SUMMARY

Taxation

Even if it does not appear in fiscal texts, citizenship seems to be a justifying principle for modern taxation. Since the 18th century, it has been integrated into two complementary legitimating views. The first one turns citizenship into a moderating element of fiscal absolutism. The second one bases on citizenship the fiscal sovereignty of the State. Ignored by positive law, questioned by rival views, such as tax as exchange, undermined by the decline of the State-Nation, citizenship remains a central notion for the philosophy of taxation.

1. Because of a paradox, but only a seeming paradox, due to the historical and philosophical circumstances of the birth of the principle of equality concerning taxes as well as to the complex factors (economical, social, cultural) that directed its evolution, the principle of an actual tax equality implies a policy of equality through tax which itself creates an inequality in front of taxes. This inequality forces one to substitute to the phrase "equality in front of taxes" the words, for the moment more relevant, of "no (unjustified) discrimination in front of taxes". Considering the width and variety of discriminations allowing an adjustment or a modification of the principle of equality in front of taxes, this, sceptical, study raises the issue of an horizon of objectivity, from the judge or the legislator, when determining the criteria that may base inequality in law. Is not the judicial control over legislative discriminations in tax matters simply making an organic substitution in the assessment of the taxpayers categories, without necessarily guaranteeing justice ? Beyond the relationships between institutions, equality in front of taxes and the discriminations it entails asks once again the eternal question of the open texture of law, and of its inability to reflect the infinite variety of the factual situations.

2. Contrary to other declensions of the equality principle, the principle of equality in front of taxes was immediately comprehended as possibly accompanied, in order to be properly implemented, with differentiated treatments and positive discrimination (I). These have a textual basis as ancient as the principle of equality in front of public office itself and also infer a legitimating philosophical reasoning (A). This double basis allowed the opening of various adjustments, admitted by legal precedents, to equality in front of taxes (B). However, the issue of their limits (II) may be put on two levels: the threat of an arbitrary power of the fiscal legislator or the administration is curbed by the judge who controls breaches to strict equality (A), a limitation that then raises a more structural issue: that of the interpretation of the principle by the judge and, more generally, the discrepancy between an ideal tax justice and its implementation by law (B).

At first sight, "fiscal competition" may appear as an expression belonging to the vocabulary of "globalisation". But one can wonder if, more than a mere metaphor, it does not exactly qualify the relationships between States and investors. Answering this question implies being able to rediscover the constitutive elements of the market's method. And yet one sees that this verification can be seen through completion. Therefore, the question is not so much about the existence of

a market between States and investors as about the effects of the functioning of this market.

Catherine Larrère, *Direct Taxes, Indirect Taxes: Economy, Politics, Law* 117

The Physiocrates are at the same time those who invented the distinction between direct and indirect taxes and who tried to present a strictly economical theory of taxation, which can only be defined by the place on the circuit of wealth where taxes are taken. The failure of the attempt shows that one cannot ignore the political nature of taxes, studied by Montesquieu and Rousseau. The distinction between the shapes of taxes relies effectively on the legal distinction between the person and the thing.

André Barilari, *Creation of Value and System of Value* 131

The notion of "creation of value" as a criterion to choose the financial markets is very narrow and shrugs off the "values" in the philosophical meaning. The creation of value must be weighted in a global sense and by doing the algebraic sum of the positive and negative elements, in particular the "collateral damages" that may derive from certain economical decisions of limited rationality centred on the immediate profit of the shareholder. Value can only be truly created inside a frame of reference, the republican values of freedom, equality and fraternity whose concrete interpretation is represented by the rule of law, which expresses the general will. Social value is also created by public services in the fields where the collective choice has been expressed so that the "common good" is managed outside of the market. But in this case, the citizen must express a strong requirement of efficiency from the public services. In addition, if a market based on the valorisation of companies is compulsory to help transmissions or restructurations and, if it is necessary to get around the obstacles in this matter, the purely speculative stock exchange movements answer no economical necessity, on the contrary they lead to serious damages. It would be desirable to make up devices tending to discourage them. The value of a company is its added value and this must be shared out between its various legitimate elements, profit for the shareholders, wages and participation for the workers and taxation for the community. The balance between these three elements is a question of political choice, only frame able to express the sovereignty of the citizen.

