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Doctoral Dissertation

TAX STATE AND FISCAL CONSTITUTION

Comparing《Discourse on Salt and Iron》and《The Crisis of the Tax State》

租稅國家與財政憲法

對照《鹽鐵論》與《租稅國危機》

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DEDICATE TO MY FAMILY

&

IN MEMORY OF FOREVER BELOVED GRANDMA

(1930 ~ 2008)

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ABSTRACT

A quick answer to the question of legitimacy of taxation on the public character of tax or its democratic endorsement may often ease the pain from taxpayers. However, if we proceed, to question the legitimacy of tax obligation or tax power in the context of *traditional Chinese ideologies*, we are bound to face the following question: whether such characters nourished in the *west* could its resemblance be found in China? If yes, what are the similarities and disparities? If no, whether these characters are worth to be transplanted?

Aiming at the fact that numerous westernized institutions with such *foreign* characters being implanted as the present situation in the Chinese society, how to mitigate possible contradictions between such western ideologies and *intrinsic* values rooted deeply in our own tradition is all the more pressing. Discouragingly, such issue in the field of tax jurisprudence seldom raises attention.

Taking the concept of "**limitations of taxation"** into account, two corresponding issues could be raised. First, whether such western-bred concept could find its resemblance in traditional China? Secondly, if yes, what are the disparities in between? To simply put,

the former deals with the question of "**Commonality**", the latter, the question of "**Intrinsity**". Such inquiry, in our opinion, has to some extent touched upon the issue of social values underlying norms.

In reply to the greetings from the westernized tax normality so as to tax morality, how do Chinese commence communication with its own ideas of taxation thus becomes the core issue. To be explicit, this paper attempts to clarify the foundations of tax normality in the traditional Chinese thoughts through reflections on the limitation theory of taxation harbored in the west.

Through socio-psychological factors indicated by the limitations of taxation in the west, we tend to sort out common features out of the background in the text of《Discourse on Salt and Iron》. In fact, the two strongly-opposed parties appeared in the "Salt and Iron Meeting" reveals two versions of tax morality, governing the development of two **contrasting** ideologies of taxation, thus resulting in the **confrontations** of two interests.

In terms of jurisprudence, the above-raised question—that is, the reply of traditional Chinese values (hereinafter "**Intrinsity**")—shall be seen as a question of "possibility of reception" (hereinafter "**Receptionability**") in the Constitutional level. To further, the

question of Receptionability intends to argue whether the question of people's tolerance to tax burden falls in the category of jurisprudence or not, namely, the question of the relativity of discipline. In reply to this question, we try to find possible answers through the process of how man reaches his understanding of knowledge.

We hold the belief that when intrinsic values encounter a foreign culture, be it confrontation or integration, only on a premise of communicability and mutual understandability could interactions between the both sides be of significance and of plausibility.

Modern State being a tax state, its revenue shall depend on tax revenue as a principle. At the same time, under a state ruled of law, taxation must be in the **form** of law, thus contributes to the protection of the people. Through constitution, imposition of proper "**limitations"** on state's taxation behaviors has been the very mechanism for the protection of taxpayer's rights. The functioning of the mechanism is centered on the "**rights"** of taxpayers. To further, once the rights, protected by the constitution, are being infringed by taxation, the constitution could **limits** such taxation (namely, to nullify such infringement to rights), and reach the goal of protecting taxpayer's *rights*.

However, two things could be questioned here. First, whether such limitations—in other words, the approach to simply nullify the source of infringement—could fulfill the purpose of the protection of the rights of the taxpayers is in doubt. Second, even more seriously is the situation that whether the protection of "rights" could actually be the protection of "taxpayers" is dubious. By paying attention of the on-going tax reforms over the years, discussions over tax equity continues to rage. Two things might worth mentioning according to such phenomenon. First, the issue of tax equity to the mass is all the more pressing. Secondly, the problem remains unsolved. Hence, maybe it should worth a try to first look at the constitutionality of the mechanism before we bury ourselves again into the floods of efficiency-oriented schemes in tax reformations. The main focus of this paper, therefore, is how to make revisions or adaptations to limitation in the constitution.

PREFACE

《The Crisis of the Tax State》and《Discourse on Salt and Iron》, two famous fiscal economic debates on state intervention into markets, both assume similar concern yet appear in different contexts. This paper focuses on the **limitation of taxation** reflected in both texts and projects different images according to their individual backgrounds. By a revisit on limitation of tax state, we come to a recognition that under spurious silhouettes also lies commonalities in actual appearances.

Additionally, this English-written paper intends to present to English readers the interaction between Chinese and western ideas, especially in the field of tax jurisprudence (*Steuerrechtswissenschaft*, 税法学), from an *insider*'s perspective, namely, someone brought up in *traditional Chinese ideologies*.

From such insider's point of view, Chinese people are isolated by English language from outer worlds, generalized as the Western world, compared to other civilizations. However, such isolation also implies that for the western world to understand Chinese world, western people are left with limited resources due to the overwhelming power of English language, despite the fact that whether the two *worlds* are willing to engage in interactions or not.

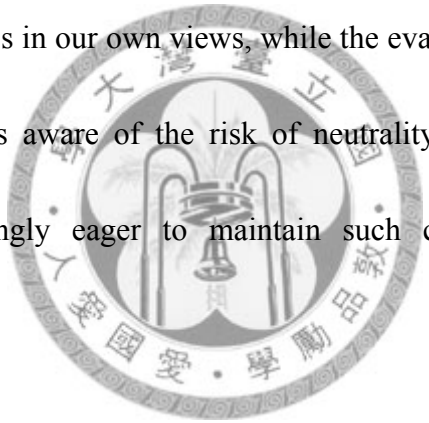
Taking the contemporary situation into account, the world at present is rapidly under integration. As *we insiders* explore the universe more, it is us people living on earth isolated from other possible *civilizations* that we might gradually come to awareness of. In this sense, the communication of civilizations between Western and Chinese becomes a less difficult meanwhile plausible task.

Back to modern earth where communication is possible through a human English language, the question of *willingness to communicate* should be brought up. To create a mutually beneficial cross-bordered transaction simply means that both sides of participants should all thereby stay in a mentality of satisfaction. But if such satisfaction of the one side is to be evaluated or judged by the other side based on their own image of satisfaction, misinterpretations are likely to happen. A resultant possibility would be the failure of the transaction.

Aside from the *language* matter, the case is the same with *ideologies*, no matter ideologies referring to *knowledge* or *thoughts* or *values* or *culture*, etc. An outsider's point of view, just like an observer whose values or ideologies nurtured from a separate origin or historical background, may likely to be disinterested in judgment but at the

same time become either inconsistent or irrelevant. In spite of that, the introduction of this insider's civilization to the outer world can none the less be overemphasized more, on earth.

This paper certainly refuses to assert the impossibility of cross-cultural understanding. Rather, quite a significant part of the content is devoted to the promotion of the communicability between different values. Thus, this paper only attempts to express to outer worlds our own values in our own views, while the evaluation is left to the readers. Nevertheless, the author is aware of the risk of neutrality (disinterestedness) of his perspective but painstakingly eager to maintain such character of Chinese-wise articulation.



As for the efforts made to tax jurisprudence, a strong urge for an elaborated consideration on taxpayer's behavior is to be proposed. That is an emphasis on the *intrinsic values* originated from tax payers' societal upbringings yet expressed in their choices of value, affecting their imagination of freedom which they act in accordance with in the daily life present.

OUTLINE

Key words: limitation of taxation, legitimacy of taxation, tax morality, tax normality, intrinsic values (*Intrinsity*), Reservation of law (*Vorbehalt des Gesetzes*), Rule of law in taxation (*Gesetzmäßigkeit der Besteuerung*), obligation to pay tax, rule and principle, language relativity

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INTRODUCTION *INTRINSITY AND COMMONALITY*

All we are concerned with is…… the fact that for the tax load……as a whole there exists a level beyond which further tax increases mean not an increase but a decrease of yield.

Schumpeter, Die Krise des Steuerstaats[*]

- Main Issue: Revision and Adaptation of Limitation of Taxation

As Schumpeter indicates, there exists a level (*eine Höhe*) of tax revenue which draws clear the limitations of the function of taxes. Ignorance of this limitation amounts to being irrespective of the economic capacity of the tax state.[2]

Such limitation of tax state, however, does not in its appearance seem to bear relations with State's power to tax. That is to say, if, by inference, the legitimacy of taxation does not take into account the endurableness of tax burden, of which taxpayers bound to

[*] Quoted from Joseph A. Schumpeter(1883-1950) in the original German text appears „Uns genügt.....es für die Belastung.....im ganzen genommen jeweilig eine Höhe gibt, über die hinaus eine weitere Steuerhöhung keinen Zuwachs, sondern eine Minderung des Ergebnisses bringt.", Zeitfragen aus dem Gebiete der Soziologie, Graz und Leipzig, 1918, S.346. English translation by W. F. Stopler and R. A. Musgrave, in : The Foundations of Public Finance, P. M. Jackson (ed.), Vol. II, Edward Elgard Publishing Ltd., pp.330-363.[hereinafter Schumpeter(1918/1996)] Additionally, the first translation appears to be in Japanese by Kimura(1951) and Kimura & Kotani (1983).

[2] Schumpeter(1918/1996), p.345

disagree to, such **legitimacy of tax power** simply can justify the **legitimacy of taxpayer's tax obligation**.

Furthermore, whether Schumpeter's **limitation of tax state** is applicable nowadays requires discussion. Not only does the theory have to overcome the challenge of out-datedness, but also the appropriateness of the theory in other environment, namely, its applicability, needs to be examined.

This paper recognizes the applicability of limitations of taxation but takes an active attitude towards a revision or an adaptation of such limitation of tax state upon its application according to individual context. The focus of the paper is within the context of Chinese civilization with special concern with 《Discourse on Salt and Iron》, which is of crucial relevance in terms of the development of state's power to tax in the history of traditional China.

1. The power to tax and obligation to pay tax

The question of "Why should people pay tax?" or "Why should people be taxed?" could be a question in daily life. In legal terms, the question could be rephrased as "What is

the legitimacy of tax obligation?" or "What is the legitimacy of tax power?" A quick reply of the public character of tax or its democratic endorsement may be able to ease the pain from taxpayers to a certain degree. However, if we proceed, to question the legitimacy of tax obligation or tax power in the context of *traditional Chinese ideologies*, we are bound to face the following question: whether such characters nourished in the *west* could its resemblance be found in China? If yes, what are the similarities and disparities? If no, whether these characters are worth to be transplanted?

2. Status-quo: Reception of limitations of taxation

More seriously, aiming at the fact that numerous westernized institutions with such *foreign* characters being implanted as the present situation in the Chinese society, how to mitigate possible contradictions between such western ideologies and *intrinsic* values rooted deeply in our own tradition is all the more pressing. Discouragingly, such issue in the field of tax jurisprudence seldom raises attention. Taking the concept of "**limitations of taxation"** as an example, two corresponding issues could be raised. First, whether such western-bred concept could its resemblance be found in traditional China? Second, if yes, what are the disparities in between? To simply put, the former deals with the question of "**Commonality**", the latter, the question of "**Intrinsity**". Such inquiry, in

our opinion, has to some extent touched upon the issue of social values underlying norms.

3. **Tax Normality** and **Tax Morality**

In reply to the greetings from the western concepts of taxes and the legal institutions concerned (hereinafter "**Tax Normality**") so as to western ideas of values and justification underlying taxation (hereinafter "**Tax Morality**"), how do Chinese people commence communication with his/her own ideas of taxation thus becomes the core issue. To be explicit, **this paper attempts to clarify the foundations of tax normality in the "traditional Chinese values" through reflections on the limitation theory of taxation harbored in the west.**

In other words, it is of our opinion that tax normality should always be derived from tax morality and that tax morality takes shape and is nourished in individual social values respective society it underlies.

4. **Intrinsity** and **Commonality**

In terms of jurisprudence, the above-raised question—the reply of traditional Chinese values—could be taken as one of "possibility of reception" (hereinafter "**Receptionability**") in the Constitutional level. Further, the question of Receptionability tends to argue whether the question of people's tolerance to tax burden falls in the category of jurisprudence or not, namely, the question of the relativity of discipline. In reply to this question, we try to find possible answers through the process of how man reaches his understanding of knowledge.

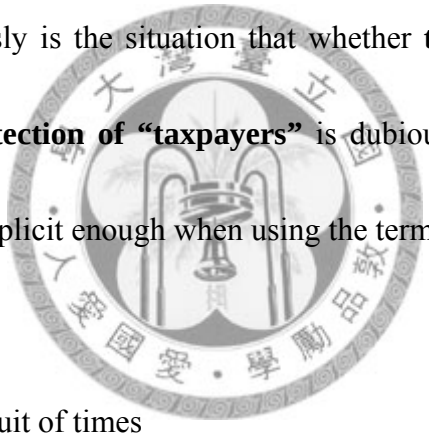
5. Protection of taxpayers' rights by means of limitation of taxation

Modern State being a **Tax State** (*Steuerstaat*), indicates that its revenue shall depend on tax revenue as a principle. However, under a state ruled of law (*Rechtsstaat*), taxation must be exercised in the **form** of law so as to contribute to the protection of people. Through constitution, imposition of proper "**limitations"** on state's actions of taxation has been the very mechanism for the protection of taxpayer's rights. The functioning of the mechanism is centered on the "**rights"** of taxpayers. To further, once the rights, protected by the constitution, are being infringed by taxation, the constitution could **limit** such actions of taxation (namely, to nullify such infringement to rights), and reach the goal of protecting taxpayer's *rights*.

However, two possible corollary questions are to be reconsidered here:

First, whether such limitations—in other words, the approach to simply nullify the **source** of infringement—could fulfill the *purpose of the protection* of the rights of the taxpayers is in doubt.

Second, even more seriously is the situation that whether **the protection of "rights"** could actually be **the protection of "taxpayers"** is dubious. That is, the "object" in need of protection is not explicit enough when using the term "rights".[1]



6. A pragmatic pursuit of times

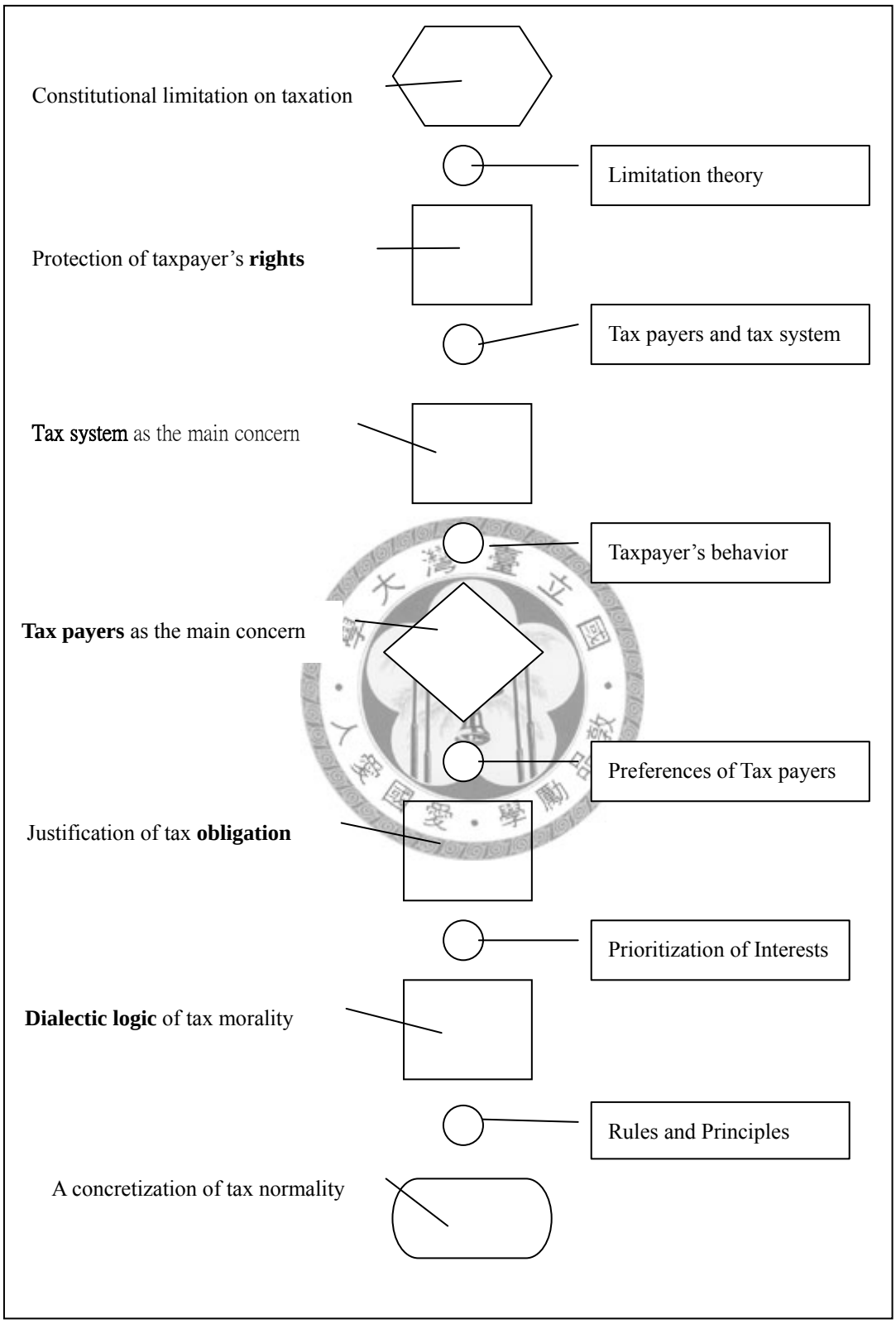
Turning to the seemingly never-ending tax reforms over the years, discussions over **tax equity** continue to rage. Not only does this phenomenon imply the issue of tax equity to the mass is all the more pressing, but as well the problem still remains unsolved with **tax efficiency** as the ultimate resolution.

[1] There had been restless efforts made in the German literature by either offering more comprehensive explanations of the concepts of "rights" or more interpretative concepts in replace, such as attaching the concept of "social obligation"(*sozialbindung*) to property rights, or the concept of institutional guarantee (*institutionelle guarantie*).

Hence, another plausible approach might be to try to first look at the constitutionality of the mechanism before we bury ourselves again into the floods of efficiency-oriented schemes in tax reformations. The main focus of this paper is how to make revisions or adaptations to limitation of taxation in the constitution.

An attempted illustration is provided below to show a flow chart of shifting in argumentations in a string of major key words.

Illustration 1 String of thoughts



PART I *COMMONALITIES IN CHINESE AND WESTERN TAX NORMS*

Natura non facit saltum. [*]

I. Possibility of Chinese-Western Tax Morality Comparison

In spite of several large-scale interactions throughout history, variations between Chinese societies and Western nations have resulted in dissimilar directions of development. It is interesting, nonetheless, that these different directions have led to the same dilemma waiting the right solution. The subject of this paper is an appropriate example in jurisprudence. When facing enormous spending on war against another nation, how a country optimizes profits from its economic system through its financial policy to cover the expenses relies on the choice of the economic system. However, the choice of the economic system often creates full impact on the economic life of the people and thus becomes a key issue in constitutional jurisprudence in modern nations.

Nevertheless, since the standpoints of constitutional jurisprudence and public finance

[*] Crisis(1918/1996), p.334, Note.6, in full text: „Social conditions always contain remnants of the past and seeds of the future; and it is these seeds that are especially noticeable to the researcher looking back through the spectacles of a later time. *Natura non facit saltum*, and it is only by way of abstraction that one can speak of any condition in the sense of a definitely defined type. "

are not the same after all and the underlying choice of value has to be differentiated. What is certain is that the same old question of "whether the state exercises market intervention" has attracted concerns in both the East and the West. This paper focuses on analysis of two texts—《Discourse on Salt and Iron》and《The Crisis of the Tax State》—two major debates on financial and economic policies.

A. 《The Crisis of the Tax State》vis-à-vis《Discourse on Salt and Iron》

Undeniably, the two debates [hereinafter ***Crisis*** and ***Discourse***] in focus all rooted deeply in their respective backgrounds. In the hope of creating an outlined sketch of understanding to accentuate the focus of discussion, an introductory as well as an interpretation of relevant materials is portrayed below.

1. Issue in *Crisis* – State Capitalism or Free Economy

In 1917, Rudolf A. Goldscheid[1], an Austrian finance scholar, while facing the question of whether the Austrian tax system would be able to pull the country out of its financial plight after WWI, cast out a gigantic question mark – his conviction that reforming the

[1] For a recent biographical work, see W. Fritz et al., Rodulf Goldscheid: finanzsoziologie und ethische sozialwissenschaft, 2007, Berlin.

order of public goods would be the right solution. In other words, in the realm of public finance the theory of public goods must be practiced to the maximum degree to become the foundation of law and order to protect as well as improve public goods and upgrade their productivity.[1]

Goldscheid asserted: [2]「*The natural social result of such a development would be a State which gradually needs to take less and less and yet can give more and more.*」 He thought, from the view of financial sociology (*Finanzsoziologie*), the natural outcome of social development would be the state asking for less and less from and giving more and more to its people. As a consequence, planning a perfect public economic system would be essential for the income sources of the entire society. [3]In other words, the fiscal system of a tax state could no longer meet the demand of the time.

Schumpeter, however, opposed the above assertion. For him a war-incurred financial crisis was not the crisis of the tax state. War could not expose the intrinsic, structural imperfections of the system of the tax state. At the most, it would only show the tax state was under external impact. It would be spontaneous for a tax state to handle its

[1] Goldscheid, Rudolf(1925), A Sociological Approach to Problems of Public Finance, in Musgrave, Richard A. and Alan T. Peacock(ed.)(1958), p.202-213. Extracts from "Staat, öffentlicher Haushalt und Gesellschaft, Wesen und Aufgaben der Finanzwissenschaften vom Standpunkete der Soziologie", Handbuch der Finanzwissenschaft, edited bz W. Gerloff and F. Meisel, Vol. 1, Tübingen 1925, pp. 146-185.
[2] Goldscheid (1925), p.213.
[3] Goldscheid (1925), p.213.

crisis through taxation. Therefore, Schumpeter, in his effort to defend economic freedom, advocated that utilizing the tax state system would be enough to cope with the crisis. On the contrary, if the state intended to plunder the private economic sector for financial gains, it might damage the market mechanism and slow down economic progress.

In response to Goldscheid's assertion, Schumpeter proposed the famous ***Crisis*** in the last year of WWI, 1918. In ***Crisis***, apart from criticizing the political status quo, Schumpeter also applied Goldscheid's methodology and established his own set of tax state theories from the origin, nature and boundaries of the tax state as an attempt to overcome the difficulties in the so-called "crisis of the tax state" at the time.

The attraction of ***Crisis*** is the calm, unwavering attitude exhibited in its handling of crises which made the study on Schumpeter's tax state philosophy even more thrilling.

2. Issue in *Discourse*—State Monopoly or Free Economy

The work ***Discourse*** was essentially the arranged and compiled record of a court

meeting.[1] It chiefly contains the debate on the advantages and disadvantages of various state monopolies promoted during the reign of the Wu Emperor of the Han Dynasty and on the question of whether these fiscal measures of revenue collection should be kept or abolished.

One side of the debating parties, Wen Xue(文學) and Xian Liang(賢良) (hereafter referred to as **Literati et al**) claiming their identity as *public opinions*[2] that the fiscal policy of the time was vying with private citizens for profits and therefore should be repealed. The opposing side, the court officials led by Sang Hong-yang (hereinafter **Sang et al**) represented state interests and retorted the assertion of Literati et al by claiming that state monopoly has its own justification paralleling the justification of agriculture, and shall not be neglected.[3]

In the debate on Chinese financial and economic policies in ***Discourse***, the Literati regarded the economic policy the Wu Emperor of the Han Dynasty promoted was "**vying with people for profits**" which limited agricultural development. Instead, they

[1] Some people believe that Huan-kuan was touched by the words of Zhu Zi-bo(朱子伯) of Ru-nan so he collected the record that had been passed down, arranged the order, polished the language, added some clauses and produced the version available today. Please refer to History of Thoughts in the East Han and West Han Dynasties by [Hsu](1979), P.125. For verifications of whether "Discourse on Salt and Iron" was a fabrication, see [Lai](1996/1998).

[2] See ***Discourse***, §1.[鹽鐵論本議第一]

[3] See ***Discourse***, §2.[鹽鐵論禁耕第二]

advocated, “restraining from trivial gains to cultivate righteousness” and “valuing the essential part and suppressing the insignificant elements.” In contrast, the court officials believed Wu Emperor’s policy was not only to reinforce national defense but also to curtail private businesses from growing out of control and endangering the central regime. Therefore, they were convinced that the economic measures were in fact advantageous for private citizens and beneficial to agricultural development.[1]

Some suggests, on the surface, the Confucian Literati et al seem to have won the debate, yet in reality the victory of Literati et al was a result of the convergence of Confucianism and Legalism and therefore it should have been a victory of the Legalists as well.”[2] However, as we investigate further: In which basic ideas did Confucianism and the Legalism converge and in which ones did they vary? Whether this can be associated with issues such as the argument of “big government v. small government” is already enough for contemporary researchers to ponder upon.

In reality, however, the argument over the policies of price control and even allocation of salt and iron reappeared itself from the Chin-Han period to the Ming and Ching Dynasties, but in different forms and to various degrees. These policies were adopted

[1] [Qiao](2002), Discourse on Salt and Iron, annotation edition, Huaxia Publishing, pp.1-3
[2] [Tang & Chen](2004), History of Economical Ethics of Ancient China, Renmin Chu Ban She, p.276

for the same causes and failed for similar reasons. It was a consistent phenomenon in Chinese economic history.[1] Various Chinese dynasties being similar in scale and structure, frontier defense was nearly always a heavy burden on state finances; in consequence, the government was unable to extend its economic power externally and, being incapable of overcoming its existent economic boundaries, which had to turn inward and squeeze out all possible civilian resources without mercy, fighting for profits with the people with it political power.[2] This feature of state fiscal authority seeking financial resources internally began with the "Discourse on Salt and Iron" and had its significance in the transformation of economic social structure.

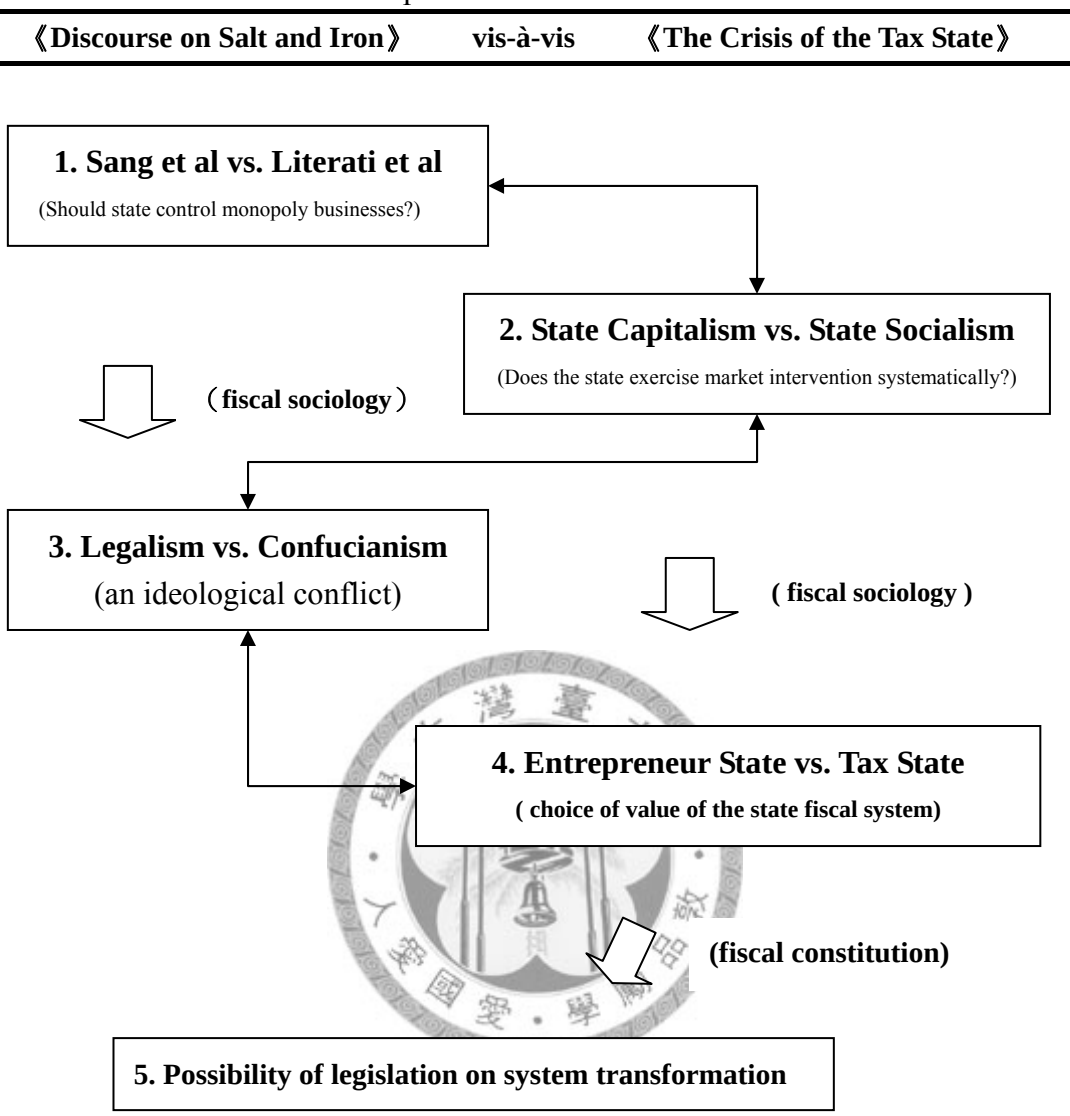
On the other hand, however, Hsu offers an insightful comment that "*Under imperial authoritarian rule, intellectuals have the opportunity to reflect political realities only when they are caught in a contradicting standoff and this is where the true value of Discourse on Salt and Iron lies.*"[3] Regardless of the complexity of the conflicts of interests between both sides of the debate i.e., Literati et al vs. Sang et al., the fact that this dialogue content reflected the life of the people at the time, which reached the ears of the emperor, already has its referential value.

[1] See [Lai] (1996/1998), p.29.
[2] See [Lai] (1996/1998), p.29.
[3] [Hsu] (1979), History of Thoughts in the East Han and West Han Dynasties, p.124

3. Taxation as Defined in Both Debates –Standpoints of Dissimilar Foundations of Taxation Ethics

The argument in both debates was concentrated on the relation between the state and economy. To be specific, both debates were intended to do nothing more than drawing the line between the state and the people based on their respective historic backgrounds and cultural contexts in order to secure their positions and continue with their lives. On the surface, the two debates could not have possibly had any association in the space-time continuum and therefore can never be compared. In reality, however, exactly because of the absence of intersection between these two debates, identification of the ethic foundation in the separate development of tax regulations in China and in the West this paper has initially set to define becomes a possibility.

Illustration 2 Schematic for Comparison between the Two Written Works



1 and 2: There are commonality and practical benefits in comparison between "Discourse on Salt and Iron" and "The Crisis of the Tax State".

1 and 3: The contradicting views in the financial and economic debate in Discourse on Salt and Iron are explained through the conflict between Legalism and Confucianism.

2 and 4: The standpoint of The Crisis of the Tax State is made conspicuous through Entrepreneur State and Tax State.

3 and 4: Through the focuses of debates in China and the West, it is made clear that the pivotal question lies in the choice of value of the fiscal system.

3 and 5: The Legalist and Confucianist theories are adopted as an attempt to explain the type of market economy in system transformation.

4 and 5: The state fiscal system is used as an attempt to explain the type of market economy in system transformation.

B. Possible comparison of Tax Morality– Legitimacy of Tax power as starting point

1. Taxation and Private Property

In modern state, taxation and private property are like the two sides of a coin. It is even appropriate to say that the tax system is the means to safeguard private property[1]. In other words, the fiscal system of a constitutional polity that acknowledges private property has to be a financial revenue system (the system of a tax state) centering on taxation in order to stay in line with historical evolution.

2. The Power to Tax as symbol of Modern State Sovereignty

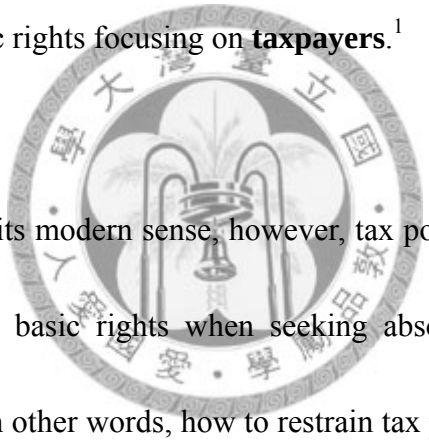
When viewing the functioning of the tax state system from the ruler's angle, i.e., the various fiscal measures of a state with the power to tax as the center, the power to tax is not only the symbol of state authority but also becomes a major approach of the state to intervene in the life of private citizens and establish different relations with the people. Simultaneously, the power to tax also becomes the most potential influence on the life

[1] Refer to [Endo] Taxation and Private Property for the outline. For the relation between constitutional protection and taxation, see [Lan](2007)

of the people.

3. taxpayers-centered idea in the protection of basic rights

The basic rights are the objects of protection of constitution. People, as the subjects of basic rights, are naturally the focus in terms of constitutional jurisprudence. By the same principle, in the realm of fiscal constitution, the direction of the core issue therefore has to be the protection of basic rights focusing on **taxpayers**.[1]



In terms of constitution in its modern sense, however, tax power can easily be regarded as a violation of people's basic rights when seeking absolute enforcement of their constitutional protection. In other words, how to restrain tax power with constitutionally recognized **values**, so as to ensure the protection of basic rights has always been a rudimentary question in terms of fiscal constitution in a modern state. However, when exercising such restraint, we find certain degree of ***detachment*** is at the same time created between regulations and the reality aims to be regulated. Reasons are developed more explicitly as follows:

[1] For discussion on taxpayers' rights, see discussion by [Kitano](1983).

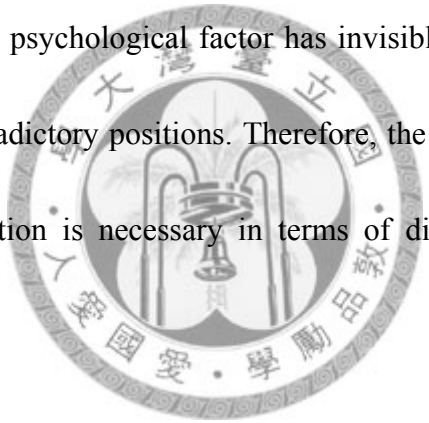
i. First of all, a certain contradictory relation arises between state's tax power and people' property right.

Tax imposition on its people[1] in a modern state is actually a prerequisite for the people's freedom to have property and the foundation of private property. Without taxes financing state's public services, basic subsistence for people is deprived. When evaluating the approaches of a state's power to tax, taxpayers may realize a certain part of their income becomes out of their disposal and thus ascribe the blame to taxation. Such ascription representing taxpayers' mentality is particularly noticeable in modern society partly because of money being the principal medium in business transactions. Once people are unable to fulfill their needs by consumption (or usufruct) of property, they attribute to the loss of their property. And the most influential factor resulting in the diminishing of property is state's taxation. Consequently, it is state's tax power taking away people's money that leads to decrease in money and one's inability to fulfill one's needs. In the end, a violation of their freedom or right to fulfill oneself due to one's property being taken away from the state is to be perceived.

[1] The term *taxation* here refers to a modern nation's imposition of taxes on the results of the people's profitable activities in order to pay for public needs. See §3 Abs.1 of Abgabenordnung (AO) (General Tax Code of Germany) for concrete legal definition. For Chinese translation, refer to the German General Tax Code, translated by Chen Min (陳敏), Training Institute, Ministry of Finance. For legal discussion on differences between taxation and state revenues of other nations, see [Fuke] (2006).

Even more seriously, when their disposable property increases as a result of tax reduction or exemption or inapplicability of tax imposition in some special situations, taxpayers may conveniently interpret it as a concession of tax power to the property right. Thus, in the minds of the people, especially taxpayers, thinking of the decrease in their disposable property, a *contradictory* or *conflicting* mentality engenders against tax power.

Here, we assume that such psychological factor has invisibly contributed to tax power and property right in contradictory positions. Therefore, the research on the emergence of such contradictory relation is necessary in terms of discussions on the limits of taxation.



ii. Secondly, a gap appears between the will of the ruling agency and the legitimacy of taxation.

Judging from historical evolution, we found that the development of the concepts of human rights in the West was the consequence of suppression – an ideology that gradually took shape after resisting and overthrowing the rulers over and again. In other words, the formation of the concept of ***right*s** was the reaction of the ruled towards the

repression from the rulers[1], and the ruler's unreasonable taxes were often recognized in the main source of this repression.

However, when judging from the constitutional legitimacy of people's obligation to pay taxes as a result of justification of taxation in modern state (lack of justifiability means no tax payment), it no longer seems right to call what taxpayers oppose to suppression. Thus, the constitutional justifiability in limiting the state's power to tax to ensure the rights of the people can no longer exist since the inherent "reactionary character" of rights has lost its theoretical basis. Subsequently, how to establish the relation between the bases of the justifiability of the will of the state, which represents the power to tax, and the constitutional justifiability of the people's tax obligation becomes a theoretical gap in urgent need of reparation.

This gap, the way this paper sees it, has been the result of the thinking logic under the influence of western human rights concepts; therefore, the so-called "reparation" calls for understanding from western thinking approaches in order to have any meaning (or produce the desired result.) As for whether the views or approaches of this reparation can be adopted or conform to the sense of value in traditional Chinese societies,

[1] Some might consider this to be the "right to disobedience."

examination from the angle of "comparative law" may be required.

4. Disparities between Chinese and Western Perspectives—the theoretical *Anschauung* and positioning of this paper

The debate in the meeting did not seem to generate any decisive influence on formulation of government policies. While Schumpeter was appointed the minister of finance soon after the release of ***Crisis*** and had the opportunity to pursue his ideal, the fiscal plans he proposed, however, did not win majority support and fell apart within a very short time.[1] The following development of ***Discourse*** was not any better. Furthermore, although the salt and iron meeting concluded with adoption of Literati et al's views[2] and Sang Hong-yang was executed for his involvement in an unsuccessful coup in the following year, Huo Guang(霍光), who took over power after Sang, followed most of Sang's financial policies. The policies did not die because of Sang's decease and Huo never adopted LITERATI ET AL's opinions.

- Theoretical intention of the paper—**adaptation** and **revision**

[1] For summaries of related discussion, see Swedberg, R. in: Schumpeter (1945), Capitalism, Socialism, and Democracy, 4th ed.

[2] In July 81 BC, the emperor released a decree to abolish the alcohol monopoly by the state and iron control south of the Great Wall. See compilation by [Wang Ning](1993), p.12.

The above shows that a theory may seem viable or is indeed applicable in reality, but in the end it might still be brushed aside. A theory may be established to solve practical problems, still whether it is implemented or how well it is executed should not be the basis for judging its quality. [1]

Basically, we believe whether a theory is feasible has nothing to do whether the theory is complete. Whether a theory can be applied in practice often requires appropriate transformation to **adapt** it to the specific time and place[2], whereas whether its structure is complete, depending on the compactness of the theory and continuous logical verification to locate unreasonable parts and **revise** them, does not necessarily touch upon practical questions such as viability.

- Positioning of the Paper – "Revision of Theory" as the Primary Objective and "Adaptation of Theory" as the Secondary Objective

[1] Here this paper intends to bring in the comparison between the basic arguments of teleology and deontology from the Ethics. For comparison between several other groups of similar concepts, a few ideas related to the exposition of this paper are also listed: the "efficiency" and "fairness" from economics, the "should do" and "should profit" principles of taxation from public finance, the principle of proportionality and principle of equality from tax law, the concept of freedom and the concept of equality in human rights, etc. Concrete arguments will be elaborated further on in this paper.

[2] Certainly, whether a theory is accepted by others or not, as long as it cannot be adapted through transformation fro feasibility, there is no point in citing that theory. This explanation is related to description of adoption of Western legal systems further on in this paper.

In positioning, this paper first acknowledges the necessity of distinguishing theory and practice in study and then places the emphasis on descriptive and attempted establishment of a theory. The practical aspects may be subject to the possible revision in the future.

C. Concrete Benchmark Comparison – the System-and-People Relation

1. Constitutional **Choice of value**(*Wertenscheidung*) in **Economic System**(*Wirtschaftsverfassung*)

Chinese and Westerners may vary significantly in backgrounds, but in tax law the core focus of both sides cannot deny the existence of the relations between state and people. In other words, a state is all the more influential to contents of people's rights and obligations through various forms of authority. When facing unreasonable and unbearable tax burden, people in the West react by resorting to human rights, whereas in traditional China, people tend to develop passive yet tolerant life philosophies and seldom express **distrust** towards the system (or monarchy) unless they are pushed to the edge[1].

1 Such distrust seems to correspond to the emphasis in the public choice theory in public finance that stresses on individuals' tendency to hide their preferences in the public domain. If so, building a benign

2. "Man within the institution" and "Man within the society" according to the Constitution

To move on further, constitutional choice of value in an economic system, be it a tax state (*Steuerstaat*) or an enterpreneurial state (*Eigentuemerstaat*), relies on people's **confidence in the system** for justification, in other words, the system and the people have to be connected. The approach the people manifest their willingness (their confidence in the system) involves different thinking patterns (the people-society relation) in accordance with variations in social structure. **In other words, constitutional recognition of a specific system is associated with the question of whether the "people within the society" are willing to and know how to adapt themselves to become "people within the system."** This question also applies when considering the necessity of adopting western experiences in rule of law into traditional Chinese philosophy and its feasibility (the same as the adaptation of theory mentioned earlier.) [1]

D. Re-examination of *Limits of Taxation*

system could be significantly constructive for human rights protection in tradition-bound China.

1 Concerning adoption of western legal systems, the Japan has some experience to offer for reference and there is a lot of literature available, such as Fukushima Masao, Tanaka Shigeaki, etc.

Firstly, this paper intends to begin with the limits of violation of people's rights from the "power to tax" (hereafter referred to as the 'limit theory').

1. **Revision** and **Adaptation** of Limit Theory

Tax State has its limits and these limits are symbiotic with the fate of capitalism and disappear with the downfall of capitalism.[1] However, in modern countries and societies the theory of tax state not only faces whether the fiscal constitution is in line in structure with their intrinsic problems but is also confronted with how these limits should be adapted in response to the needs of a society in the modern age[2] so that they can truthfully depict the image of modern taxpayers[3].

In other words, for a modern state to revise as well as to adapt the theory of tax state and its limits so as to conform to taxation and humanity standards in a modern age is the very mission of the idea of tax state. To elaborate on this mission by constitutional justifiability of the taxation limits and targeting at the "revision" and "adaptation" of the

[1] See Schumpeter(1918), Isensee(1977), Gee(1989,1990/1997)
[2] See Musgrave(1982), Seidl(1991).
[3] See [Lin](2007)

limit theory is the main axle of discussion. [1]

Under the framework of this paper, the contents of revision and adaptation of the tax state limits chiefly include three parts:

- Adoption of advanced tax law philosophies and systems;
- Harmonization of Chinese and Western taxation ethic philosophies;
- Significance of system transformation in tax law legislation

The following are outlined descriptions.

2. Reception of ideas and systems in legally-*advanced* countries

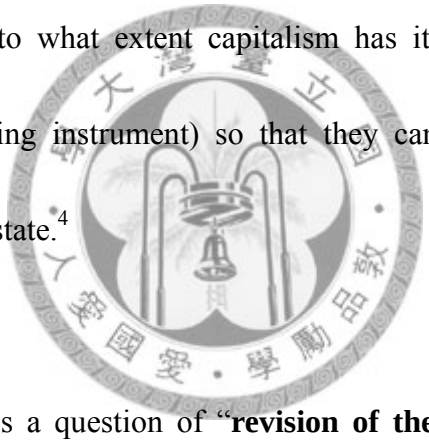
Under the mainstream influence from the West, the development of legal system in East Asia including that of Chinese societies appears to be ones that are comparably less advanced than western societies.[2] Due to the *sui generis* character of reception, the

[1] The so-called "revision" and "adaptation" are used to emphasize the distinction between temporary restriction or expansion measures (the latter) applied to the theory itself for deepening (the former) and pursuit of feasibility of the theory. However, it should be clarified here that such distinction has to be from the standpoint of recognition of independence of disciplines for it to have any practical benefit in development and discussion. In other words, even the concept of "theory" may have different definitions in various disciplines. In this paper it is only applied briefly in the fields of jurisprudence, public finance (or in fact just tax jurisprudence.) To put in simple words, each discipline has its own models.

[2] See [Huang], [Fuke].

receiving part has to deal with the localization of the received foreign systems[1].

Furthermore, in the realm of tax jurisprudence, the reception of tax state theory, even in Western nations where it has originated and is deeply rooted[2], still has to be reexamined to determine if it is in line with the times. More precisely, notice that modern taxation is symbiotic with capitalism[3], countries with "*advance*d" legal systems must determine the relation between capitalism and taxation in their respective political, economic, social and cultural contexts (or to what extent capitalism has its influence on their using taxation as the state's ruling instrument) so that they can make adaptations of the received limitations of tax state.[4]



The issue of localization is a question of "**revision of theory**" is different from the notion of **"adaptation of theory"** which deals with applicability of theory *per se*.

However, a comparison of *Crisis* and *Discourse*,—whether and how the tax state theory capable of being a reference in the Chinese world—may appear, at first glance, to be a question of "revision of theory". But in effect it may as well be taken as "adaptation of theory".

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[1] See [Yeh]
[2] See J. Backhaus (2005), N. Sasaki (2005).
[3] See Schumpeter (1945).
[4] China may have to face the same question in its transformation of socialistic market economy system.

3. Harmonizing Tax Moralities between East and West – from Internalization of **Values** to Internalization of **Legal System**

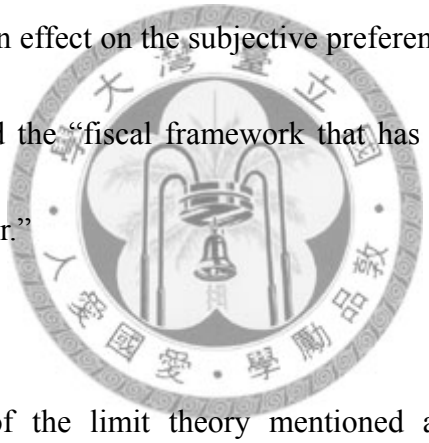
In actuality, the idea of tax state has been recognized in many constitutional contexts.[1]. Today, considerations should not only be on the justifiability of the tax state theory. they should also be made to determine how to "internalize" a set of values that exists prevalently in nations with an advanced legal system in order to make it a part of a nation's own legal system to perfect the legal system. However, from the angle of jurisprudence, conflicts can be found everywhere between the values of the law of the adopting nation and those of the adopted nations in the process of this "internalization." This is an issue that makes the need of an *original* (or intrinsic) fiscal constitution stand out even more.

4. Tax Regulations in Transformation– Reassessing Limits of Taxation in Constitution

Limits of taxation signify the relations between the state and individuals. In

[1] Precise stipulations can be seen in Magna Carta and the Bill of Rights of the UK, the Declaration of the Rights of Man and of the Citizen of France, and the Bill of Rights of the US.

constitutional jurisprudence, limits of taxation are the product of a specific constitutional sense of value. Determining observation of taxpayers from the constitutional fundamental values is after all a matter of defining the relationship between taxpayers and the tax state (or the taxation system,) as well as a matter of the interrelation between the state and society in tax jurisprudence. This relationship is not merely an external presentation of drawing the line between the power to tax and private property. It is also an approach to investigate the two major elements of the "judgment of social values that have an effect on the subjective preferences of taxpayers' behavior" (people in the society) and the "fiscal framework that has influence on the choice of value of taxpayers' behavior."



The two interpretations of the limit theory mentioned above also carry different meanings in theory. The first meaning (division between the power to tax and private property) is a question of level in "revision of theory," whereas the second meaning (definition of the relationship between taxpayers and the tax state) has its significance in "adaptation of theory." Nevertheless, investigation of regulations in socialistic market economy systems has both the abovementioned meanings in tax jurisprudence.

II. Constitutional Limits of Taxation – Elimination of Contradiction between the

Power to Tax and the Property Right

Only in state capitalism can progress be obtained; it fundamentally alters the public revenue structure and affects the economic system of the nation.

R. Goldscheid, A Sociological Approach to Problems of Public Finance[*]

The best is to allow the people to find their own directions, then to guide them with interests, then to educate them with morality, and then to restrict them with authority. The worst is to compete with the people.

Shi Ji Huozhi Liezhuan[**]

A. From Limits in Public Finance to Limits in Constitution

In the state-people relation in tax law, from the angle of distribution of tax burden in public finance, the concern of the former, unfortunately, is the choice of distribution of its financial burden between tax imposition and fee charging in various forms (choice of imposition approaches). For the latter, on the contrary, the concern is the likely changes

[*] translated from German by Elizabeth Henderson, in: R. A. Musgrave et al.(ed.), Classics in the Theory of Public Finance, St. Martin's Press, 1994, p.209.

[**] original texts: "善者因之，其次利道之，其次教誨之，其次整齊之，最下者與之爭"[史記貨殖列傳]

in their lives once tax imposition is conducted (evaluation of results of approaches chosen). From the angle of tax jurisprudence, however, the former involves constitutional justifiability of taxation (such as the agreement from the taxpayer and how the agreement is expressed,) whereas the concern of constitutional jurisprudence for the latter is protection of the fundamental rights (such as balance with other basic constitutional values.)

On the other hand, if the state intends to obtain financial resources through measures outside taxation, it requires constitutionally tenable enough reasons to replace the justifiability of taxation. Yet even so, if the state violates the fundamental rights when exercising such measures, it may still be regarded as unconstitutional.

The former of the two aforementioned aspects (the standpoint of the state) is consideration of taxation from the angle of “Cameralism” (Kameralismus) while the latter (the standpoint of the people) leans toward the view of protecting the rights of taxpayers common among modern constitutional nations. The different footings naturally lead to dissimilar considerations of interests. Once contradiction arises between the interests of two sides, conflicts are unavoidable. The focus of concern of this paper is how to enable one side to win in the conflict of interest through a

reasonable competitive mechanism.[1]In fiscal constitution, such a reasonable competitive mechanism shall call for constitutional interpretation and judicial review by the judicial department.

B. Amplifying **Contradiction**

1. "Restoration" of the Contradictory "Situation" between the Power to Tax and Property Right

The relation between the power to tax and protection of property right has always been a core issue in constitutional and tax jurisprudence.[2]Constitutional interpretation and review of constitutional violation in relation to taxation are also often focused on how to keep the power to tax in rein to prevent violation of the fundamental rights, in other words, putting limits (*Grenzen*) on the power to tax for protection of the fundamental rights, especially the property right.

Constitutional restriction on the power to tax may be able to reduce intervention in

[1] The two above-mentioned attempts to "interpret the state-people relation," judging from the historic angle or the development and evolvement process of taxation ethics, have reflected two important historio-raphical views: the history of taxation and the influence of taxation. When applied in this paper, the former refers to how taxation has become a form of practice of public authority by the state (taxation → state) [history of taxation] while the latter stresses on how the state influences its people through taxation (state → taxation → people) [influence of taxation.]

[2] [Gee](1997), relevant stipulations in Japanese law, see [Nagajima et al](1996).

people's lives from public authority, but this is only passive prohibition (**formal rule of law**) and does not cover the content of practical protection of each taxpayer's fundamental rights. It carries the connotation that this protection lacks positive meaning (**substantial rule of law**). As a consequence, the scope of application of the power to tax not only should be observed from the angle of practice of authority but should also be judged from the angle of the object of this authority, so that a better understanding can be obtained.

In fact, the said angle of the object of this authority has the function of elevating the abstraction level. The definition of this limit is not simply a constitutional or even jurisprudential question. Besides being a fundamental question in fiscal constitution (*Finanzverfassung*), discussion on this question is also valued in the fields of economics, public finance, sociology, etc.[1] In other words, to really understand the core of the question, instead of resorting to integrated interdisciplinary studies[2], direct examination of the nature of the question to impart it with a modern meaning through its historical context[3] (such as the evolvement of the relation between the power to tax and the

[1] Investigations in financial economics include studies by such as Seidl, Shionoya, Musgrave, etc.; explorations in sociology include Swedberg, O'Connor(1973), Bell(1974), Block(1981), etc. Related literature from Taiwan includes those by Chang Tse-yao, Huang Shi-hisn, Wu Ting-feng, etc.

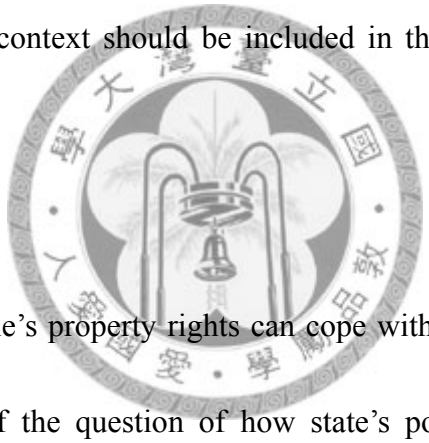
[2] There are political economy, financial economics (Finanzsoziologie), economic sociology, etc. This paper focuses more on Finanzsoziologie; for more information, see Musgrave(1980), McLure(2005), [Yamashita], [Ohata], [Naohiko], etc.

[3] To this paper, the so-called modern meanings, such as the justifiability of this limit, whether it still exists, whether the limit theory still has its function in review of constitutional violation from taxation, and the applicability of this theory in Chinese societies (possibility of theory adoption), etc., are all

people) and development of the choice of value in a more fundamental fashion (such as whether the state should intervene in private economic domains) would be a better approach. In other words, this is an attempt to restore the original appearance of the view of the "give" and "take" of this authority from historical development.

2. Historical context of current issue – Changes in justification of tax power

First of all, the historical context should be included in the realm of the history and philosophy of taxation.



The question of how people's property rights can cope with the state's power to tax is actually a continuation[1] of the question of how state's power to tax was originally justified through "consent of people." [2] Therefore, it seems that to investigate the limit of the power to tax even in the constitutional level, one cannot avoid but to reconsider the question of state's intervention in society.

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worthy of investigation.

[1] On the agreement for the power to tax from the people (bourgeois class), Schumpeter (1918) once used letters of indemnity (*Schadlosbriefe*) and analyzed, "when the bourgeoisie admits… such as the Greco-Turkish War is not a private concern of the seigneur but a "common exigency" (*gemeine Not*), state affairs thus gained identification from the people. Such state affairs imply a private domain is therefore created and become the requisite of distinction as opposed to the public domain. Out of "common exigencies" a state is born" –see Kimura (1983/2006), p.24.

[2] The so-called agreement should mean the people are willing (or make the decision) to give a part of their property for necessary public expenditure, the necessity of which perhaps can be traced back to the Aristotle's view of "cohabitation." In addition, for the idea of "social contract "derived from agreement, see the different interpretations of "state of nature" from Locke and Hobbes.

Despite the acceptance of the *Sozialstaat* concept, the notion that state is obliged to look after its people[1], the concept also leads to the legitimacy for expansion of state. In other words, while the constitution recognizes tax state system, how the state employs its means to acquire financial resources with minimal violation of **basic rights** (*Grundrechte*) and realize its protection naturally becomes an issue.[2]

Therefore, definition of the constitutional limits of the power to tax in a modern state, beside facing the old question of "state intervention in society" again, also has to respond to the doubt of "how the state intervene in the society." The former implies "positioning of the state" while the latter is a question of the role the state to play.

i. Functionalism in taxation: from revenue-oriented to policy-oriented taxation

The original function of taxation had only the purpose of financial revenue (*Fiskalzweck*). Tax imposition also carries the purpose of control and guidance (*Lenkungszweck*) today due to expansion of the function of a modern state. In order to

[1] This is the equivalent of the welfare concept in the West when practiced to a certain degree.

[2] In fact, discussion on this question in public finance (discussion on the principle of taxation fairness) has evolved into how to minimize the people's sacrifice under taxation. For details, see Musgrave, A Brief History of Fiscal Doctrine, in: A. J. Auerbach and M. Feldstein(eds.)(1985), Handbook of Public Economics, North Holland, vol. 1, pp.1-59. This paper believes, this principle of the lease sacrifice, when looking at the degree of limitation on the fundamental rights as a matter of quantity, it seems more likely to reflect the "human" element in the system.

achieve specific missions, the state offers a certain degree of tax incentives to people who choose to accept state guidance. The reason is, in constitution, achieving these missions is more justifiable than distribution of tax burden.[1]

ii. Advance in social policy-oriented taxation: from primary to secondary purpose

When observing German tax law that has deep influence on the development of the tax law in Taiwan, the significance of the role that social thought (or *Sozialstaastprinzip*) has played is obvious. Other than that the abovementioned functions of taxation can already be distinguished, at the same time, the relation between the fiscal purpose (the primary purpose) and policy purpose (the secondary purpose) has already turned from the "finance first, policy next" relation to the completely opposite "policy first, finance next" relation. [2]

In other words, viewing the significance of taxation to a nation simply as the major source of financial revenue may be somewhat inadequate and supplementary

1 In the taxation functions of a social state (Sozialstaat), the purpose of control and guidance might even be the primary function and the purpose of fiscal revenue is only secondary. For related discussion, see Gee(2005b), from p.105 onward, especially p.109.

2 This development has been verified in German tax constitution practices. See Gee (2005a) for the Chinese version.

justification in other aspects is required.[1] To speak simply, it is still a matter of constitutional justifiability of taxation. When thinking back, the emergence of this function was after all a prerequisite for expansion of state functions.[2] This goes to show that the expansion of taxation functions has once again proved the assertion of "the state reversely enriches the content of taxation."[3] Thus, to understand the development of taxation, we have to observe the modes of development of modern nations.

C. Attempts on elimination of the **Contradictory Relation**

1. Insufficiency of Conceptions of **Right**

Rises in war expenses were the chief cause of financial difficulties of fiefdoms in the feudalistic economic system in the 14th and 15th centuries. It happened again in Austria in the 20th century. Under the similar situation, in the Han Dynasty the Emperor Wu commanded top court officials, Sang Hong-yang et al., to do everything they could to raise funds for his conquering ambition. The term of "ruler" does have its certain degree

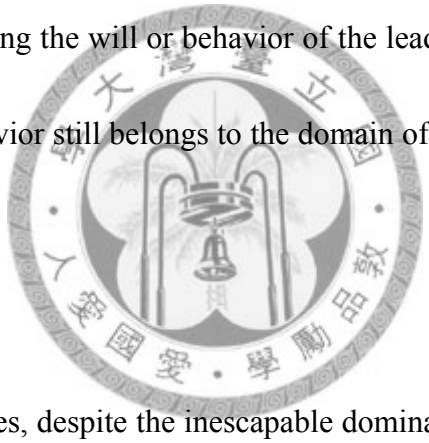
[1] Schumpeter (1918) also believed, the significance of taxation could no longer cover the concept of the state entirely. On the contrary, the concept of taxation grew more complete from the development of the concept of the state. See the Japanese translation for details, p.35.

[2] This social function of taxation, especially in Germany, may have been under the influence of German public finance at the time. The "State socialism" (Staatssozialismus) on expansion of state functions by A Wagner (1835-1917) was the most well known; Hanato Ryuuzou(花戶龍藏) (1952), Theory of Public finance, p.101 onward.

[3] Schumpeter's idea about the taxation-state relation, see Schumpeter (1918/1996), p.344; Schumpeter (1918), S.344.

of commonality in both China and the rest of the world throughout history.

In reality, when observing closely, the economic systems of China and Western Europe seem to have been the same.[1] Yet when considering from the cause and effect level, it is difficult to not blame the financial plight of a state (or kingdom or dynasty) on the leader's inappropriate fiscal policy. Again from the debate in 《Discourse on Salt and Iron》 we cannot help but question if it was possible to prevent financial difficulties from happening by restricting the will or behavior of the leader. Whether this restriction of the leader's will or behavior still belongs to the domain of jurisprudence also requires explanation.



However, this paper believes, despite the inescapable domination of state power, how to make taxpayers to still be able to enjoy "minimum life protection"[2] and avoid excessive violation from taxation, compared to the aforementioned, will have more practical benefits in jurisprudential examination. As a matter of fact, in an economic system where private interests provide the driving force, it is really hard to imagine a

[1] [Ho] (2005) even thought from the development process in the China before the Emperor Wu of the Han Dynasty and the Western Europe since the Middle Ages the pattern of human economic progress can be deduced, meaning in both cases the development process went from "feudal society → mercantilism → temporary → mercantilism capitalism." See [Ho] (Vol.I), Linking Publishing(聯經), pp.3-4.

[2] This means the state function of providing the condition for living "without necessary worries." See later elaboration on "Rights Protection Centered on Taxpayers – Minimum Protection for Living without Unnecessary Worries"

public obligation that is not only beyond the burden an individual is willing to take, but also endangering to the basic living of the individual, yet being highly justified at the same time. The paradox is, as it is difficult to be sure of the limit of this burden, the state, in its pursuit of sufficient financial resources, has no choice but turns and endeavors in stressing the justifiability of "taxation" and the justification in the "tax obligation."

