

Insegnamento del Diritto Tributario in Europa

Teaching Tax Law in Europe

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Resumen

El artículo analiza el desarrollo sufrido por el Derecho fiscal y las diferencias en la enseñanza del mismo en las universidades europeas.

Así pues se atiende la creciente importancia de los case law en contraposición a los cada vez menos efectivos códigos, no sólo por la rápida sucesión de normativa nacional sino también por la introducción de regulación europea.

Se contempla sobre todo, la división de Europa en cuanto al Derecho fiscal en los planes de estudios universitarios, enfocados en Europa del sur desde un punto de vista teórico y a la preparación de personal judicial y en el Norte desde un punto de vista práctico y a la consultoría y los negocios.

Palabras Clave

Derecho Fiscal, Europa, Plan Bolonia, norte-sur.

Abstract

The article analyzes the development undergone by the Tax Law and the differences in teaching it in European universities.

Thus it addresses the growing importance of case law as opposed to the increasingly less effective codes, caused not only by the rapid succession of national legislation but also by the introduction of European regulation.

It includes especially the division of Europe in terms of teaching Tax Law in the university curriculum, focused on Southern Europe from a theoretical point of view and the preparation of judicial personnel and the North from a practical point of view and consultancy and business.

Key words

Tax Law, Europe, Bolonia, north- south.

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1. Tax system as law

The tax system as a branch of law rose in Europe with the birth of the modern State, after 1789 French Revolution. Since then it has assumed a whole new financial role, if compared to the role it had during the absolute State period. Of such latter form of state, tax system had funded the territorial expansion, or the expenses of royal courts. In the modern State instead, the tax system supported the costs for operating the judiciary organisation, education from elementary to University, health care and social security.

The economic sacrifice the tax system requires from the taxpayers is voted by their political delegates in their elective Parliaments. In the name of fiscal democracy, unknown to absolute States, only Parliaments are entitled to decide with which taxes and for which amounts public expenditure will be funded.

Their political decisions come in form of laws and regulations with binding effect for both taxpayers and fiscal Administrations. Through laws and regulations Parliaments choose: which internal assets will contribute to fund public expenditure; which categories of taxpayers will have to bear the fiscal sacrifice required by legislative and administrative powers; which individuals among citizens and foreigners will be charged for owning assets in the State of residence.

European Parliaments nowadays have limited their fiscal choices among specific indexes of wealth: income, assets, purchases, production, national and international exchanges. These are the indexes of wealth steadily identified from a legal standpoint and adequately developed for their effects on public finance. Their economic proficiency is undisputed; therefore they express at best the economic sacrifice taxpayers have to bear to fund public expenditure. It is a fiscal responsibility of taxpayers reaffirmed in every European constitution (except for Germany) since the Declaration of the Rights of Man and of the Citizen dated 1789.

On such fiscal responsibility the equality between taxpayers, which guarantees the full effectiveness of the fiscal democracy of modern State, is grounded.

The leadership of EU has brought into question such responsibility when it imposed to member States the introduction of forms of imposition no longer directly or indirectly bound to indexes of wealth, but to facts only economically relevant, such as pollution (from environmental to acoustic) and energy. Such facts were not chosen for their attitude to distribute the fiscal sacrifice to fund fiscal expenditure, but for their non-fiscal effects: making fiscally burdensome the pollution and grading with competitive and incentivizing effects the taxation on energy. For this reason these facts are not coordinated with fiscal financing criteria related to the economic capacity.

a) Tax rules within the rule of law

With the key role of Parliaments in choosing forms of public funding, the political consensus towards the tax system turns into a regulatory framework. European systems are complex due to their encompassing of every aspect of the tax system: each tax, as well as the power of taxation of the central State and of local governments; models of taxation; obligations of taxpayers; powers of control and provisions of the financial administration; enforced collection of taxes, penalties, judges and proceedings (if provided by the relevant tax law). Indeed, within the rule of law even the tax system, like every other public department, has to abide by regulatory bonds. Such bonds regulate the power of taxation by setting out objective and transparent forms of imposition, identifying the taxpayers, the taxable wealth and the taxation level, and compelling taxpayers to pay taxes. Models of taxation can be different across Europe. Every model, however, acknowledges the key role of the taxpayer and of his tax return. Few systems (actually the minority), like the Italian one, entrust the taxpayer with the responsibility of calculating and paying his tax.

