Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules

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Among the different approaches to comparative tax law the one adopted here views comparative taxation as a descriptive tool conducive to tax design, a tax policy approach grounded in an evolutionary concept of tax change. Comparative taxation should be based on the functions of tax rules, with the goal of identifying similarities and differences between domestic tax systems, and should indicate potential alternative solutions to common policy issues by looking at how the basic elements of tax law-in-action interact. The Article develops a theoretical framework for comparative tax research and uses examples drawn from a comparative study on the General Anti-Avoidance Rule (GAAR) in Canada and China, thus endeavouring to provide a cross-cultural inquiry into tax transplants across the divide of Western and non-Western legal traditions. It is claimed here that a common model of tax systems should be adopted for the purpose of comparing them, and that legal theory is needed to pursue this task. The use of legal theory as a critique of municipal tax ideas is discussed in Part I, while Parts II and III deal with how legal theory can be used to describe the structure and evolution of tax systems by relying on concepts of legal hierarchies and chains of productions of tax rules. Part IV concludes with practical applications of legal theory in comparative tax research in respect to tax transplants and tax design issues by providing an explanatory framework of General Anti-Avoidance Rules in Canada and China.

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I. THE USE OF LEGAL THEORY IN COMPARATIVE TAXATION

After a long period of poor development, the debate among scholars of comparative tax law is now building up and a new web of communications and methodologies is beginning to evolve.[1] Different approaches have been advanced, some of them particularly conscious of the unavoidable relativistic nature of legal cultures.[2] On my part, in a couple of recent papers I have taken the position that comparative taxation can also be developed as a descriptive tool conducive to a tax policy approach, named "tax design," which is grounded in an evolutionary concept of tax change.[3] The idea is that comparative taxation should be based on the functions of tax rules, with the goal of identifying similarities and differences between domestic tax systems, and that it should indicate potential alternative solutions to common policy issues. Of course, this functional approach cannot be taken as dogma and requires empirical evidence and field studies, but it rests on the very solid idea that domestic solutions to tax issues are the result of interactions of basic elements of tax law-in-action, namely case law, administrative

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1 HUGH AULT, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS (2004); PIERRE BELTRAME, TECHNIQUES, POLITIQUES ET INSTITUTIONS FISCALS COMPARES (1997); VICTOR THURONYI, COMPARATIVE TAX LAW (2003); 1 VICTOR THURONYI, TAX LAW DESIGN AND DRAFTING (2000).

2 A critical account of the current situation in comparative tax studies can be found in Omri Y. Marian, *The Discursive Failure in Comparative Tax Law*, 58 AM. J. COMP. L. (forthcoming 2010), *available at* http://ssrn.com/abstract=1404323. Marian provides a detailed review of recent important contributions to the debate, in particular: Michael A. Livingston, *Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Taxation*, 18 CAN. J.L. & JURISPRUDENCE 119 (2005); Michael A. Livingston, *From Milan to Mumbai, Changing in Tel-Aviv: Reflections of Progressive Taxation and "Progressive" Politics in a Globalized but Still Local World*, 54 AM. J. COMP. L. 555 (2006); Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 VAND. J. TRANSNAT'L L. 1105, 1135-57 (2002); Anthony Infanti, *The Ethics of Tax Cloning*, 6 FLA. TAX REV. 251 (2003); William B. Barker, *Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa*, 109 PENN ST. L. REV. 703, 703-16 (2005).

3 Carlo Garbarino, *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*, 57 AM. J. COMP. L. 677 (2009) [hereinafter Garbarino, *Evolutionary Approach*]; Carlo Garbarino, Tax Transplant and Circulation of Tax Model (Mar. 9, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract =1356122 [hereinafter Garbarino, Tax Transplant].

guidelines, positions of scholars, as well as statutes and regulations. By using this functional approach, comparative tax research primarily looks at legal transplants and views domestic tax reforms as the result of the circulation of tax policy paradigms among countries.

These apparently stark propositions require theoretical underpinning. I therefore make a twofold claim in this Article: (i) that a common model of tax systems should be adopted for the purpose of comparing them, and (ii) that legal theory is needed to pursue this task.[4] In my view, a theory of law should basically serve two main functions within the ambit of comparative taxation: first, it should operate as a critique of municipal tax ideas and make them comparable; second, it should reveal the structure and evolution of tax systems. I will discuss the use of legal theory in comparative taxation in this Part, while I will devote Parts II and III to a discussion of its second function. I conclude in Part IV with a few remarks on practical applications of legal theory in comparative tax research in respect to tax transplants and tax design issues. Throughout the Article, I will be making use of examples drawn from a comparative study of Jinyan Li on the General Anti-Avoidance Rule (GAAR) in Canada and China, published in the same issue of this journal, which provides a very good case of a cross-cultural inquiry into tax transplants across the divide of Western and non-Western legal traditions.[5]

The discussion developed here on legal theory is not meant to be addressed to an audience of legal scholars, but rather is directed to those interested in pursuing comparative tax research. Among the different theories of law — which range from legal positivism to legal realism, from institutionalism to economic analysis of law[6] — I adopt here the approach of analytical legal philosophy,[7] as it operates as a critique of municipal tax ideas which serves the specific purpose of comparative tax analysis. In the analytical approach, the

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4 On the debate concerning the combination of comparative law and legal theory generally, see Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262, 273 (1995); Henri Batiffol, *Droit Comparé, Droit International Privé et Théorie Génerale du Droit*, 22 REVUE. INTERNATIONAL DE DROIT COMPARE' 661 (1970) (Belg.); Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 LAW Q. REV. 576 (1996).

5 Jinyan Li, *Tax Transplants and Local Culture: A Comparative Study of the Chinese and Canadian GAAR*, 11 THEORETICAL INQUIRIES L. 655 (2010).

