

Tax Policy, Women and the Law

UK and Comparative Perspectives

ANN MUMFORD

CAMBRIDGE TAX LAW SERIES

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TAX POLICY, WOMEN AND THE LAW

UK and Comparative Perspectives

Tax policy frequently targets the choices that women face in many aspects of their lives. Decisions regarding working away from home, having children, marrying, registering a partnership or cohabiting with a partner all entail tax consequences. The end of the twentieth century saw progress in women's legal and social equality, but many governments began to increase their reliance on the tax system as a means of influencing the choices that women make.

The juxtaposition of this instrumentalist deployment of tax with persisting economic inequality for women is the starting point for this book. Employing a range of theoretical approaches, and grounding its investigations in sociological theory and cultural philosophy, it provides the foundation for a comparative, contextual consideration of the issues that arise at the intersection of women, tax policy and the law.

ANN MUMFORD is a senior lecturer in law in the Department of Law, Queen Mary, University of London.

CAMBRIDGE TAX LAW SERIES

Tax law is a growing area of interest, as it is included as a subdivision in many areas of study and is a key consideration in business needs throughout the world. Books in the Cambridge Tax Law series expose and shed light on the theories underpinning taxation systems, so that the questions to be asked when addressing an issue become clear. Written by leading scholars and illustrated by case law and legislation, they form an important resource for information on tax law while avoiding the minutiae of day-to-day detail addressed by practitioner books.

The books will be of interest for those studying law, business, economics, accounting and finance courses in the UK, but also in mainland Europe, the USA and ex-Commonwealth countries with a similar taxation system to the UK.

Series Editor

Professor John Tiley, Queens' College, Director of the Centre for Tax Law.

Well known internationally in both academic and practitioner circles, Professor Tiley brings to the series his wealth of experience in tax law study, practice and writing. He was made a CBE in 2003 for services to tax law.

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The author stopped collecting material for inclusion on 30 June 2009.

This text uses the term ‘the Revenue’, as opposed to the ‘Inland Revenue’ or ‘HMRC (HM Revenue & Customs)’, as it is now known, for the sake of consistency.

London
31 October 2009

Ann Mumford

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Introduction

Scope and methodology

The taxation system cannot solve the problem of women's economic inequality. There is a view that to deploy tax law for any instrumental purpose somehow detracts from its purity and causes it to function less well as a system of tax law. The project of this book is to argue, within the constraints of the first observation, that the second observation is not correct and that the tax system should be deployed to militate against economic discrimination against women.

This book hopes to reflect its topic, and to locate itself at the intersection of ideas, disciplines and scholarship. A wide range of sources is considered. Writers who have challenged and formed traditional economic thought are consulted. For example, Karl Polanyi's writings are investigated, to discern whether his advocacy of a cultural approach to economics holds promise for the subject of women and tax. Additionally, Schumpeter's efforts to inform economic theories with sociological perspectives structure several of this book's investigations into the fiscal state. Their projects, in particular, are important because of the nature of the interaction between women and tax law. The problem of women's economic inequality is universal, and cannot be solved by tax law, in any state, or through any tax-based international agreement. There is no solution in fiscal legislation which, on its own, will help women who live in poverty to find a route to a life with more resources. Tax law will not redress the problems caused by the uncomfortable relationship between work in the paid marketplace, and unpaid labour. Simply, tax law is not a capable forum for redressing gender equality.

There are also strong arguments that tax law should not be used in this way. Tax law funds the engines of governments, and provides resources for some of the most important functions that states provide. Burdening tax law with socio-economic problems that society has not proved able to resolve in other ways can lead to complexity – and simplicity is not

something for which tax law, globally, is renowned. Tax law should be structured so as to collect taxes fairly and efficiently; and not so as to contain debate for ways of redressing difficult economic problems.

