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OMRI Y. MARIAN\*

## The Discursive Failure in Comparative Tax Law

*“What we’ve got here is . . . failure to communicate.”<sup>1</sup>*

*Tax comparatists tend to bemoan the grim status of their chosen field. Complaints are aimed both at the scarcity of decent comparative legal tax scholarship, and at the lack of a theoretical foundation for the study of comparative tax law. The purpose of this Article is to portray a more sanguine, yet critical, view of this field. Sanguine, since a sympathetic reading of contemporary comparative tax scholarship demonstrates that there is more than enough such scholarship to generate a lively debate on comparative tax works and their methodologies. Critical, since all of these works fail to produce even the faintest form of paradigmatic discourse. The result is that contemporary academic literature in comparative tax law contains strongly conflicting arguments, running parallel courses, without ever engaging each other. In this Article, I try to construct a framework for a coherent and vigorous academic discourse on comparative taxation. I do so by placing existing comparative tax scholarship in the context of pivotal debates within general comparative law, and point out the abundant contradicting arguments in the field of comparative tax law. One cannot help but wonder how is it that tax comparatists have failed to support or rebut each other’s positions. One possible reason for this lack of engagement is perhaps that it enables tax comparatists to rest comfortably in the warm confines of their own scholarship without being bothered by questions regarding their methodological—and consequently their ideological—stances. Finally, for the sake of a debate, I offer my own views by responding to a recent article authored by Carlo Garbarino.*

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1. STROTHER MARTIN, *Cool Hand Luke* (Warner Bros. 1967).

## INTRODUCTION

An occasional reader of comparative tax scholarship would quickly learn that tax comparatists tend to bemoan the grim status of their chosen field of study. Notable commentators repeatedly express their frustration with the “sparsity of general literature” in comparative taxation,<sup>2</sup> the “dearth of good comparative tax studies,”<sup>3</sup> and the “marginal role” played by the “comparison of national tax systems” in academic scholarship.<sup>4</sup> The faultfinding, however, goes beyond complaining about the leanness of scholarly literature. Tax comparatists point to the seemingly ever-primordial stage of scholarship—a stage from which the field apparently is not able to extract itself. One prominent scholar recently noted the lack of any “comprehensive attempt to develop an academic discipline of ‘comparative taxation’ or ‘comparative tax law’.”<sup>5</sup>

The purpose of this Article is to draw a more sanguine, yet critical, picture of comparative tax studies. Sanguine, since a careful reading of contemporary comparative tax scholarship demonstrates that there is more than enough such scholarship to generate a lively debate about comparative tax works and their methodologies. Critical, since all of these works fail to produce even the slightest form of paradigmatic discourse. The “non-development” that tax comparatists complain about is largely of their own doing (or rather, non-doing). The *real* and acute problem with comparative tax studies is not the lack of good comparative tax works, but the utterly absent academic discourse about it.

This point can easily be illustrated by looking at the two so-called “canonic” texts<sup>6</sup> in comparative tax scholarship. These texts 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. So how is it that they have achieved such unprecedented esteem? How can two works that have almost no theoretical foundation become canons? The answer is that tax comparatists simply did not have anything better at their disposal. While this provides a practical justification for the extensive reliance on these texts, it also calls for some serious reflection on the part of tax comparatists.

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2. VICTOR THURONYI, *COMPARATIVE TAX LAW* 6 (Kluwer Law Int'l 2003).

3. Michael A. Livingston, *Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax*, 18 CAN. J. L. & JURIS. 119, 119 (2005) [hereinafter Livingston, *Law, Culture, and Anthropology*].

4. Carlo Garbarino, *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*, 57 AM. J. COMP. L. 677, 679 (2009) [hereinafter Garbarino, *An Evolutionary Approach to Comparative Taxation*].

5. *Id.*

6. HUGH AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* (2d ed., Kluwer Law Int'l 2004) (1997); THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2.

Yet, the assertion that there were no attempts to develop a theoretical framework for comparative tax law is factually wrong. The problem is rather that such attempts were usually ignored by everybody except their own authors. In fact, crude attempts to tackle issues of comparative tax methodology were made and even debated as early as the late nineteenth century.<sup>7</sup> Somewhat more refined endeavors to address the scope, purpose, and methodology of comparative legal tax studies appeared in the 1950s,<sup>8</sup> while recent years have seen several sophisticated investigative efforts with regard to these issues.<sup>9</sup> Still, when it comes to issues of *meta-comparative* taxation, tax comparatists rarely cite, and almost never *respond* to, each other. Tax comparatists almost always start their work from scratch, failing to use already existing supportive arguments for their own objective, just as they simply ignore other authors' contradicting arguments which they should tackle if only to validate their own conclusions. In that sense, tax comparatists have fallen victim to their own presupposition that comparative tax is marginal or non-existent. As a result, the contemporary academic literature in comparative tax law contains conflicting arguments that are not being acknowledged, let alone confronted. This non-discourse allowed some tax comparatists to introduce their work as an objective, apolitical endeavor, when in reality it is anything but apolitical.

The primary objective of this Article is to shake tax comparatists out of their discursive coma. I shall try to set up an initial framework for a coherent academic discourse *on* comparative taxation: its definers, terminology, scope, purpose, and methodology. Such a frame of reference is necessary so that tax comparatists can understand each other, arrive at a fruitful debate and, ultimately, at a qualitative evaluation of comparative tax works.

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7. Edward Atkinson, *The Relative Strength and Weakness of Nations*, THE CENTURY ILLUSTRATED MONTHLY MAGAZINE, Apr. 1887, at 613. This article ignited a fierce methodological debate. It must be mentioned however, that most of the debate evolved around fiscal, rather than legal issues. See, e.g., Henry B. Gardner, *Comparative Taxation*, SCIENCE, Mar. 25, 1887, at 296; Edward Atkinson, *Comparative Taxation*, SCIENCE, Mar. 11, 1887, at 214; Henry B. Gardner, *Comparative Taxation*, SCIENCE, Mar. 4, 1887, at 218.

8. John C. Chommie, *A Proposed Seminar in Comparative Taxation*, 9 J. LEGAL EDUC. 502 (1957); John C. Chommie, *Why Neglect Comparative Taxation?*, 40 MINN. L. REV. 219 (1956).

9. See, e.g., Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4; Livingston, *Law, Culture and Anthropology*, *supra* note 3; 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, 703-16 (2005). THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2, at 1-14; Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 VAND. J. TRANSN'L L. 1105, 1135-57 (2002) [hereinafter Infanti, *Spontaneous Tax Coordination*].

The Article proceeds as follows: Part I addresses the necessary question: what is comparative taxation? Tax comparatists have usually neglected this preliminary task. Thus, they are lacking a rallying point from which a discussion can be launched. Part II briefly surveys common approaches to comparative law research in order to set the suggested framework for the comparative tax discourse. Part III implements this framework by placing contemporary comparative tax scholarship in the context of several pivotal debates in comparative law. Part IV intends to jumpstart a discourse, using the framework developed in Part III in response to Carlo Garbarino's recent article in which he promotes an "evolutionary approach" to comparative tax law.<sup>10</sup> Part V concludes with a call for further discussion.

## I. WHAT IS "COMPARATIVE TAXATION"?

### A. *In General*

With the exception of some rare examples (discussed below), tax scholars have made no attempt to define "comparative taxation." Rather, scholars have chosen to explain *why* it is important and *how* should it be done.<sup>11</sup> It seems that for the most part, tax comparatists just did comparative tax research without much thought about what it *is*.

It seems that the only attempt at the "what *is* it?" question was made by Victor Thuronyi who introduced the question but mentioned only that "comparative law involves more than just describing the rules of another legal system."<sup>12</sup> Along the same lines it was recently argued that "we need to move beyond the idea that comparison is just a special technique . . . but we should consider it as a separate discipline, strictly hinged to a theoretical framework."<sup>13</sup> These definitions are of little help since they do not explain what should or should not be considered part of this "discipline." Still, they are a starting point. By agreeing that comparative taxation is more than a "technique," these assertions present us with two possible answers to the "what is it?" question: first, that it is at least a "technique," but probably better called a *method of research*; second, that it is also more than a method, presumably some sort of *knowledge*.

Even the novice general comparatist will immediately recognize the sustained debate about whether comparative law can be labeled

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10. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4.

11. *See infra* Part III.

12. Victor Thuronyi, *What Can We Learn from Comparative Tax Law?*, 103 TAX NOTES 459, 459 (2004). After this single sentence, Thuronyi immediately turns to describe the "focus" of comparative law, namely, methodological, rather than definitional, issues.

13. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 684.

an “academic discipline.”<sup>14</sup> Some commentators assert that comparative law is only a methodology for legal research.<sup>15</sup> Some go as far as to imply that, from a normative perspective, it should not be more than that.<sup>16</sup> Other, equally notable, commentators point to decades of incremental accumulation of knowledge in the field of comparative law.<sup>17</sup> They argue that comparative law is now much more than a mere method of inquiry—it is “a field of substantive knowledge.”<sup>18</sup>

This academic debate is closely related to our inquiry but completely ignored by comparative tax scholars. Following the threads of this debate will serve two purposes: first, it will provide tax scholars with an arena in which they can present the essence of their comparative research; and second, I shall put forth the argument that comparative taxation is a substantive body of knowledge, and *not* a method of research.

### *B. Is There a Unique Method of Legal Comparative Tax Research?*

During the past two decades, methodological issues have been fiercely debated in the context of comparative legal studies.<sup>19</sup> Unfortunately, this debate has failed to produce a coherent outcome.<sup>20</sup> The only obvious result of this continuing discussion is our inability to point to a single, commonly preferred methodological approach to comparative legal studies. Instead, this debate shows that the word “method” is perceived as “techniques by which comparisons are carried out. These techniques have thereby acquired the status of separate methods.”<sup>21</sup>

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14. For a brief discussion on this long-lasting debate see PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD*, 231-32 (3d ed., Routledge Cavendish 2007) (1999).

15. Just to name a few notable commentators: KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW*, 2 (3d ed., Oxford Univ. Press 1998) (1977) (asserting that “Comparative law is the comparison of the different legal systems of the world”); W. J. Kamba, *Comparative Law: A Theoretical Framework*, 23 *INT’L COMP. L.Q.* 485, 489 (1974) (“Comparative law is the systemic application of comparison to law.”); O. KAHN-FREUND, *COMPARATIVE LAW AS AN ACADEMIC SUBJECT* 4 (Clarendon Press, 1965) (stating that “Comparative law—this has almost become a commonplace—is not a topic, but a method”).

16. James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 *AM. J. COMP. L.* 607 (1998). For a brief analysis of Gordley’s article, see Ugo Mattei & Mathias Reimann, *Introduction*, 46 *AM. J. COMP. L.* 597, 599 (1998) (arguing that Gordley’s position “implies a strong normative claim: comparative law *should not* be a separate discipline”).

17. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 *AM. J. COMP. L.* 671, 673-84 (2002).

18. *Id.* at 684.

19. For a recent outline of this debate, see Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology Of Comparative Legal Studies*, 32 *BROOKLYN J. INT’L L.* 405, 409-35 (2007).

20. Reimann, *supra* note 17, at 689.

21. Vernon Valentine Palmer, *From Leretholi to Lando: Some Examples of Comparative Law Methodology*, 53 *AM. J. COMP. L.* 261, 263 (2005).

This is an important conclusion for two reasons: first, it points to various *existing* comparative techniques which we may or may not adopt for the comparative study of tax laws. Second, assuming that tax laws do need a *special* methodology of their own in order to be studied comparatively, it implies that there may be more than one adequate method. Looking at the first issue, namely that there are several existing comparative methods, we can immediately assess what is certainly *not* a comparative tax methodology: when tax comparatists execute their research by using an existing comparative legal methodology, they are not employing any distinctively new methodology that could be labeled “comparative taxation;” instead, they are using one of several available *comparative law* methodologies for the purpose of studying tax laws.

Several tax comparatists have specifically chosen this option. For example, Garbarino defines his recent endeavor as an attempt to identify “the methods which can be used to pursue comparative analysis” of tax studies.<sup>22</sup> He portrays the process of comparative taxation as one in which the first step is the “*selection* of methodological approaches,”<sup>23</sup> and then he adopts an existing methodological *modus operandi* of comparative legal studies—the “functional approach.”<sup>24</sup> In a similar view, when Ann Mumford describes her objective as an attempt to “provide a cultural context for the laws of tax collection, within a comparative . . . structure,”<sup>25</sup> she specifically associates herself with the school of comparative law and legal culture in which a scholar must identify and interpret the “legal cultures” of the jurisdictions studied.<sup>26</sup> Cases such as these are easy: scholars who adopt existing methodologies are not creating new methodological approaches (nor do they pretend to do so).

It is possible, however, to pursue the comparative study of tax law without specifically adopting an existing method of comparative legal studies. This brings me to the second point, namely, that there is a possible technique which is a *uniquely* fitted to the comparative study of taxation (but inappropriate for other purposes) and therefore can be said to be “a comparative tax method.” Here too, the existing unsettled debate on comparative legal methodology provides an important tool. Even though general comparatists have often refrained from outlining their methods of research, they have addressed the issue of “what a method must include.” This debate envelopes sev-

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22. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 679.

23. *Id.*, at 685.

24. *Id.*, at 686.

25. ANN MUMFORD, *TAXING CULTURE: TOWARDS A THEORY OF TAX COLLECTION LAW* 1 (Ashgate Pub. Ltd. 2002).

26. See Roger Cotterrell, *Comparative Law and Legal Culture*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 709, 721-26 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

eral key controversies: the purpose of comparison, its underlying assumption of similarities or differences of the jurisdictions studied, the choice of objects to be compared, and the specific technique to be applied for the purpose of comparison.<sup>27</sup>

These controversies point to the issues that a comparative methodology *should* address.<sup>28</sup> If we were to find a body of scholarship in comparative taxation that had developed a novel process for dealing with these issues, then we could argue that there is indeed a comparative legal tax methodology. But there is no such body of scholarship. Of the major works on comparative tax studies all use methodologies that can be associated with an existing school of thought in general comparative law. Once an existing method is found to be satisfactory, there is hardly a need to take on the tormenting task of inventing a new one. The conclusion is 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. This issue is further discussed in Part III below.

### C. *Comparative Taxation as a Substantive Body of Knowledge*

At the most basic level, the process of comparison refers to the “construction of relations of similarity or dissimilarity between different matters of fact.”<sup>29</sup> Such comparison is meant “to encompass the search for new categories for understanding relevant similarities or dissimilarities, or rethinking existing ones.”<sup>30</sup> This, in essence, is what is meant by “comparative knowledge,” namely, something more than a simple juxtaposition of (tax) laws in different countries. It is knowledge which emerged from such a comparison and which could not have been produced in a non-comparative fashion. Interestingly, tax comparatists have been able to produce an impressive volume of such new knowledge. Some examples will illustrate the point.

Perhaps the most impressive display of such knowledge in a single work is found in the two-volume IMF publication, *Tax Law Design and Drafting*, edited by Victor Thuronyi.<sup>31</sup> The stated purpose of this voluminous work is to “provide nonprescriptive drafting

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27. Two good examples which thoroughly outline these pivotal issues in comparative legal studies are: David Kennedy, *The Methods and the Politics*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 345 (Pierre Legrand & Roderick Mundy eds., 2003); Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 *IOWA L. REV.* 1025 (1999).

28. See *infra* Part III.

29. Nils Jansen, *Comparative Law and Comparative Knowledge*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 26, at 205, 310.

30. *Id.*, at 311.

