

THE POLITICAL ECONOMY OF CORPORATION TAX

THEORY, VALUES AND LAW REFORM

John Snape



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THE POLITICAL ECONOMY OF CORPORATION TAX

Excellent technical writing on corporation tax abounds, but it tends to be inaccessible to public lawyers, political theorists and political economists. Although recent years have seen not only an explosion in public law scholarship but also a reawakening of interest in interpretative political theory and political economy, the potential of these perspectives to illuminate the corporation tax debate has remained unexplored. In this important work, John Snape seeks to reconcile these disparate strands of scholarship and to contribute to a new way of understanding and conceptualising the reform of the law relating to corporate taxation. Drawing on important developments in public law scholarship, the study combines elements of political theory and political economy. It advances a new interpretation of corporation tax law as an instrument of rule, through the maximisation of a nation's economic potential. Snape shows how corporate taxation belongs at the centre of any discussion of economic globalisation, not only because of the potential of national tax systems to influence inward investment decisions but also because of the potential of those decisions to shape the public interest that those tax systems might embody. Following public law and politics models, the book looks afresh at the impact of Britain's political institutions, of the processes of its representative government and of the theory that moulds and orders the values that the corporation tax code contains. This is a timely exploration of cutting-edge issues of public policy.

To Angela

Myrtle grove, or rosy shade, . . .

Yields in sweets, my queen, to thee.

– The poet of Handel's *Solomon*, 1749

Preface

The research for this book unfolded very gradually, around other projects. When embarking on the work, it occurred to me – as a tax lawyer but not an economist – how technical the taxation materials with which I work are. And this not just for general readers, but for specialists in other social science disciplines: other lawyers, political scientists and political economists. That is not to decry the excellence of much of the taxation material, nor its usefulness. I have myself written or co-written a number of technical works for practitioners and students, all well received on their appearance, and I admire and respect the work of many of the leading exponents of a more technical style of tax writing, including Judith Freedman and John Tiley, among others.

However, it did not escape my attention that those who specialise in these other social science disciplines and sub-disciplines have made tremendous strides over the last quarter-century or so in understanding what public law – of which tax law is a branch – is all about. Some of this work, such as that of David Judge, RAW Rhodes, David Marsh and Wayne Parsons, is more associated with public administration or public management, but the nature of public law means it is closely related. Other work on political economy, such as that of Joseph Stiglitz, Amartya Sen and Tim Besley, is aligned to public policy, but again, the boundaries between public policy and public law are becoming ever more porous. Among the most exciting, the most intrepid, of the public law scholars are Martin Loughlin and Adam Tomkins. It was through my critical interaction with their work that I realised that my own intellectual formation, philosophically, historically and culturally, was not merely an adjunct to my study of law but could explain the law and its institutions and workings.

In developing a theory of political jurisprudence, Loughlin shows us that it is possible to make close links between contemporary ways of thinking about public law and those which occupied our forefathers; that, far from being lost in time, they have a relevance and a reality in our modes of working of which we are scarcely aware. Tomkins, appropriately enough the holder of the Glasgow University chair named after John Millar (1735–1801), who was a radical lawyer and the greatest pupil of Adam Smith (1723–90), has similarly sought to use an historical perspective in unearthing the reasons for the dilemmas of contemporary constitutional law. Read with the public policy and public administration material, this new public law scholarship has the potential to illuminate and render universally relevant material hitherto seen, perhaps, as predominantly technical.

I have long been convinced that the key to understanding our present-day public policy dilemmas is to appreciate the sometimes exhilarating, sometimes

worrying, ways of thinking of our Enlightenment forefathers. This is not an eccentric whim but the clearly articulated view of a number of contemporary thinkers, pre-eminently the historians and philosophers Tzvetan Todorov and Gertrude Himmelfarb.

More or less in the manner of some vaguely Hegelian ideal, my own legal formation had been first to train as a practising lawyer following my undergraduate legal education. It was only after having become relatively comfortable with black-letter tax law that I began to think more deeply about what it might all amount to. My sixth-form education was greatly devoted to late eighteenth- and nineteenth-century history, much of which reading stayed with me, and on beginning an academic career, I wrote about an eminent member of the Tudor judiciary and drew Adam Smith and his intellectual disciple, Sir Robert Peel, into a student textbook that I wrote on taxation. A copy of the orange-spined Penguin Classics edition – replaced most recently with Oakeshott's 1952 edition – of Hobbes' *Leviathan* was a cherished possession as a younger man, yet it was not until I became immersed in this project that it became clear to me just how many of our contemporary worries about taxation law and policy can be illuminated by familiarising ourselves with the thinking of those who, over the centuries, have shaped the ideas that still dominate, in an attenuated form perhaps, the British state and the economy that it nurtures.

