

Schulich School of Law, Dalhousie University

Schulich Law Scholars

Articles, Book Chapters, & Popular Press

Faculty Scholarship

2020

Portrait of a Transplant Artist

Kim Brooks

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works



Part of the [Legal Writing and Research Commons](#), [Legislation Commons](#), and the [Tax Law Commons](#)

Portrait of a Tax Transplant Artist

Kim Brooks*

This article explores the process of norm migration through the study of one tax expert, Victor Thuronyi. It situates the literature on the role of experts in tax norm migration and identifies core themes and gaps in the tax transplant literature; explores five themes, connected to the literature on the role of tax experts and tax transplants, that arise from a study of Victor Thuronyi's contributions to tax transplantation; and concludes with some reflections on the benefits and challenges of having highly specialized, non-insider tax experts engaged in the exercise of drafting tax laws.

Keywords: Comparative tax, tax policy, tax experts.

I LEGAL TRANSPLANTS: CONTESTING METAPHOR

Norm migration, the phenomenon of ideas, conventions, standards, or practices transitioning among people and places, has become a popular topic in comparative law. Following Watson's influential work in 1974,¹ the transplant metaphor became the shorthand way to refer to this phenomenon. It took some time for Watson's transplant metaphor to take root.² But once it did, it became contested territory. At the extreme end, Pierre Legrand claims, 'legal transplants are impossible'.³ Others offer more tempered assessments of the viability of legal transplants – suggesting that if not properly adjusted to suit the new context they would be hazardous.⁴ Still others have sought to revise Watson's tax transplant metaphor with language thought to be more appropriate to the process of norm migration. So, for example, Esin Örüci advocates for understanding law 'as a series of transpositions and tunings',⁵ and Gunther Teubner suggests that

'legal irritants' might be a more appropriate way of describing the process of norm migration in law.⁶

One of the limits of the metaphor 'transplant' is that it focuses substantially on the act of uprooting something from one place and placing it in another.⁷ As a result, the metaphor may temporally skew scholarly analysis. Much of the tax transplant literature, for example, focuses on the act of identifying a tax law and importing it somewhere else instead of exploring the process of how norms emerge, how they travel from one person or place to another, and how they change when they are exposed to a new environment.

This article explores the process of norm migration through the study of one tax expert, Victor Thuronyi. Choosing to focus on the work of an individual tax expert enables two distinct contributions. First, it demonstrates why a longer-horizon exploration of the 'tax transplant' metaphor is necessary to come to terms with how tax law norms circulate among people and places. Second, it makes central to the process of transplant the role of a

Notes

* Dean of the Faculty of Management at Dalhousie University and the Purdy Crawford Chair in Business Law at the Schulich School of Law. She would like to thank Okanga Ogbu Okanga for his research assistance and Irma Johanna Mosquera Valderrama for her encouragement. Finally, thanks are extended to the Social Sciences and Humanities Research Council of Canada for their support. Email: kim.brooks@dal.ca.

¹ A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974).

² The metaphor did not appear regularly in the literature until the mid-1980s and it was still another decade (mid-1990s) before it became popular. See a discussion of the article's reception in J. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41(3) *Ga. J. Int'l & Comp. L.* 637–696 (2013).

³ P. Legrand, *The Impossibility of Legal Transplants*, 4(2) *Maastricht J. Eur. & Comp. L.* 11–24 (1998). The major comparative law scholars have engaged in heated exchanges about the transplant concept. See e.g. Alan Watson's published opinion that Pierre Legrand's views have 'no substance, just big words.' A. Watson, *Legal Transplants and European Private Law*, 4 *Elec. J. Comp. L.* 4 (2000), at para. 1, <https://www.ejcl.org/44/art44-2.html> (accessed 10 Dec. 2019).

⁴ J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* 16 (Clarendon Press 1996).

⁵ E. Örüci, *Law as Transposition*, 51(2) *Int'l & Comp. L. Q.* 205–223 at 206 (2002).

⁶ G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergence*, 61(1) *The Mod. L. Rev.* 11–32 (1998).

⁷ For an extended discussion of the metaphors employed in discussing norm migration (harmonization, transplantation and viral propagation) see R. A. Macdonald, *Three Metaphors of Norm Migration in International Context*, 34(3) *Brook. J. Int'l L.* 605–653 (2009).

tax expert, a possible explanatory variable in the story of tax transplants that has been under-studied.⁸ Focusing on the role of tax experts in tax law transplants is not to suggest that their role dwarfs other possible explanations for how or why norms migrate. There is a rich literature in institutional theory, for example, that speculates about (and in some cases attempts to measure) the role in norm migration of factors like the imperialism of American education, multinational businesses (including law firms), legal tradition, organization of the legal profession, underlying economic system and so on.⁹

Victor Thuronyi is an ideal candidate for study; he worked at the International Monetary Fund (IMF) from 1991 until 2014 in its legal department. Perhaps surprisingly, the tax law drafting function at the IMF is small. It has generally benefitted from one to three full time staff members and a small cluster (often not more than a dozen) of external experts (generally senior tax academics) that are called upon from time to time.¹⁰ In his time at the IMF, Thuronyi was instrumental in drafting or revising pieces of tax legislation (often multiple pieces) that were enacted in over seventy countries and offered legislative drafting or revision advice for another cluster of countries that was not (at least to his knowledge) enacted. A substantial majority of the laws drafted by the tax unit were eventually enacted, although often with revisions. Sometimes he was the lead draftsman; other times he backstopped the work of another full-time staff person in the legal department or an external expert. Thuronyi's start at the IMF coincided with the collapse of the Soviet Union. Hence, in his early days at the IMF, much of his work was with transition countries, with his work in Kazakhstan in 1995 and again in 2000 seeming to serve as a foundational early contribution. In the 2000s, much of his work was focused on South Asia and Africa, with some engagement in the Caribbean and Pacific islands. By this point, most of the former Soviet Union countries had developed their own capacity to draft tax laws. He (and consequently the IMF tax law drafting group) engaged in comparatively little work in Latin America. Thuronyi attributes this to the fact that Latin American countries by and large had developed professional staff that were capable of drafting tax laws without external help. It was similarly rare to work with EU countries, with Greece as a notable outlier. Again, EU

