison Christians and Laurens van Apeldoorn, *The OECD Inclusive Framework*. Bulletin of International Taxation vol. 72 no. 4-5, 2018, pp. 226-233. Yariv Brauner, *What the BEPS?*, Florida Tax Review vol. 16 no. 2, 2014, pp. 55-115.

7 Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) implemented by Ireland to Apple.

there is an obvious need for tax revenues if a state is to be able to support human rights through tax transfers.[8] Discussions such as these encompass *both vertical and horizontal relationships*. The traditional tax collection/tax enforcement relationship is vertical as it concerns state and taxpayer, yet as above mentioned it may also be horizontal when comparing tax compliance between differing taxpayers/groups of taxpayers as argued above through the "I paid my taxes" outcry. Yet when considering tax enforcement as a way of funding public goods and tax transfers in this human rights context, it becomes vertical (between state and individual).

The study of *vertical relationships*, those between the state (or its agencies) and the individual, has attracted a large scholarship. Critical legal scholarship has for long emphasised inequalities with reference to gender, race, class, and disabilities.[9] When applying an intersectional perspective, it becomes evident that these four categories can be combined in differing constellations, and when done so often result in even greater inequality. American tax professor Dorothy A. Brown´s most recent monograph The Whiteness of Wealth: How the Tax System Impoverishes Black Americans – and How We Can Fix It is a very timely publication which eloquently captures how seemingly neutral tax codes and tax systems in combination with the tax administration, can result in inequality and injustice.[10]

The above introduction to differing relationships reveals that vertical and horizontal relationships may not in all cases be separated easily, yet the ambition of doing so is vital if the scholar wishes to discuss justice and fairness more clearly and on a deeper level.

3 *How* may we discuss justice and fairness? Principles and theories dealing with tax justice and tax fairness

This introduction does not aim to give a deeper understanding of the principles and theories that are commonly applicable to tax justice and tax fairness, but rather to provide a guide to some of the more common ones, in addition to introducing some novel approaches in the hope of inspiring new scholarship.

Initially, distributive justice may be achieved through both *horizontal and vertical equity*. Vertical equity is what fairness demands in the tax treatment of individuals at differing levels of income while horizontal equity is what fairness demands in the treatment of people at the same level.[11] This corresponds to the importance and effects of described relationships in chapter 2 of this introduction.

Vertical equity asks what relevant differences, between taxpayers, may justify differential tax burdens. Murphy and Nagel argue that this question in itself is misguided as it results in theories on vertical equity that are either myopic[12] and/or assumes that there is some morally hypothetical distribution of resources that is applied as the baseline when determining the extent of a fair tax burden.[13]

The ability to pay principle has, therefore, historically been considered as the main alternative to the benefits principle as it relies on the taxpayers´ ability to pay. The principle is the most commonly applied criterion of vertical equity today and we may find it enshrined in several constitutions around the world, e.g. Germany, Italy and Spain. Furthermore, the ability to pay is recognized in many states as a constitutional parameter to design fair tax.[14] The function of the principle results in an endowment tax[15] as it presumes that taxpayers should pay tax

8 See for instance: Eds. Philip Alston and Nikki Reisch, *Tax, inequality, and human rights*, Oxford University Press, 2019.

9 Anthony C. Infanti and Bridget J. Crawford (eds.). *Critical Tax Theory: An Introduction*. Cambridge University Press, 2009. Eds. Karen B. Brown and Mary Louise Fellows, *Taxing America*. vol. 44 NYU Press 1997. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, North Carolina Law Review vol 76 1997. Also see the scholarly response to Zelenak´s paper: Charles O. Galvin, *Taking Critical Tax Theory Seriously--A Comment*, North Carolina Law Journal vol 76 1997. Michael A. Livingston, *Radical Scholars, Conservative Field: Putting Critical Tax Scholarship in Perspective*, North Carolina Law Journal vol 76 1997.

10 Dorothy A. Brown, *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans – and How We Can Fix It*, Crown Publishing Group, 2021.

11 Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice*. Oxford University Press. 2002, p. 13. Richard A. Musgrave, *Horizontal Equity, Once More,* National Tax Journal vol 43 1990, pp. 114-117.

