

Basic Research in Tax Law

Matti Myrsky

A Introduction

Taxation has always been a significant means of financing the public sector and has great importance in the development of European integration. It also has a conspicuous effect on the individual's everyday life and the economic affairs of society in general. Taxation also has a marked effect on work, savings, investment as well as the economic behavior of individuals and enterprises.

In the traditional organization of the legal system tax law is a part of fiscal law, which includes regulations governing the acquisition of resources by public power (tax law), plans concerning their utilization, decision-making, use and inspection (the law of fiscal administration). Tax law also has close connections to other legal areas such as administrative law and civil law, in particular, commercial law.

The purpose of this article is initially to outline various approaches to research concerning tax law; I will then examine novel questions in tax law research and finally focus on basic research in tax law and the great contribution of other social science research from the perspective of tax law. The problematics is primarily viewed from the perspective of the Finnish experience, but there are probably general features which are common to other countries.

B Research Approaches to Tax Law

The bulk of the tax law research which has been and is currently being carried out can be characterized as *judicial or legal dogmatics*. Its primary task is to clarify the existing legal situation (*interpretive task*). In practice this is generally manifested as a question involving the existing judicial view towards the interpretive problems under consideration at the time. It has concentrated on clarifying the existing legal situation and the construction of precedent regulations on the basis of case law.

In addition to its interpretive task, judicial research also has a *systematization task*. The objective is to continue the legislator's work from the point it has now reached. On the basis of abundant judicial source material (drafts of legislation, parliamentary documents, other official materials, precedents), the intent is to construct a system of tax law and to bring order out of the material chaos.

Judicial tax law research fulfills a major social function. This is the primary task of tax law research. The reasons for this prevailing research approach are understandable, since the society is dominated by a continuous immense need to explain the existing regulations governing taxation. In creating new legislation, the point of departure is also "where we are," i.e. the existing juridical situation. It is not always clear which matters under discussion at the time require interpretation; in other words, consideration and outlining interpretive problems are also a part of judicial research.

Taxation can be approached from the perspective of judicial history (*tax law history*) as well. In this case, the objective can be to clarify the creation and development of tax legislation and to help comprehend why the current legislation takes precisely the form it does. Merely maintaining historical consciousness of previously dominant tax regulations is important. Clarifying these regulations can also have its own absolute value and cultural function; it will not necessarily be "profitable."

Experience indicates that from time to time certain basic questions of taxation become the subject of the debate over tax policy. It is then necessary to be aware of how matters were previously handled legislatively: "the wheel need not be invented again." With an eye to the future, valid solutions may also be found in legislation which has been repealed. The past can be a gold mine; only when massive amounts of gravel and mud are removed can we find gold, if it is there to be found. In addition, new legislation is almost always enacted on the basis of the old.

The importance of the comparative judicial perspective (*comparative tax law*) has increased in recent years, despite the fact that it has always been important from the Nordic standpoint. It is valuable to know what has been done elsewhere, if for no other reason – since the experience has already been gained – than avoiding the same juridical situation which may have already proven to be wrong.

A central reason for the growth in importance of comparative judicial data is membership in the European Union and the stimuli and challenges it has provided for tax law research. This may, for example, be a question of the demands placed on the legislation of individual states by various directives, the real options they may contain and how other member states have adopted comparable directives into their legislation. Development in the EU sphere requires keeping abreast of issues and research activity in such matters as taxes on consumption, capital and environmental pollution. On this basis, stimuli can also be found in research into tax policy.

From the standpoint of judicial policy (*tax policy*), tax legislation can be examined as an existing phenomena in change and by analyzing the differences between the existing judicial situation and the best possible existing legislation. Based on this, it is possible to present well-founded proposals for changing the

legislation. As there are no absolute truths, research can, however, furnish the best available legislative alternative in an uncertain world. As the change in the surrounding society and tax legislation has become even more turbulent, this importance of the approach has also increased.

From the research perspective tax policy can be extremely difficult, especially since keeping the viewpoints of the researcher, actor and executor separate is not always a simple matter. This differentiation is not facilitated by the fact that these individuals are often close to everyday politics and may even participate in it. Tax policy research also touches sensitive areas which are essentially based on values. Objectivity is thus always in jeopardy.

Basic research concerning tax law explores those matters generated by tax legislation which are mainly independent of time and place. The general doctrines of tax law fundamentally involve the relationship between the judicial system and the rest of society. This approach will be examined separately below.