Furthermore, the imperative effects of tax rules limit the powers of control of fiscal administrations by regulating their procedures and defining their deeds.

As for judges, they are empowered by tax regulations to rule out disputes between fiscal administrations and taxpayers, and with such regulations they can perform their judicial function autonomously, independently, impartially.

3. Tax law as a complex and integrated regulatory system

Tax law was originated by national laws and regulations. However, tax law in present Europe does not consist of mere national laws and regulations. In states which are Members of the European Union tax law is integrated by rules coming from the Community set of rules. This legal framework, due to its supranational character, is particularly effective with regards to customs duties and indirect taxes on sales and manufacturing. With the ratification of treaties such rules become internal rules of Member states, and they have the same effect of national fiscal regulations.

Finally, taxation models or specific regimes coming from other tax systems of Member states blended in together. Europe saw a spontaneous convergence of tax systems that, even not being induced by the EU, it was however urged by the economic integration of the Community market.

With said progressive integration of sources of law and models in the Community and international framework, tax law in Europe has become not only an elaborate matter, due to its wide and miscellaneous scope, but also increasingly integrated in the Community and international set of rules.

The British experience makes no exception. Despite of their tradition of common law, tax law in Great Britain consists in written rules and not in judicial precedents with regulatory effect. The spreading of statutory laws in tax law confirms the importance that taxation has achieved in the British set of rules. Indeed the regulation of taxes and their implementation cannot be delegated to Courts and their interpretation.

Only a written rule can offer grounds for the authority of the Parliament in selecting forms of imposition, and can guarantee that the whole tax system keeps decidedly and continuously its function in funding the public expenditure required by a modern State to sustain its political role.

4. Complexity and instability of the tax system

4.1 The weakness of codification

Such a complex and integrated tax law requires an increasing amount of rules to be effective. These rules swiftly succeed one another in European tax systems, and are more and more replaced by urgent decrees.

Tax regulations are increasingly seeking solutions which can ensure faster and more reliable tax revenue, useful to counterweight public balances weakened by the global financial crisis. Thus, new regulations often are not related with prior ones, and are not coordinate with the corpus of other rules. In an ordinary tax system any rule should coexist with the others, in a unitary and rational vision. This is the only mean to guarantee the certainty and fairness required by the model of modern fiscal democracy itself. In a regulatory context urged by a national financial interest, the fiscal administration is unable to provide an effective and legitimate application of tax rules, which might be arbitrary; a Court is unable to guarantee a fair ruling of tax disputes; the taxpayer is uncertain about his own tax obligations. Ultimately, every aspect makes uncertain and unstable the fiscal revenue. The outcome is quite the opposite to the goal pursued by said increase of tax regulations, that is the enhancement of positive effects on public balances.

The remedy should be sought in coordinating and re-arranging tax regulations, encompassing both the general legislation and the detailed rules, allowing the interpreter to find the rule which should regulate his actual case. This appears to be the only way to guarantee that certainty required by the fiscal administration to implement tax rules, and by Courts to solve the disputes. Such procedure in Europe is known by the name of codification. Tax codification is once more a topic of division across Europe. Tax codes can be found in France, Germany, Belgium and Austria. However they are missing in southern Europe tax systems, where States possibly resort to a general legislation (like in Spain) to set out general principles to implement or interpret tax regulations.

4.2. New precedents: administrative settled practice and case law

The ongoing legislative production undermines the common trust towards the effectiveness of tax codes in those systems that implemented them. Moreover, it makes uncertain the application and the interpretation of tax rules in Member states which have not adopted tax codes.

In every tax system, however, administrative settled practice and case law have acquired an increasing importance, far beyond their purpose of implementing and interpreting tax rules.

The practice of fiscal administration is an early and crucial guarantee of implementation for taxpayers. The taxpayer trusts that the fiscal administration will adjust its inspections coherently with the interpretation of tax rules. Consequently, the taxpayer who complied with the practice of the fiscal administration has good chances of avoiding to be subject to inspections and controls, whether said practice is well-grounded or not.