31. *INT’L MONETARY FUND, TAX LAW DESIGN AND DRAFTING I* (Victor Thuronyi ed., Int’l Monetary Fund 1996) (1996) [hereinafter Thuronyi, TLDD I]; *INT’L MONETARY FUND, TAX LAW DESIGN AND DRAFTING II* (Victor Thuronyi ed., Int’l Monetary Fund 1998) (1996) [hereinafter Thuronyi, TLDD II].



materials that cover the major choices to be made in constructing a tax system.”<sup>32</sup> It does so by drawing on the collective experience of numerous contributors who drafted tax laws and advised on tax legislation for over two dozen countries over a five year period.<sup>33</sup>

Thuronyi specifically mentions that the book’s new knowledge “represents *an effort to distill* from our collective experience, and from the tax laws of many other countries in the world, *practical guidelines* that can be used by officials of developing and transition countries and by their foreign advisors.”<sup>34</sup> Taking into account the tax codes of numerous jurisdictions, each chapter deals with the various ways of addressing a specific tax issue, as well as problems which may arise and their possible solutions. The result is “an alternative to the model code approach to tax reform in developing and transition countries.”<sup>35</sup> Of course, such an outcome can be criticized on various grounds, beginning with doubts about the technical accuracy of its suggestions and ending with assertions of post-colonial paternalism.<sup>36</sup> But it is hard to deny that it constitutes a new comparative substantive knowledge which could not have been gained without the collective experience of its contributors.

Another example of new comparative knowledge in *Tax Law Design and Drafting* is the taxonomy of legal “tax families.”<sup>37</sup> Even though the classification of legal families is a long established concept in general comparative law, and hence not a completely novel approach (as Thuronyi admits),<sup>38</sup> such a comprehensive classification was new to tax laws when introduced by Thuronyi. Given the fact that the focus was income tax rather than private law (the traditional focus of comparative legal studies), the result was a slightly different taxonomy than the one established in general comparative law. The concept of classification is regarded by its proponents as an essential part of the process of comparison.<sup>39</sup> Even if one takes a critical look at the notion of classification,<sup>40</sup> it does provide a rallying point for an important methodological debate. Whatever the case may be, it is obvious that such typology could not have been brought about without

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32. Thuronyi, TLDD I, *supra* note 31, at xxvii.

33. *Id.*

34. *Id.*

35. Miranda Stewart, *The “Aha” Experience: Comparative Income Tax Systems*, 19 TAX NOTES INT’L 1323, 1330 (1999).

36. Most reviewers were positive, *e.g.*, Stewart, *id.*; Lief Muten, *Book Reviews: Tax Law Design and Drafting (Vol. 1)*, 14 TAX LAW INT’L 677 (1997); *but cf.* John Azzi, *Book Review: Tax Law Design and Drafting (Vol. 2): Comparing Income Tax Laws of the World*, 18 BERKELEY J. INT’L L. 196 (2000).

37. Thuronyi, TLDD II, *supra* note 31, at xxiii-xxxv; *see also* THURONYI, COMPARATIVE TAX LAW, *supra* note 2, at 23-44.

38. Thuronyi, TLDD II, *supra* note 31, at xxv.

39. John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 622 (1998).

40. *See infra* Part IIC.

the comparison of multiple tax jurisdictions and hence, qualifies as comparative tax knowledge.

A second instance of comparative tax knowledge, and quite a different one, is evident in the works of Michael Livingston. In two articles,<sup>41</sup> Livingston revisits the assumption that globalization poses a threat to the ideal of progressive taxation, presumably since in a world of increased capital mobility, the taxpayers paying the highest tax rates also have the best capability to shift their income to low tax jurisdictions. Livingston looked into what he defines as the “tax culture” of four jurisdictions (United States, Italy, India, and Israel) and their handling of the progressivity issue. Livingston defines “tax culture” as “the body of beliefs and practices that are shared by tax practitioners and policy makers in a given society and thus provide the background or context in which substantive tax decisions are made.”<sup>42</sup>

Obviously, tax culture in the way Livingston perceives it is a strictly local concept. But Livingston’s endeavor actually seeks to reach some general conclusions (“new knowledge”) about the interrelations between global and local factors in the design of tax policies. Such a task would be impossible if only a single jurisdiction were studied. In that case, any conclusion would be relevant only to that specific jurisdiction. By contrast, comparison of different local tax cultures allows Livingston to present an argument that is somewhat more global in scope. Livingston concludes<sup>43</sup> that local factors play a key role even amid globalization. This leads him to a rather skeptical view of tax convergence—an idea otherwise happily adopted by tax scholars.<sup>44</sup> Once again, this conclusion would not be possible if not for the process of comparison, and thus it represents a form of substantive comparative tax knowledge.

These two examples are not random. Both Thuronyi and Livingston addressed the methodological issues in very different ways. Both produced “new” comparative knowledge, but Thuronyi did so by seeking out *similarities*, while Livingston identified *differences*. Yet, they do not debate their methodological differences, obvious as they are. This shows that substantive comparative tax knowledge can be gen-

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41. Michael A. Livingston, *From Milan to Mumbai, Changing in Tel-Aviv: Reflections of Progressive Taxation and “Progressive” Politics in a Globalized but Still Local World*, 54 AM. J. COMP. L. 555 (2006) [hereinafter Livingston, *From Milan to Mumbai*]; Livingston, *Law, Culture, and Anthropology*, *supra* note 3, at 124-29.

42. Livingston, *From Milan to Mumbai*, at 560.

43. *Id.*, at 582-86.

44. See, e.g., REUVEN AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW* (2007); Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4; Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003). But cf. Julie Roin, *Taxation without Coordination*, 31 J. LEGAL STUD. 61 (2002); H. David Rosenbloom, *International Tax Arbitrage and the “International Tax System,”* 53 TAX L. REV. 137 (2000).

erated even without a methodological discourse. The bad news is that without such a discourse we are left helpless when trying to evaluate the merits of the new knowledge acquired.

*D. The Discursive Failure and its Significance*

Throughout the years, tax scholars have made their own more or less meaningful statements regarding the theoretical aspects of comparative tax law, but most have refrained from addressing theoretical assertions made by their colleagues. This lack of discourse is demonstrated in Table 1, which maps references to other tax comparatists' works. X represents a complete disregard of a specific article or book. v represents a mere reference in the footnotes or bibliography with no substantive reference to the specific arguments and vv represents an actual response or substantive reference to another article.<sup>45</sup>

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45. Referrals to a scholar's own articles are ignored. The tax comparatists whose work I do discuss were chosen based on the fact that they did address theoretical issues of comparative tax law.

TABLE 1

Citing Cited	Chommie <sup>46</sup> 1956	Chommie <sup>47</sup> 1957	Barker <sup>48</sup> 1996	Thuronyi <sup>49</sup> 1996, 1998	Thuronyi <sup>50</sup> 2003	Infanti <sup>51</sup> 2003	Barker <sup>52</sup> 2005	Livingston <sup>53</sup> 2005	Garbarino <sup>54</sup> 2008
Chommie 1956			X	X	X	X	X	X	X
Chommie 1957			X	X	X	X	X	X	X
Barker 1996				X	X	✓		X	X
Thuronyi 1996, 1998						✓✓	X	X	✓
Thuronyi 2003							✓	✓	✓✓
Infanti 2003							X	X	X
Barker 2005									X
Livingston 2005									X
Garbarino 2008									X

46. Chommie, *Why Neglect Comparative Taxation*, *supra* note 8.47. Chommie, *A Proposed Seminar in Comparative Taxation*, *supra* note 8.48. William B. Barker, *A Comparative Approach to Income Tax Law in the United Kingdom and the United States*, 46 CATHOLIC. U. L. REV. 7 (1996).49. Thuronyi, TLDD II, *supra* note 31; Thuronyi, TLDD I, *supra* note 31.50. THURONYI, COMPARATIVE TAX LAW, *supra* note 2.51. Infanti, *Spontaneous Tax Coordination*, *supra* note 9.52. Barker, *Expanding the Study of Comparative Tax*, *supra* note 9.53. Livingston, *Law, Culture, and Anthropology*, *supra* note 3.54. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4.

As is evident from the table, “X” is dominant, which means that comparative tax discourse is in short supply. Its absence is of profound significance. As long as tax comparatists refrain from talking and responding to each other, comparative taxation remains incapable of engaging in true evolutionary discourse. Hence, a discursive framework is badly needed in order to transform comparative taxation into a meaningful progressive field of study. Borrowing the words of Livingston, which were aimed at another tax-related discursive failure, but which are just as applicable here: “A compartmentalized discourse, in which various groups advance separate complaints . . . is unlikely to produce needed changes.”<sup>55</sup>

## II. A SUGGESTED FRAMEWORK FOR COMPARATIVE TAX DISCOURSE: SCHOOLS OF THOUGHT IN COMPARATIVE LAW

### A. *In General*

Comparison is not at all unique to legal research. It is shared by most academic disciplines. In that sense, comparison is a “parent discipline” with many offspring, one of which is comparative law. According to the same logic, comparative law may be regarded as a parent discipline for comparative research in specific legal areas, including tax law. Thus, the first obvious source which may provide us with methodological and theoretical structures for a discourse in our topic is general comparative legal studies. This methodological aspect is the focal point of my Article.

Exploring the methods and reasoning used by tax comparatists in areas other than law (such as economics and political science) should also provide valuable building blocks for our proposed discursive framework. In addition, examining the discourse of comparative studies in specific areas of public law other than tax (such as comparative administrative law or comparative constitutional law) should add another valuable source of insights. Yet, these two aspects of a theoretical framework are not explored here.

Instead, this part briefly surveys the main schools of thought in comparative legal studies. Experienced comparatists will find this terrain familiar and are thus invited to skip directly to the next part of the Article. Tax comparatists, however, should benefit from the terms and methodologies introduced here, which I suggest should be used in academic debates in comparative taxation.

Obviously, I cannot cover the entire breadth of discourse in comparative law. Still, within each approach discussed here, I shall refer to several key issues, described by Chodosh as the “*why, what and*

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55. Michael A. Livingston, *Radical Scholars, Conservative Field: Putting “Critical Tax Scholarship” in Perspective*, 76 N.C. L. REV. 1791, 1793 (1998) [hereinafter: Livingston, *Radical Scholars, Conservative Field*].

how of comparison,”<sup>56</sup> namely, the purpose, the objects, and the technique of comparison. Only the most obvious representatives and arguments are mentioned, thus omitting numerous scholars who have made important “middle-ground” contributions. Mentioning them all would simply lead us into too much detail.

Four comparative schools are surveyed below: The first is the *Functional Approach* which rests on the assumption that different legal systems face similar problems. Functionalists see the convergence of legal systems as a desirable. Their comparative project is thus aimed at identifying a common legal solution to a common social problem. The second is the *Economic Approach* which starts with an assumption that there is a competitive market for legal models. In essence, comparative economic research is aimed at inquiries into the deviations of different jurisdictions from an economically efficient benchmark. Third, *cultural* comparatists reject the functional assumptions of similarities of social problems and legal solutions. Instead, they assume that law is part of a broader cultural phenomenon. Each culture contains elements such as values, traditions, and beliefs, which make it unique. This “differentiation of cultures” entails that the laws (which are embedded in these cultures) are also necessarily different. According to this approach, comparative analysis should be aimed at understanding the cultural, social, political, and ultimately legal identities. Finally, *critical* studies in comparative law are aimed at exposing the pretentious apolitical nature of so-called mainstream discourse in comparative law and to suggest alternative discursive agendas. Such scholars argue that comparative legal studies should be a “liberating project,” releasing us from the cognitive cage of abstract relativist dichotomies which are wrongly perceived as “objective.”

### B. *The Functional Approach to Comparative Law*

Scholars in comparative law have suggested numerous objectives which may be served by comparative studies.<sup>57</sup> Yet, all the more specific goals can usually be reduced to three main categories: “Understanding, reform and unification.”<sup>58</sup>

*Unification* is an attempt “to reduce or eliminate . . . the discrepancies between national legal systems by inducing them to adopt common principles of law.”<sup>59</sup> Ideas of unification (and harmonization) are strongly associated with the functionalist heritage of comparative

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56. Chodosh, *supra* note 27, at 1032.

57. Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 54 (1996) (arguing that the number of purposes that have been suggested is so great that it is very difficult to “clearly to state what comparative law teaching is designed to achieve . . .”).

58. Chodosh, *supra* note 27, at 1069.

59. ZWEIGERT & KÖTZ, *supra* note 15, at 24.

law, which dominated (and probably still does) comparative legal thought during most of the twentieth century.<sup>60</sup> Comparative legal functionalism rests on the assumption that “the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results.”<sup>61</sup> In other words, if legal problems and legal outcomes are the same, unifying the laws (as the means to solve similar problems with similar results) would save a lot of headache.

Functional thinking advances a “functionally equivalent” approach to jurisdictional selection. This means that we must select “comparable” jurisdictions, i.e., jurisdictions which are at a similar level of evolutionary legal development.<sup>62</sup> For this reason, classification is “the beginning rather than the end, a preliminary step designed to facilitate the study of otherwise unwieldy body of information. It is a prerequisite to thinking and speaking about the underlying differences and similarities among various objects.”<sup>63</sup> Zweigert and Kötz argue that classification provides us with jurisdictions that are representative of large groups and thus with a natural choice for comparison.<sup>64</sup> These would be, as their rule of thumb goes, English, French, and German law, as each is considered to be a “parent system” of their respective legal families.<sup>65</sup>

Steeped in a nationalist tradition, the taxonomy of legal families naturally saw the national unit as an object of both classification and comparison.<sup>66</sup> This leads to an obvious tendency to compare “systems” or “families,” or at least to compare the “system’s laws” as a part of a larger, well-defined, “whole.” This sort of comparison can be regarded as “macro-comparison.” It should be distinguished from “micro-comparison” in which the object is limited in scope to a specific law, process, or institution.<sup>67</sup> Even though the issue used to be a contentious one, today it would probably be difficult to find a scholar

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60. Well, even this apparently factual issue is debatable. For example, Brand asserts that: “Today . . . the so-called ‘functional method,’ has risen to a position of dominance.” Brand, *supra* note 19, at 409. On the other hand it was argued that “the functional method . . . never represented . . . the dominant approach to comparative legal studies . . . Nor is it the prevailing method today . . .” Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 27, 100, 100.

61. ZWIEGERT AND KÖTZ, *supra* note 15, at 34.

62. Clive M. Schmitthoff, *The Science of Comparative Law*, 7 *CAMBRIDGE L.J.* 94, 96 (1939).

63. RUDOLF B. SCHLESINGER ET. AL., *COMPARATIVE LAW: CASES, TEXTS, MATERIALS* 1, 41 (6th ed. 1998) (1979), *cited in* Chodosh, *Comparing Comparisons: In Search of Methodology*, *supra* note 27, at 1091.

64. RUDOLF B. SCHLESINGER ET. AL., *COMPARATIVE LAW: CASES, TEXTS, MATERIALS* 1, 41 (6th ed. 1998) (1979).

65. *Id.* at 41.

66. See generally H. Patrick Glenn, *The Nationalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 27, at 76, 76.

67. See Kamba, *supra* note 15, at 505-06.

who advocates micro or macro comparison as an exclusively favored approach. Most scholars agree that the option to use either lends itself to the purpose of comparison, i.e., that macro comparison is probably a legitimate approach for certain purposes, while micro comparison is for others.

When it comes to the question of which laws to compare, the functionalist approach asserts that only those that fulfill the same functions in their respective jurisdictions are comparable.<sup>68</sup> Zweigert and Kötz suggest their presumption of similarity as a heuristic device: setting aside topics which are “heavily impressed by moral views or values”<sup>69</sup> (such as family laws) and concentrating on “apolitical” areas of law (such as private law), they “find that as a general rule developed nations answer the needs of legal business in the same or in a very similar way.”<sup>70</sup> In other words, when we compare the so-called “apolitical” laws of two “developed” nations, it should not be difficult to locate rules that perform the same function.

