University of St.Gallen

International Perspectives on Wealth Taxation

Translation of «Internationale Perspektiven der Vermögensbesteuerung, Steuer und Wirtschaft (2021), p. 6 et seq.»

Peter Hongler / Matthias Valta

IFF-HSG Working Papers

Working Paper No. 2021-8

September 2021

Institute of Public Finance,
Fiscal Law and Law & Economics (IFF-HSG)

Prof. Dr. Peter Hongler / Prof. Dr. Matthias Valta***

International Perspectives on Wealth Taxation

Abstract
Based on an online workshop organized by the Universities of Düsseldorf and St. Gallen in September 2020, the following report presents comparative and interdisciplinary perspectives on the existence and future of wealth taxation. Due to additional tax revenue needs triggered by the pandemic, political initiatives point to unequal wealth distributions and want to achieve redistribution through wealth taxation. Economic considerations show that the inequalities are not easy to determine. In terms of design, approaches to a broad, pragmatically determinable tax base are at odds with sometimes high assessment requirements that are difficult to enforce efficiently. As far as the level of the tax burden is concerned, all applicable wealth taxes are limited to moderate rates so that the tax burden can be paid through revenue realized on the taxable wealth. Thus, while a wealth tax may have proved unwise from a tax policy perspective, it remains unclear whether it would not be permissible to a certain extent despite the protection of property.

Wealth taxes limited to the deemed income, income taxes as well as inheritance taxes are complementary and the transitions are fluid. Wealth taxes can functionally replace capital gains taxation and inheritance taxes. Conversely, this applies to the proportional taxation of hidden reserves. The complementary relationship has led to coordination rules in the sense of overall limitations in several countries. In federal systems, these relationships raise controversial questions of competence.

* Institute of Financial Law, Finance and Law and Economics at the University of St. Gallen IFF-HSG.
** Chair of Public Law and Tax Law at Heinrich Heine University Düsseldorf.

Contents

I. Introduction

Wealth taxation has a long tradition, yet specific wealth taxes have almost died out in recent decades. In terms of valuation, wealth taxes are associated with high enforcement costs and equality problems. The liberalization and globalization of capital markets and competition for the residency of wealthy individuals have contributed to their widespread abolition. However, wealth taxes are again more prominent in the political debate due to additional burdens triggered by the financial crisis[1] and the Corona pandemic. The OECD recently presented a study on wealth taxation and also made recommendations for the introduction of corresponding taxes in certain countries.[2]

To mark this occasion, the Chair of Public Law and Tax Law at Heinrich Heine University Düsseldorf (Prof. Dr. Matthias Valta) together with the Institute of Fiscal Law, Public Finance and Law and Economics at the University of St. Gallen IFF-HSG (Prof. Dr. Peter Hongler) organized five online seminars on wealth taxes in September 2020. A total of eleven speakers[3] presented the topics of inequalities, relationship to special wealth taxes such as property tax, relationship to income taxes, valuation as well as constitutional aspects and put forward their thoughts for discussion.

The aim of these seminars was to point out, in a comparative form, the advantages and disadvantages of wealth taxation in the current highly politicized debate on reducing inequalities and to discuss the basic technical issues involved. At this point, the main findings of this seminar series will be summarized in a short general report.[4]

II. Economical and political context

1. The inequality debate among economists

Not only since the publication of *Piketty's* "Capital in the 21st Century"[5] the topic of inequalities has gained importance both politically and scientifically, especially in economics.[6] Therefore, it was obvious to start the seminar with two economic perspectives. Both presentations emphasized the difficulties of collecting comparable data on income and wealth distribution.

Charlotte Bartels presented a study, co-authored with *Thilo Albers* and *Moritz Schülerin,* on the development of wealth distribution in Germany from 1895 to 2020. The study was based on a broad data base combining national accounts, wealth tax data, surveys and rankings. In terms of time, strong inequality at the beginning of the 20th century (1% of the population held 50% of the wealth) was followed by a trend toward greater equality, which was accelerated by the wars and the consequences of the wars, including the equalization of burdens. Since the early 1990s, inequality has begun to increase again. The wealth share of the top

---

[1] Cf. *Hey*, Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), p. 14 f.

[2] *OECD,* The Role and Design of Net Wealth Taxes, 2018.

[3] Charlotte Bartels (DIW Berlin), Isabel Z. Martinez (ETH Zurich), Eric Pichet (KEDGE Business School), Lorenz Jarass (FH Rhein-Main, Wiesbaden), Amarpal Chadha (EY India), Peter Hongler (University of St. Gallen), Ari Glogower (Ohio State University, Moritz College of Law), Matthias Valta (Heinrich Heine University Düsseldorf), César Martinez (Universidad Autonoma de Madrid), Cees Peters (Tilburg University), Fabien Liégois (University of Geneva and CMS von Erlach Poncet SA).

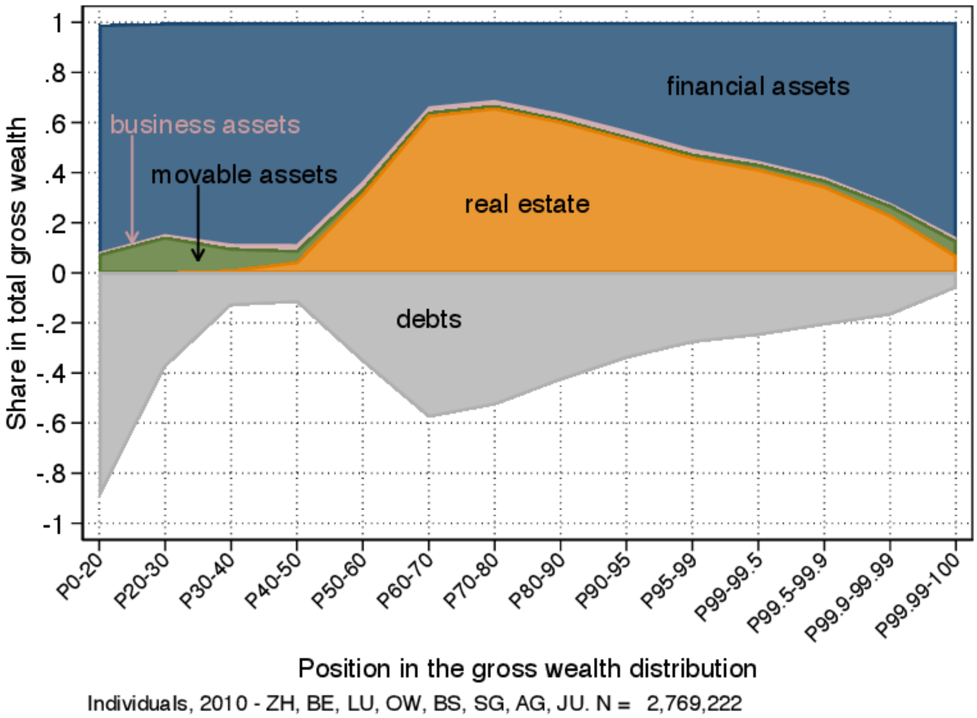
[4] For completeness, it should be noted that this is a summary of the discussion and we have refrained from reviewing and inserting primary sources of the individual domestic provisions.

