Justice in International Tax Law

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Only 38 years ago, the great German scholar Klaus Tipke wrote that the term "justice" has rarely been mentioned in the writings on international tax law. Well, times have changed and currently global and inclusive legislative projects are triggered by referring to terms such as fairness and justice. Therefore, these international legislative projects seem to be morally loaded as they aim to improve justice and fairness as moral goals in a legal regime.

Principle-based tax reform

Many commentators in the public hearings and public consultation documents with respect to Pillar I and Pillar II (and also during the BEPS project) have suggested that the current reform should be a principle-based reform. However, surprisingly the debate about the applicable principles in international tax policy is still rather limited. In very dynamic times such as the present one, it is more than ever required to discuss the fundamental goals of international tax policy and to review its main design principles. It seems evident that the more technical details are discussed, the less importance is giving to the underlying justifications of international tax reform per se. Questions such as the following should be at the forefront of the debate:

Should the international tax regime have a distributive impact? Should it be efficient? If it should be efficient, who should benefit from efficiency gains? Why should taxation and value creation be aligned? Why is a system more just if taxation occurs where value is created? Why should there be equity between nations? What is the moral difference between inter-individual and inter-nation equity? Does justice indeed require to harmonize taxation?

It is crucial that we deal with these issues and that we are transparent in our line of argumentation also for policy purposes.

International tax law as international law

The reason for referring to political philosophy lies in the fact that there is no or a very minimal international constitutional framework from which lawyers and policy makers can derive guidelines for the design of the international tax regime. Moreover, other sources of international law such as customary international law, general principle of international law but also treaty law are in general not helpful to steer international tax policy. These sources might even be a cause for injustice in the current system as justice plays a minor role in their legal validity in general and the legal validity of the international tax regime in particular. Therefore, we should not underestimate the fact that the OECD and the Inclusive Framework have to develop their legislative proposals in an environment without clear constitutional or other legal guidelines. The latter is a challenging task and major difference to domestic tax policy.

Impartial tax policy and the risk of value imperialism

We are all influenced by and were all educated in a certain tax system. And the tax system is always a sign of a specific understanding of the state and the relationship between the taxpayer and the state. However, at an international level we have to be careful not to commit what I call "value imperialism", i.e. that we force individuals living in other states to follow a certain domestic tax policy or a certain understanding of the functions of the state through international tax policy. In other words, international tax policy decisions should be considered just from the perspective of the inhabitants in various states such as, for example, from the perspective of an inhabitant of a state with a high tax to GDP ratio but also from the perspective of an inhabitant in a state with a low tax to GDP ratio.

The main goal of international tax policy should, therefore, still be coordination and not harmonization as harmonization in tax matters requires a political consensus within a society. There is, however, no global consensus on the design of the tax system and even more important there is no global society comparable to a domestic society as will be discussed in the following with reference to the term "basic structure".

The global basic structure?

If we look at the most recent international tax policy proposals there seems to be tendency to argue that we have a global responsibility to tax multinationals in a certain manner or at least at a certain minimum rate as digitalization and globalization have blurred national borders and global policy must, therefore, step-in. In other words, there seems to be a responsibility to "share the pie" and to achieve global equal treatment even if this would mean a misalignment of taxation and value creation. Prima facie, this sounds reasonable, however, we should not underestimate the fact that we are far away from a taxation of the Weltgesellschaft or world society and we are far away from having a global basic structure which would require the same moral duties as within a state such as global equal treatment (but also distributive duties).

What's next?

It will be a decisive task of tax law academia to challenge axiomatic positions in the current debate and to help to better frame the actual goals of international tax policy and its main design principles. My book – *Justice in International Tax Law, A Normative Review of the International Tax Regime* (IBFD 2019) – should be understood as a jigsaw piece of this very complex debate about justice in international tax law at a crucial moment as there seems to be strong political forces for a significant reform of the international tax regime towards more integration and more harmonization, even though, the underlying arguments in favor and against integration and harmonization are often not disclosed.