Yet tax law very frequently provides the forum for efforts by governments to deal with the basic, intransigent fact of women's poverty. The value of these efforts in many ways lies in the discussion that they enable. While some aspects of tax law in some countries may serve to redistribute more money to more women – and while the importance of this should not be underestimated in this introduction to the book – the fact of women's poverty persists as a global problem. Women are poor everywhere, but it does not follow that all economies are the same.

Additionally, although feminism, and feminist legal theory, are not homogeneous,¹ a generalised trend away from consideration of women and money has been identified in recent years.² What could be described as the feminist materialist project³ fostered a wide and vibrant literature, concerned with many aspects of women's lives; and, in particular, with their economic well-being. While the 'cultural focus' has enormously enriched legal scholarship, a cost of this development is a lack of engagement with explicitly economic law; and, in particular, with UK tax law. The purpose of this book is to argue for the development of a specifically feminist, materialist analysis of UK tax law and policy. This project is undertaken with the hope that a feminist, materialist analysis of tax policy, women and UK law, also may serve to reinvigorate the 'tax project' of fiscal sociology.⁴

The project is explicitly comparative in focus, as is the feminist scholarship with which it will engage. This text builds upon a generation

1 See discussion in Marjorie E. Kornhauser, 'Through the Looking Glass with Alice and Larry: The Nature of Scholarship', *North Carolina Law Review*, 76 (1998), 1609, at 1616–19.

2 In 1997, Judith Butler observed that 'the cultural focus of leftist politics has abandoned the materialist project of Marxism ...' ('Merely Cultural', *Social Text*, 52–3 (1997), 265–77).

3 Among this vast literature, see, in particular: Christine Delphy and Diana Leonard, 'A Materialist Feminism Is Possible', *Feminist Review*, 4 (1980), 79–105; Jill Dolan, 'In Defense of the Discourse: Materialist Feminism, Postmodernism, Poststructuralism ... and Theory', *Drama Review*, 33 (1989), 58–71; R. Hennessy, 'Materialist Feminism and the Politics of Discourse', in R. Hennessy and C. Ingraham, *Materialist Feminism: A Reader in Class, Difference, and Women's Lives* (New York: Routledge, 1997); S. Jackson, 'Why a Materialist Feminism Is (Still) Possible – And Necessary', *Women's Studies International Forum*, 24 (2001), 283–93; L. Vogel, *Woman Questions: Essays for a Materialist Feminism* (London: Routledge, 1995).

4 On this point, see generally E. J. McCaffery, 'Where's the Sex in Fiscal Sociology? Taxation and Gender in Comparative Perspective', University of Southern California Law and Economics Working Paper Series, July 2008, Working Paper 70.

of endeavours in this field,⁵ all demonstrating that paying attention to women and tax law is important and necessary. Every aspect of a tax system has the potential to affect women. A text which analyses every aspect of the tax system, and attendant case law, and then attempts to forge a bridge back to a theory of women, tax and the law may risk finding that the bridge is unable to bear the weight of the analyses. Thus, it is necessary in this introduction to set out the thesis, so as to explain the emphases which follow.

(Implicit) bias

The selection of this topic – fiscal policy, women and the law – itself may suggest an allegation of bias. The thesis of this text does not seek to identify examples of explicit bias in the UK tax system, and to compare these examples with practices in other countries. Questions of ‘explicit bias’ – addressing, for example, whether an income tax system permits independent taxation – can be easier to address than questions of ‘implicit bias’, which necessarily involve subjective judgements about appropriate economic behaviour.⁶

Although analyses of questions of implicit bias may be difficult, within tax law in particular, the potential of their engagement is particularly rich. A consideration of gender budgeting is illustrative in this context, as it presents a sturdy point from which to begin construction of the thesis. The fact of gender budgeting establishes that there is a presumption of gender bias in fiscal budgetary processes. It starts the discussion.