[5] *Piketty,* Capital in the 21st Century, 2016.

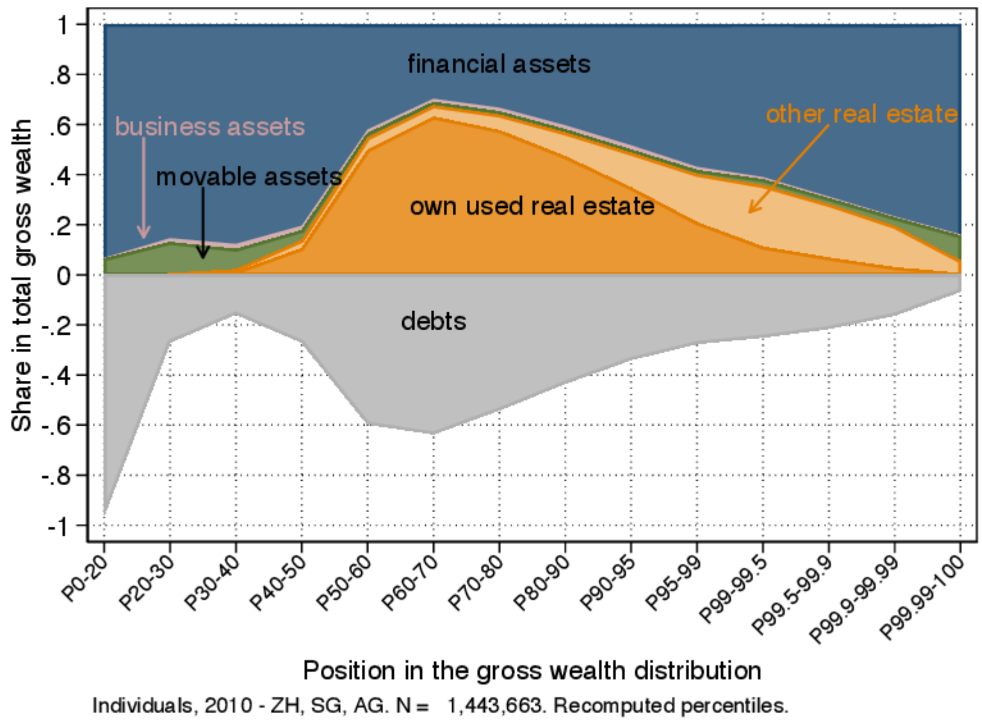
[6] *Hey*, Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), p. 15 f.

percentile increased by 1%, but the share of the bottom 50% was halved. The main growth factor for the top half, with the exception of the top percentile, was real estate assets, while for the top percentile it was corporate assets. In an overall view, real estate assets are in particular responsible for inequality, so taxing the top percentiles with the considered 1% wealth tax would change it to some degree.

In her analysis of Switzerland, *Isabel Z. Martinez* also outlined the composition of wealth across the different wealth percentiles. This shows that a wealth tax, e.g. limited to real estate, burdens the middle class much more than the top 0.5% of the wealthiest population, since the share of real estate in total wealth is much higher proportionally in the middle class. This is evident at least in the Swiss cantons on which *Martinez*'s study is based, as can be seen in the following chart[7]:



[7] *Martínez*, Evidence from Unique Swiss Tax Data on the Composition and Joint Distribution of Income and Wealth in *Chetty/Gornick/Johnson/Kennickell*, NBER book Measuring and Understanding the Distribution and Intra/Inter-Generational Mobility of Income and Wealth (2020).



These facts are crucial for the design of wealth taxation. A stronger taxation of real estate would mainly affect the (upper) middle class; the top percentile would only be particularly burdened by taxing financial assets, especially shares. But taxing the top percentile alone would change the unequal distribution of wealth only marginally; the real inequality is between the bottom and the top half, which differ in particular in terms of land ownership.

In the discussion of the presentations, it was also pointed out that despite their broad basis, the data cannot represent the government benefits and spending which mitigate or compensate for inequality. Entitlements from the state social security or welfare system, such as pension entitlements, can mitigate or offset inequality to some extent.

Even if a moderate trend toward greater inequality can be observed in Germany, it remains unclear to what extent this can be offset by wealth taxation or whether other instruments are more promising. The special role of real estate suggests that the high real estate acquisition tax (*Grunderwerbsteuer*) in some German states in particular should be taken into account as an entry barrier.

Overall, the panel highlighted the importance of making a decision based on sound data analysis from a tax policy perspective. In each state, the composition of wealth may vary across wealth percentiles.

2. Current political developments

Many countries have abolished wealth taxes. Within the OECD, the number of states knowing wealth taxes decreased from twelve to four between 1990 and 2017, leaving France, Norway, Spain and Switzerland.[8] France, in turn, converted its wealth tax into a real estate

[8] OECD, The Role and Design of Net Wealth Taxes, 2018, p. 16.

wealth tax.[9] It is worth noting, however, that some countries imposed the wealth tax temporarily for a few years during the financial crisis.[10]

In Germany, the special situation exists that the wealth tax is inapplicable following a decision by the Constitutional Court[11], but the Wealth Tax Act has neither been reformed nor repealed. Initiatives for a renewed levying of the wealth tax have been in the election program of the Left Party for several years in the form of a millionaires' tax with a tax rate of 5%.[12] Since 2019, there has also been a resolution of the presidium of the Social Democratic Party for the reintroduction of the wealth tax.[13] This proposal includes a tax rate of 1% with high personal allowances for single persons/for married persons or registered partners. One considerable approach is that corporations should be subject to tax themselves and double taxation for shareholders should be mitigated by a half exemption (half-asset procedure).[14]