While in the sphere of judicial research it is therefore possible to approach taxation from several perspectives, we should emphasize that they are not mutually exclusive. There is, however, reason to distinguish between them: is a completely different matter to state an opinion on an existing juridical situation than to espouse one concerning tax policy.

Often, particularly in research involving a doctoral dissertation, all approaches are in one way or another presented. The borders between approaches should not, however, be emphasized too much; they are also conventional. For example, juridical research may provide the impetus for tax policy while the comparative tax law approach may assist in “recognizing” interpretive problems in one’s national legislation which may have previously been overlooked. It is, however, important to define perspective employed at a given time.

C The Changing World and Changing Issues

Dynamic social development also affects tax law research. There is a continuing demand for research due to changes affecting legislation and the significance of the field. The particularly strong connection to the development of the economy, and economic phenomena in general, spawns a situation in which the legislation must change ever more rapidly and often. As a result enormous pressure is produced to clarify the existing juridical situation. These circumstances, however, also offer ample possibilities and requisites for other research approaches. The situation is often affected by major economic interests related to taxation.

The expansion of the research spectrum and the gradual change in focus presupposes in particular a future social condition leading to great challenges, especially for taxation policy research as well as basic research. The following questions may be used to illustrate those challenges:

- on the basis of what measures concerning tax and social policy would it be possible to reduce unemployment?

- to what extent should income distribution and people's living conditions be equalized, what is basis of the relationship between motivation and equalization policy, and what is the role of taxation in this?
- what is the significance of capital-based, increasingly automated and globalizing production on the current enterprise tax system based on net profit?
- what is the actual tax autonomy of a member state in the EU environment?
- what is the importance of taxation on family policy and demographic policy in general?
- in what ways can state and municipal tax revenues guarantee the social functions they are required to provide?
- what would be that system of taxation which fulfills, e.g., the Rawlsian criteria for justice and to what extent do individual state taxation systems contain these features?
- how do individuals view the system of taxation and consider it in their decision-making?
- what is the role of the taxation system in regard to promoting regional policy and industries in the EU environment?
- as taxation is a consequence of tasks set for the society, how can the existence and operations of the state and other public communities be justified; should taxpayers and the state conclude a new social contract?
- upon what value world is tax legislation (implicitly) based?
- what are the aftereffects of globalization on our system of taxation?
- what might be the legislative alternatives to the so-called Tobin tax?
- in the end, who benefits from tax revenues?
- who interprets the common good and makes decisions affecting it?
- is the common good used to benefit the few?
- are various types of taxation which affect work in essence obsolete?

Since the present and the future pose these questions, it is obvious that *traditional tax law jurisprudence has no possibility of answering them*. Due to the society's informational needs and traditions, legal dogmatics has fundamentally been the major emphasis in this research, but recent development in particular has also stressed the importance of other approaches. Micro-research which is judicial in tone cannot be considered sufficient. This risk is that we may too easily concentrate on detail at the expense of the whole, thus causing the general critical position to suffer. It must, however, be underscored that the legal dogmatics approach will always be necessary. It cannot be replaced by other research approaches when we seek to solve a question concerning the existing legal situation.

On the basis of the previously noted questions we may conclude that the other social sciences have a great deal to offer tax law research. In this case, this is not, however, a question of initiating research work in some other discipline, but solely a desire to critically benefit from existing research results. We need to be

critical since no discipline is a homogeneous, constant system with results that are considered unchanging. We must also bear in mind the value basis and different hypotheses of each discipline. Due to these factors carrying out specific basic research in tax law is imperative.

D Basic Research and its Importance

The core of basic research is comprised of those questions which would have to be answered if we seek to resolve tax legislation on the basis of a “clean slate.” These basic questions concern the choice of the subject and object of taxation. A third major group of issues affects the more precise determination of the tax base and the calculation of the degree of taxation.

The sphere of basic research includes questions about the selected tax base (income, consumption, wealth and transfer of wealth) and the determination (e.g. progressive taxation) of tax bases (tariffs). But these also pertain to questions of fairness, the systematization of different taxation systems and issues involving assessment as well. In addition, basic research also concerns issues such as the alternatives for organizing family taxation and the compatibility of the tax and social security systems.