The link between gender budgeting and the tax system lies in the significance of the budget itself. There is an initial, obvious link, in that if taxes were not collected, then it would be difficult to finance a budget. The significance of a budget, however, as Schumpeter has established,⁷ extends beyond this. It is a blueprint for the aims and ambitions of the nation state. As such, the source of funding for the budget cannot be diminished in importance. Gender budgeting, of course, is something in which Schumpeter would have been enormously interested. If governments have established gender budgeting to account for discrepancies in

5 By writers too numerous to mention in this introduction – a purpose of this book is to provide a resource for consideration of this increasingly wide literature.

6 J. G. Stotsky, ‘How Tax Systems Treat Men and Women Differently’ (Finance and Development 1997) (at: www.worldbank.org/fandd/english/pdfs/0397/070397.pdf).

7 John L. Campbell, ‘The State and Fiscal Sociology’, *Annual Review of Sociology*, 19 (1993), 163–85, at 163.

spending according to gender, then it is possible that these discrepancies extend to the tax system. Schumpeter convincingly argued that the budget is not just about spending money; it is also about choosing a way in which an economy might be organised.⁸ He also suggested that it is possible for a society to choose the economy it wants. This is an important starting point for the thesis of this book.

A point of investigation for the thesis of this book is the body of socio-legal literature dealing with implicit gender bias in the tax system. Literature dealing with the gendered status of law is also relevant. The literature derives from a range of countries, although focuses on the UK in particular. As indicated by this book's title, comparative perspectives are presented through relational analyses. Different jurisdictions are considered not to determine which affords greater equity, but to analyse tax and gender in different contexts, in relation to divergent cultures, legal systems and market structures. The literature and legal structures of the US are considered perhaps most frequently, largely due to the emergence of the interesting and challenging critical tax movement there, although a range of other jurisdictions are addressed as well. The objective of these relational analyses is to forge a link between the issue of implicit bias, and theories as to the resulting status of women in the market economy. At this point in the analysis, the raw subject of tax law will be relevant. As Stretton explained, '[t]he law is a powerful determinant of status in any society'. It is in this sense an important tool, and, indeed, '[f]eminist historians and campaigners for women's rights have therefore looked to legal codes and legal commentaries to learn the history of inequality between the sexes, and to consider directions for future reform'.⁹ The consideration of modern law, however, of law in action, can present a more difficult challenge.

Thesis

To illustrate this point, it is useful to return to the question of implicit bias. Historical legal provisions may present obvious explicit bias, when

8 See Joseph A. Schumpeter, 'English Economists and the State-Managed Economy', *Journal of Political Economy*, 57 (1949), 371–82; C. J. Whalen *et al.*, 'Post-Keynesian Institutionalism and the Anxious Society: Assessing the Evolution and Impact of Alternative Institutional Structures', in Sandra S. Batie and Nicholas Mercurio (eds.), *Alternative Economic Structures: Evolution and Impact* (London: Routledge, 2008), at pp. 273–99.

9 T. Stretton, *Women Waging Law in Elizabethan England* (Cambridge University Press, 1998), p. 1.

viewed from the perspective of modern values. The presence of examples of explicit bias in these historical backward glances also may be identified more easily. But with modern, explicit bias, the possibility exists that outright discrimination is either an anomaly (an unintended clash within a system of precisely drafted rules), or a choice. If it is a choice – and if it is a wrong choice, or an unfair choice – then an appropriate response would be to engage the political process to change the law. In the latter instance, this text could serve the purpose of political manifesto. If it is to perform that function, however, a wider view of facets of the UK tax system may not be necessary. A targeted demonstration of how one aspect of the tax system does not ‘work’ may suffice.