All these insights clarified and made sense to me of another school of public law scholarship that was ground-breaking in its day: the Sheffield school, which, though anxiously searching, lacks the historical insight of the Loughlinian approach. Indeed, it was reading Chris Hilson's book on the regulation of pollution, an avowedly Sheffield school work, that jolted me into realising that something more might be done with the legislative texts on taxation than had hitherto been the case. I indicate in chapter two how aspects of the work of that school withstand Loughlin's and Tomkins' insights. The appearance of Loughlin's second major work in 2003 highlighted ever more sharply the problems with the Sheffield school approach, yet it also highlighted by implication what remains useful in it.

Impressive as much tax law scholarship is, it has not kept pace with these developments, and existing tax reform arguments around institutions, processes – indeed the very nature of tax law itself – leave plenty of room for further theoretical speculation. This situation has become ever more starkly apparent with the publication of Loughlin's magisterial new work in the summer of 2010. I hope that this study will be a useful contribution both to the development of that line of investigation and also to the advancement of public law scholarship more widely. That said, generally speaking, I lay no claim to the originality of the interpretative theory of public law at the core of this book. What I do claim, however, is its application to taxation, specifically to corporate taxation law and policy. Within these areas of specialisation, the interpretative theory in these pages may provide a basis for the further analysis of the monumental Mirrlees review of the British tax system published in 2010 and 2011. I have

found it necessary to stress the theory of public law as promoting the public or national interest in relation to particular policies. This again is a reminder of the indebtedness to Adam Smith of a whole branch of legislative endeavour.

The years of New Labour (1997–2007) and subsequently of Labour (2007–2010) put more policy and parliamentary documentation into the public domain, I guess, than any other period of British political history. The new Coalition administration looks set to achieve something similar. In these pages, I do not seek to distinguish between Labour and New Labour. I am not disposed just now to think there was in reality much difference between them – only that latterly the vision and the quality of fiscal decision-making seemed to deteriorate. I hope to return to this material at some point in the future.

I talk about Britain or Great Britain rather than ‘the United Kingdom of Great Britain and Northern Ireland’. This seems to have become conventional in critical writing and avoids an air of technicality. I hope readers in the Province will forgive this and make allowances for the stylistic imperative. Another convention to which the reader is asked to acquiesce is my interchangeable use of ‘corporate tax’ and ‘corporation tax’. I do this ‘in the interests of euphony’, as Anthony Trollope might have said, absent the need to bring out some particular point, in which case I deliberately refer to one or the other. Chris Sanger has pointed out that the government’s interchangeable use of the terms in its policy documentation may obscure the need to take account not only of corporation tax but also of the burden on companies of other taxes, such as stamp duty land tax, irrecoverable value added tax, climate change levy and so on. The point is well made, but since I am concerned solely with corporation tax, I think my own generally interchangeable use of ‘corporate tax’ and ‘corporation tax’ is nonetheless justifiable.

This study is a substantially edited, updated and revised version of my doctoral thesis, which was examined at the University of Birmingham in 2008. In preparing the work for publication, I have benefited especially from Bill Dodwell’s *Business Tax Briefings* for Deloitte, as to factual detail, and from the commentaries in the *Financial Times* newspaper, each of which were particularly useful in making final adjustments to the text in April 2011. For stimulating conversation and fellowship I must thank especially: Julio Faundez, John McEldowney, Dan Priel, Rebecca Probert, Paul Raffield, David Salter and Gary Watt at the University of Warwick; Ann Blair, Jane Frecknall-Hughes (now of the Open University), Oliver Gerstenberg, Roger Halson, Anna Lawson, Amrita Mukherjee and Michael Cardwell at the University of Leeds; and, at Nottingham Trent University, Elspeth Berry, Graham Ferris, Juliette Grant, Peter Kunzlik, Alan Riley (both subsequently at City University, London), Marc Stauch (subsequently at Leibniz Universität Hannover) and James Slater (subsequently at the University of Buckingham). Marc Stauch and Christiane Trüe accompanied my wife Angela and me on a trip on the London Eye, one day of brilliant sunshine in 2005, and this felicitous suggestion on Marc and Christiane’s part inspired the pictorial imagery that I hope puts a sunny halo around chapters three to