2. Time for application of moral perspective – "Subsidiary Principle" as vehicle

To continue, "the constitutional limits of taxation" actually are the response to the default value of the proportion of "fundamental values of people" and "people's obligations for social solidarity" in the constitution. Nevertheless, this defaulting often has to be adjusted in line with changes through time and evolvement of human rights concepts. Using the experience of Germany as an example, as a result of the progress from[1] a liberal state of rule of law to a social state of rule of law, the responsibility of the state was no longer limited to the missions of a night watchman state but also included the function of looking after the people. The move from a formal rule-of-law

[1] For related discussion and response of taxation principles when facing such transformation, see [Fuke] (1999), Nagoyadaigakuhouseironsyu, No.177.

state to a substantial rule-of-law state enabled the liberal-rights-centered fiscal constitutional perspective to gain wider support[1] – that is, the establishment of the minimal survival standard and the upper limit of the halving principle in overall tax burden in the constitution.[2]

Here we emphasize the response of the principle of subsidiary (Subsidiaritätprinzip) of a state. When discussing this principle, it should not be forgotten that this principle has the social function of the protection of freedom and has to be evaluated from the function-accordability and effectiveness in the process of social development. The acts of state cannot force intervention by citing public purposes as an excuse. The applicability of the principle of proportionality has to be taken into account and **the state can intervene only when the society is incapable of achieving on its own**[3]**.** Still, in light of the coming of era of social state of rule of law, social demands to the state increase by the day and public affairs grow in complexity. Under inevitable expansion

[1] See [Taniguchi] (2007), zeihouniokerujiyutobyodo, Tax Jurisprudence 546, PP.210-211. For discussion on the halving principle, refer to Okuya, kazeinofutanntojyogen, Tax Jurisprudence 558, pp.23-42.
[2] See P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, S. 31f.
[3] [Gee], the dualism of state and society and its constitutional significance, in Gee, State Theory and State Law, 1997, pp.38-39. According to Gee, there are two meanings for the state: first, the state has the obligation to prevent the abuse and monopoly of authority in the social system (such as monopoly and oligopoly) and to maintain neutrality against social forces (such as prohibition of discrimination and power abuse, and administrative neutrality) to ensure economic, cultural, political and art bodies to exercise their functions; secondly, the state should practice self-control when intervening complex social organization systems, and refrain from damaging their original stability, such as taking precautions when applying control measures to market prices. The self-control of the state is a prerequisite for individual and social freedom; stepping over the line shall lead to deprivation of individual and social freedom (Rupp, Die Unterscheidung von Staat und Gesellschaft, in HBdSR, Bd.I 1987, §28, Rn. 52, quoted from Gee, supra text, p.39, note 81.)

of state duties, the subsidiary character of the state not only should not turn toward active intervention in private affairs as a result, but also should, as intersections of state and private affairs increases, heighten the alert to prevent ensuing possibilities of new forms of abuse of public authority and perform constant introspective review according to the principle of proportionality. Only so, would the subsidiary character of the state have more positive meanings. What's more, we even tend to believe that the principle of subsidiary shall be equipped with the function of **values-complementing** in the constitutional level, and helps to search alternative grounds for normality on condition that the conceptions of "rights" no longer serves to embrace the morality to be protected.

D. Moral Foundation of Tax Obligation

In this section, we tend to replace the taxpayer's rights with taxpayer's obligations to the state as the justification for taxation.

1. from **a societal individual** to **an individualistic society –Community** and Individual

This is related to an individual's tendency to hide personal financial preferences in the public domain from the perspective of the public choice theory. However, this type of methodology of individualistic thinking manifested in the so-called "individualism in methodology" faces difficulties in theoretical transplant when adopted to be the fiscal system under a constitutional framework, as it involves different modes of comprehension – i.e., "from an individual standpoint" and "from a community standpoints."

The former (out of the individual perspective) makes the "individual" the subject of action and all considerations are focused on the interests of the individual. In contrast, the latter, (out of the community perspective) makes the entire community as the object of observation. The so-called "community" in this paper refers to the aggregation of multiple individuals where the interrelation between individuals is valued.

Nevertheless, since legal regulation (using tax law as the center) is targeted at the individual (the taxpayer) as the subject of regulation; therefore, **the abovementioned "individual" and "community" standpoints, when applied in jurisprudential study, might as well be regarded as "subjective" and "objective" considerations**. In other

words, they are the self-centered "**individual view**" and the "**social view**" [1] developed through the individual's surrounding environment and the individual's external behavior to assess the world of values in the mind of the individual.

2. **Authority perspective** and **Obligation perspective**

The influence of Chinese traditional thinking on "human behavior" is mainly applied through teaching and transforming. In other words, from the angle of "**subjection to authority**", as compared with growth of the rights consciousness, is actually the thinking from the angle of "**assumption of obligations**." Subsequently, how to legitimize the justification of the obligations imparted on "people in the society" by the system becomes the factor that pushes the people in a traditional Chinese society to develop the inclination to convince themselves or force themselves to internalize this value[2] and make it easier for themselves to accept obligations as the "people in the system." In short, the question of the justifiability of the power to tax is actually the question of legitimizing people's obligations in the system, and this question of legitimization has to involve the ethic foundation of taxation.

[1] Here this paper believes the difference between the two can even be explained by using the example of learning the same knowledge in different languages, In short, when learning a concept in one's native language and in a foreign language, the methodologies are not the same.

[2] This is in particular referred to the "sense of order" in Confucian ethics; perhaps, from the angle of foreign literature, it is the inclination toward "peace."

3. Moral Foundation of Tax Regulations – Justification for Tax Obligation

When the "people in the society" have to be "people in the system" at the same time, conflicts between the obligations of both are bound to occur. If the purpose of the system is to resolve problems common to the people in the society, there should be no conflicts between the "social obligations" and the "system obligations." Quite the contrary, they should correspond to each other; in other words, the ethic foundations (or values) of both should be consistent, or even equal.

However, when these obligations become substantial legal regulations and again become the concrete obligations of each individual, between individuals' obligations and the fundamental ethic there often arises the seemingly conflicting relation

4. Summary

The salt and iron meeting may be defined as a political incident in history in order to discuss the "political morality" issue. Yet from the angle of tax ethics, the dialog in ***Discourse*** reveals the dialectic on the justification of the tax obligation. Yet, we believe

the difficulty in this dialectic is related to the entanglement of moral and legal conceptions in Chinese tradition.[1]

What needs reiteration here is when confliction arises between the justifiability of tax imposition by the state and the justification of people's right to private property, constitutional limits of power to tax provide a very strong excuse for limiting the state's tax authority, meaning the limit theory provides an effective solution to eliminate the "source of violation" of taxpayers' property – negating the effect of the said act of taxation by the state.

Yet what this paper intends to clarify is, in tax regulations, right and obligation are not necessarily the two sides of the same thing. Right is but the external appearance of obligation, a way of expressing obligation. The core issue in tax jurisprudence that needs to be addressed promptly remains a question of obligation (that is, distribution of tax burden through tax imposition,) not a question of right.

Discourse enables us to jump out of the *physiognomical* thinking brought by the limit theory under the Western framework and touch upon the tax-paying obligation itself

[1] See Noboru(1967, 1968), Makoto(1978)

directly.

In addition, in a Chinese society where part of its legal system has been adopted from the West, there is also the question of whether the adoption is complete. Whether the formal contradictory relation between the power to tax and the property right should be defined as a question to be clarified with constitutional limits of taxation or a question of discrepancy between tradition and adoption, is a prerequisite question that ought to be clarified in order to keep up with the new era.

III. Choice of Values in Fiscal Constitution – In Search of Intrinsity in Tax Normality

The Constitution is our responses to the challenges of different eras.

Gee, Tax Avoidance and Legal Methodology 1993[*]

Like other disciplines, there constantly exist in jurisprudence several fundamental key questions worthy of continuous investigation. How to observe from different angles to impart in these questions meanings in line with new eras is above all fascinating. It is the same with tax jurisprudence. Aside from the fact that the concept of "taxation" was originally the result of the intersection of various disciplines and there are therefore all kinds of cut-in points, it is also closely related to the life of people because of its use as a ruling instrument in historical development. This paper is unable to cover all aspects but hopes to extend from studies on certain basic issues in jurisprudence to comprehend and interpret them from a modern view.

How a Chinese society, having been dominated by Confucian traditions for such a long period of time, has been able to interact with the transformation glorified under the

[*] Gee (1993/2006$_2$)。Original texts: "憲法者，乃面對時代之挑戰，所爲的回應。"

reform and opening up policy in recent years is significantly different from what happened in the West. But even so, on the fundamental question of "whether the state exercises market intervention" in a constitutional system, the historical experience in the West still has its referential value. This paper, setting its focus through the contrast between two written works and analyzing the constitutional meaning of the system through the debates in the "Discourse on Salt and Iron" and "The Crisis of the Tax State", reaches the conclusion that, as a system of state capitalism transforms into one with policies oriented toward market socialism, the transformation has to meet certain constitutional requirements in order to avoid or buffer unnecessary crises.

Finally, to borrow Rawls' maximin concept[1] – the justifiability of any financial reform relies on whether the reform is to the advantage of the least fortunate in the society - the constitutional predicament a socialistic market economy system will face will probably be how to prevent or ease the alerting "prediction' from the "tax state limits" through rule-of-law construction. The solidity of such construction lies in an enforceable "system of obligations of equal burdens" that will work only through precise stipulation in each and every regulation. In the realm of fiscal constitution, only when the basic taxation ethics of the ability-to-pay principle are realized in every tax regulation, will it

[1] Rawls, J., A Theory of Justice, Cambridge, 1971.

be possible to ensure constitutional equality in taxation.

Under the premise that legal construction has to come after economic development, the problems the entire Chinese society faces today are no longer how to stimulate economic growth, but how to ensure economic achievements and sustain economic activities through the construction of legal system. Most importantly, mentality-wise, we have to stay calm to figure out a way to harmonize the contradictions between Chinese and Western cultures.

PART II *LIMITATIONS ON TAXATION IN CONSTITUTION*

—focusing on the relation between tax obligation and tax morality

[I]f one wishes to settle with this devil, one must not take to flight before him as so many like to do nowadays. First of all, one has to see the devil's ways to the end in order to realize his power and his limitations.

Max Weber, Science as a Vocation, 1919*

Indeed, tax obligations reflexive of taxpayer's values which varies with time and space, however, through interactions with alien tax systems might be adopted for reasons of "modernization". Despite the fact that whether such application is either necessary or its grounds being justified or not, the possibility of communication between the two sets of values is to be reassured as a prerequisite.

II. Mission of Modern Constitutional State—construction in public finance

* The first part of the excerpt：“I personally by my very work answer in the affirmative, and I also do so from precisely the standpoint that hates intellectualism as the worst devil, as youth does today, or usually only fancies it does. In that case the word holds for these youths: 'Mind you, the devil is old; grow old to understand him.' This does not mean age in the sense of the birth certificate. It means that (…)”

Tax regulations are targeted at economic affairs, yet the purpose is to sustain the possibility of economic life. The former expresses the necessity of independence of tax law, whereas the latter explains the special considerations in tax legislation that are different from other laws. [1]However, in common recognition, a rather noticeable degree of detachment is often found between the purpose and the target of tax regulations[2]. Such detachment may be attributed to neglect in tax jurisprudence in constitutional jurisprudence[3], or the contradiction between the regulations (things that should be done) and existing social laws (the phenomena)[4]. How to resolve this contradiction – a haunting phantom hiding amidst the myriad of tax clauses and related explanatory paragraphs, interfering the judgment of judicial and executive department, and obscuring the focus of concern of legislative and executive departments – has become an urgent mission of fiscal constitutions today.

I. Tax State as a choice of value in Constitution

In order to understand "limitation of taxation", the concept of "tax state" re-constructed by the Austrian economist **Schumpeter** and thus from which limitation of taxation is

[1] See [Gee] (2005, 2008) for Chinese reference for discussion on independence of tax law.
[2] Here the standpoint of this paper is with the corresponding relation between the purpose and the target of regulations.
[3] What Isensee referred to as "financial blindness" – Gee (1997) for details.
[4] Matsuzawa called it "kairi"(乖離) – see [Matsuzawa](1994), pp.23-24.

originated should be examined first.

A. Inferences from theories of tax state

The concept of "Tax State" (*Steuerstaat*) can be originated from the thinking of public finance (*Finanzwissenschaft*)[1], maintaining that the revenue of a state should rely upon *tax*es[2] in principle. Once tax state been decided as the fiscal system in the state, the mechanism of which should not be overlooked. That is to say, when the state exercises its competence of levying taxes, it should meanwhile take into account the nature and limitations of the tax state; otherwise the system of "tax state" would fail to maintain itself and crumbles in the end.

B. The constitutional significance of the tax state theory

This limitation of tax state also implies that human rights are protected by the Constitution. That is, this limitation holds that tax systems coexists with private economy and the abuse of tax power not alone results in the infringement of the rights

[1] Here refers to the debate appeared in the text of ***Crisis***. More details, see Part I of this paper.
[2] The terminology "tax" here refers to its meaning in modern sense, which embodies its legitimacy with the concession of the people [the estate]. Schumpeter (1918/1996), p.339-340, for the ancient functions of taxes, please see note 1 at p.337.

of people (such as right to life, right to work and right over property), but the willingness of people realizing themselves by engaging into economic activities could also be constrained, and thus possibly endangers the system of private property.

C. Between tax power and protection of property right—limitations on state's power to tax

The relationship between tax power and the protection of property right has long been the core issue in the field of constitutional law and tax law. Constitutional interpretations and judicial reviews in this respect tend to focus on—how to restrain taxation through constitutional interpretations in order to prevent people's basic rights from being infringed upon—namely, the constitutional limitations on the exertion of taxation (*Verfassungsrechtliche Grenzen der Besteuerung*) towards people's basic rights (esp. property rights).

D. The concept of "**limitation**" and the protection of human rights

It is true that this limitation serves to passively mitigate the intervention of state power to some extent, *i.e.* the formal sense of rule of law (*Prinzipien formaler*

Rechtsstaatlichkeit); but as to actively protect individual basic rights of taxpayers, is what this limitations lack of, *i.e.* the substantial sense of rule of law (*Prinzipien materialer Rechtsstaatlichkeit*). Therefore, the scope of the exertion of tax power, appears to be observed both in the perspective of power being exercised as well as that of being received. Simply put, the protection of taxpayer could be understood from the tax state as well as from the taxpayers.

II. The **societal** character of **private property**

The following discussion starts from the understanding from the perspective of the power being exercised, namely, the interpretation of tax state. What is to be emphasized would be the fact that how property rights are being affected by the exertion of tax power and such effects are unexpectedly unpleasant, in terms of modern values or freedom and equality in taxation.

A. Historical sketches of the development of tax power

An observation especially on the sociological feature of fiscal history is to be

emphasized.[1] We tend to use the sociological factors of tax power, which may prophesize a limitation of taxation in every social condition, to emphasize that these sociological factors could never be overlooked in terms of protection of taxpayer's *rights*.

1. the relations between taxation and private property

In a modern state, taxation and private property are closely connected. It is rather conceivable to even say that tax system is a means of the protection of private property.[2] In other words, in a constitution which recognizes the system of private property should be a constitution which its revenue system principally relies on taxes, in order to go with the evolving of the times.

2. taxation is the symbol of the power of the modern state

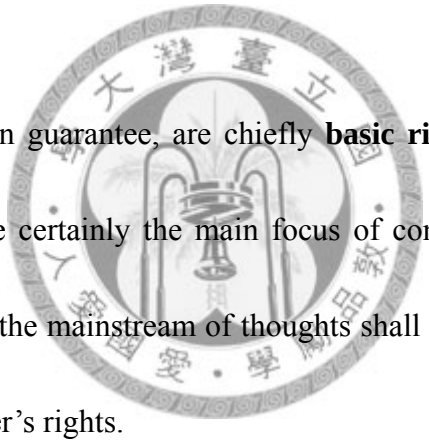
From the standpoint of the ruling power, the functioning of the tax state system, *i.e*.

[1] Such perspective is inspired from a German concept of *Finanzsogiologie* (fiscal sociology) proposed by R. Goldscheid in 1917 yet promoted by his opponent Schumpeter during the time in 1918. The so-called fiscal sociology had been quite on the fade for decades after the promotion and was introduced to other countries, especially in Japan, see *generally* Sasaki, in Backhaus(2005).
The definition or the content of *Finanzsoziologie* proper, however, has never been precise, opposing opinions appeared, See E.R.A. Seligman(1926).
Recently, discussions seems to be in accumulation again and in a worldwide dimension. See M. McLure(2006), N. Jinno(2002), R.Wagner(2008), etc.

[2] A detailed argumentation is provided elsewhere in [Lan] (2007), similar in Isensee (1977).

various state financial actions derived from taxation power, the power to tax thus not only becomes the symbol of the state's power, but as well, the impositions based on such power becomes the main avenue of the state to intervene in people's life and becomes the principal forming of the relations with people. At the same time, however, taxation power also becomes the most influential way which state may affect people.

3. reflections on the protection of basic rights centered on tax payers



Since what constitution can guarantee, are chiefly **basic rights**, human beings as the subjects of basic rights are certainly the main focus of constitution law. Thus, in the field of fiscal constitution, the mainstream of thoughts shall not overflow the categories of the protection of taxpayer's rights.

However, in modern sense of constitution, in order to achieve this idea of protection of human rights, tax power is easily to be conceived as an ***infringement*** of people's basic rights. In other words, how to restrain the unleashed wild horse of tax power through the values of constitution in order to ensure people of their free exercising of their basic rights has long been the fundamental question of fiscal constitution in the modern state. But such kind of restraining produces a certain degree of ***detachment*** between normality

and reality. The explanation of such is to be elaborated in the following two points.

- *First, **conflicts** between state's taxation power and people's property rights*

  - The genesis of "***infringement***"

The fact that modern state imposes *taxes* on people is actually a prerequisite of the freedom of people's property, *i.e.* the foundations of private property system. Without tax revenues supporting state's engagement in necessary public services, people lose their basis for subsistence. But considering the ways of how taxation are being executed (ex. tax administration), taxpayers, finding that certain part of their incomes being taken beyond their reach and that the reason is due to taxation, are expected to tend to ascribe the blame to taxation. This **mentality** of ascription becomes commonplace especially in the modern society which money becomes the major form of transaction, meaning that once people could no longer satisfy themselves through *consumption with their property* (spending what they have earned), they think of taxation as **infringement** of their freedom of property so easily.

  - The ***confrontation*** between tax power and property rights

What's more, the relative increase of tax payers' disposable property due to the fulfillment of certain tax exemptions, tax payers also tend to think of such increase as a ***concession*** of tax power to property rights. Such concessions, strengthening people's thinking of regarding the decrease of their disposable property, contributes to the generation of a contrasting or confronting mentality. And this mentality gradually pushes the power of taxation in the place against property rights. The presence of such seemingly contrasting phenomenon is in turn in need of analysis in the discussions of the limitations of taxation.

- *Second, the gap in reasoning between the will of the ruling authorities and the legitimacy of taxation*

The development of the concept of "human rights" is actually a result of oppression—an **ideology** which came into shape through countless times of rebellions and overthrows against ruler's policies. In other words, the generation of the concept of right is simply *a reaction from the ruled towards the rulers* and oftentimes these reactions results from unreasonable tax burdens imposed by the rulers.[1]

[1] For example, it is said that in the last 30 years of 18th century in France, the volume of the collection of taxes did not raise too high, however, tax payers weakened and consequently results in a *fiscal reaction*

However, if we go back to the reasoning that **constitutional legitimacy of people's tax burden** derives from the **legitimacy of taxes** (ex. No taxation without representation), what taxpayers are actually against no longer seem appropriate to be entitled "oppression". In other words, the constitutional legitimacy of putting limitations on state's tax power in order to ensure the protection of human rights would lose its ground of reasoning due to the **reactionary character** *sui generis* of "rights". Due to this, how to connect tax power, representing the will of the state, with the legitimacy of tax burden becomes a gap of reasoning needed to be bridged.

B. The reflection of taking "property rights" as a protection mechanism

1. Rethinking the doctrine of *Halbteilungsgrundsatz*[1]

By taking a look at the development of tax law from the early 20th century of Germany, it would not be an overstatement at all to call it a period of time of how tax legislation come to adopt the concept of "social state"(*Sozialstaat*).

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which arouses the hatred towards the raise the taxes. See Labrousse, *La crise de l'économie française*, xliv., cited from Hoffman, P.T. & Norberg, K.(ed.) Fiscal Crises, Liberty, and Representative Government 1450-1789, Leland Standford Junior University, 1994. [Hoffman & Norberg](2008), pp. 289-290.

[1] A recent work on the *Halbteilungsgrundsatz*, Weber-Grellet(2001), S. 65-68(65f). For Japanese literature in recent discussion, [Nakajima et al](1996), [Muragami](2002), [Okutani](2007).

Combining this social thought with the debate of Article 14II[1] of the German Constitution (*Grundgesetz, i.e., GG.*), the limitation on individual's property could be seen as a mixture of elements including both the legitimacy of property and the legitimacy of social justice.

2. Intuitive feelings of property being taken away

It is not uncommon for taxpayers to hold the belief that our property, *i.e.* the freedom to spend, is more or less shrank by taxation and to tend to think of taxation as evil on first thought. And it is true that restraining government's power to tax, as was stressed painstakingly in heaps of continental literature, could only serve temporal use for the purpose of protecting people's property right to some extent; but for a *permanent* resolution, however discouraging it may appear, is to recall the actual function of taxes—which is mainly to finance the common need of people who might be unable or unwilling to purchase through the market. Thus, the sharing of people's earnings from the private economy by taxation is *not* an infringement of the property *but* a **social obligation** which directly links to the disposal of one's property.

[1] Art. 14 II GG reads: „Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen." To simply translate: "Property right bears obligations, the use of which shall at the same time in accordance to the benefit of everyone."

Inevitably, we suffer the pain of *loss* of property when being taxed even though we are too reluctant to admit the inappropriateness of using the *infringement* of property, taking government failures aside. However, logically speaking, we cannot deny, from the deduction above, the necessity of directing our undivided attention from the question of *to what degree should we restrain the hands of state from extending into the private sphere a little deeper*, to the question of *what actually are being taxed out of our property for*, that is, *whether our taxes are being used for the purpose of our common needs or not*.

III. Constitutional limits of **legitimacy of taxes**

The disposition of this limitation is not merely a question of constitution law or jurisprudence. Rather, in addition to being the fundamental issues underlying fiscal constitution, discussions attract attentions from other academic fields such as economics, public finance, and sociology.[1] To put it differently, to actually understand the core of the issue by means of "interdisciplinary approach", what is more preferable would be to ask the essence of the question, that is—from the **historical context** (such as the

[1] Such as Political Economy, Finanzsoziologie, Economic Sociology, etc.

development of relationship between tax power and people) and from a more in-depth proposition of "**choice of value**" (such as whether the state to intervene the private sphere)—so as to re-examine the question in its contemporary significance.

The so-called "contemporary significance" in this context could be questions such as:

- What is the legitimacy of this limitation?
- Does such legitimacy or justification still exist today?
- If it does, can this limitation still function as before in the field of judicial review as to taxation?
- Does this limitation theory apply to Chinese society (the possibility of adaptation to the theory)?

etc., all leaves much to be desired.

A. Recognition of social-functioned taxation

In reply to the societal character of private property, certain taxation caters to a socially-formative function should be recognized. Such taxation should definitely in line

with the societal disposition, no matter the forms or limits on application to its functioning, be it A. Schäffle, A. Wagner, C. Frantz, or K. Mann.[1]

B. Shift of **moral grounds** in legitimacy of taxation

The question of how property rights in the position "***against***" state' s tax power nowadays could also be referred to as a continuation of the historical question—how the legitimacy of taxation is established by means of "Consent of people" . Oppositely, the question of the constitutional limitation of tax power at present will still have to face the long old debate of *whether the state to intervene the society* but only in modern conceptions.

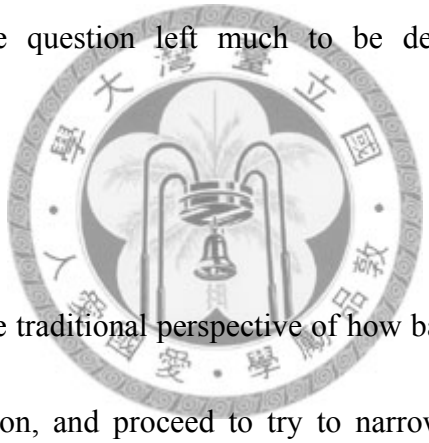
The fact that the introduction of the concept of **welfare state** to the Constitution, on the one hand, *admits* the state's **duty of care** for the people and at the same time implies *permission* to the extension of state's power. On the other hand, however, the concept of tax state has also been recognized in the Constitution, which inevitably leads to the corollary questions of how the state acquire its finance in a most harmless way to

[1] Incidentally, it is Lord Kames(1774) who envisaged the need for a non-fiscal function of taxation, z.v. Mann(1949), p.119.
Another point worth mentioning is that Mann quoted from Adams Smith that , taxation are always employed " as an instrument of revenue and never of monopoly." In: Wealth of Nations, Book V, Ch.2, Part 2, Article 4, cited from Mann(1949), p.119, note 4, which serves to be the very opposite opinion to what Sang Hung-Yang had proposed in ***Discourse***, making the monopoly of salt and iron businesses as an indirect tax revenue.

conduct activities which realizes the protection of **basic rights**.

C. The application to taxpayer's basic rights

Without a doubt, taxpayers are humans of which their basic human rights should be protected by the Constitution. On the other hand, however, the question that what kinds of human rights should be taken care of with specific concern in terms of taxpayers' human rights remains the question left much to be desired in the field of the Constitution.

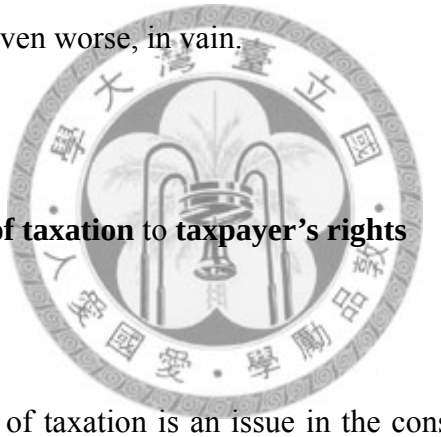


Further, if we start from the traditional perspective of how basic human rights are being protected by the constitution, and proceed to try to narrow down or elaborate these protections in terms of taxpayers' human rights, then it would be **the task of how *equality* and *freedom* be expressed in the form of taxpayer's rights**. And since that equality and freedom of taxpayers are best shown in the disposition of taxpayer's **rights over property**, the infringement or changes to such dispositions might result in unexpected loopholes in terms of constitutionality. The following discussion especially focuses on the constitutional crisis of the typical protection of taxpayer's property rights.

PART III *CONSTITUTIONALITY OF LEGITIMACY OF TAXATION*

— Laying new normative foundations for the protection of taxpayer's rights

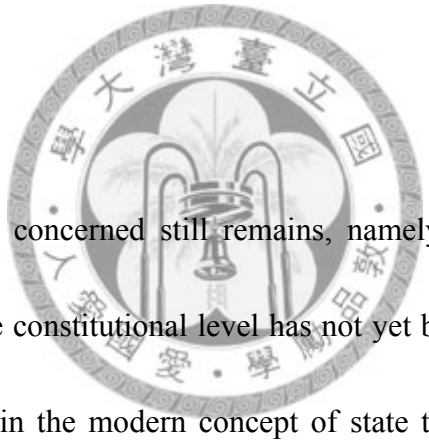
Taxation is often regarded as an infringement of private property which attracts attention to the protection of property rights in order to allow only reasonable, namely, constitutional groundings. However, if the protection is not carried out within the understanding of taxpayers as the *subjects* to be protected, such protection is very likely to be either ineffective or, even worse, in vain.



I. Attaching **limitation of taxation** to **taxpayer's rights**

The issue of the limitation of taxation is an issue in the constitutional level, no matter how it is related with the economic affairs. To be brief, the latter(economic wise) deals with the **collection** of revenue from taxpayers and the **operation** of government functions, whereas the former(constitutional wise) stresses on the protection of taxpayer's rights both in the phases of collection and of operation. In even simpler words, the former takes money away from people, the latter keeps money alone with people. The focus of the paper is the latter.

Indeed, by referring to the history of taxation, the power to tax had been playing an essential part in the creation and thus the formation of the state. To claim that the concept of **tax**es enriches the content of state is by no means an overstatement. However, as *state* gradually overwhelms *tax*, the priority of two changed. In **Schumpeter**'s words, the concept of taxation is in turn broadened by the state[1]. In terms of public affairs, for example, taxation has been regarded as means of promotion of social welfare[2], economic development[3], and other policies, such as environmental protection[4] or the forming of social values[5].



Nevertheless, the question concerned still remains, namely, the connection with the limitation of taxation at the constitutional level has not yet been disclosed. As stated in the preceding paragraphs, in the modern concept of state there are parts of state that originally do not linked to taxation but were later incorporated into taxation in terms of the "alienation" of the state.[6] Such alienated parts, indicating the shift of subjectivity from *tax* to *state*, could be related to the substance of the rights of individual tax payers.

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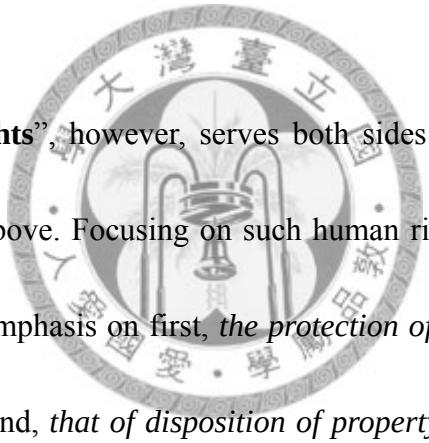
[1] ***Crisis***(1918)
[2] Such as: redistribution of wealth.
[3] Such as: tax exemptions in specific industries.
[4] *e.g.* gasoline taxes.
[5] See in general, Mann, F.K. (1943) The Sociology of Taxation, *The Review of Politics* 5: 225-235. For detailed articulation, see Mann(1978), Steuerpolitische Ideale: vergleichende Studien zur Geschichte d. ökonom. u. polit. Ideen u. ihres Wirkens in d. öffentl. Meinung 1600 – 1935, Darmstadt.
[6] Borrowed from Marx's concept of *Entfremdung*, here only intends to express the fact that states has ridden itself from the subordinate character and assumed a dominant role. For a further explanation on the concept of Marx's *Entrfremdung* and its influences on economic disciplines, see [Huang SS] (2002).

A. Two perspectives of taxpayer's human rights: **basic rights** & **civil rights**

The concept of "**human rights**" is a broad concept which its meaning could be narrowed down for concrete application. Generally speaking, human rights could be referred to either as **basic rights**, which protects the necessary needs of being a human, or as **civil rights**, which ensures certain **values**, *e.g.* freedom, that can not be realized without the exercise of certain rights such as property rights.

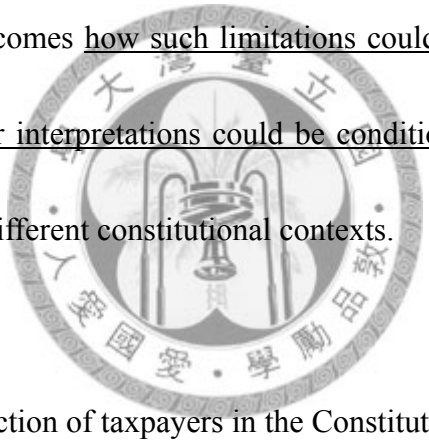


The term "**taxpayer's rights**", however, serves both sides of the meaning of human rights categorized in the above. Focusing on such human rights of **taxpayers**, the two perspectives, in turn, lay emphasis on first, *the protection of freedom of engagement in economic activity* and second, *that of disposition of property rights free from arbitrary restriction of the state*. That is to say, the imposition of state actions on people (here referring to **taxpayers**) is only appropriate when it is justified constitutional, namely being restrained from the willfulness of legislation.

In reality, however, the constitutionality of state action is not just something **created** groundlessly, but **a mere reflection** of taxpayer's reactions which leads to the indispensability of a limitation of state's power (here meaning a limitation of taxation).

B. The limitations of taxation **in the level of Constitution**

Under modern state, tax revenue has been playing a principal role in the funding of public household. Taxation, however, as a means of financing the state is only dependable within its limitations, the negligence of which would lead to inefficiency in collection of taxes and eventually to a failure of functioning the whole system. Therefore, the question becomes how such limitations could be recognized or defined, and how such definition or interpretations could be conditioned according to different circumstances, such as in different constitutional contexts.



II. **Approaches** for protection of taxpayers in the Constitution

A. Typical legal approach—protection of **property rights**

To deal with the inappropriateness of government actions, a judicial review on the constitutionality of such actions is rather typical in terms of legal approach. The choosing of **reviewing standards** and adjustments in accordance with individual cases are highlighted, for different decisions might occur due to disparities in the standards of

review, thus results in discriminating treatment of protection of rights. Such manipulation and possibly its cost-benefit analysis, however, will not be elaborated in the following discussion but only serves as an indicator showing a need for a more desirable mechanism for protection of *human rights*.

The following discussion takes a critical standpoint on the application of the principle of *rule-of-law* (or *Rechtsstaat*)[1] as a standard of constitutionality focusing possibly in the field of taxation law proper.

B. Specifications in different constitutional contexts

The application of constitutional constraints on taxation has been widely discussed in the field of tax jurisprudence. These constraints come in various conceptualizations with respective constitutional contexts. The essence of such constraints, however, shares common features with which certain patterns of protection of rights could be generalized. Firstly, various texts of constitutions will be analyzed. Secondly, in turn, focuses on the attempt of generalization.

[1] The concept of *rule-of-law* is different from that of *Rechtsstaat*, both in historical background and later developments. However, what is to be emphasized here focuses mainly on the *legal* character of protecting human rights. Thereby, the concept of "rule of law" is used as a general term which also refers to the concept of "Rechtsstaat".

1. German Constitution (GG)[1]

In the case of German Constitution (Basic Law, *Grundgesetze*, GG), the relationship between tax power and the protection of property right has long been the core issue in the field of fiscal constitution (*Finanzverfassung*). Constitutional interpretations and judicial reviews in the field tend to focus on—how to restrain taxation through **specified standards of constitutional interpretations** in order to prevent people's **basic rights** (*Grundrechte*) from being infringed upon—namely, the constitutional limitations on the exertion of taxation (*Verfassungsrechtliche Grenzen der Besteuerung*) towards people's basic rights(esp. property rights).[2]

As stated in Art 14 II of German's basic law (*Grundgesetze*)[3], claiming that property right bears obligations, the use of which shall at the same time in accordance to the benefit of everyone, each person exercises his/her property rights (Art 14 I of GG) along with a certain amount of social binding (*sozialbindung*) being imposed upon.

[1] For Full version of translation:
(http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf)
[2] Tipke, Steuerrechtsordung I, Aufl.2, 2000, §8.
[3] "Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen."

Since there is no such a specific article in the German Constitution claiming the idea of *no taxation without representation*, the source of law could be found in a general restriction on basic rights in Art 19 of GG.[1]

2. United States Constitution (UC)

Quite a different image of private property rights would be the case of U.S. Constitution. In spite of the case-law basis character, its attitude towards property rights and obligation to pay taxes could still be portrayed.

By quoting the Taxing and Spending Clause (Article 1, Section 8, Clause 1)[2], it is not difficult to have the image that paying taxes is for the fulfillment of the common good, such as common defense and general welfare.

Nevertheless, by taking a look at the Fourteenth Amendment[3], meaning such sacred character of private property shall not be touched upon unless through a due process of

[1] "Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears."

[2] "The Congress shall have the power…...[T]o lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.……"

[3] "……[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

law.

3. Japanese Constitution (NK)

The Constitution of Japan (*Nihongokukenpo*, 日本国憲法, NK), also recognized the rule-of-law principle, stipulated in Article 84. At the same time, however, in Article 30 of the same Constitution prescribes the so-called "rule-of-law in taxation" (*Sozeihouritusyugi*,租税法律主義), asserting tax burden as people's fundamental obligation(*Kihonngimu,*基本義務). In addition, Article 29 I and II of the Constitution characterize property rights in the way similar to Art. 14 I and II of the German Constitution.

4. The case of Taiwan (RC)

It is stated in Article 19 of the **Constitution of Republic of China**, maintaining that, "*The people shall have the duty of paying taxes in accordance with law.*" In addition, Article 23 reads, "*All the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to*

advance public welfare."

Likewise, the effects or validity of the two articles serves a seemingly overlapping function. That is, by combining the two articles, taxation on private earnings could be deemed legitimate on condition that the used of taxes is for the advancement of public welfare.

C. A **standardized** mechanism of traditional approach

Almost the same question could be noticed from the same pattern of interpretation—a seemingly coherent understanding of both the legitimacy of state's power to tax as well as that of taxpayer's obligation to burden. Such understanding provides a solid basis for the application of rule-of-law principle elaborated in the following but at the same time contributes to the negligence of the actual justification for tax obligation. Reasons are provided in the following discussion.

1. **Common features** in protection mechanism

In terms of the mechanism for the protection of taxpayer's human rights, it could be

observed that the principle of *rule of law* plays a major role. The application of the principle to the field of taxation is similar.

In other words, taxation in the form of law, shall always pay attention to whether the concerned tax regulations is under full authorization of legislation and that the exercise of regulations shall not reach beyond the limits being authorized.

2. The **passive** characteristic of negation

The mechanism of judicial review focuses on the controlling over **arbitrariness** of discrimination of state actions. By inference, the competence of such judicial effects is only to the extent that such arbitrary discrimination from the state be eliminated or no longer be effective to the people, thus serving the purpose of creating a fairer and more equitable legal environment.

Such mechanism, however, does not eliminate a possibility of the coexistence of both a **non-discriminatory state action** and **an unfair and inequitable legal environment**. For example, the fact that no arbitrarily discriminating taxations are imposed on a taxpayer not being heavily taxed does not necessarily follow the environment is fairly

equitable for tax payers. In other words, the application of the traditional rule-of-law principle can only at best *passively* be keeping taxpayers away from arbitrary government actions but has no *positive* intentions of providing **direct** protection towards tax subjects.

3. Brief Summary: a separate requirement of constitutionality

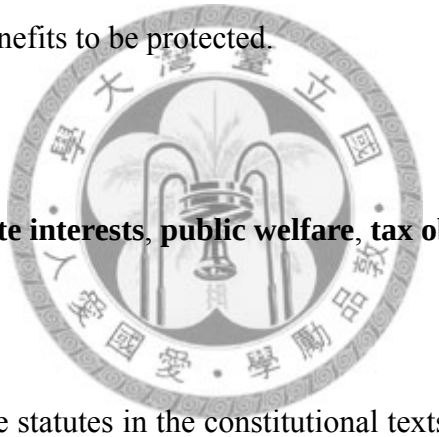
Inferred from the above, we hold that, in terms of typical legal approaches only the **choosing** of the standards of reviews and adjustments in accordance with individual cases are highlighted, for different decisions might occur due to disparities in standards of reviews, thus results in discriminating treatment of protection of rights. Such manipulation and possibly its cost-benefit analysis, as previously mentioned, will not be elaborated in the following discussion but only serves to indicate the need for a better protecting mechanism.

III. Generalization—an attempt for a normative account

A. A Pursuit of **Equity over Efficiency**

Aside from bettering the protecting mechanism, more importantly is the question of the reassurance of the things in need of protection. In fact, the answer to the former mainly depends on the latter.

In the following paragraph, we tend to **directly** find *what is to be protected* rather than **indirectly** *how to improve* the effectiveness of protecting mechanism. Based on the most frequent key words in the articles, we tend to make extensions and propose a generalization of the tax benefits to be protected.



B. Relations of **private interests**, **public welfare**, **tax obligation**

Taking into account relative statutes in the constitutional texts examined in the previous section, three major elements (or key words) which play crucial parts in the discretion of tax policy could be noticed. They are **private property**, **public welfare**, and **tax obligation**, and their interactions to be discussed respectively.

1. Recognition of private property, public welfare, and tax obligation

i. Private property—object being disciplined

The first and the most important element of all, is the **object** being disciplined, namely, *private property*. By referring to the articles in various Constitutions listed above, the enumeration thus the protection of property rights could be found in almost every version of the examined texts. What is to be emphasized here is the inference that such property right, being symbolic of taxpayer's rights is the very essence of taxpayer's **ability to pay**, which relates taxpayers to the whole tax systems.

ii. Tax obligation—social cohesion—**distribution**

The second element is the concept of *social cohesion*, which justifies the essential meaning of modern taxation.[1] Due to such feature, taxpayers ought to contribute what they have earned from market. What is to be emphasized is the function of **distribution** which taxation has characterized the social cohesion involving every taxpayer into the social network.

iii. Public welfare—social binding—**redistribution**

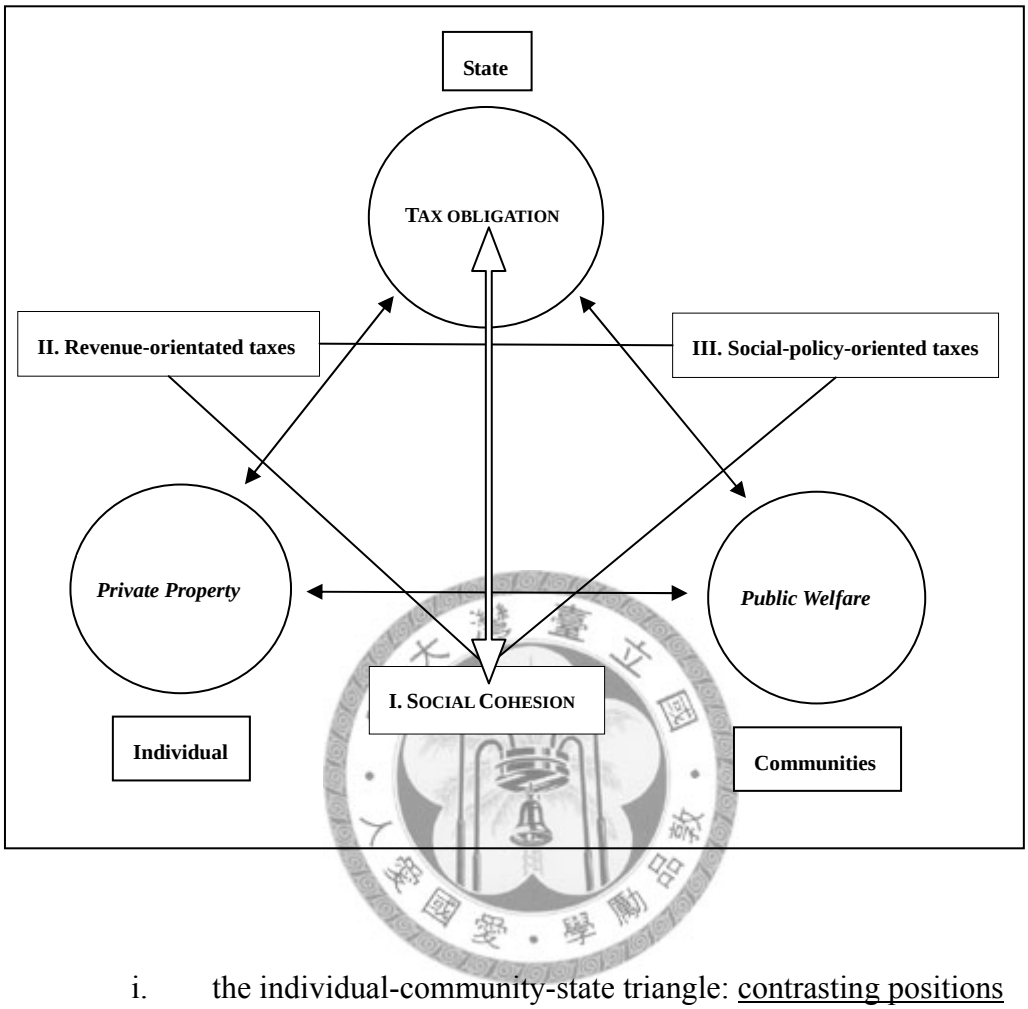
[1] Wicksell(1896), in : R. Musgrave and A. Peacock (ed.), Classics in the Theory of Public Finance, St. Martin, 1994, p.98.

In addition to the distribution function, taxation serves an additional function of **social formation** in order to promote public welfare such as balancing the inequalities between the rich and poor. The focus here is the broader understanding or recognition of "**common good**" to the extent of public welfare in the constitution level, inclusive of a *re-arrangement* of the interrelationships among taxpayer's property by means of taxation. Such taxation in the form of tax obligation can be justified as "**social binding**".

2. Relations of the three elements

In terms of taxation, the three elements are internally connected in **values**. The picture below tends to show different versions of such connection.

Illustration 3 Relations among Tax Obligation, Private Property and Public Welfare



i. the individual-community-state triangle: contrasting positions

One of the ways of connecting the three elements is the individual-community-state triangle shown in three connected circles.

a. Individual—community

Individual indicating private interests of property rights stands in the opposite direction

of **Community** showing public welfare is actually a group of private interests comprised of individual concern, suggesting taking individual concern solely would not lead to a correct understanding of the legitimacy of tax obligation, namely, *social cohesion*.

b. Individual－State

By first taking a closer look at the relation between **individual** and **state**, the collecting of taxes from private property should only be appropriated to the maintenance of the market. That is to say, the legitimacy of taxation does not exist in the social policy which its costs are financed by tax revenue in this fashion. Thus, the portrait of taxation remains its revenue-orientated character which in some degree resembles the idea of the neutrality of taxation.[1]

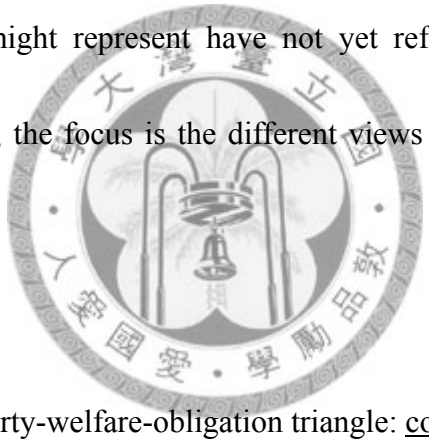
c. Community－State

As opposed to the neutral standpoint in the previous individual-state relationship, taxation in the relations between **community** and **state** has a broader meaning, inclusive

[1] Also known as the leave-them-as-you-find-them-rule-of-taxation. See Gee(1997)

of the raising of state revenue. Briefly speaking, taxation has become a means of realization of state's will. To be more explicit, the effect of taxation has been regarded as a useful tool for the state to induce people into engaging expected cooperation. Such kind of taxation is usually recognized as the policy-orientated taxation.[1]

In the individual-community-state triangle, the three sets of concepts are three different pairs of contrasting positions which indicates three separate standpoints. Notice that the interests these positions might represent have not yet reflected in the level of this discussion. In this triangle, the focus is the different views might be hold due to their different standpoints



ii. the property-welfare-obligation triangle: <u>confrontation of interests</u>

Another illustration of the three elements is to be shown in the property-welfare-obligation triangle which is characterized by the three pairs of confrontation of interests in the three sets of contrasting positions.

a. tax obligation and private property

[1] A wealth of discussions could be found in German literature.

According to the above-mentioned state-individual relationship, taxes are being imposed upon only for the sake of individuals. The function of the state is just to ensure the ***realization*** of individuality of people, meaning the disposition of one's property free from being restricted. Thus taxation, being characterized above, is no less than a mechanism for the protection of the realization of taxpayer's rights, especially property rights.

However, in terms of the quantity of one's assets, it is obvious that the effect of taxation leads to a decrease in one's property, creating an image of taxation that eliminates one's property and thus shrinks one's competence of exerting his/her property rights.

b. Tax obligation and Public welfare

If the purpose of taxation is to the fulfillment of public welfare, then public welfare could be reached or promoted by taxation. In this sense, tax obligation and public welfare could be taken as two different definitions of one same thing. That is to say, taxes are paid for the realization of public welfare. Like the explanation made in the previous triangle, if the purpose of taxation is to be limited only to the finance of basic

need for a community, such as, police, national defense, and public sanitary, etc., the concept of public welfare is thus defined in such a tax system. It could also be inferred that, once the aim of using tax revenues reaches beyond the basic need and tends to play a more active part such as the redistribution of wealth, the conception of public welfare is thus to be enlarged.

In other words, if the concept of public welfare is to be reconstructed or represented with time and space and values, and as long as tax obligation is still being defined as a **price (**or **reward)** for the common good, then tax obligation could still be justified in the name of public welfare.

In this section, what is to be emphasized is the fact that **it is taxation which decides the content of public welfare rather than vice versa**. So being said, however, we don't deny the existing fact that oftentimes is public welfare that decides the amount of tax burden to be shouldered. The sequence of deduction from taxation to public welfare is recognized here.

c. private property and public welfare

In the property-welfare-obligation triangle, what is to be stressed is the **confrontation** of interests which different positions represent.

C. Setting priorities to the three elements: <u>prioritization of protection</u>

1. prioritization: private property > tax obligation > public welfare

To reiterate, the modern significance of Constitution is characterized by the protection of human rights. Such human rights being a form of taxpayer's rights, the protection of such rights could thus be easily recognized as a form of protection of taxpayer's rights. However, the real question is what interests are to be protected in order to protect taxpayer's human rights. The answer to the questions, as derived from the preceding paragraphs, is the categorization of the three interests listed above: private property, tax obligation, and public welfare.

i. Private property and tax obligation: distribution on private property

If we take the social cohesion and private property together, it would be easier to see where tax obligation lies under therein. In detail, tax obligation can assume its

legitimacy under the name of social cohesion without which the realization of private property can never be possible. Here the effect of taxation is a distribution of what taxpayers have earned from the market. Considering the purpose of the taxation is a reflection of an equal possibility of every taxpayer to enjoy a certain guaranteed degree of freedom to act in the market, the cost to maintain such mechanism, *i.e.*, tax burden, should also be *equally* imposed upon each taxpayer, being agents in the market.

Notice that the distributive function directs to the original and the most fundamental meaning of taxation. Thus, whether a tax deprived of such function can still be called taxation is under dispute.[1] Further, the interest which taxation is bound to protect is the freedom of taxpayer and a corollary inference of it would be: once such freedom is no longer worth protecting, taxation loses its legitimacy.

ii. Private property and public welfare: redistribution on private property

Aside from the original purpose of collecting revenue, taxation grows to acquire other purposes concerning public policy, one of the best example would be the policy-oriented taxation. By putting private property and public welfare together,

[1] Further discussion, Gee(2005a)

various policy-functioned taxes are applied in the name of elevating public welfare.

iii. Tax obligation and public welfare: distribution vs. redistribution

The two interests above could be seen as government's choice of policy, namely, between tax revenue being collected and policy being done. That is to say, in order to achieve certain policies which might be against part of taxpayers' interests, to what degree of sacrifice of revenue is negotiable is the very question. Therefore, in terms of government policy, it is a choice between distribution and redistribution.

2. Linkage between two limitations of tax payer's rights: the limitation of public welfare and of social cohesion

There are two justifications for taxation on private property: social cohesion and public welfare, both provides equally important but different limitations on taxpayer's property rights.

3. *Obiter Dictum*: viewing **limited function of protection** as prerequisite

Putting together the **confrontation of interests** with the **scarcity of resource**, a set of rules for **prioritization** is needed. That is to say, even if the confronting interests doesn't result in a trading-off effect of claiming protection for each own, the scarcity of resources, which amounts to the protection, also sets limits to the realization of the interests concerned. Thus, an ordering of values shall be enforced to make the best use of protection.

IV. Reflections on the limitations

To sum up, Part I could be divided into three sections: first, the definition of **taxpayer's rights**, second, the **mechanism** for protection of such rights, and third, an **abstract model** of the linkage between the two.

Additionally, what is also worth mentioning is that the relationship among the above-mentioned three tax benefits does not necessarily imply a **prioritization**, or an **ordering** of them which is developed in the subsequent section. That is to say, alternative prioritization or ordering may be possible with another set of interpretation.

In addition, some reflections on limitations of taxation according to the argumentations

above could be furthered.

1. Limitations on tax payers

First of all, we argue that taxpayer's rights should be considered in two dimensions. One concerns with the basic subsistence of every human, that is, **basic human rights**, while the other, freedom of disposition of private property, like **civil rights** enumerated in the Constitution, is based on the subsistence guaranteed. Therefore, the protection of taxpayer's rights shall thus be designed in accordance with the two dimensions of such right.

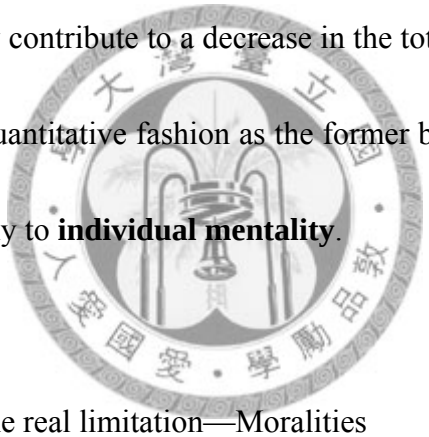
2. Limitations of tax state institution

From the viewpoint of tax state, however, in order to maintain its functioning and carry out its policy, both deemed as public interests (common good), certain amount of "takings" from people is considered necessary and legitimate. Nevertheless, both the limitations of the people and those of the state shall in the end meet.

3. the real limitation of ultimatum—individual mentality

Moreover, the limitations above which is either neglected by the government or remains unknown to the public and should be paid attention to. Furthermore, such limitations could be interpreted differently as in the view of the one who taxes, namely, **tax administration**, and in the view of the ones being taxed, namely, **taxpayers**.

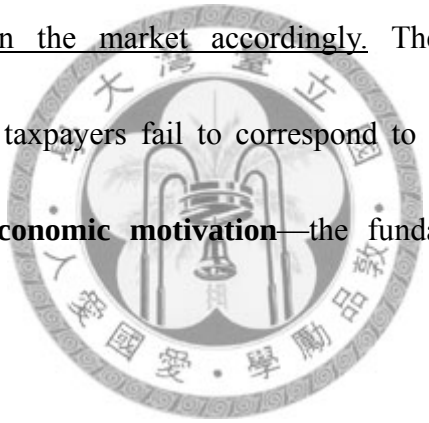
By example of **constraints** to property rights, the former asking for sharing of earnings from the people which may contribute to a decrease in the total assets, whereas the latter produces its effect not in quantitative fashion as the former but a degree of constraint of freedom which subjects only to **individual mentality**.



4. The actualization of the real limitation—Moralities

By inference, the infringement of property rights, both meaning a downsizing of taxpayer's disposable assets and meanwhile strangling his/her ability-to-pay with the left money after taxation. The latter, usually being neglected both by the tax administration as well as taxpayers themselves, however, points directly to the constitutionality of taxation and should be taken noticed of.

Therefore, we propose that protection of taxpayer's rights lies in the protection of such taxpayer's **rights over property**. Further, the constitutionality of constraints on their disposition of property could not be reached without consideration of the **moralities** underlying each society applied. That is, the examination of such constitutionality should always take into consideration the values of the people held in the society. For, it is such values that play a dominant role in taxpayer's preferences and thus make choices and conduct behaviors in the market accordingly. Therefore, the typical legal mechanisms of protecting taxpayers fail to correspond to taxpayers' preferences and behaviors indicative of **economic motivation**—the fundamental element of fiscal constitution.



PART IV *MORAL GROUNDS FOR RULE OF LAW IN TAXATION*

Since that property rights, tax obligation, and public welfare are interconnected closely, and that economic motivation lies in individual mentality, the following question we are bound to ask is how tax obligation can be defined or portrayed in different constitutional contexts where different **mentalities** are formed according to their own values in their own societies. Furthermore, in the present situation, how can the idea of rule of law be concretized, either in **revised** fashion or **adjusted** in accordance with the social values, is another important question to be asked.

I. Detachment of *Form* from *Substance* **revisited**

It would contribute to understandability to first point out again the characteristics in tax jurisprudence—the separation of law's *form* and its *substance*. Such separation implies an issue of mere interpretations of wordings in the statutes, rather than argumentations of the contents, which indicates the beliefs of the legislators as well as the intrinsic values of the law (hereinafter **Morality**). Such kind of morality-loss interpretation of has been called "**Detachment** of Form from Substance".[1]

[1] Countless discussions have been made on the issue of detachment in the literature of early Japanese tax jurisprudent. For brief reference, please refer to [Matsuzaka] (1994) , pp.23 ~.

Detachment being an issue, that is to say, morality as the inner value of law is to be emphasized. Additionally, the content of such moral foundation, in addition to the discussion of human rights, should also include aspects such as the reception of modern legal institution as well as the individuality and variety of cultural phenomenon in different regions.

To actualize and tackle such problem in the area of tax jurisprudence, the term "**tax obligation"** is designed to emphasize its aspect of moral character of taxation.

II. Functioning of **rule of law** in taxation

A. The **internal connection** between tax system and legal system

A close examination could be observed in the case of Japan. Japanese Constitution includes an article of "*All citizens shall subject to tax obligation postulated according to law*," in the Article 30 of its constitution. However, if we combine both Article 30 and Article 84 together, a way of interpretation is worthy of being noted. Such interpretation, in our opinion, is a representation of the *internal connection* between **tax obligation**

and **rule of law in taxation**.

From the standpoint of people, the legal relation between the state and people shown in the two articles can not be understood from **taxpayer's right**s but from **tax obligation**.[1] Miyazawa (1983) has provided an insightful point of view by asserting the enumeration of such obligation expresses the crucial importance of tax obligation. However, such way of emphasizing—by enumeration of its great importance—fails to provide a picture clear enough of its groundings, *e.g.*, a logical explanation. To reach such purpose, in our opinion, it is worth an attempt to focus on the legitimacy of taxation from both the perspectives of Constitutional jurisprudence and of public finance.

B. Rule of law in taxation is a multifaceted notion

The concept of **rule of law in taxation** is a core issue often discussed in the field of jurisprudence.[2] Its meaning implies that taxation from the state should always be initiated in the form of law. That is to say, law, symbolic of the will of the people, is thought to claim its legitimacy, namely the well-known idea of *No Taxation without*

[1] Cited from [Miki](1983), Nouzeinogimu in, kenpogaku no kisokugainen II, p.327-328.
[2] There have been quite a few discussions in the field of tax jurisprudence in Japan. For detail, please refer to [Kaneko](2008), [Kitano](1956).

Representation. [1] In short, without the **form** of law, the distribution of people property through taxation would be lack in legitimacy and shall be prohibited in Constitution.

Such idea is also stipulated in the Japanese Constitution (NK). Article 84 of the NK states that "*No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe* ."[2] In reality, the former constitution of Japan and even in the Meiji constitution, the idea of *rule of law in taxation* had been noticed and made inclusion in the constitution.[3] The reason for such inclusion could probably be traced back to the era of Meiji Restoration, when many other foreign institutions, codes had been introduced into Japan. In turn, such spirit originated during the period, continues to exist till nowadays but in a quite painstaking way.

Additionally, in terms of the transplantation of legal systems, inevitably, both the **actual institutions** under the system as well as the **underlying premise** are at the same time being introduced. To further, *if* we compare articles of tax norms to *actual institutions*, *then* the ideologies and theories lying under would definitely be compared to the *underlying premises*. Besides, the first thing to overcome would be the question of how to accommodate the systems being translated to the culture or habits of place being

[1] More discussions, please refer to [Kaneko] (1966), Simin to sozei , p.315.
[2] http://www.ndl.go.jp/constitution/e/etc/c01.html
[3] A concise version could be found in [Kaneko](2008) and a more detailed one in [Koyama](2003)

transplanted.

To sum up, the concept of *rule of law in taxation* to be developed in the following would not focus on its traditional focus namely as a procedural principle but emphasized on its reception and accommodation in terms of legal transplantation.

C. The essential quality of tax power and its over-respected character

Rule of law in taxation, historically speaking, could be taken as *an evolution* from the former **tax-power relation (***Steuergewaltsverhältnis*) between state and people, different from the focus nowadays, **tax-law relation** (*Steuergesetzesverhältnis*). Therefore, even *rule of law in taxation* (*Gesetzesmäßigkeit der Besteuerung*), like the tax-power relation, is merely one of the approaches to illustrate the relations between state and people. However, these two illustrations of the state-people relations, even being logical thus having its own argumentation respectively, the approach of which still remain two completely different things and even in contrasting standpoint.

To further, rule of law in taxation is actually a **legal perspective** of the state-people relation based on state's power. This so-called legal perspective lays special emphasis

on the protection of taxpayer's human rights; furthermore, from the standpoint of the **protection of rights**, such legal perspective is designed to restrain state's tax power by means of the legitimacy of democracy.

On the other hand, however, the **power perspective** only emphasizes the power character of state's taxation, the legitimacy of which is to compel taxpayers to obey their obligation to pay taxes. Therefore, the fact that taxpayers are bound to pay taxes is something absolutely legitimate under the power perspective.

If and only if, the legitimacy of the state (*Staatlichkeit*) is the same as that of democracy—*i.e.*, both the legitimacy of state and that of people are valued equally—*then*, the two are not in a contrasting position. In actuality, however, the cause of the origin of the state is the very effect that is opposed to the people, which makes it possible the causality between state and people. Therefore, what kind of relation ***best describes*** the relations between state and taxpayers is the core issue at hand.