countries had teams of lawyers and economists in their finance ministries that were used to drafting tax laws. Put simply: Thuronyi, either individually or with one or two members of a small group, was responsible for a great deal of the world's new or revised tax legislation between 1991 and 2014, at least in those countries that lacked a substantial staff that were experienced in drafting tax legislation.

This article proceeds in three additional parts. Part 2 is a brief section that situates the literature on the role of experts in tax norm migration and identifies core themes and gaps in the tax transplant literature. Part 3 explores five themes, connected to the literature on the role of tax experts and tax transplants, that arise from a study of Victor Thuronyi's contributions to tax transplantation. Part 4 concludes with some reflections on the benefits and challenges of having highly specialized, non-insider tax experts engaged in the exercise of drafting tax laws.

2 THE ROLE OF TAX LAW EXPERTS IN TAX NORM MIGRATION AND THE TAX TRANSPLANT LITERATURE

There is a limited scholarship on the role of tax experts in norm migration. The legal literature might be generalized as fitting within two narratives. The first is celebratory. In this line of scholarship, tax experts are cowboy-style heroes, riding into difficult terrain. They are presumptively men. They save countries by bringing one of the fundamental tools of democracy – a tax system that enables the country to raise often badly needed revenue. The second is critical. In this world, tax experts are the new imperial soldiers, imposing western (or northern) norms on the global south, often without the full participation of democratic actors. These are stylized renditions, but only barely.

The Political Economy of Transnational Tax Reform: The Shoup Mission to Japan in Historical Context illustrates the celebratory approach.¹¹ The Shoup mission to Japan is described as iconic,¹² resulting in 'the most dramatic tax reform program ever launched in a modern industrial nation'.¹³ The contributing authors to the collection believe that 'one person – Carl Shoup – and his ideas played an exceptionally important role' in the Japanese

Notes

⁸ Outside of the tax context, see e.g. S. Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14(5) *Org.* 643–666 (2007). Quack poses the question, 'how do rules emerge in a setting where there is so much ambiguity about which institutions should guide action in the first place and where multiple actors from different jurisdictions interact?' (at 644).

⁹ See e.g. D. Berkowitz, K. Pistor & J. Richard, *The Transplant Effect*, 51(1) *The Am. J. Comp. L.* 163–203 (2003).

¹⁰ The list of these experts beyond the IMF is similarly small. See e.g. the list generated by M. Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44(1) *Harvard Int'l L. J.* 139–190 (2003).

¹¹ *The Political Economy of Transnational Tax Reform: The Shoup Mission to Japan in Historical Context* (W. E. Brownlee, E. Ide & Y. Fukagai eds, Cambridge University Press 2013).

¹² *Ibid.*, at 1.

¹³ *Ibid.*, at 3.

tax reform project.¹⁴ Chapters explore Shoup's intellectual development as well as the influences of other key tax experts on his thinking, themes explored more later in this article.¹⁵ Part of what inspires the confidence of contributors to the collection in Shoup's efforts is the combination of his depth of expertise and the intensive and immersive way in which he conducted the Japan mission.¹⁶ Another feature that bolsters their enthusiasm seems to be the authors' conviction that Shoup's broad ideological orientation – that 'increased taxes ... accompanied by substantial reforms that make tax systems much better, that is to say much fairer, more efficient, and more transparent' – is normatively desirable.¹⁷

In contrast to the more positive accounts, other authors – especially Miranda Stewart – offer a more tempered, cautionary tale about the power of technical tax experts and their role in tax transplants.¹⁸ In her 2003 account, 'Global Trajectories of Tax Reform', Stewart unfolds a narrative about the shifting institutions and focus for tax reform initiatives around the world. In this narrative, individual experts receive occasional reference,¹⁹ but the dominant players are institutions.²⁰ One of Stewart's major concerns is the trend toward 'mass production of tax reform', which she notes makes impossible 'any real domestic political participation in the determination of tax policies and laws'.²¹ The neoliberal focus of reform efforts, particularly in the 1990s, also seems to be a focus for criticism.

In addition to this legal literature, there is some sociological study of the role of legal experts in the role of legal transplants. This literature is more explanatory than normative (in the sense that it speculates about the relative role of individual experts in effecting legal transplants). In one of the few articles that grapples with the role of lawyers and law firms in the spread of legal ideas among nations, Sigrid Quack, a comparative sociologist at the University of Duisburg-Essen, describes the function of

'cosmopolitan lawyers' in the earlier periods of internationalization:

Members of this 'cosmopolitan elite of lawyers' had in common a high degree of renown expertise in their respective speciality. Their reputation was built on many years of intercultural practice as senior partners of law firms and/or as law professors. ... the cosmopolitan elite of lawyers was small and coherent enough to develop its own common legal language and doctrines. This made these lawyers influential actors in the highly specialized process of rule-setting in their respective fields of law. The more specialized an area of international or transnational law, the more likely such a cosmopolitan elite would exist. What counted at that time was the individual qualities of the lawyer in question and his (or rarely her) reputation and connections within the cosmopolitan club of specialized lawyers. The activities of these outstanding legal scholars may have been backed by the resources of their law firms, but it was primarily their personality and expertise that took centre stage.²²

Quack postulates that legal actors like lawyers and law firms play a larger role in transnational corporate and commercial law, suggesting that because of the technical nature of these areas, their influence may dwarf the role played by elected officials. She additionally argues that the role of individual lawyers has diminished relative to the role of regulatory organizations (like international law firms, international professional associations, and transnational expert networks) given the shift to a phrase of greater globalization.²³ While the role of individual academic and legal experts may have diminished in some areas of comparative law, the conclusion of this article is that a single expert can still wield considerable influence in tax law.