Judgements of national Courts on taxes have an increasing importance as well. Courts, in interpreting tax rules to solve disputes referred to them by administrations and

taxpayers, more and more often make reference to solutions adopted in other judgments and to principles enclosed in judicial precedents. Solutions and principles often obtain a steady trust by judges who decide to implement them in subsequent judgments. This happens mainly in supreme Courts of civil law countries, where it is known by the name of “settled case law”. Such case law, even if it lacks in the effectiveness of precedents, being devoid of regulatory strength, guarantees a sufficiently uniform application of tax rules. In this way, case law is useful to contain the uncertainty originated by the regulatory instability of tax systems.

4.3 Tax law and other tax laws

Tax law has not lost its unity, even if it became more complex and more integrated. The integrations of tax law depend on the effectiveness of Community law, of tax laws of other Member states and of international tax law. All these laws are independent from national tax laws, for method and purpose.

Comparative tax law compares different tax systems with an analytic approach different from the approach adopted by national tax law.

International tax law integrates principles typical of the set of rules with rules of international treaties against double imposition.

To define Community tax law is a bit more convoluted. It needs its independence to integrate principles common among European tax systems with principles shaped by the case law of European Court of Justice, in favour of the Community market.

The complexity of tax law in the course of time has underlined the need to enhance the study of specific fields for the importance that their rules can acquire in national tax systems. This happens for constitutional tax law and tax litigation law. Both are related with tax law as a unity. They are useful to enhance the study of specific fields, always using the same method of national tax law.

5. Tax law in academic education

A complex and integrated tax law conditions the academic education. The education is uniform in Europe, even if educational models may change in the different law traditions which still divide Northern and Southern Europe.

5.1. Uniform education

Education concerns tax law as a whole. It encompasses the fields of constitutional tax law and tax litigation law which allow enhancing the study of tax law intended as a unit. The reception of the relevant subjects in academic study plans is limited, as they are adopted mainly in Italian, French and Spanish Universities.

On the other hand, the role of that tax law which is related to other tax systems (European and international tax systems) is more significant. Both comparative and international tax law integrate themselves in tax law as a unit. However they still keep their independence in the progressive education of tax law, since they are related to sets of rules different from the national one, and they resort to their own legal method. Proof of that is their stable presence in study plans of Northern and Southern European Universities, without distinctions from civil law and common law schools.

Community tax law still is not widespread across Europe, as its importance in European tax systems would require. Community tax law had its first official acknowledgment in the University of Bologna, twelve years ago. This example has been followed by other Universities like Castilla La Mancha and Tilburg, now participants in the European School of fiscal advanced studies.

In academic education European Universities stand out for the credit they give to both the theoretical and practical aspects of tax law.

Study plans of Southern and German Universities favour the theoretical aspect. Therefore these Universities integrate the study of general principles with the study of specific taxes. In the education of such Universities the theoretical models of imposition are integrated in different tax systems and specific taxes are studied according to principles and general rules of tax law.

In study plans of Northern Universities, the educational interest is theoretical-practical, or mainly practical. Indeed these study plans focus on the presentation and the analysis of tax systems. Accordingly the general discipline has a limited importance, as it happens in France or Belgium. Or at least the general discipline is reduced to a mere introduction to the tax system, as it happens in Great Britain. Anyway, the education in these Universities favours an up-to-date and knowledge of tax systems and of specific taxes and it mostly values their actual implementation in the analysis of cases.

Said differences in study plans correspond to the different role of academic education in the tax field.

Southern Universities favour the qualification of legal and judiciary professions. Northern Universities instead, where the implementation of tax law is favoured, focus on the education of professionals useful in business and management consulting, roles sought-after by US corporations which have their core business in the North European market.

5.2 Educational methodology

Educational methodologies for tax law have progressively converged, despite the different legal traditions which still separate the Universities.

With the spreading of written tax law in common law countries differences were reduced, thanks to a common interest for case law. The latter in English and Dutch Universities is crucial to provide coherence and unity to tax systems. Such tax systems are increasingly difficult to interpret, as national rules are integrated with regulations in other fields or other systems. Furthermore, tax systems are harder and harder to implement as tax regulations are constantly amended for the sake of public finance.

The analysis of case law is beneficial for students to enrich their knowledge and experience, both useful for the most effective implementation of tax law. With case law students can strengthen the effectiveness of the legal method on which the civil law legal tradition is based. That is the logical-deductive method which will allow future judges or officials to implement tax rules in most cases and factual situations with different potential interpretations, by valuing at one time the letter and at another time the function of tax rules.

5.3 Manuals for the education

Manuals to follow and support the preparation of students are different in Northern and Southern European Universities.