D. Re-examination of the concept of protection of taxpayers' rights

On the whole, rule of law in taxation underwrites the concept of **reservation of law**

(*Vorbehalt des Gesetzes*), a right-protecting mechanism which suggests any infringement on people's rights from state power *sine legem* be invalid for the lack of democratic legitimacy.

Furthermore, the mechanism of **reservation of law** is not something only exist in the field of tax jurisprudence; rather, it is an issue also rampant in other fields of law as well. Such issue could be taken as the question of whether the principle of rule of law (*Prinzipien Rechtsstaatlichkeit*) [1] is capable enough to function as a means of human right protection or not.[2] However, the mechanism for such protection is taken with a rather doubtful attitude towards its **effectiveness**. The following argument intends to start from on a teleological criticism.

1. teleological character of the traditional approach

Indeed, judging from the relations between the measures taken and the goals to be achieved, the idea of rule of law in taxation as a standard for constitutional review, without a doubt, does contribute to the protection of taxpayer's human rights. That is to say, the premise for the exercise of state's power to tax to impose taxes on people is to

[1] In the field of constitutional law in Japan, it is called "Houchisyugi"(法治主義)
[2] Tipke, Die Steuerrechtsordung I, Aufl. 2, §5.

be in the name of law; without the consent of the people the legitimacy of taxation would no longer exist.

That is to say, upon discretion of the tax administration to decide whether certain events or facts could meet the threshold of being taxed or not, in order to prevent arbitrary judgments, discretions are turned over to the legislative sector. Hence, representatives of the people are expected to decide the requirements of the employment of tax power on their own; in the end, the administrative sector is left with merely the application of laws with the ever-decreasing space for discretion.

The reasoning in the above is somewhat *teleological* in a sense. However, the approach of the argumentation—the *right*-orientated approach—as well as the attempt to achieve the purpose of protecting human rights could be insufficient, not to mention its lacking in constitutionality. The reason for this, in a word, is that the focus of the approach tend to rest on the right of the *people* rather that that of *taxpayers*. That is to say, the protection of the right of the people does not center on taxpayers.

2. Criticizing the right-orientated protection mechanism

Generally speaking, by means of enumeration in the Constitution as basic right, the content and meaning of certain interest could thus be protected. However, such way of protection, even being able to protect **rights,** doesn't equate the protection of **taxpayer's rights**. In addition, the legal-dogmatic (*Rechtsdogmatik*) approach of interpretations of articles which often incurs criticism is an excellent example to observe the defect of such mechanism.

The following paragraphs intend to present the *right*-orientated argumentation in a three-stage analysis.

i. Step 1: **contrasting position** and **confrontation** in the relations between property rights and power to tax

First of all, it is necessary to limit the scope and set the limitations of the topic. Thus, it is important to make sure the object of the right-orientated mechanism is aimed for the prevention of power. Such power, to be more explicit, is the power to tax.

- contrasting positions of tax power vis-à-vis property rights: each claiming its own legitimacy

Needless to say, tax power being a form of tax power, is entitled to the legitimacy of the state. However, in the case of the property rights of the people, holding *inviolability* character, also claims its own legitimacy. Therefore, when it comes to the state taxing away people's property, the connection of the power to tax and people's property rights turns into a contrasting so as to even a contradicting relation.

- The contrasting position indicating the inequality of the relationship

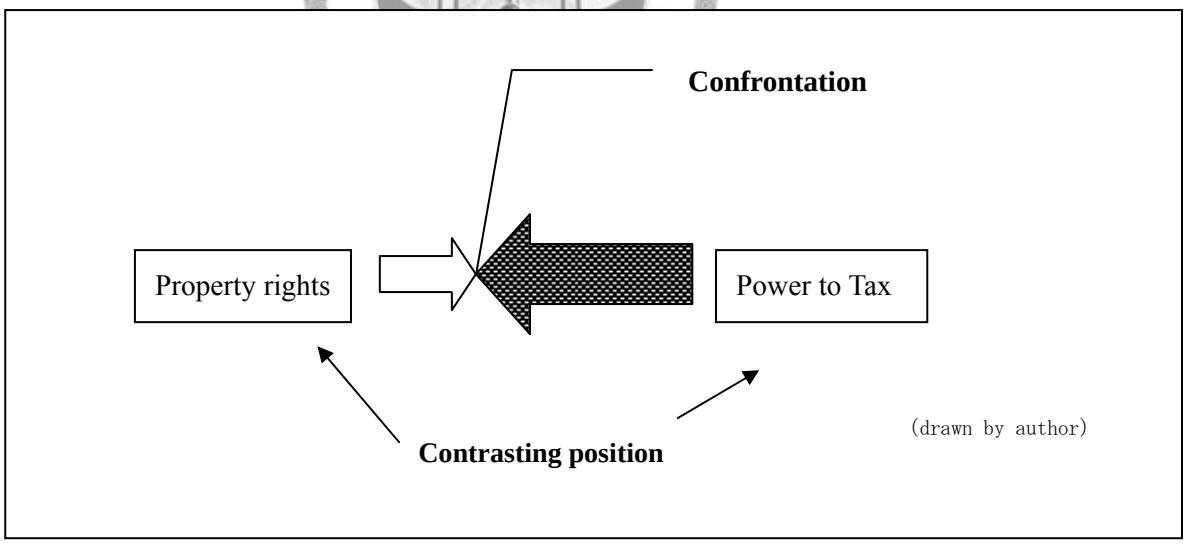
What's more, such contrasting relation, two sides having unbalanced forces, is thought to be in an unequaled situation, resulting in a need to protect the people's side, that is, the protection of property rights.

In the Illustration, two arrows, each representing the interests of tax power and property rights, could be seen in the picture. The oblique-lined part of the arrow indicates the fact that the legitimacy of taxation remains unknown. Meanwhile, people, facing with the *infringement* of tax power, is capable of defending the power is also unknown.

- A confrontation has to be based on contrasting position

One thing to be emphasized is the fact that the genesis of the confrontation should always be on the premise that two different existing wills are located on a contrasting positions. For further explanation, the formation of the relation of confrontation relies on two confronting **standpoints** which are bound to exist. Such confronting **standpoints**, in most cases represent different *interests*; sometimes even two *diametrically*-opposed interests are in competition thus effects each other frequently.[1]

Illustration 4 Contrasting position and confrontation relation between property rights and the power to tax (First Layer)



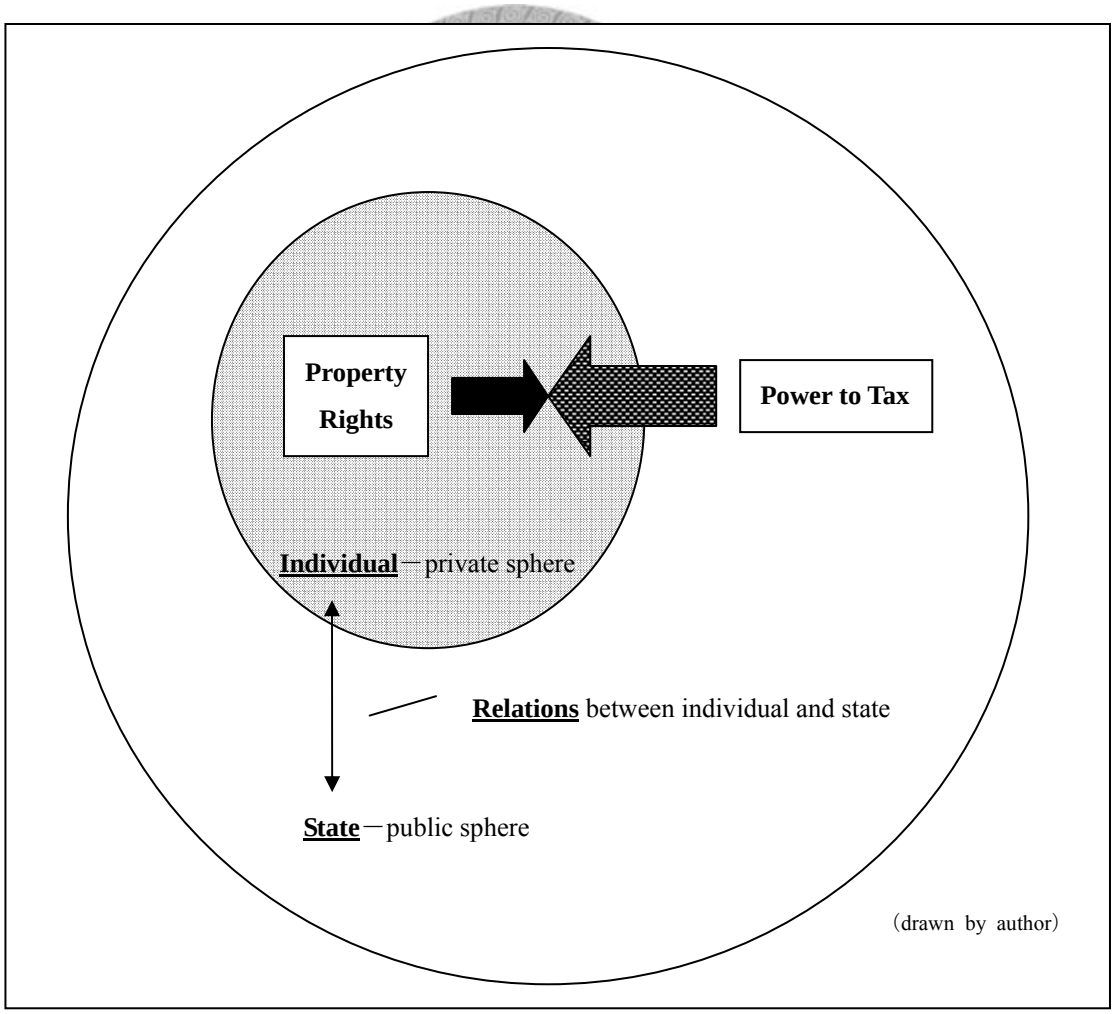
ii. Step 2: a way to understand the relation between state and people

[1] Incidentally, the term interest, infringement, defend, are used as general terms which can not be concretely defined.

The relation between state and people could actually be observed on the premise of the dichotomy of private and public sphere.

In the modern state, individual in the private sphere is centered on property rights. In turn, the exercising of one's property right, is actually a kind of fulfillment, or a possible way to self-realization.

Illustration 5 Relation between state and people (Second Layer)

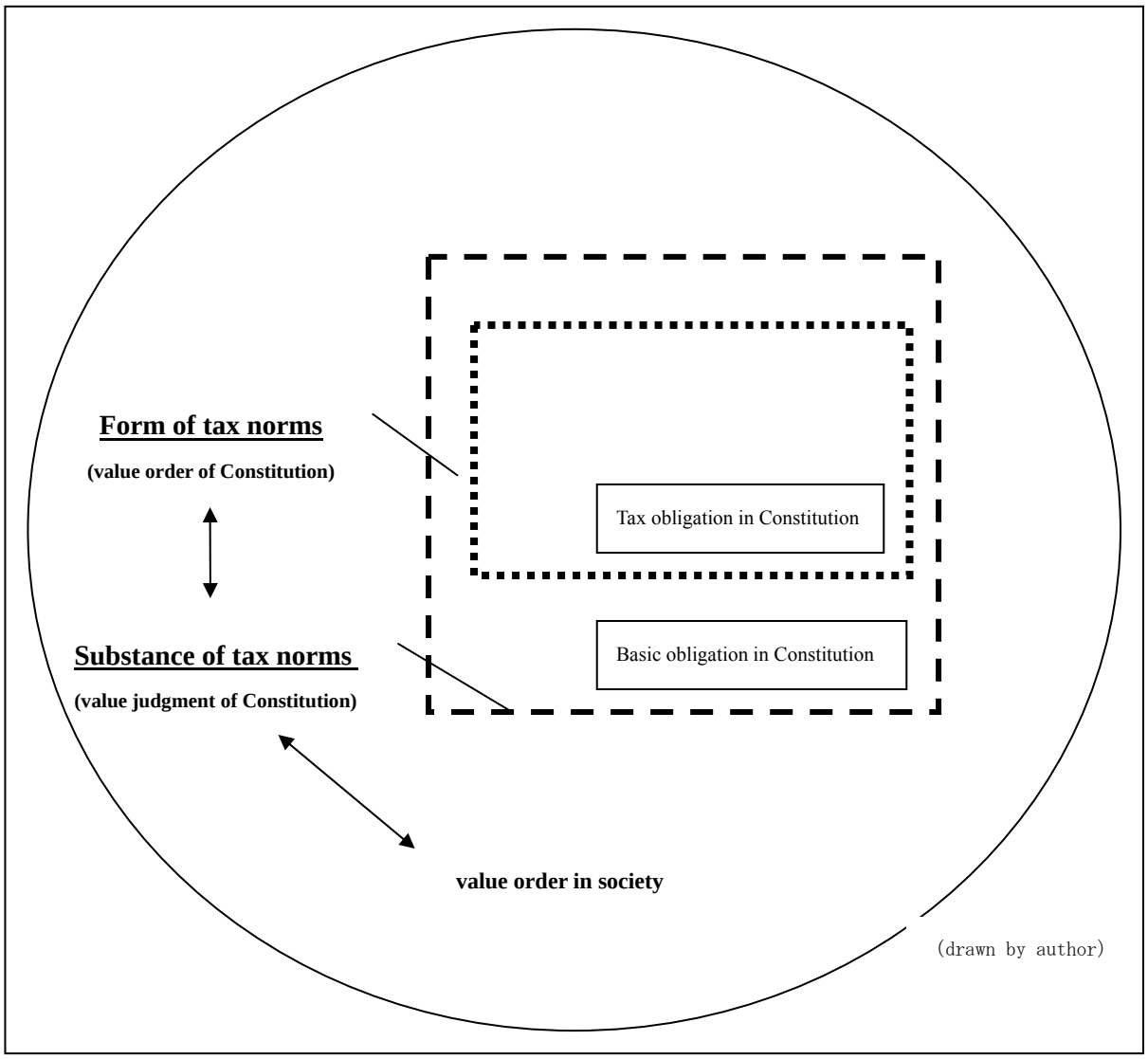


iii. Step 3: Relation between tax obligation and basic obligation: response in constitution

Both the tax obligation in the constitution and basic obligation in the constitution are somewhat interconnected. In addition, the former is a concretization o the latter. In terms of tax jurisprudent, the relation between the former and the latter, could be taken as a **form-substance relation** in terms of tax norms.

Moreover, the form and substance of tax norms, ideally speaking, are actually two sides of one same thing. A realization of such relationship, in the field of tax jurisprudence, is called the **methodology of economic observation** (*wirtschaftliche betrachtungsweise*).

Illustration 6 Relations of tax obligation and basic obligation in Constitution (Third Layer)



iv. Integrative view of the three layers

To combine all three layers from the above, three possible deductions are to be made in the following.

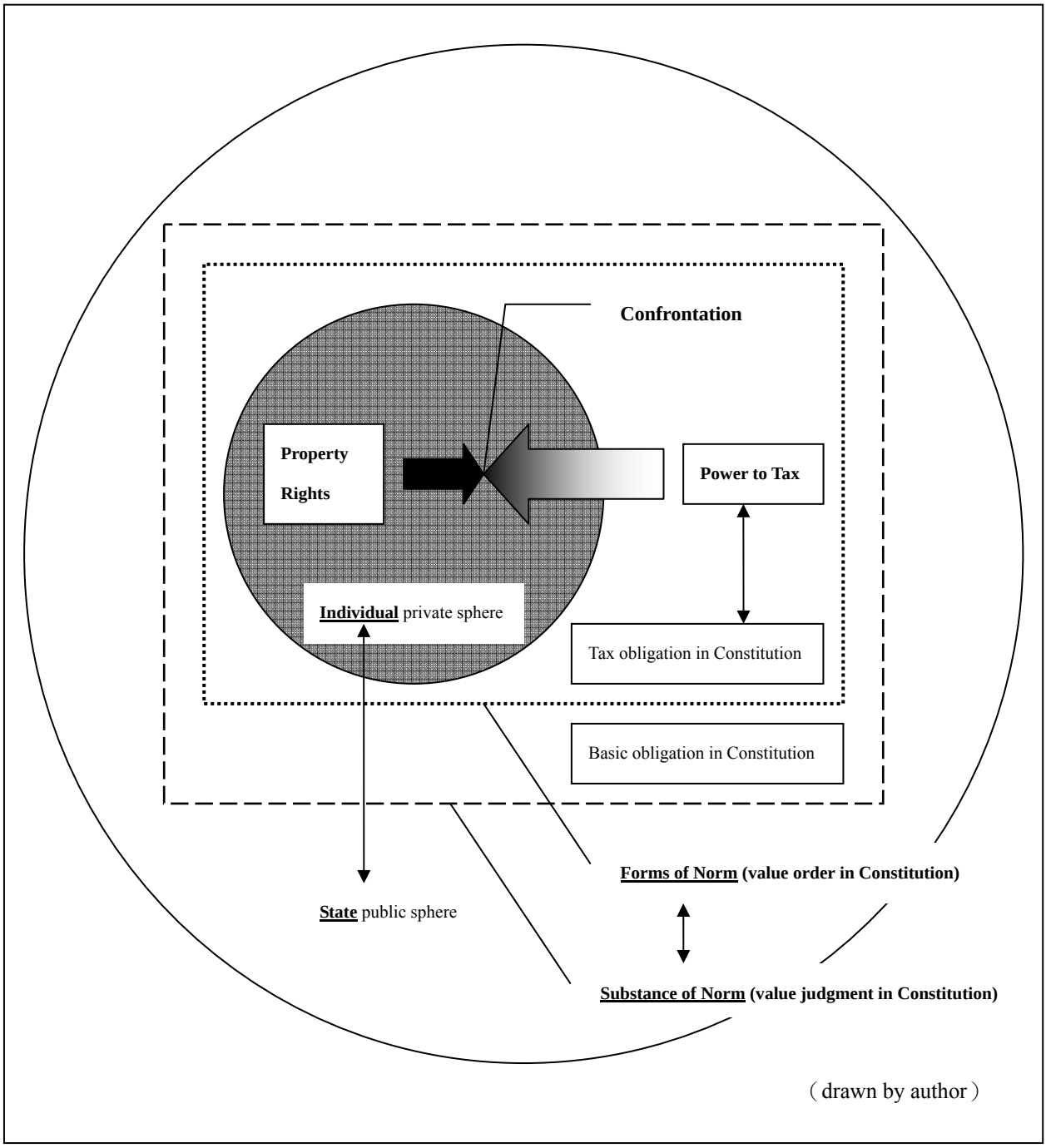
1. In the picture indicating the relation confrontation, the larger arrow with spotted coloring representing tax power expresses the need to review the legitimacy of

the tax power at a regular basis.

2. the relation between private and public sphere under the constitution is actually a linkage from the people to the state connected by the basic obligation.

3. In modern state, the basic obligation of the people is centered on the obligation to pay tax.

Illustration 7 A Panorama of Confrontation (Integration of the three layers)



In this illustration, the coloring of the arrow on the right hand side gradually turns darker as become closer to the center of the circle. Such illustration indicating the standard of the constitutionality of taxation gets more rigid as such power approaches the center of the private sphere. As for the square, the requirement of the constitutionality of the tax power is understood only within the framework of the constitution.

III. Reception of tax state theory and its reflections towards legal norms

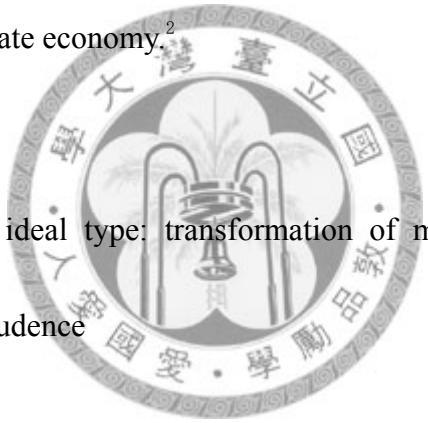
The concept of **tax state** could trace back to the concept of German concept of *Steuerstaat*. In reality, this concept is not only a technical term in public finance as generally recognized; it could also be observed in the long history of tax jurisprudence (*Steuerrechtswissenchaft*). In addition, in the field of tax jurisprudence, the origin as well as the development of tax state has been discussed not alone among European countries, but even in Japan, various works could be noticed.[1] Therefore, tax state is not at all a concept alien in the field of academics. Frequently appeared as the concept is, many things could still be overlooked, one of which is the obligation from the people to the state. The following discussion attempts to make connection between the elements

[1] Several articles concerning such concept could be found in [Kitano].

of tax state and the concept of rule of law in taxation.

A. Conversion among disciplines—the disparity between law and economics

One of the differences of tax jurisprudence and other legal field is thought to be the concept of methodology of economic observation (*wirtschaftliche betrachtungsweise*) [1]. The reason is not difficult to figure out; that is, taxation in its modern significance is like a parasite onto the private economy.[2]



B. Tax state as an ideal type: transformation of moral grounds from public finance to jurisprudence

As noted in the previous paragraphs, originally the term **tax state** is not a legal phrase but a term proved to be in the field of public finance. [3] Such idea in the field of law, especially constitutional jurisprudence, is mostly close to the concept of the principle of tax state (*Steuerstaatprinzip*) .[4] Therefore, whether the two concepts are in accordance with each other is to be noted in the context as well. In this turn, we attempt to analyze

[1] Please refer to P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, S.88ff.
[2] Schumpeter(1918)
[3] [Ohata](1925), Sozeikokkaron.
[4] More detailed discussion, c.f. Isensee(1977), Heun(2000)

the concept of tax state in public finance with legal theories.

In brevity, the term tax state in public finance simply indicates that tax revenue is the principal revenue of the state's income. To be in detail, revenues other than taxes are only a small portion to the lion's share of the revenue. Namely, the collection of state revenue other than taxation shall not be played as the major role.

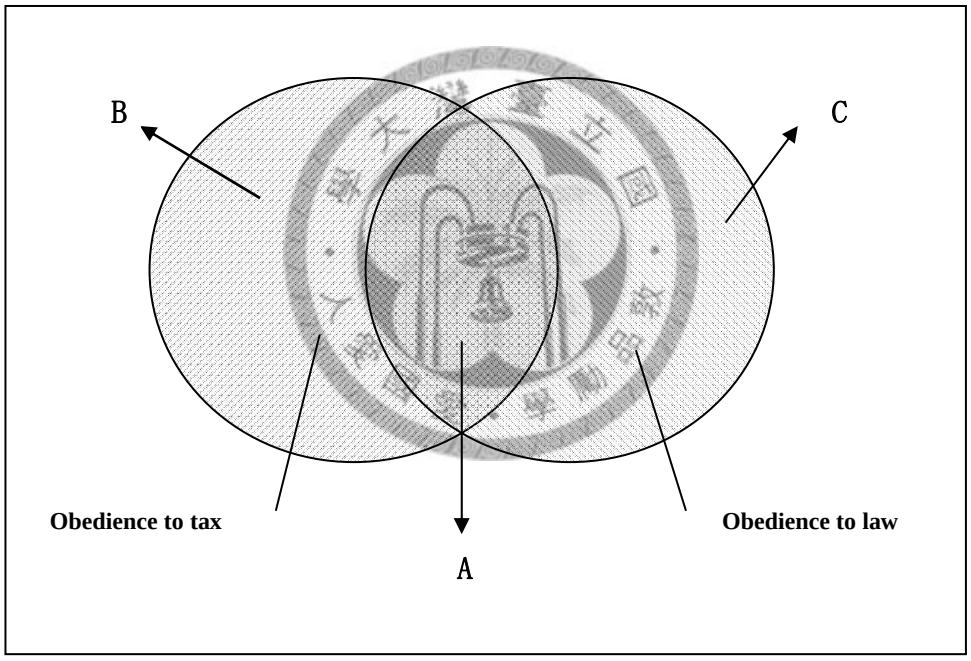
However, such definition does not include the perspective of jurisprudence. In the case of legal theories, neither constitutional theories nor other legal aspects have given genuine (or specific) legal-oriented definitions as did the scholars in public finance. In fact, to view the state as a whole, tax power being an exertion of state's power has its significance in terms of public finance as well as in jurisprudence. For instance, once the initiation of tax power has been approved, what kind of legal measures best suit the situation could be ascribed to either tax administrative affairs or tax legislative affairs.

C. An aspect reflexive of legal norms—**obedience to tax obligation** and **obedience to law**

Actually, the concept of *obedience to law* does not equal to *obedience to tax obligation*.

To explain, the so-called obedience to law does not only indicate the obedience of tax obligation. Oppositely, obeying tax obligation doesn't not only refer to the obedience of law, either. That is to say, the above-mentioned two things may have different implications of their own. Therefore, to understand tax obligation only from the perspective of obeying the law is simply not enough.

Illustration 8 Obedience to taxation and obedience to law



IV. Amplification of rule of law in taxation

From the above, for the purpose of protecting human rights, even traditional approach of the reservation of law still takes effects, it doesn't follow that such reservation works

the same in the case of protection of taxpayer's rights. Moreover, *rule of law in taxation*, expressing the idea of *reservation of law* in its human right protection mechanism has its defects which are shown in the previous paragraphs. The reason is because of the effect of such mechanism is rather passive and should have added more active elements. In other words, an amplification of the principle of rule of law in taxation may be a patching up solution.

A. The concept of **Intrinsity**: An amplification of Freedom and equality of taxpayers

Taxpayer's rights should be understood by the freedom and equality of *taxpayers*. However, such way of understanding, can't help to but borrow concepts form taxation and public finance theories. The reason lies not only in the *traditional thinking* of **the dichotomy of form and substance** in tax jurisprudence, but also in the genesis of the modern constitutional state. The following focuses on the former.

The concept of **Intrinsity** could be understood in various ways even in the context of the paper. Three ways of thinking are to be presented in the following.

1. Metaphor of **Honne** (historical experience) and **Tatemae** (received ideas)

When it comes to the legal transplantation in legally-underdeveloped countries, the transformation from the chaos of alien institutions to focusing on the historical experience of its own[1], is a question of **intrinsity**.

2. Concepts borrowed from different fields

In addition, one should also take heed to the disparity of understanding of concept of **tax** in different disciplines, which is generally being discussed in public finance. That is to say, the different concern between law and economics should be taken care of here.[2]

Moreover, there is another question which falls in the category of legal interpretation. In the field of tax jurisprudence, the so-called **original concept** *(eigener Begriff*) and **borrowed concept** (*entlehnter Begriff*) are differentiated.[3] Such differences are not the same with that of different disciplines but different concepts borrowed from different subjects of the same discipline, *i.d.*, other subjects in the field of law.

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[1] [Fuke](2006), Nagoyadaigakuhoseironsyu(名古屋大学法政論集), No.213, 2006.6., p.1-2. The experience in Taiwan, see Wang, Tay-sheng, Legal reform in Taiwan under Japanese colonial rule (1895-1945): The reception of Western law, Dissertation, University of Washington, 1992.

[2] [Hatakeda](1984), pp.23~, especially in p.25.

[3] [Miyatani](宮谷) in: Zeihonyumon（税法入門）(2007), 6.ed., p.57.

For example a concept of **gifting** in the gift tax law, when borrowing from the civil law, what kind of legal interpretation best suits the inner logic of tax law is the very issue. The choosing of methods of interpretation has to take into consideration of the values of law as well as values of the society which underlies the concerned legal systems.

B. The premise of *Instrinsity*

If the above-mentioned concept of **intrinsity** should be the premise for the reception of law, *then*, the value in both constitution and the society would be the moral foundations of the intrinsity, namely, the premise of the premise.

The value in Constitution is grown out of the values in society. Therefore, the concepts of constitutional values are bound to be included in those of society. Thus, its category is thought to be smaller yet more concrete. As a result, the demonstration shown in the previous illustration expressing a constitution framework within the society remains unchanged.

As a result, *if* the reception of the law is merely a transplantation of law statutes and

legal institutions, *then*, without a doubt, values formed in other societies would definitely be directed and even exacted to the receiving country. In turn, the enforcement of such exacted systems would face various difficulties, thus emphasizing the importance of mutual understanding among different culture as well as contrasting values. However, the fulfillment of reaching mutual understanding remaining highly doubtful, a blind-folded introduction from alien culture is definitely awkward to the fellow people. A crisis in the constitutionality of requiring people to obey such yet-internally integrated legal institution would, as a result, be unavoidable.

In summary, the concept of *rule of law in taxation*, concerning the relation between tax obligation and taxpayers, is a question of crucial importance. The previous paragraphs, focusing on the interrelationship between tax obligation and rule of law in taxation, takes a critical perspective on the function of the principle of rule of law and at the same time attempts to add a few amplifications to the concept by means of theories of tax state in the theories of public finance.

C. Further inference from the limitations of taxation

The argumentations above have not yet gone into details as to how such generalized

conditions of man are being demonstrated. However, a clarification of understanding of the multi-dimensional character of tax normality is still note-worthy.

Nevertheless, the paper tends to take a rather open attitude by listing out possibilities that this *genuine* limitation of taxation which grown out of human nature could be applied.

1. As rules or regulation

In terms of legal interpretation of concepts of taxation, there has been a long history of tug-of-war between *formal* and *substantial* approach of understanding the meaning, the former meaning the appearance of taxation power as regulations in comparison with the latter referring to the economic substance being regulated. The method of *wirtschaftliche betrachtungsweise* is the product of this detachment between the formality and substantiality of the two perspectives. However, what is to be taken into consideration in this sense usually depends on what kind of interpretation method is being chosen and has little to do with how actually economic effects are occurred afterwards due to the implementation of the chosen method.

2. As a source of state revenue

Different from the point above, taxation as a type of revenue-collecting device, should stick to its logic or its functional sense created so as to be recognized by its feature and distinct from other types of collecting devices. For example, taxation embodies the spirit of equal distribution which could only be understood when the principle of equality if being taken into account in terms of constitutional review. Moreover, the economic effect of imposing tax burden on certain conditions which alter the choice or even preferences of the individuals would risk sacrificing individual's freedom to engage in acts which still seems to be a nice choice in a pre-taxed situation.

In other words, the interpretation of the concept itself should are restricted to the extent that derivations of the concept should not go against the original meaning which focus on its economic nature. Otherwise, the attention of the freedom nor equality of the taxpayers, which bears strong inclinations to the economic sense, would very likely to be drawn misleadingly back to the generalized protection of human rights postulated in the Constitution offered in Part A.

3. As a sociological factor—the limitation proper of the *Steuerstaat*

As Goldscheid and Schumpeter had pointed out, the sociological side of public finance has long been neglected regardless of how important a role such perspective might play. The limitation of tax state, being the most demonstrative example, illustrating its dominant predictability of foreseeing the outbreak of World War I ten years before.[1] Such approach of certainly raised attention but yet to be concretized into methodology. The difficulties of standardizing such perspective would be mentioned later in part D and the plausible application is to be expanded in the next few paragraphs.

Schumpeter had proposed that there is a certain limitation to the tax state system that once a penny taken away from people would no longer mean a raise in the state's revenue but rather, only to the detriment of the productivity.[2] This visionary remark has made enormous impact on various thoughts in different academic fields. While the economists came up with a notion of "maximization" of tax revenue in total[3], legal scholars had implemented such limitation in the judicial review, asserting that the motivation in pursuit of self-interest in the market are related to certain features of freedom, such as the freedom to work and freedom to conduct business, etc., and thus

[1] Schumpeter(1918)
[2] Schumpeter(1918).
[3] Please see Laffer curve of the supply-side economist school.

should not be affected but to be protected by the Constitution.[1]

However, the essence of such limitation is still yet to be refined and in turn, to be developed into theories. As was been stressed highly in advance in Schumpeter's work, his analysis of the issue, namely, ***Crisis*** was based on the approach called Fiscal Sociology. It is the social psychological factor that the state should take heed to in order not to overpass the limitation of the tax state lest it break down the whole system.

By inference, the emphasis of such approach can be highlighted as a strong reflection and criticism on the methodology of tradition public finance theories then. It is interesting to follow the ins and outs of aftermaths of such propositions in the academic fields of public finance. Nevertheless, it is quite another topic to see how such approach could provide a different point of view of moralities in different societies. The latter, is the main theme addressed in part D.

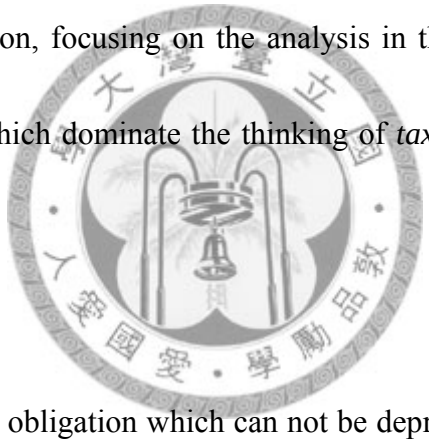
4. As a representation of people's moral mentality

People acts differently according to different social backgrounds in which they are

[1] The most famous would be the concept of "Erdrosselungsteuer" and the half-half principle ("Halbteilungsgrundsatz") proposed by P. Kirchhof.

nurtured or accustomed themselves to, and Schumpeter was being quite reticent as to the actual ways of how to approach these social factors. However, he never hesitated to leave a few clues for us to explore.

As stated above, the freedom and equality of taxpayers could not be sufficiently protected by means of the general protection of basic human rights. Taking part A and C into consideration, it stirs up the concern of how the image of "paying taxes" is rooted in people's mind. In addition, focusing on the analysis in the limitation of taxation in ***Discourse***, the elements which dominate the thinking of *taxpayers* in Ancient Chinese will be of great concern.

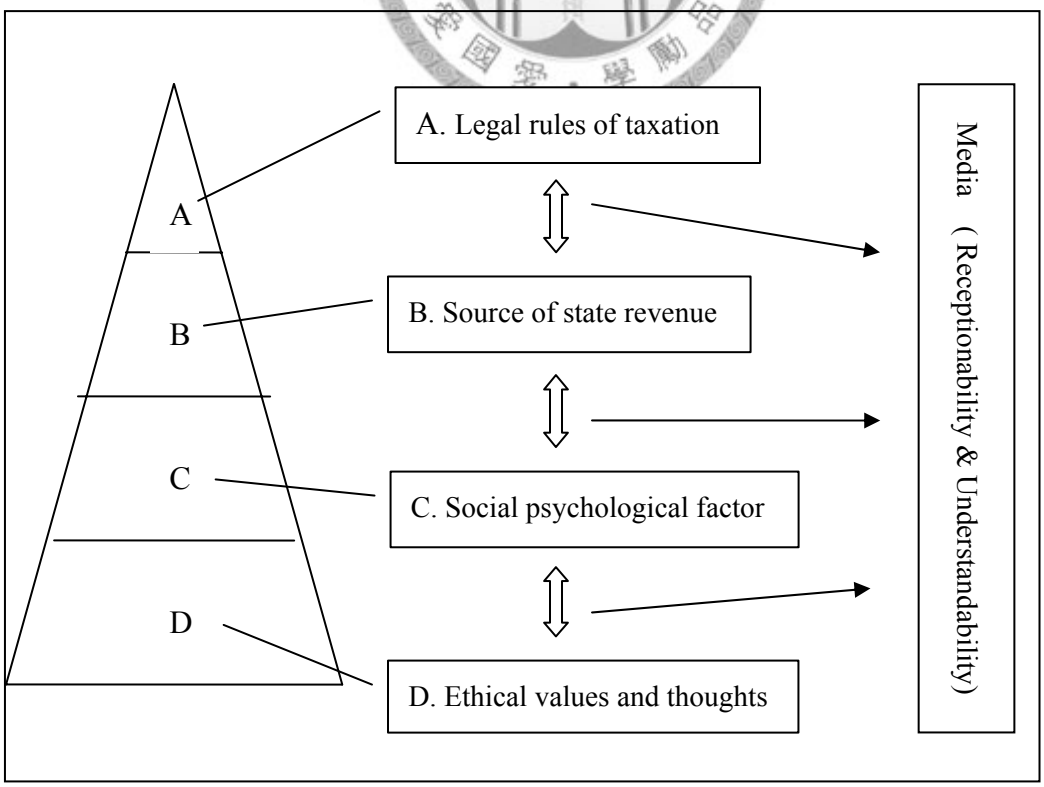


When tax duty has been an obligation which can not be deprived of a person in modern age, it is common for a person nurtured by tradition Chinese values[1], to try to either justify or condemn the legitimacy of taxation with his/her interpretations of such traditional values; whereas the attempts above can never in any way change the historical factor of the legitimacy and the task for legal studies to ensure the "what-comes-of-a-man" of taxpayers.

[1] Here we can only refer to the thoughts of Confucianism, Pragmatism, and Taoism at the very best.

However, we can still ask, how such "makings" of a man present themselves in a Chinese-cultured society—that is, the appearance of freedom and equality of a taxpayer under the necessary evil of state's ruling. Moreover, with respect to the legal issue of the protection of the makings of a human, the real question would be how to make a taxpayer either *free from* or *out of* the imposition from the environment of a specific society—that is, how to protect the equality and freedom of taxpayers with Constitution and the legal institutions sanctioned by it. Nevertheless, the content of this paper here can only extract two element factors, *i.e., institutional* concern and *sociological* concern.

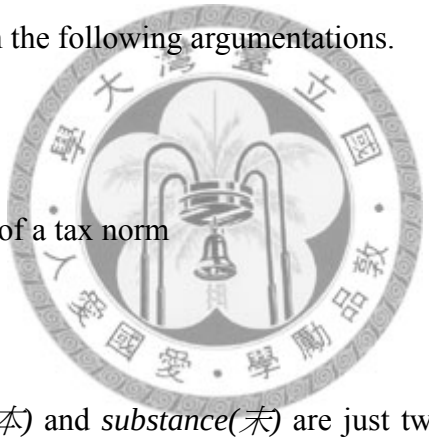
Illustration 9 The four dimensions of limitation of taxation



PART V *TAX NORMALITY : AN INTRINSIC CONCRETIZATION*

—value judgments in tax law: the righteous-beneficial differentiation

It may be clear from the above that tax regulations are chiefly influenced by two elements, both *institutional* and *societal* factors. However, how to rationalize tax norms into a *logical* model is the next step. Such attempts expressed as the interaction between **tax normality** and **tax morality**, reflecting the tension between substance and form of tax norms, are developed in the following argumentations.

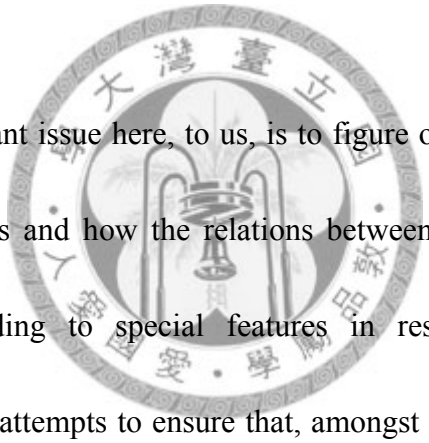


I. **Substance** and **Form** of a tax norm

Generally speaking, *form(本)* and *substance(末)* are just two sides of one same thing. However, due to opposite standpoints they take, different observations are found and thus results in incoherent interpretations. Taking into account the same origin of two interpretations have, there still exist a certain kind of **relationship** interconnected. Such relations could be found both in jurisprudence, linguistics, and possibly in other academic disciplines. The following paragraphs focus on such **dichotomy** of form and substance in different disciplines which are mostly concerned with the theme of the paper, in search of similarities.

A. Re-defining of the **Detachment**

Form and **Substance** are two of separate but related perspectives to note. Actually it has already been recognized in the fields of *jurisprudence* (e.g. historical jurisprudence and analytical jurisprudence), in *economics* (e.g. historical school and neo-classical school), and possibly in *linguistics* (e.g. sociolinguistics and theoretical linguistics).



However, the most important issue here, to us, is to figure out how such detachment is presented in different areas and how the relations between forms and substances are formed differently according to special features in respective disciplines. Most important of all, the paper attempts to ensure that, amongst all these areas, whether the formation of these dichotomies have shared some common logics or not.

B. **Concretization of Similarities**: logical vis-à-vis societal

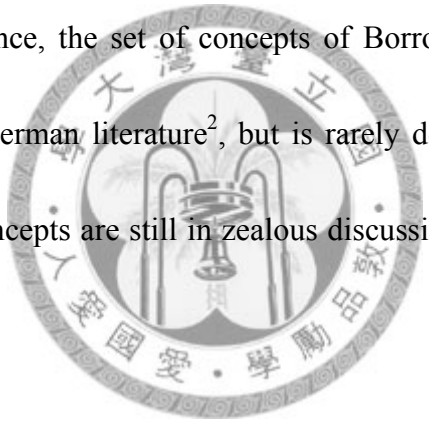
The following discussions first try to find evidences from theories in the linguistics (the separation of language and thought) and thus make linkages between theories of jurisprudence. But by focusing on the terms *rule* and *principle* and the logic in between,

we intend to find similarities both indicating a shared horizon, that is, the separation of logic and values indicated in **Perelman**'s theory[1].

II. **Understandability** and **Receptionability**

A. Borrowed concept (*entlehnter Begriff*) and Intrinsic concept (*eigener Begriff*)

In terms of tax jurisprudence, the set of concepts of Borrowed concept and Intrinsic concept originated from German literature[2], but is rarely developed inside Germany[3]. Interestingly, these two concepts are still in zealous discussions yet outside the original country.



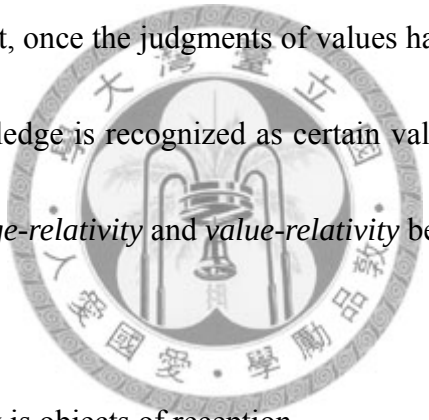
First of all, we tend to focus on the understandability of the received or transplanted legal systems and values.

1. Foreign law as **borrowed conceptions**?

[1] Perelman(1958/1969), Wang(1997), Yen(1994, 1995/2003).
[2] Distinguish between the two concept could be seen in H. Kruse, Steuerrecht, I., AT, 1 Aufl. 1966, S. 65. z.v. Kaneko, Zeihou to sihou, in: Souzeiho to seihou, 1977, p.13, note 2.
[3] The two concepts originated from the relations between Civil law (Zivilrecht) and Tax law (Steuerrecht), see *generally*, Tipke(2000), however, the development of the two concepts was no longer the focus.

The concept of **Intrinsity** may indicate two implications. It not merely implies *relativity of disciplines*—be it different sciences aside from law or different majors within jurisprudence—but also refers to a *relativity of reception*. The former points out there exists a relativity in *knowledge* itself, while the latter involves a relativity of values among different cultures.

What is to be noticed is that, once the judgments of values has to depend on the grasp of knowledge, or when knowledge is recognized as certain value, it is imperative that the relations between *knowledge-relativity* and *value-relativity* be clearly distinguished.



2. Foreign law is objects of reception

Based on **commonality of knowledge**—that is, knowledge is commonly understood to the extent that its interpretation could be the same everywhere—the understanding of knowledge, by all means is conducted in a "knowledge first, language second" process. However, if we consider the learning process of human, the understanding of knowledge is through language, rather oppositely a process of "language first, knowledge second".

If 1., 2. in the above are to be true, namely, 1. the logic of legal language are the same as that in daily life, and 2. the understanding of knowledge is by means of language; then, it may as well make sense that we consider the premise of mutual understanding between the language of the received country and the receiving one when dealing with the reception of foreign law.

B. Receptionability and Understandability

1. Comparability—commonalities among tax moralities

I suppose, then, that he'd need time to get adjusted before he could see things in the world above.

516 a, Republic VII.

Historically speaking, Chinese society turns out to be quite different from western ones, despite several massive communications between the two civilizations, each has its own development. More interestingly, however, in the course of their respective journey of development did they encounter similar tasks to be resolved. The question we are

concerned about is a good example in the area of jurisprudence.

Both facing enormous expenditure in the warfare to be financed, how state maximize its profits from its economic system were ascribed to the question of the choice of its economic system. However, since the decision of economic system brings in an overall impact on people's economic life, such decision, also falls in the category of constitutional jurisprudence, especially in its modern significance.

Despite that constitutional jurisprudence and public finance are different after all, the values and thoughts underlies themselves respectively, which can not be taken as identical; what is certain is that the question of "whether the state to intervene the market" seems to be the main concern, which appears both in *Crisis* as well as in *Discourse*.

2. Receptionability: Intrinsity vis-à-vis Reception

At first, he'd see shadows most easily, then images of men and other things in water, then the things themselves.

516 a, Republic VII.

By ***Crisis***, there exists a limitation of taxation lying between state (here referring to tax systems, *i.e.*, tax state) and people, bringing doubts to the invincibility of state power. In a constitutional state ruled of law, the rights of people (here referring to tax payers) are valued higher than state power (here referring to tax payers) and can thus restrain the power of the state. Therefore, we may be curious of the legitimacy to restrain the state. After all, what is the groundings of such legitimacy of the state? Does it originate from the values developed in our tradition and culture? Or does it come from transplantation abroad?

By ***Discourse***, we tend to be able to jump out of a westernized framework of theories of limitation and directly touch upon tax obligation itself. Combining the ideological debates during the Salt and Iron Meeting with the social contexts at the time, we found a nexus connecting power of taxation and obligation to pay tax in traditional China. And **it is the indistinctiveness of morality (De) and law (Fa) that makes the argumentation of the legitimacy of obligation to pay tax a hard nut to crack.**

In other words, if the reception of law refers to mere transplantation of institutions and regulations, then such reception amounts to laying a whole setting of social values

directly on top of an originally different one. Therefore, it is a prerequisite of a mutual-understanding between disparate values that these values could be mutually beneficial. However, being unsure of the possibility of mutual-understanding but insist on the exaction of certain values may contribute to people's ignorance of the groundings of the received system thus to the ignorance of the legitimacy of obeying such system.

- Common logic—the righteous-beneficial differentiation

We tend to apply the separation of rule and principle in the western legal theories to examine the relations between ***I*** (righteuousness) and ***Li*** (benefit). We are of the opinion that **choice of value** and **prioritization** deducted from the confrontation of principles and competing of rules, respectively, are unexpectedly in accordance with the righteuous-benefit differentiation, which penetrates through the thoughts of moral economy in traditional China, indicating commonality in the moral sense.

The issues in the two debates, both focusing on the relations of state and economy, intending to find a borderline between state and people in its own historical and cultural context so as to reach a harmony of coexistence. At first glance, both texts may have nothing in common. However, we believe, it is this very irrelevance that makes possible

our pursuit of a commonly-recognized moral grounds which exists in its own respective context.

3. Mechanism for Communication: **being understood** as premise

Of these, he'd be able to study the things in the sky and the sky itself more easily at night, looking at the light of the stars and the moon, than during the day, looking at the sun and the light of the sun.

516 a, Republic VII.

Concretely speaking, how can the tax payer's value judgments be presented in a form of understandable way is the first question to be tackled. Here, building an objectively-existing institution is of much help. The word "objective" indicates the outer world from one's inward psychological minds, and is opposite from "subjective", meaning individual's mentality.

In addition, the so called "institution" is a mechanism, where information could be gathered as long as members are aware of its functioning principle. Therefore, members are able to express their ideas through the translation (or transformation) by means of

communication rules. Therefore, in a society where people cohabits, institution is necessary. To further, when taxes are for the purpose of the maintenance of the society thus claiming its public character, it may as well necessary for the institutionalization of taxation.

However, institutionalization can not be realized without rules and principles. In detail, with a certain set of logic (no matter daily language or subsumption in jurisprudence), the organization of the institution serves to a certain degree of understandability thus possibly reaches predictability.

In a state ruled of law, people still being the ones to be understood, but the media through which understanding is reached are mainly ***legal* rules**. In other words, by means of **legal rules**, how to enhance understandability in turn making one's thoughts **communicable**, becomes issues of institutional design, namely, the ruled-of-law state.

- Understandability—**foreign law** and **domestic law**

Besides, speaking of the *reception* of foreign law, it can not be discussed without the *understanding* of foreign law. For the enforcement of the received law might face

difficulties if the laws could not make themselves understood. However, to enhance understandability, people must be ensured to understand. Therefore, the question becomes—how to understand.

Moreover, if reconsidering our own "**inherent law**", it also needs to be understood never the less. However, the understanding of inherent law, compared with "**received law**", seems to have higher feasibility.

4. Analyzability: taxpayers' value judgments

Finally, (……), he'd be able to see the sun, not image of it in water or alien place, but the sun itself, in its own place, and be able to study it.

516 b, Republic VII

In a modern state ruled of law, it not only becomes a tool of social regulation, but as well serves as a media of interaction among people in the society. Therefore, pratical tax laws, which are closely clung to daily life, also fall in this media category.

Simply put, legal issues may enter daily conversational topics and become something

thought by everyone rather than restricted to certain group of professionals. For example, it may be possible for a tax payer to have an understanding of practical legal rules so as to all kinds of tax plannings just like a jurist in a jurist way.[1] However, likewise, when tax payers are mapping out tax plannings, they shall as well be required that their tax arrangements be conform to the ideal of tax equity required in the constitution.

The question we are to raise is that whether it is possible to analyze all kinds of value judgments made by tax payers. In other words, from the perspective of taxation, if the tax arrangements made by tax payers are to no possibility of being understood, thus impossible to analyze, then, let alone their predictability.

For the question above, we are of positive opinion but reserve a conservative attitude towards the validity of the postulate of question. That is to say, presuming that analyzing subjective minds of tax payers contributes to a good understanding of the motives of tax payers' behavior, it doesn't follow that these analysis leads to predictability of their behavior.

[1] This deduction originates from the interpretation of Perelman's concept of value judgment in [Segawa]

As for our proposition of an integration of the righteousness(I)-beneficial(Li) differentiation in traditional China into the present received legal system, we still believe it effective.

5. Foreseeability

And at this point he would infer and conclude that the sun provides the seasons and the years, governs everything in the visible world, and is in some way the cause of all the things that he used to see.

516 b, Republic VII

The behavior of tax payers are the outward forms of their preferences. If these behaviors are considered to be a benefit-based thinking pattern—namely, measures taken are conducive to the fulfillment of the purpose[1]—, the predictability of such behavior is high. For example, if a tax payer only act according to the minimization of tax burden, then it is reasonable for the tax payer to choose the easiest approach to reach his/her purpose. In turn, with the thinking of benefit-oriented decision making, either tax payers themselves or the tax state could predict his/her behavior roughly to take precautions

[1] Maybe in Weber's word, "Instrumental rationality"

against or to be used for policy orientation.

However, neither do all the behaviors from tax payers count on benefit-oriented basis (or relies on his/her preferences), nor do all their behavior guided by tax minimization. Tax payers may act to self-realization which might not be taken as benefit-oriented based. Actually, we should even say that a behavior aiming at tax minimization is supposed to subordinate to one's self-profiting motivation. In other words, the reason why tax payers seek after tax minimization might be that they are taken captive by the reality of the coexistence of tax and capitalism, be it their unawareness of it or their being stuck in social reality.

On the other hand, even jumping out the framework of capitalism, the purpose of tax payer's behavior should not be (and actually difficult to) examined by merely the self-interest factor. Since that one's subjective preference are constituted or mixed by various kinds of values one recognized, and that tax minimization being only one part of the various kinds of values, technically speaking, fails to perfectly predict tax payers' inclinations. Thus, to mitigate the confrontation between received law and inherent law, in terms of tax law, all the main value judgments underlying tax payers' behavior should mostly be considered. And the prediction of individual's value judgments is certainly no

easy task.

However, with the arguments in the above, we still find high predictability from the value-based thinking pattern. Reasons are language communicability and dialectic logic. The former explains the communicability between different legal systems, the latter indicates commonalities in the exercise of dialectic logic in the process of value judgment in the respective contexts, which is similar to the righteuous-beneficial differentiation. Therefore, the motive in taxpayer's behavior still carries predictability, even though it is based on some value-judgment other than profit-maximization.

C. Reception and Transplant of rules and principles

1. Principle and rule in interdisciplinary overview

i. Linguistic perspective

It has been argued that people may have innate knowledge of certain core characteristics, **linguistic universals**, such as the concepts of *noun* and *verb*.[1] The whole mechanism of

[1] Hayasaka and Toda (1998/2000), pp.10-11.

such characteristics that is shared by all languages is known as **universal grammar**.[1]

Universal Grammar (hereinafter **UG**) is a theory strengthened by Chomsky claiming that **UG** is the common possession of the knowledge of language that all human beings share, regardless of which language they speak.[2] By inference, there exists a set of principle which may apply to all languages[3], and thus, acquiring them would equate learning the applications of such principle to a particular language.[4]

By incidentally quoting Cook & Newson(1996), "*Rules are idiosyncratic phenomena that account for specific aspects of one language such as the Verb Phrase in English. Principles account for properties of all rules and all languages; UG* [Universal Grammar] *is concerned with establishing a single principle that applies to all rules in English*." (p.34), such universality seems to bear an intention similar to that of jurisprudence.

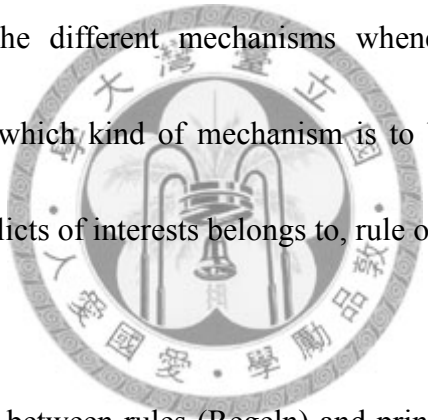
By simply analogy, like relativity in different languages, there also exist relativities in different laws, articles, and purposes of regulations. However, since the law has to be in

[1] Ibid, p.10
[2] Cook and Newson (1996), pp.1-2
[3] Ibid, p.2
[4] op cit.

unity both in values and in application, in order to eliminate the contradictions between different laws or articles in the same law, a set of rules for application must be found or created, similar to the possible effects of **UG**.

ii. Legal perspective: *Rechtsregeln* and *Rechtsprinzipien*

Another quite explicit example of the separation of rule and principle in the field of jurisprudence would be the different mechanisms whenever conflicts of interests occurred. In other words, which kind of mechanism is to be used depends on which level of the concerned conflicts of interests belongs to, rule or principle.



Discussions on differences between rules (Regeln) and principles (Prinzipen) has been recognized over years.[1]However, it is not until **Dworkin** that rules and principles are clearly distinguished in quality,[2] whereas Alexy is the one who launched a strong attack on Dworkin's rules theory[3] yet made revisions to it.

[1] J. Esser, Grundsats und Norm in der richterlichen Fortbildung des Privatrechts: rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre, 1954 1.Aufl.; 4.Aufl. Tübingen 1990 ; K. Larenz, Methodenlehre; Canaris, Systemdenken; z.v. [Yen] (1998/2003) S.62f.
[2] See [Yen] (1998/2003), pp.63-, especially p.65. For Dworkin's accounts, R. Dworkin, Taking Rights Seriously, London.
[3] [Yen](1998/2003), p.65

According to Alexy[1], legal **rules**(規則) refers to the conditions of articles (*Tätbestandes,* 構成要件) concretely stipulated in the articles the effects of which takes place as soon as the elements are fulfilled. Thus, rules could be applied directing to facts in actual cases with the approach of *subsumption*. On the contrary, **principles** are standards or criterion for application which only serves an indirect or subsidiary function to rules.[2] In other words, principles are optimization of rules which the application of rules is at best to approach to the value held by the principle as closely as possible.[3]

2. Resolution for conflicts of interests: **Prioritization** vs. **Coordination**

i. Definition of **conflicts of interests**

The concept "conflict of interests" here, refers to a number of two or more separate but related interests which confronts with each other in a certain incident, *e.g.*, **two confronting application of rules**.

ii. **Prioritization:** Resolution at the *rule*-level

[1] Alexy, Theorie des Grundrecht, 1986, z.v. [Gee](2007), p.194,[Yen](1998/2003), pp.67-.
[2] [Gee] (2005), p.194-195.
[3] Alexy (1986), S. 75, z.v. [Gee] (2005), p.387.

In terms of conflicts of rules, the problem becomes which one or one sets of rules rather than other that shall apply in the very situation. Therefore, it is the **prioritization of application** of rules that serves to resolve the dilemma when it comes to conflicts of interests.

iii. Coordination: Resolution of conflicts at the *principle*-level

On the other hand, the situation in a conflict between principles is rather different. Different from rules, which are merely results of the process of subsumption, principles are signifiers of certain values underlying regulations. When it comes to conflicts of principles, it is the confronting values that are involved. What is being decided is not based on technical concerns of the organization of applying rules but on which of conflicting values should the interpreter take side. That is to say, the coordination process results in an abandonment of values that are not adopted.

iv. Incurred effects of the two resolutions

Notice that the coexistence of two conflicting rules is allowed. The effect which prioritization can make is only the decision of order, that is, the preferred validity of

application of rules in each case. On the contrary, the effect of Coordination, involving more of moral consideration that tangles behind, the decision of which often sacrifices one side of the conflicted interests.

Due to the above-mentioned disparity of the two different levels of conflicts, resolutions for their respective conflict of interests could vary accordingly.

D. Language as Media for communications

1. The relations between language and thoughts

We hold the assertion that languages and thoughts are two different things. However, the two are very much in relation that the two influences each other.

Secondly, we hold that language is something that helps the formation of thoughts. In addition, by accepting Whorf (1965)'s hypothesis of *language relativity*, we believe, different languages affects thoughts in different ways, thus contributes to different thoughts.

As for *language determinism*, even though we fail to provide more scrutinized argumentation, we hereby take a more conservative yet integrative standpoint that **language does play a determinant role in people's thought, however, the generative capacity of human brain itself could not be overlooked**. Such point of view is stressed in the relations of principle and rules in the paper.

2. The relation between principle and rule

Taking into account the crucial role human brain itself plays to languages and thoughts, we further the argumentation by pointing out the relations of rules and principles in terms of Chomsky's Universal Grammar (**UG**).

Furthermore, we compare the relations of rule and principles both in the field of linguistics and jurisprudence, we come to the assumption that they both shared similarities. Such similarities could best be illustrated by Perelman's concept of formal logic and dialectic logic, the former implying the logic of rules and the latter the logic of principles.

3. Communication by formal logic and by dialectic logic

Finally, we tend to deal with application of the relation of rule and principle. In terms of the relations of rule and principle, two levels of application were attempted in the paper; first, the interdisciplinary application between jurisprudence and linguistics, and second, the application to the concept of knowledge.

We found the *logic* of the separation of rule and principle in both jurisprudence and linguistic are *compatible* in terms of Perelman's classification of **formal logic** and **dialectic logic**. However, the application doesn't seem as pleasant in the case of knowledge. Knowledge being one of the forms or even an equivalent of thought, still can not be applied to the model of rule-principle relationship. Thus, we propose that the logic of knowledge and that of thought are different and it is such difference that makes the rule and principle pattern inapplicable.

To sum up, theoretically speaking, even though we can't deny the existence of the detachment of form and substance in the field of tax jurisprudence, a clarification of the relations between taxpayers and tax systems in accordance to such detachment could still be portrayed in the following illustration. And to mitigate the tension between form and substance of tax norms, communication between tax moralities is considered to be a

possibility.

E. Communication in rules and in principle

1. **Relativity** and **Reciprocity**

The concept of **linguistic relativity** is known for the variety of elements in languages, e.g., grammar and lexicon, which results in diversity of languages. However different languages maybe, one of the most influencing factors, so says sociolinguists as well as Chomsky[1], lies in the **multiplicity** of societies.[2]

Such multiplicity, however, resides in the recognition of **relativism**. For example, the relativity of concepts, languages, or even values each respective society holds differs from societies.

Nevertheless, it is undeniable that, no matter what society is concerned, **languages** still play an indispensable part which is either the knowledge itself or as a medium of

[1] "Many linguists, including Noam Chomsky, contend that language in the sense we ordinary think of it, in the sense that people in Germany speak German, is a historical or social or political notion, rather than a scientific one " (http://plato.stanford.edu/entries/relativism/supplement2.html) (underlined by this paper)

[2] In other words, the recognition of pluralistic society as the basic premise is necessary. In terms of values, different interpretations of values in proper are expected and tolerated, including the concept of incommensurability and incompatibility.

communicating knowledge. As a result, in order to understand how languages are in its presentations, what needs be dealt with is the *essence* of languages or, the *definition* of languages.

a. Difference in *sociology of linguistics* and *sociolinguistics*

An explicit example would be the relationships between **sociology of linguistics** and **sociolinguistics**. On the one hand, the field of sociolinguistics would be linguistic features of different social factors, such as gender, ages, ethnic groups. A related factor is the change of time in terms of historical linguistics. However, these topics are discussed within the borderline of society which the formation of the society is recognized as a non-arguable preliminary.

On the other hand, the field called sociology of linguistics, reversely, is a sub-discipline of sociology which conducts research by means of linguistics. For example, the translation of Japanese Constitution drafted by the GHQ during the occupation of U.S. troops could stir up different interpretations according to different ideologies held by different people.[1]

[1] Further reference, Inoue K, MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Making, 1991, University of Chicago.

b. Analogy: a **reciprocity** between *theory* and *application*

In terms of the connection of the above-mentioned two fields, socio-linguistics and sociology of linguistics, it is the **reciprocity** of *theory* and *application* of the two fields as a tool for research that makes the two different fields possible. That is to say, the detection of instrumental characteristic from other fields has been noticed; in turn, the introduction of such turned out only as *methodologies of interpretations* but rather as *changes of direction* in the development of the whole discipline.

c. Application: sociological jurisprudence and sociology of law

Taking the reciprocity of theory and application into account, the *application* of the sociological method in the jurisprudence is worth mentioning.