Notes

¹⁴ *Ibid.*, at 14.

¹⁵ See *Ibid.*, Ch. 1–5.

¹⁶ See in contrast, the critique of more recent missions sponsored by international agencies in Brownlee, Ide & Fukagai, *supra* n. 11, Ch. 15, at 426, 442–449 on Shoup and International Tax Reform after the Japan Mission. For a brief, but less enthusiastic nod to Shoup's contributions to tax reform outside the US see L. Ates, *Domestic Political Legitimacy of Tax Reform in Developing Countries: A Case Study of Turkey*, 30(3) *Wisconsin Int'l L. J.* 706–760 at 735 (2012).

¹⁷ Brownlee, Ide & Fukagai, *supra* n. 11, at 449, Ch. 15.

¹⁸ Stewart, *supra* n. 10; M. Stewart, *Tax Policy Transfer to Developing Countries: Politics, Institutions and Experts*, in *Global Debates About Taxation* 183 (H. Nehring & F. Schui eds, Palgrave Macmillan 2007); and M. Stewart & S. Jogarajan, *The International Monetary Fund and Tax Reform*, 2 *Brit. Tax Rev.* 146–175 (2004). See also S. Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide*, 13(4) *Leiden J. Int'l L.* 749–813 (2000).

¹⁹ For a more detailed exploration of the role of individual experts see M. Stewart, *Waiting for Consensus of the Experts?: Expert Discourse and the Politics of Tax Reform*, Univ. Melbourne Working Paper (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532645 (accessed 14 Apr. 2020). Stewart concludes that tax experts play a significant role in tax reform and underscores the tendency for tax expertise to be understood as technical and not political in nature.

²⁰ 'I suggest that the key factor is the development of an international consensus, or "norm" of tax reform and policy driven largely by the international institutions, and propounded by non-government tax experts.' Stewart, *supra* n. 10.

²¹ Stewart, *supra* n. 10, at 174.

²² S. Quack, *Who Fills the Legal 'Black Holes' in Transnational Governance? Lawyers, Law Firms and Professional Associations as Border-crossing Regulatory Actors*, in *Global Governance and the Role of Non-State Actors* 81 at 87 (G. F. Schuppert ed., Nomos 2006).

²³ Quack, *supra* n. 22, at 86–87.

Before proceeding to an exploration of the role of one tax expert, Victor Thuronyi, in the transplant of tax law, this article describes four major questions of the tax transplant literature and identifies several gaps in the transplant literature. This context is necessary to situate the analysis of Thuronyi's contribution, which follows. First, what explains why and how tax laws migrate from one jurisdiction to another? This explanatory literature is in more limited supply than one might imagine. Ultimately, though, scholars who seek to answer this question are interested in whether environmental factors (e.g. demographics or language), the spread of ideas, economic structure, political actors, path dependency, or some combination of factors explain why countries' laws develop in similar or divergent ways.

Second, some scholarship attempts to answer the question of what conditions are necessary for the success (or failure) of a tax transplant (and broadly ignores the question of whether tax transplants are a normative good). Put another way, this work poses the question of whether it is possible to identify the conditions necessary for tax laws to be effectively transplanted. Possible factors that might influence the likelihood that a transplant takes root include legal matters like the country's legal history, its underlying private law, constitutional framework, civil procedure, treaty networks, availability of trained legal advisors, and the independence of its judicial and executive branches; administrative matters like the depth of administrative experience, drafting conventions, size of the public service, and organization of ministries and departments; economic matters like the levels of corruption, openness of the economy, size of the informal sector, availability of financing, ratio of urban to rural population, and number and significance of multinationals; political factors including state ideology, regulatory quality, political participation, colonial history, level of violence, and public trust in government; social elements like residents' willingness to pay taxes, gender and race equality, and immigration patterns; and technological factors like the scope of the digital economy. Undoubtedly the language of the countries in issue influences the effectiveness of tax transplants, particularly if the receiving country has a unique language with limited ability to read materials produced in the originating jurisdiction. Surprisingly little of this literature is concerned with identifying what constitutes 'success' in the context of tax transplantation.

Third, some tax transplant scholars question the value of a formal approach to legal transplants (which is criticized as focusing only on 'law on the books') and advocate

for a broader socio-cultural exploration of the possibilities for or implications of tax transplants.²⁴ Fourth, some tax transplant scholarship seeks to answer the question of whether greater harmonization of tax laws is desirable as a normative (or sometimes empirical) matter. This research is often linked to scholarship that seeks to identify the 'common core' of tax law.²⁵

There are four perhaps surprising gaps in the tax transplant literature. First, there is limited scholarship that explicitly argues in favour of tax transplants by, for example, identifying the benefits of borrowing tax law from another jurisdiction. Instead, it has been popular for scholars to analyse the implications of transplanted laws (perhaps implicitly supporting tax transplants) or to advocate for caution in transplanting laws (whether because there are barriers to effective transplant or because of concerns for the cultural autonomy of receiving-nations). Nevertheless, there are a host of seemingly obvious benefits of tax transplants, including that they allow one country to benefit from the previous experience of another jurisdiction, they alleviate the administrative pressures of formulating new rules from scratch, and they facilitate international activity (since international tax actors have familiarity with the imported regime). Additionally, to the extent that the imported tax law is robust (for example, imposes tax liability on high-income individuals or multinationals) it may help a receiving-jurisdiction resist internal political pressure to make concessions to those powerful groups as part of the law-making process.