Manuals adopted in Italian, Spanish, Portuguese and German Universities explain in a balanced manner the general part of the theory and the special part on specific taxes. In the first part manuals describe the constitutional principles, the architecture of taxes, models of imposition under the control of administrations, and fiscal proceedings. In the second part, manuals explain the structure of the main taxes which form the national tax system.

In both parts case law is taken into consideration. However, case law is used to integrate the legal analysis of tax law, according to the logical-deductive method. These manuals ignore instead the actual implementation of taxes, and do not make reference to actual cases.

Manuals adopted in French, Belgian, Dutch, and British Universities prefer to introduce to and explain taxes belonging to the national tax system, and reduce the general part on principles of tax law to a summary of common qualities of the system. These manuals consequently favour the actual implementation of tax rules, integrating the explanation of taxes with actual cases to facilitate the implementation more than the comprehension.

5.4 Role of tax law in academic study plans

It is hard to position tax law in educational plans of European Universities, since the so-called "Bologna process", an European academic educational model, has radically changed study plans across Europe.

The new plan has separated the educational process in three courses, with three corresponding graduations. Tax law as an independent subject barely finds place in the first course. The first course indeed offers a basic legal education. It encompasses traditional legal subjects as constitutional law, civil law, criminal law, administrative law, procedural law and commercial law. Rarely tax law has a spot in first-course studies. The fiscal subject is complex, integrated with different systems and related with other subjects of *hard law*. Therefore its study requires an advanced legal education. Thus it is placed in European Universities mainly in the second course: the course that in the process of Bologna offers a specialisation and grants the degree named Master.

The role and the importance of tax law may vary depending on the specialisations that Universities decided to adopt. Tax law has not the strength to support its own specialisation. It is commonly integrated in other specialisations, and its role and importance vary according to the referential specialisation. In plans of study it is often included in specialisations for legal and judicial professions and in specialisations concerning companies, markets and internationalisation. The above confirms the wide independence enjoyed by Universities in arranging second courses, to such an extent that study plans may differ not only between European Universities, but even between national Universities.

The Italian experience in implementing the Bologna process is the state of the art. Italy was the first among the Member states to adopt the Bologna process. But it was abandoned, after an unsatisfying ten-year experience. The complexity of concentrating the legal education and the poor utility of the bachelor degree forced such abandon. The bachelor degree indeed did not allow access to open competitive exams for employment as official or director in public administration, magistrate, nor to legal professions as attorney or notary. Students were forced to continue their studies in the second course. The latter became a necessary completion of bachelor studies and lost its original function of specialisation. It did not even hasten the entry of students into the world of work, as was planned in the Bologna process.

In a nutshell, the Italian experience in law faculties showed that the first three years of the Bologna process were basically useless, if not completed with the following two years, which however were not able to offer a specialisation, as initially planned.

Therefore Italy, first in Europe, abandoned in law faculties the two courses of study and adopted a unitary course - indicated in the Bologna process as the less demanding variant - which after five years focuses the specialisation in the last year. The student can build up his plan by choosing subjects coherent with the preferred specialisation, and consequently he chooses his final dissertation as the natural conclusion. The Italian unitary course of studies grants a doctoral law degree and not a specialist Master degree as planned in the Bologna process.

5.5 Organisation of the didactics: cycle of lessons and exams

In European universities the Tax Law course may have annual or semester duration, depending on how courses are organised. Its duration often does not exceed 60 hours. This duration is insufficient to introduce and explain such a complex and integrated subject. Accordingly in Italian, Belgian, French, British Universities lessons are accompanied by seminars. Northern Universities submit to students mid-term written tests on practical cases. This represents a useful experience, compliant with the educational model of Northern Universities, only made possible by the limited number of students in law schools. It is far more difficult to implement in Southern Universities, where the number of students is significantly higher. Suffice to say that in Italy there are currently 213,000 law students. It is a very high number that complicates any form of didactical innovation in Universities seeking to improve legal education, involving students during courses. The Spanish experience of splitting students in groups ends in multiplying courses and teachers. It does not help to adopt forms of integrative didactics that can allow students to improve their knowledge or to deal with actual cases useful for their future professions.