The differentiation of sociological jurisprudence and sociology of law comes in various interpretations[1], however, one of the most related one would be the one by Patterson (1953). Patterson asserts the research object of the two disciplines is different,

[1] [Shen](2007), pp.243~

sociological jurisprudence being **prescriptive** and sociology of law being **descriptive**.[1] While the former focuses on the regulations, the latter pays its attention to the actual facts that are being regulated.

In terms of linguistics, however, it is that **descriptive** character that is emphasized, both in sociolinguistics and sociology of languages. Even though there exists both rules and principles, we still tend to believe principles still are descriptive in character.

- language relativism and language determinism

Benjamin Whorf proposed two hypotheses for the link between thoughts and language: *linguistic relativity* and *linguistic determinism*.[2] The former suggested that thoughts differ from languages, whereas the latter suggested the language people speak helps determine the very way they think about their physical and social world.[3]

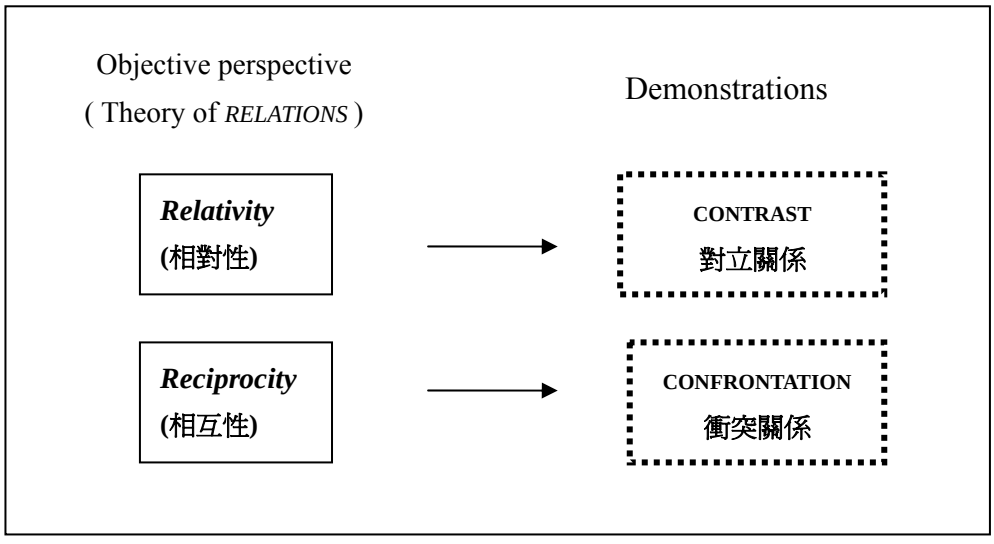
2. Reciprocity after Relativity: **Prioritization**

[1] Ibid.
[2] Whorf (1956), Language, thought, and reality: selected writings of Benjamin Lee Whorf, ed. J. B. Carroll. Cambridge, MA: MIT Press, cited from Clark in: Gumperz & Levinson (1996/1999)
[3] Clark, H.H. (1996), Communities, commonalities, and communication, in: Gumperz & Levinson (1996/1999), p324.

Two or more separate interests that are in relation could have two characteristics: **relativity** and **reciprocity**. The former simply signifies the contrasting positions of the two related interests, whereas the latter, namely, reciprocity, further indicates the confrontation between the two interests in terms of the relations in which they are involved.

Additionally, between the two characteristics of relativity and reciprocity, there exists a set of certain **prioritization**, implying a proper order of recognition. Concretely speaking, in order to understand how two related interests are in confrontation (*at the level of reciprocity*), it would be essential to first of all delve into the actual contrasting positions (*at the level of relativity*) these conflicted interests are in.

Illustration 10 Demonstration of Relativity and Reciprocity



III. Mitigation between rule and principle

If there exists an absolute differentiation between rules and principles, that would be the all-or-nothing character, **Prioritization**, in the former and a more flexible character of **Coordination** in the latter. However, if the two are to be leveled together, the nexus between the two, which contributes to how principle affects rules, mustn't be overlooked.

A. Communicability in values

Since the communication in rules depend on languages, which lies in logic; what makes it possible for two different ideologies which possibly conducted in different languages, meaning different logics, be able to understand each other? Inquiries as such, are labeled as the communicability in values. By a recognition of common logic[1], we believe that different civilizations in different time and spaces are communicable.

B. Knowledge and Language

[1] Lloyd (2007).

1. Links between language and thought

Wilhem von Humboldt believes that *thought* and *language* form so close a union that we must think of them as being identical, in spite of the fact that they could be separated artificially.[1] That is to say, thought and language are two different but closely related *concepts*.

Presumably, we hold the belief that the usage of language is merely a **confirmation** of our opinions in the minds, *i.e.*, our thoughts. That is to say, something called thoughts in our brains are conjured up before it was put into the *form* of language. Therefore, our minds could be *translated* into different forms according to different languages, whereas the meaning or the **id**eas being expressed should be the same referent.

If we consider *substance* and *form* to be two different things, then *thoughts* being the former and *language* being the latter are apparently *distinguishable*. Therefore, language is *not* the thought itself. However, if we try to focus on the fact that it is not until the formation of thoughts into languages could our thoughts be developed to the extent of being expressed. That is to say, our thoughts can never be complete without

[1] Aarsleff (1988: xviii), cited from Gumperz and Levingson(1996/1999) p.21.

the formation process of transforming into languages. Thus, using languages equates using thoughts. Thoughts and languages are just two different phases of one thing, the expression of our minds. By inference, it is not difficult to understand why Chomsky had presumed a language-mastering device which is already embedded in our brains upon birth, the functioning of which is only by certain stimulation.

In this passage, what is to be emphasized is that, even if thoughts and languages are only two sides of one same thing, their features are still distinguishable, and the relations between these features is indicative of the dichotomy of form and substance raised in the previous paragraphs.

2. An analogy of rules and principles and their prioritization

Since we are not quite sure about whether thought and language are two concepts of one same thing or not, it would be better to first recognize the difference between the two concepts before trying to take the concept of knowledge into account.

As a result, when dealing with the relation between knowledge and language, we tend to take thought and language as two different things and try to see whether both features

derived from language and thought respectively could match the concept of knowledge or not.

i. Analogy to rule-principle relationship

The relations between thought and languages in the paragraphs above may have the same logic as the relations between rule and principle. That is, if we compare thoughts to principles and compare languages to rules, the characteristics of rules towards principles and vice versa could thus be compared to that of language towards thoughts.

To demonstrate, if the purpose of the enactment of law is to regulate people's **thoughts** by means of regulations, then the application of law would be the use of legal language to transmit such purposes to the people. Furthermore, it is only with the application of rules as the avenue of communicating thoughts that people's thoughts could be reached and thus be affected.

Therefore, both rule and principle in the linguistics are indispensable when dealing the relation of language and thought. The application of the relation between rule and principle to jurisprudence is the same case. That is, rule and principle both serves its

own role to play that without either of which the whole mechanism of the rule-principle relationship would no longer function.

ii. Resolutions for conflicts of interests

If it is possible to compare the relations between thoughts and languages to the relations between principles and rules, likewise but reversely, the logic of *prioritization* in rules and the logic of *coordination* of principles may seem applicable to language and thought.

That is to say, when it comes to contrasts of opinions in the communication, principles serves the function of coordination different standpoints. Likewise, upon alternative usages of language for discretion, it is the prioritization of rules that conducts the decision process.

What is to be stressed here is that two different kinds of *logics* applies according to different levels of conflicts, rule or principle.

In addition, the separation of knowledge and language makes it possible to the

differentiation of concepts as well as values in jurisprudence. Oppositely, in the field of linguistics, this kind of differentiation appears in the form of *thought* and *language*. The former is very much related to knowledge.

C. Communication both in principles and in rules

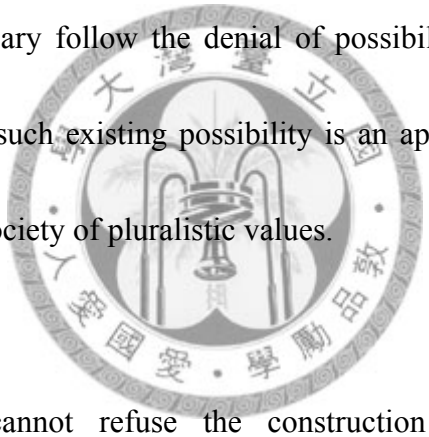
Now we tend to march in a larger leap by referring to *thoughts (opinions) and languages (communication)* as *rules and principles.*

In a more practical sense, language serves to one of the ultimate goals as **communication**. That is, the use of language plays the roles of not only expressing one's thoughts in his minds but as well exchanging ideas with other persons. The former involves only the processing of brains from one's thoughts into one's own languages, while the latter, inevitably, has something to do with exchange of thoughts with one another by means of other people's languages. Such thought-sharing and language-sharing engagements are the core of communication.

1. communicability as **common interests**

As indicated in the above, languages must deal with communication of different people's thoughts, sometimes different languages. Thus, such differences in thoughts and languages, stresses the importance of the *pluralistic* character in a society, reaffirming the fact that different values exists in the same society and needs to be negotiated, communication becoming an unavoidable process.

In a more optimistic sense, even though pluralism may deny the *commensurability*[1] of thoughts, it doesn't necessary follow the denial of possibility of *communicability*. In reality, the recognition of such existing possibility is an appropriate explanation for a functioning yet plausible society of pluralistic values.



Furthermore, pluralism cannot refuse the construction of the universality for communication. Such universality, however, requires a mechanism for mutual understanding, namely a communicable language.

2. Logic and the rule-principle relation

i. Difficulty of application to the communication process

[1] Here refers to T. Kuhn's definition in Kuhn (1970_2).

From the above, we have proposed that there is a similarity of logic between the relations of rules and principles both in the field of linguistics and jurisprudence. Even though however different the two disciplines appear in its nature and functions, such disparity does not affect the similarity of the relations proposed.

In terms of the application of such relation, however, the outcome appears not as satisfying. Due to the fact that communication involves not only the process of both principle and rule of thoughts but as well the element of knowledge, if the process of the exchange of thoughts does not cover the exchange of knowledge, such communication would become mere logical yet non-developing conversation. Simply speaking, it is the difference between exchange of knowledge and exchange of thoughts that makes the application unconvincing.

As a result, a possible explanation would be that the *logic* of knowledge different from the logic of either language or thoughts. Such proposition includes two deductions. ***First***, knowledge which is transmitted through language is not merely language itself. Conversely, language serves as the transmittance for communication as well as an interpretation of thoughts. ***Second***, knowledge and thoughts have different significance.

It is not incorrect to say that knowledge could be a more concrete form of thoughts, but to say the logic of knowledge has somewhat *reorganized* the logic of thoughts would be even more precise.

Based on this assertion, the paper tends to focus on the differentiation of logic between *knowledge* and *thought*.

ii. Introduction and further implication of Perelman's "**dialectic logic**"

According to Perelman, logic is not only **formal logic** like mathematical formula, but as well **dialectic logic** like value judgments. Value judgment is a judgment about "purposes of human action". In this sense, value judgment is the standards for evaluating right or wrong, good or bad, useful or not, etc.[1]

Different opinions could all be reasonable at the same time. The concept of *reasonable* is internally pluralistic. A reasonable man is governed by "common sense", who tries to do things that are acceptable by his surroundings and all the other people. So people consider on-changing things, evolution and feelings of human beings, and the

[1] See Tipke(1983), Wang(1997), Shen(2007)

development of morals, etc.[1]

iii. A Principle of Language

Thanks to Perelman's classification of *logic*, rules and principles could thus find themselves in a logical relationship.

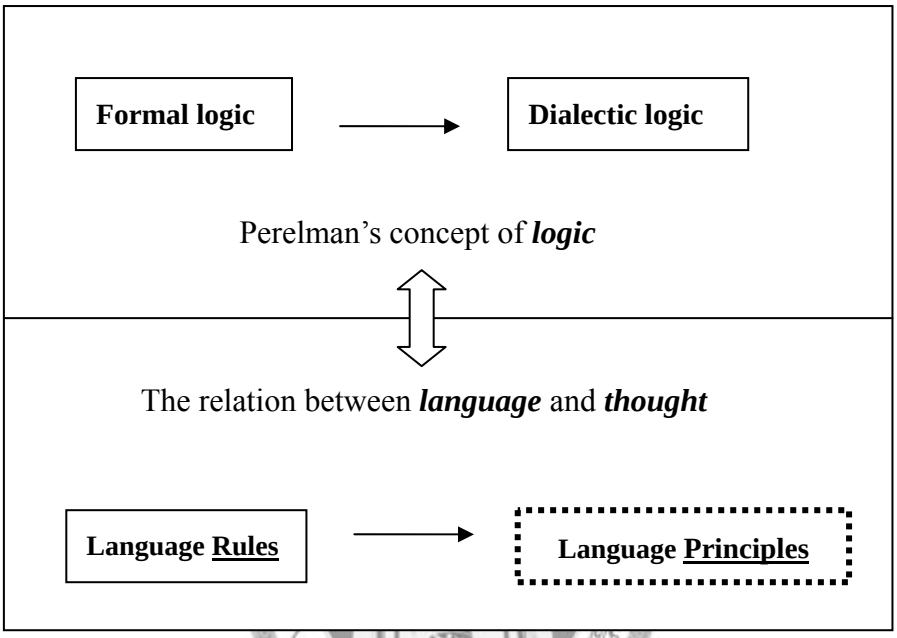
Since people live in a pluralistic public environment and different opinion could all be acceptable, people should try to make believe others among different opinions so as to find the most support. Therefore, it would not be difficult to understand why dialogues, persuasions, debates are stressed by Perelman.[2]

Further, when communicating knowledge from different backgrounds, the only way to understand these differences is by language. Applied to Perelman's logic, that is, the application of different principles, which bears different values or moral grounds, can only be understand each other or reach a certain degree of exchanging ideas by means of languages as rules which links between the concerned principles. Therefore, the *principle* of language, in terms of dialectic logic, can no longer be a thought of

[1] See Shen (2007).
[2] [Shen] (2007).

grammatical language only but as well a kind of knowledge, the logic of which is either innately different or transformed afterwards.

Illustration 11 Application of *logic* to rule-principle relation



CONCLUSION *INTRINSIC VALUE JUDGMENTS IN TAXATION LAW*

—the righteous-beneficial differentiation

It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.

K. Marx, A Contribution to the Critique of Political Economy, 1859*

In the long history of human beings, people in the pre-modern age were born within a society and at the same time, in a state; thus shadowed by such "**community**" hovering above.[1] In turn, generally speaking, it is difficult for us to get rid of the influence from such factors as *society* and *state*. Therefore, when it comes to making decisions, (or, to put it differently, when we are considering how to act), such factors[2], not only become the variables we take into account, but as well turn into one of the major criterion of our **value judgments** (*Wertentscheidung*) which we depend on.

I. Fiscal Constitution—positioning the relation of taxpayers and tax systems

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* Original text: „Es ist nicht das Bewußtsein der Menschen das ihr Sein, sondern umgekehr, ihr gesellschaftliches Sein das ihr Bewußtsein bestimmt" English translation from: K. Marx, *A Contribution to the Critique of Political Economy*, Progress Publishers, Moscow, 1977, with some notes by R. Rojas.

[1] Ray Huang, The historical thinking of the new era (新時代的歷史觀)[stressed part added in this paper]

[2] In the paper, only two factors are to be touched upon, values of the society and the institution of the state.

A. Two factors: *Society* and *Constitution*

Judging from the articles in Constitution, two main characters could be distinguished, *the basic rights of the people*, and *organizations of government*. We thus generalized the former into the question of **people**, the latter, the question of **institution**. However, if we consider from the *normative character* of Constitution, the reason why the question of people and institution are enumerated in the text of Constitution must have something to do with the **values** predisposed in the spirits of the Constitution.

Such **values**, simply put, can be taken as Constitution's predisposition of **Man**. In fact, the establishment of government institutions also serves to ensure the protection of human basic rights to the complete realization of the values predisposed (or reaffirmed) by the Constitution. And the concept of fiscal Constitution *(Finanzverfassung)* is by all means an actualization the above system in the field of fiscal and taxation law.

B. The people-institution relation

In our point of view, the word *man* refers to **behavior** and *system* refers to **institution**.

That is to say, the relation of man and system are nothing more than a relation of an agent (the person who acts on certain behavior) and the institution therein. Thus, the object to be analyzed should be **the influential factors** which plays decisive roles in agent's behaviors (such as *preferences*), and **the possible effects** the institution therein which force upon the agents' decisions. The former, depends on the values of the society, the latter, the predisposition of the institution.

II. Taxpayer's behavior in tax jurisprudence

Applying the above, taxpayer's behavior under *tax law* (no matter based on the inner subjective preferences or based on other motivations in addition to self interests), is both subjective to the influence of state's purpose (or the rationality of the state) so as to values of the society. The former refers to the effects from the institution of the state, that is, certain constraints upon people's behavior from the very institution these people resides in; the latter referring to the effects from specific social contexts, that is, the very values which people come to internalized themselves in, through the environment they live in.

If and only if a theory is expected to start from a certain logical system (or there must be

a certain logic underlying the construction of every system), *then* a theory intended to constructs the relation of state and people in tax law—designed to more precisely understand how taxpayers are to be affected by the power of taxation, and through it to be able to analyze behaviors concerned in order to better the function of legal interpretation which protects basic rights of taxpayers—should also take into account the institution where taxpayers belongs and the moral systems of the society these taxpayers and the institution are embedded in, in a logical way.

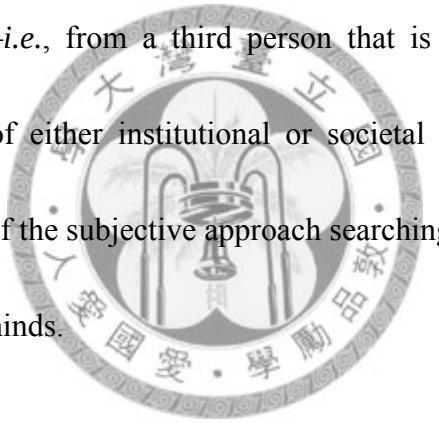
Furthermore, *if and only if* different values may result in different systems of logic; *then* it is would be possible to derive that the **interaction** between taxpayers and state institutions are understood and portrayed differently due to the influence from either institution or society. Thus, in the paper, the two systematic understanding of this interaction are distinguished as **taxpayer's values** "in institutional image" and "in social image".

In terms of **standards of conduct** of taxpayers, by introducing the two types of values above are there two types of standards, both in institutional image and in social image. Once in actuality, however, the above two values result in two different decisions, meaning a *confrontation* of values (*Wertwiderspruch*), there need to be a resolving

mechanism for coordination (*Abwaegung*). Such resolution process, *i.e.*, coordination of conflicts of interests, in terms of taxpayer's behavior under **tax law** is the very topical issue in fiscal constitution.

A. reconstruction of *objective* and *subjective*

However, if we try to observe how the external environment could effect taxpayers from an objective perspective—*i.e.*, from a third person that is neutral to the conflicting interests— the approach of either institutional or societal is never enough to claim immunity from the blame of the subjective approach searching for the actual meaning of taxpayer's values in their minds.



B. Starting from *Interpretation*

In order to clarify the obviousness of separating subjective and objective approach, an example for demonstration is needed. We try to introduce some concepts from linguistics since language rules apply widely to human sciences and it best suits our case.

For example, when a non-native English speaker attempts to interpret a passage of conversation of a native English speaker in a manner of *understanding the truth*, we hold that it would be even more *scientific* by means of verbal and grammatical analysis rather than by thinking in the native English speaker's way in order to reach the level of *objectivity*, by definition the highest level of understanding the truth, namely, the actual meaning or intent of the speaker.

Such analysis conducted by a *non-native* speaker but not a native speaker is not *native per se* (*subjective approach*) but after all *non-native* in its nature; thus, the result of the analysis is at best a *nearly* native yet non-native understanding (*objective approach*) of the speaker on condition that the interpreter has a good command of the logic structure of the language and even to the extent to emulating the thinking of the native speaker.[1]

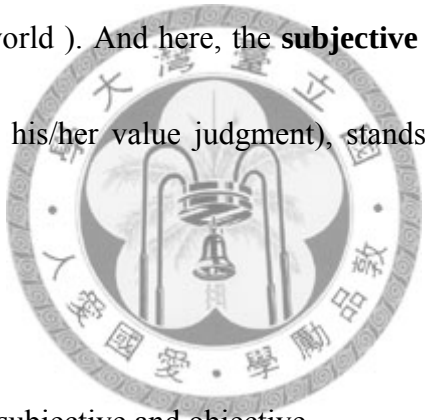
However, the above requirement of being "scientific", is nothing more than a useful tool in terms of research method to reach reality (or the truth); in other words, whether a research is scientific or not, can only value how much it is "*the affinity to reality*" the result of such research, not whether or not "*the truth itself*."

[1] Here may involve the issue of relation of thought and language. A further discussion will be made in the later part of the paper.

C. Analogy to **thoughts**

1. essential character of subjective minds

Similarly, an issue rooted in the traditional Chinese culture to a person immersed him/herself in the very culture, the ideas of whom will be more originative, in turn, more generative than to someone who is nurtured in western civilization (or humanities, moralities in the western world). And here, the **subjective minds**, in terms of judging the choice of a person (or his/her value judgment), stands out to claims its essential value of being in existence.



2. the separation of subjective and objective

Therefore, it is necessary to first of all make a distinction between the concept of **subjective** and **objective** as well as keep aware of the existence of such distinction. Simply put, an **objective** perspective takes the standpoint of an *outsider* who makes consideration without worrying whether the outcome would be against his/her own interests; oppositely, a **subjective** point of view is to try to think as an *insider* whose interests is largely involved and it is reasonable for us to assume their decisions are

often very much in accordance with their own interests.

III. Taxpayer *within the institution* and *within the society*

A. A portrait of the **behavior** of taxpayers

In order to clarify the taxpayer's behavior, we believe it would be clearer to adopt the thinking of society and institution perspective into analysis. Thus, three layers of elaboration is to be presented in the following, a collaboration of which is shown in Illustration.

1. An ideal type of a taxpayer: being free and equal

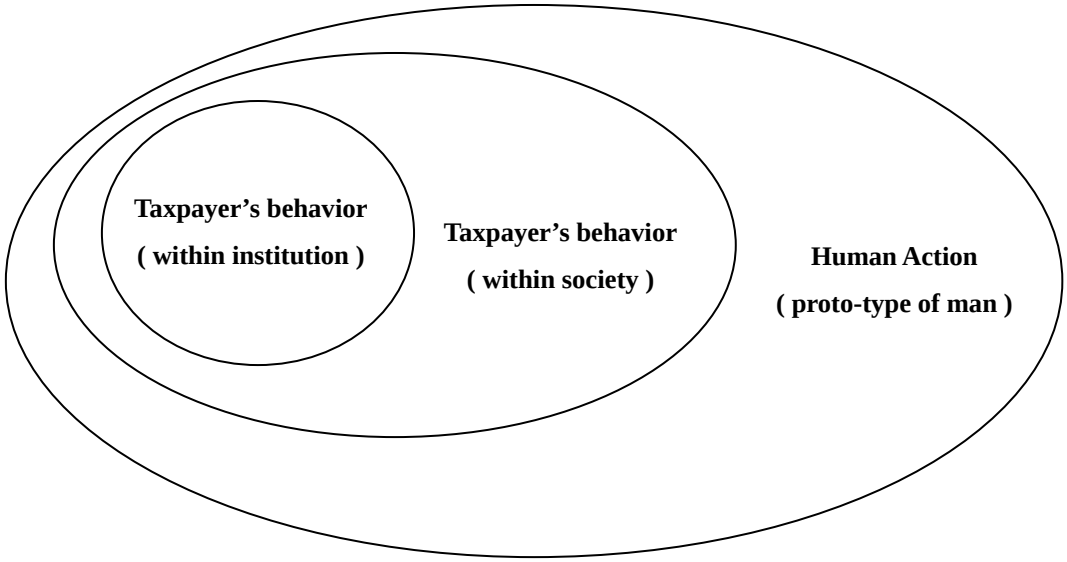
From the previous discussion, the freedom of taxpayers could be valued differently from other aspects, thus the mechanism for the protection of such freedom may as well be in different design. In addition, adding the consideration of the taxation theory, the distribution of tax burden to taxpayers should be **fair and equal**; such fair-and-equal concept of tax equity should also have its genuine meaning.

Therefore, it would be better to set these two characteristics as premises before going into discussion. In fact, it is actually how freedom and equality of taxpayers are being affected by the institution that is to be discussed and that it is how to protect such freedom and equality within the institution that is to be resolved.

2. Taxpayer within the society and within the institution

In addition, another important factor in taxpayer's decision lies in his/her social background. That is to say, important as social values are, the discussion involving such individual situation are categorized in the field of tax morality, which is to be elaborated in the next part. Therefore, in terms of the objective observation of the relation between taxpayer's behavior and the tax system, the only thing that is to be discussed is the element of institution. Never the less, the way institution may affect and its relation between societal factors is shown in the following illustration.

Illustration 12 Taxpayer's behavior within institution and within society



B. freedom and **equality** in tax law: connection between motivation and behavior

If and only if the system of taxation law itself is a logic system independent of other legal fields, *then* the concept of freedom and equality in terms of tax jurisprudence should have its own way of interpretation. What needs to be take care of is how such interpretation of freedom and equality from an individual subsystem of jurisprudence could be recognized and integrated into the ideas of Constitution.

From the standpoint of the *purpose* of law, the concept of freedom and equality are two of the most essential values held in terms of human rights. The implementation of these values in an institution usually indicates the actual situation of the realization of human

rights. From a view of public finance, the freedom of taxpayers and equal distribution of tax burden are even considered to be the fundamental questions in terms of **theory of levying taxes**.

C. Institutional effects on taxpayer's behavior

1. Self-interest superior to other self-motivations

The behavior in searching of self-interest should be observed with the premise of **a man within the institution.**

One of the propositions of this paper is that the reason why people choose to succumb to self-interest when making decisions is due to the fact that they are within the institution. In other words, **a person within the society** does not necessarily take action according to his/her self-interest, but rather, some other values (such as morality) also play significant roles in dominating such person's decisions to act.

What is to be sure is merely that, the **motivation** based on self-interest is often better understood by others. In turn, the reasonableness of the **behavior** acting in accordance

with such self-interested motivation can therefore appears more *acceptable* to others, which raises the possibility of such behaviors been exchanged thus brings in the expected effects through such exchange (*i.e.*, the purpose of conducting the behavior). And the reason why self-interest as a motivation can be "**superior"** to other motivation is due to the effect of **rationality**.

2. **Rationality** assumes having communicability

The setting of parameters in economics usually assumes to ensure a certain degree of rationality. Such **degree** of rationality indicates the **possibility** of *communication* (or *exchange* or *interaction* amongst people).

Incidentally, even if *communicability* could be taken as a measurement of the degree of rationality, it only implies the possibility that "achieving the purpose of communication" is one of the functions of rationality. However, the question of whether **rational** itself, here equating **logical**, embodies a certain value is not yet answered.

3. A mechanism for continuation of communication

None the less, judging **rationality** by its functional significance hints on a possible existence of an *objective* network where interaction amongst people is possible. In order to ensure the continuality and the well-functioning of such network, the need for a neutral and objective mechanism thus emerges. And the reason for the establishment of such inter-exchanging mechanism, without a doubt, only serves the very purpose of "*maintaining communicability*". For the purpose of communicability, by inference, a man should consider only *rationality* before action, and value only *self-interest* as motivation of his/her behavior.

By inference, under a well-functioning mechanism, a man who acts only according to his/her self-interest is more likely to achieve his/her goals.

D. Legal premise for *homo economicus* : adaptation towards *homo sociologus*

We hold that an ideal type of man in jurisprudence is a man of freedom and of equality. Both the content of freedom and equality, however, should have different appearances within different society therein. Nevertheless, a man his/her freedom and equality of whom should be guaranteed by the constitution to some degree similar to a presumption in economics, namely a somewhat *rational* hypothesis. The degree of rationality often

lies in **communicability** (or **inter-exchangeability**)—the **interactions** between people.

IV. *Ancient Voices, Modern Echoes*—aiming at the moral grounds for tax obligation

In modern constitutional state, the status of people includes various characters. That is, it is the different relations between state and people that makes up the different roles in different plays to be acted.

In a **social state ruled of law** (*sozialer Rechtsstaat*) a man guaranteed of freedom and equality is not only a **taxpayer** in terms of his/her relation of taxation to the state, but also a **recipient** in terms of his/her social-welfare relationship with the state. In other words, for, men, there seems to be different roles to play according to different thinking patterns so as to standards of conducts. In turn, the choosing of such standards relies on the roles they play in terms of the competences and obligations of his/her relations with the state. Hence, the **interests** of the roles themselves are the main concern.

However, no matter what kind of role a man plays according to his/her relations to the state, what remains constant is his/her ***existence in the state***, namely, under the control of state's power. These relations to the state are founded on the basis of the existence of

state and society. And to be a member of the state, there has to be a *basic burden*; such burden in terms of tax state, is the *obligation to pay tax*.

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Instructions:

1. References written in alphabets are listed in alphabetical order; references written in Chinese characters, Chinese and Japanese, in separate category but both arranged according to numbers of strokes of author's last name.
2. Authors whose works are cited in the paper but written in Chinese or Japanese, are cited by an English translation of their last name and is illustrated in brackets. Ex. [An] → works written in Chinese or Japanese by [安]作璋.
3. Works written in languages other than English cited in this paper, are under free translation, only serving to indicate key concepts appeared in the title. For detailed information, please refer to actual title listed in the bibliography attached to the Chinese summary.

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APPENDIX: TRANSLATIONS & ANNOTATIONS OF THE TWO TEXTS

- **《Die Krise des Steuerstaats》=The Crisis of Tax State**

Year		Language
	Original	
1918	Die Krise des Steuerstaats, Zeitfragen aus dem Gebiete der Soziologie, Graz und Leipzig	German
	Translations & Annotations	
1951	Kimura, M., *Sozeikokkanokiki*, Keisousyobo	Japanese
1954	W.F. Stolper & R.A. Musgrave trans., *International Economic Papers*, 4 (1954), 5–38	English
1970	*La crisis fiscal del estado*, Hacienda Publica Espanola, no.2, pp.145-169	Spanish
1983/2006	Kimura, M. & Kotani, Y., Sozeikokkanokiki, Iwanamibunkou.	Japanese
1983	*La crisi dello stato fiscale*, in: Stato e inflazione a cura di N. De vecchi, Torino, Boringheiri	Italian
1984	*La crise de L'Etat fiscal* , Impérialisme et classes sociales, Paris ; Flammarion, 1984, p. 229-282.	French
1991	R. Swedberg (ed.), Joseph Schumpeter: The Economics and Sociology of Capitalism., Princeton: Princeton University Press, 1991, pp.99-140.	English
1996	P.M. Jackson (ed.) The Foundations of Public Finance, Vol. II, Edward Elgar Publishing Ltd., pp.330-363.	English
2005	LAN, Y.C., The Crisis of Tax State, in: Schumpeter's Tax State Theory and Modern Constitutional State, Master Thesis of National Taiwan University, Appendix. [Lan]	Chinese

- **《Yiantielun》=鹽鐵論=Discourse on Salt and Iron**

Year		Language
	Original	
91B.C.	Huan-Kuan，Yiantielun[Discourse]	Chinese
	Translations and Annotations	
1931,1934/ 1973	Esson M. Gale, *Discourses on Salt and Iron—a debate on state control of commerce and industry in ancient China*, reprinted by Ch'eng Wen Publishing Company (Vols. I-XIX(1931), + Vols. XX-XXVIII(1934)) [Gale]	English
1934	Sogabe Shitsuo, *Entetsuron*, Iwanami.[Sogabe]	Japanese
1957/1985	Guo, Muo-Rou，*Yientielunduben*, Benjinkeshuechubanshe, 1957. Collected in: *Guomuorouchuanji*, Lishupian, vol.8, Renming，1985, pp. 471-634。[Guo]	Chinese
1967/1985	Yamada, K., *Entetsuron*, Meitoku.[Yamada]	Japanese
1970/1994	Sato, M.,Touyoubunko，Heibonsya。[Sato]	Japanese
1978	Walter Georges, Dispute sur le ser et le fer, Paris.	French
1981	Zhan Hung-Ji, Handaitsaijindabianlun—yiantielun, Reading times. [Zhan]	Chinese
1992/2006	Wang Li-Qi, Yiantielunjiaozhu, finalized version, Zhonghua. [Wang LQ]	Chinese
1993.1.	Wang Ning et al (ed.), Pinsibenbaihuayiantieluntsianfulun, Beijingguangbuoshueyuanchubansh.[Wang Ning]	Chinese
1997	Wang Zhen-Min, examined and revised by Wang Li-Qi, Yiantielunyizhu, Jianhung. [Wang ZM]	Chinese
2000.5.	Qiao Qin-Ju, Yientielun:zhushben, Huashia[Qiao]	Chinese
2001	Spore o Soli y Zheleze (Yan Te Lun). Translated by Ju. L. Kroll. Vol.1, St. Petersburg: Russian Academy of Sciences, Institute of Oriental Studies, St. Petersburg Branch, 1997, pp. 416. Vol. 2, Moscow: Russian Academy of Sciences, Institute of Oriental Studies, 2001. pp.831. [Kroll]	Russian
2002	Über Huan Kuans 》Yantie lun《, Vademecum zu dem klassiker der chinesischen wirtschaftsdebatten, hrsg. Von Bertram Schefold, 2002, Duesseldorf. [Schefold]	German
2006	Lu Lie-Hong，examined and revised by Huang Zhe-Ming, Shinyiyientielun，Sanmin.[Lu]	Chinese

附：中文摘要暨背景說明*

TAX STATE AND FISCAL CONSTITUTION

Comparing《Discourse on Salt and Iron》and《The Crisis of the Tax State》

租稅國家與財政憲法

對照《鹽鐵論》與《租稅國危機》

大綱

關鍵詞：課稅正當性基礎、租稅倫理基礎、稅法規範基礎；租稅國危機、鹽鐵論、課稅界限、財政社會學、經濟與憲法；義利之辨、原則規則理論、語言相對性；繼受、固有性、共通性；體制轉軌

* 本中文說明，鑑於中英文讀者背景不同，在脈絡上有其各自著重面向，在論述上有若干調整之處，特此說明。

目次

中文摘要

壹、 本文嘗試以經濟體制與憲法之關係爲架構，透過桓寬之《鹽鐵論》與熊彼特(Joseph A. Schumpeter)之《租稅國危機》二文之對照，作一課稅界限之中西考察，並嘗試據以建構其財政憲法上意義。

貳、 本文出發點，旨在針對課稅界限中偏向客觀制度保障之傾向，作一調整。調整方法乃提出一具有主觀性色彩、但依舊具邏輯性而有預測可能性(predictability)之價值判斷模式作爲補充。最終則在肯認課稅界限論本身爲合適方式之前提下，以固有性觀點，強化主觀要素之不足（若從制度面之角度觀之，此即增加其社會性之考量）。

參、 架構安排上，首先，就《租稅國危機》當中所使用財政社會學(Finanzsoziologie)觀點，分析其發展脈絡及現代意義；其次，再從《鹽鐵論》背景，觀察國家課稅權力及其界限概念；最後嘗試從繼受法觀點探討課稅之界限與傳統中國其固有性之互動關係。

肆、 文中（一）首先肯認「課稅界限」概念在中西方各自固有之脈絡中仍具「共通性」（Commonality）；（二）其次試圖從傳統中國之價值脈絡（即以「義利之辨」所建構之「固有性」(Intrinsity)概念）中尋求課稅「正當性基礎」、租稅「倫理基礎」、稅法「規範基礎」三者作爲課稅界限要素之可能性；（三）最後透過課稅界限三要素之應用，建構一可體現固有性之憲法課稅界限。

要之，本文認爲，「課稅界限」作爲財政憲法上一統攝概念，具有實質憲法意義。析之，「課稅界限」在意義上之分析，至少具有四種不同面向，但卻相互關連，互爲補充。

（一）首先，就法律層面而言，以法律之形式課予租稅，自有比例原則之考量，以兼顧納稅人之基本權保障；

（二）其次，財政層面而言，課稅權力之行使縱然合於比例原則，稅法所課予納稅人之稅

捐負擔，更應達到「量能平等負擔」之要求，以維持市場機制之公平性；

（三）再次，若輔以社會層面考量，即便達到量能平等負擔之外，每一納稅人在總稅負上亦有其上限，逾此上限，個人交易之行爲誘因將不復存，市場機制亦將失其基礎；

（四）但最後，倫理層面而言，納稅人行爲誘因之強烈程度因其所處之制度限制以及所處之社會價值觀感不同而有地理時空之差異，因此有透過「固有性」(Intrinsity)加以細緻化必要。

詳言之，本文認爲，**課稅之正當性基礎在於，基於該正當性所取得之利益，必須通過租稅倫理之檢驗。**對於西方以「民主正當性」作爲課稅倫理基礎之租稅正當性概念的思考，在傳統華人社會之價值脈絡下有繼受之困難。在觀察《鹽鐵論》當中「義利之辨」之體現情形，並在賦予義利之「辯」其在傳統中國一固有價值權衡模式之定位以後，本文認爲西方財政學上（在此以《租稅國危機》之討論脈絡）所討論租稅之「**公共性**」概念（在此指 Schumpeter 所歸因之 common exigency (gemeine Not)），在傳統中國脈絡下將有跡可尋。職是，改以基於此公共性所推導出之「納稅義務」作爲課稅倫理基礎之租稅正當性概念，更有具體化平等、自由等共通價值之可能，且較具可行性。

伍、 本文副標定爲「對照《鹽鐵論》與《租稅國危機》」（原文爲：Comparing《Discourse on Salt and Iron》 and 《The Crisis of the Tax State》），則用以提示研究方法，即：從「鹽鐵論」尋求租稅國家課稅界限論之固有意涵。文末認爲，中西雙方在各自文化傳統脈絡下，均有此一**界限**存在，是以在現實上已然繼受西方制度之前提下，更應透過本身固有價值理念之反省，以緩和固有與繼受之間的磨合。

陸、 本文所稱「固有性」(Intrinsity)，其目的亦在於從《鹽鐵論》脈絡中尋求反應傳統中國價值之若干要素（即「義利之辨之價值判斷模式」），並用以回應於所欲建構之固有稅法體系。本文認爲，至少在稅法中，對於「固有」(intrinsic)之概念，應具有兩種意義之認識；其一當以作爲相對於「借用概念」（entlehnter Begriff）之「固有概念」

（eigener Begriff）爲代表，具有科際整合關懷（即學門相對性）；另一則係以與「繼受法」相對之「固有法」爲代表，強調對傳統中國價值理念之認識與具體化。

柒、 具體推衍部分，本文接續上述**固有性**之兩種意義，分述其內涵及其各自與**課稅權**之關係。針對固有性之第一種意義（即固有概念借用概念層次），本文從《租稅國危機》一文所運用之財政社會學觀點，先從財政理論所探討課稅公平等概念，進而從中尋求納稅人在憲法上自由與平等之正當性；至於固有性之第二種意義（即固有法繼受法之層次），本文認爲，稅法上繼受概念有意義，原因不在其法律性格，而是其財政理論之本質性；而不同租稅文化間溝通之可能性，並非繫於形式邏輯之理性，而係基於不同價值判斷模式間之共通性。

捌、 另本文試圖透過原則規則相區分觀點在稅法學上之運用與深化，來緩和繼受法國家（以傳統華人社會爲中心）中，其固有價值理念（以傳統中國固有價值爲中心）與繼受之法制度與法理論（以歐美西方之自由平等爲中心）之間的衝突。而從《租稅國危機》與《鹽鐵論》二文本中所提示之課稅界限圖像作中西對照式分析，以對現今居於轉型階段之市場經濟體制一財政憲法上回應與相應之稅捐違憲審查基準。

玖、 本研究之具體結論，乃臚列四點於次；而本研究之定性，倘以「稅法學方法論上之反省」觀點視之，或許較易理解。

（一） 稅法學作爲一價值取捨問題

稅法學之研究課題，乃異於單純追求利益極大之學門。首先，透過對「租稅利益」之定義，說明稅法學所追求著，並非一味尋求經濟學式如何極大化租稅利益之學門。第二，稅法所欲追求或維護者，反而係一與租稅利益相對之概念，即表彰一量能平等負擔之「租稅倫理」理念；第三，說明此一租稅倫理之理念，猶如在財政學上採取重視公平優於效率之價值「取

捨」立場。

對於稅法學上長期爭辯之課題，從「稅法獨立性」，到其所衍伸之租稅規避行爲之「主觀要件」、乃至於課稅所得之「營利意圖」等，倘以財政憲法角度觀之，俱爲一關鍵概念之延伸與發展，此即「價值問題」。申之，如何規範納稅人，取決於憲法上如何對納稅人「評價」之問題。

實則，財政憲法本身應爲一價值導向之法（wertbezogenes Recht）；對於國家之經濟體制，財政憲法必須做出價值上之判斷與取捨。而在財政憲法框架下所制定之稅法規則，更應以維護該所選取價值所形成之稅法原理原則爲中心。

（二）　「租稅利益」作爲「納稅義務」之相對概念：「義」與「利」之關連

第二，稅法上價值取捨（是否給予肯認）、衡量價值高低（保護對象之優先次序），往往流於單純以「租稅利益」之有無與多寡，做爲表現稅法評價基準之判斷模式。惟吾人對於此一「租稅利益」之認識，不應侷限於數量上應納稅額多寡之表象意義，蓋此一利益更象徵納稅人內心世界個人私利與平等負擔之租稅公平理念間之價值取捨。而此種利益，究係如何表彰納稅人之價值，或者納稅人如何將此租稅利益評價爲行爲之最大誘因者，殊值深究。

（三）　「義利之辨」之固有性與共通性：固有意義稅法規範之建構

第三，透過傳統中國之倫理思想來理解此種租稅利益，並成爲規範之依據者，似較能看出將租稅利益當成「規範對象」之合理性。而此種透過固有價值來具體化理解者，亦同時突顯了稅法學本土化之必要性。

本文聚焦之《鹽鐵論》文本當中所體現之「義利之辨」（或「義利觀」），即一體現固有價

值權衡之適例，亦即在思考模式上具有一固有性。然而，傳統中國**義利觀之思考模式**（本文譯爲：righteuous-beneficial differentiation）與當代西方法學理論之「原則／規則」理論，亦具有其共通性，是以在建構固有稅法規範時，如能意識到此一特性，將能緩和繼受法制度所生之衝突。

承上，面對固有與繼受間衝突之緩和，本文不採取強勢主張固有意義之絕對支配，反而是站在承認二者主體性之前提上，強調二者間溝通可能性之促進。但易言之，在這層意義上，中西之課稅界限，其外觀上的共通性，並不足以從各自實質的固有性導出。

（四） 課稅界限論與主觀價值取捨：以「納稅人之行爲動機」爲中心

第四點乃是課稅界限論之修正與調整一事在稅法解釋之意義問題。亦即，本文嘗試將論證焦點，由「課稅權」轉移至「納稅人」，強調從納稅人之「行爲」觀察動機，並透過對行爲的保障，以確保納稅人之價值判斷不受課稅過度影響。

本文肯定財政負擔之公共性在傳統中國仍具有支配性意義，而透過「義利之辯」傳統思考模式，本文嘗試將之運用於當時納稅人主觀心態之揣摩。本文認爲，租稅國理論所提示納稅人財產自由之前提－**私利動機之維持**——除了憲法上賦予課稅權一界限外，更必須同時兼顧納稅人之行爲動機之保護，方足致之。本文嘗試指出稅法解釋中偏重客觀解釋（以制度論爲中心之課稅界限論）之傾向，並進而強調主觀主義（以行爲者動機爲中心之**避稅意圖論**）之重要性。亦即，鑑於納稅人之動機往往居於行爲之關鍵地位，是以在判斷是否具有避稅意圖時，更應斟酌其行爲取捨背後之價值衡量過程（本文簡稱**納稅價值論**）。詳言之，納稅人在價值衡量上，代表該個人之「租稅利益」與代表該個人與國家間社會連帶關係之「社會性」二者之緊張關係較強者，租稅規避意圖則較弱，反之則異。[1]

[1] 在此需加以區別的是，避稅意圖與租稅規避(Tax Avoidance)在法律效果之連結。亦即，租稅規避之效果係一回歸經濟實質之導正，故該當脫法避稅之法律結果，不是一個具有評價性的制裁。然而，

而上述以納稅人爲中心之想法，應用於稅法解釋上，爲本文所謂「主觀理解」之解釋——即對於納稅人主觀心理之行爲動機直接予以解釋。其相關結論有二：其一，在稅法解釋方法上，我們不能因爲要迴避納稅人避稅意圖在主觀上理解不易，而僅僅透過納稅人避稅行爲及其漏稅結果之客觀解釋之間接方法；其二，客觀解釋在西方之適用，在實證主義影響下租稅倫理色彩較不明顯，故有特殊之可行性；然而此一可行性在東方（在本文乃以傳統中國爲中心）則未必等同見效，而只能老實地回歸主觀解釋之面向。

壹拾、　總結之，一個有本土性關懷之稅法規範，勢必能從其所管轄人民之價值理念當中預測行爲之動機；並從各種行爲動機中整合，找到總稅負之上限；再以此上限爲限度，衡量納稅人能力，平等分配負擔於每個人；最後才有討論此種課稅行爲是否違反比例原則並具體落實其理念之實益。

倘循本文初衷，避稅意圖者，乃事涉個人價值判斷而及於行爲取捨，而似與上述脫法避稅之設定有所矛盾。在此所作回應是：脫法與避稅之「連結」問題。申之，脫法雖係對避稅之評價，亦著重其避稅後漏稅結果之有無，故對該結果賦予法律之效果；然而避稅意圖者，無論其是否造成避稅行爲之發生，乃至於漏稅結果之有無，意圖本身並不脫納稅人主觀價值取捨一事，則是本文所指，並據以深究者。

壹、　導論

國家經濟體制之取捨及其憲法意義，是一個中西共同的問題，一個現代的問題，一個必須面對的問題。

一. 楔子－國家社會主義或自由市場經濟

《孫文學說》曾有載：

「昔漢興，承秦之敝，丈夫從軍旅，老弱轉糧餉，作業劇而財匱。初以為錢少而困也，乃令民鑄錢；後錢多而又困也，乃禁民鑄錢，皆不得其當也。夫國之貧富，不在錢之多少，而在貨之多少，並貨之流通耳。漢初以貨少而困，其後則以貨不能流通而又困。於是桑弘羊起而行均輸平準之法，盡籠天下之貨，賤貴買賤，以均民用而利國家，卒收國饒民足之效，若弘羊者，可謂知錢之為用者也。惜弘羊而後，其法不行，遂至中國今日受金錢之困，較昔尤甚也！方當歐戰大作，舉國從軍，生產停滯，金錢低落，而交戰國各國之政府，乃悉收全國工商事業而經營之，以益軍資而均民用。德奧行於先，各國效之於後，此亦弘羊之遺意也。」

孫文將西漢理財重臣桑弘羊與俾斯麥(Otto von Bismarck, 1815-1898)相提並論，並據以發展其「節制私人資本」理念[1]，終而產生民生福利思想之發展源頭，甚至成爲中華民國憲法典的特色。[2]

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[1] 馬元材，[Ma (1944)]，桑弘羊及其戰時經濟政策，中國文化服務社，頁 1-3。並請參照 馬元材，桑弘羊年譜，自序，台灣商務。[Ma (1975)]

[2] 如中華民國憲法第 143 條規定：「國民經濟應以民生主義爲基本原則，實施平均地權、節制資本，以謀國計民生之均足。」

孫文氏此一理想或許源於突破帝國主義困境，有其歷史背景；惟值得吾人進一步注意者，爲其所強調之民生福利思想，即便在自由市場經濟依舊興盛之今日，竟已成爲發展之趨勢，甚且活躍於市場經濟體制之中。其現代意義，實值吾人觀察。另就法學角度而言，其欲師法「丕斯麥克（本文註：Bismarck）之所以行國家社會主義於德意志」，並欲從本身固有歷史脈絡中尋求「桑弘羊遺意」想法，則見繼受法與固有法之衝突可能性。

惟如昔非今比，現代法治國家必須同時成爲社會國家之前提[1]，恐已象徵了今日法治國家型態已由自由法治國過渡到社會法治國之事實；只是文中提及財政改革之迫切性，至今仍具檢討實益。蓋現代國家雖然多爲租稅國家，租稅國理念作爲憲法國體亦受到肯認[2]，然而企業者國家理念似依舊不墜於全球性金融危機，其中更以華人社會爲代表。是以，國家對於其經濟體制取捨之難題，因而也繫於未定之天。然而，現代憲政國家，如何體認時代潮流，並於改革中調和傳統價值，漸次實踐新理念，恐怕仍需求諸當代憲法責無旁貸之回應。

二. 問題概說－中西課稅界限之憲法基礎及其現代意義

一般舊思想是支持舊有的體制與權力，以及其他因而被支持的東西。新思想則支持在舊體制下所成長之新生命，以及因支持該新生命而被支持的東西。(…)

近世以來，此一新生命，指的是自封建統治解放出來的自由的個人，是由這個個人所形成的市民社會。新思想因將自然法用於市民社會，而使得與舊權力所支持的實定法相對立。

島恭彥，近世租稅思想史[*]

[1] 詳見葛克昌，脫法行爲與租稅國家憲法任務，連震東講座，2009。[Gee (2009)]
[2] Vgl. Staat im Wort, F.S. Isensee, 2007, S.830ff.
[*] 島恭彥 [Shima (1970)]，《近世租稅思想史》，頁 5。

（一） 租稅國家之現代意義：租稅國與社會國之「對立關係」

法學上，租稅國與社會國，一爲私人營利成果之量能分配，一爲社會所得不均之再分配，二者在理念上乍似衝突的對立關係，已在現代憲政法治國家中浮現，成爲無法忽視之處。租稅國原則背後象徵之自由主義理想[1]，象徵課稅權與私經濟自由之二元體制[2]，從社會國原則以觀，似無暇兼顧人民於社會之間平等要求。是以有提出，租稅國型態，乃社會法治國家所不得不採取手段。[3]

誠然，租稅國理念有其歷史成因，發展至今其活力不容小覷[4]，其面臨的挑戰則日益艱鉅。首先，第一，福利思想興起，與實質法治國理念結合，強調人權之實質保障，對傳統法實證主義提出批評觀點；第二，資本主義發展晚近國家，嘗試開創固有路徑，與法律繼受理論結合之下，開始從各自歷史脈絡中找尋法治國理念之固有基礎。

申之，以傳統中國爲例，其歷史脈絡異於西方固無庸論，其「法治」概念之固有內涵，亦未必與法治國相容。然而時值今日，作爲繼受法國家，縱能調和西方理念與固有價值妥協，卻仍無法漠視，在資本主義全球化之今日，固有價值所面臨者，不僅是其固有性之開創，恐怕更是固有價值存亡之危機。

所幸，上述第一點中，西方社會福利思想之興起，以及以人權爲實質保障之憲法理念，在傳統中國亦見其搖搖欲墜身影，成爲價值之共同基礎。甚且，對於國家財政經濟體制之取捨與演進，更爲貫穿歷朝各代之重要問題，反應社會價值之變動，更見其固有性。

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[1] [Isensee (1977)]
[2] [Gee (1997)]
[3] [Forsthoff (1954)]
[4] [Schumpeter (1918)]

不過我們可以更進一步深入的是，此一固有性在現代國家之態樣爲何、其與歷史之傳統是否有所關連？

（二） 固有性、現代法、繼受法－「對立關係」之產生與解消

或許西方人權之發展，多少反映國家（或國王）王權與人民之對抗史。倘以稅法理論觀之，不啻爲一國家課稅權與人民財產權對立關係之發展史。只是，從傳統中國之徵納關係演進而論，皇帝與百姓之間，雖或多或少存有相當程度之對立關係，但或因實力相差過於懸殊，或因百姓樂天知命，因此作用似乎不大。

然而，倘若我們僅基於上述說法，即據以推論「對立關係」分析方法之不可行，或許過於速斷。申之，本文認爲，欲從徵納關係分析傳統中國之國家人民關係，仍應由對立關係之角度切入，只是不應將此對立關係，具體化（或限縮至）一「課稅權與財產權之對立關係」之上。[1]

因此，本文所作《鹽鐵論》與《租稅國危機》之對照，仍然從國家與人民之對立關係出發，但不以課稅權與財產權之對抗關係爲限。詳言之，透過分析此一對抗關係背後的成因，追根究底言之，本文認爲是一納稅人其於所處社會中理應盡到之「社會義務」（或公共義務）與被國家課予「納稅義務」二者交集程度多寡的問題。

換句話說，本文所謂課稅之正當性，應與課予納稅義務之正當性同指一事，是一種必須經過租稅倫理檢驗，而能確實反映納稅人其社會義務（或公共義務）之納

[1] 誠然，此種預設自難免與現代憲政國家之理念不同，但或能見證一歷史發展軌跡。

稅義務。[1]只是，在外觀形式上，國家課稅權之正當性，或許著重課稅權力之依據是否正當，可否因此限制人民；而納稅義務之正當性，則可能側重納稅人對於所居社會應負擔之公共義務。[2]

1. 現代性危機之因應－固有法 vis-à-vis 繼受法之觀點

對於歷史發展之結果，即便跳脫對前人於特定事件之評判，也無法否認該事實已然存在，並且持續對於現今社會發揮影響。但如果，歷史的發展真有所謂的「進步」，則我們將必須認清現狀並以歷史爲前提，持續作出價值判斷。

法學角度觀之，法律之繼受即一適例。只是「進步與否」的判斷標準，是否古今中外有其部分之共通性，則是本文所追求者。但正值「現代性」在西方瀕臨危機時，已然繼受其現代化制度之繼受國家，是否能從各自歷史發展中內化繼受之元素，則是最終的目的。

有謂，對抗「現代」不難，但「後現代論者常常忘記他（她）們還有一個比「現代」更保守、頑固、難纏的對手，也就是處於現代之前的「傳統」或「前現代」」[3]；此段文字，對於本文分析所謂「固有性」 (Intrinsity)在傳統中國定位之嘗試，或許可作爲警語。

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[1] 而法治國家中，不同之處則在於此一納稅義務係以法律形式出現。

[2] 類似觀點，請參考 [Tipke (2000)]

[3] 假如「現代」代表人類對科學理性的信仰、對普遍價值的追求、以及對進步秩序的執著，那麼「後現代」就該意味著質疑理性、嘲弄永恆、反對一切號稱普遍、絕對的觀念與價值。但是，後現代論者常常忘記他（她）們還有一個比「現代」更保守、頑固、難纏的對手，也就是處於現代之前的「傳統」或「前現代」。我們之所以說「前現代」比「現代」更頑固難纏，是因為「現代」畢竟還推崇科學精神、竭力掃除迷信；然而「前現代」卻根本建築在宗教信仰的基礎上，是一個相信「舉頭三尺有神明」、「前生後世，因果報應」、「靈魂轉世投胎、永恆不滅」的時代。如果後現代論者認為自己已經徹底打垮現代的理性主義，何不嘗試面對前現代哲學的挑戰呢？
(江宜樺，蘇格拉底最後一瞥，書評：柏拉圖著，楊絳譯，《裴多》，發表於《中國時報》，「開卷版」，2002.10.21.)