In India, the wealth tax was abolished only recently, as *Amarpal Chadha* reported in his presentation. The wealth tax was introduced in 1957, i.e. about 10 years after the introduction of income tax following independence from Great Britain. In particular, "non-productive assets" (i.e. real estate with exceptions, vehicles, jewelry, cash, etc.) were taxed. However, the wealth tax was abolished with effect from April 1st, 2016. It was a 1% on assets above INR 3 million (approx. EUR 34,000) and was levied on worldwide assets. Following the abolition, income was taxed more progressively to compensate the fiscal loss of the abolition of the wealth tax. A main reason for the abolition was the intended simplification of the tax system and the reduction of the high collection costs of the wealth tax, whose fiscal revenue was relatively low compared to the collection costs. However, there are also efforts in India to reintroduce the wealth tax in order to counteract increasing inequalities. Moreover, a reintroduction of the wealth tax would also serve to curb the shadow economy in India. However, *Chadha*'s remarks have shown that this purpose of the wealth tax (i.e. reducing the shadow economy through additional transparency as a result of asset disclosure) must be questioned in a digital age, as the tax authorities have much more data at their disposal and the shadow economy can thus already be reduced to a greater extent, especially through increased digital payments. In addition, India has also introduced additional disclosure requirements in the wake of the abolition of the wealth tax.

Two prominent democratic presidential candidates in the United States called for the introduction of a wealth tax for the particularly wealthy.[15] The design of these wealth taxes was highly progressive. *Bernie Sanders,* for example, proposed the following: The wealth tax would start with a 1% tax rate on net wealth above USD 32 million for married individuals. I.e., on a net worth of USD 32.5 million, the wealth tax would be USD 5,000 (USD 500,000*1 %). The tax rate increases to 2 % for assets between USD 50 million and USD

---

[9] *Hellio/Cadet/Fermine* in Taxes in Europe, America and Asia, November 2020, France, para. 316.

[10] OECD, The Role and Design of Net Wealth Taxes, 2018, p. 16.

[11] BVerfG v. 22.6.1995 - 2 BvL 37/91, BVerfGE 93, 121.

[12] Erfurt Program from 2011, p. 41, https://www.die-linke.de/fileadmin/download/grundsatzdokumente/programm_formate/programm_der_partei_die_linke_erfurt2011.pdf (last call Jan. 5, 2021).

[13] https://www.spd.de/fileadmin/Dokumente/Beschluesse/Parteispitze/20190826_Beschluss_Vermoegensteuer.pdf (last call Jan. 5, 2021); this is based on older considerations and a DIW report prepared for this purpose, *Bach/Beznoska,* Aufkommens- und Verteilungswirkungen einer Wiederbelebung der Vermögensteuer, DIW-Schriften No. 68 (2012), p. 6.

[14] Critically *Hey,* Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), p. 65.

[15] For *Bernie Sanders*' plan, see https://berniesanders.com/issues/tax-extreme-wealth/, (last accessed Jan. 5, 2021), and for *Elisabeth Warren*'s plan, see https://elizabethwarren.com/plans/ultra-millionaire-tax (last accessed Jan. 5, 2021).

250 million, to 3 % between USD 250 million and USD 500 million, to 4 % between USD 500 million and USD 1 billion, to 5 % between USD 1 billion and USD 2.5 billion, to 6 % between USD 2.5 billion and USD 5 billion, to 7 % for assets more than USD 5 billion. *Joe Biden*, however, does not see the wealth tax proposals as part of his tax policy strategy, and in this respect the topic of the wealth tax has become somewhat quieter again in the USA.

3. Is there an optimal wealth tax?

The term "optimal tax" originates in economics.[16] A discipline of its own has developed in this field, which investigates the form in which taxes, especially income taxes, cause the least welfare losses and are therefore designed optimally. Although the seminar series did not attempt to design an optimal wealth tax, individual topics were discussed in connection with the design of the wealth tax.

In an overall economic assessment, *Eric Pichet* pointed out in his presentation that, following a rational analysis, an optimal tax mix should not include a wealth tax, as this is not considered as an efficient tax.[17] It is also to be expected that wealth taxation of entrepreneurial assets will be largely passed on to consumers or even employees.[18] *Tipke* pointedly refers to this economic incidence as a "tax illusion”.[19] Nevertheless, the wealth tax enjoys broad political support due to its symbolic power, and it is therefore worth taking a look at how wealth taxes can be designed to keep the negative effects as low as possible.

III. The wealth taxes in comparison

1. Tax base / assessment basis

a. General

From an economic point of view, broad tax bases are generally preferable in order to avoid distortions caused by different tax burdens on different assets. This is intended to prevent tax-driven investment decisions from disrupting the effective allocation of capital.

However, as with inheritance tax, wealth tax poses the particular problem of the burden on business assets. If wealth tax is levied on business assets irrespective of profits, this could severely hamper investments in business operations or lead to the withdrawal of additional funds from those operations, especially if they are not yet profitable. Thus, wealth taxes on business assets can lead to a failure to make risky (but economically sensible) investments.

It is therefore not surprising that various countries (e.g. India or Spain) have exemptions for business assets. The German wealth tax provided for a reduced tax rate for business assets. Regarding the German inheritance tax, there are extensive and preempted benefits for business assets driven by constitutional concerns.[20] This would need to be considered if the wealth tax were to be reintroduced.

---

[16] See e.g. *Diamond/Mirrlees*, Optimal Taxation and Public Production I: Production Efficiency, The American Economic Review (1971), pp. 8 ff. Regarding wealth taxes see also *Saez/Stantcheva*, A Simpler Theory of Optimal Capital Taxation, Journal of Public Economics 2018, p. 120.

[17] See *Scheuer/Slemrod*, Taxing Our Wealth, CESifo Working Papers No. 8719-2020, esp. chapter 6; *Maiterth/Houben*, Vermögensbesteuerung aus ökonomischer Sicht, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), p. 87 (92 ff., 99).

[18] *Maiterth/Houben*, Vermögensbesteuerung aus ökonomischer Sicht, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift Nr. 483 (2012), p. 87 (105 ff., 109).

[19] *Tipke*, Die Steuerrechtsordnung, Vol. II, 2nd ed. 2003, p. 944.

[20] §§ 13 a, 13b ErbStG; worth reading method-critical account in *Moes*, JZ 2017, p. 858.

Other countries have different valuation methods: in Switzerland, for example, business assets are generally valued at book values and not at market values.[21] Also the German wealth tax in its last years referred to the book values. Depending on how the principle of prudence is applied in accounting law, book values lead to a considerable advantage compared to fair market values, as unrealized hidden reserves are not recognized. This leads to equality concerns, which may also be relevant under constitutional law (see III. 2. b below). At the same time, the wealth taxation would overlap income taxation to some extent.

