

The Concept of Tax

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Introduction

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The following text which deals with the concept of tax in EU Member States is the result of a joint effort of different authors. From the start the working group preparing part¹ opted for an integrated approach instead of stand-alone national reports. Starting from a general outline, topic reporters were appointed. When they needed specific information on the national law of the EATLP countries, such information was collected through questionnaires sent to the working group members. If information about certain Member States was not available, the topic reporters relied on their own research on comparative law.

This report contains four sections. The *first section* (1.1) constitutes a general introduction to the concept of tax. In subsection 1.1.1 and 1.1.2 William Barker and Henk Vording give a predominantly normative approach to the aforementioned concept. According to William Barker the normative inquiry into the concept of tax is an examination of the motivating forces and teleology of taxation in different countries and how stated and implicit goals are realized. Tax law is a manifestation of the complex value system of a society. In this setting, tax is one of the primary tools for obtaining social equity. Barker concludes that the normative approach indicates that the concept of tax is not static and that it should develop in response to change. A definition of tax law that will be good for all times and places cannot be found because as societies change, so too do their aims and purposes.

Vording tackles the question of what normative role could be served by defining a concept of tax. This approach enables him to explore some philosophical and economical thoughts about the role of the state in taxation. In particular, libertarian and utilitarian thinking on property rights and taxation are briefly reviewed. This review enables him to address the issue of why one would want to limit the state's taxing power rather than its general regulatory power. Are there special reasons to be normative about tax legislation that do not apply to legislation in general? Finally, assuming that tax legislation needs special, either procedural, or outcome-oriented, limitations, Vording tries to answer the question how a concept of tax should be defined.

In subsection 1.1.3. of the first chapter entitled '*the concept of tax as a legal concept*', Gisela Suchy states that tax is not only an economic concept but a legal concept as well. She describes several definitions of tax. According to this author, taxing is a right rather than a power of the State. To assert this right properly the State has to

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respect the fundamental freedom of individuals and to act within the framework of public law governing public action.

The *second section* (1.2.) written by Gisela Suchy offers a general overview of the different sources of funds (loans, donations, fines, fees, and social security contributions...) obtained by the government to finance its expenditure. This overview should enable the notion of tax (and the several types of taxes) as explained later on, to be distinguished from other categories of government funds.

The notion of tax and the different types of taxes constitute the subject of the *third section* (1.3.). This section starts with a comparative part by the hand of Marco Barassi. He gives a comparative overview of the definitions given to the notion of tax and to the fees and other types of levies in different EATLP countries. In a second part Lorenzo Del Federico deals with the distinction between the concept of tax and the notion of 'commutative' taxation which is based on the idea of exchange.

The *fourth section* (1.4) of the report is the most extensive one. In this chapter - written by Marc Bourgeois - different legal rules which explicitly or implicitly refer to a legal concept of tax are identified. Since these rules refer to the concept of tax, the latter implicit reference is from one point of view an element of the former explicit reference. Consequently, the notion of tax must be defined in order to apply those rules properly. Moreover, from another point of view, the way in which those rules are interpreted in the different EU Member States, can help to define the concept of tax.

A first subsection (1.4.1) deals with the general constitutional principles that can have an important influence on the way government activities are or should be financed. For instance, *does* the constitutional right to require that a fair trial imply free access to the court making collective financing of court action by taxes compulsory, or is it possible for those citizens who go to court to pay for the court action? The same question arises *mutatis mutandis* concerning the constitutional right (in some countries) to free – sometimes compulsory – education. Furthermore, the question arises whether the equality, non-discrimination and ability-to-pay rules also affect the notion of tax. Is tax essentially a redistributive or solidarity instrument? In this subsection no attention is in principle paid to the constitutional rules that specifically govern taxation. These principles are the subject of part. 1.4.4. The distinction between general constitutional principles and specific constitutional tax principles did not always seem appropriate. For instance, regarding the way the equality rule is applied in the EU Member States, it appears that the equality issue has nothing to do with the way the rule is formally drawn up in the Constitution (general nontaxation principle versus specific tax rule).

Subsection 1.4.1. ends with a pointed and methodical illustration concerning several methods of financing motorways.

Subsection 1.4.2 deals with the relationship between taxation and the expropriation of goods (and services). Questions such as how the constitutional protection of property relates to the constitutional right of the government to setting taxes and to what degree taxes can have an 'expropriative' character are the subject of this subsection.