6 For a review of the different approaches, see JAMES W. HARRIS, LEGAL PHILOSOPHIES (2d ed. 1997).

7 AVRUM STROLL, TWENTIETH-CENTURY ANALYTICAL PHILOSOPHY (2000); ALF ROSS, ON LAW AND JUSTICE (1958); LUDWIG WITTGENSTEIN, TRACTATUS LOGICUS-PHILOSOPHICUS ch. 4 (1922).

theory of law is simply a method, essentially the method of analysis of law, a type of prescriptive language, and it implies the distinction between three different *levels of language*[8] : (i) *level 1*: the language of the rule-maker, i.e., the legal rules, such as statutes, cases, and administrative decisions; (ii) *level 2*: the meta-language of those who comment on, and discuss, level 1-language; and (iii) *level 3*: the meta-meta-language of those who comment on, and discuss, level 2-language. While level 1-language is directly normative, level 2- and level 3-languages are mostly descriptive (i.e., they describe the law), but in various cases they are indirectly normative, as they solve hard cases and propose normative solutions.[9]

Level 2-language encompasses all those writings and propositions which amount to a discussion of what the law is or ought to be, and therefore includes typically scholarly writings, but also the arguments used by judges, lawyers, bureaucrats and scholars to provide a justification of their propositions;[10] all these propositions form a kind of discourse on legal concepts, which is defined here as "*tax legal doctrine*" (synonyms for the term doctrine are "jurisprudence" or "*dogmatik*"). Tax law therefore does not coincide with tax rules, such as statutes, cases and administrative decisions (level 1-language), but is tax law-in action, the outcome of the activity of actors involved in the process (tax agencies, tax courts, lawyers, scholars, and so on) using the concepts developed by tax legal doctrine, which thus operates as the connective tissue of the legal discourse as a whole (level 2-language).

Tax legal doctrine is a discourse on municipal law which takes place within the legal community of judges, bureaucrats, lawyers and scholars and thus in most cases is expressed in specific national languages using local tax concepts. Tax legal doctrine therefore tends to be "local-bound," as it is generally limited to issues concerning specific tax systems, so that different municipal traditions and legacies are developed autonomously by different legal networks and communities.[11] Tax doctrine as interpretive

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8 Kazimier Opalek, *Les norms, les enoncés sur ler norms, et les prepositions dèontiques*, 17 ARCHIVES DE PHILOSOPHIE DU DROIT 355 (1972) (Fr.).

9 On the prescriptive/descriptive nature of level 2-language, see, for example, Eugenio Bulygin, *Norms, Normative Propositions, and Legal Statements*, *in* CONTEMPORARY PHILOSOPHY — A NEW SURVEY: PHILOSOPHY OF ACTION 127 (Guttorm Floistad ed., 1982).

10 On the theory of legal argumentation, see ROBERT ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION (1978).

11 Legal features of tax systems are described in treaties, summaries, and handbooks used in education by scholars and practitioners, in line with the tradition of legal compendia in comparative law. Alan Watson, *The Importance of Nutshells*, 42 AM.

practice (level 2-language), can and does develop also across systems because of the operation of local factors, while tax theory (level 3-language) tends to be less constrained by such local factors and operates at a general level.

The discourse conducted by tax legal doctrine is used to handle legal materials (statutes, case law, administrative guidelines) and serves several functions within municipal tax systems. First, it serves an *explanatory function*, making it possible to understand the tax system as a whole and to deal with its complexity, i.e., the chaotic accumulation of statutory materials, case law and administrative guidelines.[12] Second, tax legal doctrine serves a *heuristic function*, as it provides interpretive frameworks guided by legal concepts, which allow a comprehension of conflicting rules and the development of decisional models to fill the gaps in the system. This makes it possible to reach a level of "tolerable uncertainty" of tax law[13]: tax concepts — such as "due process," "substance over form," and the like in English, for example — are widely used at the domestic level to describe and interpret legislation. Finally, tax legal doctrine serves a *prescriptive function*, as it sets out the criteria to decide the so-called "hard cases,"[14] to formulate policies and guidelines, and to provide support to decisions.

While all the propositions of municipal tax legal doctrines are included within level 2-language, within level 3-language are included all those propositions which amount to a discussion of what the tax legal doctrine is or ought to be, without specific reference to a given tax system; all these propositions form a kind of legal discourse, which is defined here as the "*theory of tax law*." Both level 2-language (tax legal doctrine) and level

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J. COMP. L. 1 (1994). For examples of such compendia, see BORIS BITTKER & JAMES EUSTICE, FEDERAL INCOME TAXATION OF CORPORATION AND SHAREHOLDERS (1987); GRAEME STUART COOPER ET AL., INCOME TAXATION, COMMENTARY AND MATERIALS (2002); PIERRE COPPENS & ANDRÉ BAILLEUX, DROIT FISCAL (1992); MAURICE COZIAN, PRÈCIS DE FISCALITÈ DES ENTREPRISES (2003); WERNER DORALT & HANS RUPPE, GRUNDRISS DES ÖSTERREICHISCHEN STEUERRECHTS (2003); DINO JARACH, FINANZAS PUBLICAS Y DERECHO TRIBUTARIO (1999); DOUGLAS KAHN & JEFFREY KAHN, FEDERAL INCOME TAXATION (2005); JOHN KAY & MERVYN KING, THE BRITISH TAX SYSTEM (1990); VERN KRISHNA, THE FUNDAMENTALS OF CANADIAN INCOME TAX (1995); FERNANDO PEREZ ROYO, DERECHO FINANCIERO Y TRIBUTARIO (1990); JEAN-MARC RIVIER, DROIT FISCALE SUISSE: L'IMPOSITION DE REVENUE ET DE LA FORTUNE (1998); MARÍA TERESA SOLER ROCH, TAX LAW IN SPAIN (2001); JOHN TILEY, REVENUE LAW (2002); KLAUS TIPKE, DIE STEUERRECHTSORDNUNG (2003).

12 NIKLAS LUHMAN, RECHTSSYSTEM UND RECHTSDOGMATIK (1974).

13 NIKLAS LUHMAN, RECHTSSOZIOLOGIE 27-116 (4th ed. 2008); CARLOS ALCHOURRON & EUGENIO BULYGIN, NORMATIVE SYSTEMS ch. 5 (1971).

14 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

3-language (theory of tax law) are meta-languages, but while the former is local-bound, the latter is "globally oriented" as it is not limited to tax issues concerning specific tax systems: tax policy ideas have been developed mainly by networks of tax scholars and government elites, and circulate at the global level in various political and intellectual circles.