Second, as noted above, there is limited work defining what constitutes success of particular tax transplants. Instead, there is an abundance of work that offers a descriptive review of how one jurisdiction's laws have been borrowed by another and even more that advocates that one country (usually the potential receiver) *should* borrow the law of another country (e.g. that Canada should adopt the US approach to controlled foreign affiliate legislation). Identifying markers of success presumably would require considering what is necessary beyond mere enactment. Non-tax scholarship on transplants has gone farther in identifying the varied features of post-law reform engagement necessary for law to successfully take root in a jurisdiction.²⁶ The process of legislative reform is complex enough; yet, successful transplant requires everything from the redesign of standard precedents and forms, effective interpretation by judges and administrative bodies and actors, the revision of manuals and treatises, and the design of educational programming.

Notes

²⁴ Consider the observation made by John Coffee that jurisdictions with similar legal rules (e.g. governing the private benefits of control) may have very different practices around those rules (social norms) such that the jurisdictions differ substantially. Put another way, knowing only the legal rules may not assist much in understanding the differences among jurisdictions in their approach to particular social problems (regulated by those rules). See J. Coffee, *Do Norms Matter? A Cross-Country Evaluation*, 149(6) *Univ. of Pa. L. Rev.* 2151–2178 (2001).

²⁵ See e.g. C. Garbarino, *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*, 57(3) *The Am. J. Comp. L.* 677–709 (2009).

²⁶ See e.g. R. Macdonald, *Article 9 Norm Entrepreneurship*, 43(2) *Can. Bus. L. J.* 240–291 at 268–271 (2006).

Third, despite broad acceptance by tax comparatists that law is more than ‘law on the books’ and instead encompasses also legal institutions, the activities of legal formants and so on, little study has been made of the transplant of anything more than tax legislation (and to a lesser extent the borrowing of judicial precedent). One imagines that the transplant literature would benefit from greater exploration of how norm migration has influenced tax concepts, administrative tax policies, the function and design of tax administration and collection, structures of tax dispute resolution, training for tax lawyers and judges, the academic insights of tax scholars and so on.

Fourth, while some tax scholars have urged us to think about the differences among countries in contemplating tax transplants, there is limited scholarship that offers a taxonomy of types of countries (aligned with their underlying characteristics) that might assist policymakers attempting to identify countries whose tax laws (and practices) might be most usefully examined – here, Thuronyi’s work is distinguished.²⁷ In contrast, comparative law scholars have attempted more detailed frameworks for classifying states and considering the implications of particular characteristics for the likelihood of effective transplant.²⁸

In identifying themes from my conversations with Victor Thuronyi, I was mindful of these lines of inquiry and of the gaps in the available literature. In the remainder of this part of the article, I identify five major themes that emerged from our conversations, some of which add qualitative texture to the broader tax transplant debates and the literature on the role of tax experts.

3 VICTOR THURONYI: THE QUINTESSENTIAL TAX TRANSPLANT ARTIST

This portion of the article is based on a review of Victor Thuronyi’s extensive scholarship as well as two approximately two-hour interviews. The interviews were semi-structured. My initial interest in focusing on Thuronyi’s contributions was driven by the notable split in views about the desirability of deploying technical tax expertise in the way that Thuronyi did. I was hopeful that qualitative work might assist in shedding more light on the role of technical experts in the tax transplant process. The discussions were broader than just the role of an individual expert, however, and they were informed by the tax transplant literature.

3.1 Those Engaged in Transplant Work Are Part of a Cosmopolitan Tax Elite

What draws someone to want to develop tax expertise and to share that expertise with countries around the world? The collection of articles on Carl Shoup explores that topic in some detail.²⁹ Victor Thuronyi’s early career trajectory shares some features in common with Shoup’s. Both were born in the United States and each pursued distinguished venues for higher education (in Shoup’s case – Stanford and Columbia (PhD), in Thuronyi’s case – Cambridge and Harvard Juris doctor (JD)), with some training outside the US (in France for Shoup and in the UK for Thuronyi). Each was attracted to university teaching (Shoup at Columbia business school and Thuronyi at State University of New York at Buffalo). Both men spent some time working with the US Treasury Department on tax reform.

Each also identified early, elite, tax connections. The story of Carl Shoup is thick with references to his important mentoring relationships with Edwin Seligman and Robert Murray Haig. Haig was chair of Shoup’s dissertation committee and Seligman took him on one of his earliest tax missions (to Cuba).