Valérie Varnerot, *Between Essentialism and Existentialism of the Theory of Sources: the Non Formal Sources of Fiscal Law* 139

Presupposing an essence of law, contemporary doctrine seems to be hostile to accepting the pluralism of the sources of fiscal law. And yet the recent proposals of legal science pave the way for a rebuilding of the theory of sources which, while justifying them, sanctions pluralism in this field.

P. F. Racine, *The Judge, an Arbitrator of Taxes* 197

After tackling the issue of the impartiality of the judge, the author proceeds to examine how each court intervening in fiscal litigation (Conseil consti-

tutionnel, Justice Court of the European Communities, European Court of Human Rights, Conseil d'État and Cour de cassation) arbitrates between principles and demands often contradictory: the need to fight fraud and the protection of individual freedom, legal security and mutability of laws, among other examples.

The post-modern conception of law sets itself up as a new paradigm of legal science. This paper answers a wish to test the propositions of this conception in tax matters. The CSG is a particularly interesting example in so far as it seems to draw on a new approach of the tax system. The dynamic nature of the notion of modernity makes its overrunning all the more difficult because the very term of modernity is overloaded with multiple meanings. Therefore, confronting the concepts of post-modernity and CGS brings forth the difficulties that dog any attempt to overrun the notion of modernity in philosophical, legal and fiscal matters.

The "new taxes" refer to the emergence of new taxable matters that led the lawmakers to try some innovations, for instance the "eco-taxes", designed to fight pollution. In fact, two quite opposite aims may appear: on the one hand, searching for fiscal resources, which assumes the survival of the taxable matter, here the polluting activity; on the other hand, fighting pollution which, if it is successful, precisely entails the disappearance of the taxable matter. After a time of relative "euphoria", these eco-taxes are, at the moment, seldom used in France. In addition, new resources seemed promising: the sale of telephone licences. But once again, the initial prospects, which seemed fairly profitable to the State, quickly deteriorated du to the difficulties encountered by the telecommunications firms. Finally, a new taxable matter has appeared with the development of operations carried through the internet. The taxation of these operations raises dreadful technical problems, concerning VAT as well as the taxation of profit. The European Commission and the Comity for fiscal affairs of the OECD have submitted several proposals as a solution.

The author reviews the various forms of fiscal justice, inspiring himself from the Aristotelian classification of commutative and distributive justice. He especially tries to demonstrate that, contrary to classical teaching, fiscal law does not necessarily come close to the distributive justice, for a fair number of present tax rules can only be explained through a logic of commutative justice. But he also stresses that commutative justice show real flaws for it forgets that man is a social animal. The author concludes that, as there is no perfection on this world, it would probably be desirable to reconcile as far as possible the individualistic and liberal logic of the commutative justice with the collectivist and social

logic of distributive justice by admittedly taxing the contributive abilities of the citizens but only at proportional (and not progressive) rates.

Francesco d'Agostino, *Thoughts about the Fairness of Taxes* 281

Why do we have to pay taxes ? Owing to the State' sovereignty? It is then necessary to explain why the State has the right to levy taxes, in other words, we have to find what underlies sovereignty. Is it to manage and promote public good? One must then accept the existence of a collective subject: an hypothesis dismissed by all those who insist on the bad distribution of taxes. However the State is not a contract. And if private interests have to be promoted by the State, it has obligations towards the taxpayers; before anything, it must effectively allow the realisation of everybody's freedom. Therefore the functions of the State must be assessed according to their qualities and not their quantities.

Emmanuel Picavet, *Capital and Taxation According to the Criteria of Justice* 291

In this article, the author deals with two categories of judgements in social ethics, relative to taxation, and their relationship : (1) those which have to do with contributive ability (or distributive justice in the attribution of liabilities); (2) the judgements concerned with the enjoyment of State protection and the contribution-benefit proportion. A selective reading of three authors (John Stuart Mill, Maurice Allais and John Rawls) and the example of capital taxation illustrates the uneasy relationship between the two categories of judgements.