The interplay of these three levels of legal discourse is of vital importance in understanding tax systems at the comparative level: despite the apparent chaos of existing national legislations (level 1-language), local legal scholars develop viable concepts of tax law in national contexts (level 2-language), while scholars discuss such concepts irrespectively of national contexts and make it possible to pursue a comparative endeavour (level 3-language). The theory of law and comparative approaches use level-3 language and, in combination, lead to a critical discussion of local tax concepts. There is no additional level of language above level 3. Of course there can be as many meta-languages within levels; for example within level 2-language a certain discourse may relate to another discourse, or within level 3-language a certain theory may relate to another theory, but here the essential difference between level 2 and level 3 language is that while the former is locally bound, the latter is not. Therefore a general discourse on tax systems at the comparative level is coextensive with a comprehensive theory of tax law such as that proposed here, with the result that comparative taxation aims at providing a general explicative framework for comparing local solutions.

Comparative taxation thus plays an important role of challenging undisputed assumptions of local tax doctrines and operates as a critique of tax laws in general. The discourse of comparative taxation among tax scholars should use level 3-language to be effective and achieve an acceptable degree of communication. Take, for example, the case of the GAAR in Canada and China, two countries with different legal cultures: Jinyan Li describes the differences between the "tax cultures" of the two countries, lists the necessary conditions for the Western-style tax avoidance found in Canada,[15] and shows that Chinese tax culture does not provide such conditions, basically because the Chinese style of tax law drafting makes it difficult for taxpayers

15 Among these conditions are that the charging provisions of tax statutes are drafted in clear language that provides a reasonable level of certainty and predictability for taxpayers; that the taxpayer and the tax administration are equal before the court and the court has the power of interpretation; that taxpayers have no duty to pay tax in the absence of clear obligations set forth in legislation; that taxpayers can use different forms of legal arrangements to achieve the same economic results; that there is a reasonable level of transparency in tax compliance and administration; and that taxpayers' right to tax minimization is recognized in law.

to engage in the kind of tax planning common in Canada: first, the text of the law does not often clearly define the boundaries between what is taxed and what is not, and second, the government may introduce new rules at any time under the broadly-worded rules in the statute. Does this mean that tax avoidance in China cannot be compared to tax avoidance in Canada? Not at all, provided that the comparative exercise be conducted at level 3-language taking in account the cultural differences revealed by level 2-language both in China and Canada.

The case of the GAAR in China analyzed by Jinyan Li is a clear example of the use of analytical legal theory in comparative taxation, which reveals the so called "mute tax law"[16] using level 3-language. At face value, both Canada and China have adopted a GAAR and this should be enough for those who believe that comparative law amounts to comparing statutes. The point is that, at the domestic level, tax commentators quite often use shorthand expressions in their natural languages which summarize underlying principles concerning tax avoidance, such as those listed by Jinyan Li concerning Canada when she refers to the Canadian terms of art, such as the legislative definition of "avoidance transaction" and its judicial interpretations.[17] This singling out of local terms of art occurs in various tax systems, consider for example the concept of "*abus de droit*" in France or "*Missbrauch von rechtligen gestaltungmoglichkeiten*" in Germany. These principles often do not appear in the statutory language, but must be uncovered by legal doctrine using level 3-language. They operate as implicit regulative concepts generating "tax cryptotypes" which have a kind of anthropological dimension and constitute the "tax mentality" of a given country, heavily impacting the development of practical tax solutions.[18] In Canada the GAAR serves the purpose of drawing a line between legitimate tax minimization and abusive tax avoidance, while in China it is an instrument to be used at the discretion of the State Administration of Taxation. Thus, in terms of "tax culture," what

16 On implicit law, see Gerald J. Postema, *Implicit Law*, 13 LAW & PHIL. 361 (1994); Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455 (1995); Mitchel de S.-O.-l'E Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995); Mitchel de S.-O-l'E Lasser, *Comparative Law and Comparative Literature: A Project in Progress*, 1997 UTAH L. REV. 471.

17 *See supra* note 15.

18 Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495 (1998); Michael P. Waxman, *Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy*, 51 J. LEGAL EDUC. 305 (2001); Mathias Reimann, *Droit positif et culture juridique. L'americanisation du droit europeen par reception*, 45 ARCHIVES DE PHILOSOPHIE DU DROIT 61 (2001) (Fr.).

may be true in Canada concerning tax avoidance is not true in China, even if the statutory language of the respective GAARs is similar.

Another good example of the critical power of analytical legal theory in comparative taxation can be found in the common core approach,[19] a comparative method which is based on directly confronting the answers given by local jurists to a set of common questions based on common problems, carefully avoiding explicit linguistic reference to local tax concepts. This approach implies a decodification of local concepts to build a common functional language and boils down to a thorough comparative tax policy analysis. For example, using level 3-language, it is possible to plainly discuss the GAARs of Canada and China, under the condition of replying to questions using a common language, even if the legal and cultural implications of the GAAR in the two countries are significantly different. This common core analysis specifically leads to the conclusion that the effectiveness of transplanted tax rules largely depends on their fit with the local tax culture and that similar rules may produce significantly different effects in different cultural contexts: the Canadian GAAR reduces the scope of tax planning, whereas the Chinese GAAR clarifies the scope of tax planning by explicitly acknowledging that tax avoidance is permissible as long as it does not violate the GAAR, which is specifically aimed at cross-border planning carried out by multinationals.[20]

II. Types of Tax Rules and Hierarchies Within Tax Systems

Having clarified what kind of discourse should be pursued by comparative taxation using the tools of the analytical theory of law, we can move on to discuss the second fundamental function of such an approach within the ambit of comparative taxation: to reveal both the *structure* and the *evolution* of tax systems, or in short, their *evolutionary structure*. In this respect, I draw here on that area of legal theory which deals with the description of

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19 The common core approach has been developed in private comparative law, but it can be extended to other areas of comparative law. Rudolf B. Schlesinger, Formation of Contract: A Study of the Common Core of Legal System (1968); Rudolf B. Schlesinger, *The Common Core of Legal System, an Emerging Subject of Comparative Study*, *in* Twentieth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema 65 (Kurt H. Nadelmann, Arthur von Meheren & John Hazard eds., 1961); Rudolf B. Schlesinger, *The Past and the Future of Comparative Law*, 43 Am. J. Comp. L. 477 (1995).