（三） 憲法上課稅界限—租稅法律主義之實質意義

本文認爲，所謂之對立關係，實際上應是租稅法律主義之形式與實質，在意義上產生之分歧現象。[1]租稅法律主義之形式意義，主要涉及適法性，諸如法律保留、法律優位、溯及類推禁止等原則屬之；惟就實質之納稅人基本權保障、與憲法基本價值取捨等，是否能發揮福利國家之積極功能[2]，亦應深究。[3]本文認爲，倘以租稅國理論及其課稅界限觀點角度，將更能從憲法基本價值取捨角度定位該憲法，有助於釐清納稅人基本權其實質保障之內涵與範圍。

三. 研究方法：中西課稅界限之「固有性」與「共通性」

（一） 財政社會學與固有性：租稅國理論之繼受

1. 作爲借用概念之相對概念的固有性：以租稅國理論爲中心

「財政學上租稅國概念，並非一成不變地反映到我國憲法條文中，亦不能因此導出前述各原則。而實則，租稅國在我國憲法所施行者，非純粹理之貫徹，正如我國憲法並非毫無保留接受權力分立原則，租稅國亦非毫無例外之餘地；只是在**本質及重要部分不得侵犯**而已。」[4]此段話，似亦可從法律保留原則中重要性理論之觀點同獲印證。實則，在財政憲法領域中，諸如租稅優惠於犧牲量能原則之餘所

[1] 對於稅法形式與經濟實質二者關係之界定語，亦有松沢智氏之「乖離」、黃士洲氏之「剝離」等。
[2] [Gee (1997; 136)]
[3] 或許有認爲基本權之實質保障與象徵議會民主之租稅法律主義二者，雖均能從 rule-of-law（本文約略稱爲法治國原則）源出，但二者可能各有其核心內核，處於分立關係。詳參[Kaneko (2008;13-)]本文認爲，此點可能正是導致稅法學上形式與實質二者意義分歧之主要原因之一，即概念界定眾說紛紜。然此不僅涉及個人學術觀點及研究取向，更必須置於比較法中了解各自法制架構特點，方有討論實益。
[4] 葛克昌，國家學與國家法，1997，p.162。

具備更高憲法正當性事由、對納稅義務人之財產只能「限制」而不得「剝奪」、乃至於主觀生存保障淨所得原則、客觀營業職業自由保障淨所得原則、絞殺禁止原則等概念，亦可得出一致的邏輯，即一過度禁止（Übermaßverbot）、過猶不及的解釋面向。因此，本文甚至認爲，「憲法上界限」概念，亦可承此「過度禁止」之價值理念而來。至於此一價值理念之根本源頭，是否與「人生而自由」、「自由市場」等概念有所連結，尚待進一步釐清。

Isensee 所斷言「初由經濟危機，後爲財政危機，最終轉向憲法危機」之進程，除了標示一憲法危機之成因外；對於認知到可以透過「財政社會學」來解釋經濟現象一事，更有方法論上意義。

（二） 中西課稅界限之憲法基礎－對照《鹽鐵論》與《租稅國危機》

本文嘗試以經濟體制與憲法之關係爲架構，透過桓寬之《鹽鐵論》與熊彼特(Joseph A. Schumpeter)之《租稅國危機》二文之對照，作一課稅界限之中西比較，並嘗試據以建構其財政憲法上意義。

方法上，首先，就《租稅國危機》當中所使用財政社會學(Finanzsoziologie)觀點，分析其發展脈絡及現代意義；其次，再從《鹽鐵論》背景，觀察國家課稅權力及其界限概念；最後嘗試從繼受法觀點探討課稅之界限與傳統中國之固有性之互動關係。

文中（一）首先肯認「課稅界限」概念在中西方各自固有之脈絡中仍具「共通性」（Commonality）；（二）其次試圖從傳統中國之價值脈絡（即以「義利之辨」所建構之「固有性」(Intrinsity)概念）中尋求課稅「正當性基礎」、租稅「倫理基礎」、

稅法「規範基礎」三者作爲課稅界限要素之可能性；（三）最後透過課稅界限三要素，建構固有意義之憲法課稅界限。

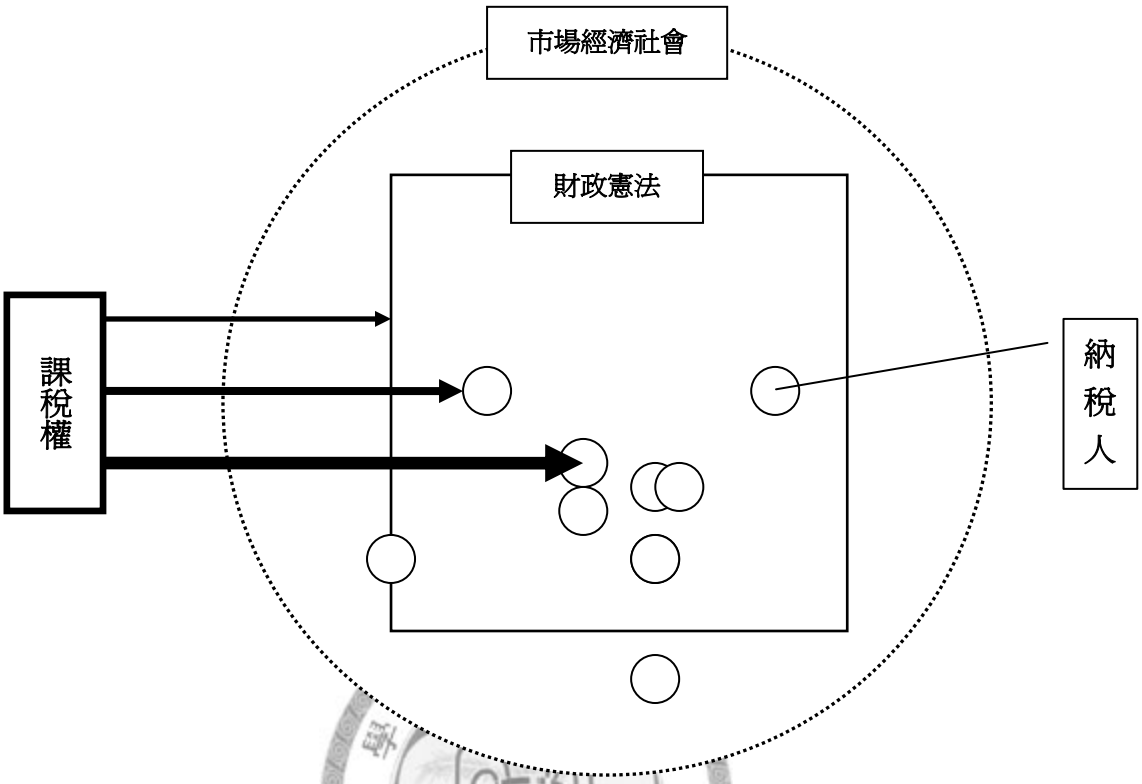
四. 論文架構

（一） 「社會市場經濟與財政憲法」之圖像

本文的出發點，在於認爲納稅人之行爲，乃由「制度要素」（在本文爲財政憲法）與「社會要素」（在本文爲社會固有價值）所影響。申之，納稅人之行爲，決取於納稅人主觀之行爲動機（或意圖），而當有多種行爲意圖以供選取時，本文認爲，此時行爲人將透過其自身之價值判斷標準來做一優先性之考量。**而此一價值判斷標準，一來形成自行爲人自身的社會價值背景，使得利潤最大之行爲，未必列爲最優先考量；另一則受限於人爲之具體制度，使得利潤最大之行爲，未必爲所處制度所允許。**

是以，欲理解納稅人之行爲，不妨從影響其行爲之因素著手（在本文爲制度因素與社會因素）。而制度因素來自財政憲法，社會因素影響市場經濟之存在基礎，因此，本文認爲納稅人與制度二者關係之具體化，毋寧爲市場經濟與財政憲法二者之互動。其具象如下：

圖表 1 市場經濟社會與財政憲法下之課稅權與納稅人



由此圖示可知，國家之課稅權對於納稅人之影響有三（即三種箭號）；依影響程度多寡區分爲三類。

第一類（箭號最細者）：納稅人於社會市場經濟內之自由，在憲法承認之範圍內，受到完全保障，課稅權不及於納稅人之公民權(civil rights.)；對納稅人之侵害程度最低。

第二類（箭號次細者）：納稅人於社會市場經濟內之自由，在憲法承認之範圍內，受到一定程度之保障，但課稅權不及於納稅人之基本人權(human rights)；對納稅人之侵害程度次高。

第三類（箭號最粗者）：課稅權及於納稅人之基本人權；對納稅人之侵害程度最高。

惟另須加以注意者爲，上述三種類型，均以如何抗衡國家課稅行爲之動機出發，均不脫課稅權與財產權二者對立關係之思考基礎。

（二） 納稅人與課稅制度關係之具體化－課稅界限

本文嘗試提供一套租稅法上國家與人民關係之解釋，能夠更精確地理解納稅人如何被國家課稅權所影響，並期能增進法律解釋保障人民基本權之功能。同樣面對「國家是否介入市場」之問題，中國與西方社會在文獻中有著不同的解釋與回應。

透過對《租稅國危機》與《鹽鐵論》兩大財經政策辯論中對於國家介入私經濟之正當性基礎的分析，本文尋求二者其中共同的基礎，那就是一條各自貫穿其時代的軸線，由兩個相互影響的因素交織而成（體制要素和人之要素）。

聚焦於二個背景下各自租稅倫理在典範轉換之過程，本文採取偏重法制度所具有之濃烈之地域性格（下稱「固有性」），並進一步針對中國在面臨西方法治主義強勢地移植時，提供相關分析（即繼受法層次考量）。

貳、 課稅界限之中西對照－固有性與共通性

承上可知，所謂對照，應強調二者在文本上之關係；體現在稅法學上，毋寧是以固有與繼受間衝突之緩和爲中心。而對照之目的，則在於對繼受之稅法規範提出反省。

一、共通性(commonality)與固有性(Intrinsity)

（一） 對照之前提：法繼受之現實性

繼受法國家其現代化的歷程，未必就是其歷史發展下固有性之現代化。簡言之，現代化過程中，繼受法國家可能無暇面對源於傳統之固有性，遑論思索其未來出路。然而固有性依舊存在，也依舊是國家社會之一部分，無論是受到扭曲壓迫還是被略而不論。

從稅法角度觀之，對於人民負擔之課予，倘無顧及個人喜好之選擇自由，則影響及於人民對其所生存制度之信賴感，乃至於制度本身之選擇。誠然，共同追求普世價值有其可能性及益處，但相異之歷史文化背景，終究有其各自獨立之難題須要克服；況且，個人各自發展各自實現之自由作爲普世價值之一環尚須加以維護，更遑論普世價值本身，亦可能只是一利益角逐之工具。

因此，若從「與時俱進」觀點理解固有法與繼受法所面臨挑戰的共通性出發，或許有助於緩和其間衝突。

（二） **異中求同－課稅界限之外見共通性**

作爲象徵國家經濟型態之價值決定指標，或者政府職能之大小，課稅權不失爲一具有歷史縱深之觀察角度。

1. 現實繼受法之強勢存在前提；
2. 中西文化上辯證邏輯之溝通可能性；
3. 現實繼受法之共通性－法治國原則係現代國家之運作。

（三） 同中見異－課稅正當性基礎與固有性

承前所述，民主性與公共性作爲西方租稅正當性基礎之思考，有其歷史依據。此依據見諸《租稅國危機》，亦可證之於財政社會學之觀察。

1. 各自歷史脈絡不能忽略之存在前提；
2. 自由平等具體化來緩和固有性與共通性間齟齬；
3. 法治國原則，有其現代性，且與租稅國家理念相呼應

繼受法脈絡下，強調二者各自之固有性有其前提，共通性與溝通可能性。

租稅國理論之現代意義，與其說是繼受法所不能忽視之特徵，也不妨說是改善本土制度時弊之有力途徑。例如，由租稅演進之歷史來看，強制工作性質之勞役，由古代直接以「力役之徵」，以滿足公共需求，轉而間接取諸賦稅之財政手段，乃時代之趨勢。[1]

二、財政憲法上意義及比較實益

（一） 財政憲法上意義

財政憲法者，固指從憲法理論賦予國家財政基本體制之憲法意義，其內涵與租稅國理念有關；蓋租稅國理論，涉及憲法理論完備性。憲法理論疏而不漏，往往在於其規範上完整性、效力上補充性、以及憲法解釋之最高性。[2]法治國家中，倘一國之基本法體制無法全面性地涵蓋其主權所及之處，則法治國原則保障人權之理

[1] 葛克昌，憲法國體－租稅國，國家學與國家法，月旦，1997。
[2] 規範具抽象性；不得做爲直接適用法源；大法官具有最後解釋權

念實難落實。財政體制攸關人民財產權，自須受憲法之拘束。

然而，現代憲政法治國家如何確立財產權制度進而確保經濟體制，涉及一國憲法所表彰人民對財產制度之取捨問題，亦即，人民必須透過憲法表彰其價值判斷，決定究係以何種經濟體制作爲依歸，方能體現以何種財產權制度爲保障對象，進而對人民基本價值決定有如實的保障。反之，倘無從得知一國憲法所表彰之基本取捨爲何，則無從進而透過憲法解釋加以實現其所欲維護的基本價值。

（二） 比較實益

綜而述之，單以《鹽鐵論》內容析之，當中所充斥意識型態之事實難以否認，對於本文所探討國家財政權進入市場其正當性之討論，亦無例外。在此我們其實可以看出，至少在漢武當時，國家財政政策之走向，無論主張專賣或私營，均藏有濃厚的意識型態色彩，而以各自「思想體系」作爲政策主張之正當性基礎。此不禁令人反思，作爲西方版《鹽鐵論》之《租稅國危機》[1]，當中是否亦有其各自意識型態作爲支柱？此等基於思想體系之價值判斷，是否能直接影響傳統中國之租稅觀、國家觀？而在方法論上，思想體系或價值判斷作爲反應課稅界限之分析工具，是否可能？

本文茲以下述三點，說明比較實益：

1. 鹽鐵論隱含一國家權力之界限觀；
2. 此一界限觀能對西方界限論作反思；[2]
3. 界限論有助於稅法固有價值體系之建構。

[1] 葛克昌 (1997)，租稅國危機及其憲法課題，收入：國家學與國家法，元照。

[2] 本文所指反思有兩種層次，一爲學科上之反思，一爲繼受上之反思；前者在本文指的是財政學之憲法意義，後者則是對西方法治之固有化問題。

實則，兩大論辯所爭執者均聚焦於國家與經濟之關係。詳言之，所爭者，無非是在各自歷史背景和文化脈絡下，尋求一條國家與人民之間的界限，使得彼此能夠藉以各安其所，各適其生而已。換言之，表面上兩個文本因爲在時空上完全沒有交錯之可能，而無從做相互比較；然而實際上，正因二者互不交集，使得本文所欲尋求中西租稅法規範在各自發展脈絡之中所共同認可之倫理基礎的初衷[1]，成爲一種可能。

三、具體比較方式－以「租稅倫理(tax morale)之異同」爲中心

本文認爲，國家課稅界限乃是課稅正當性之具體化。對於課稅正當性基礎，本文嘗試從對現代理性主義之反動觀點，反思租稅利益說之論理基礎，並對於納稅義務說賦予法學上新意，尋求其取代利益說之可能性。

（一） 課稅之正當性基礎－利益說與義務說

課稅正當性，從西方觀點，向來有利益說與義務說之分，然如果姑且不論歷史脈絡而單就其邏輯結構觀之，實則中西雙方具有共性。

有認爲欲理解財政學上租稅論，首先不得不對政府在市場社會中籌措貨幣之正當性予以究明，此即租稅正當性基礎，其分析方式，一般而言，分爲利益說(benefit theory)與義務說(Pflichttheorie)，分別體現其所存在時代之國家觀。[2]

[1] 所謂「共同認可之倫理基礎」，用另一種說法，可能是：二者在方法論上有相互溝通的可能性。至於詳細論理，容待後文爲之。

[2] 十七世紀中期以來到十九世紀初前後，英國法國所提倡之利益說，乃以「社會契約說之國家觀」爲前提；至於十九世紀後半在德國所盛行之義務說，則植基於「有機體之國家觀」。[Jinno (2003;153)]。本文關於此部分之討論，詳見以下　兩種國家觀。

1. 利益說

社會契約說之國家觀，認爲國家是一個追求其構成員共同目標之目的團體，可以說與希臘哲學中詭辯學派(Sophists)之國家觀相近。以政府活動係給予國民之利益的對價作爲租稅之正當化依據，是爲租稅利益說。[1]

2. 義務說

相對於社會契約論式的國家觀，有機體論的國家觀，主張應將國家置於社會之上，而承繼了亞里斯多德學派之國家觀理念。此說認爲，國民爲國家目的而納稅，乃至爲理所當然之事。[2]惟其種論述語句不免流於同語反覆，蓋問其論理根據，竟對之以此汝義務也云者，自難脫套套邏輯之感。是以，有謂租稅之根據，非利益說難以成立，尚且主張義務說之處，改採利益說之根據亦不斷被提及甚至有利益說復興現象之看法。[3]

3. 管見：租稅倫理應反映社會價值

利益說與義務說二者，或許只是不同國家型態下其課稅正當性之倫理依據。換言之，二說同時存在於一國家實體（或一租稅制度中）之可能性未必沒有。但在理論上，二者擺脫原始目的而作爲手段後，如何兩相調和，互爲補充，以增益欲達成之目的，則爲另一回事。

與本文相關連的則是，有關租利益說與義務說二者之關係，是否亦能從傳統中國

[1] 值得注意者爲，利益說，係社會契約論式的利益說，而不是功利主義式的利益說。亦即此種利益，並非意味個別的報償，而指一般報償。是以，倘此利益具個別利益性質，則其不具有對待給付請求權者，不啻與其無償性不符。[Jinno (2003; 153-154)]

[2] 此一理念，似乎亦明見於中華民國憲法第 19 條以及日本憲法第 30 條。

[3] [Jinno (2003;154)]

之義利思想，相互印證，則是日後必須注意之處。

（二） 兩種國家觀

不同之國家觀，代表不同之方法。有謂，財政工具之運作良窳係一經濟學問題，但使用該財政工具所欲達成之目的，則取決於一良善社會之想像以及國家於其中扮演角色。[1]

就傳統財政理論觀之，有謂德國系統係「生產體」說（即國家之屬性乃具國民經濟中不可或缺生產要素，具積極功能），而英國系統則受到啓蒙主義、自由主義思潮影響，認爲國家僅係一「消費體」，爲一必要之惡。[2]

惟十九世紀中葉以後，政治上民主思想普及，君主專制政體沒落，並影響及於經濟層面。第一，經濟上國家或政府作爲經濟活動主體性不再，而由個人取而代之；第二，國家經濟活動之本質，與市場經濟之交易活動不同；換言之，租稅作爲所得預算限制式的租稅，僅爲一公共財所支付之價格（或稱爲「租稅價格」(tax price)）；第三，政府之角色亦如同市場，行政部門爲供給面或公共財的生產者，立法（民意）部門爲需求面或代表公共財的消費者，而供給與需給二者，應維持均衡。[3]

實則，人民與國家關係，亦有英德系統之分。詳言之，所謂英美系統下，國家係必要之惡，人民在人格自我發展之前提下，盡可能地限縮國家權力；而德國系統

[1] Musgrave, R. *The Role of the State in Fiscal Theory*, INTERNATIONAL TAX AND PUBLIC FINANCE, 3:247-258(1996), p.247. 是以氏認爲，財政理論不單是一經濟學問題，還有一特別的訴求。(p.247)
[2] 黃世鑫 (1998/2000)，財政學概論，修訂再版，空大，pp.31-32.
[3] 黃世鑫 (1998/2000)，財政學概論，修訂再版，空大，pp 33-34.上述此一市場經濟化之現代財政理論，又稱「公共經濟學」(public economics)或「公部門經濟學」(public sector economics)，其源頭與沿革，pp. 34-37.

中（甚至傳統中國在內），國家除了是必然存在前提外，其對人民之影響亦是前提性的；是以人民之發展所仰賴者，可能來自於國家體系極盡資源攫取後之殘餘，也可能來看於國家所致力經濟發展，充實代表人民福祉之公共需求體系的成果。

從國家觀點，《鹽鐵論》中政府其稅役體系之正當性基礎，究應以何種依據理解，或究否能以二者擇一方式理解，值得深入探討。

（三） 兩種社會觀

本文的社會觀，所指有二：一爲**社會心理狀態**，一爲**人性論**。前者說明中西方思考模式之不同（即所謂「義利之辨」），後者著重價值取捨結果之迥異。

在鹽鐵會議之雙方所討論的焦點，均集中在君王之人性論上[1]，但有趣的是，漢朝之統治，實際上卻往往掌握於大臣之手[2]。或許我們可以認爲，著重於該管理者人性論之觀察，反而更有助於了解問題之所在。但方法上，或許我們可以先從本土之文獻加以觀察，嗣後再以身在其中者觀察異文化者對己之理解。

另就中西價值取捨之結果而言，二者或許真如牟宗三氏所述，有著內在(intensional)和外延(extensional)各自著重之面向。[3]而反映在繼受理論上，除了具有增益其截長補短之意義外，更因二者殊途同歸之可能性而使得繼受本身，不失爲一足進強烈自省的捷徑。

（四） 管見－租稅倫理與基本價值預設

[1] [Kroll (2001)]
[2] [Loewe]
[3] 牟宗三 (1983)，哲學十九講，第二講，學生書局。

租稅倫理宜反映社會價值一事而言，租稅倫理有其固有性，然而，就保障憲法上所保障之人的基本價值而言，中西有其共通性。

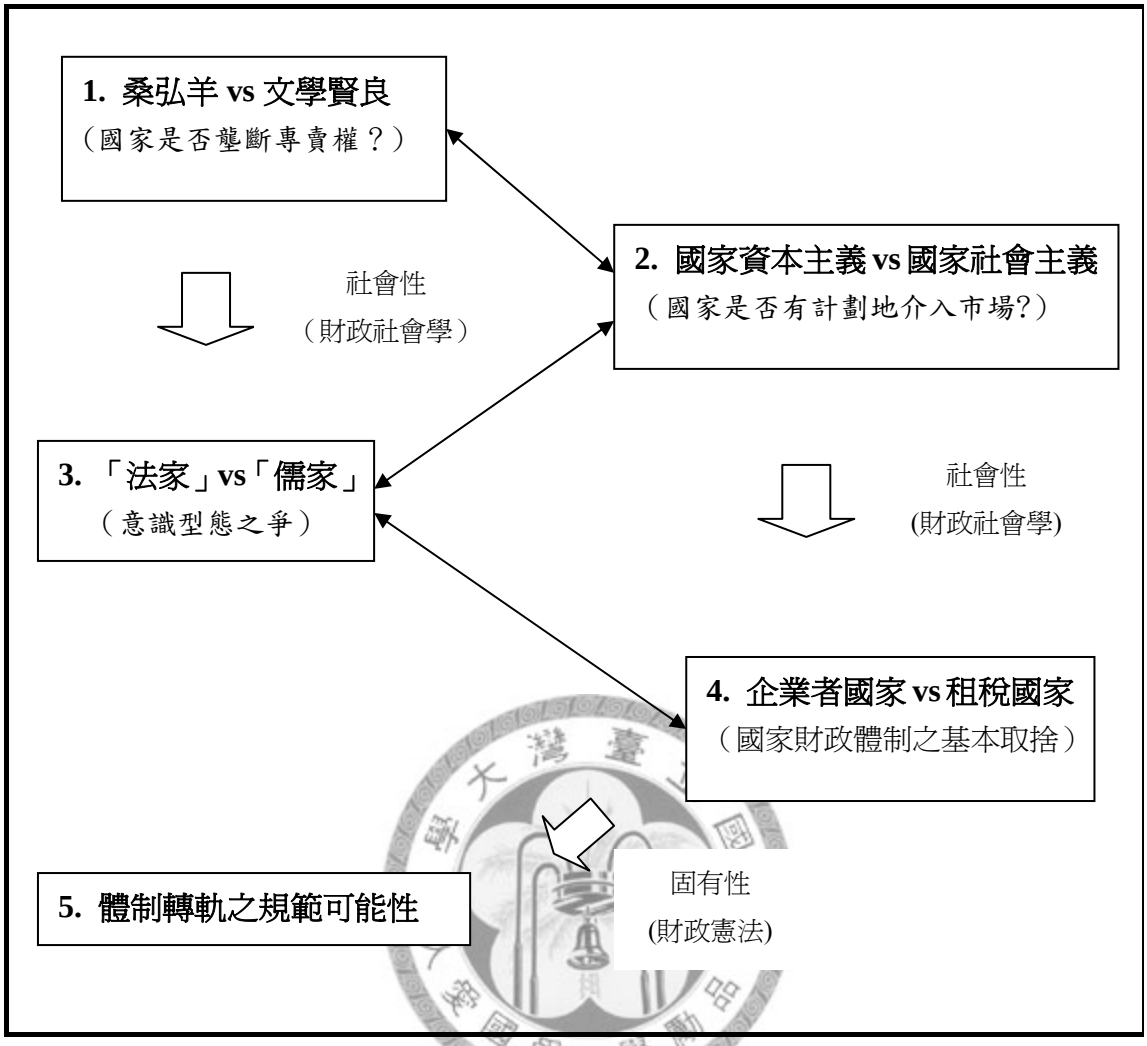
憲法對人之基本價值預設，以稅法學來說，本文認爲至少可以從自由與平等兩個面向體察。倘從傳統中國之固有價值出發，則可從義利概念之辯證關係，找到相似之處。

四、小結－課稅界限在作爲比較法上之具體模型

就具體比較而言，二者觀察角度不同所給予之方法論上觀點，對本文重塑稅法規範固有性之嘗試，毋寧更具啓發性。危機一文作工具理性式的理解，對本文啓示爲：課稅之界限、財政學之社會觀點、租稅國之理念型等。鹽鐵論以價值理性式之理解，毋寧是對價值判斷模式之反思，即：義利之辨、崇本抑末、儒法之爭等。其具體比較模型，試示意如下。

表 2　具體比較示意圖

《鹽鐵論》　vs　《租稅國危機》



具體比較方法，試列舉如下：

1.和 2.：《鹽鐵論》與《租稅國危機》二者，具有共同性及比較之實益。

1.和 3.：透過儒法之爭來說明《鹽鐵論》當中財經政策之對立立場。

2.和 4.：透過企業者國家與租稅國家來突顯《租稅國危機》之立場。

3.和 4.：透過中西雙方之爭辯焦點來突顯問題癥結乃在於財政體制之取捨。

3.和 5.：嘗試以儒法思想說明體制轉軌之市場經濟型態。

4.和 5.：嘗試以國家之財政體制說明體制轉軌之市場經濟型態。

參、　中西課稅界限、財政社會學與財政憲法

現代國家多採行租稅國家體制，有其不容忽視之歷史成因。此種觀察，即 R. Goldscheid, J. Schumpeter 等人所強調之財政社會史觀。然而，一個繼受法國家中，如何將繼受而來之制度與發展於傳統固有之歷史脈絡二者相互溝通，互動，則是傳統中國法中諸概念乃至當今華人社會所必須面對的問題。

一、概說－租稅國家界限及其財政社會學上意義

（一）「財政社會學」之觀察視角－以《租稅國危機》爲中心

1917 年，Goldscheid 面對一次大戰後奧地利的財政困境中，國家的租稅制度是否有能力承擔的問題，投下了巨大的問號──其認爲，正確的解決方法，厥爲改造公共財的秩序；亦即，在公共財政學的領域，必須將公共財（public property）的理論發揮到極致，進而成爲法律秩序的基礎，藉以保障、增益公共財，並提高其生產能力。[1]

然而 Schumpeter 反對上述的見解，氏認爲，戰爭所引發的財務危機，並非租稅國的危機，易言之，租稅國的體制，並不會因戰爭，而暴露它在本質上、結構上的缺陷，頂多只是突顯租稅國家受到了外在的衝擊而已。租稅國家在面對危機時的處理方式，自然是透過租稅的方式爲之。因此，Schumpeter 力求經濟自由度的確

[1] Goldscheid, Rudolf (1925), *A Sociological Approach to Problems of Public Finance*, in Musgrave, Richard A. and Alan T. Peacock ed., (1958), p.202-213. Extracts from "Staat, öffentlicher Haushalt und Gesellschaft, Wesen und Aufgaben der Finanzwissenschaften vom Standpunkte der Soziologie", *Handbuch der Finanzwissenschaft*, edited by W. Gerloff and F. Meisel, Vol. 1, Tübingen 1925, pp. 146-185.Goldscheid 謂：「*The natural social result of such a development would be a State which gradually needs to take less and less and yet can give more and more.*」，其認爲，社會上自然發展的結果，將會是國家向人民的需求愈趨減少，而給予人民者，卻愈益增加，因此一個規劃完善的公經濟體系，對於全體社會的所得來源而言，將是必要的。換言之，租稅國家的財政體制，已不敷時代的需求。Goldscheid (1925/1958 ; 213)

保，主張運用租稅國家的體制，即足以應付得宜；反之，倘國家欲侵入私經濟領域攫取財貨，反而可能破市場機制，使經濟發展趨緩。

Schumpeter 在一次世界大戰中的最後一年（1918 年），回應 Goldscheid 氏的問題，而寫了名爲《租稅國危機》(Die Krise des Steuerstaats)的政策時論；當中除了針砭當時局勢，更運用了 Goldscheid 氏所提倡的財政社會學觀點，從租稅國的源起、本質、與界限當中，建構了一套租稅國理論，並據以克服當時所謂「租稅國危機」之困境。

Schumpeter 寫作租稅國危機一文之目的，毋寧是用以說明租稅國家在歷史發展上之正當性。Schumpeter 認爲，領主經濟之解體過程，正是自由經濟之發生過程；而封建團體之解體，同時也意味者近代國家的發生過程；但 Schumpeter 將上述二者之內在發展關係，以一個層次說明之。領主團體崩壞的原因，在於基於領主團體的維持所必須收取之宮廷開銷及傭兵支出；這些經費，在近代國家被認爲是公共事務，在懇願稅(Bede)變成租稅時成立；領地經濟崩壞、自由經濟之發生等亦約略與此同時發生。[1]

（二） 財政社會學與現代憲政國家

Mann 則認爲透過課稅行爲所造成之社會控制形式至少有三：[2]第一，導正人類在社會上較不被期待的行爲；第二，重新調整社會族群間以及各階級間之經濟實力；第三，對抗社會上對資本主義之濫用，以及使得資本主義轉向另一個經濟秩序的過程順利化。由是觀之，現代國家之權力，依舊具有改變社會發展的作用。

[1] See [Kimura (1941; 397)]
[2] [Mann (1943)]

然立憲主義要求下，現代憲政國家其權力之行使，應受法治國原則之拘束。惟縱令如此，課稅權之行使本身，其實際上在社會上對人民所造成之影響，卻未必及於該行使有無受到法治國原則拘束一事。

財政社會學對於納稅人之觀察，納入各法治環境背後之歷史背景社會因素，如能以之補充或修正憲法之人性觀，於現代憲政國家之今日，或能促進實質法治國理念之落實。

以下茲以財政社會學之發展爲經，財政憲法其可能對應之處爲緯，對照中西課稅之界限。

二、財政社會學之實踐性－以 Schumpeter 方法論爲中心

（一） 財政社會學之內涵

廣義言之，財政社會學恐怕可泛指一切財政與社會相交集的觀察事物方法，具有財政學的關懷，社會學的視野。倘自租稅國理論之發展脈絡以觀，財政社會學(Finanzsoziologie)之概念，應由 Goldscheid 所首先提出。[1]氏對於當時財政學現況提出二點質疑：即缺乏社會學上之認識，以及現有財政學其非現實之擬制存在。[2]然而其所發展之財政理論 Musgrave 認爲其創新性，不在於決定何種財政行爲是有效率的，而是去**發展一套解釋架構來說明特定財政行為發生之原因；此一架構一旦成型，將能<u>預測</u>不同條件下財政行為之結果**。[3]

[1] [Schumpeter (1918)], [Ikegami (2002; 247)]
[2] [Kimura (1941; 389~)]
[3] Musgrave (1958/1986 ; 244-245)；氏並進一步認爲，此舉乃是在財政政治學(fiscal politics)領域中首開計量分析(Macroeconomics)之先河(p.245)。

（二） 財政社會學之影響

實則，在 Goldscheid 之後，以「財政社會學」爲名之研究曾盛極一時[1]，但莫衷一是[2]，最後難以蔚爲風潮[3]。然本文所重是毋寧是從 Schumpeter 之解讀出發及其用於租稅國家之考察情形。且**本文對財政社會學之借鏡，毋寧是聚焦於社會心理（意識型態外衣）與社會實質（經濟資源分配）之區分上**。換言之，乃是如何透過社會現實之解讀來檢證諸政策主張可行性之嘗試。此種嘗試置於傳統中國之租稅發展史中所呈現之樣貌如何，則尤爲本文所重。

（三） 財政社會學之繼受

實則，所謂「財政社會學」之研究，近年已有明顯復甦跡象[4]；其中，東亞地區之繼受與發展，亦不遑多讓。日本經濟學界長期以來對經濟史、經濟理論之研究傳統，早已累積可觀成果；除曾有對照日本現代化過程之嘗試外[5]，近年來更有實證化趨勢[6]。至於中國大陸與台灣，亦陸續有相關作品問世，前者已有應用到傳統固有歷史之嘗試[7]，後者除實證化嘗試[8]、應用具體問題[9]外，更有賦予理論新意者[10]。

[1] 諸如 Jecht, Sultan, Mann,；日本學界簡介請參照[Sasaki] (2005)；甚至在美國 E.R.A. Seligman 也有類似作品，Seligman (1926a, 1926b)。

[2] 如 Seligman 即表明自己的「財政社會科學」 (social theory of fiscal science)必不能與 Goldscheid 之 fiscal sociology 相混淆，Seligman (1926a; 194-195)。

[3] Goldscheid 其後真正產生回響者，以英語世界爲例，恐怕只有 O'Conoor 於 1973 年所著 The Fiscal Crisis of the State 一書較有討論。

[4] 諸如 Michael McLure, Richard Wagner, John Campell 等人自 2000 以後陸續有相關著作問世。德國 Erfurt 大學更於每年舉辦財政社會學之國際學術研討會，會後並將研討會論文集由知名出版社 Peter Lang 出版。

[5] 以租稅國理論爲例，最具代表性者厥爲，林　健久、日本における租税国家の成立、1965、東京大学。[Hayashi (1965)]

[6] 諸如神野直彦、金子勝等人。

[7] 如劉志廣[Liu JG (2002)]、[Liu JG (2007)]；朱進

[8] 如吳挺鋒，財政政治的轉型：從威權主義到新自由主義。東海社會所博士論文，2004。

[9] 如張嘉仁，由財政社會學探討我國的財政赤字問題，政大財政所博士論文，2008。

[10] 如黃世鑫。

準此，本文認爲，重新梳理其歷史脈絡並賦予其現代意義之時機亦漸趨成熟。

（四） 財政社會學方法論之現代意義

1. Schumpeter 之財政社會學觀

Schumpeter 對於「財政社會學」之運用，毋寧係基於自身對於資本主義之理解。本文解讀爲，現代國家基於有其歷史發展上之背景成因——此即以個人私利爲活動單位之自由競爭社會。是以一種社會學式的財政學思考，恐怕是一個嘗試以私利爲規制對象之規範機制，在現代社會中，面對層出不窮的私利行爲，欲做一全面性之規制，則勢必屈居備位，且難免流於苦追之窘境。此一社會學式之觀察，有其深刻且有力之處。

由危機一文，或可略見 Schumpeter 對 Goldscheid 所謂財政社會學之評價。其謂：

> Goldscheid 這本具高度智識性的書[1]，其科學上的意義在於，建構財政社會學的基本理念；它成功的原因，乃是對於財政問題所提出的可行之道。(…)
>
> [Schumpeter 1918]

對於其所謂之財政社會學在當時所具有之研究價值，更可見諸於下段：

> 財政工具創造並同時破壞了產業、及其形式、區域，甚至是其所料想不到的－它不假他手地促成了當代經濟學的建構（與曲解）以及透過它所展現的精神。[2]而能超越因果關係層次的，則是財政史在現象上的意義。一個民族的精神、它的文化水平，社會結構，其政策

[1] 本文註：指 Staatssozialismus oder Staatskapitalismus, 1917.
[2] [Schumpeter (1918)]

上所能提供的手段──所有這些或更多，都見諸於其財政史中，跳脫時間的藩籬。知道如何從中傾聽訊息的的人，就可分辨出世界史的巨響是最清晰可聞的。

[Schumpeter 1918]

但 Schumpeter 對於財政社會學之定性，以及方法論之說明，最爲詳盡者，莫如下段所示：

重要的是，財政史能提供一些洞見，而有助於社會規範的形成以及成為主導國家命運的一股勢力，甚至在特定組織形態中，特定（concrete）條件得喪變更的方式。國家財政，是觀察社會最好的起點之一，特別著重卻非僅止於它的政治生命。此種方法最大的成效，常見於若干轉型時期——通常是一段時間，當中，其既存的現狀開始蛻變出新，而幾乎，舊有的財政手段也同時面臨了危機。這**不僅在財政手段具有因果上重要性**（只要財政事件是所有因果變化中的一個重要的要素），**且具有現象上的重要性**（只要任何事的發生，都會有對應在財政上的一面）。儘管在該特定的事件中的所有要件，都必須要具備；但我們仍然可以確切地圍繞在該特定事件群打轉、對此設定一連串特定的問題、並提出一系列對應——簡言之就是，關於一個特殊的領域：備受期待的財政社會學。**（強調為本文所加）**

[Schumpeter 1918]

2. 租稅國家界限及其憲法上意義－「課稅界限論」與租稅法律主義

或許站在國家社會性質二元之立場，財政社會學並不認爲國家對於經濟之形成具有決定性之影響。Schumpeter 亦曾說：「史學家往往高估國家對於經濟形成的影響。在任何時候，經濟和預算都不會形成一個真正統一個「國家經濟秩序」，國家也不曾創造出一些私經濟領域所無法創造的東西，儘管國家所創造出來的東西在規模上與之有所出入。舉例言之，舊市場的優勢，解釋了當今部分工業的所在位址。但這些例子，基本上不過是

在一個以經濟因素決定市場位置體系中的一些特例罷了。」。但從財政憲法角度而言，財政社會學之作用，透過此段話的說明，毋寧提供了憲政國家在規範上漏洞預防之可能性。

三、固有性與財政社會學之應用－傳統中國租稅制度之演進及定位

另就傳統中國相關部分之整理討論，僅限縮於西漢之一隅，誠有不足之處。此由本文副標題「對照《鹽鐵論》與《租稅國危機》」所示，似無可避免。[1]但對於其討論之發展可能性而言，似有必要在此附帶討論。

（一） 以租稅爲中心之財政史

1. 租稅與徭役之二分

傳統中國之歷朝代，爲維持自己所支配之體制，執行各種公共之機能，對於其所支配之人（絕大多數爲農民）其課予之義務大別有二：一爲租稅，另一則爲徭役。所謂租稅，乃以穀物（如粟、稻等）、織物（如麻布、絹布等）或貨幣（如銅錢、紙幣等）爲基準所徵收者；其用途始於支付官僚或軍隊之薪俸，後來則供支應宮庭開銷以及公共事業等他種資金之用。至於徭役，則是爲了達成軍事行動或官廳之行政業務（如徵稅、保管、運輸、治安）目的，而課予人民一定期間的勞役。[2]

[1] 而本文一份匿名審查報告亦指出「雖然本文主旨並不在針對中國與西方的「納稅道德」進行全面性的比較，但是，究竟要如何更嚴肅地對待中國、歐洲兩個不同地區的歷史、社會與文化異同？仍是值得繼續講究…」云云，本文受此鼓勵，亦嘗試對傳統中國之租稅分期作整理，惟受限能力時限，僅另就日本史學界討論作一部分介紹整理以供比較參照，至於詳細討論，且容待後文爲之。

[2] [Nagai (2000; 102)]

2. 島居一康氏之四個分期[1]

此一隨著時代之發展而演進之二元稅賦徵納體制，其最初之型態，回溯至國家組織形成氏族共同體社會集團；而該集團係以祭祀祖先之貢物以及從軍之義務爲其徵納體制，反應了濃厚之血緣關係色彩。[2]

(1) 第一期：秦漢時代

秦漢時期之稅役體系，相對於春秋戰國時期社會經濟之變動，特別是小農個別經營出現之過程而言，毋寧是一個經淘汰、整頓過後的產物。從西元前二世紀後半開始，一直到西元前一世紀前半左右之漢武帝時代，爲第一期的集大成。

其主要稅役制度如下：

		備註
租稅部分	● 田租：對穀物之收成部分課徵定率稅 ● 芻稾稅：對土地課徵定額稅 ● 算賦、口賦錢：人頭稅 ● 更賦：徭役之代金 ● 山澤園池之稅：現物稅（草木、魚介、礦物等） ● 專賣收入（鹽鐵酒之間接稅）	
徭役部分	分爲軍役與人役（即差役）二種。	

綜述之，第一期之特徵爲：

[1] [Shimasue] (1993)]，另曾我部靜雄氏，則粗分爲三期，：（一）井田法之稅役；（二）秦漢及均田制土地法上稅役；（三）兩稅法時代之租稅與力役。詳見 [Sogabe (1969)]

[2] [Nagai (2000; 102)]

A. 以貨幣形式來徵收之稅目，占有一定之比例；

B. 在第三期以後重要性漸增的專賣制度已早熟地出現；

C. 對物課稅（對收成物課田租、對土地課芻稾稅）以及對人課稅（算賦、口賦、更賦），是稅收之兩大支柱；

D. 對於各稅目之用途已有明確區分，即分爲國家財政（作爲國家經常費用之財源）及帝室財政（皇帝私人生活費用之財源）。而此一原則，窮前近代，均持續地被遵守著。

(2) 第二期：魏晋南北朝隋唐時代

此時期，在某一側面而言，或許可看成一朝隋唐均田制邁進之土地政策改革歷程，包含了魏之屯田制、晋的占田課田制，北魏之均田制等。

另正同此時，出現了對於農民課徵以「戶」爲單位的租稅（戶調）。此制度乃逐漸往一夫一妻爲一課稅單位（稱：一牀）之形式變化，此種變化其實也不妨看成是朝向以隋唐租庸調制度來徵收之進展過程。

在唐朝之均田制中，對農民之成年男子，授與共計 100 畝之田（口分田 80 畝、永業田 20 畝）。其後，以粟爲**租**、以絹布、綿（或麻布、麻繩）爲**調**、以一定日數之力役（得以絹麻代納）爲**役**，對於每一對夫婦，以一牀爲單位，定額賦課。

除此之外，來自於地方官府之力役（稱：雜徭、色役）以及作爲軍役義務之府兵制（在役中則免除其他稅役）之型態亦有出現。

作為土地制度之「均田制」，作為稅役制度之「租調庸•雜徭制」、作為兵制之「府

兵制」三者，實乃相互關連之三位一體型態，而與第一期之稅役制度相較，有特徵上之不同。

A. 土地爲國家所有，亦即全國之耕地均爲公有的理念被制度化。

B. 以夫妻（牀）爲課稅基本單位的想法，是均等課徵現物稅之大原則。

C. 至於專賣制度在此時並未施行，而到了唐朝中期才再度復活。

(3) 第三期：唐末到清初

唐朝中期以來，均田制中所謂土地公有之理念，在現實上已完全瓦解。個別的農民，對於其自己耕作的田地，在事實上之私有的，而同時，擁有大量土地之地主勃興，在其土地上盡是所謂的「地主－佃戶制」。

此時，國家迫於現實，不得不重新對應其稅役制度。過去由於農民平均佔有土地，故以均一的定額課徵制度來課徵每一對夫婦之型態，已變成如今依照農民擁有田地面積大小，換算應納稅額的方式。這一方式，即爲西元 780 年之兩稅法，而一直到十八世紀初期爲止之各朝財政，均以此爲基礎，歷經超過 900 年。

兩稅法之課徵方式，乃以田地面積爲基準，分夏、秋兩次徵收。宋代時，夏稅以絹布、大小麥爲主要徵收對象，秋稅則爲稻米。徭役之中，差役（力役）之課予方式與兩稅相同，均依照總田地面積大小課徵，內容爲諸如徵稅、運送、治安等行政之執行事項。在此可以特別注意的是，至前代爲止，對農民之義務負擔具有重大意義之兵役，已與徭役切割開來，實現了兵農分離。

本來兩稅就是以統合先前諸稅之單一稅爲原則者，但隨著時代演進，各種的附加

稅（如和買、和糴等）、身丁稅（對成年人課徵）跟著出現，也都在王朝財政中佔有一定的位置。

另唐朝後期復活之專賣制度，在宋代經過整理擴充後，對象已擴及到鹽、茶、酒、明礬、香藥等物；但主要收入仍爲專賣鹽收入，其到了南宋及元朝（12-14 世紀），佔了全體稅收的一大半。

兩稅法時代歷時久遠，其在具體稅役制度上亦有數次重大變革。其中最值注意者，厥爲**課徵形式之貨幣化**；早在宋代兩稅的稅目當中，即出現一部分的錢納或是免役錢的形式。

貨幣化的傾向，至明代中期以降，產生決定性的進展，也就是朝著稅役二者之銀納化發展。明初以來，農民被組織、收編於里甲制之下，被課予兩稅與徭役（里甲正役、雜役）。諸此負擔，漸趨繁雜，而且負擔過重，爲謀求解決之道，於是催生了一條鞭法。

在稅役制度之貨幣化、銀納化之潮流下，約莫在十六世紀中期之後，各項之徭役負擔，一律以銀本位方式計算，其中即包含了以銀價所合算之兩稅額的部分。

至於徭役部分，儘管依舊維持丁銀的形式，但也明顯可看出，徭役漸次納入土地稅，並予以制度化。這一方向，可謂劃時代的改革，成爲邁向地丁銀制（即地、丁併徵）發展前的一個重要階段。

(4) 第四期：清初 18 世紀以後

明代以來社會上白銀經濟之普及下，租稅與徭役（差役）制度，亦以銀納之方式發展。到了十六世紀後半，根據一條鞭法，將稅役諸項目中銀納以及徭役之一部分，合併計入土地稅中。這類總決算方式，就是在 1720 年以後所確立之地丁銀制（地丁併徵）。

至於徭役之負擔，在一條鞭法施行後，依舊以「丁銀」之形式而與「地銀」（土地稅）同時存在。其丁銀的總額，以 1711 年之徵收額爲作爲嗣後固定之徵收標準，不再更改其額度。將此額度，合併於依照田地相應面積來課徵之「地銀」，一起徵收者，稱爲地丁銀制。

從地丁銀制施行以後，租稅（在此指土地稅）制度，與同時作爲農民基本負擔支柱之徭役制度二者，則隨著制度單一化之緣故併入土地稅中。

第四期的財政構造，有顯著之特徵。首先，在以地、丁併徵爲前提下，全國之丁銀總額被固定下來。此外，課稅對象一元化後之田土面積，在清代時，事實上也被固定下來。

因此，丁銀額和田土面積二者均固定不變之下，則意謂著以田土爲課徵對象之地丁銀徵收額本身將不會變動。舉凡社會經濟上各種之變動，乃至於軍事支出之增大等，均不會改變國家之人口與土地面積資料以及所據以課徵的稅額，因而國家財政將不可避免地僵化，而勢必求諸其他財源。對於傳統中國上述財政構造上的特徵，有稱其爲「原額主義」。[1]

（二） 賦稅型態之演變

[1] 此爲當時日本東洋史學界之通說，詳見 [Nagai (2000; 110-)]

1. 所謂「前近代中國財政特徵」[1]

中華帝國之稅役制度，雖二千年來歷經了複雜變遷，但深入觀察仍可歸納出若干跨越時代與朝代的特徵。這些特徵，不僅對於財政史研究具有提綱挈領作用，更可能對於各個朝代或中華帝國各時期的支配構造、時代區別等問題，產生連結之作用。

(1) 由「土地公有」（國有）趨向於「土地私有」（農民事實上擁有土地）

第一個特徵，對應的是從第 II 期之均田－租庸調體制轉移到第 III 期兩稅法體制。社會上土地制度的變化，導致了稅役制度在結構上的改變之典型例子。

(2) 以「個別人民（農民）」爲徵收對象轉向「土地稅之一元化」

第二個特徵，用先前的時代區別論觀之，也有把十八世紀初地丁銀制之成立當作是特徵的說法。亦即，如果以從秦漢到隋唐以來古代人頭稅的系譜與地丁併徵二者連結起來一併觀察，則可推出把丁銀併入地銀此事，造成了人頭稅最終消滅的結果，也造就了傳統中國封建領主制的成立（也就是中世的開始）。

此爲從「鄉紳論」之立場的觀察結果。無論其論證妥當與否，以個人（人丁）、夫婦（牀）、農家（戶）爲對象之稅役制度，被歸併爲對土地課徵地丁銀之一元化制度一事，確是中國稅役制度史上的一個歸結點。

(3) 間接稅收入之增大化

[1] See mainly [Nagai (2000;106-)]

專賣制創始於漢武時期，曾一度中斷多時，但在八世紀後的唐代中期以後再度出現；更在宋代以後，成爲當時第二重要的財源，緊接於直接稅（對土地課徵之兩稅、地丁銀）之後。傳統之王朝財政，由於土地稅之徵收額度有固定化的強烈傾向，是以歷朝在後半時期，諸如專賣、商稅、關稅等間接稅收入增大現象，並不特殊。

此一現象，對照於今日，消費稅佔稅收比例日增的趨勢而言，無論是對照資本主義之進程、抑或對照社會福利思想之進展，均不啻爲一值得分析焦點。[1]

(4) 從「兵農合一」轉向「兵農分離」

第四點特徵，和第一點相同，均爲第 II 期過渡至第 III 期之重要指標。至唐代中期爲止的兵制，雖有若干例外，但基本上乃立於兵農一致的原則，故一般而來，凡是身爲農民的成年男子，均有在一定期間內服徭役（軍役），終了後再返回各自農民生活的義務。上述兵制，乃以隋唐之府兵制爲典型。

府兵制在唐代後期，維持出現困難，而逐漸變質、崩壞。在十世紀之宋代，兵制轉爲爲募兵制（傭兵制），其士兵爲職業軍人，由國家支薪。

此種變化，對照於西方傭兵制的出現，亦具財政意義。

從財政史觀點言，演變爲兵農分離之結果，具有兩層重要意義。

其一，差役（職役、力役）與軍役二者爲徭役制度的兩大支柱，一旦其中之一與

[1] 近年日本之數次稅改，均有導入消費稅思想之傾向一事，亦值一併觀察。

農民分離，徭役的內容，就成爲受地方官廳所指示的各種行政事務。

其二，由於士兵是薪資所得者，亦是真正的消費人口；他們在社會上經常大量的出現，使得財政支出中軍事費用比例大增，財政軍事化的傾向日趨明顯。

而上述二者大致上宋代以後，所謂近世國家的共通特徵。

(5) 由「現物徵收」轉向「貨幣徵收」

雖然說，如何理解前近代中國經濟史的發展階段一事至爲重要，但各朝代以貨幣形式之稅役制度，關於其總量或實際狀況等不明之處甚多。

另就課稅規定而言，秦漢時代乃以銀本位作爲主流，但從魏晋南北朝隋唐到北宋左右則以現物徵收爲原則，南宋、元朝時期，貨幣之徵收方式漸興，但到了明朝初期，又再度重回現物徵收制，惟明代中期以後，在白銀經濟普及的社會中，稅役徵收的貨幣化乃急速地發展、確立，直到清朝末年。

實則，在課稅規範之層次上，不明之處亦夥，未必能單線演化角度觀察。但或許各時代稅役之課徵規定所產生與實際運用上分歧的可能性，或是傳統中國貨幣經濟發展過程之實質的評價，或許能成爲問題解決的線索。

(6) 由「定率課徵」轉向「定額課徵」

定率課徵轉向定額賦課的變化，早在秦漢時代已看得見這種傾向；而到了魏晋以後，定額課徵才確定成爲貫穿整個朝代制度原則。

以上之觀點，乃是站在王朝財政收支的考量。一旦定率課徵的傾向較強，財政的規模將每年變動，稅收也必然每年有所增減，是以國家財政基礎相對上較爲不安定。

相反地，在貫徹定額課徵原則的時代，每年稅收變動小，稅收也較穩定。從另一方面來說，定額課稅的財政，也因爲較爲固定緣故，而有可能較爲僵化，無法對應社會變化或是財政支出上量的變化。至於財政運用上諸如量入爲出、量出制入等問題，則是與所謂「原額主義」有關的重要問題。

2. 中西比較可能性

(1) 各種比較可能性

本文所謂之比較可能性，應指以稅法學爲中心之觀察角度而言，以本文之脈絡以觀，主要約可分爲：A.課稅正當性基礎；B. 租稅倫理基礎；C. 稅法之規範基礎；D.納稅人之價值判斷模式等數種。

換言之，和制度或歷史沿革之分析相較，本文之視角或有不同，但卻能結合制度與歷史分析，以收綜合比較之效。

3. 中西比較

前述所列舉關於中國財政史上之特徵，若與其他地區之前近代國家財政相較，長井千秋氏列出以下三點特徵：

(1) 地方政府權限不及於自主財政權

第一，中華帝國之財政，平時在中央政府集權統制之下，除了少數例外情形外，各地區之官廳、組織本身，並不具有獨自的財政運用權限。

此與日本近世之幕藩制國家、西歐中世封建國家之財政相較之下，厥爲傳統中國王朝財政的最大特色。

(2) 「絕對王權」即「絕對無產」[1]

第二中國各王朝（特別是宋代以後的近世王朝），一方面雖然代表唯一絕對的公權力，但另一方面在經濟上卻是幾近無產的狀態。亦即，財政收入面而言，國家直轄之領地（如官田、公田等）收入，佔總收入之比重甚少，反而全面地依存租稅收入一事，頗值深思。

(3) 國家於流通經濟之積極角色

第三，中國王朝在財政所自爲的經濟行爲，數量巨大而且位置集中，是以被認爲對其社會、經濟全體十分具有影響力。國家透過政策手段，對於租稅收入之分配、透過消費所產生之物資流動，相對於民間物資的流通構造而言，經常扮演了主導性、規劃性角色。

（三） 小結－傳統中國稅役制度之現代意義及回應

[1] 或許就實效觀點論之，在「普天之下，莫非王土，率土之濱，莫非王臣」思惟下，專制君王是否真爲絕對無權一事，確實容有疑義。本文認爲，此可能是觀察角度不同所致。長井氏的角度，毋寧是從財政面收入的靜態分析，然而從權力實效觀點論之，或許無產之狀態，僅爲一表象。
但在此可進一延伸者爲，此一「無產」之內涵，具有憲法對經濟體制之取捨意義。申之，所謂之無產國家，毋寧指涉一財產私有之市場經濟體制，是以國家放棄所有權者身分，轉而要求分享人民市場經濟營利成果之部分。

倘將傳統中國在稅役體系演進與現代國家之特徵作對照，係可整理如下之表：

	傳統中國特徵	現代國家特徵
1.財產制度	土地公有到土地私有	私有財產制
2.課稅對象	個人到土地	以人或家庭爲對象
3.徵稅方式	間接稅佔收入比重增大	間接稅比重日增
4.兵制	兵農合一到兵農分離	徵兵到募兵
5.給付方式	現物徵收到到貨幣	金錢給付爲原則
6.稅基	定率課徵到定額課徵	定率、累進稅率

本文簡析之，除稅基之計算中，累進稅率之課徵象徵福利國家之挑戰外，似乎傳統中國稅役體系之演變，並非與現代國家之特徵大相逕庭。

(1) 我國租稅發展之軌跡

周玉津認爲，在我國各種租稅中，有下列四個發展趨勢值得注意。[1]

A. 田賦爲主，工商稅爲輔

傳統中國以農立國，最初稅制幾爲土地單一稅（即田賦），雖其後工商各稅漸興，以補田賦之不足；但氏認爲，就歷代財政而言，仍以田賦爲主稅，工商各稅爲補充稅。

B. 工商業之課稅，原始目的爲抑商

[1] 周玉津，中國租稅史，大中國圖書，1961，p.2-3。[Zhou UJ (1961)]
周氏所著書，獨特之處爲其大綱之編排方式；即先將傳統中國租稅之主要稅目分列爲各章，再將各稅之歷朝沿革以時序編爲各節。此種以稅目爲經，朝代爲緯的整理方法，與一般以各朝爲各章再以當朝各類稅目制度作爲章內各節之寫法相較，較具歷史發展性與體系性，本文認爲甚有助益。

氏認爲，傳統中國對工商業之課徵，最初目的在於抑制，而非收入，蓋歷代多採重農抑商政策，抑制商人逐末求利；是以工商各稅完全成爲財政收入目的者，已是後來之事。[1]

C. 「節用愛民」之發展限制

中國歷代財政思想，皆本「節用愛民」，因此氏據以認爲，受此理念影響所及，租稅之課徵傾向「有限課稅說」，而與「無限課稅說」之相對，是以對各項稅制之建置偏向被動，不思積極改進。[2]

究其原因，從課稅正當性基礎觀之，或許可以有以下兩點觀察。

I. 課稅者可能認爲，非以「節用愛民」之名義課稅，其正當性基礎不足。
II. 納稅者之若干價值（如生存、財產或作爲國家財源）在實質上獲得課稅者之肯認，而具正當性。

D. 稅率輕重與王朝盛衰高度相關

氏認爲，各稅稅率之輕重，可以爲預測歷朝興亡之水準器；稅率輕免，爲盛朝兆徵，反之橫徵暴斂則多係衰朝。

(2) 管見

然而現代國家中，租稅國家體制依然有其危機存在，尚且不易克服。以下茲分就

[1] [Zhou UJ (1961; 2-3)]
[2] [Zhou UJ (1961; 3)]

財政面與法律面說明之。

首先財政面而言，對照近日稅改趨勢，間接稅佔稅收比例之增加（如消費稅）之情形，似不違背租稅國理念之稅源保持原則。然而，間接稅之課徵，（倘以消費稅爲例），並非以非對待給付之形式，倘其商品又係一般民生必需品，則是否能達到總體量能平等負擔之效，啓人疑竇。

另法律面觀之，代議民主作爲課稅正當性基礎已略見薄弱[1]；本文認爲其乃繫於民主正當性其政治性格過於強烈所致。申之，或許，代議民主之稅捐立法，倘取決於政治協商等過程，似將不易完全達到租稅公平其國會保留要求之實益，進而納稅人之量能平等理念，將現實面而言，只能期待司法之積極出現。

四、以《鹽鐵論》爲線索觀察課稅界限之固有性

本文之研究架構，乃以《鹽鐵論》與《租稅國危機》二文本爲探討中心。二者雖時空迥異，但不無比較實益；申之，（一）二者皆係探觸國家權力界限之本質問題，具有些許共性，且（二）在深受繼受法影響之華人社會中，如何看待固有法與繼受法二者交集領域一事，毋寧具有現實意義。

對於上述二問題之回應，本文擬從「體用」之論出發。（一）對於課稅界限之共通性問題，本文以之與財政憲法之基本取捨相連結，亦即「國家應藉由市場經濟取得租稅收入，或自行以國家營利帶動經濟發展」問題；（二）對於繼受現實性之問題，本文強調「鹽鐵爲體，危機爲用」之面向，亦即在繼受西方課稅界限論之前提上，試圖從「義利之辨」之納稅人角度突顯傳統中國脈絡之固有性。

[1] 本文主張民主正當性在傳統中國中，未必能有如西方歷史脈絡中無代表不納稅之理念，是以其是否成爲固有之規範基礎，存疑。詳見本文導論之相關說明。

（一） 《鹽鐵論》文本及其背景

1. 文本及內容梗概

《鹽鐵論》之文本形式爲一會議紀錄，由西漢桓寬氏所整理編輯而成[1]；主要係針對西漢武帝時期所推行之各種國營專賣政策之利弊，展開制度存廢之辯。惟其實際上則是爲了反對桑弘羊而藉題發揮的一場政治鬥爭。[2]會議辯論之結果，廢除了酒專賣及關內的鹽鐵專賣。[3]

此次論辯始於漢昭帝始元六年的鹽鐵會議（81 B.C.），至漢元帝時期（33 B.C.）《鹽鐵論》的成書爲止，歷時四十八年。此論辯既是一次封建經濟思想上的論辯，同時作爲一次漢中央政權內部不同派別之間的政治鬥爭[4]，代表著封建奴隸主階級和新興土地主階級之間的對立[5]；更有認爲是地主階級內部裡朝廷與地方的矛盾，且

[1] 有謂，桓寬有感於汝南朱子伯之言，收集流傳的紀錄，序其次第，飾其語言，增其條目，遂成爲今日所看到的形式。請參照，徐復觀(1979)，兩漢思想史，頁 125。另有認爲桓寬編寫時對於政策之是非善惡標準多有推衍增廣，並且所反映之時代係儒學成爲正統思想之漢元帝時期而非鹽鐵會議當時氛圍云云，質疑其內容之中立性者，詳見趙靖編[Zhau]，中國經濟思想通史上，2004，頁 481。至於關於鹽鐵論臆造之考，詳請參照　賴建誠 [Lai (1996/1998)]、李怡嚴、賴建誠[Li & Lai (2000)]。另值一提者爲，有認爲桓寬於撰寫時，采獲不周而有所遺漏，且只注意推衍增廣，未留心網羅散佚，見　王利器 [Wang LQ (1992/2006)]，鹽鐵論校注（下稱「王校注」）附錄一，p.623。

[2] 胡寄窗 [Hu (1998)]，中國經濟思想史導論，五南，頁 230。王校注[Wang LQ (1992/2006)]，前言，中華書局，頁 2 以下。

[3] 胡寄窗 [Hu (1998)]，中國經濟思想史導論，五南，頁 230-231。另參《鹽鐵論·取下第四十一》「奏曰：『賢良、文學不明縣官事，猥以鹽、鐵為不便。請且罷邵國榷沽、關內鐵官。』奏曰：『可。』」王校注，頁 463-464。

[4] 請參照 唐凱麟、陳科華 [Tang & Chen (2004)]，頁 269-270。

[5] 王利器曾表示，自從春秋末期，奴隸制日益崩潰，封建制日益興起，在尖銳複雜的鬥爭中形成的代表奴隸主階級利益的儒家，和代表新興地主利益的法家，二家在政治思想路上，如《漢書·藝文志》所言，是「各引一端」、「辟猶水火」的。詳見王校注，頁 6。

另陶希聖之一段描述頗爲深刻。氏認爲，漢武帝時代，政府爲應付財政支絀，順應經濟發達的趨勢；鑄發貨幣，專賣鹽鐵，設置均輸，增加商稅，蕃殖官奴，擴大官有耕地，皆用以致意財源的開闢。爲求開闢財源，政府對當時正在發展的商品生產及商業交換，並不加以節制。只是，商業資本的發達，足以破壞農家的經濟，減少國家的地稅及力役，與地主的地租。**地主反對商業的蓄積。但是地主卻不能根本反對商業交換的制度，蓋其耕地多透過交換而來，且食物與家用品亦透過商業買賣而來。因此，地主在無法否定商業交換經濟下，卻期待著一個古代氏族的封建制度。**基此，而有

此矛盾既是政治問題，也是哲學問題。[1]

其中，代表民意一方之**文學、賢良**[2]（下稱「文學賢良」），認爲當時由桑弘羊所推行之鹽鐵酒專賣等諸政策係與民爭利之舉，遂主張應予廢止；惟以桑弘羊爲首之朝廷諸官（下稱「桑弘羊等人」），則代表國家利益，認爲各項專賣政策各有其正當性，是以轉而對文學賢良之批評予以反駁。

《鹽鐵論》中國家財經政策辯論，文學認爲漢武帝推行的經濟政策是「與民爭利」，且破壞了農業發展，而主張「抑末利而開仁義」、「崇本抑末」；大夫則認爲，武帝之政策不僅爲了鞏固國防，而且也是要抑制個人工商業，不使其極度發展到危害中央政權的地步，故各項經濟政策，實際上是方便了一般百姓，促進了農業的發展。[3][4]

桑弘羊在會議中一夫當關，面對文學賢良對其政策質疑——或祖述先王聖道，或疾呼爲民喉舌——大抵上竟均能旁徵博引，據理舌戰群賢，著實不易。而漢武時期財政收支系統得不致自潰於皇帝之私人雄心，桑弘羊之貢獻，吾人自不能稍加漠視。[5]而桑弘羊一派之財政觀、國家觀，置於在其時空背景觀之，亦難謂不具極高之現實正當性。

了西漢中葉的經濟財政論爭，此一論爭，乃以鹽鐵專賣之主張或反對爲中心而展開。詳見陶希聖(1982)，頁 158-159。[強調部分係本文所加]

[1] 周桂鈿 [Zhou GT (2000)]，秦漢思想史，頁 260。

[2] 外語資料之用語不一。如 “Well versed in Writings”(文學)、“Worthy and Good”(賢良)，見 [Kroll (2001)]；The Literati(文學)與 The Worthies(賢良)，見[Gale (1933)]；Die Gelernten (文學)、Die tüchtigen und aufrechten（賢良），見 [Schefold (2002)]；本文爲求說明方便，將文學與賢良等人，統稱爲「文學賢良」（Literati et al）。

[3] 喬清舉注[Qiao (2002)]，鹽鐵論：注釋本，華夏出版社，頁 1-3。

[4] 不過，司馬遷本於善者因之觀點，認爲應繼續堅持“無爲”自由經濟發展政策，不能因爲經濟政策所存在問題而予以廢棄。詳見 [Tang & Chen (2004)]，頁 264-265

[5] 周桂鈿即謂，桑弘羊乃作爲當局者，賢良文學作爲旁議者（“從旁議者與當局者異憂”《鹽鐵論·刺復第十》）。由於地位不同，考量也因而不同。當局者考慮全局情況，要有長遠打算，因此考慮到方方面面的複雜問題；旁議者只看到局部情況，只想到個人私利，且把許多複雜問題看得過於簡單。[Zhou GT (2000)], p.270.