Finally, once a purpose of comparison is embraced and the objects of comparison are selected, we must face the question of the comparative technique. The functional assumption of similarities suggests that a comparative legal researcher should start by identifying a specific practical problem and then investigate the way in which it is solved in each of the jurisdictions compared (the “problem-solving approach”). Another possible way to address such assumptions is to take an institutional view: namely, to inquire which institutions in the countries compared perform the same problem-solving functions (“the institutional approach”).<sup>71</sup>

Kamba suggested that an effective comparison should encompass three stages.<sup>72</sup> The first is the *descriptive phase*, in which the comparatist is expected to describe the “norms, concepts and institutions of the systems concerned.”<sup>73</sup> The second is the *identification phase*, in which the researchers identify the differences and similarities between the systems studied. The last is the *explanatory phase*, in which the reasons for convergences and divergences are explained. Similarly, Zweigert and Kötz<sup>74</sup> depict the comparative research as a five-stage process.<sup>75</sup> First, one must identify a problem in functional

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68. ZWIEGERT & KÖTZ, *supra* note 15, at 34.

69. *Id.* at 40.

70. *Id.*

71. Esin Orucu, *Methodology of Comparative Law*, *infra* note 72, at 443.

72. Kamba, *supra* note 15, at 511-12. Orucu advocates a similar approach: Esin Orucu, *Developing Comparative Law*, in *COMPARATIVE LAW: A HANDBOOK* 43, 47-53 (Esin Orucu & David Nelken eds., 2007); Esin Orucu, *Methodology of Comparative Law*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 442, 447-49 (Jan M. Smits ed., 2006).

73. Kamba, *supra* note 15, at 511-12.

74. ZWIEGERT & KÖTZ, *supra* note 15.

75. *Id.*, at 32-47, conveniently summarized by Infanti in *Spontaneous Tax Coordination*, *supra* note 9, at 1138-40.



terms. Rather than depicting a problem in its local context, it is perceived as an apolitical set of social facts conceptualized in universal terminology. Second, the researcher has to choose the jurisdictions to be compared. We already noted Zweigert and Kötz's rule of thumb in this regard. From here on, Zweigert and Kötz turn to an approach similar to Kamba's. The third stage in their process is descriptive. The fourth stage is identification of similarities and differences. The assumption of similarities leads Zweigert and Kötz to assert that, put in functional terms, we should expect more similarities than differences. Fifth, there is a critical evaluation stage in which the researcher must evaluate the solution adopted by different jurisdictions and determine which solution is superior to others. While it remains unclear which standards one must apply for such evaluation, it is obvious that Zweigert and Kötz believe in the existence of a so-called "proper solution."

Another example of the problem-solving approach is *The Common Core* method, which is largely associated with Rudolph Schlesinger and the Cornell Project. In the late 1950s, Schlesinger launched a research project with the intent to "find the common core of the law of obligations."<sup>76</sup> He formed a team of local specialists in the countries studied and presented them with a "working paper." The paper contained questions regarding the legal status of the research topic in each jurisdiction. In order to overcome social and cultural barriers, Schlesinger refrained from using abstract legal terms such as "contract." instead, the paper contained descriptions of factual situations. In what can be described as the "descriptive phase" of Schlesinger's research, each participant was asked to describe how the legal system in his or her home country would react to the scenario described. In the "identification phase" the specialists were presented with all the jurisdictional reports produced and asked to study them. They then met and discussed the reports in an effort to formulate, in "general reports," major areas of agreement and disagreement among the jurisdictions. Schlesinger's work did not try to provide explanations of these differences or similarities, but was interested in reaching a consensus as to what the systems have in common (the so-called common core).

One problem with Schlesinger's approach is that jurists' reports alone cannot possibly provide a full account of the law in a given

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76. RUDOLF B. SCHLESINGER, FORMATIONS OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 5-65 (1968); Rudolf B. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 65, 66 (Kurt H. Nadelmann, Arthur T. Von Mehren & John N. Hazard eds., 1961). For the methodological description of Schlesinger work, see Schlesinger, *The Common Core of Legal Systems*, *supra*, at 72-77.

country. Law is probably more than what jurists say it is.<sup>77</sup> Another problem is that it is a static observation of laws. Schlesinger's method studies law at a given point in time not allowing for the description of long-term legal processes from a comparative perspective.<sup>78</sup> Such criticism became the basis for the *legal formants approach* developed by Rodolfo Sacco.<sup>79</sup>

A formant of law "may be a group, a type of personnel, or a community, institutionally involved in the creation of law."<sup>80</sup> These formants produce different kinds of texts through which we can understand law. So when it comes to technique, we are asked to start by looking at the institutions (formants) and their outputs (texts), rather than at putative problems and their solutions as reported to us by local specialists. The formants approach is aimed at identifying the differences among the documents studied, directly challenging the assumption that the legal rules in a given system are monolithic. After the differences in the texts are revealed, we can then reconstruct law as "a set of interlocked documents used by professionals according to their personal or institutional strategies."<sup>81</sup> Such an approach "makes it possible to keep the ambivalence and multiplicity of legal rules in each system at play in the comparison."<sup>82</sup>

According to its proponents, the legal formants approach is especially useful for the study of *legal transplants*,<sup>83</sup> since its identification phase is aimed at exposing differences in the sources of law. It "offers a picture of laws as bundles of transplants of competing sources of law."<sup>84</sup> In other words, the formants approach sees comparison as a historical science, and thus naturally serves the transplants theory which explains the formation of legal systems in terms of the historical process of legal borrowings.<sup>85</sup>

The traditional common core approach and the formants approach heavily affect contemporary practices of comparative legal studies. The obvious manifestation is the previously noted *Common Core of European Private Law Project* (also known as the *Trento Project*). This project also starts with a factual questionnaire much like

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77. Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1997).

78. Brand, *supra* note 19, at 419-20.

79. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 343 (1991).

80. *Id.*

81. *Id.*

82. Kennedy, *supra* note 27, at 400.

83. P.G. Monateri & Rodolfo Sacco, *Legal Formants*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 531 (P. Newman ed., 2004) (1998).

84. *Id.*

85. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

Schlesinger's work-paper.<sup>86</sup> However, unlike the Cornell Project, the current questionnaire contains questions which relate to the formants theory. For example, respondents are asked not only to provide a description of the operative rules in the countries studied, but also to address the role of meta-legal formants in these jurisdictions.<sup>87</sup> This project has been described as "functionalism in a revamped version" that brings in sharper awareness of the multiplicity of factors which must be taken into account.<sup>88</sup>

### C. *The Economic Approach to Comparative Law*

Some commentators categorize the economic approach to comparative law—mistakenly, I believe—as an alternative to functionalism. In reality, however, it is a functional approach taking a self-conscious ideological turn. Established by Ugo Mattei<sup>89</sup> and others, it simply provides a criterion according to which we should judge what the proper solution is: efficiency. Instead of asking which laws or institutions fulfill which functions, it asks which do so in the most efficient manner. It starts with an assumption that "there is a competitive market for the supply of law."<sup>90</sup> Legal transplants, from an economic point of view, are actually a competitive circulation of legal models, a process in which only efficient models survive, hence leading to convergence.<sup>91</sup> In essence, comparative economic research is aimed at inquiries into the deviations of different jurisdictions from an economically efficient benchmark: a so-called "model legal institution."<sup>92</sup>

### D. *The Cultural Approach to Comparative Law*

To be practical, the assumption that different jurisdictions face similar problems forces functional comparatists to define their compared problems in similar terms. However, it is just as possible to assume that different cultural contexts ascribe different moral values to similar factual patterns. What is seen as a problem in one place is not necessarily a problem elsewhere. Also, the functional assumption of similar legal outcomes naturally invites the researcher to concentrate on similarities, ignoring cultural and social differences, thus

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86. On the technique of comparison, see Bussani & Mattei, *supra* note 77, at 351-54.

87. *Id.*, at 355.

88. Graziadei, *supra* note 60, at 117.

89. UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997).

90. Raffaele Caterina, *Comparative Law and Economics*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW*, *supra* note 72, at 161, 161.

91. *Id.*, at 161-62.

92. Ugo Mattei & Fabrizio Caffagi, *Comparative Law and Economics*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW*, *supra* note 83, at 346, 347.

reducing significant differences to terminological abstracts which may well seem similar, but in reality are not.<sup>93</sup>

Thus, cultural comparatists see law as a part of a broader cultural phenomenon.<sup>94</sup> Each culture contains “non-rule” elements such as values, traditions, and beliefs, which give each culture its uniqueness. This differentiation of cultures entails that the laws (which are embedded in these cultures, or express them) are necessarily different.<sup>95</sup> Thus, rather than looking for similarities, cultural comparatists concentrate their research on a quest for differences.

Accordingly, cultural comparatists note that an agenda of unification calls, by definition, for the annulment of cultural identity as expressed in the unique laws of a given society. Writings in comparative legal culture have long celebrated (or urged that we should celebrate) the virtue of “difference,”<sup>96</sup> since difference “satisfies the need for self-transcendence.”<sup>97</sup> Merryman noted that “when the forces of unification threaten what gives a people its cultural identity, it is time we draw back and reconsider.”<sup>98</sup> On the practical level, some cultural comparatists argue that even if for some reason desirable, unification is an unattainable goal, noting that “‘Uniformity,’ in the sense of a ‘commonality’ across laws, is a promise that law is simply ontologically incapable of fulfilling.”<sup>99</sup> For example, they take a rather skeptical stance towards legal transplants. In Legrand’s view, legal cultures are unique so that, “what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words . . . because, as it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule.”<sup>100</sup>

According to this approach, a law which is, as suggested by Zweigert and Kötz, *not* “impressed by moral views,” simply does not exist. Assuming that laws can be free from moral content, is not only assuming the impossible, it also essentially strips law from all that is interesting for the sake of reducing it to a quasi-biological, neutral phenomenon.<sup>101</sup> Even if we accepted such a view, the obvious outcome of choosing a non-political realm of law as an object of

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93. Brand, *supra* note 19, at 419-20.

94. Cotterrell, *supra* note 26, at 710.

95. *Id.*, at 711-12.

96. See, e.g., Roger Cotterrell, *Is It so Bad to be Different? Comparative Law and the Appreciation of Diversity*, in *COMPARATIVE LAW: A HANDBOOK*, *supra* note 72, at 133; Roger Cotterrell, *Comparative Law and Legal Culture*, *supra* note 26, at 726-33.

97. Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 27, at 240, 280.

98. Pierre Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 *AM. J. COMP. L.* 3, 46 (1999).

99. Pierre Legrand, *The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure*, 75 *TUL. L. REV.* 1033, 1047 (2001).

100. *Id.*, at 120.

101. Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 *CARDOZO L. REV.* 631, 649-50 (2005).

comparison is the total removal of public law from the comparative discourse.<sup>102</sup> This would have profound implications for taxation as a branch of public law. Thus, taken at face value, the functionalist approach simply cannot serve us to study comparative taxation.<sup>103</sup> Moreover, it was argued that law is by definition a phenomenon strictly embedded in political considerations, and furthermore, even the very choice of laws to be compared cannot be regarded as objective and free from political implications.<sup>104</sup> Rather, the choice of laws to compare is seen as a normative (even ideological) argument about things that matter.

Nevertheless, comparative culturalists do not intend to abandon comparative law all together, but rather to change its objectives. Instead of pursuing the unification of laws, they promote the *understanding* of the legal identities in order to maintain and appreciate differences among legal cultures.<sup>105</sup> *Understanding* is an attempt "to understand the nature of law and legal change in both foreign (and by reverse projection) domestic environments."<sup>106</sup> It must be emphasized that understanding is not only an explanatory factor in the interpretation of legal systems, but a self-standing objective.

Like their fellow functionalists, cultural comparatists do not consider either micro or macro comparisons preferable per se, yet, Chodosh does criticize the fact that comparatists tend to divorce one level of analysis from the other. He argues that "comparisons must be versatile enough to shift between the micro and macro level. If not, comparisons risk falling into over generalization on the one hand . . . and extra-contextual specificity on the other."<sup>107</sup> Cultural comparatists do attack, however, the heuristic utility of classification used by functionalists, since—so the argument goes—a comparative study with such classification misses the entire point of comparison. *Ex ante* classification simply presupposes what we seek to achieve. Even worse, such taxonomies tend to generalize, utilizing only a few factors of differences or similarities as their criteria of classification.<sup>108</sup> At best, classification should be the result of a comparative study.<sup>109</sup>

From a methodological point of view, a cultural comparatist would first have to identify the legal cultures of the jurisdictions studied. But what are the components of a legal culture? The answers

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102. *Id.*, at 652.

103. *See infra* Part III.C.

104. Jansen, *Comparative Law and Comparative Knowledge*, *supra* note 29, at 314-15.

105. *See, e.g.*, Pierre Legrand, *How to Compare Now?*, 16 *LEGAL STUD.* 232 (1996).

106. Chodosh, *supra* note 27, at 1070.

107. *Id.*, at 1111.

108. *Id.*, at 1100.

109. *Id.*, at 1091-1102.

to this question are at least as numerous as the number of cultural comparatists discussing them.<sup>110</sup> Indeed, “it seems impossible to specify the content, scope or power of legal culture with clarity.”<sup>111</sup> Yet, Nelken categorizes cultural comparatists into two major groups,<sup>112</sup> exemplified in the Cotterrell-Friedman debate. Roger Cotterrell suggested that cultural comparatists should adopt “ideal types” of legal institutions, which he defines as “logically constructed concepts deliberately designed not to represent empirical reality but to organize interpretation of it,”<sup>113</sup> and to use them as benchmarks for the identification of legal-cultural differences. The price to be paid by such a methodology is the recognition that legal culture is not an empirically measurable phenomenon.<sup>114</sup> By contrast, Lawrence Friedman argued that the term “legal culture” is a methodologically useful way of “lining up a range of phenomena into one very general category.”<sup>115</sup> From this general category we can then derive smaller, less general, and more *empirically measurable* components.

### *E. The Critical Approach to Comparative Law*

At the most general level, critical studies in comparative law are aimed at exposing the pretended apolitical nature of so-called mainstream comparative law and to suggest alternative discursive agendas. Critics often see mainstream comparative law as a hegemonial-ideological project aimed at either assimilation or inclusion, culminating in projects of harmonization.<sup>116</sup> Instead, comparative legal studies should be a liberating project, as suggested by Günther Frankenberg, releasing us from the cognitive cage of abstract relativist dichotomies (such as common law/civil law; Western/Oriental; self/other), which are wrongly regarded as objective.<sup>117</sup>

Consequently, classification is perceived negatively. From a critical perspective, classification carries with it what is known as “Eurocentrism.”<sup>118</sup> The concentration on European and other Western legal systems in the process of taxonomy has resulted in the marginalization of non-Western systems. This, in turn, created an inherent bias in favor of Western systems not only in the selection

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110. *Id.*, at 715-17.

111. *Id.*, at 724-25.

112. David Nelken, *Legal Culture*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 72, at 372, 376-78.

113. Roger Cotterrell, *The Concept of Legal Culture*, in COMPARING LEGAL CULTURES 13, 24-45 (David Nelken ed., 1997).

114. *Id.*, at 25.

115. Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in COMPARING LEGAL CULTURES, *id.*, at 33.

116. Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post Modernism*, 49 INT'L & COMP. L.Q. 800, 822-24 (2000).