Finally, the definition and demarcation of tax-privileged business assets from other assets is difficult and relies on legal or judicial decisions, which promotes equality problems[22] and opportunities for circumvention in equal measure.

b. Valuation

The valuation of assets in a wealth tax system with a broad tax base appears to be crucial for its acceptance and, at the same time, one of the greatest challenges. It is particularly important to ensure that the valuation is in line with the principle of equality under (constitutional) law and with economic neutrality objectives. Simultaneously, the compliance and enforcement costs for assessment must be in reasonable proportion to the revenue in order to ensure a certain minimum cost efficiency of tax collection, especially, if the tax rates are only between 0.1 - 1 %, as in Switzerland. In the context of mass administration, the legislator may and must to a certain extent rely on pragmatic solutions such as typification and flat rates.

The objective of the valuation is to determine a current fair market value of the assets to be taxed in order to create a basis for comparison between the various asset categories. If wealth taxes are only introduced for certain assets (e.g. an annual tax on real estate), however, other reference variables would also be conceivable (e.g. the capitalized earnings value in the case of real estate, which of course does not necessarily correlate with the fair market value).

The individual assets are of varying complexity in terms of fair market value measurement. In the case of listed shares, it is the share price and such price can also be easily determined. In the case of real estate, too, fair values can be narrowed down at least schematically or by type (price per square meter, etc.), so that the deviations from the actual market price remain within reasonable limits. Quite difficult, but very relevant to fiscal concerns, however, is the valuation of unlisted shares, insofar as these are subject to wealth tax. Here, Swiss wealth tax is based on the so-called "practitioner method", according to which the capitalized earnings value is weighted twice and the net asset value once.[23] The capitalized earnings value consists of the capitalized corporate income of the past two or three years.[24] The net asset value equals (simplified) the net assets (= the equity) of the company. The basis in each case is formed by the figures in the annual financial statements in accordance with local accounting law.

Peter Hongler's presentation aimed in particular at highlighting the weaknesses (but also the strengths) of this valuation method for unlisted shares. It is obvious that in individual cases such a calculation does not form the fair market value that could actually be realized on the

---

21 However, shares and limited liability company shares are generally not included in business assets (unless the taxpayer is a professional trader in such shares).

22 The contribution to the discussion by *Schön*, DStJG 22 (1999), pp. 65 f. is concise.

23 See *Hongler/Mauchle*, Is Switzerland a Role Model for Wealth Taxes, Tax Notes International 2020, pp. 645 ff.

24 Currently, the capitalization rate is 7%.

free market. In particular, in the case of companies with a strong reliance on personal contributions (e.g. a medium-sized law firm), the corporate income (and thus the capitalized earnings value) is highly dependent on individual employees, so that on the market this value would not be paid by a third party either. However, the highest court in Switzerland has protected this schematic or typifying calculation in this (or very similar) form several times.[25]

The German wealth tax also used capitalized earnings value elements, which *Matthias Valta* presented. For example, the valuation of residential real estate was based on gross rental income, which was multiplied by various factors depending on the features of the building.[26] The problem was that the gross rental income was based on a periodic unit valuation that had to be repeated, but which was then not revalued for thirty years and was only imperfectly adjusted by lump-sum markups.[27]

In the valuation of unlisted shares, a mixture of net asset value and capitalized earnings value was also applied using the so-called "Stuttgart method" based on administrative regulations. Similar to the Swiss model, the net asset value was derived from the net equity according to the balance sheet for accounting purposes, with a special valuation of the land, which alleviated the problem of the hidden reserves that frequently occur there. The capitalized earnings value was determined on the basis of the weighted arithmetic mean of the imputed return on equity for the last three financial years.[28] The hypothetical market value was calculated based on the net asset value and five times the capitalized earnings value, insofar as this exceeded the assumed normal return of 9%.[29] The proceedings were based on the assumption that the capitalized earnings value only determines the purchase price if it exceeds the normal rate of return. In 2006, however, the Federal Constitutional Court decided that the Stuttgart method, which continues to be applied for inheritance tax purposes, was contrary to the principle of equality. Despite the modifications, the tax balance sheet approach would fall short of the market values by too much than the comparative value taken as a basis by the legislator itself.[30] According to various studies, the capitalized earnings value component does not compensate for this, and in addition, high-yielding companies are valued too high compared to the market value, while low-yielding but high-investment companies are valued too low compared to the fair market value.[31]

However, the legislator could not refrain from an income capitalization method for reasons of efficiency and introduced the so-called simplified income capitalization method (§ 200 BewG), which was intended to meet the requirements of case law. However, economic studies also show doubts here as to whether the sufficient approximation to the market price required by the Federal Constitutional Court can be achieved. [32]

Over time, the Federal Constitutional Court has tightened the level of scrutiny: In 1987, it ruled that Article 3 of the German Constitution does not require an absolute equality of burdens in the area of valuation-based taxes.[33] Since 2006, the Federal Constitutional Court has

[25] See for example BGer v. 27.8.2020 - 2C_866/2019 or BGer v. 1.10.2019 - 2C_321/2019.

[26] BVerfG v. 22.6.1995- 2 BvL 37/91, BVerfGE 93, 121 (124 ff.).

[27] BVerfG v. 22.6.1995- 2 BvL 37/91, BVerfGE 93, 121 (144 ff.).

[28] R 99 ErbStR 2003.

[29] R 100 ErbSR 2003.

[30] BVerfG v. 7.11.2006 - 1 BvL 10/02, BVerfGE 117, 1 (59 f.).

[31] BVerfG v. 7.11.2006 - 1 BvL 10/02, BVerfGE 117, 1 (60).

[32] *Müller/Sureth*, Zeitschrift für betriebswirtschaftliche Forschung Sonderheft 63 2011, p. 45 (79).