有謂，桑弘羊難能可貴之處有二：（一）在舉世皆爲重農主義思想所瀰漫的空氣中，獨能超然自樹一幟，而特標出其重工商之意見；（二）相信「富國非一道」－即「富無經業」的新時代特徵，故力排農本主義之說，而注重工商；而在工商之中，則又以爲惟商爲尤易於致富。[1]此一段說明或許能使人對當時社會氛圍稍有體會。

2. 社會背景考察

不過，另有謂：「從表面上看，這次論辯是以代表儒家之“文學賢良”之勝利告終，但實際上“文學賢良”的勝利是以儒法思想之合流爲基礎所取得的，因而也未嘗不是法家（管子）的勝利」[2]，此一見解，亦不啻另一角度之社會觀察。但我們可以進一步探求，究竟在當時是儒法思想的那些基本理念有所合流，何者有所不同？此是否與能夠與「大政府 vs 小政府」之爭論作一連結等等課題，實已足具當代研究者深思。

然徐復觀亦嘗謂[3]：「在皇權專政治之下，知識分子只有在矛盾對立，相持不下的夾縫中，才有機會反映出一點政治的真實，鹽鐵論的價值正在於此。」在此姑且不論論辯雙方（即「文學賢良」vs「桑弘羊等人」）背後錯綜複雜的利益糾葛如何，單就談話內容本身所反應出人民社會生活的諸象並達於天聽此事，已足具參考價值。

（二） 《鹽鐵論》在傳統中國財稅思想之定位

《鹽鐵論》之成書，對於中國古代經濟思想史之研究，實具指標意義。除了在主

[1] 馬元材 [Ma (1944)]，桑弘羊及其戰時經濟政策，頁 40 以下。
[2] 唐凱麟、陳科華 [Tang & Chen (2004)]，中國古代經濟倫理思想史，人民出版社，頁 276。
[3] 徐復觀，兩漢思想史，頁 124。[Hsu (1979)]

題上，以國家之經濟政策及其理論依據爲內容所展開之廣泛辯論，，並以辯論內容爲中心寫成之專書，在《鹽鐵論》之前並無前例[1]而別具意義外，該書將儒者之經濟思想充分發揮，並擴及儒者對當時政治之各種主張[2]，其中文學賢良將貴義賤利、重本抑末、黜奢崇儉等理念當成神聖不容侵犯之價值判斷標準，並成了中國往後兩千年封建社會正統經濟思想的主要教條[3]，而自西漢後期起，中國經濟思想的發展亦轉爲緩慢，較無根本性之質的變化[4]。

鹽鐵會議辯論所涉內容雖廣，但單就經濟方面而言，有認爲是集中在兩個問題點上：[5]一爲輕重政策的功過利弊之辯，一爲輕重政策的善惡是非之辯。在本文看來，前者宜定位爲利益問題，後者不妨歸於價值問題。

1. 輕重之辨－以《鹽鐵論》爲中心

輕重之學，爲古代中國之政治經濟理論，舉凡封建國家權衡輕重所採之政治、經濟、財政、貿易之政策或措施，均爲此一理論之應用。[6]

從經濟思想之發展觀之，在西漢經濟思想一個重要的議題就是「輕重之辨」，[7]其論辯之核心，即「國家是否應該直接干預經濟」，尤其是“末業”——即鹽鐵論發展的問題。[8]

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[1] 趙靖編，頁 481。[Zhau (2004)]
[2] 陶希聖，頁 159-160。[Tao (1982)]
[3] 趙靖編，頁 481。[Zhau (2004)]
[4] 趙靖編，頁 486。[Zhau (2004)]另有認爲，文學賢良所代表的儒家經濟思想，不僅是略具系統地表述了先秦以來儒家的全部經濟觀點，還可以說是基本上反映了宋朝以前幾百年中一般儒生的代表觀點。雖其中少數幾點在宋朝以後產生了一些新的變化，但大多數在十九世紀中葉仍是儒家的傳統經濟思想。請參照　胡寄窗，中國經濟思想史導論，五南，頁 235。[Hu (1998)]
[5] 趙靖(1998)，中國經濟思想史述要（上），北京大學，頁 263；轉引自唐凱麟、陳科華[Tang & Chen (2004)]，頁 271。
[6] 請參照　王校注[Wang LQ]，頁 180 以下。
[7] 並請參照《鹽鐵論·輕重第十四》。
[8] 唐凱麟、陳科華 [Tang & Chen (2004)]，頁 269。

從漢文帝賈誼提出「禁銅布」主張開始，到漢武帝時期形成之「禁榷」制度爲止，此乃輕重之辨的第一階段。在此一階段中，董仲舒和司馬遷爲輕重論之反對者；二者從經濟自由主義的立場出發，反對國家對市場的干預。[1]惟武帝終究採納了輕重論者之意見，任命桑弘羊等人制定並推行了一系列以鹽鐵官營、均輸平準、算緡和告緡、統一鑄幣及酒榷等爲主要內容之禁榷政策。有認爲從**禁榷制度的實施，標示了漢初以來「無爲而治」、「與民休息」等黃老經濟的思想已轉向「有爲」主義；並反映了西漢中期封建專制主義中央集權進一步加強的客觀要求。**[2]

武帝死後繼位的昭帝，關於此輕重之辨再度被提起，鹽鐵論之促成，反映了此一情形。

惟，桑弘羊在政治鬥爭上的失敗，並不意謂漢代輕重政策的壽終正寢；相反的，霍光在政治上鬥倒桑弘羊後，對於武帝所制定的經濟政策本身並無多大改變。有引班固所指「霍光秉政，因循守職，無所改作」云云，以資佐證。[3]

2. 傳統中國財政權力之內耗特質及其轉型期意義

有認爲鹽鐵平準均輸之爭，從秦漢到明清都曾以不同面貌與程度的出現，其起因類近，敗因亦雷同，乃是中國經濟史上的貫穿性現象[4]；且因爲中國歷代帝國規模

[1] 唐凱麟、陳科華 [Tang &Chen (2004)]，頁 269。並請參照　史記貨殖列傳。
[2] 唐凱麟、陳科華 [Tang &Chen (2004)]，頁 269。
[3] 《漢書·循吏列傳》，引自 唐凱麟、陳科華 [Tang & Chen (2004)]，頁 270。
[4] 請參照　賴建誠 [Lai (1996/1998)]，頁 29；李怡嚴、賴建誠 [Li & Lai (2000)]。單以漢代爲例，專賣制度，並非始終一實施，其數次變遷如下：

元封元年 (110 B.C.)	分劃郡國，使掌鹽鐵
始元六年 (81 B.C.)	鐵不專賣
初元五年 (44 B.C.)	罷鹽鐵官
永光二年 (42 B.C.)	復鹽鐵官

與體制相似、邊防開支負擔甚重、國家財政困難，所以在無法往外擴張經濟勢力、無法突破既有經濟格局限制之下，只好轉向內部更深苛地榨取民間資源，以政治之力與民爭利[1]。

本文認爲，此一國家財政權力「內耗」之特質，乃肇始於《鹽鐵論》，具有經濟社會結構轉型之研究意義。

3. 積累莫返現象之現代意義－國家財政權之社會界限

黃宗羲曾指出，中國歷史上併費入稅的改革進行過不只一次，像唐朝時的「兩稅法」、明朝時的「一條鞭法」、清代時的「攤丁入畝」等。每次稅費改革後由於廢除了部分稅外攤派，農民負擔會有所下降，但是，由於不能阻止地方當局在已經提高了的正稅的基礎上搞新的雜派，過了一段時間農民的負擔會漲到一個比改革前更高的水平。黃宗羲謂之「積累莫返之害」。[2]

黃宗羲氏此一觀察不僅具有歷史洞見，更與 20 世紀 80 年代財政學之理解遙相呼應。[3]然我們追溯 80 年代財政學之源頭，將不難發現 Schumpeter 的蹤跡——即對租稅制度本質界限之觀察。申之，過度膨脹之私利所導致過度龐大的支出，將引領租稅制度走向窮途末路。而此一基於西歐中世財政經濟之社會學觀察方法，是否能借鏡於傳統中國，本文肯定之。

明帝 (58-74 A.D.)	官自賣鹽
永元元年 (89 A.D.)	罷鹽鐵禁，准許自由營業。
建安元年 (196 A.D.)	置使者於關中，監督賣鹽

參照自　文獻通考，卷之十五　征榷考 pp.4-8，轉引自　吳兆莘〔Wu JZ〕，中國稅制史，台灣商務，1993(1965)，p.35。

[1] 賴建誠 [Lai (1996/1998)]，頁 28-29。另請參照 賴建誠，邊鎮糧餉──明代中後葉的北方邊防經費與國家財政危機，2008，聯經。[Lai (2008)]

[2] 吳敬璉 [Wu JL (2005)]，當代中國經濟改革，美商麥格羅．希爾，頁 157、158。

[3] 在此，乃以 A. Wildavsky 所提出之漸增主義(Incrementalism)爲代表。

以下試以《鹽鐵論》爲背景略述之。

（三） 《鹽鐵論》之政經背景及危機

1. 漢武時期國家統治型態之轉變

漢武時期，傳統中國中央集權式之國家結構已於焉成形，有謂此一結構係從戰國以降一直持續至清朝末年之「中國前近代集權式國制結構」的初期階段[1]。其中「權力集中化」與「廣大庶民階層被納入國家體制」二個特色[2]；其中前者具體內容，主要涉及軍權、財政權、乃至於審判權等方面而，與春秋以前，天子－諸侯－卿大夫階層，各自擁有獨立之軍事權、財政權和審判權等各種行政手段所共同構成之多層次統治機構[3]，有顯著不同。

2. 漢武時期之稅役體系之轉變－國家出面干預經濟

(1) 漢初以來之財政體制及民間賦稅結構

漢初之財政體制，可分爲國家財政與帝室財政；[4]前者由大司農管轄，後者掌於少府，但二者收入均以租稅爲主[5]，其各種主要稅目，可約略整理如下：

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[1] 大櫛敦弘，國制史，佐竹靖彥編，殷周秦漢史學的基本問題，2008.9.，中華書局，頁 185 以下。[Oukushi (2008)]

[2] 大櫛氏從三方面分析有(1)武器之所有形式以及軍事指揮權的集中化，象徵了由過去之實力世族私有軍隊自備武裝之情形，已轉變成武器國有化以及以軍符任免將帥、征發軍隊之型態；(2)租稅徵收權之集中化；(3)審判權、立法權之集中化。[Oukushi (2008; 186)]

[3] [Oukushi (2008; 185)]

[4] 加藤繁，漢代における国家財政と帝室財政との区別並に帝室財政一斑、支那経済史考証。中譯本，杜正勝譯，中國經濟史考證。[Kato]

[5] [Kusuyama (1969; 20)]，詳[Yamada (1993)]

財政系統	執掌	各項稅目	說明
國家財政	大司農	① 田租	
		② 算賦	
		③ 更錢	力役（強制勞動）之代金，300 錢
		④ 算訾及算緡錢	財產稅
		⑤ 算車船	依運送工具課稅
		⑥ 算馬牛羊	對家畜等課徵之資產稅
		⑦ 未成年者之賦	七歲以上十四歲以下未成年者之人頭稅
皇室財政	少府	① 山澤之稅	山林業、礦業、製鹽業之收益稅
		② 江海陂湖之稅	漁業、水鳥飼育捕獲業之收益稅
		③ 園之稅	果樹蔬菜之栽培業之收益稅
		④ 市井之稅	商業之收益稅
		⑤ 口錢	人頭稅

其中，國家財政之田租、算賦、更錢與未成年之賦四者，以及帝室財政當中山澤、江海陂湖、田園、市井之稅四者，均爲官廳主動調查課徵，其他則依照納稅人主動申報之數徵收，是爲「占租」。[1]算緡、車船稅、未成年者之賦三者，始於武帝。[2]

皇室財政中，除口錢屬於人頭稅之外，均屬各種形式之營業收益稅。然性質上，猶如向作爲「領主」之皇帝所繳納之「地租」。[3]

略而觀之，收入與支出之相應關係，似不甚強。惟自漢武以後有所轉變，尤其對外關係上，政策易和爲戰，軍事支出之財源，鑑於漢初以來不易田賦之遺訓，不得不另謀出路。

(2) 漢武帝的國營專賣政策

[1] [Kusuyama (1969;21)]
[2] 對商人資本財課稅一事，詳如後述。
[3] [Kusuyama (1969;21)]

漢武帝時期，一方面爲抑制兼併，打擊地方勢力，加強中央集權；二方面爲廣闢財源，充裕國庫，獲取征伐四方的經費，在經濟方面實行了一系列不同於漢初的政策；其共通特點乃是，**由國家出面干預經濟，對一些重要的工商業項目實行官營**。[1]

其具體變革主要如下：[2] A.對商人資本財課稅；B.鹽鐵官賣；C.均輸與平準；D.統一貨幣鑄造；E.酒的專賣；F.賣官贖罪。

A. 對商人資本財課稅——算緡、告緡

「減輕田賦」乃漢代政治的傳統，也是漢朝政府受人民擁載的一大號召，是以漢代皇帝始終不敢增重田賦的課徵。[3]就這一點而言，漢武帝亦同，他不管政府財政如何拮据，也不能打田賦的主意；只是，漢武帝卻增加了收種田賦以外的新稅目，其中最重要者，乃是對商業工業的財產與貨物課稅，稱爲「緡算」。[4][5]

B. 鹽鐵官賣

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[1] 盧烈紅譯注[Lu (1995/2006)]，黃志民校閱，新譯鹽鐵論（以下簡稱「盧版」），三民，二版，頁 4 以下。

[2] 詹宏志編撰 [Zhan (1995/2004)]，鹽鐵論（以下簡稱「詹版」），時報，頁 30 以下。

[3] 詹版 [Zhan]，頁 30。在此，爲求人民擁戴而不願加稅的政策，似乎亦見諸於現今之民主社會。只是，如果稅收乃是爲了增益民，而非爲一己之私，並且取用有度，則不致遭民怨。反之，一方面爲求人民愛戴，另一方面財政預算中卻不斷增加軍事支出，不斷與爭利，則有欺世之嫌。

[4] 詹版進一步說明，129B.C.時，漢武帝首次對商人營業用的車子、船隻課稅，但推行不徹底；後來行政官員才向其建議：「以前對自用車與商人財產課稅的執行都有偏差，務必徹底執行。所有經商、開工廠、放款收利息、及在城市買進賣出並囤積貨物販賣營利之人，即使無固定店面，均應將財產貨物自行估價申報，繳納緡錢；繳納之比例是每二千錢納稅一算，約一百廿錢，稅率約 6%；從事工藝之人，其設備與貨物每四千錢納稅一算。另外，一般人的自用車每輛納稅一算，商人之營業用車每輛納稅二算。船隻長五丈以上每船納稅一算。請參照 詹版[Zhan]，頁 30-31。

[5] 錢穆嘗謂，漢武一朝財計，言其得失，則算緡一事，厲民最甚。史稱中家以上大抵皆遇告破產，民偷甘食好衣，一事畜藏，其爲害可想。。蓋算緡錢與市稅不同。市稅可以履市而稽，算緡錢待人自呈報（稱「自占」）百姓不願自呈報，皆爭匿財，乃縱告發。一經告發，縣官沒收全部產業，告發者得半。姦人何樂不爲，且政府更以此爲羅掘大道，是以凡遇告發，稀得平反也。詳 錢穆，秦漢史，頁 155-156, 173-174。[Chien (1957/2006)]

漢初實行經濟開放政策，允許鹽鐵自由經營；時至元狩年間，武帝方易私營爲官營。

鹽的官營，採取「民製、官收、官運、官賣」的形式[1]，鹽民利用政府提供的生產工具「牢盆」[2]分散生產，產出的鹽由政府按照官定價格收購，政府遍設銷售點，直接向消費者售鹽，並禁止私人自行販運和銷售。

鐵的官營是由政府實行全程壟斷，從礦山開採、冶煉，到鐵器之製作、銷售等各階段，概由政府直接經營。鹽鐵官營事務由中央的大司農統領，地方則設鹽官和鐵官，這些鹽官鐵官直接隸屬於大司農；至於沒有礦山的各縣，僅設置小鐵官，負責鐵器的鑄造和銷售，另歸所在之縣管理。

實行官營後，這兩種商品的巨利成了國家財政收入的主要來源。

C. 均輸與平準

二者是相互配合的制度，亦屬官營商業的範疇。

- 均輸制度

均輸制度始於元鼎二年(115 B.C.)，至元封元年(110 B.C.)在全國推行。漢代承襲古制，規定地方各郡各諸侯國要在正稅以外，本地的土特產作爲貢品上交朝廷。

[1] 盧版 [Lu]，頁 4。
[2] 煮鹽用的大鐵鍋，胡寄窗 [Hu (1998;223)]。

在武帝之前，這些貢品須由各郡國自行運送入京。惟此舉弊病甚多：[1]首先，長途運送的結果，耗費大量人力；第二，運輸途中物品容易損壞變質，造成很大浪費，有些甚至運費超過本身的價值許多；第三，各地距離京城遠近不同，勞逸不均。

爲了克服上述弊病，桑弘羊創立了均輸制度。其內容爲，在各郡國設置均輸官，就地收取貢品後，朝廷所需要的貢品才運至京城；其餘朝廷不需要者，一則轉運至價格較高之地區出售，二則將貢品折算現金徵收，另購當地多產而價廉之商品運往高價地區販售。

實行均輸的結果，除了方便地方郡國貢品的交納，也調節了各地物價不平的現象。至於賤買貴賣的結果，則爲國家獲取了大量的收入。

- 平準制度

平準制度則設置於元封元年(110 B.C.)，主要目的在於平抑物價。朝廷在京城設置隸屬於大司農的平準官，其職責，一爲收受各地均輸官運往京城的貢品，一是掌握市場的商品供求情況，並於供過於求而物價低落時買進商品，供不應求物價上漲時拋售庫存，以控制物價。制度的設計目的在於，使國家掌握大量物資，富商無法從中牟取暴利，而國家反倒而因購銷價差中獲得了收入。

D. 統一貨幣鑄造

漢初幣制變更頻繁，致錢幣混亂。武帝繼位後，錢幣仍經數次變更，至元鼎四年(113 B.C.)，武帝「悉禁郡國無鑄錢，專令上林三官鑄」，從此確立朝廷對鑄幣權之壟斷。

[1] 盧版 [Lu]，頁 5。

此舉不僅取締民鑄，亦廢除地方郡國的鑄幣權。

E. 酒的專賣

98 B.C.，桑弘羊又提出一項增加財政收入之政策，即禁止民間私自釀酒販賣，改由政府設立機關，實施酒的專賣。因爲酒的利潤很高，桑弘羊希望由政府獨得賣酒的利益，也避免民間賣酒者獲致暴利。[1]

F. 賣官贖罪

漢朝政府很早以前就有以「賣爵」增加國家收入的制度，所謂「爵」，本來是封建社會貴族身份的專稱，後來成爲中央政府分封的身份。漢朝的「爵」共分二十級，沒有爵的身份是不能做官的；爵的級層不夠高也不能當官，但只要有爵身分，就可以免除徭賦（一年之中要替政府做幾天的勞力工作，如築城、修路、開湖池等）。[2]另外，爵除了能夠免除徭役外，一旦犯了罪，還可以減輕罪刑。至於人民何以願意花錢買爵，詹認爲，最主要還是爲了免除徭役；因爲當時戰爭迭起，徭役更重，如果花錢買爵能免去徭役，還是划算。[3]

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[1] 詹版 [Zhan]，頁 39。

[2] 詹版 [Zhan]，頁 39-41。

[3] 尤其是第九級爵「五大夫」和第七級武功爵「千夫」兩種爵位可以終身免役，而特別暢銷；人民購買這種爵，等於是把一生應納的徭賦，一次付清以免麻煩而已。詹版，頁 141。

在此，似乎也可以看出，在中國傳統社會中，人民亦有避免國家義務繁雜的傾向。推究其原因，不外乎擔心國家透過繁複的課徵義務體系，悄悄增加人民的負擔，另一原因，則是人民在主觀上傾向痛苦感較少的徵收手段，因此偏好金錢之給付義務，且給付次數愈少愈佳。後者，似可看出，私利（即以個人利益爲中心之思考）仍是社會運作的主要動力，至於前者，則可看出國家爲求支應財政支出，不惜以各種繁瑣名目困之。在此，稽徵簡便之原則有助提升稽徵實效之說法，恐難成立，蓋人民義務非由自己決定，與國家似不具合作關係。

一份匿名審查人亦指出，鹽鐵論當中文學賢良與計臣朝官之討論，其實是在政府支出規模擴大的前提下（兩漢與匈奴長期戰爭的國防支出），如何籌措財源的問題。以現代術語而言，桑弘羊等之鹽鐵專賣政策，即主張國營事業盈餘繳庫，取代一部分租稅收入；而文學賢良主張民間財團或商業勢力取代國營鹽鐵專賣，將使得政府少了盈餘繳庫此一財源籌措的選項，排擠了減輕賦稅、與民休息的財政空間。

實則，官方賣官爵贖罪、常是一種臨時的財政措施，在國庫拮据時以短時間內收進大筆現金，但此非桑弘羊財經政策之重要規劃。

(3) 桑弘羊之財稅觀

桑弘羊認爲政府對經濟社會活動進行控制和干預的好處有三：[1]（一）社會因素：有利於百姓，能較好地維持社會的穩定[2]；（二）政治因素：有利於西漢王朝的鞏固[3]；（三）財政因素：有利於增加財政收入[4]。

(4) 傳統中國之稅收實效性現象與「義利之辨」

對於傳統中國稅收實效性之低落，經常出現研究者之評價。本文認爲，若此爲傳統中國脈絡中固有的問題，以傳統之用語來說，就是稅政執行者對於其自身「義利定位」不清。

惟若此不爲傳統中國獨有，且亦存在不同之文化歷史脈絡之中者，則此種「義利定位」問題，在各該脈絡中之外觀爲何、其發展趨勢有何不同、而我們又應如何觀察之方具比較實益等問題，則涉及本文關於中西課稅界限比較之討論。

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[1] 宇培峰 [Yu](2007)，頁 197。

[2] 蓋所謂「交幣通施，民事不及，物有所并也。計本量委，民有飢者，谷有所藏也。智者有百人之功，愚者不更本之事，人君不調，民有相妨之富也。……非散聚均利者不齊。故人主積其食，守其用；制其有餘，調其不足；禁溢羨，厄利涂，然后百姓可家給人足也。」《鹽鐵論·錯幣第四》且他認爲政府調節市場可「平萬民而便百姓」，從而避免「豪民擅其用而專其利，決市閭巷，高下在口吻，貴賤無常」的現象。《鹽鐵論·禁耕第五》，宇培峰 [Yu](2007)，頁 197。

[3] 隨著鹽業的發展，它不再是一種單純的自然經濟，而成爲重要的經濟資源。同時，又由於它是社會經濟中的龍頭和支柱作用，進而變成一種政治資源。所以「鼓金煮鹽，其勢必深居幽谷，而人民所罕至。奸猾交通山海之際，恐生大奸。」《鹽鐵論·刺權第九》「故統一，則民不二也；幣由上，則下不疑也。」《鹽鐵論·錯幣第五》，宇培峰 [Yu](2007)，頁 197。

[4] 所謂「蕃貨長財」、「佐助邊費」、「佐百姓之急，足軍旅之費」、「有益於國，無害於人」。可見，鹽鐵已成爲社會興衰治亂的晴雨表。而桑弘羊這國家本位主義的經濟立法思想爲漢武帝的“文治武功”提供了物質保證，在漢代經濟立法中占有相當重要的地位，宇培峰 [Yu](2007)，頁 197。

3. 漢武盛世轉衰：試財政危機作爲肇因

中國自古以來，在位者對於其人民所持財富也一直有加以抑制想法。而人民當中最易積累財富甚達富可敵國者，厥爲商人階級。[1]以漢初到漢武以前之時期爲例，諸如「限民名田」、「賈人不得衣絲乘車」等理念，均主導著當時政策之發展。誠然，諸此財經政策莫不爲當時政權之附庸，惟對於社會上之形成力量，仍值得關注。套用司馬遷之說法，即「素封社會」之形成。[2]

惟自武帝以後，大一統政府逐漸成形，各種事務之處理，自應以整體國家利益之角度予以衡量。而其中對匈奴易和爲戰之政策，涉及國家財政甚大，對國計民生影響至鉅。申之，在大一統政府下，面對抵禦匈奴入侵，由於係攸關全體國家利益之國防安全問題，諸如軍費等開銷自應由國家籌措。時尚未有民主政治理念，體制上亦係皇權專制，財政負擔並無法如西方一般理直氣壯地合理分配於人民，一時之間國庫自無法支應戰時經濟之需求。尚且主要財政負擔者（農民）恐怕仍未具備此一大一統國家之國民意識，而征戰匈奴一事更非由這些生產者所能置喙，是以更無法想像軍費開銷係與己攸關之事。由此觀之，戰費此一額外之開銷，不僅造成內朝重臣捉襟見肘，對於人民而言無疑更是雪上加霜。

而從商人階級觀點，自又另一番風景。武帝挾漢興以來重農抑商之傳統，使其任

[1] 如鹽鐵論，禁耕第五，大夫所言：「山海有禁，而民不傾，貴賤有平，而民不疑。縣官設衡立準，人從所慾，雖使五尺童子適市，莫之能欺。今罷去之，則豪民擅其用而專其利，決市閭巷，高下在口吻，貴賤無常，端坐而民豪，是以養強抑弱而藏於跖也。強養弱抑，則齊民消；若眾穢之盛而害五穀。一家害百家，不在朐邴，如何也？」

[2] 司馬遷所謂「素封社會」之特徵，馬元材 [Ma]（1944; 41-42）之歸納有三：
（一）其生產部分乃以商業爲本。（封建社會係以農業爲本）
（二）個人生活之榮枯盛衰，全由個人自己負責，以能力之有無及大小爲其決定之前提。（封建社會僅憑家族關係）
（三）階級關係之決定標準，是財力，是富。（決定封建社會之階級關係，是爵位，是貴）
中文請參考，馬彪，秦漢豪族社會研究，民間編，中國書店，2004，頁 21 以下。
另日本相關討論請參照 林田慎之助(2007)，『史記』貨殖列傳の素封家たち，立命館文學，no. 598。

內中央集權之政府體制日趨完備。只是此一傳統——針對自戰國以來新興之商人資產階級予以打壓，藉以厚植自己實力——在匈奴政策轉和爲戰後，態度有了轉變。

4. 民間社會心理之反應：重農抑商之社會氛圍

「重農抑商」思想，可能源自戰國土地兼併而造成貧富不均擴大所致；然而，此一「社會公平」理念之落實，卻往往淪爲國家集權化之統治工具。有認爲漢武鹽鐵專賣政策之實施，即一適例。

關於漢代抑商政策之政治意涵，高敏氏之分析頗爲深刻；其認爲漢代的抑商政策具有著深刻的社會和階級根源，在本質上它集中反映新興的地主階級及其國家政權與奴隸主階級殘餘勢力的矛盾鬥爭。[1]

5. 小結－義利之辨之社會意涵

鹽鐵論中之爭辯，或許可化爲不同利益之間相互衝突與競爭。甚且，義利之辨作爲傳統中國之價值判斷模式，更在傳統中國中有其歷史發展脈絡，一方面得與繼受法之原則利益衝突模式相互對照，另一方面更能據以發展並深化固有理論。

（四） 小結：《鹽鐵論》中之各種對立狀態－以「義利之辯」爲中心

1. 「義利之辨」理念之發展

[1] 高敏，秦漢史論稿，五南，頁 175-176。[Gau M (2002)]

中國思想史上「義」、「利」之辨與「公」「私」之別二者，乃是密切綰合之兩條想線索。[1]義利觀作爲一種行爲人主觀上之價值判斷模式，於鹽鐵論社會背景之明證，即爲司馬遷所稱之「素封現象」。

所謂「素封」，指的是憑藉財力來代替以往封建貴族在社會上之地位；其雖無封地，卻等同有封地，故謂之「素封」。[2]素封階級之形成，乃司馬遷當時之社會觀察。但素封意識型態之生成，則可能是先秦「義利之辨」論證的具體延續。

2. 鹽鐵論中各種意識型態之對立關係

《鹽鐵論》之內容，亦體現傳統中國中「義利之辨」特質。有趣的是，置身傳統中國文化之局內人，有認爲係守舊派與改革派之爭[3]；另有從觀察者角度認爲二者係現代派（Modernists）與改革派(Reformists)之爭[4]。

安作璋氏將雙方爭論之主題歸納爲三：[5]關於鹽鐵等官營政策的爭論、關於匈奴和戰政策的爭論、以及關於德治法治政策的爭論。以下就相關部分說明如次。

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[1] 黃俊傑 [Huang JJ](1988;158)

[2] 錢穆 [Chien]，中國歷史研究法，頁 56。

[3] 許芷昕(2004)認爲中國人文化價值究應崇義或係重利一事，觀諸歷朝歷代始終沒有定論，一直處於重義貶利或主張求利之矛盾中（節自摘要）。氏進一步認爲，中國在適用西方制度時，係選擇從"利"之路，肯定利的追求；但由於仍留有傳統中國文化的價值觀，而在以西方理性價值做爲行事規則時，產生諸種衝突，甚呈現中不中、西不西主張；時至今日，幾乎處於毫無文化可言的時代——即整個國家缺乏共同客觀的是非評斷之價值標準（頁 6）。詳見 許芷昕[Xiu]，從《鹽鐵論》與宋、清兩代之改革主張，析論中國歷史文化中「義」與「利」的衝突問題，2004，東海大學政治學研究所碩士論文，2004。

本文認爲，此問題意識於固有法中深具研究可行性，並有必要持續發展下去；諸如義利二者概念界定，衝突態樣等分析，乃至於鹽鐵論如何與西方價值分庭抗禮等說明，均值得深耕不輟。

[4] Loewe 認爲，改革派與現代派之政策有一相同共識，即：首重刺激農業，而貿易與製造業爲次要。二者不同者，乃在於達成目的之手段。另現代派者傾向透過自由企業(free enterprise)方式來刺激農業。他們認爲地主階級的狀大乃是必然的結果；而且，隨著此階級的狀大，對國家支付更多的稅收。只是，現代派所支持的國家管理系統，乃是其他種類的生產工具，即鹽鐵事業。此外，現代派亦拒絕將此財源交給私人商賈。請參照 M. Loewe, in: The Former Han Dynasty, The Cambridge history of China, pp.160-; M. Loewe, Crisis and Conflict in Han China, 1974, George Allen & Unwin Ltd., pp.92~.[Loewe (1974)]

[5] 安作璋 [An](1983)，桑弘羊，中華書局，北京，頁 65-82。

(1) 儒法之爭與禮治與法治

德治和法治，是儒家和法家長期以來爭論不休的一個問題。戰國時代，百家爭鳴，秦國的地主階級從中認定了法家思想作爲理論武器，以法治國，最後兼併六國，統一天下。但是如何鞏固統一的這個問題，法家也暴露了它的弱點；即法家的嚴刑峻法，及重賦繁役，剛好成了統治者謀求長治久安的致命傷。是以漢朝開國以來近半世紀，在統治階級中所盛行的思想是黃老治術，此思想與法家思想有密切關係。只是前者強調對人民要因勢利導，而不太公開嚴刑峻法。[1]

漢武前期，乃實行法家的法治，期內重用張湯、趙禹、杜周等人推行嚴刑峻法的法治政策，但卻接受董仲舒的建議而獨尊儒術，公開宣揚儒家的德治；到了武帝晚年，面臨農民反抗而深感法治政策之不足，故不得不採取些許緩和階級矛盾的措施，即所謂的「輪台詔令」。而此即鹽鐵會議中，德治法治爭論的歷史背景。

但對於鹽鐵論中儒法對立關係最爲敏銳者，厥爲趙靖編(2004)之觀察。[2]其文認爲，文學賢良所說的聖王之道，在經濟思想上主要表現爲**貴義賤利**，**重本抑末**和**黜奢崇儉**三個論點，惟三者爲本來都是以前經濟思想中早已提出並且已經相當流行的論點，只是在此次論辯中，對這些論點的解釋和運用，卻同過去有了一系列明顯不同的特點：（一）保守化（二）儒學化（三）教條化。

(2) 專賣或民營之政策時論

鹽鐵官營政策自實行以來，即迭有爭議；除了董仲舒明白主張「鹽鐵皆歸于民」

[1] 安作璋 [An](1983)，頁 76。
[2] 趙靖編 [Zhau (2004)]，頁 482-484。

外，卜式更攻擊均輸平準之政策，謂「縣官當食租衣稅而已，今弘羊令吏坐市列肆，販物求利。烹弘羊，天乃雨。」《史記·平準書》[1]，反對聲浪可見一般。

文學認爲，鹽鐵官營乃是民所疾苦的根源，因此要求罷鹽鐵、酒榷、均輸，而將從事鹽鐵等事業的勞動力都調回至農業，是爲「進本退末，廣利農業」《鹽鐵論•本議第一》，且有利於鞏固封建統治。

只是，有認爲，文學所提出的重農抑商想法，與西漢政府過去所推行之重農抑商政策有別；後者的重農，是重在保護小農經濟，恢復和發展農業生產，以鞏固中央集權的封建統治；而前者（即文學）所謂之重農，乃是放手讓商人、地主無限制地兼併農民土地。[2]是以，西漢政府之抑商與文學之抑商，其差別乃是「限制私商」與「反對官商」的不同。[3]

(3) 與桑弘羊財稅觀對立之思想

胡寄窗(1998)認爲，文學賢良所代表的儒家經濟思想，不僅是略具系統地表述了先秦以來儒家的全部經濟觀點，還可以說是基本上反映了宋朝以前幾百年中一般儒生的代表觀點。[4]趙靖也認爲，鹽鐵會議的內容，也表明了西漢前期的經濟思想並不遜於先秦，而否定中國經濟思想史研究中曾有認爲中國經濟思想「唯先秦」的觀點；只是西漢後期起，中國經濟思想基本上是在前一時期形成的框架下緩慢地發展著，在許多方面雖有所前進和提高，但卻沒有根本性、質的變化；而必須到1840 年鴉片戰爭後隨著封建制度的解體後，才有嶄新的發展。[5]

[1] 安作璋 [An (1983)]，頁 66。
[2] 安作璋 [An (1983)]，頁 66-67。
[3] 安作璋 [An (1983)]，頁 67。
[4] 其中少數幾點在宋朝以後產生了一些新的變化，但大多數在十九世紀中葉仍是儒家的傳統經濟思想。請參照 胡寄窗 [Hu (1998)]，中國經濟思想史導論，五南，頁 235。
[5] 趙靖 [Zhau (2002)]，頁 486。

不過，胡提出以下數點觀察：[1]

A. 對待經濟事務的基本態度：堅持孔孟以來恥言財利而高唱仁義的傳統

胡氏認爲，他們對外族入侵的問題，主張「加之以德，施之以惠，北夷必內向」《鹽鐵論·擾邊第十二》的想法，是脫離現實的。

B. 重農：卻堅持不談生活資源如何取得、拒絕參加農業生產

胡氏認爲，重農思想自有可取之處，惟儒者堅持不談諸如生活資源如何取得，並公開拒絕參加農業生產的態度，只能意味著他們肯定農業中的剝削制度是天經地義的。

C. 財富：否定工商業能致富

胡氏認爲，文學賢良所說之楚、趙之民所以多貧而寡富，是因爲「民淫好末，侈靡而不務本，田疇不修」；反之，宋、衛、韓、梁之所以富足，是因爲人民「好本稼穡」《鹽鐵論·通有第三》。

至於這些儒者認爲貨幣之作用係「以通民施」，胡氏則認爲，此係不承認貨幣可以代表財富，而只不過一流通手段而已。《鹽鐵論·錯幣第五》

D. 輕工商：「非治國之本務」

[1] 胡寄窗 [Hu (1998)]，中國經濟思想史導論，五南，頁 231-235。此部分的批評，簡要收於：王紀平等 [Wang JP (2007)]編，中國古代稅收思想史，中國財政經濟出版社，2007.3.，頁 91-92。

胡氏指出會中儒者所言爲證：「商所以通鬱滯，工所以備器械，非治國之本務也」《鹽鐵論·本議第一》；而工商之民都易於欺詐[1]，且「工商上通傷農」《鹽鐵論·散不足第二十九》，「工商盛而本業荒」《鹽鐵論·本議第一》，尤其反對商業，認爲商業是「交萬里之財，曠日費功，無益於用」《鹽鐵論·通有第三》。

胡氏歸結道，漢初儒家繼承了荀況的工商業觀點，並接過先秦法家重本抑末口號而大肆宣揚，成了此後二千年封建中國的儒家傳統的經濟思想之一。[2]

E. 反對經濟干涉

胡氏認爲，干涉主義與放任主義的經濟觀點在先秦時代早已並行存在，但在鹽鐵論議上，這二觀點之對立情形才正式出現[3]；氏引用「順天之理，因地之利，即不勞而功成」《鹽鐵論·擾邊第十二》爲據，認爲文學賢良對經濟活動主張不加干涉反可使其順利進行。

可以比較的是，幾乎在同一時期的司馬遷，在經濟上也是主張放任政策的。在他看來，封建國家對於社會經濟活動的最好策略，首先是聽其自然發展，最壞的辦法，則是官府自營經濟事業與民爭利。[4]氏曾謂：「善者因之，其次利道之，其次教誨之，其次整齊之，最下者與之爭。」[5]蓋「物賤之徵貴，貴之徵賤，各勸其業，樂其事，若水之趨下，日夜無休時，不召而自來，不求而民出之。豈非道之所符，

[1] 文學曰：「古者，商通物而不豫，工致牢而不僞。故君子耕稼田魚，其實一也。商則長詐，工則飾罵，內懷闚（？）而心不怍，是以薄夫欺而敦夫薄。」《鹽鐵論·力耕第二》，請參照　詹版，頁248。
[2] [Hu (1998;232)]。
[3] [Hu (1998;232-233)]。
[4] [Hu (1998;205-)]。
[5] 《史記．貨殖列傳》。

而自然之驗邪？」[1]

F. 反兼併：將社會經濟亂源歸結於是否遵循一定道德規範，文不對題

胡氏似支持桑弘羊的說法，贊同其從增加國家財政收入和維護商人階級的長遠利益出發而反兼併；而對於文學賢良之「禮義弛崩，風俗滅息，故自食祿之君子，違於義而競於財，大小相吞，激轉相傾」《鹽鐵論·錯幣第四》[2]的說法，則認爲係將一切社會經濟紛亂的根源，歸爲人們是否遵循一定的道德規範，結論千篇一律，自然文不對題。[3]

G. 分配觀念：鹽鐵專賣使「富者愈富，貧者愈貧」惟「非小人無以養君子」

會中儒者引用《論語》中「不患寡而患不均，不患貧而患不安」的原則，認爲產生貧富不均現象的原因係「禮義壞則君子爭於朝。人爭則亂，亂則天下不均，故或貧或富」《鹽鐵論·授時第三十五》。而更直接的原因即在於鹽鐵的專賣政策，使得「富者愈富，貧者愈貧」《鹽鐵論·輕重第十四》；但他們卻同時認爲此一貧富不均的現象不必消除，蓋「非小人無以養君子」《鹽鐵論·相刺第二十》。

H. 土地制度：堅持井田制度

胡氏認爲，文學賢良主張「故理民之道在於節用尚本，分土井田而已」《鹽鐵論·

[1] 《史記．貨殖列傳》。

[2] 其所引上下文——文學曰：「古者貴德而賤利，重義而輕財。三王之時，迭盛迭衰。衰則扶之，傾則定之。是以夏忠、殷敬、周文，庠序之教，恭讓之禮，粲然可得而觀也。及其後，**禮義弛崩，風俗滅息，故自食祿之君子，違於義而競於財，大小相吞，激轉相傾。**此所以或儲百年之餘，或無以充虛蔽形也。」並請參照 詹版[Zhan]，頁 252。

[3] [Hu (1998;233)]。

力耕第二》[1]，乃堅持井田制度的說法，而似乎落後了約莫四十年前，董仲舒所指出「古井田法」已難恢復的說法。

I. 對外貿易：堅決反對對外貿易

文學賢良嘗謂，「不待蠻貊之地，遠方之物而足用。」《鹽鐵論·未通第十五》，是以胡氏認爲他們堅決反對對外貿易，認爲國內產品已經夠用。

此外，外國貨也不如本國實用，蓋「今騾驢之用不中牛馬之功」《鹽鐵論·力耕第二》；且對外貿易又使財貨外流，進口外貨的「資財之費，是一物而售百倍其價，一揖而中萬鐘之粟也」《鹽鐵論·力耕第二》；胡認爲，上述反映了儒家經濟思想已走向「故步自封」。[2]

J. 貨幣概念：主張任民自由私鑄，嚮往物物交換狀態

胡氏認爲，文學賢良一直嚮往古代「抱布貿絲」的以物易物之經濟模式，而不歡迎貨幣的使用；因爲，他們自貨幣制度的發展歷史出發，認爲貨幣自開始使用以來，「幣數變而民滋為」《鹽鐵論·錯幣第四》，是以不願再從事農業；此外，鑄造權集中反而會因「吏匠侵利或一中式，使有厚薄輕重」《鹽鐵論·錯幣第四》，使人

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[1] 胡所引部分之上下文——文學曰：「……夫上好珍怪，則淫服下流，貴遠方之物，則貨財外充。是以王者不珍無用以節其民，不愛奇貨以富其國。**故理民之道，在於節用尚本，分土井田而已。**」本文的解讀則與胡氏略有不同。申之，文學所謂「分土井田」似僅用以說明**節用尚本**之重要性而已，實際是否真認爲應遵循古制，尚不得而知。但詹版的解讀，似同胡的說法；其譯文爲：「從這裡看治理百姓的基本原則，應該是節約財政支出，發展基本農業，分給百姓土地，依井田制度耕種，除此沒有別的了。」，請參照頁 68。

不過另外值得一提的是，詹版嗣後針對《力耕》篇提出的想法；其認爲桑弘羊所認爲「商業可以使國家富強，透過貿易可以使百姓富足」以及「商業雖然可以賺錢，然而如果所有大家都經商，沒有實際的農業生產的話，大家都要餓死了」二者，似乎有「整體的行爲」與「個別的行爲」在層次上的差別，頁 70。

[2] [Hu (1998;234)]。

「不知奸真」《鹽鐵論·錯幣第四》，無法辨認，故反對貨幣鑄造權的集中。因此，「王者……內不禁刀幣以通民施」《鹽鐵論·錯幣第四》。

K. 消費概念：黜奢崇儉，安愉寡求

胡氏認爲，他們除了崇尚節儉反對奢侈之外，也承道家之說，主張「安愉而寡求」《鹽鐵論·通有第三》，過著「安其居，樂其俗，甘其食，便其器」《鹽鐵論·通有第三》的簡單生活。

L. 財政概念：堅持什一之農業稅

文學賢良從《論語》「百姓足君孰與不足」出發，主張藏富於民，「王者不畜聚，下藏於民」《鹽鐵論·禁耕第五》。在租稅上堅持什一之稅的農業稅，反對超過什一的「賦斂」，其代表意見是採用「什一而借民力」的勞役地租制度《鹽鐵論·未通第十五》。在租稅方面他們基本上是繼承了孟軻的觀點。

承上，胡氏於是乎總結地認爲，此等儒生對於秦漢帝國建立一來由地主經濟體系發展所生之新經濟事物和問題，仍舊固守成見地以早期儒家經濟思想來觀察現實的社會，以致於對早期儒家已接觸過的問題，或勉強能夠引經據典地自圓其說，至於一些未經早期儒家論述過的問題（如貨幣、對外貿易等），其說法即絲毫不具招架之力。[1]

(4) 傳統中國思想之義利觀及法學上啓示

[1] [Hu (1998;235)]。

黃俊傑氏認爲，中國思想史上之「義利之辨」雖牽涉許多問題，但最重要的仍是「普遍」與「特殊」的問題。[1]本文認爲其論證方式與本文亟欲說明之國家課稅權與納稅人財產權間的對立關係，有其相近之處，更提供了一「義利之辨」之論證模型。以下嘗試說明其相關思考脈絡以及對本文之意義。

A. 孟子之義利觀：義利二者敵對不相容

孟子(390 B.C. – 305 B.C.)視義利爲絕不相容之敵體，較孔子(551 B.C. – 479 B.C.)尤進一層。蓋孔子之義利說其雖隱含「價值內在」之預設，但對「義」(即適當性)從何而來未作深論，而毋寧強調修身之用[2]；孟子則謂「仁義禮智根於心」，認爲與「利」相對之「義」具有強烈價值預設。[3]是以，人的意志自由不受任何外在性結構（如經濟），或超越性之實體（諸如天、命）宰制。

B. 荀子之義利觀：「義、利」之辨與「公、私」之分

義利之辨的思想線索到荀子(340 B.C. – 245 B.C.)，已歷經兩層重要轉折，即：「公義」觀念的提及和「以義制利」的必要性。[4]

I. 「公義」：從個體到群體

孔孟反對私利，並大體上把「義」歸爲「我」的範疇，即屬於個人修德問題。但到了戰國晚期，荀子將「公」與「義」結合，使得孔孟思想中特重內省之「義」轉而取得外燦之意。易言之，乃是突破了「個體」(我)的範疇而指涉「群體」(人)

[1] 黃俊傑，先秦儒家義利觀念的演變及其思想史的涵義，漢學研究 4 卷 1 期，1986.6.，頁 109。[Huang JJ (1986;109)]
[2] [Huang JJ (1986;110)]
[3] [Huang JJ (1988;157-158)]
[4] [Huang JJ (1988;158)]

的範疇。

黃俊傑氏補充到，這種轉折固然根源於荀子之人性論而來，但此與先秦思想史上「公」「私」觀念之演變，亦有相當關係。[1]

II. 「以義制利」：從倫理到法律

孔孟思想中「義」作爲自律性道德之靜態概念，到了荀子則一躍成爲強制性的動態工具。這種轉變，也使得先秦儒學史之「義」，從原屬於倫理上層次之概念，從而進入法學層次，更爲漢儒之法家化，作一舖路的工作。

另值注意者爲，荀子之「利」指的是「私利」，「義」指的是抑制私利的「公義」，而與「法」之內涵應無二致[2]；是以，荀子之「法」具有道德內涵，而對於韓非及法家諸子之「法」，應予以區辨。[3]

C. 反對「私利」壟斷「公利」

D. 西漢之義利觀：「捨利就義」

西漢諸思想家之義利觀，當以董仲舒爲代表，其謂「夫仁人者，正其誼不謀其利，明其道不計其功」（漢書·董仲舒傳）

申之，黃俊傑氏認爲，孟子義利之辨章當中：「未有仁而遺其親者也，未有義而後

[1] [Huang JJ (1988;158)]
[2] [Huang JJ (1986;146)]、[Huang JJ (1988;161)]
[3] [Huang JJ (1986;146)]

其君者也。」此段話中，義具有普遍性、利則具有特殊性。

詳言之，古代思想家均肯認「公利」爲「義」。這種義利觀到秦漢大帝國建立以後，思想家始對一個新的問題：此公利係人民百姓之利還是國君之利？[1]黃俊傑氏認爲，此與帝制中國所謂政治上「雙重主體性」之矛盾有關，亦即儒家思想中，人民是政治主體，但政治現實中，皇帝才是政治主體。[2]

E. 小結：普通性與特殊性及法學上意義

綜合述之，「義利之辨」概念牽涉甚廣，並與「公利之分」、「王霸之別」相互重疊，成爲中國思想史上之三條主要線索[3]。此外，義利之辨，更涉及價值之普遍性與特殊性問題，本文認爲具有固有法上之研究實益。[4]

就本文之脈絡而言，「義利之辨」作爲傳統中國之思想線索，除有自我定位意義外，更具有一固有之價值判斷模式，用以權衡兩相對立之利益，進而化解隨之而來的衝突關係。[5]甚且，此種價值判斷模式，有其邏輯結構，而具有預測之可能，成爲立法政策工具之選項。

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[1] 對於漢朝公利與私利之分別，或許錢穆對於漢武帝心境的一段觀察，可茲對照。氏認爲，漢武帝爲應財政需求，將原歸私有（少府）之山澤收入，劃歸國庫（大司農）所有，盼眾富商群起效尤；然事與願違，響應者恐僅卜式一人而已；是以武帝震怒之下，遂將鹽鐵專賣利權，全數收歸國有。詳錢穆，秦漢史。

[2] [Huang JJ (1988;162)]

[3] [Huang JJ (1986;109)]

[4] 申之，有認爲，義利之辨作爲一抽象概念，倘從「義」係作爲價值普遍性觀點而言，與其相對之「利」，則指的是價值之特殊性；是以二者之關係，猶如全體與個體之關係；落實到社會經濟之具體現實時，就是「公私之分」；落實到政治層次，就衍伸出「王霸之別」的問題。[Huang JJ (1986;101-102)]三者之關係，或許可示意如下：

<table>
<tr><td rowspan="2">義利之辨
（價值之普遍性與特殊性）</td><td>王霸之別
（政治層面）</td></tr>
<tr><td>公私之分
（經社層面）</td></tr>
<tr><td>抽象</td><td>具體</td></tr>
</table>

[5] y

肆、　課稅正當性、倫理基礎與固有性

納稅心理是一種意識到租稅本質與納稅義務人相遇的精神狀態。

Tipke, Die Steuerrechtsordung I, 2000, Aufl.2, S.236.*

一、概說：課稅正當性之反思

「人民爲什麼要納稅？」或者「人民何以要被課稅？」這個問題可能是一個日常生活的問題；在法律上則可能是「納稅義務之正當性爲何？」或者「課稅權之正當性爲何？」的問題。解答這個問題，現代國家租稅具有公共性，或者具有民主主義性格等答案，或許能夠獲得相當程度的認同。但如果進一步試問——「傳統中國思惟下」「納稅義務之正當性爲何？又課稅權之正當性如何？」時，則我們不得不面對的問題是：上述租稅之公共性乃至於民主性格等源自於西方(western)歷史發展之特質，是否在傳統中國的歷史脈絡(traditional Chinese ideologies)下亦有類似的發展？倘有[1]，其異同之處爲何？若無[2]，此類外來之特質對於傳統中國的思惟是否有所借鏡之處，進而有繼受之必要[3]？

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* Steuermentalität ist die Geisteshaltung, das Bewußtsein, mit dem Steuerpflichtige dem Steuerwesen begegnen.

[1] 有認爲，中國經濟的理想在求「平」，西方則主要在求「不平」，錢穆，中國歷史研究法，素書樓文教基金會，頁 55。氏進一步說明，中古時期封建社會崩潰以後，即產生自由工商業，在中國亦有相似趨勢；蓋戰國以下，古代封建政制崩潰，社會上興起了三種新勢力，於史記中分列爲儒林、貨殖、游俠三者（其中游俠一類在西方無類似發展）；此三者，除儒林者，在農村安分耕讀，不失平民身分外，貨殖、游俠之輩，無不交王通候，奴役平民，在社會上佔有絕大勢力。故自武帝重儒生、組織士人政府後，並禁絕游俠、裁抑商人，使此下之中國社會，走上一條與西方歷史相異之路。前揭書，頁 55~57，61。

[2] 錢穆亦曾表示，傳統中國之經濟觀點，領導人生向上者，應非經濟，而別有所在。氏嘗謂，人生對經濟之需要言，並不是無限的，而經濟之必需既有一限度（氏稱之爲經濟之「水準」）；水準以內是必需經濟，對人生有積極價值，水準之上，則不但無作用或無價值，甚且可能產生反作用或反價值；蓋只提高了人的欲望，卻未提高了人生。詳 錢穆，中國歷史研究法，頁 53-54。此一經濟上之「限度」之說，對本文所研究之「憲法上課稅界限」課題，不無啓發。

[3] 反思西方課稅權之民主正當性於傳統中國之套用，或可見諸錢穆之一段文字：「中國的賦稅制度，全國各地租稅全是一律。而且能「輕徭薄賦」，主張「藏富於民」。只要此制度一訂立，便易獲得全國人民心悅誠服，社會便可藉此〔本文註：藉此〕安定幾百年。縱有變壞，經一番亂事之後，此項制度又復活了。此事似極尋常，不值得我們誇大宣揚。但以此和西方歷史比觀，他們的賦稅正為沒有制度，遂致引起革命，產生近代的民主政治，一切預算、決算都要由民選議會來通過。現在我們

二、課稅界限之修正與調整－固有與繼受觀點

然而，面對在現實上該等西方特質產物之各種制度已大量移植於華人社會之現象，如何在已繼受成形之既定制度上，針對與固有價值相互扞格之處予以緩和，毋寧更具現實急迫性。

本文肯定財政負擔之公共性在傳統中國仍具有某種支配性意義，只是以財政負擔之公共性所作爲課稅之正當性基礎，是否在不同社會中與其各自社會價值理念相互激盪，並發展出各自正當性基礎等思考，亦值重視，本文稱之爲「社會性」之考量。

而以「課稅之界限」作爲觀察起點，在「社會性」考量面臨的困難可能有二：

其一，「課稅界限」此一源自西方之觀點，是否能在傳統中國找到類似依據？

其二，倘在傳統中國有類似依據，此一依據與西方相較，其不同之處為何？

申之，前者是「共通性」(commonality)的問題，後者是「固有性」(Intrinsity)的問題。簡言之，傳統中國下，有無類似於西方之課稅界限？倘有，此一界限和西方有何不同？而欲回應問題，不得不觸及規範背後社會價值觀問題。

鑑於上述，對於西方稅法規範(tax normality)乃至於其背後課稅倫理(tax morality)之來訪，傳統中國之徵稅倫理對於如何與之溝通並加以回應之問題，於是乎成了本文探討的重心。**詳言之，本文欲透過對西方「課稅界限理論」之反思，來具體化傳統中國法下稅法之規範基礎。**

偏愛說中國人無法制，無定憲，永遠在「帝王專制」下過活，那豈非冤枉了中國歷史！這**因我們自己不瞭解自己以往的歷史，遂誤認為自己以往一切完全要不得，於是只想抄襲別人。**」錢穆，中國歷史研究法，素書樓文教基金會，2001，頁 32-33。〔**強調係本文所加**〕

鑑於西方課稅理論中課稅界限所反映之社會心理因素，與國家課稅之倫理應有相當程度之關連性，本文認爲從傳統中國價值系統中亦能梳理一條課稅倫理之脈絡（在本文中爲「義利觀」）。本文嘗試從「鹽鐵論」當時背景中尋求與西方之些許共性－即尋求中西課稅界限之固有性與共通性。在「鹽鐵會議」雙方論辯之思惟中，因立場鮮明而透露出兩種不同之課稅倫理，分別引導著對立之兩組課稅觀，進而形成兩相衝突的利害關係。

法學上觀點，於本文脈絡中—亦即傳統中國固有價值之回應問題〔下稱「固有性」(Intrinsity)〕—宜予處理者爲**憲法上之繼受可能性**問題。詳言之，憲法上繼受可能性者，乃試問此一人民對課稅之忍受程度是否應爲一法律問題，亦即學科上之相對性問題。

本文認爲，固有價值在與外來文化產生交集時，無論是衝突(confrontation)或是融合(integration)，惟有以能夠相互溝通乃至於能夠相互理解的前提下，方具有進行互動之實益與可能性。

從社會進程觀點而論，現代國家作爲租稅國家，其運作所仰賴之財源亦以租稅爲主。只是，法治國家下，租稅必以稅法之「形式」爲之，而必須兼顧對人民利益之保護。透過憲法，對國家之課稅行爲賦予一適當之「界限」，則一直是保障納稅人權利之重要機制。此一機制之運作，乃是納稅人之「權利」爲核心。申之，透過憲法上所保障之權利，如受到國家課稅行爲之侵害，憲法將能「限制」該課稅行爲（亦即，除去該課稅行爲對權利之侵害），進而達到保護納稅人「權利」之目的。

從制度實效性觀點，對於透過對課稅行為賦予之界限（或者說，單純以去除侵害來源之方式），是否能保障納稅人之權利，其實不無疑問。甚且，**保障納稅人之「權利」，是否真能保障到「納稅人」之問題**，恐怕更應值得關切。復觀諸稅制之改革行之有年，而課稅公平之討論卻仍熱烈不減、歷久彌新。此一現象之解讀可能有二：一為，課稅公平問題對人民具有迫切性，有時時檢討必要；另一則為，此現象顯示了課稅公平之落實問題依舊懸而未決。準此，是否我們在再度埋首於稅制設計之前，不妨先行檢討此一憲法保障機制是否依然運作得當、或者已不合時宜之問題。至於如何針對憲法上之界限，做一修正(revision)或調整(adaptation)，則是稅法學上應有之回應。

三、課稅界限論之固有理解

（一） 課稅界限之定性

本文所謂「課稅界限」，以西方來看，乃指：**納稅人對於國家透過課稅權所要求分享之市場勞動成果，所能忍受的最大程度。**在抽象的層次，或許可化約為：國家與納稅人在「市場勞動成果」之「最大共享狀態」。

（二） 課稅界限之理解方式：從客觀到主觀

本文之論證，是一種從「客觀」到「主觀」的反思歷程。本文所謂「客觀」，指的是制度對於其內行為人之預設（理解）；「主觀」，則是強調行為人如何理解所處制度對其行為之限制。

透過對課稅界限論之分析，本文認為源自西方之「界限」觀，有偏重強調客觀制度面的傾向，而擬透過固有性來強化應有的主觀價值面向。

詳言之，租稅國理論脈絡下之課稅界限，著重制度面之變遷，然而此一制度之存立基礎，卻係植基於社會。換言之，真正促成制度變革的主因，乃在於作爲制度運作驅力之社會價值。此一社會價值，雖因時空各異，但均不脫離所處社會環境，本文更認爲，此一社會價值之核心內涵，乃是由固有之倫理價值所構成。

面對課稅界限客觀化的傾向，本文先以課稅制度面爲討論核心，說明客觀面向在法律，由其是財政憲法上所可能產生之危機。至於解決之道，則透過對課稅界限在主觀面向之反思，並以固有性爲中心，作爲主觀面向在法律上之價值核心。

《鹽鐵論》與《租稅國危機》之比較，其外觀上貌似共通之處（或稱比較實益），即在於一課稅界限之權力觀，惟因其背後各自租稅倫理有其不同之處，反映在稅法規範性基礎上，自呈現不同的樣貌；其經濟體制與憲法之關係，自隨之而異。

承此東西方二元發展的脈絡以觀，本文認爲西方國家與納稅人間的徵納關係，係建立在一「對立關係」之上。而納稅人之諸權利之內涵，則隨此對立關係之演進而充實。至於對照東方之脈絡，本文不否認人民與政府之間的徵納關係不具對立關係色彩，惟此種對立關係並非影響傳統中國徵納關係發展之主要動因，而與西方不同。但複雜的是，現代華人社會，由於大量繼受西方諸制度的結果，在稅法上，無可避免地也將西方之對立關係問題，連帶接受進來。此種源於西方對立關係的問題，或許再次借鏡西方之解決辦法，未必沒有解決之可能。但是，一旦此一西方之對立關係，與源自傳統之「對立關係」有模稜兩可之處，可被混爲一談、甚至迨二者兩相增益，互爲輝映之際，欲解其間糾結情形，決計無法等閒視之。

然而，在現代法治國家中，此一情形恐早已勢不可免。雖然繼受片面在所難免，

但多元繼受蔚爲風潮之際，片面而多元的單一法典結構已是山雨欲來，悄然成形。「所幸」，傳統中國的諸特質，在法律繼受潮流之下，似未甚受青睞，而僅待興一事而已。[1]

針對此一情形，本爲求正本清源，擬先還原西方之對立關係，直接將其中元素（自由、平等）與傳統中國之相應之處對照（義與利）。換言之，本文無法避免的，必須預設中西雙方之價值具有共同性作爲前提，再針對此價值之共通性，以各自歷史發展之脈絡，說明其各自固有面貌。然後，再根據其各自相異觀點，推斷產生對立關係，衝突關係之可能性。

以鹽鐵論與租稅國危機爲例，自本文脈絡以觀，其最主要的論點，即在於國家對經濟體制之取捨之辯，亦即重商主義與自由主義之辯。但無論如何，此皆係偏重制度及以制度變革的客觀解釋面向。對於 Goldscheid 所提出社會學式的質疑，或是文學賢良所著重以「人」爲中心之思考，均有難以兼顧之虞。然而，在現代憲政法治國家之要求下，對於歷史脈絡之掌握，重新以「人」（在本文爲「納稅人」）爲中心的思考方式，方具有展望未來之可能。

自本文脈絡以觀，以「納稅人」爲中心的思考，不妨以納稅人之價值判斷聚焦；而納稅人對於其身處之制度如何回應一事，此即本文所謂之「主觀解釋面向」。倘結合前述客觀面向，對於人與制度之間的關係（在本文即爲納稅人與租稅制度之間關係），方能較完整地掌握實相的全貌，而賦予更堅實的規範基礎。

然而納稅人之主觀價值判斷各異，不易探求；《鹽鐵論》與《租稅國危機》，更因中西各自歷史文化背景差異，欲言比較，實爲強求。然而承上所述，面對中西各

[1] 但在與本文相關之稅法領域，則非如此單純。

自對立關係、價值相互交融情形浸漸已成常態之今日，如不正視價值定位問題，「何去何從」一事恐怕終有消失之日，此等憂慮或許早已成爲繼受法與固有法相互磨合現象之註腳。

是以，本文對於「比較」一事，必須採取不同方式看待。申之，本文認爲，比較之目的，應在於不同事物溝通可能性之建立。而多方的相互比較，則是不斷地在共同建構彼此的溝通可能性。換言之，彼此的差異（或是固有性）並不因而減損。[1]

至於東西之差異，本文將重心置於思考模式之對照。以國家人民間徵納關係之發展爲例，西方係以衝突對立關係作爲發展，傳統中國則是以優先劣後次序之不斷重新決定，爲最終目的。換言之，若西方是一種沒有終點的前進，則傳統中國的發展方向，就是以起點爲終點的前進。本文認爲，中西在思考模式上之差異，反應在納稅人之價值判斷時，亦見其特殊之處。

另就正當性基礎而言，本文之理解爲：透過該正當性所獲得之利益，應通過倫理基礎之檢驗。在稅法學上，自是課稅正當性基礎之具備，存乎基於該課稅正當性所取得之租稅利益，應通過租稅倫理之檢驗。而中西租稅倫理有其各自固有性，其課稅之正當性基礎，自不宜等同視之。本文認爲，相較於西方「租稅利益說」之脈絡，傳統中國之課稅正當性，較具「租稅義務說」之特徵，且較能與義利之辯的價值判斷模式相結合。此種價值判斷模式，應用在憲法上，本文認爲具有強化預見可能性的效果。

另就繼受法層次而言，在華人社會中有其繼受之實益，但面臨許多困難有待克服。

[1] 實則，也不宜減損。

本文以下述固有性部分，作爲回應。

（三） 東西課稅界限之對照及其固有性——三個問題

財政憲法之觀點，在於對國家之課稅權力賦與界限之問題。而所謂「界限」，除了在形式意義上具有之正當性外，亦應注意其實質上人民之負擔能力。此一負擔稅捐之能力，乃是課稅在憲法上之實質界限。然而，縱係兼顧實質之「界限論」觀點，從納稅人權利保障觀點亦有其侷限。其一，此一界限係西方外來理念，適用上應賦予本土性之關懷；其二，此界限之功效屢遭誤用。是，爲求強化界限論之適用，本文擬從三個具體問題著手，嘗試修正(revision)其理論、調整(adaptation)其適用。

問題一：此一西方之「界限」觀念，是否亦存在於華人社會之中？

問題二：倘有，此一傳統中國之課稅界限，與西方界限有何異同？

問題三：傳統中國之課稅界限，如何具體化於實定之法規範中？

1. 「對立關係」作爲比較

第一個問題，本文將之歸於「對立關係」之問題；亦即從課稅權與財產權所衍伸出存在於政府（或統治者）與納稅人之間的對立關係，乃是中西古今並存之現象[1]；其存在於西方，亦出現於華人社會；見諸中世歐洲之莊園經濟，似亦明於傳統中國之農耕經濟。故本文認爲華人社會中，亦有某一課稅界限之存在，但由於生成背景不同，而可能與西方之界限有若干差異。

[1] 有關本文具體之「對立關係」，以及所據以建構之人民抗稅圖像，詳見後文。

2. 與傳統中國之課稅界限之比較可能性

第二個問題，中西界限之異同點部分，本文以文本聚焦之方式，試從西方之《租稅國危機》與東方之《鹽鐵論》中尋求。而作爲法學上之比較方式，乃分別以**正當性基礎**（legitimacy）、**倫理基礎**(morality)、**規範基礎**(normality)三個層次比較。另鑑於具體化課稅界限之意象之建構，是本文嘗試以「課稅之正當性基礎」、「租稅之倫理基礎」、「稅法之規範基礎」三者作爲界限之比較基準。

(1) 比較基準與用語定義

但在此必須對於上述之「正當性基礎」、「倫理基礎」、「規範基礎」等用語，本文說明如次。

A. 正當性基礎(Legitimacy, Justification)：課稅之正當性在於，基於該正當性所取得之利益，必須通過租稅倫理之檢驗。[1]

B. 倫理基礎(Morality)：本文對倫理之定義爲：一種既定之思考模式；透過此一思考模式所得出之結論或判斷將能趨於一致。而倫理基礎之具備，則意指經過一種價值決定過程，亦即歷經一種既定模式之價值取捨之表示。

C. 規範基礎(Normality)：規範基礎指的是租稅正當性之實踐可能，亦即屬於執行層面的問題。換言之，一規範之具備規範基礎與否[2]，取決透過此一規範能否

[1] 原文：The legitimacy of taxation is the benefits acquired through which such legitimacy can be justified by tax morality.