117. Günther Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L. J. 411, 444-45 (1985).

118. *Id.*, at 434-36.

process of jurisdictions to be studied, but also in the normative evaluation of what are “good/successful” systems. Critical legal comparatists also object to the very idea of classification as a scientific tool. The argument here is that classification “is inherently static by fixing, at least temporarily, the objects of classification for purposes of their classification.”<sup>119</sup> The concern is that pre-existing taxonomy may “impede, or even prevent, any appreciation of change or variation on the course of human and legal life and would therefore constitute a major obstacle in human understanding.”<sup>120</sup>

In methodological terms, Frankenberg suggests a three-step approach to a critical comparative study.<sup>121</sup> Such legal study should start where other studies end: the conceptualization of complicated social phenomena into abstract terms, which can be fitted easily with a legal framework. Then, the comparative scholar is asked to deconstruct the process of legal decision making, exposing the political interests underlying the process. Once we are in clear view of the abstract “objective” legal framework on the one hand, and the underlying political interests on the other, the third step is to re-introduce the legal process, showing how its discourse “ignores, marginalizes or transforms.”<sup>122</sup>

### III. TOWARDS A COHERENT DISCOURSE: COMPARATIVE TAX SCHOLARSHIP AS A SUB-FIELD IN COMPARATIVE LEGAL STUDIES

Admittedly, the idea of using the methods of comparative legal studies for tax purposes is not new. More than three decades ago, Hugh Ault and Mary Ann Glendon suggested adopting the theories of general comparative legal studies for the purpose of comparative tax law.<sup>123</sup> Yet, they stopped short of executing the idea. Notwithstanding Ault’s important contributions to comparative tax studies, he, like other tax comparatists, never clearly harnessed a specific methodological approach to advance a specific point of view. In this section, I utilize the discursive framework presented by general legal comparatists in order to demonstrate where tax comparatists divide—but more importantly—and fail to engage.

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119. Glenn, *supra* note 66, at 427.

120. *Id.*, at 426.

121. *Id.*, at 450-52.

122. *Id.*, at 452.

123. Hugh J. Ault & Mary Ann Glendon, *The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparison*, 27 J. LEGAL EDUC. 599, 607 (1975). See also Jorg Manfred Mossner, *Why and How to Compare Tax Law*, in LIBER AMICORUM LUC HINNEKENS 303 (2002).

A. *The “Why”: What is the Purpose of Comparative Tax Studies?*

Most tax comparatists have, at least briefly, addressed the objectives of their field. Many legal comparative tax scholars see their work as an essential tool for tax reform. The differences among them concern the results that such reform is designed to achieve, and the sensitivity to contextual differences that such reform should take into account. Some of the scholars take a clear-cut position within the general discourse of comparative law. Others are not as committed, but they can still be quite easily associated with one of the approaches described above. For example, they do not prescribe harmonization as an ultimate purpose, rather, harmonization seems like a probable outcome of their approach. Others stress contextual differences, taking a more relativistic approach. The bottom line is that currently, all kinds of approaches, regardless of the purposes they serve—so it seems—are “kosher.” Apparently, tax comparatists are quite comfortable with this situation since they do not bother to confront each other and their contradicting objectives.

The easiest way to see this is by starting at one end of the spectrum. Probably the most obviously functional tax comparatist is Carlo Garbarino, who in a recent article explicitly adopts the functional approach and advances a functional assumption of common tax problems.<sup>124</sup> Nowhere in his article does he directly propose a practical end to be served by his functional analysis, but he does offer five challenges for prospective comparative tax research. Of these five challenges, the fifth provides us with more than a hint of Garbarino’s comparative purposes.<sup>125</sup>

His fifth proposed challenge is to verify whether there is a potential “bottom-up” predominance of a tax consolidation model to be implemented at the EU-level through closer cooperation. Garbarino refers here to the European Common Consolidated Corporate Tax Base Project (CCCTB). In 2001, the European Commission “identified corporate taxation across the European Union as one major obstacle to the achievement of a common market.”<sup>126</sup> To address this problem, the European Commission launched a project to eliminate double taxation of European corporate groups doing business in multiple European jurisdictions. One of the possible approaches for such a project is to apply an all-European, i.e., comprehensive, solution. Indeed, by late 2004 a CCCTB working group began discussions with a view towards replacing “national tax systems by a *common tax*

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124. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 681.

125. *Id.*, at 706-09.

126. MICHAEL LANG ET AL., *COMMON CONSOLIDATED CORPORATE TAX BASE* 5 (Michael Lang et al. eds., 2008).



base.”<sup>127</sup> Garbarino specifically uses the CCCTB as an example of comparative “common core” research and asserts that it may “reveal the existence of an EU common model of tax consolidation on which *agreement can be reached* through reinforced cooperation at the EU level.”<sup>128</sup> In other words, such research should bring about tax unification. In a later article, Garbarino specifically addresses the issue of tax transplants in a corporate tax environment, and is a little clearer with respect to his purpose.<sup>129</sup> He argues that a comparative study of corporate taxation may present us with “alternative policy choices in respect to the *proper* arrangement of fiscal institutions.”<sup>130</sup> This is an ideological assertion, as it assumes that there is a “proper” solution (and if all jurisdictions were to adopt it, it should lead—again—to harmonization). In sum, it is not unreasonable to assume that Garbarino views comparative studies of tax law as a tool for *reform leading to harmonization* or even unification of tax laws.

Garbarino’s position stands in sharp contrast with that of Anthony Infanti, but never engages it. To begin with, Infanti utterly rejects the functional approach as inadequate for comparative tax research. He argues that the failure of the functional method to place law in its local contexts is especially acute in the case of taxation.<sup>131</sup> Infanti also rejects the assumption of similarity and the existence of a common core of tax rules, stating that “[t]he inherently strong undulating nature of tax policy militates strongly against the conclusion that there are absolute tax rules that may be ascertained simply by comparing the systems of different countries.”<sup>132</sup> However, he does not resort to abstract notions of “understanding” as the purpose of comparative tax studies, but specifically advocates such studies as a practical tool for legislative reform, albeit in a way very different from Garbarino.

Infanti asserts that his method of comparative tax law “will *not* be employed as a vehicle for achieving tax harmonization.”<sup>133</sup> Rather, it is aimed at what he calls “coordination.” Unlike *tax harmonization* which according to Infanti “would result in each country having exactly the same tax system,”<sup>134</sup> *tax coordination* includes “any

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127. Michel Aujean, *The CCCTB Project and the Future of European Taxation*, in COMMON CONSOLIDATED CORPORATE TAX BASE, *id.*, at 11, 32.

128. Carlo Garbarino, *Tax Transplants and Circulation of Corporate Tax Models* (Mar. 9, 2009) (working paper, on file with Bocconi Legal Studies Research Group or available at <http://ssrn.com/abstract=1356122>).

129. *Id.*

130. *Id.*, at 21. Emphasis added.

131. Infanti, *Spontaneous Tax Coordination*, *supra* note 9, at 1140-42.

132. *Id.*, at 1141.

133. *Id.*, at 1141.

134. *Id.*, at 1125. Infanti’s discussion of tax harmonization exemplifies the incoherencies that characterizes comparative tax scholarship. What is described as “harmonization” by Infanti would probably be defined as outright “unification” of laws in terms of the general comparative discourse. Ironically, what he aims for—i.e., “co-

adaptation of one country's tax system to that of another."<sup>135</sup> Such adaptation can be multilateral (by way of international agreements) or "spontaneous."<sup>136</sup> Infanti's "spontaneous coordination" is a unilateral act of a country seeking to reform its tax system in order better to accommodate legislative tax trends abroad. If we accept Infanti's notion of spontaneous tax coordination, then obviously, in order to execute such reform successfully, one must take a comparative approach. If we want to be in line with foreign legal trends, we should understand them first.<sup>137</sup>

Infanti explains his choice of comparative tax studies as a tool of tax reform in an interesting way. He notes that "[t]he ensuing debate over how to reform the ailing U.S. international tax regime has largely been shaped by the traditional concerns of efficiency, fairness, and simplicity."<sup>138</sup> He further notes that "[t]he traditional focus on these concerns may stem from the fact that they lend themselves to the theoretical analysis *preferred by commentators*,"<sup>139</sup> and he suggests that the reform debate should shift its perspective. He believes that placing the reform debate in a comparative perspective is needed in order to liberate the current discussion from its own parochial view.<sup>140</sup> In other words, he takes a truly critical stand here exposing the actual nature of the current "mainstream" debate and suggests an alternative agenda.

As an example of his argument, Infanti discusses the tax treatment of contributions made by domestic taxpayers to foreign non-profit organizations.<sup>141</sup> Analyzing the tax regimes in eight countries, Infanti shows that there is a wide variety of how such contributions are treated, starting with their effective prohibition and ending with generous tax incentives to induce them. Such a spectrum allows a prospective reformist country to borrow an existing model from a wide array of models, taking into account the unique characteristics of the reformed system and the context in which it is positioned. That way, reform is induced through borrowing, without eliminating or ignoring contextual differences. In other words, Infanti maintains that reform through legal transplants could be desirable, if it takes into account local differences. Unlike Garbarino, for Infanti there is more

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ordination"—would probably be referred to as "harmonization" in terms of the general discourse. Infanti is not the only one who is affected by this incoherence. Many other tax comparatists and international tax scholars use comparative jargon and apply terms such as "harmonization" and "convergence" imprecisely and often incoherently.

135. *Id.*, at 1128

136. *Id.*, at 1132.

137. *Id.*, at 1142 (stating that "comparative analysis will first aid policy makers in identifying the rules currently in place in other countries—along with any trends in the rules that are being adopted or abandoned by them").

138. *Id.*, at 1113.

139. *Id.*, at 1119.

140. *Id.*, at 1119-20.

141. *Id.*, at 1157-1233.

than one “proper” solution. There are many legislative models, and each is “proper” in a different context.

In a later article, Infanti specifically addresses the issue of legal transplants in the tax context, calling it “tax cloning.”<sup>142</sup> In *Tax Cloning*, he probes the general comparative discourse on legal transplants, illustrating it by the positions taken by Alan Watson and Otto Kahn-Freund.<sup>143</sup> As Infanti observes, both Watson and Kahn-Freund advocate transplants as a means of reform, but with great differences in their attitudes. Kahn-Freund’s base assumption was that of difference, and hence he emphasizes the risk of legal transplants being rejected due to their incompatibility with the social and cultural contexts of the target jurisdiction. Watson, on the other hand, sees law as a largely autonomous phenomenon with its own tradition and historical evolution. He regards legal history as the most important factor in legal evolution, while Kahn-Freund puts the emphasis on socio-legal contexts. Infanti notes, however, that both Watson and Kahn-Freund would probably agree that transplantation can only be successful if the recipient system’s legal environment is thoroughly studied in order to determine the form and the extent of the adjustments the transplanted rule must undergo to be accepted.

In this context, Infanti seems to place himself more closely to Kahn-Freund, as he believes that, due to their local contextual nature, the risk of rejection is magnified when tax rules are being cloned.<sup>144</sup> Based on these observations, Infanti proposes some “ethical guidelines” to American tax experts who are advising transition countries on issues of tax reform.<sup>145</sup> According to Infanti, such advisors should not abandon the idea of tax transplants, but should use caution not to cause harm to the recipient system (which he calls “the principal of nonmalfeasance”). One of the requirements is to tailor the cloned rule to the specific context of the recipient country, in a sense, to avoid quasi-colonial forcing of tax rules upon the target systems.

Another divergence-oriented view is apparent in the work of Michael Livingston. I have already discussed some of Livingston’s scholarship<sup>146</sup> and noted that Livingston starts with a presumption of contextual difference. Like some of the general legal cultural comparatists, Livingston sees the study of comparative tax law as a hermeneutic process. He argues that

[m]uch as comparative taxation inevitably requires a scholar to consider the impact of cultural issues, the question of tax

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142. Anthony C. Infanti, *The Ethics of Tax Cloning*, 6 FLA. TAX. REV. 251 (2003).

143. *Id.*, at 319-36.

144. *Id.*, at 335.

145. *Id.*, at 336-37.

146. See *supra* notes 41-43 and accompanying text.

culture . . . leads inexorably to a comparative perspective . . . Comparative studies are thus an invaluable tool for discovering which features of one's own tax system are universal or "inevitable" in nature, and which are culture dependent.<sup>147</sup>

Thus, Livingston views comparative taxation as a necessary endeavor to understanding any tax system (including one's own.) For example, in *From Milan to Mumbai*,<sup>148</sup> Livingston concludes that, while different countries face similar issues, the *outcomes* presented by their tax systems are significantly different due to local considerations. Livingston seeks to understand how local factors may explain divergences in the concept of progressivity, and how such understanding can help us to comprehend our own system.<sup>149</sup> Hence, "understanding" actually achieves a practical aim as it casts doubt on home policies which in turn may bring about discussion, reform, and improvement.

In this regard, Garbarino and Livingston are at two opposite ends of the spectrum. Garbarino sees harmonization and convergence of tax laws as an already occurring (and presumably desirable) phenomenon. On the other hand, Livingston questions the practicality of tax harmonization as well as its desirability.<sup>150</sup> He notes that differences in tax systems are "not random, but relate to underlying differences in both the national and tax specific cultures . . ." <sup>151</sup>

Having sketched the two ends of the spectrum, there is still some middle ground left to cover. As early as 1957, John C. Chommie was probably the first *legal* scholar to address theoretical aspects of comparative tax law scholarship in a somewhat elaborative manner.<sup>152</sup> Chommie was best known for his scholarship in federal income taxation<sup>153</sup> and for his authorship of a well-accepted treatise on this

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147. Livingston, *Law, Culture, and Anthropology*, *supra* note 3, at 123.

148. Livingston, *From Milan to Mumbai*, *supra* note 41, at 555.

149. *Id.*, at 584.

150. *Id.*

151. *Id.* at 585.

152. Non-legal scholars have indeed made important contributions to the social sciences field of comparative taxation long before Chommie. As noted in Part II.A, such literature is not covered here and is left for further research. *See, e.g.*, EDWIN R.A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* (The Macmillan Co. 1911); EDWIN R.A. SELIGMAN, *ESSAYS ON TAXATION* (1905). For some later important contributions not covered here, see CEDRIC SANDFORD, *WHY TAX SYSTEMS DIFFER: A COMPARATIVE STUDY OF THE POLITICAL ECONOMY OF TAXATION* (Fiscal Publ'ns 2000); B. GUY PETERS, *THE POLITICS OF TAXATION: A COMPARATIVE PERSPECTIVE* (1991); AARON B. WILDAVSKY & CAROLYN WEBBER, *HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD* (Simon & Schuster 1986); *THE TAX SYSTEM IN INDUSTRIALIZED COUNTRIES* (Ken Mesere ed., Oxford Univ. Press 1998).

153. *See* Charles O. Galvin, *Reflection of Tax Reform: A Tribute to John Chommie*, 29 U. MIAMI L. REV 21, 21 (1974).

subject.<sup>154</sup> But he was also a frequent writer on issues of legal education. It is in this scholarly capacity that he presented a contribution which can be regarded as path-breaking. He even preceded European comparative tax scholarship, which is usually regarded as more developed than its U.S. counterpart.<sup>155</sup>

Chommie began his quest by counting the numerous values of legal comparative work in general.<sup>156</sup> Unfortunately, he then immediately stated that his purpose was “not to reappraise these values in a tax context . . . .”<sup>157</sup> Yet, his work provides us with more than a hint as to why Chommie valued the comparative study of tax law. We should start by noting that he was a supporter of functionalism, and specifically advocated it as a method of legal education.<sup>158</sup> In this context, the idea is to teach law not only in conceptual legal terms (such as contracts, torts, etc.) but also in functional terms, i.e., law as a response to specific factual patterns.<sup>159</sup> In addition, Chommie proposed that comparative taxation should be taught in U.S. law schools.<sup>160</sup> In justifying his proposal, he argued that comparative tax studies should serve policy makers when responding to emerging needs of democratic communities.<sup>161</sup> In sum, he was a functionalist who advocated comparative study as a tool for reform. Yet, Chommie—while adopting functionalism as a general approach—specifically warned against simply accepting the functionalist assumption of similarities.<sup>162</sup> The reform Chommie advocated by the comparative study of tax law concerns something more (or something else) than the harmonization or unification of tax laws. Chommie argued that:

The point to be made is simply this: As a condition to *understanding* other tax systems, one must exhaustively re-examine one’s own basic policy position; and if comparative analysis does no more than stimulate such re-examination,

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154. JOHN C. CHOMMIE, *THE LAW OF FEDERAL INCOME TAXATION* (3d ed., West Pub. Co. 1988) (1967)).