The different numbers of students between Northern and Southern Universities naturally affects the model of exams and their object. European Universities adopt the written form for the exam, even if with different object basing on the educational model. In Southern Universities the written exam tests the level of knowledge of topics in manuals achieved by the student. In Northern Universities the written exam tests the skills of the student in using his legal knowledge by solving practical cases. Italian Universities only remain loyal to the traditional academic education by testing the student not only for his knowledge, but also for his technical ability to debate. With the oral exam student has still to show his capacity of arguing on a topic coherently with the logical-deductive method that Italian and other Southern Universities continue to use for legal education (and tax law as well). The same method that students will use in legal professions and public administrations.

6. Education in the third course of studies in the process of Bologna

6.1 Ph.D.

In Europe academic education does not stop with the first two courses, but continues with a third course of education, solely dedicated to research. The Ph.D. represents the only form of education set forth by the process of Bologna, even if its form was not regulated. Universities can choose the best form of Ph.D. to perform legal research, coherently with their own cultural and organisational needs. Educational paths of European Ph.Ds are different not for the choice of legal subjects, but for their integration of cultural fields and areas. In many universities Ph.Ds in law are identified with a generic meaning of "law", without further specifications.

Cultural reasons and organisational needs contributed and still contribute to this process of integration in Ph.D education. Certainly is increasingly difficult in such integrated Ph.Ds to plan sectorial educational paths, devoted to single subjects or wide areas of knowledge (like historical or international areas). Legal research in these Ph.Ds

unfolds horizontally. Ph.Ds indeed favours links between legal subjects or cultural areas in a wide vision of legal culture. They do not concentrate on a thematic field as the implementation of a scientific method to legal matters would have required. The in depth sectorial analysis not offered by scientific education programs, due to their width and integration, in European Ph.Ds is reserved to the mutual relationship between the Ph.D student and his supervisor. In this way the outcomes of education and research in these Ph.Ds do not depend on the originality and the educational effectiveness of Ph.Ds plans of study, but on the educational ability of their professors. Tax law as well is involved in this process of integration of Ph.Ds across Europe, but it did not obtain its own Ph.D. Its scientific and academic identity varies according to forms and degrees of integration of tax law with other legal subjects or according to the cultural role acknowledged to the subject in wider areas of legal studies. This difficulty is emphasised by the link with the Master degree required to access Ph.D in some Universities, like Spanish and British ones. In these cases the success of tax law in a Ph.D depends on the role acknowledged to the subject during the second course of studies. The more tax law is important in the Master degree, the more tax law will likely take its spot in the Ph.D. The less tax law is important during the Master, the more its position will be marginal in the Ph.D.

Difficulties for tax law in Ph.Ds are caused not only by the necessary link with the Master, but also by the organisational models adopted by Universities. When the State funds Ph.Ds and not Ph.D students, like in Italy, students can take more or less advantage depending on the role played by tax law in integrated Ph.Ds. Furthermore, the Ph.D student who enjoys a public scholarship will have more or less difficulty in completing his research activity in the three fateful mandatory years of course, depending on the role of tax law in integrated plans of studies. The less this subject is important, the more difficulties the Ph.D student will face, and this will depend only on the educational ability of his Ph.D dissertation supervisor.

In this picture it is much appreciated across Europe and beyond the experience of the European School of fiscal advanced studies, which for twelve years has offered a European tax law Ph.D. It is a Ph.D unique in Europe for organisation (as it is participated by eight European universities); for prestige, as it enjoyed the sponsorship of the European Commissioner for Taxation; for results, as it produced 45 Ph.Ds dissertations, with students from Europe, Latin America and China; for the degree in European tax law, which values the specific path of research instead of providing a generic law degree as in other Ph.Ds. The original aspect of this Ph.D is still the educational project, which integrates common principles of Community tax systems, always inspired by the funding purpose, and principles shaped by ECJ case law in favour of the Community common market.

6.2. Specialisation. The advanced Master.

In several European Universities the specialistic education takes place even in the third course of studies of the process of Bologna. Such course, which would have been reserved to research in Ph.D, is often used in Italy, Spain, France, Belgium, to further

value the specialisation of students during the second course of studies, if the second course did not provide to the full the education or if it did was not sufficiently effective for single subjects or linked subjects.

The success of this further specialisation in tax law also depends on the level of usefulness acknowledged for legal professions, advising companies and other companies.

This offers an explanation for the proliferation of Advanced Masters in tax law in Italian, Belgian, Spanish and French Universities.