20 Li, *supra* note 5.

normative systems, and my basic proposition is twofold: (i) that at a given moment in time a tax system has a *structure* identifiable through a model of tax systems in terms of hierarchies of rules, and that (ii) the *evolution* of tax systems is constrained by their structure. The model of the evolutionary structure of tax systems adopted in this Article is based on hierarchies of tax rules and operates generally for every kind of legal system, arguably including those that do not belong to the Western legal tradition. The model adopted here, within the ambit of the Western legal tradition, also explains the operation of different areas of law, such as tax law, which has evolved from administrative law as the implementation and enforcement of tax statutes and has become one of the main tasks of modern states. In this respect the model developed here in respect to tax law can be extended to other areas of law, particularly those involving ongoing interaction between individuals and administrative authorities, such as business licensing, or planning and construction regulation.

I refer to the classic tradition of legal positivism developed by Kelsen and Hart: I consider Kelsen in respect to the concepts of production of norms and chain of validity, and Hart in respect to the distinction between primary and secondary rules.

The definition of a common model of tax systems is the prerequisite for conducting comparative tax research, but it should also be clarified from the outset that any such model is a conceptual construct that serves as an explicative framework and does not amount to a direct and detailed description of social reality.[21] There is a gap between the model and reality, because of three main cognitive limiting factors: first, the changes to domestic tax legislation are massive and cannot be described and compared in detail (the legislative change factor); second, domestic tax systems involve complex regulatory arrangements which are very different from each other (the complexity of tax systems factor); and finally, tax concepts used at the domestic level cannot be compared directly at their face value for linguistic and cultural reasons (the heterogeneity of local tax concepts factor). These three limiting factors pose an apparent paradox of incomparability, which can however be solved by looking at the deep common evolutionary structure of tax systems. In that respect, the legal theory of taxation plays the important role of revealing how tax systems are structured and evolve.[22]

A widely accepted model of tax systems is that which is based on the distinction between *primary rules* and *secondary rules*. *Primary tax*

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21 JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 31-58 (1995).

22 Garbarino, *Evolutionary Approach*, *supra* note 3.

rules are prescriptive statements, which are directly aimed at taxpayers and establish normative qualifications, such as obligations or duties and so on.[23] These rules are mainly restrictive, specifying the requirements for taxation (which are generally found in tax statutes and regulations), but may also be derogatory, allowing for exceptions or relief. By contrast, *secondary tax rules* confer *normative powers* (the power to create binding rules) upon specific institutions and lead to the creation or variation of duties, obligations and other prescriptive qualifications.[24] Among the different types of secondary rules presented in legal theory, I am referring here to the broad definition proposed by Hart; in particular, I use the term "secondary rules" to denote rules on the production of other rules (so called "legal production rules"). One type of these secondary tax rules are the constitutional rules attributing legislative tax powers. Another type of these secondary tax rules are those attributing to tax authorities or to tax courts the power to enact regulations or specific binding decisions. The possibility of enacting primary rules exists because there are secondary rules that attribute the normative powers to specific institutions.

Primary and secondary tax rules can be either general or singular. *General tax rules* are directed to many undefined recipients, are created *ex ante* by institutions with the proper powers (lawmakers or governmental agencies), take the form of statutes or regulations, and are related to transactions which occur after their enactment. *Singular tax rules* are directed to defined recipients, are created *ex post* by institutions with the proper powers (tax authorities and tax courts), are applicable to transactions which occur before their enactment, and take the form of judicial and administrative decisions (including tax settlements). Self-compliance by taxpayers also generates singular primary rules.

By combining the distinction "singular/general tax rules" and the distinction "primary/secondary tax rules," in a single matrix, it is possible to distinguish between *primary* (singular or general) *tax rules* and *secondary* (singular or general) *tax rules*. Primary (singular or general) tax rules directly concern the taxpayers' behavior, while secondary (singular or general) tax rules concern other primary (general or singular) tax rules. Therefore it is possible to establish a fourfold classification of tax rules, as shown in Table 1 below: singular primary rules (SPR), general primary rules (GPR),

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23 *See* HERBERT L.A. HART, THE CONCEPT OF LAW 78 (1961). As to the prescriptive content of rules, see Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710-58 (1917).

24 HART, *supra* note 23, at 79.

singular secondary rules (SSR), and general secondary rules (GSR). A tax system in the synchronic plane (i.e., at a single moment in time) can be viewed as the set of these four types of tax rules. Please note that tax rules do not exist in themselves, but are the result of the activities of those who apply and interpret the law.

Table 1: Types of Tax Rules

Tax Rules	Singular	General
Primary	singular primary rule (SPR)	general primary rule (GPR)
Secondary	singular secondary rule (SSR)	general secondary rule (GSR)

It is precisely because of the operation of secondary rules that a tax system can be modeled on the synchronic plane as a set of primary/secondary rules organized in a hierarchical structure.[25] A hierarchy is a relation of two elements in which one element (at a lower hierarchical level) depends on the other element (at a higher hierarchical level). Hierarchies also operate in tax systems; among the different types of legal hierarchies, here we will focus on and discuss formal hierarchies.[26]

A "*formal hierarchy*" is one which obtains between a rule on production (R1) and a produced rule (R2), when a rule of production (RP) establishes how R2 is produced. R1 is therefore superior to R2. A formal hierarchy is a relation between a higher secondary rule R1 and a lower rule R2, as the lower rule is enacted on the basis of the powers attributed to an institution

25 The idea that law has a hierarchical structure is typically advanced by legal positivism: HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945) [hereinafter KELSEN, GENERAL THEORY]; HANS KELSEN, THÉORIE PURE DU DROIT (1962); JOSEPH RAZ, PRACTICAL REASON AND NORMS (2d ed. 1990); JOSEPH RAZ, THE AUTHORITY OF LAW (1979); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

26 In addition to formal hierarchies, there are other types of hierarchies, such as substantial hierarchies under which tax statutes must conform to constitutional rules, tax regulations must conform to tax statutes, and decisions issued by tax authorities must conform to tax statutes and regulations. There are also logical hierarchies created by certain norms referring to other norms in various ways (such as norms abrogating other norms, legislative definitions, etc.), and axiological hierarchies established between two or more norms by the interpreter through value-judgments (such as hierarchies of legal principles).

by the higher secondary rule; for example, constitutional rules have a higher hierarchical position than statutory rules because they attribute and regulate legislative powers. A formal hierarchy is established when, for example, a statute R2 must be enacted by the legislative body in accordance with a higher constitutional rule R1. Thus, in a formal hierarchy one can say that the statute R2 is "generated" or "produced" by the constitutional rule R1, even if it is actually enacted by the legislative body.