[33] BVerfG v. 10.2.1987- 1 BvL 18/81, BVerfGE 74, 182 (201).

demanded, on the basis of equality before the law, that a uniform, far-reaching approximation to the market value be achieved separately from later preferential treatment, as it were as an upstream procedural step and for reasons of transparency.[34] The adoption of tax balance sheet values is structurally excluded[35] and the capitalized earnings value is not accepted as an independent valuation, but only and to the extent that it approximates the fair market value understood as the net asset value.[36] However, it is questionable whether such a valuation system is even factually possible.[37] Particularly in the area of intangible assets, there are assets for which no market prices exist and therefore no reference value against which the approximations can be measured.[38] Even with the valuation law, which has been reformed on the basis of case law, significant deviations are still to be expected.[39] In addition, the comparative view of the Swiss legal system raises the further question of whether it is the task of constitutional case law to take such pragmatic as well as proven regulatory models out of the hands of the legislator.[40]

c. Allowances

Another important element is the existence of an allowance in order to avoid both the burden and the high enforcement effort in relation to small assets. In comparison, *Pichet* reported on countries with quite low allowances, such as in some Swiss cantons of below EUR 50,000 and Norway with EUR 75,000, as well as a group of countries with quite high exemption amounts, such as Spain of EUR 700,000 or 1 million, respectively. The exemption amount of the historical German wealth tax would be the equivalent of EUR 84,300 as of 2020, adjusted for purchasing power, with an additional exemption amount for persons over sixty years of age of another EUR 35,100.

2. Tax rate

a. Different control models

The existing wealth taxes have rates of approximately 0.1% and 1% in Swiss cantons, 0.2% and 2.5% in Spanish regions except Madrid, 1.1% in Norway (0.7% municipal share and 0.4% state share), and 0.162% to 0.851% in Liechtenstein. The tax rate of the historical German wealth tax was 1% for individuals and provided for a reduced rate of 0.6% for legal entities, business assets and certain preferential private assets.

Politically, two rough approaches are being discussed or already applied. On the one hand, a wealth tax that is already progressive from EUR 1 in assets, combined with relatively low allowance (e.g. EUR 50,000). However, the tax rates always remain within a range that does not lead to significant redistributions and to a significant reduction of the highest wealth (no Robin Hood effect). I.e. the wealth tax has primarily a fiscal purpose, according to which a

[34] BVerfG v. 7.11.2006 - 1 BvL 10/02, BVerfGE 117, 1 (34).

[35] BVerfG v. 7.11.2006 - 1 BvL 10/02, BVerfGE 117, 1 (38).

[36] BVerfG v. 7.11.2006 - 1 BvL 10/02, BVerfGE 117, 1 (34).

[37] *Hey,* Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), p. 34; *Maiterth/Sureth,* StuB 2005, p. 70 (76 ff.); *Tipke*, FS Ritter, 1997, p. 587 (591).

[38] See the OECD's work on "hard to value intangibles": OECD, Transfer Pricing Guidelines, 2017, para. 6.186 et seq.

[39] *Maiterth/Houben,* Vermögensbesteuerung aus ökonomischer Sicht, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift Nr. 483 (2012), p. 87 (110 ff., 117 ff.).

[40] *Moes*, JZ 2017, p. 858 (865) sees this as an influence of economic theories on decision neutrality.

broad part of the population should contribute a share to the wealth tax revenues.[41] The situation would be different with *Bernie Sanders'* wealth tax, which has been described above, and in which the wealth tax rates in the top progressive brackets can clearly have a wealth-consuming effect.[42] It is thus obvious that such a design would lead to a reduction in the largest wealth and, depending on the other design of tax and spending policies, would actually lead to significant redistribution. As mentioned, Spain also provides for very high exemption amounts (EUR 700,000 or 1 million), so that the wealthiest in particular are burdened. According to *César Martinez,* also only about 200,000 people in Spain file wealth tax returns (compared to about 20 million income tax returns).

b. Substance taxation or deemed income taxation?

This raises a crucial question of wealth taxation: That of the taxation of substance. Does the wealth tax have to be payable from a standardized deemed income, which in turn makes it an income tax in the broader sense? Or may a wealth tax, through its level of burden, also attack the substance of wealth in order to achieve a substantial redistributive effect? Such a prohibition on taxing the substance of property can result from the right to property.

The exchange among the seminar participants revealed that none of the represented or known legal systems provides for a decided taxation of substance with substantial redistribution (soon referred to in the discussion as a "Robin Hood tax"). However, it has also been discussed that too extreme inequalities could indeed be reduced via substance taxes in the broadest sense, including inheritance taxes as well as wealth taxes.[43] This is again an important conclusion of the comparative seminar series, according to which not only do inequalities vary widely across countries,[44] but also the relationship between income and wealth distribution can be very different. Accordingly, tax policy measures must always be designed on a country-by-country basis, and no general conclusions can be drawn on the question of whether a wealth tax should be introduced (and in what form).

However, the current low interest rate environment means that even small wealth tax burdens can no longer be paid out of nominal income and are, therefore, a tax of the substance. [45]

However, the exact scope of protection of the right to property is not interpreted harmoniously by the constitutional courts, and no recognizable uniform practice has developed in this regard, although ECtHR case law can serve as a guide.[46] The Swiss Federal Supreme Court, however, has already ruled on various occasions that the wealth tax in the Swiss cantons (rates between approx. 0.1 and 1 %) is constitutional and, in particular, it is not considered to be an infringement of the right to property.[47]

In Germany, the Federal Constitutional Court used a decision on valuation issues presented by *Valta* to restrict the wealth tax, which at that time also included a tax rate of 1%, in

[41] In Switzerland, wealth tax accounts for around 6% of total tax revenues.

[42] Thus, under *Bernie Sanders'* plan, billionaires' wealth would be cut in half after 15 years, see https://berniesanders.com/issues/tax-extreme-wealth/ (last accessed Jan. 05, 2021), supra II. 2.

[43] In addition, however, spending policy in particular is decisive for the medium- and long-term distribution of income and wealth in a state. See extensively *Atkinson,* Inequality: What Can Be Done? Harvard University Press 2015.

[44] Cf. the impressive data collection at www.wid.world (last call Jan. 5, 2021).

[45] Cf. *Maiterth/Houben,* Vermögensbesteuerung aus ökonomischer Sicht, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), p. 87 (92 ff., 99).

[46] See the overview in *Debelva*, International Double Taxation and the Right to Property, 2019, pp. 177 ff.