155. On the trailing of American comparative tax scholarship behind the European scholarship, see generally Livingston, *Law, Culture, and Anthropology*, *supra* note 3, at 119; Thuronyi, *What can we Learn from Comparative Tax Law*, *supra* note 12, at 459.

156. Chommie, *Why Neglect Comparative Taxation?*, *supra* note 8, at 219.

157. *Id.*

158. John C. Chommie, *What Progress in the Functional Approach in Law School Curricula*, 8 J. LEGAL EDUC. 472 (1956).

159. ESTHER LUCILE BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* 99 (Irvington Pub. 1989) (1947).

160. Chommie, *A Proposed Seminar in Comparative Taxation*, *supra* note 8.

161. *Id.*, at 503-06.

162. Chommie, *Why Neglect Comparative Taxation?*, *supra* note 8, at 219 (arguing that we should account for “social background to legislative action, economic and political forces . . . since these are by observation, the most pertinent in any study of tax-policy making” and that “the investigation of political forces allows even fewer assumptions of similarity . . .”).

it will have served a valuable function in the training of policy-oriented lawyers.

Assuming “understanding” is a code word for sensitivity to differences, Chommie reconciles his two ends in a way similar to Infanti’s. His bottom line is that comparative study is needed to provide a choice among comparable decisions (rather than a single “proper” solution) when attempting needed reform.<sup>163</sup>

Chommie’s purposive thinking can serve as a natural link to Victor Thuronyi’s *Tax Law Design and Drafting (TLDD)*. *TLDD* is a straight-forward example of the comparable decisions Chommie sought, as it is intended to present alternatives to tax legislators. Thuronyi himself sees comparative taxation as an instrument that provides reference for prospective tax reforms.<sup>164</sup> Taken at face value, it seems that Thuronyi sees the betterment of tax reforms as the true purpose of comparative tax study, with no special interest in whether such reform would lead to the unification of laws. As he specifically states: “the purpose of a comparative approach is to learn about new possibilities from studying actual practice, to convince by example, and to avoid reinventing the wheel.”<sup>165</sup> It remains unclear, however, what are—in Thuronyi’s view—the standards according to which one should judge the merits of a tax reform.

Yet, there are some aspects in Thuronyi’s writing that specifically advocate convergence. To begin with, Thuronyi sees a remarkable process of tax systems convergence worldwide.<sup>166</sup> He believes that different tax systems have adopted truly similar rules, despite their different backgrounds. He also specifically argues that “convergence by legal systems . . . is always something to look for.”<sup>167</sup> It is not clear whether this assertion is merely a methodological one (assumption of similarities as a heuristic device) or a normative one (convergence as a desirable goal). In any case, Thuronyi also advocates functionally-oriented research for the study of tax transplants,<sup>168</sup> and in unearthing common tax principles when classifying countries into legal tax families. This may imply a common core style approach.<sup>169</sup>

In yet another article, Thuronyi specifically accounts for the values of comparative tax studies.<sup>170</sup> These are: (1) they can provide another point of view which may help one when reflecting upon one’s own system; (2) they can teach us about the historical development of

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163. Chommie, *A Proposed Seminar in Comparative Taxation*, *supra* note 8, at 504.

164. THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2, at 1.

165. THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2, at 4.

166. *Id.*, at 15-17.

167. *Id.*, at 5.

168. *Id.*, at 4-5; Thuronyi, *TLDD I*, *supra* note 31, at xxviii.

169. Thuronyi, *TLDD II*, *supra* note 31, at xxv.

170. Thuronyi, *What Can We Learn from Comparative Tax Law?*, *supra* note 12.

tax systems and their *convergence*; (3) since tax “touches virtually all phenomena of society,” by comparative study we are required to *understand the legal context*; and (4) teaching comparative taxation can provide alternatives for solving a tax issue.

It is fairly difficult to summarize Thuronyi’s stance regarding the purpose of comparative tax studies in terms of the general comparative debate. On the one hand, he emphasizes convergence and historical approaches; on the other, he does not miss social contexts and the understanding of differences. Yet, he does not reconcile these ends. It is possible that Thuronyi is a victim of the discursive failure and thus is unable to produce a coherent approach.

Lastly, I turn my focus on William Barker. Barker, like Infanti, attempted to portray comprehensively the theoretical facets of a comparative approach to tax law<sup>171</sup> and to address the objectives of comparative taxation within this framework. One of Barker’s articles states his view regarding the purpose of comparative tax studies quite clearly: “Expanding the study of comparative tax law *to promote democratic policy*” (emphasis added).<sup>172</sup> Yet, when formulating his objectives within the article, he seemingly adheres to a sort of “grab bag” attitude:

Whether the audience is students, who want to gain a better understanding of their own system, or students or practitioners who need knowledge of a foreign system in an ever-expanding global environment, or legislators who wish to consider foreign solutions for their own country, comparative tax law performs an important role.<sup>173</sup>

Barker seems to pursue an even more general approach by saying that his objective is “to create a view of tax law as a tool for human development.”<sup>174</sup> This statement explains little more than that comparative tax is “important.” To understand where Barker might be positioned in our framework, it is useful to note that he launched his comparative endeavor through “examining [the] system’s approach to the resolution of similar problems,” which is the bread and butter of functionalism.<sup>175</sup> But he also explicitly holds the traditional functional approach to comparative law insufficient for the comparative study of tax laws because this “largely analytical approach to law does not advance a realistic view of law and thus does not promote comparative tax law’s ability to advance legal theory.”<sup>176</sup>

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171. Barker, *Expanding the Study of Comparative Law*, *supra* note 9, at 703-12.

172. *Id.*

173. *Id.*, at 708.

174. *Id.*, at 711.

175. Barker, *A Comparative Approach to Income Tax Law*, *supra* note 48, at 8.

176. Barker, *Expanding the Study of Comparative Law*, *supra* note 9, at 706.

He does not seek to reject traditional functionality completely, but rather to revamp it by giving it a clearly stated normative stance.<sup>177</sup>

Barker notes the existence of many differences in the particulars of tax laws and argues that these differences can be “appropriately characterized as fundamental doctrinal differences regarding the proper approach to the formulation of tax base.”<sup>178</sup> Like Infanti, he believes that tax transplants can be successful as long as their adaptability to local cultural contexts is carefully considered.<sup>179</sup> More than that, Barker’s view is that transplants are not only a means of importing *possible* tax solutions, but also a means to spread *desirable* democratic values.<sup>180</sup>

Thus, Barker is best described as taking a middle-ground in this discussion though leaning towards the functionalist “unifying” end. His idea is to respect differences while promoting *certain* values (democratic ones) which implies that not all differences should be respected equally. Also, if only certain values are to be advanced, convergence becomes a sensible outcome.

## B. *The “What”: Comparative Tax Law and its Objects of Comparison*

### 1. In General

There is no easy way to summarize contemporary comparative tax literature with respect to its objects of comparison. The only distinctive feature is that tax comparatists see the issue of variable selection in very different ways. Some 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. Surprisingly, such differences are seldom debated. As long as this silence persists we are left with nothing but a mishmash of possible choices where each comparatist can compare whatever he or she wants without the risk of being exposed to any criticism as to the choice of objects of comparison and its possible ideological implications.

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177. *Id.*

178. Barker, *A Comparative Approach to Income Tax Law*, *supra* note 48, at 7.

179. Barker, *Expanding the Study of Comparative Law*, *supra* note 9., at 716-23.

180. *Id.*, *supra* note 9, at 727 (arguing that “[t]he comparative study of tax law affirms the conclusion that achieving a democratic policy of economic equality is the result of a struggle for its recognition *which must be constantly advanced*. Thus, comparative tax law is critical to a more complete understanding of how democratic society grapples with the problems of economic equality.”).



## 2. Which Jurisdictions?

One problem of the comparative tax non-discourse is that only a few tax comparatists provide any explanation of their selection of compared jurisdictions. To begin with, there is the question of classification into tax families as a basis for jurisdictional variables selection: without a doubt, Thuronyi pioneered this issue in the tax arena. In two works he elaborates his ideas of jurisdictional tax classification.<sup>181</sup> However, Thuronyi admits that his classification “largely tracks the classification of legal families by comparative law scholars.”<sup>182</sup> Against such taxonomy, one could argue that it presupposes what it seeks to achieve, since the existing taxonomy originates in comparative studies of private law. So at the least it is questionable whether such a taxonomy is really helpful in comparative public law research, such as tax law. Yet, in favor of Thuronyi’s taxonomy we can say that he notes some differences from the conventional classification which are due to the fact that his classification is focused on income tax.<sup>183</sup> Also, Thuronyi’s taxonomy can be quite comfortably regarded as a result of years of experience as a tax advisor, and thus an outcome of a realistic research rather than an *ex-ante* heuristic assumption. Another strength that can be attributed to his taxonomy is the fact that he largely avoids Eurocentrism. His taxonomy is truly global in nature, taking into account dozens of jurisdictions.

Thuronyi believes that his classification can provide a head start for future research.<sup>184</sup> It seems that his primary criterion for classification is the level of similarity of a specific country to a specific legal tax tradition,<sup>185</sup> namely, the civil law tradition, the common law tradition, or what he calls the European law tradition.<sup>186</sup> Very similar to Zweigert and Kötz, his classification leads him to suggest a rule of thumb for the selection of jurisdictions which are representative of a larger tax family. He suggests Germany, France, the United States, and the United Kingdom as natural choices for comparison.<sup>187</sup> Such an approach exposes him to criticism of ethnocentrism. It also suggests that Thuronyi adheres to an assumption of jurisdictional comparability. After all, the reason to choose these jurisdictions, according to Thuronyi, is that these countries can be regarded as “leaders in influencing the tax laws of other countries.”<sup>188</sup>

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181. THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2, at 7-10, 23-44; Thuronyi, TLDD II, *supra* note 31, at xxxiii-xxxv.

182. Thuronyi, TLDD II, *supra* note 31, at xxv.

183. *Id.*

184. *Id.*

185. THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2, at 7.

186. *Id.*, at 24-25.

187. *Id.*, at 9.

188. *Id.*

Thuronyi does explore other possible criteria for jurisdictional tax classification, but rejects them. For example he suggests that we could classify tax systems along economic lines.<sup>189</sup> Such classification could be determined by looking at the size of tax revenue and the components of the tax mix. This classification, Thuronyi admits, would probably result in a much different taxonomy than the traditional one. For example, it would probably group together many OECD countries, despite their origins in different legal traditions. Thuronyi rejects such classification on the ground that it could prove to be “misleading.”<sup>190</sup> His reason is that the various systems may produce significantly different tax mixes, which would put them in different classes, even though the economic effects are the same. For example, “a country extensively using tax expenditures (e.g., the United States) will show a lower tax share as compared with other countries (e.g., many European countries) that accomplish *the same policies* with direct expenditure programs whose economic effects may be *very similar* to those of tax expenditures.”<sup>191</sup> This example explains nothing more than Thuronyi’s general tendency towards the functional classification. The reason he rejects economic classification is that it prevents us from discerning which tax laws or institutions fulfill the same economic *function*. This is tautological reasoning which, simply put, rejects non-functional classification because it is not a functional classification. Functionalism might indeed be a preferred criterion of tax classification, but if so, Thuronyi does not explain why.

With that background Barker’s scholarship rings very different. Like Thuronyi, Barker asserts that “the fundamental contextual starting place of comparative law is that different nations belong to different legal families.”<sup>192</sup> Yet, he immediately notes the fact that the traditional classification is closely associated with scholarship in private law, and thus may not provide equally important insights for purposes of tax law. Barker—in a way strikingly different from Thuronyi’s classification—argues that taxation “does have its own taxonomy”<sup>193</sup> and suggests classifying tax systems according to their “defining elements.”<sup>194</sup> Those defining elements should be critically examined in order to determine whether they help to promote the democratic values which, as you recall, are the goals to be advanced by comparative tax studies according to Barker. Thus, we are dealing with normative rather than functional criteria for classification. The “normative underpinnings” of democratic taxation according to

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189. *Id.*, at 10.

190. *Id.*, at 11.

191. *Id.* (italics added).

192. Barker, *Expanding the Study of Comparative Tax*, *supra* note 9, at 711.

193. *Id.*, at 712.

194. *Id.*

Barker are “equity, both horizontal and vertical, and redistributive justice.”<sup>195</sup> Of course, Barker’s unique criteria could be criticized on various grounds. But given the objectives that Barker ascribes to comparative tax studies, he is doing a much better job explaining his criteria for classification than Thurnoyi does.

Barker’s approach is evident in an earlier comparative study, published well before he developed his classification criteria, in which he selected the United States and the United Kingdom as comparatives.<sup>196</sup> He explained then that both countries share the “same general system of law” and thus offer a “natural comparison.”<sup>197</sup> But he also noted that both systems started with remarkably different tax systems and that a comparison of strikingly different systems may “yield the greatest insight into the nature of legal doctrine.”<sup>198</sup> Loyal to his assertion, he later added South Africa to this equation, precisely because it is a country at a very early stage of democratic transition, with a new legal environment and tax system. Thus it offers a natural field of inquiry for comparative tax study aimed at promoting democratic values. In other words, Barker would probably reject the functional limitation which requires us to compare jurisdictions with tax systems at a similar evolutionary stage.

Livingston’s scholarship can be regarded as the most refined in this regard. Comparing tax progressivity in the United States, Italy, India, and Israel, Livingston admits that these countries were chosen in part because of his linguistic abilities, but also on the basis of their “distinctive features.”<sup>199</sup> According to Livingston, India, Israel, and Italy “are advanced enough to have a sophisticated tax policy discourse, but each has political and cultural features that renders its tax policy necessarily different from that of the others and the United States.”<sup>200</sup> Livingston virtually deconstructs the jurisdictional “comparability” requirement of the functional approach into its two components. The first is the requirement that the systems compared be at a similar evolutionary stage. To a significant extent, Livingston accepts this requirement by noting that the jurisdictions selected should be sufficiently “advanced” or “sophisticated” with respect to their tax policies. The second is the requirement of functional equivalence of the laws being compared. By noting the unique differences in the selected jurisdictions’ tax politics and tax cultures, probably as a prerequisite for obtaining comparative insights, Livingston rejects this requirement. In a sense, instead of showing how supposedly different laws achieve similar ends, he shows how supposedly similar

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195. *Id.*

196. Barker, *A Comparative Approach to Income Tax Law*, *supra* note 48.

197. *Id.*, at 8.

198. *Id.*, at 9.

199. Livingston, *From Milan to Mumbai*, *supra* note 41, at 556.

200. *Id.*, at 557.

laws achieve different ends. Livingston thus stands between Thuronyi and Barker. On the one hand, he would probably support Barker in choosing a classification criterion which is unique to the purpose of tax studies (tax cultures in Livingston's case) but on the other hand, he acknowledges the necessity to consider developmental criteria as well.