We are specifically interested here in a behavioral and reductionist notion of "tax rules" as singular primary rules. According to this notion, a tax rule is not just an (explicit or implicit) prescriptive statement produced through the operation of secondary rules which can be merely known by the recipient, but an (explicit or implicit) prescriptive statement which is consciously perceived by the recipient who thereafter may or may not act in compliance with it. From this perspective, although general primary rules do have a general prescriptive nature in relation to potential individual situations, it bears emphasis that they do not specifically and directly regulate individual situations until they are "individualized" or "actualized" by singular primary rules. For example, the GAAR in Canada as well as in China is a general primary rule enacted according to an (explicit or implicit) general secondary rule and eventually leading to singular primary rules, either enforced by courts or administrative agencies, or resulting from individual self-compliance by taxpayers.

III. CHAINS OF PRODUCTION OF TAX RULES AND THE RULES OF THE CASE

On the basis of the analysis in Part II above of different types of tax rules and of hierarchies within tax systems, in this Part I advance the idea that tax systems can be viewed as the outcome of different types of chains of production which ultimately create singular primary rules, each of them regulating an individual situation. This perspective allows us to view tax systems as complex structures generating a countable number of "individualized" or "actualized" singular primary rules, which exert their prescriptive effects in respect to individual situations.[27] For example, in the comparative study on the GAAR in Canada and China, used here as a case

27 Each "individualized" or "actualized" singular primary rule regulates a specific individual situation, so that there is a unique combination between each singular primary rule and the individual fact pattern regulated by that rule.

study, one should look at the GAARs of the two countries (general primary rules found in tax statutes and regulations) in the actual process through which they are "individualized" or "actualized" by singular primary rules created by tax authorities, tax courts and self-compliant taxpayers in the two countries under analysis.

When there are formal hierarchies, rules are created and exist in the tax system because there are secondary rules that produce them. It is therefore possible to define here a key-concept of "chain of production" of rules as follows: whenever a produced rule R2 is created according to a rule on production, there is a "chain of production" of rules. The process of creation of tax rules occurs through "*chains of production*" and the operation of formal hierarchies shows that different tax systems share a common structure based on chains of production, regardless of the prescriptive content of the rules and irrespectively of the subtleties of different legal cultures and traditions.[28]

There are four types of these basic chains of production linking secondary rules to primary rules:

1. Higher general secondary rule (GSR) producing a lower general primary rule (GPR);
2. Higher general secondary rule (GSR) producing a lower singular primary rule (SPR);
3. Higher singular secondary rule (SSR) producing a lower general primary rule (GPR);
4. Higher singular secondary rule (SSR) producing a lower singular primary rule (SPR).

The *four types of chains of production* linking secondary rules to primary rules in formal hierarchies are shown in Table 2 below.

28 There can also be substantial hierarchies among the rules produced in the system and these hierarchies are related to the validity of these rules, but we do not discuss these aspects here, as we are focusing on how the rules of tax systems are created and exist.

Table 2: Types of Chains of Production of Tax Rules[29]

Chains of Production	GSR	SSR
GPR	*Type 1* higher general secondary rule producing a lower general primary rule	*Type 3* higher singular secondary rule producing a lower general primary rule
SPR	*Type 2* higher general secondary rule producing a lower singular primary rule	*Type 4* higher singular secondary rule producing a lower singular primary rule

An example of chains of production falling under *Type 1* (a higher general secondary rule producing a lower general primary rule) is the enactment of tax statutes pursuant to constitutional rules. Another example is the enactment of tax regulations based on normative powers attributed to governmental agencies. Instances of the latter chains of production leading to tax regulations abound in all tax systems.

There are three main examples of chains of production falling under *Type 2* (a higher general secondary rule producing a lower singular primary rule): the exercise of binding administrative powers by tax authorities, exercise of binding judicial powers by tax courts, and exercise of normative powers by the taxpayers in cases of self-compliance. The first two examples can be discussed together, as they both amount to the exercise of administrative or judicial normative powers by institutions.

The *exercise of binding administrative powers* occurs when a general secondary rule attributes to tax authorities the power to issue binding decisions for the recipient taxpayers (singular primary rules) to implement a tax statute or regulation (a general primary rule). The *exercise of binding judicial powers* occurs when a general secondary rule attributes to tax courts the power to issue binding decisions (singular primary rules) to apply tax statutes (general primary rules), typically as a result of tax audits. Depending on the authority which enacts the rules or the legal process

29 Please note that down the chain there can be one or more hierarchical connections between higher (singular or general) secondary rules and lower (singular or general) secondary rules; in these cases lower secondary rules ultimately lead to the creation of (singular or general) primary rules.

adopted, judicial and administrative decisions may belong to two basic types: (i) unilateral (administrative or judicial) singular rules, which are issued by an administrative agency or a tax court; and (ii) bilateral (administrative or judicial) singular rules, which are the result of a settlement or agreement by the tax authorities and taxpayer within an administrative or judicial process.

In cases where the exercise of binding administrative or judicial powers occurs, there is an "individualized" or "actualized" application of a tax statute or regulation (a general primary rule) and the rule on production (the rule which attributes the powers to issue decisions) is implicit in the general primary rule which is implemented by the tax authorities or tax courts with a decision. A formal hierarchy obtains between the implicit rule on production and the produced rule (the current decision), so that the power-attributing rule is superior to the current decision. The lower singular primary rules embodied in current decisions are enacted on the basis of the powers attributed to the proper institutions by the higher power-attributing rule. In this formal hierarchy, one can say that current decisions are "produced" by the power-attributing rule even if they are actually enacted by tax authorities and tax courts, and that they "individualize" or "actualize" the general primary rules (tax statutes and regulations).