[47] Cf. for a more recent ruling BGer v. 4.10.2019 - 2C_203/2017, in which the Federal Supreme Court qualifies the wealth tax at least implicitly per se as constitutional.

detailed "obiter dictum" to a deemed income taxation.[48] Constitutional-historical arguments can be used to support this restriction, according to which the property tax tradition found by the mothers and fathers of the Basic Law was designed as a target income tax.[49] However, a mandatory restriction can only be derived from the protection of property. It seems contradictory in the argumentation of the Federal Constitutional Court that, on the one hand, hypothetical limits to taxation are drawn, but a justification by redistribution was not considered with the argument that the wealth tax in force at the time had only a low revenue. [50]

In a famous dissenting opinion, *Böckenförde* on the one hand criticized the "judicial activism," which is problematic from the point of view of the separation of powers, of committing the legislature to regulatory models without any concrete reason.[51] On the other hand, he also expressly spoke out against limiting the wealth tax to a deemed income tax.[52] The holding of assets represented a special ability of the tax payer that should not be taken away from the legislature.[53] According to previous case law, assets as such are not subject to the special protection of property, which has its ultimate reason in the equalizing function of the tax and welfare state.[54] Legal freedom and equality inevitably lead to material inequalities between citizens, which congeal in property and accumulate in wealth. If wealth is made "sacrosanct," there would be the danger that inequality can increase unbridled and that, as a result, the liberal legal order cancels itself out.[55]

Whether property as such falls under the protection of the fundamental right to property is still disputed today.[56] Even if this is assumed on the basis of the factual linkage of the wealth tax to the property items constituting the wealth, absolute protection of the wealth substance cannot be justified dogmatically without further ado. The wealth tax does not aim at the deprivation of a concrete property item in the sense of an expropriation. In this respect, only a content and limitation provision comes into consideration,[57] which must only generally preserve private utility and power of disposal in a proportionate manner. The applicability to abstract property as a whole, but also the added value of this yardstick for taxation, appear questionable.[58] *Hey* tries to overcome this lack of standard with the argument of expropriation-equivalent effect,[59] which, however, is in tension[60] with the doctrine of the Federal

[48] BVerfG v. 22.6.1995 - 2 BvL 37/91, BVerfGE 83, 121.

[49] *Kube*, DStR-Beih. 2013, p. 37 (41 f.).

[50] BVerfG v. 22.6.1995 - 2 BvL 37/91, BVerfGE 83, 121 (135).

[51] BVerfG v. 22.6.1995 - 2 BvL 37/91, BVerfGE 83, 121 (150).

[52] Critically ("artifice") also *Hey,* Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift Nr. 483 (2012), p. 34.

[53] BVerfG v. 22.6.1995 - 2 BvL 37/91, BVerfGE 83, 121 (163); for the fundamental suitability of wealth as at least a performance indicator under equality law, also *Hey*, Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift Nr. 483 (2012), p. 38 f.; *Birk,* DStJG 22 (1999), p. 7 (15).

[54] BVerfG v. 22.6.1995 - 2 BvL 37/91, BVerfGE 83, 121 (163).

[55] BVerfG v. 22.6.1995 - 2 BvL 37/91, BVerfGE 83, 121 (163).

[56] Leaving open BVerfG v. 18.1.2006 - 2 BvR 2194/99, BVerfGE 115, 97 (111); denying *Birk,* DStJG 22 (1999), p. 7 (20); *Kempny* StuW 2014, p. 185 (189).

[57] Related to the "stock of the acquired" in the case of income taxes BVerfG v. 18.1.2006 - 2 BvR 2194/99, BVerfGE 115, 97 (113)

[58] With reference to the "stock of what has been acquired" in the case of income taxes BVerfG v. 18.1.2006 - 2 BvR 2194/99, BVerfGE 115, 97 (114 f.)

[59] *Hey,* Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), pp. 41 f.

[60] BVerfG v. 15.7.1981 - 1 BvL 77/78, BVerfGE 58, 300 (330 ff.).

Constitutional Court, which strictly distinguishes between content and boundary provisions and expropriations. *Hey* considers a taxation of substance to be possible even under its approach, since even Article 14 paragraph 3 sentence 2 German Constitution, which is intended for expropriations, does not contain an absolute guarantee of value and compensation may be waived in exceptional cases where the public interest is predominant.[61] *Hey* therefore considers a taxation of substance to be permissible by way of exception in the case of inequality-related social tensions that seriously endanger peaceful coexistence.[62]

c. Relation to other taxes

The distinction between a wealth tax and an income tax is not trivial, especially if the income tax is structured as a deemed income tax.

In this regard, the presentation by *Cees Peters* provided a detailed insight into the current discussion in the Netherlands. The Dutch wealth tax was in force from 1892 to 2001. One of the main arguments for abolishing it was that many wealthy people left the country because of the wealth tax or the tax burden in general. However, the income tax system currently in place is very similar to a wealth tax. In the Netherlands, various boxes are distinguished for income tax purposes. Among others, a box for certain capital income exists. In simple terms, a deemed capital income is calculated in the capital income box (although not all capital income falls under this box) (currently 4%). This fictitious income is taxed at 30%.

Originally, this was colloquially a "fun box", as 4% deemed income could be easily achieved and thus in most cases less than the effectively realized income was taxed in this box. In modern times, however, there are various efforts to change this system, since the low interest rate or low yield environment means that more than the effectively realizable income is taxed after all, and thus the substance is taxed. Moreover, the legislator has been forced by supreme court rulings to adjust this system. According to *Peters*, it is currently being discussed to use different deemed rates of return for the individual capital classes (e.g. for savings and investments), which would be closer to market returns. Another option under discussion would be to introduce a real wealth tax while abolishing the taxation of notional capital income. *Peters* correctly points out in his presentation that the terminology can be misleading, however. Depending on how the income tax is structured, especially as a deemed income tax, it comes very close to a wealth tax in economic terms.

Lorenz Jarass presented a model for the taxation of hidden reserves that would have the same effect as a wealth tax in the context of income tax. Traditionally, capital gains are taxed only upon realization. As hidden reserves, capital gains enjoy a tax deferral, while losses are taken into account immediately. This tax deferral could last indefinitely since inheritance taxation could also be circumvented by structuring options or by moving to jurisdictions without a wealth tax. Overall, there is unequal treatment compared to other types of income and there is a "lock-in" effect since the deferral of taxation creates an incentive against economically sensible disposals. The valuation problems can be managed by pragmatic solutions and safety margins.[63] Liquidity problems could be avoided by differentiating between necessary and non-necessary business assets, since the latter could also be sold if necessary. In addition, Jarass presented a liquidity-preserving model of gradual pro rata taxation of hidden reserves, in which the difference between book value and market value is only

[61] *Hey*, ibid. pp. 41 f.

[62] *Hey*, ibid. p. 42.

[63] See III.1.b. above on the strict BVerfG case law in Germany.

reduced pro rata each year. *Jarass* proposed a share of 10%, so that the hidden reserves - assuming they are fixed - would be taxable over 10 years.

