The Law of Taxation Is the Lynchpin of Civilization

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Date : June 26, 2019

John Snape & Dominic de Cogan, Introduction: On the Significance of Revenue Cases, *in* **Landmark Cases in Revenue Law** 1 (John Snape & Dominic de Cogan eds. 2018).

John Snape and Dominic de Cogan, two legal scholars from universities in England, have provided a significant contribution to the emerging scholarly discussion in many different countries about the nature and limits of the law—not just tax law, which is their nominal domain in this chapter and book, but of all law. Without being at all polemical, and although they give a fair hearing to those with whom they disagree, they make an undeniable case for the claim that the study of tax law is ultimately the study of, to be honest, everything.

Their argument is subtle and nuanced in a number of important ways, but in the end they could not be more clear. Tax laws are, in the point of view to which they adhere, "not exclusively legal and not even exclusively about tax." (P. 25.) Even detailed tax statutes have "no coherence or morality outside [of a] political and public law context." (P. 25.)

Here, I explore a few of the subtleties of their argument and, much more importantly, the ultimately revolutionary impact that this chapter could and should have on our understanding of the study of tax law.

Snape and de Cogan's edited volume is part of the *Landmark Cases* series, an analogue (which the editors readily acknowledge) to the *Stories* series in the United States that began with Tax Stories. Like its American counterpart, a *Landmark Cases* volume can serve as an avenue for understanding an area of the law through the study of a small canon of foundational legal decisions that continue to shape our understanding of that particular area of the law.

Especially for those who are interested in comparative perspectives in taxation, then, this volume is essential. In particular, it provides insights about tax avoidance and the nature of compulsion in tax law, in the British context. But the reason that I am reviewing here only Snape and de Cogan's introductory chapter, rather than the (extremely valuable) book within which it resides, is that they make an argument in twenty-six elegant pages that, as I suggested above, should be understood as the planting of a flag in an ongoing debate over the nature of law and its interpretation.

This is not to say that the authors would ever be so immodest as to make a claim to universality. They are careful and measured in their words, and they allow the argument to become evident to the reader through its own power. That modesty, however, should not obscure what is truly at stake.

Within the first few paragraphs of their essay, Snape and de Cogan make two essential choices that frame the way we will think about this topic going forward. First, they acknowledge without fanfare that there is an ideological split that drives much of tax analysis. They do not waste our time with claims that the complicated nature of law cannot be reduced to two schools of thought, because it can. They do not use the words "right" and "left" as shorthand descriptors, but that is what this is all about. The classical economic liberals and self-styled libertarians who "emphasize property rights, balanced budgets and small government" (P. 1) disagree with "those who emphasize solidarity, individual duties as opposed to rights, fiscal stimuli and a large state." (P. 2.) The authors acknowledge the necessarily broad terms of these descriptions, but there is no pretense that they have found a "third way" or some unifying factor that others have missed.

Having made the refreshing choice, without being argumentative, simply to acknowledge that the analysis is correctly understood as the familiar right/left split, Snape and de Cogan then make a second distinction that is even more

important—and that ultimately, though not obviously in an ex ante fashion, explains why the left side of that split has the better of the debate. They explain that the proper topic of discussion is "revenue law," not merely "tax law," which includes "both its 'raising' and 'expending' sides" (P. 2), or in American English, the entirety of both the taxing and spending sides of the fiscal state. This goes beyond even the concept of tax expenditures, encompassing direct expenditures and indeed all activities of (all levels of) government.

Why is this important? Although Oliver Wendell Holmes's famous observation that we "get civilized society" in exchange for paying taxes (to which the title of this Jot pays homage) might not be as well known in the UK as it is here, Snape and de Cogan are very much on the same page as the great jurist. They state plainly that, "without revenue law, there would be no United Kingdom of Great Britain and Northern Ireland." (Pp. 24-25.)

Why does that truism matter? Using a broad meaning of "welfare," they point out that "[t]he strict division that can be made between tax and welfare law on a certain understanding of property rights dissipates if entitlements to benefits and liabilities to taxes are reconceived as equally dependent on law, rather than being referable to some pre-legal property entitlement." (P. 3.)

Readers who are familiar with The Myth of Ownership, Liam Murphy and Thomas Nagel's now-classic 2002 book, will readily see that the Snape/de Cogan analysis provides the broader framework within which Murphy and Nagel's argument fits. It is not only (as Murphy and Nagel correctly explain) that pre-tax income is an incoherent concept because any choice of a tax system— even to fund an absolutely minimal state— necessarily changes the amounts that people would think of as "their" income from which the state extracts a share. It is much larger than that.

Snape and de Cogan make clear— and I am not saying that they "argue" this point, because they are simply making an observation that is logically unavoidable and is not a matter of debate— that the "property entitlements" that determine economic and social outcomes are not "natural" or preordained. Different politically determined choices about such entitlements necessarily change our incomes, our relationships to the state, and our dealings with one another.

Revenue law can "pinpoint the nexus between personal freedom and collective wellbeing" (P. 16) because, for example, anti-poverty law "benefits poorer people [but] also enmeshes them." (P. 25.) Most fundamentally, "revenue law moulds how goods in society are distributed in the furtherance of political decisions." (P. 25.) Even looking only at what might seem to be narrow rulings in tax cases, "the legal questions in each case are a function of earlier political judgements, or to be more precise the expression of the judgements in revenue statutes." (P. 9.)

In short, Snape and de Cogan frame a book containing classic cases in tax law as a means of understanding the deeply social and political nature of tax law, revenue law, the government, and the people's interactions in what they hope will be a civilized society. Seeing issues from this more inclusive framing will allow legal scholars to contribute to that desired outcome without unnecessarily narrowing (and thus inevitably distorting) their focus.

Cite as: Neil H. Buchanan, *The Law of Taxation Is the Lynchpin of Civilization*, JOTWELL (June 26, 2019) (reviewing John Snape & Dominic de Cogan, *Introduction: On the Significance of Revenue Cases*, *in* **Landmark Cases in Revenue Law** 1 (John Snape & Dominic de Cogan eds. 2018)), https://tax.jotwell.com/the-law-of-taxation-is-the-lynchpin-of-civilization/.