That targeted demonstration nonetheless would have to confront the fact that the unfair outcome at one point was a choice, from among other options. Choices within a system of competing goals, as Alstott famously examined, are not always straightforward.¹⁰ It does not necessarily follow, as Alstott explained, that it is impossible to ‘design tax law changes in ways that are most likely to achieve feminist goals’,¹¹ but it may be the case that, at one point, to achieve one good thing, something else will be sacrificed.¹²

The thesis of this book in some ways starts with a problem. At various points, research will be presented which addresses the disproportionate poverty of women, and the difficulties that women face in the market economy. The thesis, however, does not identify the role of tax systems in remedying the problem. Women are more likely to be poor, and the tax system is part of the problem. It is at this point that the relevance of the question of status may become most evident. To begin with one, perhaps obvious, question: do ‘feminist goals’ inevitably lead to contradictory choices? If yes, then that inevitability may be linked to disagreement as to what constitutes a feminist goal, or a goal that benefits women. This directly impacts upon the status of women within, among other aspects of society, the economy. Their figurative and symbolic positions

10 A. L. Alstott, ‘Tax Policy and Feminism: Competing Goals and Institutional Choices’, *Columbia Law Review*, 96 (1996), 2001–82, at 2003.

11 *Ibid.*

12 F. Bennett presented an excellent example of this when arguing that ‘independent taxation can sometimes be seen as the major obstacle to a targeted, integrated tax and benefits system’ (‘Policy Implications of Tax Credits’, www.genet.ac.uk/workpapers/GeNet2005p8.pdf, at 20). Both independent taxation and an integrated tax and benefits system are, to engage Alstott, ‘likely to achieve feminist goals’. Yet, as Bennett has emphasised, to achieve one, the other may be sacrificed. A section of this book is dedicated to the subject of independent taxation, and the extent to which it has changed the UK tax system since its implementation in 1990.

are unclear. It will be difficult to identify which provisions of tax law exactly benefit women. Thus, a project to advance the thesis of this book will involve engagement with socio-legal literature addressing the status of women within the economy; or, put differently, the gendered nature of the economic structure.

One approach to this project would be to suggest that the status of women within the economy is best analysed by addressing the question of money. If women disproportionately live in poverty, for example, then their status is clear, and it is patently not a good one. Put differently, it should not be difficult to identify exactly which provisions of tax law benefit women: rather, it is necessary to choose those laws which give women, as an interest group, the most money. Sometimes a government initiative which is clearly about redistribution, however, such as benefits, may be difficult to administer effectively in the face of what Alstott would describe as a competing goal (independent taxation). This book will move beyond specific aspects of the law at several points, and consider the question of its administration. Bureaucracy is never a side issue in tax law.¹³

Social science literature, dealing in particular with the 'new institutionalist' turn in governance, may be particularly relevant to an analysis of (implicit) bias, and resultant status of women in connection to fiscal legislation. Ultimately, and among other objectives, the 'new institutionalism' deals with the interaction of aspirations and legal culture.¹⁴ The 'new institutionalist' literature in recent years has been developed in the context of European legal integration.¹⁵ It has been particularly relevant in the identification of what could be described as the emergence of new legal forms from legislative efforts to integrate the European common market. This book will engage with new institutionalist literature within

13 Robin Williamson, Technical Director of the Low Incomes Tax Reform Group, illustrated this when he observed: '[e]xactly 20 years after the discriminatory treatment of women in the tax system was ended by the advent of independent taxation, it will be re-introduced as a by-product of Brownian complexity' ('Winners and Losers among Low-income Taxpayers', *Tax Journal*, 867 (2007), 19–20, at 20). Williamson was responding to changes introduced in the 2007 Budget, which included measures targeting some forms of tax avoidance believed (by the government) to be engaged in by married couples.

14 P. A. Hall and R. C. R. Taylor warn that the 'new institutionalism' 'does not constitute a unified body of thought. Institutional analysis of corporate tax law is not new' ('Political Science and the Three New Institutionalisms', in Karol Soltan *et al.* (eds.), *Institutions and Social Order* (Dearborn, MI: University of Michigan Press, 1998), at p. 15).

15 See, e.g., M. A. Pollack, 'The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis', *Governance*, 9 (1996), 429–58; J. Bulmer Simon, 'The Governance of the European Union: A New Institutional Approach', *Journal of Public Policy*, 13(4) (1993), 351–80.