These considerations show that the taxation of capital gains and, more broadly, of any increase in net wealth is functionally equivalent to a wealth tax for this area to a large extent. Switzerland does not tax private capital gains but replaces them with wealth taxation. Germany no longer levies a wealth tax, but is increasingly taxing capital gains comprehensively, ignoring hidden reserves. The flat-rate final withholding tax on capital gains and capital gains is also attributed effects of a wealth tax due to its debit income element.[64] The Netherlands do not levy a wealth tax either but replace it equivalently with a deemed income tax.

Unfortunately, the supplementary relationship to inheritance tax was not examined during the seminar. However, it is worth noting *Pichet's* comment that, with very few exceptions, Switzerland does not have an inheritance tax in the direct line and therefore the wealth tax has a certain substitute function here as well. It therefore seems likely that, contrary to the OECD trend, the continued existence of the wealth tax in Switzerland is also due to the fact that it replaces both the taxation of private capital gains and the inheritance tax.

d. Overall limitation of income and wealth taxation

The certain interchangeability of income and wealth taxes is also reflected in attempts to define an overall limitation of the combined income and wealth tax burden.

Individual cantons in Switzerland provide for such an overall limitation. In his presentation, *Fabien Liègois* pointed out the strengths and weaknesses of these systems (so-called "Bouclier Fiscal"). For example, Art. 60 of the Tax Code for Individuals of the Canton of Geneva states that the tax burden may not exceed 60%[65] of the net income and that for the calculation of the net income on assets, a deemed income of at least 1% of the net assets is assumed. The latter provision is intended to prevent taxpayers from artificially keeping the income from assets low in order to obtain the lowest possible overall limitation. The Federal Supreme Court has also recently generally considered this mechanism to be in conformity with the Constitution, although various questions of interpretation had arisen in connection with the "Bouclier Fiscal". [66]

Spain has a similar cap, as reported by *César Martinez.* Wealth tax was introduced there in 1977. Business assets are exempt, however, and relatively high exemption amounts are also applied (EUR 700,000 and EUR 1 million, respectively). Tax rates range from 0.2% to 2.5% depending on the region, with no wealth tax in Madrid. Spain also has a limit similar to the "Bouclier Fiscal" in some Swiss cantons. According to this limit, the total tax burden (income and wealth tax) may not exceed 60 % of the income tax base, whereby the income tax base is further reduced by non-speculative capital gains. Non-speculative capital gains include capital gains with a holding period of more than one year. However, in aggregate, the wealth tax cannot be reduced by more than 80%. According to Martinez, the effect of this limitation is significant and this limitation method also seems to be abused by aggressive tax planning. Taxpayers, for instance, try to squeeze the income tax base in order to benefit from an overall limitation. In addition, there seems to be empirical evidence of significant tax

[64] *Hey*, Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), pp. 22 f.

[65] This is only cantonal and municipal tax. In addition, there is the direct federal tax (max. 11.5 %).

[66] See, for example BVerfG, 2C_869/2017 and 2C_870/2017 both dated August 7, 2018.

planning to benefit in particular from the exemptions from the wealth tax, notably for business assets.[67]

In Germany, the Federal Constitutional Court also postulated the requirement of an overall limitation in an "obiter dictum" in the decision on valuation issues that led to the abolition of the wealth tax. From the wording of Article 14 (2) of the German Constitution, according to which the use of property, in addition to private benefit, should immediately serve the general public, it assumed an overall limitation according to which the cumulative burden of income tax and wealth tax should remain close to a 50/50 split.[68] The Federal Constitutional Court later distanced itself from this principle of halving[69] and it became irrelevant because of the expiry of the applicability of the wealth tax - although it may have contributed to the inactivity of the legislature. This is because, as *Böckenförde* noted in his dissenting opinion, there was no longer any substantial room for additional wealth taxation after the top income tax rates of the time.[70] This would have led to a favoring of the wealthy with high incomes and thus also tended to favor the very wealthy, who would no longer have paid wealth tax due to the high income tax burden.

IV. Federal issues

1. In general

The introduction of a wealth tax may also raise issues of federal competences and federal tax and location competition. The wealth taxes that still exist have a pronounced federal component. In Switzerland, wealth taxes are levied by the cantons and by municipalities at different rates, but not by the federal government. In Spain, wealth taxes are levied by the regions, although the capital region of Madrid does not levy a wealth tax. According to *Martinez,* this has led to wealthy individuals in Spain moving their residence to the capital accordingly.[71] In Norway, according to *Pichet's* report, the wealth tax consists of a larger municipal share and a smaller state share.

In addition to wealth taxes, there are often special taxes on real estate assets, such as the U.S. property taxes and the German land tax, which are assigned to the municipal level.

In Germany, a general wealth tax existed at the federal level, and in the U.S., such taxes are planned at the federal level. In both cases, however, there are doubts about federal competence, which will be discussed in more detail below.

2. U.S.

In the U.S., the admissibility of the discussed wealth taxes at the federal level is doubtful. *Ari Glogower* pointed out during his presentation that from a constitutional point of view it is decisive whether the wealth tax is qualified as a direct or indirect tax. Article 1 § 8 of the Constitution provides for a broad right of the U.S. Congress to levy taxes, but Article 1 §§ 2 and 9 bind direct taxes to the so-called "apportionment". This stipulates that the tax revenue, just like the allocation of seats in the House of Representatives, must be proportionally apportioned to the population of the member states. This ultimately points to a poll tax, a poll

67 *César Martinez* refers to the following study: *Duràn-Cabré José Maria* et al., Behavioural Responses to the Re(Introduction) of Wealth Axes. Evidence from Spain, IEB Working Paper 2019/04.

68 BVerfG v. 22.6.1995- 2 BvL 37/91, BVerfGE 93, 121 (138).

69 BVerfG v. 18.1.2006 - 2 BvR 2194/99, BVerfGE 115, 97

70 BVerfG v. 22.6.1995- 2 BvL 37/91, BVerfGE 93, 121 (161 f.).

71 *Duràn-Cabré José Maria* et al., Behavioural Resp onses to the Re(Introduction) of Wealth Axes. Evidence from Spain, IEB Working Paper 2019/04.

tax in the context of the right to vote. In any case, the wording seems to rule out a cross-state redistribution. However, it is disputed what was historically understood by "direct tax" and whether the "apportionment" requirement stemming from the context of electoral law should really limit the taxing power of the federal government.