A third example of chains of production falling under *Type 2* is *the exercise of normative powers by taxpayers in cases of self-compliance*. In those cases where a general primary tax rule is consciously complied with by individual taxpayers, such a general primary rule generates a singular primary rule through the exercise by taxpayers of the normative powers to assess and pay their own taxes by reporting them in their tax returns, powers attributed to them by a secondary rule. In cases of exercise *of normative powers by the taxpayers*, there is also an "individualized" or "actualized" application of a tax statute or regulation (a general primary rule) and the rule on production (the rule which attributes to taxpayers the power to report taxes with binding effects) is implicit in the general primary rule which is implemented by individual taxpayers. These singular primary rules are called here "*self-compliance singular rules*," and they are binding even if there is no exercise of normative powers by tax authorities or tax courts. The point is that general primary rules are "individualized" or "actualized," becoming singular primary rules through conscious acts of compliance.

If, for example, a taxpayer correctly reports her or his income and pays the taxes due and no assessment is made, then the tax statute (a general primary rule) becomes a singular primary rule for the individual, as such a rule is created *ex post* by the same taxpayer through the exercise of normative powers (the power to assess and pay her or his taxes by reporting them in the tax return) attributed to her or him by a secondary general rule. Please also

note that when an individual recipient acts in line with a general primary rule without *consciously* creating for herself or himself a self-compliance singular rule, there is *no* singular rule, but simply a *fact* (i.e., an individual situation or behavior) which is not the result of a legal rule; that is a situation which is unlikely to occur in tax systems where taxpayers' action is the result of positive rules.

The introduction of the requirement of "*conscious*" self-compliance rules requires a simple definition of a psychological model of rule-observance. Here one can distinguish between the power an agent has to impose rules on others ("*nomothesis*") and the power an agent has to impose rules on herself/himself ("*nomopoiesis*"). There is nomothesis if a person with proper normative powers (for example a tax authority with the power to enact binding singular rules) orders somebody else (a taxpayer) to do something even if the recipient is not aware of such a rule (with nomothesis of course legal systems create presumptions as to the actual knowledge of a rule by the recipients, so there can be cases in which there is a presumption that the recipient legally knows the rule even if this does not actually occur). By contrast there is nomopoiesis when a person with proper normative powers (for example a taxpayer with the power to file a binding tax return) imposes action on herself/himself through a conscious act. In nomothesis, a rule to exist does not require a conscious process of self-implementation by the recipient, while in nomopoiesis, a rule to exist necessarily requires such a conscious process by the recipient. Thus I argue here that both consciousness and individual action are required for a self-compliance rule to exist (a self-compliance rule is a specific nomopoietic instance of a singular rule). Thus of course there is no self-compliance rule if there is a demand of payment by tax authorities to an individual taxpayer, but no consciousness of such a demand on the part of the taxpayer. Please note however that such a demand is a singular rule even if there is no awareness or no compliance by the recipient, but such a singular rule is not a self-compliance rule. A corollary of this is that if there is a consciously *not* compliant taxpayer in respect to a general or singular rule (for example a tax evader who willingly does not report her/his income), there is no self-compliance rule whatsoever. In this situation one, in theory, could say that the taxpayer creates for herself/himself a "non-self-compliance rule," an act of negative nomopoiesis leading to tax evasion. If a taxpayer does not comply and the authorities do nothing clearly there is a general or singular rule but no self-compliance rule.

In the case of self-compliance rules, there is a formal hierarchy between a rule on production and a produced rule. This formal hierarchy is established by the higher secondary rule, according to which taxpayers can assess and

pay their taxes directly, the so called "self-assessment rule." The formal hierarchy obtains between a rule on production (the self-assessment system rule) and a produced rule (the individual tax report by the taxpayer), the self-assessment rule being superior to the individual tax report by the taxpayer. The individual tax report by the taxpayer (a singular primary rule) is enacted on the basis of the powers attributed to the taxpayer by the higher secondary rule of self-assessment. In this formal hierarchy, one can say that the binding tax reports are "produced" by the self-assessment rule even if they are actually enacted by individual taxpayers, and they "individualize" or "actualize" the general primary rules.[30]

An example of a chain of production falling under *Type 3* (a higher singular secondary rule producing a lower general primary rule) is a single and specific decision (singular secondary rule) issued by tax authorities, which attributes to another tax authority specific powers to issue regulations (general primary rules) according to certain procedures and/or standards; this is another type of delegation of powers; *Type 3* is a variation chain of *Type 1* as it leads to general primary rules.

Finally, an example of a chain of production falling under *Type 4* (a higher singular secondary rule producing a lower singular primary rule) is a decision (singular secondary rule) issued by tax authorities, which attributes to another tax authority powers to issue a single and specific decision (a singular primary rule) according to certain procedures and/or standards. This kind of chain of production occurs when there is a one-to-one delegation of powers within tax authorities and results in a final singular primary rule as in the *Type 2* chain of production, of which *Type 4* is a variation.

The actual instances of tax rules falling under the four types of chains of production can be summarized in Table 3 below.

30 Going up the branches of the chain of production, one can say that the binding report of taxes by the taxpayer (a singular primary rule) applying a statute (a general primary rule) is ultimately produced by the constitutional rule attributing to the legislature the normative power to enact tax statutes. KELSEN, GENERAL THEORY, *supra* note 25, at 96.

Table 3: Examples of Chains of Production of Tax Rules

Chains of Production	GSR	SSR
GPR	*Type 1* higher general secondary rule producing a lower general primary rule ▪ *Tax statutes* ▪ *Tax regulations*	*Type 3* higher singular secondary rule producing a lower general primary rule ▪ *Delegation of powers within tax authorities leading to tax regulations*
SPR (or *Rules of the Case*)	*Type 2* higher general secondary rule producing a lower singular primary rule ▪ *Decisions by tax authorities* ▪ *Decisions by tax courts* ▪ *Private self-compliance rules*	*Type 4* higher singular secondary rule producing a lower singular primary rule ▪ *Delegation of powers leading to decisions by tax authorities*

Thus, every tax system has a *countable number* of "individualized" or "actualized" singular primary rules, which (i) are generated by chains of production and (ii) exert their prescriptive effects in respect to individual situations. These we define as "*Rules of the Case*." In *Type 2* and *Type 4* chains of production (highlighted by the shaded area of Table 3), the exercise of normative powers attributed by secondary rules results in the Rules of the Case, i.e., singular primary rules regulating *ex post* individual situations. In *Type 1* and *Type 3* chains of production, by contrast, the exercise of normative powers attributed by secondary rules results in general primary rules regulating *ex ante* classes of potential individual situations. These four chains of production encompass the processes of creation of norms through norms in tax systems, and it is claimed here that (i) any rule within a tax system can be located in one of these four chains of production[31] and (ii) any

31 Each rule of the legal system is at the same time both an application and creation of the law, as each rule applies higher rules and creates new lower rules. Thus, legislation is an application of constitutional rules and creation of new legislative

chain of production ultimately leads to the creation of Rules of the Case, i.e., singular primary rules regulating individual situations (shaded area in Table 3).