Alain Trannoy, *Negative Taxes and Theories of Justice* 311

It is shown that it is not so easy to make the principle of negative tax stem from philosophical systems, whose avowed aim is not to do its panegyric. Rawls' principle of difference leaves the door open to the lack of such an instrument in a just society, not only for incentive purpose, but also due to the priority given to primary goods based on freedom. In its most recent version, Rawls' thought leans toward a version of negative tax conditioned to a participation of the individual to the work market. Concerning the insurance system devised by Dworkin, it is established, through an example, that it is compatible with any level of inequality in the current society and that states of the world may exist where the type of transfers set up using the insurance scheme increases inequalities instead of reducing them. A quick overview of the literature concerning taxation enables to show that every formula of negative tax may find its justification in a body of very specific hypotheses.

Philippe Van Parijs, *Philosophy of the Tax-System for a Globalised Economy* 329

The general implementation of capitalism makes tax-system more important than ever, because it tends to reduce at the same time (1) the scope of intra-family redistribution through a distribution of income between the members of a single household or a single enlarged family and (2) the scale of the implicit redistribution within the firm through a redistribution of primary incomes substantially diverging from the distribution of productivities. Also because a well

understood justice consists in a lasting maximisation of the real freedom of those who own less and requires therefore a major divergence from the distribution that the market spontaneously tends to carry out, according to the productive contributions of everyone.

But on the other hand, the globalisation of capitalism weakens even more the tax-system because it does not only magnify the inequalities of primary incomes. It also strengthens the strain on the effort of redistribution by the States, from now on buried in a global market. But for all that, is it necessary to despair of the situation of a tax-system that owes more but can less? Not if it is possible at the same time to gradually hoist the tax-system to a supranational level and to (re)create the conditions for a sturdy fiscal civic responsibility.

Miscellaneous Studies

Starting from Foucault's sovereignty and governmentality relationship, and subjecting it to a series of shifts, the author seeks to grasp, as inspired by Bodin's text, the positivity and productivity of sovereignty theory itself.

Moral philosophy, that was already represented and still is, by Paul Ricoeur's work is henceforth present in France too. Monique Canto-Sperber is the one who has contributed to introduce those discussions into French thinking; she has worked out her reflexion in *L'inquiétude morale et la vie humaine.* Without leaving the deontological and purely formal perspective of ethics, both philosophers point the necessity of rediscovering teleology and giving a true meaning to the notion of good or virtue. Besides, if we are not always able to find indisputable statements for ethics, it is however possible to get certain conclusions. In *Le Sens de la justice* and *La Logique du respect* Patrick Pharo takes care too to improve pure deontology with his reflexion about what he calls "politics of others justice".

May one establish a relationship between the Husserlian phrase "the earth does not move by itself" and the article 518 of the French civil code? A priori, no, for the terms seem to be absolutely in contradiction. However, the analysis offered by Husserl prefigures a new questioning of space, of the earth inside space, of the body in relation with the earth and lastly of the flesh on the Earth. It can then be extended to the relations that law creates between the persons and the earth, thus questioning the impact of legal qualifications and their metaphysical foundations, in a singular understanding of a legally clean and morally common earth.

The rationalistic view point, in exact sciences, mantains that the real is necessarily rational without reason or, more precisely : 1. – the object that one studies is submitted to laws that explain all but that doesn't explain themselves. 2. – reason itself explains itself by reasons that are without reason. The most powerful reason leans on something else that reason. What is therefore the reach of this trial instituted by empiricism against metaphysics ? The instrumental rationalism of Kelsen may be submitted to the same critic. There are good reasons here also for reason to give up.

In France, literature and law are two academic strongholds which are not used to communicate. This is regrettable and little in keeping with the common history of the two fields. Originally in Indo-European cultures, law and literature were one and only, in the literary history of France they acted in concert during a thousand years and only split in the 19th century. The fact that literary history begins precisely at this time probably explains why it sees this divorce as very natural. Now what the diachronic inquiry so clearly shows, a scrutiny of the two poetics is evidence of: law and literature share in common a calling on the "power of language" and the production of big "illocutionary" effects. By crystallising the human experiment in writing, they order it and give it a high meaning. They both draw on the humanising function of the language.

Reports