12 Myopic in the sense that the scholar in question focuses more on the question of tax justice as an separate and isolated political issue rather than to understand how it operates in the overall scheme of both revenues and expenses

13 Chapter 2 in Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice*. Oxford University Press. 2000.

14 Åsa Gunnarsson, *Skatterätvisa*, Iustus 1995.

15 Income and wealth being proxies for endowment.

according to earned income and accumulated wealth. This could arguably be considered as a natural outcome as an individual who has more wealth is, at least in theory depending on the source of wealth (funds can for instance be tied to the value of a property etc.), able to transfer more funds to the state compared to those who have less.

It has been considered by some tax scholars that above-described tax principles should be confined to the domestic level.[16] However, these principles have been integrated in some scholarship on international taxation. For instance, Wolfgang Schön has discussed the ability to pay principle in connection to EU state aid rules and fiscal state aid on several occasions.[17] Furthermore, Ivan Ozai and Vasiliki Koukoulioti have both discussed the idea of applying a reconceptualised benefit principle to the international tax regime in connection to the transformation of the international tax regime in the aftermath of the BEPS project.[18]

When considering *horizontal equity*, one such example of equity within international tax scholarship would be *inter-nation equity.* Inter-nation equity was developed as early as the mid-20th century and is commonly acknowledged as a general principle in tax policy discussions.[19] The principle considers the distribution of taxes between states and is today widely accepted as a tool for evaluating international tax systems.[20] It is well recognized among tax scholars yet there are disparities in how the concept of inter-nation equity is understood in the tax literature. In my opinion, inter-nation equity is applicable when capital flows between differing states are uneven and the principle arguably incorporates both political and moral judgements, and it therefore requires judgements and considerations that are rarely explicitly recognized in the tax literature.

In this special issue, Tomi Viitala and Moritz Scherleitner presents their own theoretical approach to inter-taxpayer equity and tax fairness in the paper *EU State Aid Rules as a Means of Promoting Equity within International Taxation With a focus on inter taxpayer equity in light of the Apple case*. They have the ambition of reconceptualizing inter-nation equity through discussions which resembles those traditionally linked to the concept of competition neutrality found within EU competition law and EU state aid rules. The paper uses the recent judgement in the Apple case when outlining an analytical framework concerning inter-taxpayer equity and briefly describes the key takeaways of the Apple case with the intention to analyze how close the decision in the Apple case came to a stylized theoretical optimum of EU-wide inter-taxpayer equity and to what extent such equity may be reached within the EU future wise.

Finally, a less traditional research approach within tax scholarship would be to employ moral and/or ethics theory. Legal positivism (or as it is often applied and referred to in the Nordic states: legal dogmatic method - rättsdogmatiska metoden) makes out the foundation for most tax scholarship and primarily offers an analysis of legal terms, and an inquiry into the logical interrelations of legal propositions.[21] Law and its authority are considered as source-based resulting in the validity of a legal norm being dependent not on moral values or societal norms, but instead on the inherent hierarchy among legal sources. Therefore, the foundation of any legal study, when chartering the present legal situation, is commonly to identify and systematize relevant legal sources. Bentham eloquently refers to this approach as expositors, i.e. those who explain what the law in practice is.[22] This method serves many studies well, yet it should be acknowledged that the exclusion of external factors such as moral values or societal

16 This has for instance been argued by Åsa Gunnarsson. Alice Pirlot has further questioned if it is possible, or appropriate, to discuss tax fairness outside of the domestic sphere. See her criticism of how the EU sets the fairness agenda in her paper: Alice Pirlot, *The Vagueness of Tax Fairness: A Discursive Analysis of the Commission's 'Fair Tax Agenda'*, Intertax vol 48 no 4 2020.

17 See for instance Wolfgang Schön, *Taxation and State Aid Law in the European Union*, Common Market Law Review, vol 36 no 4 1999, pp. 911-936. Wolfgang Schön, *Tax legislation and the notion of fiscal aid: A review of 5 years of European jurisprudence* in Edts. Isabelle Richelle, Wolfgang Schön and Edoardo Traversa *State Aid Law and Business Taxation,* Springer 2016.