We have emphasized above that we are interested in a reductionist notion of "tax rules," as general primary rules do not directly regulate individual situations until they are "individualized" or "actualized" by singular primary rules. As a result, we ultimately view a tax rule as a singular primary rule regulating an individual situation, and it is necessary to look backward in the chain of production to understand how such a rule has been generated within the tax system. For example, a tax statute (a general primary rule) enacted according to the rules of production of a written constitution (general secondary rules) falls under a *Type 1* chain of production and is necessarily geared to a *Type 2* (or *Type 4*) chain of production, as it can be ultimately applied to an individual situation only through a singular primary rule, i.e., a decision by tax authorities or tax courts or self-compliance by taxpayers (shaded area in Table 3). This approach is in line with the longstanding tradition of the concept of "obligation" found in Hart and Kelsen; according to the latter, for instance, the secondary rule attributing to the legislature the power to enact legislation is aimed directly at individuals, and when an individual consciously applies the statute a singular rule is created.[32]

In conclusion, the three instances of chains of production falling under *Type 2* and *Type 4* (decisions by tax authorities, decisions by tax courts, private self-compliance rules) show that tax systems continuously create new Rules of the Case, and that any individual situation may potentially be regulated. These kinds of chains of production leading to the creation of Rules of the Case (administrative and judicial decisions and private self-compliance rules) challenge the widespread idea that tax systems are comprised of statutes or regulations (general primary rules), showing instead that tax systems are actually made of singular primary rules, each regulating an individual taxpayer's position.

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rules (general rules), a decision by tax authorities is an application of statutory rules and creation of new administrative rules (singular rules), and a decision by tax courts is an application of statutory rules and creation of new judicial rules (singular rules). There are two exceptions to this chain of legal production: constitutive constitutional rules and execution of rules. Constitutive constitutional rules amount to the creation of the law, but not to its application, as they do not apply any pre-existing rule. Execution of rules amounts to an application of the law, but not to its creation, as they only apply preexisting rules without the creation of any new rule.

32 KELSEN, GENERAL THEORY, *supra* note 25, at 96.

IV. Practical Application of Chains of Production of Rules in Tax Transplants and Tax Design

Drawing on the conclusions of Jinyan Li's article, it is possible to present a diagrammatic example of a practical application of chains of production of rules in the comparative tax analysis of the GAAR in Canada and China, as follows:

Table 4: Comparative Analysis of the GAAR in Canada and China Using Chains of Production of Tax Rules

Chains of Production	GSR	SSR
GPR	*Type 1* higher general secondary rule producing a lower general primary rule ▪ *Tax statutes* ○ Canada ▪ Section 245 of the Income Tax Act ○ China ▪ Enterprise Income Tax Law, Article 47 ▪ *Tax regulations* ○ Canada ▪ None, only interpretive positions by Canada Revenue Agency ○ China ▪ Enterprise Income Tax Regulations, Articles 120-21 ▪ Implementation Regulations for Special Tax Adjustments, Article 92	*Type 3* higher singular secondary rule producing a lower general primary rule ▪ *Delegation of powers within tax authorities leading to tax regulations* ○ Canada ▪ none ○ China ▪ Broad scope of discretion to tax administration in individual cases

SPR (or *Rules of the Case*)	*Type 2* higher general secondary rule producing a lower singular primary rule ▪ *Decisions by tax authorities* ○ Canada ▪ Not relevant ○ China ▪ Relevant ▪ *Decisions by tax courts* ○ Canada ▪ Relevant ○ China ▪ Not relevant ▪ *Private self-compliance rules*[33] ○ Canada ▪ Relevant ○ China ▪ Relevant	*Type 4* higher singular secondary rule producing a lower singular primary rule ▪ *Delegation of powers leading to decisions by tax authorities* ○ Canada ▪ none ○ China ▪ Broad scope of discretion to tax administration in individual cases

In summary, while at the statutory level both countries have similar GAARs, the actual operation of the GAAR in Canada is shaped by the behavior of courts, whereas in China it is arguably defined by the position of tax authorities; in both cases the impact on the chain of production of tax rules should be assessed in terms of the Rules of the Case generated by the system. There is a structural similarity between the two tax systems viewed as dynamic sets of singular rules, but in cultural-legal terms while in Canada these rules are developed by the judiciary with a bottom-up approach which cannot be regulated top-down, in China these rules are created by the tax authorities as a sort of top-down administrative policy.

Another important issue is the use of chains of production of tax rules in assessing the effects of "*tax transplants*." A tax transplant occurs when a tax structure or arrangement originating in one country is imported into one or more other countries through the implementation of statutes, administrative guidelines or case law, or some combination of the above,[34] with the result

33 The analysis of private self-compliance rules requires an empirical assessment of the acts of compliance with the GAAR, and this is a particularly difficult empirical task for the quite simple reason that this kind of behavior cannot be traced through tax returns or specific questionnaires.

34 The research on legal transplants was initiated by Alan Watson. *See* Alan Watson,

that domestic tax reforms often are the result of tax transplants and domestic tax policy may have more to do with the circulation of tax models than with local processes. In the case of the GAAR in Canada and China, Jinyan Li correctly assumes that the GAAR has been imported by China from the Western tax legal tradition, but it is also important to understand the structural impact of such a transplant. In that respect the approach based on chains of productions comes in quite handy, as it connects domestic tax policy to comparative analysis. Domestic tax policy can in fact amount to the selection of a certain tax solution after the analysis of alternative tax models in other countries and in such a case tax policy can be properly denominated as "*tax design*." Viewed from a comparative perspective, then, tax design is a choice among alternative solutions coming from other countries or provided for by generally adopted tax models. In this context China clearly appears to have selected nominally a classical anti-avoidance approach borrowed from a the tradition of OECD countries based of case-by-case judicial distinctions, while the tax design option actually adopted heavily relies on a sort of regulatory approach based on administrative decisions. Jinyan Li's analysis of differing cultural contexts within this framework shows that a commonality in the purported approach (the use of an anti-avoidance doctrine) produces different results in different systems because of the underlying mould of the Chinese tax system.