Thuronyi similarly had important tax connections early in his career. He took a public finance course from Martin Feldstein, Alan Auerbach and Richard Musgrave while he was at Harvard. He was also heavily influenced by tax academics at Harvard Law School (Bill Andrews, Stanley Surrey, Michael Graetz (visiting Harvard at the time) and Alvin Warren), as well as other tax legal academics who wrote about tax reform from an economic perspective, and subsequently his experience on tax reform at the US Treasury. Thuronyi read Andrews’ seminal article on consumption taxation while still a student at Cambridge, and edited Graetz’s article on the consumption tax while on the Harvard Law Review. At Treasury, he worked with a team of economists in producing the Treasury Tax Reform Studies and Proposals. This school of tax law scholarship, of which Surrey was considered the intellectual leader, espoused a tax reform philosophy that involved eliminating tax expenditures, broadening the tax base, taxing economic income equally, and trying to make the tax system more progressive. Another important influence on Thuronyi, particularly for his international work, was Charles McLure. Thuronyi’s first publication was a review of McLure’s *Must Corporate Income Be Taxed Twice?*³⁰ He later worked with McLure at US Treasury. Instrumental to his future career path, Thuronyi was invited by

Notes

²⁷ Victor Thuronyi’s rough and ready classification of tax families is one starting resource. See V. Thuronyi et al., *Comparative Tax Law* (2d ed., Wolters Kluwer 2016).

²⁸ See e.g. R. Peerenboom, *Toward a Methodology for Successful Legal Transplants*, 1(1) *The Chinese J. Comp. L.* 4–20 (2013).

²⁹ See Brownlee, Ide & Fukagai, *supra* n. 11; Ates, *supra* n. 16. See also A. P. Dourado, *Is This a Pipe? Validity of a Tax Reform for a Developing Country*, in *Tax, Law and Development*, c. 6 (Y. Brauner & M. Stewart eds, Edward Elgar 2013). Dourado posits a perfectly cosmopolitan tax expert: female, with excellent substantive tax knowledge (both comparative and theoretical), with policy influences, who takes her work serious and with the support of the host country as well as with access to thoughtful, democratic input. In this context, and with the aid of the lens of legal pluralism, Dourado expresses optimism for the role of a tax expert in tax reform.

³⁰ V. Thuronyi, *Book Review of Must Corporate Income Be Taxed Twice? By Charles McLure*, 93(2) *Harvard L. Rev.* 462 (1979).

McClure to join a mission to Colombia in the late-1980s. McClure brought together Professors Richard Bird, Jack Mutti, and George Zodrow as additional members of the team. The work to review and reform the tax system in Colombia seemed exhaustive, not unlike the Shoup mission (if considered together with the earlier effort led by Musgrave, in which both McClure and Bird also participated). The mission team prepared an extended discussion of their analysis of the Colombian system and related recommendations in a book that rivals many of the larger tax commissions of that era in its comprehensiveness.³¹ In the book's foreword, Richard Bird describes the mission process as reflecting 'a Colombian tradition of defining an interesting and important policy problem, asking some of the leading experts in the world to consider and to propose solutions for the problem and then, after full public discussion, drawing on the work of these experts to design a made-in-Columbia solution'.³² Thuronyi was largely responsible for preparing the chapters on the taxation of income from business, capital, and wealth.³³

These stories – Shoup and Thuronyi's – offer some insight into what features might attract someone to make a major commitment to tax reform on an international scale. Early exposure to ideas from outside the home jurisdiction seems a component part; the advantage of elite American education; connections to the tax elite of the times; and a genuine cosmopolitan curiosity seem to be essential ingredients.

3.2 At Least Some 'Cultural' Factors Must Be Accommodated

The literature on comparative tax law ranges substantially between those who are more functionalist and those who are more culturalist in their orientation. It is fair to say that Thuronyi leans to the functionalist. For example, in his contribution to the Elgar encyclopedia of comparative law on tax, he observes that, 'regardless of the differences in legal culture or tradition, legislatures in different countries often come to similar tax policy judgments'.³⁴

He does, however, place importance on language, as far as legal drafting is concerned. Thuronyi believes firmly that it was desirable, sometimes even essential, for the foreign tax expert advisors to be able to work in the home country language. So, for example, he was committed to ensuring he regularly worked with experts with Chinese, Portuguese, Spanish, Arabic, French, English and Russian language skills. In addition, Thuronyi learned Latin, German, French and Spanish by the time he had completed high-school and he re-learned Russian (which was his original first language) when he started offering technical advisory services in Russia. He also developed some capacity in Romanian and Italian (similar to Latin), Ukrainian, Czech (similar to Russian), and Portuguese (similar to Spanish). This commitment to participating on a more even language footing with the government actors in the home country seems atypical in the world of tax technical experts. Indeed, it reflects a rarefied form of cosmopolitan elitism to be able to find such linguistic diversity within one person.

3.3 Intellectual Curiosity, Scholarly Engagement, and Comparative Tax Study Are Essential Characteristics of a Tax Transplant Artist

Throughout his career, Thuronyi maintained his commitment to scholarship and to staying abreast of work authored by tax academics.³⁵ He motivated two major contributions that supported his advisory work: *Tax Law Design and Drafting*,³⁶ a two-volume text published originally in hard copy and now available free on the IMF website, and *Comparative Tax Law*.³⁷ These works defined the field.³⁸ *Tax Law Design and Drafting* features many leading tax academics, several of whom worked as technical experts with Thuronyi. The text is regularly relied upon by tax administrators in medium- and low-income countries who are seeking to reform their tax systems. Indeed, that was precisely Thuronyi's intent in developing the project in the first place. *Comparative Tax Law* is perhaps a little less accessible to tax administrators and

Notes

³¹ C. McClure Jr. et al., *The Taxation of Income from Business and Capital in Colombia* (Duke University Press 1990).

³² *Ibid.*, at xiii.

³³ *Ibid.*, Acknowledgements (not paginated).

³⁴ V. Thuronyi, *Tax Law*, in *Elgar Encyclopedia of Comparative Law* (2d ed., J. M. Smits ed., Edward Elgar Publishing 2014).