Chommie suggested comparing the tax systems of the United States and Canada, noting that the availability of Canadian materials in English is "of paramount importance."<sup>201</sup> Luckily, Chommie left us with more than a mere technical lingual consideration. Given the importance that Chommie ascribes to comparative studies as a catalyst for reform of the home system, it is not surprising to find him arguing that the primary substantive consideration in the selection of foreign taxation materials is "the light that they may shed on the tax-policy-making process in the United States."<sup>202</sup> Chommie offers several reasons why Canada's tax system is a successful candidate to shed light on the U.S. tax system.<sup>203</sup> First, Canada—like the United States—is a federal government. This would allow a critical examination of federal/state issues in the United States. Second, Canada presents a markedly similar economic structure. Third, Canada shares a common legal and cultural heritage with the United States. Fourth, at the time when Chommie wrote his proposals, Canada was a vibrant arena of tax reforms and professional tax-related activities, which in Chommie's view, transformed Canada into a more "mature tax community."<sup>204</sup> Thus Chommie, even though not a true traditional functionalist, resorts to a very functional-oriented approach in the choice of jurisdictions to be compared, especially when they share a similar background and similar level of development.

### 3. Micro or Macro Comparison?

The question of the scope of tax law comparison also attracts strikingly divergent views expressed by tax comparatists, yet they also go unchallenged. The most obvious representative of the macro end of the spectrum is Garbarino, who argues that tax systems should be studied comparatively as "wholes."<sup>205</sup> Garbarino makes his stand very clear, but does not provide an explanation for his prefer-

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201. Chommie, *A Proposed Seminar in Comparative Taxation*, *supra* note 8, at 504. Today, Chommie's prerequisite can usually be met with regard to most jurisdictions. Various databases provide detailed accounts in English of tax systems in most jurisdictions, the best example is the enormously voluminous database of the International Bureau of Fiscal Documentation (IBFD), listed at: <http://www.ibfd.org/portal/app?bookmarkablePage=org.ibfd.portal.presentation.Shop>.

202. Chommie, *A Proposed Seminar in Comparative Taxation*, *supra* note 8, at 506.

203. *Id.*, at 504-06.

204. *Id.*, at 506.

205. Garbarino, *An Evolutionary and Structural Approach to Comparative Taxation*, *supra* note 4, at 684.

ence for macro comparison. Barker, on the other hand, takes a similar position but does provide an idea of the reasons behind such a choice. When studying comparatively the tax systems of the United States and the United Kingdom,<sup>206</sup> he explains that his inquiry seeks “to investigate the nature and development of tax law through an examination of the *general structure* of two systems.”<sup>207</sup> Barker acknowledges the subjective nature of the choice of objects of comparison, but also embraces it.<sup>208</sup> Unlike Garbarino, he recognizes that there is no macro level without a micro level and hence is not exposed to Chodosh’s criticism aimed at comparatists who tend to disengage one from the other.<sup>209</sup> In order to characterize tax systems at the macro-level one must do some “micro work.” Barker specifically notes that his way of demonstrating the “general structure” of tax systems is by comparing specific topics which “were chosen due to the often dramatic way they expose the fundamental nature” of the systems compared.<sup>210</sup> The “micro-comparisons” to be performed presumably correlate with what Barker later termed the “defining elements” of tax systems. Such elements, he argues, “provide a critical structure for comparative analysis.”<sup>211</sup> A somewhat similar approach is taken by Thuronyi, who describes the primary characteristics of numerous specific areas of taxation in order to “survey the whole.”<sup>212</sup>

Infanti provides an opposite example regarding the breadth of comparison. Like many other authors, he chose to compare a narrowly defined topic, namely the tax treatment of contributions made by domestic taxpayers to foreign NGOs.<sup>213</sup> Infanti’s justification for this micro-approach seems to be primarily practical, i.e., that a single researcher would be unable to conduct a broad meaningful comparison. In light of the complex nature of tax law, this is a good reason, but it is incomplete without an explanation why one specific narrow area of tax law should be a preferred object of comparison over others. Infanti’s explanation for his choice is discussed below.<sup>214</sup>

Livingston probably provides the most elaborate account of the micro/macro choice, and eventually takes a middle ground. He starts by categorizing tax culture literature based on how broadly the term “tax culture” has been used.<sup>215</sup> At one end of the spectrum tax culture is used in a “macroscopic sense, to refer to broad beliefs and

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206. Barker, *A Comparative Approach to Income Tax Law*, *supra* note 48.

207. *Id.*, at 8.

208. *Id.*

209. Chodosh, *supra* note 27, at 1111.

210. *Id.*

211. Barker, *Expanding the Study of Comparative Tax*, *supra* note 9, at 711.

212. THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2, at 7.

213. Infanti, *Spontaneous Tax Coordination*, *supra* note 9.

214. See *infra* notes 225-28 and accompanying text.

215. Livingston, *Law, Culture, and Anthropology*, *supra* note 3, at 122-24.

practices and their impact upon the contemporary tax system.”<sup>216</sup> The other end of the spectrum is “narrower in focus,”<sup>217</sup> and “tends to use the idea of culture in an unsystematic way.”<sup>218</sup> There is also middle ground, which encompasses tax culture as an expression of both a narrowly structured phenomenon, as well as broad cultural attitudes.<sup>219</sup> Livingston then applies this categorization to state his hypothesis.<sup>220</sup> He argues that broad cultural or historical tendencies are poor explicators of tax differences as they tend to over-generalize. The problem with the comparison of broad perspectives is that such perspectives are “filtered” through specific tax cultures to an extent that eventually renders them unrecognizable. “It seems more promising,” he thus argues, “to find explanation in narrower, tax related institutions or traditions—what might be called the intermediate level between the overall national culture and specific tax rules or institutions.”<sup>221</sup>

#### 4. Which Tax Laws?

Two issues emerge when contemplating the tax laws to be compared: what qualifies as a “tax rule” and—assuming we can distinguish tax rules from non-tax rules—which tax rules should we compare?

The first of these issues, what is a tax rule, is closely related to the above discussion of what is comparative taxation. Unfortunately, this question has also largely been neglected by tax comparatists. Presumably, the question could be dismissed as a “non-issue” since “tax professionals speak a common language.”<sup>222</sup> So, if a common language for taxation does exist, we probably know what this language is all about. Such an assertion might be appealing and is not necessarily out of touch with reality. Yet, we should be very careful when stating that we know what the field’s unifying *tertium comparationis* is, if the statement really rests purely on the claim that tax laws are simply “there” and are expressed in a “common language.”

For example, an American tax comparatist would probably be quite comfortable asserting that a comparison of the administrative powers employed by the U.S. Internal Revenue Service on the one hand and by the Department of Zakat and Income Tax in Saudi Arabia on the other is clearly within the borders of comparative taxation. However, it would be much harder to find common tax terms which describe Zakat from an American scholarly perspective. Under Saudi

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216. *Id.*, at 122.

217. *Id.*

218. *Id.*, at 123.

219. *Id.*

220. *Id.*, at 127-29, 132.

221. *Id.*, at 128.

222. Barker, *Expanding the Study of Comparative Tax*, *supra* note 9, at 711.

law, Saudi nationals do not pay income tax. They are, however, subject to Zakat, which is charitable giving to the needy, required by Islamic law. For purposes of receiving foreign tax credits, the IRS has determined that Zakat is not a credible tax since it is not a “tax” in an American sense.<sup>223</sup> So, is research comparing income tax compliance in the United States with Zakat compliance in Saudi Arabia research in comparative tax law? Or is it simply comparative law research dealing with law compliance? Maybe a “common language” is more wishful thinking than reality after all?

Thus, the “what is comparative taxation” question cannot be fully tackled without a necessary discourse about the boundaries of comparative taxation. Presumably, such boundaries will never be clearly defined, but a discourse should still produce some defining criteria for our field of study. Defining what is “comparative” about a study is a worn-out topic; defining what is a comparative study about “taxation”—not nearly as much. Within the scope of this Article, it is not possible to develop a coherent and convincing argument as to what is a “tax law” from a comparative perspective, but we can say this much: the use of terms such as “common language” or “comparable tax law” eventually boils down to an acceptance or rejection of functionalism.

If we accept functionality as a suitable approach to the study of comparative tax, we must discuss the most basic similarity of functions that tax systems are intended to fulfill. Only the comparison of laws that share the most basic function of tax law can be regarded as comparative taxation from a functional perspective. So what is this “basic function”? Is it simply the generation of national revenue? If so, does the international comparison of speeding tickets fines fall within the boundaries of comparative taxation? Is it redistributive justice? And if so, does the cross-border comparison of social benefit laws qualify as a study in comparative taxation? To date, functional tax comparatists have neglected the most basic prerequisite needed to define their field of study: what basic function transforms a *law* into a *tax law*? Moreover, what if we reject functionalism? What is the common ground then by which we define the “tax laws” we compare? If we do not discuss such common ground, are we tax comparatists at all? Or are we just comparatists who compare texts in which the word “tax” appears more often than not?

Moreover, to date tax comparatists have engaged in the comparative study of almost any field of taxation, from controlled foreign corporations (CFC) regimes to the process of tax reforms in developing countries. As noted, a choice of topic may imply an ideological perspective regarding the questions that tax comparatists *should* ask. Since no criteria have been developed to decide which questions

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223. I.R.S. Gen. Couns. Mem. 37,263 (Sept. 21, 1977).

tax comparatists should ask, most comparative tax articles simply focus on the specific area of interest or expertise of the tax scholar who writes them. In other words, we have no real way to judge which comparative tax studies offer the most valuable insights, and which studies add only marginal value to the development of the field. Two tax comparatists however, did provide a somewhat detailed justification for their choice of tax laws.

When examining his theoretical framework, Infanti justified his micro-approach to comparing the tax treatment of contributions made by domestic taxpayers to foreign NGOs on practical grounds.<sup>224</sup> But he added another justification which is purpose-driven. The purpose is to show that reform and simplification of the Internal Revenue Code can go hand-in-hand. Hence, he chose to compare this area of tax law, because it “suffers from both the excessive complexity and the failure to keep pace with a changing economy.”<sup>225</sup> Naturally, such criteria advance his specific purpose, but can “excessive complexity” and “failure to keep pace with a changing economy” also serve as proper *general* criteria for the selection of tax laws to compare? Luckily, Infanti does provide an answer to such questions in a later article—an answer which again posits him at the critical end of the tax-comparison spectrum. Explaining his choice in retrospect, Infanti admits that the issue of deductibility of cross-border contributions to foreign NGOs is somewhat esoteric.<sup>226</sup> He further explains that he chose this subject specifically for its marginality, “because it was *not* a topic about which academics studying international tax normally write.”<sup>227</sup> Part of his purpose in doing so, he continues, “was to try to move the international tax discourse beyond the usual subjects.”<sup>228</sup> With this assertion Infanti acknowledges his critical view of comparative tax studies.

Another tax comparatist who convincingly justifies his choice of laws is Barker. Barker suggests studying the “defining elements” of income tax systems:

Exemptions and tax preferences are the defining elements of a tax system and are critical to the comparative study of tax law. Exemptions and preferences strongly indicate whether the ideals of equity and distribution are being achieved by a particular system because they are the sources of the vast majority of direct tax transfers.<sup>229</sup>

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224. Infanti, *Spontaneous Tax Coordination*, *supra* note 9, at 1157.

225. *Id.*

226. Anthoni C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 25 WHITTIER L. REV. 707, 796 (2005) [hereinafter: *A Tax Crit Identity Crisis*].

227. *Id.*

228. *Id.*, at 796-97.

229. Barker, *Expanding the Study of Comparative Tax Law*, *supra* note 9, at 715.



Assuming we accept Barker's ideological stance—namely, that the purpose of comparative tax study is to promote democratic values and that these values culminate in a call for distributive justice—he makes a valid point as to the choice of tax laws to be studied. If we seek tax benchmarks of distributive justice, we should certainly compare tax laws that actually *distribute*, such as tax exemptions and preferences.

C. *The "How": Comparative Tax Studies and the Construction of Similarities and Differences*

1. In General

The act of comparison itself is supposedly a technical one, and hence apolitical. In reality however, techniques serve particular purposes and cannot be detached from an ideological stance. Even the most generalized blueprint of comparison would have to take a particular shape when executed. One would have to decide which legal texts to read, which non-legal sources to consult, how to interpret texts and data, and so on. All of these choices are deeply embedded in subjective views, which may be ideologically affected.

This makes it quite obvious that there is no one-size-fits-all technique.<sup>230</sup> For example, the comparison of tax compliance cultures and the comparison of effective corporate tax rates in different countries cannot be possibly performed in accordance with the same standards and procedures, and it is doubtful that such comparisons can serve the same purposes. Some would argue that the self-evident result is that—when it comes to methodology—comparative tax research must resort to eclecticism.<sup>231</sup> In my view, however, complete eclecticism is undesirable. A coherent discourse would address the question, among many others: which is more important to compare (tax cultures or tax rates)? If an academic discourse marginalizes specific kinds of tax comparison and emphasizes others, it would have to concentrate the methodological discussion on techniques which are most relevant to the "important kinds" of comparisons. This would make the methodological discussion significantly less eclectic. In case we should experience a paradigmatic shift in the discussion, it is reasonable to assume that a methodological shift would follow. In other words, in order to establish which methods are *currently* most suitable for the purposes of comparative tax law, we should start by developing a discourse on the purposes of comparative tax law instead of simply resorting to eclecticism. As tax comparatists, we should commit to specific academic purposes rather than proclaim that all purposes are equally important.

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230. See Kamba, *supra* note 15, at 511.

231. For a critical look at the issue, see generally Kennedy, *The Methods and the Politics*, *supra* note 27, at 352-55.

The following survey clearly demonstrates that different tax comparatists have taken different approaches towards the process of comparison, from both practical and normative perspectives. The fact that they ignore each other's methodological stances is a serious problem in comparative tax law research. Each tax comparatist conducts his scholarship in his own intimate methodological bubble, free from outside critique. The result is that tax comparatists do not reflect on their methodological practices and ideologies. Taking a critical position, I would conclude that to date, legal comparative tax studies simply lack "self-consciousness."

## 2. Methodological Conflicts in Comparative Tax Law

Not all tax comparatists explain their purposes and choices, or their underlying assumptions. Yet, even if they do not explain their technique, it can be determined by looking at what they actually do. Thus, projects of comparative taxation often provide examples of coherent methodological approaches, even though the author may not be aware of it.

One such example is the annual *Cahiers De Droit Fiscal International* published by the International Fiscal Association (IFA), which provides a comparative report on a specific field of tax law in each of the two volumes published every year. From a jurisdictional perspective the *Cahiers* provide a rather comprehensive analysis. Given the sheer magnitude of the IFA<sup>232</sup> and the central role it plays in the global tax environment, the *Cahiers* certainly have significant effect on the very issue of "what is currently important" in the tax world. In that sense they advance a particular kind of comparative tax discourse. They are also interesting for another reason, i.e., the method by which they are produced. Every year, the IFA invites local specialists from around the world to address a particular tax issue. These specialists are presented with a series of questions, many times in the form of a case study. Each specialist produces a national report summarizing his local jurisdiction's handling of such a case. The reports are presented to a general reporter who compiles a general report summarizing the trends.<sup>233</sup> In methodological terms, this bears a strong resemblance to Schlesinger's Common Core Project. For example, Masui, the general reporter for the second 2004 report that dealt with a comparative analysis of group taxation, specifically

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232. In 2008, the IFA had 59 branches and over 12,500 members worldwide. See Han A. Kogels, What is the IFA?, <http://www.ifa.nl/index.htm> (last visited Nov. 22, 2009).

233. For the description of the methodology used for the compilation of the *Cahiers*, see, e.g., Kees van Reed, *General Report*, 73a CAHIERS DE DROIT FISCAL INT'L 21, 21-25 (1988).

presents his report in functional terms.<sup>234</sup> The report also concludes that there are four primary regimes of group taxation and that each jurisdiction surveyed can be associated with one of these regimes.<sup>235</sup> Such classification brings forward the common core of group income taxation for each “family” of jurisdictions.