In subsection 1.4.3. the issue is whether, and if so, why there is a relationship between the interest of defining the concept of tax and the way the power to tax is divided within the countries under review. It is not the purpose in this subsection to deal extensively with the division of taxing powers in the several EATLP countries. However, especially in federal (or rather decentralized) countries the question arises as to what the relation is between the competence to levy tax and the so-called substantial (regulatory) competences at the federal and decentralized levels. Is the power to tax considered as autonomous or is it substantially connected to other kinds of government responsibilities (social policy and, economic policy, for example)? Is the concept of tax different at the central and the decentralised level of government?

As mentioned above, subsection 1.4.4. deals with the specific constitutional principles of taxation and their justification. These include the legality principle ('no taxation without representation'), the 'annuality' principle, the equality principle, and the principle of solidarity among others.

Finally, the specific constitutional principles underlying other types of financing government action and their justification are the subject of subsection 1.3.e. These include, for example, the principles concerning retributions and social security contributions. Some countries have specific constitutional provisions concerning 'retributions, Gebühren' and social security contributions (*parafiscalité*). The questions include what is the justification of those principles and what is their impact on the notion of tax.

In the fifth subsection (1.5.), Marc Bourgeois gives a non-exhaustive list with examples of the so-called secondary consequences of the distinction between taxes and the other types of financing government action in the different EATLP-countries. Different legal consequences of labelling a levy as a tax are put in evidence. For instance, the impact of these include qualifying government income as a tax on the scope of national tax-evasion measures, on judicial control measures, on the application of penal provisions, and on the availability of obtaining rulings. Specific attention is given to the justification of these secondary consequences.

Finally, part I ends with some general conclusions.

1.1. The Relevance of a concept of tax

1.1.1. The Concept of Tax: a Normative Approach

William B. Barker

There are many reasons for studying tax. Cicero called taxes the sinews of the state; it is the primary way societies allocate the burden of government to their people² Its impact is enormous; in some advanced economies taxes can account for as much as fifty percent of Gross Domestic Product.³ This impact is felt by citizens in most aspects of their daily lives.

²See William B. Barker, *Statutory Interpretation, Comparative Law and Economic Theory: Discovering the Grund of Income Taxation*, 40 SAN DIEGO L. REV. 821, 822 (2003).

³See JOSEPH P. QUINLAN & KATHRYN STEVENS, 101 TRENDS EVERY INVESTOR SHOULD KNOW ABOUT THE GLOBAL ECONOMY 144-45 (Lincolnwood Contemporary Books 1998).

The inquiry into the concept of tax is a search for those principles or standards that identify taxation as a critical element of human legal experience. This study must be a truly comparative one that removes tax law from the confines of one nation's practice and places it in the wider context of mankind's struggle for improvement.⁴

One can begin to get a sense of how broad the idea of tax law is when one considers the ways in which different nations classify tax law, which include the categories of public finance, budget administration, and social welfare law. The idea of tax law starts with the recognition that tax law is public law that deals with the duties and relationship of individuals to government and society.

Tax is a powerful tool for achieving economic and social policy. Thus, in today's democratic societies, tax serves many goals, the first and foremost of which is providing for the transfer of resources from the private to the public sector. In general, a state taxes in order to remedy failures in private markets to provide important or necessary goods and services to the populace. Taxes represent a nation's decision regarding what benefits should be paid for collectively and what should be paid for individually. Tax law as public law, however, shares public law's purposes to influence, modify, and control individual conduct for the public good. Therefore, the concept of tax cannot be found solely in its obvious role as one method of providing government funding. It must also be seen from its other democratic goals, which are to allocate the burden of taxes fairly among the people and to promote economic stability and prosperity.⁵

The overall goal of this study is to arrive at the thing called tax. As a study in legal theory and comparative law, there are three approaches to the analysis: the analytical, the functional, and the normative.⁶

The analytical approach is a descriptive approach that seeks to analyze, characterize, and compare the rules and concepts of different systems. The analytical is the traditional positive law, doctrinal approach to comparative law. It could be said that the analytical exposes the skeleton of tax. In other words, it exposes those shared or common elements of the concept of tax that can be viewed independently of time, place, or political system. Many of the authors in this study concentrate on the basic legal framework of taxation in the European states (and Brazil) in order to determine those factors that are relevant to the discipline of taxation. These studies emphasize an analytical approach to the concept of tax. In many of these works, there is significant agreement as to many of the common elements of the concept of tax. However, the similarities are not sufficient to reach a broad consensus on or comprehensive definition of the concept of tax.

⁴ See, in general, 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*, 109 PENN ST. L. REV. 703 (2005).

⁵ JOSEPH A. PECHMAN, *FEDERAL TAX POLICY* 5 (5th ed. 1987).

⁶ See Barker, *supra* note 3, at 706-710.