18 Koukoulioti is currently writing her Ph.D. thesis with the title *The Benefit Principle Revisited - Avoiding the Repercussions of Digitalization on the Tax Base Sustainability* and Ivan Ozai has published work on the principle, see for instance: Ivan Ozai, *Tax Competition and the Ethics of Burden Sharing*, Fordham International Journal vol 42 2018. Ivan Ozai, *Two Accounts of International Tax Justice,* Canadian Journal of Law & Jurisprudence vol 33 no 2 2020, pp. 317-339.

19 Richard A. Musgrave and Peggy B. Musgrave. *Inter-nation equity* in Modern Fiscal Issues: Essays in Honour of Carl S. Shoup, 1972, pp. 63-85. Also see the exchange in this matter between Musgrave and Kaplaw: Paul R. McDaniel and James Repetti, *Horizontal and vertical equity: the Musgrave/Kaplow exchange*, Florida Tax Review nr 1 1992.

20 Kim Brooks, *Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value* in Edt. Richard Krever and John G. Head Tax Reform in the 21st Century, Wolters Kluwer, 2008. Ivan Ozai, *Inter-nation Equity Revisited,* Columbia Journal of Tax Law vol 12 no. 1, 2020, pp. 58-88.

21 Peter Curzon, *Jurisprudence Lecture Notes*, Routledge 1998.

22 Jeremy Bentham, *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*, Clarendon Press 1996.

norms may provide limited results and restrict argumentation. For instance, when studying tax, and in particular international tax where soft law and political institutions such as the OECD and the EU dictates the conditions and legal situation.

A great example of how ethics theory may be included in a tax study can be found in this special issue through the paper, *Ethical and Legal Responsibility of Multinational Corporate Groups for a Fair Share of Taxes* by Ute Schmiel and Anna-Lena Scherer. In this paper, the horizontal relationship between state and taxpayer is explored[23] with the aim of reducing inequality. The two authors provide an excellent introduction to the concept of inequality and the abstract nature when interpretating inequality through the application of ethical concepts and theories. Ethical concepts argue that companies should generally be held responsible for paying their fair share of tax. Furthermore, the authors argue that these ethical considerations interpret tax avoidance as irresponsible behaviour that results in inequality. However, these findings are at odds with the mainstream economic theory that understands firms as legal fictions.[24] From this economic perspective, there is no reason to deem companies able to pay taxes. Insofar, there is only a legal responsibility of legal fictions to comply with these legal obligations. Within this reasoning, there is no reason to assign a legal responsibility to corporate groups since the group companies, and not the groups themselves, are legal actors. All in all, according to this view, multinational corporate groups' tax avoidance is not unethical and does not lead to inequality. The authors challenge this traditional perception by highlighting possibilities to deem companies' legal fictions from the perspective of corporate tax avoidance. The argumentation of the paper is based upon a political-cultural market approach that explicitly uses micro foundations.

4 Some final words

I would like to conclude this introduction with a call for tax scholars to not only consider justice and fairness more extensively in their work, despite our inherent nature of focusing on the legislation, but also to do so with a holistic research approach, considering taxes as a part of a more extensive system in which coherence, or lack of coherence, plays a vital role. Instead of focusing on specific tax provisions and whether these may be just or fair we should also consider the totality of the state´s treatment of its subjects, its expenditures along with its taxes. Within critical tax scholarship we find many good examples of why this is essential in order to achieve justice and fairness. For instance, a neutrally worded tax code, whether it may be gender neutral or race neutral, may still have an unfair or discriminatory outcome when applied if it does not consider societal values or the reality of the taxpayers in question. Alternatively, if taxation is enforced by a tax administration which does not understand, or consider, the reality of various taxpayer groups.

Or as Pigou expressed it:

> *People´s economic well-being depends on the whole system of law, including the laws of property, contract and bequest, and not merely upon the law about taxes. To hold that the law about taxes ought to affect different people´s satisfactions equally, while allowing that the rest of the legal system may properly affect them very unequally, seems not a little arbitrary*.[25]

23 Using multinationals as an illustrative example of this relationship

24 Scholars such as Reuven Avi-Yonah has discussed this. See for instance Reuven Avi-Yonah, *Corporations, society, and the state: A defense of the corporate tax*, Virginia Law Review no 5 2004.

25 Arthur C. Pigo, *A study in public finance*, Read Books Ltd, 2013.