³⁵ Notably, Thuronyi authored or co-authored about 25 books and articles in his time at the IMF.

³⁶ *Tax Law Design and Drafting*, Vol. 1 (V. Thuronyi ed., IMF 1996) and *Tax Law Design and Drafting*, Vol. 2 (V. Thuronyi ed., IMF 1998).

³⁷ V. Thuronyi, *Comparative Tax Law* (Kluwer Law International 2003) and Thuronyi et al., *supra* n. 27. Thuronyi also co-authored A. Schenk, V. Thuronyi & W. Cui, *Value Added Tax: A Comparative Approach* (2d ed., Cambridge University Press 2015), which makes a substantial contribution to our understand of the design of VATs around the world, but which has not received the same comparative law attention as the two contributions identified in the text above, likely because of its more specific focus.

³⁸ Every serious scholarly piece on comparative tax law cites one, or both, of these contributions. For reviews, see J. Azzi, *Book Review: Tax Law Design and Drafting* (Vol. 2): *Comparing Income Tax Laws of the World*, 18 Berkeley J. Int'l L. 196 (2000); D. Bentley, *Current Books, Book Review of Tax Law Design and Drafting by Victor Thuronyi*, 8(1) Rev. L. J. 216 (1998); T. Edgar, *Book Review of Comparative Tax Law by Victor Thuronyi*, 51(6) Can. Tax J. 2357 (2003); M. Stewart, *The 'Aha' Experience: Comparative Income Tax Systems*, *Book Review of The Tax System in Industrialized Countries by Ken Messere, Tax Law Design and Drafting II by Victor Thuronyi*; H. Ault, *Comparative Income Taxation: A Structural Analysis by Hugh Ault*, 19 Tax Notes Int'l 1323 (2019).

its audience is more likely students and academics; nevertheless, it captures Thuronyi's deep and broad knowledge of tax laws around the world and advances his argument that countries can be grouped into families that allow those interested in tax study to obtain some predictive insights about the whole family through the careful study of the tax laws of one of the related countries.

Comparative study clearly influenced many of Thuronyi's drafting decisions. He affirmed, perhaps unsurprisingly, that 'I really did take comparative law seriously, and ... tried to figure out what the actual differences were in legal forms and viewpoints'. As a concrete example, in talking about designing a general anti-avoidance rule, he observed that the 'approach I took was a pretty simple approach ... you look at the experience and what other countries have done'. His enthusiasm for comparative tax law is succinctly articulated in a short contribution to *Tax Notes*.³⁹

3.4 No Matter How Effective One Hopes 'Transplant' Work Is, There Are Acknowledged Limits to Non-Insider Technical Advice

Thuronyi readily acknowledges the limits of the approach to providing technical advice that he fostered and developed while at the IMF. In contrast to the discussion of the early Shoup missions in Japan, for example, which required extensive immersion, Thuronyi embraced a streamlined approach to tax drafting. He describes that approach in a note for tax officials in Turkey:

In terms of process, one observation I have is that it would be useful to involve in the drafting process tax lawyers with experience in drafting tax laws. In this context, tax policy officials in Turkey may be interested in the assistance that the IMF Legal Department can offer. We have worked with numerous countries, in modalities appropriate to each country. In some countries, the draft tax law has been prepared by local officials and, where needed, translated into English. Then an expert from the Legal Department (in some cases two experts working together) has travelled to the country to sit down with the responsible officials and go through the draft article by article. This is an intensive process that normally requires one or two weeks of fairly intensive all-day meetings going through the draft. As a result of the discussions, problems are identified, the policy intentions of the authorities are clarified, and a solution for the specific

wording of the law is found. This kind of approach can bring in experience and best practices from other countries and has helped local officials to deliver well drafted tax laws for consideration by the government and eventually by Parliament.⁴⁰

Thuronyi's shift from the more intensive and extended work reflected in the Shoup mission or Thuronyi's earlier mission to Columbia, to a less intensive approach was by design. It enabled him to work with a more ambitious list of countries. Early in his time at the IMF, he began developing model tax codes – with variances for legal systems and languages – that could be used as a basis for the next project to avoid the additional work of starting each drafting project from scratch. (This approach was started by his predecessor at the IMF, Richard Vann. Thuronyi built on Vann's approach, in particular by extending it beyond English-speaking countries.) He also reduced the time spent on return visits and generally avoided working on subsidiary legislation, administrative guidance, or training and education. These limitations were inherent in the process and he accepted them as a sensible compromise, 'I went all over the place, and once I drafted something, in a particular country, I sometimes wouldn't even come back ... so [I would] not have the type of intense relationship that it would take to really implement some new practices'. Similarly, he acknowledges that, '[t]he approach that I took, which maximized the number of laws that I was drafting, seemed like a reasonable approach, even though I realized that a lot of those laws would not be implemented really well'. Thuronyi accepted the compromise between offering a rough, but workable, legislative framework to more countries at the expense of developing a wider legal framework (that might have included regulations, taxpayer guidance, and education programs) and ensuring a rich, engaged dialogue with stakeholders in the host country.

Thuronyi recognized the need for much greater focus on training for tax administration in tax law; however, the staff limits at the IMF precluded him from advancing much in the way of concrete training. If he had spent longer at the IMF, he might have been inclined to study how tax administrations conduct training and to develop some training plans that would enable those administrations to seek training funding from other donors. A common refrain in Thuronyi's approach was to focus on the most efficient way to transfer knowledge. To that end, it is not surprising that he might have liked to see a centralized training agency (perhaps not at the IMF) that would offer training.