Another example of such a common-core-like project in tax law is found in Hugh Ault’s and Brian Arnold’s work.<sup>236</sup> Their book states its functional orientation at the outset by saying that “[t]he purpose of this book is to compare different solutions adopted by nine industrialized countries to *common problems* of income tax design.”<sup>237</sup> Here too, local specialists were asked to provide accounts of their home tax systems. Ault and Arnold then synthesized the country reports into a form of general analysis which categorizes the findings. They, too, recognize legal “family resemblances” among different jurisdictions which belong to parent legal traditions.<sup>238</sup> Ault and Arnold’s work primarily reveals the “many communalities”<sup>239</sup> among the systems compared, thus again providing some form of common core.

However, there are two important differences *vis-a-vis* the IFA *Cahiers*. First, the scope: while the *Cahiers* cover narrowly-defined issues in a rather technical way, Ault and Arnold try to establish a general picture of tax systems encompassing the legislative process, administration, adjudication, and legal interpretation. Such research certainly provides a “more nuanced understanding of how to approach the income tax in each country than is produced by a mere description of tax rules.”<sup>240</sup> This is related to the second important difference: namely, that local experts were asked to go beyond a mere description of the respective tax laws; they also provided an account of the history and sources of tax law, the legislative process, constitutional considerations, tax process and administration, the role of adjudication, and so on. This is reminiscent of Sacco’s legal formants approach. In sum, from a methodological perspective, while the IFA *Cahiers* can be regarded as the “tax-duplicate” of Schlesinger’s project, Ault and Arnold’s work is something like a small scale *Tax-Trento-Project*.

Garbarino is a rare example of a comparative tax scholar whose position is very clear on this matter. I criticize Garbarino in relative detail in Part IV of the Article, so for now I will only make some short

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234. Yoshihiro Masui, *General Report*, 89b CAHIERS DE DROIT FISCAL INT’L 21, 31-33 (2004).

235. *Id.*, at 29-31.

236. AULT & ARNOLD, *COMPARATIVE INCOME TAXATION*, *supra* note 6.

237. *Id.*, at xix.

238. *Id.*, at xxii.

239. Stewart, *supra* note 35, at 1327.

240. *Id.*, at 1326.

observations regarding his approach. We have already noted Garbarino's advocacy for the functional approach. But Garbarino goes further than simply suggesting such an approach. He specifically advocates the use of both the common core and the legal formants approaches for purpose of comparative taxation. Interestingly, he also advocates the use of comparative law and economics, asserting that "the institutional approach can be used in a comparative taxation to consider operative tax rules in a context in which alternative solutions can be readily compared in connection with their costs."<sup>241</sup>

At first glance, Thuronyi's *Comparative Tax Law* looks like another clear-cut case as it purports to deal "with core common knowledge that any well-informed lawyer should have."<sup>242</sup> More precisely, he tries to "identify the key elements of legal traditions for tax law."<sup>243</sup> This, by definition, is an attempt to discover common cores. Thuronyi is also sensitive to formants-related issues noting the "divergent interests" of multiple actors which affect the tax process.<sup>244</sup> Yet, when explaining his "comparative method,"<sup>245</sup> Thuronyi resorts to an extreme form of eclecticism and notes that historical, sociological, and economic methods are all relevant to the study of tax law.<sup>246</sup> Unfortunately, he does not provide any guidelines on how to choose methods for tax comparison and we are left to guess.

Barker, as you recall, suggested "viewing the concepts of income taxation from an ideological perspective."<sup>247</sup> This represents a shift away from the supposedly apolitical stance of functionalism. Yet Barker does not reject functionalism altogether; instead, he makes it self-aware. He questions the functions of tax systems in promoting distributive justice.<sup>248</sup>

The critical assumptions or presuppositions underlying the legal discourse of income taxation in the world today are the general *economic definitions of the income tax base*. The starting place for most tax policy discussions is the *accretion concept* of income and what is now known as the comprehensive income base.<sup>249</sup>

In other words, Barker provides a benchmark for comparison: "the accretion concept." Barker also makes it clear that by "accretion

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241. *Id.*

242. THURONYI, *COMPARATIVE TAX LAW*, *supra* note 2, at xiii-xiv.

243. *Id.*, at 3.

244. *Id.*, at 21.

245. *Id.*, at 3-7.

246. *Id.*, at 4-6.

247. Barker, *Expanding the Study of Comparative Tax Law*, *supra* note 9, at 712.

248. *Id.*, at 714.

249. *Id.*

concept” he refers to the Schanz-Haig-Simons model.<sup>250</sup> Thus, Barker’s technique can be associated with a reformed version of comparative law and economics. He offers an economic model (Schanz-Haig-Simons) to be used as a reference point for the identification of similarities and differences among tax systems. Yet, unlike Mattei’s approach, Barker’s comparative analysis is aimed at distributive justice rather than efficiency.

Given Infanti’s critical stance towards functionalism, it is not surprising that he starts out with his comparative tax analysis by rejecting the five-step approach suggested by Zweigert and Kötz.<sup>251</sup> Instead, he adopts Kamba’s general scheme of description, identification, and explanation.<sup>252</sup> As we have already noted, one has to fill Kamba’s model with some practical content in order to transform it from an abstract scheme into a workable technique. Yet, it seems that Infanti fails to do so. Instead, he basically restates Kamba’s assertion. In his descriptive phase, Infanti suggests that the studied tax rules should be described in “their historical and cultural context.”<sup>253</sup> In the identification phase the rules are to “be compared and constructed in an effort to identify any similarities among them and differences between them.”<sup>254</sup> And in the explanation phase the results are “employed as a framework for developing an appropriate rule for enactment by the United States.”<sup>255</sup>

It is obvious that Infanti went to great length to provide a full account of the relevant laws in each jurisdiction as well as the pertinent historical development and political discourse that surrounded the creation of these rules. In that sense, Infanti’s approach is simple and complicated at the same time. It is simple because deducting a practical rule from his descriptive work would be to study the laws and contexts of the foreign jurisdictions. It is complicated because this is indeed a daunting task, and Infanti is not entirely clear as to how it should be performed. His explanatory phase is rather short and unexpectedly “mainstream,” given his usual critical stand. Instead of deconstructing the findings to expose the political interest underlying them, as a truly critical writer would, he places the jurisdictions along an imaginary spectrum of possible choices.<sup>256</sup> Instead of deconstructing abstract notions, he constructs them. It is a puzzle

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250. This model is defined as “the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question.” See HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 206 (Univ. of Chi. Press 1993) (1938), cited in Barker, *A Comparative Approach to Income Tax Law*, *supra* note 48, at 11-12.

251. Infanti, *Spontaneous Tax Coordination*, *supra* note 9, at 1140-41.

252. *Id.*, at 1141.

253. *Id.*, at 1158.

254. *Id.*, at 1159.

255. *Id.*

256. *Id.*, at 1223-26.

that after attacking the mainstream discourse of tax reform in the United States, he brings his comparative findings straight back into the framework of this mainstream discourse, assessing the possible comparative solutions in terms of “efficiency, fairness, the competitiveness of U.S. multinationals, the impact on political relations with foreign countries, the need to raise revenue, and the prevention of tax avoidance and evasion.”<sup>257</sup> The reason for such ambivalence is perhaps that, at the time when Infanti outlined his approach, his identity as a critical scholar was not fully shaped. Infanti, in his own words, was probably a “closet” tax-crit not yet ready to be exposed.<sup>258</sup> Luckily for us, since then Infanti has made his critical position quite clear, enriching our comparative tax environment with a truly critical comparatist.

A further shift away from traditional functionalist techniques of comparison can be observed in Livingston’s scholarship. Livingston’s starting point is that:

[c]omparative taxation . . . inevitably focuses attention of the problems of tax culture and the ways in which different country’s tax systems may be extremely different from one another, even if they face the same problems.<sup>259</sup>

As in the case of the cultural branch in general comparative law, when reading Livingston’s work, it is hard to put into practical terms what exactly it is that a cultural tax comparatist should do. But I doubt that Livingston, as a true cultural comparatist, would find it desirable to put the notion of tax culture into a generalized dogmatic scheme. That said, Livingston is aware of the fact that one cannot perform a successful comparative tax culture study without meticulous attention to the definition of culture.<sup>260</sup> Hence he provides some guidelines for the possible components of tax cultures and their comparisons.

Livingston’s quest for the identification of tax cultures starts by affirming that usually, narrow and localized factors play a more important role than “broad cultural norms which are often subject to misleading or over-stated stereotypes.”<sup>261</sup> Thus, within the framework of the Cottorell-Friedman debate, it seems that Livingston is

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257. *Id.*, at 1226.

258. Infanti, *A Tax Crit Identity Crisis*, *supra* note 226, at 810-13. In fact, his most CLS oriented tax articles were indeed published after *Spontaneous Tax Coordination*, which was published in 2002. See, e.g., *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 *TAX LAW* 407 (2008); Tax Protest, “A Homosexual,” and Frivolity: A Deconstructionist Meditation, 24 *ST. LOUIS U. PUB. L. REV.* 21 (2005); The Internal Revenue Code as Sodomy Statute, 44 *SANTA CLARA L. REV.* 763 (2004).

259. Livingston, *Law, Culture, and Anthropology*, *supra* note 3, at 121.

260. *Id.*, at 132-33.

261. *Id.*, at 132.

more inclined towards Friedman's suggestions that cultures are best understood as a general category from which narrow indicators are devised. For example, some of the possible components considered by Livingston in *From Milan to Mumbai* are:

the education and training of tax elites; the relationship between lawyers, economists, and other tax professionals; the nature of tax administration; attitudes toward tax compliance and evasion; and the unwritten traditions that govern the making and implementation of tax policy in the country in question.<sup>262</sup>

Livingston's scholarship also contains some critical elements. But unlike most general comparatists who aim this critique at the process of comparison itself, Livingston is critical at the level of each jurisdiction. He deconstructs local tax discourse in the countries studied, noting that within each "there is a pronounced tendency for tax arguments to become an argument about something else." In other words, his cultural project is aimed at exposing the different underlying—sometimes hidden—local factors which effect tax outcomes and compares them.

This brief survey of the wide array of methodologies used by tax comparatists demonstrates the eclectic nature of the field. In and of itself, such eclecticism is not necessarily a bad thing. In our context, however, it is, because the form of eclecticism which currently controls the field means that true discourse is missing. With no discourse, tax comparatists have failed to develop any meaningful form of guidance to explain which method is to be used and when. Thus, any prospective comparative tax researcher in search of a methodology is necessarily left confused. Some guidance is badly needed if we want to overcome this confusion.

#### IV. TAKING SIDES: QUESTIONING GARBARINO'S APPROACH TO COMPARATIVE TAXATION

##### A. *In General*

It is easy to criticize tax comparatists for not talking to each other and to challenge them to do so. But one must hold to his own propositions. If no one talks to each other, someone should start a conversation and, since I pointed out this failure in the first place, it is only fitting that this someone should be me.

I will take sides in this yet to be implemented discourse by presenting my reaction to Carlo Garbarino's recent article.<sup>263</sup> Garbarino begins by introducing the purpose of his essay: to have

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262. Livingston, *From Milan to Mumbai*, *supra* note 41, at 557.

263. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4.

comparative tax studies absorb the insights of the general comparative law debate, and to use such insights to formulate the methods applicable to comparative tax law.<sup>264</sup> Garbarino introduces the current discourse in general comparative law in a rather simplistic way,<sup>265</sup> and immediately turns to adopt the functional approach for purpose of comparative taxation.

Garbarino misses the opportunity to refer to important works by other tax comparatists. As we have seen, functionalist positions towards comparative tax law have been adopted as early as the 1950s by John Chommie and practiced ever since by comparatists such as Hugh Ault and Victor Thuronyi. Moreover, other writers have rejected the functional approach for the purpose of comparative tax studies. His failure to consider previous scholarship enables Garbarino to imply that current comparative tax scholarship is a “technique,” consisting of merely “collecting legislative materials of different tax systems.”<sup>266</sup> In fact, as noted throughout this Article, it is hard to find any tax comparatist who treats tax comparison as a mere juxtaposition of tax rules. Thus, the basis for Garbarino’s unconvincing argument is a rather simplistic presentation of the wide array of ideological choices and their respective methodological counterparts. Garbarino summarizes his approach in four points: (1) tax systems should be studied as “wholes,” (2) comparative taxation must adhere to the functional approach, (3) comparative taxation should concentrate on legal transplants, and (4) be viewed as the result of the circulation of models among different countries.<sup>267</sup> Let us take a look at these points in turn.

### B. *The “Tax Systems as a Whole” Myth*

At the outset of his article Garbarino opines that “taxation can only be understood in connection with a global approach which addresses the operation of the legal system as whole.”<sup>268</sup> He explains that “comparative tax studies should not be limited to isolated aspects but should consider tax systems as complex evolutionary structures.”<sup>269</sup>

Here, Garbarino clearly suggests the macro-analysis of tax systems. It is my first observation that Garbarino does not follow his own suggestion. In a later article, Garbarino offers a comparative analysis of what he calls “corporate tax models” in order to explain

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264. *Id.*, at 670-80.

265. *Id.*

266. *Id.*, at 685. Cf. INTRODUCTION TO COMPARATIVE TAX LAW (Claudio Sacchetto & Marco Barassi eds., 2008).

267. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 685.

268. *Id.*, at 680-81.

269. *Id.*, at 683.



how corporate tax innovation is a “result of tax competition.”<sup>270</sup> This approach hardly coincides with the idea to study tax systems “as a whole” as it compares a specific area of tax law. Garbarino himself notes that “we look here at the competition of *specific* tax structures and *not* of tax systems as a whole.”<sup>271</sup> Even though he makes his stance quite clear, he does not explain his sudden shift from macro to micro-analysis.

This lack of coherence can perhaps be explained by the fact that Garbarino’s initial choice of macro-comparison is unconvincing. Garbarino supports his suggestion for macro analysis by citing David Gerber and Mathias Reimann,<sup>272</sup> but in doing so, he misinterprets both. Gerber, as Garbarino suggests, indeed advances a new form of comparative thinking, aimed at gaining what he calls “generalizable knowledge.”<sup>273</sup> However, Gerber’s quest for “generalization” has nothing to do with macro-comparison, but rather with an attempt to put comparative knowledge into a cohesive methodological context. Gerber is unhappy with the fact that comparative legal knowledge “tends to remain particular, specific—and isolated.”<sup>274</sup> This is presumably what Garbarino means when he writes that “comparative tax studies should not be limited to isolated aspects.” This is exactly what Gerber seeks to remedy—he strives to develop a general method to pursue such knowledge effectively.<sup>275</sup> Garbarino correctly reads Gerber’s suggestion that in order to accomplish such a goal, legal comparatists must turn their focus towards the process, or the dynamics of legal systems “to interpret what legal actors have done and predict what they are likely to do.”<sup>276</sup> But unlike Garbarino, Gerber does not suggest that the study of such a process must adhere to the investigation of systems as “wholes.”

Actually, Gerber expresses quite the opposite view. He looks at the objects of comparison and advances the use of “analytically useful concepts.” One of the criteria that make concepts analytically useful is that “[t]hey will have to refer to *specific behavior*, so that the analysis can be grounded in observable data.”<sup>277</sup> Accordingly, comparisons must look at specific rather than generalized variables.

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270. Garbarino, *Tax Transplants and Circulation of Corporate Tax models*, *supra* note 128, at 1.

271. *Id.*, at 9 (italics added).

272. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at n.22.

273. David J. Gerber, *System Dynamics: Towards a Language of Comparative Law?*, 46 AM. J. COMP. L. 719, 724-25 (1998).

274. *Id.*, at 723.

275. *Id.*, at 725.

276. *Id.*, at 726.

277. *Id.*, at 728.