We might hope that matters pertaining to the comprehensive analysis of tax law concepts and the systematization of the taxation system could be afforded more attention. The same could be said, for instance, in regard to the taxation power of the authorities, the purposes of taxation and the function of society in general. From the standpoint of developing the system, these matters in particular can, however, have strategic importance. They could also better help to outline the current situation and totalities. We should try to examine the current situation on the basis of “points” existing in the future. Here, the selection of the proper perspective has a decisive importance. Then, for example, the existing judicial situation would only appear as one alternative among many. Without new perspectives, no new understanding will necessarily be generated.

Basic research comprises that footing upon which applied research is largely established. When the norm material in respect to taxation as a whole becomes impossible to govern, we must not lose sight of the overall guidelines. If a sufficient amount of basic tax law research exists, we are not in the same way dependent on development that has occurred elsewhere nor of playing the role of implementer.

Naturally, this has always occurred and will continue to occur, but we must be able to provide an effective critique. The condition, however, is that a sufficient number of proven instruments of assessment are available. Original theoretical research on taxation can also optimally represent system-level “export products.” In that case, the contribution of tax law would in no way only be a reaction to the interpretive problems which arise at the time or to legislative impulses derived elsewhere.

Orientation to basic research opens horizons to other disciplines involved with taxation and necessitates the utilization of their research results. This, in turn, may be a significant benefit. We must bear in mind that, for instance,

economics was originally a part of philosophy, and only gradually diverged. On this basis, we must discover viewpoints which combine apparently unrelated explanatory systems of society (various disciplines). The boundaries of seemingly unrelated research areas should be crossed and perhaps in part be made superfluous. Paradigm changes do not necessarily arise from inside the system, but externally. Progress in the human sciences often occurs as a result of analogies transferred from one field to another.

All scientific research should delve deeply into the foundations of their own areas; various “mirrors” may in this way be found. This is important specifically in regard to the construction of taxation systems, which require proposals which are based more than before on principle and go beyond general surveys. We also have an increasing need for extensive proposals which deal with the *comprehensive taxation system* from some point of view. The objective can also be making understandable what has previously been incomprehensible or even invisible.

Taxation policy research, in turn, requires that the foundations of a discipline be valid. The foundations of the taxation system are not often “evident,” but are decisively important. Therefore, it is important to periodically check their quality and validity.

When we begin to engage in tax law research, we are easily confronted with the boundaries of the discipline. We may be unable to discern any actual tradition having arisen in the latest research though the basic issues pertaining to taxation have been presented in several different contexts.

E The Significance of Other Social Sciences in Tax Law Research

The greatest contribution to basic research in tax law has been provided by other fields in the social sciences. Primarily, this involves those fields exploring the individual and society. Examples of these are political science, administration, social policy and philosophy.

The contribution of social policy can be expressed, for instance, in considering the development of the system of deductions or the possibilities of integrating the taxation and social security systems. Issues pertaining to philosophy and its sub-areas can provide stimuli in pondering the fairness of taxation, the rights and duties of the individual in respect to public power and, in contrast, what are the functions of the state, etc. Even theology and the sociology of religion may have a great deal to offer. Nor must the contribution of other fields necessarily be “new.”

When taxation is related to people’s economic behavior, sciences such as psychology and social psychology play key roles in explaining this behavior. For example, how does the taxation system in fact function at the individual level? How do individuals experience it and internalize it in their decision-making? What is the actual effect, for instance, of clauses concerning tax evasion? What is the juridical interpretation and how, for example, may the effect of the authorities’ feelings be expressed in it or the construction of the taxation structure?

The answers to questions such as these may provide important feedback about the operations of the taxation system, which in turn can have great significance in drafting new legislation. A successful system of taxation may in general be more psychological than mathematical. People are not automatons, complex machines or creatures that in some unambiguous way maximize profit, but extremely complex and developing systems.

Political science can be of assistance, for example, when we wish to clarify how the so-called lobbying system shapes tax policy and the tax legislation it is based on. What is the role of drafting a law in regard to its enactment? Who in practice generally wields power in initiating tax legislation and who has the power to further tax reforms?

The most important “non-juridical” discipline is economics. What may it contribute to tax law research? Most important are the stimuli, which may be more diversified. For instance, the purpose of the theory of optimal taxation is to determine the best possible taxation structure and scale for the selected criteria of social well-being. The economic sphere contains a substantial amount of diverse “raw material” that is meaningful to tax law research; its importance to future legislation can also be very high.

Economic problematics and instruments of analysis can open new horizons for the examination of judicial questions. Law and economics can be cited as an example of this. The centrality of the economic approach in tax law research, especially from the perspective of taxation policy, is considerable, even though we can also benefit by weighing different interpretive alternatives, in other words, in regard to the existing judicial situation.

