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COMPARATIVE TAX LAW AND CULTURE

Tax Culture, Tax History, and the Limits of Convergence: A Comment on Professor Likhovski's Article

A Comment on: "Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine" by Assaf Likhovski.

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The issue of legal transplants — provisions originating in one legal system and "transplanted" into another — lies at the heart of comparative law. The term itself implies a profound ambivalence. As any doctor knows, the human body tends to reject, sometimes fatally, an organ or tissue originating in another body: largely for this reason the first heart transplants took place only in the later twentieth century, and the transplant of (say) a brain from one person to another remains in the realm of science fiction. Even with the best intentions, the effort to import legal rules from one jurisdiction to another is fraught with danger; and in this area intentions are rarely pure.

The transplant issue is especially touchy when it comes to tax law. As recently as 75 years ago Great Britain controlled, one way or another, a substantial portion of the earth's surface. More recently the United States, and increasingly China, has exercised hegemonic power over even larger portions of the globe. Exporting criminal or family law has always proved a difficult business because of cultural differences. But tax law is, or appears to be, universal in nature: the choice of taxes (income, property, sales or VAT) and the underlying principles (fairness, efficiency, simplicity) are the same everywhere. Why then not export more "advanced" tax systems to those who do not yet have them: by imperial decree, in the case of the British Empire, or by the use of intermediaries (the OECD, the Harvard and NYU tax programs) in the American and (eventually) Chinese cases? What indeed is the definition of an advanced country, if not a nation boasting tax

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and fiscal institutions that resemble those of the larger and more important players?

The problem, of course, lies in implementation. It is one thing to say that "a tax on income shall be imposed at a rate of 15 percent on the first 10,000 units, 25 percent on the next 10,000," and so forth, quite another to define income in a country where many transactions lie outside the market economy, or to collect the tax in a country without administrative resources or a tradition of taxpayer compliance. It is one thing to draw a line between business and personal expenditures, and another to enforce the line in a country, like Italy, with a largely family-based economy. Something that looked a certain way in the country of origin has a profound way of becoming something different in the country of destination; if indeed it made sense to export it, in the first place.

This is where Assaf Likhovski comes in. One of a small but growing number of scholars interested in problems of tax and culture, Likhovski here turns his attention to his native country, specifically the introduction of the income tax in mandatory Palestine and the reaction of the local communities (Jewish, Arab, and other) to that introduction. He finds that the law "on the books" did not differ terribly much from that in other British dominions. But the "law in action" did, both because of differences between the local communities (the Jews feared, as it turns out rightly, that they would wind up paying a disproportionate amount of the tax) and issues that cut across them (the modes of organizing business and personal life in the Middle East were often inconsistent with those in Europe and North America where the principal income tax laws were drafted). Institutional factors also played a role: while certain legal actors (notably judges) worked to eliminate differences between English and Palestinian tax law, others (notably administrators) sometimes multiplied them, in an effort to conform the law to local conditions and raise revenue more effectively. As is common in Likhovski's work, there is also a note of irony: the Jews in Palestine opposed the British income tax, but eventually adopted it, and indeed their victory over the Arabs in 1948 is at least partially attributable to their superior revenue system.²

Likhovski's article is well-researched and well-argued, and his willingness to engage in "thick description" of a specific place and time, rather than limit

¹ The names of Marjorie Kornhauser, Ann Mumford, and Joseph Bankman, *inter alia*, also come to mind in this context. *See* Michael Livingston, *Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax*, 18 CAN. J.L. & JURISPRUDENCE 119 (2005).

² Assaf Likhovski, *Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine*, 11 THEORETICAL INQUIRIES L. XXX (2010).

himself to generalized recognitions of the role of culture and taxation, is especially admirable. Rather than gainsay his conclusions, I will accordingly limit myself to a few comments about his methodology and suggestions for future work.

First, I think that Prof. Likhovski's article demonstrates — if indeed it required any further demonstration — the skepticism that should greet any declaration of universal rules or universal convergence in tax matters. The British Empire attempted to impose a similar tax code in several jurisdictions, all administered by British personnel and in the English language, at approximately the same time. If it found it difficult to do so, how likely are a hundred or more different countries, which have different languages, different economic structures, and different political and cultural assumptions, to do so?

Second, Prof. Likhovski's article reminds us of the need to be extremely careful in our definition of "culture" for tax purposes. Among the special features of Palestine that he describes are some that are essentially attitudinal in nature (*e.g.*, the difference in Middle Eastern attitudes toward citizenship and tax compliance from those in Europe); others that are institutional in emphasis (*e.g.*, differences in the organization of business and personal activity, both between England and Palestine and between Palestinian Jews and Arabs, as well as differences in levels of administrative resources); and a third group best described as political in character (*e.g.*, the Arab-Jewish conflict and its effect on each group's perceptions of the income tax). These are all "cultural" on some level, but they operate in different ways and are subject to varying degrees of change over an extended time period. Further work to break down these categories, both as a theoretical matter and with regard to specific case studies, would be most welcome.

Finally, the article serves as a reminder of the close link between comparative taxation on the one hand and tax history on the other. The contemporary tax systems of many countries — Israel and India come immediately to mind — continue to bear the stamp of the British Colonial Office and its earnest if incompletely successful efforts to impose an English-style tax system in the first half of the twentieth century. It is quite impossible to understand the substance or procedure of these tax systems without knowing something of this history, just as American antitax sentiment cannot be comprehended without understanding that the country was formed in the framework of a tax revolt and that the initial Tea Party happened in the eighteenth rather than the twenty-first century. From this perspective, the relatively undeveloped character of comparative taxation is closely related to the undeveloped character of tax history; both deserve a far greater role than is typically assigned them.

The lessons above are especially relevant as we move into a new millennium, one which shows every sign of being less Western — and surely less Anglo-Saxon — dominated than the last one. Britain and America could at least pretend that their values and outlook were universal, even if the rest of the world did not always share this conceit. Increasingly we cannot even pretend. By reminding us of the culturally situated nature of law and legal institutions, even in a field known for universalism, Assaf Likhovski has done us an important service.