Of course, Gerber seeks to develop a concept of “legal systems,”<sup>278</sup> but he specifically rejects the idea of legal systems as “the totality of factors involving law in a particular jurisdiction.”<sup>279</sup> Rather, he seeks to “define ‘legal system’ in a way that is both operationally grounded . . . and broad enough to capture the full range of factors involved.”<sup>280</sup> In other words, Gerber would probably advocate the study of particular issues only if they were to shed light on the broader picture of law in a specific jurisdiction. Interestingly enough, Gerber-like suggestions resonate loudly in the comparative tax scholarship of Livingston and Barker, which receives little attention from Garbarino.

Reimann, like Gerber, notes the lack of a coherent theoretical framework in comparative legal studies, complaining that “comparative law keeps accumulating knowledge in a piecemeal fashion but then leaves the pieces scattered, fragmentary and often difficult to access.”<sup>281</sup> Reimann believes that the first step towards remedying that malaise is to establish a canon which will provide “a common ground on which ideas connect, the center around which knowledge can be organized, and the launching pad from which further research starts.”<sup>282</sup> But he also asserts specifically that such a canon should be established on the basis of existing accumulated knowledge.<sup>283</sup> Since such knowledge is accumulated by means of, among others, micro-comparisons, I see no urgent call in Reimann’s writing for a macro-analysis. When outlining possible goals for successful comparative research, Reimann stresses goals which can be achieved by micro-analysis side-by-side with goals which can be achieved by macro-analysis.<sup>284</sup> By doing so, Reimann rejects—by implication—the idea that a comparatists *must* look at legal systems as a “whole.”

This skepticism towards macro-analysis for tax purposes is further strengthened if one questions this approach within the context of the peculiar nature of tax law. Garbarino defines three unique characteristics of tax law: rapid change, complexity, and heterogeneity of concepts.<sup>285</sup> Most relevant for the micro/macro question is the observation that tax law is highly complex. If, as Garbarino notes, tax law shows “remarkable *variations* involving interactions between statutes, administrative guidelines, case law and opinions of scholars,” how can we address such a combination of complexities as “a whole?” There may be some unifying explanation that could bring sense and

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278. *Id.*

279. *Id.*, at 729.

280. *Id.*

281. Reimann, *supra* note 17, at 687 (citation omitted).

282. *Id.*, at 695-96.

283. *Id.*, at 696.

284. *Id.*, at 698.

285. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 686-87.

coherence to this “mishmash of complexities” (for example, unique cultural characteristics). But we would be unable to find such consistencies if we were to reduce multiple complexities to abstract systemic notions.

Ultimately, the incredible complexity of tax laws would force us to deconstruct “tax systems” into components. First, because there is no possible way we can reduce such an overly elaborate body of law into abstract terms that would do it justice. Even in a technical sense, studying tax systems as “a whole” is simply impractical. Second, even if we accept Garbarino’s functional stance, the fact remains that tax systems perform a multiplicity of functions. Consolidating them all into some single unit to be used as an object of comparison would necessitate the preference of some functions over others. So how should one define the “whole” unit? According to which tax rules? According to definitions of tax base or according to tax expenditures? According to rules supporting corporate reorganizations or to rules which give preferential treatment to medical expenses? The only guidance proposed by Garbarino in this matter is a call for eclecticism. I further discuss Garbarino’s eclectic stance below.

*C. Is the Functional Approach Adequate for the Purposes of Comparative Tax Law?*

In his article, Garbarino adopts the functional approach for the study of comparative tax law. While I do not necessarily reject functionalism in comparative tax studies, I cannot accept it in the form advanced by Garbarino. His form of functionalism is flawed in three different aspects. First, Garbarino almost completely ignores the long-standing critique of functionalism as a general method of comparative legal research. Such lack of engagement puts the integrity of his arguments at risk.

Second, there is the question whether functionalism is adequate as a method of comparative legal research in public law. Garbarino himself notes that “comparative studies have long focused primarily on private law while public law and especially taxation are relatively unexplored.”<sup>286</sup> If so, we must question whether functionalism, a method which was predominantly used for the comparative study of private law, necessarily fits the study of public law, such as tax rules. In fact, it was argued that the presumption of similarities—the central pillar of functionalism—does not apply to public law and, as a result, not to tax law. Rather, “the vast majority of the law taught at the universities, applied by courts, and . . . examined by comparative

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<sup>286</sup> Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 681.

lawyers is not caught by the presumption.”<sup>287</sup> This difficulty with the functional approach was noted by tax comparatists and yet it is largely ignored by Garbarino.<sup>288</sup>

This brings us directly to the third criticism, i.e., to questioning the functional approach specifically in light of the unique nature of tax law. Garbarino explains his choice of the functional approach as the only one fit to overcome the obstacles to comparing tax rules. For example, he notes the heterogeneity of tax concepts, stating that “[t]he problem with tax concepts is that they can often not be compared directly as they are not readily convertible into each other. In certain cases, similar terms do not have an identical legal meaning while in other contexts, different terms may mean the same.”<sup>289</sup> Taking such an assertion at face-value, we might accept that functional analysis is indeed a good way to proceed since it posits the legal problem in factual rather than conceptual terms. But this is true only if we accept that tax law is completely detached from local contexts. Garbarino overlooks that such “heterogeneity of tax concepts” might be the result of divergent cultural or sociological factors, rather than simple linguistic differences. How would we pose the Saudi Arabian “Zakat” in functional terms understandable to a U.S. taxpayer? How should we explain the function of rent imputation in Belgian tax law to an American homeowner who is indifferent to concepts of imputation? How should we deconstruct “progressivity” into comparable functional notions? Is it intended to accomplish distributive justice? If so, how should we define it? Should we limit the impact of redistribution to wage earners, like in Italy? Should it be placed to promote Zionist social ideologies, like in Israel? Or is it perhaps intended to benefit the agricultural sector, like in India?<sup>290</sup>

Tax law is very much *about* local context. It is the very essence of the political orientation of any regime in any given jurisdiction. Significantly, unlike some other areas of law, this politicized characteristic of taxation is clearly evident. There is no need to take a critical position or to “deconstruct texts” to understand the ultra-politicized nature of taxation. Tax law is used expressly to promote political agendas. Political candidates run their electoral campaigns on tax-reform tickets. For example, the Obama administration’s suggestion to repeal the check-the-box regulations,<sup>291</sup> frequently used by U.S. multinationals to defer their tax payments and to generate for-

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287. Gerhard Dannemann, *Comparative Law: Study of Similarities of Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 26, at 383, 395.

288. Barker, *Expanding the Study of Comparative Tax Law*, *supra* note 9, at 707-08.

289. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 687-88.

290. Livingston, *From Milan to Mumbai*, *supra* note 41.

291. John D. McKinnon & Jesse Drucker, *Firms Face New Tax Curbs*, *WSJ.COM*, May 4, 2009, <http://online.wsj.com/article/SB124140022601982149.html>.

eign tax credits, would have been unheard of under a Republican administration. It has been said that “[e]ven conservative tax scholars recognize the inherently political nature of their subject.”<sup>292</sup> So how is it that tax law is not strictly embedded in local contexts? Critical comparatists have been subject to criticism for their attempt to “politicize” an already politicized field.<sup>293</sup> Garbarino actually does the opposite: he is trying to depoliticize what is clearly political.

Moreover, even if we accept the premise that one should adhere to the functional approach in comparative tax studies, the question still remains, which functional approach? Functional analysis is not a coherent instrument of research, but rather an inclusive term which encompasses multiple sub-schools of thought.<sup>294</sup> Garbarino’s answer is that “comparative tax research should be eclectic as to the methods available under a functional approach.”<sup>295</sup> But Garbarino refrains from questioning whether eclecticism is desirable at all, which in his case is especially needed since he seeks to provide us with a coherent framework for the comparative study of tax laws. One must explain how eclecticism is to be made coherent. As eloquently put by David Kennedy: “As an argumentative or rhetorical effect . . . methodological eclecticism is unstable, the argumentative apparatus which supports it is full of elisions, ambiguities, hidden contradictions, understatements and overstatements which can be, and often are, the object of criticism, often from other comparatists.”<sup>296</sup> In addition, an eclectic posture facilitates a lack of methodological commitment, i.e., it promotes “methodological disengagement.”<sup>297</sup> Such disengagement, in turn, enables comparatists to portray themselves as apolitical actors, thus avoiding scrutiny and critique.

Yet, in order to correct the shortcomings of eclecticism, there is no need to reject eclectic methodology altogether. Instead, methodological eclecticism can indeed be justified as a paradigm.<sup>298</sup> But in order to do so, one must disconnect eclecticism from vagueness and from lack of ideological commitment. Instead, comparatists should “pursue political projects . . . harnessing their mature eclectic pragmatism to political objectives which can be embraced or contested.”<sup>299</sup> Eclecticism, as proposed by Garbarino, does not achieve this goal. Since it lacks clearly stated objectives, Garbarino’s

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292. Livingston, *Radical Scholars, Conservative Field*, *supra* note 55, at 1798.

293. Ugo Mattei, *Comparative Law and Critical Legal Studies*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 26, at 815.

294. See, Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 26, at 339, 343-59.

295. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 704.

296. Kennedy, *supra* note 27, at 353.

297. *Id.*, at 405-06.

298. Michaels, *supra* note 294, at 362.

299. *Id.*, at 408.

eclecticism is precisely the form of disengagement which Kennedy tries to avoid—the kind of eclecticism which forestalls, rather than advances, a fruitful academic discourse, as it allows comparatists to avoid critical discussion simply by saying that they pursue different goals.

*D. Legal Transplants, Legal Formants and the Common Core in Tax Contexts*

Putting his functional orientation into practical terms, Garbarino suggests adopting Sacco's legal formants approach in order to study the circulation of tax transplants. As a substantive matter, this is not objectionable, but Garbarino reduces the formants approach to a quasi-formal, all-legal and, by implication, ethnocentric method of research. Specifically, he observes that "within the Western tax tradition, basically five groups are involved in this process: legislators, tax authorities, (tax) courts, practicing lawyers, and legal scholars."<sup>300</sup> The obvious problem with such an assertion is that it provides no guidance as to which tax formants we should explore when studying non-Western jurisdictions. The probable outcome would be narrowly-focused research from a jurisdictional perspective, meaning that by providing methodological guidance that is applicable to Western jurisdictions alone, non-Western jurisdictions run the risk of being neglected in future research.

The second reductive characteristic is that Garbarino's formants are limited to actors who can be formally recognized as legal professionals. Yet, the legal formants approach has long advanced beyond looking strictly at legal actors to explain the "making of law." The European Common Core Approach specifically addresses meta-legal formants by asking its participants to consider "*policy considerations, economic and/or social factors, social context and values, and the structure of the legal process.*"<sup>301</sup> The modern formants approach takes into account local considerations that are not strictly legal, while Garbarino seeks to keep tax law out of its unavoidably local context.

This delocalization helps Garbarino reach his conclusion that the study of tax transplants shows how they lead to convergence.<sup>302</sup> This may be the case in some instances, but certainly not always. Given the contradicting arguments—specifically in the field of comparative tax scholarship—Garbarino's assertion calls for further analysis. We already noted Infanti's arguments, which are specifically aimed at maintaining divergence in an environment of legal transplants. More

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300. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 691.

301. Bussani & Mattei, *supra* note 77, at 339.

302. *Id.*, at 13.

recently, questioning the transplantation of British tax rules in Mandatory Palestine, Assaf Likhovski has convincingly shown that tax transplantation does not escape local contextualization in the receiving jurisdictions.<sup>303</sup> Thus, even in transplantation local context plays an important role. Some have considered this role so important that it completely alters the original configuration of the transplanted rule, turning it into a completely new animal.<sup>304</sup> If this is indeed the case, then we must revisit the “transplants = convergence” thesis.

My main critique of Garbarino’s operational suggestions is his adoption of Schlesinger’s common core approach for the purpose of comparative tax studies.<sup>305</sup> He maintains that “the comparative tax scholar interested in revealing deep structures of convergence should adopt a common core approach.”<sup>306</sup> In support he cites Pierre Legrand.<sup>307</sup> But Legrand clearly states that “legal systems . . . *have not been converging, are not converging and will not be converging.*”<sup>308</sup> I would cautiously guess that Legrand—who portrays himself as a “difference engineer”<sup>309</sup>—would probably reject most of Garbarino’s ideas.

But my objection here is more substantive. I believe that the underlying assumptions of the common core approach are not applicable to comparative tax studies, at least not to the same extent as in private law. For the task of unearthing a common core of legal rules, one needs to believe that there is indeed such a common core to unearth. In the case of private law in Europe, this is not an unreasonable assumption. For hundreds of years, legal practices and ideas have circulated within the continent through legal transplantations. In such a situation, it is possible to accept that a “common core,” which transcends apparent differences, was formed during centuries-long processes of legal borrowing. However, this assumption is doubtful in comparative tax studies. Individual income taxation, in its modern form, is barely 200 years old. Taxation of corporate entities dates back about a hundred years. VAT—now widely adopted across the globe—is merely sixty years old and thus, on the scale of legal history, still an infant. It is much harder to believe that in such a short time countries were able to distill a true, stable, and broad

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303. Assaf Likhovsky, *Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine*, 11 THEORETICAL INQ. L. (forthcoming 2010).

304. Legrand, *The Impossibility of Legal Transplants*, 4.4 MAASTRICHT J. EUR. COMP. L. 111 (1997).

305. Garbarino, *An Evolutionary Approach to Comparative Taxation*, *supra* note 4, at 697-700.

306. *Id.*, at 697.

307. *Id.*, at n.47.

308. Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52, 61-62 (1996) (italics added).

309. Legrand, *The Same and the Different*, *supra* note 97.

“common core” of tax rules. Assuming that there is a competitive market for tax structures, it seems that these structures are still competing and undergoing constant scrutiny.

Garbarino notes that one of the unique characteristics of tax legislation, as compared to other areas of law, is its unbelievably fast pace of change. This is the clearest evidence that there is no common core of taxation, or at best a very narrow one. Tax law is a new historical phenomenon. Even if we accept the assumption that tax law is an autonomous body of law, free from contextualization, it is still in search of its true common core. Had tax law found its so-called “core,” meaningful legislative changes would not occur as often as they do. Something that changes so rapidly is probably not yet a “core” but may be better understood as an experimental form of law.

#### V. CONCLUSION: NOW, CAN WE TALK?

The argument presented in this Article is straight forward, and can be summarized in David Gerber’s critique of comparative law in general:

Gains in knowledge produced by a member of the community are not part of a shared project that renders that knowledge usable by others. As a result, there is little basis for community among those applying the method. There is, in other words, little room for “science” if one understands science to be a process by which a community seeks to create new knowledge that is useful to its members.<sup>310</sup>

Unlike general comparative legal studies, where scholars have at least attempted to engage each other’s ideas, tax comparatists simply ignore each other. In essence, comparative taxation serves as an extreme example for the methodological incoherence that characterizes general comparative legal studies. To date, there is no debate regarding the purposes of comparative taxation, and as long as we do not start questioning those purposes, there is little use in discussing methodologies. And if we do not discuss methodologies, we will encounter difficulties when evaluating each other’s research. Under such conditions, the production of comparative tax knowledge can be regarded as a somewhat miraculous event. We, comparative tax scholars, must begin a meaningful discussion and should begin by utilizing the long established schools of thought in comparative law as rallying points.

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310. Gerber, *supra* note 273, at 723.



Michael Livingston once rightfully stated that “a field in which everyone is shouting at each other is likely to come to no good.”<sup>311</sup> I would like to add that a field in which no one even talks to each other is unlikely to produce any better results. So by all means, let’s talk!

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311. Livingston, *Radical Scholars, Conservative Field*, *supra* note 55, at 1815.