Tax law research is needed to mediate, to transform, economic research results into functional legislation. Ideas “as such” cannot be implemented; in a constitutional state they need to be put into a legislative form. In that case, it is not enough that we operate according to the “enterprise” concept, but we must take into account that the law permits numerous forms of enterprise.

Thus the general relationship between the economics of taxation and tax law research can be described as a form of partnership; they have a mutual need. Economics may furnish the content, but jurisprudence provides the form; occasionally, this order may be reversed. On the other hand, jurisprudence can aid in bringing high-flying ways of thinking “down to earth;” in a way it functions like a medical researcher doing clinical work.

From the standpoint of tax law research, this is largely a question of utilizing the results of economics. We should be aware of them and utilize them when necessary. The utilization of research results from another field are chiefly a question of benefitting from existing data rather than, for example, doing something for which we have no competence.

Utilization does not, however, represent automatic acceptance; in other words, we may not relate to such results uncritically, since nothing can be considered “given.” In economics there is no uniform, constant system of unchanging truths. We must also take into account the value basis and various hypotheses contained in (linked to) this discipline. Furthermore, important fundamental concepts should be questioned and subjected to critical assessment. These include the key economic concepts of efficiency and neutrality, as well as

such concepts as optimal taxation and tax arbitrage. Are the measurements and indicators in economics sufficiently justified and, by using them, what conclusions can we in fact draw? The world in general is a more difficult and complicated totality than many economic hypotheses suggest.

Tax law research can in this way gain significant impetus from other disciplines; the analogies we derive from them can be a force propelling science forward and help in examining matters from something other than the “rear-view mirror” perspective.

F Tax Law as a Part of Jurisprudence

An increasing number of relevant problems are such that preclude resolution by concentrating on one, narrowly understood discipline; new positions need to be adopted. Regardless of how extensive the examination has been, this is no guarantee that the research results will be important to the entire society. The necessary degree of integration between various judicial areas and, at the same time, the totality and unity of the judicial system should be significantly emphasized.

It is important to outline the judicial order even more holistically, both as a whole and multi-dimensionally. Tax law research should to an increasing degree *go beyond the boundaries of jurisprudence*.

For example, in tax law research progressive taxation is rarely examined expediently, separated from other juridical issues, especially those related to the incomes of the citizens. We can cite so-called traps and the way they are created as an example. These come about because the taxation system does not always consider the effect of income transfer systems nor do the income transfer systems always take into account the effect of the taxation system.

Explaining the problematics involved with this requires close co-operation between judicial areas (chiefly between tax and social law). If we, for example, in the future start to consider the introduction of a some sort of a negative income tax system as an integrated alternative for replacing the taxation and income transfer system, this will fail if it is unable to create legislative alternatives which go beyond individual judicial fields.

It is also possible to ask whether taxation could be used to prevent poverty while not reducing individual initiative. In this case it is important that various structural factors such as stimuli would provide the opportunity to work and allow it to be taken up; this would be greatly affected by taxation. What might be the basis for developing a concept of social tax law?

It is also problematic that research in fiscal law has generally only been interested in the income side of public communities, i.e. questions concerning taxation; the connections between the sources and use of money can be obscured. Questions such as the purpose of taxation, the function of public power and how it is funded, as well as matters concerning the level and determination of the tax burden may then receive less attention. Taxation involves the relationship between the individual and society, which is two-sided:

what are the rights and duties of the individual towards society but, on the other hand, what are the rights and duties of society in respect to the individual.

There may also be numerous connections between constitutional and tax law. Examples of this include the question of how much tax in general may be collected from the citizens. How much, for instance, of an individual's income may the society "confiscate?" What is the relationship between the individual's own labor and its utilization according to basic judicial regulations? Nor should we forget, for example, the viability of the concept "ability to pay tax" and the significance and determination of the right of insolvency, work and the status of entrepreneur in tax, labor and pension legislation. Numerous questions concerning the setting of limits between tax and criminal law and the problematics of this are also important.

It is obvious that traditional judicial systematics should be reformulated to develop *several parallel and concentric judicial systematics*, which would better fulfill current and, in particular, future needs. In any case, a strict systematics would need to be "flexible" in accordance with the demands of the period. For instance, it is possible to outline the position of fiscal law in the alternative systematics affecting the collection of public power resources, as a system re-dividing and organizing them as well as one insuring risks, in a way that is different from the traditional system. Therefore, in relation to other juridical fields, fiscal law could be seen to be much more than just a special administrative procedure that was separated from administrative law.