Notes

³⁹ V. Thuronyi, *What can We Learn from Comparative Tax Law*, 103(4) *Tax Notes* 459–464 (26 Apr. 2004).

⁴⁰ V. Thuronyi, *Turkey's Income Tax Laws in International Comparison*, https://www.google.com/url?client=internal-element-cse&cx=016364595556873131513:lg-p43v3tam&q=https://www.tr.undp.org/content/dam/turkey/docs/pressreleases/Thuronyi_Turkey.DOC&sa=U&ved=2ahUKewjNqPzA0O7mAhVDIbCAHbRjBXUQFjAAegQIAxAB&usg=AOvVaw2lB-xHo_3Kf39aFPlzUYe (accessed 10 Dec. 2019).

3.5 Defining Success and Its Connection to an Ideal Tax System

As Leyla Ates nicely puts it, '[d]etermining the success and failure of tax reform is specifically complicated by the lack of widely accepted metrics'.⁴¹ At a basic level, one could imagine measuring the success of a legal transplant by its enactment and that certainly seems to be the dominant view. Yet, there are laws that are enacted and never enforced; and laws that are never enacted, but that alter the way we think about taxation. More sophisticated approaches might attempt to determine other markers of success – like whether a reform project increases revenue raised, results in redistributed income, raises citizen confidence in government spending, or achieves particular economic, social or political goals.

In our conversations, it was clear that Thuronyi saw a difference between the role of those who draft tax laws and those who serve as tax policy analysts. He asserts, '[t]ax law drafters have to really think of themselves as lawyers, not economists'. This disciplinary boundedness may be the result of the design of the functions within the IMF itself – where the tax law drafters reside within the legal department and the economists reside with the fiscal affairs department. The result is a relatively narrow concept of the function of tax law drafting expertise. But bifurcation has an unexpected advantage: it appears to have provided Thuronyi with some flexibility in determining when a reform project was successful.

Our discussion revealed a less dogmatic commitment to any given tax drafting decision than some of the literature on the role of tax law experts in tax transplants might predict. The critical scholarship on transplants often offers up a narrative of 'institutions taking positions' in monolithic ways. The IMF separation between tax law drafters (housed in the legal department) and tax economists (housed in fiscal affairs) meant that often there was little cooperation: projects were either legal projects or Fiscal Affairs Department (FAD) projects. And when a project was primarily left with Thuronyi in the legal department, 'by and large, they didn't really care that much about it'. That structural design feature within the IMF may have left Thuronyi with more liberty to define his own approach to tax law drafting.

Instead of forcefully pressing his own view on tax policy, in many cases, Thuronyi's response to questions about success was focused on the important function of providing support for countries' reform efforts. For example, he suggested that '[m]ostly, it was just a matter of making sure that their existing law was coherent and it made sense as a statute. ... I wasn't going to be second

guessing ... '. Similarly, in describing his process for reviewing the legislation of other countries, he says he was often 'just using the existing law ... and kind of ... streamlining it a bit ... but basing it on their existing drafts'. And he states that, 'ultimately, I draft what they want to do'.

Nevertheless, in our discussions Thuronyi frequently referred to 'good tax policy' assuming that such policy was broadly-agreed upon. This aligns with Stewart's perception that the discourse of tax reform has 'led to the flourishing of tax policy and the development of a set of international norms (the remarkable consensus) that are presented as basic principles for a successful tax system'.⁴² Stewart reflects that this remarkable consensus ultimately results in the depoliticization of tax reform:

Tax reform discourse is primarily an economic discourse, and it claims to be scientific largely through its affiliation with economics and public finance theory. The technical nature of tax reform discourse gives it added authority Legal practitioners of tax reform tend to rely uncritically upon the international norms of the tax reform discourse when drafting tax laws for a particular country. In addition, tax lawyers bring into the tax reform discourse a heavy emphasis on rules and drafting as a solution to problems of taxation in developing and transition countries. Both the economic and legal aspects of tax reform discourse depoliticize tax reform, reducing it to a matter of mechanics.⁴³

Despite clearly holding a view of what constitutes good tax policy, Thuronyi did not seem particularly troubled by countries' interest in maintaining elements of their tax system that did not align with his vision. He considered himself as a temporary civil servant in the countries where he worked, seeing his role as giving advice but also implementing the policy decisions of the authorities even where they conflicted with that advice. He jokingly noted that 'there are many countries that have things that don't work, that are peculiar to them and that they like to hang on to'. In other instances, he pointed to unique approaches adopted by some countries that had little grounding in tax policy; but often he found that those differences had little consequence for the application of the law. For example, he recalled that for Value Added Taxes in the former Soviet Union countries there are often three categories – goods, work, and services. But since work and services are treated the same for tax purposes, having three categories instead of two makes no substantial difference to the application of the rule. Put

Notes

⁴¹ Ates, *supra* n. 16, at 742.

⁴² Stewart, *supra* n. 10, at 173.

⁴³ *Ibid.*, at 173 [footnotes removed].

another way, there may be cultural differences in drafting, but sometimes those differences have no real tax effect.

Thuronyi also exerted limited influence over the design of different models by external experts. He noticed that ‘different people were working on different laws in different countries and they were ending up being different’. These factors suggest less uniformity in approach than might be imagined by some of the standard narratives about how tax transplants are imposed.

Thuronyi was attentive to, but not constrained by, enactment as a marker of success. In considering the signal that enactment sends about the success of a reform project, he said, ‘does that [enactment] mean that it’s successful in the sense of actually creating something positive and significant for the country? No. That’s a different standard’.