[2] 在此，一規範必然具有規範基礎之說法不成立；換言之，一徒具規範形式而不具規範基礎之「規範」，也應被認爲是存在的。

實踐其所維護之價值，亦即一正當性之存在。[1]因此，如果租稅之正當性受到肯認，其理念須加以維繫並加以實踐時，其將涉及規範基礎之問題。[2]

另外，規範基礎在意義上雖與倫理基礎相對，但本質上仍可視爲不同層次之同一事物。

(2) 租稅倫理之檢驗－納稅人之價值判斷模式

課稅之正當性，倘係由租稅倫理加以「檢驗」，則此檢驗機制如何具體化，厥爲所問。本文認爲，檢驗之機制，乃係一價值判斷的模式。而規範環境不同，價值判斷之模式自異，租稅倫理之內涵也各有所本。

另在現代憲政國家中，乃以納稅人爲中心，價值判斷之模式，則應以「納稅人」之價值判斷設身處地，俾使納稅人其基本權保障思想寓於其中。

(3) 東西課稅界限之對照：課稅界限之具體化

A. 課稅之正當性基礎：課稅權 v.s. 納稅義務

承如前述，在西方，現代國家之租稅正當性基礎或係基於民主，倘欲一言蔽之，即「無代表不納稅」（No taxation without representation）之理念。[3]

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[1] 原文：The term “Normality” refers to the feasibility of legitimacy of taxation, namely a question in the executive level. In another fashion, whether a norm maintains its normality or not, lies in the feasibility of underlying values to protect, *i.e.*, the existence of justification.

[2] 另須附加說明者爲，「規範」與「規範基礎」二者，在本文之脈絡下，實不應等同視之；申之，前者指的是一種義務之賦予**形式**，後者乃是賦予義務之**正當性**。

[3] 除英國之例子，亦證於法國 1789 年人權與公民權宣言第 14 條（The Declaration of the Rights of Man）：所有公民均有權，親自或透過其代表，檢視公共捐之必要性，自由地同意其課徵，監督其後之運用，決定其數額、基準、徵收和期間。。（原文爲：Tous les Citoyens ont le droit de constater, par eux-mêmes ou par leurs représentants, la nécessité de la contribution publique, de la consenter librement

B. 租稅之倫理基礎：自由與平等 v.s. 義與利

本文預設了自由和平等作爲一中西所共同追求之普世價值。其次，從鹽鐵論論辯中，汲取當中「義」與「利」之理念作爲核心要素，用以體現傳統中國之價值預設。最後，本文並進一步嘗試從義、利二要素，尋求與近代西方所肯認之「自由」(Freedom)與「平等」(Equality)二理念之共通性。

C. 稅法之規範基礎：規則原則 v.s. 法與道德

規範基礎用以說明實現可能時，稅法上之規範基礎，毋寧係強調以法律作爲手段之實現可能性。

D. 納稅人之價值判斷模式：價值權衡 v.s. 義利之辨

「義利之辯」在本文係指傳統中國固有之利益（或價值）權衡模式。此模式所要強調者爲，規範與價值之間具有關聯性。透過原則理論對法規則理論之反動，本文以之對照傳統中國的「義利之辯」思想脈絡。認爲中西不僅有類似共通性，甚且對於義與利之間差異，多有著墨，更具緩和原則與規則間看似各屬不同層次實則互有交集並時有衝突之功能。

對於兩課稅界限之比較，在此以中西對照之方式，如下列圖表所示。

表格 1 課稅界限之中西對照

d'en suivre l'emploi, et d'en determiner la quotité, l'assiette, le recouvrement et la durée.

課稅界限態樣 具體基準	西方：《租稅國危機》	東方：《鹽鐵論》
A. 課稅之正當性基礎	課稅權之正當性 →	納稅義務之正當性
B. 租稅之倫理基礎	納稅人之自由、平等 ←	義、利
C. 稅法之規範基礎	稅法上之規則與原則 ←→	法與道德
D. 租稅倫理之檢驗	價值權衡	義利之辨（固有性）

3. 課稅界限之四個面向與語言之作用－稅法繼受初探

第三，乃是如何將課稅界限具體化於法規範制度的問題。本文先將課稅界限分從法律、財政、社會、倫理等四個面向分析；次從繼受法觀點討論語言之功用。

(1) 課稅界限之四個面向

本文認爲，「課稅界限」在意義上之分析，至少有四種不同面向，但卻互相關連，相互補充。首先，就法律層面而言，以法律之形式課予租稅，自有比例原則之考量，以兼顧納稅人之基本權保障；其次，縱合於比例原則，稅法所課予納稅人之負擔能力，更應達到「量能平等負擔」之要求，以維持市場機制之公平性；再次，社會層面來說，即便達到量能平等負擔之外，每一納稅人在總稅負上亦有其上限，逾此上限，交易之行爲誘因將不復存，市場機制亦不復在；但最後，倫理層面而言，納稅人行爲誘因之強烈程度因其所處之制度限制以及所處之社會價值觀感，而有地理時空之差異因此有細緻化必要。

而一個有本土性關懷之稅法規範，勢必能從其所管轄人民之價值理念預測行爲之動機；從各種行爲動機中整合，找到總稅負之上限，再以此上限爲限度，衡量納稅人能力，以平等分配負擔於每個人，最後才有討論此種課稅行爲是否違反比例原則之實益。

(2) 繼受意義下之「語言」溝通：同時作爲媒介與知識本身

從繼受之客體以觀，我們不能忽略的前提是，繼受之對象本身就是由一外來語所構成。以租稅一詞爲例，我們所繼受之對象，其實不是「稅」，而可能是「tax」。因此，重要的問題在於，所繼受之對象─不論是「稅」或「tax」─**如何證明所指爲同一概念或是具比較實益之二相異概念的問題**。其次，是對於「tax」此字背後價值層面的意義，亦即所繼受者之正當性基礎之問題，而此涉及**「稅」與「tax」之間原理原則之溝通權衡問題。**

答覆如下。首先，本文認爲，語言具有溝通媒介功能，但語言同時亦爲媒介的對象（亦即知識之一部）。首先，語言之間之溝通可能性，在於語言之邏輯。語言之邏輯有二種：字義上的邏輯爲如同數學之形式邏輯，不因語言使用者之不同而有不同理解，另一種邏輯爲字義背後之原理原則，在理解上涉及不同時空之價值觀，在溝通上必須仰賴稱爲辨證邏輯之一種異於形式邏輯之邏輯，而仍具備溝通可能性。

其次，借用語言相對性理論 (language relativism)，本文認爲不同語言代表不同思考方式，而代表對知識之不同形成過程，自爲知識之一部。換句話說，理解語言，亦爲理解知識之一部，因而欲理解該種知識，如能以該種語言理解之，將更能獲得該種知識全貌。套用於稅法制度之繼受過程，如能理解他種制度之思想，並以該思想理解他種制度，將能較能理解他種制度之全貌，亦即具備理解可能性（Understandability）。

(3) 語言之理解與理解之固有性

正因爲語言除了傳遞知識之外，更兼有知識形成之本質意義，因此不同語言（或符號）所表達有其各自之固有性，也將造成各有其固有的知識之體系。在法學繼受上的問題則是，此種固有性的形成，對於被繼受者之本質內涵之影響爲何？

(4) 小結：繼受「課稅界限論」之前提

綜上所述，對於西方理論之繼受有其前提，即「溝通可能性」（Communicability）。具備溝通之可能，方能談及理解之可能（Understandability）與繼受之可能（Receptionability）二者。

四、租稅倫理與固有性

（一） 概述－西方之兩套租稅倫理系統

在資本主義社會出現之前，無論是古中國之文明抑或是古希臘、古羅馬、西歐中世紀之西方文明，此二獨立發展的文化系統，在經濟思想均有其獨特之處。[1]

然而，在資本主義興起之後，隨著全球化之壓力，各自傳統脈絡中之固有價值，受到相當程度挑戰。以傳統中國之賦稅思想爲例，其如何與源於西方理性主義所帶來幾近普世之價值理念對話、調和，具有繼受法意義。尤其稅法學，其對於國際情勢變化甚爲敏感，稍有錯失，差距一日千里，不可不慎。

惟因應之道，雖非如《鹽鐵論》中文學賢良所稱遵循古制，一味回歸傳統，然追尋一條固有之發展途徑，卻不得不以自身現下所處爲起點；而欲掌握現下之定位

[1] 詳見　許滌新，中國大百科全書，經濟學Ⅰ，1993.10.，錦繡，頁 6 以下。[Hsu (1993)]

何如，自難擺脫自身歷史軌跡不顧。

是以，吾人欲對國家與經濟關係其固有性之探求，不妨先從自身之歷史脈絡，略窺其梗概。[1]

（二） 傳統中國之思想論辯

傳統中國封建社會之政經制度，與西方相較，雖在重視農業生產、社會分工思想等方面有其相似性外，更有其固有之特徵；此特徵之思想淵源無他，正是以儒、道、墨、法爲主之先秦諸子百家。[2]

(1) 道法自然

此爲道家之經濟思想。惟此道，除指自然界之道外，更包含人類社會之道。詳言之，道家認爲經濟活動當順應自然法則，主張清靜無爲與小國寡民，而與當時日益茁莊之封建制度下儒家所倡之禮制、法家所主之刑政二者相對。

實則，司馬遷之經濟思想背景，亦見道家身影。[3]氏反對桑弘羊爲求財政收入增加而主張封建官府壟斷鹽鐵等重要工商業的經營，而認爲農工商各業應任其自然發展[4]，其中又以《史記·貨殖列傳》中所謂「善者因之，其次利道之，其次教誨之，其次整齊之、最下者與之爭。」者，最具代表性。

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[1] 簡言之，我們如果不知道自己是什麼，就難以知道將來可能會變爲什麼，也就無法確知應該可以怎麼做。而如何知道自己是什麼，一個可靠的方法，就是自己以前是什麼，再觀察自己如何從以前變成現在的狀態。

[2] [Hsu (1993; 7-)]

[3] 此或許受其父司馬談影響。另有主張其經濟思想爲道家爲體，儒家爲用者，而反對過度干人民之生活，見　周金聲，中國經濟思想史（二），頁 353。[Zhou JS]

[4] [Hsu (1993; 8)]

針對中西發展上之共性而言，有認爲，道家此一經濟思想後來傳至西歐，對 17~18 世紀在西歐盛行的自然法和自然秩序思想，有一定影響[1]。另有認爲，司馬遷之「善因論」乃近似西方「資產階級宏觀經濟學」之自由主義思想。[2]

(2) 義利思想

此乃關於人們求利活動與道德規範間相互關係之理論，在稅法學上，即租稅倫理與稅法規範之互動。「利」主要指物質利益，「義」指人之行動所應遵循的道德規範。

實則，義利關係乃是中國古代思想史上長期爭辯之問題。[3]儒家承認求利之心，人皆有之，故不反對求利，惟應將義置於其前；是以，求利活動應受義之制約、先義後利。

惟此無異將合乎封建利益之規範作爲求利之前提，且儒家貴義賤利之理論佔據統治地位之結果，使得傳統中國封建社會之人民，在思想上受到長期的束縛、僵化其發展，更妨礙了人民對求富求利等問題之探討和論證，同時也影響了商品經濟在中國之發展。[4]

(3) 富國思想

[1] [Hsu (1993; 8)]
[2] 陳世陔，秦漢國家經濟思想的演變，湖北大學學報（哲學社會科學版），1997，第 5 期，頁 66。[Chen SG]另氏進一步推導出，漢初與民休息之政策，也逐漸產生不良後果，主要表現於兩方面：一爲貧富懸殊加劇，統治與富有階級和廣大農民與平民之矛盾進一步尖銳化，另一則是，豪族地主和諸侯王等坐大，使得地方勢力割據性加劇，皇權和朝廷的統治受到威脅。
[3] 簡要請參照　黃俊傑，先秦儒家義利觀念的演變及其思想史的涵義，漢學研究第 4 卷第 1 期，1986.6.，頁 109-150。[Huang JJ (1986)]
[4] [Hsu (1993;8)]

中國古代思想家爲強化中央集權之封建國家制，曾提出各種想法。

如孔子「足食足兵」、有若「百姓足、君孰與不足」等儒家富國思想。如商鞅「重本抑末」政策，係法家富國理論之先驅。其與韓非，皆認爲農業乃衣食之本，戰士之源，是以重本；而工商業乃易於牟利之末業，倘不予限制，人人避農則不利生產，是以禁末。

對照另一方面，管子與荀子二者，對於末業之評價，則略有不同。詳言之，管子主張富國必須富民，蓋“民必得其所欲，然後聽上”。至於荀況則在儒學的基本上，吸收統合各家富國思想，並著有《富國》，專文說明其富國理論。其重視農業，但同時也肯定工商各業在社會經濟之重要性。其雖主張限制商賈之數量，亦主張富國須以富民基礎之「上下均富」理念。

實則，富國思想，在漢朝以來，迭受重視，其在中國政治經濟思想史之獨特地位，或許和中國長期以來係一中央集權之封建專制主張國家一事有密切關係。[1]此對照日本近代化之思想，亦有所謂「國富」、「國益」之說；此種想法或許也是受傳統中國思惟之影響。

（三） 西方重商主義與重農主義之異同

關於西方文化起源對於其經濟學理念之觀察，對於其後租稅理論之影響甚深。以嘗試整合相關討論[2]，並以重商、重農主義爲中心，做一簡明之論述。

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[1] [Hsu (1993;8)]

[2] 日文文獻討論，簡明請參照　泉美之松、租税理論の変遷、税務大学論叢、昭和 45 年 11 月 1 日発行、税務大学校、頁 55-。[Izumi (1970)]

租稅制度之沿革，乃指從十八世紀末期，由所謂特權收入時代進入近代之租稅收入時代爲開端。在此之前的封建制度末期，由於處於絕對王制之時代，稅金、賦役與實物給付等負擔均日益沈重，此外，國王的奢侈和不時的戰爭耗費，更增加了一般人民之負擔。然而，相對於此，貴族（一部分爲武士）、僧侶等之權階級卻擁有免稅特權，是以人民之不滿日增。而對於「稅金究竟是否必要」之討論，則日受關注；發展至今，對於「租稅理論」、「租稅原則學說」等議題之討論，其熱絡程度依舊可見。

如此所謂的租稅原則，最爲人熟知者，前有 A.Smith 租稅四原則，後爲 A.Wagner 租稅原則。然而，這些原則，在當時並未被冠上「租稅原則」之名，而只是以「租稅理論」之形式，在其時代其國度內之租稅政策，多半扮演指導、辯護之角色。[1]是以，如此的「租稅理論」，雖形式上是以學說之型態出現，但論諸實際，仍不脫所處時代侷限[2]；從而，不得不從該理論形成當時之社會經濟現象爲背景，予以綜合理解。

(1) 重商主義之租稅理論

重商主義者，被認爲係經濟學之先驅，而近代之租稅理論，亦起源於重商主義諸學者。

A. 資本原始積累

重商主義者，象徵的是封建末期所謂絕對王制之時代，同時也可說是資本主義興起前夕。時歐洲各國，作爲絕對之君主，雖不斷與封建貴族對抗，但已不再具有

[1] [Izumi (1970;57)]
[2] Smith 之租稅原則，與其說是學者之獨創見解，毋寧說是一時代之產物。[Izumi (1970;57)]

完全壓抑諸封建貴族勢力的能力，而多半透過妥協、懷柔政策之反覆使用，使得封建制度於其中漸次崩壞。國王，爲確保其作爲絕對君主之地位，開始扶植國內產業，進行所謂原始之資本積累。

B. 君主之自我保護

國王，基於此種地位保護政策，與隣近諸國交戰、以及個人和家族之奢侈等原因，被迫籌措更多的經費。其時，封建時代除了賦役與實物給付之外，也課徵大量的地租、關稅、消費稅等，對於農民或一般工商業者而言，均爲極重負擔。但另一方面，真正富裕的貴族及僧侶階級，卻強力主張自古以來的免稅特權，對於國王向其索求之稅金負擔，不予承諾。

C. 消費稅爲最佳稅種

當時重商主義作爲統治階級的想法，認爲「即使國民如何地貧窮，只要國王依舊富有，就不能說國家貧窮。因為國王每年的收入，均是為了國民利益而使用」或基於保護商業資本、基於滿足封建貴族及僧侶免稅特權，而有認爲「稅乃是使下層人民，尤其是農民，勤勉工作的權宜之計」或「為不使工資提高，以盡可能不使農民購買消費性物資為宜，如此便可以提高消費物資的價格，是以課稅之最佳形式為消費稅。」等主張。

此等主張，雖在今日匪夷所思，但在當時稅制中，卻成爲保護扶植國內工商業之有效手段。關稅位居重要地位，蓋當時由於各地絕對君主各據一方，國土與今日相較遠爲狹小；另，內國消費稅之角色亦頗吃重，其課徵之理由，多以抑制消費，以節欲促進資本蓄積等爲名目，或是未負擔直接稅之階層亦須一同分擔等理由。

此類主張，成爲當時重商主義者辯護當時制度的理由。

實則在當時之英國，正由都鐸王朝邁向斯圖亞特王朝，其以議會爲中心之市民階級已逐漸得勢，並開始對以王權爲中心之封建勢力展開批判，進而產生對國王其課稅權之討論。例如，Hobbes 即謂：「如果主權者課予對於臣民及其家族無法維持其生活能力之租稅負擔時，此不僅是臣民的不利，同時也是主權者之不利。臣民一旦不存在，即便主權者能擁有如此大量之稅收，仍無法維持其權勢。但是，倘若主權者適當地行使其權力，不徵收超額的租稅，則對主權者與臣民均同等受益，達致共同的和平與防衛之效。」

就權力由絕對君主轉移至市民階級之過程而言，相較於英國式的平順，法國遭受的反對較爲強烈。所謂舊制度(Ancien Régime)，肇因於路易王朝之奢侈與戰爭，在封建的賦役與實物給付以外，新增了被稱爲 Taille、Aides 等各種形式的消費稅、關稅而負擔極重之間接稅。當時雖屢有提出稅制改革之主張，諸如 Colbert (1619-1683), Boiguillbert (1646-1714), Vauban (1633-1707)等人，但均因爲封建貴族及僧侶之強力反對，而索性增加間接稅。

D. 評價

重商主義之背景，在於商業資本興起，促使封建自然經濟瓦解，國內市場統一，並通過對殖民地之掠奪以及對外貿易之擴張，累積了大量資金，爲資本主義之生產方式提供了前提要件。重商主義者，原指國家爲獲取貨幣財富而採取之政策，其重視金銀貨幣之積累，並將金銀看成財富之唯一形式，認爲對外貿易是財富之真正源泉。[1]

[1] [Hsu (1993;9)]

無論如何，重商主義者大致上採取擁護間接稅立場，而與重農主義者之反間接稅立場強烈對立。而十七世紀至十八世紀左右，租稅理論之核心問題，可說是環繞在間接稅之評價及其合理化方法之討論。但其研究只限於流通之過程，尚未形成一套完整之經濟理論體系。[1]

(2) 重農主義之租稅理論

A. 對重商主義之反動

誠如前述，封建末期，處於正所謂資本主義發生前夕，各國間漫無限制的關稅及內國消費稅之課徵，佔了絕對君主收入之大半。然而，隨著貨幣經濟逐漸發達，各國間商品之交流、流通亦隨之興盛；如此一來，重課關稅與消費稅一事，反而阻礙商品在國際間乃至於國內各地之間的流動，此對於新興工商業的發展而言，亦逐漸感受莫大的桎梏。

B. 作爲正統經濟學之橋樑

於是乎，重農主義者展開了他們的新租稅理論。不過話雖如此，重農主義者之租稅理論，其最終之集大成，已經到了近代經濟學之父的 A.Smith 所代表之英國正統經濟學和其所提倡之租稅四原則的時候。因此，重農思想可以說是 A.Smith 理論完成關鍵。[2]

C. 以土地之純生產物爲課稅對象

[1] [Hsu (1993;9)]
[2] [Izumi (1970; 60-61)]

重農思想代表者，無疑的是 F.Quesnay(1694-1774)，其認爲土地是唯一產生價值者，是以其在經濟理論上主張，國民所得之源泉，土地生產物之價值，減除農民先前支付的種子等費用後，所剩下來的土地純生產物。而建基在此一經濟理論上，F.Quesnay 從而認爲：A.租稅不能破壞也不能使得國民所得總額有不均衡的情形；B.增稅，應隨著所得之增加爲之；C.租稅者，即使對象是租金或商品，最後終究是以土地之純生產物來支付，因此應該只以土地之純生產物爲課稅對象，而不對租金或商品課徵（現在的用語來講，就是主張禁止針對相當於農民資本的生產性開銷課稅。）

D. 單一稅論

另外 Quesnay 曾說，以比例方式課稅土地的純生產物，並且直接對於經常再生產之財源課稅者，對國家最爲簡明、也有利，而且對納稅人之損害最小。此種認爲應該只對於土地之純生產物的單一課稅想法，便是其有名的單一稅論(Impôt Unique)。

E. 以經濟法則說明國家與人民之關係

如此一來，只對土地純生產物課稅，而不對資本課稅的想法，具有經濟法則的意義。申之，重農主義者視土地爲最重要之資本，即便有偏重以租金爲最典型之剩餘價值之傾向，**對此種相對於從法律、政治、道德觀點，而認爲國家與人民之關係之詮釋，亦具有經濟性之法則一事，意義殊爲重大。**亦即，保護市民財產、採取比例課稅等主張，不再只是道德上的要求，更具有經濟上之意義（即資本之法則）。

F. 評價

然而，重農主義者雖欲反映當時經濟狀態，而以資本型企業方式思考農業一事，卻未將重心置於資本主義原先的中堅分子，工商業者。或者說，有意無意地不將具實力雄厚之金融資本家、大商人等當成一獨立階級看待一事，爲其缺點。

另外，重農主義者，其與重商主義者相異之處，在於認爲課稅係對資本造成負擔之想法，而國家之任務僅止於對於人民之生命財產安全之最小限度，其餘則屬人民自由範疇一事，自然期待稅負愈輕愈好，要求一廉價之政府(Cheap Government)。此種思考方式，與日後資本主義之勃興相結合，即成爲英國正統經濟學之租稅理論。

（四） 現代國家租稅國理論之對照－以日本爲例

日本經濟學者林健久在 1965 年出版了名爲「日本租稅國家之成立」一書；依照租制發展進程分章說明（第一章關稅、第二章地租、第三章工商稅、第四章消費稅、第五章所得稅），並說明其在制度建置之固有特殊性，即一從資本主義生產方式反求原始資本積累促進之急進資本主義[1]。

在方法論意義上，其認爲不體察資本主義進程角度，將難以解明日本之國家權力性格一事[2]；確實回應了 Schumpeter 等人對於財政學研究之呼籲；而該書對於租稅國家嗣後之發展與動向等說明的闕如而降低其後發展可能性之缺憾，此或許乃財政社會學本身亟待克服之難題。[3]

[1] 請參照 [Hayashi (1965;338)]
[2] See [Hayashi (1965;140)]
[3] 關於此點，亦非著者林健久氏所不察。See [Hayashi (1965;140)]

伍、　稅法與繼受法－理解可能性與繼受可能性

基於上述關於異文化間依然具備溝通可能之論證結果，本文進一步推論：對外來法律之繼受，除了對法制度之建置的理解有其可能性外，甚至對於法制度背後之價值取捨，亦有被他人理解的可能。詳言之，各國課稅制度，均以財政收入爲目的，在理解上較無困難，惟課稅背後課稅正當性基礎一事，各有其歷史脈絡，價值判斷自有不一，固在理解上較爲費力。

一、問題概說

（一）　溝通可能性之前提：理解與繼受

兩個文本，出於不同時空背景，但皆採觸財政體制取捨之基本問題，而有比較可能。比較方法而言，本文以「納稅人之行爲」作爲研究對象，並聚焦於其「行爲動機之取捨」。本文認爲，主導納稅人行爲取捨之動機主要有二：一爲利益極大，一爲其他個人主觀偏好。前者基於理性原因，較能爲他人所理解、預測，故具較高之溝通可能性。反觀後者，由於個人價值觀事涉所處社會之價值、所處體制之建置，不易爲他人所理解、預測，但仍具低度溝通可能性。

（二）　外來文化之理解方式

關於理解方式，本文將論證集中在將「價值判斷」當爲一種思考模式來理解。本文認爲，傳統中國的思考模式乃是一種「義利之辨」的形式。而自由平等之判斷，實際上亦是「義利之辨」的另一種形式而已。

二、對於納稅人主觀心理因素之理解—「繼受之客體」爲何

綜觀十九世紀以來歐美日諸國課稅理論之發展，其在稅制之設計上往往環繞者「所得」概念之充實與調整，作爲評估納稅人負擔稅捐能力之指標。[1]然而所不能忽略者是，租稅在本質上具有強烈的市場依附性；是以「所得」之概念，勢必應探求其與市場之間關係；而從所得係用以掌納稅人之經濟狀況者以觀，「所得」者，無論如何乃是「人之所得」；從而**一筆能夠課稅之「所得」，毋寧是表彰「納稅人」與「市場」之某一特定之關係**。

租稅規避(Tax Avoidance, Steuerumgehung)之防杜，始終作爲財政憲法上之核心問題，亦難與納稅人經濟能力之掌握方法脫鈎。倘以一般防杜條款爲例，一般而言，租稅規避之要件在討論上多有討論，卻依國情不同而不易定於一尊[2]；惟本文在此先依主客觀要件區分爲二：一爲行爲人（納稅人）透過私法上形式之濫用，實質上產生一定的經濟利益，另一則爲行爲人主觀上具有避稅之意圖。前者與市場密不可分，後者則涉及行爲人主觀之價值判斷。

（一） 對於「繼受對象」之理解：稅法規範之理解

首先，就繼受之對象而言，應該要更加具體討論。以課稅制度爲例，我們所繼受的對象，並不是「租稅」，而可能是「tax」、「steuer」、「impôt」、「impuesto」、「imposta」、「НАЛОГ」等。同理，就固有之理解而言，究竟我們討論的，是稅、是賦，亦有更細緻化必要。[3]

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[1] 所得概念之介紹，此部分討論甚多，日本之介紹暫請參照　金子宏，租税法における所得概念の構成（一）、（二）、（三）、法学協会雑誌 83, 85, 92 期。

[2] 各要件之探討，請參照　葛克昌 (1978)，租稅規避之研究，頁 67 以下。

[3] 以漢書所使用之詞語爲例，暫請參照 Nancy Lee Swann, On tax terms in the treatise, in: Food & Money in Ancient China, the earliest economic history of China to A.D. 25: Han Shu 24 with related texts, Han Shu 91 and Shi-Chi 129, translated and annotated by Nancy Lee Swann, 1950, Princeton University

此外，即便是「tax」，其內容究是指的是「donum」、「Auxilium」、還是「scutage」，亦可能產生不同理解；對應於傳統中國，究竟討論的對象是貢，是助還是徹，亦須深究。所謂深究，就是其歷史與社會之脈絡。

而更爲複雜卻也更爲有趣的是，理解之方式。單單「稅」一字而言，固有意義之理解上，就可以有「Shui」、「ㄕㄨㄟˋ」、「ぜい」、「세」等數種方式；倘從繼受觀點來看，以英文學習者而言，可能必須從類似於「Shu-wei」的發音想像，再來理解「稅」的涵義，與固有理解方式，可能有些許之不同。

（二） 對於「繼受對象之正當性」的理解：租稅倫理之理解

其次，就該繼受對象之所以成爲來源國（即被繼受國）之原因，更應探究。本文即嘗試從納稅人個人之主觀心理因素出發，用以尋求預測納稅人行爲之方向。首先，納稅人之主觀心理因素，因其所處之社會而異。以本文所欲探討之東西方租稅規範倫理爲例，最重要者毋寧是尋求二者共通之處，以爲溝通之平台，進而發揮相輔相承之效。

三、固有概念(eigener Begriff)與借用概念(entlehnter Begriff)

固有概念與借用概念，實則源自於德國稅法上私法與稅法二者關係之討論。惟發展至日本學術界後，除了在實定法上私法與稅法上概念間有所討論外 ，更有獨自發展出來討論之趨勢。只是二者之區分在理論上探討仍不甚充足，是以本文在此擬從繼受法與固有法觀點切入，或許能提供不同觀點。

Press, pp.366-376, especially the tabulation at pp.375-376.其中針對漢代之「賦」、「租」、「緡」等稅概念加以區分。另中文對於租稅概念之考證，或可參照 錢穆(1996/2008)，國史大綱，修訂本，上冊，商務，pp. 132-136.

東亞諸國之法學發展，近來時處「繼受」的狀態，亦即參考了大量外國之法制度。[1]以法制度和法思想爲例，繼受之來源乃以歐美之資本主義先進國家爲主。近年來日本之法學界，「意識到」並「自覺地」發起了本土法學之研究想法。[2]然「繼受」作爲不同社會乃至於不同文化之間的溝通過程，未必僅具有消極之意義；毋寧，自本土文化之成長與包容性之增加以觀，繼受更具積極意義。

稅法學上的對應，可以從「固有概念」與「借用概念」爲代表。此概念不僅代表涉及一般所認知私法與稅法二者在價值判斷之相對性外，對本文而言，更觸及固有法與繼受法層次之議題，而值得更深入研究。

四、稅法上價值判斷：以「固有性」爲中心

（一） 稅法上原則與規則之二分

原則(principle)與規則(rule)之二分概念對於稅法學理論之發展有著啓蒙式的作用，而此一作用亦應體現於繼受理論之中。爲求具體化問題意識，以下茲以提問方式聚焦。

首先，如果原則係表彰特定之價值，則法原則所表彰之特定法律價值爲何？此置於本文脈絡中，則是傳統中國法之性質爲何的問題。

其次，如果稅法原則所欲表彰的價值是量能平等負擔，那稅法原則作爲法原則之性格應如何展現？

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[1] 傳統中國固有法與繼受法問題，或可約略參照　寺田浩明，鄭芙蓉譯，中國固有法秩序與西方近代法秩序，山東大學學報，哲學社會科學版，2005 年第 1 期。

[2] 以稅法學爲例，福家俊朗，東アジアにおける新たな公共性の協同形成と課題―比較公法研究のあり方に関する覚え書、名古屋大学法政論集、213 号、2006.6.。

第三，如果法原則係表彰所處之社會價值，則稅法原則應如何同時展現社會價值與量能平等理念？此為固有性於量能平等負擔之體現問題。

（二） 具體之溝通機制：以「被理解」為前提

具體言之，**納稅人之價值判斷如何能夠以一種可以被他人理解的方式出現**，乃是首當其衝之先決問題。在此，一個客觀上存在之「制度」的建立，發揮了積極的作用。這裡所謂「客觀」乃是相對於各個納稅人心理狀態之「主觀」而論，著重於一種非關單一個人心理的外在世界。而所謂「制度」，則是一套運作機制；每個人只要熟悉了該機制運作之原則，即可透過此機制中訊息交換之規則，作為將自己主觀心理轉化於外的一種媒介、進而與其他個人溝通。因此，在一個同居共活的社會中，制度有其存在必要性。推之，當租稅作為一種支應社會之系統而具備相當之公共性時，自有必要將租稅予以制度化。

而「制度化」，本文認為，非以原則與規則不足以成就之。[1]詳言之，以一定之邏輯（無論是日常生活之語言或是法學領域所使用之三段論證）予以規整，方具有相當程度之被理解性，方能論及被預測之可能。而一個法治國家中，被理解之對象依然是人民，只是制度中用以相互理解之媒介，成了林林總總之法律規則。換言之，人民透過法律規則之使用，如何能夠具有「被理解」性、進而使得自己的想法具有「溝通之可能性」，則是制度設計亦即法治國家的重要問題。

◆ 「對本國法」與「對外國法」之理解－繼受與理解之關係

[1] 法規範正當性之討論有其發展脈絡，以筆者粗淺理解，或許可源自於 Austin 之授權命令說，其後受到 Hart 所代表之法實證主義對規則內容重新定性（法規則具有內在邏輯而應僅止於最低限度道德之說法），嗣有 Dworkin 再針對規則(rule)理論批判而提出原則理論(principle)之想法，而 Alexy 再對此原則理論加以修正而成原則之權衡理論。一般介紹，Patterson, D.(ed.) Philosophy of Law and Legal Theory: An Anthology, Blackwell Publishing.

此外，欲談外國法之「繼受」，不能不談對外國法之「理解」，蓋對於所繼受者如無法取信於民，在執行手段將不易爲人民所理解，繼而難以爲人民所接受。然，欲使所繼受之法能取信於民，非爲人民所理解不得徹底落實。是以，「如何理解」成了繼之而來的問題。更有甚者，反觀我們本土自己的「固有法」，亦同樣地需要被理解。只是此種理解，和對外國之「繼受法」相較，表面上似乎較容易爲之。亦即，少去了理解「繼受」之過程。

（三） 納稅人行爲取捨之分析可能性

再者，法治國家乃是現代國家之要求；換言之，法律在規範社會之手段之同時，其本身亦成爲社會中人與人之一互動媒介。申言之，作爲與納稅人日常生活關係密切之稅收實體法，亦不免成爲現代社會中溝通媒介之一。簡單來說，法律之話題，早已是日常生活中的討論話題乃至於一般人之思考判斷的對象，而非僅由特定專業人士獨享。是以，以納稅人爲例，其對於稅收實體法之理解乃至於所據以形成之各種租稅規劃方式，亦不無符合法律價值判斷之可能。只是相對地，納稅人在從事租稅規劃之同時，也應該被要求盡到其安排是否違反憲法上之租稅平等負擔理念。[1]

然而，本文在此想提出的問題是，納稅人之各種價值判斷是否有被分析的可能。易言之，從徵稅角度觀之，對於納稅人之各種規劃，如果沒有可能理解乃至於沒有分析之必要時，將遑論其預測之可能。

對於上述的問題，雖然本文的立場是肯定的，只是對於此一問題設定之有效性，則暫爲保留。亦即，納稅人主觀心理雖能夠掌握納稅人行爲背後的動機，但透過

[1] 葛克昌(1993/2005$_2$)，頁 18。

對納稅人主觀心理的分析，是否能夠達到預測出納稅人之行爲程度，仍待觀察。**而傳統中國之「義利之辨」思維如何能夠與當前之繼受法制相融合，亦可能爲影響此一有效性之原因。**

五、財政憲法借鏡財政社會學之可行性評估

（一） 財政社會學視野下《鹽鐵論》圖像－財政憲法之借鏡

1. 稅法學上法律與道德之界限問題

Goldscheid 認爲當時之財政學，僅是一擬制的國家理念之構築，是一種黑格爾式神化的「國中之國」；其缺少社會學式的分析，而悖於現實。[1]木村元一氏進一步認爲，社會學一直以來在論及國家時，僅著重法的面向，而不觸碰國家對經濟之規範性（経済的規定性），是以忽略了存在於國家與財政之間緊密的連結性。[2]

基於此點，本文認爲可證之於法律與道德二者難以劃清之界線。申之，若法律係社會之產物，其所維持所存社會之特定價值體系，勢必不應被忽略。在傳統中國中，道德作爲規範，與法律同具保護所存社會該特定價值體系性格，恐有過之而無不及。而在稅法學中，財產權賦有社會義務之觀點，即一適切之反應。

2. 不同利益間之「**對立關係**」：從「課稅正當性」到「課稅界限」

財政社會學對於鹽鐵論之法學分析主要貢獻之一，或許可歸於 Goldscheid 理論之馬克斯主義觀點，即不同利益之對立與衝突之出發點。此於稅捐徵納關係中納稅

[1] See [Kimura] (1941 ; 390)
[2] [Kimura] (1941 ; 390)

人私利與國庫收入利益間的對立關係中，可見一斑。然而，從憲法觀點，納稅人個人之權利受到保障之同時，確保國庫收入亦非不受憲法所保障；是以**問題之癥結，已不在於對立之雙方孰具正當性之論證，而是將重點置於反應二者彼此消長、分際之上**；此種觀察，在本文脈絡下，或者用 Schumpeter 觀點，落在課稅界限論。

（二） 租稅國家作爲一憲法理念

「租稅國」抑或與其相對之「所有權者國家」、「企業者國家」，爲國家財政之基本體制[1]，屬於憲法層次之規範，學者稱爲「財政憲法」（Finanzverfassung），關係及於課稅權及其憲法上限制[2]，以及違反「租稅國」（或「所有權者國家」）本質，是否構成違憲的問題。此點，端看「租稅國」特徵，是否與我國憲法上制度相衝突或失效而定。[3]

是以，財政憲法一詞，著重的仍是憲法層次之意義；因此，即便所欲反應者仍爲，財政租稅事務本質之規範體系，但作用上仍不應遠離法律而定。[4]

[1] Kirchhof, Besteuerung und Eigentum, VVDStRL, 39, 1980, S.227.
[2] Loritz, Das Grundgesetz und die Grenzen der Besteuerung, NJW, 86, S.1.
[3] 葛克昌，憲法國體－租稅國，國家學與國家法，月旦，1997。
[4] 相類似之想法，或許可參照「部門憲法」之概念。詳見，蘇永欽編，部門憲法，元照，2006。[Su YC (2006)]

陸、　「租稅法律主義」概念之定性與內容擴充－以「義利之辯」爲中心

「租稅法律主義」(rule of law in taxation)一詞不易定性，蓋其內涵容有解釋空間。首先，在法源依據上或許可分爲二：一爲財產權之神聖不可侵犯，一爲人民之基本義務。然而其內容究何所指，將引導出截然不同論理基礎，甚至產生相互衝突之法律效果。惟有趣的是，兩套論理，均存在於大多數之憲法文本之中，看似並行不悖。以下茲以對立關係爲例析述之。

一、納稅人之行爲取捨：「主觀理解」與「客觀理解」

稅法規範其形式與實質二者之關係，係用以說明租稅倫理與稅法規範基礎二者之關連性。形式部分，強調的是國家與人民二者之關係論，兩種地位對等之理解方式，即客觀與主觀。具體適用部分：前者之**客觀理解觀點著重納稅人於制度中所受到的限制（亦即制度對納稅人所產生影響）**；後者之**主觀理解則著重納稅人本人如何理解並運用其所處之制度**。

實質部分，強調納稅人主觀之價值取捨，用以突顯界限論之不足之處，以及說明價值論之補充作用。[1]具體適用部分：界限論以保障納稅人之權利作爲最終目的，價值論則以確認納稅義務之正當性爲最終目的。

二、「繼受問題」之導入與「課稅倫理」之系統化

無論是國家課稅權之行使，或係人民納稅義務之承擔，均係一連繫國家與人民間之**關係**（即「課稅關係」）。納稅人透過其與國家之連結，方負有納稅義務。在西

[1] 制度論與價值論之相對性，類似觀點，諸如李明煇稱之爲制度論與文化論之爭，儒家視野下的政治思想，國立台灣大學。(2005；209~)

方，人民之納稅義務，透過民意而正當化；但在傳統中國，納稅義務之正當性是否亦來自於人民，即爲所問。

只是，**何謂「正當化」？本文認爲「正當化」是：判斷正當化的「程序」應由人民本身的「價值理念」作爲基準。**再者，不同社會中價值理念言人人殊，如何正當？本文認爲，基於價值判斷上「**辯證邏輯**之共通性」，即便不同社會，價值理念仍具有相互理解之可能。

在傳統中國之價值理念中，「義利之辨」作爲價值判斷之準則，具有指標性意義。在《鹽鐵論》之文本中，即爲此一特徵之縮影。

三、「義務」作爲觀察原點

中西文化之中統治者（如國家）與被統治者（如人民）之關係有其相似之處。第一，人民均受到政府（統治者）權力之影響；亦即，中西之人民，均係受到統治者權力所制約。第二，人民之各種義務係由政府所具體化；且此類義務，亦有以「租稅」之形式呈現之可能。故本文認爲，就對國家或對統治者之「義務」而言，中西在課稅倫理上有其共性。

近代之前，「tax」不過是義務之一代稱。然在西方之歷史上到了近代，「租稅」一詞才被重新定義，而成了主權之象徵。而反觀現今之華人社會，「稅」一詞雖早已見諸史料[1]，但其文義是否有如同西方之民主意涵，應先予深究。[2]惟本文在此擬另

[1] 漢書食貨志：「有稅有賦。稅謂公田什一及工商衡虞之入也。賦共車馬甲兵士徒之役。」鹽鐵論：「薄賦其民。」（禁耕·第五），詳見　宮崎市定(1933)，pp.189-196, 681.；另鹽鐵論：「外設百位之利，收山澤之稅(略)」(非鞅第七)，鹽鐵論譯注〔王貞珉版〕，頁 41。

[2] 另值得一提者爲，此一現象亦證之於鄰近之日本。

尋租稅正當性之論據。[1]

對於租稅之正當性，本文之定義如下：**租稅之正當性在於，基於該正當性所取得之利益，必須通過租稅倫理之檢驗。**在此必須加以說明者有二，即：「所取得之**利益**」以及「租稅倫理」。首先，此「所取得之利益」不分公私、無論得利於團體或個人、只要能夠通過租稅倫理之檢驗，即應具備正當性。

再者是關於「租稅倫理」之定義。倘若課稅之正當性不再是人民之同意所賦予時，則此「租稅倫理」與租稅正當性之關連性理應何解？亦即，何以租稅在透過某租稅倫理的檢驗後，人民之財產即有被分享之義務？或者，國家即可堂而皇之攫取人民之勞動成果？本文之想法如下：**「租稅倫理」乃是人民對於國家之關係的一種界定。**透過此一關係之界定，人民與國家之間方能有所依、並據以互動、進而形成彼此具體之權利義務。

是以，國家對人民徵稅，或人民負有納稅義務，在憲法上之正當性，應取決於該憲法保護下之人民其對於國家之關係爲何之問題。而此一問題，承前所述，乃是租稅倫理之問題。而欲探求租稅倫理之問題，必先對於傳統中國歷史文化之諸價值予以理解或定位（下稱「倫理基礎」,tax morality），始足當之。

四、倫理基礎之討論：所謂「固有性」(Intrinsity)

然而，即便在一個現代之非西方社會中，要“肯認”(confirm)西方式租稅之存在以前，仍應先“辨識”(recognize)此類價值之存在；亦即，先去理解財政權力的特質，以及在各自歷史脈絡中其與人民之關係後，再去進行其與西方對照之工作。

[1] 蓋本文認爲，此問題可能涉及多數決原則得否作爲課稅正當性問題，嗣於後文討論之。甚且，倘與法學連結，則可能必須探觸：在法律作爲主權者命令一說已受質疑並被取代之下，稅法其內涵應如何加以因應之問題；於本文似乎無法充分予以討論。

本文所謂之「倫理」，係用以**具體化**「價值理念」者。而具體化，乃指如何將個別不同之價值理念予以相互比較、相互理解之過程。是以，承此具體化之目的，**倫理之定義爲：一種既定之思考模式；透過此一思考模式所得出之結論或判斷將能趨於一致。**

承前所述，租稅之倫理基礎，係用以處理「固有價值」（固有性）問題，而稅法學上之價值取捨又往往化約成「義利之辨」形式；是以，**用以檢證租稅正當性之「租稅倫理」，理應處理的是：源自於固有傳統下所形成之「義利之辨」**。

但必須面對的問題是，即便取材自傳統中國思想或價值理念，所謂「義利之辨」，取決於不同之思想流派或政道治術，亦容有多種不甚相容之解釋結果。而此一難題，亦係本文所研究之文本《鹽鐵論》中所不難發現者，當中不時摻雜之「儒法之爭」，即一分析適例。

本文對「義利之辨」之定義爲：一種決定偏好之優先次序的機制。所謂的優先，除了行爲之先後，亦包含行爲之與否。

五、中西之價值共性：「義、利」、「Equality、Liberty」與「自由平等」

本文接下來處理的是二文本背後所體現之固有性與共通性之問題。

危機一文強調：所謂之財政危機，乃起因於戰費之籌措問題；但真正之危機卻是由於此一籌措不利可能性所伴隨而來社會不安之附作用。[1]鹽鐵會議所爭者，亦係

[1] 中文文獻，黃世鑫說明到：「因此，財政危機若指的是國家債務的累積，只要不是國外公債，就無危機可言；換言之，所謂財政危機，其實只是一症狀，真正的危機是隱藏其後的經濟危機、政治

針對支應戰功彪炳之漢武帝之戰費而起，亦即財源論層次問題。惟此所帶給社會之影響，卻不僅社會心理層面之因素所足以解釋。本文進一步認爲，此更說明了社會中人民所持課稅倫理之「價值觀」層次問題。

（一） 財政社會學在方法上之意義與固有意義之自由、平等

本文認爲，熊彼特之財政社會學方法論，毋寧提示了個別社會在其進展上之獨特意義，換言之，即必須掌握個別社會之**固有性**。具體言之，該特定社會中其人民之社會心理狀態如何、以及人性觀如何掌握等問題，均深具稅法意義。

另承前關於倫理基礎之說明可知，傳統華人社會之固有價值中，義利之辨的說法也莫衷一是，在面對外來文化時，所謂的義利之辨，應以何種面貌加以因應，則是本部分必須回應者。而回應之方式，乃將焦點集中在西方自由平等價值如何與傳統中國義利之辨的「相互溝通」問題。

我們必須預設：第一，自由(Liberty)與平等(Equality)二者，乃是西方人權保障之二個終極價值；而在傳統中國思想體系中，此二終極價值亦應存在，只是其體現的方式，有所不同而已。是以，中西在對話上，亦應從傳統中國法之固有價值中，尋求類似自由與平等之價值理念。[1]第二，對於「義利之辨」作爲一種**辯證邏輯（詳前述 Perelman 之分類）**，如何能夠達到表彰自由平等之層次。

（二） 納稅人之自由：主觀之客觀化

本文擬先從價值取捨之主觀面向出發。申之，從個人心理之想法出發，一個人之

危機、甚至社會危機。」，頁 437。本文進一步認爲，社會危機之根源在於心理危機，係倫理價值觀所左右者。

[1] 詳見拙文(2008b)，台日法學交流研討會。

自由是否受到限制，應由該個人之感受爲判斷基準。在制度上如何判斷，則只不過是如何將該主觀因素予以客觀化（或具體化），以達到能被理解而具備溝通可能性之地步。換言之，主觀要素才是探討的重心。而既然自由是屬於主觀層次，自應透過制度來加以客觀化。

（三） 納稅人間之平等：客觀之主觀化

反觀「平等」之概念，則是客觀制度下之產物，應透過客觀層次之認識來求取。只是求取之方式，鑑於不同社會中價值觀各異，探討時自應斟酌性質差異之處。換言之，平等概念之具體化，對象上雖是一客觀事物，但在手段上，則應以主觀化方法爲妥。

（四） 自由平等之「固有化」[1]：二者之「關係」

憲法對於自由與平等之保障上，看似分庭抗禮，然實際上是否殊途同歸，殊值深究；而二者此種關係在稅捐違憲審查上亦同。[2]本文則欲透過義利之辨當中義利二者先後順序（prioritization）之思考模式，來對照並定性自由平等二者之關係。

柒、 租稅法律主義與固有法：以稅法上形式與實質之二分爲例

租稅法上形式與實質間之不一致，衡諸世界各國立法例，均所在多有（詳如後述）；然而，此一非單一國家所獨有之現象的根源，**不是稅法形式與實質間理論或技術上無法產生一致，而是納稅人基於私利追求所必然衍生之租稅規避行爲傾向**。此

[1] 在此必須先說明者，本文無意於傳統中國價值中尋求等同於自由平等等價值之質素，而僅嘗試在所預設之前提上，試求有意義之比較基準。相關想法請參考 黃進興(1985, ?)，食貨月刊。

[2] 如葛克昌(2002/2005$_2$)，管制誘導性租稅與違憲審查，行政程序與納稅人基本權，翰蘆，pp. 103-132(131).

一傾向，往往使得納稅人被課予之納稅義務（縱符應盡之社會義務），仍與納稅人個人所願意負擔（或履行）之義務有所差距，而依舊提高了納稅人與國家之對抗程度。

如何解消（或緩和）此一衝突性之對抗關係，是一問題。然而，稅法學中，究竟何謂形式與實質？二者對立關係在稅法上之指涉爲何？形式與實質對立關係之解消對於稅法解釋之意義爲何？等問題，均是相互關連，而須一併探討。

一、問題之所在－「納稅人基本權保障」與「納稅人憲法上基本權之保障」

台灣之法制度，具有繼受多元性。[1]在租稅法領域中，台灣同時深受德，日，美等諸國影響，其中財政憲法領域部分，尤以德國稅法學爲最。司法院大法官會議解釋中，更不時以「法律保留」概念爲核心之所謂租稅法律主義，做爲主要之違憲審查基準。[2]雖然此一租稅法律主義理念屢有過受重視而致形骸化之危機，但一般以爲，再度藉由德國「實質法治國」理念的充實，仍足收亡羊補牢之效。

然而，本文認爲，此舉誠具操作實效，卻難兼顧「本末」之明確性要求（即目的與手段之間之連結性問題）。其原因與台灣稅法學界長期受到法律保留原則理念影響有關。申之，透過對法律保留在功能上之強化，而欲遂增進納稅人保障目的之想法，雖有力求收效快速之功，卻極易與納稅人基本權的落實失之交臂。詳言之，「法律保留原則」本身是否真正足以適切表彰納稅人之價值，亦可能成爲問題的所在。

本文認爲，單以財產權爲中心之保障，並不足以完整呈現納稅人之基本權，是以

[1] 日治時期之繼受情形，詳見 Wang Tay-Sheng, Legal reform in Taiwan under Japanese colonial rule (1895-1945): The Reception of Western Law, University of Washington, 1992.
[2] 諸如釋字 167、210、413 號。

單純針對納稅人之相關基本權予以保障，在此前提下，其功能勢必大受影響。一言以蔽之，後者（憲法上基本權之保障）僅保障「基本權」，但前者（納稅人基本權保障）卻欲直接保障「納稅人」。

再者，即便透過財產權之「制度性保障理論」予以擴充，在上述前提下，所提昇之保障效果亦受到侷限。申之，本文認爲，制度性保障係透過對「制度」之建置與存續之肯認，來針對難以正面論述（如財產自由或財產權）或尚無法具體化之權益（如經濟活動上之若干自由）加以確保。從納稅人之「權利」觀之，此舉自能充實或補充基本權保障功能，惟實則對憲法所應保障之「納稅人之自由」避而不談，更遑論各納稅義務人之間實質平等之要求。前者（納稅人之自由）得證之於制度經濟學觀點，後者（各納稅義務人間之實質平等）則有待財政社會學觀點予以考察。

具體之提問與理由，試以「納稅人之自由」與「納稅人間之平等」爲中心，分析如下。

（一） 「納稅人之自由」之保障－制度經濟學之兩面刃

在此所指制度經濟學觀點，乃強調整體制度對其制度內個別行動者之重要性。亦即，倘於制度設計中未能針對該制度本身是否造成個別行動者差別待遇情況，作整體性關懷，即便個別行動者其具體行爲均受到制度規範，仍無法顧及，（亦即個別規範間之一致性問題）。

租稅制度與納稅人之關係，在此亦有發揮之處。詳言之，不同納稅人可能因其資產組合方式之不同（例如現金與不動產之比例），而受到不同形式之租稅待遇（例

如所得稅與不動產稅上之待遇）。倘在總資產相同之情況下，基於不同資產組合所導致不同形式之租稅待遇，在總稅負上造成不相等之情形，即可能產生租稅上差別待遇之不公平情形。[1]是以，倘透過憲法理念對租稅制度予以貫穿，將得以宏觀角度予以整合並調控個別租稅分支系統，以減少或者合理化差別待遇之情形。

惟此一制度經濟學觀點，對於理解納稅人行爲之成因（如是否爲營利動機），恐怕仍有不足之處。亦即，其無法針對個別納稅人不同負擔能力之成因——主觀偏好，作進一步分析。詳言之，上述衡量個別納稅人負擔能力方法，乃基於「客觀」上納稅人於市場上營利能力之外顯成果，但真正造成如此成果者，更可歸因於個別納稅人其個別之「主觀」偏好所致。而欲分析主觀因素，不得不理解形成諸此偏好之各種價值判斷；惟，各種價值判斷之起點，卻往往源自於個別納稅人所處之社會文化價值乃至於植基於此的倫理道德觀念（Tax Morality）。

由是觀之，納稅人之稅捐負擔問題，實則具有客觀與主觀兩種層次之探討實益。承上，納稅人行爲與租稅制度之關係，屬於客觀上之形式層次，乃是用以探討納稅人之自由問題。

（二） 納稅人間之負擔之實質平等

課稅所得理論之發展，往往最能看出租稅國家在不同體制與不同社會中之表現型態。而在現代憲政法治國家對人權保障之要求，如何將課稅權與財產權之關係賦予法律上意義，將極具意義。P. Kirchhof 將市場所得說 (Markteinkommenstheorie) 與憲法上財產權保障結合[2]，透過財產權所附社會義務之連結，納稅人於市場中實現自我之機會得以確保，從而國家對於納稅人在市場中之獲利要求分配自亦有其

[1] 此種不平等之情形，倘在租稅優惠之場合，自是更爲嚴重。
[2] 市場所得說之中文詳細討論，葛克昌，所得稅法基本概念，收入：所得稅與憲法（第三版），2009，翰蘆，頁 1 以下。

正當性。

只是此一社會義務之範圍，必須受制於各國地區狀況而有所張縮。申之，納稅人與納稅人之間係共存於市場中謀生營利之成員，對自應共同維持機制之正常運作。從財產權附有社會義務觀點，個人主義之租稅觀，應基於不同之社會文化脈絡予以修正；惟此一附帶性之社會性格，其正當性基礎及界限，自具有因地制宜、因時制宜性格，亦即應兼顧。

二、「租稅法律主義」與「實質課稅原則」二者「對立」之成因

承上所述，國家與人民之間關係，透過財產權理論及其保障所爲理解，未必能滿足現代法治國家人權保障之要求；只是，始終亟待解決的問題，卻似乎一直是人民對於國家權力之對立與回應。在稅法學上，一言以蔽之，所謂「課稅權力關係」，有必要重新以有別於「租稅法律關係」之方式（即課稅權與財產權之關係）重新予以理解。[1]而欲遂此目的，勢必應先還原爲最單純之形式，方能觀察演進之狀態。所謂「最單純之形式」，即存在於國家與人民間，課稅權(power)與財產權(rights)之對立關係(confrontation)。

（一） 「形式」與「實質」之二分與對立

稅法學上所謂「經濟觀察法」(wirtschaftliche betrachtungsweise)，其與「租稅法律主義」二者間緊張關係，時常流於「形式」與「實質」之爭。細究之，論者或許欲從納稅人在經濟上實質獲益之多寡，來緩和法律上對納稅人課稅所得過度僵化

[1] 租稅法律關係，乃以課稅要件是否具有合乎法律保留或法律明確性原則作爲討論核心，強調以法律對課稅權之制約，以圖納稅人財產權之不受侵害，是以此一法律關係，乃以財產權與課稅權之對立作爲切入點。而本文鑑於財產權之保障不足以完全說明納稅人與國家之關係，而擬從納稅義務爲出發點，探討人民作爲國家一分子所應負有之基本義務爲何問題，即所謂「納稅義務關係」。

之形式認定。惟此種緩和方式，在以法律解釋爲主的財政憲法領域，卻因法律形式之高度正當性，而往往不易觸及立法目的背後多種價值間之權衡。詳言之，此一植基於法律形式的國家人民關係，在本文看來，必須執著於課稅權力與財產權利之間的對立，而也因此必須將解決方法限縮在對立關係之改良上，而**無法**直接從「對立關係」中「對立」之成因重新反省。[1]然而，**欲反思關係如何產生對立，則應先理解對立如何產生關係。**

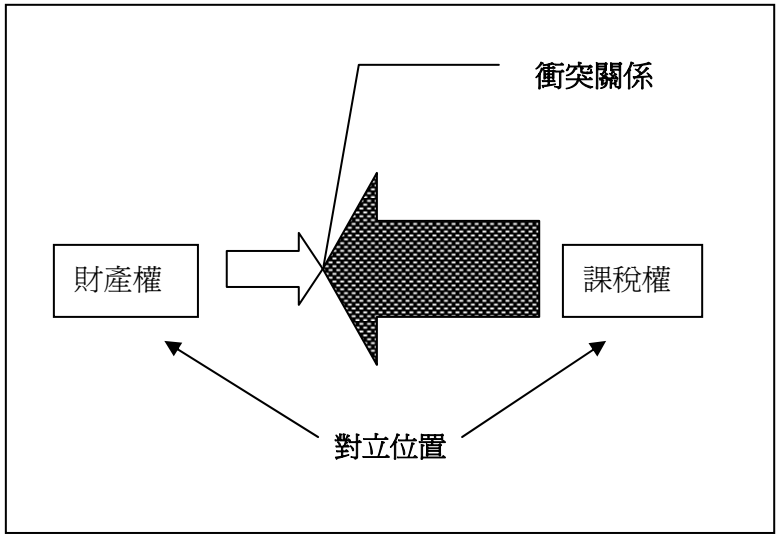
（二） 「對立關係」(confrontation)之理解

1. 財產權與課稅權二者，處於對立位置，並產生衝突關係

首先，本文將對立關係之基本形式，化約爲課稅權(power to tax)以及財產權(taxpayer's property rights)二者，再以權力之施與受作爲二者之連結。是以，基於前階段，稅權與財產權二者分屬不同事物；後者則將二者置於對立位置。其具像乃如下圖所示。

[1] 職是之故，法學常常可能因此劃地自限，終而將某些議題化歸爲其他學科領域，略美不談。

圖 1 財產權與課稅權之對立與衝突（第一層）



來源：作者自製

首先，本文有必要限縮範圍。亦即，確認「權利保障機制」(right-orientated mechanism)之設置目標，旨在針對防止權力之侵害；具體言之，此一權力即課稅權。