Development does not, however, mean that we should eliminate traditional juridical fields. They should be viewed from new perspectives and seen in a new way, since a sharp vertical division (by judicial area) will not resolve future problems through juridical means. The prevailing juridical systematics has "stiffened" and is tied to the past. The difficulties caused by this fragmentation of the societal whole and the accompanying problems of jurisdiction have for long been visible and they are becoming even more serious; "the right hand does not know what the left is doing."

In practice the foregoing can mean that in the future research work will emphasize the collective activity of researchers in various fields in a framework of broader research projects, and research will not be based to such an extent on individual researchers, as has thus far been the case.

G Conclusions

The fiercely changing operational environment continuously generates serious problems that tax law research also seeks to resolve. The major unresolved questions of our society thus produce special tasks for taxation policy and as a result for people doing research into tax law. The research needs are exceptionally great since in the future the economic upkeep of public sector systems (including taxation) will at least in part increasingly need to be harmonized within the EMU framework.

Tax law research has for a longtime been judicially dogmatic in nature, but the focus is gradually shifting towards studies based on taxation policy and

European tax law. Furthermore, the quality and quantity of basic tax law research needs to be sufficient since it largely lays the foundation for other tax law research and co-operation with other social sciences within this framework is natural. All this requires intellectual curiosity, wide reading and an all-round education.

The determination, formulation and problematization of relevant issues as well as seeking well-founded answers on the basis of this is essential. The proper questions are important as they remain (relatively) unchanged; the answers have a tendency to change over time. We need to outline larger totalities and identify fixed points, which are already necessary to explain where we are going at a given time. An important objective would also be to place established ideas into a new order and new contexts. Society is a microcosm of the universe, which may now be in the process of shifting from a Ptolemaic system to a Copernican one.

It is useful to also see various fields of social science research as *concentric rather than only parallel explanatory systems*. The changing role of jurisprudence requires a holistic approach and basic research in the field. It also demands that basic judicial research be combined more efficiently than has previously been the case with the research traditions of economics and other social sciences. Tax law is not merely an area of jurisprudence, but also an established discipline in the social sciences. Tax law should increasingly be seen as a part of the entire judicial system together with the other fields of jurisprudence, and also as a part of the social sciences, keeping in mind the values and traditions backgrounding them.

Tax law research should problematize issues which are related to renewable social processes, not to those which are being rejected. It is precisely these matters that can have strategic importance from the standpoint of developing the system. This can involve, for example, the role and significance of taxation from the perspective of the maintenance and development of the Nordic welfare state. A welcome academic critique of existing policy can arise on the basis tax law research being more broadly understood as a counterbalance and as a means of initiating the discussion demanded of a vibrant civil society.

In the end, taxation is a question of what kind of society do we want to construct and finance. What are the values and principles it is based on? Therefore taxation cannot merely be a series of autonomous objectives arising from its own problematics. Tax law, no less than any other segment of jurisprudence, is not divorced from the problems and values affecting society. The time has again come to look at taxation as a part of the societal whole and its material fairness.

Modern jurisprudence can be seen as a combination of the methods and achievements of various disciplines. Jurisprudence can hardly be considered a science with a truth that can be verified by some special method. The question is rather one of a discussion between those investigating the judicial system and others (and society).

Jurisprudence is universal in that sense that in a certain period there are certain problems facing the level of cultural and economic development in societies which need to be resolved. This common background and the

homogeneity of the problems which arise create the foundation upon which it is possible to participate in the international discussion.

The expansion of the research concept and the range of tax law provide better possibilities of broadening the paradigm into an actual body of *tax law research*, in which the nucleus is chiefly founded on the problematics arising from basic research. Meeting the challenges demands new effective and diverse co-operation between sciences studying the individual and society. It would also offer an opportunity to participate in the international discussion in a new way.

Changing the focus of the research would also provide a way of freeing ourselves of the ballast of time and place. In part the research could also shift, as in painting, from figurative, representational art to the abstract. Things could then be expressed so as to include deeper and more difficult questions. In order for juridical research on this level to have any significance from the standpoint of the surrounding society, the level of abstraction, however, should not be allowed to go sky-high. We can – and should – reach for the stars, but at the same time we need to keep our feet firmly on the ground.