So, on one hand, the Stewart story seems to align with Thuronyi’s narrative about tax reform – he assumes a broad consensus on what good tax policy is and as a result talks about it in a depoliticized way. On another level, however, the Stewart story ignores the fractures between the view of good tax policy held by one technical expert, and the various ways in which that view is set aside to advance the goals and objectives of the host country and other expert advisors.

4 THE BENEFITS AND CHALLENGES OF HIGHLY SPECIALIZED, NON-INSIDER, TAX LAW DRAFTERS

One of the advantages of relying on the transplant of tax laws might be the minimization of resources devoted to the project to tax law design and drafting. Certainly, Thuronyi’s trajectory reveals that a substantial volume of drafting work can be undertaken by a small, dedicated group of experts. Whether it is socially useful for each country to develop tax law drafting capacity in-house is open for debate; but in a world with myriad demands on often small public sectors, it seems unlikely in many countries that tax law drafting would be identified as a vital and core area where building capacity is important. Additionally, the project of getting the benefit of wide comparative tax exposure is time consuming. For in-house civil servants, it might require additional language proficiency, access to expensive tax databases, and substantial technical tax expertise to make sense of the approaches undertaken by other countries and their advantages and disadvantages.

A second advantage might be that transplants enable a relatively sophisticated legal framework to be put in place, which facilitates greater capacity building over time. For example, in more than a few instances, Thuronyi reflected that countries to which he originally provided substantial drafting support eventually no longer needed that support. The initial intervention appears to have laid a foundation that could then be adapted and revised as the country’s needs changed and as its in-house expertise was further developed. Put another way, it is possible that the effectiveness of a transplant needs to be measured not only by its initial implementation, but also by the ramifications of the transplant on future reform projects.

Disadvantages are also apparent. To the extent that tax law drafting seems to require a belief in positive law,⁴⁴ the process of transplanting tax laws offers only limited scope for attention to what some sociologists refer to as ‘legal consciousness’.⁴⁵ Put another way, the implications of undertaking reform that relies heavily on an expert individual become divorced from the broader power dynamics within which legal reform and legal enforcement occur. Ultimately, tax law has ramifications for most people’s daily lives, but the implications of a technical drafting exercise seem quite removed from an analysis of those implications.

Second, the policy reflected in the drafting work undertaken inevitably reflects at least to some extent the tax policy convictions of the drafter. Most of the previous academic work paints tax policy decision-making at a macro level: for example, the pressure that may be brought to bear on a country to enact a VAT. But tax law drafting requires literally thousands of small, potentially significant, policy decisions that are often not of much interest to international institutions (for example, the mechanism for valuing particular in-kind employment benefits, the design of childcare expense recognition, or which business entities should be treated as flow-throughs). As the discussions with Thuronyi suggest, some of those convictions might be tempered by the institutional aims of the expert’s employer (e.g. the IMF) and some might be tempered by the home governments (who, for example, may be committed to particular policy settings). Nevertheless, the commitments of the drafter of necessity will be informed by that person’s (or small group of persons’) educational history and ongoing engagement with the world. For example, perhaps because of the experts engaged, the drafting positions may only rarely reflect a gender-budget analysis; presumably, that is the consequence of the combination of the international organization’s position, the position of the government actors,

Notes

⁴⁴ For a related discussion, see L. Philipps, *Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy*, 11(1) Can. J. L. & Soc’y 141–176 (1996). The broad point is that technical expertise can create a discourse that obscures the underlying power dynamics.

⁴⁵ See e.g. P. C. St-Pierre, *Investigating Legal Consciousness Through the Technical Work of Elite Lawyers: A Case Study on Tax Avoidance*, 53(2) L. & Soc’y Rev. 323–352 (2019).

and the particular drafters' views about what constitutes appropriate tax policy settings.

Ultimately, the legacy of a single technical tax expert, even one as prolific as Victor Thuronyi, may be harder to characterize than some of the previous scholarship suggests. Has he served as a key influence on the design and implementation of tax laws around the world? Undoubtedly. Are the tax laws he drafted or revised 'transplants' in the sense described by the comparative law scholarship or should they be covered by a different label, one that better reflects the process Thuronyi developed while at the IMF? In Thuronyi's words:

I don't think that there really is such a thing as a transplant. ... the idea of a transplant is that you're starting with something from one country and you're transplanting it to another country, but I never did that, really. ... You're certainly bringing ideas that have developed elsewhere. But it's not like you're actually transplanting.

Overstating only slightly, the literature on tax experts tends to characterize the role of tax experts as heroic or villainous, and the act of transplanting as a normative good (or at least, an unquestioned good) or as a problematic incursion on the self-determination of low- and

middle-income states. Thuronyi's contributions suggest that the picture may be blurrier. It seems likely that many of the contributors to the transfer of tax law ideas (and law) come from a rarified elite: like Thuronyi, one expects that they are highly-educated at exclusive institutions, that they have had the privilege of access to talented and high-level experts in their own development, and that they have an atypical confidence in their own ability to be helpful. These characteristics most certainly will mean that most high-influence tax transplanters are men, educated in high-income countries. They will have ideas about tax that are broadly acceptable to conventional institutions. Nevertheless, Thuronyi's path also suggests an open-mindedness and relative unobtrusiveness of intervention. He might have held views about tax policy (whether developed on his own or held by the IMF), but he did not feel that those needed to be adopted by countries where he worked; he accepted varying levels of country engagement in tax reform and felt that once a threshold of drafting competence was achieved, additional intervention was not a priority; and he approached drafting projects with creativity and a willingness to work within the framework of the host country. The standard narrative about the role of tax experts has overstylized their influence and perhaps underestimated the consequences of their work.