five. I have also benefited from conversations with Dermot Fenlon, who directed me to Ted McAllister's work; Ann Mumford, who encouraged me to reacquaint myself with the work of ERA Seligman; Philip Ridgway, regarding developments in corporate tax law; Michael Sutton, on the history of political ideas generally; and Bill O'Brian and Matthew Clayton, on the so-called 'genetic fallacy'. At a more practical level, I would like to thank Helen Riley and colleagues in the university library at Warwick, especially in document supply and also Jane Bryan, Peter Cook and Gary Watt, who covered my teaching for the period of leave in 2010–11, during which, while taking forward my on-going work on the English philosopher John Locke (1632–1704), I completed the manuscript. It might be that I have other people to thank whom I have not mentioned. If so, I ask their forgiveness for overlooking them.

Richard Hart has been the most patient, helpful and supportive of publishers, suggesting the highly apposite title. On the editorial side, I have benefited from the assistance of Rachel Turner, Mel Hamill, Tom Adams and Lisa Gourd. A special word of thanks, too, is due to David Salter. He has been a conscientious supervisor, a careful observer and a good colleague. Although we do not always agree, our often detailed discussions of corporate tax law and policy, and much else, are a constant source of intellectual stimulation and companionship. And, too, my thanks are due to the examiners of my thesis, Geoffrey Morse and Abimbola Olowofoyeku. Their comments have proved extremely useful. For the same reason, I am grateful to the originally anonymous reviewer, Marc Moore, of University College, London, whose comments on the manuscript were extremely valuable in putting it into its present shape. Neither Marc, nor Geoffrey, nor Abimbola bear any responsibility for its inevitable imperfections and infelicities.

Most of all, I should like to thank my wife, Angela Kershaw, for her love and support over the years that the work has occupied my time. Angela has shown the greatest interest and encouragement at every stage, and I am deeply grateful to her. She is herself a gentle, witty and scholarly companion, and I benefit more from her conversation than I might perhaps realise.

My father, Edward Snape, and my mother, Elizabeth Brigid Snape, died within three weeks of each other, almost to the hour, as the thesis was in its last stages. They were therefore its dedicatees. Nothing if not trenchant, they would certainly have wished that, this difficult time having passed, I should dedicate the book that has come of it to Angela. That is what I do, with a love that I cannot easily put into words. And I do so mindful still of the courage and example that Edward and Elizabeth set when I originally made the thesis dedication. Andrew William Snape and Michael Francis Snape were to me all that brothers could have been over that difficult time, and they continue to be my closest friends.

The text seeks to reflect developments as at 5 April 2011.

John Snape
5 April 2011

Table of Abbreviations

ACE	allowance for corporate equity
CA 2006	Companies Act 2006
CAA 2001	Capital Allowances Act 2001
CRCA 2005	Commissioners for Revenue and Customs Act 2005
CTA 2009	Corporation Tax Act 2009
CTA 2010	Corporation Tax Act 2010
CTRM	Corporate Tax Road Map ¹
FA	Finance Act
FB	Finance Bill
GAAR	general anti-avoidance rule
GANTIP	general anti-avoidance principle
ICTA 1988	Income and Corporation Taxes Act 1988
ITA 2007	Income Tax Act 2007
ITEPA 2003	Income Tax (Earnings and Pensions) Act 2003
NATP	New Approach to Tax Policy
TAAR	targeted anti-avoidance rule
TCGA 1992	Taxation of Chargeable Gains Act 1992
TFEU	Treaty on the Functioning of the European Union
TIOPA 2010	Taxation (International and Other Provisions) Act 2010

¹ This abbreviation is used in the footnotes for the whole of the document in which the CTRM appears, namely: HM Treasury and HMRC, *Corporate Tax Reform: Delivering a More Competitive System* (London, 2010), available at http://www.hm-treasury.gov.uk/d/corporate_tax_reform_complete_document.pdf (accessed 15 July 2011).

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