Tax design should take into account the impact of basic transplant scenarios on the importing tax system, because the change of rules which occurs in a transplant impacts the tax system at all levels. Local legal dynamics are particularly relevant to so-called "*hybrid tax transplants*," in which a tax mechanism (such as a tax statute or a judicial doctrine) is imported from country C (exporting country) for example into country A and country B (importing countries), but is then modified substantially in those countries; in such cases the transplants lead to different outcomes in the importing countries. In hybrid tax transplants, the tax mechanisms in the importing countries A and B have a common origin, as they both come

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Aspects of Reception of Law, 44 AM. J. COMP. L. 335 (1996); Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469, 469-76 (1995); Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978); ALAN WATSON, SOCIETY AND LEGAL CHANGE (1977); Alan Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79 (1976); ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974). The legal transplant approach has also been used by Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pts. 1 & 2), 39 AM. J. COMP. L. 1 (1991), 39 AM. J. COMP. L. 343 (1991).

from the same country C, yet they do not have a common function, as the transplanted mechanism is modified in some relevant aspect.

Tax transplants can be introduced in the importing country through arrangements varying along a continuum, which goes from a "top-down pattern" to a "bottom-up pattern." In a "*top-down pattern*" of tax design, a tax transplant is introduced by either legislation or administrative guidelines (possibly in conjunction with case law and/or opinions of scholars). In a "*bottom-up pattern*" of tax design, a tax transplant is introduced in a spontaneous way through case law, without recourse to legislation or regulations.

In accordance with the various types of rules of tax systems described in Parts II and III above,[35] there are basically three types of tax transplants to be considered in tax design by the importing country: tax transplants implemented through legislation; tax transplants implemented through administrative guidelines; and tax transplants which occur through case law. The story of the transplant of the GAAR in China necessarily falls within one or more of these tax design patterns, and a summarized view of the structural impact of such a transplant is presented below in Table 5. In Table 5, each type of tax transplant is considered in respect to various factors: the chain of production adopted by China in implementing it (first column), the type of tax design pattern adopted by China (second column), and the likelihood that the original imported operative rule will be modified in the process, leading to a hybrid tax transplant (third column).

35 Singular primary rules, general primary rules, singular secondary rules, and general secondary rules. *See* Table 1 *supra* p. 775.

Table 5: Types of Tax Transplants and Impact on Tax Systems

	Chain of Production	Tax Design Pattern	Hybridization
Tax transplants implemented through legislation	▪ Tax statutes ▪ Tax regulations And ▪ Delegation of powers within tax authorities leading to tax regulations Leading to subsequent ▪ Decisions by tax authorities ▪ [Decisions by tax courts] ▪ Private self-compliance rules	Top-down	Possible
[Tax transplants implemented through administrative guidelines]	▪ [Decisions by tax authorities*] And ▪ [Delegation of powers within tax authorities leading to decisions by tax authorities*]	[Top-down (administrative discretionary powers)*]	[Possible*]
[Tax transplants which occur through case law]	▪ [Decisions by tax courts*]	[Bottom-up*]	[Very likely*]

* N.B. The transplant patterns which were *not* adopted in China have been highlighted in square brackets and underlined.

At a very descriptive general level, one can say that the pattern of tax design adopted by Chinese policymakers in transplanting the GAAR is that of a tax transplant implemented through legislation: the first column of the chart shows a chain of production driven by tax statutes, tax regulations, and delegation of powers within tax authorities, leading to subsequent individual Rules of the Case (decisions by tax authorities and private self-compliance rules), with courts playing only a limited role. The alternative patterns of tax design (tax transplants implemented through administrative guidelines or through case law) have not been adopted. The tax design pattern adopted in China for the transplant of the GAAR is thus a "top-down pattern" in which a tax problem is solved by tax statutes and regulation within the peculiar ambit of sources of law of the Chinese tax system.

But this is not the full picture of the transplant of the GAAR in China, as one should also look at the multiple sets of Rules of the Case being generated subsequently in chains of production from the transplanted GAAR (a general primary rule), primarily through subsequent decisions of tax authorities, or through self-compliance by taxpayers. The impact of the tax transplant therefore should be assessed in respect of these Rules of the Case generated within the tax system, which would require an empirical assessment of the behavior of Chinese authorities in respect to the GAAR. An additional issue here, even in a "top-down pattern" of tax design, is the likelihood of subsequent "hybridization" of the transplant by local processes which are not under the control of central Chinese policymakers.

Finally, it should be noted that in other cases the circulation of anti-avoidance policies has occurred "bottom-up" through the implantation of foreign administrative guidelines or foreign case law (in Table 5 these patterns have been underlined and bracketed to show the specificities of the Chinese case). These "bottom-up" transplants are carried out through judicial activism or through the development of policies by tax authorities and are more flexible than simple legislative transplants. In particular, tax transplants of anti-avoidance policies through case law are not directly controlled by policymakers (legislators or administrative agencies) and easily result in a process of creation of Rules of the Case which involve subsequent change of the imported model.[36]

A last kind of scenario is that in which tax scholars contribute to a process leading to a tax transplant. There are various instances of these transplants, for example there can be reception by scholars in a country of policy ideas circulating in academic circles of other countries, which occurs when tax

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36 *See, e.g.*, Garbarino, Tax Transplant, *supra* note 3.

reforms are influenced by networks of tax scholars and government elites. Generally speaking, tax scholars play an important role in legislative tax transplants when the scholarly debate influences policymakers. Scholars also play an important role in all kinds of hybrid tax transplants in which the debate on the purpose and ambit of imported legislation is subject to judicial review, because judges often rely on the opinions of tax scholars. As for transplants which occur through case law, it is difficult to model *ex ante* transplants driven by scholars. The reason for this is that the activity of scholars does not directly or apparently impact the creation or elimination of rules of the tax system, as it basically amounts to a process of cultural evolution. Nevertheless, empirical research could be conducted to assess the impact of tax ideas on actual transplants implemented through legislation, administrative guidelines, and case law, respectively.