(1) 課稅權與財產權二者位居對立位置：各具其正當性

誠然，課稅權作爲一種國家權力，享有國家之正當性。然而，人民之財產權，其神聖不可侵犯性格，亦具正當性基礎。是以，當國家要求分享人民財產時，課稅權與財產權之連結上，轉變爲一種對立(contrasting)，甚至是衝突(contradictory)之關係。

(2) 對立關係，顯示人民與國家之關係爲不對等

此外，這一對立關係，各自之實力並不均衡，而有必要保護人民之一方，此即財產權之保護。

圖示中的兩個箭頭，一爲課稅權之利益，一爲財產權之利益。其中，課稅權之箭頭爲虛線，表示課稅之正當性依舊存疑。同時，人民在面對課稅權之侵害時，是否有足夠能力對抗一事，亦尚無得知可能。

(3) 「衝突關係」須建基於「兩相對立之位置」

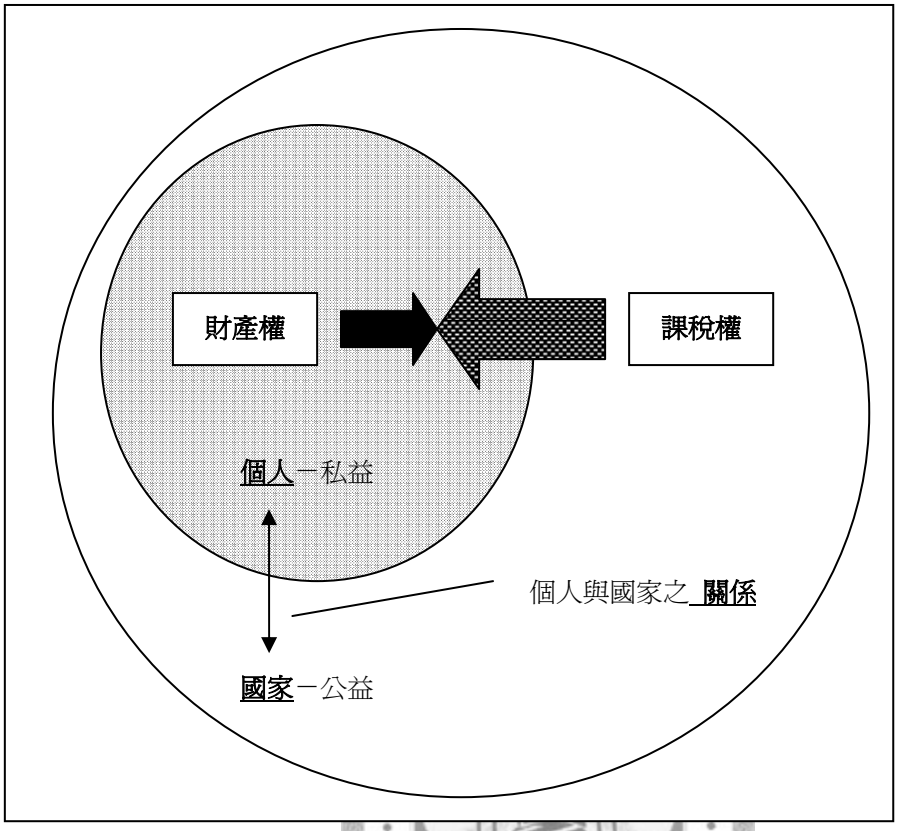
衝突關係(Confrontation)的前提，在於對兩個相異而同時存在的力量(will)，處於一對立的位置。申之，衝突關係之形成，首先要有兩個相互衝突的**立場**（standpoints）的存在。多數情形下，這種立場代表各種不同的利益，有時更可能是兩相對立之利益的競爭狀態。[1]

2. 此一對立關係，突顯了國家公益與人民私益在課稅關係上之對立

其次，此一對立之關係，倘置於公私領域交錯之脈絡下觀察，將更易察覺其間國家(state)與個人(individual)之間的利益衝突狀態。申之，課稅權之正當性，在愈接近私領域之核心範圍時，在憲法上應具備更高的要求。詳如下圖所示。

[1] 順道一提的是，諸如利益(interest)、侵害(infringement)、防禦(defend)等用語，僅具一般之描述性，而無法被具體定義。

圖 2 國家與人民公私脈絡下之課稅關係（第二層）



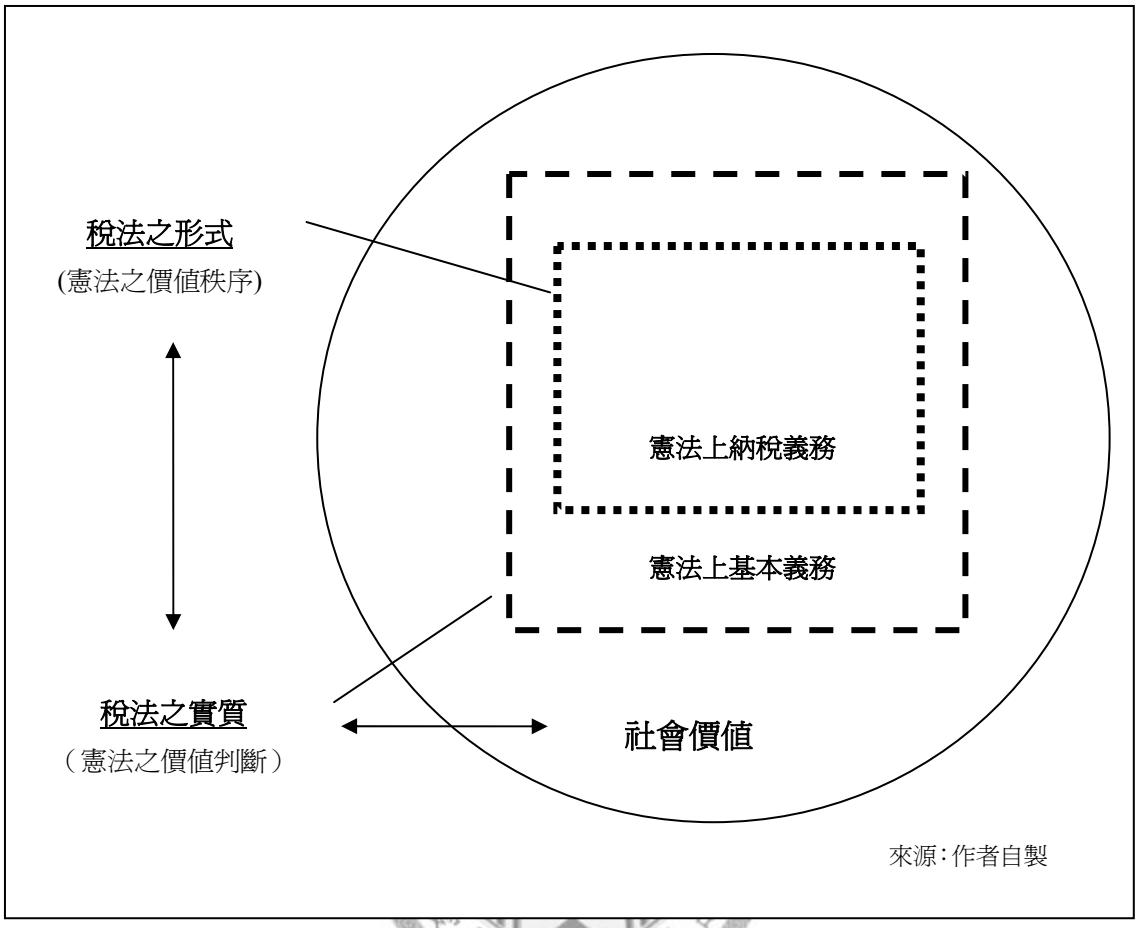
來源：作者自製

國家與人民之關係，不妨從公私領域之二元論角度理解。現代國家之中，私領域之個人以財產權爲中心；財產權之行使，實質上可能是一種個人意見的實現或實現之方法之一。

3. 納稅義務與基本義務之關係：憲法上回應（第三層）

最後，復從憲法價值秩序內化社會價值之觀點，描繪憲法規範框架與此一對立形式之連結。憲法價值之形成，應取決於所植基之社會價值，亦即將社會價值內化於所建置之體制之中。亦即，納稅義務爲憲法之基本義務，前者作爲形式意義之稅法，宜體現後者作爲實質意義之稅法

圖 3 憲法上基本義務與納稅義務之關係（第三層）



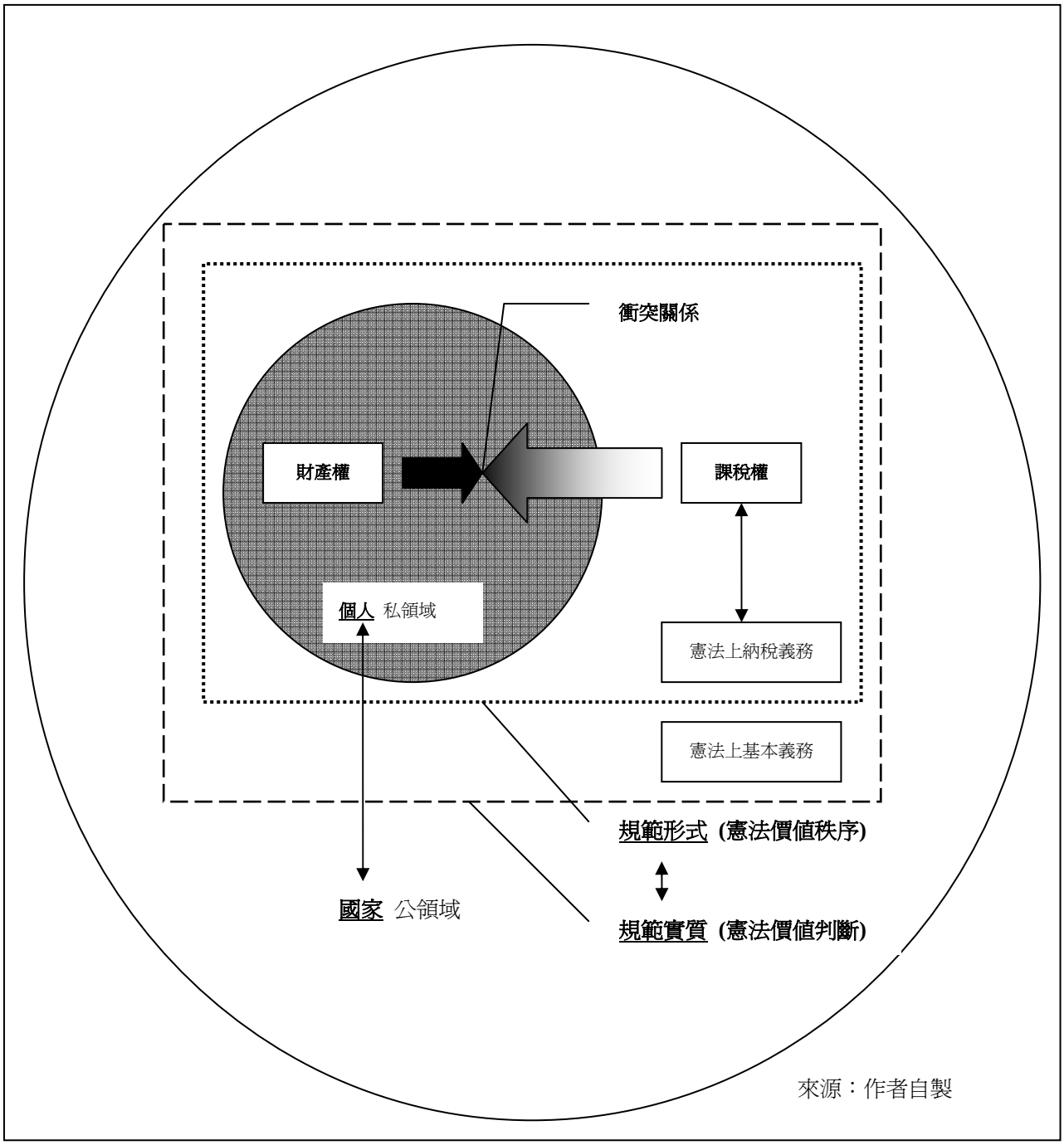
憲法上納稅義務與憲法上基本義務二者，有其交集之處。此外，前者乃後者之具體化。稅法上而言，前者與後者，毋寧表現出一種租稅法規範上其形式與實質之關係。稅法之形式與實質，理想上應爲一體之兩面。至於所謂的經濟觀察法（wirtschaftliche betrachtungsweise），則係二者關係在稅法上之實踐。

（三） 「對立關係」係對課稅權之形式理解，尚應顧及其實質意義

綜上所述，即如著重法律形式之對立關係，於若干判斷上仍不免求諸實質上社會價值之判斷。是以，在租稅法律主義精神之貫徹本身，亦含有對實質上納稅人保障之要求。而所謂「實質」之保障，就法學角度而言，不得不探觸自由與平等核

心理念，在稅法領域上如何內化之問題。惟鑑於本文意旨，在內化之前，更應先增加一道確認與固有社會價值關係之手續[1]，以利嗣後進行對話和溝通。

圖 4 三層次對立關係綜覽



[1] 此即憲法基本義務與社會上價值秩序之相容程度。

觀諸前述對立關係三層次的統合，本文之推論如下：

1. 第一層次衝突關係之示意圖中，箭頭較大爲課稅權力，以虛點形式表現，象徵其正當性應隨時予以檢驗。
2. 憲法上公私領域之關係，乃是透過「基本義務」將人民連結至國家。
3. 現代國家之中，人民之基本義務，乃以納稅義務爲中心。

（四） 小結：租稅國家課稅權與納稅人財產權自由之辯證關係

本文嘗試以解消對立關係之方式，找尋納稅義務之正當性基礎。以下詳述之。

首先，財產權與課稅權之對立關係，實係租稅國家之前提要求[1]，亦爲納稅人得以享有經濟自由之代價[2]，是以曾有財產權保障是否及於稅課之討論[3]，認爲此係稅法是否受實質憲法拘束問題[4]，進而聚焦於課稅權侵犯財產權之界限之討論。從國家社會二元觀下理解，課稅權與財產權之對立化，毋寧代表全體納稅人，爲求共同於租稅國家活動之自由，所共同負擔的制度維繫責任。此爲第一層之理解。

然而本文進一步試問，倘承前所述，財產權之自由繫於租稅者，則財產權其神聖不可侵犯之正當性，亦應同時象徵納稅義務之正當性。又納稅義務之正當性與上述全體納稅人共同之自由相連結時，每一納稅人對於所處之制度中，均代表共同義務之一部分。另課稅權之正當性，倘回顧其歷史成因，爲一共同危難（common exigency）之防免，而與納稅人之共同義務，在概念上之區分已漸趨模糊。是爲第二層次之理解。

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[1] [Gee (1997;143-144)]
[2] [Kirchhof (2006)]
[3] VVDStRL 39, 1981.
[4] [Gee (1997; 118)]

最後，第三層次，本文欲以納稅義務之公共性概念，統合共同危難與共同義務二者，並透過納稅義務在現代國家係社會義務之一環，說明社會義務之正當性，即爲納稅義務之正當性。從而，納稅義務之公共性如能維持，毋寧同時肯認社會義務之正當性，與納稅義務之正當性，也同時肯認課稅權力之正當性與財產權利之正當性。

以上之說明，茲以下表示之。

對立層次	具體對立關係	國家社會二元觀下之理解
第一層	課稅權力 ➔➔ 財產權利	租稅國家 v.s. 納稅人
第二層	課稅權力 ➔➔ 納稅義務	共同危難 v.s. 共同義務
第三層	社會義務 ⇔ 納稅義務	納稅義務之公共性

三、租稅法規範，應同時具有形式與實質意義－「租稅倫理」之提出

稅法規範的對象，乃以經濟事務爲核心；而稅法之規範目的，卻在於維持經濟生活的可能性。前句標示了稅法獨立說的必要性，後句則說明了稅法規範不同於其他法秩序的特殊考量。然而，在認識上，稅法之規範目的，卻時常與稅法規範之對象二者，產生相當程度的「剝離」。此種剝離，或因憲法學上向來對財稅法學的研究不甚重視，或因規範本身（當爲）與對現存社會之法（現象）之間存在了矛盾。而如何化解此一矛盾——隱藏在稅法諸多條文與解釋函令下，干擾著司法與行政部門之認事用法，模糊立法與行政部門的關注焦點，卻揮之不散的幽靈——成了當今財政憲法刻不容緩的任務。

（一） 租稅法規範之具有多層次意義

欲分析租稅法規範之性格，本文認爲下述幾個面向應加以注意。其一，從稅法上經濟觀察法之形成過程以觀，租稅法律之形式往往須時時觀照其自身是否與其所規範之實質內容（經濟事務）相互一致。惟「欲規範經濟事務」一事本身，另有須加以考量者；此種對目的本身之價值判斷，在國家社會二分之脈絡下，即國家介入私經濟之正當性。此其二。另外，國家介入私經濟之手段，其亦有正當性考量；亦即，國家選擇何種方式影響私經濟之秩序中，亦爲價值判斷問題。而此爲其三。

（二） 課稅界限之負擔上限，取決於不同社會中各自之課稅倫理基礎

課稅界限，實則標示著一種國家與人民之關係。詳言之，兩大論辯所爭執者，卻無不聚焦於國家與經濟之關係。詳言之，所爭者，無非是在各自歷史背景和文化脈絡下，尋求一條國家與人民之間的界限，使得彼此能夠藉以各自安其所，各適其生而已。換言之，在表面上，兩個文本因爲在時空上完全沒有交錯之可能，而無從做相互比較；然而實際上，正因二者互不交集，而爲本文所欲尋求中西租稅法規範在各自發展脈絡中之所共同認可之倫理基礎的初衷[1]，提供一個可行性。

四、「納稅義務論」較具理論完整性與華人傳統之親近性

從傳統中國之歷史脈絡觀之，國家對於人民之義務，實則不以租稅之形式爲限，反而以諸如勞役等金錢給付形式以外之義務爲大宗；故單從租稅作爲觀察國家權力的行使狀態及至於型態之演變，或許稍嫌以偏概全。不過，《鹽鐵論》中文學賢良的若干論證，卻無形中透露了民間社會的國家觀，以及支配民間社會的倫理思想；國家對於租稅等負擔之分配方式，也在在反應了國家（或者朝廷）的社會觀，

[1] 所謂「共同認可之倫理基礎」，用另一種說法，則可能是——二者在方法論上有相互溝通的可能性。

以及支配國家管理人民之統治思想。因此，對於傳統中國徵納關係，如何以國家權力以外之角度觀察或補充國家權力角度單一性，均爲尙待克服之難題。本文的嘗試爲「納稅義務」之角度。

（一） 納稅義務與人民基本義務之關聯——解消「對立關係」之嘗試

1. 權利思惟體系之限制－從私利出發之侷限性

戰費的高漲，是十四十五世紀封建經濟體制下，領主財政困難的主因[1]；在二十世紀的奧地利也是；而在兩千年前的漢武帝時代，更令桑弘羊等內朝重臣竭精殫慮地籌措銀兩，以滿足雄才大略者之野心[2]。於是，「統治者」一詞之義，在古今中外似乎有相當程度的共通性。

實則，倘就經濟體制之發展歷程就近觀察，西歐與中國的歷史發展進程似是若合符節。[3]但在因果關係之層次上思考，我們不難將一個國家（或王國或朝代）的財政困境，歸咎於領導者所代表之財政政策的失當；但從《鹽鐵論》的辯論過程中，我們不禁又想問，透過約束領導者的意志或行爲，是否能夠進一步預防財政困難的發生；而此約束領導者意志或行爲，是否依舊屬於法學的任務，亦有待說明。

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[1] Schumpeter (1918/1996), p.338.

[2] 桑田幸三認爲，武帝時代經費異常膨脹的原因，有以下三種：1. 軍事外交費；2. 災害救恤費；3. 天子各種任務開銷，詳見桑田幸三(1976)，中國經濟思想史論，ミネルヴァ書房，頁 56 以下。

[3] 侯家駒(2005)甚至認爲，在漢武帝之前的中國，和中世紀以來的西歐，其發展歷程可以歸納出人類經濟發展的規律；即在發展歷程上均是由「封建社會→重商主義→短暫重農→資本主義」之演進。詳氏著，中國經濟史(上)，聯經，頁 iii-iv。另氏進一步認爲，漢代文景之治以下出現資本主義萌芽；惟至漢武帝，爲籌措軍費，將鹽鐵酒收歸國營，並採平準政策之後，此一剛萌芽之資本主義即被扼殺。（前揭書，頁 iv）

附帶一提者，氏嘗試以制度經濟學觀點之貫通中國經濟史的想法，本文採取保留態度。詳言之，本文贊同以單一理論一以貫知之嘗試，惟此一制度之概念來自西方，如未經過固有價值內化之過程，不無水土不服疑慮，此其一。而單一客觀之制度考察作爲分析方法，如未斟酌主觀價值理念之分析，從本文採取之主觀價值判斷之立場而論，恐有輕重失衡之憾。

不過本文認爲，如何使得納稅人，在不得不處於國家公權力支配之下，仍盡可能享有「最低限度的生活保障」[1]而免於課稅之過度侵害之問題，較之前述，在法學上將更具探討實益。實則，在私利心作爲驅力的經濟體系中，實難想像一種公共義務，其負擔超越個人本身所願意承受且危及個人的基本生活，卻仍具有高度正當性。但矛盾的是，由於此一負擔界限究竟爲何難以確知；因此國家爲求足夠的財源支應，只能轉而致力於強調「課稅」之正當性，進而強調「納稅義務」的正當性。

2. 道德觀之介入時機－「補充性原則」與「制度性介入」

承上，「憲法上課稅之界限」實則反應了憲法對於「人之基本價值」與「人之社會連帶義務」二者比重之價值預設；然而，此一預設，往往必須與時俱進而配合著人權理念的演進作調整。以德國的經驗爲例，從自由法治國過渡到社會法治國的發展結果，國家的任務已不再侷限於夜警國家的任務，甚且更身兼生存照顧的功能。[2]從形式法治國到實質法治國的進展，更使得以自由權爲中心的財政憲法觀，獲得更大的支持[3]——亦即，憲法對於整體租稅負擔所設置之最低生存下限和半數原則(Halbteilungsgrundsatz)之上限兩者。[4]

不過在此，本文要強調的是國家補充性原則（Subsidiaritätprinzip）的回應[5]。誠然，討論此原則時，不能遺忘該原則原本具有保障自由之社會功能，而必須由社會發

[1] 對於國家之任務而言，即提供一使人民「無後顧之憂」之生存條件。
[2] 相關討論以及面對此種型態的轉換，課稅原則所須有之回應，請參照　福家俊朗(1999)，公的負担の法理におけるバラダイム転換－統治におけるバラダイム転換との連動性, 名古屋大學法政論集，177 號。
[3] 請參照　谷口勢津夫(2007)，税法における自由と平等，税法学 546，頁 210-211。另日本文獻關於半數原則的討論，暫請參考　奥谷健，課税の負担と上限，税法学第 558 号，頁 23-42。
[4] 請參照 P. Kirchhof, Besteuerung im Verfassungsstaat, 2000, S. 31f. 半數原則之提出與批判，詳見 BVerfGE 93, 121; 115, 81(97ff); 德國對半數原則之專論，H.Butzer, Freiheitsrechtliche Grenzen der Steuer-und Sozialabgabenlast: Der Halbteilungsgrundsatz des Bundesverfassungsgerichts im Spannungsfeld von Globalisierung, Freiheitsrechten und Sozialstaatlichkeit, 1999.
[5] 詳見 J. Isensee, Subsidiaritätsprinzip und Verfassung, Aufl. 2, 2001.

展過程中之功能該當性與實效性予以斟酌考量；國家行爲不能單以公共目的爲由即強行介入，尚需考量比例原則之適用，而只有在**社會不能自己達成時，國家才能介入**[1]。

而基於租稅與私經濟之相互依賴性，國家作爲維持財政公共性存續之前提下介入時，唯有也使自己以私利爲中心之運作方式來從中進入，並同時在每個基本權主體受有受到侵害之虞時，順著該基本權主體之行爲下從旁輔助——此即本文所謂之「制度性介入」之理念。

只是，鑑於社會法治國時代的來臨，社會對於國家所求日增，公共事務日益繁複，國家職權在必然擴張情況下，國家之補充性格，不僅不應因此轉向主動地介入私人事務；毋寧，國家在一方面在與私人事務之交集程度增加的同時，更應提高警覺，對隨之而來公權力濫用可能之新態樣，而時時以比例原則自我檢討；如此，國家之補充性格，方具積極意義。

另補充性原則對於企業者國家理念，毋寧具有相當挑戰性。國有財產之正當性，在於補充性原則。[2]

（二） 納稅義務之「倫理基礎」

1. 從「社會之個人觀」到「個人之社會觀」－「群體」與「個人」

[1] 葛克昌(1997)，國家與社會二元論及其憲法意義，收於氏著國家學與國家法，月旦，1997，頁 38-39。氏申述，此點對國家而言具有雙重意義：其一，國家負有防止社會體系權力之濫用與壟斷之義務（如獨占，寡佔之管制），對現有之社會勢力國家應保持中立（如歧視禁止，權力濫用禁止，行政中立），並確保經濟，文化，政治，藝術團體功能之發揮。其二，國家應自我節制，對於複雜之社會組織體系，國家在介入時應予自制，以免破壞原有體系的穩定性，如國家對市場價格之管制措施即應慎重。蓋國家之自制，乃個人與社會自由之必要條件，如有所逾越，個人與社會自由均將被剝奪(Rupp, Die Unterscheidung von Staat und Gesellschaft, in HStR I, 1987, §28, Rn. 52 轉引自葛克昌，前揭文，頁 39，註 81。)。

[2] Isensee, HStR VIII, §122, Rn. 91, 92.

此與公共選擇理論中認爲個人在公領域中有隱藏自己財政偏好的傾向有關。只是，此種所稱「方法論之個人主義」所明白透露個人主義思考的方法論，其理論上不僅受到各方有力之批判，在社會市場經濟作爲財政體制的憲法架構下，其適用更面臨理論上的移植困難。因爲此涉及在理解方式上的不同－即「從個人出發」與「從群體出發」的不同。

申之，前者（即從個人出發的視點），即以「個人」爲行動之主體，一切的考量乃以個人之利害爲中心。反之，後者（即從群體出發的視點），即以整個群體爲觀察的對象；而本文所謂之「群體」乃指多數個人的組合體，是以重視的毋寧是個人與個人之間的相互關係。

不過，由於法規範的對象（倘以稅法爲中心），係以個人（即「納稅人」）爲規範主體。是以**上述「個人」與「群體」的兩種觀點，應用於法學研究上，不妨轉換成「主觀」與「客觀」之考量。**亦即，一種以自我爲中心的出發點的「**個人觀**」，以及一種透過個人所身處之外在環境及該個人所行諸於外之各種行爲選擇等等，來判斷個人內心價值世界之「**社會觀**」。[1]

2. 「權力面」與「義務面」

實則，中國傳統思想對「人之行爲」之影響，主要在於教化。換言之，本文認爲，從「**權力收受**」之觀點，相對於權利意識之伸張，毋寧是一種「**義務承擔**」面的思考。申之，如何正當化「社會中之人」其對於所處體制內所賦予義務之正當性，反而成爲傳統中國社會中之人民，傾向於說服自己或強迫自己內化該價值的因素

[1] 在此，本文認爲二者之不同，甚至可以用不同語言對相同知識之理解之不同處爲例來說明。簡言之，用母語來學習一概念，以及用外語來學習一概念，在方法論上就有不同。

[1]，使自己更容易去接受其身爲「體制內的人」所負有的義務。要之，課稅權正當性之問題，就是人居於體制內之義務的正當化問題；而此一**義務之正當化問題，勢必涉及課稅之倫理基礎。**

3. 租稅法規範之倫理基礎——納稅義務之倫理基礎

承上，當「社會中的人」必須同時成爲「體制內的人」時（亦即，當人的行爲同時要符合社會規範與制度規範二者之標準時），勢必產生二者義務是否有所衝突的問題。誠然，如果說體制之建置目的是在於解決人居於社會的共同問題，人之「社會義務」與「體制義務」，應不致有所衝突，反而相互呼應才是。亦即，二者背後之倫理基礎（或是價值）應該是相通，甚至是相等的。

只是，當這些義務成爲具體之法規範，轉而成爲個別之具體義務時，往往產生個別義務與體制背後之建置倫理之間明顯產生貌似衝突的關係。

4. 小結－「納稅人之基本權」是一種納稅義務的「外觀」

鹽鐵會議在傳統中國歷史上，或許可以被評價爲一政治事件，並進一步論證「政治之道德性」問題；但從租稅倫理角度，鹽鐵論中所載之對話內容在在顯示了納稅義務正當性之論證，而此論證上之困難，在本文看來，乃與中國傳統上道德與法律二者概念上無法明確區分的事實有關。[2]

在此必須重申的是，當國家課稅之正當性和人民私有財產制之正當性二者兩相衝突時，課稅權之憲法界限，提供了一個限制國家課稅權力極爲有力的理由。亦即，

[1] 在此特指儒家倫理之「秩序觀」。或許，從外國文獻的觀點，就是一種對「和平」的傾向。
[2] 請參照 仁井田陞 (1967, 1968)，根本誠 (1978)

對於此一納稅人財產之「侵害來源」之去除，界限論提供了一個有效的解消方式－即，否定該國家課稅行爲之效力。

但本文想說明的是，權利與義務二者，在租稅法律關係當中，未必即爲一體之兩面。申言之，納稅人之基本權，只是一種納稅義務的「外觀」，一種納稅義務的表現方式。而稅法學上亟待處理之核心問題，依舊是義務之問題（亦即透過納稅義務之課予來分配稅捐的負擔），不是權利的問題。反過來說，稅法學上典型之納稅人權利之保障方式，毋寧是以「平等分配稅負」之方式實現，

五、「稅法規範基礎」之探求：稅法規範其形式與實質之重塑

在此透過鹽鐵論的引介，本文嘗試跳脫西方框架下界限論所帶來外觀式的思考，而直接探觸納稅義務本身。除此之外，在一個繼受西方法制的華人社會中，還需面對法制繼受是否完整之問題。詳言之，此一課稅權和財產權在形式上的對立關係，究竟係出於課稅之憲法界限在論理上如何劃清之問題，抑或是出於傳統與繼受之間的齟齬問題，才是符合時代意義，而必須先行加以釐清的前提問題。而傳統與繼受之間，置於法律繼受觀點，仍爲一形式與實質之二分問題。

（一） 稅法上之「私利」（稅負極小）與「私益」（個人滿足極大）

誠然，租稅國家乃以租稅收入作爲其主要依據。然而，在實際徵收上如何能夠達到與法律規範之要求一事，不無疑問。申之，如何設計一套租稅制度能夠精準地掌握納稅人之經濟利益或負擔能力者，方爲所求。

只是，納稅人之行爲動機難以探求，其所展露於外之種種行爲態樣更是千變萬化，

作爲徵稅者之行政機關乃至於維護租稅正義之司法機關，對於如何預測納稅人之行爲，始終不遺餘力。法治國家之要求下，如何在不「強意」於納稅人卻依然能夠準確掌握納稅人之心理乃至於其價值判斷，則是不得不加以面對的時代課題。

而此一問題之處理，在東亞諸國（有謂係「西洋法治上後進國家」），只有更爲複雜棘手。詳言之，基於歷史因素，東亞諸國在法治發展上有定位爲「後進法治國家」者，在現代化過程中不得不接收西洋先進法治建設之前提下，往往產生如何與西方法治精神相互融合之問題。而從對外國法思想、法制度之「繼受」與「理解」來突顯以「固有法」與「繼受法」二者關係之重要性；其在財稅法學之應用上，則擬聚焦於稅法上固有概念與借用概念二者之區別時，不得不注意之前提問題。

以對納稅人之行爲之掌握爲例，其行爲之動機，除了稅負最小—亦即造成利潤最大結果—之考量外，是否還有其他基於納稅人本身特殊價值判斷之行爲考量，亦值注意。此類「個人價值判斷」（或稱「私益」）未必等同於個人經濟上之利益（或稱「私利」）之多寡，而往往不易藉由上述利潤最大之考量而對該納稅人產生相當程度之預見可能性；但透過納稅人所處社會環境之價值理念之理解，來據以判斷納稅者行爲之動機者，在理解上、分析上、乃至於預測上，或許提供了若干可能性。

（二） 行爲與偏好－本文所謂「主觀」與「客觀」之提出

納稅人之行爲，乃是其偏好行諸於外的形式。倘該行爲係以利益模式（即手段直接有益於目的之達成者）爲考量，該行爲之預見可能性較高。以納稅人之行爲爲例，倘其係以納稅人之稅負最小化爲目的，則在判斷納稅人所可能採取之諸手段，

自以最易達成目的之手段爲優先選項。由此觀之，無論係納稅人自己或係徵稅方之國家，在藉助此種利益導向之決策模式思考，均能夠大致預見納稅人之行爲，而預爲管制甚或援用爲誘導工具。

然而，納稅人之行爲，並非全出於利益考量，或者說，納稅人之主觀偏好，亦非僅由「稅負最小化」之想法所主導，諸如納稅人種種自我實現之行爲，其實未必以「自利」爲考量。甚至，以稅負最小化爲目的之行爲，本質上仍應認爲係附屬於營利動機，而僅具附屬地位；只是在考量租稅必與資本主義共存共亡之現實因素，深陷其中之納稅人往往或因不自覺或囿於社會現實而反受其所奴役支配而已。

另一方面，即便跳脫資本主義等時代框架，納稅人行爲之目的，本即不應、實亦難以單從「個人私益」此一因素加以理解掌握。詳言之，倘一個人之主觀偏好，係由其所認同或所受到之各種價值所構成，而稅負最小化作爲體現各種價值之一部，自難以完全預測納稅人行爲之動向。而爲求緩和繼受法與固有價值二者之衝突，在稅法建置上恐怕不得不兼顧納稅人行爲背後之各種主要價值判斷。而個人之價值判斷爲何，卻非爲他人所得以輕易預測。

（三） 主觀理解與客觀理解－主觀係一種「固有理解」

與利益模式相對者，爲價值模式。相較於利益模式所具備之預見可能性，價值模式由於係個人基於其個別主觀偏好之選擇過程，其內容不僅難以客觀地從外部觀察，即便得觀察亦未必能夠爲他人所理解。詳言之，納稅人之行爲作爲納稅人目的之外在形式，從旁人觀之，自可能造成各種不同之理解；只是諸此種種不同於行爲人本人之理解，實乃由於他人與本人在主觀上偏好不同，致使價值取捨究竟有所不同之故。而從同居共活於同一社會之人其價值理念應較爲相近之觀點，亦

僅爲各人價值理念中同受所處制度影響者，而較易被其他同居共活之人所理解之部分而已。而其餘部分，對旁人而言，只得由揣摩其本人之思考模式方可能略知一二，此種取向，本文稱之爲固有理解。固有理解，則是運作個人自身內部各種價值取捨之動力。

（四） 語言與知識－溝通作爲理解之前提

價值之取捨，乃思想之活動，是以各種價值之間的衡量，非思想無以呈現。惟一人之思想欲表露於外而與他人之思想產生互動，則須透過語言加以具體化。是以價值之間之溝通，必待語言作爲媒介。

透過語言來相互理解之過程，兩種價值之相互溝通成爲一種可能。本於語言之邏輯具有形式邏輯和價值判斷二者（借用 Perelman 之觀點加以推論）[1]，本文認爲，透過語言作爲載具，不同價值之間亦應具有溝通可能；但前提在於，彼此之間在語言上（亦即形式邏輯上），具有溝通的可能。此種可能性，乃植基於一套能夠同時表達者思想並且能夠傳遞各表達者之間思想之溝通機制。語言學上之類似說法，乃所謂共通文法之假設(Universal Grammar)。

（五） 規則與原則－利益模式與價值模式之相互性

透過此一假設，作爲溝通媒介之語言規則，與傳遞思想之價值原則，將具有一定

[1] Perelman 認爲，邏輯不僅只是有如同數學公式般的形式邏輯，同時亦有如同價值判斷般的辯證邏輯而後者乃是一種對各種人類行爲目的之判斷。基此，價值判斷者，乃是作爲是非、善惡、效用與否之基準。相關資料，中文請參考王效文(1997)，法、論證與修辭學－Chaim Perelman 新修辭學法理論之研究，政大法碩。顏厥安，(1994, 1995/2003)，法、理性與論證──Robert Alexy 的法論證理論，收於：法與實踐理性，允晨。

另值一提著爲，語言與知識二者之關係，在傳統中國哲學思想中亦能見其蹤跡。如莊子之思想體系，詳見林俊宏(2001)，《莊子》的語言、知識與政治，政治科學論叢第十五期，頁 101-134。

程度之關聯，而可能相互影響。此外，更重要的是，透過此一相互性，使得我們即便難以直接掌握他人之固有理解，卻能夠在確認此一相互性之前提下間接影響其主觀偏好，以遂規制目的。

不過在此須加以強調者爲，納稅人自由作爲財政憲法之核心價值，即便能透過利益模式加以理解，其內涵並非「納稅人之利益」所足以涵蓋。詳言之，在資本主義市場經濟體制下，納稅人自我之實現已逐漸能透過其財產之多寡予以量化，是以對納稅人財產之提高與減少，毋寧直接地影響其自我實現之能力（已知道該如何自我實現）或可能性（尚不知道該如何實現）。換言之，利益模式之確保亦有助於納稅人價值之確保。

綜上所述，對於台灣之稅捐釋憲實務，或許能有下述此一具體推論：

稅法領域中，違憲審查或法律解釋之對象，應該是納稅人「個人」之行爲選擇（即顯露於外之價值選擇）[1]與憲法「秩序」所表彰基本價值決定二者是否相符之問題。

[1] 此部分乃是對公共選擇理論之反思。

捌、　課稅界限、稅法規範與固有性－結論

Early in Life, I formed an idea of rich and full life to include economics, politics, science, art, and love. All of my failures are due to the observance of this program and my successes to the neglect of it; concentration is necessary for success in any field.

Schumpeter[1]

華人社會與西方諸國的淵源各異，雖在歷史上偶有數次大規模的交流，但在發展上究屬不同。惟有趣的是，在各自的發展歷程中，卻面臨了相同的難題而有待解決；本文所研究之課題，毋寧是法學上之一適例。同樣面臨對外戰爭的龐大支出，國家如何透過其財政政策於經濟體制中謀求最大利潤，以支應費用，取決於其經濟體制之選擇。然而，經濟體制之選擇，往往可能對人民之經濟生活造成全面性的影響，而在現代國家中更成爲憲法學上關鍵問題。

然而憲法學與財政學二者觀點畢竟不同，其背後之價值取捨更不能等同視之，但可以確定的是，「國家是否介入市場」此一千古大哉問，似乎已儼然成爲東西方所不約而同關注的焦點。本文則焦點集中於《鹽鐵論》與《租稅國危機》兩大財經政策辯論之分析，強調租稅倫理與稅法規範二者之互動關係，同時，也突顯固有法與繼受法之溝通可能性。

一、社會市場經濟下財政憲法之定位－固有性與預見可能性

透過《鹽鐵論》的引介，能夠使我們跳脫西方框架下界限論所帶來外觀式的思考，而直接探觸納稅義務本身。鹽鐵會議之思想對辯與當時社會背景之結合，說明了

[1] Schumpeter's report for the *Harvard Crimson* on 4th November 1944, cited from Allen, Robert Loring, Opening Doors: The Life and Work of Joseph Schumpeter, 1991, p.152.

課稅權與納稅義務正當性二者在傳統中國之關聯性。只是由於中國傳統上道德與法律二者概念上無法明確區分，使得納稅義務之正當性出現了論證上之困難。本文透過西方法治思想中原則與規則之二分以及關連性作爲橋樑，用以協助二者之釐清。實則，原則衝突與規則競合二者所揭示之價值權衡與先後定序問題，亦與貫穿中國經濟倫理思想之「義利之辨」理念不謀而合，充分顯示出中西倫理思想之些許共性。

以下嘗試以此納稅人主觀預見可能性爲座標系統，說明現代國家其社會市場經濟與財政憲法之可能定位。

（一） 民生福利國思想之調和：以固有性爲中心

（二） 稅捐立法：給予納稅人行爲之裁量空間

（三） 稅捐行政：疑則爲有利於國庫解釋之「義利之辯」說明義務

（四） 稅捐司法：在有限之租稅負擔選項之中，納稅人在主觀價值取捨之後，納稅人採取合法節稅之行爲是否仍具期待可能性。（否則即是限制納稅人之價值判斷、裁量之自由。）

鑑於議會民主對於租稅正當性不再有完全之把關能力，稅捐司法部分從憲法觀點賦予實質限制功能，已有日趨主動積極之必要。[1]實則，就本文觀點論之，議會民主作爲課稅正當性基礎之意義，已非把關能力有無的問題，而是正當性基礎有無的問題。

換言之，當議會通過之稅法雖具有形式意義，但一旦無法實質上如實反映納稅人利益時，則稅捐司法機關的因應，也不再是堅守立法解釋問題，而毋寧具有積極

[1] 參照 [Gee (2006b; 37~)]

之立法監督功能，方能真正落實納稅人之實質保障理念。

二、納稅人之價值判斷模式、補充性原則與稅捐違憲審查基準

本文認爲，從上述繼受觀點而論，所繼受者縱具可行性亦仍須考量「固有性」——即納稅人之主觀價值判斷——方能精確掌握保障之核心。而課稅界限作爲現代國家約束國家權力之憲法機制，如不能顧及受保障主體之主觀價值判斷，此種保障機制，難謂已然具備實質法治國家之要求，而仍無法掙脫形式法治國之枷鎖。

透過以下之嘗試，本文期能將「固有性」結合「課稅界限」概念，並具體化於稅捐違憲審查基準之中。

（一） 人權保障－國家權力「補充性」之反證

本文最終目的，乃在於對納稅人之權益，提供一最適切之保障。課稅界限作爲反映納稅人權益之保障機制，自應盡可能地體現納稅人之行爲及至於主觀內心價值判斷上受到國家權力之各種形式之限制。

（二） 課稅界限之特質及其四層意義：從制度到個人

以固有性之第二層意義—亦即「學門相對性」下固有概念與借用概念層次—觀之，課稅界限之分析，有四層分析意義；要之，即法律、財政、社會、倫理等四個面向，具有層遞的關係。

1. 法律面：過度禁止

首先在法律層次而言，課稅界限在憲法上之相應概念是比例原則之具體化。亦即

現代憲政國家中，國家之課稅權力具有最高性，而同時在法治國家要求下，課稅權無疑地對人民具有直接侵害之可能性。是以比例原則之要求勢必應更受重視。

2. 財政面：量能平等

然而，此一比例原則如何具體化於稅法領域者，則係第二層次－財政層次－問題。此一層次涉及租稅本質，亦即稅負公平理念之落實問題。而最能反映稅負公平本質之量能平等負擔，毋寧兼具有憲法平等原則考量。將量能原則理念之導入，具有具體化財政憲法上平等原則要求之功能。

3. 社會面：行爲動機

不過量能平等負擔下之課稅界限，仍不能忽略租稅之本質—即租稅之本質在於自由經濟體系之依附性。換言之，從社會學角度觀察，課稅權力之行使，倘無法注意此一租稅國體系之內在界限，俯仰其間之納稅人，不僅行動自由大受折扣，其行爲之誘因動機亦逐漸喪失。

4. 倫理面：固有價值

惟一此界限觀之社會考察恐怕欠缺具體之預測可能性。在不同社會要求下有其各自型態，而須依各自固有性—亦即源自於社會倫理價值之思考—加以調整。傳統中國社會中義利之辯思考，作爲納稅人（或負擔徭役之人）之判斷，具有彰顯固有性，調整課稅觀之功能。

（三） 課稅界限對**納稅人行爲**之「限制」：規範機制之建構爲例

而稅法規範如具固有性之關懷，勢必能從其所管轄人民之價值理念預測行為之動機；從各種行為動機中整合，找到總稅負之上限，再以此上限為限度，衡量納稅人能力，以平等分配負擔於每個人，最後方具有討論此種課稅行為是否違反比例原則並具體落實其理念之實益。

1. 倫理面：行為動機之偏好

內在的限制，受到社會價值之影響，納稅人之行為偏好可能具有固有性色彩而不易預期。但另一方面，納稅人行為選擇之範圍，也因偏好之故，而受到相當程度之限縮。簡言之，在確知納稅人行為偏好之前提下，納稅人終局選擇從事自身偏好以外之選項一事，是很難被期待的。

惟誠如本文所論證者，價值判斷模式作為辯證邏輯而仍具有共通性一事出發，縱納稅人之行為偏好具固有性（在傳統中國即義利之辨之價值判斷模式），也因具備邏輯性而具有推測其行為傾向之可能。因而，縱然納稅人仍有可能，未依其偏好而行為，但此等行為也因固有性作用之影響而預見可能性極低，而反而更顯得價值判斷模式之高度預測可能性。

2. 社會面：行為自由之空間

市場經濟體系之幅員，亦界定納稅人活動之空間，但也限制了納稅人行為之自由程度。而市場不能不依附社會而存，因此社會之大小及其資源多寡將決定依附其上之市場經濟體系，從而決定了納稅人其行為之場域，甚至所處社會共同體中所形成的價值，也成了行為人價值取捨之一部分，限縮了行為選擇之可能性。

3. 財政面：財政體制之限制

制度因素作爲課稅界限之一環，強調的是納稅人行爲在具體制度中所受到其規範之拘束。此種制度之限制，乃相對於社會價值之侷限。申之，前者偏向外在之限制，對於納稅人行爲背後之偏好，僅具有消極減少其選項之作用；相對於此，後者，著重納稅人內在之價值形成，雖無法不承認其價值範圍有限縮可能，但此毋寧有助於使納稅人偏好之具體化，賦予發展可能性。

4. 法律面：法制體系之限制

誠然，法律之目的如係保障納稅人之行爲自由，則其意謂著在法律所肯認之範圍內所爲之行爲，受到保障。惟另一方面亦意謂，在法律所肯認之範圍外，則爲法律保障所不及，亦不符保障之目的本旨。

此外，縱納稅人係處於市場經濟自由之內，其行爲之自由亦因憲法採取保障類型之不同或納稅人之行爲不容於憲法之價值選擇，而在結果未必受到保障。是以，如納稅人欲使其行爲受到相當程度之法律保障，反而必須有目的地使自己的行爲符合法律規範之範圍內，而可能因此限制了納稅人之行爲自由。

是故，法律之保障，某種程度而言，反而是一種限制。對於此種限制，在現代憲政國家中是否能有所抑制，以本文角度來看，取決於下述標準是否確立：

1.行政上是否明確賦予納稅人適度之選擇空間

2.立法上是否係以納稅人爲保障之對象

3.司法上是否兼顧納稅人之預見可能性。

（四） 以「納稅人」爲保護主體之稅捐違憲審查基準：抽象到具體

「課稅界限」之四種不同面向互相關連、相互補充之特性，亦可反應在稅捐違憲審查基準之中。

1. 稅法面：課稅行使有無過當

首先，法律層面而言，以法律之形式課予租稅，自有比例原則之考量，以兼顧納稅人之基本權保障。申之，國家課稅權之行使，對於納稅人

2. 財政面：公共負擔有無平等

其次，課稅權力之行使縱然合於比例原則，稅法所課予納稅人之負擔能力，更應達到「量能平等負擔」之要求，以維持市場機制之公平性；

3. 社會面：行爲動機有無選擇

再次，社會層面來說，即便達到量能平等負擔之外，每一納稅人在總稅負上亦有其上限，逾此上限，交易之行爲誘因將不復存，市場機制亦不復在。

4. 倫理面：固有價值有無衡量

但最後，倫理層面而言，納稅人行爲誘因之強烈程度因其所處之制度限制以及所處之社會價值觀感，而有地理時空之差異因此有細緻化必要。

不過在此須注意者爲，對於行爲人之主觀考量之解釋自不能恣意爲之。理由有二，除了有權解釋者並非行爲人本人之本質上侷限外，制度上賦予解釋者之權限多寡，以及該制度之繼受與執行可能性問題。

（五） 小結：制度要素與社會要素

詳言之，在追求最大私利之預設下，其實每個人的行爲都有其相當程度之類似性而有機可循；然而，針對植基於個人價值觀所爲之自我實現行爲，則由於價值理念不同，而難以預測判斷。前者之預測可能性，在於**制度所賦予之最大營利可能性**，本文稱之爲「**制度要素**」；而後者，本文也認爲具有預測可能性，只是其原因乃源自於其**所處社會之價值理念所給予之最大可能之認同**，本文稱之爲「**社會要素**」。

玖、 展望－民生福利國思想之挑戰與願景

一、固有性與課稅界限之歷史脈絡及其現代意義

（一） 實質法治國原則之形骸化危機

傳統中國之賦稅改革，具有一歷史脈絡可尋。[1]然而如何從財政社會思想予以觀察，甚至在實質法治國理念受到肯認之當代華人社會中賦予其憲法意義，研究價值甚鉅，更是不得不面對之時代課題。

[1] 傳統中國歷史分期的研究，在日本有著相當程度的累積，其中稅制改革之分期，請參考島居一康、「中国における国家的土地所有と農民的土地所有――両税法時代を中心として――」、東アジア専制国家と社会･経済、青木書店、1993；長井千秋、中華帝国の財政、東アジア経済史の諸問題、阿吽社、2000。另關於傳統中國之經濟管制發展，英文文獻簡明請參照 Loewe, M., *The Operation of the Economy*, in: IMPERIAL CHINA, THE HISTORICAL BACKGROUND TO THE MODERN AGE, Rainbow Bridge, pp.183-. [Loewe](1969/1973)

現代國家之所以多爲租稅國家，自有其歷史演進意義。傳統中國稅賦徭役體系之演進脈絡發展至今，是否與西方之發展成果遙相呼應，未必可知。然而，在稅法上透過繼受或移植之過程，中西方各自發展之理念勢必有所交集，甚至產生連結。不過在二者具有相互關係之前提上，如何於具體制度中緩和或減少不必要之紛爭，依舊甚具現實意義。

而如能對傳統中國歷朝歷代之諸改革作更進一步之梳理，確認一以租稅倫理之轉換軌跡，俾供租稅立法參照之用，則課稅之憲法正當性將更能兼具固有性與共通性，而租稅倫理與稅法規範之關係，亦可成爲檢驗稅法規範基礎之標準。

二、體制轉軌與課稅之正當性

稅法學上之回應，本文透過固有性來突顯繼受國之社會價值背景，以提高課稅界限理論之繼受可行性，但二者均以納稅人其行爲之預測可能性（predictability）爲中心。下述則係強調共通性與固有性二軸線之梳理功能。

（二） 體制轉軌：「共通性」作爲溝通基礎

在長期受到儒家道統所支配之華人社會，如何與近年來改革開放所標榜之轉軌政策交互作用，有其異於西方文化之重大意義。然而，即便如此，同樣對於「國家是否介入市場」這個憲政體制上之基本問題，西方的歷史經驗，仍深具參考價值。本文乃以文本相互對照之聚焦方式，透過對《鹽鐵論》與《租稅國危機》中西財經政策之辯論，分析其體制上之憲法意義；認爲，從國家資本主義體制轉型爲市場社會主義之政策取向，其體制之轉型上在憲政上須符合一些基本要求，始足以

避免或緩和不必要之危機。

是以體制轉軌對於本文而言，其意義有二，一爲財政國家體制之轉型，一爲社會運作力量之轉質；前者是轉換基礎其共通性之認識問題，後者是固有性之維持。然而，前者之完整轉型，有賴後者之確立；換言之，也只有對固有性之徹底理解，方有尋求可能尋求真正之共通性。

（三） 「固有性」作爲社會心理因應：納稅人主觀要素之重視

如能借用 Rawls 之 maximin 理念[1]——進而認爲，任何一次財政改革的正當性，繫於是否能對於社會中最弱勢的群體提供更有利的條件的話（to the advantage of the least fortunate）；——那麼社會市場經濟的體制所將面對的憲法難題，將可能是如何藉由法治的建設，防免或緩和黃宗羲「積累莫返之害」所“預示”的警訊。而法治建設的健全，則在於一套真正能夠落實義務平等的價值體系，透過法原則明確地指導於各個法規則中，始足致之；在財政憲法的領域，量能平等負擔之原則體現於各個稅法之中，始有機會將憲法上平等的理念貫徹之中。

或許，從納稅義務觀點所追求之租稅正義，乍看之下很可能與追求租稅利益之結果無異。然而，只有透過對私利之抑制，方能探觸社會心理之界限問題。誠然在傳統中國社會中，以德性倫理爲中心之意識型態，未必能反應真實赤裸的社會現實；然而，此一意識型態並不失爲一社會現象之本質意義，且此一本質，在華人思想體系中占有相當程度的支配性地位。

因此，最重要的，恐怕還是在主觀心態上之準備；亦即，能使自己平心氣和地迎向東漸的西風，冷靜地思索中西文化調和的出路，方爲穩妥。否則，在一個企業

[1] Rawls, J., *A Theory of Justice*, Cambridge, 1971.

者國家理念盛行的年頭，社會所期待的，恐怕只會是一個「租稅法隨風飄逝、經濟法亙古長存」的時代。

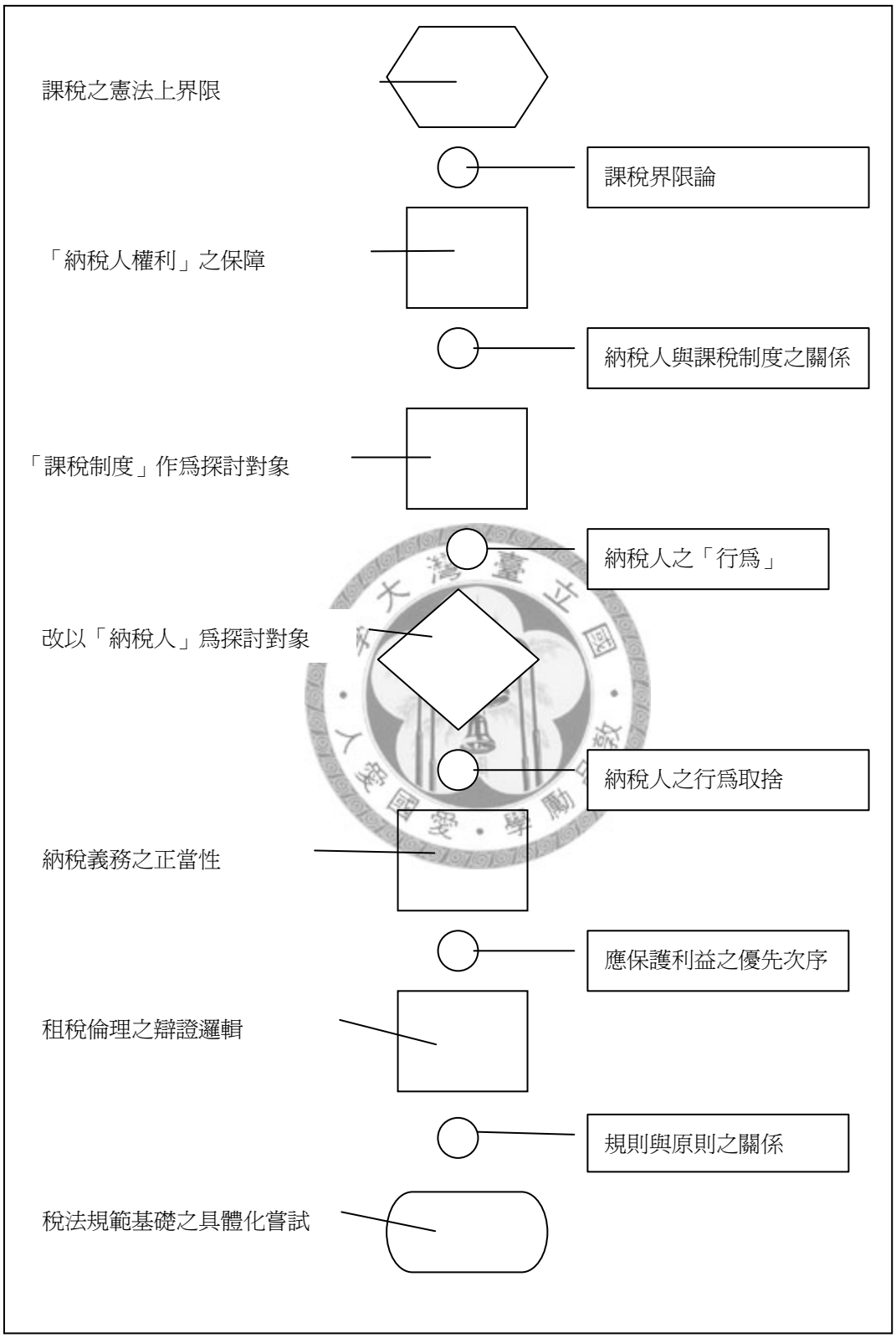
在此，何妨再以孫文「知難行易」一語共勉！

吾心信其可行，則移山填海之難，終有成功之日；

吾心信其不可行，則反掌折枝之易，亦無收效之期也。

摘自《孫文學說·自序》

附：本文思考脈絡


課稅之憲法上界限
課稅界限論
「納稅人權利」之保障
納稅人與課稅制度之關係
「課稅制度」作爲探討對象
納稅人之「行爲」
改以「納稅人」爲探討對象
納稅人之行爲取捨
納稅義務之正當性
應保護利益之優先次序
租稅倫理之辯證邏輯
規則與原則之關係
稅法規範基礎之具體化嘗試

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說明：

1. 以羅馬字母拼寫之參考文獻（如英文、德文），係以字母順序編排；以漢字書寫之參考文獻（如繁體簡體中文、日文），係以姓氏第一字筆劃數編排。
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附錄　兩文本之校注、譯本與註釋一覽表

- **《Die Krise des Steuerstaats》=The Crisis of the Tax State=租稅國危機**

Year		Language
	Original	
1918	Die Krise des Steuerstaats, Zeitfragen aus dem Gebiete der Soziologie, Graz und Leipzig	German
	Translations & Annotations	
1951	〔木村元一，租税国家の危機，勁草書房〕	Japanese
1954	W.F. Stolper & R.A. Musgrave trans., *International Economic Papers*, 4 (1954), 5–38	English
1970	La crisis fiscal del estado, Hacienda Publica Espanola, no.2, pp.145-169	Spanish
1983/2006	〔木村元一=小谷義次，租税国家の危機、岩波文庫。〕	Japanese
1983	La crisi dello stato fiscale,in: Stato e inflazione a cura di N. De vecchi, Torino, Boringheiri	Italian
1984	La crise de L'Etat fiscal , Impérialisme et classes sociales, Paris ; Flammarion, 1984, p. 229-282.	French
1991	R. Swedberg (ed.), Joseph Schumpeter: The Economics and Sociology of Capitalism., Princeton: Princeton University Press, 1991, pp.99-140.	English
1996	P.M. Jackson (ed.) The Foundations of Public Finance, Vol. II, Edward Elgar Publishing Ltd., pp.330-363.	English
2005	[藍元駿譯，租稅國危機，收於：熊彼特租稅國思想與現代憲政國家，台大法碩附錄]	Chinese

- **《Yen tieh-lun》=鹽鐵論=Discourse on Salt and Iron**

Year		Memo
	Original	
91B.C.	桓寬，鹽鐵論[Discourse]	Chinese
	Revisions, Translations, and Annotations	
1931,1934 /1973	Esson M. Gale, Discourses on Salt and Iron—a debate on state control of commerce and industry in ancient China, reprinted by Ch'eng Wen Publishing Company (Vols. I-XIX(1931), + Vols. XX-XXVIII(1934)) [Gale]	English
1934	曾我部靜雄譯注，鹽鐵論，岩波文庫。[Sogabe]	Japanese
1954	山田勝美，鹽鐵論補釋支那學研究特輯 11 號，廣島支那學會出版	Japanese
1957/2006	楊樹達，鹽鐵論要釋，上海古籍。[Yang]	Chinese
1957/1985	郭沫若，鹽鐵論讀本，北京科學出版社，1957。收入：郭沫若全集，歷史編，第八卷，人民出版社，1985，頁 471-634。[Guo]	Chinese
1967/1985	山田勝美，鹽鐵論，明德出版社。[Yamada]	Japanese
1970/1994	佐藤武敏訳注，東洋文庫，平凡社。[Sato]	Japanese
1978	Walter, Georges (ed.), Dispute sur le ser et le fer. Yantie lun. Présentation par Georges Walter, traduit du chinois par Delphine Baudy-Weulersse, Jean Levi, Pierre Baudry, collaboration de Georges Walter. Paris :Seghers 1978, 1991(Chine an-81) [Georges]	French
1981	詹宏志，漢代財經大辯論─鹽鐵論，時報文化事業出版有限公司，中國歷代經典寶庫。[Zhan]	Chinese
1983	徐漢昌，鹽鐵論研究，文中哲出版社。	Chinese
1984	林平和，鹽鐵論析論與校補，文史哲出版社。	Chinese
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2000.5.	喬清舉注，鹽鐵論：注釋本，華夏出版社[Qiao]	Chinese
2001	陳弘治校注，新編鹽鐵論，國立編譯館主編，五南。[Chen HZ]	Chinese
2002	Über Huan Kuans » Yantie lun « , Vademecum zu dem klassiker der	German

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2006	盧烈紅譯注，黃志民校閱，新譯鹽鐵論，三民。[Lu]	Chinese