In order to avoid the uncertainties of apportionment, it is also being considered to base the wealth tax on the 16th Amendment of 2013, which provides for an exception from this requirement for income taxes. In this case, however, the wealth tax would have to be classified as an income tax in the broader sense. In particular in view of the fact that it is designed as a deemed income tax such position could be support. Thus, the Supreme Court does not require the realization of profits for income taxation. As a result, the reform of wealth taxation would result in a transitional area from a supplement to the existing income tax in the direction of a deemed income tax and, for example, a coupling of the progression to the wealth, which would probably still have to be classified under the 16th Amendment, to an increasingly non-income-related wealth tax, which would then raise increasingly strong concerns with regard to the "apportionment".

3. Germany

In Germany, too, wealth taxation has a federal issue, which *Valta* presented. According to Article 106 (2) No. 1 of the Constitution, the states alone are entitled to the revenue of the wealth tax. The Federal Government is thus, according to Art. 105 para. 2 sentence 2. alt. of the Constitution, the federal government is only authorized to legislate concurrently if and to the extent that, according to Article 72 (2) of the Constitution, which was tightened in 1994, "the creation of equal living conditions within the federal territory or the preservation of legal or economic unity in the interest of the state as a whole makes federal legislation necessary."

The Federal Constitutional Court's case law on non-tax legislative items has made this standard effective.[72] Accordingly, justification on the basis of the equivalence of living conditions requires a concrete danger or disturbance of the federal social fabric. The preservation of legal or economic unity is not sufficient in the case of the diversity of laws normal in federalism alone but requires a fragmentation of laws with problematic consequences contrary to the interests of both the federal government and the states. In view of these requirements, the necessity of a federal wealth tax seems doubtful and the introduction of state wealth taxes possible.[73]

However, the Federal Constitutional Court has shown itself to be more "federal-friendly" in the area of taxes. Thus, federal competence for inheritance tax, which is of the same nature in terms of competence, was affirmed with the argument that the mere existence of different favorable regulations for the transfer of a business should already lead to the danger of an unacceptable fragmentation of law.[74] The mere danger of double taxation and the impediment of tax planning for the transfer of a business would suffice for the assumption of federal competence.[75] It is questionable, however, whether full regulation by the federal government is necessary for this purpose, or whether a "federal double tax law" based on the historical model of the Reichsdoppelsteuergesetz (Imperial Double Tax Law Act of 1870/1909) would

---

[72] BVerfG v. 24.10.2002 - 2 BvF 1/01, BVerfGE 106, 62.

[73] *Kube*, DStR-Beih. 2013, p. 37 (39).

[74] BVerfG v. 17.12.2014 - 1 BvL 21/12, BVerfGE 183, 136 (178 f.).

[75] BVerfG v. 17.12.2014 - 1 BvL 21/12, BVerfGE 183, 136 (179).

not also suffice.[76] And it is remarkable if the federal government, by providing for complex regulations, virtually creates for itself the necessity of a uniform federal regulation, while simpler regulatory models could also be implemented by the states - a comparative legal view of Switzerland, but also Spain, certainly raises doubts here.

Finally, the discussion on the wealth tax is overshadowed by the curiosity that, although the wealth tax ceased to apply at the end of 1996 due to the failure to implement the constitutional need for reform in the valuation[77], it was never formally repealed. This is interpreted as a deliberate abolition of the wealth tax by the federal legislator.[78] In some cases, the transitional provision in Article 125a (2) of the Constitution is assumed to mean that, despite the tightening of Article 72 (2) of the Constitution, the blocking effect continues to apply and binds the states as well.[79] There are three doubts about this: First, the waiver of a declaration of nullity was intended only to give the legislature the possibility of an orderly reorganization within a period of time, but not to allow any legal effects to continue beyond that.[80] Second, the transitional regulation only allows for further developments, not fundamental reforms, which[81] must include abolition. In view of the considerations in the Federal Constitutional Court decision on the Shop Closing Act[82], one must rather assume that the federal government is obligated to release the law pursuant to Art. 125 para. 2 sentence 2 Constitution. On the other hand, it seems questionable whether the federal government may unilaterally abolish a tax within the framework of concurrent legislation by means of a pure "prevention regulation" to the detriment of the states alone.

V. Conclusions

Tax scholars should not leave the discussion on wealth taxes to others alone but should dare to take an independent look at tax policy theory and should follow comparative approaches. The academic discussion should be a technical and impartial one separated from political visions, whose redistributive needs are not evident according to the empirical data. The technical view should consider the different design features of wealth taxes in general but in particular considering the tax mix of income taxes, inheritance taxes, general and special wealth taxes.

Nevertheless, the symbolic and general political significance of wealth taxes and inheritance taxes for social equalization should not be ignored. From a tax policy perspective, however, inefficient symbolic taxes should be avoided and the legitimate interests of equalization should be considered and emphasized when looking at the overall tax mix. In this context, it would be useful to take a look at the income taxation of capital gains or a moderate tax reduction of hidden reserves.

The Swiss wealth tax, on the other hand, has successfully resisted the trend toward abolishing wealth taxes and enjoys broad support among the population because it is based on a broad but at the same time pragmatically assessed tax base with low tax rates and at the same

[76] *Kube*, DStR-Beih. 2013, p. 37 (39); *Hey*, Die Zukunft der Besteuerung von Vermögen aus rechtlicher Perspektive, in Hey/Maiterth/Houben, Zukunft der Vermögensbesteuerung, IFSt-Schrift No. 483 (2012), p. 28.

[77] In consequence of the already several times quoted decision BVerfG v. 22.6.1995- 2 BvL 37/91, BVerfGE 93, 121.

[78] *Schüppen*, DStR 1997, 225 (225), *Arndt/Janzen*, NJW 1997, p. 1678 (1678).

[79] *Mayer*, DStR 1997, 1152 (1155 f.).

[80] *Kube*, DStR-Beih. 2013, 37 (39).

[81] BVerfG v. 4.11.2003 - 1 BvR 636/02, BVerfGE 111, 10 (31).

[82] On the reduction of the discretion to release from state-friendly behavior BVerfG v. 4.11.2003 - 1 BvR 636/02, BVerfGE 111, 10 (31).

time assumes the functions of a capital gains tax and an inheritance tax. This shows that a wealth tax does not have to be an inefficient measure but, on the contrary, can be a pragmatic solution to problems of income and inheritance tax law that are not at rest, especially in German tax law. Its strength can be the continuous and thus in time of moderate collection of taxes, which avoids burden peaks due to sale or inheritance.